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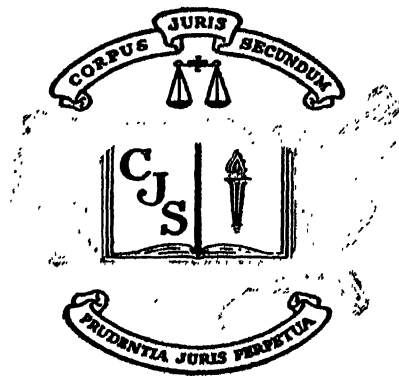








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# CORPUS JURIS SECUNDUM

A COMPLETE RESTATEMENT OF THE ENTIRE  
AMERICAN LAW  
AS DEVELOPED BY  
ALL REPORTED CASES

By  
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## EXPLANATION

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THE object in view in preparing *Corpus Juris Secundum* has been twofold: First, to provide a complete encyclopedic treatment of the whole body of the law, which means that it must be based upon all the reported cases; Second, to present each title of the law in form and content most suitable as a means of practical reference for the Bench and Bar.

*Corpus Juris Secundum* is therefore a complete restatement of the entire body of American Law. The clear-cut and exhaustive propositions comprising the text are supported by all the authorities from the earliest times to date. The supporting case citations, conspicuously set out in the notes, point to all decisions handed down since the publication of *Corpus Juris*. When the searcher may wish to consult earlier authorities, a specific reference to *Corpus Juris* makes available all cases back to 1658.

Each title is preceded by a complete section analysis, greatly simplified to facilitate research. Where the scope of any section is such as to require it, a more minute analysis is found thereunder in its appropriate place within the title (see Abatement and Revival, Section 112). The convenience of this method—an innovation in encyclopedic writing—must immediately commend itself.

A concise black-letter summary, indicative of its scope, precedes the full treatment or statement of the law under each section. These introductory summaries, concise and free from interlineation of authorities, have proven of great convenience and value in legal research.

An index is found in the back of each volume covering the titles contained therein, thus providing another convenient means of ready access to the text and notes.

*Corpus Juris Secundum* is kept to date by means of annual cumulative pocket parts for each volume. This feature of supplementation which has proved so successful in modern digests and statutes conveniently, and with certainty, keeps each title constantly to date through current cases and new precedents.

*Corpus Juris Secundum* represents the combined products of the highest editorial talent and manufacturing skill. Its many excellent editorial features are fittingly accompanied by corresponding innovations and improvements in mechanical arrangement, typography, and design, which the publisher believes will commend themselves to the profession as representing a new standard in legal publications.

THE PUBLISHERS



# TABLE OF ABBREVIATIONS

## REPORTS AND TEXTBOOKS

### A

A.	Atlantic Reporter	Am.L.J.N.S.	American Law Journal New Series (Pa.)
A.2d	Atlantic Reporter Second Series	Am.L.Rec.	American Law Record (Ohio)
Abb.	Abbott (U.S.)	Am.L.Reg.	American Law Register
Abb.Adm.	Abbott's Admiralty (U.S.)	Am.L.Reg.N.S.	American Law Register New Series
Abb.App.Dec.	Abbott's Appeals Decisions (N.Y.)	Am.Law Reg.O.S.	American Law Register Old Series
Abb.Dec.	Abbott's Decisions (N.Y.)	Am.L.Rev.	American Law Review
Abb.N.Cas.	Abbott's New Cases (N.Y.)	Am.L.T.Bankr.	American Law Times Bankruptcy Reports
Abb.Pr.	Abbott's Practice (N.Y.)	Am.Law Inst.	American Law Institute, Restatement of the Law
Abb.Pr.N.S.	Abbott's Practice New Series (N.Y.)	Am.Negl.Cas.	American Negligence Cases
A'Beck.Res. Judgm.	A'Beckett's Reserved Judgments (Vict.)	Am.Negl.R.	American Negligence Reports
[1917]A.C.	[1917] Appeal Cases (Can.)	A.M.&O.	Armstrong, Macartney & Ogle (Ir.)
[1918]A.C.	Law Reports [1918] Appeal Cases (Eng.)	Am.Prob.	American Probate
Acton	Acton (Eng.)	Am.Prob.N.S.	American Probate New Series
Adams	Adams Reports (N.H.)	Am.Pr.	American Practice
Add.	Addison (Pa.)	Am.R.	American Reports
Add.EccL.	Addams' Ecclesiastical (Eng.)	Am.Rt.&Corp.	American Railroad & Corporation
A.&E.	Adolphus & Ellis (Eng.)	Am.R.Rep.	American Railway Reports
A.&E.Enc.L.	American & English Encyclopædia of Law	Am.S.R.	American State Reports
A.&E.Enc.L.&Pr.	American & English Encyclopædia of Law & Practice	Am.St.R.D.	American Street Railway Decisions
Aik.	Aikens (Vt.)	And.	Anderson (Eng.)
A.K.Marsh.	A. K. Marshall (Ky.)	Andr.	Andrews (Eng.)
Ala.	Alabama	Ann.Cas.	American & English Annotated Cases
Ala.App.	Alabama Appellate Court	Ann.Cas.1912A	American Annotated Cases 1912A, et seq.
Alaska	Alaska	Anstr.	Anstruther (Eng.)
Alb.L.J.	Albany Law Journal	Anth.N.P.	Anthony's Nisi Prius (N.Y.)
A.L.C.	American Leading Cases	App.D.C.	Appeal Cases (D.C.)
Alc.&N.	Alcott & Napier (Eng.)	App.Cas.	Law Reports Appeal Cases (Eng.)
Alc.Reg.Cas.	Alcock's Registry Cases (Eng.)	App.Div.	Appellate Division (N.Y.)
Aleyn	Aleyn (Eng.)	Ariz.	Arizona
Alison Pr.	Alison's Practice (Sc.)	Ark.	Arkansas
Allen	Allen (Mass.)	Ark.Just.	Arkley's Judiciary (Sc.)
Allen (N.B.)	Allen, New Brunswick	Arn.	Arnold (Eng.)
Alta.L.	Alberta Law	Arn.&H.	Arnold & Hodges (Eng.)
A.L.R.	American Law Reports	Ashm.	Ashmead (Pa.)
A.L.R.2d	American Law Reports, Second Series	Aspin.	Aspinall's Maritime Cases (Eng.)
Am.Bankr.	American Bankruptcy (U.S.)	Atk.	Atkin (Eng.)
Ambl.	Ambler (Eng.)	Austr.C.L.R.	Commonwealth Law Reports, Australia
A.M.O.	American Maritime Cases	Austr.Jur.	Australian Jurist
Am.Corp.Cas.	American Corporation Cases	Austr.L.T.	Australian Law Times
Am.Cr.	American Criminal		
Am.D.	American Decisions		
Am.&E.Corp.Cas.	American & English Corporation Cases		
Am.&E.Corp.Cas. N.S.	American & English Corporation Cases New Series		
Am.&Eng.Ency. Law	American and English Encyclopedia of Law		
Am.&E.Eq.D.	American & English Decisions in Equity		
Am.&Eng.Pat. Cas.	American and English Patent Cases		
Am.&Eng.R.R. Cas.	American and English Railroad Cases		
Am.Electr.Cas.	American Electrical Cases		
Am.&E.R.Cas.	American & English Railroad Cases		
Am.&E.R.Cas.N. S.	American & English Railroad Cases New Series		
Am.J.Int.L.	American Journal of International Law		
Am.L.J.	American Law Journal (Pa.)		
C.J.S.			

### B

Bacon Abr.	Bacon's Abridgment (Eng.)
Bail.Eq.	Bailey's Equity (S.C.)
Bailey	Bailey's Law (S.C.)
B.&Ad.	Barnewall & Adolphus (Eng.)
B.&Ald.	Barnewall & Alderson (Eng.)
Baldw.	Baldwin (U.S.)
Balf.Pr.	Balfour's Practice (Sc.)
Balf.&B.	Balf & Beatty (Ir.)
Bank.&Ins.R.	Bankruptcy and Insolvency Reports (Eng.)
Bann.	Bannister (Eng.)
Bann.&A.	Banning & Arden (U.S.)
Barb.	Barbour (N.Y.)
Barb.Ch.	Barbour's Chancery (N.Y.)
B.&Arn.	Barron & Arnold (Eng.)
Barn.	Barnardiston King's Bench (Eng.)
Barn.Ch.	Barnardiston Chancery (Eng.)
Barnes	Barnes' Practice Cases (Eng.)
Barnes Notes	Barnes' Notes (Eng.)
Batty	Batty (Ir.)
B.&Aust.	Barron & Austin (Eng.)
Baxt.	Baxter (Tenn.)
Bay	Bay (S.C.)
B.&B.	Broderip & Bingham (Eng.)
B.C.	British Columbia

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B.&Macn.  
B.D.&O.  
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C.J.	Corpus Juris	Cranch	Cranch (U.S.)
C.J.Ann.	Corpus Juris Annotations	Cranch O.C.	Cranch's Circuit Court (U.S.)
C.J.S.	Corpus Juris Secundum	Cranch Pat.Dec.	Cranch's Patent Decisions (U.S.)
C.&K.	Carrington & Kirwan (Eng.)	Cr.App.	Criminal Appeals (Eng.)
C.&L.	Connor & Lawson (Ir.)	Crawf.&D.	Crawford & Dix (Ir.)
Cl.App.	Clark's Appeal Cases (Eng.)	Crawf.&D.Abr.	
Cl.Ch.	Clarke's Chancery (N.Y.)	Cas.	
Clark & F.	Clark & Fennelly (Eng.)		Crawford & Dix's Abridged Cases (Ir.)
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			Croke Elizabeth (Eng.)
C.L.Chamb.	Chamber's Common Law (U.C.)	Cro.Car.	Croke's Reports tempore James (Jacobus) (Eng.)
Clev.L.Rec.	Cleveland Law Record (Oh.)	Cro.Eliz.	
Clev.L.Rep.	Cleveland Law Reporter (Oh.)	Cro.Jac.	
Cl.&F.	Clark & Fennelly (Eng.)		Crompton & Jervis (Eng.)
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Clif.	Clifford (U.S.)	Crowp.&M.	Crowwell's Collection of Patent Cases (U.S.)
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Coke	Coke (Eng.)	Curt.Recl.	Curtis Ecclesiastical (Eng.)
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Col.C.C.	Collyer's Chancery Cases (Eng.)	Cyc.	Cyclopedia of Law & Procedure
Coldw.	Coldwell (Tenn.)	Cyc.Ann.	Cyclopedia of Law & Procedure Annotations
Coll.	Collyer (Eng.)		
Col.L.Rep.	Colorado Law Reporter		
Col.Law Review	Columbia Law Review		
Coll.&B.Bank.	Collier and Batton's American Bankruptcy Reports		
Colles	Colles' Cases in Parliament (Eng.)	Dak.	Dakota
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Comyns	Comyns (Eng.)	D'Anv.Abr.	D'Anver's Abridgment (Eng.)
Comyns Dig.	Comyns Digest (Eng.)	Dauph.Co.	Dauphin County (Pa.)
Con.&Law.	Connor & Lawson (Ir.)	Dav.&M.	Davison & Merivale (Eng.)
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Conn.	Connecticut	Day	Day (Conn.)
Conn.Surr.	Connolly's Surrogate (N.Y.)	D.B.&M.	Dunlop, Bell & Murray (Sc.)
Const.	Constitutional Reports (N.C.)	D.C.	District of Columbia
Cooke	Cooke (Eng.)	D.Chipm.	D. Chipman (Vt.)
Cooke	Cooke (Tenn.)	D.C.Mun.App.	Municipal Court of Appeals (D.C.)
Cooke & A.	Cooke & Alcock (Ir.)	Deac.	Deacon (Eng.)
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		Deas & A.	Deas & Anderson (Eng.)
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		De G.F.&J.	De Gex, Fisher & Jones (Eng.)
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Co.P.C.	Coke's Reports (Eng.)	De G.&J.	De Gex & Jones (Eng.)
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Court.&MacL.	Courtney & Maclean (Sc.)	De G.&Sm.	De Gex & Smale (Eng.)
Cow.	Cowen (N.Y.)	Del.	Delaware
Cow.Gr.Rep.	Cowen's Criminal (N.Y.)	Del.Ch.	Delaware Chancery
Cowp.	Cowper (Eng.)	Del.Co.	Delaware County (Pa.)
Cox.Am.T.M.Cas.	Cox's American Trade-Mark Cases	Dem.Surr.	Demarest's Surrogate (N.Y.)
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		Dev.&Bat.	Devereux & Battle (N.C.)
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D.&L. Dowling & Lowndes (Eng.)  
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 Edw. Edwards (Eng.)  
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Kay	Kay (Eng.)	Litt.	Littleton (Eng.)
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Keb.	Kable (Eng.)	L.J.Ch.	Law Journal Chancery New Series (Eng.)
Keen	Keen (Eng.)	L.J.Ch.O.S.	Law Journal Chancery Old Series (Eng.)
Keilw.	Keilway (Eng.)	L.J.C.P.	Law Journal Common Pleas New Series (Eng.)
Kel.C.O.	Kelyng's Crown Cases (Eng.)	L.J.C.P.O.S.	Law Journal Common Pleas Old Series (Eng.)
Kelly	Kelly (Ga.)	L.J.Eccl.	Law Journal Ecclesiastical New Series (Eng.)
Kelyng, J.	Kelyng's English Crown Cases	L.J.Exch.	Law Journal Exchequer New Series (Eng.)
Kelynge, W.	Kelyng's Chancery (Eng.)	L.J.Exch.O.S.	Law Journal Exchequer Old Series (Eng.)
Keyes	Keyes (N.Y.)	L.J.K.B.	Law Journal King's Bench New Series (Eng.)
Keil.	Keilway (Eng.)	L.J.K.B.O.S.	Law Journal King's Bench Old Series (Eng.)
K.&G.	Keane & Grant (Eng.)	L.J.M.C.	Law Journal Magistrate Cases New Series (Eng.)
Kilk.	Kilkerran's Decisions (Sc.)	L.J.M.C.O.S.	Law Journal Magistrate Cases Old Series (Eng.)
Kirby	Kirby (Conn.)	L.J.P.C.	Law Journal Privy Council New Series (Eng.)
Knapp	Knapp (Eng.)	L.J.P.D.&Adm.	Law Journal Probate Divorce & Admiralty New Series (Eng.)
Knapp&O.	Knapp & Ombler (Eng.)	L.J.P.&M.	Law Journal Probate & Matrimonial New Series (Eng.)
Kn.&Moo.	Knapp & Moore (Eng.)	L.J.Q.B.	Law Journal Queen's Bench New Series (Eng.)
Knox	Knox (N.S.Wales)	L.J.Rep.	Law Journal Reports (Eng.)
Knox&F.	Knox & Fitzhardinge (N.S.Wales)	L.L.&G.L.P.	Lloyd & Gould temp. Plunket (Ir.)
Kulp	Kulp (Pa.)	L.L.&G.L.S.	Lloyd & Gould temp. Sugden (Ir.)
Ky.	Kentucky	L.L.&W.	Lloyd & Welsby (Eng.)
Ky.Dec.	Kentucky Decisions	L.L.M.	Lowndes & Maxwell (Eng.)
Ky.L.	Kentucky Law Reporter	L.L.M.&P.	Lowndes, Maxwell & Pollack (Eng.)
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La.	Louisiana	Longf.&T.	Longfield & Townsend (Ir.)
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Lalor	Lalor's Supplement to Hill & Denio (N.Y.)	L.R.C.C.	Law Reports Crown Cases (Eng.)
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Lane	Lane (Eng.)	L.R.Exch.	Law Reports Exchequer Cases (Eng.)
Lans.	Lansing (N.Y.)	L.R.I.L.	Law Reports House of Lords (English & Irish Appeal Cases)
Lans.Ch.	Lansing Chancery Decisions (N.Y.)	L.R.I.L.Sc.	Law Reports House of Lords (Scotch Appeal Cases)
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Ld.Ken.	Lord Kenyon (Eng.)	L.T.O.S.	Law Times, Old Series (Pa.)
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 Myl.&K. Mylne & Keen (Eng.)  
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 N.Chipm. N. Chipman (Vt.)  
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 Neb. Nebraska  
 Neb.Unoff. Nebraska Unofficial  
 Nels. Nelson (Eng.)  
 Nels.Abr. Nelson's Abridgment of the Common Law  
 Nev. Nevada  
 Newb.Adm. Newberry's Admiralty (U.S.)  
 Newfoundl. Newfoundland  
 Newf.Sel.Cas. Newfoundland Select Cases



Pr.Rep.	Practice Reports (Eng.)	Russ.&C.Eq.Cas.	Russell's & Chesley's Equity Cases (N.S.)
P.Wms.	Peere-Williams (Eng.)	Russ.Eq.Cas.	Russell's Equity Cases (N.S.)
P.U.R.	Public Utilities Reports	Russ.&Geld.	Russell & Geldert, Nova Scotia
Pyke	Pyke (Can.)	Russ.&M.	Russell & Mylne (Eng.)
		Ry.&M.	Ryan & Moody (Eng.)
<b>Q</b>			
Q.B.	Queen's Bench (Adolphus & Ellis New Series) (Eng.)	<b>S</b>	
[1891]Q.B.	Law Reports [1891] Queen's Bench (Eng.)	Salk.	Salkeld (Eng.)
Q.B.D.	Law Reports Queen's Bench Division (Eng.)	Sandf.	Sandford's Superior Court (N.Y.)
Queensl.J.P.	Queensland Justice of the Peace	Sandf.Ch.	Sandford's Chancery (N.Y.)
Queensl.L.	Queensland Law	Sask.L.	Saskatchewan Law
Queensl.L.J.	Queensland Law Journal	Saund.	Saunders (Eng.)
Que.L.	Quebec Law	Saund.&C.	Saunders & Cole (Eng.)
Que.Pr.	Quebec Practice	Sau.&Sc.	Sausse & Scully (Ir.)
Que.Q.B.	Quebec Official Reports Queen's Bench	S.Austr.L.	South Australia Law
Que.Rev.Jud.	Quebec Revised Judicial	Sav.	Savile (Eng.)
Que.Super.	Quebec Official Reports Superior Court	Sawy.	Sawyer (U.S.)
Quincy	Quincy (Mass.)	Saxt.	Saxton (N.J.)
<b>R</b>		Say.	Sayer (Eng.)
Rand.	Randolph (Va.)	S.C.	South Carolina
Rap.Jud. Q.C.S.	Rapport's Judicials de Quebec Cour Supérieure	[1907]S.C.	Court of Session Cases (Sc.)
Rawle	Rawle (Pa.)	Scam.	Scammon (Ill.)
R.C.L.	Ruling Case Law	S.C.Eq.	South Carolina Equity
R.&Can.Cas.	Railway & Canal Cases (Eng.)	Sch.&Lef.	Schoales & Lefroy (Ir.)
R.&Can.Tr.Cas.	Railway & Canal Traffic Cases (Eng.)	Sch.Leg.Rec.	Schuykill Legal Record (Pa.)
Redf.	Redfield's Surrogate (N.Y.)	Sch.Reg.	Schuykill Register (Pa.)
Redf.&B.	Redfield & Bigelow's Leading Cases (Eng.)	[1907]S.C.(J.)	Court of Justiciary Cases (Sc.)
Redf.R.Cas.	Redfield's Railway Cases (Eng.)	Sc.Jur.	Scottish Jurist
Redf.Surr.	Redfield's Surrogate (N.Y.)	S.C.L.	South Carolina Law
Reeve Eng.L.	Reeve's English Law	Sc.L.Rep.	Scottish Law Reporter
Reports	Reports (Eng.)	Scot L.T.	Scot Law Times
Reprint	English Reprint	Scott	Scott (Eng.)
Rep.t.Finch	Cases temp. Finch (Eng.)	Scott N.R.	Scott's New Reports (Eng.)
Rep.t.Hard.	Lee's Reports <i>tempore</i> Hardwicke (Eng.)	Scr.L.T.	Scranton Law Times (Pa.)
Rep.t.Holt	Reports <i>tempore</i> Holt (English Cases of Settlement)	Sc.Sess.Cas.	Scotch Court of Session Cases
Res.&Eq.Judgm.	Reserved & Equity Judgments (N.S. Wales)	S.Ct.	Supreme Court Reporter (U.S.)
Rev.Crit.	Revue Critique (Can.)	S.D.	South Dakota
Rev.de Jur.	Revue de Jurisprudence (Can.)	S.E.	South Eastern Reporter
Rev.de Legis.	Revue de Legislation (Can.)	S.E.2d	South Eastern Reporter Second Series
Rev.Leg.	Revue Legale (Can.)	Searle & Sm.	Searle & Smith (Eng.)
Rev.Leg.N.S.	Revue Legale New Series (Can.)	Sel.Cas.Ch.	Select Cases in Chancery (Eng.)
Rev.Rep.	Revised Reports (Eng.)	Seld.	Selden's Notes (N.Y.)
R.I.	Rhode Island	Selden	Selden (N.Y.)
Rice	Rice (S.C.)	Selw.	Selwyn's Nisi Prius (Eng.)
Rich.	Richardson (S.C.)	Serg.&R.	Sergeant & Rawle (Pa.)
Rich.C.P.	Richardson's Practice Common Pleas (Eng.)	Sess.Cas.	Court of Session Cases (Eng.)
Ridg.	Ridgeway's Reports <i>tempore</i> Hardwicke (Eng.)	Shan.	Shannon (Tenn.)
Ridg.Ap.	Ridgeway's Appeal (Ir.)	Shaw	Shaw (Sc.)
Ridg.L.&S.	Ridgeway, Lapp & Schoale (Ir.)	Shaw & D.	Shaw & Dunlop (Sc.)
Ridg.P.C.	Ridgeway's Parliament Cases (Ir.)	Shaw Dec.	Shaw's Digest of Decisions (Sc.)
Ridg.t.Hardw.	Ridgeway temp. Hardwicke (Eng.)	Shaw, Dunl.&B.	Shaw, Dunlop & Bell (Sc.)
Riley	Riley (S.C.)	Shaw&M.	Shaw & MacLean (Sc.)
R.&M.	Ryan & Moody (Eng.)	Sheld.	Sheldon (N.Y.)
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Rob.	Robinson (La.)	Sheph.Sel.Cas.	Shepherd's Select Cases (Ala.)
Rob.	Robinson (Va.)	Show.	Shower (Eng.)
Robb Pat.Cas.	Robb's Patent Cases (U.S.)	Show.P.C.	Shower's Parliament Cases (Eng.)
Robert.App.Cas.	Robertson's Appeal Cases (Sc.)	Sid.	Siderfin (Eng.)
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Rob.Wm.Adm.	William Robinson's Admiralty (Eng.)	Sim.	Simons (Eng.)
Rolle	Rolle (Eng.)	Sim.N.S.	Simons New Series (Eng.)
Rolle Abr.	Rolle's Abridgment (Eng.)	Sim.&St.	Simons & Stuart (Eng.)
Rolls Ct.Rep.	Rolls' Court Reports	Skin.	Skinner (Eng.)
Rom.Cas.	Romilly's Notes of Cases (Eng.)	Smale&G.	Smale & Giffard (Eng.)
Root	Root (Conn.)	Smith	Smith (Ind.)
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R.&R.	Russell & Ryan Crown Cases (Eng.)	Smith K.B.	Smith's King's Bench (Eng.)
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		Sm.&M.	Smedes & Marshall (Miss.)
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		So.	Southern Reporter
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		Sol.J.	Solicitor's Journal (Eng.)
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 William Blackstone (Eng.)  
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 Webb, A'Beckett, & Williams' Insolvency, Probate, and Matrimonial Reports (Victoria)  
 Webster's Patent Cases (Eng.)  
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 Westmoreland County Law Journal (Pa.)  
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Wils.C.P.	Wilson's Common Pleas (Eng.)	W.W.Harr.	W. W. Harrington (Del.)
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W.Jones	William Jones (Eng.)		
W.Kel.	William Kelynge (Eng.)		
Wkly.L.Gaz.	Weekly Law Gazette (Oh.)		
Wkly.N.C.	Weekly Notes of Cases (Pa.)		
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Wms.Saund.	Williams Notes to Saunders' Reports		
W.N.	Weekly Notes (Eng.)		
Wolf.&B.	Wolferstan & Bristow's Election Cases (Eng.)		
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Woll.	Woodbury & Minot (U.S.)		
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Y.B.	Year Book (Eng.)
Y.&O.Exch.	Younge & Collyer's Exchequer (Eng.)
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## LAW REVIEWS AND LAW JOURNALS

A.B.A.Jour.	American Bar Association Journal	Md.L.Rev.	Maryland Law Review
Ala.L.Rev.	Alabama Law Review	Mass.L.Q.	Massachusetts Law Quarterly
Albany L.Rev.	Albany Law Review	Mercer, Beasley	
Am.J.Int.Law	American Journal of International Law	L.Rev.	Mercer, Beasley Law Review
Am.Law S.Rev.	American Law School Review	Miami L.Q.	Miami Law Quarterly
Ark.L.Rev.	Arkansas Law Review	Mich.L.Rev.	Michigan Law Review
Aust.L.J.	Australian Law Journal	Minn.L.Rev.	Minnesota Law Review
B.U.L.Rev.	Boston University Law Review	Miss.L.J.	Mississippi Law Journal
Brooklyn L.Rev.	Brooklyn Law Review	Mo.L.Rev.	Missouri Law Review
Calif.L.Rev.	California Law Review	Montana L.Rev.	Montana Law Review
Camb.L.J.	Cambridge Law Journal	Neb.L.B.	Nebraska Law Bulletin
Chi-Kent Rev.	Chicago-Kent Review	N.J.L.J.	New Jersey Law Journal
Colum.L.Rev.	Columbia Law Review	N.J.L.Rev.	New Jersey Law Review
Com.L.J.	Commercial Law Journal	N.Y.U.L.Q.Rev.	New York University Law Quarterly Review
Cornell L.Q.	Cornell Law Quarterly	Notre Dame Law.	Notre Dame Lawyer
Detroit L.Rev.	Detroit Law Review	N.C.L.Rev.	North Carolina Law Review
Dick.L.Rev.	Dickinson Law Review	Okl.L.Rev.	Oklahoma Law Review
Fed.B.A.J.	Federal Bar Association Journal	Oreg.L.Rev.	Oregon Law Review
Fla.L.J.	Florida Law Journal	Phil.L.J.	Philippine Law Journal
Fordham L.Rev.	Fordham Law Review	Rocky Mt.L.Rev.	Rocky Mountain Law Review
Geo.Wash.L.Rev.	George Washington Law Review	Rutgers U.L.Rev.	Rutgers University Law Review
Geo.L.J.	Georgetown Law Journal	St. John's L.Rev.	St. John's Law Review
Harv.L.Rev.	Harvard Law Review	St. Louis L.Rev.	St. Louis Law Review (now Washington University Law Quarterly)
Ia.L.Rev.	Iowa Law Review		
Idaho L.J.	Idaho Law Journal	So.Calif.L.Rev.	Southern California Law Review
Ill.L.Rev.	Illinois Law Review	Southwestern L.J.	Southwestern Law Journal
Ind.L.J.	Indiana Law Journal	Stanford L.Rev.	Stanford Law Review
J.Am.Jud.Soc.	Journal of the American Judicature Society	Temp.L.Q.	Temple Law Quarterly
J.Comp.Leg.	Journal of the Society of Comparative Legislation	Tenn.L.Rev.	Tennessee Law Review
J.N.A.Referees Bank.	Journal of the National Association of Referees in Bankruptcy	Tex.L.Rev.	Texas Law Review
J.Soc.Pub.Teach. Law	Journal of the Society of Pub. Teachers of Law	Tul.L.Rev.	Tulane Law Review
John Marshall L. Q.	The John Marshall Law Quarterly	U.Chl.L.Rev.	University of Chicago Law Review
Kan.City L.Rev.	Kansas City Law Review	U.Cin.L.Rev.	University of Cincinnati Law Review
Kan.St.L.J.	Kansas State Law Journal	U.Detroit L.J.	University of Detroit Law Journal
Ky.L.J.	Kentucky Law Journal	U.Florida L.Rev.	University of Florida Law Review
L.J.	Law Journal	U.Kan.City L.Rev.	University of Kansas City Law Review
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Law Q.Rev.	Law Quarterly Review	U.Pa.L.Rev.	University of Pennsylvania Law Review
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		Wash.& Lee L.Rev.	Washington and Lee Law Review
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# CORPUS JURIS

## SECUNDUM

### VOLUME SEVENTY-TWO

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#### PLEDGES

This Title includes delivery of possession of personal property as security for payment of money or performance of contracts or other obligations in general; nature, requisites, incidents, operation, and effect of such delivery; evidence relating thereto; rights, duties, and liabilities of the parties as between themselves and as to others; extinguishment, waiver, or release of lien; sale of property for enforcement of pledge; and redemption.

*Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index*

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- III. CONSTRUCTION AND OPERATION, §§ 21-28
- IV. RIGHTS AND LIABILITIES OF PARTIES, §§ 29-42
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## I. DEFINITIONS, NATURE, AND DISTINCTIONS

## 1. Definitions

A pledge is a bailment or transfer of personal property as security for a debt or other obligation; a bailment or delivery of goods by a debtor to his creditor, to be kept until the debtor's obligation is discharged. "Pledge" has substantially the same meaning as "pawn."

The word "pledge" has a legal and well defined interpretation.<sup>1</sup> Broadly speaking, it is a transfer, bailment, or deposit of personal property<sup>2</sup> as a security for a debt or other obligation.<sup>3</sup> More specifically, it is a bailment or delivery of goods

1. U.S.—*Corpus Juris* quoted in *In re Rogers*, D.C.W.Va., 20 F. Supp. 120, 126.  
 9 C.J. p 895 note 2.

2. U.S.—*Corpus Juris* quoted in *In re Rogers*, D.C.W.Va., 20 F. Supp. 120, 126.  
 Minn.—*Palmer v. Mutual L. Ins. Co.*, 130 N.W. 250, 114 Minn. 1, Ann. Cas.1912B 957.

I.J.—*Paramount Building & Loan*

*Ass'n of City of Newark v. Sacks*, 152 A. 457, 107 N.J.Eq. 328.  
 49 C.J. p 895 note 3.

3. U.S.—*Nelson v. Commissioner of Internal Revenue*, C.C.A.8, 101 F. 2d 568—*In re Harkimer Mills Co.*, D.C.N.Y., 39 F.2d 625, 627—*Corpus Juris* quoted in *In re Rogers*, D.C.W.Va., 20 F.Supp. 120, 126—*City Bank Farmers' Trust Co. v. Bowers*, D.C.N.Y., 2 F.Supp. 883, 885,

reversed on other grounds, C.C.A., 68 F.2d 909, certiorari denied 54 S.Ct. 778, 292 U.S. 644, 78 L.Ed. 1495.

Fla.—*Therrell v. Filer*, 133 So. 861, 863, 101 Fla. 192.

Kan.—*Corpus Juris* cited in *Columbia Cas. Co. v. Sodini*, 155 F.2d 524, 528, 159 Kan. 478.

Minn.—*Thoen v. First Nat. Bank*, 271 N.W. 111, 112, 199 Minn. 47—

by a debtor to his creditor, to be kept until the debtor's obligation is discharged;<sup>4</sup> a deposit of personal effects, not to be taken back, but on payment of a certain sum, by express stipulation to be a lien on it;<sup>5</sup> a deposit of corporeal personal property as security with express or implied power of sale on default.<sup>6</sup> As discussed *infra* § 11, every contract by which the possession of personal property is transferred as security only is generally deemed to be a pledge.

A "pledge" has been defined as a lien created by the owner of personal property by the mere delivery of it to another, on an express or implied understanding that it shall be retained as security for an existing or future debt.<sup>7</sup>

The word "pledge" is also sometimes used to describe the article or articles of personal property thus delivered by one person to another as security for the debt or obligation,<sup>8</sup> but this is using the word in a colloquial, rather than a technical, sense.<sup>9</sup>

**Pawn.** The word "pawn" has the same legal

signification as "pledge"<sup>10</sup> and is often referred to as being synonymous with the latter word.<sup>11</sup> In this respect "a pawn" may be defined as a mere collateral security for the payment of a debt,<sup>12</sup> a species of bailment which arises when personal property is deposited with another as security for some debt or engagement,<sup>13</sup> and which is made for the mutual benefit of the parties.<sup>14</sup> In common usage, however, the word "pawn" is applied to a pledge of chattels as distinguished from that of choses in action,<sup>15</sup> and in a more limited sense has been employed to mean a deposit of personal property made to a pawnbroker as security for a loan.<sup>16</sup>

**Pledgor and pledgee.** The person who delivers the property as security is called the "pledgor"<sup>17</sup> and the person who receives it to hold in accordance with the contract the "pledgee."<sup>18</sup>

**Pledgeholder.** Where the pledgor and pledgee select a third person to hold the property pledged, for the purposes of the pledge, he is called the "pledgeholder."<sup>19</sup>

Palmer v. Mutual L. Ins. Co., 130 N.W. 250, 114 Minn. 1, 6, Ann.Cas. 1912B 957.

Neb.—Glissmann v. Bauermeister, 19 N.W.2d 43, 46, 146 Neb. 197.

Wash.—Olsen v. National Grocery Co., 130 P.2d 78, 81, 15 Wash.2d 164.

Wis.—Overton v. Wisconsin Tax Commission, 236 N.W. 526, 204 Wis. 614.

49 C.J. p 895 note 4, p 896 note 3.

#### Similar definitions

(1) Property deposited with another as security for the payment of a debt.—Gilbert v. State, 85 S.E. 86, 16 Ga.App. 249.

(2) A contract by which one debtor gives something to his creditor as a security for his debt.—Carroll v. Bancker, 10 So. 187, 43 La. Ann. 1078, 1089, 1194.

4. U.S.—Corpus Juris quoted in In re Rogers, D.C.W.Va., 20 F.Supp. 120, 126.

Neb.—Glissmann v. Bauermeister, 19 N.W.2d 43, 146 Neb. 197.

Utah.—Campbell v. Peter, 162 P.2d 754, 755, 108 Utah 565.

49 C.J. p 895 note 5.

#### Similar definition

A transaction by which collateral security is delivered by debtor and accepted by creditor.

Tex.—Smith v. Blancas, Civ.App., 87 S.W.2d 781, 784, error refused.—Central Nat. Bank v. Latham & Co., Civ.App., 22 S.W.2d 765, 768, error refused.

Wash.—Hodge v. Truax, 51 P.2d 357, 359, 184 Wash. 360, 103 A.L.R. 420.

5. U.S.—Corpus Juris quoted in

In re Rogers, D.C.W.Va., 20 F.Supp. 120, 126.

49 C.J. p 895 note 6.

6. Fla.—Pepper v. Beville, 129 So. 334, 337, 100 Fla. 97.

A pledge of incorporeal personal property is designated by the term "collateral" or "collateral security."—Therrell v. Filer, 133 So. 861, 101 Fla. 192.—Pepper v. Beville, 129 So. 334, 100 Fla. 97.

7. Ill.—Immel v. Travelers Ins. Co., 26 N.E.2d 114, 116, 373 Ill. 250.—Chapin v. Tampoorlos, 59 N.E.2d 334, 335, 325 Ill.App. 219.

Kan.—Columbia Cas. Co. v. Sodini, 156 P.2d 524, 159 Kan. 478, stating Illinois law.

49 C.J. p 896 note 10.

8. U.S.—Corpus Juris quoted in In re Rogers, D.C.W.Va., 20 F.Supp. 120, 126.—Corpus Juris cited in City Bank Farmers' Trust Co. v. Bowers, 2 F.Supp. 883, 885, reversed on other grounds, C.C.A., 68 F.2d 909, certiorari denied 54 S.Ct. 778, 292 U.S. 644, 78 L.Ed. 1495.

49 C.J. p 896 note 11.

9. U.S.—Corpus Juris quoted in In re Rogers, D.C.W.Va., 20 F.Supp. 120, 126.—Little Rock St. Grading Dist. No. 60 v. Hagadorn, Ark., 186 F. 451, 108 C.C.A. 429, certiorari denied 32 S.Ct. 524, 223 U.S. 721, 56 L.Ed. 630.

49 C.J. p 896 note 12.

10. U.S.—Corpus Juris quoted in In re Rogers, D.C.W.Va., 20 F.Supp. 120, 126.

49 C.J. p 896 note 13.

11. U.S.—Corpus Juris quoted in

In re Rogers, D.C.W.Va., 20 F.Supp. 120, 126.

49 C.J. p 896 note 19.

12. U.S.—Corpus Juris quoted in In re Rogers, D.C.W.Va., 20 F.Supp. 120, 126.

Tenn.—Pulaski Nat. Bank v. Winston, 5 Dax. 685, 688.

13. U.S.—Corpus Juris quoted in In re Rogers, D.C.W.Va., 20 F.Supp. 120, 126.

Ga.—Gilbert v. State, 85 S.E. 86, 16 Ga.App. 249.

49 C.J. p 896 note 21.

14. U.S.—Corpus Juris quoted in In re Rogers, D.C.W.Va., 20 F.Supp. 120, 126.

49 C.J. p 896 note 22.

15. U.S.—Corpus Juris quoted in In re Rogers, D.C.W.Va., 20 F.Supp. 120, 126.

49 C.J. p 896 note 23.

16. U.S.—Corpus Juris quoted in In re Rogers, D.C.W.Va., 20 F.Supp. 120, 126.

49 C.J. p 896 note 24.

17. N.Y.—Union Ins. Co. v. Central Trust Co., 52 N.E. 871, 157 N.Y. 633, 44 L.R.A. 227.

49 C.J. p 896 note 25.

18. N.Y.—Union Ins. Co. v. Central Trust Co., *supra*.

49 C.J. p 896 note 26.

"Pawnbroker" distinguished and "pawnee" defined see Pawnbrokers § 1.

19. U.S.—Corpus Juris quoted in In re Rogers, D.C.W.Va., 20 F.Supp. 120, 126.

Cal.—Bank of America Nat. Trust & Savings Ass'n v. California Sav-

*Other terms.* Various terms have been said to be synonymous with "pledge," such as "security,"<sup>20</sup> "assurance,"<sup>21</sup> and, under some conditions, "forfeit."<sup>22</sup> "Collateral security" is sometimes used to denote a "pledge,"<sup>23</sup> more particularly, a "pledge" of a chose in action or incorporeal property as distinguished from a "pledge" of corporeal personal property.<sup>24</sup>

In the Roman and under the civil law, the term "pignus" is substantially similar in import to "pledge."<sup>25</sup>

## § 2. Nature in General

A pledge is a contract for the delivery of personalty to be retained by the pledgee as security for the performance of some obligation due from the pledgor, title remaining in him and possession only passing to the pledgee.

It has been broadly stated that a pledge is a contract for delivery of personalty to be retained by the pledgee as security for the performance of some obligation due from the pledgor, legal title remaining in the pledgor and possession only passing to the pledgee, who has a special property in the thing pledged until the obligation secured is satisfied.<sup>26</sup> The transaction is a kind of bailment and security;<sup>27</sup> it remains a pledge until its status has been changed by foreclosure or further contract of the parties.<sup>28</sup> A pledge creates a contract relationship,<sup>29</sup> its primary purpose or basis being to put

it in the power of the pledgee to reimburse himself for the money advanced when it becomes due and remains due and unpaid;<sup>30</sup> the contract carries with it an implication that the security shall be made effectual to discharge the obligation.<sup>31</sup> The pledge is generally regarded as collateral to the principal obligation.<sup>32</sup>

*Property as surety.* Property pledged by the owner to answer for the debt or default of another occupies the position of a surety.<sup>33</sup>

*Relationship between pledgor and pledgee.* Although there is some authority to the contrary,<sup>34</sup> it has been held that the relationship between pledgor and pledgee is not confidential<sup>35</sup> and does not preclude the parties thereto from dealing with each other with respect to the property held as collateral.<sup>36</sup> The pledgor and pledgee have been held to stand to each other in the relationship of bailor and bailee.<sup>37</sup>

## § 3. Distinguished from Other Transactions

A pledge is distinguishable from a number of somewhat similar transactions; and whether in a given case a transaction constitutes a pledge or another transaction depends on the intention of the parties as ascertained from the contract.

Whether in a given case the transaction constitutes a pledge or another transaction depends on the intention of the parties as ascertained from the

ings & Commercial Bank, 22 P.2d 704, 218 Cal. 261.

Mont.—*Mason v. Farmers' & Merchants' Bank of Winnett*, 300 P. 207, 90 Mont. 33.

49 C.J. p 896 note 27.

20. Kan.—*Jarrard v. McCarthy*, 140 P. 696, 95 Kan. 719.

21. N.Y.—*National Watch Co. v. Weiss*, 163 N.Y.S. 46, 47, 98 Misc. 453.

22. Miss.—*Eckert v. Searcy*, 74 So. 818, 114 Miss. 150.

49 C.J. p 896 note 16.

23. U.S.—*In re Schilling Press, D. C.N.Y.*, 52 F.Supp. 569, affirmed, C. C.A., *Schilling v. Rockmore*, 141 F.2d 643, 152 A.L.R. 1094.

Tenn.—*Third Nat. Bank v. Hall*, 209 S.W.2d 46, 30 Tenn.App. 586.

24. Fla.—*Pepper v. Bevilacqua*, 129 So. 334, 100 Fla. 97.

Tex.—*Central Nat. Bank v. Latham & Co., Civ.App.*, 22 S.W.2d 765, error refused.

Wash.—*Olsen v. National Grocery Co.*, 130 P.2d 78, 15 Wash.2d 164—*Hodge v. Truax*, 51 P.2d 357, 184 Wash. 360, 103 A.L.R. 420.

25. U.S.—*The Nestor, C.C.Me.*, 18 F. Cas.No.10,126, 1 Sumn. 73.

N.C.—*Barrett v. Cole*, 49 N.C. 40.

### Impignorate

Pledged; given in pledge, pignori data; mortgaged.—Black L.D.

### Impignoration

The act of pawning or putting to pledge.—Black L.D.

26. U.S.—*Nelson v. Commissioner of Internal Revenue, C.C.A.8*, 101 F.2d 568.

27. U.S.—*In re Franklin Savings & Loan Co., D.C.Tenn.*, 34 F.Supp. 585.

Ala.—*Mingo v. Clark*, 69 So. 421, 193 Ala. 447.

Fla.—*Richardson v. Gourlie*, 40 So.2d 553.

Ind.—*Damier v. Balne*, 51 N.E.2d 885, 114 Ind.App. 534.

28. Or.—*Morgan v. Johns*, 105 P. 369, 84 Or. 557.

29. Ind.—*Hatfield v. Schloms Bros. Inv. Co.*, 8 N.E.2d 380, 103 Ind. App. 420.

Necessity, form, and requisites of contract see infra §§ 11-18.

30. U.S.—*In re Carter, D.C.Va.*, 50 F.Supp. 385—*Corpus Juris* quoted in *In re Rogers, D.C.W.Va.*, 20 F. Supp. 120, 128.

Colo.—*Robertson v. Jackson First Nat. Bank*, 186 P. 542, 67 Colo. 517.

31. U.S.—*Corpus Juris* quoted in *In re Rogers, D.C.W.Va.*, 20 F. Supp. 120, 128.

Colo.—*Robertson v. Jackson First Nat. Bank*, 186 P. 542, 67 Colo. 517.

32. U.S.—*American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co., D.C.N.Y.*, 11 F.Supp. 418.

33. N.Y.—*Corpus Juris* cited in *Rutherford Nat. Bank v. Man-nico*, 271 N.Y.S. 69, 71, 240 App. Div. 506.

Or.—*Corpus Juris* cited in *Schinka v. Schramm*, 51 P.2d 608, 670, 151 Or. 647.

49 C.J. p 897 note 40.

34. U.S.—*Commercial Nat. Bank in Shreveport v. Parsons*, 144 P.2d 231. *Rehearing denied, C.C.A.1st.*, 145 P.2d 191, certiorari denied 65 S.Ct. 440, 323 U.S. 796, 80 L.Ed. 625.

La.—*Wells v. Dean*, 29 So.2d 590, 211 La. 132.

35. Pa.—*Colonial Trust Co. v. Hoff-stot*, 69 A. 52, 210 Pa. 497. As creating trust relationship see infra § 21.

36. Pa.—*Colonial Trust Co. v. Hoff-stot*, 69 A. 52, 210 Pa. 497.

37. Ind.—*Damier v. Balne*, 51 N.E.2d 885, 114 Ind.App. 534.



contract<sup>38</sup> by application of the general rules of construction,<sup>39</sup> and is generally a question of fact to be determined as such from the facts and circumstances of the particular case.<sup>40</sup> A loan of money on the security of articles deposited with the lender is a pledge, although a chattel mortgage on them is given in addition.<sup>41</sup>

A pledge is similar to, but differs in certain material respects from, a number of other transactions, such as an assignment in general, as discussed in Assignments § 2, an assignment for the benefit of creditors, as discussed in Assignments for Benefit of Creditors § 4 i, a chattel mortgage, as discussed in Chattel Mortgages § 4, a lien, as discussed in Liens § 1 a, a trust receipt, as discussed in Chattel Mortgages § 9, a wager, as discussed in Gaming § 1, or, as discussed *infra* § 4, a sale.

"*Antichresis*" is a term of the civil law meaning a delivery of real property as security for a debt and differs from a pledge in that the security consists of real property or immovables.<sup>42</sup>

*Assignment in trust.* A pledge has sometimes been spoken of as in the nature of a trust;<sup>43</sup> but strictly it has not the legal characteristics of a trust<sup>44</sup> and particularly is distinguishable therefrom in that in the case of an assignment in trust the title to the property passes, whereas in the case of a pledge it does not.<sup>45</sup>

*Conditional payment.* The transfer of the note of a third person by a debtor to his creditor on agreement that, if the note is paid at maturity, the debt is to be satisfied, is a conditional payment, and not a pledge.<sup>46</sup>

*Hypothecation.* "Hypothecation" is distinguishable from "pledge" or "pawn" in respect of possession; in the case of a pledge the thing pledged passes into the possession of the pledgee, whereas in the case of hypothecation it remains in the possession of the owner.<sup>47</sup>

*Privilege.* It has been said that a pledge is a privilege, with the right of retention of the property pledged,<sup>48</sup> but a "privilege" and a "pledge" are distinguishable, in that a privilege is a right which the nature of a debt gives to a creditor and enables him to be preferred over other creditors, whereas a pledge is a contract by which a debtor gives something to his creditor as a security for his debt.<sup>49</sup>

*Transfer.* A "pledge" cannot be regarded as synonymous with a "transfer" of property in the sense in which the latter term is ordinarily used.<sup>50</sup>

#### § 4. — Sale

- a. In general
- b. Conditional sale

38. N.J.—Bardsley v. First Nat. Bank & Trust Co. of Montclair, 168 A. 665, 111 N.J.Law 512—Moss Industries v. Irving Metal Co., 61 A. 2d 159, 142 N.J.Bq. 704.

N.Y.—Colton v. Kennedy, 131 N.Y.S. 483, 74 Misc. 217.

Pa.—Knapp v. Yellow Mfg. Credit Corporation, Com.Pl., 34 Berks Co. 235.

S.C.—Rayfield v. Bank of Chesterfield, 180 S.E. 885, 177 S.C. 175.

Wis.—Consolidated Discount Corp. v. Holton St. State Bank, 19 N.W. 2d 171, 247 Wis. 152.

49 C.J. p 897 note 50.

#### Transactions held pledges

(1) An agreement whereunder fiduciary of estates, who was also beneficiary of estates, deposited stocks and securities belonging to estates with trust company "as trustee" to secure fiduciary's indebtedness to estates, constituted a pledge. —In re Rogers, D.C.W.Va., 20 F. Supp. 120.

(2) Where an assignment of a chose in action or of an interest therein is made as security for payment of a debt, it is a mere pledge. —Tioga County General Hospital v. Tidd, 298 N.Y.S. 460, 164 Misc. 273—Frensdorf v. Stumpf, 30 N.Y.S.2d 211.

(3) Separation agreement, where-

by wife deposited money with attorneys as security for covenant to protect husband against her creditors, created a pledge.—Raffo v. Foltz, 288 P. 884, 106 Cal.App. 51.

(4) Where lessee of premises owned by estate was required to deposit sum as guaranty that premises would not be used for unlawful purposes, transaction amounted to a pledge.—Ryan v. Stagg, 298 P. 353, 89 Mont. 390.

(5) Other transactions.

Pa.—Automobile Banking Corp. v. Weicht, 51 A.2d 409, 160 Pa.Super. 422.

Wash.—Hodge v. Truax, 51 P.2d 357, 184 Wash. 360, 103 A.L.R. 420.

39. Mont.—Averill Mach. Co. v. Bain, 148 P. 334, 50 Mont. 512. 49 C.J. p 897 note 51.

40. U.S.—Mitchell v. Cramp, C.C.A. Pa., 8 F.2d 481. 49 C.J. p 897 note 52.

41. Cal.—Levison v. Boas, 88 P. 325, 150 Cal. 185, 12 L.R.A., N.S., 575, 11 Ann.Cas. 661. Minn.—St. Paul v. Lytle, 71 N.W. 703, 69 Minn. 1.

42. U.S.—Livingston v. Story, La., 11 Pet. 351, 9 L.Ed. 746. La.—Payne v. Hubbard, 7 So. 572, 42 La. Ann. 395.

43. Mass.—Wohrle v. Mercantile Nat. Bank, 109 N.E. 367, 221 Mass. 585—Newton v. Pay, 10 Allen 505. As creating trust relation see *infra* § 21.

44. Mass.—Willett v. Herrick, 155 N.E. 589, 258 Mass. 585, certiorari denied 48 S.Ct. 83, 275 U.S. 545, 72 L.Ed. 417. 49 C.J. p 898 note 62.

45. U.S.—Tilles v. Commissioner of Internal Revenue, C.C.A.3, 113 F. 2d 907, certiorari denied 61 S.Ct. 143, 311 U.S. 703, 85 L.Ed. 456.

Cal.—Raffo v. Foltz, 288 P. 884, 106 Cal.App. 51.

49 C.J. p 898 note 63.

46. Mass.—Lord v. Bigelow, 124 Mass. 185.

49 C.J. p 898 note 65.

Conditional payments generally see Payment § 9.

47. U.S.—The Nestor, C.C.Me., 18 F. Cas.No.10,126, 1 Sumn. 73, 81. S.C.—Wolff v. Farrell, 5 S.C.L. 68.

48. La.—Villere v. Shaw, 32 So. 196, 108 La. 71.

49. La.—Carroll v. Rancker, 10 So. 187, 43 La. Ann. 1078, 1089.

50. Conn.—Robertson v. Wilcox, 36 Conn. 426.

63 C.J. p 782 note 46.

### a. In General

The distinction between a pledge and a sale is that in case of a pledge possession alone, and not title, passes to the pledgee, whereas in the case of a sale title passes to the vendee.

A pledge differs from a sale in that, in case of a pledge, only the possession of the property passes and not the title thereto, the pledgee acquiring only a special property in the thing pledged, as discussed infra § 23, whereas in case of a sale the title passes to the vendee.<sup>51</sup> In case of a sale, transfer of possession may or may not be made,<sup>52</sup> whereas transfer of possession is indispensable to a pledge and loss thereof destroys the pledge.<sup>53</sup> Where property is delivered with a right reserved by the grantor to repurchase at a stipulated price within a given time, whether the transaction constitutes a sale or a pledge must be determined by the peculiar circumstances of the case.<sup>54</sup>

**Pledge and not sale.** A transaction is a pledge, and not a sale, where, although in some respects similar to a sale, it constitutes a delivery of personal

property merely as security for a debt or other obligation,<sup>55</sup> as where property is assigned to secure an amount less than its acknowledged value,<sup>56</sup> or there is no agreement to receive the property in satisfaction of the debt,<sup>57</sup> or where the transfer of the property is collateral to the execution of a note<sup>58</sup> or the payment of a draft.<sup>59</sup>

**Sale and not pledge.** If personal property is delivered by a debtor to his creditor in payment of the debt, the transaction is not a pledge, but has the effect of a sale;<sup>60</sup> and this is also true if goods are delivered by the debtor to the creditor to be sold, and the proceeds applied on the debt with a return of the surplus.<sup>61</sup> A transaction which on its face constitutes a sale will not be converted into a pledge by a mere agreement to repurchase or resell<sup>62</sup> or redeem.<sup>63</sup> Even though the transaction is in the form of a pledge, it may be converted into a sale by a subsequent agreement that the pledgee shall take the property in extinguishment of the debt.<sup>64</sup>

51. Ga.—Gilbert v. State, 85 S.E. 86, 16 Ga.App. 249.

Tenn.—Smith v. Atkinson, 4 Holak. 625.

Absolute transfer as pledge see infra § 15.

52. N.Y.—James v. Hamilton, 2 Ifun 630, 5 Thomps. & C. 183, affirmed 63 N.Y. 616.

53. U.S.—Manufacturers Acceptance Corporation v. Hale, C.C.A. Tenn., 65 F.2d 76.

54. Cal.—Shelley v. Byers, 238 P. 177, 78 Cal.App. 44.

55. U.S.—In re Grand Union Co., N. Y., 219 F. 353, 135 C.C.A. 237, certiorari denied Hamilton Ins. Co. v. Ernst, 35 S.Ct. 664, 238 U.S. 626, 59 L.Ed. 1495, and appeal dismissed 35 S.Ct. 938, 238 U.S. 647, 59 L.Ed. 1504.

Cal.—Rauer v. Rynd, 150 P. 780, 27 Cal.App. 556.

Ga.—Evans v. Odum, 183 S.E. 609, 52 Ga.App. 453.

N.J.—Moss Industries v. Irving Metals Co., 57 A.2d 922, 141 N.J.Eq. 421.

Wis.—Consolidated Discount Corp. v. Holton St. State Bank, 19 N.W.2d 171, 247 Wis. 152.

49 C.J. p 898 note 74.

#### Transfer of accounts receivable

A transfer of accounts receivable is a pledge or collateral loan and not a sale where, under the agreement, the transferee is allowed to retain or use the accounts as security only.

U.S.—Home Bond Co. v. McChesney, 482.

Ky., 36 S.Ct. 170, 239 U.S. 568, 60 L.Ed. 444.—In re Gotham Can Co., C.C.A.N.Y., 48 F.2d 540.—Petition of National Discount Co., C.C.A. Tenn., 272 F. 570, certiorari denied Williams v. National Discount Co., 42 S.Ct. 48, 257 U.S. 635, 68 L.Ed. 408.—Sponge Exch. Bank of Tarpon Springs v. Commercial Credit Co., C.C.A.Fla., 263 F. 20, certiorari denied Commercial Credit Co. v. Sponge Exch. Bank of Tarpon Springs, 40 S.Ct. 587, 253 U.S. 496, 64 L.Ed. 1080.—National Trust & Credit Co. v. F. H. Orant & Son Co., C.C.A.Ill., 259 F. 830, 170 C. C.A. 630.

Ill.—See Dorothy v. Commonwealth Commercial Co., 198 Ill.App. 601, judgment affirmed 116 N.E. 143, 278 Ill. 629, L.R.A.1917M 1110.

49 C.J. p 898 note 74 [a] (1).

#### Absolute bill of sale

(1) An absolute bill of sale, accompanied by delivery of the goods, may be shown to be a pledge if such was the intention of the parties.

Ala.—May v. Kustin, 2 Port. 414.

Colo.—Morgan v. Dod, 3 Colo. 551.

Mass.—Newton v. Fay, 10 Allen 505.

—Walker v. Staples, 5 Allen 34.

N.Y.—Campbell v. Parker, 9 Bosw. 322.

(2) So, delivery of a car under an absolute bill of sale will constitute a pledge and not a sale where it appears from a promissory note executed to the transferee simultaneously therewith that the transfer is made as collateral security for the payment of the note.—Darragh v. Willotte, Tenn., 215 F. 340, 131 C.C.A. 482.

**Option to hold as buyer or as pledgee**  
Mass.—Boynton v. Woodbury, 101 Mass. 346.

56. Mass.—Jawett v. Warren, 12 Mass. 300, 7 Am.D. 74.  
49 C.J. p 898 note 75.

57. Miss.—Harris v. Lombard, 60 Miss. 29.

Pa.—Stene v. Miller, 16 Pa. 450.—Houser v. Kemp, 3 Pa. 208.

58. Cal.—Golden v. Fletcher, 149 P. 797, 27 Cal.App. 271.

N.Y.—Campbell v. Parker, 22 N.Y. Super. 322.

59. Pa.—Blawell v. Steel, 67 Pa. 443.  
49 C.J. p 899 note 78.

60. U.S.—Mitchell v. Cramp, C.C.A. Pa., 8 F.2d 481.

Ill.—Julius Levin Co. v. Ronenfield, 230 Ill.App. 126.

N.C.—American Lumber Co. v. Qulett Mfg. Co., 78 N.C. 284, 162 N.C. 395.

N.Y.—Joseph T. Ryerson & Son v. A. V. O'Donnell, Inc., 17 N.E.2d 788, 279 N.Y. 109, rearrangement denied Joseph T. Ryerson & Son v. Shapiro, 18 N.E.2d 870, 279 N.Y. 789.

49 C.J. p 899 note 79.

61. Cal.—Rauer v. Rynd, 150 P. 780, 27 Cal.App. 556.

49 C.J. p 899 note 80.

62. Del.—Corpus Juris quoted in Claude Banta, Inc. v. Wilmington Huburban Water Co., 46 A.2d 876, 880.

49 C.J. p 899 note 81.

63. Pa.—Appeal of Lauman, 68 Pa. 88.

49 C.J. p 899 note 82.

64. Pa.—Appeal of Spering, 60 Pa. 199.

### b. Conditional Sale

The distinction between a pledge and a conditional sale is that in the former legal title remains in the pledgor, whereas in the latter title passes to the vendee, subject to being divested.

The important distinction between a "pledge" and a "conditional sale" is that in a contract of pledge the legal title remains in the pledgor, while in a "conditional sale," in the strict sense of the term, title passes to the vendee, subject to being divested, as by a reservation to the vendor, of a right to repurchase the property at a fixed price and specified time;<sup>65</sup> and a transaction in form a conditional sale will be construed as a pledge where it appears that it was intended as a security only;<sup>66</sup> this rule applies although the object in adopting the form of a conditional sale was to avoid the usury laws.<sup>67</sup>

The intention of the parties at the inception of the contract determines whether it is a pledge or a conditional sale, and its character is not changed by lapse of time.<sup>68</sup> Generally speaking, where a doubt exists as to whether a transaction is a conditional sale or a pledge, it will be deemed a pledge.<sup>69</sup> It is sometimes held that a contract by which property is transferred by a debtor to his creditor as a security for his debt, with a provision that, if the debt is not paid at maturity, the creditor shall become the owner of the property, is enforced as a conditional sale;<sup>70</sup> but such a contract is more generally regarded as a pledge,<sup>71</sup> and, as discussed *infra* § 52, the provision that, on the debtor's default, the title shall become absolute in the pledgee is generally held void.

## II. REQUISITES AND VALIDITY

### § 5. In General

The necessary elements of a pledge are a pledgor and a pledgee, a debt or obligation, and a contract of pledge.

The necessary elements of a pledge are: A pledgor and a pledgee, a debt or obligation, and a contract of pledge.<sup>72</sup> In order to constitute a contract one of pledge the possession of the pledged property must pass from the pledgor to the pledgee or to someone for him, the legal title to the pledged property must remain in the pledgor, the pledgee must have a lien on the property for the payment of a debt or performance of an obligation due him by the pledgor or some other person, and

there must be a right of redemption in the pledgor.<sup>73</sup> A pledge involves a transfer merely of the possession of personal property, and not of the title.<sup>74</sup> The contract may be made on such terms and conditions as the parties agree on.<sup>75</sup>

*Validity in general.* A grant of an unfettered dominion over pledged property to the pledgor invalidates the pledge as to creditors because of the inherent repugnancy between the pledge and the reserved power.<sup>76</sup> Not every grant of control will invalidate the pledge,<sup>77</sup> and the mere fact that the pledgor is given the right to collect sums receivable from the collateral does not invalidate the pledge.<sup>78</sup>

65. N.J.—Moss Industries v. Irving Metal Co., 61 A.2d 159, 142 N.J.Eq. 704.

49 C.J. p 899 note 85.

66. Wash.—Low v. Colby, 243 P. 18, 247 P. 475, 137 Wash. 476.

49 C.J. p 899 note 86.

67. N.Y.—Baker v. Arnot, 67 N.Y. 448.

68. Mo.—Smith v. Becker, 184 S.W. 943, 192 Mo.App. 597.

69. Mo.—Smith v. Becker, *supra*.

70. U.S.—Ware v. Hooper, C.C.Cal., 98 F. 160.

49 C.J. p 899 note 88.

71. Miss.—Eckert v. Searcy, 74 So. 818, 114 Miss. 150.

49 C.J. p 899 note 89.

72. U.S.—Alexander v. Phillips Petroleum Co., C.C.A.Okla., 130 F.2d 593—*Corpus Juris* quoted in *In re Rogers*, D.C.W.Va., 20 F.Supp. 120, 126.

Ark.—Umsted Auto Co. v. Henderson Auto Co., 207 S.W. 437, 137 Ark. 40.

N.J.—*Corpus Juris* quoted in *Jersey*

*Security Co. v. Lottimer*, 28 A.2d 623, 625, 20 N.J.Misc. 432.

Tex.—*Corpus Juris* quoted in *First Nat. Bank v. McCamey*, 105 S.W. 2d 879, 882, 130 Tex. 148.

Debts and liabilities which may be secured see *infra* § 10.

Necessity of contract generally see *infra* § 11.

#### Valid debt or obligation

One of the necessary elements of a contract of pledge is a valid and effectual debt or obligation to pledgee.—*Gehres v. Ater*, 73 N.E.2d 518, 148 Ohio St. 89, 172 A.L.R. 693.

73. U.S.—*Alexander v. Phillips Petroleum Co.*, C.C.A.Okla., 130 F.2d 593—*Corpus Juris* cited in *Grand v. Kimbell Milling Co.*, C.C.A.Tex., 116 F.2d 999, 1001—*Corpus Juris* quoted in *In re Rogers*, D.C.W.Va., 20 F.Supp. 120, 126.

Tex.—*Corpus Juris* quoted in *First Nat. Bank v. McCamey*, 105 S.W. 2d 879, 882, 130 Tex. 148.

49 C.J. p 900 notes 95-97.

Nature and extent of lien generally see *infra* § 24.

Necessity of delivery and possession generally see *infra* § 19.

Right of redemption generally see *infra* § 50.

74. Minn.—*Palmer v. Mutual Life Ins. Co.*, 130 N.W. 250, 114 Minn. 1, Ann.Cas.1912B 957.

Title to property pledged generally see *infra* § 23.

Transfer of title is not essential to a pledge.—*Paramount Building & Loan Ass'n of City of Newark v. Sacks*, 152 A. 457, 107 N.J.Eq. 328.

75. U.S.—*Corpus Juris* quoted in *In re Rogers*, D.C.W.Va., 20 F.Supp. 120, 126.

49 C.J. p 900 note 98.

76. U.S.—*In re Prudence Co.*, C.C.A. N.Y., 88 F.2d 420.

77. U.S.—*In re Prudence Co.*, *supra*.

78. U.S.—*In re Prudence Co.*, *supra*.

#### Separate accounts

Provision of loan agreement and note that principal and interest collected from collateral were to be kept in separate accounts by pledgor and monthly statement made accompanied by remittances of principal to pledgee, and that collections of interest were to be withdrawn from

## § 6. What Law Governs

The validity of a contract of pledge and the rights of the parties thereunder are determined, as a general rule, by the law of the state where the contract is made and is to be performed.

The validity of a contract of pledge and the rights of the parties thereunder are determined, as a general rule, by the law of the state where the contract is made and is to be performed,<sup>79</sup> especially where the contract expressly so provides.<sup>80</sup> Where, however, it is evident from the facts and circumstances that it is the intention of the parties that the contract, although made in one state, shall be performed in another state, where the pledged property is situated, the law of the latter state will govern,<sup>81</sup> even though the principal contract to which the pledge is collateral is to be performed in another state and is governed by the laws of that state.<sup>82</sup> When a pledge of goods within the jurisdiction of a particular state is made elsewhere, the state within whose jurisdiction the property is situated may apply its domestic law.<sup>83</sup>

Whether or not a pledgee has converted proceeds obtained from the collateral security is determined by the law of the state in which the pledgee held the collateral and received the proceeds.<sup>84</sup>

## § 7. Right to Pledge

The right to pledge goods as security for the payment of a debt is based on the common law and exists independently of statute.

separate accounts and used by pledgor as long as there should not exist event of default, was held not to invalidate pledge of collateral in possession of pledgee.—*In re Prudence Co.*, *supra*.

<sup>79</sup> Mich.—*Clark v. Chapman*, 184 N. W. 497, 215 Mich. 518.  
49 C.J. p 900 note 1.

<sup>80</sup> U.S.—*Le Sueur v. Manufacturers' Finance Co.*, C.C.A.Tenn., 285 F. 490, certiorari denied 43 S.Ct. 432, 261 U.S. 621, 67 L.Ed. 831.

<sup>81</sup> Minn.—*Swedish-American Nat. Bank v. Gardner First Nat. Bank*, 94 N.W. 218, 89 Minn. 98, 99 Am. S.R. 649.  
49 C.J. p 900 note 3.

<sup>82</sup> Minn.—*Swedish-American Nat. Bank v. Gardner First Nat. Bank*, *supra*.

<sup>83</sup> U.S.—*Underwood v. Phillips Petroleum Co.*, C.C.A.Okl., 155 F.2d 372.

<sup>84</sup> J.—*Mill Factors Corporation v. Guardian Trust Co.*, 154 A. 420, 107 N.J.Law 529.

<sup>85</sup> U.S.—*In re Harriman Securities Corporation*, D.C.N.Y., 9 F.Supp. 860, affirmed, C.C.A., 77 F.2d 999.

<sup>86</sup> Ind.—*Corpus Juris cited in*

*Hatfield v. Schlöss Iron. Inv. Co.*, 8 N.E.2d 389, 390, 103 Ind.App. 429.  
Ky.—*Cochran v. Ripy*, 13 Bush 495.

<sup>86</sup> U.S.—*The John W. Cannon*, C. C.La., 24 F. 892.

<sup>87</sup> U.S.—*The John W. Cannon*, C.C.La., 24 F. 392.  
49 C.J. p 900 note 2.

<sup>88</sup> N.Y.—*General Motors Acceptance Corporation v. Baker*, 291 N. Y.S. 1015, 161 Misc. 238.

<sup>89</sup> Tex.—*Climber Motor Corporation v. Fore*, Civ.App., 272 S.W. 284.  
W.Va.—*Corpus Juris cited in Litz v. First Huntington Nat. Bank*, 197 S.W. 740, 748, 120 W.Va. 281.  
49 C.J. p 901 note 9.

<sup>90</sup> U.S.—*In re Shulman*, D.C.Pa., 206 F. 129.

Cal.—*Hougham v. Howland*, 90 P.2d 860, 33 Cal.App.2d 11.

Mo.—*National Match Co. v. Empire Storage & Ice Co.*, 58 S.W.2d 797, 227 Mo.App. 1115, certiorari denied *Empire Storage & Ice Co. v. National Match Co.*, 54 S.Ct. 88, 290 U.S. 668, 78 L.Ed. 577.

Pa.—*Agnew v. Johnson*, 22 Pa. 471, 62 Am.D. 303.

49 C.J. p 901 note 10.

The right to pledge or pawn goods as security for the payment of a debt is based on the common law and exists independently of statute,<sup>85</sup> although in some jurisdictions the right is expressly given by statute.<sup>86</sup>

## § 8. — As Dependent on Title or Interest of Pledgor

A pledge may be made only by one who is the owner of the property or interest pledged, or by one who has authority and consent from the owner to use it for the purposes of a pledge. An unauthorized pledge may become valid on approval or ratification by the owner.

A debtor may pledge any interest which he owns in property;<sup>87</sup> but cannot pledge any further right or interest than he himself has.<sup>88</sup> Therefore, as a general rule, a pledge may be made only by one who is the owner of the property or interest pledged,<sup>89</sup> or by one who, although he has no interest in the property, has authority and consent from the owner to use it for the purposes of a pledge.<sup>90</sup> In the absence of authority and consent by the owner, or of subsequent approval or ratification by him, a pledge by one who has no interest in the property is void as against the real owner,<sup>91</sup> and the owner may follow and reclaim the property no matter in whose possession it may be found.<sup>92</sup> Mere possession of property, with the consent of the owner, and apparent title, is insufficient to authorize the possessor to pledge the property,<sup>93</sup> unless such apparent ownership is permitted by the

<sup>90</sup> Cal.—*Hougham v. Howland*, 90 P.2d 860, 33 Cal.App.2d 11.  
49 C.J. p 901 note 11.

<sup>91</sup> Cal.—*Cooper v. Tanner*, 295 P. 525, 111 Cal.App. 282.  
Mass.—*Union Old Lowell Nat. Bank v. Palma*, 61 N.E.2d 668, 318 Mass. 313.  
49 C.J. p 901 note 12.

<sup>92</sup> Mo.—*Paper v. American Exchange Nat. Bank in St. Louis*, App., 295 S.W.2d 215, affirmed, Sup., 210 S.W.2d 41—*Metzger v. Columbia Terminal Co.*, 50 S.W. 2d 680, 227 Mo.App. 125.  
49 C.J. p 901 note 14.

### Trust property

Where the pledgee had notice that the property pledged to him was held in trust by the pledgor, he may not hold it as security for the indebtedness of the pledgor.—*Hoppenstedt v. Army*, 174 N.Y.S. 742—49 C.J. p 941 note 53.

<sup>93</sup> Cal.—*Cooper v. Tanner*, 295 P. 525, 111 Cal.App. 282.  
49 C.J. p 901 note 16.  
Authority of agent to pledge see Agency § 113.  
Estoppel of owner see *infra* § 26.

real owner with fraudulent intent.<sup>94</sup> Where authority is given to pledge another's property for a specific debt, the fact that it is also pledged for other debts does not affect the validity of the pledge for the authorized debt.<sup>95</sup>

*Property subject to a lien* may be pledged to another,<sup>96</sup> but in such a case the pledgee takes the pledge subject to the prior lien, as discussed *infra* § 25.

*Approval or ratification of unauthorized pledge.* A pledge of property, without the owner's authority and consent, may become valid and binding when the owner, with full knowledge of the unauthorized pledge, approves it, where it was made by a third person,<sup>97</sup> or ratifies it, where it was made by his agent on his behalf or for his benefit.<sup>98</sup>

## § 9. Property Subject to Pledge

- a. In general
- b. Property not in existence
- c. Chose in action
- d. Personal obligation of principal debtor

### a. In General

Personal property only may be made the subject of a pledge. As a general rule every kind of personal property may be pledged, provided it is capable of delivery and there is no statutory prohibition.

Personal property only may be made the subject of a pledge.<sup>99</sup> As a general rule, personal property

of every kind may be pledged,<sup>1</sup> provided it is capable of delivery<sup>2</sup> and there is no statutory prohibition.<sup>3</sup> The value of the property, as being more than the debt secured, is immaterial.<sup>4</sup> Although money may be the subject of a pledge,<sup>5</sup> a deposit of a sum of money as security for the performance of a contract has been held not to be a pledge, but to create the relationship of debtor and creditor.<sup>6</sup>

### b. Property Not in Existence

As a general rule, property which is not in existence at the time cannot be the subject of a pledge.

As a general rule, property which is not in existence at the time cannot be the subject of a pledge;<sup>7</sup> but an agreement as to such property will be construed as a contract for a pledge,<sup>8</sup> or as an equitable pledge, as considered *infra* § 14, and a lien in favor of the creditor will attach when the property comes into existence.<sup>9</sup> Thus it has been held that a pledge of uncut timber to be delivered after it is cut is valid and takes effect as soon as the timber is cut and delivered,<sup>10</sup> but that, until such delivery, there is no pledge as against third persons.<sup>11</sup>

### c. Chose in Action

Unless prohibited by statute, a pledge may be made of a chose in action.

Unless prohibited by statute, a pledge may be made of a chose in action,<sup>12</sup> such as an accepted bill of exchange;<sup>13</sup> a promissory note;<sup>14</sup> and, like-

**Pledgee has duty to see that pledgor is owner.**—*Johnstown Automobile Co. v. Read*, 96 Pa.Super. 143.

94. Mass.—*Nickerson v. Darrow*, 5 Allen 419.

95. Fla.—*Springfield Co. v. Ely*, 32 So. 892, 44 Fla. 319.

96. La.—*Haynes v. Their Creditors*, 5 So. 68.

97. Kan.—*Corpus Juris* quoted in *Independence State Bank v. Drogen*, 58 P.2d 260, 263, 144 Kan. 39. 49 C.J. p 901 note 22.

98. Kan.—*Corpus Juris* quoted in *Independence State Bank v. Drogen*, 58 P.2d 260, 263, 144 Kan. 39. 49 C.J. p 901 note 23.

99. Ind.—*Corpus Juris* cited in *Davis v. Landis*, 53 N.E.2d 544, 114 Ind.App. 665. 49 C.J. p 902 note 25. Property or interest pledged see *infra* § 22.

#### Real estate contract

Where note containing unconditional promise to pay was secured by assignment of real estate contract, the transaction did not constitute a pledge.—*Davis v. Landis*, 53 N.E.2d 544, 114 Ind.App. 665.

1. Ky.—*Mercer Nat. Bank of Harrodsburg v. White's Ex'r*, 32 S.W. 2d 734, 236 Ky. 128. 49 C.J. p 902 note 26.

2. U.S.—*Chattanooga Nat. Bank v. Rome Iron Co.*, C.C.Ga., 102 F. 755. 49 C.J. p 902 note 28.

3. N.J.—*Buttinghausen v. Rappoport*, 24 A.2d 877, 131 N.J.Eq. 252.

4. Mass.—*Jewett v. Warren*, 12 Mass. 300, 7 Am.D. 74.

5. Cal.—*Anderson v. Pacific Bank*, 44 P. 1063, 112 Cal. 598, 53 Am.S.R. 228, 32 L.R.A. 479. 49 C.J. p 902 note 28 [a].

6. Mich.—*Wilcox v. Gauntlett*, 166 N.W. 856, 200 Mich. 272. 49 C.J. p 902 note 56.

7. La.—*In re Pleasant Hill Lumber Co.*, 52 So. 1010, 126 La. 743. 49 C.J. p 902 note 31.

8. Ky.—*Bogard v. Tyler*, 55 S.W. 709, 21 Ky.L. 1452.

N.Y.—*Smith v. Craig*, 105 N.E. 798, 211 N.Y. 456, Ann.Cas.1915B 937.

Pa.—*Hudson Manure Co. v. Evans*, Com.Pl., 3 Chester Co. 238.

9. U.S.—*Commonwealth Trust Co. of Pittsburgh v. Reconstruction*

*Finance Corporation, C.C.A.Pa.*, 120 F.2d 254.

49 C.J. p 902 note 34.

10. Ala.—*Nobles v. Christian, etc.*, Grocery Co., 20 So. 961, 113 Ala. 220.

11. La.—*In re Pleasant Hill Lumber Co.*, 52 So. 1010, 126 La. 743.

N.Y.—*Manufacturers' Commercial Co. v. Rochester R. Co.*, 126 N.Y.S. 1051, 142 App.Div. 249, affirmed 99 N.E. 1110, 206 N.Y. 664.

12. U.S.—*Corpus Juris* quoted in *In re Rogers*, D.C.W.Va., 20 F. Supp. 120, 128.

Tex.—*Citizens State Bank of Houston v. O'Leary*, 167 S.W.2d 719, 140 Tex. 345.

49 C.J. p 902 note 39.

13. N.Y.—*Cornwell v. Baldwin's Bank*, 43 N.Y.S. 771, 12 App.Div. 227.

14. Ind.—*Corpus Juris* cited in *Walner v. Capron*, 66 N.E.2d 64, 67, 224 Ind. 267.

R.I.—*Colonial Finance Corporation v. Schacht Motor Truck Co. of N. E.*, 160 A. 787, 52 R.I. 317.

49 C.J. p 902 note 41.

wise, may be made of such a chose in action as a bond;<sup>15</sup> a debt;<sup>16</sup> an installment sales contract;<sup>17</sup> a certificate of corporate stock, as discussed in Corporations §§ 417-433; a patent right;<sup>18</sup> an insurance policy, as considered in Insurance § 419; a benefit certificate in a benevolent association;<sup>19</sup> a mortgage, whether of real<sup>20</sup> or of personal<sup>21</sup> property; a lease of real estate;<sup>22</sup> an option to purchase real estate;<sup>23</sup> or any other special interest in property.<sup>24</sup>

#### d. Personal Obligation of Principal Debtor

As a general rule, one personal obligation of a debtor cannot become a pledge or collateral security for another obligation of the same debtor.

As a general rule, one personal obligation of a debtor cannot become a pledge or collateral security for another obligation of the same debtor.<sup>25</sup> A debtor may pledge his own mortgage bond as collateral security for a note executed by him,<sup>26</sup> and, where his personal obligation is secured by a lien on property, both may be treated as collateral

so far as is necessary to give the creditor the benefit of the lien or obligation.<sup>27</sup>

### § 10. Debts and Liabilities Which May Be Secured

- a. In general
- b. Illegal or invalid debt or obligation

#### a. In General

A pledge may be made not only to secure debts and obligations created at the time of delivery, but also to secure preexisting debts, future loans and advances, and contingent liabilities.

A pledge may be made not only to secure debts and obligations created at the time of delivery,<sup>28</sup> but also to secure preexisting debts,<sup>29</sup> future loans and advances,<sup>30</sup> and contingent liabilities.<sup>31</sup> A contract making its collateral subject to the payment of other indebtedness, besides the one for which the collateral is particularly pledged, is a valid agreement,<sup>32</sup> and the right to sell the collateral for the nonpayment of the other indebtedness is equally as valid.<sup>33</sup>

#### Negotiability

Notes, whether negotiable or non-negotiable, are susceptible of being validly pledged.—*Eureka Homestead Soc. v. Newman*, 143 So. 38, 175 La. 189.

15. U.S.—*Corpus Juris* quoted in *In re Rogers*, D.C.W.Va., 20 F. Supp. 120, 128.  
49 C.J. p 903 note 42.

16. N.Y.—*Fairbanks v. Sargent*, 22 N.E. 1030, 117 N.Y. 320, 6 L.R.A. 475.  
49 C.J. p 903 note 43.

17. Ind.—*Department of Financial Institutions v. General Finance Corp.*, 86 N.E.2d 444, 227 Ind. 373, 10 A.L.R.2d 430.

18. N.J.—*Morris Canal, etc., Co. v. Fisher*, 9 N.J.Eq. 687, 64 Am.D. 423.

19. Tex.—*Schonfield v. Turner*, 12 S. W. 626, 75 Tex. 324, 7 L.R.A. 189.  
49 C.J. p 903 note 47.

20. Ind.—*Corpus Juris* cited in *Walner v. Capron*, 86 N.E.2d 64, 67, 224 Ind. 267.  
49 C.J. p 903 note 48.

21. Cal.—*Wright v. Ross*, 36 Cal. 414.

22. Cal.—*Dewey v. Bowman*, 8 Cal. 145.

23. Mont.—*Ringling v. Smith River Dev. Co.*, 138 P. 1098, 48 Mont. 467.

24. Cal.—*Waldie v. Doll*, 29 Cal. 555.  
N.Y.—*Wright Steam Engine Works v. McAdam*, 99 N.Y.S. 577, 113 App. Div. 872, affirmed 83 N.E. 1135, 100 N.Y. 550.

25. Ga.—*Corpus Juris* quoted in *Sulter v. Citizens Bank & Trust*

Co., 181 S.E. 694, 696, 51 Ga.App. 798.

Ill.—*Corpus Juris* cited in *Parish Bank & Trust Co. v. Wennerholm Bros.*, 39 N.E.2d 383, 386, 313 Ill. App. 121.

49 C.J. p 903 note 53.

Debtor's additional promise to pay cannot be treated as collateral security for any debt he then owes, unless such additional promise to pay is itself secured by a lien or property.—*First Nat. Bank v. Kay Bee Co.*, 7 N.E.2d 880, 360 Ill. 202.

#### Notes as collateral security

A creditor may hold two notes of his debtor for the same debt, one note being collateral to the other, but the note "pledged" is not the subject matter of a pledge in the true sense.—*Parish Bank & Trust Co. v. Wennerholm Bros.*, 39 N.E.2d 383, 313 Ill.App. 121.

26. U.S.—*Rogers Brown & Co. v. Tindal Morris Co.*, D.C.Pa., 271 F. 475.

27. Conn.—*Corpus Juris* cited in *Progressive Welfare Ass'n v. Mordechai*, 200 A. 813, 814, 124 Conn. 485.  
49 C.J. p 903 note 55.

28. U.S.—*Corpus Juris* cited in *In re Rogers*, D.C.W.Va., 20 F. Supp. 120, 128.

Ga.—*Itone City Foods v. Bank of Thomas County*, 62 S.E.2d 145, 207 Ga. 477.

La.—*Wolf v. Wolf*, 12 La. Ann. 529.  
Wyo.—*Corpus Juris* quoted in *Bradburn v. Wyoming Trust Co. of Casper*, 63 P.2d 792, 796, 51 Wyo. 73.  
Consideration for contract of pledge see infra § 13.

Debts and liabilities secured by particular pledge see infra § 28.

29. U.S.—*Corpus Juris* cited in *In re Rogers*, D.C.W.Va., 20 F. Supp. 120, 128.

Ga.—*Itone City Foods v. Bank of Thomas County*, 62 S.E.2d 145, 207 Ga. 477.

Ill.—*Mongoven v. Watts*, 258 Ill.App. 106.

Wyo.—*Corpus Juris* quoted in *Bradburn v. Wyoming Trust Co. of Casper*, 63 P.2d 792, 796, 51 Wyo. 73.

49 C.J. p 903 note 58.

Preexisting debt as consideration see infra § 13.

30. Ga.—*Itone City Foods v. Bank of Thomas County*, 62 S.E.2d 145, 207 Ga. 477.

Ill.—*Mongoven v. Watts*, 258 Ill.App. 106.

Wyo.—*Corpus Juris* quoted in *Bradburn v. Wyoming Trust Co. of Casper*, 63 P.2d 792, 796, 51 Wyo. 73.

49 C.J. p 903 note 59.

31. U.S.—*Corpus Juris* cited in *In re Rogers*, D.C.W.Va., 20 F. Supp. 120, 128.

Wyo.—*Corpus Juris* quoted in *Bradburn v. Wyoming Trust Co. of Casper*, 63 P.2d 792, 796, 51 Wyo. 73.

49 C.J. p 903 note 60.

32. Pa.—*Empire Nat. Bank v. High Grade Oil Refining Co.*, 103 A. 802, 260 Pa. 255.

Wyo.—*Corpus Juris* quoted in *Bradburn v. Wyoming Trust Co. of Casper*, 63 P.2d 792, 796, 51 Wyo. 73.

33. Pa.—*Empire Nat. Bank v. High*

## b. Illegal or Invalid Debt or Obligation

As a general rule, the invalidity of the principal debt or obligation destroys the claim of the creditor on collaterals held for its security.

As a general rule, the invalidity of the principal debt or obligation destroys the claim of the creditor on collaterals held for its security,<sup>34</sup> as where it is given as security for a gambling debt or obligation.<sup>35</sup> A pledge voluntarily made to secure an illegal demand may not be reclaimed by the pledgor without payment of the demand,<sup>36</sup> and the fact that a note given for a valid debt is illegal does not render the whole transaction invalid, and property pledged as security for such note may be held as security for the principal debt.<sup>37</sup>

*Failure of consideration.* Invalidity of the principal obligation for want of consideration necessarily renders void a transfer of collaterals as security for such obligation.<sup>38</sup> Where the consideration for the contract consists of several mutual covenants, and the contract is not an entire one, inability to perform one of the covenants does not constitute such a failure of consideration as to render the whole contract void.<sup>39</sup>

## § 11. Necessity, Form, and Requisites of Contract

- a. In general
- b. Contents of written contract

### a. In General

A pledge of personal property requires a contract expressing the intention of the parties that the property is to be held as security. No particular formality is necessary and a contract may be implied from the facts and circumstances of the particular case.

In order to constitute a pledge of personal property there must be a contract whereby the property is to be held as security.<sup>40</sup> Although the contract must be specific and definite,<sup>41</sup> as a general rule it is not essential that the contract shall be expressed in any formal manner,<sup>42</sup> even though a statute requires a pledge to be in writing to be valid against third persons;<sup>43</sup> and, where it appears that the minds of the parties have met, it may be implied from the facts and circumstances of the particular case.<sup>44</sup> However, whether express or implied, the intention of the parties that the property is to be held as a pledge must clearly appear;<sup>45</sup> and accordingly every contract, express or implied, by which the possession of personal property is transferred as security only is generally deemed to be a pledge.<sup>46</sup> The legislature may change a statute

Grade Oil Refining Co., 103 A. 602, 260 Pa. 255.

Wyo.—*Corpus Juris* quoted in *Bradburn v. Wyoming Trust Co. of Casper*, 63 P.2d 792, 796, 51 Wyo. 78.

34. Fla.—*St. Lucie Estates v. Nobles*, 141 So. 314, 105 Fla. 421.  
Ill.—*Henderson v. Victor*, 263 Ill. App. 514.

Ohio.—*Gehres v. Ater*, 73 N.E.2d 513, 148 Ohio St. 89, 172 A.L.R. 693.  
49 C.J. p 903 note 63.

Test of validity of security for illegal debt is whether holder of security had notice of illegality of debt at the time he acquired the security.  
—*Bernhardt v. Atlantic Finance Corporation*, 40 N.E.2d 713, 311 Mass. 183.

35. Ohio.—*Gehres v. Ater*, 73 N.E.2d 513, 148 Ohio St. 89, 172 A.L.R. 693.

49 C.J. p 903 note 64.

36. Mass.—*King v. Green*, 6 Allen 139.

37. La.—*Blanc v. Germania Nat. Bank*, 38 So. 537, 114 La. 739.  
49 C.J. p 903 note 66.

38. Tex.—*Chapman v. Sipe Springs First Nat. Bank*, Civ.App., 275 S. W. 498.

Necessity for consideration see *infra* § 13.

39. N.Y.—*Stokes v. Stokes*, 50 N.E. 342, 155 N.Y. 581.  
49 C.J. p 903 note 69.

40. N.J.—*Corpus Juris* quoted in *Jersey Security Co. v. Lottimer*, 28 A.2d 623, 625, 20 N.J.Misc. 432.  
Pa.—*Witherow v. Kessler*, Com.Pl., 28 Del.Co. 81.

Wis.—*Corpus Juris* quoted in *Matz v. Farmers & Citizens Bank of Sauk City, Wis.*, 261 N.W. 755, 757, 218 Wis. 613.

49 C.J. p 904 note 70.

Mutual assent or acceptance is necessary to constitute valid pledge of securities.—*Peurifoy v. Loyal*, 151 S.E. 579, 154 S.C. 267.

Transaction held not pledge

N.J.—*Bardsley v. First Nat. Bank & Trust Co. of Montclair*, 168 A. 665, 111 N.J.Law 512.

41. La.—*Wells v. Dean*, 29 So.2d 590, 211 La. 132.

42. Wash.—*Dexter Horton Nat. Bank v. Washington-Alaska Bank*, 150 P. 1178, 86 Wash. 452.  
49 C.J. p 904 note 71.

43. La.—*Madding v. Hoover*, App., 44 So.2d 184.

Necessity for writing see *infra* § 12.

44. Tex.—*James v. Klar & Winterman*, Civ.App., 118 S.W.2d 625.  
49 C.J. p 904 note 73.

45. Neb.—*Corpus Juris* cited in *Ben B. Wood Realty Co. v. Wood*, 278 N.W. 493, 495, 132 Neb. 817.

N.J.—*Corpus Juris* quoted in *Jersey Security Co. v. Lottimer*, 28 A.2d 623, 625, 20 N.J.Misc. 432.

N.Y.—*Malco Trading Corporation v. Mendelson-Silverman, Inc.*, 269 N. Y.S. 95, 240 App.Div. 322, affirmed 191 N.E. 609, 264 N.Y. 651.

49 C.J. p 904 note 74.

Trustee

If property is deposited with a creditor on a particular trust, the creditor may not retain it as security for a debt owed him.

U.S.—*Bank of Montreal v. White*, Ill., 14 S.Ct. 1191, 154 U.S. 660, 26 L.Ed. 307.

Mass.—*Jarvis v. Rogers*, 15 Mass. 389.

46. U.S.—*Tilles v. Commissioner of Internal Revenue*, C.C.A., 113 F. 2d 907, certiorari denied 61 S.Ct. 142, 311 U.S. 703, 85 L.Ed. 456—*Corpus Juris* quoted in *In re Rogers*, D.C.W.Va., 20 F.Supp. 120, 128.  
Idaho.—*Isaak v. Journey*, 15 P.2d 1069, 52 Idaho 392.

N.J.—*Corpus Juris* quoted in *Jersey Security Co. v. Lottimer*, 28 A.2d 623, 625, 20 N.J.Misc. 432.  
49 C.J. p 904 note 75.

"Pledge" defined see *supra* § 1.

Under express statutory provision in some jurisdictions, the term

which relates to the execution of a pledge provided no constitutional inhibition is violated.<sup>47</sup>

**Insufficiency.** A contract of pledge is not constituted by a mere loose understanding<sup>48</sup> or statement,<sup>49</sup> or by statements by one party to which the other does not assent.<sup>50</sup>

**Use of word "pledge"** in an instrument does not of itself settle the character of the transaction as a pledge;<sup>51</sup> but where the word "pledge" is used, and the nature of the transaction is in conformity with the character of a pledge, the word is accurately used, and must control, both as expressive of the intent of the parties and of the legal effect of their agreement.<sup>52</sup>

**Subsequent stipulation validating imperfect pledge.** Where an attempt has been made to pledge property, the parties may, by a subsequent stipulation or ratification of the original contract, make a valid pledge although the original pledge was imperfect.<sup>53</sup>

#### b. Contents of Written Contract

In a written pledge, the amount of the debt or liability secured should be designated with reasonable certainty and the property pledged must be sufficiently described to identify it.

Where the contract of pledge is in writing, it should designate with reasonable certainty the amount of the debt or liability secured;<sup>54</sup> but it

need not stipulate that the pledgee shall have a lien.<sup>55</sup>

**Description of property.** The particular property pledged need not be fully described;<sup>56</sup> but it must be sufficiently described to identify it,<sup>57</sup> and this is especially true where the property is not delivered to the pledgee, and the pledgor is allowed to keep possession as the pledgee's agent.<sup>58</sup> A failure to describe the property, or an incomplete description thereof, may be cured by a delivery of the property to the pledgee.<sup>59</sup>

**Mentioning in note.** It is not essential to the validity of a pledge that it be specifically mentioned in the note secured thereby,<sup>60</sup> and a lien can be foreclosed on property which the evidence shows was pledged as collateral security for the note, although not mentioned in the note.<sup>61</sup>

### § 12. — Written or Oral

Unless required by statute, as a general rule it is not essential to the validity of a contract of pledge that it be in writing.

Unless required by statute, as a general rule it is not essential to the validity of a contract of pledge that it be in writing,<sup>62</sup> and statutes requiring a writing for the validity of sales or mortgages do not apply to pledges.<sup>63</sup> Under some statutes a

"pledge" includes every contract by which the possession of personal property is transferred as security only.—*Levison v. Boas*, 88 P. 825 150 Cal. 185, 190, 12 L.R.A., N.S., 575, 11 Ann.Cas. 661—49 C.J. p 896 note 9.

#### Mental reservation

Agreement for substitution of mortgage note for other collateral in creditor's possession was held binding, notwithstanding creditor's uncommunicated mental reservation, when assenting to substitution, that he was going to look into value of mortgaged property.—*Davis v. Lacaze*, 158 So. 626, 181 La. 75, followed in *Lacaze v. Atkins*, App., 158 So. 876.

47. La.—*Standard Homestead Ass'n v. Horvath*, 17 So.2d 811, 205 La. 520, appeal dismissed 65 S.Ct. 53, 323 U.S. 666, 89 L.Rd. 542.

48. Mont.—*Brunswick-Balke-Coller Co. v. Higgins*, 165 P. 1109, 1111, 54 Mont. 11.

Pa.—*Houser v. Kemp*, 3 Pa. 208.

49. U.S.—*In re Evans*, Pa., 238 F. 543, 151 C.C.A. 470.

49 C.J. p 904 note 78.

50. Mont.—*Brunswick-Balke-Coller Co. v. Higgins*, 165 P. 1109, 1111, 54 Mont. 11.

49 C.J. p 904 note 79.

51. N.Y.—*Moors v. Kidder*, 13 N.E. 818, 106 N.Y. 32.  
49 C.J. p 904 note 80.

52. N.Y.—*Hankins v. Patterson*, 1 Edm.Hel.Cas. 120.

53. Ky.—*Cochran v. Ripy*, 18 Bush 495.

54. Wash.—*Union Mach., etc., Co. v. McCush*, 175 P. 559, 104 Wash. 62.  
49 C.J. p 905 note 91.

#### Statement of amount held sufficient

A statement that the pledge was given to secure payment for merchandise valued at eight hundred thirty-five dollars and seventy cents and to secure return of particular truck satisfied statutory requirement that pledge state amount of debt intended to be secured thereby.—*Hambola v. Fandison*, La.App., 178 So. 276.

55. U.S.—*British Columbia Bank v. Marshall*, C.C.Or., 11 F. 19, 8 Hawy. 29.

Nature and extent of lien generally see *infra* § 24.

56. U.S.—*Chattanooga Nat. Bank v. Rome Iron Co.*, C.C.Ga., 102 F. 755.

57. Wash.—*Union Mach., etc., Co. v. McCush*, 175 P. 559, 104 Wash. 62.  
49 C.J. p 905 note 94.

#### Description held sufficient

Tenn.—*Robertson v. Wade*, 65 S.W. 2d 487, 17 Tenn.App. 457.

58. U.S.—*Box parts v. Itz*, D.C.Mann., 9 F.Cas.No.4,837, 2 Lowell 519.

59. Tenn.—*Corpus Juris* cited in *Robertson v. Wade*, 65 S.W.2d 487, 494, 17 Tenn.App. 457.

49 C.J. p 905 note 96.

60. Tex.—*Stanton v. Security Bank, etc., Co.*, Civ.App., 232 S.W. 854, modified on other grounds, Com. App., 244 S.W. 593.

61. Tex.—*Stanton v. Security Bank, etc., Co.*, *supra*.

62. Ky.—*Klaproth v. Tanner*, 197 S.W.2d 418, 303 Ky. 292.

La.—*Hambola v. Fandison*, App., 178 So. 276.

N.Y.—*In re Bickford's Estate*, 38 N.Y.S.2d 785, 265 App.Div. 268.  
49 C.J. p 905 note 83.

63. Okl.—*Carothers Warehouse Bldg. Assoc. v. McConnell*, 121 P. 101, 30 Okl. 304.

49 C.J. p 905 note 86.

Necessity of writing for chattel mortgage see *Chattel Mortgages* § 49.

Validity of oral sales see *Frauds, Statute of* § 138, and the C.J.S. title Sales §§ 59, 560, also 55 C.J. p 188 note 78 et seq., p 1201 note 7 et seq.



pledge must be in writing in order to be effective with respect to third persons,<sup>64</sup> but such statutes do not apply so as to affect the validity of the pledge between the parties to the transaction.<sup>65</sup> It has been held that a pledge of a chose in action not capable of manual delivery cannot be made without a written transfer of title,<sup>66</sup> which performs the office of delivery of possession on a pledge of corporeal property;<sup>67</sup> but where the debt is evidenced by a writing, such as a bond and mortgage, a mere delivery thereof to the pledgee without any writing is sufficient, at least in a court of equity.<sup>68</sup> Where collateral notes were pledged under a written agreement as security for a note, it was held that the mere fact that the pledgee did not indorse the collateral notes was of no consequence.<sup>69</sup>

### § 13. — Consideration

#### a. In general

#### b. Preexisting indebtedness

#### a. In General

A contract of pledge must be supported by a valid consideration, and general rules apply as to the sufficiency of the consideration.

As in the case of contracts generally, a contract of pledge must be supported by a valid considera-

tion;<sup>70</sup> and a pledge of property for the debt of another is presumed to have been made for a sufficient consideration.<sup>71</sup>

**Sufficiency of consideration.** The general rules, discussed in Contracts §§ 74-126, apply as to the sufficiency of the consideration.<sup>72</sup> It has been held that such consideration may consist of a loan of money,<sup>73</sup> a discount of notes,<sup>74</sup> an obligation assumed by the pledgee at the time of the pledge,<sup>75</sup> a surrender or exchange of property already held as collateral,<sup>76</sup> or an extension of time for the payment of a debt<sup>77</sup> unless the extension is too indefinite.<sup>78</sup>

#### b. Preexisting Indebtedness

As a general rule, a preexisting debt or liability, if still subsisting, is a sufficient consideration for a contract of pledge.

Although there is some authority that a preexisting debt will not support a pledge of collateral security,<sup>79</sup> as a general rule a preexisting debt or liability, if still subsisting, is a sufficient consideration for a contract of pledge<sup>80</sup> without any new consideration,<sup>81</sup> even though the pledgor's liability is only a contingent liability.<sup>82</sup> Where the pledgor is a stranger to the debt and there is no other con-

64. La.—Millet v. Conrad, 38 So. 139, 114 La. 193.

49 C.J. p 906 note 83 [b, c].

Letters held sufficient

La.—Madding v. Hoover, App., 44 So. 2d 184.

65. La.—Sambola v. Fandison, App., 178 So. 276—Foote v. Sun Life Assur. Co. of Canada, App., 173 So. 477—Ganey v. Cockerham, 123 So. 194, 11 La.App. 201.

Wife as participant

Where wife was a participant in the transaction whereby her former husband pledged jewelry to secure a loan made to him, she was not a third person within the pledge statute, so as to invalidate the pledge against her, even though the pledge was oral.—Madding v. Hoover, La. App., 44 So.2d 184.

66. Pa.—American Exch. Nat. Bank v. Federal Nat. Bank, 75 A. 683, 226 Pa. 483, 134 Am.S.R. 1071, 27 L.R.A.N.S., 866, 18 Ann.Cas. 444. 49 C.J. p 906 note 88.

67. Pa.—American Exch. Nat. Bank v. Federal Nat. Bank, supra.

68. Pa.—Berks County Trust Co. v. Trexler, Com.Pl., 35 Berks Co. 19. S.C.—Weatherly v. Medlin, 139 S.E. 633, 141 S.C. 290. 49 C.J. p 906 note 90.

69. Tex.—First Nat. Bank v. Bell,

Civ.App., 88 S.W.2d 119, error dismissed.

70. Ohio.—Robinson v. Boyd, 53 N. E. 494, 60 Ohio St. 57.

Tenn.—Hall v. McCandless, 14 Tenn. App. 528.

49 C.J. p 906 note 1.

Debts and liabilities which may be secured see supra § 10.

71. Ohio.—Robinson v. Boyd, 53 N. E. 494, 60 Ohio St. 57.

72. Ohio.—Robinson v. Boyd, supra. 49 C.J. p 906 note 5.

Representation of debtor, who procured creditor's consent to substitution of mortgage note for other collateral, that mortgaged property was valuable property, was held not to nullify substitution, even if mortgaged property only had small value.—Davis v. Lacaze, 158 So. 626, 181 La. 75, followed in, App., Lacaze v. Atkins, 158 So. 876.

73. N.Y.—Forchione v. Rome Trust Co. of Rome, 300 N.Y.S. 1306, 253 App.Div. 113.

49 C.J. p 906 note 6.

74. Pa.—Hiller v. Pollock, 39 Leg. Int. 237.

75. Mo.—Midland Nat. Bank v. Missouri Pac. R. Co., 33 S.W. 521, 132 Mo. 492, 53 Am.S.R. 505.

Tenn.—Cherry v. Frost, 7 Lea 1.

76. Miss.—Rhymes v. Boggess, 111 So. 844, 146 Miss. 707.

49 C.J. p 906 note 9.

77. La.—Tucker v. Legotte, App., 200 So. 31.

49 C.J. p 906 note 10.

78. Ga.—Abraham v. Cook County First Bank, 139 S.W. 583, 37 Ga. App. 220.

49 C.J. p 906 note 11.

79. Ohio.—Kellogg-Mackay Co. v. O'Neal, 177 N.E. 778, 39 Ohio App. 372.

80. Ala.—Corpus Juris cited in Allgood v. First Nat. Bank of Piedmont, 139 So. 100, 102, 224 Ala. 169.

Md.—Corpus Juris cited in People's Banking Co. of Smithsburg v. Fidelity & Deposit Co. of Maryland, 170 A. 544, 552, 165 Md. 657, dissenting opinion 171 A. 345, 165 Md. 657.

Vt.—Central Vermont Public Service Corporation v. Bitapence, 34 A.2d 184, 113 Vt. 284.

49 C.J. p 906 note 12.

Pledge as security for preexisting indebtedness see supra § 10.

81. Ala.—Bynum Mercantile Co. v. Anniston First Nat. Bank, 65 So. 815, 187 Ala. 281.

40 C.J. p 906 note 13.

82. Ala.—Bynum Mercantile Co. v. Anniston First Nat. Bank, supra. 49 C.J. p 907 note 14.

sideration, the pledge is void for want of consideration;<sup>83</sup> and under a statutory provision that the real owner cannot defeat a pledge of property which has been transferred to an apparent owner for the purpose of pledge, and which he pledges in good faith for value, a pledge by an apparent owner for a past indebtedness is not for value so as to be good against the real owner.<sup>84</sup>

*Mere executory contract* for a pledge, as security for an existing debt, where there has been no delivery, is void without a new consideration.<sup>85</sup>

#### § 14. — Equitable Pledge

A contract for a pledge which does not constitute a valid pledge because of the lack of some requisite creates an equitable pledge which is generally enforceable between the parties and purchasers with notice.

A contract for a pledge which does not constitute a valid pledge because of the lack of some requisite,<sup>86</sup> such as the nonexistence of the property to be pledged at the time thereof<sup>87</sup> or want of delivery of the property,<sup>88</sup> creates an equitable lien or

pledge, which a court of equity will enforce between the parties<sup>89</sup> and purchasers with notice,<sup>90</sup> but not as against subsequent bona fide purchasers or pledgees for value.<sup>91</sup> There is authority both that it will<sup>92</sup> and will not<sup>93</sup> be enforced as against the then general creditors of the pledgor; in any event it will not be enforced as against creditors who have a superior claim on the property.<sup>94</sup> In order to apply the doctrine of an equitable pledge there must be a contract from which it sufficiently appears that the particular property was designed by the debtor to be subjected to the payment of the debt;<sup>95</sup> and the property must come into existence and into the possession of the pledgee in order to give him any title thereto.<sup>96</sup>

#### § 15. — Absolute Transfer as Pledge

A bill of sale or other transfer of property absolute in form, such as an assignment of a mortgage, will be construed as a pledge where it appears that the instrument was intended merely as security.

A bill of sale<sup>97</sup> or other transfer of property absolute in form<sup>98</sup> will be construed as a pledge

83. Ala.—Blynum Mercantile Co. v. Anniston First Nat. Bank, *supra*.

84. Cal.—Fairmont Creamery Co. v. Los Angeles Ice, etc., Co., 165 P. 553, 33 Cal.App. 414.

85. Conn.—Huntington v. Sherman, 22 A. 769, 60 Conn. 463.

Md.—People's Banking Co. of Smithsburg v. Fidelity & Deposit Co. of Maryland, 170 A. 544, 165 Md. 657, dissenting opinion 171 A. 345, 165 Md. 657.

86. Tex.—*Corpus Juris* cited in National Bank of Commerce of Houston v. Moody, Civ.App., 90 S. W.2d 279, 284.

49 C.J. p 907 note 19.

87. U.S.—Trenton Cotton Oil Co. v. C. I. R., C.C.A.Pa., 147 F.2d 33, certiorari denied 148 F.2d 208, 49 C.J. p 907 note 20.

88. U.S.—Lane v. School Dist. of City of Monessen, C.C.A.Pa., 120 F. 2d 479—*Taplinger v. Northwestern Nat. Bank in Philadelphia*, C.C.A.Pa., 101 F.2d 274.

Pa.—Hayward v. Wandrie, Com.Pl., 21 Erie Co. 258, 9 Som.Leg.J. 399.

Tenn.—*Corpus Juris* cited in Robertson v. Wade, 68 S.W.2d 487, 494, 17 Tenn.App. 457.

Vt.—Inland Pond Nat. Bank v. Lacroix, 158 A. 684, 104 Vt. 282, 49 C.J. p 907 note 21.

#### Agreement to assign

If agreement to give note as collateral merely constituted agreement to assign at future date, assignee would nevertheless have equitable lien.—Murry v. Central Bank, 40 S. W.2d 721, 226 Mo.App. 400.

89. U.S.—Lane v. School Dist. of

City of Monessen, C.C.A.Pa., 120 F. 2d 479—*Taplinger v. Northwestern Nat. Bank in Philadelphia*, C.C.A.Pa., 101 F.2d 274.

Mo.—Murry v. Central Bank, 40 S. W.2d 721, 226 Mo.App. 400.

N.Y.—Titusville Iron Co. v. City of New York, 100 N.Y. 806, 207 N.Y. 203.

Pa.—Ambler Nat. Bank v. Maryland Credit Finance Co., 24 A.2d 123, 147 Pa.Super. 496—*Hayward v. Wandrie*, Com.Pl., 21 Erie Co. 258, 9 Som.Leg.J. 399.

Tenn.—*Corpus Juris* cited in Robertson v. Wade, 68 S.W.2d 487, 494, 17 Tenn.App. 457.

Vt.—Inland Pond Nat. Bank v. Lacroix, 158 A. 684, 104 Vt. 282, 49 C.J. p 907 note 22.

90. U.S.—*Taplinger v. Northwestern Nat. Bank in Philadelphia*, C.C.A.Pa., 101 F.2d 274.

N.Y.—Titusville Iron Co. v. City of New York, 100 N.Y. 806, 207 N.Y. 203.

Pa.—Hayward v. Wandrie, Com.Pl., 21 Erie Co. 258, 9 Som.Leg.J. 399.

Tenn.—*Corpus Juris* cited in Robertson v. Wade, 68 S.W.2d 487, 494, 17 Tenn.App. 457.

49 C.J. p 907 note 24.

91. U.S.—Lane v. School Dist. of City of Monessen, C.C.A.Pa., 120 F.2d 479—*Taplinger v. Northwestern Nat. Bank in Philadelphia*, C.C.A.Pa., 101 F.2d 274.

Pa.—Hayward v. Wandrie, Com.Pl., 21 Erie Co. 258, 9 Som.Leg.J. 399.

Tenn.—*Corpus Juris* cited in Robertson v. Wade, 68 S.W.2d 487, 494, 17 Tenn.App. 457.

49 C.J. p 907 note 26.

92. U.S.—Lane v. School Dist. of City of Monessen, C.C.A.Pa., 120 F. 2d 479.

Pa.—Davis v. Hillings, 99 A. 163, 254 Pa. 574.

Tenn.—*Corpus Juris* cited in Robertson v. Wade, 68 S.W.2d 487, 494, 17 Tenn.App. 457, 49 C.J. p 907 note 23.

93. N.Y.—Titusville Iron Co. v. City of New York, 100 N.Y. 806, 207 N.Y. 203. F. & M. Schaefer Brewing Co. v. Amsterdam Tavern, 13 N.Y.S.2d 701, 171 Misc. 352.

94. U.S.—Continental Bank & Trust Co. of New York v. Webster Hall Corporation of America, D.C.Pa., 4 F.Supp. 337, affirmed, C.C.A., Webster Hall Corporation of America v. Continental Bank & Trust Co. of New York, 66 F.2d 558.

Pa.—Ambler Nat. Bank v. Maryland Credit Finance Co., 24 A.2d 123, 147 Pa.Super. 496.

Tenn.—*Corpus Juris* cited in Robertson v. Wade, 68 S.W.2d 487, 494, 17 Tenn.App. 457.

Vt.—Inland Pond Nat. Bank v. Lacroix, 158 A. 684, 104 Vt. 282, 49 C.J. p 907 note 25.

95. U.S.—Hook v. Ayers, Ill., 80 F. 978, 26 C.C.A. 287.

96. Ala.—Alabama State Bank v. Barnes, 2 So. 349, 82 Ala. 607.

97. U.S.—Mount Tivy Winery v. Lewis, C.C.A.Cal., 134 F.2d 120, 49 C.J. p 907 note 30.

98. Cal.—Mayer v. Thomas, 63 P.2d 1176, 18 Cal.App.2d 299.

Idaho.—Isaak v. Journey, 15 P.2d 1069, 52 Idaho 392.

Pa.—Kelter v. American Bankers' Fi-

where it appears, either from the instrument itself<sup>99</sup> or from other evidence<sup>1</sup> that it was intended as a security only. It is not necessary, to the application of this rule, that an express promise on the part of the transferor to pay the debt shall appear<sup>2</sup> or that fraud be shown.<sup>3</sup> Where a creditor releases a surety on a deposit of paper security, but the debt continues in fact, the creditor does not become the owner of such security but holds it as a pledgee.<sup>4</sup> It has been held that an absolute sale for a cash price acknowledged to have been received cannot be construed as a pledge.<sup>5</sup>

Where the original transaction constitutes a pledge, no act on the part of the pledgee alone can convert it into an outright assignment.<sup>6</sup>

*Assignment of mortgage as collateral.* Where a mortgagee assigns a mortgage as security for a debt, the transaction constitutes a pledge.<sup>7</sup> Whether an assignment of a mortgage is in legal effect a pledge is determined by the substance of the contract and the intention of the parties.<sup>8</sup>

## § 16. — Evidence as to Character of Transaction

- a. Presumptions and burden of proof
- b. Admissibility
- c. Weight and sufficiency

nance Co., 160 A. 127, 306 Pa. 483, 82 A.L.R. 999.

Wash.—Olsen v. National Grocery Co., 130 P.2d 78, 15 Wash.2d 164. 49 C.J. p 908 note 31.

### Deed

Tex.—Segal v. Saunders, Civ.App., 220 S.W.2d 339, refused no reversible error.

### Lease

N.Y.—Maltz v. Westchester County Brewing Co., 140 N.Y.S. 521, reversed on other grounds 146 N.Y.S. 52, 161 App.Div. 933.

99. Ill.—Chapin v. Tampoorlos, 59 N.E.2d 334, 325 Ill.App. 219. 49 C.J. p 908 note 32.

1. U.S.—Mount Tivy Winery v. Lewis, C.C.A.Cal., 134 F.2d 120.

Ill.—Chapin v. Tampoorlos, 59 N.E. 2d 334, 325 Ill.App. 219.

Pa.—Kelter v. American Bankers' Finance Co., 160 A. 127, 306 Pa. 483, 82 A.L.R. 999.

2. Ohio.—Toledo First Nat. Bank v. Central Chandelier Co., 17 Ohio Cir.Ct. 443, 9 Ohio Cir.Dec. 807.

8. Cal.—Meyer v. Thomas, 63 P.2d 1176, 13 Cal.App.2d 299.

4. D.C.—Dollar v. Land, C.A.D.C., 184 F.2d 245, certiorari denied Land v. Dollar, 71 S.Ct. 198.

5. La.—Millet v. Conrad, 38 So. 139, 114 La. 193.

6. Idaho.—Isaak v. Journey, 15 P. 2d 1069, 52 Idaho 392.

7. Md.—Corpus Juris cited in People's Banking Co. v. Fidelity & Deposit Co., 170 A. 544, 553, 165 Md. 657—Remsen v. Duvall, 157 A. 581, 161 Md. 352.

Mich.—Frey v. Farmers & Mechanics Bank of Ann Arbor, 262 N.W. 911, 273 Mich. 284.

N.J.—Shaw v. Hughan, 157 A. 126, 109 N.J.Eq. 317.

N.Y.—Frensdorf v. Stumpf, 80 N.Y. S.2d 211.

49 C.J. p 908 note 31 [a].

8. Conn.—Saposnick v. Kenig, 184 A. 584, 121 Conn. 258.

9. Cal.—Borland v. Nevada Bank, 33 P. 737, 90 Cal. 89, 37 Am.S.R. 32.

Minn.—Corpus Juris cited in Janesville State Bank v. Aetna Life Ins. Co., 274 N.W. 232, 233, 200 Minn. 312.

10. U.S.—In re Cross, D.C.N.Y., 244 F. 844.

Chattel mortgage distinguished from pledge see Chattel Mortgages § 4.

11. U.S.—In re Cross, supra.

12. Mo.—Smith v. Becker, 184 S.W. 943, 192 Mo.App. 597.

13. U.S.—In re Cross, D.C.N.Y., 244 F. 844.

N.J.—Caldwell v. Fifield, 24 N.J.Law 150.

14. Del.—Corpus Juris cited in Claude Banta, Inc., v. Wilmington Suburban Water Co., Ch., 46 A.2d 876, 881.

49 C.J. p 908 note 42.

15. Ill.—Cottrell v. Gerson, 16 N.E. 2d 529, 206 Ill.App. 412, affirmed 20 N.E.2d 74, 371 Ill. 174.

N.C.—Corpus Juris cited in Tesh v. Rominger, 1 S.E.2d 98, 100, 215 N. C. 52.

49 C.J. p 908 note 43.

### Validity of notes

One who alleges that property in his possession was pledged to secure the payment of certain notes held by him has the burden of proving the validity of the notes.—De Silver v. Pennsylvania Trust Co. of Pittsburgh, 20 A.2d 761, 342 Pa. 320.

### Repledge

Where the pledgee claims that a note which he did not return after it had been paid was repledged to secure a subsequent loan, he has the burden of showing that the pledgor consented to the repledge.—Poliato v. Ferraro, La.App., 135 So. 477.

## a. Presumptions and Burden of Proof

There is a presumption that property deposited by a debtor with his creditor was intended as collateral security for the debt. Where a transfer of property is absolute on its face the burden of proving that it was intended as a mere pledge is on the one who claims it to be such.

Where a debtor deposits property with his creditor, it is presumed, in the absence of any showing as to the purpose with which the deposit was made or received, that it was intended as collateral security for the debt.<sup>9</sup> In case of doubt whether a transaction by which personal property is given as security is a pledge, or is a chattel mortgage,<sup>10</sup> a sale,<sup>11</sup> a conditional sale,<sup>12</sup> or an absolute assignment,<sup>13</sup> the law favors the conclusion that it is a pledge; but where a transfer of property is absolute on its face the burden is on one who asserts that it was intended as a mere pledge to establish that fact by clear and satisfactory proof.<sup>14</sup> Where it is admitted that the property is owned by another, one who claims that it is subject to a pledge in his favor has the burden of proving that fact.<sup>15</sup>

## b. Admissibility

Parol evidence is admissible to show that a transfer, absolute on its face, was in reality intended only as a pledge.

In accordance with the general rule that parol evidence is admissible where it is offered, not for

the purpose of varying the terms of a written contract, but for the purpose of explaining and showing the real nature of the transaction, as considered in Evidence § 1015, parol evidence is admissible to show that an assignment or transfer of personal property, absolute on its face, was in reality intended only as a pledge,<sup>16</sup> and such fact may also be shown by written evidence.<sup>17</sup> For example, where a note or other negotiable instrument is indorsed by the holder to another, parol evidence is admissible to show that the indorsement was intended to transfer the paper simply as collateral security, and not absolutely.<sup>18</sup> Evidence of any acts of the parties relevant to the issue is properly admitted,<sup>19</sup> and evidence of irrelevant acts is properly excluded.<sup>20</sup>

Where the instrument making the transfer amounts to a complete contract or agreement between the parties, parol evidence cannot be introduced to vary or contradict the terms of the written contract, as considered in Evidence § 900.

### c. Weight and Sufficiency

General rules apply with respect to the weight and sufficiency of the evidence as to whether or not a particular transaction constitutes a pledge. In the case of a transfer, absolute on its face, it cannot be construed as a pledge unless the evidence is clear and convincing.

General rules apply with respect to the weight

and sufficiency of the evidence as to the character of a particular transaction, whether it constitutes a pledge or other form of contract,<sup>21</sup> and the terms and conditions thereof.<sup>22</sup> Thus evidence sufficient to show whether an ambiguous transaction constitutes a pledge may consist of the writings, if any, accompanying the transaction,<sup>23</sup> the oral statements of the parties made at the time<sup>24</sup> or afterward,<sup>25</sup> and of any collateral circumstances tending to show the intentions of the parties.<sup>26</sup> The uncontradicted evidence of one of the parties that the property was transferred as collateral may be sufficient to prove a pledge.<sup>27</sup> The fact that no note was given and no rate of interest agreed on does not conclusively establish that the transaction was not a pledge.<sup>28</sup>

In the case of a transfer, absolute on its face, it cannot be construed as a pledge unless the evidence is clear and convincing.<sup>29</sup>

### § 17. — Questions of Law and Fact

Ordinarily it is the province of the court to determine questions of law and that of the jury to determine questions of fact, with respect to whether or not a transaction constitutes a pledge.

In accordance with the general rules, ordinarily it is the province of the court to determine questions

16. U.S.—*Brown v. New York Life Ins. Co.*, D.C.S.C., 22 F.Supp. 82, reversed on other grounds, C.C.A., New York Life Ins. Co. v. Brown, 99 F.2d 199, certiorari denied *Brown v. New York Life Ins. Co.*, 59 S.Ct. 487, 306 U.S. 628, 82 L.Ed. 1039.

Ala.—*Corpus Juris* cited in *Missouri State Life Ins. Co. v. Robertson Banking Co.*, 134 So. 25, 28, 223 Ala. 13.

Del.—*Corpus Juris* quoted in *Claude Banta, Inc., v. Wilmington Suburban Water Co., Ch.*, 46 A.2d 876, 880.

Md.—*Hodgson v. Burroughs*, 2 A.2d 407, 175 Md. 413.

Okl.—*Beverly Hills Nat. Bank & Trust Co. v. Martin*, 91 P.2d 94, 185 Okl. 254.  
49 C.J. p 908 note 45.

17. Del.—*Corpus Juris* quoted in *Claude Banta, Inc., v. Wilmington Suburban Water Co., Ch.*, 46 A.2d 876, 880.

49 C.J. p 909 note 47.

18. Ind.—*Hazzard v. Duke*, 64 Ind. 220.

49 C.J. p 909 note 48.

19. Tex.—*Smith v. Blancas*, Civ. App., 87 S.W.2d 781, error refused.

20. Idaho.—*Isaak v. Journey*, 15 P. 2d 1069, 52 Idaho 392.

21. Evidence held sufficient to show pledge

Ark.—*Pyrtle v. Martin*, 118 S.W.2d 106, 196 Ark. 1179.

Cal.—*Loveland v. Peters*, 306 P.2d 448, 92 Cal.App.2d 47.

Idaho.—*Isaak v. Journey*, 15 P.2d 1069, 52 Idaho 392.

La.—*Coleman v. Fidelity Finance Co.*, 137 So. 584, 18 La.App. 422.

Mo.—*Murry v. Central Bank*, 40 S.W. 2d 721, 226 Mo.App. 400.

Pa.—*De Silver v. Pennsylvania Trust Co. of Pittsburgh*, 30 A.2d 761, 342 Pa. 820.

49 C.J. p 909 note 53 [a].

Evidence held insufficient to show pledge

Ill.—*Wine v. Packard*, 17 N.E.2d 368, 297 Ill.App. 637—*Gottrell v. Gerson*, 16 N.E.2d 529, 296 Ill.App. 412, affirmed 20 N.E.2d 74, 371 Ill. 174.

La.—*Wells v. Dean*, 29 So.2d 590, 211 La. 122.

Mich.—*Koslowski v. Szlaba*, 236 N. W. 845, 254 Mich. 508.

N.J.—*First Nat. Bank & Trust Co. of Blackwood v. Blackwood Theatre Co.*, 187 A. 740, 121 N.J.Mq. 161.

Okl.—*Beverly Hills Nat. Bank & Trust Co. v. Martin*, 91 P.2d 94, 185 Okl. 254.

Wash.—*Colver v. Fraser, Goodwin & Colver*, 7 P.2d 24, 166 Wash. 898.

49 C.J. p 909 note 52 [b].

22. La.—*W. F. Taylor Co. v. Whitbeck*, App., 159 So. 187.

Tex.—*Moring v. Wolf & Klar*, Civ. App., 146 S.W.2d 1048—*Celada v. Mathias*, Civ.App., 269 S.W. 459.

23. Okl.—*Carothers Warehouse Bldg. Assoc. v. McConnell*, 121 P. 191, 30 Okl. 394.

49 C.J. p 909 note 54.

24. Md.—*Schwind v. Boyce*, 51 A. 48, 94 Md. 510.

Okl.—*Carothers Warehouse Bldg. Assoc. v. McConnell*, 121 P. 191, 30 Okl. 394.

25. N.Y.—*Ayer v. Seymour*, 5 N.Y.S. 650, 15 Daly 249.

Okl.—*Carothers Warehouse Bldg. Assoc. v. McConnell*, 121 P. 191, 30 Okl. 394.

26. La.—*Sambola v. Pandimon*, App., 178 So. 276.

49 C.J. p 909 note 57.

27. Mass.—*Proctor v. Whitcomb*, 184 Mass. 428.

28. Idaho.—*Isaak v. Journey*, 15 P. 2d 1069, 52 Idaho 392.

29. Idaho.—*Isaak v. Journey*, *supra*.

Okl.—*Beverly Hills Nat. Bank & Trust Co. v. Martin*, 91 P.2d 94, 185 Okl. 254.

49 C.J. p 909 note 59.

of law<sup>30</sup> and that of the jury to determine questions of fact,<sup>31</sup> with respect to whether or not a transaction constitutes a pledge.

### § 18. — Acknowledgment; Recording and Registration

Unless required by statute a contract of pledge in writing need not be acknowledged or recorded.

In the absence of statute a contract of pledge in writing need not be acknowledged.<sup>32</sup>

Since a contract of pledge ordinarily is not required to be in writing, as discussed supra § 12, in the absence of statute requiring it a written contract of pledge need not be registered or recorded;<sup>33</sup> and statutes which require the recording or registration of a contract of sale,<sup>34</sup> an assignment in trust,<sup>35</sup> or a mortgage,<sup>36</sup> are inapplicable to a pledge. Under some statutes, however, a written contract of pledge is not valid as against third persons unless it is duly registered and recorded,<sup>37</sup> and a third person

within the meaning of this rule includes the seller of the property pledged, who seeks to recover the purchase price thereof from the pledgor,<sup>38</sup> and also includes other creditors of the pledgor where the pledge has been made to secure a particular debt.<sup>39</sup>

### § 19. Delivery and Possession

- a. Necessity
- b. Sufficiency in general
- c. Continued possession

#### a. Necessity

Under both the civil and the common law, as affirmed by statute in some jurisdictions, it is essential to the validity of a pledge that actual or constructive possession of the pledged property be delivered to the pledgee.

Under both the civil and the common law, as affirmed by statute in some jurisdictions, it is essential to the validity of a pledge of personal property that either actual or constructive possession of the pledged property be delivered to the pledgee,<sup>40</sup>

#### 30. Determination of sufficiency of evidence

III.—Chapin v. Tampoorlos, 59 N.E.2d 334, 325 Ill.App. 219.

31. Idaho.—Isaak v. Journey, 15 P. 2d 1069, 52 Idaho 392.

Evidence held sufficient to go to jury III.—Chapin v. Tampoorlos, 59 N.E. 2d 334, 325 Ill.App. 219.

32. Cal.—Irwin v. McDowell, 34 P. 708, 4 Cal.Unrep.Cas. 329.

33. U.S.—Colorado Nat. Bank of Denver v. Newton, C.C.A.Colo., 80 F.2d 696, certiorari denied Newton v. Colorado Nat. Bank of Denver, 56 S.Ct. 596, 297 U.S. 719, 80 L.Ed. 1004—Corpus Juris quoted in In re Rogers, D.C.W.Va., 20 F.Supp. 120, 127.

49 C.J. p 909 note 62.

34. Tenn.—Arendale v. Morgan, 5 Sneed 703.

35. Pa.—In re Handy, 31 A. 983, 167 Pa. 552.

36. Kan.—Citizens' Nat. Bank v. Bank of Commerce, 101 P. 1005, 80 Kan. 205.

49 C.J. p 909 note 65.

#### Assignment of interest in bonds

Statute requiring chattel mortgages to be promptly recorded was held inapplicable to instrument assigning pledgor's interest in bonds to bank to secure note discounted by bank, for the reason that such bonds were not goods or chattels within meaning of statute.—Passaic Nat. Bank & Trust Co. v. Owens, 162 A. 879, 111 N.J.Eq. 486.

37. Ky.—Meade v. Wells, 218 S.W. 2d 972, 309 Ky. 748.

49 C.J. p 910 note 66.

38. Philippine.—Tec Bi v. Chartered Bank of India, etc., 41 Philippine

596—Ocejo v. International Bank Corp., 37 Philippine 631.

39. Ky.—Meade v. Wells, 218 S.W.2d 972, 309 Ky. 748.

49 C.J. p 910 note 68.

40. U.S.—Gins v. Mauser Plumbing Supply Co., C.C.A.N.Y., 148 F.2d 974—In re Prudence Co., C.C.A.N.Y., 88 F.2d 420—Goldstein v. Rusch, C.C.A.N.Y., 56 F.2d 10, certiorari denied 53 S.Ct. 9, 287 U.S. 604, 77 L.Ed. 526—In re Herkimer Mills Co., D.C.N.Y., 39 F.2d 625—Hinson v. Plowden, D.C.S.C., 91 F. Supp. 836—In re Eakin Lumber Co., D.C.W.Va., 39 F.Supp. 787, affirmed, C.C.A., R. F. C. v. Sun Lumber Co., 128 F.2d 731—Kirst v. Buffalo Cold Storage Co., D.C.N.Y., 36 F.Supp. 401—Corpus Juris, quoted in In re Rogers, D.C.W.Va., 20 F. Supp. 120, 128—Randolph v. Scranton, M. & B. R. Co., D.C.Pa., 4 F. Supp. 861, affirmed, C.C.A., Miners' Bank of Wilkes-Barre v. Acker, 66 F.2d 850—Dealers' Finance Co. v. Coulter, D.C.Ark., 3 F.Supp. 114, appeal dismissed, C.C.A., 64 F.2d 752.

Ga.—Williams v. Williams, 154 S.E. 260, 170 Ga. 814—Valdosta Plywoods v. Belote, 44 S.E.2d 138, 75 Ga.App. 616—Carpenter v. Williams, 154 S.E. 298, 41 Ga.App. 685.

Ind.—Gretzinger v. Arehart, App., 193 N.E. 714.

Iowa.—Reyelts v. Feucht, 221 N.W. 937, 206 Iowa 1326.

Kan.—Columbia Cas. Co. v. Sodini, 156 P.2d 524, 159 Kan. 478.

Ky.—Liberty Nat. Bank & Trust Co. v. Louisville Trust Co., 175 S.W.2d 524, 295 Ky. 825—Martin v. St. Matthews Produce Exchange, 95 S.W.2d 1119, 265 Ky. 26.

La.—Muse v. Hill, App., 42 So.2d 919—O'Hanlon v. Phoenix Building & Homestead Ass'n, 137 So. 228, 17 La.App. 673.

Minn.—Goemmel v. Heesch, 4 N.W. 2d 104, 212 Minn. 424.

N.J.—Mill Factors Corporation v. Guardian Trust Co., 154 A. 420, 107 N.J.Law 529—Paramount Building & Loan Ass'n of City of Newark v. Sacks, 152 A. 457, 107 N.J.Eq. 328.

N.Y.—McCoy v. American Express Co., 171 N.E. 749, 253 N.Y. 477, reargument denied 173 N.E. 861, 254 N.Y. 550—In re Bickford's Estate, 38 N.Y.S.2d 785, 265 App.Div. 266.

N.C.—Bundy v. Commercial Credit Co., 163 S.E. 676, 202 N.C. 604.

N.D.—Corpus Juris cited in Congress Candy Co. v. Farmer, 12 N.W.2d 796, 804, 73 N.D. 174, 150 A.L.R. 1316.

Pa.—Corpus Juris cited in First Nat. Bank of Jamestown v. Sheldon, 54 A.2d 61, 63, 161 Pa.Super. 265—Corpus Juris cited in Ambler Nat. Bank v. Maryland Credit Finance Co., 24 A.2d 123, 127, 147 Pa.Super. 496.

Tenn.—Robertson v. Wade, 68 S.W.2d 487, 17 Tenn.App. 457—Eason v. Gibbs, 1 Tenn.App. 523.

Tex.—Republic Nat. Bank of Dallas v. Cox, Civ.App., 163 S.W.2d 718, error refused—Central Nat. Bank v. Latham & Co., Civ.App., 22 S.W. 2d 765, error refused.

Utah.—Campbell v. Peter, 162 P.2d 754, 108 Utah 565.

Vt.—Island Pond Nat. Bank v. Lacroix, 158 A. 684, 104 Vt. 282—Jennings v. Gallagher, 152 A. 802, 103 Vt. 169.

Wash.—Kietz v. Gold Point Mines, 105 P.2d 71, 5 Wash.2d 224—Rock-

or to someone as his agent or representative,<sup>41</sup> or, under some statutes, to a third person agreed on as pledgeholder.<sup>42</sup> The purposes of this requirement are not only to furnish evidence of the contract of pledge but also to furnish notice to third persons dealing with the property,<sup>43</sup> and to prevent fraud and deception.<sup>44</sup> Although a contract of pledge is made and acted on in good faith, if there is no actual or constructive delivery and change of possession of the property there is no valid pledge,<sup>45</sup> and the pledgee obtains no lien at law on the property although he actually advances money on the faith of the contract of pledge,<sup>46</sup> particularly as against creditors or subsequent purchasers or encumbrancers in good faith,<sup>47</sup> such as attachment or execution creditors of the pledgor,<sup>48</sup> and this is especially true under a statute which makes every

charge on personalty, unless actual possession in good faith accompanies it, void as to any creditor prior to the recording of the charge.<sup>49</sup> It has been held, however, that the fact that the property remains in the possession of the pledgor does not invalidate the pledge as between the parties,<sup>50</sup> or as against a wrongdoer,<sup>51</sup> and that all who claim under the pledgor<sup>52</sup> or who acquire their rights with notice of the pledge<sup>53</sup> are bound.

In the absence of a statute providing otherwise, delivery and possession are not merely a consequence of the relation, but are the very essence of the contract of pledge,<sup>54</sup> for until the pledgee takes possession his lien thereon is merely inchoate<sup>55</sup> and cannot be claimed except as to articles thereafter delivered.<sup>56</sup> Where the pledgee does take posses-

well v. Peyran, 20 P.2d 841, 172 Wash. 434.

49 C.J. p 910 notes 70, 72.

#### Effect of traders act

Virginia Traders Act, intended to regulate agency and consignment arrangements and undisclosed partners or backers, does not dispense with the common-law requirement that possession of pledged property must pass to the pledgee in order to create a valid pledge.—*Swetnam v. Edmund Wright Ginsberg Corporation*, C.C.A.N.Y., 128 F.2d 1, certiorari denied *Edmund Wright Ginsberg Corp. v. Swetnam*, 63 S.Ct. 42, 317 U.S. 647, 87 L.Ed. 521.

#### Rule applied to motor vehicles

Conn.—*Personal Auto Finance Co. v. Bove*, 66 A.2d 126, 135 Conn. 461. Ind.—*Fletcher American Nat. Bank v. McDermid*, 76 Ind.App. 150, 128 N.E. 685.

Pa.—*Ambler Nat. Bank v. Maryland Credit Finance Co.*, 24 A.2d 123, 147 Pa.Super. 496.

41. Mo.—*National Bank of Commerce v. Flanagan Mills, etc., Co.*, 188 S.W. 117, 268 Mo. 547.

49 C.J. p 911 note 73.

42. Mont.—*Goriez v. Rock Creek Ditch Co.*, 216 P. 778, 67 Mont. 560. 49 C.J. p 911 note 74.

43. U.S.—*Gins v. Mauser Plumbing Supply Co.*, C.C.A.N.Y., 148 F.2d 974—*Swetnam v. Edmund Wright Ginsberg Corporation*, 128 F.2d 1, certiorari denied *Edmund Wright Ginsberg Corp. v. Swetnam*, 63 S.Ct. 42, 317 U.S. 647, 89 L.Ed. 521.—*Kirst v. Buffalo Cold Storage Co.*, D.C.N.Y., 36 F.Supp. 401. 49 C.J. p 911 note 76.

44. Wash.—*Kietz v. Gold Point Mines*, 105 P.2d 71, 5 Wash.2d 224.

45. U.S.—*Swetnam v. Edmund Wright Ginsberg Corporation*, C.C.A.N.Y., 128 F.2d 1, certiorari denied

*Edmund Wright Ginsberg Corp. v. Swetnam*, 63 S.Ct. 42, 317 U.S. 647, 87 L.Ed. 521—*Goldstein v. Rusch*, D.C.N.Y., 54 F.2d 86, modified on other grounds, C.C.A., 56 F.2d 10, certiorari denied 53 S.Ct. 9, 287 U.S. 604, 77 L.Ed. 526.

Pa.—*First Nat. Bank & Trust Co. of Tarentum v. Jaffe*, 173 A. 845, 114 Pa.Super. 315.

49 C.J. p 911 note 77.

#### Motor vehicle

If the debtor remains in possession of a motor vehicle contracted to be pledged, the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the vehicle, and good faith does not avail the pledgee.—*Fletcher American Nat. Bank v. McDermid*, 128 N.E. 685, 76 Ind.App. 150—42 C. J. p 757 note 10.

46. U.S.—*Reconstruction Finance Corporation v. Sun Lumber Co.*, C. C.A.W.Va., 126 F.2d 731.

Ky.—*Liberty Nat. Bank & Trust Co. v. Louisville Trust Co.*, 175 S.W.2d 524, 295 Ky. 825—*Martin v. St. Matthews Produce Exchange*, 95 S. W.2d 1119, 265 Ky. 26.

47. U.S.—*Taplinger v. Northwestern Nat. Bank in Philadelphia*, C.C.A. Pa., 101 F.2d 274—*In re Richenell Fabric Mfg. Co.*, D.C.Pa., 31 F. Supp. 645.

Pa.—*Ambler Nat. Bank v. Maryland Credit Finance Co.*, 24 A.2d 123 147 Pa.Super. 496—*Pottstown Finance Co. v. Ibach*, Com.Pl., 58 Montg.Co. 223.

Tenn.—*Robertson v. Wade*, 68 S.W.2d 487, 17 Tenn.App. 457. 49 C.J. p 912 note 79.

48. U.S.—*Taplinger v. Northwestern Nat. Bank in Philadelphia*, C.C.A. Pa., 101 F.2d 274—*In re Richenell Fabric Mfg. Co.*, D.C.Pa., 31 F. Supp. 645.

N.J.—*Mill Factors Corporation v.*

*Guardian Trust Co.*, 154 A. 420, 107 N.J.Law 529.

49 C.J. p 912 note 80.

49. Ky.—*Burnes v. Daviess County Bank, etc., Co.*, 122 S.W. 182, 135 Ky. 355, 135 Am.S.R. 467, 25 L.R.A., N.S., 525.

50. U.S.—*Taplinger v. Northwestern Nat. Bank in Philadelphia*, C.C.A. Pa., 101 F.2d 274.

Ga.—*Carpenter v. Williams*, 154 S.E. 298, 41 Ga.App. 685.

Pa.—*Davis v. Billings*, 99 A. 163, 254 Pa. 574—*Ambler Nat. Bank v. Maryland Credit Finance Co.*, 24 A.2d 123, 147 Pa.Super. 496.

51. Ga.—*Carpenter v. Williams*, 154 S.E. 298, 41 Ga.App. 685.

52. U.S.—*Taplinger v. Northwestern Nat. Bank in Philadelphia*, C.C.A. Pa., 101 F.2d 274.

Pa.—*Davis v. Billings*, 99 A. 163, 254 Pa. 574.

#### Receiver of insolvent corporate pledgor

Wash.—*Whiting v. Rubinstein*, 109 P. 2d 312, 7 Wash.2d 204.

53. U.S.—*Taplinger v. Northwestern Nat. Bank in Philadelphia*, C.C.A. Pa., 101 F.2d 274—*In re Berlin, D. C.Pa.*, 54 F.Supp. 416, reversed on other grounds, C.C.A., 147 F.2d 491—*In re Fell*, D.C.Pa., 16 F.Supp. 987.

Pa.—*Davis v. Billings*, 99 A. 163, 254 Pa. 574.

54. Iowa.—*Andrew v. Hanchett*, 226 N.W. 3, 208 Iowa 1179.

La.—*Wells v. Dean*, 29 So.2d 590, 211 La. 132—*Alexandria Production Credit Ass'n v. Horn*, App., 199 So. 430.

49 C.J. p 912 note 85.

55. Conn.—*Macdonald v. Aetna Indemnity Co.*, 97 A. 332, 90 Conn. 415.

56. U.S.—*Reconstruction Finance Corporation v. Sun Lumber Co.*, C. C.A.W.Va., 126 F.2d 731.

sion, it is in fulfillment of a right to perfect the lien<sup>57</sup> and not in creation of a new right.<sup>58</sup>

**Executory contract.** Where delivery of possession of the property pledged is not made to the pledgee, the transaction, although otherwise sufficient as a pledge, will constitute merely an executory contract for the creation of a pledge.<sup>59</sup>

**Delivery in escrow** of property to be delivered to the pledgee on the happening of certain conditions which do not occur is not a sufficient delivery.<sup>60</sup>

### b. Sufficiency in General

- (1) Time of delivery
- (2) Manner of delivery
- (3) Possession pursuant to contract
- (4) Property already in pledgee's possession
- (5) Property remaining on pledgor's premises
- (6) Possession by agent or third person for pledgee

#### (1) Time of Delivery

In order to constitute a present valid pledge, as against creditors or subsequent purchasers in good faith, ordinarily there should be an immediate change of possession to the pledgee. Subsequent delivery will validate a prior pledge in the absence of intervening fraud or creditors' rights.

In order to constitute a present valid pledge, as

against creditors or subsequent purchasers or encumbrancers in good faith, ordinarily there should be an immediate change of possession of the property to the pledgee.<sup>61</sup> Possession delivered to the pledgee at a subsequent time will validate the pledge and render it effectual,<sup>62</sup> even as against intermediate creditors at large of the pledgor,<sup>63</sup> except where there has been fraud<sup>64</sup> and except as against creditors who have in the meantime acquired specific rights or liens on the property pledged.<sup>65</sup> The subsequent delivery will relate back to the date when the contract or pledge was made.<sup>66</sup> A contract of pledge unaccompanied by delivery of the property, and ineffectual for that reason, has been held not per se fraudulent.<sup>67</sup>

#### (2) Manner of Delivery

As a general principle, in order for a pledge of property to be effectual as against innocent third persons, delivery must be made in such manner and be accompanied by such change of possession as the nature of the property and the surrounding circumstances will reasonably permit. Under proper circumstances, and in the absence of a statutory prohibition, the delivery of pledged property may be constructive or symbolic.

As a general principle, in order for a pledge of property to be effectual as against innocent third persons, delivery must be made in such manner and be accompanied by such change of possession as the nature of the property and the surrounding circumstances will reasonably permit,<sup>68</sup> the manner of

Tex.—Houston First Nat. Bank v. Campbell, Civ.App., 193 S.W. 197.

57. Conn.—Macdonald v. Aetna Indemnity Co., 97 A. 332, 90 Conn. 415.

58. Conn.—Macdonald v. Aetna Indemnity Co., supra.

59. Tenn.—Corpus Juris cited in Robertson v. Wade, 68 S.W.2d 487, 493, 17 Tenn.App. 457.

Tex.—Republic Nat. Bank of Dallas v. Cox, Civ.App., 163 S.W.2d 718, error refused.  
49 C.J. p 912 note 55.

60. Wash.—Qualley v. Snoqualmie Valley Bank, 238 P. 915, 136 Wash. 42.  
49 C.J. p 912 note 90.

61. Okl.—Frosser v. Norton, 259 P. 217, 126 Okl. 202.  
49 C.J. p 912 note 91.

62. U.S.—Goldstein v. Rusch, C.C.A. N.Y., 56 F.2d 10, certiorari denied 53 S.Ct. 9, 287 U.S. 604, 77 L.Ed. 526.

Miss.—Corpus Juris cited in Wood Preserving Corporation v. Coney Grocery Co., 168 So. 864, 867, 176 Miss. 406.

Pa.—Ambler Nat. Bank v. Maryland Credit Finance Co., 24 A.2d 123, 147 Pa.Super. 496.

Tenn.—Maddox v. Cone, 1 Tenn.App. 534.

Wash.—Whiting v. Rubinstein, 109 P.2d 312, 7 Wash.2d 204.  
49 C.J. p 912 note 93.  
Equitable pledge see supra § 14.

#### Goods not in existence

Fact that goods were not in existence when pledge was made does not preclude a legally sufficient delivery thereof under pledge once they are produced.—Commonwealth Trust Co. of Pittsburgh v. Reconstruction Finance Corporation, C.C. A.Pa., 120 F.2d 254.

63. U.S.—Johnson v. Burke Manor Bldg. Corporation, C.C.A.Ill., 48 F.2d 1031, 83 A.L.R. 1273.

64. U.S.—Johnson v. Burke Manor Bldg. Corporation, supra.  
Conn.—Macdonald v. Aetna Indemnity Co., 97 A. 332, 90 Conn. 415.

65. U.S.—Johnson v. Burke Manor Bldg. Corporation, C.C.A.Ill., 48 F. 2d 1031, 83 A.L.R. 1273.—In re Richenell Fabric Mfg. Co., D.C. Pa., 31 F.Supp. 645.

Pa.—Ambler Nat. Bank v. Maryland Credit Finance Co., 24 A.2d 123, 147 Pa.Super. 496.

Wash.—Whiting v. Rubinstein, 109 P.2d 312, 7 Wash.2d 204.  
49 C.J. p 912 note 95.

66. U.S.—Burrowes v. Nimocks, C. C.A.N.C., 85 F.2d 152.

Tenn.—Maddox v. Cone, 1 Tenn.App. 534.—Eason v. Gibbs, 1 Tenn.App. 523.

49 C.J. p 912 note 93 [c].

67. N.Y.—Parshall v. Eggert, 54 N. Y. 18.

Retention of possession or apparent title as evidence of fraud in general see Fraudulent Conveyances §§ 187-191.

68. U.S.—Gins v. Mauser Plumbing Supply Co., C.C.A.N.Y., 148 F.2d 974.

Pa.—First Nat. Bank & Trust Co. of Tarentum v. Jaffe, 173 A. 845, 114 Pa.Super. 315.

Tex.—Central Nat. Bank v. Latham & Co., Civ.App., 22 S.W.2d 765, error refused.

49 C.J. p 913 note 99.

#### Matters considered

In determining whether delivery of property pledged was legally effective, it was proper to consider character of property, use to be made thereof, nature and object of transaction and position of parties, and particular circumstances were therefore important.—Commonwealth Trust Co. of Pittsburgh v. Reconstruction Finance Corporation, C.C. A.Pa., 120 F.2d 254.

delivery and possession depending to a great extent on the nature, bulk, and situation of the property.<sup>69</sup> Ordinarily, actual delivery of the pledged property is sufficient<sup>70</sup> in the case of corporeal property<sup>71</sup> without any written transfer of the title.<sup>72</sup> Manual delivery or manual taking possession of the property pledged is not always essential to the validity of a pledge,<sup>73</sup> and the delivery is sufficient if there are circumstances which in contemplation of law are deemed sufficient to pass the possession of the property,<sup>74</sup> especially where in the case of bulky articles manual delivery would be inconvenient;<sup>75</sup> but if the property is capable of manual delivery there should be actual delivery.<sup>76</sup>

In whatever manner the pledged property is delivered, in order to be effective as against creditors and other innocent third persons the delivery must be clear and unequivocal,<sup>77</sup> and there must be at all times an open and visible change of possession

or custody of the property,<sup>78</sup> so complete and effective as to pass the property and its exclusive control and dominion to the pledgee,<sup>79</sup> who must hold openly and adversely to the pledgor.<sup>80</sup> It has been held that the delivery must be as complete as is required in the case of a sale of personal property.<sup>81</sup>

The pledgee should exercise due care to negative the existence of ostensible ownership in the pledgor,<sup>82</sup> and such means should be resorted to as fairly to put third persons on inquiry;<sup>83</sup> but the giving of notice to the public in such a manner as to insure to all persons dealing with the pledgor knowledge of the existence of the pledge is not necessary.<sup>84</sup>

A written acceptance of property delivered, under a written contract of pledge, is not required.<sup>85</sup>

*Constructive or symbolic delivery in general.* Under proper circumstances, and in the absence of a statutory prohibition, the delivery of pledged property may be constructive,<sup>86</sup> or it may be a symbolic

69. U.S.—In re Spanish-American Cork Products Co., C.C.A.Md., 2 F. 2d 203, certiorari denied Western Nat. Bank v. Chapman, 45 S.Ct. 225, 266 U.S. 634, 69 L.Ed. 479—Israel v. Woodruff, C.C.A.N.Y., 299 F. 454.

#### Raw materials

What may be required to establish possession of negotiable securities, or stocks of goods or wares, should not necessarily be exacted in a case involving raw materials and their necessary processing to accomplish conversion into marketable merchandise.—Swetnam v. Edmund Wright Ginsberg Corporation, D.C. N.Y., 37 F.Supp. 546, reversed on other grounds, C.C.A., 128 F.2d 1, certiorari denied Edmund Wright Ginsberg Corporation v. Swetnam, 63 S.Ct. 42, 317 U.S. 647, 87 L.Ed. 521.

70. Pa.—First Nat. Bank & Trust Co. of Tarentum v. Jaffe, 173 A. 845, 114 Pa.Super. 315. 49 C.J. p 913 note 97.

71. Vt.—Island Pond Nat. Bank v. Lacroix, 153 A. 684, 104 Vt. 282.

72. Vt.—Island Pond Nat. Bank v. Lacroix, supra.

73. Pa.—First Nat. Bank & Trust Co. of Tarentum v. Jaffe, 173 A. 845, 114 Pa.Super. 315. 49 C.J. p 914 note 14.

74. N.Y.—Markham v. Jaudon, 41 N.Y. 235.

75. Cal.—Sequeira v. Collins, 95 P. 876, 153 Cal. 426. 49 C.J. p 914 note 16.

76. Pa.—First Nat. Bank & Trust Co. of Tarentum v. Jaffe, 173 A. 845, 114 Pa.Super. 315. 49 C.J. p 913 note 1.

Actual change of possession required to validate pledge means ex-

isting in act, and truly and absolutely carried out, as opposed to formal, potential, virtual, or theoretical change.—McGaffey Canning Co. v. Bank of America, 294 P. 45, 109 Cal. App. 415.

#### Motor vehicle

In general, it cannot be said that a motor vehicle is so bulky or otherwise of such character as to render manual delivery thereof to the pledgee either impossible or inconvenient, so as to permit a constructive delivery, in view of the fact that a motor vehicle is portable by its own power and manual delivery thereof is not only possible but can be made without inconvenience.—Fletcher American Nat. Bank v. McDermid, 128 N.E. 685, 76 Ind.App. 150.

77. U.S.—Swetnam v. Edmund Wright Ginsberg Corporation, D.C. N.Y., 37 F.Supp. 546, reversed on other grounds, C.C.A., 128 F.2d 1, certiorari denied Edmund Wright Ginsberg Corporation v. Swetnam, 63 S.Ct. 42, 317 U.S. 647, 87 L.Ed. 521.

49 C.J. p 913 note 3.

78. Cal.—McGaffey Canning Co. v. Bank of America, 294 P. 45, 109 Cal.App. 415.

49 C.J. p 913 note 5.

Words alone do not constitute delivery.—McCoy v. American Express Co., 171 N.E. 749, 253 N.Y. 477, reargument denied 173 N.E. 861, 254 N.Y. 550.

79. U.S.—McDonnell v. Bank of China, C.C.A.China, 33 F.2d 816, certiorari denied Bank of China v. McDonnell, 50 S.Ct. 160, 280 U.S. 612, 74 L.Ed. 654—Swetnam v. Edmund Wright Ginsberg Corporation, D.C.N.Y., 37 F.Supp. 546, reversed on other grounds, C.C.A.,

128 F.2d 1, certiorari denied Edmund Wright Ginsberg Corporation v. Swetnam, 63 S.Ct. 42, 317 U.S. 647, 87 L.Ed. 521.

Conn.—Personal Auto Finance Co. v. Bove, 66 A.2d 126, 135 Conn. 461.

Ill.—Immel v. Travelers Ins. Co., 26 N.E.2d 114, 373 Ill. 256.

Pa.—Pottstown Finance Co. v. Ibach, Com.Pl., 58 Montg.Co. 223.

Tex.—Tyler State Bank & Trust Co. v. Monaville Independent School Dist., Civ.App., 228 S.W.2d 207.

Wash.—Hodge v. Truax, 51 P.2d 357, 184 Wash. 360, 103 A.L.R. 420. 49 C.J. p 913 note 6.

The proof required to show actual change of possession is not measured by any fixed set of rules; dependence must be placed on the facts and circumstances of each particular case, and usually the determination must rest on the finding of the court or the jury after hearing the evidence adduced on both sides.—McGaffey Canning Co. v. Bank of America, 294 P. 45, 109 Cal. App. 415.

80. Kan.—Atkinson v. Bush, 139 P. 393, 91 Kan. 860.

49 C.J. p 913 note 7.

81. Tex.—Riley v. Hallmark, Civ. App., 180 S.W. 134. 49 C.J. p 913 note 8.

82. U.S.—Philadelphia Warehouse Co. v. Winchester, C.C.Del., 156 F. 600. 49 C.J. p 913 note 9.

83. U.S.—Philadelphia Warehouse Co. v. Winchester, supra.

84. U.S.—Philadelphia Warehouse Co. v. Winchester, supra.

85. La.—Britton v. Harvey, 16 So. 747, 47 La. Ann. 259.

86. Pa.—First Nat. Bank & Trust



delivery,<sup>87</sup> which may be made by delivering a writing which sufficiently describes the property pledged to make it capable of identification,<sup>88</sup> or by substituting something as a symbol in place and stead of actual and real delivery.<sup>89</sup> Delivery may be sufficiently made of the contents of a house or warehouse by the delivery of a key,<sup>90</sup> but delivery of a key to a structure does not necessarily, in and of itself, constitute a symbolic delivery of the goods located therein,<sup>91</sup> and whether it does so depends largely on the facts and the intention of the parties.<sup>92</sup> So also, delivery may be made by the delivery of a part of the whole,<sup>93</sup> by the delivery of an order which is accepted by a warehouseman,<sup>94</sup> by the delivery of a bill of lading, as discussed *infra* § 20, or of a deposit in a savings bank by delivery of the pass book.<sup>95</sup> If the property is present it may be delivered by the pledgor committing it to the exclusive control and charge of the pledgee,<sup>96</sup> especially if this is followed by an act of dominion or possession by the pledgee or his agent.<sup>97</sup> A delivery of samples to the agent of the pledgee to facilitate sales on behalf of the pledgor is not a delivery of the goods.<sup>98</sup>

### (3) Possession Pursuant to Contract

It is essential that the possession and control of the property should come to the pledgee pursuant to an agreement that it shall be held by the pledgee as security.

It is essential that the possession and control of the property should come to the pledgee pursuant to

an agreement that it shall be held by the pledgee as security;<sup>99</sup> and delivery in accordance with the terms of such a previous contract supplies the necessary element to render the pledge complete.<sup>1</sup> A mere agreement by the debtor that the creditor shall take and hold certain property as security for his debt is insufficient to constitute a delivery.<sup>2</sup>

### (4) Property Already in Pledgee's Possession

As a general rule, if the pledgee is already in possession of the property pledged, the contract of pledge constitutes, by operation of law, a delivery of such property the moment the contract is completed.

As a general rule, if the pledgee is already in possession of the property pledged, although for another purpose,<sup>3</sup> the contract of pledge constitutes, by operation of law, a delivery of such property the moment the contract is completed,<sup>4</sup> and the pledge becomes effectual without any further delivery or change of possession.<sup>5</sup> It has been held, however, that even in such a case there must be an open and visible change in the nature of the possession so as to impart notice to all desiring thereafter to secure any interest in or to the property pledged.<sup>6</sup> It has also been held that, where the pledgee is not in possession of the property for himself, but for another, in order to constitute him a pledgee, a further transfer of possession to him must be made.<sup>7</sup> Possession by an agent or servant of property which he is employed to guard, being the possession of the

Co. of Tarentum v. Jaffe, 173 A. 845, 114 Pa.Super. 315.  
49 C.J. p 913 note 97, p 914 note 17.  
87. Pa.—First Nat. Bank & Trust Co. of Tarentum v. Jaffe, 173 A. 845, 114 Pa.Super. 315.  
Wash.—Whiting v. Rubinstein, 109 P.2d 312, 7 Wash.2d 204.  
49 C.J. p 914 note 18.  
88. Pa.—First Nat. Bank & Trust Co. of Tarentum v. Jaffe, 173 A. 845, 114 Pa.Super. 315.  
49 C.J. p 914 note 19.  
89. La.—Liberty Farms v. Miller, 45 So.2d 610, 216 La. 1023.  
90. Ill.—Cottrell v. Gerson, 16 N.E. 2d 529, 296 Ill.App. 412, affirmed 20 N.E.2d 74, 371 Ill. 174.  
49 C.J. p 914 note 20.  
91. Ill.—Cottrell v. Gerson, *supra*.  
92. Ill.—Cottrell v. Gerson, *supra*.  
93. Iowa.—Nevan v. Roup, 8 Iowa 207.  
94. U.S.—Atherton v. Beaman, C.C. A.Mass., 264 F. 878.  
49 C.J. p 914 note 22.  
95. Mass.—Rix v. Dooley, 77 N.E. 2d 233, 322 Mass. 303.  
49 C.J. p 914 note 25.

96. Minn.—Combs v. Tuchelt, 24 Minn. 423.  
N.H.—Tibbetts v. Flanders, 18 N.H. 284.  
97. N.H.—Tibbetts v. Flanders, *supra*.  
98. U.S.—Thurber v. Oliver, C.C. Md., 26 F. 224.  
99. S.D.—Buffalo Pitts Co. v. Deeg, 138 N.W. 802, 30 S.D. 384.  
49 C.J. p 914 note 29.  
Necessity for contract generally see *supra* § 11.  
1. N.C.—Virginia-Carolina Chemical Co. v. McNair, 51 S.E. 949, 139 N. C. 326.  
49 C.J. p 914 notes 30, 31.  
2. Mo.—Miners' Bank v. Aylor, App., 264 S.W. 99.  
49 C.J. p 915 note 32.  
Agreement that pledgor will hold property as security see *infra* subdivision b (6) of this section.  
3. U.S.—Corpus Juris cited in Ingram v. Mandler, C.C.A.Okl., 56 F. 2d 994, 997.  
Ill.—Farson v. Gilbert, 114 Ill.App. 17.  
4. U.S.—Corpus Juris cited in In-

gram v. Mandler, C.C.A.Okl., 56 F. 2d 994, 997.  
Kan.—Piqua State Bank v. Brannum, 173 P. 1, 103 Kan. 25.  
49 C.J. p 915 note 35.  
5. U.S.—Corpus Juris cited in Ingram v. Mandler, C.C.A.Okl., 56 F. 2d 994, 997.  
Kan.—Piqua State Bank v. Brannum, 173 P. 1, 103 Kan. 25.  
49 C.J. p 915 note 36.  
6. Kan.—Atkinson v. Bush, 139 P. 393, 91 Kan. 860.  
**Oral pledge without notice**  
Trustee's possession of horses and harness located on property covered by trust deed on which was posted notice of trustee's possession which referred to trust deed as authority for possession, but contained no reference to oral pledge under which horses and harness were claimed, was held invalid as against bona fide creditors or innocent purchasers. —People for Use of New Mexico Lumber Mfg. Co. v. U. S. Fidelity & Guaranty Co., 52 P.2d 1146, 98 Colo. 41.  
7. Ark.—Belford v. Abston-Wynne, 248 S.W. 265, 157 Ark. 318.  
49 C.J. p 915 note 38.

master, is not sufficient to support a pledge of such property to the agent or servant.<sup>8</sup>

#### (5) Property Remaining on Pledgor's Premises

A mere setting apart of designated personalty as a pledge or security is sufficient as between the parties to create a lien. A valid delivery, as against third persons, may be made by segregating the property and placing it in the custody of the pledgee or a special bailee.

A mere setting apart of designated personalty as a pledge or as security is sufficient as between the parties to create a lien.<sup>9</sup> As against third persons, where the nature of the property is such that a valid delivery may be made without removing it from the premises of the pledgor, a sufficient delivery may be made by segregating the property and placing it in the custody of a special bailee who can at all times have control over it,<sup>10</sup> although the bailee is an employee of the pledgor,<sup>11</sup> or by placing it in the custody of the pledgee.<sup>12</sup> As a general rule, if the property remains on the pledgor's premises, the property must be so separated and marked as to give notice of the pledgee's possession to third persons who might deal with the pledgor.<sup>13</sup> It has been held that merely pointing out and counting certain property on the pledgor's premises is not sufficient without a further delivery.<sup>14</sup>

*Part of mass.* Where the property pledged is a

part of a larger uniform mass, separation from such mass is not necessary to constitute an appropriation of the property to the contract of pledge, if the symbol of title is delivered.<sup>15</sup>

#### (6) Possession by Agent or Third Person for Pledgee

In the absence of statute, it is immaterial to the validity of a pledge whether the pledgee himself holds the property or a third person holds it for him, where all the parties agree that the property shall be held as security for the pledgee. As a general rule, a change of possession required for the validity of a pledge is not effected where the pledgor is left in control of the property as custodian for the pledgee or under an agreement by which he is to hold or manage the property as agent for the pledgee.

In the absence of statute, it is immaterial to the validity of a pledge whether the pledgee himself holds the property or a third person holds it for him;<sup>16</sup> and therefore, where all the parties agree that the property shall be held as security for the pledgee, delivery of possession, instead of being made directly to the pledgee, may be made to an agent or trustee of the pledgee;<sup>17</sup> or, by agreement, it may be delivered to, or left in the possession of, a third person to hold for the pledgee,<sup>18</sup> provided the third person has notice of the trust and accepts the obligation it imposes,<sup>19</sup> and such third person may even be an agent, clerk, or servant of the pledgor.<sup>20</sup> Where the property at the time of the pledge agreement is in the possession of a third

8. Alaska.—De Blondeau v. Faulkner, 5 Alaska 55.  
49 C.J. p 915 note 39.

9. Del.—Muhleman & Kayhoe v. Brown, 45 A.2d 521, 4 Terry 207, motion denied in part and granted in part 50 A.2d 92, 4 Terry 481.  
Iowa.—F. P. Gluck Co. v. Therme, 134 N.W. 438, 154 Iowa 201.

Or.—Corpus Juris quoted in Perry v. Gore, 56 P.2d 1142, 1144, 153 Or. 441.  
**Pledged securities in safe deposit box**  
Pa.—Murdock v. Murdock, 150 A. 599, 300 Pa. 280.

10. Del.—Muhleman & Kayhoe v. Brown, 45 A.2d 521, 4 Terry 207, motion denied in part and granted in part 50 A.2d 92, 4 Terry 481.

Or.—Corpus Juris quoted in Perry v. Gore, 56 P.2d 1142, 1144, 153 Or. 441.  
49 C.J. p 915 note 41.  
**Possession by agent or third person for pledgee in general see infra subdivision b (6) of this section.**

11. **Independent duty**  
Leaving pledged property on pledgor's premises in charge of a person in the employ of pledgor does not invalidate pledgee if the duty of the person in charge of the

pledged property is independent of his regular duty to his employer.—Muhleman & Kayhoe v. Brown, 45 A.2d 521, 4 Terry 207, motion denied in part and granted in part 50 A.2d 92, 4 Terry 481.

12. Or.—Corpus Juris quoted in Perry v. Gore, 56 P.2d 1142, 1144, 153 Or. 441.  
49 C.J. p 915 note 42.

13. Cal.—McGaffey Canning Co. v. Bank of America, 294 P. 45, 109 Cal.App. 415.

Or.—Corpus Juris quoted in Perry v. Gore, 56 P.2d 1142, 1144, 153 Or. 441.

49 C.J. p 915 note 43, p 916 note 55.  
Necessity for receipt see infra subdivision b (6) of this section.

**Attaching cards or tags held sufficient**  
Ala.—Allgood v. First Nat. Bank, 139 So. 100, 224 Ala. 169.

14. Pa.—Smyth v. Craig, 3 Watts & S. 14.

15. Minn.—National Exch. Bank v. Wilder, 24 N.W. 699, 34 Minn. 149.

16. U.S.—Gins v. Mauser Plumbing Supply Co., 53 F.Supp. 151, reversed on other grounds, C.C.A., 148 F. 2d 974—Corpus Juris quoted in In re Rogers, D.C.W.Va., 20 F.Supp. 120, 127.

N.H.—Brown v. Warren, 43 N.H. 430.

**Possession of special bailee on pledgor's premises see supra subdivision b (5) of this section.**

17. U.S.—Corpus Juris quoted in In re Rogers, D.C.W.Va., 20 F.Supp. 120, 127.

N.Y.—McCoy v. American Express Co., 171 N.E. 749, 253 N.Y. 477, reargument denied 173 N.E. 861, 254 N.Y. 550.

49 C.J. p 916 notes 47-49.

18. U.S.—Robinson v. Exchange Nat. Bank of Tulsa, D.C.Ok., 31 F. Supp. 350—Corpus Juris quoted in In re Rogers, D.C.W.Va., 20 F. Supp. 120, 127.

Conn.—Corpus Juris cited in Hansel v. Hartford-Connecticut Trust Co., 49 A.2d 666, 672, 133 Conn. 181.

La.—Wells v. Dean, 29 So.2d 590, 211 La. 132—Sambola v. Fandison, App., 178 So. 276.

49 C.J. p 916 note 50.

19. U.S.—Schram v. Sage, D.C.Mich., 46 F.Supp. 381, petition overruled 47 F.Supp. 94.

La.—Wells v. Dean, 29 So.2d 590, 211 La. 132.

49 C.J. p 916 note 51.

20. N.Y.—McCoy v. American Express Co., 171 N.E. 749, 253 N.Y. 477, reargument denied 173 N.E. 861, 254 N.Y. 550.

49 C.J. p 916 note 52.

person, the pledge may become effectual without further delivery<sup>21</sup> on notification to the third person that the property has been pledged.<sup>22</sup> It is sufficient if possession is delivered to a third person and afterward assented to by the pledgee,<sup>23</sup> or the property may be held by two jointly in pledge for one of them, provided they both assent.<sup>24</sup>

Where the property is delivered to, or left in the possession of, a third person, it must be so set apart and marked as to constitute an actual change of possession and to give the pledgee control over it.<sup>25</sup> The validity of the pledge is not affected by the fact that, after delivery to a third person, the pledgor assists, with or without the knowledge of the pledgee, in taking care of the property.<sup>26</sup> Where a single collateral is pledged by two separate and distinct contracts to two creditors whose claims aggregate the value of the collateral, possession by one is a possession for the benefit of the other, and in this respect each is the agent of the other.<sup>27</sup>

**Successive pledges.** A pledgee who already holds property to secure his debt may, by consent of the parties, become the pledgee for another creditor after the expiration of his pledge;<sup>28</sup> and, where the subsequent pledge is made subject to the lien of the original pledgee, the possession of the former pledgee may be regarded as the possession of the latter one through the agency of the former, for the purpose of validating the subsequent pledge.<sup>29</sup>

**Receipt.** A receipt by the agent to the pledgor is not necessary where the property is actually deliv-

ered to the agent of the pledgee,<sup>30</sup> although the property remains on the pledgor's premises.<sup>31</sup>

**Pledgor in possession as custodian or agent of pledgee.** As a general rule, a change of possession required for the validity of a pledge is not effected where the pledgor is left in control of the property as custodian for the pledgee<sup>32</sup> or under an agreement by which he is to hold or manage the property as agent for the pledgee.<sup>33</sup> Such possession, however, has been upheld as sufficient to support the pledge under exceptional circumstances, where a transfer of possession is impossible or inconvenient because of the nature of the property<sup>34</sup> or where the pledgor is left in possession by the pledgee for a special purpose.<sup>35</sup> Under some statutes the pledgor may retain possession of the property, where the contract of pledge so provides, and is properly acknowledged and recorded;<sup>36</sup> but since such a statute is in derogation of the common law, it must be strictly construed.<sup>37</sup>

### c. Continued Possession

Ordinarily after the delivery of possession of the property pledged, the pledgee, or depositary for him, must retain the continuous possession and control of the property in order for the pledge to remain in effect.

As a general rule, after the delivery of possession of the property pledged, the pledgee, or depositary for him, must retain the continuous possession and control of the property in order for the pledge to remain in effect,<sup>38</sup> and if there is no such continued possession the pledgor's creditors may levy

21. U.S.—Gins v. Mauser Plumbing Supply Co., C.C.A.N.Y., 148 F.2d 974.

22. U.S.—Schram v. Sage, D.C.Mich., 46 F.Supp. 381, petition overruled 47 F.Supp. 94.

23. U.S.—Freiburg v. Dreyfus, La., 10 S.Ct. 716, 135 U.S. 478, 34 L.Ed. 206.

24. Cal.—Meyers v. Lasker, 294 P. 80, 110 Cal.App. 538.

N.H.—Brown v. Warren, 43 N.H. 430.

25. U.S.—Manufacturers', etc., Nat. Bank v. Gilman, C.C.A.Mass., 7 F. 2d 94.

49 C.J. p 916 note 55.

26. Cal.—Hilliker v. Kuhn, 16 P. 707, 71 Cal. 214.

Or.—Corpus Juris quoted in Perry v. Gore, 56 P.2d 1142, 1144, 153 Or. 441.

27. La.—Levy v. Winter, 10 So. 198, 43 La. Ann. 1049.

28. La.—Herber v. Thompson, 17 So. 318, 47 La. Ann. 800.

29. U.S.—Gins v. Mauser Plumbing Supply Co., C.C.A.N.Y., 148 F.2d 974—Schram v. Sage, D.C.Mich., 46 F.Supp. 381, rehearing overruled

47 F.Supp. 94—Robinson v. Exchange Nat. Bank of Tulsa, D.C. Okl., 81 F.Supp. 350.

S.D.—Agricultural Credit Corporation v. Johnson, 260 N.W. 824, 63 S.D. 476.

49 C.J. p 917 note 59.

30. U.S.—Dunn v. Train, Me., 125 F. 221, 60 C.C.A. 113.

31. U.S.—Dunn v. Train, supra.

32. N.Y.—McCoy v. American Express Co., 171 N.E. 749, 253 N.Y. 477, reargument denied 173 N.E. 861, 254 N.Y. 550.

49 C.J. p 917 note 63.

#### Bailee

Delivery cannot be dispensed with even though the parties agree that the pledgor will hold the property as bailee of the pledgee.—Williams v. Williams, 154 S.E. 260, 170 Ga. 814.

33. N.Y.—McCoy v. American Express Co., 171 N.E. 749, 253 N.Y. 477, reargument denied 173 N.E. 861, 254 N.Y. 550.

Tenn.—Corpus Juris cited in Robertson v. Wade, 68 S.W.2d 487, 493, 17 Tenn.App. 457.

49 C.J. p 917 notes 64, 65.

34. S.C.—Freeman Brown Co. v. Harris, 70 S.E. 802, 88 S.C. 558. 49 C.J. p 917 note 66.

35. U.S.—Darragh v. Elliott, Tenn., 215 F. 340, 131 C.C.A. 482.

49 C.J. p 917 note 67.

Delivery to pledgor for special purpose as not affecting lien see infra, § 27.

36. Ill.—Griffen v. Henry, 99 Ill. App. 284.

37. Ill.—Griffen v. Henry, supra.

38. U.S.—In re Herkimer Mills Co., D.C.N.Y., 39 F.2d 625—Randolph v. Scranton, M. & B. R. Co., D.C.Pa., 4 F.Supp. 861, affirmed, C.C.A., Miners' Bank of Wilkes-Barre v. Ackers, 66 F.2d 850.

Ind.—Gretzinger v. Arehart, App., 193 N.E. 714.

Iowa.—Revelts v. Feucht, 221 N.W. 937, 206 Iowa 1326.

Ky.—Liberty Nat. Bank & Trust Co. v. Louisville Trust Co., 175 S.W.2d 524, 295 Ky. 825.

N.D.—Congress Candy Co. v. Farmer, 12 N.W.2d 796, 73 N.D. 174, 150, A.L.R. 1316.

on the pledged property as the property of the pledgor and sell it under execution.<sup>39</sup>

## § 20. — Of Written Instrument

- a. In general
- b. Accounts
- c. Bills of lading
- d. Bills or notes
- e. Bonds

### a. In General

Where property is represented by an instrument in writing, a valid pledge of the property may be effected by a transfer of such instrument.

Where property is represented by an instrument in writing, a valid pledge of the property may be effected by a transfer of such instrument.<sup>40</sup> Incorporeal property,<sup>41</sup> such as a claim or chose in action,<sup>42</sup> may be pledged only by a transfer or delivery of the written evidence of the property or obligation. Under some statutes where the thing given in pledge consists of a credit or instrument not negotiable the debtor of such pledged credit or instrument must be notified in writing of the giving of the pledge,<sup>43</sup> but such a statute has been held to be without application to the immediate parties to

the pledge agreement, and may be invoked only by third persons.<sup>44</sup>

### b. Accounts

An account may be pledged by a transfer of the book in which it is contained, or by delivery of the original contract of indebtedness with a written assignment thereof, or by a transfer of a list of the account with the understanding between the parties that it shall be regarded as security.

An account may be pledged by a transfer of the book in which it is contained,<sup>45</sup> but it may also be transferred without the book where delivery of the book would be impracticable.<sup>46</sup> Delivery of the original contract of indebtedness with a written assignment thereof<sup>47</sup> or a transfer of a list of the account with the understanding between the parties that it shall be regarded as security<sup>48</sup> may be sufficient, provided notice thereof is given to the debtor.<sup>49</sup> It is not sufficient merely to deliver a copy of the account without an assignment thereof;<sup>50</sup> and, although it is not necessary that the pledgee shall be given the sole right of collection,<sup>51</sup> and the validity of the pledge is not affected as between the parties by the fact that the pledgor reserves the right to make collections,<sup>52</sup> such reservation may render the transaction void as against creditors and other third persons,<sup>53</sup> especially where the pledgor

Utah.—Campbell v. Peter, 162 P.2d 754, 108 Utah 565.  
49 C.J. p 919 note 15.

Purpose of rule is to prevent fraud and deception.—Kietz v. Gold Point Mines, 105 P.2d 71, 5 Wash.2d 224.

#### Motor vehicle

Ind.—Fletcher American Nat. Bank v. McDermid, 128 N.E. 685, 76 Ind. App. 150.

39. Cal.—George v. Pierce, 55 P. 775, 56 P. 53, 123 Cal. 172.

Waiver or loss of lien generally see infra § 27.

40. Idaho.—Gem State Lumber Co. v. Gallon Irrigated Land Co., 41 P.2d 620, 55 Idaho 314.

Ky.—Martin v. St. Matthews Produce Exchange, 95 S.W.2d 1119, 265 Ky. 26.

49 C.J. p 918 note 70.

Certificate of stock see Corporations § 421.

Insurance policy see Insurance § 426.

41. Ariz.—Martin v. Bankers' Trust Co., 156 P. 87, 18 Ariz. 55, Ann. Cas.1918C 1240.

Tex.—Central Nat. Bank v. Latham & Co., Civ.App., 22 S.W.2d 765, error refused.

#### Substitution of symbol

Statute providing that actual delivery essential to contract of pledge is not necessary with respect to in-

corporeal rights which are given in pledge, and that delivery is merely fictitious and symbolic, did not dispense with delivery in case of pledge of incorporeal rights, but requires that something must be substituted as a symbol in place and stead of actual and real delivery.—Liberty Farms v. Miller, 45 So.2d 610, 216 La. 1023.

42. Cal.—Corpus Juris cited in Joint Pole Ass'n v. Steele, 2 P.2d 835, 336, 213 Cal. 233.

Pa.—First Nat. Bank & Trust Co. of Tarentum v. Jaffe, 173 A. 845, 114 Pa.Super. 315.

Tex.—Central Nat. Bank v. Latham & Co., Civ.App., 22 S.W.2d 765, error refused.

Vt.—Island Pond Nat. Bank v. La-croix, 158 A. 684, 104 Vt. 282.

49 C.J. p 918 note 77.

43. La.—Williams v. Robertson, 63 So. 250, 133 La. 640.

49 C.J. p 919 note 95 [a] (3).

Purpose of statute is to prevent debtor from paying his obligation to pledgor or any one else than pledgee where he has written notice of pledge.—Foote v. Sun Life Assur. Co. of Canada, La.App., 173 So. 477.

44. La.—Foote v. Sun Life Assur. Co. of Canada, supra.

45. Tex.—R. F. Scott Grocer Co., v. Carter, Civ.App., 34 S.W. 375.

46. Pa.—First Nat. Bank & Trust

Co. of Tarentum v. Jaffe, 173 A. 845, 114 Pa.Super. 315.

47. Pa.—First Nat. Bank & Trust Co. of Tarentum v. Jaffe, supra.

#### Separate assignment of individual accounts

If pledgor delivered to pledgee number of original accounts sufficiently designated and executed a written assignment thereof, it was unnecessary, in order to make pledge valid, that each individual account be separately assigned.—First Nat. Bank & Trust Co. of Tarentum v. Jaffe, supra.

48. Tex.—R. F. Scott Grocer Co. v. Carter, Civ.App., 34 S.W. 375.

49. U.S.—Brown Bros. Co. v. Smith, D.C.La., 231 F. 475, reversed on other grounds 238 F. 269, 151 C.C. A. 285.

Pa.—Harr v. First Nat. Bank of Scranton, Com.Pl., 39 Lack.Jur. 141.

49 C.J. p 918 note 81.

50. Ala.—Clanton Bank v. Robinson, 70 So. 270, 195 Ala. 194.  
49 C.J. p 918 note 83.

51. Tex.—R. F. Scott Grocer Co. v. Carter, Civ.App., 34 S.W. 375.

52. Mont.—Savage Tire Sales Co. v. Stuart, 203 P. 364, 61 Mont. 524.

53. Mont.—Savage Tire Sales Co. v. Stuart, supra.

retains possession of the account and of the right to collect without keeping collections separate.<sup>54</sup>

### c. Bills of Lading

The delivery of a bill of lading as security is a sufficient delivery of the goods to sustain the pledge, without an assignment or indorsement of the bill.

The delivery of a bill of lading as security is a sufficient delivery of the goods, for which the bill of lading was issued, to sustain the pledge,<sup>55</sup> without an assignment or indorsement of the bill.<sup>56</sup> Such a delivery constitutes a good symbolic delivery of the goods represented by the bill, and the pledgee thereby acquires a lien on them or title to them which he may hold until the loan is paid.<sup>57</sup>

### d. Bills or Notes

Delivery and possession are essential to a valid pledge of a bill or note. A pledge thereof may be effected by simple delivery of the bill or note without an indorsement or other writing.

Delivery and possession are essential to a valid pledge of a bill or note.<sup>58</sup> A valid pledge thereof may be effected by simple delivery of the bill or note to the creditor<sup>59</sup> or to someone for him,<sup>60</sup> without an indorsement or other writing,<sup>61</sup> and without the necessity of notice to the maker.<sup>62</sup> Delivery of a bank's bills receivable to another bank for selection of securities to be held as a pledge for a loan, pursuant to a contract fixing no time for selection, is a valid pledge,<sup>63</sup> and in the absence of fraudulent intent the pledge will not be ineffectual as to renewals, the originals of which have not

been surrendered to the makers.<sup>64</sup> A note deposited in a bankruptcy court is not validly pledged to an intervener by a symbolic delivery of a copy of the note so as to give the pledgee any rights against a garnishing creditor of the pledgor.<sup>65</sup>

Where the pledgee already has possession of the pledged note, no change of possession is necessary.<sup>66</sup> A note in the possession of a third person may be pledged by a written assignment thereof without an actual delivery to the pledgee,<sup>67</sup> but a note in the possession of an indorsee cannot be pledged by the maker without a transfer of possession to the pledgee.<sup>68</sup> It is not essential to a valid second pledge, subject to a first pledge of notes in possession of the first pledgee, that there be any further actual delivery;<sup>69</sup> but, if the first pledgee agrees to the second pledge, his possession will be regarded as the possession of the second pledgee also, through the agency of the first pledgee.<sup>70</sup>

*Notice of acceptance.* Where notes are pledged by the payee as collateral, it is not necessary for the pledgee to notify the payee of his acceptance of them as collateral, further than the keeping of the notes indicates and gives notice that they are accepted.<sup>71</sup>

### e. Bonds

Delivery and possession are essential to the validity of a pledge of bonds, and a valid pledge thereof may be effected merely by delivery of the bonds or by the delivery of a written assignment thereof.

Delivery and possession are essential to the valid-

54. N.C.—Bundy v. Commercial Credit Co., 163 S.E. 676, 202 N.C. 604—Sneed v. Nurnberger's Market, 135 S.E. 328, 192 N.C. 439.

55. Wash.—Hull v. Myers, 235 P. 786, 134 Wash. 286.  
49 C.J. p 918 note 89.

56. Wyo.—Toms v. Whitmore, 44 P. 56, 6 Wyo. 220.  
49 C.J. p 918 note 90.

57. N.Y.—Becker v. Hallgarten, 86 N.Y. 167.  
49 C.J. p 919 note 91.

58. Ind.—Gretzinger v. Arehart, App., 193 N.E. 714.  
Iowa.—Revelts v. Feucht, 221 N.W. 937, 206 Iowa 1326.  
49 C.J. p 919 note 92.

Symbolic delivery of copies of negotiable notes has been held ineffective to give pledgee any lien or claim against garnishing creditor of pledgor.—Merchants' & Farmers' Bank & Trust Co. v. First State Bank & Trust Co., 123 So. 401, 11 La. App. 553.

59. Mont.—Rock Island Plow Co. v. Cut Bank Implement Co., 53 P.2d 116, 101 Mont. 117.  
49 C.J. p 919 note 93.

60. Mont.—National Park Bank v. American Brewing Co., 257 P. 436, 79 Mont. 542.  
Possession by agent or third person for pledgee generally see supra § 19 b (6).

61. Va.—Citizens' Bank, etc., Co. v. Chase, 144 S.E. 464, 151 Va. 65.  
49 C.J. p 919 note 95.

62. Ark.—Vance v. White, 21 S.W. 2d 853, 180 Ark. 470.

#### Negotiable note

A statute which requires notice to the debtor of a pledged credit or instrument which is not negotiable does not apply where the pledged instrument is a negotiable note.—Succession of Bier, 82 So. 868, 145 La. 722.

63. Tex.—Chapman v. Johnson, Civ. App., 261 S.W. 470.

64. Tex.—Chapman v. Johnson, supra.

65. La.—Merchants, etc., Bank v. First State Bank, etc., Co., 123 So. 401, 11 La.App. 553.

66. U.S.—Ingram v. Mandler, C.C. A.Okl., 56 F.2d 994.  
Necessity for delivery of property already in pledgee's possession in general see supra § 19 b (4).

67. U.S.—In re Wiley, D.C.Ind., 29 F.Cas.No.17,655, 4 Biss. 171.

68. Mo.—Storts v. Mills, 93 Mo. App. 201.

69. Vt.—Shurtleff v. Norcross, 115 A. 494, 95 Vt. 420.  
Delivery in case of successive pledges generally see supra § 19 b (6).

70. Vt.—Shurtleff v. Norcross, supra.

71. Mo.—Central Bank v. Lyda, App., 191 S.W. 245.

ity of a pledge of bonds,<sup>72</sup> and a valid pledge thereof may be effected merely by a delivery of the

bonds<sup>73</sup> or by the delivery of a written assignment thereof.<sup>74</sup>

### III. CONSTRUCTION AND OPERATION

#### § 21. In General

- a. Construction and operation in general
- b. Trust relationship
- c. Estoppel

##### a. Construction and Operation in General

As a general rule, a pledge does not affect the rights of the parties under the contract or obligation it is given to secure. The general rules of construction of contracts apply in construing a contract of pledge.

As a general rule, the delivery of a pledge does not affect the rights of the parties under the contract or obligation it is given to secure<sup>75</sup> except as the pledge contract provides for additional security<sup>76</sup> or as the parties contract by special agreement.<sup>77</sup> Where the contract so provides, the pledgee must rely solely on the property pledged as security for the debt and not on the personal liability of the pledgor.<sup>78</sup> The pledgee does not, by virtue of the transaction, become liable for the pledgor's obligations with respect to the thing pledged.<sup>79</sup>

The general rules of construction of contracts apply in construing a contract of pledge.<sup>80</sup> Accordingly, the rights and liabilities of the parties are, if possible, to be construed and enforced according to the intention of the parties as determined from the terms of the contract of pledge and the subject matter,<sup>81</sup> the course of dealing to which it relates,<sup>82</sup> and the surrounding circumstances;<sup>83</sup> and, where the intention is clear and contravenes no rule of law and sufficient words are used to arrive at the intention, it should be enforced irrespective of technical rules of construction.<sup>84</sup>

The pledge must be strictly construed<sup>85</sup> and enforced in accordance with its terms,<sup>86</sup> and the pledgee<sup>87</sup> or the pledgor<sup>88</sup> has the right to exact strict performance of the contract. An ambiguous pledge agreement must be construed with some degree of strictness against the person preparing it,<sup>89</sup> and, where the contract has been prepared by the pledgee, that construction should be given to it

72. U.S.—Westinghouse Electric, etc., Co. v. Brooklyn Rapid Transit Co., C.C.A.N.Y., 263 F. 532. 49 C.J. p 919 note 7.

73. La.—Ribet v. Bataille, 35 La. Ann. 1171.

74. N.J.—Mott v. Newark German Hospital, 37 A. 757, 55 N.J.Eq. 722. 49 C.J. p 919 note 9.

75. S.D.—Black Hills Trust, etc., Bank v. Plunkett, 166 N.W. 527, 40 S.D. 130.

49 C.J. p 921 note 42.

76. Mass.—Federal Trust Co. v. Central Trust Co., 138 N.E. 562, 244 Mass. 204.

49 C.J. p 921 note 43.

77. Tenn.—Grayson v. Harrison, Ch., 59 S.W. 438.

49 C.J. p 921 note 44.

78. Wash.—Price v. Northern Bond & Mortgage Co., 297 P. 786, 161 Wash. 690.

##### Absence of express covenant

In a case concerning a mortgage of real property it has been broadly stated, in applying the statute relating to real property mortgages, that the court cannot infer from mere pledge, a promise to pay sum secured thereby, in absence of express covenant to pay it.—In re Fogarty's Estate, 300 N.Y.S. 231, 165 Misc. 78.

79. Vt.—Dieter v. Scott, 9 A.2d 95, 110 Vt. 376.

80. Cal.—Security-First Nat. Bank

of Los Angeles v. Spring Street Properties, 67 P.2d 720, 20 Cal. App.2d 618.

Mo.—Dibert v. D'Arcy, 154 S.W. 1116, 248 Mo. 617.

Pa.—In re Berkovitz, 179 A. 746, 319 Pa. 397—Heffner v. First Nat. Bank, 166 A. 370, 311 Pa. 29, 87 A.L.R. 610.

49 C.J. p 920 note 21.

**Legal effect of collateral agreement**  
The construction of legal effect of a written collateral agreement between parties to a pledge is for the court.—Valley Nat. Bank v. Stewart, 89 P.2d 493, 53 Ariz. 328.

81. Ala.—Corpus Juris cited in Taylor v. Southern Bank & Trust Co., 151 So. 357, 361, 227 Ala. 565. Mich.—Perron v. First Nat. Bank, 286 N.W. 859, 289 Mich. 629.

Vt.—Schwarz v. Avery, 31 A.2d 916, 113 Vt. 175.

Va.—Commonwealth v. Appalachian Electric Power Co., 166 S.E. 461, 159 Va. 462, certiorari denied Commonwealth of Virginia v. Appalachian Electric Power Co., 53 S. Ct. 405, 288 U.S. 613, 77 L.Ed. 987. 49 C.J. p 920 note 22.

##### Ejusdem generis

In construing pledge agreement, rule of ejusdem generis is persuasive but is not conclusive, and intention of parties may determine applicability of rule.—Cabbage v. Citizens Bank & Trust Co., 214 S.W.2d 572, 31 Tenn.App. 283.

82. U.S.—Citizens' Bank, etc., Co. v. Thornton, Ala., 174 F. 752, 98 C. C.A. 478.

Ala.—Corpus Juris cited in Taylor v. Southern Bank & Trust Co., 151 So. 357, 361, 227 Ala. 565.

Vt.—Schwarz v. Avery, 31 A.2d 916, 113 Vt. 175.

83. Tenn.—Cabbage v. Citizens Bank & Trust Co., 214 S.W.2d 572, 31 Tenn.App. 283.

84. Ala.—Corpus Juris quoted in Taylor v. Southern Bank & Trust Co., 151 So. 357, 361, 227 Ala. 565. Ga.—Deen v. Hazlehurst Bank, 147 S.E. 909, 39 Ga.App. 633.

85. Pa.—Heimpel v. First Nat. Bank & Trust Co., 12 A.2d 28, 337 Pa. 425—Kelter v. American Bankers' Finance Co., 160 A. 127, 306 Pa. 483, 82 A.L.R. 999—Rocco v. Peoples Nat. Bank of Ellwood City, 28 A.2d 863, 150 Pa.Super. 348.

49 C.J. p 920 note 28.

86. Vt.—Schwarz v. Avery, 31 A.2d 916, 113 Vt. 175.

49 C.J. p 920 note 28.

87. N.Y.—Toplitz v. Bauer, 55 N.E. 1059, 161 N.Y. 325—First Trust & Deposit Co. v. Potter, 278 N.Y.S. 847, 155 Misc. 108.

88. Miss.—Hudson v. Belzoni Equip-ment, 33 So.2d 796, 203 Miss. 212.

89. Fla.—St. Lucie County Bank, etc., Co. v. Aylin, 114 So. 433, 94 Fla. 528.

Pa.—Heimpel v. First Nat. Bank &

which is the more favorable to the pledgor.<sup>90</sup> It has been held that if the contract is susceptible of two constructions the one most favorable to the pledgee should not be adopted.<sup>91</sup> A statute which determines the contract of pledge is as much a part of the contract as though actually written into it.<sup>92</sup>

**Modification.** A contract of pledge may be changed at any time by consent of the parties thereto,<sup>93</sup> although it is denominated an irrevocable assignment and pledge, and declared to be intended to endure until the obligation for which the pledge is given is paid;<sup>94</sup> and it is immaterial that the original contract has been recorded, where such recordation was not required by law.<sup>95</sup> After the contract of pledge is made neither party can, by anything he alone may do, vary the rights of the other party,<sup>96</sup> but by his promise to extend the time of payment or by his conduct may change the duties and obligations of the parties to each

other as prescribed by the original contract of pledge.<sup>97</sup>

### b. Trust Relationship

The very nature of the pledge transaction gives rise to a trust relationship between the pledgor and the pledgee, with its consequent duties to protect the debt or obligation and the collateral.

The duties and relations of a pledgor and pledgee are governed more by the general maxims of equity than by the strict rules of the common law.<sup>98</sup> The very nature of the transaction gives rise to a trust relationship between the pledgor and pledgee<sup>99</sup> with its consequent duties to protect the debt or obligation and the collateral,<sup>1</sup> and the pledgee is presumed to act for the pledgor's interest as well as his own, although their interests are not identical.<sup>2</sup> For the purposes of the pledge, the pledgee holds the pledged property in trust first for himself to the extent of his claim and then for the pledgor;<sup>3</sup>

Trust Co., 12 A.2d 28, 337 Pa. 425  
—In re Berkovitz, 179 A. 746, 319 Pa. 397—Heffner v. First Nat. Bank, 166 A. 370, 311 Pa. 29, 87 A.L.R. 610.

90. Ky.—National Bank of Kentucky v. Gallagher, 49 S.W.2d 1006, 243 Ky. 740.

Pa.—In re Merion Title and Trust Company, No. 3, 19 Pa.Dist. & Co. 490.

Vt.—Schwarz v. Avery, 31 A.2d 916, 113 Vt. 175.

49 C.J. p 920 note 26.

91. Mo.—South St. Joseph Live Stock Exchange v. St. Joseph Stock Yards Bank, 16 S.W.2d 722, 223 Mo.App. 623, 224 Mo.App. 40.

49 C.J. p 920 note 25.

92. Fla.—Therrell v. Filler, 133 So. 861, 101 Fla. 192.

93. U.S.—Harris v. Commodity Credit Corporation, D.C.Ark., 47 F.Supp. 681.

La.—Bass v. Biggs, 118 So. 861, 167 La. 126.

Miss.—Love v. Hytken, 150 So. 777, 163 Miss. 194.

94. La.—Bass v. Biggs, 118 So. 861, 167 La. 126.

95. La.—Bass v. Biggs, supra.

96. U.S.—Harris v. Commodity Credit Corporation, D.C.Ark., 47 F. Supp. 681.

97. N.Y.—Toplitz v. Bauer, 55 N.E. 1059, 161 N.Y. 325.

98. U.S.—Corpus Juris quoted in Commercial Nat. Bank in Shreveport v. Parsons, C.C.A.La., 144 F. 2d 231, 236, rehearing denied 145 F.2d 191, certiorari denied 65 S.Ct. 440, 323 U.S. 796, 89 L.Ed. 635—Corpus Juris quoted in In re Rogers, D.C.W.Va., 20 F.Supp. 120, 127.

N.Y.—Toplitz v. Bauer, 55 N.E. 1059, 161 N.Y. 325.

99. U.S.—Corpus Juris quoted in Commercial Nat. Bank in Shreveport v. Parsons, C.C.A.La., 144 F. 2d 231, 236, rehearing denied 145 F.2d 191, certiorari denied 65 S.Ct. 440, 323 U.S. 796, 89 L.Ed. 635—Corpus Juris quoted in In re Rogers, D.C.W.Va., 20 F.Supp. 120, 127.

Md.—Corpus Juris cited in Perring v. Baltimore Trust Corporation, 190 A. 516, 519, 171 Md. 618.

Mich.—Corpus Juris cited in Frey v. Farmers & Mechanics Bank of Ann Arbor, 262 N.W. 911, 912, 273 Mich. 284.

N.Y.—Kono v. Roeth, 260 N.Y.S. 662, 237 App.Div. 252, reargument denied 261 N.Y.S. 1048, 238 App.Div. 775—Corpus Juris quoted in Cole v. Manufacturers Trust Co., 299 N.Y.S. 418, 424, 164 Misc. 741—First Trust & Deposit Co. v. Potter, 278 N.Y.S. 847, 155 Misc. 106—Corpus Juris quoted in Reconstruction Finance Corporation v. Eastern Terra Cotta Realty Corporation, 48 N.Y.S.2d 920, 924, appeal dismissed 51 N.Y.S.2d 94.

Pa.—In re Berkovitz, 179 A. 746, 319 Pa. 397.

Utah.—Corpus Juris cited in Morris v. Ogden State Bank, 28 P.2d 138, 143, 84 Utah 127.

49 C.J. p 920 note 36.

#### Trust fund

Money pledged by lessee of premises of estate as protection against abatement for violations of law constituted trust fund.—Ryan v. Stagg, 298 P. 353, 89 Mont. 390.

1. U.S.—Corpus Juris quoted in Commercial Nat. Bank in Shreveport v. Parsons, C.C.A.La., 144 F. 2d 231, 236, rehearing denied 145

F.2d 191, certiorari denied 65 S.Ct. 440, 323 U.S. 796, 89 L.Ed. 635—Corpus Juris quoted in In re Rogers, D.C.W.Va., 20 F.Supp. 120, 127.

Mich.—Corpus Juris cited in Frey v. Farmers & Mechanics Bank of Ann Arbor, 262 N.W. 911, 912, 273 Mich. 284.

Mo.—Dibert v. D'Arcy, 154 S.W. 1116, 248 Mo. 617.

N.Y.—Kono v. Roeth, 260 N.Y.S. 662, 237 App.Div. 252, reargument denied 261 N.Y.S. 1048, 238 App. Div. 775—Corpus Juris quoted in Cole v. Manufacturers Trust Co., 299 N.Y.S. 418, 424, 164 Misc. 741—Corpus Juris quoted in Reconstruction Finance Corporation v. Eastern T. C. R. Corp., 48 N.Y.S. 2d 920, 924, appeal dismissed 51 N.Y.S.2d 94.

2. Pa.—In re Berkovitz, 179 A. 746, 319 Pa. 397—Union Trust Co. of Pittsburgh v. Long, 164 A. 346, 309 Pa. 470—Plucker v. Teller, 34 A. 203, 174 Pa. 529.

3. U.S.—Corpus Juris quoted in In re Rogers, D.C.W.Va., 20 F.Supp. 120, 127.

Ga.—Corpus Juris quoted in Loflin v. Howard, 172 S.E. 831, 832, 48 Ga.App. 373.

Miss.—Hibernia Bank & Trust Co. v. Turner, 127 So. 291, 156 Miss. 842.

N.Y.—Cole v. Manufacturers Trust Co., 299 N.Y.S. 418, 164 Misc. 741. Ohio.—Corpus Juris cited in Rubel v. Hunt, 179 N.E. 367, 368, 40 Ohio App. 561.

Pa.—Corpus Juris cited in Keltner v. American Bankers' Finance Co., 160 A. 127, 130, 306 Pa.Super. 483.

Tex.—Corpus Juris cited in Hatch v. Turner, Civ.App., 191 S.W.2d 701, 703, reversed on other

and the same rules apply whether the collateral pledged is the obligation of a third person or of the debtor himself.<sup>4</sup> If the duties of the pledgee as trustee for the debtor are defined by express contract, the terms of the contract govern as to the nature and extent of the trust;<sup>5</sup> but limitations in the contract on the liability which the law would imply against the pledgee must be plainly expressed.<sup>6</sup>

### c. Estoppel

The pledgor, by the act of pledging, impliedly engages that he is the general owner of the property pledged, and is estopped to deny the equitable rights of the pledgee therein. The pledgee is estopped to deny the title of the pledgor.

The pledgor, by the act of pledging, impliedly engages that he is the general owner of the property pledged,<sup>7</sup> and is estopped to deny the equitable rights of the pledgee therein<sup>8</sup> unless it particularly appears in the contract that he has a lesser interest in the property.<sup>9</sup> If he pledges as his own property which does not belong to him, he is estopped to set up a title to it subsequently acquired by him during the existence of the pledge.<sup>10</sup>

The pledgee is estopped to deny the title of his pledgor,<sup>11</sup> either by claiming title to the property in

himself<sup>12</sup> or by setting up the title of a third person to the property pledged to him by the pledgor.<sup>13</sup> Therefore as long as the pledgee holds the property as collateral security he cannot claim a holding adversely to the pledgor, so as to acquire title under the statute of limitations.<sup>14</sup> He may, however, show that another was the real pledgor and owner and entitled to possession;<sup>15</sup> and it has been held that, in an action by the pledgor, the pledgee can set up the title of a third person when he does so by authority of such third person.<sup>16</sup>

## § 22. Property or Interest Pledged

The particular property or interest pledged depends on the terms of the contract of pledge.

The particular property or interest covered by the pledge depends on the terms of the contract of pledge.<sup>17</sup> In the absence of an agreement to the contrary, the pledge will apply only to the interest which the pledgor owns in the property at the time of the pledge,<sup>18</sup> and the pledgee takes the property subject to any liens on it existing at that time, as discussed infra § 25. He is entitled to the benefit of any liens or collaterals by which it may be secured,<sup>19</sup> and also to any increase of the property, such as dividends on stock, as discussed in Corporations § 469 b, or interest on bonds;<sup>20</sup> and, where the pledged

grounds 193 S.W.2d 668, 145 Tex. 17.

Utah.—*Corpus Juris* cited in *Morris v. Ogden State Bank*, 28 P.2d 138, 143, 84 Utah 127.

49 C.J. p 920 note 38.

Pledgee as trustee of surplus see infra § 54.

### Commercial paper

The pledgee of commercial paper holds it as trustee for the pledgor. *Miss.—Love v. Rogers*, 150 So. 815, 168 Miss. 1.

Tex.—*Randolph v. Citizens Nat. Bank of Lubbock*, Civ.App., 141 S.W.2d 1030, error dismissed, judgment correct.

4. U.S.—*Corpus Juris* quoted in *In re Rogers*, D.C.W.Va., 20 F. Supp. 120, 127.

Ga.—*Corpus Juris* quoted in *Lofin v. Howard*, 172 S.E. 831, 832, 48 Ga. App. 373.

Mo.—*Dibert v. D'Arcy*, 154 S.W. 1116, 248 Mo. 617.

5. U.S.—*Corpus Juris* cited in *In re Rogers*, D.C.W.Va., 20 F. Supp. 120, 127.

Mo.—*Dibert v. D'Arcy*, 154 S.W. 1116, 248 Mo. 617.

6. U.S.—*Corpus Juris* cited in *In re Rogers*, D.C.W.Va., 20 F. Supp. 120, 127.

Mo.—*Dibert v. D'Arcy*, 154 S.W. 1116, 248 Mo. 617.

7. Pa.—*Mairs v. Taylor*, 40 Pa. 446.

8. Ill.—*Hoffman v. Schoyer*, 28 N.E. 823, 143 Ill. 598.

9. Mass.—*Northampton First Nat. Bank v. Massachusetts L. & T. Co.*, 123 Mass. 330.

49 C.J. p 921 note 53.

10. Cal.—*Goldstein v. Hort*, 30 Cal. 372.

11. Colo.—*Eaton v. Commercial Nat. Bank*, 182 P. 890, 66 Colo. 450.

49 C.J. p 921 note 45.

12. Pa.—*Bangor Silk Knitting Co. v. Wise*, 121 A. 308, 277 Pa. 415.

49 C.J. p 921 note 46.

13. Pa.—*Bangor Silk Knitting Co. v. Wise*, supra.

49 C.J. p 921 note 47.

14. Cal.—*Cross v. Eureka Lake, etc., Canal Co.*, 14 P. 885, 73 Cal. 302, 2 Am.S.R. 808.

49 C.J. p 921 note 48.

15. Colo.—*Eaton v. Commercial Nat. Bank*, 182 P. 890, 66 Colo. 450.

16. Cal.—*Palmtag v. Doutrick*, 59 Cal. 154, 43 Am.R. 245.

17. U.S.—*Eppstein v. Trade Bank & Trust Co.*, C.C.A.N.Y., 149 F.2d 261. N.C.—*Edwards v. Buena Vista Annex*, 6 S.E.2d 469, 216 N.C. 708.

Wash.—*Price v. Northern Bond & Mortgage Co.*, 297 P. 786, 161 Wash. 690.

49 C.J. p 921 note 55.

18. Ill.—*Habel, Armbruster & Larsen Co. v. Alleva*, 49 N.E.2d 793, 319 Ill.App. 641.

Ky.—*Corpus Juris* cited in *Martin v. St. Matthews Produce Exchange*, 95 S.W.2d 1119, 1121, 265 Ky. 26.

La.—*First Nat. Bank v. Canal Bank & Trust Co.*, 159 So. 711, 181 La. 445.

49 C.J. p 921 note 56.

### Pledge of mortgage

(1) A mortgage is solely the property of mortgagee and, by pledging it with another, mortgagee disposes of nothing owned by mortgagor or his surety.—*Kissling v. Skolkin*, 9 N.Y.S.2d 843, 256 App.Div. 935, reargument denied 11 N.Y.S.2d 368, 256 App.Div. 990.

(2) Since pledge of mortgage could not deprive mortgagor or his surety of right to satisfy mortgage on maturity, neither mortgagor nor his surety was damaged by pledge.—*Kissling v. Skolkin*, 9 N.Y.S.2d 843, 256 App.Div. 935, reargument denied 11 N.Y.S.2d 368, 256 App.Div. 990.

19. U.S.—*Thomson-Houston Electric Co. v. Capitol Electric Co.*, Tenn., 65 F. 341, 12 C.C.A. 643.

49 C.J. p 922 note 58.

20. Me.—*Androscooggin R. Co. v. Auburn Bank*, 48 Me. 335.



collateral is sold or collected, he is entitled to have the proceeds applied to his debt, as discussed *infra* § 54.

**Additional property.** Where additional property is delivered to keep the security good, it is subject to the same rights of the pledgee as the original property.<sup>21</sup>

## § 23. Title to Property Pledged

- a. In general
- b. Special property in pledgee
- c. Pledge of chose in action

### a. In General

Ordinarily the general property or title in the thing pledged remains in the pledgor, subject to a lien in favor of the pledgee for the amount of the debt or obligation for which the pledge is given.

The interest of the pledgor in the property

pledged is entirely separate and distinct from that of the pledgee;<sup>22</sup> and, as a general rule, in some jurisdictions affirmed by statute, on a contract of pledge the general property or title in the thing pledged remains in the pledgor,<sup>23</sup> subject to a lien in favor of the pledgee for the amount of the debt or obligation for which the pledge is given.<sup>24</sup> This rule applies notwithstanding an apparent transfer of legal title to the pledgee.<sup>25</sup> This general property or title in the pledgor continues until there has been a sale or foreclosure under the contract of pledge<sup>26</sup> or until the title is changed in some judicial proceeding;<sup>27</sup> and, even though the pledgee is deemed the legal owner of the pledge, the pledgor has not only a technical, but a substantial, interest, where the debt is less than the value of the property pledged.<sup>28</sup>

**After pledgor's default.** On the pledgor's default the property in the thing pledged does not become

21. N.Y.—*Higgins v. Graul*, 1 N.Y. S. 347, 48 Hun 618.  
49 C.J. p 922 note 62.

22. N.D.—*Corpus Juris* quoted in *Congress Candy Co. v. Farmer*, 12 N.W.2d 796, 804, 73 N.D. 174, 150 A.L.R. 1316.

Pa.—*Corpus Juris* quoted in *In re Gordon*, 25 A.2d 304, 305, 344 Pa. 262.

Mo.—*Aab v. French*, App., 279 S.W. 435.

23. U.S.—*Tilles v. Commissioner of Internal Revenue*, C.C.A.8, 113 F.2d 907, certiorari denied 61 S.Ct. 143, 311 U.S. 703, 85 L.Ed. 456—*Corpus Juris* cited in *Henderson v. Henderson*, C.C.A.Nev., 109 F.2d 863, 866—*Nelson v. Commissioner of Internal Revenue*, C.C.A.8, 101 F.2d 568—*City Bank Farmers' Trust Co. v. Bowers*, C.C.A.N.Y., 68 F.2d 909, certiorari denied 54 S.Ct. 778, 292 U.S. 644, 78 L.Ed. 1495—*Goldstein v. Rusch*, C.C.A.N.Y., 56 F.2d 10, certiorari denied 53 S.Ct. 9, 287 U.S. 604, 77 L.Ed. 526.

Ala.—*Wood v. Williams*, 192 So. 421, 238 Ala. 580—*Dobson v. Protective Life Ins. Co.*, 181 So. 492, 236 Ala. 111—*Payne v. Kendall*, 129 So. 40, 221 Ala. 478.

Cal.—*MacDonald v. Pacific Nat. Bank of San Francisco*, 152 P.2d 360, 66 Cal.App.2d 357—*Robinson v. Raquet*, 36 P.2d 821, 1 Cal.App.2d 533—*Tracy v. Stock Assur. Bureau*, 23 P.2d 41, 132 Cal.App. 573—*Raffo v. Foltz*, 288 P. 884, 106 Cal.App. 51.

Colo.—*Butler v. Gage*, 23 P. 462, 14 Colo. 125.

Fla.—*Travers v. Stevens*, 145 So. 851, 108 Fla. 11—*Pepper v. Beville*, 129 So. 384, 100 Fla. 97.

Ill.—*Painter v. Merchants & Manu-*

*facturers Bank of Milwaukee*, 277 Ill.App. 208.

La.—*People's Bank v. Cookston*, App., 142 So. 285.

Mont.—*Ryan v. Stagg*, 298 P. 353, 89 Mont. 390.

N.J.—*Moss Industries v. Irving Metal Co.*, 61 A.2d 159, 142 N.J.Eq. 704.

N.Y.—*Zinaman v. Stivelman*, 285 N.Y.S. 20, 248 App.Div. 851, affirmed 4 N.E.2d 813, 272 N.Y. 580—*In re Cooke's Estate*, 264 N.Y.S. 836, 147 Misc. 528.

N.D.—*Corpus Juris* quoted in *Congress Candy Co. v. Farmer*, 12 N.W.2d 796, 804, 73 N.D. 174, 150 A.L.R. 1316.

Pa.—*Corpus Juris* quoted in *In re Gordon*, 25 A.2d 304, 305, 344 Pa. 262—*Schwab v. Continental-Equitable Title & Trust Co.*, 189 A. 150, 330 Pa. 540—*Union Trust Co. of Pittsburgh v. Long*, 164 A. 846, 809 Pa. 470.

S.C.—*Hodges v. Lake Summit Co.*, 152 S.E. 658, 155 S.C. 436.

Tenn.—*Skidmore v. Little*, 181 S.W.2d 144, 181 Tenn. 280.

Tex.—*Cecil v. Wise*, Civ.App., 109 S.W.2d 214, error refused—*San Angelo Hilton Hotel Co. v. B. B. Hall Bldg. Corporation*, Civ.App., 60 S.W.2d 1049.

Vt.—*Dieter v. Scott*, 9 A.2d 95, 110 Vt. 376—*Island Pond Nat. Bank v. Lacroix*, 158 A. 684, 104 Vt. 282—*Jennings v. Gallagher*, 152 A. 802, 103 Vt. 169—*Lamoille County Savings Bank & Trust Co. v. Hanson*, 108 A. 396, 93 Vt. 486.

49 C.J. p 922 note 65, p 923 note 68.

24. U.S.—*In re Franklin Savings & Loan Co.*, D.C.Tenn., 34 F.Supp. 585.

Ariz.—*Corpus Juris* cited in *Wentz v. Pacific States Savings & Loan*

Co., 83 P.2d 1006, 1007, 52 Ariz. 508.

Cal.—*MacDonald v. Pacific Nat. Bank of San Francisco*, 152 P.2d 360, 66 Cal.App.2d 357—*Robinson v. Raquet*, 36 P.2d 821, 1 Cal.App.2d 533.

N.D.—*Corpus Juris* quoted in *Congress Candy Co. v. Farmer*, 12 N.W.2d 796, 804, 73 N.D. 174, 150 A.L.R. 1316.

Pa.—*Corpus Juris* quoted in *In re Gordon*, 25 A.2d 304, 305, 344 Pa. 262.

49 C.J. p 923 note 66.

25. Cal.—*Tracy v. Stock Assur. Bureau*, 23 P.2d 41, 132 Cal.App. 573. N.D.—*Corpus Juris* quoted in *Congress Candy Co. v. Farmer*, 12 N.W.2d 796, 804, 73 N.D. 174, 150 A.L.R. 1316.

49 C.J. p 923 note 67.

26. U.S.—*St. Paul Fire & Marine Ins. Co. v. Garza County Warehouse & Marketing Ass'n*, C.C.A. Tex., 93 F.2d 590—*Cherry v. Insull Utility Investments*, D.C.Ill., 58 F.2d 1022, reversed on other grounds, C.C.A., Guaranty Trust Co. of New York v. Fentress, 61 F.2d 329.

Ala.—*Payne v. Kendall*, 129 So. 40, 221 Ala. 478.

Pa.—*Corpus Juris* cited in *Tioga No. 2 Bldg. Ass'n v. North Philadelphia Trust Co.*, 189 A. 708, 711, 125 Pa.Super. 234.

Tenn.—*Wilson v. Hayes*, 193 S.W.2d 107, 29 Tenn.App. 49.

49 C.J. p 923 note 69.

27. N.Y.—*Markham v. Jaudon*, 41 N.Y. 235—*Bowman v. Hoffman*, 20 N.Y.S. 415, 22 N.Y.Civ.Proc. 373.

28. N.C.—*Ball-Thrash v. McCormick*, 78 S.E. 303, 162 N.C. 471.

absolutely vested in the pledgee, but the general property still remains in the pledgor.<sup>29</sup>

*The loss or destruction of the property* without fault on the part of the pledgee must be borne by the pledgor.<sup>30</sup>

*On the death of the pledgor* the property remains as it was when pledged; it belongs to his estate, encumbered, however, with the charge put on it by decedent for the payment of his debt.<sup>31</sup>

### b. Special Property in Pledgee

Ordinarily a pledgee of personal property does not acquire the legal title thereto but has merely a special property or interest in the thing pledged during the continuance of the pledge.

Ordinarily a pledgee of personal property does not acquire the legal title thereto,<sup>32</sup> but the pledgee may

by its terms vest title in the pledgee.<sup>33</sup> The pledgee is presumed to hold the property pledged subject to the pledgor's title,<sup>34</sup> and, as a general rule, in some jurisdictions affirmed by statute, the pledgee has merely a special property or interest in the thing pledged during the continuance of the pledge,<sup>35</sup> which vests in the pledgee the right to the property as far as is necessary to secure payment of the debt,<sup>36</sup> and which entitles him to the possession and control of the property until his debt or obligation is paid or satisfied, as discussed *infra* § 29. In other words, the pledgee has a mere possessory right to, or lien on, the property until the object of the pledge is accomplished,<sup>37</sup> unless the lien is waived or lost, as considered *infra* § 27. He acquires no interest in the property except as security for his debt or obligation,<sup>38</sup> and his actual interest is purely

29. U.S.—*Corpus Juris* cited in *Henderson v. Henderson*, C.C.A. Nev., 109 F.2d 863, 866.

Miss.—*Hudson v. Belzoni Equipment Co.*, 33 So.2d 796, 203 Miss. 212.

Mo.—*Fitzsimmons v. American Union Life Ins. Co.*, 133 S.W.2d 680, 234 Mo.App. 878.

Nev.—*Corpus Juris* cited in *Tobin v. Seaborn*, 82 P.2d 746, 747, 58 Nev. 432.

N.J.—*Moss Industries v. Irving Metal Co.*, 61 A.2d 159, 142 N.J.Eq. 704.

N.Y.—*First Trust & Deposit Co. v. Potter*, 278 N.Y.S. 847, 155 Misc. 106.

49 C.J. p 923 note 72.

30. Ala.—*Thomason v. Dill*, 30 Ala. 444.

31. U.S.—*City Bank Farmers' Trust Co. v. Bowers*, D.C.N.Y., 2 F.Supp. 883, reversed on other grounds, C. C.A., 68 F.2d 909, certiorari denied 54 S.Ct. 778, 292 U.S. 644, 78 L.Ed. 1495.

Fla.—*Corpus Juris* quoted in *Henderson v. Usher*, 170 So. 846, 853, 125 Fla. 709.

49 C.J. p 923 note 74.

Continuation of pledgee's lien on death of pledgor see *infra* § 24.

32. U.S.—*Mount Tivy Winery v. Lewis*, C.C.A.Cal., 134 F.2d 120—*Goldstein v. Rusch*, C.C.A.N.Y., 56 F.2d 10, certiorari denied 53 S.Ct. 9, 287 U.S. 604, 77 L.Ed. 526.

Ala.—*May v. Stallings*, 16 So.2d 870, 245 Ala. 292.

Cal.—*Bank of America Nat. Trust & Savings Ass'n v. Figueroa*, 22 P.2d 712, 218 Cal. 281.

49 C.J. p 923 note 76.

33. U.S.—*Byland v. Miller*, D.C.Ky., 13 F.Supp. 137.

Ala.—*May v. Stallings*, 16 So.2d 870, 245 Ala. 292—*Dodson v. Protective Life Ins. Co.*, 181 So. 492, 236 Ala. 111.

N.Y.—*Alkoff v. Miller*, 1 N.Y.S.2d 163, 165 Misc. 774.

34. Ala.—*Keeble v. Jones*, 65 So. 384, 187 Ala. 207.

35. U.S.—*Tilles v. Commissioner of Internal Revenue*, C.C.A.8, 113 F.2d 907, certiorari denied 61 S.Ct. 143, 311 U.S. 708, 85 L.Ed. 456—*Nelson v. Commissioner of Internal Revenue*, C.C.A.8, 101 F.2d 568—*City Bank Farmers' Trust Co. v. Bowers*, C.C.A.N.Y., 68 F.2d 909, certiorari denied 54 S.Ct. 778, 292 U.S. 644, 78 L.Ed. 1495—*Cherry v. Insull Utility Investments*, D.C. Ill., 58 F.2d 1022, reversed on other grounds, C.C.A., *Guaranty Trust Co. of New York v. Fentress*, 61 F.2d 329.

Ala.—*Wood v. Williams*, 192 So. 421, 238 Ala. 580—*Dobson v. Protective Life Ins. Co.*, 181 So. 492, 236 Ala. 111—*Payne v. Kendall*, 129 So. 40, 221 Ala. 478.

Ark.—*Leonard v. Taylor*, 39 S.W.2d 704, 183 Ark. 933.

Colo.—*Butler v. Gage*, 23 P. 462, 14 Colo. 125.

Fla.—*Pepper v. Beville*, 129 So. 334, 100 Fla. 97.

Ky.—*Mercer Nat. Bank of Harrodsburg v. White's Ex'r*, 32 S.W.2d 734, 236 Ky. 128.

N.J.—*Moss Industries v. Irving Metal Co.*, 61 A.2d 159, 142 N.J.Eq. 704.

Pa.—*In re Gordon*, 25 A.2d 804, 344 Pa. 262—*Schwab v. Continental-Equitable Title & Trust Co.*, 199 A. 150, 330 Pa. 540—*Union Trust Co. of Pittsburgh v. Long*, 184 A. 346, 309 Pa. 470.

S.C.—*Hodges v. Lake Summit Co.*, 152 S.E. 658, 155 S.C. 436.

Tenn.—*Skidmore v. Little*, 181 S.W. 2d 144, 181 Tenn. 280—*Wilson v. Hayes*, 193 S.W.2d 107, 29 Tenn. App. 49.

Tex.—*San Angelo Hilton Hotel Co. v.*

*B. B. Hall Bldg. Corporation*, Civ. App., 60 S.W.2d 1049.

Vt.—*Dieter v. Scott*, 9 A.2d 95, 110 Vt. 376—*Island Pond Nat. Bank v. Lacroix*, 158 A. 684, 104 Vt. 282—*Jennings v. Gallagher*, 152 A. 802, 103 Vt. 169—*Lamolle County Savings Bank & Trust Co. v. Hanson*, 108 A. 396, 93 Vt. 486.

49 C.J. p 923 note 78, p 924 note 80.

#### Bailee for hire

Pledgee of diamond ring as security for debt became bailee of ring for hire.—*Hibernia Bank & Trust Co. v. Turner*, 127 So. 291, 156 Miss. 842.

36. U.S.—*City Bank Farmers' Trust Co. v. Bowers*, C.C.A.N.Y., 68 F.2d 909, certiorari denied 54 S.Ct. 778, 292 U.S. 644, 78 L.Ed. 1495.

Fla.—*Gables Racing Ass'n v. Persky*, 156 So. 392, 116 Fla. 77—*Travers v. Stevens*, 145 So. 851, 108 Fla. 11.

#### Bank deposit

Bank book given as security vested in the pledgees equitable title not only in the book but also in the sum deposited in the bank to the extent of the obligation.—*Rix v. Doolley*, 77 N.E.2d 233, 322 Mass. 303.

37. U.S.—*Goldstein v. Rusch*, C.C.A. N.Y., 56 F.2d 10, certiorari denied 53 S.Ct. 9, 287 U.S. 604, 77 L.Ed. 526—*In re Schilling Press*, D.C.N. Y., 52 F.Supp. 569, affirmed, C.C.A., *Schilling v. Rockmore*, 141 F.2d 643, 152 A.L.R. 1094.

Ala.—*Wood v. Williams*, 192 So. 421, 238 Ala. 580.

Pa.—*In re Gordon*, 25 A.2d 804, 344 Pa. 262—*Schwab v. Continental-Equitable Title & Trust Co.*, 199 A. 150, 330 Pa. 540.

Tenn.—*Skidmore v. Little*, 181 S.W. 2d 144, 181 Tenn. 280.

49 C.J. p 924 note 81.

38. U.S.—*Corpus Juris* cited in *City Bank Farmers' Trust Co. v.*

contingent in that it depends for effect on something that may or may not occur.<sup>39</sup>

*A pledge obtained by fraud* of the pledgee, although unredeemed by the pledgor, vests no interest in the pledgee.<sup>40</sup>

*Incidental rights.* A pledgee's special property is sufficient to enable him to hold the thing pledged as against the pledgor,<sup>41</sup> his general creditors,<sup>42</sup> and persons claiming under subsequent assignments from the pledgor.<sup>43</sup> It is also sufficient to entitle him to recover possession of the property from a third person or to maintain trover for the conversion of the property, as considered *infra* §§ 37-40, unless he is stopped by his conduct to do so.<sup>44</sup>

### c. Pledge of Chose in Action

The pledgor of a chose in action retains the general property therein, and the pledgee takes only a special interest or title.

The pledgor of a chose in action such as a bond, bill, or note, retains the general property therein,<sup>45</sup> and the pledgee takes only a special interest or title therein,<sup>46</sup> a lien to secure the payment of the principal debt,<sup>47</sup> of which he cannot be deprived by the pledgor, as by a release, without first paying the

debt secured;<sup>48</sup> and, where the obligation of a third person is given in pledge, the pledgor alone cannot make a valid agreement with the obligor changing the terms of the obligation.<sup>49</sup> Whatever special interest is necessary is vested in the pledgee to enable him to exercise the right guaranteed to him by the contract<sup>50</sup> or to discharge the obligation imposed on him.<sup>51</sup> By taking the chose as collateral security the pledgee undertakes to account to the debtor,<sup>52</sup> and where, for the purposes of the pledge, the legal title to the chose is passed to the pledgee, he holds it or the proceeds in trust primarily for himself and secondarily for the pledgor.<sup>53</sup>

### § 24. Nature and Extent of Lien

A pledge casts a lien on the property pledged, and the nature and extent of the lien are governed by the terms of the contract of pledge.

A pledge casts a lien on the property pledged,<sup>54</sup> which is more than a simple lien.<sup>55</sup> The nature and extent of the lien, in a particular case, are governed by the terms of the contract of pledge,<sup>56</sup> and, as long as the debt remains unpaid, the collateral security continues to be charged with the lien unless changed by subsequent contract or conduct of the

Bowers, D.C.N.Y., 2 F.Supp. 883, 885, reversed on other grounds, C. C.A., 68 F.2d 909, certiorari denied 54 S.Ct. 778, 292 U.S. 644, 78 L.Ed. 1495.

49 C.J. p 924 note 83.

39. U.S.—*Corpus Juris* cited in *City Bank Farmers' Trust Co. v. Bowers*, D.C.N.Y., 2 F.Supp. 883, 885, reversed on other grounds, C. C.A., 68 F.2d 909, certiorari denied 54 S.Ct. 778, 292 U.S. 644, 78 L.Ed. 1495.

49 C.J. p 924 note 84.

40. Me.—*Dubie v. Branz*, 73 A.2d 217.

49 C.J. p 924 note 85.

41. Neb.—*Robinson v. Ralph*, 103 N. W. 1044, 74 Neb. 55.

49 C.J. p 924 note 86.

42. Iowa.—*Mitchell v. McLeod*, 104 N.W. 349, 127 Iowa 733.

49 C.J. p 924 note 87.

43. Pa.—*Eagle, Inc. v. Kunkle*, 122 A. 276, 278 Pa. 190.

49 C.J. p 924 note 88.

44. Cal.—*Yamato v. Southern California Bank*, 149 P. 826, 170 Cal. 351.

45. Cal.—*Rissman v. National Thrift Corporation of America*, 34 P.2d 230, 139 Cal.App. 447.

La.—*Ott v. Sanders, App.*, 147 So. 701.

Okl.—*Miller v. Horton*, 170 P. 509, 69 Okl. 147, L.R.A.1918C 625.

49 C.J. p 924 note 95.

### Attributes of ownership

The payee or owner of a note pledged as collateral security has the attributes of ownership, subject, however, to rights of pledgee, who by the transfer becomes the holder of pledged note according to the terms of contract of pledge.—*McArthur v. Pemiscot County, Mo.*, 176 S.W.2d 618.

48. Ind.—*Hammond Pure Ice & Coal Co. v. Heitman*, 47 N.E.2d 309, 221 Ind. 352, 145 A.L.R. 997.

49 C.J. p 924 note 98.

### Right to set-off

The pledgee of a negotiable note has no such interest therein as entitles the maker of such note to set off against it a debt which he holds against the pledgee.—*Hammond Pure Ice & Coal Co. v. Heitman*, supra.

47. Ind.—*Hammond Pure Ice & Coal Co. v. Heitman*, supra.

48. Mont.—*National Bank of Republic v. American Brewing Co.*, 257 P. 1043, 79 Mont. 605.

49 C.J. p 924 note 97.

49. N.Y.—*Sands v. Gilleran*, 144 N. Y.S. 837, 159 App.Div. 37.

49 C.J. p 924 note 98.

50. Nev.—*Winnemucca State Bank, etc., Co. v. Corbell*, 178 P. 23, 42 Nev. 378.

51. Nev.—*Winnemucca State Bank, etc., Co. v. Corbell*, supra.

52. Nev.—*Winnemucca State Bank, etc., Co. v. Corbell*, supra.

Liability of pledgee to account for income or profits generally see *infra* § 31.

53. Nev.—*Winnemucca State Bank, etc., Co. v. Corbell*, supra.

49 C.J. p 925 note 3.

Pledge as creating trust relation generally see *supra* § 21.

54. U.S.—*In re Sandoval*, D.C.Puerto Rico, 78 F.Supp. 135.

Ark.—*Umsted Auto Co. v. Henderson Auto Co.*, 207 S.W. 437, 137 Ark. 40—*Mattar Bros. v. Wathen*, 138 S.W. 455, 99 Ark. 329.

55. Mich.—*Austin v. Hayden*, 137 N.W. 317, 171 Mich. 38, 51, Ann. Cas.1915B 894.

49 C.J. p 925 note 6.

56. U.S.—*In re Elakin Lumber Co.*, D.C.W.Va., 39 F.Supp. 787, affirmed, C.C.A., R. F. C. v. Sun Lumber Co., 126 F.2d 731.

Minn.—*Barnes v. Davis*, 128 N.W. 1118, 113 Minn. 132.

Property or interest pledged in general see *supra* § 22.

### Amount of crop represented by receipts

Any lien on tenant's crop acquired by landlord by pledge of crop constructively delivered to landlord by delivery of receipts given tenant by produce exchange for year's crop which tenant had delivered to the exchange was only for net amounts they represented.—*Martin v. St. Matthews Produce Exchange*, 95 S. W.2d 1119, 265 Ky. 26.

parties.<sup>57</sup> Ordinarily the lien exists for the full debt or obligation for which the pledge was given.<sup>58</sup>

*Several pledges.* The creditor may hold several pledges from the same or different pledgors,<sup>59</sup> and is not bound to part with any of the property so held until the discharge of the whole of the debt or obligations it has been given to secure.<sup>60</sup>

*Date of lien.* The pledgee's lien dates from the execution of the contract<sup>61</sup> and not from the date of a judgment which he afterward recovers against the pledgor.<sup>62</sup>

*Death of pledgor.* A pledgee's lien survives the death of the pledgor.<sup>63</sup>

## § 25. Priorities

- a. In general
- b. Effect of recording statute

### a. In General

As a general rule a pledgee acquires a superior right

to the property and its proceeds as against all persons except those who held prior liens on the property at the time the pledge took effect.

Since the pledgee, by act of the pledgor, acquires in addition to his original right against the pledgor a right or interest in the thing itself which is the subject of pledge, as discussed supra § 23, as a general rule he acquires a superior right to the property and its proceeds as against all persons<sup>64</sup> except those who held prior liens on the property at the time the pledge took effect<sup>65</sup> and who have not agreed to subordinate their liens to that of the pledgee.<sup>66</sup> Ordinarily a pledgee acquires a right superior to any right which can thereafter be given by the pledgor;<sup>67</sup> and, except where the equities of the case are such as to give a subsequent purchaser, pledgee, or creditor a prior right,<sup>68</sup> he is entitled to priority to the extent of his lien<sup>69</sup> over subsequent purchasers<sup>70</sup> or other creditors of the pledgor.<sup>71</sup> Where a subsequent creditor comes into possession of the property with notice of the

57. Ky.—Mercer Nat. Bank of Harrodsburg v. White's Ex'r, 32 S.W. 2d 734, 236 Ky. 128.

58. U.S.—In re Chicago & N. W. Ry. Co., D.C.Ill., 35 F.Supp. 230, affirmed, C.C.A., 126 F.2d 351, certiorari denied Chicago & N. W. Ry. Co. v. Mutual Sav. Bank Group Committee, 63 S.Ct. 987, 318 U.S. 793, 87 L.Ed. 1158, rehearing denied 63 S.Ct. 1160, 319 U.S. 781, 87 L.Ed. 1726, certiorari denied Suman v. Mutual Sav. Bank Group Committee, 63 S.Ct. 987, 318 U.S. 793, 87 L.Ed. 1158, rehearing denied 63 S.Ct. 1161, 319 U.S. 781, 87 L.Ed. 1726, certiorari denied City Bank Farmers Trust Co. v. Life Ins. Group Committee, 63 S.Ct. 988, 318 U.S. 793, 87 L.Ed. 1158, certiorari denied Irving Trust Co. v. Mutual Sav. Bank Group Committee, 63 S.Ct. 989, 318 U.S. 793, 87 L.Ed. 1158, rehearing denied 63 S.Ct. 1161, 319 U.S. 781, 87 L.Ed. 1726, certiorari denied Protective Committee for Holders of Common Stock v. Mutual Sav. Bank Group Committee, 63 S.Ct. 989, 318 U.S. 793, 87 L.Ed. 1158, certiorari denied Protective Committee for Holders of Preferred Stock v. Mutual Sav. Bank Group Committee, 63 S.Ct. 990, 318 U.S. 793, 87 L.Ed. 1158.

49 C.J. p 925 note 10.  
Debts or liabilities secured generally see infra § 28.

**Past indebtedness or future advances**

The lien of a pledge for past indebtedness or future advances is

measured by extent of advances and amount of debt.—Mongoven v. Watts, 258 Ill.App. 106.

59. U.S.—Union Bank v. Laird, Dist.Col., 2 Wheat. 390, 4 L.Ed. 269.

60. Cal.—Pacific Acceptance Corp. v. Bank of Italy, 209 P. 1024, 59 Cal.App. 76.

49 C.J. p 925 note 15.

61. Ga.—American Nat. Bank v. East Atlanta Bank, 95 S.E. 286, 147 Ga. 750.

62. Ga.—American Nat. Bank v. East Atlanta Bank, supra.

63. N.Y.—In re Kiamie's Estate, 76 N.Y.S.2d 684, 101 Misc. 179.

Title to pledged property on death of pledgor see supra § 23 a.

64. U.S.—Lewis v. Dillard, Ark., 76 F. 688, 62 C.C.A. 438.

49 C.J. p 925 note 20.

65. U.S.—Reconstruction Finance Corporation v. Sun Lumber Co., C. C.A.W.Va., 126 F.2d 731.

Ala.—First Nat. Bank v. Murphree, 118 So. 404, 218 Ala. 221.

Ky.—Owensboro Savings Bank v. Atwood, 7 Ky.Op. 440.

N.J.—Mill Factors Corporation v. Imhoff Berg Silk Dyeing Co., 153 A. 484, 107 N.J.Law 442.

49 C.J. p 901 note 20, p 925 note 21.

### Pledge of motor vehicle

La.—Powell Motor Co. v. A. Christina & Bros., 8 La.App. 174.

Pa.—Sunbury Finance Co. v. Scarborough, 180 A. 107, 119 Pa.Super. 422.—Sunbury Finance Co. v. Boyd Motor Co., 180 A. 103, 119 Pa.Super. 412.

### Agreement held established

La.—Tallulah Production Credit Ass'n v. Krauss, App., 3 So.2d 446.

### Holding for pledgee after discharge of lien

Dyer's notice to owner's pledgee that dyer would hold goods for pledgee was held to be mere substitution of right of possession after discharge of dyer's lien.—Mill Factors Corporation v. Imhoff Berg Silk Dyeing Co., 153 A. 484, 107 N.J.Law 442.

67. Kan.—Citizens' Nat. Bank v. Bank of Commerce, 101 P. 1005, 80 Kan. 205.

49 C.J. p 926 note 22.

68. Mich.—Detroit Fidelity & Surety Co. v. Continental Bank, 235 N. W. 258, 253 Mich. 574.

Pa.—Hayward v. Wandrie, Com.Pl., 21 Erie Co. 258, 9 Som.Leg.J. 399.

49 C.J. p 926 note 23.

69. Tenn.—Crisp v. Miller, 5 Heisk. 697.

Tex.—Clarke v. Dallas First State Bank, Civ.App., 150 S.W. 203.

Extent of lien in general see supra § 24.

70. Tex.—Tyler State Bank & Trust Co. v. Monaville Independent School Dist., Civ.App., 226 S.W.2d 207.

49 C.J. p 926 note 25.

71. U.S.—Irving Trust Co. v. Bank of America Nat. Ass'n, C.C.A.N.Y., 68 F.2d 887, certiorari denied 54 S. Ct. 630, 292 U.S. 628, 78 L.Ed. 1482.—First Nat. Bank v. Hall, D.C.Me., 18 F.Supp. 44.

Miss.—Wood Preserving Corporation v. Coney Grocery Co., 168 So. 844, 176 Miss. 406.

49 C.J. p 926 note 28.

pledgee's lien, his rights in the property are subordinate to those of the pledgee,<sup>72</sup> and the rule applies even though the pledgee has delivered the property to him where the delivery was made under order of court for another purpose.<sup>73</sup> An assignee of a conditional sales contract from a seller has been held estopped to assert his lien as superior to that of a subsequent pledgee from the buyer without notice, where the buyer had a receipted invoice and possession of the property.<sup>74</sup>

*As between successive pledgees* without any communication with each other, the one who lawfully obtains possession at the time of the pledge, or subsequently, is entitled to be preferred;<sup>75</sup> and therefore a pledgee in possession is entitled to priority over subsequent pledgees.<sup>76</sup> A subsequent pledgee in good faith from the pledgor, and in possession of the property pledged, is entitled to priority over a former pledgee of such property<sup>77</sup> except that, where the pledgor has wrongfully obtained possession of the property and delivered it to a subsequent pledgee, the prior pledgee has the right to require that the second pledgee shall first make application on his debt of other property of the pledgor in his hands.<sup>78</sup>

*As between contractees.* As between two creditors to whom the debtor has contracted to pledge the property, the one in possession will prevail.<sup>79</sup>

#### b. Effect of Recording Statute

Where a statute requires a contract of pledge to be recorded, a recorded contract of pledge is superior to all

antecedent unrecorded claims or liens and subsequently recorded liens or pledges.

Where a statute requires a contract of pledge to be recorded, a recorded contract of pledge is superior to all antecedent unrecorded claims or liens<sup>80</sup> and subsequently recorded liens or pledges;<sup>81</sup> and an unrecorded pledge is invalid as against a subsequent pledgee, without notice,<sup>82</sup> even though the later pledge itself is unrecorded.<sup>83</sup> Under a statute requiring a conveyance of personal property to be recorded, the lien of a pledgee without notice is superior to an antecedent unrecorded vendor's lien,<sup>84</sup> and also takes priority over a vendor in an unrecorded conditional sale.<sup>85</sup> An innocent pledgee of false notes issued by the mortgagee after the original notes have been transferred by him may be entitled to priority in accordance with recording statutes where the transferees of the original notes have not recorded the transfers to them.<sup>86</sup>

### § 26. Pledgee as Bona Fide Purchaser

- a. In general
- b. As against real owner of property
- c. Pledge as security for preëxisting debt
- d. Pledgee with notice

#### a. In General

Where a pledgee receives possession of the property from the pledgor in good faith, the pledgee is deemed a bona fide purchaser and his claim takes priority over outstanding equities.

On a question of priority, a pledgee stands on the same footing as a purchaser,<sup>87</sup> and is deemed

#### Priority over:

Assignees in general see Assignments § 92.

Assignee for the benefit of creditors see Assignments for Benefit of Creditors § 359.

Attaching creditor see Attachment § 272 b (1).

Execution creditor see Executions § 128 a.

Claimant under garnishment see Garnishment § 183.

Mortgagees see Chattel Mortgages § 297.

Purchaser at execution sale see Executions § 291 b.

72. Ky.—Liberty Nat. Bank & Trust Co. v. Louisville Trust Co., 175 S. W.2d 524, 295 Ky. 825.

73. Ky.—Liberty Nat. Bank & Trust Co. v. Louisville Trust Co., supra.

74. Pa.—General Contract Purchase Corporation v. Bitomski, 156 A. 727, 102 Pa.Super. 266.

75. Pa.—Corpus Juris cited in Ambler Nat. Bank v. Maryland

Credit Finance Co., 24 A.2d 123, 127, 147 Pa.Super. 496.

49 C.J. p 926 note 35.

76. Pa.—Corpus Juris cited in Ambler Nat. Bank v. Maryland Credit Finance Co., 24 A.2d 123, 127, 147 Pa.Super. 496.

49 C.J. p 926 note 36.

77. Pa.—Maryland Casualty Co. v. National Bank of Germantown & Trust Co., 182 A. 362, 320 Pa. 129 —Corpus Juris cited in Ambler Nat. Bank v. Maryland Credit Finance Co., 24 A.2d 123, 127, 147 Pa.Super. 496.—Hudson Manure Co. v. Evans, Com.Pl., 3 Chester Co. 238.

49 C.J. p 926 note 37.

78. N.Y.—Hazard v. Fiske, 83 N.Y. 287.

79. Ala.—Nobles v. Christian, etc., Grocery Co., 20 So. 961, 113 Ala. 220.

80. La.—Maxwell-Yerger Co. v. Rogan, 51 So. 48, 125 La. 1—Hardee, etc., Co. v. Kelly, 8 La.App. 502.

81. La.—Maxwell-Yerger Co. v. Ro-

gan, 51 So. 48, 125 La. 1—Hardee, etc., Co. v. Kelly, 8 La.App. 502.

82. Cal.—Security Mortg. Co. v. Delfs, 191 P. 53, 47 Cal.App. 599.

49 C.J. p 927 note 49. Record or registration of pledge generally see supra § 18.

83. Cal.—Security Mortg. Co. v. Delfs, supra.

49 C.J. p 927 note 50.

84. Ky.—Jewell v. Cecil, 193 S.W. 199, 177 Ky. 822.

Word "purchaser," as used in statute includes pledgee.—Farmers & Merchants State Bank of Wisconsin Dells v. Schulenberg, 276 N.W. 333, 226 Wis. 278.

85. Ala.—Starr Piano Co. v. Baker, 62 So. 549, 8 Ala.App. 449.

49 C.J. p 927 note 44.

86. Md.—Frederick County Nat. Bank of Frederick v. Brown, 137 A. 351, 152 Md. 609.

87. Vt.—Corpus Juris cited in Island Pond Nat. Bank v. Lacroix, 158 A. 684, 692, 104 Vt. 282.

49 C.J. p 927 note 52.

to be a holder for value to the extent of his lien,<sup>88</sup> but his lien must rest on the faith of the collateral pledged.<sup>89</sup> Since his interest in the property pledged is a legal interest sufficient to invoke the rule protecting bona fide purchasers,<sup>90</sup> where he receives possession of the property from the pledgor in good faith,<sup>91</sup> that is, where there is an absence not only of participation in the pledgor's fraud, but of knowledge or notice of the fraud or of facts and circumstances calculated to put an ordinarily prudent business man on inquiry to ascertain the truth,<sup>92</sup> the pledgee is deemed a bona fide purchaser and his claim takes priority over outstanding equities,<sup>93</sup> such as a prior unrecorded mortgage<sup>94</sup> or lien.<sup>95</sup> A pledgee without notice also will prevail over the right of an unpaid seller who has parted with possession of the property,<sup>96</sup> even though the terms of the sale were cash,<sup>97</sup> or over a vendor who, because of the fraud of the vendee or for other reasons, has a right to rescind the sale.<sup>98</sup>

*Usury* in the transaction for which a pledge is given does not affect the right of the pledgee, as a holder in due course, to recover on the collateral security.<sup>99</sup>

### b. As against Real Owner of Property

In the absence of some element of estoppel, a pledgee of property from one who has no title or authority to pledge it, even though he acts in good faith, acquires no title as against the real owner.

In the absence of some element of estoppel, a pledgee of property from one who has no title or authority to pledge it, even though he acts in good faith, acquires no title as against the real owner;<sup>1</sup> and the mere possession of property, as for the purposes of safe-keeping or sale, without other evidence of ownership, or authority from the true owner to pledge, will not give the pledgee of such person in possession a lien against the true owner,<sup>2</sup> especially where the pledge is made by the pledgor for the fraudulent purpose of converting the proceeds to his own use,<sup>3</sup> since, as discussed supra § 8, a pledgor ordinarily may lawfully pledge only such right or interest as he owns in the property pledged.

*Estoppel of owner.* It is well settled that, where the real owner permits the pledgor to have possession of his property under apparent ownership or authority to pledge, he is estopped to assert his title as against a pledgee, to the extent that the

88. Ky.—Erlanger Citizens Bank v. Williams, 151 S.W.2d 381, 286 Ky. 492.—Kavinedus v. Maglia, 94 S.W.2d 675, 264 Ky. 276.  
Pa.—Land Title Bank & Trust Co. v. Schenck, 6 A.2d 878, 335 Pa. 419.  
Vt.—Corpus Juris cited in Island Pond Nat. Bank v. Lacroix, 158 A. 684, 692, 104 Vt. 282.  
49 C.J. p 927 note 53.

89. Tex.—Huntington Beach First Nat. Bank v. Van Horn, Civ.App., 2 S.W.2d 333.

90. Ky.—Kavinedus v. Maglia, 94 S.W.2d 675, 264 Ky. 276.  
Vt.—Corpus Juris cited in Island Pond Nat. Bank v. Lacroix, 158 A. 684, 692, 104 Vt. 282.  
49 C.J. p 927 note 55.

91. Ky.—Kavinedus v. Maglia, 94 S.W.2d 675, 264 Ky. 276.  
Pa.—Land Title Bank & Trust Co. v. Schenck, 6 A.2d 878, 335 Pa. 419.—Maryland Casualty Co. v. National Bank of Germantown & Trust Co., 182 A. 362, 320 Pa. 129.  
Vt.—Corpus Juris cited in Island Pond Nat. Bank v. Lacroix, 158 A. 684, 692, 104 Vt. 282.  
49 C.J. p 927 note 56.

#### Necessity of possession

In order to invoke rule protecting bona fide purchasers, pledgee must have possession of thing pledged, since rule assumes that pledgee has possession.—Island Pond Nat. Bank v. Lacroix, 158 A. 684, 104 Vt. 282.

92. Vt.—Corpus Juris cited in

Island Pond Nat. Bank v. Lacroix, 158 A. 684, 692, 104 Vt. 282.  
49 C.J. p 927 note 57.

93. Ky.—Kavinedus v. Maglia, 94 S.W.2d 675, 264 Ky. 276.  
Vt.—Corpus Juris cited in Island Pond Nat. Bank v. Lacroix, 158 A. 684, 692, 104 Vt. 282.  
49 C.J. p 927 note 58.

94. Okl.—Phillips v. Kight, 280 P. 439, 138 Okl. 98.  
49 C.J. p 928 note 59.

95. Pa.—Maryland Casualty Co. v. National Bank of Germantown & Trust Co., 182 A. 362, 320 Pa. 129.  
Tenn.—Ingles Land Co. v. Knoxville Fire Ins. Co., Ch.A., 53 S.W. 1111.

96. La.—Pierson v. Carmouche, 84 So. 59, 146 La. 798.  
49 C.J. p 928 note 61.

97. Ill.—Michigan Cent. R. Co. v. Phillips, 60 Ill. 190.

98. Ill.—Ohio, etc., R. Co. v. Kerr, 49 Ill. 458.—Williams v. Birch, 19 N.Y.Super. 299, affirmed 36 N.Y. 319, 2 Transcr.A. 133.

99. Ala.—Weaver v. Henderson, 91 So. 313, 206 Ala. 529.  
49 C.J. p 928 note 64.

1. Mo.—National Match Co. v. Empire Storage & Ice Co., 58 S.W.2d 797, 227 Mo.App. 1115, certiorari denied Empire Storage & Ice Co. v. National Match Co., 54 S.Ct. 88, 290 U.S. 668, 78 L.Ed. 577.  
N.Y.—Thompson v. Goldstone, 157 N.Y.S. 621, 171 App.Div. 666.  
49 C.J. p 928 note 66.

#### Failure to secure certificate of title

Finance company, financing original transaction between manufacturer and dealer, was not estopped to assert title to motor vehicle as against lender of money to dealer under security of lease agreement covering motor vehicle because it did not secure certificate of title from state highway department, since certificate is required only of one who claims to have obtained ownership from dealer.—Sunbury Finance Co. v. Boyd Motor Co., 180 A. 103, 119 Pa.Super. 412.

2. N.H.—New Hampshire Sav. Bank v. National Rockland Bank, 41 A. 2d 760, 93 N.H. 326.  
49 C.J. p 928 note 67.

#### Possession as mere custodian

Pledge of property by broker, receiving it as mere custodian from wholesaler under written memorandum giving him no title thereto or authority to transfer title to purchaser, afforded broker's pledgee no protection under statute prohibiting one allowing another to assume apparent ownership of former's property for purpose of transferring it from setting up title thereto to defeat pledge thereof by apparent owner to one receiving it in good faith for value, pledgee being broker's successor in interest.—California Jewelry Co. v. Provident Loan Ass'n, 45 P.2d 271, 6 Cal.App.2d 506.  
3. Colo.—Newton v. Cardwell Blue Print, etc., Co., 92 P. 914, 41 Colo. 492.—Gatlieb v. Hartman, 3 Colo. 53.

latter has, without notice of the real owner, taken the property in pledge on the faith of the pledgor's being the owner of, or having authority to pledge, it.<sup>4</sup> However, it has been held that, in such a case, if the pledgee holds other property of the pledgor, the owner of the property wrongfully pledged is entitled to have the pledgee first apply such other property to the debt.<sup>5</sup>

### c. Pledge as Security for Preexisting Debt

The authorities differ as to whether a pledgee who receives property in good faith as security for a preexisting debt is a bona fide purchaser or holder for value.

A pledgee who receives property in good faith as security for a preexisting debt has been held to be a bona fide purchaser or holder for value,<sup>6</sup> even though there is no other consideration for the pledge<sup>7</sup> or the pledgor's title to the property is voidable at the option of a third person.<sup>8</sup> However, it has also been held that in order to constitute the pledgee a holder for value it is not sufficient that he receive the property as security for a preexisting debt,<sup>9</sup> but that he must part with something of value, or grant the debtor some indulgence, on the faith of the pledge.<sup>10</sup> Under this rule, where goods fraudulently obtained by the pledgor are pledged in good faith for a present advance and an antecedent debt owing to the pledgee, the pledgee may not be considered a bona fide transferee or

pledgee of the goods in respect of the antecedent debt so as to enable him to hold the goods against the original vendor as security for such debt.<sup>11</sup>

*As against subsequent creditors.* The lien of a pledgee for a preexisting debt has priority as against subsequent attaching creditors of the pledgor.<sup>12</sup>

### d. Pledgee with Notice

A pledgee who has either actual or constructive notice of outstanding rights or equities affecting the pledged property before he delivers up anything of value in consideration for the pledge, or in any way carries out the agreement, is not a bona fide holder of the property.

A pledgee who has either actual or constructive notice of outstanding rights or equities affecting the pledged property before he delivers up anything of value in consideration for the pledge, or in any way carries out the agreement, is not a bona fide holder of the property,<sup>13</sup> and therefore takes the property subject to all outstanding rights of other persons against the pledgor of which he has notice,<sup>14</sup> such as the rights of the real owner of the property.<sup>15</sup> As to what does or does not constitute notice, aside from actual notice,<sup>16</sup> and constructive notice of public records,<sup>17</sup> it is sufficient that the pledgee has knowledge of such facts as would put a reasonably prudent business man on inquiry that would lead to actual notice,<sup>18</sup> and, where the circumstances are such as to justify the conclusion that the failure to make inquiry arose from a suspicion

4. Cal.—Salomon v. Ellis, 94 P.2d 393, 34 Cal.App.2d 672.

Del.—El I. Du Pont de Nemours & Co. v. Laird, 8 A.2d 162, 24 Del. Ch. 152, modified on other grounds 9 A.2d 76, 24 Del.Ch. 250.

Ga.—Savannah Trust Co. v. National Bank of Savannah, 86 S.E. 49, 16 Ga.App. 706.

N.H.—New Hampshire Sav. Bank v. National Rockland Bank, 41 A.2d 760, 93 N.H. 326.

49 C.J. p 928 note 69.

#### Reason for rule

Where one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer.—Barthelmess v. Cavalier, 38 P.2d 484, 2 Cal.App. 2d 477.

5. N.Y.—Le Marchant v. Moore, 44 N.E. 770, 150 N.Y. 209.

49 C.J. p 929 note 70.

6. Cal.—Smitton v. McCullough, 189 P. 686, 182 Cal. 530.

49 C.J. p 929 note 72.

Preexisting debt as consideration for pledge generally see supra § 13.

7. S.C.—Charleston Bank v. Frost, 45 S.C.L. 657.

8. Colo.—Haraszthy v. Shandel, 27 P. 876, 1 Colo.App. 137.

9. U.S.—Corpus Juris cited in Filipowicz v. Rothensties, D.C.Pa., 43 F.Supp. 619, 624.

Iowa.—Etna Life Ins. Co. of Hartford, Conn., v. Morlan, 264 N.W. 58, 221 Iowa 110.

Mont.—Rasmussen v. O. E. Lee & Co., 66 P.2d 119, 104 Mont. 278—Foster v. Winstanley, 102 P. 574, 39 Mont. 314.

Vt.—Central Vermont Public Service Corporation v. Eltapence, 34 A.2d 184, 113 Vt. 284.

49 C.J. p 929 note 75.

10. Vt.—Central Vermont Public Service Corporation v. Eltapence, supra.

49 C.J. p 929 note 76.

11. N.Y.—Adams v. Bowerman, 15 N.E. 874, 109 N.Y. 23.

12. Ky.—Greenbaum v. Burnes, 13 Ky.Law 267.

Mo.—Davis v. Carson, 69 Mo. 609.

13. Mo.—Corpus Juris cited in Murray v. Central Bank, 40 S.W.2d 721, 723, 226 Mo.App. 400.

Va.—Corpus Juris cited in Easley v. First Nat. Bank of Lynchburg, 200 S.E. 603, 606, 172 Va. 94.

49 C.J. p 929 note 79.

14. Wash.—Willett v. Central Yakima

Ranches Co., 219 P. 20, 126 Wash. 587.

49 C.J. p 930 note 80.

15. Va.—Corpus Juris cited in Easley v. First Nat. Bank of Lynchburg, 200 S.E. 603, 606, 172 Va. 94.

49 C.J. p 930 note 81.

16. Mass.—Kellogg v. Thompson, 6 N.E. 860, 142 Mass. 76.

17. U.S.—In re Eakin Lumber Co., D.C.W.Va., 34 F.Supp. 460.

Mass.—Strong v. Jackson, 123 Mass. 60, 25 Am.R. 19.

18. Ga.—Groover v. Savannah Bank & Trust Co., 198 S.E. 217, 186 Ga. 476, mandate conformed to 198 S. E. 223, 58 Ga.App. 251.

Md.—People's Banking Co. of Smithsburg v. Fidelity & Deposit Co. of Maryland, 170 A. 544, 165 Md. 657, dissenting opinion 171 A. 345, 165 Md. 657.

49 C.J. p 930 note 84.

#### Notice held insufficient

Ark.—Rose v. Spear, 58 S.W.2d 684, 187 Ark. 163.

Pa.—Maryland Casualty Co. v. National Bank of Germantown & Trust Co., 182 A. 362, 320 Pa. 129.

49 C.J. p 930 note 84 [b].

that inquiry would disclose a vice or defect in title, the pledgee is charged with notice of the defect.<sup>19</sup>

The pledgee is put on inquiry and takes with constructive notice of the terms of the trust, where the property is pledged by one known to the pledgee to hold in a fiduciary capacity,<sup>20</sup> such as an agent,<sup>21</sup> guardian,<sup>22</sup> or a trustee.<sup>23</sup> However knowledge that the pledgor obtained the subject of the pledge for an inadequate consideration is not alone sufficient to charge the pledgee with notice of defective title.<sup>24</sup> Also, the fact that the loan for which the pledge is given is at a usurious rate of interest is not sufficient in itself to put the pledgee on inquiry of outstanding rights in others.<sup>25</sup>

## § 27. Waiver or Loss of Lien

- a. Express waiver
- b. Implied waiver in general
- c. Extension of time for payment of debt
- d. Resort to other remedy
- e. Loss of possession
- f. Delivery to pledgor for special purpose

### a. Express Waiver

The lien of a pledgee may be released by his express agreement to that effect; but where the agreement has been procured by fraud he may reassert his claim to the property against anyone privy to the fraud.

The lien of a pledgee may be released by his express agreement to that effect,<sup>26</sup> such as by agreeing that the pledged property may be attached at the suit of a third person<sup>27</sup> or by voluntarily surrendering the pledge with intent to abandon the lien.<sup>28</sup> Such a release may be made by a pledgee without

the consent of the other creditors of the pledgor, and without thereby losing his right to resort, as creditor, against the debtor's property.<sup>29</sup> A pledgee, however, is relieved from such an agreement where, while the agreement is yet executory, the consideration therefor fails;<sup>30</sup> and where the agreement has been procured by fraud the pledgee may reassert his claim to the property against anyone privy to the fraud.<sup>31</sup>

### b. Implied Waiver in General

The lien of a pledgee may be waived or lost by any conduct on his part which is inconsistent with a claim of the lien.

The lien of a pledgee may be impliedly waived or lost by any conduct on his part which is inconsistent with a claim of the lien,<sup>32</sup> such as by a confusion by him of claims secured by the pledge with others unsecured, so that it is impossible to tell the amount for which he has a lien,<sup>33</sup> by any act short of a voluntary release of the pledge by which he acquiesces in the acquirement by third persons of an interest in the property<sup>34</sup> or by which he disregards his rights under the pledge and intentionally seeks to obtain a lien on the property by other means for himself<sup>35</sup> or his assignee.<sup>36</sup> Moreover, a refusal by the pledgee of a tender of the amount due on the obligation the pledge is given to secure may also extinguish the lien,<sup>37</sup> provided the tender is made in good faith and the refusal thereof is without just or reasonable cause.<sup>38</sup>

A waiver or loss of the pledge lien will not be implied from any act or conduct on the part of the pledgee which is not inconsistent with the claiming of the lien,<sup>39</sup> such as by his unsuccessfully contend-

19. U.S.—Fidelity Nat. Bank & Trust Co. of Kansas City v. Southern United Ice Co., C.C.A.Mo., 78 F.2d 438.

Tenn.—Nickey Bros. v. Lonsdale Mfg. Co., 257 S.W. 408, 149 Tenn. 1, 31 A.L.R. 1383.

20. La.—Calhoun v. David Burk Co., App., 153 So. 568.  
49 C.J. p 930 note 85.

21. Tex.—Fidelity Trust Co. v. Fowler, Civ.App., 217 S.W. 953.  
49 C.J. p 930 note 86.

22. Ill.—McConnell v. Hodson, 7 Ill. 640.

23. N.Y.—Paterson First Nat. Bank v. National Broadway Bank, 51 N.E. 398, 156 N.Y. 459, 42 L.R.A. 139.  
49 C.J. p 930 note 89.

24. Mass.—Briggs v. Rice, 130 Mass. 50.  
49 C.J. p 930 note 90.

25. Tenn.—Memphis Bethel v. Continental Nat. Bank, 45 S.W. 1072, 101 Tenn. 130.

Va.—Fischer v. Lee, 35 S.E. 441, 98 Va. 159.

26. Ill.—Corning v. Bridgewater Gas Co., 100 Ill.App. 221.

Pa.—In re Dyotts, 2 Watts & S. 463.  
Discharge of lien by payment see infra § 46.

27. Tenn.—Arendale v. Morgan, 5 Sneed 703.

28. Tenn.—Arendale v. Morgan, supra.  
Surrender of possession as loss of lien generally see infra subdivision e of this section.

29. Pa.—In re Dyotts, 2 Watts & S. 463.

30. Ark.—Taylor v. Judsonia Mercantile Co., 19 S.W. 1065, 56 Ark. 461.  
49 C.J. p 931 note 97.

31. U.S.—Easton v. Hodges, C.C. Wis., 18 F. 677.

32. U.S.—Detroit Trust Co. v. First Nat. Bank-Detroit, D.C.Mich., 7 F.Supp. 117.  
49 C.J. p 931 note 99.

33. Ill.—Union Trust Co. v. Trumbull, 27 N.E. 24, 137 Ill. 146.

34. N.Y.—McDonald v. Grant, 34 N.Y.S. 988, 69 N.Y.St. 48.  
49 C.J. p 931 note 2.

35. Wash.—Everett First Nat. Bank v. Neilsen, 159 P. 113, 92 Wash. 84.  
49 C.J. p 931 note 3.

36. Mass.—Whitaker v. Sumner, 20 Pick. 399.

37. Cal.—Latta v. Tutton, 54 P. 844, 122 Cal. 279, 68 Am.S.R. 30.  
49 C.J. p 931 note 5.

38. Tex.—Malone v. Wright, 26 S.W. 420, 90 Tex. 50.

39. La.—Dickson Ice Cream Co. v. Knight, 149 So. 439, 177 La. 735.  
49 C.J. p 931 note 7.



ing that the equity of redemption has been extinguished<sup>40</sup> or by his releasing a lien on other property,<sup>41</sup> or by his making use of other security toward the payment of his debt<sup>42</sup> except where the debt is thereby discharged.<sup>43</sup>

There is, furthermore, no waiver or release of the lien by a modification of the pledge contract which does not destroy it or render its performance impossible,<sup>44</sup> by the pledgee's consent that a certain portion of the proceeds of the pledged property be applied to a purpose other than to the payment of the debt owing to him by the pledgor,<sup>45</sup> by a failure to present the principal obligation for payment within a reasonable time,<sup>46</sup> by the pledgee's acceptance of the pledgor's assignment or surrender of the property for the benefit of creditors,<sup>47</sup> by his release of the principal obligation, where his rights to the pledged property are expressly reserved,<sup>48</sup> or by the fact that the pledgor has become insolvent and the pledgee has filed claim for the full amount of the debt.<sup>49</sup>

**Conversion.** A conversion of the pledged property by the pledgee releases his lien<sup>50</sup> unless the pledgor waives the tort by electing to treat the conversion as authorized.<sup>51</sup>

#### c. Extension of Time for Payment of Debt

While a pledgee's lien on collateral may not be released by an extension of time for the payment of the original debt, an extension of time may release collateral of a third person.

While a pledgee's lien on collateral may not be

released by an extension of time for the payment of the original debt,<sup>52</sup> such as by the giving of a renewal note for the one secured by the pledge, as discussed infra § 28, an extension of time for the payment of the principal obligation may release collateral of a third person pledged to secure the debt, if the extension is made without his notice and consent,<sup>53</sup> unless the pledgee had no notice that the collateral did not belong to the borrower.<sup>54</sup>

#### d. Resort to Other Remedy

Various remedies resorted to by the pledgee to enforce the original obligation owing to him by the pledgor have been held not to constitute a waiver by the pledgee of his lien on the pledged property.

The lien of a pledge is not waived by a suit on the original debt or obligation by the pledgee against the pledgor,<sup>55</sup> or, as discussed infra § 28, by a change of the evidence of the debt from a simple contract to a judgment. A pledgee's lien on the pledged property also is not waived by the pledgee's attempting to file his claim with the pledgor's assignee in bankruptcy,<sup>56</sup> nor is it waived by an invalid private sale of the pledged property.<sup>57</sup> Although the arrest or imprisonment of the debtor under an execution for the debt has been held not to waive the pledgee's lien,<sup>58</sup> such imprisonment has been held to suspend the pledgee's right to enforce the pledge, since the imprisonment is a satisfaction of the judgment while it lasts.<sup>59</sup>

**Attachment or execution.** While it has been held that a pledgee's lien is not waived by an attach-

Although pledgee knows of assignment, an assignment by the pledgor of his interest in the pledged property to a third person does not, without the pledgee's consent, release the latter's lien on the property.—Horton v. McCafferty, 84 P. 733, 42 Wash. 221.

40. Neb.—Wilkins v. Redding, 97 N. W. 233, 70 Neb. 182.

41. Mo.—Wolff v. Famous Mut. Sav. Fund, etc., Assoc., 67 Mo.App. 678. 49 C.J. p 931 note 9.

42. Ky.—Weischopt v. Newman, 65 S.W. 808, 24 Ky.Law 36. 49 C.J. p 932 note 10.

43. Ga.—Ober, etc., Co. v. Drane, 32 S.E. 371, 106 Ga. 406. 49 C.J. p 932 note 11.

Discharge of lien by payment generally see infra § 46.

44. Ala.—Minge v. Clark, 69 So. 421, 193 Ala. 447.

45. La.—Dickson Ice Cream Co. v. Knight, 149 So. 439, 177 La. 735.

**Application to another loan.**

Pledgee of rent notes did not surrender pledge when he consented that certain portion of payments

should be applied otherwise than to payment of indebtedness to him where he consented that portion of monthly payments should be paid to lender, to facilitate loan transaction, and lender subsequently took over leased premises in satisfaction of debt, so that pledgee properly retained remaining unpaid rent notes in pledge to secure pledgor's indebtedness.—Dickson Ice Cream Co. v. Knight, supra.

46. N.Y.—Reynolds v. Doyle, 211 N.Y.S. 509, 125 Misc. 778.

47. La.—Blouin v. Hart, 30 La. Ann. 714.

48. Mass.—Beacon Trust Co. v. Robbins, 53 N.E. 868, 173 Mass. 261.

49. U.S.—Carey v. McMillan, C.C.A. Iowa, 289 F. 380.

50. U.S.—Union Pac. R. Co. v. Schiff, C.C.N.Y., 78 F. 216, affirmed 86 F. 1023, 30 C.C.A. 503.

Cal.—Bixby v. Crafts, 53 P. 404, 6 Cal.Unrep.Cas. 12.

Conversion of pledged property in general see infra §§ 35–38.

51. Cal.—Bixby v. Crafts, supra.

52. Neb.—Omaha First Nat. Bank v. Goodman, 79 N.W. 1062, 53 Neb. 701.

49 C.J. p 932 note 21.

53. Ind.—Owen County State Bank v. Guard, 26 N.E.2d 395, 217 Ind. 75.

Miss.—Corpus Juris cited in Hederman v. Cox, 193 So. 19, 188 Miss. 21.

49 C.J. p 932 note 23.

54. Ind.—Eberhart v. Eyre-Shoemaker, Inc., 134 N.E. 227, 78 Ind. App. 658.

55. Iowa.—McLaughlin-Gormley-King Co. v. Hauser, 191 N.W. 880, 195 Iowa 224.

49 C.J. p 932 note 26.

56. Cal.—Perry v. Parrott, 67 P. 144, 135 Cal. 238.

57. Cal.—Brittan v. Oakland Sav. Bank, 57 P. 84, 124 Cal. 282, 71 Am.S.R. 58.

58. Me.—Smith v. Strout, 63 Me. 205.

N.H.—Morse v. Woods, 5 N.H. 297.

59. N.Y.—Wakeman v. Lyons, 9 Wend. 241—Sunderland v. Loder, 5 Wend. 58.

ment or execution levied on the property pledged at the instance of the pledgee for the purpose of enforcing his lien,<sup>60</sup> it has also been held that such procedure on the part of the pledgee may constitute a waiver or abandonment of his lien,<sup>61</sup> and estop him to assert any lien other than the lien of the attachment<sup>62</sup> unless such attachment is made by the pledgee to prevent his being fraudulently deprived of his lien by the pledgor.<sup>63</sup> A pledgee does not waive his lien on the pledged property by attaching other property of the pledgor in an action against him for debt,<sup>64</sup> nor does a pledgee's issuance of a landlord's warrant to seize property in his possession as a pledge constitute a waiver of his lien as pledgee.<sup>65</sup>

### e. Loss of Possession

The lien of a pledgee may be waived or lost by his abandonment of the pledged property or by his voluntary and unconditional surrender or relinquishment of possession of the property.

Since, as discussed supra §§ 19, 20, the lien of a pledgee is dependent on his possession of the pledged property, the lien may be waived or lost by his abandonment of the property,<sup>66</sup> or by his voluntary and unconditional surrender or relinquishment of possession of the property<sup>67</sup> to a person claiming possession thereof,<sup>68</sup> or by his voluntary relinquish-

ment of its possession to the pledgor,<sup>69</sup> even though such relinquishment is under restrictions as to the use of the property by the pledgor,<sup>70</sup> or under an agreement that the articles relinquished are to remain the pledgee's property.<sup>71</sup> Moreover, this rule has been held to apply even where the voluntary surrender of possession by the pledgee is induced by a misconception of his rights, for want of correct information.<sup>72</sup> So the lien of a pledgee may be waived by a surrender of possession of the property to another creditor of the pledgor<sup>73</sup> or to a purchaser from him<sup>74</sup> unless such surrender is made under an agreement for the retention of the pledgee's lien.<sup>75</sup>

A pledgee, on the other hand, may not lose his rights in the pledged property where he consents that, for a limited time or for a specific purpose, the property be placed in the hands of another person.<sup>76</sup> So, it has been held that a pledgee does not, as against the pledgor, lose possession of the property by making a subpledge of it,<sup>77</sup> and that he does not lose his lien by hiring or lending the property to persons other than the pledgor.<sup>78</sup> Also, a pledgee's delivery of possession of the pledged property to the wife of the pledgor as the agent of the pledgee has been held not to defeat his lien because of the status of husband and wife,<sup>79</sup> even though the property is

60. Ky.—Guenther v. Cary, 34 S.W. 232, 17 Ky.Law 1262.  
49 C.J. p 932 note 30.

61. Mass.—Perivoliotis v. Eveleth, 146 N.E. 724, 251 Mass. 444, 446.  
49 C.J. p 932 note 31.

62. Pa.—Eagle, Inc. v. Kunkle, 122 A. 276, 278 Pa. 190.

63. U.S.—Marshall v. Otto, C.C.Nev., 59 F. 249.  
49 C.J. p 932 note 33.

64. Iowa.—McLaughlin-Gormley-King Co. v. Hauser, 191 N.W. 880, 195 Iowa 224.

65. Pa.—Eagle, Inc. v. Kunkle, 122 A. 276, 278 Pa. 190.

66. N.Y.—Black v. Bogert, 65 N.Y. 601.

67. U.S.—Manufacturers Acceptance Corporation v. Hale, C.C.A.Tenn., 65 F.2d 76.

Minn.—Goemmel v. Heesch, 4 N.W. 2d 104, 212 Minn. 424—Combs v. Tuchselt, 24 Minn. 423.

N.D.—Congress Candy Co. v. Farmer, 12 N.W.2d 796, 73 N.D. 174, 150 A.L.R. 1316.

Tex.—Central Nat. Bank v. Latham & Co., Civ.App., 22 S.W.2d 765, error refused.

Vt.—Vermont Evaporator Co. v. Taft, 181 A. 100, 107 Vt. 400.

68. Okl.—City Nat. Bank v. Lewis, 178 P. 237, 73 Okl. 329.

69. U.S.—Manufacturers Acceptance Corporation v. Hale, C.C.A.Tenn., 65 F.2d 76.

Ky.—Corpus Juris cited in Liberty Nat. Bank & Trust Co. v. Louisville Trust Co., 175 S.W.2d 524, 527, 295 Ky. 825.

La.—Wells v. Dean, 29 So.2d 590, 211 La. 132.

N.Y.—McCoy v. American Express Co., 171 N.E. 749, 253 N.Y. 477, reargument denied 178 N.E. 861, 254 N.Y. 550.

Or.—Buckman v. Hill Military Academy, 189 P.2d 575, 182 Or. 621.

Vt.—Jennings v. Gallagher, 152 A. 802, 103 Vt. 169.  
49 C.J. p 933 note 41.

In absence of fraud or special bailment, voluntary and unconditional surrender of pledged property by pledgee to pledgor, waives pledge.—Kellogg-Mackay Co. v. O'Neal, 177 N.E. 778, 39 Ohio App. 372.

#### Deposit in name of pledgor

Pledgee's deposit of pledged bonds with bank in name of pledgor subject to withdrawal by pledgor has been held to extinguish pledge and render bonds subject to seizure by other creditors of pledgor.—Bacher v. Krauss, La.App., 159 So. 766.

As against good-faith purchaser for value, where alleged pledgee of article permits it to remain in pledgor's sales room after discover-

ing that it has been returned to sales room, the pledgee has been held to abandon or relinquish his right as pledgee.—Goemmel v. Heesch, 4 N.W.2d 104, 212 Minn. 424.  
70. Mass.—Walker v. Staples, 5 Allen 84.

71. Cal.—Salinas City Bank v. Graves, 21 P. 732, 734, 79 Cal. 192.

72. Tenn.—Mills v. Stewart, 5 Humphr. 308.

73. Pa.—Denniston v. Hill, 34 A. 452, 173 Pa. 633.

49 C.J. p 933 note 46.

74. Mo.—Cochrane v. Pickton First State Bank, 201 S.W. 572, 198 Mo. App. 619.

49 C.J. p 933 note 47.

75. N.Y.—Thalman v. Capron Knitting Co., 91 N.Y.S. 520, 100 App.Div. 247, affirmed 74 N.E. 1126, 182 N.Y. 525.

76. La.—Muse v. Hill, App., 42 So. 2d 919—Foote v. Sun Life Assur. Co. of Canada, App., 173 So. 477. Delivery to pledgor for special purpose see infra subdivision f of this section.

77. La.—Meyer v. Moss, 34 So. 332, 110 La. 132.

78. Ill.—Cooper v. Ray, 47 Ill. 53.

79. Or.—Perry v. Gore, 56 P.2d 1142, 153 Or. 441.

not removed from the dwelling house of the pledgor and his wife<sup>80</sup> but is left in the possession of the wife and stored in a separate room of the house,<sup>81</sup> and although the pledgor performs certain acts with respect to the property in order to preserve the pledge.<sup>82</sup>

**Involuntary surrender or loss.** The lien of a pledgee may not be extinguished by an involuntary surrender of the pledged property by him.<sup>83</sup> So a pledgee's lien is not extinguished where he surrenders the property pursuant to a court order directing him to do so,<sup>84</sup> nor is he divested of his lien by the taking of the property out of his possession under the levy of an execution<sup>85</sup> or other legal process<sup>86</sup> against the pledgor, and even a purchaser at a sheriff's sale takes subject to the pledgee's rights.<sup>87</sup> Moreover, the lien of a pledgee is not lost on the pledgor's obtaining possession of the property by fraud<sup>88</sup> or other wrongful act,<sup>89</sup> even though it is sold by the pledgor to a bona fide purchaser.<sup>90</sup> So also the lien is not lost by the pledgee's being deprived of the possession of the property by the wrongful act of an agent<sup>91</sup> or of a third person.<sup>92</sup>

**Surrender to receiver by fiduciary.** Where the pledged property is placed in the hands of a trustee

for the creditor, a delivery by him of a key to the warehouse in which the property is stored, to a receiver for the pledgor, does not destroy the pledgee's lien unless he authorized or ratified such delivery;<sup>93</sup> for, where the property is delivered to a receiver of the pledgor, his possession as officer of the court is possession of the court which appointed him, and is in the custody of the law, to be held for those ultimately entitled, and therefore his possession is not adverse to that of the pledgee.<sup>94</sup>

#### f. Delivery to Pledgor for Special Purpose

- (1) In general
- (2) For sale or other disposition

##### (1) In General

The delivery of the property by the pledgee to the pledgor for merely a temporary, limited, or special purpose ordinarily does not divest the pledgee's lien. The pledgee's lien would be lost as against bona fide purchasers for value from the pledgor while in such temporary possession, without notice of the pledgee's rights.

The delivery of the property by the pledgee to the pledgor for merely a temporary, limited, or special purpose,<sup>95</sup> as, for example, for some temporary use<sup>96</sup> or for the performance of some work on it,<sup>97</sup> does not divest the pledgee's lien as against the pledgor or his attaching creditors;<sup>98</sup> and the fact

#### Reason for rule

Possession of pledge by wife was not possession by husband, common-law disabilities of wife having been abolished.—Perry v. Gore, *supra*.

80. Or.—Perry v. Gore, *supra*.

81. Or.—Perry v. Gore, *supra*.

82. Or.—Perry v. Gore, *supra*.

83. Ky.—Liberty Nat. Bank & Trust Co. v. Louisville Trust Co., 175 S. W.2d 524, 295 Ky. 825.

84. Ky.—Liberty Nat. Bank & Trust Co. v. Louisville Trust Co., *supra*.

85. Ark.—Umsted Auto Co. v. Henderson Auto Co., 207 S.W. 437, 137 Ark. 40.

49 C.J. p 934 note 59.

86. Iowa.—Gunsel v. McDonnell, 25 N.W. 759, 67 Iowa 521.

87. Pa.—Reichenbach v. McKean, 95 Pa. 432.

88. Vt.—Jennings v. Gallagher, 152 A. 802, 103 Vt. 169.

49 C.J. p 933 note 49.

89. Vt.—Jennings v. Gallagher, *supra*.

49 C.J. p 933 note 50.

Possession held not obtained wrongfully or surreptitiously  
Minn.—Goembel v. Heesch, 4 N.W. 2d 104, 212 Minn. 424.

90. Ala.—American Pig Iron Storage Warrant Co. v. German, 28 So. 603, 126 Ala. 194, 85 Am.S.R. 21.

91. N.Y.—Mechanics', etc., Bank v. Farmers', etc., Nat. Bank, 60 N.Y. 40.

49 C.J. p 933 note 52.

92. Cal.—Yokohama Specie Bank v. Trans-Oceanic Co., 202 P. 346, 54 Cal.App. 533.

49 C.J. p 933 note 53.

93. U.S.—Manufacturers', etc., Nat. Bank v. Gilman, C.C.A.Mass., 7 F. 2d 94.

49 C.J. p 934 note 54.

94. U.S.—Manufacturers', etc., Nat. Bank v. Gilman, *supra*.

49 C.J. p 934 note 55.

95. U.S.—Manufacturers Acceptance Corporation v. Hale, C.C.A.Tenn., 65 F.2d 76—In re Alday Motor Co., D.C.Tenn., 50 F.2d 228, reversed on other grounds, C.C.A., Hamilton Nat. Bank v. McCallum, 58 F. 2d 912, certiorari denied Scott v. Hamilton Nat. Bank, 53 S.Ct. 19, 237 U.S. 619, 77 L.Ed. 537—First Nat. Bank v. Hall, D.C.Me., 18 F. Supp. 44.

Ind.—Fletcher American Nat. Bank v. Federal Securities Co., 163 N. E. 599, 94 Ind.App. 379.

La.—Wells v. Dean, 29 So.2d 590, 211 La. 132—Muse v. Hill, App., 42 So. 2d 919—Foote v. Sun Life Assur. Co. of Canada, App., 178 So. 477.  
N.Y.—McCoy v. American Express Co., 171 N.E. 749, 253 N.Y. 477, re-

argument denied 173 N.E. 861, 254 N.Y. 550.

Vt.—Jennings v. Gallagher, 152 A. 802, 103 Vt. 169.

49 C.J. p 934 note 63.

Possession by pledgor as agent of pledgee generally see *supra* § 19.

#### Deposit in safety deposit boxes

Pledgee does not forfeit its rights to property which bank pledged as security for deposits because of the deposit of such property in safety deposit boxes of the bank where the property may not be removed from the boxes by the bank, its officers, or employees, and it may be removed only by designated officials of the pledgee.—Hood v. Board of Financial Control, 164 S.E. 331, 203 N. C. 119.

96. Ind.—New Albany Nat. Bank v. Brown, 114 N.E. 486, 489, 63 Ind. App. 391.

49 C.J. p 934 note 64.

#### Purpose held not temporary

Minn.—Goembel v. Heesch, 4 N.W.2d 104, 212 Minn. 424.

97. Cal.—Waldie v. DoH, 29 Cal. 555.

Ind.—New Albany Nat. Bank v. Brown, 114 N.E. 486, 63 Ind.App. 391.

49 C.J. p 934 note 65.

98. Ind.—New Albany Nat. Bank v. Brown, *supra*.

49 C.J. p 934 note 67.

that the pledgor incurred debts after the return to him of the pledge, through mutual mistake, does not prevent a reinstatement of the pledge where it does not appear that any of the creditors had knowledge of the pledged property.<sup>99</sup> In such cases the pledgor may be regarded as holding the pledged property as trustee for the pledgee,<sup>1</sup> and, on the accomplishment of the special purpose, the pledgee may recover the property from the pledgor if he refuses to redeliver it.<sup>2</sup> However, the pledgee's lien would be lost in such cases as against bona fide purchasers for value from the pledgor while in such temporary possession, without notice of the pledgee's right.<sup>3</sup>

**For collection.** A redelivery by the pledgee of collateral security to the pledgor for collection only ordinarily does not divest the pledgee's lien as against the pledgor.<sup>4</sup> However, where a pledgor of notes as collateral security takes them back from the pledgee for convenience of collection, under an agreement that he will on demand return the same notes to the pledgee or replace them with others of the same amount, the special property of the pledgee has been held not to attach to money received by the pledgor in payment of the notes,<sup>5</sup> and if other notes are not in fact substituted for the pledged notes when collected, and no particular notes were by the agreement specified to be used in such substitution, the pledge has been held to fail.<sup>6</sup>

## (2) For Sale or Other Disposition

Where the pledgee surrenders the possession of the pledged property to the pledgor for the sole purpose of having it sold, or otherwise disposed of, for the benefit of the pledge and the proceeds applied on the secured debt, he does not thereby lose his lien.

Where the pledgee surrenders the possession of the pledged property to the pledgor for the sole purpose of having it sold for the benefit of the pledge and the proceeds applied on the secured debt, he does not thereby lose his lien.<sup>7</sup> Moreover, the same rule applies where such delivery is for the purpose of a lease for the pledgee's benefit,<sup>8</sup> or for pledge to another creditor of the pledgor, to be returned to the first pledgee when it has performed this function.<sup>9</sup> Where, however, the pledgee voluntarily surrenders the property to the pledgor to dispose of for himself, on the mere promise that the indebtedness will be paid from a sale of the pledge, the pledgee's lien will be lost, since under such circumstances the property passes into the possession of the pledgor as general owner.<sup>10</sup>

**Sale with pledgee's consent.** A sale of pledged property and delivery to the purchaser with the pledgee's consent constitutes a waiver of the pledgee's lien as against the purchaser,<sup>11</sup> and the purchaser is under no duty of seeing that the proceeds of the sale are paid to the pledgee.<sup>12</sup>

**Substitution.** A redelivery of the property to the pledgor for the purpose of having it exchanged

99. U.S.—*In re Smith-Flynn Commn. Co.*, C.C.A.Minn., 292 F. 465.

1. Mont.—*Ainsworth v. Kruger*, 260 P. 1055, 80 Mont. 468.

2. Ill.—*Colburn v. Commercial Security Co.*, 172 Ill.App. 510.

3. Minn.—*Clark v. Corser*, 191 N.W. 917, 154 Minn. 508.  
49 C.J. p 934 note 71.

4. U.S.—*Manufacturers Acceptance Corporation v. Hale*, C.C.A.Tenn., 65 F.2d 76.

Hawaii.—*Merchants Collection Agency v. Mitchell*, 32 Hawaii 343.  
N.C.—*Bundy v. Commercial Credit Co.*, 163 S.E. 676, 202 N.C. 604.  
49 C.J. p 934 note 72.

5. Vt.—*Samson v. Rouse*, 48 A. 666, 72 Vt. 422.

6. Vt.—*Samson v. Rouse*, *supra*.

7. U.S.—*Harrison v. Merchants Nat. Bank of Fort Smith*, C.C.A. Ark., 124 F.2d 871—*Manufacturers Acceptance Corporation v. Hale*, C.C.A.Tenn., 65 F.2d 76—*In re Alday Motor Co.*, D.C.Tenn., 50 F.2d 228, reversed on other grounds, C.C.A., *Hamilton Nat. Bank v. McCallum*, 58 F.2d 912, certiorari denied *Scott v. Hamilton Nat. Bank*, 53 S.Ct. 19, 287 U.S. 619, 77 L.Ed.

537—*First Nat. Bank v. Hall*, D.C. Mo., 18 F.Supp. 44.  
49 C.J. p 935 note 75.

### Permission to ship on purchase orders

Where bank to which chattels were pledged, pursuant to the pledge agreement, permitted pledgor to ship the chattels on purchase orders given by third person, and chattels were in possession of warehouse for the bank, waiver or release of the pledge lien did not result, since a pledgee may employ pledgor as his agent to sell the pledged chattels, and does not lose his lien by allowing pledgor to contract in his own name for their sale, or by delivering the chattels on pledgor's order to the purchaser.—*Harrison v. Merchants Nat. Bank of Fort Smith*, C.C.A.Ark., 124 F.2d 871.

### Innocent third person

Where pledgee surrendered possession of pledged property to pledgor for shipment to a purchaser who was directed to pay the price directly to the pledgee, a bank which was a party to an agreement whereby the money was to take the place of the goods, and was bound to apply the money in accordance with

such agreement on a note which the pledgee had indorsed for the pledgor, did not stand in the position of an innocent third person in receiving the proceeds of the goods.—*First Nat. Bank v. Hall*, D.C.Me., 18 F. Supp. 44.

8. Cal.—*Palmtag v. Dautrick*, 59 Cal. 154, 48 Am.R. 245.

Ind.—*New Albany Nat. Bank v. Brown*, 114 N.E. 486, 489, 63 Ind. App. 391.

9. La.—*New Albany Nat. Bank v. Brown*, *supra*—*Cahn v. Ford*, 3 So. 477, 42 La. Ann. 965.

10. U.S.—*In re Alday Motor Co.*, D.C.Tenn., 50 F.2d 228, reversed on other grounds, C.C.A., *Hamilton Nat. Bank v. McCallum*, 58 F.2d 912, certiorari denied *Scott v. Hamilton Nat. Bank*, 53 S.Ct. 19, 287 U.S. 619, 77 L.Ed. 537.  
49 C.J. p 935 note 78.

11. Okl.—*First State Bank of Audubon, Iowa, v. Collins-Dietz-Morris Co.*, 123 P.2d 957, 190 Okl. 409.  
49 C.J. p 935 note 79.

12. Tex.—*Lumberman's Nat. Bank v. Bush, etc., Co.*, Civ.App., 247 S.W. 295.

for other property to be held in pledge does not affect the pledgee's lien which will subsist on the substituted property.<sup>13</sup> So, where a pledgee disposes of the goods pledged, and delivers to a purchaser from the pledgor substituted goods of the same quality and value, the purchaser who takes the goods with knowledge of the lien of the pledgee may not set up the conversion as a defense in an action by the latter to recover the amount of his lien.<sup>14</sup>

## § 28. Persons, Debts, and Liabilities Secured

- a. Persons secured
- b. Debts or liabilities secured
- c. Evidence as to persons and debts or liabilities secured

### a. Persons Secured

The terms of the contract control as to the particular person or persons secured by a pledge.

The terms of the contract, as construed by the general rules of construction, control as to the particular person or persons secured by a pledge.<sup>15</sup> A pledge given to secure a particular debt ordinarily will protect not only the immediate pledgee, but also others entitled to the debt.<sup>16</sup>

### b. Debts or Liabilities Secured

#### (1) In general

13. U.S.—Manufacturers Acceptance Corporation v. Hale, C.C.A.Tenn., 65 F.2d 76.
- 49 C.J. p 935 note 81.
14. N.Y.—Carrington v. Ward, 71 N.Y. 360.
15. Wyo.—Corpus Juris quoted in Bradburn v. Wyoming Trust Co. of Casper, 63 P.2d 792, 796, 51 Wyo. 73.
- 49 C.J. p 936 note 85.
- Debts of other person or of same person in different capacity see infra subdivision b (6) of this section.
16. Wyo.—Corpus Juris quoted in Bradburn v. Wyoming Trust Co. of Casper, 63 P.2d 792, 796, 51 Wyo. 73.
- 49 C.J. p 936 note 86.
17. Mich.—State v. Grand Rapids Sav. Bank, 7 N.W.2d 220, 304 Mich. 55.
18. U.S.—Brotherhood of Locomotive Engineers Securities Corporation of New York v. W. L. Shepherd Lumber Co., C.C.A.Fla., 51 F.2d 153.
- Ky.—National Bank of Kentucky v. Gallagher, 49 S.W.2d 1006, 243 Ky. 740.

- Pa.—Heffner v. First Nat. Bank, 166 A. 370, 311 Pa. 29, 87 A.L.R. 610.
- Wis.—Corpus Juris quoted in Matz v. Farmers & Citizens Bank of Sauk City, Wis., 261 N.W. 755, 757, 218 Wis. 613.
- Wyo.—Corpus Juris quoted in Bradburn v. Wyoming Trust Co. of Casper, 63 P.2d 792, 796, 51 Wyo. 73.
- 49 C.J. p 936 note 88.
- Negotiability of note does not affect indebtedness to which collateral is applicable.—In re Haynsworth, 34 F.2d 334, affirmed in part and reversed in part on other grounds, C.C.A., Jones v. Kendall, D.C.S.C., 34 F.2d 344.
- Contingent Liability
- Collateral does not secure a contingent liability unless intention to have such obligation secured is clearly indicated.—Potter Title & Trust Co. v. Berkshire Life Ins. Co., 39 A.2d 268, 156 Pa.Super. 1.
19. Ky.—Corpus Juris cited in National Bank of Kentucky v. Gallagher, 49 S.W.2d 1006, 1007, 243 Ky. 740.
- Md.—Mattingly Lumber Co. v. Equitable Building & Savings Ass'n of

- (2) Agreement of parties changing debt secured or terms thereof
- (3) Pledge to secure general indebtedness
- (4) Interest
- (5) Renewal of note or other alteration in form of evidence of debt
- (6) Debts of other person or of same person in different capacity

#### (1) In General

The question as to what debts or liabilities are secured by a pledge is determined by the agreement between the pledgor and the pledgee, where the agreement is unambiguous; and the intention of the parties, as gathered from the entire transaction between them, is controlling.

The question as to what debts or liabilities are secured by a pledge is determined by the agreement between the pledgor and the pledgee, where the agreement is unambiguous;<sup>17</sup> the intention of the parties, as gathered from the entire transaction between them, is controlling;<sup>18</sup> and where the contract, prepared by the pledgee, is not clear as to whether the collateral pledged shall secure a particular indebtedness, it should be construed in favor of the pledgor.<sup>19</sup>

Where the contract shows that the collateral or property is pledged as security for a specific debt or liability, the pledgee has no lien on it for other purposes, such as for a general balance, for a running account, or for the payment of other claims;<sup>20</sup>

- Baltimore City, 5 A.2d 458, 176 Md. 403.
- Mich.—Perron v. First Nat. Bank, 286 N.W. 859, 289 Mich. 629.
- Pa.—New Bethlehem Trust Co. v. Spindler, 172 A. 309, 315 Pa. 250—Heffner v. First Nat. Bank, 166 A. 370, 311 Pa. 29, 87 A.L.R. 610.
- Wis.—Corpus Juris quoted in Matz v. Farmers & Citizens Bank of Sauk City, Wis., 261 N.W. 755, 757, 219 Wis. 613.
- Wyo.—Corpus Juris quoted in Bradburn v. Wyoming Trust Co. of Casper, 63 P.2d 792, 796, 51 Wyo. 73.
- 49 C.J. p 936 note 89.
20. U.S.—State of Arkansas v. Pufahl, C.C.A.Ark., 52 F.2d 116—Harris v. Commodity Credit Corporation, D.C.Ark., 47 F.Supp. 681.
- Ark.—Union Trust Co. v. Pochontas Special School Dist., 76 S.W.2d 60, 189 Ark. 1019.
- Cal.—Farmers' & Merchants' Nat. Bank of Los Angeles v. Stowell, 44 P.2d 392, 6 Cal.App.2d 373.
- Colo.—Corpus Juris cited in Horton v. McPerson, 30 P.2d 256, 258, 94 Colo. 361.
- Ky.—National Bank of Kentucky v.

and therefore the collateral or property so pledged ordinarily, may not be appropriated by the pledgee to any other debt or liability of the pledgor,<sup>21</sup> regardless of his insolvency,<sup>22</sup> or unless the pledgor consents to such an appropriation of the property,<sup>23</sup> or the facts give rise to a just presumption that such was the intention of the parties.<sup>24</sup>

A pledge made to secure future advances may not be held for a previous obligation of the pledgor,<sup>25</sup> and the mere existence of a prior debt or obligation due to the pledgee does not authorize him to obtain the pledge for that debt if it was not contemplated in the contract.<sup>26</sup> The holder of collateral security for obligations which are unenforceable may not retain the security for other obligations.<sup>27</sup>

**Death of one pledgor.** Where two persons each deposit property to secure a past and future indebtedness, on the death of one of such pledgors the agreement that the collateral shall be held for future advances becomes inoperative,<sup>28</sup> and the property of the deceased may not be held to secure an indebtedness created subsequent to his death.<sup>29</sup>

**Charges and expenses.** The pledgee is entitled to a lien on the property, not only for the particular debt secured, but also for all lawful charges which he has paid on the property and for necessary expenses which he has incurred;<sup>30</sup> and it has been

held that, since, as discussed *infra* § 74, it is the duty of the pledgee to collect collaterals, he has the right, as discussed *infra* § 54, to pay, out of the proceeds of the collaterals collected, the reasonable expenses of such collection, including reasonable attorney's fees.

## (2) Agreement of Parties Changing Debt Secured or Terms Thereof

The pledgor may consent that property pledged as security for a particular debt shall be held by the pledgee as security for other obligations already existing or to be thereafter contracted.

The pledgor may consent that security pledged for an obligation may be retained by the pledgee notwithstanding a change in the terms of the obligation.<sup>31</sup> Also, by special agreement, the pledgor may consent that property pledged as security for a particular debt shall be held by the pledgee as security for other obligations already existing<sup>32</sup> or to be thereafter contracted.<sup>33</sup> However, only the pledgor may consent to the substitution of new obligations to be secured by the pledge,<sup>34</sup> and the pledgor is not bound by an agreement or act, to which he is not a party, attempting to make such a substitution.<sup>35</sup> Moreover, under the rule that a written agreement may not be varied or enlarged by parol, it has been held that a written contract of pledge for a specified debt may not be made to

Gallagher, 49 S.W.2d 1006, 243 Ky. 740.

N.Y.—*In re Towns Paint Co.*, 39 N.Y.S.2d 585, 179 Misc. 813—*In re Cooke's Estate*, 264 N.Y.S. 336, 147 Misc. 528.

Okl.—*First Nat. Bank v. Jackson*, 283 P. 242, 140 Okl. 282, 68 A.L.R. 900.

Pa.—*Bartram Building & Loan Ass'n of Eggleston*, 6 A.2d 508, 335 Pa. 42.

Tex.—*Leleux v. Serafino*, Civ.App., 88 S.W.2d 1100.

W.Va.—*Ferimer v. Lewis, Hubbard & Co.*, 173 S.E. 264, 114 W.Va. 629.

Wis.—*Sharpe v. First Nat. Bank*, 264 N.W. 245, 220 Wis. 506.

49 C.J. p 936 note 90.

21. Md.—*Mattingly Lumber Co. v. Equitable Building & Savings Ass'n of Baltimore City*, 5 A.2d 458, 176 Md. 403.

Mo.—*Caneer v. Kent*, 119 S.W.2d 214, 342 Mo. 878—*Turner v. Bank of Mountain View, App.*, 19 S.W.2d 19.

Pa.—*Bartram Building & Loan Ass'n v. Eggleston*, 6 A.2d 508, 335 Pa. 42—*In re Berkovitz*, 179 A. 746, 319 Pa. 397—*Heffner v. First Nat. Bank*, 166 A. 370, 311 Pa. 29, 87 A.L.R. 610—*Corpus Juris* cited in *Kelter v. American Bankers' Finance Co.*, 160 A. 127, 130, 306 Pa.

483, 82 A.L.R. 999—*Potter Title & Trust Co. v. Berkshire Life Ins. Co.*, 39 A.2d 268, 156 Pa.Super. 1—*Auto Building & Loan Ass'n v. Hall*, 177 A. 581, 117 Pa.Super. 104.

Tex.—*Leleux v. Serafino*, Civ.App., 88 S.W.2d 1100.

Wis.—*Sharpe v. First Nat. Bank*, 264 N.W. 245, 220 Wis. 506.

49 C.J. p 936 note 91.

In absence of adequate terms of appropriation, pledge to secure specific notes will not include other notes of pledgor indirectly acquired by pledgee.—*Brotherhood of Locomotive Engineers Securities Corporation of New York v. W. L. Shepherd Lumber Co.*, C.C.A.Fla., 51 F.2d 153.

22. Mo.—*Turner v. Bank of Mountain View, App.*, 19 S.W.2d 19.

49 C.J. p 937 note 92.

23. Md.—*Eichelberger v. Murdock*, 10 Md. 373, 69 Am.D. 140.

Mo.—*Wilkinson v. Misner*, 138 S.W. 931, 158 Mo.App. 551.

24. Mass.—*Jarvis v. Rogers*, 15 Mass. 389.

Tenn.—*Nashville Fourth Nat. Bank v. Stahlman*, 178 S.W. 942, 132 Tenn. 367, L.R.A.1916A 568.

25. N.Y.—*Robinson v. Frost*, 14 Barb. 536.

26. Md.—*Franklin Bank v. Harris*, 26 A. 523, 77 Md. 428.

49 C.J. p 937 note 97.

27. Mass.—*Munroe v. Stanley*, 107 N.E. 1012, 220 Mass. 438.

28. Cal.—*Andrews v. Los Angeles First Nat. Bank*, 203 P. 156, 55 Cal.App. 138.

29. Cal.—*Andrews v. Los Angeles First Nat. Bank*, *supra*.

30. N.Y.—*Union Ins. Co. v. Central Trust Co.*, 52 N.E. 671, 157 N.Y. 633, 44 L.R.A. 227.

49 C.J. p 940 note 37.

Right of pledgee to allowance for expenses see *infra* § 32.

31. Cal.—*MacDonald v. Pacific Nat. Bank of San Francisco*, 152 P.2d 360, 66 Cal.App.2d 357.

32. Cal.—*Grangers' Business Assoc. v. Clark*, 23 P. 1081, 84 Cal. 201.

49 C.J. p 937 note 3.

33. Mont.—*Ainsworth v. Kruger*, 260 P. 1055, 80 Mont. 468.

49 C.J. p 937 note 4.

34. Cal.—*Peterson v. First Nat. Bank*, 281 P. 1104, 101 Cal.App. 532.

35. Cal.—*Peterson v. First Nat. Bank*, 281 P. 1104, 101 Cal.App. 532.

cover other indebtedness by an oral agreement between the parties.<sup>36</sup>

### (3) Pledge to Secure General Indebtedness

Where the contract of pledge contains a provision showing that it is of a continuing nature and is intended to cover a general indebtedness, it may be applied to other debts or obligations of the pledgor to the pledgee.

Whether or not a contract of pledge is a continuing one should be determined by a consideration of the terms, scope, and character of the contract and the situation of the parties at the time it was executed.<sup>37</sup> Where the contract of pledge contains a provision showing that it is not intended to be limited to the particular debt or obligation existing at the time the pledge is given, but that it is of a continuing nature and is intended to cover a general indebtedness, it may be applied to other debts or obligations of the pledgor to the pledgee,<sup>38</sup> whether contracted before or after the agreement;<sup>39</sup> and this rule applies to an agreement entered into subsequent to the original agreement.<sup>40</sup>

**Limitations of rule.** The intention of the parties, especially of the pledgor, as determined by a proper construction of the provision as to general indebtedness, is the controlling element in the operation of the rule;<sup>41</sup> and accordingly a pledge containing

such a provision will secure only such other debts or liabilities of the pledgor as the terms of the pledge show it was the intention of the parties it should secure;<sup>42</sup> and will not be extended to a debt or obligation other than that intended by the pledgor,<sup>43</sup> especially where the rights of sureties or others claiming under the pledgor are involved.<sup>44</sup>

If the language of the pledge is unambiguous and plainly shows that the parties contemplated that the collateral may be held as security for all other legal obligations or liabilities, the contract will be so construed,<sup>45</sup> but if the language is ambiguous and the meaning doubtful its provisions will be limited to a restricted class of obligations presumed to have been within the contemplation of the parties when the contract was made;<sup>46</sup> and, where the pledge is on a printed form furnished by the pledgee and signed by the pledgor, any doubt arising as to its proper interpretation will be construed in favor of the pledgor.<sup>47</sup>

According to the intention of the parties, the security may be limited to other debts of the same kind as the specific debt<sup>48</sup> or to such obligations only as are held by the pledgee and on which the pledgor is liable,<sup>49</sup> or the collateral may be applied first to the specific debt and the surplus to other

36. Ky.—Hamilton v. Wagner, 2 A. K. Marsh. 331.

S.C.—National Loan, etc., Bank v. Tolbert, 124 S.E. 772, 129 S.C. 503. Admissibility of evidence to vary pledge see *infra* subdivision c of this section.

37. Pa.—Henwood v. Home Indemnity Co., 10 A.2d 848, 138 Pa. Super. 430.

38. U.S.—Brotherhood of Locomotive Engineers Securities Corporation of New York v. W. L. Shepherd Lumber Co., C.C.A.Fla., 51 F. 2d 153.

Mo.—Russell v. Empire Storage & Ice Co., 59 S.W.2d 1061, 352 Mo. 707.

N.Y.—In re Towns Paint Co., 39 N. Y.S.2d 585, 179 Misc. 813.

Okl.—Johnston v. American Finance Corporation, 79 P.2d 242, 182 Okl. 567.

Va.—Easley v. First Nat. Bank, 200 S.E. 603, 172 Va. 94.

Vt.—Schwarz v. Avery, 81 A.2d 916, 113 Vt. 175.

Wyo.—Bradburn v. Wyoming Trust Co. of Casper, 63 P.2d 792, 51 Wyo. 73.

49 C.J. p 938 note 7.

**Expressions showing intention to secure general indebtedness**

"This and all other liabilities of the undersigned to the said company due or to become due, which may hereafter be contracted or existing."

—Brotherhood of Locomotive Engineers Securities Corporation of New York v. W. L. Shepherd Lumber Co., C.C.A.Fla., 51 F.2d 153.

(2) Other expressions showing intention to secure general indebtedness see 49 C.J. p 938 note 7 [a].

**Where amount of debt not immediately ascertainable**

Where officer of association executed bond and transferred collateral to cover defalcations in his accounts and agreed to repay entire indebtedness, which was not immediately ascertainable, association could proceed against collateral, held by it for full amount due, notwithstanding amount fixed in bond was less than indebtedness thereafter determined.—Commonwealth ex rel. Flowers v. Flowers, 181 A. 485, 320 Pa. 78.

39. U.S.—Brotherhood of Locomotive Engineers Securities Corporation of New York v. W. L. Shepherd Lumber Co., C.C.A.Fla., 51 F. 2d 153.

N.Y.—In re Towns Paint Co., 39 N.Y. S.2d 585, 179 Misc. 813.

Vt.—Schwarz v. Avery, 81 A.2d 916, 113 Vt. 175.

Va.—Easley v. First Nat. Bank, 200 S.E. 603, 172 Va. 94.

Wyo.—Bradburn v. Wyoming Trust Co. of Casper, 63 P.2d 792, 51 Wyo. 73.

49 C.J. p 938 note 8.

40. Md.—Eichelberger v. Murdock, 10 Md. 373, 69 Am.D. 140.

41. Mich.—Corpus Juris cited in Perron v. First Nat. Bank, 286 N. W. 859, 861, 289 Mich. 629.

49 C.J. p 938 note 10.

42. U.S.—Jones v. Kendall, C.C.A. S.C., 34 F.2d 344.

Mich.—Corpus Juris cited in Perron v. First Nat. Bank, 286 N.W. 859, 861, 289 Mich. 629.

49 C.J. p 938 note 10.

43. U.S.—Jones v. Kendall, C.C.A. S.C., 34 F.2d 344.

Mich.—Corpus Juris cited in Perron v. First Nat. Bank, 286 N.W. 859, 861, 289 Mich. 629.

49 C.J. p 938 note 11.

44. Tenn.—Nashville Fourth Nat. Bank v. Stahlman, 178 S.W. 942, 132 Tenn. 367, L.R.A.1916A 568.

49 C.J. p 938 note 12.

45. Tenn.—Nashville Fourth Nat. Bank v. Stahlman, *supra*.

46. Mich.—Perron v. First Nat. Bank, 286 N.W. 859, 289 Mich. 629.

49 C.J. p 938 note 14.

47. N.Y.—Gillet v. Bank of America, 55 N.E. 292, 160 N.Y. 549.

49 C.J. p 938 note 15.

48. Va.—Lloyd v. Lynchburg Nat. Bank, 11 S.E. 104, 86 Va. 690.

49 C.J. p 938 note 16.

49. Neb.—Parker v. Omaha First Nat. Bank, 223 N.W. 651, 118 Neb. 96.

indebtedness;<sup>50</sup> and the provision as to general indebtedness may be restricted by a further provision as to the pledgee's power of sale and application of the proceeds.<sup>51</sup>

*Validity of provision.* A provision in a note authorizing the pledgee to hold collateral as security for a general indebtedness, if pledged for a particular debt, is valid.<sup>52</sup>

#### (4) Interest

The pledgee has the right to hold the property pledged as security for interest on an interest-bearing debt; but where a demand therefor is not made at the proper time the right thereto may be regarded as waived.

The pledgee has the right to hold the property pledged as security for interest on an interest-bearing debt.<sup>53</sup> However, where a demand therefor is not made at the proper time, the right thereto may be regarded as waived,<sup>54</sup> especially where the amount of interest is small.<sup>55</sup>

#### (5) Renewal of Note or Other Alteration in Form of Evidence of Debt

Ordinarily, pledged property may be retained and applied to the satisfaction, in any changed form, of the obligation it secures.

As a general rule, pledged property may be retained and applied to the satisfaction, in any changed form, of the obligation it secures.<sup>56</sup> Therefore, where the secured indebtedness is evidenced by a promissory note, unless it is apparent that the collateral was intended as security only for the original note,<sup>57</sup> the extension or renewal of the note does not affect the pledgee's interest in the property pledged, but it may be retained as security for the indebtedness in its new form,<sup>58</sup> especially where the pledge is of a continuing nature<sup>59</sup> and the renewal is made in the ordinary course of business.<sup>60</sup>

The rule applies even though the new note is given only for an unpaid balance on the old one,<sup>61</sup> or includes also another debt,<sup>62</sup> and although a change is inadvertently made in the form of the note on renewal.<sup>63</sup> Furthermore it has been held that the rights of the pledgee to the property are preserved by such a renewal, even though the contract of pledge is not renewed.<sup>64</sup> However, on the renewal of a note by different parties, the pledgee has no right to retain as security for the new note property of a third person, deposited as collateral for the old note, without first obtaining his consent;<sup>65</sup> and where a note is made to the order of

50. Ga.—Parks v. Savannah Bank, etc., Co., 130 S.E. 365, 34 Ga.App. 554.

49 C.J. p 939 note 18.

51. U.S.—Omaha First Nat. Bank v. Illinois Trust, etc., Co., C.C.Ill., 84 F. 34.

49 C.J. p 939 note 19.

52. Ky.—National Bank of Kentucky v. Gallagher, 49 S.W.2d 1006, 243 Ky. 740.

Mo.—Corpus Juris cited in Russell v. Empire Storage & Ice Co., 59 S.W.2d 1061, 1070, 332 Mo. 707.

N.C.—Tesh v. Rominger, 1 S.E.2d 98, 215 N.C. 52.

49 C.J. p 939 note 20.

53. U.S.—Eddy v. Prudence Bonds Corp., C.C.A.N.Y., 165 F.2d 157, certiorari denied 68 S.Ct. 664, 333 U.S. 845, 92 L.Ed. 1128—Lyon County Bank Mortg. Corporation v. Tobin, D.C.Nev., 23 F.Supp. 763, affirmed, C.C.A., 104 F.2d 435.

Md.—Perring v. Baltimore Trust Corporation, 190 A. 516, 171 Md. 618.

N.Y.—Corpus Juris cited in In re Levy's Estate, 70 N.Y.S.2d 72—In re Washburn's Will, 21 N.Y.S.2d 469, affirmed 33 N.Y.S.2d 111, 263 App.Div. 873.

Pa.—Commonwealth ex rel. Flowers v. Flowers, 181 A. 485, 320 Pa. 73.

49 C.J. p 939 note 21.

Even though loan is made without interest, collateral in possession of creditor is collateral to whole debt

and from and after demand whole debt includes interest in nature of damages.—In re Levy's Estate, 70 N.Y.S.2d 72.

54. Cal.—Kullman v. Greenebaum, 28 P. 674, 92 Cal. 403, 27 Am.S.R. 150.

55. Cal.—Kullman v. Greenebaum, supra.

56. Ind.—Hunt v. Longyear, 125 N.E. 533, 72 Ind.App. 109.

La.—Brock v. Citizens Bank & Trust Co., 175 So. 673, 187 La. 1078.

Minn.—Merrill v. Zimmerman, 188 N.W. 1019, 152 Minn. 333.

N.Y.—Lyons Nat. Bank of Lyons v. Guglielmino, 22 N.Y.S.2d 287, affirmed 26 N.Y.S.2d 509, 261 App. Div. 1039.

Any renewal of the debt ordinarily is secured by a pledge.—Union Nat. Bank v. Waters, 9 Tenn.App. 608.

57. Ind.—New Albany Nat. Bank v. Brown, 114 N.E. 486, 63 Ind.App. 391.

49 C.J. p 939 note 25.

58. Cal.—College Nat. Bank of Berkeley v. Morrison, 280 P. 218, 100 Cal.App. 403.

D.C.—Goldenberg v. Wardell, 92 F.2d 539, 67 App.D.C. 388.

Ky.—Koehler v. Hussey, 57 S.W. 241, 22 Ky.Law 317.

La.—Reconstruction Finance Corporation v. Thomson, 171 So. 553, 186 La. 1.

N.Y.—Lyons Nat. Bank of Lyons v. Guglielmino, 22 N.Y.S.2d 287, af-

firmed 26 N.Y.S.2d 509, 261 App. Div. 1039.

Pa.—Haffner v. First Nat. Bank, 166 A. 370, 311 Pa. 29, 87 A.L.R. 610—Harr v. Roth, Com.Pl., 20 Erie Co. 5.

Tenn.—Union Nat. Bank v. Waters, 9 Tenn.App. 608.

49 C.J. p 939 note 26.

Effect of extension or renewal of note as between parties as release of securities from liens generally see Bills and Notes § 281.

59. D.C.—Goldenberg v. Wardell, 92 F.2d 539, 67 App.D.C. 388.

N.Y.—Lyons Nat. Bank of Lyons v. Guglielmino, 22 N.Y.S.2d 287, affirmed 26 N.Y.S.2d 509, 261 App. Div. 1039.

49 C.J. p 940 note 27.

60. N.Y.—Merchants' Nat. Bank v. Hall, 83 N.Y. 338, 3 Am.R. 434.

61. Cal.—College Nat. Bank of Berkeley v. Morrison, 280 P. 218, 100 Cal.App. 403.

49 C.J. p 940 note 29.

62. Mass.—Cotton v. Atlas Nat. Bank, 12 N.E. 850, 145 Mass. 43.

63. Mass.—Cotton v. Atlas Nat. Bank, supra.

64. Tex.—Watson v. Dallas First State Bank, Com.App., 237 S.W. 1106, 1107.

65. Ind.—Owen County State Bank v. Guard, 26 N.E.2d 395, 217 Ind. 75.

49 C.J. p 940 note 32.



the maker and indorsed by him for a valuable consideration to another, who discounts it with a bank on a pledge of collateral, the bank has no right, at the maturity of the note, without the consent or knowledge of the person who discounted it, to accept a new note executed and indorsed by the maker of the first note for the same amount, and retain the collateral as security for the second note.<sup>66</sup>

**Judgment.** Where a judgment is recovered by the pledgee on the debt secured and such judgment is not paid, in the absence of an agreement to the contrary the judgment does not operate to release the property from the lien of the pledge, but it may be held as security for the judgment.<sup>67</sup>

#### (6) Debts of Other Person or of Same Person in Different Capacity

Where property is pledged as security for the debt of a particular debtor, unless the pledgor consents thereto, it may not be held as security for the debt of another person or for a debt of the original debtor in a different capacity.

Where property is pledged as security for the debt of a particular debtor, unless the pledgor consents thereto,<sup>68</sup> it may not be held as security for

the debt of another person<sup>69</sup> or for a debt of the original debtor in a different capacity.<sup>70</sup>

If a pledge is made to secure a joint debt of two or more persons, it does not ordinarily cover a debt of one of them individually,<sup>71</sup> nor does it cover demands against such persons jointly with others,<sup>72</sup> since it covers only liabilities similar to that of the original demand, that is, the joint liabilities of the obligors.<sup>73</sup> Property which is pledged for a debt due to an individual may not be held for a debt due to a firm of which the individual pledgee is a member.<sup>74</sup> Also, property pledged to secure a debt due by an individual ordinarily may not be applied to a debt of a partnership of which the pledgor is a member<sup>75</sup> or to an obligation owed by him and a partnership of which he is a member.<sup>76</sup>

While it has been held that, where the pledge contains a clause covering general indebtedness, it may be held to apply to a debt of the pledgor's firm to the pledgee,<sup>77</sup> and that such a clause may be sufficient to authorize the holding of the collateral pledged for the individual note of a corporate officer, as collateral for his liability as one of the officers of the corporation who individually indorsed a note of the corporation,<sup>78</sup> it has also been held that

66. N.Y.—Burnap v. Potsdam Nat. Bank, 96 N.Y. 125.

67. Cal.—Baird v. Olsheski, 2 P.2d 493, 116 Cal.App. 109.  
49 C.J. p 940 note 35.

68. Mich.—Corpus Juris quoted in Perron v. First Nat. Bank, 286 N.W. 859, 861, 289 Mich. 629.  
49 C.J. p 941 note 41.

69. U.S.—In re Haynsworth, D.C.S.C., 34 F.2d 334, affirmed in part and reversed in part on other grounds, C.C.A., Jones v. Kendall, 34 F.2d 344.

Ark.—Union Trust Co. v. Pocahontas Special School Dist., 76 S.W.2d 60, 189 Ark. 1019.

Mich.—Corpus Juris quoted in Perron v. First Nat. Bank, 286 N.W. 859, 861, 289 Mich. 629.

Pa.—Heffner v. First Nat. Bank, 166 A. 370, 311 Pa. 29, 87 A.L.R. 610.  
49 C.J. p 941 note 42.

70. U.S.—Atherton Co. v. Ives, C.C.Ky., 20 F. 894.

Mich.—Corpus Juris quoted in Perron v. First Nat. Bank, 286 N.W. 859, 861, 289 Mich. 629.

71. N.C.—Powell v. McDonald, 181 S.E. 277, 208 N.C. 436.  
49 C.J. p 941 note 44.

**Pledge for all sums for which undersigned liable**

Contract in pledgors' joint note, pledging property to secure all sums for which undersigned might be liable, did not pledge one pledgor's property for other pledgor's indi-

vidual debt, although such contract was sufficient to pledge each pledgor's stock for his own debts.—National Bank of Kentucky v. Gallagher, 49 S.W.2d 1006, 243 Ky. 740.

72. U.S.—In re Haynsworth, D.C.S.C., 34 F.2d 334, affirmed in part and reversed in part on other grounds, C.C.A., Jones v. Kendall, 34 F.2d 344.

**Provisions for application of residue**

Where joint and several note pledged maker's collateral to secure "any other . . . liabilities to . . . holder," holder could not apply collateral to other notes made jointly by comaker with others than maker, notwithstanding provisions for application of residue to any of "said liabilities," and for "like lien" on any other property in holder's hands.—Heffner v. First Nat. Bank, 166 A. 370, 311 Pa. 29, 87 A.L.R. 610.

73. Pa.—Heffner v. First Nat. Bank, supra.

74. U.S.—Sparhawk v. Drexel, C.C.Pa., 22 F.Cas.No.13,204, 1 Wkly.N.C. 560.

75. N.Y.—Fullerton v. Chatham Nat. Bank, 40 N.Y.S. 874, 17 Misc. 529.  
Tex.—Corpus Juris cited in McCamery v. First Nat. Bank of Wichita Falls, Civ.App., 75 S.W.2d 910, 914.

76. Pa.—New Bethlehem Trust Co. v. Spindler, 172 A. 309, 315 Pa. 250.—Heffner v. First National Bank of Huntingdon, 166 A. 370, 311 Pa. 29, 87 A.L.R. 610.

77. Mass.—Hallowell v. Blackstone Nat. Bank, 28 N.E. 281, 154 Mass. 359, 13 L.R.A. 315.

49 C.J. p 941 note 48.

78. D.C.—Goldenberg v. Wardell, 92 F.2d 539, 67 App.D.C. 388.

**Reason for rule**

Liability of indorser of note, with-in meaning of collateral note which indorser as maker had executed, and which provided that collateral should be held as general collateral for any or all obligations due or to become due, arose prior to maturity of note, and the fact that liability of officer on his own note to holder was sole and separate obligation whereas liability as indorser on corporation's note was joint liability with coindorser did not render provision of officer's own note, that its collateral should be held as general collateral for any or all obligations, inapplicable to his liability on corporation's note, since his liability on note was joint and several and not joint only, and the fact that note of corporation, which was indorsed by officer of corporation individually, was executed prior to execution of collateral note by such officer individually as maker did not require holding that collateral could not be held as general collateral for corporation's note, where corporation's note had been extended from time to time and corporation and its president had been treated as one. —Goldenberg v. Wardell, supra.

a pledge made to secure the pledgor's individual notes and any other liabilities of the maker to the payee or his assigns, due or to become due, may not be applied to his joint and contingent liability as indorser of notes for the obligation of a corporation.<sup>79</sup> A pledge in the name of a firm, owned by an individual, of which fact the pledgee is aware, may cover the personal indebtedness of the pledgor.<sup>80</sup>

*A purchaser or assignee of the secured obligation* from the pledgee is not entitled to avail himself of the collateral or any surplus thereof in satisfaction of his own unsecured claims against the pledgor<sup>81</sup> unless the contract of pledge, in terms, runs to the holder or holders of the original obligation.<sup>82</sup>

### c. Evidence as to Persons and Debts or Liabilities Secured

The general rules of evidence apply to evidence as to persons and debts or liabilities secured by a pledge.

The general rules of evidence apply to evidence as to persons and debts or liabilities secured by a pledge.<sup>83</sup> Thus, the burden of proof is on a creditor who claims a subsequent agreement by which collateral is to be held for additional indebtedness to prove such agreement.<sup>84</sup> On the other hand, where defendant, in an action on a note, sets up a counterclaim alleging a tender of payment by himself, and a refusal by plaintiff to deliver up the collateral security, the burden is on him, although it requires proof of a negative, to prove that the collateral was given to secure the note only,<sup>85</sup> or, if given to secure some other obligation, that such obligation was discharged before the tender;<sup>86</sup> and he does not sustain such burden by testifying that he deposited the securities as security for the notes

in suit, without stating that they were deposited for no other purpose,<sup>87</sup> or by testifying that he deposited the securities with plaintiff as security for the notes and for the purposes mentioned in the agreement referred to in plaintiff's reply, where such agreement shows other purposes for holding the collateral than to secure the notes in suit, even though such agreement has been abrogated by failure of consideration.<sup>88</sup>

In ascertaining the intention of the parties as to the debt or liability secured by the pledge, in addition to the express agreements of the parties, evidence is admissible of correspondence<sup>89</sup> and conversations<sup>90</sup> of the parties with respect to the pledge, of a general course of dealing between them,<sup>91</sup> and of a general banking custom with which both parties were familiar.<sup>92</sup> Also, on a question whether securities in the possession of the creditor are held by him as collateral, evidence is admissible that about the time of the transfer of such securities to him he made advances to the debtor,<sup>93</sup> and that after the pledgee's death securities sought to be held as collateral were found among his papers attached to the principal obligation.<sup>94</sup>

On a question whether a pledgee received certain collaterals in good faith, evidence is admissible that he made advances on the faith of the securities;<sup>95</sup> and, in the case of a loan to an estate, evidence is admissible that the pledgee was informed that the loan was to be put into a corporation in which the estate was largely interested.<sup>96</sup> In attacking the good faith of the pledgee of negotiable securities who obtained them from one not the owner, it is not necessary to show that he had notice of the particular person who was the real owner.<sup>97</sup> How-

79. Mich.—Perron v. First Nat. Bank, 286 N.W. 859, 289 Mich. 629.

80. Ill.—Union Brewing Co. v. Inter State Bank, etc., Co., 88 N.E. 997, 240 Ill. 454.

49 C.J. p 941 note 50.

81. Mo.—Hornsby v. Knorpp, 232 S.W. 776, 207 Mo.App. 302.

82. U.S.—Mulert v. Tarentum Nat. Bank, Pa., 210 F. 857, 127 C.C.A. 419.

49 C.J. p 941 note 55.

83. Iowa.—Clement v. Houck, 85 N.W. 765, 113 Iowa 504.

Mich.—Stoddard v. Courtright, 89 N.W. 710, 130 Mich. 134.

Neb.—Omaha First Nat. Bank v. Goodman, 75 N.W. 846, 55 Neb. 409.

N.Y.—Lyons Nat. Bank of Lyons v. Guglielmino, 22 N.Y.S.2d 287, affirmed 26 N.Y.S.2d 509, 261 App. Div. 1039.

Evidence as to character of transaction see supra § 16.

### Presumption

Where borrowers executed note, collateral in form, for total principal sum due on two notes secured by mortgages, and notes were surrendered but lender retained possession of mortgages in its collateral file, presumption obtained that note was a renewal of obligation evidenced by original notes.—Lyons Nat. Bank of Lyons v. Guglielmino, supra.

84. Iowa.—Clement v. Houck, 85 N.W. 765, 113 Iowa 504.

85. N.Y.—Stokes v. Stokes, 50 N.E. 342, 155 N.Y. 581—Stokes v. Stokes, 59 N.Y.S. 801, 28 Misc. 58.

86. N.Y.—Stokes v. Stokes, 50 N.E. 342, 155 N.Y. 581—Stokes v. Stokes, 59 N.Y.S. 801, 28 Misc. 58.

87. N.Y.—Stokes v. Stokes, 50 N.E. 342, 155 N.Y. 581.

88. N.Y.—Stokes v. Stokes, 50 N.E. 342, 155 N.Y. 581.

89. N.Y.—Sherman v. Robertson, 34 N.Y.S. 275, 88 Hun 40.

90. Mich.—Stoddard v. Courtright, 89 N.W. 710, 130 Mich. 134.

N.Y.—Sherman v. Robertson, 34 N.Y.S. 275, 88 Hun 40.

91. N.Y.—Jones v. Merchants' Nat. Bank, 25 N.Y.S. 660, 72 Hun 344.

92. N.Y.—Jones v. Merchants' Nat. Bank, supra.

93. Md.—Gemmell v. Davis, 23 A. 1032, 75 Md. 546, 32 Am.S.R. 412.

94. N.Y.—Covert v. Townsend, 1 N.Y.S. 816, 48 Hun 618.

95. N.Y.—Perth Amboy Mut. Loan, etc., Assoc. v. Chapman, 81 N.Y.S. 38, 80 App.Div. 556, affirmed 70 N.E. 1104, 178 N.Y. 558.

96. Conn.—Freeman v. Bristol Sav. Bank, 56 A. 527, 76 Conn. 212.

97. N.Y.—Perth Amboy Mut. Loan, etc., Assoc. v. Chapman, 81 N.Y.S.

ever, if the purpose for which the collateral security was given is expressed in writing, parol evidence is not admissible for the purpose of varying or contradicting such writing and showing that debts other than those expressed were intended to be secured.<sup>98</sup>

*Weight and sufficiency.* The general rules apply to the weight and sufficiency of the evidence as to the debt or liability secured by the pledge.<sup>99</sup> A preponderance of the evidence has been held sufficient to establish a continuing pledge.<sup>1</sup>

#### IV. RIGHTS AND LIABILITIES OF PARTIES

##### § 29. Possession and Control of Property

- a. In general
- b. Termination of pledgee's right to possession

###### a. In General

A pledgee is entitled to retain possession and control of the pledged property until the purposes of the pledge have been satisfied, which ordinarily is until the debt secured has been tendered or paid in full.

Since possession is the essence of a valid pledge,

as considered supra § 19, the pledgee is entitled to retain possession and control of the pledged property until the purposes of the pledge have been satisfied,<sup>2</sup> as long as he does not breach the terms of the contract,<sup>3</sup> unless the parties agree to its surrender or the pledgee in some way discharges or releases it.<sup>4</sup> In the usual case of a pledge to secure payment of a debt, the pledgee can retain possession until the debt has been tendered or paid in full<sup>5</sup> or is otherwise discharged,<sup>6</sup> and this is true even though no suit will lie for recovery of

38, 80 App.Div. 556, affirmed 70 N. E. 1104, 178 N.Y. 558.

98. Tex.—Hardie v. Wright, 18 S.W. 615, 83 Tex. 345.

49 C.J. p 942 note 72.

99. N.Y.—Lyons Nat. Bank of Lyons v. Guglielmino, 22 N.Y.S.2d 287, affirmed 26 N.Y.S.2d 509, 261 App.Div. 1039.

49 C.J. p 942 note 74.

###### Evidence held insufficient

N.Y.—Lyons Nat. Bank of Lyons v. Guglielmino, supra.

49 C.J. p 942 note 74 [a].

1. Neb.—Omaha First Nat. Bank v. Goodman, 75 N.W. 846, 55 Neb. 409.

2. U.S.—Tilles v. Commissioner of Internal Revenue, C.C.A., 113 F. 2d 907, certiorari denied 61 S.Ct. 143, 311 U.S. 703, 85 L.Ed. 456—Pacific States Life Ins. Co. v. Gill, C.C.A.Ill., 71 F.2d 376—Greenebaum v. General Forbes Hotel Co., D.C. Pa., 38 F.2d 96—Corpus Juris quoted in In re Rogers, D.C.W.Va., 20 F.Supp. 120, 132—Byland v. Miller, D.C.Ky., 13 F.Supp. 187.

Ga.—Johnson v. Hinson, 4 S.E.2d 561, 188 Ga. 639.

Ky.—Mercer Nat. Bank of Harrodsburg v. White's Ex'r, 32 S.W.2d 734, 236 Ky. 128.

La.—Reconstruction Finance Corporation v. Thomson, 171 So. 553, 186 La. 1.

N.J.—Bardsley v. First Nat. Bank & Trust Co. of Montclair, 163 A. 665, 111 N.J.Law 512.

Pa.—Clements v. Stoudt, Com.Pl., 26 North.Co. 315.

Vt.—Dieter v. Scott, 9 A.2d 95, 110 Vt. 376.

49 C.J. p 942 note 78.

Possession of pledged corporate stock see Corporations § 426 b.

Rights of pledgor and pledgee as against:

Attaching creditor see Attachment § 73 c.

Execution creditor see Executions § 47.

Garnishing creditor see Garnishment §§ 64-66.

Title and rights of trustee in bankruptcy to pledged property of the bankrupt see Bankruptcy §§ 176, 302.

###### Only right

All that the pledgee receives is possession of the goods and the right to retain possession until the debt is paid.—Mount Tivy Winery v. Lewis, C.C.A.Cal., 134 F.2d 120.

###### Temporary possession

A pledge confers on the pledgee the right to temporary possession of the property.—May v. Stallings, 16 So.2d 870, 245 Ala. 292.

3. U.S.—Corpus Juris quoted in In re Rogers, D.C.W.Va., 20 F. Supp. 120, 132.

49 C.J. p 942 note 79.

4. La.—Reconstruction Finance Corporation v. Thomson, 171 So. 553, 186 La. 1.

5. U.S.—Tilles v. Commissioner of Internal Revenue, C.C.A.8, 113 F. 2d 907, certiorari denied 61 S.Ct. 143, 311 U.S. 703, 85 L.Ed. 456—Greenebaum v. General Forbes Hotel Co., D.C.Pa., 38 F.2d 96—Corpus Juris quoted in In re Rogers, D.C.W.Va., 20 F.Supp. 120, 132—Mitchell v. Roberts, C.C.Ark., 17 F. 776, 5 McCrary 425.

Cal.—Commercial & Savings Bank of San Jose v. Hornberger, 73 P. 625, 140 Cal. 16—Spect v. Spect, 26 P. 203, 88 Cal. 437, 13 L.R.A. 137, 22 Am.S.R. 314—MacDonald v. Pacific Nat. Bank of San Francisco, 152

P.2d 360, 66 Cal.App.2d 357—In re Bank of Oakley, 21 P.2d 164, 131 Cal.App. 203.

Fla.—Pepper v. Beville, 129 So. 334, 100 Fla. 97.

Ga.—Johnson v. Hinson, 4 S.E.2d 561, 188 Ga. 639.

La.—Reconstruction Finance Corporation v. Thomson, 171 So. 553, 186 La. 1.

Mo.—Corpus Juris cited in Russell v. Empire Storage & Ice Co., Mo., 59 S.W.2d 1061, 332 Mo. 707.

N.J.—Franklin Trust Co. v. Goerke, 185 A. 39, 116 N.J.Law 529—Bardsley v. First Nat. Bank & Trust Co. of Montclair, 163 A. 665, 111 N.J.Law 512.

N.Y.—Manufacturers Trust Co. v. Bank of Yorktown, 282 N.Y.S. 507, 156 Misc. 793.

Pa.—Tioga No. 2 Bldg. Ass'n v. North Philadelphia Trust Co., 189 A. 708, 125 Pa.Super. 234.

Vt.—Island Pond Nat. Bank v. Lacroix, 158 A. 684, 104 Vt. 282.

Wash.—Hodge v. Truax, 51 P.2d 357, 184 Wash. 360, 103 A.L.R. 420—Stusser v. Gottstein, 35 P.2d 5, 178 Wash. 360.

49 C.J. p 942 note 80.

Termination of right to possession by payment or other discharge of secured debt see infra §§ 47-49.

###### Entire amount due

Creditor in possession of collateral, pledged as security for debt, cannot be compelled to return it until he receives whole payment of principal, interest, and costs.—First Nat. Bank v. Davis, La.App., 147 So. 93.

6. Vt.—Island Pond Nat. Bank v. Lacroix, 158 A. 684, 104 Vt. 282.

Wash.—Hodge v. Truax, 51 P.2d 357, 184 Wash. 360, 103 A.L.R. 420—Stusser v. Gottstein, 35 P.2d 5, 178 Wash. 360.

the secured debt,<sup>7</sup> and entitles the pledgee to retain possession of all the property pledged.<sup>8</sup>

By *special agreement* of the parties provision may be made for a release of a portion of the collaterals on the payment of a part of the principal debt<sup>9</sup> or the performance of other conditions not amounting to a complete discharge of the principal obligation.<sup>10</sup>

*Substitution of property pledged.* In order that there may be a substitution of property pledged, it is necessary that there be an agreement to substitute it and that it should actually be substituted.<sup>11</sup>

*Enforcement of right to possession without action.* Where the pledgee is deprived of his possession by the pledgor, in addition to his right to bring legal or equitable proceedings, as considered infra §§ 39-42, he may peaceably and without force take possession of the pledged property, but he is not authorized to take it forcibly or to capture it from the pledgor's wife.<sup>12</sup>

*Duty to enforce pledge.* A third person,<sup>13</sup> or third persons in whose custody the pledged property is deposited jointly,<sup>14</sup> are bound to enforce the terms of the pledge.

#### b. Termination of Pledgee's Right to Possession

The pledgee's right to possession of the pledged property terminates when the purposes of the pledge have been fulfilled.

The pledgee's right to possession of the pledged property, as considered supra subdivision a of this

section, terminates when the purposes of the pledge have been fulfilled.<sup>15</sup> The right is not lost by the subsequent bankruptcy of the pledgor,<sup>16</sup> or by a repurchase by the pledgee and payment by the pledgor of the debt for which repurchased,<sup>17</sup> or by a reorganization of the corporation the stock of which constituted the pledge,<sup>18</sup> or by a delivery thereof by the pledgee's agent to a disinterested third person,<sup>19</sup> although in the absence of a demand on the agent the pledgee may be unable to recover the property from the agent's depository.<sup>20</sup>

#### § 30. Use of Property

The pledgee ordinarily is not entitled to use the property pledged except with the consent of the pledgor.

As a general rule the pledgee is not entitled to use the property pledged<sup>21</sup> except with the express or implied consent of the pledgor,<sup>22</sup> as where use is essential to preservation of the pledged property.<sup>23</sup> However, it has been held that a pledgee does not incur liability by using the property pledged when it is of such a character as not to be lessened by use.<sup>24</sup> A pledgee of a ship, pledged to secure amounts owed him and others, has been held entitled to keep the vessel employed and to incur some risks therein.<sup>25</sup> However, the pledgee is not entitled to make a profit from the pledged property,<sup>26</sup> and if, from the use of it profits are derived, he must, in the absence of a special agreement, account to the pledgor for them.<sup>27</sup> It has been held that the pledgor may use the original collateral for his own purposes on substitution of other of equal value.<sup>28</sup>

7. Pa.—Cohen v. Keller, 90 A. 463, 244 Pa. 109.

49 C.J. p 943 note 81.

Effect of limitations see Limitations of Actions § 10.

8. Mo.—Smith v. Holdoway Const. Co., 129 S.W.2d 894, 344 Mo. 862.

9. Ind.—Indianapolis First Nat. Bank v. Root, 8 N.E. 105, 107 Ind. 224.

Okl.—Durant Nat. Bank v. Bennett, 271 P. 141, 133 Okl. 80.

10. Tex.—Malone v. Wright, 36 S. W. 420, 90 Tex. 50.

49 C.J. p 943 note 83.

11. U.S.—Queen City Printing Ink Co. v. Rochester Herald Co., D.C. N.Y., 38 F.2d 254.

12. N.Y.—Gehl v. Bachmann-Bechtel Brewing Co., 141 N.Y.S. 133, 156 App.Div. 51, appeal denied 141 N.Y.S. 1120, 156 App.Div. 915.

49 C.J. p 943 note 87.

13. Cal.—Perry v. Parrott, 67 P. 144, 135 Cal. 238.

14. Cal.—Meyers v. Lasker, 294 P. 80, 110 Cal.App. 538.

15. U.S.—Corpus Juris quoted in In re Rogers, D.C.W.Va., 20 F. Supp. 120, 132.

49 C.J. p 943 note 89.

16. U.S.—Yeatman v. New Orleans Sav. Inst., La., 95 U.S. 764, 24 L. Ed. 589—Corpus Juris quoted in In re Rogers, D.C.W.Va., 20 F.Supp. 120, 132.

17. N.Y.—Sistare v. Olcott, 7 N.Y. St. 470.

18. N.Y.—Griggs v. Day, 47 N.Y.S. 609, 21 App.Div. 442, reversed on other grounds 52 N.E. 692, 158 N. Y. 1.

49 C.J. p 943 note 92.

Pledged stock generally see Corporations §§ 417-433.

19. Cal.—Stephan v. Lagerqvist, 199 P. 52, 52 Cal.App. 519.

49 C.J. p 943 note 93.

20. Cal.—Stephan v. Lagerqvist, supra.

49 C.J. p 943 note 94.

21. U.S.—Commercial Nat. Bank in Shreveport v. Parsons, C.C.A.La., 144 F.2d 281, rehearing denied 145

F.2d 191, certiorari denied 65 S. Ct. 440, 323 U.S. 796, 89 L.Ed. 635.

49 C.J. p 944 note 96.

Liability to account for income or profits see infra § 31.

Rehypothecation of pledged property see infra § 43 d.

Use of corporate stock held in pledge. see Corporations § 426 b.

22. Cal.—Damon v. Waldteufel, 33 P. 903, 99 Cal. 234.

49 C.J. p 944 note 97.

23. Hawaii.—Howard v. Hubertson, 1 Hawaii 74.

24. Utah.—Hoyt v. Upper Marion Ditch Co., 76 P.2d 234, 94 Utah 134.

25. U.S.—Fagan v. Thompson, C.C. Mo., 38 F. 467.

26. U.S.—Hellowell v. Town of Hempstead, D.C.N.Y., 10 F.Supp. 771.

27. Utah.—Hoyt v. Upper Marion Ditch Co., 76 P.2d 234, 94 Utah 134.

28. U.S.—In re Prudence Co., C.C.A. N.Y., 38 F.2d 420.

## § 31. Income or Profits

The pledgee is entitled, in the absence of an agreement to the contrary, to the possession and control of income accruing from the pledged property during the period of the pledge; but he must account to the pledgor for all such income, and ordinarily it should be applied to the reduction of the indebtedness secured.

The pledgee's right to possession and control of the pledged property ordinarily carries with it right to possession and control of income accruing during the period of the pledge.<sup>29</sup> However, this right may be modified by an agreement between the parties for a specified portion of the income to be paid to the pledgor,<sup>30</sup> and, where the agreement so provides, the pledgee may be entitled to terminate the right to such income on the occurrence of specified conditions or events.<sup>31</sup> A pledgee who voluntarily permits the pledgor to collect the income accruing from the pledged property is estopped to claim title to collections thereof made prior to the giving of notice of claim to it.<sup>32</sup> It has been held that a pledgor may collect accounts receivable and, instead of remitting them to the pledgee, make cash payments for the equivalent.<sup>33</sup>

The pledgee must account to the pledgor for all the income, profits, and advantages derived by him from the pledged property.<sup>34</sup> Ordinarily such profits or income should be applied to the reduction of the indebtedness,<sup>35</sup> first to the payment of the interest on the debt, then to the principal,<sup>36</sup> and any

surplus remaining after all proper payments to the pledgee, including expenses, as considered *infra* § 32, is held for the pledgeor.<sup>37</sup>

*Application of fund arising from pledged property.* The pledgor cannot compel the pledgee to apply to payment of the debt in advance of its maturity a fund arising from the property pledged.<sup>38</sup>

*Rental value.* A pledgee is not chargeable with rental value for unused property.<sup>39</sup>

*Waiver.* Statutes providing that acceptance of the whole principal is a waiver of interest do not apply to a pledgor accepting in different installments the whole principal of the debt.<sup>40</sup>

## § 32. Allowance for Expenses

- a. In general
- b. In subjecting property to purposes of pledge

### a. In General

The pledgee is entitled to reimbursement for expenses reasonably incurred by him in keeping, caring for, and protecting the property pledged.

The pledgee is entitled to reimbursement for all expenses reasonably incurred by him in keeping and caring for the property pledged,<sup>41</sup> such as reasonable expenses incurred in connection with the

29. Ind.—O'Brien v. Flanders, 41 Ind. 486.

N.Y.—Manufacturers Trust Co. v. Bank of Yorktown, 282 N.Y.S. 507, 156 Misc. 793.

Respective rights of pledgor and pledgee to dividends on stock pledged see Corporations § 469 b.

#### Duty to collect

It is the duty of the pledgee or subpledgee to collect the accruals from the security.—Hoyt v. Upper Marion Ditch Co., 76 P.2d 234, 94 Utah 134.

#### Interest on bonds

Generally, pledgee is entitled to interest on pledged bonds.—Detroit Trust Co. v. First Nat. Bank-Detroit, D.C.Mich., 7 F.Supp. 117.

30. Mich.—Stott v. Stott Realty Co., 11 N.W.2d 215, 306 Mich. 492.

31. Mich.—Stott v. Stott Realty Co., *supra*.

#### Court proceedings impounding amount allowed

Mich.—Stott v. Stott Realty Co., *supra*.

32. U.S.—Detroit Trust Co. v. First Nat. Bank-Detroit, D.C.Mich., 7 F.Supp. 117.

33. U.S.—In re Prudence Co., C.C.A. N.Y., 88 F.2d 420.

34. Pa.—Thomas v. Waters, 38 A.2d 237, 350 Pa. 214.

Wash.—Corpus Juris cited in State v. Nicely, 18 P.2d 503, 506, 171 Wash. 439.

49 C.J. p 944 note 1. Dividends on pledged stock see Corporations § 469 b.

35. N.Y.—Manufacturers Trust Co. v. Bank of Yorktown, 282 N.Y.S. 507, 156 Misc. 793.

Utah.—Hoyt v. Upper Marion Ditch Co., 76 P.2d 234, 94 Utah 134.

36. Pa.—Thomas v. Waters, 38 A.2d 237, 350 Pa. 214.

Wash.—Corpus Juris cited in State v. Nicely, 18 P.2d 503, 506, 171 Wash. 439.

49 C.J. p 944 note 2.

37. Wash.—Corpus Juris cited in State v. Nicely, 18 P.2d 503, 506, 171 Wash. 439.

49 C.J. p 944 note 4.

38. Tex.—Caldwell v. Spear, Civ. App., 259 S.W. 1007.

49 C.J. p 944 note 5.

39. La.—Louisiana-Texas Oil, etc., Co. v. Atlanta Oil, etc., Co., 50 So. 409, 124 La. 385.

49 C.J. p 944 note 6.

40. Mont.—Leggat v. Palmer, 102 P. 327, 39 Mont. 302.

49 C.J. p 944 note 8.

41. U.S.—Corpus Juris cited in Grand v. Kimbell Milling Co., C. C.A.Tex., 116 F.2d 999, 1001.

N.J.—Corpus Juris cited in Fidelity Union Trust Co. v. Guaranty Trust Co. of New York, 37 A.2d 853, 857, 135 N.J.Eq. 222, reversed in part on other grounds and cause remanded Fidelity Union Trust Co. v. Johnson, 55 A.2d 813, 140 N.J.Eq. 548.

Pa.—Corpus Juris quoted in Gordon v. Mohawk Bond & Mortgage Co., 176 A. 422, 425, 317 Pa. 257.

Tex.—Moore v. Krenex, Civ.App., 17 S.W.2d 89, reversed on other grounds Moore v. Krenex, Com. App., 39 S.W.2d 828.

Wash.—Corpus Juris cited in State v. Nicely, 18 P.2d 503, 506, 171 Wash. 439.

49 C.J. p 944 note 10.

Duty of pledgee to pay installments due on pledged stock see Corporations § 426 b.

#### Necessary expenses

Ga.—Johnson v. First Nat. Bank, 184 S.E. 915, 53 Ga.App. 56.

#### Ownership of pledged property

Fact that security given to insure fulfillment of obligation of indorser of note belongs to maker and was pledged to indorser and subpledged by him to holder does not

physical preservation and care of the property,<sup>42</sup> protecting it against liens,<sup>43</sup> or in the payment of taxes,<sup>44</sup> assessments,<sup>45</sup> and insurance premiums.<sup>46</sup> However, there can be no recovery on this theory for expenses not reasonably incurred in the care and preservation of the pledged property.<sup>47</sup>

*Under express agreement.* Where the parties have agreed that the pledgee shall pay specified expenses, the pledgee is not entitled to reimbursement for them.<sup>48</sup>

*As between joint pledgees.* In the absence of a contract that compensation for services shall be paid, joint pledgees cannot recover of each other compensation for services rendered in caring for the pledged property and converting it into money.<sup>49</sup>

### b. In Subjecting Property to Purposes of Pledge

The pledgee is entitled to reimbursement for reasonable expenses necessarily incurred in subjecting the pledged property to the purposes of the pledge.

The pledgee is entitled to reimbursement for reasonable expenses necessarily incurred in subjecting the pledged property to the purposes of the pledge,<sup>50</sup> such as expenses incurred in collecting pledged choses in action.<sup>51</sup> No reimbursement will be allowed for unnecessary and unauthorized expenses.<sup>52</sup>

Reasonable attorney's fees necessarily incurred in

preserving or collecting collateral may be allowed the pledgee.<sup>53</sup> However, reimbursement for attorney's fees will be denied where it was not reasonably necessary to incur them for the purposes of the pledge<sup>54</sup> or they are unreasonable in amount or character.<sup>55</sup>

## § 33. Care of Property

- a. In general
- b. By pledgee

### a. In General

A pledgor who has free access to the goods pledged, equally with the pledgee, has the duty to care for them, and he cannot hold the pledgee responsible for a loss which could have been prevented by the exercise of due care on his part.

Where the pledgee permits the pledgor to have free access to the goods, it is equally the duty of the pledgor to care for them, and he cannot hold the pledgee responsible for any loss which could have been prevented by due care on his part.<sup>56</sup> In such a case an unexplained loss of the goods does not raise any presumption of negligence on the part of the pledgee.<sup>57</sup>

### b. By Pledgee

- (1) In general
- (2) Liability for loss
- (3) Pledges of life insurance policies
- (4) Evidence and questions for jury

derogate from right of holder to charge indorser with such payments necessary to protect and save the security.—Hoyt v. Upper Marion Ditch Co., 76 P.2d 234, 94 Utah 134.

42. Or.—Seawear v. Ontario First Nat. Bank, 165 P. 232, 84 Or. 678. 49 C.J. p 944 note 11.

#### Repairs

Ga.—Johnson v. First Nat. Bank, 184 S.E. 915, 53 Ga.App. 56.

Or.—Seawear v. Ontario First Nat. Bank, 165 P. 232, 84 Or. 678.

43. Wash.—Gray v. Haasze, 245 P. 24, 138 Wash. 604, 608. 49 C.J. p 944 note 12.

44. U.S.—Fagan v. Thompson, C.C. Mo., 38 F. 467.

N.J.—Corpus Juris cited in Fidelity Union Trust Co. v. Guaranty Trust Co. of New York, N.J.Ch., 37 A.2d 853, 857, 135 N.J.Eq. 222, reversed in part on other grounds and cause remanded Fidelity Union Trust Co. v. Johnson, 55 A.2d 813, 140 N.J. Eq. 548.

Pa.—Corpus Juris quoted in Gordon v. Mohawk Bond & Mortgage Co., 176 A. 422, 425, 317 Pa. 257.

Tex.—Moore v. Krenex, Civ.App., 17

S.W.2d 89, reversed on other grounds Moore v. Krenex, Com. App., 39 S.W.2d 828.

49 C.J. p 945 note 13.

45. Pa.—Corpus Juris quoted in Gordon v. Mohawk Bond & Mortgage Co., 176 A. 422, 425, 317 Pa. 257.

Utah.—Hoyt v. Upper Marion Ditch Co., 76 P.2d 234, 94 Utah 134.

49 C.J. p 945 note 14.

46. Pa.—Corpus Juris quoted in Gordon v. Mohawk Bond & Mortgage Co., 176 A. 422, 425, 317 Pa. 257.

49 C.J. p 945 note 15.

Duty of pledgee to advance money for premiums on pledged insurance policies see *infra* § 33.

47. U.S.—Wolf v. American Trust, etc., Bank, Ill., 214 F. 761, 132 C.C. A. 410.

49 C.J. p 945 note 16.

48. N.Y.—Meyer v. Carmer, 135 N. Y.S. 64, 150 App.Div. 921.

49 C.J. p 945 note 17.

49. N.Y.—Central Trust Co. v. New York Equipment Co., 84 N.Y.S. 349, 87 Hun 421.

50. Okl.—Picher Bank v. Harris, 229 P. 137, 100 Okl. 256, 40 A.L.R. 254. 49 C.J. p 945 note 18.

51. Tex.—Moore v. Krenex, Civ. App., 17 S.W.2d 89, reversed on other grounds Moore v. Krenex, Com.App., 39 S.W.2d 828.

49 C.J. p 945 note 19.

52. Mich.—Austin v. Hayden, 137 N.W. 317, 171 Mich. 38, Ann.Cas. 1915B 894.

49 C.J. p 945 note 20.

53. Tex.—Moore v. Krenex, Civ. App., 17 S.W.2d 89, reversed on other grounds Moore v. Krenex, Com.App., 39 S.W.2d 828.

49 C.J. p 945 note 21.

54. Iowa.—McCormick v. Lundburg, 38 N.W. 409, 74 Iowa 558.

49 C.J. p 946 note 22.

55. Neb.—Cressman v. Whitall, 21 N.W. 458, 16 Neb. 592.

49 C.J. p 946 note 23.

56. N.Y.—Willets v. Hatch, 30 N.E. 251, 132 N.Y. 41, 17 L.R.A. 193.

Care of pledged corporate stock see Corporations § 426 b.

57. N.Y.—Lemnos Broad Silk Works, Inc. v. Spiegelberg, 217 N. Y.S. 595, 127 Misc. 855.

## (1) In General

The pledgee is under an implied agreement to keep safe the pledge, and must exercise ordinary or reasonable care in the preservation of the property pledged and in protecting the pledgor's rights therein.

There is an implied agreement on the part of the pledgee for the safe-keeping of the pledge.<sup>58</sup> He is under a duty to exercise ordinary or reasonable care in the preservation of the property pledged<sup>59</sup> and in protecting the pledgor's rights therein.<sup>60</sup> However, the exercise of ordinary care is sufficient;<sup>61</sup> the pledgee is not an insurer of the property pledged,<sup>62</sup> and he need not exercise every

possible precaution to prevent loss.<sup>63</sup> Ordinary care is that degree of care which prudent men exercise with respect to their own property of a similar kind under similar circumstances,<sup>64</sup> and varies in accordance with the conditions affecting its exercise.<sup>65</sup>

Some authorities have stated that the pledgee is charged with the duty of an agent<sup>66</sup> or that he is a trustee,<sup>67</sup> first, to pay the debt, and second, to pay over the surplus of the pledge to the pledgor;<sup>68</sup> and that he cannot so deal with the pledged property as to destroy or even impair its value.<sup>69</sup>

58. Fla.—Pepper v. Beville, 129 So. 334, 100 Fla. 97.  
Sufficiency of diligence in collection of chose in action pledged see *infra* § 74.

**To keep intact**

Where he does not proceed on the pledged property, the pledgee is under obligation to keep the pledged property intact, in order that it may be returned when the principal obligation is paid.—People's Bank v. Cookston, La.App., 142 So. 285.

59. Mich.—Alexander v. Glass, 299 N.W. 155, 298 Mich. 483—Melvindale State Bank v. Eckfeld, 277 N.W. 876, 283 Mich. 179.

Minn.—Faunce v. Schueller, 8 N.W. 2d 523, 214 Minn. 412.

Miss.—Hibernia Bank & Trust Co. v. Turner, 127 So. 291, 156 Miss. 842.

Wis.—Rezash v. Bank of Two Rivers, 227 N.W. 4, 199 Wis. 419.  
49 C.J. p 946 note 29.

Care and negligence of bailees generally see Bailments §§ 26–29.

**Purpose of statute imposing duty on person receiving collateral security to use reasonable care and diligence in connection therewith is to require creditor to handle collaterals in good faith.**—Irwin v. Life & Cas. Ins. Co. of Tenn., 50 S.E.2d 354, 204 Ga. 582.

60. Iowa.—Carter v. McClain, 244 N.W. 671, 215 Iowa 19.

Mich.—Alexander v. Glass, 299 N.W. 155, 298 Mich. 483—Melvindale State Bank v. Eckfeld, 277 N.W. 876, 283 Mich. 179.

**Sacrifice of pledge**

Pledgee has the duty to protect the debtor to the extent that the security should not be sacrificed.—Wise v. Cecil, Tex.Civ.App., 135 S.W.2d 235, error refused.

61. Miss.—Hibernia Bank & Trust Co. v. Turner, 127 So. 291, 156 Miss. 842.

Mont.—Rock Island Flow Co. v. Cut Bank Implement Co., 53 P.2d 116, 101 Mont. 117.

Tex.—Corpus Juris cited in Savage Oil Co. v. Johnson, Civ.App., 141 S.W.2d 994, 997.

49 C.J. p 946 note 30.

62. Miss.—Hibernia Bank & Trust Co. v. Turner, 127 So. 291, 156 Miss. 842.

63. S.C.—Scott v. Crews, 2 S.C. 522.  
49 C.J. p 946 note 31.

**Payment of prior liens**

Pledgee is not compelled to advance expenses or payments on prior liens on principal's property in order to preserve the security pledged.—Faunce v. Schueller, 8 N.W.2d 523, 214 Minn. 412.

**Third person's enforcement of junior lien**

Fact that holder of note secured by chattel mortgage note permitted sale of mortgaged property under junior chattel mortgage without protest could not discharge makers from liability.—People's Bank v. Cookston, La.App., 142 So. 285.

64. Iowa.—Carter v. McClain, 244 N.W. 671, 215 Iowa 19.

Miss.—Hibernia Bank & Trust Co. v. Turner, 127 So. 291, 156 Miss. 842.

Wis.—Rezash v. Bank of Two Rivers, 227 N.W. 4, 199 Wis. 419.

49 C.J. p 946 note 32.

65. Miss.—Hibernia Bank & Trust Co. v. Turner, 127 So. 291, 156 Miss. 842.

49 C.J. p 946 note 33.

**Diligence required of pledgee in care of pledge depends on character of thing pledged and surrounding circumstances as well as means of protection.**—Hibernia Bank & Trust Co. v. Turner, *supra*.

66. Mo.—Dibert v. D'Arcy, 154 S.W. 1116, 248 Mo. 617.

67. Ga.—Loflin v. Howard, 172 S.E. 831, 48 Ga.App. 373.

Md.—County Trust Co. of Maryland v. Stevenson, 185 A. 435, 170 Md. 550.

Miss.—Hibernia Bank & Trust Co. v. Turner, 127 So. 291, 156 Miss. 842.

Boswell v. Thigpen, 22 So. 823, 75 Miss. 308—McLemore v. Hawkins, 46 Miss. 715.

N.Y.—Toplitz v. Bauer, 55 N.E. 1059, 161 N.Y. 325—Gillet v. Bank of America, 55 N.E. 292, 160 N.Y. 549.

—Wheeler v. Newbould, 16 N.Y.

392—Bowes v. National City Bank of New York, 6 N.Y.S.2d 803, 169 Misc. 78—Cole v. Manufacturers Trust Co., 299 N.Y.S. 418, 164 Misc. 741—First Trust & Deposit Co. v. Potter, 278 N.Y.S. 847, 155 Misc. 106.

49 C.J. p 946 note 35.

Pledge as creating trust relationship generally see *supra* § 21.

68. Miss.—Hibernia Bank & Trust Co. v. Turner, 127 So. 291, 156 Miss. 842—Boswell v. Thigpen, 22 So. 823, 75 Miss. 308.

N.Y.—Toplitz v. Bauer, 55 N.E. 1059, 161 N.Y. 325—Gillet v. Bank of America, 55 N.E. 292, 160 N.Y. 549.

—Wheeler v. Newbould, 16 N.Y. 392—Bowes v. National City Bank of New York, 6 N.Y.S.2d 803, 169 Misc. 78—Cole v. Manufacturers Trust Co., 299 N.Y.S. 418, 164 Misc. 741.

69. Miss.—Hibernia Bank & Trust Co. v. Turner, 127 So. 291, 156 Miss. 842—Boswell v. Thigpen, 22 So. 823, 75 Miss. 308.

N.Y.—Toplitz v. Bauer, 55 N.E. 1059, 161 N.Y. 325—Gillet v. Bank of America, 55 N.E. 292, 160 N.Y. 549.

—Wheeler v. Newbould, 16 N.Y. 392—Kono v. Roeth, 260 N.Y.S. 662, 237 App.Div. 252, reargument denied 261 N.Y.S. 1048, 238 App. Div. 775—Cole v. Manufacturers Trust Co., 299 N.Y.S. 418, 164 Misc. 741.

Origin of rule

The rule has its origin in the case of pledges of tangible personal property because the possession and control are thought to give the trustee opportunities for oppression and wrong in the management of the property which call for the closest scrutiny of his acts.—Bowes v. National City Bank of New York, 6 N.Y.S.2d 803, 169 Misc. 78.

662, 237 App.Div. 252, reargument denied 261 N.Y.S. 1048, 238 App. Div. 775—Cole v. Manufacturers Trust Co., 299 N.Y.S. 418, 164 Misc. 741.

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662, 237 App.Div. 252, reargument denied 261 N.Y.S. 1048, 238 App. Div. 775—Cole v. Manufacturers Trust Co., 299 N.Y.S. 418, 164 Misc. 741.

*Employment of agents or attorneys.* The pledgee must use reasonable skill and diligence in the employment of agents and attorneys.<sup>70</sup>

*Insurance.* In the absence of an agreement to that effect, the pledgee is not obligated to insure the pledged property.<sup>71</sup>

### (2) Liability for Loss

A pledgee is liable for the loss, destruction, or depreciation of the property pledged through his negligence, but, in the absence of an express agreement to the contrary, he is not liable for damage arising without legal fault on his part.

Loss, destruction, or depreciation of the property through the negligence of the pledgee imposes on him liability therefor to the pledgor.<sup>72</sup> Such liability continues for losses occurring after maturity of the debt,<sup>73</sup> and even after its discharge, as long as the property remains in the possession of the pledgee.<sup>74</sup> However, the pledgee is not liable for damage arising without legal fault on his part,<sup>75</sup> as where he makes an honest error in judgment<sup>76</sup> or where the loss is caused by overpowering force.<sup>77</sup> This rule, however, may be varied by express agreement of the parties.<sup>78</sup> Where the pledgee has agreed to keep pledged property insured he is liable for loss occurring while it is uninsured,<sup>79</sup> the measure of damages in event of total loss being the insurable value of the property.<sup>80</sup> It has been held that a contract expressly excluding the pledgee's liability for loss from specified causes should be construed as imposing liability for loss from unspecified causes.<sup>81</sup>

Limitations on the liability imposed on the

pledgee by law must be plainly expressed,<sup>82</sup> and cannot go so far as to authorize fraud.<sup>83</sup>

### (3) Pledges of Life Insurance Policies

In the absence of an agreement to such effect, a pledgee is not required to pay premiums on a life insurance policy pledged to him.

In the absence of an agreement to such effect, the pledgee is not obligated to pay premiums on a life insurance policy pledged to him.<sup>84</sup> The pledgee is not authorized to surrender the policy without the pledgor's consent.<sup>85</sup>

### (4) Evidence and Questions for Jury

In the case of loss or injury to the property pledged, the burden is on the pledgee to show the exercise of due care on his part, where he has been given exclusive possession of the pledged property. The general rules governing the admissibility and the weight and sufficiency of the evidence apply, and on conflicting evidence the question of the pledgee's negligence in caring for the pledged property is for the jury.

As a general rule, in the case of loss or injury to the pledged property, the burden is on the pledgee to show the exercise of due care on his part.<sup>86</sup> This rule does not apply, however, in a case where he has not been given exclusive possession of the pledged property.<sup>87</sup> Evidence is admissible as to the nature of the property and all the circumstances connected with its keeping by the pledgee.<sup>88</sup> Evidence that the pledgee failed to use the same care for the pledged property as for his own is strongly persuasive of negligence;<sup>89</sup> but evidence of the employment of such care, although entitled to consideration,<sup>90</sup> does not create a prima

70. S.D.—Plymouth County Bank v. Gilman, 68 N.W. 735, 9 S.D. 273, 62 Am.S.R. 868.

49 C.J. p 946 note 36.

71. Ga.—Norris v. Manget-Brannon Co., 90 S.E. 79, 18 Ga.App. 639. 49 C.J. p 946 note 37.

72. Ca.—Irwin v. Life & Cas. Ins. Co. of Tenn., 50 S.E.2d 354, 204 Ga. 582.

Miss.—Hibernia Bank & Trust Co. v. Turner, 127 So. 291, 156 Miss. 842. Mont.—Rock Island Plow Co. v. Cut Bank Implement Co., 53 P.2d 116, 101 Mont. 117.

N.Y.—First Trust & Deposit Co. v. Potter, 278 N.Y.S. 847, 155 Misc. 106.

Wis.—Rezash v. Bank of Two Rivers, 227 N.W. 4, 199 Wis. 419. 49 C.J. p 947 note 40.

Liability of pawnbroker for loss of goods see Pawnbrokers § 8.

73. Neb.—Butler v. Greene, 68 N.W. 496, 49 Neb. 280.

74. Md.—Baltimore Third Nat. Bank v. Boyd, 44 Md. 47, 22 Am.R. 35.

N.Y.—Ouderkirk v. Troy Cent. Nat. Bank, 23 N.E. 875, 119 N.Y. 263.

75. Pa.—Reading First Nat. Bank v. Ferguson, 73 A. 551, 224 Pa. 397. 49 C.J. p 947 note 43.

76. Pa.—Reading First Nat. Bank v. Ferguson, supra. 49 C.J. p 947 note 44.

77. U.S.—McLemore v. Louisiana State Bank, La., 91 U.S. 27, 23 L. Ed. 196.

49 C.J. p 947 note 45.

78. Mass.—Drake v. White, 117 Mass. 10.

49 C.J. p 947 note 46.

79. Mo.—Matthews v. McGuffin, 165 S.W. 874, 180 Mo.App. 65. 49 C.J. p 946 note 38.

80. Ark.—People's Bank v. Mendenhall, 243 S.W. 805, 154 Ark. 282. 49 C.J. p 946 note 39.

81. Ohio.—Savin v. Butler, 146 N. E. 673, 111 Ohio St. 695. 49 C.J. p 947 note 47.

82. Mo.—Dibert v. D'Arcy, 154 S. W. 1116, 248 Mo. 617.

83. Mo.—Dibert v. D'Arcy, supra.

84. N.Y.—Killoran v. Sweet, 25 N. Y.S. 295, 72 Hun 194, affirmed 39 N.E. 857, 144 N.Y. 703.

49 C.J. p 947 note 50.

85. R.I.—Manton v. Robinson, 37 A. 8. 49 C.J. p 947 note 52.

86. N.Y.—Lemnos Broad Silk Works, Inc. v. Spiegelberg, 217 N.Y.S. 595, 127 Misc. 355.

Burden of proof as to negligence of bailee generally see Bailments § 50 c.

Evidence as to care in action:

For failure to enforce pledged collateral see infra § 74.

To recover on secured debt see infra § 55.

87. N.Y.—Lemnos Broad Silk Works, Inc. v. Spiegelberg, supra.

88. S.C.—Scott v. Crews, 2 S.C. 522.

89. N.Y.—Ouderkirk v. Troy Cent. Nat. Bank, 23 N.E. 875, 119 N.Y. 263.

49 C.J. p 948 note 56.

90. Pa.—Erie Bank v. Smith, 3 Brewst. 9, 8 Phila. 68.



facie case of the exercise of ordinary care, where there is direct evidence of the manner in which the pledge was kept.<sup>91</sup> The fact that the pledged property is stolen from the pledgee establishes neither responsibility nor lack of responsibility on his part.<sup>92</sup> The usual rules as to weight and sufficiency of evidence apply with respect to issues involving the duty and care of the pledgee as to pledged property.<sup>93</sup>

*Questions for jury.* On conflicting evidence, the question whether the pledgee has exercised due diligence and care in keeping the pledged property is for the jury to determine.<sup>94</sup>

### § 34. Sale of Property before Maturity of Debt

- a. In general
- b. Duty to sell
- c. Conduct of sale
- d. Effect of unauthorized sale; ratification

#### a. In General

In the absence of an agreement permitting it, a pledgee has no right to sell the pledged property before maturity of the debt, but such right may be conferred by the contract of pledge.

In the absence of an agreement to such effect, the pledgee has no right to sell the pledged property

before maturity of the debt.<sup>95</sup> Such a right may, however, be conferred by the contract of pledge,<sup>96</sup> although provisions therefor are to be strictly construed,<sup>97</sup> and a sale is not authorized except on happening of the conditions specified.<sup>98</sup> In the absence of the happening of the specified contingencies, the consent of the pledgor will not authorize a sale, by a pledgee with notice, as against the rights of an execution purchaser, of the rights of the pledgor in the pledged property.<sup>99</sup>

*Commercial paper.* A pledgee has no right, in the absence of special authority or agreement permitting him to do so, to sell commercial paper held as pledge, either at public or private sale,<sup>1</sup> except in execution of a judgment obtained after ordinary proceedings.<sup>2</sup> The power to sell may, however, be given the pledgee by express agreement,<sup>3</sup> although even in such case notice of the time and place of sale must be given the pledgor.<sup>4</sup> A statutory provision that the pledgee has no right to sell pledged notes or do otherwise than collect them at maturity and apply the proceeds on the secured debt is designed for the benefit of the pledgor,<sup>5</sup> who may waive it.<sup>6</sup>

*Waiver of authorization to sell.* A contract provision giving the pledgee the right to sell before default is waived by a subsequent agreement extending the date of payment and silent as to sale before default.<sup>7</sup>

91. Pa.—*Erie Bank v. Smith*, supra.
92. Miss.—*Hibernia Bank & Trust Co. v. Turner*, 127 So. 291, 156 Miss. 842.
93. Minn.—*Faunce v. Schueller*, 8 N.W.2d 523, 214 Minn. 412.  
49 C.J. p 948 note 60.
94. Wis.—*Rezash v. Bank of Two Rivers*, 227 N.W. 4, 199 Wis. 419.  
49 C.J. p 948 note 61.
95. Ariz.—*Hallenbeck v. Regional Agr. Credit Corporation of Salt Lake City, Utah*, 56 P.2d 1041, 47 Ariz. 477.
- Mo.—*Corpus Juris* cited in *State v. Bagley*, 96 S.W.2d 331, 333, 339 Mo. 215—*Allen v. Bagley*, 133 S.W.2d 1027, 234 Mo.App. 891.
- N.J.—*Corpus Juris* quoted in *Franklin Trust Co. v. Goerke*, 135 A. 39, 40, 116 N.J.Law 529.
- S.C.—*Corpus Juris* quoted in *Parrish v. W. R. Barringer Co.*, 179 S.E. 485, 488, 175 S.C. 452.
- Wis.—*Corpus Juris* cited in *Gulbrandsen v. Chaseburg State Bank*, 295 N.W. 729, 734, 236 Wis. 729—*Corpus Juris* cited in *First Wisconsin Nat. Bank of Milwaukee v. Pierce*, 278 N.W. 451, 456, 227 Wis. 581.  
49 C.J. p 948 note 63.
- Conversion by sale before default see infra § 36 c.
- Sale or disposal after maturity see infra §§ 56-66.
- Sale or other disposition before default of pledged corporate stock see *Corporations* § 429.
96. S.C.—*Corpus Juris* quoted in *Parrish v. W. R. Barringer Co.*, 179 S.E. 485, 488, 175 S.C. 452.  
49 C.J. p 948 note 64.
97. Mo.—*Corpus Juris* cited in *Allen v. Bagley*, 133 S.W.2d 1027, 1029, 234 Mo.App. 891.
- Pa.—*Union Trust Co. of Pittsburgh v. Long*, 164 A. 846, 309 Pa. 470.
- S.C.—*Corpus Juris* quoted in *Parrish v. W. R. Barringer Co.*, 179 S.E. 485, 488, 175 S.C. 452.  
49 C.J. p 948 note 65.
98. Mo.—*Corpus Juris* cited in *Allen v. Bagley*, 133 S.W.2d 1027, 1029, 234 Mo.App. 891.
- S.C.—*Corpus Juris* quoted in *Parrish v. W. R. Barringer Co.*, 179 S.E. 485, 488, 175 S.C. 452.  
49 C.J. p 948 note 66.
99. Cal.—*Cushing v. New or Practical Psychology Soc. Bldg. Assoc.*, 134 P. 324, 165 Cal. 731.
1. Fla.—*Gables Racing Ass'n v. Persky*, 156 So. 392, 116 Fla. 77.
- La.—*Ott v. Sanders*, App., 147 So. 701.
- S.C.—*Corpus Juris* quoted in *Parrish v. W. R. Barringer Co.*, 179 S.E. 485, 488, 175 S.C. 452.  
49 C.J. p 948 note 69.
- Right to enforce chose in action pledged see infra §§ 68-71.
- Transfer of title*
- The pledgee of a note has no authority to transfer title to it without express authority from the pledgor, or the waiver of the pledgor's rights as owner.—*Allardyce v. Abraham*, App., 178 So. 170, rehearing denied 179 So. 317, affirmed *Allardyce v. Abrahams*, 182 So. 717, 190 La. 686—*Ott v. Sanders*, La.App., 147 So. 701.
2. La.—*Ott v. Sanders*, supra.
3. Mo.—*State v. Castleton*, 164 S.W. 492, 255 Mo. 201, 212.
- Pa.—*Davis v. Funk*, 39 Pa. 243, 30 Am.D. 519.
4. Mo.—*State v. Castleton*, 164 S.W. 492, 255 Mo. 201, 212.  
49 C.J. p 948 note 71.
5. Cal.—*Gault v. Wiens*, 161 P. 996, 32 Cal.App. 1.
6. Cal.—*Gault v. Wiens*, supra.
7. N.Y.—*Wyckoff v. Riverside Bank*,

**Proceeds of sale.** A pledgee authorized to sell collateral before default must apply the proceeds in accordance with the terms of the contract of pledge.<sup>8</sup> However, where the pledgee is not required to sell, no duty to account arises unless and until there is a sale by the pledgee of the property pledged.<sup>9</sup> Funds derived from the sale of pledged property sold by the pledgor after redelivery by the pledgee for the purpose of sale belong to the pledgee,<sup>10</sup> and another creditor of the pledgor with notice of the pledge cannot assert a lien on such funds.<sup>11</sup>

**Collection of pledged obligation.** The pledgee of a note can collect it and apply the proceeds to his claim against the pledgor.<sup>12</sup>

### b. Duty to Sell

In the absence of a special agreement therefor, a pledgee is not required to sell the pledged property and apply the proceeds on the debt before maturity, even

though he has authority to sell or has been requested to sell by the pledgor.

In the absence of a special agreement, a pledgee is not required,<sup>13</sup> nor can he be compelled,<sup>14</sup> to sell the pledged property and apply the proceeds on the debt before its maturity,<sup>15</sup> even though he has authority to sell<sup>16</sup> or has been requested to sell by the pledgor;<sup>17</sup> and he is not liable for a loss due to depreciation in the value of the property after the failure or refusal to sell it.<sup>18</sup> However, in the case of property of fluctuating value, the pledgee has been held liable for loss due to depreciation in its value after he was requested by the pledgor to sell it.<sup>19</sup>

**Under agreement.** The pledgee is under a duty to sell the pledged property before maturity of the debt on the happening of conditions specified in an agreement as imposing the duty to sell,<sup>20</sup> which agreement may be made subsequent to the time the pledge was made,<sup>21</sup> and the pledgee is liable for

119 N.Y.S. 937, 135 App.Div. 400, affirmed 97 N.E. 1119, 204 N.Y. 561. Extension agreement as waiver of right to sell on default see *infra* § 57.

2. Colo.—*West v. Bates*, 201 P. 562, 70 Colo. 355.

Pa.—*Loew v. Austin*, 21 A. 240, 140 Pa. 41.

3. Mich.—*Fildew v. Stockard*, 249 N. W. 837, 264 Mich. 238.

**Profit from sale of property not pledged**

Where pledgee was unable to consummate sale of specified amount of securities by delivering pledged securities and delivered instead a like amount of other securities obtained from another source, he was not required to account to the pledgor for the profit realized therefrom, even though the transaction was undertaken incident to an attempt to realize on the pledged securities.—*Fildew v. Stockard*, *supra*.

10. Ga.—*Griffin Banking Co. v. Macon Nat. Bank*, 126 S.E. 848, 33 Ga. App. 503.

Ind.—*Fletcher American Nat. Bank v. Federal Securities Co.*, 168 N.E. 599, 94 Ind.App. 379.

11. Ga.—*Griffin Banking Co. v. Macon Nat. Bank*, 126 S.E. 848, 33 Ga. App. 503.

Ind.—*Fletcher American Nat. Bank v. Federal Securities Co.*, 168 N. E. 599, 94 Ind.App. 379.

12. La.—*Ott v. Sanders*, App., 147 So. 701.

Enforcement of pledged chose in action see *infra* §§ 68–78.

13. Ga.—*Johnson v. First Nat. Bank*, 184 S.E. 915, 53 Ga.App. 56. Mich.—*Fildew v. Stockard*, 249 N.W. 837, 264 Mich. 238.

N.J.—*Corpus Juris* quoted in *Franklin Trust Co. v. Goerke*, 185 A. 39, 40, 116 N.J.Law 529.

N.Y.—*First Trust & Deposit Co. v. Potter*, 278 N.Y.S. 847, 155 Misc. 106.

Wis.—*First Wisconsin Nat. Bank of Milwaukee v. Pierce*, 278 N.W. 451, 227 Wis. 581.

49 C.J. p 948 note 78.

**Failure to sell not negligence**

Doctrine that duty imposed on one holding and controlling collateral as security for a debt is to exercise ordinary care for its preservation does not oblige a pledgee to sell such collateral and apply proceeds on debt to escape charge of negligence.—*Faunce v. Schueller*, 8 N.W. 2d 523, 214 Minn. 412.

14. Mass.—*Badlam v. Tucker*, 1 Pick 389, 11 Am.D. 202.

N.J.—*Corpus Juris* quoted in *Franklin Trust Co. v. Goerke*, 185 A. 39, 40, 116 N.J.Law 529.

15. N.J.—*Corpus Juris* quoted in *Franklin Trust Co. v. Goerke*, 185 A. 39, 40, 116 N.J.Law 529.

16. Mich.—*Fildew v. Stockard*, 249 N.W. 837, 264 Mich. 238.

N.J.—*Franklin Trust Co. v. Goerke*, 185 A. 39, 116 N.J.Law 529.

N.Y.—*First Trust & Deposit Co. v. Potter*, 278 N.Y.S. 847, 155 Misc. 106.

49 C.J. p 949 note 81.

17. Mass.—*Bank of U. S. v. Thomson & Kelly Co.*, 195 N.E. 115, 290 Mass. 224.

N.J.—*Franklin Trust Co. v. Goerke*, 185 A. 39, 40, 116 N.J.Law 529.

N.Y.—*First Trust & Deposit Co. v. Potter*, 278 N.Y.S. 847, 155 Misc. 106.

Pa.—*Gordon v. Mitchell*, 182 A. 386,

320 Pa. 277—*Union Trust Co. of Pittsburgh v. Long*, 164 A. 346, 309 Pa. 470—*Tioga No. 2 Bldg. Ass'n v. North Philadelphia Trust Co.*, 189 A. 708, 125 Pa.Super. 234—*Doty v. Foust*, Com.Pl., 33 Luz. Leg.Reg. 321.

Wis.—*First Wisconsin Nat. Bank of Milwaukee v. Pierce*, 278 N.W. 451, 227 Wis. 581.

49 C.J. p 949 note 82.

18. N.J.—*Franklin Trust Co. v. Goerke*, 185 A. 39, 116 N.J.Law 529.

Pa.—*Union Trust Co. of Pittsburgh v. Long*, 164 A. 346, 309 Pa. 470.

**Loss falls on pledgor**

When the pledgor requests the pledgee to sell and the latter refuses, the loss from a decline in value of the pledged property thereafter occurring cannot be charged against the pledgee, but falls on the pledgor.—*Johnson v. First Nat. Bank*, 184 S. E. 915, 53 Ga.App. 56.

19. Mo.—*National Exch. Bank v. Kilpatrick*, 102 S.W. 499, 204 Mo. 119.

49 C.J. p 949 note 83.

**Fluctuation arising from nature of security**

Fluctuating value of pledge must arise from nature of security itself, rather than general fluctuation in value of all securities, to charge pledgee with negligence in selling, or failing to sell, collateral pledged as security for debt.—*First Trust & Deposit Co. v. Potter*, 278 N.Y.S. 847, 155 Misc. 106.

20. Ga.—*Johnson v. First Nat. Bank*, 184 S.E. 915, 53 Ga.App. 56 49 C.J. p 949 note 84.

21. Ga.—*Johnson v. First Nat. Bank*, *supra*.

loss occasioned by his failure to sell as agreed.<sup>22</sup> However, a promise to sell, made without consideration, has been held unenforceable and imposes no duty on the pledgee or liability for loss occasioned by his failure to sell.<sup>23</sup> Even where an agreement to sell has been made, the pledgee is not obligated to sell except in accordance with the provisions of the agreement.<sup>24</sup>

**Negligence.** Liability of a pledgee for failure to sell pledged property may be founded on negligence as well as on the breach of an express contract;<sup>25</sup> and it has been held that, where the pledgee promises to sell the pledged property and informs the pledgor that it has been sold according to agreement, the failure to do so constitutes such negligence that, even if there was no consideration for the agreement to sell, it will render the pledgee liable for a loss arising from depreciation in value of the property pledged.<sup>26</sup>

**The measure of damages** for breach of the duty to sell is the resultant loss in value of the pledged property.<sup>27</sup>

**Evidence.** The usual rules as to sufficiency of evidence apply respecting issues arising on alleged breach of the pledgee's duty to sell.<sup>28</sup>

### c. Conduct of Sale

A pledgee who sells the pledged property before maturity of the debt is bound to exercise reasonable care and diligence in making the sale, and he is liable for damages arising from the failure to exercise such care. As a general rule a pledgee cannot sell the pledged property to himself.

Where, in the exercise of his right or duty, the pledgee sells the pledged property before maturity

of the debt, he is bound to exercise reasonable care and diligence<sup>29</sup> as to the time,<sup>30</sup> place,<sup>31</sup> price,<sup>32</sup> and terms<sup>33</sup> of sale, and is liable for damages arising from failure to exercise due care in the conduct thereof.<sup>34</sup>

**Notice.** A pledgee with authority to sell the pledged property before maturity under certain circumstances must give notice to the pledgor in case he elects to sell on the happening of a contingency of which the pledgor may be in ignorance.<sup>35</sup> The pledgee is not bound to notify one other than the owner of the pledged property as to his intention to sell it,<sup>36</sup> particularly where the sale is made at the owner's request.<sup>37</sup>

**A guaranty** made by the pledgee under authority of the pledgor is binding on the pledgor,<sup>38</sup> and the usual rules governing the admissibility and sufficiency of evidence apply in connection with the pledgee's claims for reimbursement on account of moneys expended in satisfaction of the guaranty.<sup>39</sup>

**Jury question.** Whether the pledgee acted with ordinary care and diligence in selling the pledged property is a question of fact properly determinable by a jury.<sup>40</sup>

**Sale by pledgee to himself.** As a general rule the pledgee cannot purchase the pledged property<sup>41</sup> or speculate in it.<sup>42</sup> Such is the rule under a contract authorizing sale generally,<sup>43</sup> but it is competent for the parties to agree that under certain conditions the pledgee may himself become the purchaser of the pledged property before default.<sup>44</sup> Even where such an agreement has been made, however, the sale will be invalidated by fraud.<sup>45</sup> If a pledgee

22. Ark.—People's Bank v. Mendenhall, 243 S.W. 805, 154 Ark. 282. 49 C.J. p 949 note 85.

23. Pa.—Gordon v. Mitchell, 182 A. 386, 320 Pa. 277—Union Trust Co. of Pittsburgh v. Long, 164 A. 346, 309 Pa. 470.

24. Pa.—Lanahan v. Clark, 123 A. 798, 279 Pa. 297. 49 C.J. p 949 note 86.

25. Mich.—Melvindale State Bank v. Eckfeld, 277 N.W. 876, 283 Mich. 179.

26. Mich.—Melvindale State Bank v. Eckfeld, supra.

27. Ark.—People's Bank v. Mendenhall, 243 S.W. 805, 154 Ark. 282. 49 C.J. p 949 note 88.

28. Mass.—Bank of U. S. v. Thomson & Kelly Co., 195 N.E. 115, 290 Mass. 224. 49 C.J. p 949 note 90.

**Evidence held insufficient**

To show damages from failure to sell property pledged.—Bank of U. S. v. Thomson & Kelly Co., supra.

29. Ga.—Johnson v. First Nat. Bank, 184 S.E. 915, 53 Ga.App. 56. 49 C.J. p 949 note 94.

Sale at or after maturity see infra §§ 56-66.

30. Ga.—Johnson v. First Nat. Bank, supra. 49 C.J. p 949 note 95.

31. Mass.—Jennings v. Moore, 75 N. E. 214, 189 Mass. 197. 49 C.J. p 949 note 96.

32. Minn.—Grand Forks Second Nat. Bank v. Sproat, 56 N.W. 254, 55 Minn. 14.

33. Mass.—Etheridge v. Binney, 9 Pick. 272. 49 C.J. p 949 note 98.

34. Mass.—Jennings v. Moore, 75 N. E. 214, 189 Mass. 197. 49 C.J. p 949 note 99.

35. Mo.—Allen v. Bagley, 133 S.W. 2d 1027, 234 Mo.App. 891.

36. La.—Alexandria Bank, etc., Co. v. Honeycutt, 108 So. 475, 161 La. 261.

49 C.J. p 949 note 1.

37. La.—Alexandria Bank, etc., Co. v. Honeycutt, supra.

38. Tex.—Taylor v. Hemphill, Civ. App., 238 S.W. 986. 49 C.J. p 949 note 3.

39. Tex.—Taylor v. Hemphill, supra. 49 C.J. p 949 note 6.

40. Ga.—Johnson v. First Nat. Bank, 184 S.E. 915, 53 Ga.App. 56.

41. Md.—County Trust Co. of Maryland v. Stevenson, 185 A. 435, 170 Md. 550.

42. Md.—County Trust Co. of Maryland v. Stevenson, supra.

43. La.—Shexneider v. Simon Rice Milling Co., 83 So. 28, 145 La. 831.

44. Utah.—Western Securities Co. v. Silver King Cons. Min. Co., 192 P. 664, 57 Utah 88. 49 C.J. p 949 note 8.

45. D.C.—Ohio Nat. Bank v. Central Constr. Co., 17 App.D.C. 524.

**Inadequate price**

An alleged "sale" by the pledgee

sells to himself without authority, the pledgor may recover the market value of the property at the time of such sale.<sup>46</sup>

#### d. Effect of Unauthorized Sale; Ratification

An invalid sale of pledged property does not affect the rights of the parties, but the pledgor may ratify such a sale.

The rights of the parties under the pledge are not affected by an invalid sale.<sup>47</sup> The mere possession of property as pledgee, without any other evidence of title or authority to sell, will not enable the pledgee to give a good title to the property by a sale of it.<sup>48</sup> The pledgor may, as between the pledgee and himself, ratify an unauthorized sale,<sup>49</sup> including a sale by the pledgee to himself,<sup>50</sup> and claim the benefits of it, that is, the proceeds of the sale;<sup>51</sup> and he cannot hold the pledgee for any loss resulting from a sale which he has expressly ratified<sup>52</sup> or which he has impliedly ratified by failure to repudiate within a reasonable time after acquiring knowledge thereof.<sup>53</sup>

The purchaser from the pledgee at an unauthorized sale cannot complain that the pledgee violated its obligation to the pledgor.<sup>54</sup>

### § 35. Conversion of Pledged Property in General

The wrongful or unlawful appropriation of property

deposited as collateral security for a debt constitutes conversion.

The unlawful appropriation of property deposited as collateral security for a note constitutes conversion.<sup>55</sup> Conversion of pledged property by particular persons is discussed infra §§ 36-38.

### § 36. — By Pledgee

- a. In general
- b. Surrender of possession
- c. Sale
- d. Exchange for other securities
- e. Release or transfer to obligor of collateral
- f. Renewal of pledged collateral
- g. Compromise

#### a. In General

A pledgee's exercise of dominion over the property inconsistent with the rights of the pledgor or his wrongful or unauthorized disposition of the pledged property so as to put it out of his power to redeliver it on payment of the debt it secures constitutes a conversion.

A pledgee's exercise of dominion over the property pledged, inconsistent with the rights of the pledgor in and to the property,<sup>56</sup> or his disposition of the whole or part thereof inconsistent with, and subversive of, the pledgor's legal rights,<sup>57</sup> or his wrongful or unauthorized disposition of the pledged

to itself for several thousand dollars less than the market value of securities pledged was invalid for fraud even though the pledge contract authorized a sale by the pledgee to itself.

Ala.—*Corpus Juris* quoted in *Coleman v. Solomon*, 143 So. 576, 578, 225 Ala. 407.

D.C.—*Ohio Nat. Bank v. Central Constr. Co.*, 17 App.D.C. 524.

46. La.—*Shexneider v. Simon Rice Milling Co.*, 83 So. 28, 145 La. 831.

47. Mo.—*Corpus Juris* cited in *Allen v. Bagley*, 133 S.W.2d 1027, 1029, 234 Mo.App. 891.

49 C.J. p 950 note 15.

Unauthorized sale as constituting conversion see infra § 36.

#### Sale to pledgee

If the debtor does not ratify an unauthorized sale of the property pledged by the pledgee to himself and elects to treat it as illegal, the sale is void and the parties are remitted to their rights as they existed before any sale was made or attempted; the debtor is liable on his debt and the creditor still holds the property in pledge.—*Bardsley v. First Nat. Bank & Trust Co. of Montclair*, 168 A. 665, 111 N.J.Law 512.

48. Del.—*El. I. DuPont de Nemours & Co. v. Laird*, 8 A.2d 162, 24 Del.

Ch. 152, modified on other grounds 9 A.2d 76, 24 Del.Ch. 250.

#### No power to transfer title

A pledgee of personalty can transfer no title as against true owner even to a person possessing all the attributes of an innocent purchaser.—*Cowan v. Thompson*, 152 S.W.2d 1036, 25 Tenn.App. 130.

49. Tex.—*Brinkman v. Rick*, Civ. App., 285 S.W. 885.

#### Inaction and subsequent demand

Pledgor who had knowledge of unauthorized sale by pledgee but took no steps to repudiate sale and subsequently demanded proceeds in action by pledgor on open account ratified unauthorized sale.—*W. F. Taylor Co. v. Whitbeck*, La.App., 159 So. 187.

#### Ratification held shown

Allegations showing plaintiff's unauthorized sale of pledged property at time when price was higher than when sale was subsequently requested, and alleging that defendant was entitled to any profit made by plaintiff in sale, was held to show defendant's ratification of sale.—*W. F. Taylor Co. v. Whitbeck*, supra.

50. N.J.—*Bardsley v. First Nat. Bank & Trust Co. of Montclair*, 168 A. 665, 111 N.J.Law 512.

51. La.—*W. F. Taylor Co. v. Whitbeck*, App., 159 So. 187.

#### Ownership of proceeds

Proceeds of sale of pledged goods belong to owner of goods or pledgor.—*W. F. Taylor Co. v. Whitbeck*, supra.

52. N.Y.—*Violett v. Horbach*, 104 N.Y.S. 249, 119 App.Div. 373.

Pa.—*Granger v. Fidelity Ins. Trust, etc., Co.*, 48 A. 250, 198 Pa. 428.

53. N.Y.—*Violett v. Horbach*, 104 N.Y.S. 249, 119 App.Div. 373—*Swann v. Baxter*, 73 N.Y.S. 336, 86 Misc. 233.

54. Cal.—*Gault v. Wiens*, 161 P. 996, 32 Cal.App. 1.

49 C.J. p 950 note 19.

55. Cal.—*Nichols v. Leach*, 300 P. 103, 114 Cal.App. 545.

56. Cal.—*Horn v. Klatt*, 151 P.2d 149, 65 Cal.App.2d 510.

Tex.—*Wallace v. Renfro*, Civ.App., 124 S.W.2d 456, error dismissed, judgment correct.

Failure or refusal of pledgee to return property pledged on payment or discharge of debt secured as constituting conversion of pledge see infra § 48.

Negligence in collection of chose in action pledged see infra § 74.

Redemption on conversion see infra § 50.

57. Cal.—*Horn v. Klatt*, 151 P.2d 149, 65 Cal.App.2d 510.

property so as to put it out of his power to redeliver it on payment of the debt it secures,<sup>58</sup> constitutes a conversion although there is no wrongful intent or motive on the part of the pledgee.<sup>59</sup> However, it has been held that a pledgee of securities rightfully in possession thereof, although the legal title thereto may be in another, is not guilty of conversion in the absence of an intent to convert.<sup>60</sup> Also, a diversion of the property pledged from the purpose originally intended is not a conversion where it takes place with the consent, knowledge, and acquiescence of the pledgor;<sup>61</sup> and it has also been held that tender of payment of the secured debt and demand for the return of the pledged property must be shown before conversion can be established.<sup>62</sup>

In order to constitute conversion, a wrongful or unauthorized disposition of the pledged property is

essential<sup>63</sup> except perhaps in a case where, although the pledgee may have had actual dominion over the collateral, he has asserted the contrary to the pledgor.<sup>64</sup> A conversion is not effected by a nominal transfer of the pledge,<sup>65</sup> or delivery for a mere temporary purpose, or for a special purpose,<sup>66</sup> which does not put the property beyond the control of the pledgee; or by a mere assertion by the pledgee of ownership of the pledged property<sup>67</sup> or of the right to hold it for purposes other than those of the pledge involved;<sup>68</sup> or by the assertion of a larger right in the property pledged than he can maintain;<sup>69</sup> or by his bringing suit on it in his own name;<sup>70</sup> or by his collection of the pledged collateral<sup>71</sup> or of the income therefrom;<sup>72</sup> or by his assignment of the collateral together with the principal obligation;<sup>73</sup> or by a transfer of pledged certificates of stock under an arrangement by which he retains control over them;<sup>74</sup> or by the registra-

#### Partial conversion as conversion of whole

Pledgee's conversion of part of pledged chattel amounts to conversion of whole chattel when circumstances evince pledgee's purpose to control or dispose of whole thereof or remaining part is thereby impaired in value or utility.—Horn v. Klatt, *supra*.

58. Ala.—Stanley v. People's Sav.

Bank, 157 So. 844, 229 Ala. 446.

Ind.—Hammond Pure Ice & Coal Co.

v. Heitman, 47 N.E.2d 399, 221

Ind. 352, 145 A.L.R. 997.

La.—W. F. Taylor Co. v. Whitbeck,

App., 159 So. 187.

Pa.—Brooks v. Caruthers' Estate,

Com.Pl., 23 West.Co.L.J. 138.

S.C.—*Corpus Juris* cited in Daniel v.

Post, 187 S.E. 915, 917, 181 S.C.

468.

Tex.—Cecil v. Wise, Civ.App., 109

S.W.2d 214, error refused—Smith

v. Blancas, Civ.App., 87 S.W.2d

781, error refused—Vaughn v. Central

State Bank, Civ.App., 27 S.W.

2d 1112.

49 C.J. p 950 note 21.

#### Time of conversion

The conversion takes place at the time the pledgee makes the unauthorized disposition.—Allen v. Bagley, 133 S.W.2d 1027, 234 Mo.App. 891.

59. Cal.—Horn v. Klatt, 151 P.2d

149, 65 Cal.App.2d 510.

49 C.J. p 950 note 22.

60. Tex.—Allison v. Victoria Bank

& Trust Co., Civ.App., 138 S.W.2d

151, petition granted Victoria Bank

& Trust Co. v. Monteith, 158 S.W.

2d 63, 138 Tex. 216, conformed to,

Civ.App., 159 S.W.2d 528.

61. S.D.—Biesmann v. Black Hills

United Mining Co., 264 N.W. 518,

64 S.D. 82.

Nonconsent of pledgor is indispensable to constitute any use of pledged property a conversion.

U.S.—Adair v. Reorganization Inv.

Co., C.C.A.Mo., 125 F.2d 901.

S.D.—Biesmann v. Black Hills United

Mining Co., 264 N.W. 518, 64 S.

D. 82.

62. U.S.—Adair v. Reorganization

Inv. Co., C.C.A.Mo., 125 F.2d 901.

63. Ariz.—Pawley v. Yuma First

Nat. Bank, 256 P. 507.

49 C.J. p 950 note 23.

64. Kan.—Lynn v. McCue, 147 P.

808, 94 Kan. 761, rehearing denied

150 P. 523, 96 Kan. 114.

49 C.J. p 950 note 24.

65. Conn.—Moore v. Waterbury

Tool Co., 199 A. 97, 124 Conn. 201,

116 A.L.R. 564.

N.J.—Bardsley v. First Nat. Bank

& Trust Co. of Montclair, 168 A.

665, 111 N.J.Law 512.

N.Y.—Kaufman v. Provident Sav.

Bank & Trust Co. of Cincinnati,

23 N.Y.S.2d 637, affirmed 31 N.Y.S.

2d 664, 263 App.Div. 703, appeal

denied 32 N.Y.S.2d 129, 263 App.

Div. 809.

#### Intent to pass owner's rights

A transfer of a pledge in derogation of the owner's rights must be a transfer with intent of passing the rights the owner has therein.—Kaufman v. Provident Sav. Bank & Trust Co. of Cincinnati, *supra*.

66. N.Y.—Kaufman v. Provident

Sav. Bank & Trust Co. of Cincinnati,

*supra*.

67. Conn.—Moore v. Waterbury Tool

Co., 199 A. 97, 124 Conn. 201, 116

A.L.R. 564.

N.J.—*Corpus Juris* cited in Bardsley

v. First Nat. Bank & Trust Co. of

Montclair, 168 A. 665, 668, 111 N.

J.Law 512.

N.M.—*Corpus Juris* cited in Long-

well v. Caron, 31 P.2d 690, 695, 38

N.M. 260.

N.Y.—Brown v. Leary, 91 N.Y.S. 463,

100 App.Div. 421, appeal dismissed

80 N.E. 1106, 187 N.Y. 558, 559.

68. U.S.—Pierce v. St. Louis National

Bank of Commerce, C.C.A.

Mo., 13 F.2d 40.

49 C.J. p 951 note 26.

69. N.J.—Bardsley v. First Nat.

Bank & Trust Co. of Montclair, 168

A. 665, 111 N.J.Law 512.

70. Tex.—Luter v. Roberts, Civ.

App., 39 S.W. 1002.

71. Okl.—Johnston v. American Finance

Corporation, 79 P.2d 242,

182 Okl. 567.

#### Retention for purpose of collection

The retention by pledgee, after notice from trustee in bankruptcy to deliver collateral to it, of some of pledged collateral for purpose of making further collections to pay balance due on notes for which collateral was pledged would not constitute conversion thereof by pledgee.—Johnston v. American Finance Corporation, *supra*.

72. U.S.—In re Harrison Securities

Corporation, D.C.N.Y., 9 F.Supp.

860, affirmed, C.C.A., 77 F.2d 999.

Me.—Androsoggin R. Co. v. Auburn

Bank, 48 Me. 335.

N.J.—Bardsley v. First Nat. Bank &

Trust Co. of Montclair, 168 A. 665,

111 N.J.Law 512.

73. Cal.—Revert v. Hesse, 193 P.

943, 184 Cal. 295.

49 C.J. p 951 note 29.

74. Colo.—Eaton v. Commercial

Nat. Bank, 182 P. 890, 66 Colo. 450.

49 C.J. p 951 note 30.

tion of pledged bonds in his own name;<sup>75</sup> or by his assent to the foreclosure of a mortgage by which the collateral is secured and to the payment of a share of the expenses incident to such foreclosure from the proceeds;<sup>76</sup> or by foreclosure with consent of the pledgor.<sup>77</sup> The pledgee's act in having a pledged check certified is not a conversion thereof.<sup>78</sup>

A pledgee is not liable to the holder of an equitable lien on the property pledged as long as he does nothing to prevent the equitable lienholder from imposing the charge of his lien on the pledge.<sup>79</sup>

**Use.** A pledgee's application of pledged bonds to his own separate use in excess of his rights as pledgee is an illegal conversion of the property.<sup>80</sup>

**Rehypothecation.** An unauthorized rehypothecation of collateral for a different debt<sup>81</sup> or a misappropriation of the pledged property<sup>82</sup> is a conversion thereof.

**Subordination.** Where a pledgee of mortgage notes, without the authorization or ratification of the pledgor, subordinates such notes to receiver's certificates and other receivership charges, resulting in the impairment or total loss of the value of such mortgage notes, the pledgor is entitled to offset the loss thus occasioned against the claim of the pledgee.<sup>83</sup>

**Effect of conversion.** A pledgee's conversion of the property pledged does not amount to a pay-

ment of the pledgor's obligation,<sup>84</sup> but it only creates a right in the pledgor to set off the pledgee's liability for conversion against his claim.<sup>85</sup>

**Right to collect pledged obligation.** The pledgee of a note or other obligation of a third person has a right to collect it when due,<sup>86</sup> particularly where he has been authorized to collect it by the pledgor.<sup>87</sup> A pledgee has been held not authorized to accept payment before maturity of a pledged note which is payable on a day certain.<sup>88</sup> Where the obligations of a third person are pledged, the pledgee is accountable to the pledgor for payments made on such obligations by the third person and applied by the pledgee to other debts owed him by the third person.<sup>89</sup>

### b. Surrender of Possession

A pledgee's surrender of the property pledged is a conversion of it for which he is liable, if it is made without the consent of the pledgor.

If, without consent of the pledgor, the pledgee surrenders possession of collateral,<sup>90</sup> either to the obligor thereunder<sup>91</sup> or to a third person,<sup>92</sup> he is liable to the pledgor for conversion. Surrender with consent of the pledgor is not a conversion.<sup>93</sup> A surrender to an invalid legal process<sup>94</sup> or a passive permission of sale under an attachment<sup>95</sup> may constitute a conversion, although, on the other hand, it has been held that there is no conversion by the pledgee where the property is taken

#### Broker's repledge or sale of:

Collateral deposited with him as security for loan or margin transaction see Brokers § 32.

Property purchased by him for customer see Brokers § 31.

Conversion of pledged stock generally see Corporations § 430.

75. U.S.—Ritchie v. Burke, C.C. Ohio, 109 F. 16.

76. N.Y.—Field v. Sibley, 77 N.Y.S. 252, 74 App.Div. 81, 11 N.Y. Ann. Cas. 187, affirmed 66 N.E. 1108, 174 N.Y. 514.

77. Wash.—E. I. Du Pont de Nemours Powder Co. v. Pederson, 176 P. 542, 104 Wash. 433.  
49 C.J. p 951 note 33.

78. Tex.—Celada v. Mathias, Civ. App., 269 S.W. 459.  
49 C.J. p 951 note 34.

79. Conn.—Hansel v. Hartford-Connecticut Trust Co., 49 A.2d 666, 133 Conn. 181.

#### Extent or character of indebtedness immaterial

It is immaterial to what extent the pledgor is, or becomes, indebted to the pledgee or for what debts the pledgee purports to hold the property

pledged.—Hansel v. Hartford-Connecticut Trust Co., supra.

80. Cal.—People v. Fleming, 32 P.2d 593, 220 Cal. 601.

81. Me.—Duble v. Branz, 73 A.2d 217.

Mo.—Richardson v. Ashby, 33 S.W. 806, 132 Mo. 238.

49 C.J. p 952 note 75.

Pledge and repledge of customer's stock by broker see Brokers §§ 31-32.

Power of pledgee to repledge generally see infra § 43 d.

82. Ind.—Sprague v. State, 181 N.E. 507, 203 Ind. 581.

83. U.S.—International Shoe Co. v. Picard & Geismar, D.C.La., 30 F. Supp. 570, affirmed, C.C.A., Mayer v. Gros, 116 F.2d 733.

84. Mich.—Crowley v. Atkinson's Estate, 296 N.W. 864, 297 Mich. 15.

85. Mich.—Crowley v. Atkinson's Estate, supra.

86. Cal.—Beatty v. Pacific States Savings & Loan Co., 41 P.2d 378, 4 Cal.App.2d 692.

87. Tex.—Wise v. Cecil, Civ.App., 135 S.W.2d 235, error refused.

#### Authorization

A pledgee of a vendor's lien note, who has been given permission by the pledgor to use the note to purchase realty covered by the vendor's lien, has a right to collect the note.—Wise v. Cecil, Tex.Civ.App., supra.

88. Ind.—Hammond Pure Ice & Coal Co. v. Heltman, 47 N.E.2d 809, 221 Ind. 352, 145 A.L.R. 997.

89. Ga.—Lofin v. Howard, 172 S.E. 831, 48 Ga.App. 373.

90. Mass.—Stevens v. Wiley, 43 N.E. 177, 165 Mass. 402.

49 C.J. p 951 note 35.

91. Cal.—Meyer v. Thomas, 63 P.2d 1176, 18 Cal.App.2d 299.

49 C.J. p 951 note 36.

92. N.Y.—MacDonnell v. Buffalo Loan, etc., Co., 85 N.E. 801, 193 N.Y. 92.

49 C.J. p 951 note 37.

93. Conn.—Hoyt v. Stuart, 96 A. 166, 90 Conn. 41.

94. N.Y.—MacDonnell v. Buffalo Loan, etc., Co., 85 N.E. 801, 193 N.Y. 92.

95. Mass.—Potter v. Tyler, 2 Metc. 53.

from his possession under an attachment against the pledgor.<sup>96</sup>

### c. Sale

A pledgee's unauthorized sale of the property pledged prior to the maturity of the obligation secured or the pledgor's default thereon may constitute conversion.

A pledgee's unauthorized sale of the property pledged prior to the maturity of the obligation secured or the pledgor's default thereon may constitute conversion.<sup>97</sup> However, an authorized sale is not a conversion,<sup>98</sup> nor is a sale by the pledgee to himself a conversion;<sup>99</sup> and, even if a pledgee's foreclosure of a pledged mortgage or trust deed and purchase of the property constitute a conversion, a pledgor who thereafter gives the pledgee a new note for the principal obligation, which recites a pledge of the same collateral as that foreclosed, and pays interest on the new note, thereby waives the conversion.<sup>1</sup> Irregularities in the sale of pledged property have been held not to establish a conversion where the pledgor did not suffer any prejudice therefrom and the irregularities resulted from the pledgor's own conduct.<sup>2</sup>

*Maker not entitled to object.* The maker of a pledged note cannot, in the absence of prejudice, take advantage of a statute rendering an unauthorized sale thereof a conversion as respects the pledgor.<sup>3</sup>

*A sale under authority of statute* is not a conversion<sup>4</sup> even though it purports to be under authority of a reversed judgment.<sup>5</sup>

*Sale of owner's equity in pledged property.* The pledgee of notes and mortgages securing them, who is also a creditor of the mortgagor, violates no duty to the pledgor by attaching and having sold at execution sale the interest of the mortgagor in the mortgaged property.<sup>6</sup>

### d. Exchange for Other Securities

A pledgee's exchange of the property pledged for other securities constitutes a conversion for which he is liable, if it is made without the consent of the pledgor.

If, without consent of the pledgor, the pledgee exchanges collateral for other securities, he is liable for conversion.<sup>7</sup> However, it has been held that the pledgee's exchange of pledged securities is proper and he will not be penalized therefor, where the maker of the pledged securities is insolvent, the exchange is made as a compromise and on terms advantageous to the pledgor, and the procedure resulting in the exchange was participated in by representatives of the pledgor.<sup>8</sup> With the consent of the pledgor the pledgee may lawfully exchange the collateral for other securities.<sup>9</sup> An unexecuted agreement to exchange collateral does not amount to a conversion.<sup>10</sup>

### e. Release or Transfer to Obligor of Collateral

The release or transfer of pledged collateral to the obligor thereon may constitute a conversion thereof.

Release of pledged collateral may constitute a conversion thereof.<sup>11</sup> However, it is not conversion for the pledgee of a negotiable instrument to

96. Cal.—Barnhart v. Edwards, 47 P. 251, 5 Cal.Unrep.Cas. 558.

97. Cal.—Beatty v. Pacific States Savings & Loan Co., 41 P.2d 378, 4 Cal.App.2d 692.

Me.—Dubie v. Branz, 78 A.2d 217.

Mo.—Allen v. Bagley, 133 S.W.2d 1027, 234 Mo.App. 891.

Wis.—Gulbrandsen v. Chaseburg State Bank, 295 N.W. 729, 236 Wis. 391.

49 C.J. p 951 note 43.

Enforcement of pledge by sale of choses in action see infra § 57.

Invalid sale of pledged property after maturity of obligation secured as constituting conversion see infra § 83.

Right to sell before default see supra § 34.

Unauthorized sale of pledged stock as constituting conversion see Corporations § 480.

#### Effect on principal debt

Sale of pledged collateral contrary to pledge amounts to conversion and extinguishes principal debt to extent of actual value of collateral at time of conversion.—California Bank v. Daniel, 288 P. 7, 36 Ariz. 549.

98. Ga.—Bennett v. Well, 110 S.E. 744, 28 Ga.App. 266.

99. N.J.—Bardsley v. First Nat. Bank & Trust Co. of Montclair, 168 A. 665, 111 N.J.Law 512. Purchase of property pledged by pledgee after maturity of principal obligation see infra § 61.

#### Assertion of ownership

Pledgee's assertion of ownership of securities pledged to it was held not conversion, even though without legal warrant, where it credited aggregate principal sum thereof on pledgor's obligations, such action being in effect private sale to itself.—Bardsley v. First Nat. Bank & Trust Co. of Montclair, supra.

1. Mich.—Crowley v. Atkinson's Estate, 296 N.W. 864, 297 Mich. 15.

2. U.S.—Faivret v. First Nat. Bank in Richmond, D.C.Cal., 62 F.Supp. 1012, affirmed, C.C.A., 160 F.2d 827.

3. Cal.—Woolf v. Clarke, 121 P. 407, 17 Cal.App. 696.

4. S.C.—Tolbert v. Fouche, 123 S.E. 859, 129 S.C. 338.

5. S.C.—Tolbert v. Fouche, supra.

6. N.D.—Ingstad v. Farmers' State Bank of Mandan, 237 N.W. 704, 61 N.D. 194.

7. U.S.—Corpus Juris quoted in Varden v. First Christian Church of Pineville, Ky., D.C.Ky., 13 F. Supp. 159, 160.

Ind.—Hammond Pure Ice & Coal Co. v. Heitman, 47 N.E.2d 309, 221 Ind. 352, 145 A.L.R. 997.

49 C.J. p 951 note 50.

8. Minn.—First & American Nat. Bank of Duluth v. Whiteside, 292 N.W. 770, 207 Minn. 537.

9. N.Y.—Griggs v. Day, 47 N.Y.S. 609, 21 App.Div. 442, reversed on other grounds 52 N.E. 692, 158 N. Y. 1.

Tenn.—Randolph v. Merchants' Nat. Bank, 9 Lea 63.

10. N.Y.—Field v. Sibley, 77 N.Y. S. 252, 74 App.Div. 81, 11 Ann.Cas. 187, affirmed 66 N.E. 1108, 174 N. Y. 514.

11. Cal.—Meyer v. Thomas, 63 P.2d 1176, 18 Cal.App.2d 299—Beatty v. Pacific States Savings & Loan Co., 41 P.2d 378, 4 Cal.App.2d 692.

49 C.J. p 951 note 53.

sell and transfer the principal debt, accompanied by the pledged negotiable instrument, to the maker of the pledge instrument.<sup>12</sup>

**Release of indorser.** Releasing the solvent indorser of the note of an insolvent amounts to a conversion thereof.<sup>13</sup>

#### f. Renewal of Pledged Collateral

A pledgee's unauthorized renewal or extension of pledged collateral is a conversion thereof.

The pledgee's unauthorized renewal<sup>14</sup> or extension<sup>15</sup> of pledged collateral amounts to a conversion.

Extension of time for payment of installments which the obligor of the pledged installment contract could not meet when due is not necessarily a conversion.<sup>16</sup>

#### g. Compromise

A pledgee who receives as collateral security the ob-

ligation of a third person is liable for conversion if he compromises it for less than its full face value, except where he compromises it on terms advantageous to the pledgor as well as to himself.

One who receives from his debtor as collateral security the obligation of a third person ordinarily has only the power to hold such obligation and to receive payment or collect it at maturity.<sup>17</sup> He is not authorized to compromise it for less than its full face value,<sup>18</sup> or to accept in payment and discharge of it anything other than the full amount due thereon,<sup>19</sup> or to discharge a lien securing it on receipt of less than the full amount due on it;<sup>20</sup> and ordinarily if he compromises with the persons liable on the pledged collateral he is liable for conversion.<sup>21</sup> Even under an express power to sell a pledged note the pledgee cannot compromise and surrender it to the maker for a sum less than is due thereon, but enough to pay the principal debt, and such action will prima facie render him liable for the face of the note in excess of his debt.<sup>22</sup> If,

#### Negligence immaterial

With respect to pledgee's conversion of collateral note and surrender thereof to maker, it was immaterial whether pledgee acted negligently.—*Vaughn v. Central State Bank*, Tex. Civ.App., 27 S.W.2d 1112.

No authority to discharge pledged debt

Pledgee to whom an evidence of debt has been pledged cannot discharge pledged debt or security therefor without consent of pledgor, and, if he releases debt or security otherwise than on collection, pledgor may hold pledgee for conversion.—*Meyer v. Thomas*, 63 P.2d 1176, 18 Cal.App.2d 299.

12. S.D.—*Buck v. First Nat. Bank*, 260 N.W. 834, 63 S.D. 507, 99 A.L.R. 23.

13. Ga.—*Pace v. Thomasville Bank*, 117 S.E. 741, 155 Ga. 585.

14. Neb.—*Corpus Juris* quoted in *Citizens State Bank of Thedford v. U. S. Fidelity & Guaranty Co. of Baltimore, Md.*, 266 N.W. 81, 84, 130 Neb. 603, 103 A.L.R. 1401. 49 C.J. p 952 note 60.

**Renewal of, or new, certificate of deposit**

Neb.—*Citizens State Bank of Thedford v. U. S. Fidelity & Guaranty Co. of Baltimore, Md.*, supra.

N.D.—*Larson v. National Surety Co.*, 235 N.W. 495, 60 N.D. 538.

**Matification of renewal held not shown**

Neb.—*Citizens State Bank of Thedford v. U. S. Fidelity & Guaranty Co. of Baltimore, Md.*, 266 N.W. 81, 130 Neb. 603, 103 A.L.R. 1401.

15. Neb.—*Corpus Juris* quoted in *Citizens State Bank of Thedford v. U. S. Fidelity & Guaranty Co.*

of Baltimore, Md., 266 N.W. 81, 84, 130 Neb. 603, 103 A.L.R. 1401. 49 C.J. p 952 note 61.

16. S.C.—*Riley v. Allendale Bank*, 35 S.E. 535, 57 S.C. 98. 49 C.J. p 952 note 62.

17. Cal.—*Meyer v. Thomas*, 63 P.2d 1176, 18 Cal.App.2d 299.

N.J.—*Corpus Juris* cited in *Shapiro Bros. Factors Corporation v. Cherokee Silk Corporation*, 176 A. 893, 896, 114 N.J.Law 356. 49 C.J. p 952 note 63.

18. Fla.—*Gables Racing Ass'n v. Persky*, 156 So. 322, 116 Fla. 77.

Tex.—*Parmley v. Aynesworth*, Civ. App., 37 S.W.2d 836, error dismissed.—*Vaughn v. Central State Bank*, Civ.App., 27 S.W.2d 1112.

19. Ark.—*Schutt v. Arkansas Rice Growers' Agr. Credit Corporation*, 39 S.W.2d 517, 183 Ark. 972.

Ind.—*Hammond Pure Ice & Coal Co. v. Heitman*, 47 N.E.2d 309, 221 Ind. 352, 145 A.L.R. 997.

Tex.—*Wise v. Cecil*, Civ.App., 135 S.W.2d 235, error refused.—*Parmley v. Aynesworth*, Civ.App., 37 S.W.2d 836, error dismissed.

**Proof of obligation in bankruptcy proceeding**

Where a bankruptcy court authorizes a sale of property covered by a vendor's lien free and clear of all liens and encumbrances, a pledgee of the vendor's lien note cannot as between him and the pledgor, who is not a party to the bankruptcy proceeding, prove the note as a claim in the bankruptcy proceeding and thereby authorize the bankruptcy court, if the property sells for less than sufficient to discharge it in full, to pay less than the full amount of the note in discharge of the obliga-

tion.—*Cecil v. Wise*, Tex.Civ.App., 109 S.W.2d 214, error refused.

20. Tex.—*Wise v. Cecil*, Civ.App., 135 S.W.2d 235, error refused.

21. Ark.—*Schutt v. Arkansas Rice Growers' Agr. Credit Corporation*, 39 S.W.2d 517, 183 Ark. 972.

N.J.—*Corpus Juris* cited in *Shapiro Bros. Factors Corporation v. Cherokee Silk Corporation*, 176 A. 893, 896, 114 N.J.Law 356.

Tex.—*Corpus Juris* cited in *Parmley v. Aynesworth*, Civ.App., 37 S.W.2d 836, 838, error dismissed. 49 C.J. p 952 note 64.

#### Alternative remedies

Where court orders the sale of property covered by a vendor's lien free and clear from encumbrances and a pledgee of the vendor's lien note purchases the property for a price sufficient to pay the pledgor's indebtedness to him, but insufficient to pay the note in full, the pledgor may treat this as a conversion and claim damages therefor or waive the tort and impress the land with a trust, so that the land stands in lieu of the note subject to a like lien to secure the indebtedness as the collateral note.—*Cecil v. Wise*, Tex.Civ. App., 109 S.W.2d 214, error refused.

#### Estoppel

Where a bankruptcy court orders a sale of property covered by vendor's lien free and clear from liens, notice by the pledgee to the pledgor of the vendor's lien note of his purpose to purchase the land for his own protection, if the pledgor fails to do so, does not estop pledgor to claim that the land stands in lieu of the collateral note and merely as security for the debt it was pledged to secure.—*Cecil v. Wise*, supra.

22. Tex.—*Parmley v. Aynesworth*,



without consent of the pledgor, the pledgee of a note and mortgage or deed of trust releases the debt in exchange for a deed to the premises, he must account for the face of the mortgage.<sup>23</sup> However, where one of two joint obligors pledges choses in action as security for the joint debt, the pledgee may accept less than the face of the collateral with consent of the pledgor and without incurring liability to account to the other obligor for more than the amount received.<sup>24</sup>

An exception to the general rule exists in the case of a compromise by the pledgee of the pledged security on terms advantageous to the pledgor as well as to himself,<sup>25</sup> especially where the maker is insolvent and the debt is insufficiently secured;<sup>26</sup> and in such case he must account to the pledgor only for the amount actually received under the compromise.<sup>27</sup> The pledgee is justified in compromising where the pledgor's conduct is such as to render the pledgee's recovery by suit uncertain.<sup>28</sup>

With the consent of the pledgor the pledgee may lawfully compromise litigation respecting the collateral.<sup>29</sup>

### § 37. — By Pledgor

A pledgor converts pledged property where he wrongfully takes or retains possession of it or destroys it.

If the pledgor wrongfully takes or retains possession of the pledged property without the consent of the pledgee, this constitutes a conversion, for which the pledgee may maintain an action.<sup>30</sup> Also a pledgor converts pledged collateral where he

obtains possession of it under an agreement to use it for a specific purpose and return it but instead destroys it.<sup>31</sup>

### § 38. — By Third Person

A third person who converts pledged property may be sued in conversion by either the pledgor or pledgee.

Where the possession of the property is wrongfully secured, or retained by a third person, he may be sued in conversion by either the pledgor<sup>32</sup> or the pledgee.<sup>33</sup>

### § 39. Actions for Possession or Proceeds of Property

- a. In general
- b. By pledgor
- c. By third person
- d. Conditions precedent
- e. Parties
- f. Pleading
- g. Evidence
- h. Trial
- i. Amount and extent of recovery

#### a. In General

The pledgee's interest in the pledged property is sufficient to enable him to maintain an action against the pledgor or a third person for the recovery of the property or its proceeds.

The pledgee may maintain an action to protect his right to the possession of the property pledged,<sup>34</sup> such as detinue,<sup>35</sup> replevin,<sup>36</sup> or trover.<sup>37</sup> If the pledgor has wrongfully disturbed his possession

Civ.App., 37 S.W.2d 836, error dismissed.

49 C.J. p 952 note 65.

23. Cal.—Meyer v. Thomas, 63 P.2d 1176, 18 Cal.App.2d 299.

49 C.J. p 952 note 66.

24. Ill.—Foltz v. Hardin, 28 N.E. 786, 139 Ill. 405.

25. Minn.—First & American Nat. Bank of Duluth v. Whiteside, 292 N.W. 770, 207 Minn. 537.

N.H.—Exeter Bank v. Gordon, 8 N.H. 66.

N.J.—Corpus Juris cited in Shapiro Bros. Factors Corporation v. Cherokee Silk Corporation, 176 A. 893, 896, 114 N.J.Law 356.

26. Cal.—Slavin v. Argood, 191 P. 2d 120, 84 Cal.App.2d 610.

Minn.—First & American Bank of Duluth v. Whiteside, 292 N.W. 770, 207 Minn. 537.

N.J.—Corpus Juris cited in Shapiro Bros. Factors Corporation v. Cherokee Silk Corporation, 176 A. 893, 896, 114 N.J.Law 356.

49 C.J. p 952 note 70.

27. N.J.—Corpus Juris cited in

Shapiro Bros. Factors Corporation v. Cherokee Silk Corporation, 176 A. 893, 896, 114 N.J.Law 356.

28. Okl.—Picher Bank v. Harris, 229 P. 137, 100 Okl. 256, 40 A.L.R. 254.

29. Ky.—McDonald v. Green, 12 Ky. Op. 62.

30. N.H.—Walcott v. Keith, 22 N.H. 196.

49 C.J. p 952 note 76.

31. Colo.—Rogers v. Rogers, 44 P.2d 909, 96 Colo. 473.

#### Release of mortgage note

Pledgor, who obtained his mortgage note from pledgee thereof ostensibly for purpose of using note temporarily as collateral at bank, was liable to pledgee for conversion if, after obtaining note, pledgor caused mortgage to be released and later conveyed property covered thereby.—Rogers v. Rogers, supra.

32. Me.—Dubie v. Branz, 73 A.2d 217.

49 C.J. p 952 note 77.

33. Cal.—Yokohama Specie Bank v.

Trans-Oceanic Co., 202 P. 346, 54 Cal.App. 533.

49 C.J. p 952 note 78.

34. Ky.—Mercer Nat. Bank of Harrodsburg v. White's Ex'r, 32 S.W. 2d 734, 236 Ky. 128.

Actions for damages for conversion see infra §§ 40-41.

Bar of secured debt as affecting right of pledgee to realize on collateral see Limitations of Actions § 10.

Effect of taking of pledge or collateral security on running of statute of limitations on debt secured see Limitations of Actions § 162.

Limitations as to pledgee's right to hold property and apply it to secured debt see Limitations of Actions § 144.

35. Ky.—Mercer Nat. Bank of Harrodsburg v. White's Ex'r, supra.

36. Ky.—Mercer Nat. Bank of Harrodsburg v. White's Ex'r, supra.

37. Ga.—Rose City Foods v. Bank of Thomas County, 62 S.E.2d 145, 207 Ga. 477.

Ky.—Mercer Nat. Bank of Harrods-

he has a right of action for the property or its proceeds<sup>38</sup> and can maintain replevin against the pledgor for a wrongful taking of the property pledged,<sup>39</sup> or trover for its wrongful detention by the pledgor, although it may have come rightfully into his hands by the pledgee's consent.<sup>40</sup>

*Against third person.* The pledgee has sufficient interest in the pledged property to sustain an action against third persons for the recovery of the property or its proceeds,<sup>41</sup> such as an action in trover,<sup>42</sup> or in detinue,<sup>43</sup> or replevin,<sup>44</sup> or other action for the recovery of the specific property.<sup>45</sup> A pledgee redelivering pledged property to the pledgor for a special purpose cannot maintain an action for its recovery or conversion against an innocent purchaser for value from the pledgor.<sup>46</sup> The pledgee's recovery is subject to liens on the property existing at the time of its pledge.<sup>47</sup>

*Where the property is in the possession of a depositary of the pledgee,* the pledgee, having no notice of any other rights on the part of the depositary, has been held not to lose any of his rights against such person by modifications in the contract with the pledgee.<sup>48</sup>

### b. By Pledgor

The pledgor may maintain an action for the pledged property or its proceeds against a pledgee or third person who has converted it.

In general the pledgee's conversion of the pledged property gives the pledgor a right of action against the pledgee.<sup>49</sup> He may maintain an action for the property itself,<sup>50</sup> or, as in the case of its unauthorized sale or exchange, for the proceeds,<sup>51</sup> or he may bring an action for the amount of damages suffered by him, as considered *infra* § 40. However, the pledgor is not entitled to recover the property unless he establishes either that it was obtained from him by fraud or that the pledgee has violated the conditions on which it was delivered.<sup>52</sup> The pledgor cannot sue in assumpsit for the pledgee's misuse of the property pledged.<sup>53</sup>

*Against third person.* The pledgor ordinarily may maintain an action against a third person for the possession of pledged property or its proceeds.<sup>54</sup>

### c. By Third Person

The owner of property pledged by another may maintain an action for the property or its proceeds where the property was pledged without his consent or where the pledge, although with his consent, was invalid and illegal.

burg v. White's Ex'r, 32 S.W.2d 734, 236 Ky. 128.

38. Ala.—Rolf v. Huntsville Lumber Co., 62 So. 537, 8 Ala.App. 487, 500.

49 C.J. p 953 note 80.

39. Mass.—Way v. Davidson, 12 Gray 465, 74 Am.D. 604.

40. Ga.—Eplan v. Wheat, 68 S.E. 78, 134 Ga. 511.

Mass.—Way v. Davidson, 12 Gray 465, 74 Am.D. 604.

41. Cal.—Seymour v. Salsberry, 171 P. 938, 177 Cal. 755.

49 C.J. p 953 note 81.

#### Payments on renewal of pledged note

One to whom original note was assigned as collateral could recover payments received by defendant from maker, even though payments were made on renewal note.—Murry v. Central Bank, 40 S.W.2d 721, 226 Mo.App. 400.

42. Ga.—Rose City Foods v. Bank of Thomas County, 62 S.E.2d 145, 207 Ga. 477—Graham v. Frazier, 60 S.E.2d 838, 82 Ga.App. 185.

49 C.J. p 953 note 82.

43. Ala.—Rolf v. Huntsville Lumber Co., 62 So. 537, 8 Ala.App. 487.

49 C.J. p 953 note 83.

44. Mass.—Gamson v. Pritchard, 96 N.E. 715, 210 Mass. 296.

49 C.J. p 953 note 84.

#### Creditor of pledgor

A pledgee deprived of his possession by attachment of the property by a creditor of his pledgor is entitled to replevy it.—Currier v. Ford, 26 Ill. 488.

45. S.C.—Lyons v. Rogers, 3 S.C.L. 5.

Suit in equity see *infra* § 42.

46. Or.—Schumann v. California Nat. Assoc. Bank, 233 P. 860, 114 Or. 336, 347.

49 C.J. p 953 note 88.

47. N.Y.—Page v. Boggess, 88 N.Y. S. 569, 41 Misc. 46.

48. N.Y.—Mercantile Trust Co. v. Atlantic Trust Co., 28 N.Y.S. 496, 69 Hun 264.

49. Ala.—Stanley v. People's Sav. Bank, 157 So. 844, 229 Ala. 446.

La.—W. F. Taylor Co. v. Whitbeck, App., 159 So. 187.

Tex.—Leleux v. Serafino, Civ.App., 88 S.W.2d 1100.

50. Tex.—Leleux v. Serafino, *supra*.

49 C.J. p 953 note 92.

Recovery of property on payment of

debt see *infra* §§ 47–49.

51. La.—W. F. Taylor Co. v. Whitbeck, App., 159 So. 187.

Tex.—Leleux v. Serafino, Civ.App., 88 S.W.2d 1100.

49 C.J. p 953 note 93.

#### Assumpsit

(1) Where the property pledged

has been sold for value, the pledgor

may sue in assumpsit for such value.—May v. Stallings, 16 So.2d 870, 245 Ala. 292.

(2) The amount of value received by the pledgee on the sale of the property pledged is the foundation of the pledgor's claim for recovery in assumpsit.—May v. Stallings, *supra*.

#### Pledgee's acquisition of title from third person

If seller agreed to take the property in storage as pledge to protect seller against liability on guaranty to assignee of conditional sales contract, and to give buyer additional time, default of buyer on sales contract would justify assignee's seizure of property, but seller repurchasing from the assignee could not claim that it occupied a new status for purpose of defeating liability to buyer for violation of pledge agreement, and, if buyer was not in default under storage agreement, there was no change in relation occupied by seller and buyer except seller was substituted for assignee as creditor under the sales contract.—May v. Stallings, *supra*.

52. Ill.—Winston v. Rawson, 38 Ill. App. 193.

53. Ala.—May v. Stallings, 16 So.2d 870, 245 Ala. 292.

54. N.Y.—Treadwell v. Clark, 82 N. E. 505, 190 N.Y. 51, motion denied.

88 N.E. 1138, 190 N.Y. 542.

49 C.J. p 953 note 98.

The owner of property pledged by another may maintain an action for the property or its proceeds where the property was pledged without his consent,<sup>55</sup> or where the pledge, although made with the owner's consent, was invalid and illegal, under a statute so providing, because the debt secured was usurious.<sup>56</sup>

A conditional vendor who has failed to comply with statutory requirements cannot recover from his vendee's pledgee or persons claiming under the latter.<sup>57</sup>

#### d. Conditions Precedent

The pledgor ordinarily must tender payment of, or have paid, the debt the pledge was given to secure as a prerequisite to the maintenance of an action against the pledgee, or one holding under him, to recover the property pledged.

The pledgor must tender payment of, or have paid, the debt the pledge was given to secure as a prerequisite to the maintenance of an action against the pledgee to recover the property itself,<sup>58</sup> such as an action in replevin,<sup>59</sup> trover to recover the property,<sup>60</sup> or other possessory action,<sup>61</sup> unless the lien created by the pledge has been otherwise discharged,<sup>62</sup> or there has been such a conversion of the property pledged by the pledgee as renders it impossible for him to return it on payment of the debt,<sup>63</sup> or the pledgee has informed the pledgor, or his successor in interest, that a tender will not be accepted.<sup>64</sup> Also, where the indebtedness secured has not been paid, the pledgor is not entitled to the return of additional collateral pledged to secure the debt, in the absence of an adjudication that the original collateral was sufficient.<sup>65</sup>

Likewise, ordinarily payment or tender of the secured debt is a condition precedent to the pledgor's right to recover the property or its proceeds from a third person<sup>66</sup> unless defendant pleads ownership of the property pledged and denies the pledgor's right to redeem it.<sup>67</sup> However, there is authority to the effect that the pledgor may sue for the property before paying the debt, the pledgee being protected by an order that his claim shall be first paid out of the proceeds thereof.<sup>68</sup> A mere offer to tender is not sufficient.<sup>69</sup> Tender has been held not necessary to the maintenance of an action to recover the proceeds of the property pledged.<sup>70</sup> The pledgee of bonds unlawfully pledged by one not the owner cannot exact payment of their value before surrendering them to the owner.<sup>71</sup>

*Where the debt has been paid to the pledgee*, the pledgor need not make a tender to a third person in possession of the pledged property.<sup>72</sup>

*No demand* is necessary unless required by statute before a pledgee may sue a third person in trover for the property.<sup>73</sup>

*Subsequent purchaser or claimant.* A subsequent purchaser of the property from the pledgor is entitled to recover possession from the pledgee only on payment or tender to the pledgee of the amount of the debt for which it is security.<sup>74</sup>

#### e. Parties

The usual rules respecting parties apply in actions to recover pledged property or its proceeds.

The usual rules with respect to parties apply in actions to recover pledged property or its proceeds.<sup>75</sup> It is not necessary for the pledgor to

55. Cal.—Ripley Improvement Co. v. Hellman Commercial Trust & Savings Bank, 265 P. 835, 90 Cal. App. 83.

49 C.J. p 953 notes 99-1.

56. U.S.—Mendez v. Murdock, D.C. Mo., 83 F.Supp. 630.

57. N.Y.—Leonard v. Harris, 131 N. Y.S. 909, 147 App.Div. 458.

49 C.J. p 954 note 7.

58. Ga.—Corpus Juris cited in Evans v. Odum, 183 S.E. 669, 671, 52 Ga.App. 453.

49 C.J. p 954 note 10.

59. Miss.—Spencer v. O'Bryant, 106 So. 6, 140 Miss. 474.

49 C.J. p 973 note 99.

60. Ga.—Evans v. Odum, 183 S.E. 669, 52 Ga.App. 453.

61. N.J.—Meisel v. Merchants' Nat. Bank, 88 A. 1067, 85 N.J.Law 253. 49 C.J. p 973 note 1.

62. Mich.—Feige v. Burt, 77 N.W. 928, 118 Mich. 243, 74 Am.S.R. 390. 49 C.J. p 954 note 11.

63. N.Y.—Cortelyou v. Lansing, 2 Cal.Cas. 200.

*Answer showing disposition of property*

In trover by pledgor to recover pledge, pledgee's answer alleging that pledgee disposed of property under claim of absolute title showed conversion, so as to relieve pledgor of duty of proving tender of amount of debt secured by pledge prior to filing suit.—Evans v. Odum, 183 S.E. 669, 52 Ga.App. 453.

64. La.—Nelson v. Snell, 129 So. 387, 14 La.App. 256.

65. Ky.—Citizens Union Nat. Bank v. Klein, 86 S.W.2d 691, 260 Ky. 730.

66. Ga.—Payne v. Power, 79 S.E. 771, 140 Ga. 759. 49 C.J. p 954 note 12.

67. N.C.—Tesh v. Rominger, 1 S.E. 2d 98, 215 N.C. 52.

68. N.C.—Ball-Thrash v. McCormick, 78 S.E. 303, 162 N.C. 471.

69. Ga.—Payne v. Power, 79 S.E. 771, 140 Ga. 759. 49 C.J. p 954 note 14.

70. N.J.—Meisel v. Merchants' Nat. Bank, 88 A. 1067, 85 N.J.Law 253. N.Y.—Cortelyou v. Lansing, 2 Cal. Cas. 200.

71. Cal.—Ripley Improvement Co. v. Hellman Commercial Trust & Savings Bank, 265 P. 835, 90 Cal. App. 83.

72. Md.—German Sav. Bank v. Renshaw, 28 A. 281, 78 Md. 475.

73. Me.—Porter v. Foster, 20 Me. 391, 37 Am.D. 59.

74. Minn.—Jones v. Rahilly, 16 Minn. 320.

75. Mass.—Sutcliffe v. Cawley, 132 N.E. 406, 240 Mass. 231.

join as a plaintiff in an action or suit by the pledgee against a third person for recovery of the pledged property or its proceeds.<sup>76</sup> Where his claims conflict with those of the pledgee, the pledgor may file a cross complaint.<sup>77</sup> The validity of a pledge to secure notes cannot be attacked by a suit to which neither the pledgor nor the holders of the notes are parties.<sup>78</sup>

### f. Pleading

The usual rules of pleading apply in actions to recover pledged property or its proceeds.

The usual rules of pleading,<sup>79</sup> including those respecting issues, proof, and variance,<sup>80</sup> apply in proceedings to recover pledged property or its proceeds.

### g. Evidence

General rules governing the admissibility and sufficiency of evidence, burden of proof, and presumptions apply in proceedings for the possession of pledged property or its proceeds.

The usual rules apply to questions involving admissibility<sup>81</sup> and sufficiency<sup>82</sup> of evidence, and burden of proof<sup>83</sup> and presumptions<sup>84</sup> in proceedings for the possession of pledged property or its proceeds. One sued in replevin has the burden of proving an alleged defense of a preëxisting debt and pledge.<sup>85</sup>

### h. Trial

In proceedings for possession of pledged property or its proceeds, questions of fact are for the jury on conflicting evidence, and the general rules governing instructions and findings apply.

On conflicting evidence, questions of fact are for the jury,<sup>86</sup> but in a proper case the court may direct a verdict.<sup>87</sup> Ordinarily it is for the jury to find whether plaintiff complied with his duty under the pledge, and defendant did not live up to his.<sup>88</sup> The usual rules apply to instructions in proceedings for possession of pledged property or its proceeds<sup>89</sup> and also according to judicial deci-

Miss.—Hart v. Moore, 158 So. 490, 171 Miss. 838.

49 C.J. p 955 note 23.

#### Accommodation indorser

Where a bill of exchange indorsed for accommodation is pledged for less than its face and the pledgee transfers it and receives its full value, and the accommodation indorser is subsequently compelled to pay it, the indorser cannot maintain an action against the pledgee for the surplus; the action must be in the name of the party pledging it.—Gregory v. Burrall, 2 Wend., N.Y., 391.

#### Proper parties

Bank issuing and paying cashier's check for portion of balance of proceeds of personal check above amount of payee's note, as security for which check was accepted, to payee's agent, who forged payee's signature on both checks, was held proper party in payee's suit for such balance.—Hart v. Moore, 158 So. 490, 171 Miss. 838.

76. Mass.—Michigan State Bank v. Gardner, 3 Gray 305.

77. Colo.—Tom Boy Gold Mines Co. v. Green, 53 P. 845, 11 Colo.App. 447.

78. U.S.—Hubbard v. Tod, Iowa, 19 S.Ct. 14, 171 U.S. 474, 43 L.Ed. 246.

79. Cal.—Floyd v. Riskin, 77 P.2d 233, 25 Cal.App.2d 297.

49 C.J. p 955 note 27.

80. Tex.—Moore v. Krenex, Civ. App., 17 S.W.2d 89, reversed on other grounds Moore v. Krenex, Com.App., 39 S.W.2d 323.

49 C.J. p 955 note 28.

#### Proof required

Abandonment or waiver of the security pledged will not be adjudged

without clear and satisfactory proof of both intention to abandon or waive and actual relinquishment of the security.—Waken v. Bimstrom, 45 P.2d 97, 172 Okl. 232.

81. Wis.—Smith v. Sherry, 13 N.W.

482, 55 Wis. 480.

49 C.J. p 955 note 30.

#### Evidence held not admissible

Rejection of defendant's evidence in payee's suit for balance of proceeds of check after satisfaction of payee's note, as security for which defendant accepted check, that plaintiff received proceeds from his agent or otherwise, was held warranted.—Hart v. Moore, 158 So. 490, 171 Miss. 838.

82. La.—Dickson Ice Cream Co. v.

Knight, 149 So. 439, 177 La. 735.

49 C.J. p 955 note 31.

#### Evidence held sufficient

(1) In general.

U.S.—Mendez v. Murdock, D.C.Mo., 83 F.Supp. 680.

Cal.—Floyd v. Riskin, 77 P.2d 233, 25 Cal.App.2d 297.

Me.—Dubie v. Branz, 73 A.2d 217.

49 C.J. p 955 note 31 [a].

(2) To establish the identity of the property sued for.—Nelson v. Snell, 129 So. 387, 14 La.App. 256.

(3) To show conversion.—Dubie v. Branz, supra.

(4) To show tender of amount due on debt secured by pledge.—Evans v. Odum, 183 S.E. 669, 52 Ga.App. 453.

(5) To show that maker of notes had notice of their pledge to defendant.—Dickson Ice Cream Co. v. Knight, 149 So. 439, 177 La. 735.

(6) To warrant conclusion that dealer lending salesman money on

automobile as security had notice that salesman was not real owner.—Rhinoek v. Price, 23 P.2d 1014, 218 Cal. 403.

83. N.Y.—Frisch v. Dulany, 265 N.

Y.S. 383, 238 App.Div. 609, motion denied 189 N.E. 757, 263 N.Y. 684.

49 C.J. p 955 note 32.

#### Good faith

When seller rightfully rescinds sale for fraud, burden of proof is on third person to show that he is pledgee from buyer for value without notice; but, where third person shows that he paid fair value for pledge of property from buyer, presumption of good faith arises, placing burden on seller to show that pledgee had knowledge or notice of fraud.—Frisch v. Dulany, supra.

84. Minn.—Ware v. Squyer, 84 N. W. 126, 81 Minn. 388, 83 Am.S.R. 390.

49 C.J. p 956 note 33.

85. Or.—Patton v. Washington, 103 P. 60, 54 Or. 479.

49 C.J. p 956 note 34.

86. Mo.—Tourse v. Mound City Trust Co., App., 52 S.W.2d 611—Leedom v. The J. M. Ward Furniture, Stove and Carpet Company, 38 Mo.App. 425.

49 C.J. p 956 note 35.

87. Ga.—Evans v. Odum, 183 S.E. 669, 52 Ga.App. 453.

88. Ala.—May v. Stallings, 16 So.2d 870, 245 Ala. 292.

89. Tex.—Riley v. Hallmark, Civ. App., 180 S.W. 134.

49 C.J. p 956 note 37.

#### Instructions held proper

Ga.—Scott v. Latham & Sons, 161 S.E. 662, 44 Ga.App. 323.

49 C.J. p 956 note 37 [a].

sions on the question, with respect to the findings.<sup>90</sup>

### 1. Amount and Extent of Recovery

- (1) In general
- (2) In suit by pledgor
- (3) In suit by third person

#### (1) In General

In an action by a pledgee against the pledgor, or one holding under him, for the possession of the pledged property the pledgee is entitled to a judgment for the return of the goods or payment of the debt; but, in an action against a third person not holding under the pledgor, the pledgee is entitled to judgment for the return of the property pledged or its full value.

In a suit by the pledgee against the pledgor for the latter's retaking of the pledged property, the pledgee is entitled to a judgment for the return of the goods or payment of the debt due.<sup>91</sup> In other words, plaintiff is entitled to recover only the property itself, or the debt it was given to secure, with interest, since this is the measure of the pledgor's liability to him.<sup>92</sup>

*Against third person.* In an action in trover against a third person, the pledgee ordinarily is entitled to an alternative judgment for the full value of the collaterals, irrespective of the amount for which they were pledged, since this is the measure of his responsibility to the pledgor.<sup>93</sup> However, in an action against a purchaser from the pledgor, the pledgee can recover only the amount of his debt,<sup>94</sup> since this would be the extent of his recovery against the pledgor himself;<sup>95</sup> and, where the pledgee sues on the contract for the purchase price of the goods, the purchaser may set off his loss on a portion of the goods purchased but never delivered.<sup>96</sup>

*Income.* A pledgee can recover only the income or dividends from pledged property which was received subsequent to the time of the pledge.<sup>97</sup>

#### (2) In Suit by Pledgor

In an action by the pledgor against the pledgee for

the property pledged, the pledgee ordinarily will be given an option to return the property or its value, and if adjudged to pay its value he may deduct the unpaid portion of the loan secured.

In jurisdictions where trover will lie for the recovery of property, on judgment in trover against the pledgee, he will be given an option to return the property itself or its value.<sup>98</sup> Where the action is for the return of the property pledged and it develops that part of the property has in fact been converted, the pledgor is entitled to the return of the pledged property held intact and damages for that converted.<sup>99</sup> A pledgee adjudged to pay the cash value of pledged property in event of failure to return it may deduct from such cash value the amount of the unpaid loan secured.<sup>1</sup> If a pledged note is construed as paid to the pledgee, no matter by what means, he is liable for the face value, whether or not it was legally collectable.<sup>2</sup> In an action in assumpsit against a pledgee who wrongfully sold the property pledged, plaintiff may recover the consideration which went to the pledgee on the sale, either money or money's worth.<sup>3</sup> The pledgor may recover the full sales price from the pledgee even though the latter took a note for the purchase price which he subsequently surrendered for less than its face value.<sup>4</sup>

*Interest.* Where the property is sold by the pledgee on credit, without interest, and the sale is ratified by the pledgor by his suing for the proceeds, the pledgor is chargeable with interest on his debt not only to the time of the sale, but until the payment of sufficient purchase money to discharge his debt.<sup>5</sup>

*Where the property of a number of pledgors has been mingled* and converted by the pledgee, the surplus proceeds of such property remaining on the pledgee's insolvency is impressed with a trust for the benefit of the pledgors in proportion to their loss.<sup>6</sup>

#### Instructions held erroneous

N.Y.—Frisch v. Dulany, 265 N.Y.S. 283, 238 App.Div. 609, motion denied 189 N.E. 757, 263 N.Y. 684.

90. Cal.—Rhinoek v. Price, 23 P.2d 1014, 218 Cal. 403.

Tex.—Cecil v. Wise, Civ.App., 109 S.W.2d 214, error refused.

91. Miss.—Jones v. Hicks, 52 Miss. 682.

49 C.J. p 956 note 38.

92. Ala.—Rolfe v. Huntsville Lumber Co., 62 So. 537, 8 Ala.App. 487, 501.

49 C.J. p 956 note 39.

93. N.Y.—Hanover Nat. Bank v.

American Dock, etc., Co., 43 N.Y.S. 544, 14 App.Div. 255.

49 C.J. p 956 note 41.

94. Ga.—Rose City Foods v. Bank of Thomas County, 62 S.E.2d 145, 207 Ga. 477.

N.D.—Grand Forks Second Nat. Bank v. St. Thomas First Nat. Bank, 76 N.W. 504, 8 N.D. 50.

95. N.D.—Grand Forks Second Nat. Bank v. St. Thomas First Nat. Bank, supra.

96. Okl.—First State Bank of Audubon, Iowa, v. Collins-Dietz-Morris Co., 123 P.2d 957, 190 Okl. 409.

97. U.S.—Reed v. Kellerman, D.C. Pa., 40 F.Supp. 46, motion dismissed 2 F.R.D. 195.

98. La.—Johnson v. Robbins, 20 La. Ann. 569.

99. Cal.—Horn v. Klatt, 151 P.2d 149, 65 Cal.App.2d 510.

1. La.—Alcolea v. Smith, 90 So. 769, 150 La. 482, 24 A.L.R. 815.

49 C.J. p 956 note 45.

2. Ill.—Union Nat. Bank v. Post, 61 N.E. 507, 192 Ill. 385.

3. Ala.—May v. Stallings, 16 So.2d 870, 245 Ala. 292.

4. Mont.—Demars v. Hudon, 82 P. 952, 33 Mont. 170.

5. Mont.—Demars v. Hudon, supra.

6. N.Y.—Whitlock v. Seaboard Nat. Bank, 60 N.Y.S. 611, 29 Misc. 84. 49 C.J. p 956 note 49.

*Against third person.* Where the pledgor has conferred on the pledgee the indicia of ownership of the property, he can recover from a third person who has received it from the pledgee in good faith as collateral for a loan only the value of the property in excess of the loan by defendant to the pledgee.<sup>7</sup> Where the pledgor consents to a sale by one claiming by a transfer from his pledgee, he cannot hold such person responsible for more than the actual amount received although the property is sold for less than it is worth.<sup>8</sup>

*Costs.* Where plaintiff fails in a suit, the sole purpose of which is to secure possession of the property pledged, he is properly cast for costs.<sup>9</sup>

### (3) In Suit by Third Person

The owner of property pledged by another may recover it or its proceeds in an action therefor, where it was pledged without his consent and by one on whom he had not conferred the indicia of ownership; but where he conferred the indicia of ownership on the pledgor his recovery is limited to the excess of the proceeds over the amount for which it was pledged.

The owner of property pledged without his consent by one on whom he had not conferred the indicia of ownership may recover the property itself or the proceeds from the pledgee.<sup>10</sup> However, he cannot defeat the pledge and his recovery is limited to the excess of the proceeds over the amount for which it was pledged where he conferred the indicia of ownership on the pledgor,<sup>11</sup> or, under some statutes, where he has allowed another to assume the apparent ownership of the property for the purpose of making any transfer of it,<sup>12</sup> unless the pledgee had actual or imputed knowledge of the owner's rights and was not an innocent encumbrancer.<sup>13</sup> The pledgee is not, however, entitled to set off sums advanced to the pledgor on the property after notice of its true ownership,<sup>14</sup> or on

a negotiable note not belonging to the pledgor and received by him otherwise than in the usual course of business,<sup>15</sup> or to use the property to extinguish an antecedent indebtedness due him from the person making such delivery.<sup>16</sup> In a suit to recover possession of property which has been pledged by another with his consent, the pledgee is not entitled in reconvention to foreclose on his pledge where he has not complied with a statute governing the method of foreclosure on pledged property.<sup>17</sup> These rules apply with equal force in favor of bona fide purchasers from the true owner.<sup>18</sup>

## § 40. Actions for Damages

- a. In general
- b. By pledgor
- c. By third person
- d. Conditions precedent
- e. Defenses; recoupment, set-off, and counterclaim
- f. Pleading
- g. Evidence
- h. Trial and judgment

### a. In General

A pledgee may maintain an action against the pledgor or a third person to recover damages for the conversion or wrongful injury of the pledged property.

The pledgee may recover by an action in trover,<sup>19</sup> or the statutory substitute therefor,<sup>20</sup> for the pledgor's conversion of the pledged property, and this although the pledged property may have come into the pledgor's hands by the pledgee's consent,<sup>21</sup> as where the pledgee has delivered the property to the pledgor for a special purpose.<sup>22</sup>

*Against third person.* The pledgee has such an interest or property in the pledged property as en-

7. N.Y.—Van Woert v. Olmstead, 71 N.Y.S. 431.

Pa.—Appeal of Klein, 14 A. 369, 10 Pa.Cas. 477.

8. N.Y.—Merchants' Bank v. Livingston, 17 Hun 321, affirmed 79 N.Y. 618.

9. La.—Hoover v. Madding, App., 15 So.2d 557.

10. Cal.—Ripley Improvement Co. v. Hellman Commercial Trust & Savings Bank, 265 P. 835, 90 Cal.App. 83.

49 C.J. p 953 note 99.

11. Md.—Patapsco Nat. Bank v. Meads, 102 A. 993, 131 Md. 573.

49 C.J. p 953 note 1.

#### Certificate of deposit

Where holder of deposit certificate indorsed it to defendant bank, which obtained proceeds thereof from issu-

ing bank and subsequently issued other certificates in lieu thereof, third person claiming ownership of such certificates on theory that he was beneficiary of surety bond to which original certificate was pledged was held not entitled to recover against defendant bank regardless of whether or not defendant was holder of original certificate in due course.—Seaboard Surety Corporation of America v. Hollywood State Bank, 62 P.2d 752, 17 Cal.App. 2d 638.

12. Cal.—Floyd v. Riskin, 77 P.2d 233, 25 Cal.App.2d 297.

13. Cal.—Rhinoek v. Price, 28 P.2d 1014, 218 Cal. 403.

14. N.Y.—Kaminski v. Schefer, 61 N.Y.S. 771, 46 App.Div. 170.

49 C.J. p 954 note 2.

15. N.Y.—Keutgen v. Parks, 4 N.Y. Super. 60.

16. Idaho.—Van Ausdile Hoffman Piano Co. v. Jain, 228 P. 342, 39 Idaho 563.

N.Y.—Hoppenstedt v. Amy, 174 N.Y.S. 742.

17. La.—Hoover v. Madding, App., 15 So.2d 557.

18. Cal.—Ambrose v. Evans, 4 P. 960, 66 Cal. 74.

49 C.J. p 954 note 5.

19. Vt.—Jennings v. Gallagher, 152 A. 802, 103 Vt. 169.

20. U.S.—Hurst v. Coley, C.C.Ga., 15 F. 645.

21. Vt.—Jennings v. Gallagher, 152 A. 802, 103 Vt. 169.

22. Vt.—Jennings v. Gallagher, 152 A. 802, 103 Vt. 169.

49 C.J. p 956 note 52.

ables him to maintain an action for the conversion of,<sup>23</sup> or wrongful injury to,<sup>24</sup> it by a third person, and even though it is taken under an attachment regular on its face.<sup>25</sup> Such an action may be maintained against one who returns the pledged property, without authority, to the pledgor,<sup>26</sup> or against one who causes or induces the pledgor to convert the pledged property.<sup>27</sup> A production credit association to which a tenant pledged his crop has been held entitled to bring a personal action against the landlord for breach of his agreement not to interfere with the association's lien, and is not restricted to an hypothecary action against that portion of the crop produced which was delivered to the landlord by the tenant and disposed of in breach of the agreement.<sup>28</sup>

### b. By Pledgor

The pledgor may maintain an action against the pledgee or a third person for damages for conversion of the pledged property.

On a conversion of the property by the pledgee, the pledgor, instead of suing for the property itself or its proceeds, as considered *supra* § 39, may maintain an action at law for damages<sup>29</sup> for breach of the contract to keep the property safely and restore it to the pledgor on payment of the debt,<sup>30</sup> or an action on the case,<sup>31</sup> or he may plead such con-

version as a set-off to a suit on the original debt by the pledgee or his representative, as considered *infra* § 55. The pledgor may recover for the pledgee's misuse of the property pledged by an action or count in case.<sup>32</sup> A pledgor may maintain an action for damages against a pledgee for violation of special contractual rights.<sup>33</sup>

*In the absence of loss*, the pledgor cannot recover damages for conversion.<sup>34</sup>

*Partial conversion.* If the conversion of a part of the property pledged has damaged the pledgor so that the whole may not be used with the same degree of efficiency or dominion as previously, and such change is due to the acts of the pledgee, the pledgor should be compensated for the detriment suffered.<sup>35</sup>

*Conversion of several things.* The pledgor ordinarily should bring one action for conversion of several different things pledged under one contract.<sup>36</sup>

*Title and possession.* If a pledgor's equitable or other rights have been injured or destroyed by a person in possession as pledgee, in violation of the terms of the pledge agreement, he may sue in case,<sup>37</sup> but in order for a pledgor to be able to maintain an action in trover for conversion of the

23. Cal.—Watson v. Stockton Morris Plan Co., 93 P.2d 855, 34 Cal. App.2d 393.

Fla.—Corpus Juris cited in Alford v. Barnett Nat. Bank of Jacksonville, 188 So. 322, 326, 137 Fla. 564.

Ga.—Rose City Foods v. Bank of Thomas County, 62 S.E.2d 145, 207 Ga. 477—Carpenter v. Williams, 154 S.E. 298, 41 Ga.App. 685.

Mass.—Way v. Davidson, 12 Gray 465, 74 Am.D. 604.  
49 C.J. p 957 note 56.

#### Trover

Fla.—Alford v. Barnett Nat. Bank of Jacksonville, 188 So. 322, 137 Fla. 564.

Ga.—Graham v. Frazier, 60 S.E.2d 833, 82 Ga.App. 185.

24. Mass.—Way v. Davidson, 12 Gray 465, 74 Am.D. 604.  
49 C.J. p 957 note 55.

25. Mo.—Roeder v. Green Tree Brewery Co., 33 Mo.App. 69.  
49 C.J. p 957 note 57.

26. Cal.—Faulkner v. Santa Barbara First Nat. Bank, 62 P. 463, 130 Cal. 253.

27. Ga.—Carpenter v. Williams, 154 S.E. 298, 41 Ga.App. 685.

28. La.—Tallulah Production Credit Ass'n v. Krauss, App., 3 So.2d 446.

#### Loan held not excessive

La.—Tallulah Production Credit Ass'n v. Krauss, *supra*.

29. Cal.—Bell v. State Bank, 94 P. 889, 153 Cal. 234.

S.C.—Daniel v. Post, 187 S.E. 915, 181 S.C. 468.

Tex.—Wallace v. Renfro, Civ.App., 124 S.W.2d 456, error dismissed, judgment correct—Leleux v. Serafino, Civ.App., 38 S.W.2d 1100.

Action for return of property on discharge of secured debt see *infra* § 49.

#### Basic character of proceeding

A suit for conversion of pledged property by pledgee is basically an equitable proceeding designed to award pledgor and pledgee all that is fair and just.—Horn v. Klatt, 151 P. 2d 149, 65 Cal.App.2d 510.

#### Time cause of action accrues

A pledgor's cause of action for conversion of pledged securities by alleged illegal sale accrued on date that pledgee divested itself of possession and control of securities, and pledgor could not by subsequent demand create new cause of action for conversion accruing on day of such demand.—Jones v. National Chautauqua County Bank of Jamestown, 74 N.Y.S.2d 498, 272 App.Div. 521.

#### Conversion authorizing action for damages

(1) Compromise of pledge by surrender of collateral notes to maker at sum less than face value.—Parn-

ley v. Aynesworth, Tex.Civ.App., 37 S.W.2d 836, error dismissed.

(2) Unauthorized sale of pledged property.—W. F. Taylor Co. v. Whitbeck, La.App., 159 So. 137.

(3) Unlawful appropriation of property pledged.—Nichols v. Leach, 300 P. 103, 114 Cal.App. 545.

30. Mo.—Murray v. Farmers', etc., Bank, App., 206 S.W. 577.  
49 C.J. p 957 note 62.

31. Ill.—Hughes v. Barrell, 167 Ill. App. 100.  
49 C.J. p 957 note 63.

32. Ala.—May v. Stallings, 16 So.2d 870, 245 Ala. 292.

33. Ohio.—Francis v. Tildesley Coal Co., App., 32 N.E.2d 54.

34. N.Y.—Jones v. National Chautauqua County Bank of Jamestown, 74 N.Y.S.2d 498, 272 App.Div. 521.

Pa.—Wolfe v. Pennsylvania Co. for Insurances on Lives and Granting Annuities, 185 A. 292, 322 Pa. 344.  
49 C.J. p 957 note 66.

35. Cal.—Horn v. Klatt, 151 P.2d 149, 65 Cal.App.2d 510.

36. Vt.—Bullard v. Thorpe, 30 A. 36, 66 Vt. 599, 44 Am.S.R. 867, 25 L.R.A. 605.

49 C.J. p 957 note 67.

37. Ala.—May v. Stallings, 16 So.2d 870, 245 Ala. 292—Stanley v. Peo-

pledged property he must have and retain the legal title, general or special, to the property pledged.<sup>38</sup> Also the present right to possession is an essential element of a suit for conversion<sup>39</sup> unless the pledgee has become unable to return the pledged property.<sup>40</sup> Thus a purchaser of property on a conditional sale who pledges it to the seller cannot sue in trover either for its misuse or wrongful sale.<sup>41</sup>

**Against third person.** The pledgor, as general owner of the property, may maintain an action for damages against a third person for its injury or conversion.<sup>42</sup> However, the pledgor, not being entitled to the possession of the property, cannot maintain trespass for taking it from the possession of the pledgee<sup>43</sup> except with the latter's consent.<sup>44</sup> The pledgor may recover damages against a third person by reason of whose breach of contract to pay the pledgor's debt to the pledgee the collateral has been forfeited.<sup>45</sup>

**Where the pledgee has surrendered a note to the maker for less than its full value,** in addition to the pledgor's remedy against the pledgee for conversion, he may also recover from the maker the balance on the note.<sup>46</sup>

### c. By Third Person

A subsequent purchaser of pledged property from the pledgor may maintain an action for its conversion.

A subsequent purchaser of the property from the pledgor may maintain an action for its conversion.<sup>47</sup> One to whom the goods have been deliv-

ered by the pledgee, with the consent of the pledgor, may maintain an action for their conversion.<sup>48</sup>

**Maker of pledged note.** Where the pledgee has wrongfully transferred a note pledged to him, he will be liable to the maker, on the payment or tender of his debt, for the amount the maker was obliged to pay to the holder of the note.<sup>49</sup>

**Prior lienor.** Any liens existing on the property at the time of its pledge may be enforced against the pledgee.<sup>50</sup>

### d. Conditions Precedent

As a general rule a tender of the amount due on the debt secured by the pledge or a demand for the return of the pledged property is not required as a condition precedent to the maintenance of an action for damages for conversion of the pledged property.

Tender of the amount of the principal debt has been held not necessary to the maintenance of an action for conversion of the property pledged,<sup>51</sup> especially where the pledgee has indicated that he will not return the property in any event<sup>52</sup> or is unable to do so because he no longer has possession thereof.<sup>53</sup> However, tender may be required where the property remains in the possession of the pledgee,<sup>54</sup> and tender has been held necessary to support an action for conversion where plaintiff has never had possession of the pledged property.<sup>55</sup> Tender into court of the amount due is proper, although not necessary, in a trover action by the pledgor to recover the property pledged.<sup>56</sup> The pledgor may sue a third person without previous

ple's Sav. Bank, 157 So. 844, 229 Ala. 446—Nabring v. Bank of Mobile, 58 Ala. 204.

38. Ala.—May v. Stallings, 16 So.2d 870, 245 Ala. 292—Stanley v. People's Sav. Bank, 157 So. 844, 229 Ala. 446.

Me.—Patten v. Dennison, 14 A.2d 12, 137 Me. 1.

39. U.S.—Byland v. Miller, D.C.Ky., 13 F.Supp. 137.

Ala.—Stanley v. People's Sav. Bank, 157 So. 844, 229 Ala. 446.

Me.—Patten v. Dennison, 14 A.2d 12, 137 Me. 1.

Mass.—Moore, etc., Co. v. Manufacturers' Nat. Bank, 158 N.E. 755, 261 Mass. 328.

### Trover

Pledgor may not sue in trover for conversion when he has conferred on pledgee right to possession of property as security for debt, although there may be an act of conversion by pledgee thus in rightful possession of property.—May v. Stallings, 16 So.2d 870, 245 Ala. 292.

40. Mass.—Moore, etc., Co. v. Manufacturers' Nat. Bank, 158 N.E. 755, 261 Mass. 328.

41. Ala.—May v. Stallings, 16 So.2d 870, 245 Ala. 292.

42. Ala.—Polytinsky v. Sharpe, 100 So. 750, 211 Ala. 510.

49 C.J. p 957 note 70.

43. N.H.—Gay v. Smith, 38 N.H. 171.

44. Ala.—Fairbanks v. Chunn, 56 So. 847, 2 Ala.App. 642.

45. Ill.—Rea v. Forrest, 38 Ill. 275.

46. Tex.—Farmley v. Aynesworth, Civ.App., 37 S.W.2d 836, error dismissed.

49 C.J. p 957 note 75.

47. N.Y.—Mercantile Trust Co. v. Atlantic Trust Co., 33 N.Y.S. 252, 86 Hun 213—Genet v. Howland, 45 Barb. 560, 30 How.Pr. 360.

Action for surplus after payment of debt see infra § 54.

48. Mass.—Clark v. Dearborn, 103 Mass. 335.

49. La.—Romero v. Newman, 23 So. 493, 50 La.Ann. 80.

49 C.J. p 957 note 79.

50. Ky.—Blalock v. Keys, 13 Ky.L. 205.

51. Ga.—Corpus Juris cited in

Evans v. Odum, 133 S.E. 669, 671, 52 Ga.App. 453.

Tex.—Wallace v. Renfro, Civ.App., 124 S.W.2d 456, error dismissed, judgment correct.

49 C.J. p 958 note 82, p 973 note 3.

52. Mo.—Hornsby v. Knorpp, 232 S.W. 776, 207 Mo.App. 302.

N.C.—Corpus Juris cited in Tesh v. Rominger, 1 S.E.2d 98, 100, 215 N.C. 52.

53. Ark.—Meyer Bros. Drug Co. v. Matthews, 64 S.W. 264, 69 Ark. 483.

54. Mo.—Amick v. Empire Trust Co., 296 S.W. 798, 317 Mo. 157, 53 A.L.R. 1064.

49 C.J. p 973 note 6.

55. Mo.—Andrews v. Buchanan County Bank, 234 S.W. 518, 208 Mo.App. 366.

49 C.J. p 973 note 7.

56. Ga.—Evans v. Odum, 133 S.E. 669, 52 Ga.App. 453.

### Reason for rule

If his action is successful in actually obtaining the property or its value, under an alternative verdict, or its value after judgment on a



tender of the debt.<sup>57</sup> An owner of property who permitted another to pledge it has been held not required to tender payment of the debt secured in order to maintain an action for the conversion of the property by its wrongful sale, particularly where it appears that the pledgor had pledged other property of his own of sufficient value to discharge the debt.<sup>58</sup>

The pledgor may sue the pledgee for damages for conversion without first demanding a return of the pledged property.<sup>59</sup> It has been held that a demand for the return of the property pledged unaccompanied by a legal tender of amount due is insufficient to support an action for conversion.<sup>60</sup> In order to maintain trover against a pledgee, the agreement must be such that the property is to be kept in its original form as the identical property of the owner.<sup>61</sup>

#### e. Defenses; Recoupment, Set-Off, and Counterclaim

In an action for damages for conversion of pledged property, a tender back of the property is not a defense, but the plaintiff's waiver or ratification of the wrongful act may constitute a defense; and the defendant, in a proper case, may recoup or set off an indebtedness due from the plaintiff to him.

A tender back of the property by the wrongdoer

is not a bar to an action to recover damages for its conversion.<sup>62</sup> However, where the pledgee had previously offered to return the property, but the pledgor refused to pay the debt, he cannot in his action against the pledgee complain that pledgee could not have delivered the property if he had paid.<sup>63</sup> A waiver<sup>64</sup> or ratification<sup>65</sup> of the wrongful act by the pledgor may constitute a defense. The pledgor is not estopped to recover damages against his pledgee for a wrongful sale of the property by the fact that he has purchased the property from the pledgee's vendee.<sup>66</sup> It is no defense to an action by the pledgee against the pledgor for the pledgor's conversion of the property pledged that the pledgee wrongfully sold other securities which he held for the same debt.<sup>67</sup>

*Laches.* The equitable doctrine of laches has been held not applicable to an action at law for conversion of pledged property.<sup>68</sup>

*Recoupment, set-off, and counterclaim.* Under rules applicable to the propriety of a set-off or counterclaim generally, one sued for a conversion of pledged property may set off or recoup an indebtedness due from plaintiff to him.<sup>69</sup> Generally the pledgee is entitled to recoup, or have set off, the amount of the debt secured against the amount of damages recovered;<sup>70</sup> and this rule has been ap-

replevy bond given by defendant in a bail proceeding, the right of defendant to be reimbursed to the extent of his money loss, if he has not already received the amount of his debt, may be conserved.—*Evans v. Odum, supra.*

57. S.C.—*Gregg v. Columbia Bank*, 52 S.E. 195, 72 S.C. 458, 110 Am.S.R. 633.

49 C.J. p 958 note 33.

58. Okl.—*Buellesfeld v. Jones*, 105 P.2d 242, 187 Okl. 596.

59. N.Y.—*Jones v. National Chautauqua County Bank of Jamestown*, 74 N.Y.S.2d 498, 272 App.Div. 521.

49 C.J. p 958 note 31.

60. Cal.—*Kallem v. Vincent*, 297 P. 974, 113 Cal.App. 127.

61. S.C.—*Daniel v. Post*, 187 S.E. 915, 181 S.C. 468.

62. Tex.—*King v. Boerne State Bank, Civ.App.*, 159 S.W. 433.

#### Necessity of taking back

Pledged property having been converted by pledgee, pledgor need not receive back property if tendered by pledgee.—*Leleux v. Serafino, Tex.Civ.App.*, 88 S.W.2d 1100.

63. S.C.—*Tolbert v. Fouché*, 123 S.E. 859, 129 S.C. 338.

64. Or.—*Ontario First Nat. Bank v. Seawear*, 152 P. 883, 78 Or. 567.

49 C.J. p 958 note 87.

65. Ga.—*McElmurray v. Heard*, 119 S.E. 220, 30 Ga.App. 677.

49 C.J. p 958 note 88.

66. Mo.—*Hilgert v. Levin*, 72 Mo. App. 48.

67. N.Y.—*Hays v. Riddle*, 3 N.Y. Super. 248.

68. N.Y.—*Hennessey v. Merrill*, 65 N.Y.S.2d 639.

69. Mo.—*National Bank of Commerce v. Maryland Casualty Co.*, 270 S.W. 691, 307 Mo. 417.

N.Y.—*Kaufman v. Provident Sav. Bank & Trust Co. of Cincinnati*, 23 N.Y.S.2d 637, affirmed 31 N.Y.S.2d 664, 263 App.Div. 703, appeal denied 32 N.Y.S.2d 129, 263 App. Div. 809.

Pledgor's recoupment for conversion in action by pledgee to collect secured debt see *infra* § 55.

#### Contract not connected with transaction

In an action against a pledgee for conversion of the pledged property, a counterclaim based on a contract not connected with the transaction set forth in the complaint and not within the classes enumerated in the statute authorizing counterclaims, is not permissible.—*Morris v. Windsor Trust Co.*, 106 N.E. 753, 213 N.Y. 27, Ann.Cas.1916C 972.

70. U.S.—*Rush v. First Nat. Bank, Kan.*, 71 F. 102, 17 C.C.A. 627.

Ala.—*Nabring v. Mobile Bank*, 58 Ala. 204.

Ark.—*Schutt v. Arkansas Rice Growers' Agr. Credit Corporation*, 39 S.W.2d 517, 183 Ark. 972.

Ill.—*Stow v. Yarwood*, 14 Ill. 424.

Mass.—*Fowler v. Gilman*, 13 Metc. 267; *Jarvis v. Rodgers*, 15 Mass. 389.

Mo.—*Russell v. Empire Storage & Ice Co.*, 59 S.W.2d 1061, 332 Mo. 707.

N.Y.—*Stearns v. Marsh*, 4 Den. 227, 47 Am.D. 248.

Pa.—*Work v. Bennett*, 70 Pa. 484; *Neiler v. Kelley*, 69 Pa. 403.

Tex.—*Wallace v. Renfro*, Civ.App., 124 S.W.2d 456, error dismissed, judgment correct.

49 C.J. p 958 note 93.

Right of pledgor to interest on surplus from date of conversion see *infra* § 41 b (4).

#### Failure to ask personal judgment in prior foreclosure suit

Creditor's withdrawal of prayer for personal judgment in action to foreclose mortgages on land did not preclude creditor from setting off balance due on indebtedness against debtor's claim for damages for conversion of pledged securities.—*Kaufman v. Provident Sav. Bank & Trust Co. of Cincinnati*, 23 N.Y.S.2d 637, affirmed 31 N.Y.S.2d 664, 263 App.Div. 703, appeal denied 32 N.Y.S.2d 129, 263 App.Div. 809.

plied in an action by one who pledged his property for the debt of another, so as to permit the pledgee to recoup the amount of the principal debt, not exceeding the value of the property pledged,<sup>71</sup> although it has also been held that in such an action the pledgee may not recoup the debt due him, where the pledge was discharged, prior to its conversion, by the owner's valid tender of the amount due on the principal debt.<sup>72</sup> In an action by the pledgor against the pledgee for conversion of the property, the latter is entitled to set off damages sustained by him by reason of the pledgor's breach of the contract the pledge was given to secure;<sup>73</sup> but he cannot show, in an action against him for surrendering notes to the maker for less than their face value, that the pledgor was indebted to the maker of the notes in an amount greater than the pledgor's loss.<sup>74</sup>

### f. Pleading

General rules of pleading, particularly those applicable to actions for conversion, apply in actions for damages for conversion of pledged property.

General rules of pleading, more particularly those applicable to actions for conversion, apply respecting pleadings in actions for damages for conversion

brought by the pledgor against the pledgee<sup>75</sup> or against a third person,<sup>76</sup> or by the pledgee against the pledgor<sup>77</sup> or a third person,<sup>78</sup> or by a third person against the pledgee.<sup>79</sup> The pledgee's complaint in an action for conversion must allege the amount due on the secured debt.<sup>80</sup> Where the gist of the action is conversion, and the proof fails to show conversion, a nonsuit is proper.<sup>81</sup> It is proper to exclude evidence not conforming to the issues as raised by the pleadings,<sup>82</sup> but evidence pertinent and relevant thereto is admissible.<sup>83</sup> Where a written contract is not pleaded but appears for the first time in the evidence, evidence of fraud, mistake, or undue influence may be admitted without having been pleaded.<sup>84</sup>

### g. Evidence

In an action for damages for conversion of pledged property, the burden of proof rests on a pledgor suing for conversion to establish the pledge, the conversion, and the fact and extent of his loss; and the general rules respecting the admissibility and the weight and sufficiency of evidence apply.

The burden of proof rests on a plaintiff suing for conversion to establish the pledge,<sup>85</sup> and to allege and prove not only the conversion, but the fact and extent of his loss.<sup>86</sup> On his failure to prove the

71. Mo.—Kegan v. Park Bank of St. Joseph, 8 S.W.2d 858, 320 Mo. 623, modified on other grounds 15 S.W.2d 333, 320 Mo. 623.

72. Utah.—Lilenquist v. Utah State Nat. Bank, 100 P.2d 185, 99 Utah 163.

73. Mont.—Reardon v. Patterson, 47 P. 956, 19 Mont. 231.

74. Ill.—Union Trust Co. v. Rigdon, 93 Ill. 458.

75. U.S.—Byland v. Miller, D.C.Ky., 13 F.Supp. 137.

Pa.—Hendricks v. Federal Deposit Ins. Corporation, Com.Pl., 8 Sch. Reg. 269.

49 C.J. p 959 note 99.

**Complaint or petition held sufficient**  
(1) Generally.—Meyer v. Thomas, 68 P.2d 1176, 18 Cal.App.2d 299—Nichols v. Leach, 300 P. 103, 114 Cal. App. 545—49 C.J. p 959 note 99 [a].

(2) To show plaintiff's ownership of the pledged property at the time of the alleged conversion.—Eppert v. Lowish, 169 N.E. 884, 91 Ind.App. 231.

**Complaint or petition held insufficient**

(1) Petition not alleging possession or right of possession in plaintiff at time of alleged conversion.—Byland v. Miller, D.C.Ky., 13 F.Supp. 137.

(2) Petition merely alleging that pledgee wrongfully and unlawfully converted collateral pledged to se-

cure payment of note.—Strassburger v. Irving Trust Co., 24 N.Y.S.2d 873, 261 App.Div. 210, affirmed 41 N.E.2d 791, 288 N.Y. 499.

(3) Other complaints.—Hickey v. Wyoming Bank & Trust Co., 6 A.2d 62, 334 Pa. 350—49 C.J. p 959 note 99 [b].

#### Issues

(1) Where complaint alleged that transaction was both a sale of security with option to repurchase and a pledge, and asked for damages for breach of contract and for conversion, and evidence disclosed and answer admitted that transaction constituted pledge, only issue was whether pledgee had converted property.—Beatty v. Pacific States Savings & Loan Co., 41 P.2d 378, 4 Cal. App.2d 692.

(2) In action for alleged wrongful conversion of securities deposited as collateral for a loan, question of ratification did not arise where no relation of principal and agent was pleaded or proved.—Heimpel v. First Nat. Bank & Trust Co. of Bethlehem, 12 A.2d 28, 337 Pa. 425.

#### Proof

In action of trover for conversion of property pledged, defendant has right to rely on lack of proof of possessory right in plaintiff notwithstanding there is no evidence to show that defendant as pledgee took required statutory action to sell the property and terminate plaintiff's

right therein.—Patten v. Dennison, 14 A.2d 12, 137 Me. 1.

76. Mont.—Brennan v. Northern Electric Co., 231 P. 388, 71 Mont. 35.

49 C.J. p 959 note 1.

77. Colo.—Rogers v. Rogers, 44 P. 2d 909, 96 Colo. 473.

78. N.Y.—McCoy v. American Express Co., 171 N.E. 749, 253 N.Y. 477, reargument denied 173 N.E. 861, 254 N.Y. 550.

79. N.Y.—Cole v. Manufacturers Trust Co., 299 N.Y.S. 418, 164 Misc. 741.

80. U.S.—Florida Nat. Bank v. Merchants', etc., Bank, D.C.Ga., 227 F. 714.

81. Pa.—Potter v. Ketterlinus, 69 A. 1119, 221 Pa. 35.

82. S.D.—Aulwes v. Farmers' Bank, 182 N.W. 528, 44 S.D. 92. 49 C.J. p 959 note 4.

83. Fla.—Alford v. Barnett Nat. Bank of Jacksonville, 188 So. 322, 137 Fla. 564.

84. Ky.—Whiteside v. Murphy, 192 S.W. 632, 174 Ky. 583.

85. Wis.—Sloan v. Brown County State Bank, 182 N.W. 363, 174 Wis. 36.

49 C.J. p 959 note 7.

86. Iowa.—Williams v. Herman, 249 N.W. 215, 216 Iowa 499.

49 C.J. p 959 note 8.

actual value of the securities converted it will be presumed that they were of no value or of only a nominal value, and the pledgor will not be entitled to a judgment,<sup>87</sup> or he will be entitled to a judgment for only a nominal amount.<sup>88</sup>

**Admissibility.** General rules respecting the admissibility of evidence apply in actions for damages for conversion.<sup>89</sup> In the event of a special contract by the parties governing their rights, evidence of a custom or usage in conflict therewith is inadmissible, since the effect of such evidence would be to vary the express terms of the agreement.<sup>90</sup> Where the pledgee is sued for conversion of a note and is primarily liable for its face value and interest, as considered *infra* § 41 b (3), he may introduce evidence to show that the actual value of the note was less than its face value.<sup>91</sup>

**Sufficiency.** General rules apply respecting the weight and sufficiency of evidence in actions for damages for conversion brought by the pledgor against the pledgee<sup>92</sup> or against a third person,<sup>93</sup> or by the pledgee against the pledgor<sup>94</sup> or a third

person,<sup>95</sup> or by a third person against the pledgee.<sup>96</sup>

### h. Trial and Judgment

In actions for damages for conversion of pledged property, questions of fact are for the jury on conflicting evidence or where the evidence will admit of different reasonable inferences; rules of general application apply with respect to instructions, and the judgment should be molded so as to conform to the case made and protect all parties concerned.

In actions for damages for conversion of pledged property, questions of fact are for the jury on conflicting evidence<sup>97</sup> or where the evidence will admit of different reasonable inferences;<sup>98</sup> and if there is evidence to prove an issue it should be submitted to the jury.<sup>99</sup> A conversion of a part of the pledged property is not a conversion of the whole as a matter of law, but the question is to be determined by the facts of each case.<sup>1</sup> General rules apply with respect to instructions.<sup>2</sup> The court may mold its judgment so as to protect all parties concerned.<sup>3</sup> Where a pledgor sues only for damages for conversion, he is not entitled to judgment for the property itself.<sup>4</sup> The court cannot com-

#### Burden not shifted by mere averment

There is no such relation of trust and confidence between pledgee and pledgor that mere allegation that pledgee breached his duty will shift burden on him to establish performance of duty.—*Williams v. Herman*, *supra*.

87. Ga.—*Fisher v. George S. Jones Co.*, 34 S.E. 172, 108 Ga. 490.

88. N.Y.—*Griggs v. Day*, 52 N.E. 692, 158 N.Y. 1.

89. Fla.—*Alford v. Barnett Nat. Bank of Jacksonville*, 188 So. 322, 137 Fla. 564.

N.Y.—*Jones v. National Chautauqua County Bank of Jamestown*, 74 N.Y.S.2d 498, 272 App.Div. 521.  
49 C.J. p 959 note 12.

**Evidence held admissible**  
Fla.—*Alford v. Barnett Nat. Bank of Jacksonville*, 188 So. 322, 137 Fla. 564.

49 C.J. p 959 note 12 [a].

**Evidence held inadmissible**  
Ala.—*Stanley v. People's Sav. Bank*, 157 So. 844, 229 Ala. 446.  
49 C.J. p 959 note 12 [b].

90. Md.—*Rich v. Boyce*, 39 Md. 314.  
N.Y.—*Lawrence v. Maxwell*, 53 N.Y. 19.

91. Ark.—*Schutt v. Arkansas Rice Growers' Agr. Credit Corporation*, 39 S.W.2d 517, 183 Ark. 972.  
Cal.—*Meyer v. Thomas*, 63 P.2d 1176, 18 Cal.App.2d 299.  
49 C.J. p 959 note 16.

92. U.S.—*Faivret v. First Nat.*

*Bank in Richmond*, C.C.A.Cal., 160 F.2d 827.

49 C.J. p 959 note 18.

#### Evidence held sufficient

(1) In general.—*Faivret v. First Nat. Bank in Richmond*, *supra*—49 C.J. p 959 note 18 [a].

(2) To prove conversion.—*Nichols v. Leach*, 300 P. 103, 114 Cal.App. 545—49 C.J. p 959 note 18 [a] (2).

93. Ark.—*Hoffman v. Epperson*, 193 S.W.2d 1008, 210 Ark. 37.  
Ill.—See *Parkyn v. Turley*, 206 Ill. App. 78.

94. Ill.—*Knight v. Seney*, 211 Ill. App. 324.  
49 C.J. p 960 note 20.

95. Cal.—*Watson v. Stockton Morris Plan Co.*, 93 P.2d 855, 34 Cal. App.2d 393.

#### Evidence held insufficient

Ariz.—*California Bank v. Daniel*, 288 P. 7, 36 Ariz. 549.

96. Cal.—*Dellarowe v. Kirchner*, 279 P. 210, 99 Cal.App. 599.

97. Ark.—*Hoffman v. Epperson*, 193 S.W.2d 1008, 210 Ark. 37.  
Fla.—*Alford v. Barnett Nat. Bank of Jacksonville*, 188 So. 322, 137 Fla. 564.  
49 C.J. p 960 note 21.

#### Questions held for jury

(1) Value of the property pledged.—*Leleux v. Serafino*, *Tex.Civ.App.*, 88 S.W.2d 1100.

(2) Whether defendant pledgee's negligence damaged the pledged property.—*Russell v. Empire Storage & Ice Co.*, 59 S.W.2d 1061, 332 Mo. 707.

(3) Whether pledgor had actual or constructive knowledge of alleged conversion.—*Jones v. National Chautauqua County Bank of Jamestown*, 74 N.Y.S.2d 498, 272 App.Div. 521.

(4) Whether resolution authorizing sale of securities pledged applied to past or future loans.—*California Bank v. Daniel*, 288 P. 7, 36 Ariz. 549.

(5) Whether substitution of property pledged was authorized.—*Alford v. Barnett Nat. Bank of Jacksonville*, 188 So. 322, 137 Fla. 564.

(6) Other questions held for jury see 49 C.J. p 960 note 21 [a].

#### Jury question not raised

Minn.—*Goemmel v. Heesch*, 4 N.W. 2d 104, 212 Minn. 424.

98. Fla.—*Alford v. Barnett Nat. Bank of Jacksonville*, 188 So. 322, 137 Fla. 564.

99. Fla.—*Alford v. Barnett Nat. Bank of Jacksonville*, *supra*.

#### Evidence held insufficient

Ariz.—*California Bank v. Daniel*, 288 P. 7, 36 Ariz. 549.

1. Cal.—*Horn v. Klatt*, 151 P.2d 149, 65 Cal.App.2d 510.

2. Fla.—*Alford v. Barnett Nat. Bank of Jacksonville*, 188 So. 322, 137 Fla. 564.

Mo.—*Russell v. Empire Storage & Ice Co.*, 59 S.W.2d 1061, 332 Mo. 707.

49 C.J. p 960 note 23.

3. N.C.—*Tesh v. Rominger*, 1 S.E. 2d 98, 215 N.C. 52.

4. Tex.—*King v. Boerne State Bank*, *Civ.App.*, 159 S.W. 433.

pel the pledgor to take back his property in an action by him for conversion,<sup>5</sup> and he cannot recover the property.<sup>6</sup> The effect of the satisfaction by the wrongdoer of the judgment in trover is to vest in him title to the property or its proceeds.<sup>7</sup>

#### § 41. — Elements and Measure of Damages

- a. In general
- b. In actions by pledgor
- c. In actions by third person

##### a. In General

In a pledgee's action for damages for conversion of the pledged property, the measure of damages is that which will fully compensate him for the detriment sustained.

In a pledgee's action for damages for conversion of the pledged property, his recovery is limited to a sum which will fully compensate him for the detriment sustained.<sup>8</sup> Where the action is against the pledgor for conversion, the measure of damages is the amount of the debt with interest where the value of the property exceeds the debt,<sup>9</sup> and the value of the property with interest where it is less than the amount of the debt.<sup>10</sup> Subject to the rule that the pledgee cannot recover more than the amount of his debt with interest,<sup>11</sup> it has been stated that plaintiff may, at his option, take the value at the time of conversion or the highest value between the conversion and the trial.<sup>12</sup>

*Against third person.* In an action for damages instituted by the pledgee against a third person for injury to, or conversion of, the property which has been pledged to him, he is not limited to recovery for his interest only, but may recover the total amount of the loss, which in a case of the conver-

sion of the property is the actual value of the property at the time of the conversion.<sup>13</sup> However, as against anyone claiming through,<sup>14</sup> or in privity with,<sup>15</sup> the pledgor, the pledgee is entitled to recover only the amount of his debt, or, if his debt is greater than the value of the property, such value, with interest to date of judgment.<sup>16</sup>

*Where the conversion is by an officer acting under a writ of attachment or execution against the pledgor legal and regular in all respects, such officer occupies the same position as the pledgor, and is liable to the pledgee only to the same extent;<sup>17</sup> but if the attachment or execution is improperly issued, or is otherwise illegal, the officer is liable for the full value of the goods,<sup>18</sup> which will be their market value at the time of the conversion,<sup>19</sup> and not the price for which they were sold by the officer.<sup>20</sup>*

##### b. In Actions by Pledgor

- (1) In general
- (2) Property of fluctuating value
- (3) Particular property
- (4) Interest

##### (1) In General

In an action by the pledgor for damages for conversion of the property pledged, the measure of damages is the actual loss sustained, which, in an action against the pledgee ordinarily is the value of the property pledged less the amount of the unpaid secured debt, and in an action against a third person is the full value of the pledged property less any of the indebtedness paid by the defendant to the pledgee.

The measure of damages which the pledgor is entitled to recover against the pledgee for conversion of the property is the actual amount of loss suffered by the pledgor by reason of the pledgee's

5. Tex.—King v. Boerne State Bank, supra.  
49 C.J. p 960 note 24.

6. Tex.—King v. Boerne State Bank, supra.

7. Cal.—Thompson v. Toland, 48 Cal. 93

8. Cal.—Watson v. Stockton Morris Plan Co., 93 P.2d 855, 34 Cal.App. 2d 393.

9. Cal.—Watson v. Stockton Morris Plan Co., supra.  
49 C.J. p 960 note 27.

10. Ala.—Rolfe v. Huntsville Lumber Co., 62 So. 537, 8 Ala.App. 487.  
N.Y.—Hays v. Riddle, 3 N.Y.Super. 248.

11. Ga.—Levy v. American Wholesale Corp., 122 S.E. 808, 32 Ga. App. 103.

12. Ga.—Levy v. American Wholesale Corp., supra.  
49 C.J. p 960 note 30.

13. Ga.—Farmers', etc., Bank v. Hamilton, 117 S.E. 287, 30 Ga.App. 194, 196.  
49 C.J. p 960 note 31.

14. Cal.—Watson v. Stockton Morris Plan Co., 93 P.2d 855, 34 Cal. App.2d 393.  
49 C.J. p 961 note 33.

*Direction to find full amount due pledgee was held not error where value of converted property was in excess of total amount due.*—Rose City Foods v. Bank of Thomas County, 62 S.E.2d 145, 207 Ga.App. 477.

15. Cal.—Watson v. Stockton Morris Plan Co., 93 P.2d 855, 34 Cal. App.2d 393.

16. Ga.—Rose City Foods v. Bank

of Thomas County, 62 S.E.2d 145, 207 Ga. 477.

49 C.J. p 961 note 34.

*Election as to value*

Measure of damages is either highest proved value of pledged property between date of conversion and trial, or value of property at time of conversion with interest or hire thereon.—Rose City Foods v. Bank of Thomas County, supra.

17. Alaska.—DeBlondeau v. Faulkner, 5 Alaska 55.

Ill.—Baldwin v. Bradley, 69 Ill. 32.

18. Cal.—Treadwell v. Davis, 34 Cal. 601, 94 Am.D. 770.

Mass.—Pomeroy v. Smith, 17 Pick. 85.

19. Tex.—Grabfelder v. Lockett, Civ.App., 26 S.W. 168.

20. Tex.—Grabfelder v. Lockett, supra.

wrongful act.<sup>21</sup> Ordinarily this is the value of the pledged property at the time of conversion,<sup>22</sup> or its market value at such time,<sup>23</sup> with interest, as considered infra subdivision b (4) of this section, less the amount of the unpaid secured debt.<sup>24</sup> In the cases where it has been held that the pledgor must tender payment of his debt before he is entitled to demand a return of the property or maintain a suit for its conversion, it has been held that the measure of his damages is the value of the property at the time of such tender and demand,<sup>25</sup> and not its value at the time of conversion.<sup>26</sup>

*If the pledgor is not the absolute owner of the property, he should introduce evidence to show the extent and value of his interest.*<sup>27</sup>

*Action in contract.* Where the pledgor waives the tort and sues the pledgee in breach of contract for the wrongful sale of pledged property, his damages are the proceeds of the sale.<sup>28</sup> Where a pledgee, having an option to purchase the property pledged at a specified price, converts the property, the pledgor may elect to consider the conversion as an exercise of the option, and sue for the price.<sup>29</sup>

*Motive.* It has been held that the motive of the pledgee in converting the property pledged may

be taken into consideration in assessing damages.<sup>30</sup>

*Punitive damages.* Punitive damages may be recovered for a fraudulent conversion of pledged property.<sup>31</sup> The failure to make the pledgor a party to foreclosure proceedings affecting the pledged property does not entitle him to punitive damages.<sup>32</sup>

*Misuse.* The pledgor's recovery for the pledgee's misuse of the property pledged is limited to the damage thereby caused.<sup>33</sup>

*Against third person.* In an action by the pledgor against a third person for conversion, he may recover the full value of the collateral<sup>34</sup> less any of his indebtedness paid by defendant to the pledgee.<sup>35</sup> Statutory provisions basing the amount of damages for conversion on the highest value of the property within a reasonable time after notice of conversion do not apply to one who acquired the pledged property from the pledgee for value and without notice of the pledgor's interest therein.<sup>36</sup>

## (2) Property of Fluctuating Value

In an action for damages for conversion of pledged property of fluctuating value, the measure of damages has been variously held to be the highest proved value between the date of conversion and that of trial, the

21. Ga.—Fisher v. George S. Jones Co., 34 S.E. 172, 108 Ga. 490.

49 C.J. p 961 note 40.

Burden of proof as to damages see supra § 40 g.

### Special contract

The measure of damages for a pledgee's violation of a pledgor's contractual rights, in that he refused to coöperate with the pledgor in withdrawing pledged mortgage bonds from the control of a reorganization committee, as a result of which the pledgor lost the right to his bonds and was required to accept new bonds, is the difference between the value of the new bonds and the amount which would have been received from the proceeds of the mortgaged property had the bonds not been exchanged.—Francis v. Tildesley Coal Co., Ohio App., 32 N.E.2d 54.

22. Cal.—Nichols v. Leach, 300 P. 103, 114 Cal.App. 545.

N.Y.—Jones v. National Chautauqua County Bank of Jamestown, 74 N.Y.S.2d 498, 272 App.Div. 521.

Property of fluctuating value see infra subdivision b (2) of this section.

### Fair value

Pledgee may not be held for face value of collateral pledged but only for fair value of pledge.—Spadaro v. Chenango County Nat. Bank & Trust Co. of Norwich, 281 N.Y.S. 498, 156 Misc. 230.

23. Ala.—Nabring v. Bank of Mobile, 58 Ala. 204.

Mass.—Perry v. Manufacturer's Nat. Bank of Lynn, 25 N.E.2d 730, 305 Mass. 368, 127 A.L.R. 339.

Pa.—Neller v. Kelley, 69 Pa. 403. 49 C.J. p 961 note 42.

24. Ind.—Owen County State Bank v. Guard, 26 N.E.2d 395, 217 Ind. 75.

Mass.—Perry v. Manufacturers Nat. Bank of Lynn, 25 N.E.2d 730, 305 Mass. 368, 127 A.L.R. 339.

Mo.—Corpus Juris cited in Russell v. Empire Storage & Ice Co., 59 S.W.2d 1061, 1067, 332 Mo. 707.

25. N.Y.—Hopper v. Smith, 63 How. Pr. 34.

Tex.—Early-Foster Co. v. Mix-Tex Oils Mills, Civ.App., 208 S.W. 224.

26. Tex.—Early-Foster Co. v. Mix-Tex Oil Mills, supra.

27. Mo.—Interurban Constr. Co. v. Hayes, 89 S.W. 927, 191 Mo. 248.

28. U.S.—Heinze v. McKinnon, N. Y., 205 F. 866, 123 C.C.A. 492. 49 C.J. p 961 note 49.

29. Minn.—Upham v. Barbour, 68 N.W. 42, 65 Minn. 364.

30. Cal.—Horn v. Klatt, 151 P.2d 149, 65 Cal.App.2d 510.

31. S.C.—Daniel v. Post, 187 S.E. 915, 181 S.C. 468.

32. Conn.—Hoyt v. Stuart, 96 A. 166, 90 Conn. 41.

33. Ala.—May v. Stallings, 16 So. 2d 870, 245 Ala. 292.

34. Neb.—Kaufmann v. Parmele, 157 N.W. 342, 99 Neb. 622. 49 C.J. p 963 note 78.

35. Neb.—Kaufmann v. Parmele, supra. 49 C.J. p 963 note 79.

### Credit of amount on debt by pledgee

Where pledgee of negotiable bonds delivered bonds to defendant as collateral for indebtedness to defendant who was purchaser for value without notice, defendant's sale of bonds for pledgee's debt did not require defendant to account to pledgor, where pledgee credited pledgor's account with market value of bonds.—Wolfe v. Pennsylvania Co. for Insurances on Lives and Granting Annuities, 185 A. 292, 322 Pa. 344.

36. Pa.—Wolfe v. Pennsylvania Co. for Insurances on Lives and Granting Annuities, supra.

### Held purchaser for value without notice

Company which accepted coupon bonds, payable to bearer, as collateral for debt of trust company without knowledge that trust company held bonds as pledgee, was held purchaser for value without notice, as regards company's liability to pledgor for sale of bonds for pledgee's debt.—Wolfe v. Pennsylvania Co. for Insurances on Lives and Granting Annuities, supra.

highest market price within a reasonable time after notice of conversion, or the highest market value between the date of conversion and the date of filing suit, subject, in any event in an action by the pledgor against the pledgee, to a deduction of the amount unpaid on the debt secured.

In the case of property of fluctuating value, the pledgor suing in trover may, according to some authorities, recover the highest proved value between the date of conversion and that of trial,<sup>37</sup> or, according to others, the highest market price within a reasonable time after notice of conversion,<sup>38</sup> or, under a third view, the highest market value between the date of conversion and the date of filing suit,<sup>39</sup> subject, in any event, to deduction of whatever he owed the pledgee on the secured debt.<sup>40</sup>

*Pledgor's recoupment for conversion.* There is authority to the effect that a pledgor seeking recoupment for conversion, in an action by the pledgee to collect the secured debt, is entitled merely to the value of the property at time of conversion,<sup>41</sup> and not to the highest value between the date of conversion and trial.<sup>42</sup> Other authority holds that it lies with the jury to determine which measure of damages shall be applied.<sup>43</sup>

*For breach of a special contract* not to sell before a specified date, the pledgor may recover the value of the property up to the date of permissible sale<sup>44</sup> or may recoup such value as damages in an action by the pledgee to collect the secured debt.<sup>45</sup>

### (3) Particular Property

The measure of damages in an action for the conver-

sion of a pledged note, bond, or mortgage is its actual value at the time of conversion, which prima facie is its face value; the measure of damages for the conversion of an insurance policy is prima facie the face value of the policy, less any premiums accrued on the death of the insured.

On the conversion of a note or bond pledged as collateral, the pledgee is liable to the owner for its actual value at the time of such conversion.<sup>46</sup> Prima facie its value is its face value and interest,<sup>47</sup> although, as appears supra § 40 g, the pledgee will be allowed to introduce evidence to prove that its actual value was less than its face value; but where no evidence is introduced tending to invalidate the note or bond or reduce its value the prima facie case becomes absolute.<sup>48</sup> Ordinarily its value is not the value alone of property given to secure it,<sup>49</sup> but, in the case of notes worthless when converted, damages may be measured by the value of property securing such notes.<sup>50</sup>

*Mortgages.* The measure of damages for the conversion of a mortgage by the pledgee is prima facie the amount for which the mortgage is security,<sup>51</sup> and not the value of the mortgaged property.<sup>52</sup> However, the value of the mortgaged premises may be a proper matter of consideration in determining the value of the converted collateral.<sup>53</sup>

*Insurance policies.* On the wrongful surrender of a policy of insurance by the pledgee before the death of insured, the measure of damages is the face value of the policy,<sup>54</sup> less any premiums accrued on the death of insured.<sup>55</sup>

37. Ga.—La Grange Bank v. Guinn, 106 S.E. 308, 26 Ga.App. 411. 49 C.J. p 961 note 53.

38. Utah.—Western Securities Co. v. Silver King Cons. Min. Co., 192 P. 664, 57 Utah 88.

*Diligence to replace property converted required*

A pledgor suing for conversion of pledged fluctuating securities by pledgee must use diligence to keep down his loss and if, within reasonable time after knowing of conversion, pledgee can replace securities for the same price or a less price he has suffered no actionable loss.—Jones v. National Chautauqua County Bank of Jamestown, 74 N.Y.S.2d 498, 272 App.Div. 521.

39. Tex.—Early-Foster Co. v. Mix-Tex Oil Mills, Civ.App., 208 S.W. 224.

49 C.J. p 961 note 55.

40. Ga.—Hall v. Vann, 123 S.E. 172, 32 Ga.App. 281.

41. Ark.—Tipton v. Jonesboro Grocer Co., 266 S.W. 270, 166 Ark. 407. 49 C.J. p 962 note 58.

Recoupment by pledgee in pledgor's action for conversion see supra § 40 e.

42. Ga.—Bennett v. Tucker, 123 S.E. 165, 32 Ga.App. 288. 49 C.J. p 962 note 59.

43. S.C.—Cooper-Smith Co. v. Bell, 134 S.E. 658, 137 S.C. 1. 49 C.J. p 962 note 60.

44. Ga.—Park v. Swann, 92 S.E. 398, 20 Ga.App. 39. 49 C.J. p 962 note 61.

45. Ga.—Buckeye Cotton Oil Co. v. Malone, 126 S.E. 913, 33 Ga.App. 519. 49 C.J. p 962 note 62.

46. Cal.—Scrivner v. Woodward, 73 P. 863, 139 Cal. 314. 49 C.J. p 962 note 68.

Corporate stock see Corporations § 480.

Fluctuating values see supra subdivision b (2) of this section.

47. Ark.—Schutt v. Arkansas Rice Growers' Agr. Credit Corporation, 39 S.W.2d 517, 183 Ark. 972.

Cal.—Meyer v. Thomas, 63 P.2d 1176, 18 Cal.App.2d 299. 49 C.J. p 962 note 69.

48. Ark.—Schutt v. Arkansas Rice Growers' Agr. Credit Corporation, 39 S.W.2d 517, 183 Ark. 972.

49. Cal.—Meyer v. Thomas, 63 P.2d 1176, 18 Cal.App.2d 299.

50. Tex.—Hazleton v. Holt, Civ. App., 285 S.W. 1115.

51. Conn.—Hoyt v. Stuart, 96 A. 166, 90 Conn. 41. 49 C.J. p 962 note 64.

52. N.Y.—Barber v. Hathaway, 62 N.Y.S. 329, 47 App.Div. 165, affirmed 61 N.E. 1127, 169 N.Y. 575. 49 C.J. p 962 note 65.

53. Conn.—Hoyt v. Stuart, 96 A. 166, 90 Conn. 41. 49 C.J. p 962 note 66.

54. N.Y.—Bailey v. American Deposit, etc., Co., 65 N.Y.S. 330, 52 App.Div. 402, affirmed 59 N.E. 1118, 165 N.Y. 672.

55. N.Y.—Topf v. Bauer, 55 N.E. 1059, 161 N.Y. 325.

## (4) Interest

In an action for damages for conversion of the property pledged, the pledgor ordinarily is entitled to interest from the date of conversion on the amount due him as of that date, that is, on the difference between the value of the property converted and the amount of the debt secured.

The pledgor ordinarily is entitled to interest from the date of conversion<sup>56</sup> on the sum due him as of such date.<sup>57</sup> In other words, interest ordinarily is computed on the difference between the value of the property converted and the amount of the debt secured.<sup>58</sup>

Usurious interest actually collected by a pledgee cannot be recovered by a pledgor.<sup>59</sup>

## c. In Actions by Third Person

The measure of damages in an action by a third person for conversion of pledged property is the actual loss sustained.

A third person entitled to sue for conversion of pledged property may recover damages measured by his actual loss.<sup>60</sup> Where the pledged property is sold by the pledgee, the value is to be fixed as of the time of the sale.<sup>61</sup>

## § 42. Equitable Proceedings

## a. In general

## b. Accounting

## a. In General

Under circumstances admitting equitable jurisdiction,

a pledgor or pledgee may maintain a suit in equity to recover pledged property or its value.

Under circumstances admitting equitable jurisdiction, the pledgor may maintain a suit in equity against the pledgee<sup>62</sup> or a third person<sup>63</sup> for the recovery of pledged property wrongfully withheld or other appropriate relief, or for its proceeds.<sup>64</sup> Also, the pledgor may sue in equity to have the value of property converted by pledgee credited on the principal debt.<sup>65</sup> On the other hand, the pledgee may bring a suit in equity to recover the property from the pledgor<sup>66</sup> or from a third person<sup>67</sup> who has wrongfully taken it from him, or to secure the proceeds of the property if it has been transferred by defendant.<sup>68</sup> In equitable proceedings the rights of a pledgor as well as the rights of a pledgee must be tested by principles of equity.<sup>69</sup>

On a bill for discovery a decree may be entered against pledgee without sending plaintiff to law.<sup>70</sup>

**Evidence.** In such proceedings the rules governing the evidence in equitable proceedings generally apply.<sup>71</sup>

## b. Accounting

A pledgor may sue the pledgee for an accounting where there has been a conversion.

There is authority to the effect that the pledgor may sue the pledgee for an accounting where it appears that there has been a conversion.<sup>72</sup> A pledgee already in default is not entitled to a demand before being sued for an accounting.<sup>73</sup>

56. Mo.—Russell v. Empire Storage & Ice Co., 59 S.W.2d 1061, 332 Mo. 707.

49 C.J. p 962 note 74.

57. Ind.—Hazzard v. Duke, 64 Ind. 220.

Tex.—Early-Foster Co. v. Mix-Tex Oil Mills, Civ.App., 208 S.W. 224.

58. Mass.—Fowler v. Gilman, 13 Metc. 267.

49 C.J. p 963 note 76.

59. Ill.—Sutphen v. Cushman, 35 Ill. 186.

60. U.S.—Fetzer v. South Side Lumber Co., Wis., 202 F. 878, 121 C.C.A. 236.

49 C.J. p 963 note 81.

**Negotiable bonds**

(1) Under law of New York, the face value of a corporate bond is the prima facie measure of damages for its conversion, with respect to pledgee.—Land Oberoesterreich v. Gude, C.C.A.N.Y., 109 F.2d 635, certiorari denied 61 S.Ct. 30, 311 U.S. 670, 85 L.Ed. 431.

(2) In a former opinion, however, it was held that the measure of damages was the market value of the bonds rather than the face value.

—Land Oberoesterreich v. Gude, C.C.A.N.Y., 86 F.2d 621, certiorari denied 57 S.Ct. 493, 300 U.S. 663, 81 L.Ed. 871.

**Improper measure**

Difference between aggregate realized from sale of pledged securities and total prices at which owner could have sold them has been held not the proper measure of damages for the alleged wrongful sale thereof.—Miller v. Dillon, 165 A. 64, 108 Pa.Super. 455.

61. U.S.—In re Franklin Saving & Loan Co., D.C.Tenn., 34 F.Supp. 585.

62. Mo.—State ex rel. Shull v. Liberty Nat. Bank of Kansas City, 53 S.W.2d 899, 331 Mo. 386.

49 C.J. p 963 note 83.

**Cancellation of pledge**

Fraud in procuring pledge may justify cancellation.—State ex rel. Sorensen v. State Bank of Omaha, 253 N.W. 356, 126 Neb. 343.

63. U.S.—Wilson v. Colorado Min. Co., Utah, 227 F. 721, 142 C.C.A. 245.

49 C.J. p 963 note 84.

64. Miss.—Hart v. Moore, 158 So. 490, 171 Miss. 838.

Mo.—State ex rel. Shull v. Liberty Nat. Bank of Kansas City, 53 S.W. 2d 899, 331 Mo. 386.

65. Ga.—Pace v. Thomasville Bank, 117 S.E. 741, 155 Ga. 585.

49 C.J. p 963 note 83.

66. S.C.—Coleman v. Shelton, 7 S.C. Eq. 126, 16 Am.D. 639.

67. W.Va.—Security Realty Inv. Co. v. Lewis, 102 S.E. 702, 86 W.Va. 10.

49 C.J. p 963 note 86.

68. N.Y.—Hazard v. Fiske, 83 N.Y. 287.

69. Ind.—Walner v. Capron, 66 N. E.2d 64, 224 Ind. 267.

70. Va.—Skinner v. Dodge, 4 Hen. & M. 432, 14 Va. 432.

49 C.J. p 963 note 89.

71. La.—Kottelman v. Audubon Homestead Ass'n, App., 171 So. 598.

Neb.—State ex rel. Sorensen v. State Bank of Omaha, 253 N.W. 356, 126 Neb. 343.

72. N.Y.—Beugger v. Ashley, 146 N. Y.S. 910, 161 App.Div. 576.

49 C.J. p 963 note 91.

73. Ind.—Dulin v. National City Bank, App., 130 N.E. 426.

*Laches* may bar the right to an accounting.<sup>74</sup>

The statute of limitations against such an action does not begin to run until plaintiff has notice

of the facts entitling him to an accounting.<sup>75</sup>

Evidence in such proceedings is governed by rules of general application.<sup>76</sup>

## V. TRANSFER OF DEBT OR PLEDGE

### § 43. Assignment of Debt or Pledge

- a. In general
- b. Transfer of debt secured
- c. Transfer of pledge without transfer of debt
- d. Repledge by pledgee

#### a. In General

In the absence of an agreement or statute to the contrary, as a general rule a pledgee may transfer or assign his interest under the contract of pledge.

In the absence of an agreement or statute to the contrary,<sup>77</sup> as a general rule the pledgee<sup>78</sup> or his personal representative<sup>79</sup> may transfer or assign his interest under the contract, whether or not the principal debt is negotiable.<sup>80</sup> So, in the absence of an agreement or statute to the contrary,<sup>81</sup> the pledgee may sell or assign the principal debt and transfer the collateral to the purchaser<sup>82</sup> if nothing is done to deprive the pledgor of the right to redeem on payment of the amount due on the principal debt;<sup>83</sup> and this right is not curtailed by a statute relating merely to the procedure to be followed in enforcing a pledge.<sup>84</sup>

The pledgee of a note may make a valid assignment of it to another simply for collection,<sup>85</sup> but the pledgee's assignment of a pledged note to a trustee for collection constitutes a complete relin-

quishment of the note as collateral for future advances.<sup>86</sup>

*Method of assignment.* An assignment of the pledgee's interest may be effected without a formal assignment,<sup>87</sup> and may be by a delivery of the collateral to the assignee.<sup>88</sup> The pledgee may assign his interest without first demanding payment of the pledgor<sup>89</sup> or notifying him that the assignment is to be made.<sup>90</sup>

*Conversion by assignee.* Where the debt secured is evidenced by a negotiable instrument, if the assignee converts the collateral to his own use, the original pledgee will not be liable to the pledgor for such conversion.<sup>91</sup>

#### b. Transfer of Debt Secured

Usually, in the absence of an agreement to the contrary, the pledgee's transfer of the secured debt carries with it a transfer of the collateral.

While the view has been expressed that no lien or right of property in the property pledged passes to the assignee of the debt unless the assignment is accompanied by a delivery of such property, actual or constructive,<sup>92</sup> since the pledge is regarded as collateral to the principal obligation, as discussed supra §§ 1, 2, usually, unless the parties agree otherwise,<sup>93</sup> the pledgee's transfer of the secured debt

74. N.Y.—Wheeler v. Breslin, 95 N.Y.S. 966, 47 Misc. 507.

49 C.J. p 963 note 93.

75. N.Y.—Beugger v. Ashley, 146 N.Y.S. 910, 161 App.Div. 576.

76. Wis.—Johnson v. State Bank, 158 N.W. 59, 163 Wis. 369.

49 C.J. p 963 note 95.

77. S.D.—Buck v. First Nat. Bank, 260 N.W. 834, 63 S.D. 507, 99 A.L.R. 23.

49 C.J. p 963 note 96.

Provision not rendering contract unassignable

Provision that collateral was to remain pledged until withdrawn with consent of pledgee did not render contract of pledge unassignable.—Pollak v. Kahn, D.C.La., 17 F.Supp. 750.

78. Cal.—Johnson v. Mortgage Guarantee Co., 4 P.2d 208, 117 Cal.App. 416.

9 C.J. p 964 notes 1, 99 [a].

79. Mich.—Drake v. Cloonan, 57 N.W. 1098, 99 Mich. 121, 41 Am.S.R. 586.

80. N.H.—Goss v. Emerson, 23 N.H. 38.

Negotiable character of security

The security partakes in a sense of the negotiable character of the debt.—American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co., D.C.N.Y., 11 F.Supp. 418.

81. S.D.—Buck v. First Nat. Bank, 260 N.W. 834, 63 S.D. 507, 99 A.L.R. 23.

82. N.D.—Sprenger v. Wishek First Nat. Bank, 206 N.W. 224, 53 N.D. 398.

S.D.—Buck v. First Nat. Bank, 260 N.W. 834, 63 S.D. 507, 99 A.L.R. 23.

Tex.—Golden Gate Cemetery Corporation v. Oak Park Cemetery, Civ.App., 33 S.W.2d 711.

49 C.J. p 964 note 1.

83. S.D.—Buck v. First Nat. Bank, 260 N.W. 834, 63 S.D. 507, 99 A.L.R. 23.

49 C.J. p 963 note 98.

84. N.D.—Sprenger v. Wishek First

Nat. Bank, 206 N.W. 224, 53 N.D. 398.

85. Me.—Hunt v. Bessey, 52 A. 905, 96 Me. 429.

86. S.C.—Hodges v. Lake Summit Co., 152 S.E. 658, 155 S.C. 436.

87. U.S.—Carpenter v. Longan, Colo., 16 Wall. 271, 21 L.Ed. 313.

88. Tenn.—Pulaski Nat. Bank v. Winston, 5 Baxt. 685.

49 C.J. p 964 note 6.

89. Mich.—Drake v. Cloonan, 57 N.W. 1098, 99 Mich. 121, 41 Am.S.R. 588.

90. Mich.—Drake v. Cloonan, supra.

91. Ga.—Forsyth Bank v. Davis, 33 S.E. 836, 118 Ga. 341, 84 Am.S.R. 248.

N.H.—Goss v. Emerson, 23 N.H. 38. Conversion generally see supra §§ 35-38.

92. Tenn.—Johnson v. Smith, 11 Humphr. 396.

93. Ill.—Corpus Juris quoted in Painter v. Merchants & Manufac-



carries with it a transfer of the collateral,<sup>94</sup> notwithstanding the collateral is not actually delivered to the transferee,<sup>95</sup> and notwithstanding the rule stated and discussed generally infra §§ 47, 48, that, on satisfaction or payment of the secured debt, the collateral pledged should be returned to the pledgor.<sup>96</sup>

On an assignment of the principal obligation without the pledge, generally the assignor holds the collateral as trustee or agent for his assignee,<sup>97</sup> even though the assignee takes a renewal of the principal obligation in his own name,<sup>98</sup> and payments received by the assignor on the collateral will be held for the use of the assignee.<sup>99</sup> So, where the pledgee assigns the debt to one person and the collateral to another, the latter, under some circumstances, holds the collateral in trust for the assignee of the debt.<sup>1</sup> Where, however, it is the evident intention of the

parties in the delivery of collateral that it shall be held for the personal security of the pledgee, on an assignment by the pledgee of his debt, without the collateral, the collateral becomes the property of the pledgor freed from the lien.<sup>2</sup>

Enforcement of the principal obligation by an assignee is discussed infra § 44 a.

### c. Transfer of Pledge without Transfer of Debt

Generally speaking, the pledgee may not make a valid assignment of the collateral separate from the debt secured so as to confer rights on the assignee as against the pledgor.

Generally speaking, the pledgee, having merely a special property in the pledge as security for his debt, cannot make a valid assignment of the collateral separate from the debt so as to confer any rights on the assignee as against the pledgor,<sup>3</sup> and

turers Bank of Milwaukee, 277 Ill. App. 208, 229.

Ky.—*Corpus Juris* cited in *Callebs v. Smith*, 103 S.W.2d 949, 951, 268 Ky. 162.

49 C.J. p 964 note 12.

94. Ill.—*Corpus Juris* quoted in *Painter v. Merchants & Manufacturers Bank of Milwaukee*, 277 Ill. App. 208, 229.

Iowa.—*Bates v. First Sav. Bank of Richland*, 261 N.W. 797, 219 Iowa 1358.

Ky.—*Corpus Juris* cited in *Callebs v. Smith*, 103 S.W.2d 949, 951, 268 Ky. 162.

Mo.—*Barker v. Hunkins-Willis Lime & Cement Co.*, App., 39 S.W.2d 391. 49 C.J. p 964 note 11.

"The security pledged for a debt follows it no matter how the debt may be modified or into whose hands the debt may pass."—*Schramm v. Bank of California*, Nat. Ass'n, 20 P.2d 1093, 1097, 143 Or. 546, rehearing denied 23 P.2d 327, 143 Or. 546.

#### Transfer of note

(1) Assignment or transfer of a note evidencing an indebtedness generally carries with it the collateral pledged as security.

U.S.—*Central Hanover Bank & Trust Co. v. United Traction Co.*, C.C.A. N.Y., 95 F.2d 50—*Rubenstein v. Nourse*, C.C.A. Mo., 70 F.2d 482.

Ala.—*Folmar v. Beall*, 85 So. 540, 204 Ala. 298.

Iowa.—*Bates v. First Sav. Bank of Richland*, 261 N.W. 797, 219 Iowa 1358.

Mo.—*Barker v. Hunkins-Willis Lime & Cement Co.*, App., 39 S.W.2d 391. Wash.—*In re Frye's Estate*, 4 P.2d 639, 164 Wash. 660.

(2) A person who had lent bonds owned by him to the original pledgor for the purpose of having them pledged to secure the debt of such pledgor and who had taken an as-

ignment of the note of the original pledgee from a subpledgee, to whom the original pledgee had pledged the bonds, could not separate such note from the bonds as collateral by assigning such note and retaining the bonds.—*Kreider v. California Thorn Cordage*, 16 P.2d 1002, 128 Cal.App. 262.

(3) Transfer of note as carrying rights in collaterals generally see *Bills and Notes* § 203.

#### Right to possession

Normally, if the pledgee assigns the debt, the assignee is entitled to possession of the collateral.—*Weinress v. Bland*, Del.Ch., 71 A.2d 59.

#### Pledged property in possession of third person

(1) An assignment of a debt secured by pledged property in possession of third person operates as a transfer to assignee of all the pledgee's rights.—*Schram v. Sage*, D.C.Mich., 46 F.Supp. 381, petition overruled 47 F.Supp. 94.

(2) Thus an assignee of a judgment, secured by a pledge of property which was in possession of a third person succeeded to all rights of the judgment creditor in the pledge agreement.—*Schram v. Sage*, supra.

95. U.S.—*Central Hanover Bank & Trust Co. v. United Traction Co.*, C.C.A.N.Y., 96 F.2d 50.

Ala.—*Folmar v. Beall*, 85 So. 540, 204 Ala. 298.

Ind.—*Hawkins v. New York Fourth Nat. Bank*, 49 N.E. 957, 150 Ind. 117.

49 C.J. p 964 note 11.

96. Ky.—*Callebs v. Smith*, 103 S.W. 2d 949, 268 Ky. 162.

97. Ala.—*Folmar v. Beall*, 85 So. 540, 204 Ala. 298.

Ill.—*Corpus Juris* quoted in *Painter v. Merchants & Manufacturers Bank of Milwaukee*, 277 Ill. App. 208, 229.

Miss.—*Hibernia Bank & Trust Co. v. Turner*, 127 So. 291, 156 Miss. 842.

49 C.J. p 964 note 14.

98. Ill.—*Corpus Juris* quoted in *Painter v. Merchants & Manufacturers Bank of Milwaukee*, 277 Ill. App. 208, 229.

Ind.—*Hawkins v. New York Fourth Nat. Bank*, 49 N.E. 957, 150 Ind. 117.

99. Ill.—*Corpus Juris* quoted in *Painter v. Merchants & Manufacturers Bank of Milwaukee*, 277 Ill. App. 208, 229.

Pa.—*Painter v. Harding*, 3 Phila. 59.

1. Ill.—*Corpus Juris* quoted in *Painter v. Merchants & Manufacturers Bank of Milwaukee*, 277 Ill. App. 208, 229.

49 C.J. p 964 note 17.

2. Ill.—*Corpus Juris* quoted in *Painter v. Merchants & Manufacturers Bank of Milwaukee*, 277 Ill. App. 208, 229.

Md.—*Morgan v. Dugan*, 30 A. 558.

3. Minn.—*Van Eman v. Stanchfield*, 13 Minn. 75.

49 C.J. p 964 note 24.

Invalid sale after default see infra § 63.

Pledgee's sale of pledge as conversion see supra § 36.

Power of pledgee to sell:

After default or maturity of debt generally see infra § 57.

Before maturity of debt generally see supra § 34.

Pledged corporate stock before or after default or maturity of debt see *Corporations* §§ 429, 431 d.

this rule has been embodied in some statutory provisions.<sup>4</sup>

A gift of the pledged property by the pledgee to a third person does not pass the pledgee's interest in the secured debt.<sup>5</sup>

An assignment for collection may be made without transfer of the secured debt.<sup>6</sup>

#### d. Repledge by Pledgee

Under certain circumstances the pledgee may repledge property delivered to him as security.

It has been held or recognized that ordinarily the pledgee has the right to repledge property delivered to him as security<sup>7</sup> without obtaining the consent of the pledgor,<sup>8</sup> provided the repledge is not for a sum greater than the original secured debt<sup>9</sup> and provided the original pledgor may repossess himself of the property on payment of his debt.<sup>10</sup> Unless authorized by a special agreement, the pledgee has no right, as against the pledgor, to repledge the property for a greater amount than that for which it is held as security.<sup>11</sup>

It has been held that a pledgee who has acquired possession of the chattel involved from the pledgor by fraud does not have such title as to authorize the pledgee to repledge the chattel to a third person<sup>12</sup> and that such attempted repledge is invalid.<sup>13</sup>

Rights of the subpledgee are discussed *infra* § 44 b.

*Under agreement of the parties*, the pledgee may have the power to repledge collateral to secure the pledgee's own indebtedness<sup>14</sup> and to repledge for an amount greater than the original secured debt.<sup>15</sup> Conversely, where the contract of pledge forbids repledge for more than the original indebtedness, the pledgee has no right so to repledge.<sup>16</sup> The power to repledge under an agreement will in the last analysis depend on the terms and construction of the particular agreement involved.<sup>17</sup>

*Right to possession.* Under an authorized repledge, the pledgee does not lose his right to possession as against the pledgor.<sup>18</sup>

### § 44. Rights of Purchaser from Pledgee

- a. In general
- b. Rights of subpledgee

#### a. In General

In general, on an effective transfer by the pledgee to a third person of the pledgee's interest with respect to the pledge, the transferee steps into the shoes of the pledgee, and is entitled to the same rights, and has the same obligations, with respect to the pledge, as those of the pledgee.

Subject to certain qualifications and limitations, it is a general rule that on an assignment by the pledgee of his interest in the pledge,<sup>19</sup> or on a sale thereof absolute in form,<sup>20</sup> such assignee or purchaser steps into the shoes of the original pledgee; usually the transferee is entitled to the same rights

4. Ala.—Lunsford v. Marx, 102 So. 110, 212 Ala. 144.

5. N.Y.—Sheridan v. Presas, 41 N.Y.S. 451, 18 Misc. 180.

6. U.S.—Easton v. Hodges, C.C. Wis., 18 F. 677.

49 C.J. p 966 note 27.

7. Tenn.—Dinkins v. Farmers' Bank, etc., Co., 265 S.W. 983, 150 Tenn. 485.

49 C.J. p 966 note 54.

Repledge by pledgor see *infra* § 45 a.

Right of:

Broker to repledge corporate stock or other collateral see Brokers §§ 31, 32.

Pledgee to use pledged property generally see *supra* § 30.

8. Tenn.—Dinkins v. Farmers' Bank, etc., Co., *supra*.

Tex.—Coleman v. Anderson, Civ. App., 82 S.W. 1057, affirmed 86 S.W. 730, 98 Tex. 570.

Unauthorized repledge as conversion see *supra* § 36.

9. Tenn.—Dinkins v. Farmers' Bank, etc., Co., 265 S.W. 983, 150 Tenn. 485.

10. Tenn.—Dinkins v. Farmers' Bank, etc., Co., *supra*.

49 C.J. p 966 note 57.

11. Cal.—People v. Tambara, 219 P. 745, 192 Cal. 236.

49 C.J. p 966 note 59.

12. Me.—Dubie v. Branz, 73 A.2d 217.

13. Me.—Dubie v. Branz, *supra*.

14. N.Y.—Presser v. Central Trust, etc., Co., 179 N.Y.S. 259, 189 App. Div. 721, 735, affirmed 134 N.E. 577, 232 N.Y. 573.

49 C.J. p 966 note 60.

15. U.S.—In re Hollins, D.C.N.Y., 230 F. 917.

49 C.J. p 966 note 61.

16. N.Y.—Wood v. Fisk, 109 N.E. 177, 215 N.Y. 233.

17. Mass.—Warfield v. Adams, 102 N.E. 706, 215 Mass. 506.

49 C.J. p 966 note 63.

#### Pledge of negotiable securities

One receiving negotiable securities as collateral security is unauthorized, without pledgor's consent, to use collateral as security for own obligations.—Sprague v. State, 181 N.E. 507, 203 Ind. 581.

18. La.—Meyer v. Moss, 34 So. 332, 110 La. 132.

19. U.S.—Pollak v. Kahn, D.C.La., 17 F.Supp. 750.

Ark.—Union Trust Co. v. Pocahontas Special School Dist., 76 S.W. 2d 60, 189 Ark. 1019.

Cal.—Johnson v. Mortgage Guaranty Co., 4 P.2d 208, 117 Cal.App. 416.

Miss.—Hibernia Bank & Trust Co. v. Turner, 127 So. 291, 156 Miss. 842.

49 C.J. p 465 notes 31, 34.

#### Application of collections to other indebtedness

Where note pledged collateral security for payment of indebtedness to payee, assignee as holder could not apply collections from collateral to any other indebtedness, notwithstanding clause giving right to sell collateral used word "holder."—Union Trust Co. v. Pocahontas Special School Dist., 76 S.W.2d 60, 189 Ark. 1019.

20. Cal.—Williams v. Ashe, 48 P. 595, 111 Cal. 180—Stoner v. Security Trust Co., 190 P. 500, 47 Cal.App. 216.

49 C.J. p 966 note 34.

Sale by pledgee of property pledged: Before maturity of debt generally see *supra* § 34.

For enforcement of debt after default see *infra* §§ 56-66.

and benefits with respect to the pledge as was the pledgee,<sup>21</sup> and need not surrender the property to the pledgor except on payment or tender of the debt for which it was originally pledged.<sup>22</sup> Conversely, subject to exceptions with respect to the pledge of negotiable instruments as collateral, hereinafter discussed, the transferee ordinarily acquires only the rights possessed by the pledgee,<sup>23</sup> and is charged with the same duty or obligations with respect to the pledge as was the pledgee.<sup>24</sup> These rules apply with respect to pledged chattels<sup>25</sup> or nonnegotiable securities,<sup>26</sup> and irrespective of whether the transfer is to a third person with notice of the pledgor's rights<sup>27</sup> or without such notice.<sup>28</sup> If the purchaser has notice that the sale is fraudulent on the part of the pledgee, he acquires no right whatever as against the pledgor.<sup>29</sup> The view has been taken that a pledgee who has acquired possession of the chattel involved from the pledgor by fraud does not have such special property in, or right of possession of, such chattel which the pledgee may transfer to a third person,<sup>30</sup> even though the purported transferee acts in good faith and with reasonable care.<sup>31</sup>

If, after the assignment of the principal debt

without recourse and without delivery of the collateral, the pledgee makes an exchange of collateral with the pledgor without the authorization of the assignee, it has been held that the assignee may enforce the principal obligation against the pledgor,<sup>32</sup> without returning or accounting for the collateral.<sup>33</sup>

Where the pledgee sells collateral to a third person with the consent of the pledgor, there is no trust relation between the pledgee and the purchaser.<sup>34</sup>

*Negotiable instruments.* If the collateral security is itself a negotiable instrument, the transfer of the collateral to a bona fide purchaser for value may vest in such purchaser a valid legal title, without any liability to the pledgor.<sup>35</sup> So, where collateral is pledged to secure the payment of a negotiable instrument, if the collateral is transferred to a bona fide purchaser for value, under some circumstances the purchaser may acquire title free from the claim of the pledgor,<sup>36</sup> and, in such case, on the transfer of the principal obligation and the collateral to such a purchaser, the purchaser takes free from equities between the pledgor and the pledgee affecting the right to enforce the collateral.<sup>37</sup> If,

21. U.S.—Pollak v. Kahn, D.C.La., 17 F.Supp. 750.

Ark.—Union Trust Co. v. Pocahontas Special School Dist., 76 S.W. 2d 60, 189 Ark. 1019.

Miss.—Hibernia Bank & Trust Co. v. Turner, 127 So. 291, 156 Miss. 842.

*Purchaser of note succeeded to all seller's rights, including right to possession of pledge securing note.*—In re Frye's Estate, 4 P.2d 639, 164 Wash. 660.

#### Restoration of benefits received

One pledging note and mortgage without indorsing note could not, without restoring benefits received, recover note from purchaser thereof from pledgee bank.—Rohwer v. Young, 233 N.W. 851, 182 Minn. 168.

22. Ga.—Payne v. Power, 79 S.E. 771, 140 Ga. 759.  
49 C.J. p 965 note 35.

#### Retention of pledge by assignor of debt

The right to subject the pledge to the payment of the secured debt passes to the assignee of such debt, even though the assignor retains possession of the pledge.—Hibernia Bank & Trust Co. v. Turner, 127 So. 291, 156 Miss. 842.

23. Fla.—Richmond v. Gourlie, 40 So.2d 553.  
49 C.J. p 965 note 37.

24. U.S.—Pollak v. Kahn, D.C.La., 17 F.Supp. 750.

Ark.—Union Trust Co. v. Pocahontas Special School Dist., 76 S.W.2d

60, 189 Ark. 1019.

Miss.—Hibernia Bank & Trust Co. v. Turner, 127 So. 291, 156 Miss. 842.

25. Ill.—Bradley v. Parks, 83 Ill. 169.

26. N.Y.—McNeil v. New York Tenth Nat. Bank, 55 Barb. 59, modified on other grounds 46 N.Y. 325.

27. Miss.—Boswell v. Thigpen, 22 So. 823, 75 Miss. 308.  
49 C.J. p 965 note 41.

28. U.S.—Talty v. Freedman's Sav. etc. Co., D.C., 93 U.S. 321, 23 L. Ed. 886.

Cal.—Williams v. Ashe, 43 P. 595, 111 Cal. 180.

29. Ill.—Dana v. Buckeye Coal, etc. Co., 38 Ill.App. 371.

Ind.—Eberhart v. Eyre-Shoemaker, Inc., 134 N.E. 227, 78 Ind.App. 658.

30. Me.—Dubie v. Branz, 73 A.2d 217.

31. Me.—Dubie v. Branz, supra.

32. Ill.—Corpus Juris quoted in Painter v. Merchants & Manufacturers Bank of Milwaukee, 277 Ill.App. 208, 229.

N.H.—Haskell v. Africa, 41 A. 73, 68 N.H. 421.

Action on debt or liability secured generally see infra § 55.

33. Ill.—Corpus Juris quoted in Painter v. Merchants & Manufac-

turers Bank of Milwaukee, 277 Ill. App. 208, 229.

N.H.—Haskell v. Africa, 41 A. 73, 68 N.H. 421.

In connection with the exchange of collateral, it was pointed out that the pledgor appointed the original pledgee trustee to hold the collateral for the benefit of the owner of the principal obligation until paid, if such owner saw fit to ratify the transaction, and that the assignee had never ratified the action of the pledgee in making the exchange of collateral.—Haskell v. Africa, 41 A. 73, 68 N.H. 421.

34. N.J.—Polhemus v. Holland Trust Co., 45 A. 534, 59 N.J.Eq. 93, reversed on other grounds 47 A. 417, 61 N.J.Eq. 654.

49 C.J. p 965 note 43½.

35. Ga.—Cumming v. McDade, 45 S.E. 479, 118 Ga. 612.

49 C.J. p 965 note 44.

Bona fide holder of bill or note generally see Bills and Notes §§ 301-342.

36. Ala.—Nelson v. Owen, 21 So. 75, 113 Ala. 372.

37. Mass.—White v. Dodge, 73 N.E. 549, 187 Mass. 449.

#### Agreement as to effectiveness of collateral

If assignee, at time note and collateral were delivered to him, had no knowledge of agreement between maker and original payee that deed

however, the transferee is not a bona fide holder for value, he takes subject to the pledgor's equities.<sup>38</sup> One with notice, buying from a purchaser without notice, acquires the rights of the latter.<sup>39</sup>

*In action by pledgee against purchaser from him for price of pledged property*, the purchaser is not entitled to inquire into the amount due the pledgee on the original obligation.<sup>40</sup>

### b. Rights of Subpledgee

Apart from questions as to the status of a bona fide purchaser of a negotiable instrument, as a general rule a person with whom a pledgee has repledged the property pledged takes only the title of his transferor and may not hold the property for an amount in excess of the original debt unless greater rights exist by virtue of due authorization or estoppel.

Generally the subpledgee, unless he occupies the favored position of a bona fide purchaser for value of a negotiable instrument,<sup>41</sup> takes only the title of his transferor,<sup>42</sup> but is entitled to hold the property until the debt of the original owner has been discharged.<sup>43</sup> Where the subpledgee holds under an unauthorized repledge for an amount in excess of the debt due to the original pledgee from the original pledgor, the subpledgee must deliver up the property or its proceeds to the original pledgor on the payment of the original debt it was delivered to secure.<sup>44</sup> One claiming as subpledgee under a void assignment acquires no rights.<sup>45</sup> A subpledgee holding under an authorized repledge may be entitled to retain the collateral until his debt is paid,<sup>46</sup> the original pledgor being obliged to pay the amount of the subpledge in order to regain possession of the property.<sup>47</sup> It has been held that, under some circumstances, a repledge of collateral carries with it the pledgee's rights in the original debt.<sup>48</sup>

The subpledgee ordinarily is chargeable with notice of the extent of authority of the original pledgee to repledge,<sup>49</sup> but, according to some authorities, the subpledgee is not necessarily chargeable with notice of the pledgee's deliberate bad faith toward his pledgor,<sup>50</sup> although it has been held that a subpledgee does not acquire any right in a chattel involved as against the original pledgor where the original pledgee acquired such chattel from the original pledgor by fraud, even though the subpledgee has acted in good faith and with reasonable care.<sup>51</sup>

*Estoppel to deny pledgee's authority to repledge.* The pledgor may be estopped with respect to a subpledgee to deny the pledgee's authority to repledge the property,<sup>52</sup> as where he has conferred the indicia of ownership on the pledgee.<sup>53</sup> Under such circumstances, the original pledgor may still require that the subpledgee shall first apply to the satisfaction of the pledgee's debt to the subpledgee other collateral transferred to the subpledgee by the pledgee,<sup>54</sup> but, where the original pledgor has received payment in full from the pledgee for the property converted by him, he has no further right against the assignee.<sup>55</sup>

## § 45. Transfer of Interest of Pledgor

- a. In general
- b. Rights of pledgor's transferee
- c. Sale or transfer to pledgee

### a. In General

Subject to the rights of the pledgee, the pledgor may sell or assign his interest in the pledged property.

In general, the pledgor may sell or assign his

and vendor's lien notes constituting the collateral should be of no effect unless lands were sold to particular person, agreement was not binding on assignee.—*First Nat. Bank v. Bell*, Tex.Civ.App., 88 S.W.2d 119, error dismissed.

38. Miss.—*Eckert v. Searcy*, 74 So. 818, 114 Miss. 150.

49 C.J. p 966 note 49.

39. Ga.—*Sparta First Nat. Bank v. Sparta*, 114 S.E. 221, 154 Ga. 25.

49 C.J. p 966 note 50.

40. Ill.—*Rice, etc., Malting Co. v. International Bank*, 56 N.E. 1062, 185 Ill. 422.

41. N.Y.—*Thompson v. St. Nicholas Nat. Bank*, 21 N.E. 57, 113 N.Y. 325, affirmed 13 S.Ct. 66, 146 U.S. 240, 36 L.Ed. 956.

49 C.J. p 966 note 64.

42. Cal.—*Stoner v. Security Trust Co.*, 190 P. 590, 47 Cal.App. 216.

49 C.J. p 966 note 65.

43. Tenn.—*Pulaski Nat. Bank v. Windston*, 5 Baxt. 685.

49 C.J. p 966 note 66.

Right of original pledgor to redeem from subpledgee see infra § 50 d.

44. N.Y.—*Covell v. Tradesmen's Bank*, 1 Paige 131.

49 C.J. p 966 note 68.

45. Mass.—*Sherman v. Connecticut Mut. Life Ins. Co.*, 110 N.E. 159, 222 Mass. 159.

49 C.J. p 966 note 69.

46. N.Y.—*Presser v. Ruffer*, 179 N.Y.S. 270, 190 App.Div. 912, affirmed 134 N.E. 577, 232 N.Y. 573.—*Presser v. Central Trust, etc., Co.*, 179 N.Y.S. 259, 189 App.Div. 721, affirmed 134 N.E. 577, 232 N.Y. 573.

47. U.S.—*International Banking Corp. v. McGraw Tire, etc., Co.*, Ohio, 259 F. 381, 170 C.C.A. 357.

49 C.J. p 967 note 77.

48. Ark.—*Whitney v. Peay*, 24 Ark. 22.

49. Iowa.—*Matteson v. Dent*, 84 N.W. 710, 112 Iowa 551.

50. Mass.—*Warfield v. Adams*, 102 N.E. 706, 215 Mass. 506.

49 C.J. p 967 note 74.

51. Me.—*Dubie v. Branz*, 73 A.2d 217.

52. N.Y.—*Presser v. Central Trust, etc., Co.*, 179 N.Y.S. 259, 189 App.Div. 721, affirmed 134 N.E. 577, 232 N.Y. 573.

49 C.J. p 967 note 79.

53. Cal.—*Fowles v. State Nat. Bank*, 140 P. 271, 167 Cal. 653.

Conn.—*Skiff v. Stoddard*, 26 A. 874, 28 A. 104, 68 Conn. 198, 21 L.R.A. 102.

54. N.Y.—*Gould v. Farmers' L. & T. Co.*, 23 Hun 322.

55. Cal.—*Colton v. Oakland Sav. Bank*, 70 P. 225, 137 Cal. 376.

interest in the pledged property<sup>56</sup> without delivery of the property to the purchaser or assignee.<sup>57</sup> The assignment of the pledgor's interest in the pledged property to a third person may be effective as a junior pledge,<sup>58</sup> and, after the discharge of the pledge, the pledgor may repledge the collateral.<sup>59</sup> Where the payee of a note payable in installments has pledged some of the installments to secure his debt, his assignment of the unpledged installments may be valid as to him.<sup>60</sup>

A transfer of the pledgor's interest ordinarily is subject to the rights of the pledgee.<sup>61</sup> Thus, despite such a transfer, the pledgee usually retains the right to compromise a suit to collect the collateral without the consent of the pledgor's transferee,<sup>62</sup> to sell the collateral in accordance with the terms of the pledge,<sup>63</sup> or to have possession of the pledged property.<sup>64</sup> The pledgee will be protected as to advances against the collateral made after transfer of the pledgor's interest but before notice thereof.<sup>65</sup>

A sale made on authority of the pledgee is binding on him.<sup>66</sup>

#### b. Rights of Pledgor's Transferee

As a general rule, the assignee of the pledgor's interest in the property pledged acquires all the pledgor's rights in such property, at least where the pledgee has notice of the assignment.

As a general rule, the assignee of the pledgor's interest succeeds to all the pledgor's rights in the property,<sup>67</sup> at least where the pledgee has notice of the assignment.<sup>68</sup>

In general one who has acquired the interest of the pledgor in pledged property acquires only the pledgor's equity in such property.<sup>69</sup> A person who acquires from the pledgor the latter's interest in the pledged property, with knowledge of the contract of pledge and subject to such contract, takes subject to the rights of a person holding the secured debt and the pledge under a valid assignment by the pledgee.<sup>70</sup> A pledgee who, on payment of the debt secured and at the request of the pledgor, has transferred to the purchaser from the pledgor mortgages which were the subject matter of the pledge is not liable to the purchaser because prior mortgages were in default at the time of the transfer to such purchaser, in the absence of any misrepresentation by the pledgee.<sup>71</sup>

If the purchaser of the pledgor's interest later redeems the pledged property, he does not thereupon become entitled to enforce the obligation for which the security was given.<sup>72</sup>

*Assignee of unpledged part of single collateral.* Where the payee of a note payable in installments has pledged a part of the installments to secure his debt, the payee's assignment of the unpledged installments may be sufficient to vest an equity in the assignee,<sup>73</sup> and, where the pledgee of a part of the installments, with knowledge of the facts, has collected the full amount of the note, the assignee who has acquired such an equity may recover from the pledgee the amount of the unpledged installments.<sup>74</sup>

#### c. Sale or Transfer to Pledgee

Subject to the requirements that the transaction

56. Mo.—*Corpus Juris* quoted in *Murry v. Central Bank*, 40 S.W.2d 721, 724, 226 Mo.App. 400.

Okl.—*Corpus Juris* quoted in *Tonini v. Thurman*, 136 P.2d 909, 911, 192 Okl. 421.

Pa.—In re *McCahan's Estate*, 18 Pa. Dist. & Co. 171, reversed on other grounds 168 A. 685, 312 Pa. 515. 49 C.J. p 967 note 84.

57. Mo.—*Murry v. Central Bank*, 40 S.W.2d 721, 226 Mo.App. 400.

58. U.S.—*Schram v. Sage*, D.C.Mich., 46 F.Supp. 331, petition for rehearing overruled 47 F.Supp. 94.

S.D.—*Agricultural Credit Corporation v. Johnson*, 260 N.W. 824, 63 S.D. 476.

Sufficiency of delivery and possession in case of successive pledges by same pledgor see *supra* § 19.

59. Ala.—*O'Barr v. Turner*, 75 So. 271, 16 Ala.App. 65.

60. Mo.—*Webster v. Sterling Finance Co.*, 173 S.W.2d 928, 351 Mo. 754.

61. Mo.—*Murry v. Central Bank*, 40 S.W.2d 721, 226 Mo.App. 400.

Pa.—*First Nat. Bank & Trust Co. of Tarentum v. Jaffe*, 173 A. 845, 114 Pa.Super. 315. 49 C.J. p 967 note 92.

#### Rights as affected by possession

If, by agreement, the subject matter of a pledge remains in the pledgor's possession, his sale thereof binds all claiming under him, except purchasers without notice; but, where the pledgee has possession, an implication of notice arises, binding the purchaser to ascertain the pledgee's status by inquiry.—*Eagle, Inc. v. Kunkle*, 122 A. 276, 278 Pa. 190.

62. Okl.—*Tulsa Exch. Nat. Bank v. Rogers*, 268 P. 293, 131 Okl. 129.

63. Tex.—*Vander Stucken v. Willoughby*, Civ.App., 242 S.W. 478.

64. U.S.—*Dome City Bank v. Barnett*, Alaska, 184 F. 607, 106 C.C. A. 611.

49 C.J. p 967 note 95.

65. N.Y.—*Whelen v. Goldman*, 115 N.Y.S. 1006, 62 Misc. 108.

49 C.J. p 967 note 96.

66. Okl.—*Hartshorne First Nat. Bank v. Anderson*, 216 P. 111, 90 Okl. 145.

67. Neb.—*Brown v. Omaha Hotel Assoc.*, 88 N.W. 175, 63 Neb. 181.

68. Neb.—*Brown v. Omaha Hotel Assoc.*, *supra*.

69. Ark.—*Moore v. First Nat. Bank of Jonesboro*, 205 S.W. 902, 135 Ark. 369.

70. Tex.—*Golden Gate Cemetery Corporation v. Oak Park Cemetery*, Civ.App., 83 S.W.2d 711.

71. Pa.—In re *Dollar Title & Trust Co.*, 17 Pa.Dist. & Co. 257.

72. Cal.—*Cushing v. New or Practical Psychology Soc. Bldg. Assoc.*, 134 P. 324, 165 Cal. 731.

49 C.J. p 967 note 90.

Redemption generally see *infra* § 50.

73. Mo.—*Webster v. Sterling Finance Co.*, 173 S.W. 928, 351 Mo. 754.

74. Mo.—*Webster v. Sterling Finance Co.*, *supra*.

must be fair and not induced by fraud or oppression and that the consideration must be adequate, as a general rule the pledgee may acquire from the pledgor the pledgor's interest in the pledged property, as, for example, in discharge of the debt or obligation secured.

It has been held or recognized that the purchase by the pledgee from the pledgor at a private sale of the pledgor's interest in the property pledged is not necessarily invalid,<sup>75</sup> and that the pledgee may take a transfer of the pledged property from the pledgor in satisfaction of the debt secured,<sup>76</sup> provided such property is taken at a fair market value.<sup>77</sup> The view has been taken, however, that the purchase by the pledgee of the remaining interest in the

property is presumed to be fraudulent and void<sup>78</sup> unless the pledgee can show that it was fair, open, bona fide, and for an adequate consideration;<sup>79</sup> but this rule does not apply to the sale of the property under an execution against the pledgor,<sup>80</sup> and the pledgee is free to buy at such sale.<sup>81</sup> A purchase of the property by the pledgee does not extinguish his rights under the pledge as against an intervening garnishment by a creditor,<sup>82</sup> but he will hold the legal title subject to the payment of the debt for which the property was pledged to him and to the payment of the debt of the garnishing creditor.<sup>83</sup>

## VI. PAYMENT AND REDEMPTION

### § 46. Payment or Other Discharge of Secured Debt

- a. In general
- b. Tender of performance or payment
- c. Partial payment or discharge
- d. Negligence or other tort of pledgee
- e. Matters affecting pledge of property for debt of third person
- f. Other transactions
- g. Effect of discharge of pledged property by discharge of secured obligation

#### a. In General

Generally, the discharge of the pledged property

from the contract of pledge is effected by the performance of the pledgor's obligation secured by the pledge, as, for example, by payment or other termination or discharge of the debt secured.

Where the obligation for which a pledge is given no longer exists, usually the pledge agreement is no longer effective.<sup>84</sup> Accordingly, the discharge of the pledged property from the contract of pledge may be effected by performance of the pledgor's obligation secured by the pledge,<sup>85</sup> as, for example, by payment of the debt secured<sup>86</sup> or by other termination or discharge of such debt.<sup>87</sup> Subject to rules of general application, stated in Payment §§ 3-37, what constitutes payment depends on the facts and circumstances of the particular case.<sup>88</sup> Payment to the pledgee made by the person who is

#### Pledging held sufficient

Mo.—Webster v. Sterling Finance Co., *supra*.

75. Ill.—Wetherell v. Johnson, 70 N.E. 229, 208 Ill. 247. 49 C.J. p 968 note 2.

76. U.S.—Alexander v. Phillips Petroleum Co., C.C.A.Okl., 130 F.2d 593.

Cal.—MacDonald v. Pacific Nat. Bank of San Francisco, 152 P.2d 360, 66 Cal.App.2d 357.

Ill.—Wetherell v. Johnson, 70 N.E. 229, 208 Ill. 247.

Kan.—Snyder v. Lassen, 132 P.2d 624, 156 Kan. 230.

77. Cal.—MacDonald v. Pacific Nat. Bank of San Francisco, 152 P.2d 360, 66 Cal.App.2d 357.

78. N.C.—Jennings v. Hinton, 38 S.E. 863, 128 N.C. 214.

Pledgee as trustee for pledgor generally see *supra* § 21.

79. N.C.—Jennings v. Hinton, *supra*.

80. Iowa.—Clark v. Holland, 38 N.W. 350, 72 Iowa 34, 2 Am.S.R. 230.

81. Iowa.—Clark v. Holland, *supra*. Persons who may buy at sale to enforce pledge see *infra* § 61.

82. Minn.—Cooley v. Minnesota Transfer R. Co., 55 N.W. 141, 53 Minn. 327, 39 Am.S.R. 609.

83. Minn.—Cooley v. Minnesota Transfer R. Co., *supra*.

84. Mont.—Gerard v. Sanner, 103 P.2d 314, 110 Mont. 71.

85. N.Y.—Kirsch v. Provident Loan Soc. of New York, 71 N.Y.S.2d 241, 189 Misc. 898.

86. U.S.—Cherry v. Insull Utility Investments, D.C.Ill., 58 F.2d 1022, reversed on other grounds, C.C.A., Guaranty Trust Co. of New York v. Fentress, 61 F.2d 329.

Ark.—Strickland v. Dyer, 92 S.W.2d 206, 192 Ark. 462.

Ill.—Painter v. Merchants & Manufacturers Bank of Milwaukee, 277 Ill.App. 208.

Neb.—Glissmann v. Bauermelster, 19 N.W.2d 43, 146 Neb. 197.

Okl.—Cook v. Bingman, 179 P.2d 470, 198 Okl. 421.

Tex.—Farmley v. Aynesworth, Civ. App., 37 S.W.2d 836, error dismissed.—Vaughn v. Central State Bank, Civ.App., 27 S.W.2d 1112. 49 C.J. p 968 note 8.

87. Ariz.—Wentz v. Pacific States

Savings & Loan Co., 83 P.2d 1006, 52 Ariz. 508.

Pa.—Potter Title & Trust Co. v. Berkshire Life Ins. Co., 39 A.2d 268, 156 Pa.Super. 1. 49 C.J. p 968 note 9.

88. Ky.—Block v. Oliver, 43 S.W. 238, 102 Ky. 269, 19 Ky.Law 1278. 49 C.J. p 968 note 11.

Payment must be of such validity as to comply with the requisites of the law as to payment.—Peru Van Zandt Impl. Co. v. Burnett, 122 P. 668, 32 Okl. 304.

#### Payment not shown

Where the note of a person who had acquired merely the equity of the pledgor in the pledged collateral was taken in substitution for the note of the pledgor which was marked "paid" and the same collateral was pledged to secure the note so substituted, it was held that the pledgee did not lose his interest in the collateral.—Moore v. First Nat. Bank of Jonesboro, 205 S.W. 902, 135 Ark. 369.

#### Two notes of same debtor

(1) A creditor who holds two notes of his debtor for the same

liable as obligor on the pledged collateral may be sufficient to discharge the debt secured.<sup>89</sup> A payment excluding expenses for which the pledgee is entitled to reimbursement is insufficient to discharge the pledgee's lien.<sup>90</sup>

Generally, the payment or satisfaction of the principal debt does not result in the discharge or payment of the obligation or debt evidenced by collateral which has been pledged to secure such principal debt.<sup>91</sup> Where, however, the obligor on the pledged collateral pays to the pledgee sufficient to discharge the principal debt, the payment has been regarded as a payment pro tanto on such obligor's own obligation.<sup>92</sup> A discharge of the obligation or debt evidenced by the collateral may result from a transaction between the obligor on such collateral and the pledgor.<sup>93</sup>

#### b. Tender of Performance or Payment

##### (1) In general

##### (2) Sufficiency of tender

##### (1) In General

On due tender of performance of the obligation for which the pledge is security, the lien of the pledge is discharged, even though such tender is not accepted by the pledgee.

On a proper tender of performance of the pledgor's obligation,<sup>94</sup> as, for example, tender of the amount due on the principal obligation,<sup>95</sup> the lien of the pledgee is discharged, even though such tender is refused by the pledgee.<sup>96</sup> Such tender,

if it is not accepted, does not, however, discharge the debt secured.<sup>97</sup>

Tender of a larger amount than is due is not necessarily an admission that the amount tendered is due.<sup>98</sup>

#### (2) Sufficiency of Tender

What constitutes a tender of performance of the secured obligation sufficient to discharge the lien of the pledgee depends on the particular facts and circumstances involved.

What constitutes a sufficient tender to discharge the lien of a pledge will depend on the facts and circumstances of the particular case.<sup>99</sup> The tender must be valid in the sense that it must comply with the requisites of the law as to tender,<sup>1</sup> and, where securities are held as collateral for several items of indebtedness, a tender which does not include all such items does not operate to release the securities.<sup>2</sup>

A mere offer to pay the amount of the debt for which property has been pledged, not accompanied by an actual tender of money, is insufficient to discharge the pledgee's lien or entitle the pledgor to a return of the property.<sup>3</sup>

*Tender on condition that property be returned.* It has been held or recognized that a tender is not vitiated by the demand of the pledgor at that time that the property be returned to him,<sup>4</sup> at least if the amount of the debt is not in dispute,<sup>5</sup> but, where the amount is in dispute, a tender on such condition has been regarded as insufficient.<sup>6</sup>

debt, one note being collateral, is entitled to only one satisfaction.

Ill.—Parish Bank & Trust Co. v. Wennerholm Bros., 39 N.E.2d 383, 313 Ill.App. 121.

Tenn.—Dies v. Wilson County Bank, 165 S.W. 248, 129 Tenn. 89, Ann. Cas.1915A 1090.

(2) Generally, payment of one note by the pledgor operates to discharge both.—Parish Bank & Trust Co. v. Wennerholm Bros., 39 N.E.2d 383, 313 Ill.App. 121.

89. Tex.—Farmley v. Aynesworth, Civ.App., 37 S.W.2d 836, error dismissed.—Vaughn v. Central State Bank, Civ.App., 27 S.W.2d 1112.

90. Va.—Moore v. Hermitage Realty Inv. Corp., 133 S.E. 881, 145 Va. 199.

49 C.J. p 968 note 13.

Expenses for which pledgee entitled to reimbursement generally see supra § 32.

91. Ark.—Wentz v. Pacific States Savings & Loan Co., 83 P.2d 1006, 52 Ariz. 508.

La.—Continental Bank, etc., Co. v. Sacks, 92 So. 747, 152 La. 97.

92. Tex.—Farmley v. Aynesworth, Civ.App., 37 S.W.2d 836, error dismissed.

93. N.C.—Holland v. Dulin, 170 S.E. 784, 205 N.C. 202, rehearing denied 173 S.E. 310; 206 N.C. 211.

94. N.Y.—Kirsch v. Provident Loan Soc. of New York, 71 N.Y.S.2d 241, 189 Misc. 898.

95. Cal.—Berry v. Bakersfield Bank, 170 P. 415, 177 Cal. 206.  
49 C.J. p 969 note 29.

96. U.S.—Mitchell v. Roberts, C.C. Ark., 17 F. 776, 5 McGarry 425.  
Pa.—Cunningham v. Kitchen, 181 A. 387, 119 Pa.Super. 382.  
49 C.J. p 969 note 30.

97. U.S.—New York Assets Realization Co. v. McKinnon, N.Y., 209 F. 791, 126 C.C.A. 515.

Ga.—Renfro v. Butts, 16 S.E.2d 551, 192 Ga. 720—Glover v. Central Investment Co., 65 S.E. 147, 133 Ga. 62.

98. N.Y.—Talmage v. New York Third Nat. Bank, 91 N.Y. 531, 49 C.J. p 969 note 31.

99. N.Y.—Stratton v. Graham, 149 N.Y.S. 662, 164 App.Div. 348.

49 C.J. p 969 note 33.

Sufficiency of tender generally see the C.J.S. title Tender §§ 6-44, also 62 C.J. p 660 note 77—p 680 note 15.

1. Okl.—Peru Van Zandt Impl. Co. v. Burnett, 122 P. 668, 32 Okl. 304.

2. Tenn.—Nashville Fourth Nat. Bank v. Stahlman, 178 S.W. 942, 132 Tenn. 367, L.R.A.1916A 568—Greene County Union Bank v. Miller, 75 S.W.2d 49, 18 Tenn.App. 239.

3. N.Y.—Lewis v. Mott, 36 N.Y. 395.

R.I.—Potter v. Thompson, 10 R.I. 1.

4. N.Y.—First Trust & Deposit Co. v. Potter, 278 N.Y.S. 847, 155 Misc. 106.

49 C.J. p 969 note 38.

5. Cal.—Loughborough v. McNeven, 14 P. 369, 15 P. 773, 74 Cal. 250, 5 Am.S.R. 435.

49 C.J. p 969 note 38.

6. Neb.—Wilkins v. Redding, 97 N. W. 238, 70 Neb. 182.

49 C.J. p 969 note 39.

*Time of tender.* Ordinarily tender may be made at or after maturity of the debt.<sup>7</sup> It should, however, be made before sale of the collateral for default.<sup>8</sup>

*Keeping tender good.* It has been held or recognized that, under all circumstances, it is not necessary that the tender should be kept good,<sup>9</sup> at least in order to enable the pledgor to avail himself of it as a defense to an action by the pledgee to enforce the collateral.<sup>10</sup> The view has been taken, however, that, under some circumstances, if the pledgor seeks affirmative relief, he must keep his tender good, or at least offer to pay the amount into court.<sup>11</sup>

### c. Partial Payment or Discharge

Partial payments on the principal debt may operate pro tanto to reduce the lien of the pledgee on the collaterals.

Partial payments on the principal debt operate pro tanto to reduce the lien of the pledgee on the collaterals,<sup>12</sup> but, in the absence of an agreement to the contrary, the pledgee is entitled to hold the property pledged until the debt secured has been tendered or paid in full, regardless of partial payment on the secured debt, as discussed supra § 29.

Where, on the receipt by the pledgee or his agent of funds sufficient to discharge the debt, he is induced through the fraud of the pledgor to permit their application in part on other debts, the pledge remains in full force as to the balance due.<sup>13</sup>

### d. Negligence or Other Tort of Pledgee

While the view has been taken that the secured debt is discharged to the extent of the loss resulting from the pledgee's failure to preserve the pledged property, according to some authorities loss or depreciation in the value of such property caused by the pledgee's negligence does not of itself operate to extinguish pro tanto the debt secured.

While the view has been taken that, where the

pledgee by his own fault fails to preserve the pledged property, the secured debt is discharged to the extent of the loss,<sup>14</sup> according to some authorities loss or depreciation in value of the property pledged, through negligence of the pledgee, does not of itself operate to extinguish pro tanto the debt secured,<sup>15</sup> although it will entitle the pledgor to damages, as considered supra § 33.

*Conversion of pledged property.* According to some authorities, conversion of the collateral by the pledgee constitutes a discharge of the secured debt to the extent of the value of the property converted,<sup>16</sup> but conversion by the pledgee of pledged property having an ascertainable market value does not effect a satisfaction of the entire debt secured if the just value of the pledged property is less than the amount of the debt.<sup>17</sup>

### e. Matters Affecting Pledge of Property for Debt of Third Person

With respect to a pledge made to secure the debt of a third person, generally any material alteration of the principal contract, which is not consented to by the pledgor, will discharge the pledge. Under some circumstances, the owner of property which is pledged to secure the debt of another may make a tender of the amount of the secured debt sufficient to discharge the lien on the pledged property.

Where a pledge is given to secure the debt of another, for which the pledgor assumes the liability of a surety, any material alteration in the principal contract, not assented to by the pledgor, will discharge the pledge,<sup>18</sup> and, where property is pledged for the debt of a third person, the discharge of such person from liability for the debt may constitute an effective release of the lien on the pledged property,<sup>19</sup> as, for example, where the pledgee releases such debt.<sup>20</sup> It has been held or recognized, however, that the collateral is not discharged by the extension of time of payment of loan by a lender

7. Pa.—Cunningham v. Kitchen, 181 A. 387, 119 Pa.Super. 382.  
49 C.J. p 970 note 40.

*Tender after commencement of action on debt*

A tender by the pledgor of the amount of the note secured and costs made after the commencement of an action on such note may be sufficient.—Cass v. Higgins, 3 N.E. 189, 100 N.Y. 248—First Trust & Deposit Co. v. Potter, 278 N.Y.S. 847, 155 Misc. 106.

8. N.Y.—Van Woert v. Olmstead, 71 N.Y.S. 431.  
49 C.J. p 970 note 41.

9. Utah.—Lilenquist v. Utah State Nat. Bank, 100 P.2d 185, 99 Utah 163.  
49 C.J. p 970 note 42.

10. Minn.—Norton v. Baxter, 42 N.W. 865, 41 Minn. 146, 16 Am.S.R. 679, 4 L.R.A. 305.  
49 C.J. p 970 note 42.

11. N.J.—Meisel v. Merchants' Nat. Bank, 88 A. 1067, 85 N.J.Law 253.  
49 C.J. p 970 note 43.

12. Okl.—Durant Nat. Bank v. Bennett, 271 P. 141, 133 Okl. 80.  
49 C.J. p 970 note 55.

13. La.—Peters v. Pacific Guano Co., 7 So. 790, 42 La.Ann. 690.

14. U.S.—Skud v. Tillinghast, Mich., 195 F. 1, 115 C.C.A. 83.

15. Mo.—Corpus Juris cited in Russell v. Empire Storage & Ice Co., 59 S.W.2d 1061, 1072, 332 Mo. 707.  
49 C.J. p 970 note 44.

16. U.S.—Skud v. Tillinghast, Mich., 195 F. 1, 115 C.C.A. 83.

Mo.—Corpus Juris quoted in Slyman v. Simon, 48 S.W.2d 140, 142, 226 Mo.App. 1000.

17. S.C.—Cooper-Smith Co. v. Bell, 134 S.E. 658, 137 S.C. 1.

18. Wash.—Thompson v. Metropolitan Bldg. Co., 164 P. 222, 95 Wash. 546.  
49 C.J. p 971 note 57—50 C.J. p 118 note 38.

19. Pa.—Lupowitz v. Double Share Bldg. & Loan Ass'n, 14 Pa.Dist. & Co. 280.

20. U.S.—Herrmann v. Central Car. Trust Co., N.Y., 101 F. 41, 41 C.C.A. 176.



lacking notice that the collateral was owned by a third person.<sup>21</sup>

The owner of property which has been pledged to secure the debt of another may, under some circumstances at least, make a tender of payment of such debt sufficient to discharge the lien of the pledgee,<sup>22</sup> and such tender may be sufficient to discharge the lien, even though the tender is not kept good.<sup>23</sup>

#### f. Other Transactions

A discharge of the collateral contract or pledge may be effected by a surrender of the principal obligation, by an avoidance of the principal contract by the pledgee, or by a substantial fulfillment of the condition accepted by the pledgee.

A discharge of the collateral contract or pledge may be effected by a surrender of the principal obligation,<sup>24</sup> by an avoidance of the principal contract by the pledgee,<sup>25</sup> such as the pledgee's sale of the property making it impossible for him to fulfill his obligation for ultimate return thereof to the pledgor,<sup>26</sup> or by substantial fulfillment of the condition accepted by the pledgee.<sup>27</sup> On the other hand, it has been held or recognized that the collateral is not discharged by the giving of a renewal note for the secured debt, as discussed supra § 28, failure

duly to present the secured note for payment,<sup>28</sup> or an unsupported parol promise to release collateral.<sup>29</sup>

#### g. Effect of Discharge of Pledged Property by Discharge of Secured Obligation

On the discharge of collateral which was pledged by the owner, by payment or other discharge of the principal obligation, the pledgor becomes the absolute owner and is entitled to the possession of the collateral.

On the discharge of collateral owned by the pledgor by payment or other discharge of the principal obligation, the pledgor becomes the absolute owner of the collateral,<sup>30</sup> and is entitled to the possession thereof,<sup>31</sup> freed from any right of the pledgee to hold it for any debt other than that for which it was pledged<sup>32</sup> and from any right of set-off which a third person might have against the pledgee.<sup>33</sup>

Where the pledgee has the legal title to the property, he will hold it as a mere naked trustee for the pledgor,<sup>34</sup> and any payments made to him on the collaterals will be held for the use of the pledgor.<sup>35</sup> Where the pledgee realizes enough from a portion of the collaterals to pay the principal debt, his interest in the remaining collaterals is extinguished.<sup>36</sup> The pledgee, after collecting from the obligor on

21. Cal.—Fowles v. State Nat. Bank, 140 P. 271, 167 Cal. 653.

49 C.J. p 969 note 22.

22. Utah.—Lilenquist v. Utah State Nat. Bank, 100 P.2d 185, 99 Utah 163.

#### Refusal of tender

Refusal of creditor to accept payment of debt by third person who has pledged property to secure the debt of another discharges the lien on the pledged property.—Lilenquist v. Utah State Nat. Bank, supra.

23. Utah.—Lilenquist v. Utah State Nat. Bank, supra.

24. Tenn.—Union, etc., Bank v. Smith, 64 S.W. 756, 107 Tenn. 476. 49 C.J. p 968 note 16.

25. Ind.—Green v. Sinker, 35 N.E. 262, 135 Ind. 434.

26. Colo.—E. F. Hallack Lumber Mfg. Co. v. Gray, 34 P. 1000, 19 Colo. 149.

49 C.J. p 969 note 19.

27. U.S.—Boehm v. U. S., 20 Ct.Cl. 241.

Cal.—Kullman v. Greenebaum, 28 P. 674, 92 Cal. 403, 27 Am.S.R. 150.

#### Termination under terms of agreement

Under the terms of a pledge agreement contemplating a pledge to secure the payment of dividends on certain corporate stock owned by

the pledgee and the repayment of the purchase price of such stock to the pledgee, the pledge agreement was terminated by the purchase of such stock by the pledgor from the pledgee.—Sievers v. Sievers, 119 P. 2d 668, 112 Wash.2d 446.

28. N.Y.—Reynolds v. Doyle, 211 N.Y.S. 509, 125 Misc. 778.

Effect of running of statute of limitations against principal debt on right of pledgee to resort to pledged property see Limitations of Actions § 10 a.

29. Pa.—Black v. Closser, 26 Pa. Dist. 286.

49 C.J. p 969 note 26.

30. Ill.—Corpus Juris cited in Painter v. Merchants & Manufacturers Bank of Milwaukee, 277 Ill. App. 208, 245.

49 C.J. p 970 note 48.

31. Ill.—Corpus Juris cited in Painter v. Merchants & Manufacturers Bank of Milwaukee, 277 Ill. App. 208, 245.

N.Y.—Kirsch v. Provident Loan Soc. of New York, 71 N.Y.S.2d 241, 189 Misc. 198.

Pa.—Corpus Juris cited in Potter Title & Trust Co. v. Berkshire Life Ins. Co., 39 A.2d 269, 270, 156 Pa. Super. 1.

Tex.—Corpus Juris cited in Parmley v. Aynesworth, Civ.App., 37 S.W.2d 836, 839, error dismissed.

49 C.J. p 970 note 49.

Pledgee's right to retain possession until tender or payment of secured debt in full see supra § 29.

Right to return of property on discharge of secured debt see infra § 47.

Termination of pledgee's right to possession of pledged property generally see supra § 29.

Estate of deceased pledgee had no interest in the pledged property where the pledge agreement had been terminated pursuant to its terms.—Sievers v. Sievers, 119 P.2d 668, 11 Wash.2d 446.

32. Ark.—Strickland v. Dyer, 92 S. W.2d 206, 192 Ark. 462.

Ill.—Corpus Juris cited in Painter v. Merchants & Manufacturers Bank of Milwaukee, 277 Ill. App. 208, 245.

49 C.J. p 970 note 50.

33. N.Y.—Thompson v. Harrison, 1 Daly 302.

34. Ill.—Corpus Juris cited in Stombaugh v. Morey, 58 N.E.2d 545, 548, 388 Ill. 392—Thomas v. Van Meter, 62 Ill. App. 309.

35. Mass.—Merrifield v. Baker, 9 Allen 29.

49 C.J. p 970 note 53.

36. Tex.—Corpus Juris quoted in Parmley v. Aynesworth, Civ.App., 37 S.W.2d 836, 839, error dismissed.

49 C.J. p 970 note 54.

the pledged collateral sufficient to satisfy the secured debt, holds the collateral, credited with the payment, in trust for the pledgor<sup>37</sup> or his assignee.<sup>38</sup> Where the pledgee has collected the whole amount due on collateral pledged by two debtors, he may, after applying sufficient to discharge the debt secured, pay over the balance to the debtors in such shares as their individual interests may appear.<sup>39</sup>

Where, after the discharge of the pledge contract by discharge of the debt secured, the pledged property remains in the possession of the pledgee, the pledgee has been regarded as a depository for the pledgor,<sup>40</sup> or, under some circumstances, the transaction has been regarded as a gratuitous bailment.<sup>41</sup> With respect to collateral pledged which is owned by another than the pledgor, after the payment of the principal debt the pledgee holds the

collateral subject to the equities between the owner and the pledgor without regard to questions as to notice.<sup>42</sup>

### § 47. Return of Property on Discharge of Secured Debt

Generally on discharge of the obligation secured by the pledge, or on due tender of the performance of such obligation, the pledgor or his assignee is entitled to the return of the property pledged.

While usually the pledgor is not entitled to the return of the pledged property until he has in some form discharged his obligation,<sup>43</sup> as, for example, by payment of the debt secured,<sup>44</sup> or has made due tender of performance or payment of his obligation or debt,<sup>45</sup> on the discharge of the obligation the pledge was given to secure, the pledgor<sup>46</sup> or his assignee, or successor in interest,<sup>47</sup> is entitled to the collateral, or its proceeds,<sup>48</sup> if any re-

37. Tex.—*Parmlay v. Aynsworth*, Civ.App., 37 S.W.2d 836, error dismissed—*Vaughn v. Central State Bank*, Civ.App., 27 S.W.2d 1112.

38. Tex.—*Parmlay v. Aynsworth*, Civ.App., 37 S.W.2d 836, error dismissed.

39. Wash.—*Brown v. Kliks*, 6 P.2d 409, 165 Wash. 698.

40. Cal.—*Farr v. Wolcott*, 171 P. 291, 176 Cal. 734.

41. In absence of agreement for compensation  
Okl.—*Cook v. Bingman*, 179 P.2d 470, 198 Okl. 421.

42. N.Y.—In re *Cooke's Estate*, 264 N.Y.S. 336, 147 Misc. 528.

43. Cal.—*MacDonald v. Pacific Nat. Bank of San Francisco*, 152 P.2d 360, 66 Cal.App. 357.

Right of pledgee to retain possession of pledged property until secured debt tendered or paid in full see supra § 29.

#### Furnishing different security

Where a note payable to the pledgor was pledged as additional security for a debt of the pledgor under an agreement that such note would be returned when other security was given in lieu thereof, and such other security was neither furnished nor offered, neither the pledgor nor his assignee was entitled to the return of such note.—*Briggs v. Kansas City Joint Stock Land Bank*, 40 S.W.2d 682, 328 Mo. 23.

44. N.J.—*Bardsley v. First Nat. Bank & Trust Co. of Montclair*, 168 A. 665, 111 N.J.Law 512.

Ohio.—*Glidden v. Mechanics' Nat. Bank*, 42 N.E. 995, 53 Ohio St. 588, 43 L.R.A. 737.

Pa.—*National Bank of Fayette County v. Valentich*, 22 A.2d 724, 343 Pa. 132—*Gordon, Secretary of*

*Banking, v. Mitchell*, 183 A. 386, 320 Pa. 277.

#### Necessity for satisfaction of mortgage debt

Mortgagor was not entitled on foreclosure of mortgage to assignment of note given as additional security for mortgage debt until mortgage debt should be satisfied in full by proceeds of foreclosure sale or otherwise.—*Phillipsburg Nat. Bank & Trust Co. v. Rush*, 183 A. 913, 119 N.J.Eq. 387, affirmed 183 A. 207, 119 N.J.Eq. 387.

45. N.J.—*Bardsley v. First Nat. Bank & Trust Co. of Montclair*, 168 A. 665, 111 N.J.Law 512.

Ohio.—*Glidden v. Mechanics' Nat. Bank*, 42 N.E. 995, 53 Ohio St. 588, 43 L.R.A. 737.

46. Ariz.—*Corpus Juris* cited in *Wentz v. Pacific States Savings & Loan Co.*, 83 P.2d 1006, 1007, 52 Ariz. 508.

Ark.—*Grand Nat. Bank of St. Louis v. Hutchings*, 67 S.W.2d 576, 188 Ark. 709.

Cal.—*Post v. City & County Bank*, 183 P. 802, 181 Cal. 238—*Horn v. Klatt*, 151 P.2d 149, 65 Cal.App.2d 510.

Del.—*Weinress v. Bland, Ch.*, 71 A. 2d 59.

Ill.—*People v. Nelson*, 176 N.E. 59, 344 Ill. 46—*Painter v. Merchants & Manufacturers Bank of Milwaukee*, 277 Ill.App. 208.

Ky.—*Callebs v. Smith*, 103 S.W.2d 949, 268 Ky. 162.

Mont.—*Ryan v. Stagg*, 298 P. 353, 89 Mont. 390.

N.Y.—*Kirsch v. Provident Loan Soc. of N. Y.*, 71 N.Y.S.2d 241, 189 Misc. 898.

Pa.—In re *Ryman's Estate*, 99 A. 24, 254 Pa. 455—*Dime Bank & Trust Co. v. Walsh, Com.Pl.*, 34 Luz.Leg. Reg. 53, affirmed *Dime Bank &*

*Trust Co. of Pittston v. Walsh*, 17 A.2d 728, 143 Pa.Super. 189.

Tenn.—*Skidmore v. Little*, 181 S.W. 2d 144, 181 Tenn. 280.

Tex.—*Parmlay v. Aynsworth*, Civ. App., 37 S.W.2d 836, error dismissed—*Vaughn v. Central State Bank*, Civ.App., 27 S.W.2d 1112.

49 C.J. p 971 note 59.

Right of pledgor to possession on discharge of secured debt generally see supra § 46 g.

#### Obligation of debtor held as collateral

Iowa.—*Monticello State Bank v. Schatz*, 268 N.W. 602, 222 Iowa 335.

47. Ariz.—*Pacific States Savings & Loan Co.*, 83 P.2d 1006, 52 Ariz. 508.

Tex.—*Parmlay v. Aynsworth*, Civ. App., 37 S.W.2d 836, error dismissed.

49 C.J. p 971 note 60.

#### Right of junior pledgee and his assignee

(1) On discharge of the debt due to a senior pledgee by application of the proceeds of part of the collateral, a junior pledgee to whom the pledgor has assigned his interest in the pledged property may be entitled to the possession of the remaining proceeds of the collateral and to other collateral.—*Schram v. Sage, D.C.Mich.*, 46 F.Supp. 381, petition for rehearing overruled 47 F.Supp. 94.

(2) In such case the right of the assignee of the junior pledgee to obtain possession of the remaining proceeds and the other collateral was not defeated by mere lapse of time which was the only circumstance indicating laches.—*Schram v. Sage, D.C.Mich.*, 47 F.Supp. 94.

48. Ill.—*Painter v. Merchants &*

main.<sup>49</sup> So, the pledgor may be entitled to the return of the pledged property on due tender of performance of the obligation secured by the pledge.<sup>50</sup> Also, where an indorser of a note secured by collateral takes it up, he may be entitled to the benefit of the collateral.<sup>51</sup> These rights, however, are extinguished, it seems, where the entire collateral has been required to satisfy the principal obligation<sup>52</sup> or where the pledgor's remaining interest has been exhausted under legal process for the payment of other claims against him.<sup>53</sup> On tender of the amount due on a debt, the pledgor is entitled to a surrender only of the collateral which was deposited for the particular debt.<sup>54</sup>

The pledgee's obligation to return the pledged property on the pledgor's performance or payment of his obligation or debt or on due tender in that respect, as considered generally infra § 48, and the pledgor's obligation so to perform, pay, or make tender are reciprocal,<sup>55</sup> and neither can require per-

formance by the other unless he himself is able and ready to perform.<sup>56</sup>

If the pledgee has acquired an absolute interest in the collateral in his own right, the pledgor is not entitled to a return thereof.<sup>57</sup>

A pledgor may recover property pledged to secure a note subsequently declared void for illegality,<sup>58</sup> or the value of such property if it is no longer under the pledgee's control.<sup>59</sup>

*What constitutes a sufficient return of the collateral to the pledgor will depend on the facts and circumstances involved.*<sup>60</sup>

## § 48. — Duty of Pledgee to Return

On the discharge of the obligation secured by the pledge, or on due tender of performance of such obligation, generally it becomes the duty of the pledgee to return the pledged property or its proceeds to the pledgor.

Whenever the obligation which the pledge was given to secure is discharged, it becomes the duty of the pledgee to return the property or its proceeds, if any, to the pledgor,<sup>61</sup> and, according to

Manufacturers Bank of Milwaukee, 277 Ill.App. 208.

49 C.J. p 971 note 61.

49. Neb.—Cressman v. Whitall, 21 N.W. 458, 16 Neb. 592.

N.J.—Whittaker v. Amwell Nat. Bank, 29 A. 203, 52 N.J.Eq. 400.

50. N.Y.—Kirsch v. Provident Loan Soc. of N. Y., 71 N.Y.S.2d 241, 189 Misc. 898.

51. N.Y.—Lansingburgh Nat. Exch. Bank v. Silliman, 65 N.Y. 475.

49 C.J. p 972 note 63.

Subrogation of indorser see the C.J. S. title Subrogation § 23, also 60 C. J. p 738 note 85.

52. Neb.—Cressman v. Whitall, 21 N.W. 458, 16 Neb. 592.

N.J.—Whittaker v. Amwell Nat. Bank, 29 A. 203, 52 N.J.Eq. 400.

53. N.J.—McNeal v. Florence Loan Assoc., 8 A. 125, 40 N.J.Eq. 351.

54. Pa.—Gildner v. First Nat. Bank & Trust Co. of Bethlehem, 19 A. 2d 910, 342 Pa. 145.

55. N.J.—Bardsley v. First Nat. Bank & Trust Co. of Montclair, 168 A. 665, 111 N.J.Law 512.

Ohio.—Glidden v. Mechanics' Nat. Bank, 42 N.E. 995, 53 Ohio St. 588, 43 L.R.A. 737.

56. N.J.—Bardsley v. First Nat. Bank of Montclair, 168 A. 665, 111 N.J.Law 512.

Ohio.—Glidden v. Mechanics' Nat. Bank, 42 N.E. 995, 53 Ohio St. 588, 43 L.R.A. 737.

49 C.J. p 971 note 59 [c].

57. Vt.—Angus v. Robinson, 19 A. 992, 62 Vt. 60.

49 C.J. p 972 note 66.

58. Tex.—Cooper Grocery Co. v. McDonald, Civ.App., 256 S.W. 311.

49 C.J. p 972 note 67.

59. Ky.—Timmons v. Timmons, 140 S.W. 164, 145 Ky. 259.

49 C.J. p 972 note 68.

60. Neb.—Ludden v. Marsters, 21 N.W. 442, 16 Neb. 654.

49 C.J. p 972 note 69.

61. Ala.—Stanley v. People's Sav. Bank, 157 So. 844, 229 Ala. 446.

Ark.—Hall v. Pryor, 114 S.W.2d 847, 195 Ark. 856—Strickland v. Dyer, 92 S.W.2d 206, 192 Ark. 462.

Ill.—Cottrell v. Gerson, 20 N.E.2d 74, 371 Ill. 174—Painter v. Merchants & Manufacturers Bank of Milwaukee, 277 Ill.App. 208.

Mass.—Weiss v. Balaban, 53 N.E.2d 83, 315 Mass. 390.

N.J.—Bardsley v. First Nat. Bank & Trust Co. of Montclair, 168 A. 665, 111 N.J.Law 512.

Ohio.—Glidden v. Mechanics' Nat. Bank, 42 N.E. 995, 53 Ohio St. 588, 43 L.R.A. 737.

Pa.—In re Gordon, 25 A.2d 304, 344 Pa. 262—Schwab v. Continental-Equitable Title & Trust Co., 199 A. 150, 330 Pa. 540—Gordon, Secretary of Banking, v. Mitchell, 182 A. 386, 320 Pa. 277—In re Berkovitz, 179 A. 746, 319 Pa. 397—Kellogg v. Veith, Com.Pl., 19 Erie Co. 503.

Tex.—Cecil v. Wise, Civ.App., 109 S.W.2d 214, error refused—Parmley v. Aynesworth, Civ.App., 37 S.W.2d 836, error dismissed—Vaughn v. Central State Bank, Civ.App., 27 S.W.2d 1112.

49 C.J. p 972 note 71.

There is an implied agreement on the part of the pledgee to return the

pledge on payment of the secured debt.—Pepper v. Beville, 129 So. 334, 100 Fla. 97.

### Equity

Pledgee's duty to care for the pledge and restore it includes any equity.—Overbury v. Platten, C.C.A. N.Y., 108 F.2d 155, 126 A.L.R. 185, certiorari denied 61 S.Ct. 21, 311 U.S. 664, 85 L.Ed. 426.

### Agreement to protect pledgor

Where pledgor of bonds, on payment of entire debt, received back all but one bond which pledgee could not find, pledgee's written agreement to replace lost bond or to secure the payment of the amount of such bond to the pledgor at maturity, made prior to such payment in full, was supported by sufficient consideration, even if bond was stolen without pledgee's negligence, since pledgee was prima facie under legal duty to return bond on payment of debt and pledgor waived right to obtain bond.—Till v. Material Service Corporation, 5 N.E.2d 769, 288 Ill.App. 103.

### Property pledged for debt of another

Where a person deposited a sum of money to secure the payment of the debt of a third person, the creditor was not entitled to retain the deposit after such third person had been discharged from liability to pay such debt, and was liable for interest on the amount of the deposit from the date of such discharge to the date of the return of the deposit.—Lupowitz v. Double Share Bldg. & Loan Ass'n, 14 Pa.Dist. & Co. 230.

### Obligation of debtor held as collateral

Iowa.—Monticello State Bank v. Schatz, 263 N.W. 602, 222 Iowa 335.

some authorities, a like rule applies in the case of due tender of performance or payment of his obligation or debt by the pledgor.<sup>62</sup> The pledgee cannot lawfully retain the property to secure a debt distinct from that for which it was pledged.<sup>63</sup>

The failure<sup>64</sup> or refusal<sup>65</sup> of the pledgee to return the collateral on payment of the principal debt, or on performance of the secured obligation,<sup>66</sup> is itself a conversion, and a sufficient tender of payment or performance and an unauthorized refusal and retention of the pledged property by the pledgee also constitute a conversion,<sup>67</sup> or at least prima facie evidence of a conversion.<sup>68</sup>

Where the obligation of one who has pledged his property to secure the debt of a third person is released by reason of a change or alteration in the principal obligation, the pledgee's refusal to return the property constitutes a conversion<sup>69</sup> for which the pledgee may be liable in damages.<sup>70</sup> While the view has been taken that the pledgee is not in de-

fault until a demand for the return of the pledged property, accompanied by tender of payment of the secured debt, is made by the pledgor,<sup>71</sup> tender is not essential to complete conversion where the pledgee has clearly indicated an intention to retain the property irrespective of tender.<sup>72</sup> A tender of payment of the secured debt, a demand for return of the pledged property, and failure to return do not constitute a conversion where the tender and demand are made when the pledgor knows that the law renders it impossible for the pledgee to accept the tender or to comply with the demand.<sup>73</sup> Retraction of the refusal before suit has been held to show that there was no conversion.<sup>74</sup>

**Return of identical property.** Usually the pledgee on payment of the principal debt must return the identical property pledged,<sup>75</sup> but this rule is not necessarily applicable to property of an interchangeable character.<sup>76</sup> It has been stated broadly that, in order to render a pledgee liable for conversion,

#### Limitation on obligation

Pledgee need do no more than return property remaining after debt is paid, and has no responsibility for vicissitudes thereof unless he provokes them.—*Flat-Marks Realty Corporation v. Silver's Lunch Stores, C. C.A.N.Y.*, 74 F.2d 210, certiorari denied 55 S.Ct. 640, 294 U.S. 731, 79 L. Ed. 1260.

62. Ill.—*Cottrell v. Gerson*, 20 N.E. 2d 74, 371 Ill. 174.

N.J.—*Bardsley v. First Nat. Bank & Trust Co. of Montclair*, 168 A. 665, 111 N.J.Law 512.

Ohio.—*Glidden v. Mechanics' Nat. Bank*, 42 N.E. 995, 53 Ohio St. 588, 43 L.R.A. 737.

63. Ill.—*Painter v. Merchants & Manufacturers Bank of Milwaukee*, 277 Ill.App. 208.

N.Y.—*Corpus Juris* quoted in *People ex rel. Bellel v. Klinger*, 300 N.Y.S. 408, 417, 164 Misc. 530, 49 C.J. p 972 note 80.

64. Ill.—*Deane v. Fort Dearborn Trust, etc., Bank*, 241 Ill.App. 517, 528.

#### Delivery to obligor on pledged collateral

(1) The act of the pledgee who has collected from the obligor on the pledged collateral sufficient to satisfy the debt secured in delivering such collateral to such obligor, without the consent of the pledgor, constitutes a conversion regardless of whether the pledgee was negligent.—*Vaughn v. Central State Bank, Tex.Civ.App.*, 27 S.W.2d 1112.

(2) Transfer of collateral to obligor thereon as conversion generally see supra § 36.

#### Unauthorized delivery to purported agent

Where one who had previously made partial payment on note purported to be maker's agent, and in paying up note claimed to have authority to receive the collateral, payee, in reposing confidence in purported agent and in delivering collateral without ascertaining whether he in fact had authority, is liable for loss on purported agent's conversion of collateral.—*Post v. City & County Bank*, 183 P. 802, 181 Cal. 238.

65. Cal.—*Kullman v. Greenebaum*, 28 P. 674, 92 Cal. 403, 27 Am.S.R. 150.

49 C.J. p 972 note 73.

#### Proper tender required

Before refusal to return collateral pledged can constitute conversion there must be a proper tender of the amount actually due.—*Greene County Union Bank v. Miller*, 75 S.W.2d 49, 18 Tenn.App. 239.

66. Ill.—*Cottrell v. Gerson*, 20 N.E. 2d 74, 371 Ill. 174.

Tex.—*Cecil v. Wise, Civ.App.*, 109 S.W.2d 214, error refused.

67. Ill.—*Cottrell v. Gerson*, 20 N.E. 2d 74, 371 Ill. 174.

Mo.—*Russell v. Empire Storage & Ice Co.*, 59 S.W.2d 1061, 332 Mo. 707.

N.J.—*Bardsley v. First Nat. Bank & Trust Co. of Montclair*, 168 A. 665, 111 N.J.Law 512.

Tex.—*Corpus Juris* cited in *Citizens Industrial Bank of Austin v. Oppenheim, Civ.App.*, 92 S.W.2d 312, 315, error dismissed.

49 C.J. p 972 note 76.

**Tender by the owner of property pledged for the debt of another, re-**

fusal of tender, and pledgee's subsequent application of pledged property in payment of the indebtedness constituted conversion rendering pledgee liable for value thereof, notwithstanding the tender was not kept good.—*Lilenquist v. Utah State Nat. Bank*, 100 P.2d 185, 99 Utah 163.

68. Pa.—*Beadling v. Moore*, 93 Pa. Super. 544.

Wyo.—*De Clark v. Bell*, 65 P. 852, 10 Wyo. 1.

69. N.Y.—*Rutherford Nat. Bank v. Manniello*, 271 N.Y.S. 69, 240 App. Div. 506, affirmed 195 N.E. 203, 266 N.Y. 568.

70. N.Y.—*Rutherford Nat. Bank v. Manniello*, supra.

71. N.J.—*Bardsley v. First Nat. Bank & Trust Co. of Montclair*, 168 A. 665, 111 N.J.Law 512.

Demand as condition precedent to maintenance of action see infra § 49 c.

72. Tex.—*King v. Boerne State Bank, Civ.App.*, 159 S.W. 433.

73. N.Y.—*Wood v. Fisk*, 141 N.Y.S. 342, 156 App.Div. 497, affirmed 109 N.E. 177, 215 N.Y. 233.

#### Reason for rule

A claim for conversion is predicated on a wrongful assumption of ownership or interference with the owner's right to possession.—*Wood v. Fisk*, supra.

74. Ga.—*McCalla v. Clark*, 55 Ga. 53.

49 C.J. p 972 note 79.

75. Cal.—*Atkins v. Gamble*, 42 Cal. 86, 10 Am.R. 282—*Henning v. Akin*, 266 P. 981, 91 Cal.App. 246.

76. Cal.—*Henning v. Akin*, supra, 49 C.J. p 972 note 82.

it must appear that the pledgee is unable to return the original property or, under some circumstances, property of the specific kind.<sup>77</sup>

## § 49. — Actions

- a. In general
- b. Form of action
- c. Conditions precedent
- d. Defenses
- e. Pleading and evidence
- f. Amount of recovery and judgment

### a. In General

Generally, on the discharge or payment of the principal obligation or debt, an appropriate action will lie to compel the return of the pledged property, and failure to return may be the basis of an action for conversion.

Where the principal obligation or debt has been discharged or paid, delivery back of the collateral or of the property pledged may generally be compelled by appropriate action.<sup>78</sup> The pledgor may be entitled to recover the pledged property from a remote transferee of the pledgee.<sup>79</sup>

If the pledgee refuses to return the pledged collateral on discharge of the secured debt, an action for the conversion may be maintained by the pledgor,<sup>80</sup> or his assignee<sup>81</sup> or legal representative.<sup>82</sup>

### b. Form of Action

Under varying circumstances, on the discharge of the contract of pledge and failure of the pledgee to return the pledged property, a possessory action for such property itself, an action for money had and received to

recover the proceeds of such property, or other appropriate action may lie.

The remedy of the pledgor for the conversion of the pledged property or for a failure to return it may be in replevin or other possessory action for the property itself,<sup>83</sup> by an action in assumpsit for money had and received to recover its proceeds,<sup>84</sup> or damages for breach of contract,<sup>85</sup> by an action in trover,<sup>86</sup> or under some circumstances, where necessary to obtain adequate redress, by a proceeding or suit in equity.<sup>87</sup> Generally, the rules hereinbefore stated apply to the pledgor's assignee.<sup>88</sup>

According to some authorities the pledgor may secure return of the collateral by showing payment and asking return in a suit on the secured debt.<sup>89</sup>

### c. Conditions Precedent

Demand for the return of the pledged property or collateral on discharge of the principal obligation is not necessarily essential in order to require such return, but under some circumstances such demand is essential.

On discharge of his obligation the pledgor usually may maintain an action for the recovery of the pledge or its proceeds without a distinct demand for the return of the property;<sup>90</sup> but the pledgor cannot maintain an action without first demanding a return of the collateral where the pledgeholder is not the person to whom payment is made<sup>91</sup> or where the pledgor has merely an option to withdraw the collateral pro rata on partial payment of the debt.<sup>92</sup>

As to pledged corporate stock:

Generally see Corporations § 428.  
In hands of broker see Brokers §§ 31, 32.

77. Cal.—Horn v. Klatt, 151 P.2d 149, 65 Cal.App.2d 510.

78. Cal.—McPherson v. Great Western Milling Co., 187 P. 80, 45 Cal. App. 91.

S.C.—Sullivan v. Sullivan, 20 S.C. 509.

Wis.—Wenzel v. Conrad Schmitt Studios, 11 N.W.2d 503, 244 Wis. 160.

Action for redemption see *infra* § 51.

#### Basis of action

Pledgor's action to recover pledged property after pledgee's refusal or failure to restore it on pledgor's demand, accompanied by tender of payment of debt secured is founded on breach of contract, although treated as for conversion, and pledgee is entitled to recoup debt.—Bardsley v. First Nat. Bank & Trust Co. of Montclair, 168 A. 665, 111 N. J. Law 512.

79. Fla.—Richardson v. Gourlie, 40 So.2d 553.

80. Ill.—Deane v. Fort Dearborn Trust, etc., Bank, 241 Ill.App. 517. 49 C.J. p 973 note 83.

81. N.Y.—Roberts v. Berdell, 61 Barb. 37, affirmed 52 N.Y. 644, 15 Abb.Pr., N.S., 177. 49 C.J. p 973 note 84.

82. Fla.—Lasseter v. Long, 96 So. 841, 85 Fla. 439.

83. Cal.—McPherson v. Great Western Milling Co., 187 P. 80, 45 Cal. App. 91. 49 C.J. p 973 note 86, p 970 note 49 [b].

84. Mass.—Hancock v. Franklin Ins. Co., 114 Mass. 155. 49 C.J. p 973 note 87.

85. Ill.—Eldred v. Colvin, 206 Ill. App. 2.

86. Ala.—Overstreet v. Nunn, 36 Ala. 649. 49 C.J. p 973 note 89.

87. Wis.—Brown v. Runals, 14 Wis. 698. 49 C.J. p 973 note 91.

**Relief in suit to foreclose mortgage on real property**  
Where mortgagors, in addition to realty described in mortgages, in-

cluded a chattel as collateral to secure debt, after foreclosure of mortgages on realty and payment of secured debt in full, court in which foreclosure suit had been instituted had jurisdiction to order that chattel be returned.—Hall v. Fryor, 114 S.W. 2d 847, 195 Ark. 856.

Where pledgor may obtain adequate redress at law, equity is without jurisdiction.

Ky.—Flowers v. Sproule, 2 A.K. Marsh. 54.  
Mass.—Mather v. Bennett, 9 Cush. 175.

88. S.C.—Ratcliff v. Vance, 9 S.C.L. 239.

49 C.J. p 973 note 93.

89. Ga.—Rylee v. Statham Bank, 67 S.E. 383, 7 Ga.App. 489, 493. 49 C.J. p 973 note 94.

90. Ala.—O'Barr v. Turner, 75 So. 271, 16 Ala.App. 65.  
Pa.—Gilpin v. Howell, 5 Pa. 41, 45 Am.D. 720.

91. Pa.—Dewart v. Masser, 40 Pa. 302.

92. Pa.—Williamson v. McClure, 37 Pa. 402.

The necessity of tender of payment of the principal debt as a condition precedent to an action by the pledgor to recover pledged property or its proceeds is discussed supra § 39, and the necessity of such tender as a condition precedent to an action by the pledgor for damages for conversion, supra § 40.

#### d. Defenses

In an action by a pledgor based on the failure of the pledgee to return the pledged property, it is a good defense that the secured obligation has not been discharged and that due tender in discharge or payment of such obligation has not been made.

It is a good defense that the secured obligation has not been discharged and that due tender in discharge or payment of such obligation has not been made,<sup>93</sup> or that there has been a material alteration in the collateral since its execution.<sup>94</sup> It is no defense that the collateral was worthless, or of any less value than the amount paid to the pledgee on it,<sup>95</sup> that plaintiff was not the owner of the claim sued on,<sup>96</sup> or that, at the time of the tender and demand, a suit by a third person claiming title to the property was pending.<sup>97</sup>

*Laches* may bar the right to recover.<sup>98</sup>

#### e. Pleading and Evidence

Rules governing pleading and evidence in civil actions generally apply in actions by a pledgor involving want of return of the pledged property.

Rules governing civil actions generally apply to actions involving failure to return pledged property with respect to the pleadings.<sup>99</sup> In accordance with the general rules of evidence, plaintiff pledgor must prove compliance or tender of compliance with his obligation,<sup>1</sup> and generally the burden of proof is on the pledgee to show the circumstances of the loss relied on to excuse a return.<sup>2</sup> General rules of evidence also apply with respect to the admissibility<sup>3</sup> and the weight and sufficiency of evidence.<sup>4</sup>

#### f. Amount of Recovery and Judgment

In an action against a pledgee for failure to return the pledged property on discharge of the principal obligation or of the contract of pledge, the amount recoverable is the actual loss sustained by reason of defendant's wrongful act.

In an action against a pledgee for failure to return the collateral on payment or tender, the amount of recovery is the actual loss suffered by reason of defendant's wrongful act.<sup>5</sup> Where the pledgee has wrongfully refused to return the pledged property on due payment or tender of payment of the principal debt, generally he is responsible for any subsequent depreciation in the value of the pledge;<sup>6</sup> but under an agreement by which the pledgor has a right to return of collateral in proportion to the amount of the debt paid, the pledgee is not liable for depreciation in value of collateral

93. Neb.—Parker v. Omaha First Nat. Bank, 223 N.W. 651, 118 Neb. 96.

49 C.J. p 974 note 8.

94. N.Y.—Flint v. Craig, 56 N.Y. 22, 59 Barb. 319.

95. Ill.—Union Nat. Bank v. Post, 93 Ill.App. 339, affirmed 61 N.E. 507, 192 Ill. 385.

96. N.Y.—Smith v. Hall, 67 N.Y. 48.

97. Cal.—Loughborough v. McNevin, 14 P. 369, 15 P. 773, 74 Cal. 250, 5 Am.S.R. 435.

N.Y.—Cass v. Higenbotam, 3 N.E. 189, 100 N.Y. 248.

98. Mass.—Wehrle v. Mercantile Nat. Bank, 109 N.E. 367, 221 Mass. 585.

49 C.J. p 974 note 17.

Accrual of cause of action for trover and conversion with respect to statute of limitations see Limitations of Actions § 168 b (3).

Effect of collateral security with respect to operation of statute of limitations as to principal debt or obligation see Limitations of Actions §§ 51, 162.

99. Conn.—Whiting v. McDonald, 1 Root 444.

49 C.J. p 974 note 18.

#### Necessity of defendant showing right to accounting

A defendant sued in claim and delivery cannot secure an accounting from plaintiff without pleading the facts on which his demand for an accounting is based.—McPherson v. Great Western Milling Co., 187 P. 80, 45 Cal.App. 91.

1. Me.—Patten v. Dennison, 14 A.2d 12, 137 Me. 1.

N.Y.—Chalfant v. New York Evening Post, 197 N.Y.S. 733.

2. N.Y.—Onderkirk v. Troy Cent. Nat. Bank, 23 N.E. 875, 119 N.Y. 263.

#### Going forward with evidence

Where plaintiff pledgor had made a prima facie case by showing that one of the collateral securities which had been pledged was not returned when payment of the secured debt was made, it devolved on defendant pledgee to go forward with evidence which would tend to show that loss of security did not result from his fault or neglect.—Till v. Material Service Corporation, 5 N.E.2d 769, 288 Ill.App. 103.

3. Ill.—Till v. Material Service Corporation, supra.

49 C.J. p 974 note 19 [a].

4. Cal.—Van Hagen v. Clovis First State Bank, 173 P. 764, 37 Cal.App. 141.

49 C.J. p 974 note 19 [b], [c].

#### Evidence held sufficient

To establish prima facie case for plaintiff pledgor.—Till v. Material Service Corporation, 5 N.E.2d 769, 288 Ill.App. 103.

#### Evidence held insufficient

To overcome, on behalf of defendant pledgee, plaintiff pledgor's prima facie case.—Till v. Material Service Corporation, supra.

5. Pa.—Bangor Silk Knitting Co. v. Wise, 121 A. 308, 277 Pa. 415.

49 C.J. p 974 note 22 [a], [b].

#### Balance due on collateral note and interest

Where pledgee had collected from maker of collateral note sufficient sum to satisfy pledgor's debt and had turned over collateral note to maker, he was liable to pledgor for balance of principal of, and interest on, collateral note.—Vaughn v. Central State Bank, Tex.Civ.App., 27 S.W.2d 1112.

6. S.C.—Sullivan v. Sullivan, 20 S.C. 509.

49 C.J. p 975 note 23.

until demand has been made for its return.<sup>7</sup> In an action on the principal debt, the pledgor is entitled to set off any sums realized by the creditor from collaterals, as discussed *infra* § 55, and may in an independent action recover any surplus in the pledgee's possession after satisfaction of the debt.<sup>8</sup> A judgment in replevin for plaintiff should fix the amount, if any, plaintiff is required to pay into court before recovering the pledged property.<sup>9</sup>

A person who has pledged his money to secure payment of the debt of another is entitled to interest from the date of discharge of such debt to the date of return of such money.<sup>10</sup>

## § 50. Redemption

- a. In general
- b. Sale or conversion of pledged property
- c. Time of redemption
- d. Persons entitled to redeem
- e. Amount and medium of payment or tender
- f. Surrender or loss of right

### a. In General

Generally, on default of the pledgor with respect to discharging the principal obligation, the pledgee holds the pledged property subject to the pledgor's right of redemption until there has been a lawful sale of such property.

On default of the pledgor with respect to discharging the principal obligation at maturity, the pledgee does not acquire title to the collateral, but holds it subject to the right of redemption in the

pledgor,<sup>11</sup> or his representative,<sup>12</sup> until this right has been extinguished by a lawful sale of the property.<sup>13</sup> So also, the assignee of the pledgee who has stepped into the shoes of the pledgee holds the pledged property subject to the right of the pledgor to redeem.<sup>14</sup> It has been stated broadly that the pledge contract, in so far as it affects the pledgor's equity of redemption, will be construed favorably to the pledgor, consistently with the rights of the pledgee.<sup>15</sup>

Statutory provisions authorizing the pledgee to foreclose the right of redemption by a judicial sale should not be construed as granting the pledgor a right of redemption from the foreclosure similar to that possessed by a real estate mortgagor.<sup>16</sup>

### b. Sale or Conversion of Pledged Property

Generally the pledgor is entitled to redeem the pledged property within a reasonable time after learning that such property has been wrongfully sold or otherwise converted by the pledgee.

Where the pledgee has been guilty of a wrongful sale or other conversion of the collateral, the pledgor is entitled to redeem it within a reasonable time after learning thereof;<sup>17</sup> but his right of redemption is extinguished where he has authorized<sup>18</sup> or ratified<sup>19</sup> the sale, or where he has failed to assert his right within a reasonable time after receiving notice of a wrongful sale,<sup>20</sup> especially where the collaterals have increased in value since the sale.<sup>21</sup> The pledgor is not limited to a suit for redemption,<sup>22</sup> but may sue for conversion, as considered *supra* § 40.

7. Pa.—Williamson v. McClure, 37 Pa. 402.

8. La.—Bezanson v. Wray-Dickinson, Inc., 140 So. 255, 19 La.App. 788.

49 C.J. p 975 note 26.

9. Mo.—Turner v. Mountain View Bank, App., 19 S.W.2d 19.

10. Pa.—Lupowitz v. Double Share Bldg. & Loan Ass'n, 14 Pa.Dist. & Co. 280.

11. N.J.—Moss Industries v. Irving Metal Co., 61 A.2d 159, 142 N.J.Eq. 704.

49 C.J. p 975 note 28.

Appropriation of pledge to payment of debt generally see *infra* § 52.

#### Nature of right to redeem

(1) The pledgor has a right of redemption, which is akin to the equity of redemption relating to mortgaged real property, that is, the right to pay off the debt and have the pledged property restored to him.—City of Albertville v. Universal Electric Const. Co. of Alabama, 3 So.2d 801, 241 Ala. 412.

(2) Right to redeem from sale of

pledge is generally controlled by rules of law applicable to mortgages.

—Coleman v. Solomon, 143 So. 576, 225 Ala. 407.

#### Pledge of mortgage notes

Pledgor of mortgage notes who offered to redeem after mortgage was foreclosed by pledgee under power was entitled to redeem collateral.—Coleman v. Solomon, *supra*.

12. N.J.—Chambers v. Kunzman, 45 A. 599, 59 N.J.Eq. 433.

49 C.J. p 975 note 29.

13. U.S.—In re International Fuel, etc., Corp., C.C.A.Pa., 21 F.2d 598. 49 C.J. p 975 note 30.

14. Ark.—Union Trust Co. v. Pochontas Special School Dist., 76 S. W.2d 60, 189 Ark. 1019.

15. Ind.—Eppert v. Lowish, 168 N. E. 616, 91 Ind.App. 231, rehearing denied 169 N.E. 884, 91 Ind.App. 231.

16. Cal.—Frese v. New York Mut. Life Ins. Co., 105 P. 265, 11 Cal. App. 387.

49 C.J. p 975 note 32.

17. Cal.—Bell v. State Bank, 94 P. 889, 153 Cal. 234.

N.Y.—Treadwell v. Clark, 77 N.Y.S. 350, 73 App.Div. 473.

Wrongful sale constituting conversion:

After maturity of secured debt see *infra* § 63.

Before maturity of secured debt see *supra* § 36.

18. N.Y.—Swann v. Baxter, 73 N.Y. S. 336, 36 Misc. 233.

19. U.S.—Lacombe v. Forstall, La., 8 S.Ct. 247, 123 U.S. 562, 31 L.Ed. 255.

R.I.—Earle v. Grant, 14 R.I. 228.

20. U.S.—Hayward v. Elliot Nat. Bank, Mass., 96 U.S. 611, 24 L.Ed. 855.

49 C.J. p 975 note 37.

21. U.S.—Lacombe v. Forstall, La., 8 S.Ct. 247, 123 U.S. 562, 31 L.Ed. 255.

49 C.J. p 975 note 38.

22. Tex.—King v. Boerne State Bank, Civ.App., 159 S.W. 433.

49 C.J. p 975 note 39.

### c. Time of Redemption

The pledgor may redeem at any time before there has been a valid sale or foreclosure of the pledge by the pledgee.

On payment of the proper amount, the pledgor may redeem at any time before a valid sale or foreclosure of the pledge.<sup>23</sup> While the right to redeem may be lost by a valid foreclosure,<sup>24</sup> such right is not extinguished by a wrongful sale or surrender of the property, since the purchaser will acquire no greater interest in the property than the pledgee had;<sup>25</sup> nor is such right of redemption barred by a provision in the contract of pledge that, unless it is redeemed by a certain time, the collateral is to become the property of the pledgee, the pledgor still having the right to redeem after the time fixed.<sup>26</sup> If no time has been fixed for the performance of the principal obligation or for the redemption of the pledge, the pledgor is entitled to a reasonable time after demand by the pledgee before sale or foreclosure.<sup>27</sup>

### d. Persons Entitled to Redeem

On the death of the pledgor, his right of redemption passes to his personal representative, or, under some circumstances, to his heirs. The owner of property which has been pledged without his consent generally has the right to redeem, and the original pledgor has the right to redeem from a subpledgee.

On the death of the pledgor, his right of redemption passes to his personal representative,<sup>28</sup> or, under some circumstances, to his heirs.<sup>29</sup> Redemption

may be made by the owner of property which has been pledged without his consent<sup>30</sup> or by a prior pledgee who has assented to the subsequent pledge.<sup>31</sup>

The original pledgor ordinarily has the right to redeem from a subpledgee on payment of whatever is due under the circumstances involved.<sup>32</sup>

### e. Amount and Medium of Payment or Tender

Generally, as a prerequisite to his right to redeem, the pledgor must pay or tender the amount of the principal debt, together with any interest which is due and the amount of any expenses of the pledgee which are chargeable on the pledge.

In the absence of an agreement providing for a different procedure, as a prerequisite to his right to redeem the pledgor must pay or tender the amount of the principal debt,<sup>33</sup> together with whatever interest is due,<sup>34</sup> and any expenses of the pledgee properly chargeable on the pledge,<sup>35</sup> subject to a reduction, however, to the extent of any benefit or profits derived by the pledgee from the possession or use of the property.<sup>36</sup> Where the pledged property is in the hands of the pledgee's transferee who is not an innocent purchaser for value, the pledgor is entitled to redeem on payment of the amount due from him.<sup>37</sup>

The pledgee cannot prevent redemption by refusing to disclose the exact amount due on the debt, and denying that the tender made was the proper

23. Cal.—Wright v. Ross, 38 Cal. 414.

49 C.J. p 976 note 48.

Whether right of action to redeem defeated by laches see *infra* § 51 d.

24. Ala.—City of Albertville v. Universal Electric Const. Co. of Alabama, 3 So.2d 301, 241 Ala. 412.

Wash.—Freepons v. Elliott, 67 P.2d 924, 190 Wash. 348.

25. Md.—Dungan v. Newark Mut. Ben. Life Ins. Co., 46 Md. 469.

Vt.—Taggart v. Packard, 39 Vt. 628.

26. N.Y.—Vickers v. Battershall, 22 N.Y.S. 314, 84 Hun 496.

49 C.J. p 976 note 50.

Agreement to surrender right of redemption generally see *infra* subdivision f of this section.

27. Mo.—Perry v. Craig, 3 Mo. 516.

49 C.J. p 976 note 51.

Necessity of demand for payment and notice to redeem before sale for purpose of enforcement see *infra* § 58.

28. N.Y.—Cortelyou v. Lansing, 2 Cal.Cas. 200.

29. La.—Nelson v. Snell, 129 So. 387, 14 La.App. 256.

30. Ala.—Starr Piano Co. v. Baker, 62 So. 549, 8 Ala.App. 449.

49 C.J. p 976 note 55.

31. U.S.—Manhattan Trust Co. v. Sioux City, etc., R. Co., C.C.Iowa, 65 F. 559.

32. Mass.—Warfield v. Adams, 102 N.E. 706, 215 Mass. 506.

49 C.J. p 967 note 78.

Repledge by pledgee generally see *supra* § 43.

33. Ky.—Corpus Juris cited in National Bank of Kentucky v. Gallagher, 49 S.W.2d 1006, 1008, 243 Ky. 740.

Utah.—Hoyt v. Upper Marion Ditch Co., 76 P.2d 234, 94 Utah 134.

Wash.—Corpus Juris cited in Freepons v. Elliott, 67 P.2d 924, 927, 190 Wash. 348.

49 C.J. p 976 note 57.

#### Joint pledge

Pledgee was not liable for conversion in refusing to surrender joint pledgor's stock, where such pledgor made no offer to satisfy entire debt for which stock was pledged.—National Bank of Kentucky v. Gallagher, 49 S.W.2d 1006, 243 Ky. 740.

#### Collateral pledged for debt of another

Where the owner of collateral delivered it to the creditor of a third person for the purpose of securing some indebtedness of such third person, there was no definite agreement as to the amount of the indebtedness for which the collateral was security, and the owner of the collateral never agreed that the collateral would secure all the indebtedness of such third person, it was held that such owner was entitled to redeem on payment of an amount less than the full amount of the indebtedness of such third person.—Matz v. Farmers & Citizens Bank of Sauk City, Wis., 261 N.W. 755, 218 Wis. 613.

34. Mass.—Clark v. Seagraves, 71 N.E. 813, 186 Mass. 430.

49 C.J. p 976 note 57.

35. Minn.—Newton v. Van Dusen, 50 N.W. 820, 47 Minn. 437.

49 C.J. p 976 note 58.

36. Md.—Rayner v. Bryson, 29 Md. 473.

49 C.J. p 976 note 59.

37. N.Y.—Torrey v. Harris, 12 Daly 385.



sum;<sup>38</sup> and where the pledgee, without objection, accepts the amount tendered, he cannot afterward refuse to return the collateral on the ground that the amount tendered was insufficient.<sup>39</sup>

Property pledged to secure a loan in foreign money may be redeemed on payment in such currency.<sup>40</sup>

#### f. Surrender or Loss of Right

It is not permissible to surrender the right of redemption by a provision in the original contract of pledge, but the pledgor may surrender such right by a contract which is supported by a separate consideration and which is made after the contract of pledge has become operative.

The right of redemption may not be surrendered by the terms of the original contract of pledge;<sup>41</sup> a pledge agreement whereby a pledgor is deprived of his equity of redemption is void on the grounds of public policy,<sup>42</sup> and is inoperative to terminate the equity of redemption.<sup>43</sup> The pledgor, however, may surrender his right to redeem by a contract for a separate consideration made after the original contract of pledge.<sup>44</sup> Equity will scrutinize such a contract with great care, and set it aside if it is harsh or unconscionable.<sup>45</sup> The right to redeem may not be denied on the ground that it has been waived or abandoned by the pledgor, where the right is recognized by the pledgee.<sup>46</sup>

### § 51. — Actions

- a. In general
- b. Nature of remedy
- c. Payment or tender of amount of debt

- d. Limitations and laches.
- e. Parties
- f. Pleading
- g. Evidence
- h. Judgment or decree
- i. Costs

#### a. In General

The pledgor may maintain an action against the pledgee to redeem, and also, where there is doubt or dispute as to the amount due on the debt, for an accounting.

The pledgor may maintain an action against the pledgee not only to redeem,<sup>47</sup> but also, where there is doubt or dispute as to the amount due on the debt, for an accounting.<sup>48</sup> The mere relationship of pledgor and pledgee, however, is insufficient to serve as the basis for an accounting.<sup>49</sup> In an action by the pledgee to enforce the contract of pledge, the pledgor may file a cross bill to redeem, on tender of an amount sufficient to discharge the debt.<sup>50</sup>

#### b. Nature of Remedy

The pledgor's remedy to redeem is, in general, at law, but it may be permissible to resort to equity where a ground of equitable jurisdiction is shown.

The remedy of the pledgor to redeem is, in general, at law.<sup>51</sup> A bill in equity will not lie to redeem pledged property<sup>52</sup> except on a showing of some additional ground of equitable jurisdiction,<sup>53</sup> such as a sale or assignment of the pledge by the pledgee, and a demand for its retransfer to the

38. N.J.—Chambers v. Kunzman, 45 A. 599, 59 N.J.Eq. 433.

39. N.Y.—August v. O'Brien, 61 N. Y.S. 720, 30 Misc. 54, affirmed 63 N. Y.S. 989, 50 App.Div. 626.

40. N.Y.—Stoker v. Cogswell, 25 How.Fr. 267.  
49 C.J. p 977 note 64.

41. Ga.—Corpus Juris cited in Evans v. Odum, 183 S.E. 669, 671, 52 Ga.App. 453.

N.J.—Moss Industries v. Irving Metal Co., 61 A.2d 159, 142 N.J.Eq. 704.  
49 C.J. p 975 note 43.

Agreement authorizing appropriation of pledge see *infra* § 52.

42. N.J.—Moss Industries v. Irving Metal Co., *supra*.

43. N.J.—Moss Industries v. Irving Metal Co., *supra*.

44. U.S.—Rutherford v. Massachusetts Mut. Life Ins. Co., C.C.N.Y., 45 F. 712.  
49 C.J. p 976 notes 44, 45.

45. N.J.—Endicott v. Marvel, 87 A.

230, 81 N.J.Eq. 378, 384, affirmed 92 A. 873, 83 N.J.Eq. 632, and bill of review denied 95 A. 361, 85 N.J.Eq. 52.

49 C.J. p 976 note 46.

46. Ill.—In re Peters' Estate, 66 N. E.2d 188, 328 Ill.App. 400.

47. Nev.—Beatty v. Sylvester, 3 Nev. 228.

49 C.J. p 977 note 66.

48. Ala.—Crowson v. Cody, 96 So. 875, 209 Ala. 674.  
49 C.J. p 977 note 66.

Accounting as incident to right to redeem

Pledgor may have accounting as incident to right to redeem.—American-Traders' Nat. Bank v. Henderson, 133 So. 36, 222 Ala. 426.

49. Ala.—Crowson v. Cody, 96 So. 875, 209 Ala. 674—Crowson v. Cody, 93 So. 420, 207 Ala. 476.

50. Tex.—Kountze v. Bonner, 34 S. W. 163, 12 Tex.Civ.App. 31.

51. Fla.—Corpus Juris cited in

Pepper v. Beville, 129 So. 334, 338, 100 Fla. 97.

49 C.J. p 977 note 68.

52. Fla.—Corpus Juris cited in Pepper v. Beville, 129 So. 334, 338, 100 Fla. 97.

N.J.—Fitzsimons v. Irwin Realty Co., 174 A. 717, 116 N.J.Eq. 575.  
49 C.J. p 977 note 69.

Adequate remedy at law

In general a bill in equity will not lie to redeem property pledged as security for the performance of a contract, as the law affords remedies.

Ala.—Minge v. Clark, 72 So. 167, 196 Ala. 617.

Fla.—Pepper v. Beville, 129 So. 334, 100 Fla. 97.

53. Ala.—Coleman v. Solomon, 143 So. 576, 225 Ala. 407—American-Traders' Nat. Bank v. Henderson, 133 So. 36, 222 Ala. 426.

Fla.—Corpus Juris cited in Pepper v. Beville, 129 So. 334, 338, 100 Fla. 97.

N.J.—Fitzsimons v. Irwin Realty Co., 174 A. 717, 116 N.J.Eq. 575.  
49 C.J. p 977 note 70.

pledgor,<sup>54</sup> or a request for an accounting,<sup>55</sup> or discovery.<sup>56</sup>

### c. Payment or Tender of Amount of Debt

Generally payment or tender of the amount of the secured debt is essential in order to permit the pledgor to recover possession of the pledged property, but various circumstances may excuse want of tender.

While, in the absence of express provision to the contrary, generally a pledgor cannot recover possession of the pledged property without paying or tendering his debt,<sup>57</sup> even though the debt is barred by the statute of limitations, as discussed in Limitations of Actions § 10 a, it has been held or recognized that tender of the amount of the debt is not required where the goods are pledged to secure a running account<sup>58</sup> or where the pledgor sues to redeem from a wrongful sale by the pledgee.<sup>59</sup> It is unnecessary to make a tender where the pledgee gives notice that tender will not be accepted.<sup>60</sup>

### d. Limitations and Laches

While mere lapse of time after the maturity of the principal obligation does not bar the pledgor's right to redeem, laches or delay injurious to the pledgee may bar such right.

Mere lapse of time after the maturity of the principal obligation does not bar the pledgor's right to redeem,<sup>61</sup> or an accounting incidental to redemption,<sup>62</sup> unless it is accompanied by elements of estoppel.<sup>63</sup> Laches, however, injurious to the

pledgee<sup>64</sup> may bar the right to redeem.<sup>65</sup> Whether or not laches exist in any particular case will depend on the facts and circumstances involved.<sup>66</sup> The right to redeem should not be denied on the ground that it has been lost by laches where the right is recognized by the pledgee.<sup>67</sup>

Accrual of cause of action with respect to the statute of limitations in the case of a pledge considered in the aspect of a trust is discussed in Limitations of Actions § 179 d (2).

### e. Parties

In a suit by the pledgor to redeem the pledge, persons who have an interest in the pledge, and only such persons, are necessary parties.

In a suit for redemption, all persons having an interest in the pledge should be made parties;<sup>68</sup> but persons not interested in the pledge are not necessary parties,<sup>69</sup> and generally are not proper parties.<sup>70</sup> A decree for accounting and redemption with respect to property sold by the pledgee on foreclosure should be dismissed as to independent purchasers on foreclosure.<sup>71</sup>

### f. Pleading

The bill or petition to redeem should allege a pledge and state the terms of the contract of pledge, should show the plaintiff's interest in the collateral, and allege or tender a fulfillment of the conditions entitling the plaintiff to redeem.

The bill or petition to redeem should allege a pledge<sup>72</sup> and state the terms of the contract of pledge,<sup>73</sup> should show plaintiff's interest in the col-

54. Ala.—Nelson v. Owen, 21 So. 75, 113 Ala. 372.  
49 C.J. p 977 note 71.

Insolvency of pledgee who has assigned or transferred pledge may be ground for jurisdiction in equity.—Pepper v. Beville, 129 So. 334, 100 Fla. 97.

55. Fla.—Corpus Juris cited in Pepper v. Beville, 129 So. 334, 338, 100 Fla. 97.  
49 C.J. p 977 note 72.

56. Fla.—Corpus Juris cited in Pepper v. Beville, 129 So. 334, 338, 100 Fla. 97.  
49 C.J. p 977 note 73.

57. Cal.—Bell v. State Bank, 94 P. 889, 153 Cal. 234.  
49 C.J. p 978 note 74.

Pledgee was put in default when pledgor's heirs offered to redeem and tendered money in open court before pledgee complied with law, by sale, etc.—Nelson v. Snell, 129 So. 387, 14 La.App. 256.

58. Nev.—Beatty v. Sylvester, 3 Nev. 228.

59. Mo.—Hagan v. Continental Nat. Bank, 81 S.W. 171, 182 Mo. 319.

Tex.—Luckett v. Townsend, 3 Tex. 119, 49 Am.D. 723.

60. La.—Nelson v. Snell, 129 So. 387, 14 La.App. 256.

61. Pa.—Reynolds v. Cridge, 18 A. 1010, 131 Pa. 189.  
49 C.J. p 978 note 78.

62. Ala.—Keeble v. Jones, 65 So. 384, 187 Ala. 207.  
49 C.J. p 978 note 79.

63. N.J.—Lance v. Bonnell, 43 A. 288, 58 N.J.Eq. 259.

Pa.—Waterman v. Brown, 31 Pa. 161.

64. Conn.—Whittemore v. Hamilton, 51 Conn. 153.

Iowa.—Groeltz v. Cole, 103 N.W. 977, 128 Iowa 340.

65. Ala.—City of Albertville v. Universal Electric Const. Co. of Alabama, 3 So.2d 301, 241 Ala. 412—Keeble v. Jones, 65 So. 384, 187 Ala. 207, 213.

66. Ala.—Keeble v. Jones, supra.  
49 C.J. p 978 note 84.

Laches requiring dismissal of bill held shown

N.J.—Cocheu v. New Jersey General

Security Co., 15 A.2d 124, 128 N.J. Eq. 64.

Laches held not shown

Ill.—Daly v. Spiller, 78 N.E. 782, 222 Ill. 421.

49 C.J. p 978 note 84 [a].

67. Ill.—In re Peters' Estate, 66 N. E.2d 188, 328 Ill.App. 400.

68. U.S.—Gideon v. Representative Securities Corp., D.C.N.Y., 232 F. 184.

49 C.J. p 978 note 90.

69. Ill.—Hinckley v. Colvin, 84 N.E. 174, 233 Ill. 139.

49 C.J. p 978 note 91.

70. La.—Bezanson v. Wray-Dickinson, Inc., 140 So. 255, 19 La.App. 788.

49 C.J. p 978 note 92.

71. Ala.—Hicks v. Dowdy, 105 So. 656, 213 Ala. 559.

49 C.J. p 978 note 93.

72. Mo.—Cantwell v. Johnson, 139 S. W. 365, 236 Mo. 575.

73. Tex.—Houston, etc., R. Co. v. Conner, 67 S.W. 773, 20 Tex.Civ. App. 259.

lateral,<sup>74</sup> and allege or tender a fulfillment of the conditions entitling him to redeem.<sup>75</sup> The bill or petition must be free from inapt allegations and purposes,<sup>76</sup> and must state a cause of action.<sup>77</sup> A bill affirmatively showing that the pledged property is not in defendant's control is defective as a bill to redeem.<sup>78</sup> The pledgor in an action for redemption and accounting need not allege the amount of his claim.<sup>79</sup> It has been held or recognized that, in a suit against a transferee from the pledgee, it is not necessary to allege that defendant took with notice of plaintiff's rights.<sup>80</sup>

#### g. Evidence

The general rules of evidence apply in an action to redeem a pledge.

Mere delay on the part of the pledgor in redeeming ordinarily will not raise a presumption of abandonment,<sup>81</sup> although it would seem that such a presumption may arise from a prolonged failure to take steps for redemption.<sup>82</sup>

**Admissibility.** In accordance with rules applicable in civil actions generally, the evidence should be relevant and material.<sup>83</sup> The pledgor may introduce evidence to show that a transfer of the collateral by the pledgee was not a sale under the contract, but was merely colorable.<sup>84</sup> Exhibits filed by plaintiff may constitute evidence to sustain and supplement defendant's pleadings.<sup>85</sup> An action by the pledgee on the principal debt is an admission that the pledgor's right to redeem is still open.<sup>86</sup>

**Weight and sufficiency.** The general rules as to the weight and sufficiency of evidence apply in actions to redeem,<sup>87</sup> and the burden is on one seek-

ing a redemption to establish his case by a preponderance of evidence.<sup>88</sup>

#### h. Judgment or Decree

In an action by the pledgor to redeem the pledge, the judgment or decree may contain a direction for the plaintiff's payment of the debt secured as a condition of relief to him and such other provisions as circumstances and the evidence warrant.

The judgment in a suit for redemption should order a payment of the amount for which the pledge is security as a condition to the return of the pledge.<sup>89</sup> So too, when a suit is brought against a bona fide holder to redeem property wrongfully sold or repledged to him, the court may decree the payment of defendant's claim as a condition to redemption, and declare plaintiff's rights extinguished if the condition is not performed.<sup>90</sup> Where, pending a suit for redemption and accounting, or before suit brought, but unknown to the pledgor, the pledgee has sold the property, the judgment may be that the pledgee account for the value of the pledge at the time of its conversion.<sup>91</sup> A pledgor redeeming a pledged mortgage after foreclosure of the mortgage may be entitled to a decree for the reconveyance of the land,<sup>92</sup> and the decree should also specify that the amount paid the mortgagee be credited on the pledgor's debt to the pledgee.<sup>93</sup>

#### i. Costs

While the pledgor may be chargeable with costs where his debt had not been paid when his bill to redeem was filed, the pledgee may be so chargeable where such debt had been paid at the time of the filing of the bill.

While it seems that generally, if the pledgor's debt has not been paid at the time of the filing of

74. Tenn.—Mann v. Bamberger, 4 Heisk. 486.

Tex.—Houston, etc., R. Co. v. Conner, 67 S.W. 773, 29 Tex.Civ.App., 259.

75. Ala.—Crowson v. Cody, 96 So. 875, 209 Ala. 674.  
49 C.J. p 979 note 97.

76. Ala.—Hicks v. Dowdy, 81 So. 37, 202 Ala. 535.  
49 C.J. p 979 note 98.

77. Mo.—Cantwell v. Johnson, 139 S.W. 365, 236 Mo. 575.

**Complaint held sufficient**  
Colo.—Friedrichs v. Midland Savings & Loan Co., 31 P.2d 493, 94 Colo. 563.  
49 C.J. p 979 note 99 [a].

78. Cal.—Bell v. State Bank, 94 P. 889, 153 Cal. 234.  
49 C.J. p 979 note 1.

79. S.C.—Haselden v. Hamer, 81 S.E. 424, 97 S.C. 178.  
49 C.J. p 979 note 2.

80. Ala.—Nelson v. Owen, 21 So. 75, 113 Ala. 372.  
49 C.J. p 979 note 4.

81. Ohio.—Whelan v. Kinsley, 26 Ohio St. 131.

82. Pa.—In re Louchbaum's Estate, 7 Pa.Dist. 100.  
49 C.J. p 979 note 7.

83. Evidence held immaterial and properly excluded.—Matz v. Farmers & Citizens Bank of Sauk City, Wis., 261 N.W. 755, 218 Wis. 613.

84. Mass.—Jennings v. Wyzanski, 74 N.E. 347, 188 Mass. 285.

85. Ind.—Kiser v. Ruddick, 8 Blackf. 382.

86. Me.—Cutts v. York Mfg. Co., 18 Me. 190.

**87. Evidence held sufficient**  
(1) To support findings sufficient to support judgment in favor of pledgor's assignee as plaintiff in action to recover possession of collat-

eral.—Swanson v. Mohr, 14 P.2d 8, 169 Wash. 461.

(2) Other evidence held sufficient see 49 C.J. p 979 note 13 [a].  
Weight and sufficiency of evidence in civil actions generally see Evidence §§ 1016-1050.

88. Mo.—Cantwell v. Johnson, 139 S.W. 365, 236 Mo. 575.

89. Tex.—Smith v. Anderson, 27 S.W. 775, 8 Tex.Civ.App. 188.

90. U.S.—Hubbard v. Tod, Iowa, 19 S.Ct. 14, 171 U.S. 474, 43 L.Ed. 246.

91. Mo.—Hagan v. Continental Nat. Bank, 81 S.W. 171, 182 Mo. 319.  
Pa.—Blood v. Erie Dime Sav., etc., Co., 30 A. 362, 164 Pa. 95.

92. Ala.—Hicks v. Dowdy, 81 So. 37, 202 Ala. 535.  
49 C.J. p 979 note 17.

93. Ala.—Hicks v. Dowdy, supra.  
49 C.J. p 980 note 13.

his bill to redeem, he must pay the costs of the proceeding,<sup>94</sup> the costs are chargeable to the pledgee where the debt has been paid before the

bill is filed,<sup>95</sup> or where the pledgee, having sold the pledge, has refused to give any information with respect to the sale.<sup>96</sup>

## VII. ENFORCEMENT

### § 52. Remedies of Pledgee

- a. In general
- b. Concurrent remedies and election
- c. By special agreement
- d. Pledge of commercial paper
- e. Pledge of two or more collaterals
- f. Appropriation of pledge to debt
- g. Against real owner of property
- h. Against adverse claimant

#### a. In General

In the absence of a statutory or contractual provision to the contrary, a pledgee may proceed against the pledgor on the original debt or liability, or he may proceed on the pledge, or he may sell the pledged property without judicial process, or he may bring suit to foreclose the pledge.

The pledgee, on default of the pledgor, in the discharge of the principal obligation, may proceed to collect the pledge,<sup>97</sup> or he may, in the absence of statutory or contractual provision or other lawful agreement aliunde the agreement of pledge, proceed personally against the pledgor on the original debt or liability, or he may proceed on the pledge and may sell the pledged property without judicial process, on reasonable notice to the debtor to redeem, or he may bring a suit to foreclose the pledge and obtain a judicial sale of the property.<sup>98</sup> The default gives the pledgee only the right to realize on the pledge in some appropriate proceeding,<sup>99</sup> and collateral security is to be resorted to only if the pledgor fails to perform the principal contract.<sup>1</sup> A pledge is not a lien within the terms

of a statute requiring that there be but one action for the enforcement of any right secured by mortgage or lien.<sup>2</sup> Where the legal title to property held as security is in the creditor, who intrusts the property to the debtor, the trust is enforceable at law, but if the legal title is in the debtor, who holds in trust for the creditor, the trust is enforceable in equity only.<sup>3</sup> A court of equity has been held to have an inherent right to deal with pledges.<sup>4</sup>

All proceedings in foreclosure of a void pledge are without effect, and give the pledgee no better title than before.<sup>5</sup>

*Where property is deposited with the pledgor for a special purpose, under an express reservation of right in the pledgee to retake it, the fact that he does retake it does not affect his remedies against the pledgor.*<sup>6</sup>

#### b. Concurrent Remedies and Election

A pledgee having concurrent remedies may pursue them concurrently or separately.

A pledgee holding collateral securities may bring concurrent suits on the principal obligation and on the collateral securities held by him,<sup>7</sup> or he may pursue such remedies singly,<sup>8</sup> or he may sue to foreclose the pledge lien, or on the collateral itself, in the same action on the original debt of the pledgor.<sup>9</sup> It has been held that the pledgee may proceed under a hypothecation statute or in equity.<sup>10</sup> The pledgee may not be compelled to make an election as to whether he will enforce the principal or collateral obligation,<sup>11</sup> although there can

94. Md.—Rayner v. Bryson, 29 Md. 473.

95. Md.—Rayner v. Bryson, *supra*.

96. N.J.—Cake v. Shull, Ch., 13 A. 666.

97. N.J.—Sulken v. United Holding Co., 184 A. 405, 14 N.J.Misc. 275.

98. N.Y.—Corpus Juris cited in First Trust & Deposit Co. v. Potter, 278 N.Y.S. 847, 854, 155 Misc. 106.

#### Action:

On debt or liability secured see *infra* § 55.

To foreclose pledge see *infra* § 67.

Default of pledgor see *infra* § 53.

Sale of pledged property see *infra* § 56.

99. D.C.—Hawley v. Hawley, 114 F. 2d 745, 72 App.D.C. 376.

1. N.H.—Barbin v. Moore, 159 A. 409, 85 N.H. 362, 83 A.L.R. 62.

Va.—Smith v. Coleman, 35 S.E.2d 107, 184 Va. 259, 160 A.L.R. 1376.

2. Nev.—Nevada-Douglas Consol. Copper Co. v. Berryhill, 75 P.2d 992, 58 Nev. 261.

3. N.J.—Schneider v. Hamilton Trust Co. of Paterson, 147 A. 863, 105 N.J.Eq. 377.

Trust held enforceable in equity only  
N.J.—Schneider v. Hamilton Trust Co. of Paterson, *supra*.

4. N.Y.—Queen v. Fryer, 249 N.Y. S. 651, 232 App.Div. 222.

5. Mo.—Central Missouri Trust Co. v. Smith, 247 S.W. 241, 213 Mo. App. 106.

6. Pa.—Western Nat. Bank v. York

Silk Mfg. Co., 74 A. 244, 225 Pa. 442.

49 C.J. p 980 note 29.

7. Miss.—Rhymes v. Boggess, 111 So. 844, 146 Miss. 707.

49 C.J. p 980 note 31.

8. Mass.—Weiss v. Balaban, 53 N. E.2d 83, 315 Mass. 390.

Tex.—Spencer v. Citizens' State Bank of Woodville, Civ.App., 28 S.W.2d 1104, error dismissed.

49 C.J. p 980 note 32.

9. Tex.—Denmark v. Avinger, Civ. App., 257 S.W. 970.

Joinder of causes of action in suit to foreclose see *infra* § 67.

10. S.C.—Hodges v. Lake Summit Co., 152 S.E. 658, 155 S.C. 436.

11. Ohio.—Cleveland Second Nat. Bank v. Morrison, 8 Ohio Dec., Reprint, 534.

be but one satisfaction of the principal debt or obligation.<sup>12</sup> The fact that a pledgee is seeking foreclosure in equity of his real estate security does not prevent enforcement of his pledge of personal property in the statutory manner.<sup>13</sup> On the other hand, where the pledgee, after the maturity of the principal debt, wrongfully transfers the collateral to third persons, he will be held to have elected to take them in satisfaction of his debt, and he will not thereafter be allowed to sue on the principal obligation for any alleged deficiency.<sup>14</sup>

If third person stands as surety for the debt the pledgee may proceed against the surety personally, and at the same time seek to subject any collateral which he may hold.<sup>15</sup>

### c. By Special Agreement

The method of enforcement of a pledge may be regulated by the agreement of the parties as long as the agreement is not fraudulent, contrary to statute, or in violation of public policy.

The method of enforcement of the pledge may be regulated by the agreement of the parties,<sup>16</sup> provided such agreement is not fraudulent,<sup>17</sup> in contravention of statute,<sup>18</sup> or against public policy,<sup>19</sup> and ordinarily the rights of the pledgee will be protected.<sup>20</sup> The parties may stipulate that

the pledgee may buy the pledged property at private sale at the market price on default by the pledgor<sup>21</sup> or that he may sell at public or private sale with or without notice, and become the purchaser,<sup>22</sup> or they may agree that the pledgee shall exhaust his remedies against the original debtor before resorting to the collateral.<sup>23</sup> Where, however, the method agreed on is not made exclusive, it does not preclude a resort to other methods of enforcement,<sup>24</sup> especially where another method would be to the best interest of both parties.<sup>25</sup> Thus the pledgee of a mortgage has a right to foreclose it, even though the contract of pledge only authorizes the pledgee to sell the mortgage.<sup>26</sup>

### d. Pledge of Commercial Paper

Where commercial paper is pledged, the pledgee on default may proceed by action or sale to collect the collateral, or he may proceed to foreclose the pledge, or he may proceed on the original obligation.

In case of a pledge of commercial paper, as the nature of the property pledged indicates,<sup>27</sup> the pledgee, on maturity of the secured debt or obligation and default in payment thereof, may proceed, either by action or sale,<sup>28</sup> to collect the collateral and apply the proceeds to such debt or obligation,<sup>29</sup> and this rule applies even though the pledgee holds other collateral<sup>30</sup> and even though

Okl.—Ricks v. Johnson, 162 P. 476, 62 Okl. 125.

12. Ark.—Plunkett v. State Nat. Bank, 117 S.W. 1079, 90 Ark. 86.

Fact that pledgee had recourse to two funds in no way impaired his right to proceed against either or both as long as he did not claim or secure more than was justly due.—Union Trust Co. of Pittsburgh v. Long, 164 A. 346, 309 Pa. 470.—In re Fulton's Estate, 65 Pa.Super. 847.

13. U.S.—Stedham v. Swift & Co., C. C.A.Ga., 79 F.2d 648.

14. N.Y.—Hawks v. Hinchcliff, 17 Barb. 492.

15. Tenn.—Harlan v. Sweeny, 1 Lea 682.

16. Wash.—Sherman v. New York Mut. Life Ins. Co., 102 P. 419, 53 Wash. 523.

49 C.J. p 980 note 39.

17. Kan.—Hunter v. Hamilton, 34 P. 782, 52 Kan. 195.

18. Kan.—Hunter v. Hamilton, supra.

19. Kan.—Hunter v. Hamilton, supra.

#### Public or private sale

Provision in pledge agreement for sale of pledged property at any public or private sale in such manner and on such terms and conditions as pledgee deemed proper without notice, demand, or advertisement of

any kind was controlling and not against public policy.—Clapp v. Associated Depositors, Toledo, Ohio, D. C. Ohio, 33 F.Supp. 686.

20. S.C.—Collins v. Collins Estate, 36 S.E. 584, 207 S.C. 452.

#### Interference in equity

Ordinarily right of payee of note to realize on collateral pledged to secure payment of note, in the manner provided in the note, will be protected, but a court of equity has the power to interfere with such rights in some circumstances and to grant injunctive relief.—Collins v. Collins Estate, supra.

21. Wash.—Sherman v. New York Mut. Life Ins. Co., 102 P. 419, 53 Wash. 523.

22. N.Y.—Cole v. Manufacturers Trust Co., 299 N.Y.S. 418, 164 Misc. 741.

49 C.J. p 980 note 44.

#### Contract held not contrary to public policy

N.Y.—Cole v. Manufacturers Trust Co., supra.

23. Tex.—Spencer v. Citizens' State Bank of Woodville, Civ.App., 28 S.W.2d 1104, error dismissed.

Contract authorizing sale of collateral did not require collection of principal note before proceeding on collateral note.—Spencer v. Citizens' State Bank of Woodville, supra.

24. U.S.—Warburton v. Trust Co. of America, Pa., 182 F. 769, 105 C.C. A. 201.

49 C.J. p 981 note 45.

25. U.S.—Warburton v. Trust Co. of America, supra.

26. Pa.—Huntington Valley Trust Co. v. Norristown-Penn Trust Co., 196 A. 821, 329 Pa. 356.—Corpus Juris cited in Gordon v. Mohawk Bond & Mortgage Co., 176 A. 422, 424, 317 Pa. 257.

49 C.J. p 981 note 47.

27. Or.—Corpus Juris quoted in Cole v. Vinson, 20 P.2d 436, 438, 142 Or. 313.

Tex.—Celada v. Mathias, Civ.App., 269 S.W. 459.

28. Or.—Corpus Juris quoted in Cole v. Vinson, 20 P.2d 436, 438, 142 Or. 313.

49 C.J. p 981 note 49.

29. N.J.—Howell v. Bartlett, 3 A.2d 300, 124 N.J.Eq. 544, modified on other grounds 3 A.2d 690, 126 N. J.Eq. 315.—Sulken v. United Holding Co., 184 A. 405, 14 N.J.Misc. 275.—Lodi Trust Co. v. Himadi, 176 A. 691, 13 N.J.Misc. 169.

Or.—Corpus Juris quoted in Cole v. Vinson, 20 P.2d 436, 438, 142 Or. 313.

49 C.J. p 981 note 50.

30. Mich.—Shattuck v. Reed, 190 N.W. 649, 221 Mich. 155.

the pledged collateral contains a provision for its sale on default in payment of the principal obligation;<sup>31</sup> and it has also been held to apply although the maker of the paper has, with knowledge of the pledgee's right, paid the pledgor the amount due him thereon.<sup>32</sup> This remedy, however, is not exclusive;<sup>33</sup> the pledgee may also proceed to foreclose the pledge,<sup>34</sup> or, as discussed *infra* § 55, he may proceed on the original obligation without restoring the collateral. It has been held that, where a vendor's lien notes are pledged as collateral, the pledgee may foreclose the lien and recover on the principal debt in the same suit.<sup>35</sup>

**Bonds.** The effect of a pledge of bonds to secure a note of the same obligor is to give the pledgee the power to issue the pledged bonds, thereby increasing the pledgor's debts by foreclosure of the pledge.<sup>36</sup>

**Return of unsatisfactory paper.** Where it is agreed that unsatisfactory paper deposited as collateral may be returned, such return may be made within a reasonable time,<sup>37</sup> even though the pledgor has, in the meantime, been placed in the hands of a receiver.<sup>38</sup>

#### e. Pledge of Two or More Collaterals

A pledgee in possession of two or more collaterals may, as a general rule, proceed against all or either of them at his election.

As a general rule, where the pledgee is in possession of two or more collaterals for his debt, he may proceed against either or all of them at his election<sup>39</sup> and cannot be compelled to subject or exhaust one before resorting to the other;<sup>40</sup> and

where, after he has resorted to one, there still remains due a sum exceeding the value of the other security, he may proceed against it for its full amount;<sup>41</sup> but he is not obliged to resort to either but may collect through execution on the debt itself.<sup>42</sup> Where a lien is created on property by its delivery as a pledge, and also by a contemporaneous deed of trust, the lien of the pledgee as such may be enforced, even though the enforcement of the deed of trust is barred by the statute of limitations as to chattel mortgages.<sup>43</sup> Where a person having possession of securities belonging to another pledges them without authority together with other securities, and the owner before a sale of the securities notifies the pledgee of his claim, the owner then stands as a mere surety for the claim secured and can compel the pledgee to apply the proceeds of the other securities held in pledge before resorting to those belonging to him.<sup>44</sup> It has also been held that, where a creditor holds two collateral securities, the indorser on one only of which is an accommodation indorser to the knowledge of the creditor, the other security must first be resorted to.<sup>45</sup>

#### f. Appropriation of Pledge to Debt

- (1) In general
- (2) Effect of agreement authorizing appropriation

##### (1) In General

Default on the original debt does not work a forfeiture of the pledged property so as to vest it in the pledgee, and he is generally not entitled to take the property in satisfaction of the debt.

31. Cal.—Farmers', etc., Bank v. Copsey, 66 P. 324, 134 Cal. 287.

49 C.J. p 981 note 52.

32. Tex.—Landa v. Mechler, Civ. App., 111 S.W. 752.

49 C.J. p 981 note 53.

33. Or.—Corpus Juris quoted in Cole v. Vinson, 20 P.2d 436, 438, 142 Or. 313.

49 C.J. p 981 note 54.

34. Or.—Corpus Juris quoted in Cole v. Vinson, 20 P.2d 436, 438, 142 Or. 313.

49 C.J. p 981 note 55.

35. Tex.—Martin v. Lee County State Bank, Civ.App., 265 S.W. 1057.

36. U.S.—In re Chicago & N. W. Ry. Co., D.C.Ill., 35 F.Supp. 230, affirmed, C.C.A., 126 F.2d 351, certiorari denied Chicago & N. W. Ry. Co. v. Mutual Sav. Bank Group Committee, 63 S.Ct. 987, 318 U.S. 793, 87 L.Ed. 1158, rehearing denied 63 S.Ct. 1160, 319 U.S. 781, 87 L.Ed. 1726, certiorari denied Susman

v. Mutual Sav. Bank Group Committee, 63 S.Ct. 987, 318 U.S. 793, 87 L.Ed. 1158, rehearing denied 63 S.Ct. 1161, 319 U.S. 781, 87 L.Ed. 1726, certiorari denied 63 S.Ct. 988, 318 U.S. 793, 87 L.Ed. 1158, rehearing denied 63 S.Ct. 1161, 319 U.S. 781, 87 L.Ed. 1726, certiorari denied City Bank Farmers Trust Co. v. Life Ins. Group Committee, 63 S.Ct. 988, 318 U.S. 793, 87 L.Ed. 1158, certiorari denied Irving Trust Co. v. Mutual Sav. Bank Group Committee, 63 S.Ct. 989, 318 U.S. 793, 87 L.Ed. 1158, rehearing denied 63 S.Ct. 1161, 319 U.S. 781, 87 L.Ed. 1726, certiorari denied Protective Committee for Holders of Common Stock v. Mutual Sav. Bank Group Committee, 63 S.Ct. 989, 318 U.S. 793, 87 L.Ed. 1158, rehearing denied 63 S.Ct. 1161, 319 U.S. 781, 87 L.Ed. 1726, certiorari denied Protective Committee for Holders of Preferred Stock v. Mutual Sav. Bank Group Committee, 63 S.Ct. 990, 318 U.S. 793, 87 L.Ed. 1158.

37. Kan.—Northrup Nat. Bank v.

Yates Center Nat. Bank, 159 P. 403, 98 Kan. 563.

38. Kan.—Northrup Nat. Bank v. Yates Center Nat. Bank, supra.

49 C.J. p 981 note 59.

39. N.Y.—In re Vicinus' Estate, 290

N.Y.S. 20, 159 Misc. 903.

49 C.J. p 981 note 60.

40. N.Y.—In re Vicinus' Estate, supra.

49 C.J. p 981 note 61.

41. Mo.—Cox v. Sloan, 57 S.W. 1052,

153 Mo. 411.

42. N.Y.—In re Vicinus' Estate, 290

N.Y.S. 20, 159 Misc. 903.

43. Colo.—Richardson v. Longmont Supply Ditch Co., 76 P. 546, 19 Colo.App. 483.

44. N.Y.—Smith v. Savin, 36 N.E. 338, 141 N.Y. 315—Farwell v. Importers', etc., Nat. Bank, 90 N.Y. 483.

45. Mass.—Goodwin v. Massachusetts Loan & Trust Co., 25 N.E. 100, 152 Mass. 189.

The nonpayment of the original debt at the stipulated time does not, either by the civil law or at common law, work a forfeiture of the pledged property so as to vest it in the pledgee;<sup>46</sup> and as a general rule the pledgee is not entitled, on the pledgor's default, to take the pledged property as his own in satisfaction of the debt;<sup>47</sup> nor can the pledgee cut off the pledgor's interest in the collateral by a mere notice that, if the debt is not paid by a certain time, he will take the collateral as his own.<sup>48</sup> So, where a surety who holds collateral to indemnify him against liability on the debt transfers such collateral to the payee for the purpose of discharging the debt, the transfer does not divest the pledgor of his interest in the collateral and he may still redeem it, even after maturity of his debt.<sup>49</sup> The pledgor, however, may be estopped by his conduct to object to the pledgee's appropriation of the property to the debt;<sup>50</sup> and it has been held that, where the amount of the debt is much larger than the value of the collateral which, from its nature, could not increase in value, objection cannot be made to the pledgee's appropriation of the collateral to the debt.<sup>51</sup>

## (2) Effect of Agreement Authorizing Appropriation

A provision in the contract of pledge by which the absolute property in the pledge is to vest in the pledgee is void, or at least voidable.

A pledge cannot be taken as, or converted by the pledgee into, a payment of the debt without an express agreement clearly made between the pledgor and the pledgee.<sup>52</sup> A provision in the contract of pledge by which the absolute property in the pledge is to vest in the pledgee, on the default of the pledgor, is void,<sup>53</sup> or at least voidable,<sup>54</sup> and the

pledgor is still entitled to redeem.<sup>55</sup> This provision, however, does not vitiate the principal contract;<sup>56</sup> and it has been held that the pledgee may appropriate the property, under such a provision, but he must make the fact of appropriation clear.<sup>57</sup> After the debt for which the pledge has been given has fallen due, the parties may lawfully agree that the pledgee may keep the property in satisfaction of the debt.<sup>58</sup>

## g. Against Real Owner of Property

Where the owner of property permits it to be pledged to secure the obligation of a third person, he is not liable for a personal judgment, but the pledge may be foreclosed.

An owner of property who consents to its use as a pledge by a third person, to secure the latter's obligation to the pledgee, is not liable for a personal judgment in favor of the pledgee;<sup>59</sup> but, as against him, the pledgee may only foreclose the pledge on the property.<sup>60</sup>

## h. Against Adverse Claimant

A pledgee may proceed in equity to have his rights determined and the pledge foreclosed as against an adverse claimant.

Where the property has been wrongfully taken from the possession of the pledgee without his knowledge and consent, by an adverse claimant, if default is made in the payment of the debt at maturity and the property still remains in the possession of the adverse claimant, the pledgee may maintain a bill in equity to determine the rights of the parties to the property, and to enforce the pledge by judicial sale;<sup>61</sup> and the pendency of other creditors' bills against the pledgor does not preclude the pledgee from maintaining an original

46. La.—*Alcolea v. Smith*, 90 So. 769, 150 La. 482, 24 A.L.R. 815.  
49 C.J. p 982 note 67.

47. D.C.—*Hawley v. Hawley*, 114 F. 2d 745, 72 App.D.C. 376.

Minn.—*First & American Nat. Bank of Duluth v. Whiteside*, 292 N.W. 770, 207 Minn. 537.

N.Y.—*Joseph T. Ryerson & Son v. A. V. O'Donnell, Inc.*, 1 N.Y.S.2d 608, 253 App.Div. 1, reversed on other grounds 17 N.E.2d 788, 279 N.Y. 109, reargument denied *Joseph T. Ryerson & Sons v. Shapiro*, 18 N.E.2d 870, 279 N.Y. 789.  
49 C.J. p 982 note 68.

48. D.C.—*Hawley v. Hawley*, 114 F. 2d 745, 72 App.D.C. 376.  
49 C.J. p 982 note 69.

49. Colo.—*Morgan v. Dod*, 3 Colo. 551.

50. Pa.—*Waterman v. Brown*, 31 Pa. 161.

49 C.J. p 982 note 71.

51. Cal.—*Du Brutz v. Visalia Bank*, 87 P. 467, 469, 4 Cal.App. 201.  
49 C.J. p 982 note 72.

52. Md.—*County Trust Co. of Maryland v. Stevenson*, 185 A. 435, 170 Md. 550.

53. Ga.—*Evans v. Odum*, 183 S.E. 669, 52 Ga.App. 453.

N.J.—*Moss Industries v. Irving Metal Co.*, 61 A.2d 159, 142 N.J.Eq. 704.

N.Y.—*First Trust & Deposit Co. v. Potter*, 278 N.Y.S. 847, 155 Misc. 106.

49 C.J. p 982 note 73.

54. Md.—*Kemp v. Kemp*, 16 A.2d 888, 178 Md. 645.

55. Ga.—*Evans v. Odum*, 183 S.E. 669, 52 Ga.App. 453.

49 C.J. p 982 note 74.

56. Philippine.—*Puig v. Sellner*, 45 Philippine 236—*Mahoney v. Tusaon*, 39 Philippine 952.

57. Nev.—*Beatty v. Sylvester*, 3 Nev. 228.  
49 C.J. p 982 note 77.

58. D.C.—*Hawley v. Hawley*, 114 F. 2d 745, 72 App.D.C. 376.  
La.—*Alcolea v. Smith*, 90 So. 769, 150 La. 482, 24 A.L.R. 815.

59. Tex.—*Killman v. Young*, Civ. App., 171 S.W. 1065.

60. Ill.—*Naef v. Potter*, 127 Ill.App. 106, affirmed 80 N.E. 1084, 226 Ill. 628, 11 L.R.A., N.S., 1034.  
Tex.—*Killman v. Young*, Civ. App., 171 S.W. 1065.

61. Ala.—*American Pig Iron Storage Warrant Co. v. German*, 28 So. 603, 126 Ala. 194, 85 Am.S.R. 21.

bill to determine and enforce his interest in the property.<sup>62</sup>

### § 53. Default by Pledgor

- a. In general
- b. Time of maturity fixed

#### a. In General

A present liability is presumed where no time is fixed for maturity of the principal obligation, and the pledgor will be in default on failure to pay or perform within a reasonable time after notice or after his having made performance impossible.

The pledgee has the right to exact strict performance of the contract.<sup>63</sup> Where no time is fixed for the maturity of the principal debt or obligation, the law will presume a present liability,<sup>64</sup> and the pledgor will be considered in default on his failure to pay or perform within a reasonable time after notice,<sup>65</sup> or after a reasonable time and after his having made performance impossible.<sup>66</sup>

#### b. Time of Maturity Fixed

Where a definite time for maturity is fixed, default occurs on failure to pay or perform by the time stated. If the principal obligation is payable on demand, default occurs on failure to pay on demand.

If a definite time for maturity is fixed, the pledgor will be in default on failure to pay or perform by the time stated,<sup>67</sup> unless such time has been extended by the pledgee, in which case the pledge cannot be sold until the expiration of the extension;<sup>68</sup> and if the extension is indefinite as to time the pledgor is not in default until a reasonable time after demand and notice.<sup>69</sup> Where the extension is conditional on the payment of interest, the pledgee may

sell on default in the payment of interest and notice to the pledgor of that fact.<sup>70</sup> Where bonds are pledged as security for the payment of a note which is in turn pledged as security to pay certain acceptances, the time when the pledgee might sell the bonds is determined by the maturity of the note, and not of the acceptances.<sup>71</sup>

If the principal obligation is payable on demand, the pledgor will be in default on his failure to pay on demand;<sup>72</sup> and where, on such demand, a part payment only is made it constitutes a default;<sup>73</sup> and the fact that the pledgee agrees not to press the demand without notice does not constitute a waiver of his rights to sell the collateral after notice.<sup>74</sup>

### § 54. Proceeds and Surplus

- a. Application of proceeds to debt
- b. Distribution among claims secured
- c. Disbursements and charges
- d. Right to surplus
- e. Proceedings

#### a. Application of Proceeds to Debt

The rights of the parties to the proceeds of a pledge depend on the terms of the contract. Generally the proceeds must be applied exclusively to the debt secured.

Subject to the rules which govern the debts or liabilities secured by a pledge, the rights of the parties as to the application of the proceeds of a pledge, to particular debts or liabilities, must be determined by the terms of the pledge as they existed at the time of the sale or collection,<sup>75</sup> and the application will be made as of that date.<sup>76</sup> Before

82. Ala.—American Pig Iron Storage Warrant Co. v. German, *supra*.

83. Miss.—Hudson v. Belzoni Equipment Co., 33 So.2d 796, 203 Miss. 212.

N.Y.—Toplitz v. Bauer, 55 N.E. 1059, 161 N.Y. 325—First Trust & Deposit Co. v. Potter, 278 N.Y.S. 847, 155 Misc. 106.

84. Ala.—Stokes v. Dimmick, 48 So. 66, 157 Ala. 237.

85. Mo.—Perry v. Craig, 3 Mo. 516. N.Y.—Garlick v. James, 12 Johns. 146, 7 Am.D. 294.

86. S.C.—Ex parte Fisher, 20 S.C. 179.

49 C.J. p 983 note 86.

87. Cal.—McAulay v. Moody, 60 Cal. 778, 128 Cal. 202.

49 C.J. p 983 note 87.

#### Acceleration of maturity

Where plaintiff made demand for payment of delinquent interest installments on note, payees had right

to exercise option of accelerating maturity of note as provided therein and, having done so, to sell collateral security pledged to secure payment of note.—Faulk v. Futch, Civ.App., 209 S.W.2d 1008, affirmed 214 S.W.2d 614, 147 Tex. 253, 5 A.L.R.2d 963.

#### Postponing maturity

Where maturity dates of notes secured are fixed, collateral securities do not suspend the remedy on secured indebtedness unless such is the agreement of the parties expressed in collateral instrument or clearly to be deduced from its terms.—Turner v. Pugh, Civ.App., 195 S.W.2d 374, reversed on other grounds 197 S.W.2d 822, 145 Tex. 292, 172 A.L.R. 707.

88. Ill.—Wadsworth v. Thompson, 8 Ill. 428.

89. Ky.—Louisville Banking Co. v. W. H. Thomas, etc., Co., 69 S.W. 1078, 24 Ky.L. 811, 68 S.W. 2, 24 Ky.L. 115.

70. Ky.—Louisville Banking Co. v. W. H. Thomas, etc., Co., *supra*.

71. Mo.—Chouteau v. Allen, 70 Mo. 290.

72. Pa.—Corpus Juris cited in Heimpele v. First Nat. Bank & Trust Co. of Bethlehem, 12 A.2d 28, 30, 337 Pa. 425.

49 C.J. p 983 note 92.

73. Mass.—Hallowell v. Blackstone Nat. Bank, 28 N.E. 281, 154 Mass. 359, 13 L.R.A. 315.

74. Mass.—Hallowell v. Blackstone Nat. Bank, *supra*.

75. U.S.—Burlingham v. Crouse, N. Y., 181 F. 479, 104 C.C.A. 227, affirmed 33 S.Ct. 564, 228 U.S. 459, 57 L.Ed. 920, 46 L.R.A., N.S., 148, 49 C.J. p 983 note 96.

#### Application of amortization payments

U.S.—In re Prudence Co., C.C.A.N.Y., 88 F.2d 420.

76. Ill.—Stokes v. Frazier, 72 Ill. 428.



a pledgee may apply the proceeds of securities held as collateral he must give the pledgor notice to redeem;<sup>77</sup> and where collections are made in installments, in the absence of a special agreement, a pledgee of securities to secure payment of a call or demand loan cannot apply to the payment of the loan money received on collections of collaterals as they fall due, but must hold the proceeds as a substitute for the collateral collected.<sup>78</sup>

*To what debts applied.* As a general rule, on a sale or collection of the collateral security, the proceeds must be applied to the debt or debts it was given to secure, and to no others,<sup>79</sup> and the pledgee is entitled to retain only as much of the proceeds as is necessary to satisfy such debt or debts.<sup>80</sup> In accordance with this rule the pledgee, in the application of the proceeds to his secured debt, takes precedence over the general creditors of the pledgor,<sup>81</sup> and where the pledgor, after delivery of the collateral, has made a general assignment for the benefit of creditors, the pledgee is still entitled to apply the proceeds of the collateral to the debts it was given to secure, to the exclusion of other claims.<sup>82</sup>

*Joint or several debts.* Proceeds of collateral pledged for a joint debt may not be applied in payment of an individual debt of one of the debtors;<sup>83</sup> but the mere fact that the proceeds of separate securities held for different debts are applied in each case to the wrong debt is immaterial where neither security brings enough to satisfy the smaller debt.<sup>84</sup>

*As to third person.* Where the pledge is given to secure the pledgee and also a third person, the pledgee, in disposing of the collateral and apply-

ing the proceeds, is charged with a trust in favor of such third person.<sup>85</sup>

*Right of purchaser to retain purchase money for debt.* Where the pledged property is sold, the purchaser is not entitled to retain a part of the purchase money in satisfaction of a debt due him by the pledgor;<sup>86</sup> and, where the pledgee acts in ignorance of the facts, he is not estopped to recover the sum retained by the purchaser by reason of his having credited such sum to him<sup>87</sup> or by reason of his inability to place the parties in statu quo.<sup>88</sup>

#### b. Distribution among Claims Secured

If the pledge secures several obligations, the pledgee may generally apply the proceeds according to his judgment; but the contract may prescribe the manner of distribution.

In accordance with the rules relating to the application of payments in general, in the absence of express direction regarding such application or reservation of right of direction by the owner of the collateral, the pledgee may apply the collateral to any debt within the pledge that he may deem most precarious, or as his judgment may dictate,<sup>89</sup> or the debtor, on giving collateral security, may authorize the proceeds to be applied to the several debts or obligations, as the creditor may elect;<sup>90</sup> and, if the creditor acts in good faith, other creditors may not interfere with his application.<sup>91</sup> On the other hand, the debtor may expressly direct the application of the proceeds;<sup>92</sup> and where the collateral is delivered as security on the aggregate amount of several obligations, the proceeds, if insufficient to pay all, must be applied, pro rata, on each of the obligations.<sup>93</sup> Such direction, however, must be given in the original contract;<sup>94</sup> and if

Pa.—In re Wilhelm, 37 A. 819, 182 Pa. 281.

77. N.Y.—Farwell v. Importers', etc., Nat. Bank, 90 N.Y. 483.

78. N.Y.—Farwell v. Importers', etc., Nat. Bank, supra.

79. U.S.—Pollak v. Kahn, D.C.La., 17 F.Supp. 750.

Mo.—Caneer v. Kent, 119 S.W.2d 214, 342 Mo. 878.

N.D.—Corpus Juris cited in Security Building & Loan Ass'n v. Bacon, 244 N.W. 644, 646, 62 N.D. 658, 49 C.J. p 984 note 1.

#### Priorities of application

U.S.—Pollak v. Kahn, D.C.La., 17 F. Supp. 750.

80. Conn.—Saposnick v. Kenig, 184 A. 584, 121 Conn. 253, 49 C.J. p 984 note 2.

81. La.—Clay v. His Creditors, 9 Mart. 519.

82. Fla.—Cohen v. State Bank, 11 So. 44, 29 Fla. 655, 49 C.J. p 984 note 4.

83. Ky.—Corpus Juris cited in National Bank of Kentucky v. Gallagher, 49 S.W.2d 1006, 1008, 243 Ky. 740.

Wis.—Milwaukee First Nat. Bank v. Finck, 76 N.W. 608, 100 Wis. 446.

84. U.S.—Morris v. East Side R. Co., Or., 104 F. 409, 43 C.C.A. 605.

85. S.C.—Butler v. Spencer, 107 S. E. 154, 116 S.C. 177, 49 C.J. p 984 note 7.

86. Tex.—Whitesboro First Nat. Bank v. Andrews, Civ.App., 77 S. W. 956.

87. Tex.—Whitesboro First Nat. Bank v. Andrews, supra.

88. Tex.—Whitesboro First Nat. Bank v. Andrews, supra.

89. Tex.—Guaranty Bond State Bank v. Duncan, Civ.App., 19 S. W.2d 400.

W.Va.—Koblegard Co. v. Maxwell, 34 S.E.2d 116, 127 W.Va. 680.

Application of payments generally see Payment §§ 50-80.

90. U.S.—Reconstruction Finance Corporation v. McCormick, C.C.A. III, 102 F.2d 305, certiorari denied McCormick v. Reconstruction Finance Corporation, 60 S.Ct. 90, two cases, 308 U.S. 558, 84 L.Ed. 469, Werner v. Reconstruction Finance Corporation, 60 S.Ct. 90, 308 U.S. 558, 84 L.Ed. 469, Bele v. Reconstruction Finance Corporation, 60 S.Ct. 90, 308 U.S. 558, 84 L.Ed. 469, and Utility & Industrial Corporation v. Reconstruction Finance Corporation, 60 S.Ct. 90, 308 U.S. 558, 84 L.Ed. 469, 49 C.J. p 984 note 14.

91. W.Va.—Donnelly v. Hearndon, 23 S.E. 646, 41 W.Va. 519.

92. Ind.—Beach v. State Bank, 2 Ind. 488.

93. Ind.—Beach v. State Bank, supra.

94. Tex.—Guaranty Bond State Bank v. Duncan, Civ.App., 19 S.W. 2d 400.

49 C.J. p 985 note 18.

at the time of the delivery of the collateral the debtor fails to exercise his right to direct the application of its proceeds he cannot do so afterward;<sup>95</sup> and the creditor may, at his election, apply the proceeds to the payment of any of the secured debts which are due at the time the money is received.<sup>96</sup>

In some jurisdictions this right of the creditor to determine the application is recognized whether the proceeds of the collateral are voluntarily paid to him or are collected by suit;<sup>97</sup> but in other jurisdictions it is confined to voluntary payments, and where collection is made through resort to legal proceedings the court will apply the proceeds to the different debts secured in accordance with equitable principles,<sup>98</sup> and, if the funds are insufficient to pay all the secured debts, will usually direct application, pro rata, on them;<sup>99</sup> and it has been held that a court of equity, after default, may direct the property to be sold and the proceeds applied, not only in payment of debts due, but also of debts not due.<sup>1</sup>

**Mingled proceeds.** Where pledgees mix the proceeds of goods belonging to one person with the proceeds of that of another person on which a third person has a claim, so that it is impossible to identify any specific part of the money in their hands as having been derived from the sale of either portion of the goods, and the funds resulting from these mingled assets are insufficient to pay both claims in full, they may be required to abate in proportion to the amount of their respective claims.<sup>2</sup>

### c. Disbursements and Charges

The pledgee is entitled to allowance out of the pro-

ceeds for all proper charges and expenses of converting the security into money.

The pledgee is entitled to allowance out of the proceeds for all proper charges and expenses of converting the security into money,<sup>3</sup> including commissions where the pledgee is also a broker or factor<sup>4</sup> or where they are stipulated for in the contract of pledge,<sup>5</sup> and also including reasonable attorney's fees expended for that purpose,<sup>6</sup> particularly where there is an express stipulation for such fees,<sup>7</sup> together with such amount as he may reasonably have been required to expend in keeping and caring for the property pledged.<sup>8</sup> It has been held that these charges and expenses are first to be deducted from the gross proceeds, and the balance only applied to the principal debt.<sup>9</sup> The pledgee is not entitled to allowance for unreasonable expenditures in preserving the pledge<sup>10</sup> or its value;<sup>11</sup> nor is he entitled to the interest on the security as a bonus in addition to the payment of his debt.<sup>12</sup>

**Contribution.** Where a holder of notes secured by collateral forecloses after a sale of one of the notes, the purchaser, on recovering his pro rata share of the proceeds on foreclosure, must contribute his proportionate share of the expenses of the foreclosure proceedings.<sup>13</sup>

### d. Right to Surplus

The surplus of collaterals sold or collected belong to the pledgor or owner of the pledged property, and the pledgee, if he retains it, holds as trustee for the pledgor or person entitled thereto.

The surplus proceeds of collaterals sold or collected after the satisfaction of debts for which they are security belong to the pledgor,<sup>14</sup> and, if retained

95. Mo.—Field v. Brown, 229 S.W. 445, 207 Mo.App. 55.

49 C.J. p 985 note 19.

96. Mo.—Cox v. Sloan, 57 S.W. 1052, 158 Mo. 411.

49 C.J. p 985 note 20.

97. Wis.—Milwaukee First Nat. Bank v. Finck, 76 N.W. 608, 100 Wis. 446.

98. N.Y.—Armstrong v. McLean, 47 N.E. 912, 153 N.Y. 490.

49 C.J. p 985 note 22.

99. Idaho.—Jenkins v. Greene, 256 P. 950, 44 Idaho 306, 52 A.L.R. 1386.

49 C.J. p 985 note 23.

1. Minn.—Hage v. Drake Marble, etc., Co., 176 N.W. 192, 144 Minn. 113.

2. Pa.—Smith v. Moors, 64 A. 593, 215 Pa. 421.

3. Ariz.—California Bank v. Daniel, 288 P. 7, 36 Ariz. 549.

N.Y.—D. S. Stern & Co. v. Pizitz, 270 N.Y.S. 715, 240 App.Div. 509—

Spadaro v. Chenango County Nat. Bank & Trust Co. of Norwich, 281 N.Y.S. 498, 156 Misc. 230.

49 C.J. p 985 note 27.

4. N.Y.—Sheldon v. Raveret, 49 Barb. 203.

5. Mass.—Goodwin v. Massachusetts L. & T. Co., 25 N.E. 100, 152 Mass. 189.

6. Neb.—Cressman v. Whittall, 21 N.W. 458, 16 Neb. 592.

49 C.J. p 985 note 30.

7. La.—Union Nat. Bank v. Forsyth, 23 So. 917, 50 La.App. 770.

49 C.J. p 985 note 31.

8. Conn.—Sapossnick v. Kenig, 184 A. 584, 121 Conn. 253.

9. N.J.—Fidelity Union Trust Co. v. Guaranty Trust Co. of New York, 37 A.2d 853, 135 N.J.Eq. 222, reversed in part on other grounds

Fidelity Union Trust Co. v. Johnson, 55 A.2d 813, 140 N.J.Eq. 548.

N.Y.—Sheldon v. Raveret, 49 Barb. 203.

10. Iowa.—State Nat. Bank v. Cooper, 101 N.W. 459.

11. Mass.—Goodwin v. Massachusetts Loan & Trust Co., 25 N.E. 100, 152 Mass. 189.

12. S.C.—Ruberg v. Brown, 51 S.E. 96, 71 S.C. 287.

13. Idaho.—Jenkins v. Greene, 256 P. 950, 44 Idaho 306, 52 A.L.R. 1386.

14. Ark.—Schutt v. Arkansas Rice Growers' Agr. Credit Corporation, 39 S.W.2d 517, 188 Ark. 972.

Cal.—Tracy v. Stock Assur. Bureau, 23 P.2d 41, 132 Cal.App. 573.

D.C.—Pilcher v. Continental Trust Co., 69 F.2d 987, 63 App.D.C. 111.

N.C.—Howell v. Bartlett, 3 A.2d 300, 124 N.J.Eq. 544, modified on other

by the pledgee, are held by him in trust for the pledgor or person entitled thereto,<sup>15</sup> or his estate,<sup>16</sup> to whom, or to whose order,<sup>17</sup> such surplus must be paid or accounted for on demand.<sup>18</sup> The pledgee cannot relieve himself of liability for such surplus by a transfer of the collateral which does not in fact constitute a sale.<sup>19</sup> If the pledgee, without the consent of the pledgor, buys the pledged collateral securities at his own sale and afterward collects them, he may be required in equity to account to the pledgor for the surplus after payment of his debt.<sup>20</sup> Where expressly authorized to do so, the pledgee may apply the surplus to satisfy other obligations of the debtor.<sup>21</sup>

Where a pledged note is delivered by the pledgee to the maker in exchange for another note, which is taken in payment of the collateral note, it constitutes a payment of the pledgor's debt, and his

right to the surplus will not be affected by a subsequent reëxchange of such notes.<sup>22</sup>

*Owner who is not pledgor.* When the pledgor is not the owner of the collateral but has pledged it for his own debt, with<sup>23</sup> or without<sup>24</sup> the consent of the owner, the surplus proceeds are held by the pledgee for the owner, who, unless he has waived his rights,<sup>25</sup> is entitled to such surplus as against the pledgor<sup>26</sup> or any other person claiming under the pledgor.<sup>27</sup> It has been held that, where the surplus is realized from collaterals, part of which belonged to the pledgor and part to a third person, the latter may claim the entire surplus and not merely the proportion realized on the property,<sup>28</sup> but that, where the property of several owners is wrongfully pledged to several pledgees, each owner is entitled only to the surplus which accrues from his property.<sup>29</sup>

grounds 8 A.2d 690, 126 N.J.Eq. 315.

Pa.—Huntingdon Valley Trust Co. v. Norristown-Penn Trust Co., 196 A. 821, 329 Pa. 356—Kelter v. American Bankers' Finance Co., 160 A. 127, 306 Pa. 483, 82 A.L.R. 999.

49 C.J. p 986 note 38.

#### Accounting on cash basis

Where pledgee was answerable for amount he received in excess of amount of pledgor's indebtedness, because of pledgee's wrongfully conducted sale of pledged mortgage, pledgee, who subsequently foreclosed the mortgage, purchased at foreclosure sale, and sold property purchased, was required to account on a cash basis, even though pledgee accepted a mortgage for greater part of purchase price of the property.—Huntingdon Valley Trust Co. v. Norristown-Penn Trust Co., 196 A. 821, 329 Pa. 356.

#### Amount

(1) A pledgor who had authorized the pledgee to sell collateral security is entitled to the difference between the gross sales price less the selling expenses, and the amount applied in satisfaction of the indebtedness, plus interest on such difference from the time of sale.—Dow v. Brookline Trust Co., 31 N.E.2d 13, 308 Mass. 90.

(2) Where assignments of accounts receivable had been given by defendant as security for money lent on payment by defendant of amount of judgment for money lent, he would be entitled to a reassignment of all uncollected accounts held by plaintiff, together with amounts received by plaintiff subsequently to late parties agreed the auditor should determine amount of the indebtedness.—Weiss v. Balaban, 53 N.E.2d 83, 315 Mass. 390.

(3) Seller holding mortgage notes due buyer from sale of his old car, as security for note given in payment of new car, by selling old car canceled notes entitling buyer to credit for them, notwithstanding he consented to sale; but the buyer is entitled to credit limited to face of notes, notwithstanding seller sold car for greater amount.—Bezanson v. Wray-Dickinson, Inc., 140 So. 255, 19 La.App. 788.

#### Assignees of pledgee

Indorser on note who paid maker's indebtedness to payee bank and acquired collateral deposited with bank was accountable to maker's assignee for any excess received on sale of collateral above debt, interest, and costs of sale.—Pilcher v. Continental Trust Co., 69 F.2d 987, 63 App.D.C. 111.

15. Conn.—Saposnick v. Kenig, 184 A. 584, 121 Conn. 253.

Ohio.—Rubel v. Hunt, 179 N.E. 867, 40 Ohio App. 561.

Tex.—Moore v. Krenex, Civ.App., 17 S.W.2d 89, reversed on other grounds Moore v. Krenex, Com. App., 39 S.W.2d 828.

49 C.J. p 986 note 39.

Pledgor held estopped to interpose defense of extinguishment of debt by realization on collateral.—Dickson v. Bank of Chandler, 215 P. 926, 25 Ariz. 243.

16. Mo.—Hornsby v. Knorpp, 232 S. W. 776, 207 Mo.App. 302.

17. Miss.—Knight v. Yarborough, 15 Miss. 179.

49 C.J. p 986 note 41.

18. Iowa.—Williams v. Herman, 249 N.W. 215, 216 Iowa 499.

N.J.—Moss Industries v. Irving Metal Co., 61 A.2d 159, 142 N.J.Eq. 704.

N.Y.—Cole v. Manufacturers Trust Co., 299 N.Y.S. 418, 164 Misc. 741.

49 C.J. p 986 note 42.

#### Sufficiency of accounting

Return of note to debtor, with notation thereon that note was paid, and that collateral had been sold for amount of note and interest, was sufficient accounting by pledgee, who owed debtor no duty to inform him of subsequent sale of note as collateral by purchaser.—Williams v. Herman, 249 N.W. 215, 216 Iowa 499.

19. Colo.—Cripple Creek State Bank v. Russell, 219 P. 212, 74 Colo. 111.

49 C.J. p 986 note 43.

20. Mo.—Dibert v. D'Arcy, 154 S.W. 1116, 248 Mo. 617.

49 C.J. p 986 note 44.

21. Pa.—Maryland Casualty Co. v. National Bank of Germantown & Trust Co., 182 A. 362, 320 Pa. 129.

22. Ill.—Post v. Union Nat. Bank, 42 N.E. 976, 159 Ill. 421.

23. N.Y.—Gauntlett v. Patton, 89 N.Y.S. 385, 96 App.Div. 627.

49 C.J. p 986 note 46.

24. N.Y.—Hatch v. New York Fourth Nat. Bank, 41 N.E. 403, 147 N.Y. 184.

49 C.J. p 986 note 47.

25. N.Y.—Farwell v. Importers', etc., Nat. Bank, 90 N.Y. 483.

49 C.J. p 986 note 49.

26. N.Y.—Corpus Juris cited in In re Cooke's Estate, 264 N.Y.S. 336, 344, 147 Misc. 528.

Pa.—In re Pfeibel's Estate, 20 Pa. Dist. & Co. 389.

49 C.J. p 986 note 50.

27. N.Y.—Matter of Bonner, 8 Daly 75.

28. N.Y.—Smith v. Savin, 9 N.Y.S. 106.

29. U.S.—In re Jamison, C.C.A.Pa., 209 F. 541, 126 C.C.A. 363.

## e. Proceedings

Surplus proceeds may be recovered by the pledgor or other person entitled thereto in appropriate proceedings brought for that purpose.

The pledgor may recover the surplus proceeds of the collateral in an action brought for that purpose,<sup>30</sup> although he is not the actual owner thereof;<sup>31</sup> but such recovery cannot be had in a proceeding in which it is not in issue.<sup>32</sup> On a sale of the pledge with his consent, he may sue the purchaser or his assignee to recover the balance due,<sup>33</sup> and if the pledgee refuses to pay over the surplus to the pledgor he may be held liable in an action for conversion;<sup>34</sup> and where the pledgee asserts a right, and is threatening to apply the proceeds of a collateral to the payment of a debt not secured thereby, the pledgor may sue in equity for relief.<sup>35</sup> Such surplus may not be recovered by the pledgor in an action in trover.<sup>36</sup> Where the pledge is given to secure several obligations in a prescribed order, if sufficient money is collected to satisfy all the obligations, the pledgor is not required to wait until a senior obligation is paid before suing to have the proceeds applied to a junior obligation.<sup>37</sup> The pledgor may be entitled to a complete accounting even though he is not entitled to a settlement at the time of the accounting.<sup>38</sup>

*By assignee of pledgor or owner.* An assignee of the pledgor's interest in the property pledged acquires the right to recover the surplus proceeds from the pledgee,<sup>39</sup> and where the pledgee sells the property with the assent of the assignee, in an action by the latter to recover the surplus proceeds, the pledgee can claim against such surplus only such an amount as, if tendered by the assignee at the time of the assignment, with interest and expenditures, would have canceled and discharged the pledgee's claim;<sup>40</sup> and hence, where the title to the property passes to the assignee prior

to the sale by the pledgee, the title to the surplus, at the time of the sale, is vested in the assignee, and consequently the pledgee can set off no claim which he at that time held against the assignor.<sup>41</sup> The assignee of the executor of an insured person may sue an insurance company for the surplus due on a life insurance policy after the payment to the pledgee of the secured debt,<sup>42</sup> and the company is not entitled to set off expense incurred by it in resisting unfounded claims of other persons to such surplus.<sup>43</sup>

*By real owner.* The owner of property wrongfully pledged by one having it in possession, on the assignment of such pledgor for the benefit of creditors, may elect to ratify the pledge and look only to the pledgor's estate for satisfaction,<sup>44</sup> or he may file a claim for damages for the wrongful conversion against the assignee of the pledgor,<sup>45</sup> and he may also sue the pledgee for any surplus realized from the collateral after the payment of the debt it was pledged to secure,<sup>46</sup> and may maintain an action in equity against the pledgee for an accounting without first exhausting his legal remedy against the pledgor.<sup>47</sup>

## § 55. Action on Debt or Liability Secured

- a. In general
- b. Enforcement or surrender of security as condition precedent
- c. Accounting for pledge or proceeds
- d. Defenses
- e. Parties
- f. Pleading
- g. Evidence
- h. Trial
- i. Judgment

## a. In General

As a general rule, and notwithstanding he has tak-

30. Cal.—Tracy v. Stock Assur. Bureau, 23 P.2d 41, 132 Cal.App. 573.  
49 C.J. p 987 note 55.

Action for money had and received  
Cal.—Tracy v. Stock Assur. Bureau, 23 P.2d 41, 132 Cal.App. 573.

31. N.Y.—Gould v. Farmers' Loan & Trust Co., 23 Hun 322.  
49 C.J. p 987 note 56.

32. N.Y.—Powers v. Savin, 19 N.Y. S. 340, 64 Hun 560, 22 N.Y.Civ. Proc. 253, 28 Abb.N.Cas. 463, affirmed 35 N.E. 207, 139 N.Y. 652.  
49 C.J. p 987 note 57.

33. N.H.—Kimball v. Jackman, 42 N.H. 242.

34. Neb.—Palmer v. Parmele, 164 N. W. 708, 848, 101 Neb. 691.  
49 C.J. p 987 note 59.

35. Ill.—Smith v. Albany First Nat. Bank, 135 N.Y.S. 985, 151 App.Div. 317.

49 C.J. p 987 note 60.

36. Ill.—Loomis v. Stave, 72 Ill. 623.

37. Colo.—Mercantile Nat. Bank v. Peabody, 72 P. 611, 18 Colo.App. 455.

49 C.J. p 987 note 62.

38. La.—Basso v. Export Warrant Co., 198 So. 654, 194 La. 303.

39. N.Y.—Van Blarcom v. Broadway Bank, 37 N.Y. 540, 5 Transcr. A. 132.

40. N.Y.—Van Blarcom v. Broadway Bank, supra.

41. N.Y.—Van Blarcom v. Broadway Bank, supra.

42. N.Y.—Earle v. New York Life Ins. Co., 7 Daly 303, affirmed 74 N.Y. 618.

43. N.Y.—Earle v. New York Life Ins. Co., supra.

44. N.Y.—Le Marehand v. Moore, 44 N.E. 770, 150 N.Y. 209.

45. N.Y.—Rhinelander v. National City Bank, 55 N.Y.S. 229, 36 App. Div. 11.

46. N.Y.—Rhinelander v. National City Bank, supra.

47. N.Y.—Farwell v. Importers', etc., Nat. Bank, 90 N.Y. 483.

on collateral security, the pledgee may proceed against the pledgor personally on the debt or liability secured.

On default of the pledgor in the payment or discharge of the principal obligation, the pledgee, notwithstanding he has taken collateral security and has a lien thereon for his debt, may, in the absence of a stipulation to the contrary, proceed against the pledgor personally on the debt or liability secured,<sup>48</sup> and execution may be levied on the pledge and sale be made by the sheriff under a personal judgment, in such action.<sup>49</sup> This rule applies even though the collaterals were taken under an agreement not to sue on the debt for a limited time,<sup>50</sup> or under a mistaken belief that no personal liability would be enforced,<sup>51</sup> and even though the collateral is illegal.<sup>52</sup> If the pledgee proceeds first by sale of the pledged property, and the sale does not satisfy the debt, he may recover the balance due

from the pledgor by an action at law.<sup>53</sup>

**Recovery of interest.** Where a pledgor claims a conversion of collaterals by the pledgee, and does not tender the balance of the debt, the pledgee is entitled to recover interest on such balance to the time of the trial.<sup>54</sup>

#### b. Enforcement or Surrender of Security as Condition Precedent

As a general rule the pledgee may sue on the principal debt or obligation without first returning or surrendering the collateral pledged, or without first enforcing such collateral.

As a general rule the pledgee may sue on the principal debt or obligation without first returning or surrendering the collateral pledged,<sup>55</sup> or offering to surrender it,<sup>56</sup> or without first enforcing such collateral,<sup>57</sup> even though the debtor is insol-

48. Cal.—Baird v. Olsheski, 2 P.2d 493, 116 Cal.App. 109.

Nev.—Nevada-Douglas Consol. Copper Co. v. Berryhill, 75 P.2d 992, 58 Nev. 261.

N.J.—Case v. Plainfield Trust Co., 1 A.2d 405, 121 N.J.Law 239—*Corpus Juris* cited in Lodi Trust Co. v. Himadi, 176 A. 691, 692, 13 N.J. Misc. 169.

N.Y.—First Trust & Deposit Co. v. Potter, 278 N.Y.S. 847, 155 Misc. 106.

Pa.—*Corpus Juris* quoted in First Nat. Bank of New Wilmington v. Getty, 179 A. 764, 767, 118 Pa.Super. 326—In re Geissler's Estate, Orph., 35 Berks Co. 145, 57 York Leg.Rec. 2.

49 C.J. p 987 note 76.

#### Demand for payment

Holder may sue maker of note without demanding payment.—Resource Holding Corporation v. Nitke, 239 N.Y.S. 26, 136 Misc. 139.

49. Iowa.—Robinson v. Hurley, 11 Iowa 410, 79 Am.D. 497.

49 C.J. p 988 note 77.

50. Ind.—Mendenhall v. Lenwell, 5 Blackf. 125, 33 Am.D. 458.

51. Mo.—Equitable L. Assur. Soc. v. De Lisle, 182 S.W. 1026, 194 Mo. App. 42.

49 C.J. p 988 note 79.

52. Conn.—Pothier v. Reid Air Spring Co., 130 A. 383, 103 Conn. 380.

53. Mass.—Weiss v. Balaban, 53 N. E.2d 83, 315 Mass. 390.

49 C.J. p 988 note 82.

#### Liability for deficiency

(1) Elimination from printed note form of provision requiring makers to pay deficiency after sale of collateral did not release makers from liability for deficiency, in view of agreement in note to pay entire

amount and interest and attorney's fees, and promise to deposit additional security if demanded.—McCune v. Harris, 50 P.2d 837, 9 Cal. App.2d 719.

(2) Sale of cotton given as security for note, made on default without notice to maker and as authorized in note without judicial action, did not defeat action on renewal note allegedly given without knowledge of the sale of security.—Farmerville Bank v. Tucker, La.App., 166 So. 491.

(3) Where collateral agreement provided that, out of the proceeds of any sale of collateral pledged to secure note, holder of note, after payment of all costs and expenses for making sale, should first pay off and satisfy note in full, and residue, if any, should be paid to the holder, and, in case of any deficiency, the making of the note agreed "promptly" to pay the note, maker of the note was liable for the balance due after the sale of the collateral and suit for its recovery could be maintained.—Mercantile-Commerce Bank & Trust Co. v. Kieselhorst Co., 164 S.W.2d 342, 350 Mo. 30.

54. Tex.—Oriental Bank v. Western Bank, etc., Co., Civ.App., 143 S.W. 1176.

55. U.S.—Overbury v. Platten, C.C. A.N.Y., 108 F.2d 155, 126 A.L.R. 185, certiorari denied 61 S.Ct. 21, 311 U.S. 664, 85 L.Ed. 426—Federal Deposit Ins. Corporation v. Lynch, D.C.N.Y., 46 F.Supp. 466.

Ind.—Newell v. Newell, 12 N.E.2d 344, 213 Ind. 261.

Mont.—Rock Island Plow Co. v. Cut Bank Implement Co., 53 P.2d 116, 101 Mont. 117.

N.Y.—Haight v. Brown, 288 N.Y.S. 65, 159 Misc. 652—First Trust & Deposit Co. v. Potter, 278 N.Y.S. 847, 155 Misc. 106.

49 C.J. p 988 note 85.

56. U.S.—Federal Deposit Ins. Corporation v. Lynch, D.C.N.Y., 46 F. Supp. 466.

Ind.—Newell v. Newell, 12 N.E.2d 344, 213 Ind. 261.

Mont.—Rock Island Plow Co. v. Cut Bank Implement Co., 53 P.2d 116, 101 Mont. 117.

N.Y.—Resource Holding Corporation v. Nitke, 239 N.Y.S. 26, 136 Misc. 139.

Wash.—Stusser v. Gottstein, 35 P. 2d 5, 178 Wash. 360.

49 C.J. p 988 note 86.

57. U.S.—Federal Deposit Ins. Corporation v. Lynch, D.C.N.Y., 46 F. Supp. 466.

Cal.—Journigan v. Stenzel, 58 P.2d 738, 14 Cal.App.2d 484—Bromberg v. Brower, 44 P.2d 1063, 6 Cal.App. 2d 699—In re Bank of Oakley, 21 P.2d 164, 131 Cal.App. 203.

Md.—Webster v. People's Loan Savings & Deposit Bank of Cambridge, 152 A. 815, 160 Md. 57.

N.J.—Shepard v. Hilton, 163 A. 805, 11 N.J.Misc. 8.

N.Y.—Jefferson County Nat. Bank v. Dusckas, 2 N.Y.S.2d 336, 166 Misc. 720—Kress v. Central Trust Co. of Rochester, 275 N.Y.S. 14, 153 Misc. 397, affirmed 283 N.Y.S. 467, 246 App.Div. 76, affirmed Kress v. Central Trusts Co., 5 N.E.2d 365, 272 N.Y. 629—Salt Springs Nat. Bank of Syracuse v. Hitchcock, 259 N. Y.S. 24, 144 Misc. 547, reversed on other grounds 263 N.Y.S. 55, 238 App.Div. 150.

N.C.—Fidelity Bank v. Hessee, 175 S.E. 826, 207 N.C. 71.

49 C.J. p 988 note 87.

**Possession of pledged personal property** does not suspend right of pledgee to proceed personally against payor without selling pledge, in absence of statute or stipulation to the contrary.—Bromberg v. Brower, 44 P.2d 1063, 6 Cal.App.2d 699.

vent,<sup>58</sup> unless he has entered into a special agreement first to enforce the pledged collateral,<sup>59</sup> as where the agreement on the pledgor's part is merely to pay any deficiency,<sup>60</sup> or unless such enforcement is required by statute,<sup>61</sup> or unless the equities of the case are such as to require the pledgee to proceed first against the collateral.<sup>62</sup>

In accordance with the general rule, if action is commenced to enforce the security, the pledgee may discontinue it and proceed for judgment on the debt or obligation, if no right of the pledgor is forfeited.<sup>63</sup> Such suit may be brought by one to whom the debt has been assigned.<sup>64</sup>

*Statute requiring chattel mortgage to be enforced* before action can be maintained for the debt does not apply to pledges, and hence does not preclude a pledgee from suing for the debt without first resorting to the pledge.<sup>65</sup>

*Unsuccessful attempt to enforce.* A pledgee may also sue for the amount of the principal debt or obligation although he has sought to procure a sale of the pledge by judicial process, but has failed because of the pledge not being salable.<sup>66</sup>

### c. Accounting for Pledge or Proceeds

As a general rule the pledgee in a suit on the prin-

cipal debt or obligation is not bound to produce the collateral at the trial or to account for it.

As well as not being required to resort to the collateral pledged as a condition to suing on the debt, as a general rule the pledgee, in a suit on the principal obligation, is not bound to produce such collateral at the trial or to account for it,<sup>67</sup> especially where the collateral was not given with the obligation in suit, but in connection with a previous liability which constitutes the consideration for the principal obligation,<sup>68</sup> or where it has never been in the pledgee's possession or control,<sup>69</sup> or where it has been disposed of in good faith and in a lawful manner in an effort to realize all that was possible out of it.<sup>70</sup> Under some circumstances, however, a pledgee of collateral may be required to produce it as a condition to enforcing the obligation for which it is security.<sup>71</sup> Thus the pledgee must produce the collateral or its proceeds or account for its nonproduction where it is alleged or proved by defendant that the pledgee has realized on the collateral,<sup>72</sup> or that he has lost or misappropriated it,<sup>73</sup> or that the collateral was actually deposited and that plaintiff is unable to produce it;<sup>74</sup> and the pledgee cannot escape this duty by

58. N.Y.—*People v. Remington*, 24 N.E. 793, 121 N.Y. 328, 8 L.R.A. 458, 25 Abb.N.Cas. 78.

59. Ala.—*Thompson v. Montgomery Fourth Nat. Bank*, 108 So. 69, 214 Ala. 452.  
49 C.J. p 989 note 89.

#### Where authorization insufficient

A note, not directing, but merely authorizing, payee to sell collateral, pledged as security, on maker's default, did not require realization on collateral as condition precedent to recovery on note.—*First Trust & Deposit Co. v. Potter*, 278 N.Y.S. 847, 155 Misc. 106.

30. S.D.—*Black Hills Trust, etc., Bank v. Plunkett*, 166 N.W. 527, 40 S.D. 130.  
49 C.J. p 989 note 90.

31. Minn.—*Schalck v. Harmon*, 6 Minn. 265.  
49 C.J. p 989 note 91.

32. Ind.—*Alexander v. Alexander*, 64 Ind. 541.  
49 C.J. p 989 note 92.

33. N.Y.—*Gilligan v. Owens*, 171 N.Y.S. 596, 184 App.Div. 209—*Gilligan v. Owens*, 169 N.Y.S. 958, 122 App.Div. 580.

34. Cal.—*Williams v. Parker*, 157 P. 550, 30 Cal.App. 71.

35. Cal.—*Bank of America Nat. Trust & Savings Ass'n v. Schu-*

*macher*, 45 P.2d 239, 6 Cal.App.2d 651.

49 C.J. p 989 note 96.

#### In Utah

(1) A pledge is not a mortgage within statute permitting only one action for recovery of debt or enforcement of right secured by mortgage.—*Campbell v. Peter*, 182 P.2d 754, 108 Utah 565.

(2) It is the duty of a holder of security pledged to secure note to exhaust the security before he can obtain a deficiency judgment against the indorser or maker, and the security holder cannot reasonably exhaust the security if at the foreclosure sale no one would buy it because he would not get a good title, because owner has not been joined.—*Hoyt v. Upper Marion Ditch Co.*, 76 P.2d 234, 94 Utah 134.

(3) Secured creditor must first exhaust his security and can then proceed against debtor to collect balance due with no better rights than unsecured creditor would have.—*U. S. Fidelity & Guaranty Co. v. Mallia, for Use and Benefit of Creditors of Provo Commercial & Savings Bank*, 49 P.2d 954, 87 Utah 426.

(4) Under the statute relating to but one action on a debt secured by a mortgage on real or personal property, where a debt is secured by collateral in the absence of a showing

that the security has become valueless, plaintiff cannot maintain an action for a personal judgment, without first exhausting the remedy against the security.—*National Bank of Commerce v. James Pingree Co.*, 218 P. 552, 62 Utah 259.

66. Cal.—*Traders Bank v. Wilcox*, 183 P. 256, 42 Cal.App. 24.  
49 C.J. p 989 note 97.

67. Okl.—*Farmers' Nat. Bank v. Cravens*, 219 P. 138, 93 Okl. 58.  
49 C.J. p 989 note 99.

68. D.C.—*Ambler v. Ames*, 1 App. D.C. 191.

69. Okl.—*Boyd v. Tecumseh State Bank*, 153 P. 666, 49 Okl. 604.  
49 C.J. p 989 note 2.

70. U.S.—*Warburton v. Trust Co. of America, Pa.*, 182 F. 769, 105 C. C.A. 201.

71. U.S.—*Warburton v. Trust Co. of America*, supra.

72. U.S.—*Corpus Juris* quoted in *Varden v. First Christian Church of Pineville*, D.C.Ky., 13 F.Supp. 159, 160.  
49 C.J. p 989 note 5.

73. Okl.—*Farmers' Nat. Bank v. Cravens*, 219 P. 138, 93 Okl. 58.  
49 C.J. p 989 note 6.

74. Ga.—*Miller v. Piedmont Fertilizer Co.*, 94 S.E. 266, 21 Ga.App. 180.  
49 C.J. p 990 note 7.

showing that the collateral has become worthless.<sup>75</sup> It has also been held that, where the collateral is negotiable by the pledgee, he should produce it at the trial<sup>76</sup> unless he insists on proceeding after being charged with its face value.<sup>77</sup> It has been held, however, that, where the note in suit does not refer to collateral, although defendant had given plaintiff other notes as collateral, plaintiff is not bound as a condition to recovery to produce or restore the collateral on a plea alleging conversion of the collateral.<sup>78</sup>

*Amount for which pledgee accountable.* Where it becomes the duty of the pledgee, in an action for the principal debt or obligation, to account for the pledge if, acting strictly within his rights under the pledge, he has realized on the collateral on default of the pledgor, he must account for the amount actually received by him therefor,<sup>79</sup> and not for a higher price at which similar property is afterward sold between the date of delivery and commencement of the action.<sup>80</sup> Where he is guilty of conversion of the pledge, or of negligence in collecting or selling it, he must account not merely for the amount received for it, but for its full value;<sup>81</sup> but this does not affect his right to recover on the obligation of the pledgor to the extent that it exceeds such value.<sup>82</sup>

#### d. Defenses

- (1) In general
- (2) Set-off and counterclaim
- (3) Nonperformance of conditions precedent

##### (1) In General

In actions on the principal debt or obligation, vari-

ous defenses may be interposed; but generally it is no defense that the creditor has taken or holds collateral security.

In the absence of an agreement to the contrary, the mere fact that the creditor has taken or holds collateral security is no defense to an action on the principal debt unless he has realized thereon;<sup>83</sup> nor does the taking of security of a higher nature operate as a merger of the original debt so as to bar a suit on the latter.<sup>84</sup> In the absence of any agreement it is no defense that the creditor has failed to sell collateral security although requested to do so,<sup>85</sup> but it is a good defense to such a suit that the creditor agreed to realize first on the collateral,<sup>86</sup> or that, aside from the collateral, the pledgor's personal estate is not sufficient to pay the debt, without resort to the realty.<sup>87</sup> In an action on a note, a person signing the note as a maker cannot impeach the unambiguous terms of a collateral agreement which he executed.<sup>88</sup>

*Return of property.* Where the right to return of the pledged property is asserted by the pledgor in a suit on the secured debt by the pledgee, the pledgor must show a tender of the indebtedness.<sup>89</sup>

##### (2) Set-Off and Counterclaim

Generally the pledgor may set off against the amount of the debt any profits or proceeds realized by the pledgee from the collateral, or any damages or loss resulting from the negligence or wrongful act of the pledgee with respect to the collateral.

As a general rule the pledgor defendant is entitled to set off against the amount of the debt any profits or proceeds realized by the pledgee plaintiff from the collateral,<sup>90</sup> and any damage or loss resulting from the negligence,<sup>91</sup> or any damage or

75. Pa.—Stuart v. Bigler, 98 Pa. 80.  
49 C.J. p 990 note 8.

76. N.Y.—Jenkins v. Conklin, 130 N.Y.S. 778, 146 App.Div. 301.

77. N.Y.—Jenkins v. Conklin, supra.

78. Ga.—Miller v. Piedmont Fertilizer Co., 94 S.E. 266, 21 Ga.App. 180.

79. U.S.—Warburton v. Trust Co. of America, Pa., 182 F. 769, 105 C.C.A. 201.  
49 C.J. p 990 note 14.

#### Credit for entire proceeds

Plaintiff, having admitted receiving security for note sued on and sale thereof, must give proper credit for entire proceeds.—Security Sav. Bank v. Carlson, 231 N.W. 643, 210 Iowa 1117.

80. Mo.—Berlin v. Eddy, 33 Mo. 426.

81. U.S.—American Exch. Bank v. Goetz, C.C.A.Wis., 283 F. 900.  
49 C.J. p 990 note 18.

82. U.S.—Warburton v. Trust Co. of America, Pa., 182 F. 769, 105 C.C.A. 201.

83. Kan.—Fidelity State Bank v. Evans, 282 P. 591, 129 Kan. 199.  
49 C.J. p 990 note 21.

84. N.Y.—Davis v. Anable, 2 Hill 339.  
49 C.J. p 990 note 23.

85. Ga.—First Nat. Bank v. Hattaway, 158 S.E. 565, 172 Ga. 731, 77 A.L.R. 375.

86. Ind.—Mills v. Gould, 14 Ind. 278.

Mo.—Corpus Juris quoted in Slyman v. Simon, 48 S.W.2d 140, 143, 226 Mo.App. 1000.

87. Ind.—Alexander v. Alexander, 64 Ind. 541.

88. Tex.—First Nat. Bank v. Bell, Civ.App., 88 S.W.2d 119, error dismissed.

89. Ind.—Thornburg v. Lawrence, 123 N.E. 430, 73 Ind.App. 692.

90. U.S.—Corpus Juris quoted in Varden v. First Christian Church of Pineville, D.C.Ky., 13 F.Supp. 159, 161.

La.—Corpus Juris cited in W. F. Taylor Co. v. Whitbeck, App., 159 So. 187, 189.

Wash.—Corpus Juris cited in Higgins v. Daniel, 105 P.2d 24, 5 Wash. 2d 134.

49 C.J. p 990 note 28.

91. Mont.—Rock Island Plow Co. v. Cut Bank Implement Co., 53 P.2d 116, 101 Mont. 117.

Tex.—Hughes v. Martin, Civ.App., 150 S.W.2d 413, error refused.  
49 C.J. p 990 note 29.

#### Lack of diligence

In action on notes given by con-

loss resulting from the wrongful sale,<sup>92</sup> or from other wrongful conversion or act<sup>93</sup> of the pledgee with respect to the collateral; and in some jurisdictions this rule applies although the damages for the wrongful act or conversion are unliquidated or uncertain.<sup>94</sup> The pledgor is not entitled to credit for notes pledged unless he shows that the pledgee was under the duty of collecting and applying them before suing on the principal debt;<sup>95</sup> and the giving of a new note by the pledgor without claiming credit for the conversion of collateral will constitute a waiver of his right to urge their loss or conversion as a defense.<sup>96</sup> A statutory provision for set-off in actions on a bond secured by a mortgage as collateral has been held not applicable in an action on a promissory note secured by a pledge of personal property.<sup>97</sup>

**Depreciation in value.** In the absence of negligence or other wrongful act of the pledgee, depreciation in the value of the collateral will not be allowed as a set-off.<sup>98</sup>

**Amount of set-off.** In accordance with the rule that the pledgee, in case of a conversion or negligent loss, must account for the actual value of the pledged property, the pledgor, in an action against him on the principal debt, may set off against the amount of the debt the actual value of the property,<sup>99</sup> with interest, in the discretion of the court

or jury,<sup>1</sup> and not the highest value between the dates of the conversion and the trial.<sup>2</sup> In case of a sale, the pledgor may recoup the difference between the amount for which the pledged property was sold and the actual value on the date of sale.<sup>3</sup>

### (3) Nonperformance of Conditions Precedent

Compliance with conditions precedent is essential to interposition of defenses or set-offs.

Tender or payment of the amount due on the principal debt is not a condition precedent to the pledgor's right to set off the value of collateral converted by the pledgee<sup>4</sup> or lost through his negligence.<sup>5</sup> However, it has been held that in a suit on certain notes defendant cannot avail himself of the defense that some of the notes sued on were delivered as security for the others without first paying the amount of his real indebtedness.<sup>6</sup>

### e. Parties

Only proper and necessary parties should be joined in an action by the pledgee on the principal debt or obligation.

In an action by the pledgee on the principal debt or obligation, it is improper to join as defendants the maker of a note held as security and the pledgor,<sup>7</sup> and, in an action against the assignee of a mortgage on a debt to secure which the assignee

signees for shipment of fertilizer where consignees delivered to consignor a number of farmer's notes which had theretofore been delivered to consignees for collection under a trust receipt, consignees were entitled not only to credit or set-off for sums collected on notes listed in receipt given at the time, but for any sums which could and should have been collected by reasonable diligence under the equitable rules defining the duty of the holder of collateral notes.—*Hyatt v. International Agr. Corporation*, 183 So. 670, 236 Ala. 527.

92. Ala.—*Thompson v. Montgomery Fourth Nat. Bank*, 108 So. 69, 214 Ala. 452.

49 C.J. p 991 note 30.

**Who may counterclaim.**

In an action on a note, if there was a wrongful sale of collateral securing defendant's note, the damage accruing would be as for a conversion, and would have existed in favor of the maker pledgor alone, and not in favor of the indorser guaranteeing payment of the note.—*Williams v. Parker*, 157 P. 550, 30 Cal. App. 71.

93. Wash.—*Corpus Juris* cited in *Higgins v. Daniel*, 105 P.2d 24, 26, 5 Wash.2d 134.

49 C.J. p 991 note 31.

### Refusal to return after tender

Where pledgor has tendered amount due on note, secured by pledged collateral, with costs, on condition that pledgee return pledged property, after commencement of action on note, pledgee, refusing to accept such tender, could be charged with value of property as credit on note.—*First Trust & Deposit Co. v. Potter*, 278 N.Y.S. 347, 155 Misc. 106.

94. N.Y.—*Stearns v. Marsh*, 4 Den. 227, 47 Am.D. 248.  
49 C.J. p 991 note 32.

95. Ind.—*Dugan v. Sprague*, 2 Ind. 600.  
Neb.—*Larmer v. Bain*, 15 N.W. 323, 14 Neb. 178.

96. Pa.—*Girard Bank v. Richards*, 4 Phila. 250.

97. N.Y.—*First Trust & Deposit Co. v. Potter*, 278 N.Y.S. 347, 155 Misc. 106.

98. N.Y.—*First Trust & Deposit Co. v. Potter*, supra.  
49 C.J. p 991 note 35.

99. Tex.—*Leleux v. Serafino*, Civ. App. 88 S.W.2d 1100.  
49 C.J. p 991 note 38.

Where pledgee refused to comply with pledgor's request to sell prop-

erty securing note and elected to hold property as security against possible obligation on another note executed by pledgor and signed by pledgee as surety, pledgee, bringing action on former note, was guilty of conversion and was liable to pledgor for value of property as of date of conversion.—*Leleux v. Serafino*, supra.

1. Ga.—*Bennett v. Tucker*, 123 S.E. 165, 32 Ga.App. 288.

2. Ga.—*Hulsey v. Forrester*, 137 S. E. 904, 36 Ga.App. 729—*Bennett v. Tucker*, 123 S.E. 165, 32 Ga.App. 288.

3. Ga.—*Hulsey v. Forrester*, 137 S. E. 904, 36 Ga.App. 729.  
49 C.J. p 991 note 41.

4. Iowa.—*Leonard v. Sehman*, 220 N.W. 77, 206 Iowa 277.  
49 C.J. p 991 note 43.

5. Iowa.—*Fort Dodge First Nat. Bank v. O'Connell*, 51 N.W. 162, 84 Iowa 377, 35 Am.S.R. 313.

6. Mass.—*Liverpool Royal Bank v. Grand Junction R., etc., Co.*, 100 Mass. 444, 97 Am.D. 115.

7. La.—*Forstall v. Farmers' Union Commercial Assoc.*, 16 So. 651, 47 La. Ann. 105.



had deposited the mortgage as security, the mortgagee is not a necessary party.<sup>8</sup>

### f. Pleading

The rules of pleading in civil actions are applicable in actions by a pledgee on the principal debt or obligation.

The general rules of pleading apply in an action by the pledgee on the principal debt or obligation, as to the declaration or petition,<sup>9</sup> or answer or plea,<sup>10</sup> such as the rule that, where the answer fails to set up a defense, a verdict or judgment for plaintiff may be rendered on the pleadings.<sup>11</sup>

**Misfeasance by pledgee.** A general allegation that the pledgee has failed properly to keep or enforce the pledge is insufficient; specific acts of misfeasance must be averred.<sup>12</sup>

**Issues, proof, and variance.** The general rules of pleading also apply as to issues, proof, and variance.<sup>13</sup> The pledgor will usually be allowed to prove a conversion of the collateral by the pledgee, or his negligence in realizing on it and applying the proceeds to the payment of the debt, under a plea of non assumpsit<sup>14</sup> or of payment.<sup>15</sup> The defense of damages from the loss of collateral security is the set-off of one cause of action against another, and must be specially pleaded;<sup>16</sup> and the

pledgee will not be obliged to account for nonnegotiable securities held in pledge unless the answer of defendant alleges that they have been lost or converted.<sup>17</sup> The defense that the debt is not yet due must be directly alleged,<sup>18</sup> as must also the defense of payment of the debt out of the proceeds of property pledged,<sup>19</sup> or of an agreement whereby the pledgee has waived his right to sell the pledge on default.<sup>20</sup>

### g. Evidence

The general rules of evidence are applicable in an action by a pledgee on the principal debt or obligation.

The general rules of evidence apply in an action by a pledgee on the principal debt or obligation, in respect of the burden of proof and presumptions.<sup>21</sup> On an issue raised by defendant as to the conversion or loss of collaterals by the pledgee, the burden of proof is on the pledgee to account for them;<sup>22</sup> but, having done so, the burden is on defendant to prove a conversion.<sup>23</sup> The burden is on the pledgor to show absence of good faith on the part of the pledgee in making a sale of the pledge,<sup>24</sup> or to establish his contention that the pledge was worth more than it sold for,<sup>25</sup> or to establish the value of the pledge which the pledgee refused to sell, in order to recover a judgment canceling his note.<sup>26</sup> Likewise the burden is on defendant to

8. N.C.—Styers v. Alsbaugh, 24 S.E. 423, 118 N.C. 631.

9. Tex.—Hicks v. Emerson-Brantingham Impl. Co., Civ.App., 229 S.W. 348.  
49 C.J. p 992 note 52.

10. Ga.—Turner v. Commercial Sav. Bank, 87 S.E. 918, 17 Ga.App. 631.  
49 C.J. p 992 note 53.

**Affidavit of defense held insufficient**  
Pa.—Gordon v. Mitchell, 182 A. 386, 320 Pa. 277—Gordon v. Mohawk Bond & Mortgage Co., 176 A. 422, 317 Pa. 257—Union Trust Co. of Pittsburgh v. Long, 164 A. 346, 309 Pa. 470.  
49 C.J. p 992 note 53 [c].

#### Counterclaim

Pledgor, setting up counterclaim or set-off for damage suffered by pledgee's neglect with respect to collateral, must plead facts constituting negligence and rendering collateral worthless, and also his damage.—Rock Island Plow Co. v. Cut Bank Implement Co., 53 P.2d 116, 101 Mont. 117.

11. Mont.—Grant v. Hawitt, 208 P. 887, 63 Mont. 422.  
49 C.J. p 992 note 54.

12. Wash.—Anderson v. Carothers, 52 P. 229, 18 Wash. 520.

13. Utah.—Hoyt v. Upper Marion Ditch Co., 76 P.2d 234, 94 Utah 134.  
49 C.J. p 992 note 57.

14. Mo.—Corpus Juris quoted in Slyman v. Simon, 48 S.W.2d 140, 143, 226 Mo.App. 1000.  
49 C.J. p 992 note 58.

15. Mo.—Corpus Juris quoted in Slyman v. Simon, 48 S.W.2d 140, 143, 226 Mo.App. 1000.  
49 C.J. p 992 note 59.

16. Tex.—Carver v. Merrett, Civ. App., 155 S.W. 633.

17. Tex.—Marberry v. Farmers', etc., Nat. Bank, 26 S.W. 215, 6 Tex. Civ.App. 607.  
49 C.J. p 992 note 61.

18. Tex.—King v. Texas Banking, etc., Co., 58 Tex. 669.  
49 C.J. p 992 note 62.

19. Ark.—Barnes v. Bradley, 19 S.W. 319, 56 Ark. 105.

20. Tex.—King v. Texas Banking, etc., Co., 58 Tex. 669.

21. Wyo.—Farm Inv. Co. v. Wyoming College, etc., 68 P. 561, 10 Wyo. 240.  
49 C.J. p 992 note 67.

22. U.S.—Corpus Juris quoted in Varden v. First Christian Church of Pineville, Ky., D.C.Ky., 13 F. Supp. 159, 160.

N.C.—Corpus Juris cited in Meri-

den Nat. Bank v. Turner, 2 S.E.2d 848, 849, 215 N.C. 665.  
49 C.J. p 992 note 68.

23. Mo.—Carterville First Nat. Bank v. Hahn, 198 S.W. 489, 197 Mo.App. 593.

Okl.—Wood v. Harris, 203 P.2d 710, 201 Okl. 201.

24. Ariz.—Atlantic Nat. Bank v. Korrick, 242 P. 1009, 29 Ariz. 468, 48 A.L.R. 1184.

25. Ariz.—Atlantic Nat. Bank v. Korrick, supra.

#### Proof of damage in recoupment

(1) In suit on note, accommodation indorsers had burden of proving damages in recoupment for payee's failure to sell collateral deposited by indorsers.—Bank of U. S. v. Thomson & Kelly Co., 195 N.E. 115, 290 Mass. 224.

(2) In payee's suit on note, indorsers were not entitled to recoupment for damages for payee's failure to sell collateral deposited by indorsers, where there was no evidence showing lesser market value for collateral at later date than on date when payee was allegedly obliged to sell collateral.—Bank of U. S. v. Thomson & Kelly Co., supra.

26. Tex.—Leleux v. Serafino, Civ. App., 88 S.W.2d 1100.

prove alleged usury<sup>27</sup> or payment.<sup>28</sup> Where the pledgee has failed to restore the pledge, the burden is on him to show that it has been lost or destroyed<sup>29</sup> and that he unsuccessfully used all necessary care and diligence to preserve it.<sup>30</sup> On the issue of the loss of the pledged property by theft, the burden is on the pledgee to show that the loss occurred without fault on his part.<sup>31</sup> The pledgor seeking to counterclaim for damage suffered because of the pledgee's neglect with respect to the collateral has the burden of proving negligence<sup>32</sup> and damage.<sup>33</sup>

**Admissibility.** The general rules which govern the competency, relevancy, and materiality of the evidence in civil actions are applicable in an action by a pledgee on the principal debt or obligation.<sup>34</sup> Evidence of the willingness of the maker to secure a note pledged as collateral is not admissible in the absence of a showing of negligence or wrongful conduct on the part of the pledgee.<sup>35</sup> Any evidence of a settlement or other conduct of defendant inconsistent with his assertion of a set-off or counterclaim is admissible.<sup>36</sup> On an issue of payment of the principal debt by the sale of collateral, parol evidence is admissible to show that the collateral was also held as security for another debt,<sup>37</sup> but parol evidence is not admissible as to debts due plaintiff for which the collateral was not held as security.<sup>38</sup>

**Weight and sufficiency.** General rules governing the weight and sufficiency of the evidence are applicable in an action by a pledgee on the principal

debt or obligation.<sup>39</sup> Testimony that plaintiff said he did not have the collateral when defendant offered to pay the debt authorizes an inference of conversion,<sup>40</sup> and such inference is not conclusively rebutted by testimony of plaintiff's agent that, if plaintiff ever received the collateral, it had been lost or misplaced and had never been sold.<sup>41</sup>

#### h. Trial

The general rules of trial of civil actions apply to actions by a pledgee on the principal debt or obligation.

The general rules of trial apply in respect of questions of law and fact<sup>42</sup> and instructions to the jury.<sup>43</sup> Thus, where the evidence is conflicting or of a doubtful nature, it is generally a question for the jury whether certain property is held by the pledgee as collateral security<sup>44</sup> or whether the pledgee has committed a specific wrongful act with respect to the property.<sup>45</sup> Where, in a suit against the pledgee for a balance due after the sale of the pledged property by him, competent evidence does not sustain a charge of the pledgee's fraud and negligence in such sale, a motion for a verdict for plaintiff should be granted.<sup>46</sup> The value of the property pledged may be a question for the jury.<sup>47</sup>

#### i. Judgment

A judgment in an action on the principal debt or obligation does not affect the pledgee's lien on the collateral security, and need not, but may in a proper case, provide for return of the collateral on satisfaction of the judgment.

The recovery of a judgment does not affect plaintiff's lien on the collateral security,<sup>48</sup> and the

27. Okl.—Wood v. Harris, 203 P.2d 710, 201 Okl. 201.

28. Okl.—Wood v. Harris, supra.

29. La.—Crocker v. Monrose, 18 La. 553, 36 Am.D. 660.

30. La.—Crocker v. Monrose, supra.

31. Cal.—Fay Fruit Co. v. Ryan, 229 P. 62, 68 Cal.App. 304. 49 C.J. p 993 note 75.

32. Mont.—Rock Island Plow Co. v. Cut Bank Implement Co., 53 P. 2d 116, 101 Mont. 117.

#### Presumptions

On counterclaim or set-off by pledgor for damage suffered through pledgee's neglect with respect to collateral, negligence and loss may not be presumed from mere fact that collateral remains uncollected, but presumptions are that person is ignorant of wrong, that private transactions have been fair and regular, and that ordinary course of business has been followed, burden to overcome which rests on counterclaimant.—Rock Island Plow Co. v. Cut Bank Implement Co., supra.

33. Mont.—Rock Island Plow Co. v. Cut Bank Implement Co., supra.

34. Colo.—Cone v. Carlton, 169 P. 281, 64 Colo. 1. 49 C.J. p 993 note 77.

35. N.C.—Silvey v. Axley, 23 S.E. 933, 118 N.C. 959.

36. Mo.—Merriam v. Childs, 5 S.W. 615, 98 Mo. 131.

37. Mass.—Globe Nat. Bank v. Ingalls, 126 Mass. 209.

38. N.Y.—Weston v. Turver, 1 N.Y.S. 807.

#### Evidence held sufficient

La.—Wells v. Dean, 29 So.2d 590, 211 La. 132.

Miss.—Hibernia Bank & Trust Co. v. Turner, 127 So. 291, 156 Miss. 842. Okl.—Wood v. Harris, 203 P.2d 710, 201 Okl. 201.

49 C.J. p 993 note 83 [a].

#### Evidence held insufficient

Mont.—Rock Island Plow Co. v. Cut Bank Implement Co., 53 P.2d 116, 101 Mont. 117.

49 C.J. p 993 note 83 [b].

40. Ga.—Blackwell v. Dannenberg Co., 123 S.E. 179, 32 Ga.App. 307.

41. Ga.—Blackwell v. Dannenberg Co., supra.

42. Ill.—White v. Parish, 23 N.E.2d 989, 302 Ill.App. 172. 49 C.J. p 993 note 86.

43. Ind.—Lindley v. Sullivan, 32 N.E. 738, 33 N.E. 361, 133 Ind. 588. 49 C.J. p 993 note 87.

44. Ga.—Blackwell v. Dannenberg Co., 123 S.E. 179, 32 Ga.App. 307. N.Y.—Staten Island Bank v. Silvie, 85 N.Y.S. 760, 89 App.Div. 465.

45. N.Y.—Cammann v. Huntington, 85 N.Y.S. 434, 89 App.Div. 99.

46. Ariz.—Atlantic Nat. Bank v. Korrick, 242 P. 1009, 29 Ariz. 468, 43 A.L.R. 1184.

47. Tex.—Leleux v. Serafino, Civ. App., 88 S.W.2d 1100.

48. N.Y.—Haight v. Brown, 288 N.Y.S. 65, 159 Misc. 652—First Trust & Deposit Co. v. Potter, 278 N.Y.S. 847, 155 Misc. 106.

judgment need not provide for surrender of the pledge on satisfaction of the judgment;<sup>49</sup> but where defendant establishes that he has fully paid his indebtedness it is proper to order that his collateral be returned to him.<sup>50</sup> In a suit on notes secured by collateral, it has been held improper for the decree directing sale of the collateral to permit the pledgee to purchase at the sale, where such purchase would be invalid if made without the pledgor's consent.<sup>51</sup>

**Relief against judgment.** The pledgor, on paying the amount of a judgment on the principal debt into court, will be entitled to an order that no execution issue until the return of the collateral.<sup>52</sup> He will not be entitled to enjoin execution on the judgment on the mere allegation of irregularities in the enforcement of the collateral.<sup>53</sup>

## § 56. Sale of Pledged Property

Questions relating to the sale of pledged property as a means of enforcing the pledge are discussed infra §§ 57-66.

Examine Pocket Parts for later cases.

## § 57. — Right and Duty to Sell

- a. Right to sell
- b. Duty to sell

### a. Right to Sell

- (1) In general
- (2) Nature and extent of right in general
- (3) As to choses in action pledged
- (4) By and against whom right enforceable
- (5) Waiver or loss of right

#### (1) In General

As a general rule, on default of the pledgor on the principal debt or obligation, it becomes the right and the privilege of the pledgee to sell the pledged property without judicial process.

The old rule required a judicial decree to warrant a sale by the pledgee unless there was a special agreement to the contrary;<sup>54</sup> but, except in some jurisdictions where the pledge consists of a chose in action, it has long been a well settled rule that, on default by the pledgor in the performance of the principal obligation and in the absence of a special agreement to the contrary, it becomes the right and the privilege of the pledgee, in order to satisfy the debt or obligation, to sell the pledged property<sup>55</sup>

49. Mont.—Rock Island Plow Co. v. Cut Bank Implement Co., 53 P.2d 116, 101 Mont. 117.

#### Credit for remaining collateral

Pa.—National Bank of Fayette County v. Valentich, Com.Pl., 4 Fay.L.J. 155, affirmed 22 A.2d 724, 343 Pa. 132.

50. Ga.—Rylee v. Statham Bank, 67 S.E. 383, 7 Ga.App. 489.

51. Miss.—Ebochs-Flowers, Limited, v. Bank of Forest, 157 So. 711, 172 Miss. 36, suggestion of error overruled 159 So. 407, 172 Miss. 36.

52. Kan.—Semple, etc., Mfg. Co. v. Detwiler, 2 P. 511, 30 Kan. 386.

53. Tex.—Carpenter v. Sanborn, Civ. App., 25 S.W. 36, 49 C.J. p 993 note 94.

54. N.Y.—Cole v. Manufacturers Trust Co., 299 N.Y.S. 418, 164 Misc. 741, 49 C.J. p 994 note 96.

55. U.S.—Faivret v. First Nat. Bank in Richmond, C.C.A.Cal., 160 F.2d 827—Goldstein v. Rusch, C. C.A.N.Y., 56 F.2d 10, certiorari denied 53 S.Ct. 9, 287 U.S. 604, 77 L.Ed. 526—In re Henry, D.C.Pa., 50 F.2d 453—Byland v. Miller, D. C.Ky., 13 F.Supp. 137.

Ala.—De Merville v. Merchants &

Farmers Bank of Greene County, 186 So. 704, 237 Ala. 347.

N.J.—Moss Industries v. Irving Metal Co., 61 A.2d 159, 142 N.J. Eq. 704—Sokoloff v. Wildwood Pier & Realty Co., 155 A. 125, 108 N.J.Eq. 362, affirmed 166 A. 218, 113 N.J.Eq. 159.

N.Y.—In re Kiamie's Estate, 76 N. Y.S.2d 684, 191 Misc. 179—Cole v. Manufacturers Trust Co., 299 N.Y. S. 418, 164 Misc. 741—First Trust & Deposit Co. v. Potter, 278 N.Y. S. 847, 155 Misc. 106.

Pa.—In re Geissler's Estate, Orph., 35 Berks Co. 145, 57 York Leg.Rec. 2.

S.C.—Rayfield v. Bank of Chesterfield, 180 S.E. 885, 177 S.C. 175.

Tenn.—Wilson v. Hayes, 193 S.W.2d 107, 29 Tenn.App. 49.

Tex.—Hurlock v. Mitchell, Civ.App., 98 S.W.2d 1005, error dismissed.

Wash.—Corpus Juris cited in Kolstad v. Younglove Grocery Co., 201 P.2d 142, 144, 32 Wash.2d 212, 49 C.J. p 994 note 99.

#### Lien law inapplicable

A pledgee's contract right to sell collateral pledged to secure loan without notice to defaulting pledgor is not governed by statute relating to sale of personalty to satisfy lien.—In re Kiamie's Estate, 76 N.Y.S. 2d 684, 191 Misc. 179.

#### Sale of pledge after resort to principal security

(1) A creditor, making no attempt to secure personal judgment against debtor for unpaid balance of debt after resorting to principal security therefor by exercising power of sale in trust deed of realty, but merely seeking to realize on additional security held under pledge agreement and another trust deed, need not bring action under statute for personal deficiency judgment against debtor.—Hatch v. Security-First Nat. Bank of Los Angeles, 120 P.2d 869, 19 Cal.2d 254.

(2) The statute is concerned only with actions to recover deficiency judgments after exhaustion of security, and sales of personalty and realty under pledge agreement and trust deed, given by individuals as additional security for estate's indebtedness principally secured by prior trust deed, were not invalid because of failure to sue for deficiency judgment after resort to principal security.—Hatch v. Security-First Nat. Bank of Los Angeles, supra.

#### Power to option

While a power of sale does not ordinarily include a power to option, since the granting of an option to purchase precludes exercise of the power of sale while option lasts, a

without judicial process,<sup>56</sup> provided he complies with conditions designed to protect the rights of the pledgor,<sup>57</sup> unless the character of the property is such as to raise a presumption that the parties intended that it should be used in some other way to raise money, if necessary,<sup>58</sup> or other matter renders it inequitable to make a sale.<sup>59</sup> Under some statutes the pledgee cannot sell the property in the absence of a special power of sale.<sup>60</sup> Under other statutes, unless the pledgor consents to the sale, the pledgee cannot sell the pledged property except by judicial process after he has obtained a judgment against the pledgor.<sup>61</sup>

Sales of pledges are frequently controlled by the law applicable to mortgages.<sup>62</sup>

## (2) Nature and Extent of Right in General

The right to sell may be given expressly by the contract of pledge, but it also exists as an incident to, or as implied from, the contract independently of any provision. It can be exercised only to satisfy a debt in default which the property was pledged to secure.

The right to sell the property, on default, is sometimes expressly conferred by the contract of

pledge,<sup>63</sup> in which case the terms of the contract are binding on the parties and must be strictly pursued;<sup>64</sup> but an agreement by which the pledgee binds himself not to dispose of the collateral will usually be construed so as not to deprive him of the right to sell after default.<sup>65</sup> Even in the absence of a provision for sale in the contract, the right of the pledgee to sell exists as an incident to, or as implied from, the contract of pledge and as a part of the security,<sup>66</sup> unless an express agreement to the contrary is affirmatively shown.<sup>67</sup> The pledgee may sell the property as his own<sup>68</sup> or have another dispose of it for his benefit;<sup>69</sup> and the property may be sold whether it belongs to the pledgor or to another who pledged it for his security.<sup>70</sup> The pledged property may be sold only in satisfaction of a debt in default, which it was pledged to secure;<sup>71</sup> and, where the property is of a divisible nature, only as much thereof may be sold as is necessary to satisfy the debt,<sup>72</sup> unless the contract expressly authorizes a sale of all, if any part of the liability is unpaid.<sup>73</sup> Where other property is substituted for the original pledge, the right to sell attaches to the substituted property.<sup>74</sup>

pledgee with power of sale may resort to other lawful means of realizing on pledged collateral, even though pledge contract expressly authorizes sale only, and his power of sale must be interpreted with eye to its purpose and should carry such incidental powers, including power to option, as make for advantage of both parties to pledge.—*Buder v. New York Trust Co.*, C.C.A.N.Y., 82 F.2d 168, 104 A.L.R. 1035.

56. U.S.—*Falvret v. First Nat. Bank* in Richmond, C.C.A.Cal., 160 F.2d 827.

N.Y.—*First Trust & Deposit Co. v. Potter*, 278 N.Y.S. 847, 155 Misc. 106.

Tex.—*Hurlock v. Mitchell*, Civ.App., 98 S.W.2d 1005, error dismissed—*Celada v. Mathias*, Civ.App., 269 S.W. 459.

Wash.—*Corpus Juris* cited in *Kolstad v. Younglove Grocery Co.*, 201 P.2d 142, 144, 32 Wash.2d 212.

57. Wash.—*Kolstad v. Younglove Grocery Co.*, 201 P.2d 142, 32 Wash.2d 212.

58. Tex.—*King v. Texas Banking, etc., Co.*, 58 Tex. 669.

59. Ala.—*Persons v. Russell*, 103 So. 543, 212 Ala. 506.

Md.—*Corpus Juris* cited in *Miller v. Horowitz*, 191 A. 906, 913, 172 Md. 419.

60. Ariz.—*Babbitt Bros. Trading Co. v. Flagstaff First Nat. Bank*, 261 P. 45, 32 Ariz. 538.

61. In Louisiana

A pledgee in order to sell prop-

erty legally to satisfy debt for which it was pledged must do so by means of legal process unless the pledgor authorizes its sale otherwise.—*Rembert v. Fenner & Beane*, 177 So. 247, 188 La. 385—49 C.J. p 994 note 8 [a].

62. Ala.—*Coleman v. Solomon*, 143 So. 576, 225 Ala. 407.

63. N.Y.—*Corpus Juris* cited in *Cole v. Manufacturers Trust Co.*, 299 N.Y.S. 418, 425, 164 Misc. 741. 49 C.J. p 994 note 9.

64. Ind.—*Eppert v. Lowish*, 168 N. E. 616, 91 Ind.App. 231, rehearing denied 169 N.E. 884, 91 Ind.App. 231.

N.Y.—*Cole v. Manufacturers Trust Co.*, 299 N.Y.S. 418, 164 Misc. 741.

Sale for nonpayment of debt at maturity

Express authority in a collateral note to sell the collateral for nonpayment of the debt at maturity excluded any authority to sell it at any other time unless specifically authorized by other provisions of the contract.—*Rocco v. Peoples Nat. Bank of Ellwood City*, 28 A.2d 363, 150 Pa.Super. 348.

65. N.Y.—*Kalley v. Root*, 77 N.Y.S. 431, 74 App.Div. 499.

66. Miss.—*Trenholm v. Miles*, 59 So. 930, 102 Miss. 835, Ann.Cas. 1915A 1079.

49 C.J. p 995 note 12.

67. Tex.—*King v. Texas Banking, etc., Co.*, 58 Tex. 669.

68. U.S.—*Corpus Juris* cited in

*Falvret v. First Nat. Bank* in Richmond, C.C.A.Cal., 160 F.2d 827. Or.—*Proebstel v. Trout*, 118 P. 551, 60 Or. 145.

69. U.S.—*Corpus Juris* cited in *Falvret v. First Nat. Bank* in Richmond, C.C.A.Cal., 160 F.2d 827, 831.

Or.—*Proebstel v. Trout*, 118 P. 551, 60 Or. 145.

70. N.Y.—*Greene v. Faber*, 143 N.Y. S. 27, 158 App.Div. 149.

71. U.S.—*Buffum v. Peter Barceloux Co.*, D.C.Cal., 51 F.2d 80, reversed on other grounds, C.C.A., *Peter Barceloux Co. v. Buffum*, 61 F.2d 145, reversed on other grounds *Buffum v. Peter Barceloux Co.*, 53 S.Ct. 539, 289 U.S. 227, 77 L.Ed. 1140—*Buffum v. Gelinas*, D.C.Cal., 51 F.2d 80, reversed on other grounds, C.C.A., *Gelinas v. Buffum*, 52 F.2d 598, modified on other grounds 67 F.2d 380, certiorari denied *Buffum v. Gelinas*, 54 S.Ct. 454, 291 U.S. 670, 78 L.Ed. 1060.

49 C.J. p 995 note 17.

72. Ala.—*Whitlock v. Heard*, 13 Ala. 776, 48 Am.D. 73.

Ark.—*Fitzgerald v. Blocher*, 32 Ark. 742, 29 Am.R. 3.

73. Cal.—*Fisher v. Long Beach Exch. Nat. Bank*, 188 P. 1033, 46 Cal.App. 191.

49 C.J. p 995 note 19.

74. Pa.—*Appeal of Jeanes*, 11 A. 862, 116 Pa. 573, 2 Am.S.R. 624.

*Remedy against right.* The only remedy against such a sale is to redeem the pledge.<sup>75</sup> An offer to redeem does not affect the right to sell where such offer is not accompanied by an appropriate tender.<sup>76</sup>

### (3) As to Choses in Action Pledged

In some jurisdictions commercial paper held in pledge may be sold, but generally such paper or choses in action, with certain exceptions, may not be sold in the absence of express authorization but must be held and collected as they become due.

In a few jurisdictions the doctrine prevails that a pledgee, on default of the pledgor, may sell commercial paper which he holds in pledge;<sup>77</sup> but, in most jurisdictions, as an exception to his right to sell on default, a pledgee who holds commercial paper or other choses in action other than stocks and bonds of a corporation and the like may not, on the pledgor's default, sell them for the purpose of satisfying his debt or obligation,<sup>78</sup> unless he is expressly authorized to do so;<sup>79</sup> but must hold and collect them as they become due, and apply the proceeds to the payment of the debt secured.<sup>80</sup> This rule has been expressly enacted by some statutes, but such a provision is for the benefit of the pledgor who may waive it.<sup>81</sup> Where, however, bonds having a long time to run are pledged as security for a short-time loan, it would be unreasonable to require the pledgee to wait until their maturity to realize on his security and he may accordingly sell them at public auction on default and notice.<sup>82</sup> It has also been held that, where a debtor pledges his own mortgage bond as collateral security, the

pledgee, having the right to receive and hold such a pledge, with the power to sell, has also the right to exercise such power.<sup>83</sup>

### (4) By and against Whom Right Enforceable

The right of sale may be enforced by the pledgee or his assignee, or personal representative, against the pledgor, his receiver, or other person claiming through the pledgor.

The right of sale may be enforced not only by the pledgee but also by his assignee,<sup>84</sup> unless restricted by positive stipulation;<sup>85</sup> and on his death it survives to his personal representatives.<sup>86</sup> Where all the preliminaries are performed in the name of the pledgee, the mere act of selling may be performed through an agent;<sup>87</sup> but the power to make the sale cannot be delegated by the pledgee to another, unless the contract so provides.<sup>88</sup>

*Against whom.* The right to sell pledged property may be enforced not only against the pledgor,<sup>89</sup> but also against the receiver,<sup>90</sup> or the assignee of the pledgor for the benefit of creditors,<sup>91</sup> and all other persons claiming through the pledgor.<sup>92</sup>

### (5) Waiver or Loss of Right

- (a) In general
- (b) Revocation of power of sale

#### (a) In General

The pledgee may waive his right to sell the pledged property on default.

75. La.—Union Nat. Bank v. Forsyth, 23 So. 917, 50 La. Ann. 770. 49 C.J. p 996 note 31.

76. R.I.—Potter v. Thompson, 10 R.I. 1.

77. R.I.—Potter v. Thompson, 10 R.I. 1. 49 C.J. p 996 note 24.

78. Ariz.—California Bank v. Daniel, 288 P. 7, 36 Ariz. 549.

Fla.—Gables Racing Ass'n v. Persky, 156 So. 392, 116 Fla. 77.

Ill.—Corn Belt Bank of Bloomington v. Forman, 264 Ill. App. 589.

Ky.—Erlanger Citizens Bank v. Williams, 151 S.W.2d 381, 286 Ky. 492.

N.Y.—Berwin v. Newman, 85 N.Y.S. 2d 568, affirmed 95 N.Y.S.2d 596, 276 App. Div. 994. 49 C.J. p 996 note 26.

79. Ariz.—California Bank v. Daniel, 288 P. 7, 36 Ariz. 549.

Ill.—Corn Belt Bank of Bloomington v. Forman, 264 Ill. App. 589.

Ky.—Erlanger Citizens Bank v. Williams, 151 S.W.2d 381, 286 Ky. 492. 49 C.J. p 996 note 27.

*Stipulation in pledge contract giving*

*pledgee right to sell collateral was valid.*—Union Trust Co. of Pittsburgh v. Long, 164 A. 346, 309 Pa. 470.

80. Ky.—Erlanger Citizens Bank v. Williams, 151 S.W.2d 381, 286 Ky. 492. 49 C.J. p 996 note 28.

81. Cal.—Johnson v. Mortgage Guarantee Co., 4 P.2d 208, 117 Cal. App. 416. 49 C.J. p 996 note 30.

82. U.S.—Guaranty Trust Co. v. Galveston City R. Co., Tex., 87 F. 813, 31 C.C.A. 235. 49 C.J. p 996 note 31.

83. U.S.—Rogers Brown & Co. v. Tindel Morris Co., D.C.Pa., 271 F. 475.

84. N.Y.—Fairchild Sons v. Gescus, 285 N.Y.S. 49, 246 App. Div. 843. 49 C.J. p 996 note 34.

85. N.Y.—Brown v. Ward, 10 N.Y. Super. 660, 9 How. Pr. 197. Tex.—King v. Texas Banking, etc., Co., 58 Tex. 669.

#### Designated person

Power of sale given designated person cannot be delegated, unless so provided, expressly or by plain implication, in instrument giving it.—Lewis v. Valley Finance Corporation, Tex. Civ. App., 17 S.W.2d 138, error refused.

86. N.H.—Chapman v. Gale, 32 N.H. 141.

87. U.S.—McDougall v. Hazleton Tripod-Boller Co., Tenn., 88 F. 217, 31 C.C.A. 487. 49 C.J. p 996 note 37.

88. Tex.—Lewis v. Valley Finance Corp., Civ. App., 17 S.W.2d 138—Hazleton v. Holt, Civ. App., 285 S.W. 1115.

89. Mass.—Union Cattle Co. v. International Trust Co., 21 N.E. 962, 149 Mass. 492.

90. Ohio.—Harrison v. Friend, 1 Ohio S. & C.P. 258, 1 Ohio N.P. 39.

91. La.—Rasch v. His Creditors, 1 La. Ann. 31.

N.H.—Chapman v. Gale, 32 N.H. 141.

92. Tex.—Vander Stucken v. Willoughby, Civ. App., 242 S.W. 478. 49 C.J. p 996 note 42.

A pledgee may waive his right to sell the pledged property on default of the pledgor,<sup>93</sup> and the waiver requires no new or independent consideration to support it.<sup>94</sup> The waiver may be express or implied,<sup>95</sup> and may arise from the pledgee's act in extending the time for payment of the principal debt,<sup>96</sup> except where it is apparent from the circumstances of the extension for an indefinite time that no waiver was intended.<sup>97</sup> The pledgee's right of sale is not waived or lost by the pledgor's assignment of the pledged property to a third person,<sup>98</sup> even though the pledgee has notice thereof;<sup>99</sup> nor is it merged in a judgment obtained on the principal debt.<sup>1</sup>

### (b) Revocation of Power of Sale

The right to sell is a power coupled with an interest and is not revocable at the will of the pledgor.

The right of the pledgee to sell is not a mere

naked power,<sup>2</sup> but is a power coupled with an interest,<sup>3</sup> and as such is not revocable at the will of the pledgor;<sup>4</sup> nor is it revoked by the pledgor's insolvency, or bankruptcy,<sup>5</sup> or death.<sup>6</sup>

### b. Duty to Sell

While the pledgee has the right to sell, in the absence of a special agreement, he may or may not sell at his option, and the pledgor cannot make it the duty of the pledgee to sell by directing or requesting him to do so.

Although the pledgee, for the pledgor's default, is entitled to sell the collateral, in the absence of a special agreement, he may or may not sell at his option,<sup>7</sup> and is under no legal obligation to make a sale,<sup>8</sup> and is not liable for a depreciation in value of the property after the failure to sell;<sup>9</sup> but is liable only for damages resulting from bad faith<sup>10</sup> or negligence.<sup>11</sup>

93. Ky.—National Bank of Kentucky v. Gallagher, 49 S.W.2d 1006, 243 Ky. 740.

N.Y.—First Trust & Deposit Co. v. Potter, 278 N.Y.S. 847, 155 Misc. 106.

49 C.J. p 996 note 44.

94. N.Y.—First Trust & Deposit Co. v. Potter, supra.

49 C.J. p 996 note 45.

95. N.Y.—First Trust & Deposit Co. v. Potter, supra.

96. N.Y.—Toplitz v. Bauer, 55 N.E. 1059, 161 N.Y. 325—Wyckoff v. Riverside Bank, 119 N.Y.S. 937, 135 App.Div. 400, affirmed 97 N.E. 1119, 204 N.Y. 561.

97. Ky.—Louisville Banking Co. v. W. H. Thomas, etc., Co., 68 S.W. 2, 24 Ky.Law 115, 69 S.W. 1073, 24 Ky.Law 811.

49 C.J. p 996 note 47.

98. Tex.—Vander Stucken v. Willoughby, Civ.App., 242 S.W. 478.

99. Tex.—Vander Stucken v. Willoughby, supra.

1. Pa.—Elbert v. Moffly, 2 Pa.Co. 71.

2. Ill.—De Wolf v. Pratt, 42 Ill. 198.

3. N.Y.—In re Kiamie's Estate, 76 N.Y.S.2d 684, 191 Misc. 179—In re Tabbagh's Estate, 3 N.Y.S.2d 542, 167 Misc. 156.

Ill.—De Wolf v. Pratt, 42 Ill. 198.

4. N.Y.—In re Kiamie's Estate, 76 N.Y.S.2d 684, 191 Misc. 179—In re Tabbagh's Estate, 3 N.Y.S.2d 542, 167 Misc. 156.

Ill.—De Wolf v. Pratt, 42 Ill. 198.

5. La.—Renshaw v. His Creditors, 3 So. 403, 40 La.Ann. 37—Jacquet v. His Creditors, 38 La.Ann. 863.

6. N.Y.—In re Kiamie's Estate, 76 N.Y.S.2d 684, 191 Misc. 179—In re

Tabbagh's Estate, 3 N.Y.S.2d 542, 167 Misc. 156.

49 C.J. p 997 note 56.

7. Ga.—First Nat. Bank v. Hattaway, 158 S.E. 565, 172 Ga. 731, 77 A.L.R. 375.

La.—Corpus Juris quoted in Kottmann v. Audubon Homestead Ass'n, App., 171 So. 598, 600.

N.J.—Corpus Juris quoted in Franklin Trust Co. v. Goerke, 185 A. 39, 40, 116 N.J.Law 529.

N.Y.—First Trust & Deposit Co. v. Potter, 278 N.Y.S. 847, 155 Misc. 106.

Wis.—Corpus Juris cited in First Wisconsin Nat. Bank in Milwaukee v. Pierce, 278 N.W. 451, 456, 227 Wis. 581.

49 C.J. p 997 note 59.

8. Ga.—First Nat. Bank v. Hattaway, 158 S.E. 565, 172 Ga. 731, 77 A.L.R. 375.

Ky.—Corpus Juris cited in Smith v. American & Scottish Inv. Co., 71 S.W.2d 441, 442, 254 Ky. 211—Corpus Juris cited in National Bank of Kentucky v. Gallagher, 49 S.W.2d 1006, 1008, 243 Ky. 740.

La.—Corpus Juris quoted in Kottmann v. Audubon Homestead Ass'n, App., 171 So. 598, 600.

Miss.—Hudson v. Belzoni Equipment Co., 33 So.2d 796, 203 Miss. 212.

N.J.—Corpus Juris quoted in Franklin Trust Co. v. Goerke, 185 A. 39, 40, 116 N.J.Law 529.

N.Y.—Conlew, Inc., v. Newman, 270 N.Y.S. 695, 240 App.Div. 511—First Trust & Deposit Co. v. Potter, 278 N.Y.S. 847, 155 Misc. 106.

Pa.—National Bank of Fayette County v. Valentich, 22 A.2d 724, 343 Pa. 132.

Tex.—Krackau v. Abe B. Freeman, Civ.App., 60 S.W.2d 853, error dismissed.

Wis.—Corpus Juris cited in First Wisconsin Nat. Bank of Milwaukee v. Pierce, 278 N.W. 451, 456, 227 Wis. 581.

49 C.J. p 997 note 60.

Agreement to sell held not shown

N.Y.—Conlew, Inc., v. Newman, 270 N.Y.S. 695, 240 App.Div. 511.

9. Ga.—First Nat. Bank v. Hattaway, 158 S.E. 565, 172 Ga. 731, 77 A.L.R. 375.

Ky.—Corpus Juris cited in National Bank of Kentucky v. Gallagher, 49 S.W.2d 1006, 1008, 243 Ky. 740.

La.—Corpus Juris quoted in Kottmann v. Audubon Homestead Ass'n, App., 171 So. 598, 600.

N.J.—Corpus Juris quoted in Franklin Trust Co. v. Goerke, 185 A. 39, 40, 116 N.J.Law 529.

N.Y.—First Trust & Deposit Co. v. Potter, 278 N.Y.S. 847, 155 Misc. 106.

49 C.J. p 997 note 61.

10. Ky.—Corpus Juris cited in National Bank of Kentucky v. Gallagher, 49 S.W.2d 1006, 1008, 243 Ky. 740.

N.J.—Corpus Juris quoted in Franklin Trust Co. v. Goerke, 185 A. 39, 40, 116 N.J.Law 529.

N.Y.—First Trust & Deposit Co. v. Potter, 278 N.Y.S. 847, 155 Misc. 106—Field v. Leavitt, 37 N.Y.Super. 215.

11. Ky.—Corpus Juris cited in National Bank of Kentucky v. Gallagher, 49 S.W.2d 1006, 1008, 243 Ky. 740.

Mich.—Melvindale State Bank v. Eckfeld, 277 N.W. 876, 283 Mich. 179.

N.J.—Corpus Juris quoted in Franklin Trust Co. v. Goerke, 185 A. 39, 40, 116 N.J.Law 529.

49 C.J. p 997 note 63.

A contract of pledge which contains a stipulation authorizing the pledgee to sell does not deprive him of his option to sell or not as he sees fit.<sup>12</sup> If there is a stipulation that the pledgee shall sell within a specified time after default, it is his duty to do so,<sup>13</sup> and his failure in this constitutes a breach of duty for which he is liable in damages to the pledgor,<sup>14</sup> without any previous notice or demand by the pledgor.<sup>15</sup>

*Where pledgor requests pledgee to sell.* Where there is no contract varying the powers and duties of the parties, as a general rule the pledgor cannot make it the duty of the pledgee to sell by directing or requesting him to do so.<sup>16</sup>

## § 58. — Demand of Payment, and Notice to Redeem

### a. Necessity

### b. Sufficiency

12. Tex.—*Adoue v. Hutches*, 75 S. W. 41, 32 Tex.Civ.App. 559.  
49 C.J. p 997 note 64.

13. Ala.—*Montgomery Bank, etc., Co. v. Kelly*, 81 So. 612, 202 Ala. 656.  
49 C.J. p 997 note 65.

14. Ala.—*Montgomery Bank, etc., Co. v. Kelly*, supra.  
Tex.—*Adoue v. Hutches*, 75 S.W. 41, 32 Tex.Civ.App. 559.

15. Ala.—*Montgomery Bank, etc., Co. v. Kelly*, 81 So. 612, 202 Ala. 656.

16. Ga.—*Corpus Juris* quoted in *First Nat. Bank of Blakely v. Hattaway*, 156 S.E. 565, 567, 172 Ga. 731, 77 A.L.R. 375.

Ky.—*Corpus Juris* cited in *National Bank of Kentucky v. Gallagher*, 49 S.W.2d 1006, 1008, 243 Ky. 740.  
Miss.—*Hudson v. Belzoni Equipment Co.*, 33 So.2d 796, 203 Miss. 212.  
N.J.—*Franklin Trust Co. v. Goerke*, 185 A. 39, 116 N.J.Law 529.

N.Y.—*Conlew, Inc. v. Newman*, 270 N.Y.S. 695, 240 App.Div. 511.  
Pa.—*National Bank of Fayette County v. Valentich*, 22 A.2d 724, 343 Pa. 132.  
49 C.J. p 997 note 68.

### Request for return of security

Under some collateral agreements, pledgor of security may notify the pledgee to sell and apply the security to the debt for which it was pledged, but pledgor has no action against an unaccommodating pledgee because of the latter's refusal to grant a request to return the security so that it may be sold, and the fact that holder of note, with whom stocks were pledged by indorsers as security, refused to permit sale of security and its application on debt

and waited four years thereafter before attempting foreclosure of security, did not affect holder's rights against indorsers.—*Hoyt v. Upper Marion Ditch Co.*, 76 P.2d 234, 94 Utah 134.

17. N.J.—*Corpus Juris* cited in *Paine v. Jersey Central Power & Light Co.*, 174 A. 495, 497, 12 N.J. Misc. 739.

N.Y.—*Joseph T. Ryerson & Son v. A. V. O'Donnell, Inc.*, 1 N.Y.S.2d 608, 253 App.Div. 1, reversed on other grounds 17 N.E.2d 783, 279 N.Y. 109, reargument denied *Joseph T. Ryerson & Sons v. Shapiro*, 18 N.E.2d 870, 279 N.Y. 789—*First Trust & Deposit Co. v. Potter*, 278 N.Y.S. 847, 155 Misc. 106.

Pa.—*Heimpel v. First Nat. Bank & Trust Co. of Bethlehem*, Com.Pl., 27 North.Co. 229.  
49 C.J. p 997 note 69.

18. U.S.—*Bell v. Mills*, Cal., 123 F. 24, 59 C.C.A. 104.

19. N.Y.—*Milliken v. Dehon*, 27 N.Y. 364.  
49 C.J. p 998 note 71.

20. Mo.—*Allen v. Bagley*, 133 S.W. 2d 1027, 234 Mo.App. 891.

N.J.—*Corpus Juris* cited in *Paine v. Jersey Central Power & Light Co.*, 174 A. 495, 497, 12 N.J. Misc. 739.

Pa.—*Heimpel v. First Nat. Bank & Trust Co. of Bethlehem*, 12 A.2d 28, 337 Pa. 425.

Tenn.—*Wilson v. Hayes*, 193 S.W.2d 107, 29 Tenn.App. 49.  
49 C.J. p 998 note 72.

21. Pa.—*Heimpel v. First Nat. Bank & Trust Co. of Bethlehem*, 12 A.2d 28, 337 Pa. 425—*In re Hendrick's Estate*, Orph., 9 Sch. Reg. 200.  
49 C.J. p 998 note 73.

### a. Necessity

As a general rule, before selling collateral the pledgee must demand payment and give reasonable notice and opportunity for redemption of the pledge.

As a general rule the pledgee is not entitled to sell the collateral on default in the payment of the principal debt by the pledgor until he has demanded payment of the pledgor,<sup>17</sup> or of his personal representative,<sup>18</sup> or authorized agent;<sup>19</sup> and has given him reasonable notice and opportunity to redeem the pledge.<sup>20</sup> A demand for payment is required, although the debt is payable presently and without demand,<sup>21</sup> and although the pledge agreement stipulates that the pledgee may sell at public or private sale without notice to the pledgor.<sup>22</sup>

Such a demand and notice to redeem, however, are not necessary where the pledgor has expressly agreed that the pledgee may sell without demand<sup>23</sup>

### Demand for payment or additional collateral

(1) Where demand note provided for calls by payee for additional collateral and sale of collateral deposited "upon default of payment at maturity . . . without any previous demand, advertisement or notice," the note itself indicated that a demand either for payment or for additional collateral was contemplated by the parties as essential before conferring on payee the right to sell the collateral.—*Heimpel v. First Nat. Bank & Trust Co. of Bethlehem*, 12 A.2d 28, 337 Pa. 425.

(2) Debtor's payment in advance, of interest to date of maturity, did not deprive creditor of right to accelerate maturity under note permitting acceleration if security should become unsatisfactory.—*Atkinson v. Bank of Manhattan Trust Co.*, C.C.A.Wis., 69 F.2d 735.

22. N.Y.—*Wilson v. Little*, 2 N.Y. 443, 51 Am.D. 307.

49 C.J. p 998 note 74.

23. N.Y.—*Fairchild Sons v. Gesecus*, 285 N.Y.S. 49, 246 App.Div. 843.

49 C.J. p 998 note 75.

### Assignee

Judgment requiring assignee of pledgee, who had executed satisfaction of mortgage given as collateral, to assign mortgage to pledgor, on payment of pledgor's indebtedness, with authorization to pledgee's assignee to sell mortgage after notice in event of pledgor's failure to make payment, should be modified by striking out provision for notice, where collateral agreement authorized sale of collateral on default without notice or demand.—*Fairchild Sons v. Gesecus*, 285 N.Y.S. 49, 246 App.Div. 843.

or has otherwise waived demand.<sup>24</sup> It has also been held that, where the debt is payable at a fixed date, unless it has been indefinitely extended,<sup>25</sup> a demand of payment before sale is not necessary<sup>26</sup> provided notice of the sale is given,<sup>27</sup> since such notice is regarded as equivalent to a demand.<sup>28</sup>

*Inability to make demand.* The inability of the pledgee to make a demand does not entitle him to sell without a demand,<sup>29</sup> but, as discussed *infra* § 67, the disposition of the pledge should be authorized and sanctioned by judicial proceedings.

#### b. Sufficiency

No particular formality is required in making a demand for payment.

In making a demand of payment of the pledgor it is not necessary that the word "demand" be used;<sup>30</sup> it is sufficient that any means be used to press and urge the pledgor to pay the debt secured<sup>31</sup> or that the pledgee signifies to the pledgor his desire for payment in such a manner as to be equivalent to a request.<sup>32</sup> It is not essential to such demand that the collateral be there produced or be shown to be in the possession of the pledgee.<sup>33</sup>

### § 59. — Notice of Sale

#### a. Necessity

#### b. To whom given

#### c. Requisites and sufficiency

#### d. Waiver

#### a. Necessity

##### (1) To pledgor

##### (2) To public

##### (1) To Pledgor

Where default continues after demand and notice to redeem, the pledgee, as a general rule, must, before sale, give the pledgor reasonable notice of the time and place of sale, or such notice as may be required by the contract or by statute.

If, after a demand and notice to redeem, the pledgor continues in default, the pledgee, as a general rule, cannot make a valid sale of the collateral without first giving to the pledgor reasonable notice of the time and place of sale,<sup>34</sup> or the notice prescribed by statute,<sup>35</sup> or by the contract of pledge,<sup>36</sup> unless the giving of such notice is waived by the pledgor or is dispensed with by statute;<sup>37</sup> and some statutes expressly regulate the matter of giving such notice.<sup>38</sup> This rule is especially applicable where the pledgor has been led to believe that the collateral will not be sold without actual notice to him.<sup>39</sup> It has been said that notice of sale is required even though demand for payment may have been waived or become unnecessary.<sup>40</sup>

*Effect of failure to give notice.* A sale without reasonable or the prescribed notice to the pledgor,

24. W.Va.—*Highland v. Davis*, 195 S.E. 604, 119 W.Va. 501—*Berry v. Neuhardt*, 183 S.E. 858, 117 W.Va. 67—*First Nat. Bank v. Neuhardt*, 183 S.E. 859, 117 W.Va. 70—*Fisher v. Neuhardt*, 183 S.E. 861, 117 W.Va. 80.

49 C.J. p 998 note 76.

#### Definiteness of waiver

A note authorizing sale of collateral "upon the nonperformance of this promise," without demanding payment of note and without any advertisement, notice of intention to sell, or of time or place of sale, was sufficiently definite to constitute waiver of demand for payment.—*Berry v. Neuhardt*, 183 S.E. 858, 117 W.Va. 67.

25. Colo.—*Drake v. Pueblo Nat. Bank*, 96 P. 999, 44 Colo. 49.  
49 C.J. p 998 note 77.

26. Ill.—*State Nat. Bank v. Baker*, 21 N.E. 510, 128 Ill. 533, 4 L.R.A. 586.

49 C.J. p 998 note 78.

27. N.Y.—*Estes v. Perkins*, 121 N.Y.S. 714, 137 App.Div. 367.

28. Ala.—*Sharpe v. Birmingham Nat. Bank*, 7 So. 106, 87 Ala. 644.

29. Ind.—*Indiana, etc., R. Co. v. McKernan*, 24 Ind. 62.

N.Y.—*Strong v. National Mechanics' Banking Assoc.*, 45 N.Y. 718.

30. Iowa.—*Carson v. Iowa City Gas-Light Co.*, 45 N.W. 1068, 80 Iowa 638.

31. Iowa.—*Carson v. Iowa City Gas-Light Co.*, *supra*.  
49 C.J. p 999 note 84.

32. U.S.—*McDougall v. Hazelton Tripod-Boiler Co.*, Tenn., 88 F. 217, 31 C.C.A. 487.

33. Ill.—*Wing v. Beach*, 31 Ill.App. 78.

34. Ga.—*Evans v. Odum*, 183 S.E. 669, 52 Ga.App. 453.

N.J.—*Moss Industries v. Irving Metal Co.*, 61 A.2d 159, 142 N.J. Eq. 704—*Elrae Corporation v. Bankers' Trust Co.*, 148 A. 652, 105 N.J.Eq. 501, affirmed *Bankers' Trust Co. v. Second Nat. Bank*, 158 A. 343, 110 N.J.Eq. 64, and *Elrae Corporation v. Bankers' Trust Co.*, 158 A. 344, 110 N.J.Eq. 66.

N.Y.—*Joseph T. Ryerson & Son v. A. V. O'Donnell, Inc.*, 1 N.Y.S.2d 608, 253 App.Div. 1, reversed on other grounds 17 N.E.2d 788, 279 N.Y. 109, reargument denied *Joseph T. Ryerson & Sons v. Shapiro*, 18 N.E.2d 870, 279 N.Y. 789—*First*

*Trust & Deposit Co. v. Potter*, 278 N.Y.S. 847, 155 Misc. 106.

Tex.—*Hurlock v. Mitchell*, Civ.App., 98 S.W.2d 1005, error dismissed—*Forrest v. Gaines*, Civ.App., 21 S.W.2d 325, error dismissed.

Wash.—*Chambers v. Carlyon*, 62 P. 2d 726, 188 Wash. 352.

W.Va.—*Highland v. Davis*, 195 S.E. 604, 119 W.Va. 501.  
49 C.J. p 999 note 89.

35. Ala.—*Persons v. Russell*, 103 So. 543, 212 Ala. 506.

36. N.Y.—*Smith v. Craig*, 105 N.E. 798, 211 N.Y. 456, Ann.Cas.1915B 937.

37. U.S.—*Dibert v. Wernicke*, Ohio, 214 F. 673, 131 C.C.A. 109.  
49 C.J. p 999 note 93.

38. Ga.—*Halliday v. Stewart County Bank*, 37 S.E. 721, 112 Ga. 461—*Campbell v. Redwine*, 96 S.E. 347, 22 Ga.App. 455.  
49 C.J. p 999 note 94.

39. La.—*Smith v. Shippers' Oil Co.*, 45 So. 533, 120 La. 640.  
49 C.J. p 999 note 95.

40. N.J.—*Paine v. Jersey Central Power & Light Co.*, 174 A. 495, 12 N.J.Misc. 739.



as required by this rule, in the absence of waiver, is invalid,<sup>41</sup> and, as discussed *infra* § 63, constitutes a conversion of the property for which the pledgee is liable. Only the pledgor, however, may make objection to a failure to give notice.<sup>42</sup>

*A custom* that, under certain circumstances, the pledged property may be sold without notice cannot be availed of in direct variance to the general rule requiring notice.<sup>43</sup>

*Where title in pledgee.* Where the title to the property is in the pledgee, he may sell without notice independently of the contract of pledge.<sup>44</sup>

*Excuse for failure to give notice.* The inability of the pledgee to give notice of the time and place of sale does not entitle him to sell without notice<sup>45</sup> unless such inability has been caused by act of the pledgor.<sup>46</sup>

## (2) To Public

Where a public sale is required, the public must be given due notice.

Where, as discussed *infra* § 60, the sale is required to be made by public auction, notice thereof, by due advertisement, must also be given to the public.<sup>47</sup> Even where the pledge contract authorizes the pledgee to sell at public or private sale

without notice to the pledgor, notice by advertisement must be given to the public where the sale is made by public auction,<sup>48</sup> but not where a private sale is made.<sup>49</sup>

## b. To Whom Given

Generally the notice must be given to the pledgor personally, or to his proper representative, even though he is not the owner of the property pledged; and the owner in such case is not entitled to notice.

The notice of sale must be given to the pledgor in person<sup>50</sup> or to his authorized agent;<sup>51</sup> or in case of his death, to his personal representative.<sup>52</sup>

Where the pledgor is not the owner of the property pledged, the pledgor only is entitled to notice of sale,<sup>53</sup> and not the real owner of the property,<sup>54</sup> unless the pledgee has notice of his ownership.<sup>55</sup>

*A third person* who is not the owner of the pledged property is not entitled to notice of an intended sale thereof,<sup>56</sup> although he has an interest therein,<sup>57</sup> especially where the sale is made by direction of the owner.<sup>58</sup>

## c. Requisites and Sufficiency

Generally the notice must inform the pledgor that a sale is to be made, and the time and place of the sale; but, except as required by statute, no particular formality is necessary.

41. Ariz.—United Bank, etc., Co. v. Jones, 249 P. 747, 30 Ariz. 557.  
49 C.J. p 999 note 96.

42. Kan.—Water Power Co. v. Brown, 23 Kan. 676.  
49 C.J. p 1000 note 98.

43. N.Y.—Markham v. Jaudon, 41 N.Y. 235.

44. Ala.—Union Springs First Nat. Bank v. Blue, 101 So. 75, 20 Ala. App. 107.

45. N.Y.—Strong v. National Mechanics' Banking Assoc., 45 N.Y. 718.

46. R.I.—Potter v. Thompson, 10 R. I. 1.  
49 C.J. p 1003 note 55.

47. Ind.—Eppert v. Lowish, 168 N. E. 616, 91 Ind.App. 231, rehearing denied 169 N.E. 884, 91 Ind.App. 231.  
49 C.J. p 1000 note 3.

48. Pa.—Huntington Valley Trust Co. v. Norristown-Penn Trust Co., 196 A. 821, 329 Pa. 356—Corpus Juris quoted in Finley v. Insurance Finance Co., 163 A. 325, 327, 106 Pa.Super. 314.  
49 C.J. p 1000 note 4.

49. Idaho.—Mechanics, etc., Nat. Bank v. Pingree, 232 P. 5, 40 Idaho 118.

Tex.—Amarillo Nat. Bank v. Harrington, 131 S.W. 231, 62 Tex.Civ. App. 179.

50. Ariz.—Valley Nat. Bank v. Stewart, 89 P.2d 493, 53 Ariz. 328.  
N.Y.—Curtis v. Thomson, 2 N.Y.S.2d 418, 166 Misc. 870, affirmed 2 N.Y.S.2d 428, 253 App.Div. 806.  
49 C.J. p 1000 note 6.

### Purpose or object of notice

The purpose of notice to pledgor of sale of collateral by pledgee is to give pledgor an opportunity to redeem and to be present at sale to see that it is fairly conducted and that property is disposed of to best advantage.—*In re Kiamie's Estate*, 76 N.Y.S.2d 684, 191 Misc. 179—Jacobs v. National Bank of Far Rockaway, 13 N.Y.S.2d 60.

### Necessity for personal notice

Under the rule discussed in Notice § 18 c, that, where the giving of notice is required without provision as to the method, actual notice is essential, a statute requiring pledgor to be given written notice of public sale of pledged property by pledgee was not complied with and sale was void, where written notice was mailed to pledgor at his last known address instead of being delivered to him personally.—*Valley Nat. Bank v. Stewart*, 89 P.2d 493, 53 Ariz. 328.

51. N.Y.—Curtis v. Thomson, 2 N.Y.S.2d 418, 166 Misc. 870, affirmed 2 N.Y.S.2d 428, 253 App.Div. 806.  
49 C.J. p 1000 note 7.

52. U.S.—Bell v. Mills, Cal., 123 F. 24, 59 C.C.A. 104.

N.Y.—Buffalo German Ins. Co. v. Buffalo Third Nat. Bank, 43 N.Y.S. 550, 19 Misc. 564, affirmed 51 N.Y. S. 667, 29 App.Div. 137, reversed on other grounds 56 N.E. 521, 162 N.Y. 163, 48 L.R.A. 107.

53. N.Y.—Smith v. Savin, 36 N.E. 338, 141 N.Y. 315.

54. N.Y.—Smith v. Savin, *supra*.

55. N.Y.—Le Marchant v. Moore, 44 N.E. 770, 150 N.Y. 209.

56. La.—Alexandria Bank, etc., Co. v. Honeycutt, 108 So. 475, 161 La. 261.

Wis.—Livingston County Trust Co. v. Green Bay Canning Co., 234 N. W. 346, 204 Wis. 256.

Where principal's agent was indebted to drawee of principal's draft, proceeds of which agent embezzled, drawee selling agent's collateral was not liable to principal for amount received on resale of collateral under circumstances.—*Livingston County Trust Co. v. Green Bay Canning Co.*, 234 N.W. 346, 204 Wis. 256.

57. La.—Alexandria Bank, etc., Co. v. Honeycutt, 108 So. 475, 161 La. 261.

49 C.J. p 1000 note 13.

58. La.—Alexandria Bank, etc., Co. v. Honeycutt, *supra*.

The notice must inform the pledgor, or his agent or personal representative, that a sale is to be made of the pledged property,<sup>59</sup> and generally must inform him of the time and place of sale,<sup>60</sup> and must be given a reasonable time before sale so that the pledgor may have an opportunity to protect his interests.<sup>61</sup> The names of the pledgor and pledgee may be omitted if the pledgor understands that the property to be sold is his.<sup>62</sup>

Except where the manner in which the notice shall be given is prescribed by statute,<sup>63</sup> it is not required that the notice shall be given in a formal manner.<sup>64</sup> The notice must be of the character prescribed by the statute.<sup>65</sup> Except where public notice is required,<sup>66</sup> it is sufficient that notice is sent by mail to the pledgor's post office,<sup>67</sup> or is left at his place of business, in his absence, with a person in charge thereof,<sup>68</sup> or that knowledge that the sale is to be made is brought home to the pledgor.<sup>69</sup>

*Notice to the public*, when given, should be given

in the usual and customary manner for public sales at the place where the sale is to be made,<sup>70</sup> allowing sufficient time and stating sufficient facts to enable the public to make an intelligent investigation of the title and value of the pledged property to be sold.<sup>71</sup> Where such statements are not usual, it is not necessary for the notice to state that the property was pledged or that it was the property of the pledgor.<sup>72</sup>

#### d. Waiver

- (1) Of notice of sale
- (2) Of right to sell without notice

##### (1) Of Notice of Sale

The pledgor may waive his right to have notice of the sale, as by express stipulation in the contract of pledge.

The pledgor may waive his right to have notice of the sale<sup>73</sup> unless the statute requiring notice makes a waiver inoperative.<sup>74</sup> Such waiver may be made by the express consent of the pledgor to a sale with-

59. N.Y.—*Stewart v. Drake*, 46 N. Y. 449—*McCutcheon v. Dittman*, 48 N.Y.S. 380, 23 App.Div. 285, modified on other grounds 58 N.E. 97, 164 N.Y. 355.  
49 C.J. p 1000 note 15.

60. U.S.—*Bell v. Mills*, Cal., 123 F. 24, 59 C.C.A. 104.  
49 C.J. p 1000 note 16.

61. U.S.—*Jacoby v. Jacoby*, C.C.N. Y., 103 F. 473.  
49 C.J. p 1000 note 17.

62. R.I.—*Earle v. Grant*, 14 R.I. 228.

63. La.—*Andrews v. New Orleans City Bank*, 5 La. Ann. 737.  
49 C.J. p 1000 note 19.

64. R.I.—*Earle v. Grant*, 14 R.I. 228.

Va.—*Alexandria, etc., R. Co. v. Burke*, 22 Gratt. 254, 63 Va. 254.  
49 C.J. p 1001 note 20.

65. Ala.—*De Merville v. Merchants & Farmers Bank of Greene County*, 170 So. 756, 233 Ala. 204.

**Description of securities or property**  
(1) While special grant of power in mortgage to sell collateral authorized sale without notice at option of mortgagee, when mortgagee exercised option to sell with notice, statute, in absence of anything to the contrary in the power, prescribed character of notice to be given, that is, "such notice must describe the securities or property."  
—*De Merville v. Merchants & Farmers Bank of Greene County*, supra.

(2) A statement in mortgage foreclosure notice, that "all crops and personal property mortgages and

liens and claims for advances and rents of every kind and description for the year 1931 or prior thereto," was too indefinite to meet requirements of statute.—*De Merville v. Merchants & Farmers Bank of Greene County*, 170 So. 756, 233 Ala. 204.

66. Wash.—*Richardson v. Foster*, 170 P. 321, 100 Wash. 57.

67. D.C.—*U. S. Trust Co. v. Blundon*, 42 App.D.C. 500.  
49 C.J. p 1001 note 22.

**Letter mailed to improper address** with pledgee's knowledge was insufficient as notice to pledgor of time of sale of security.—*Elrae Corporation v. Bankers' Trust Co.*, 148 A. 652, 105 N.J.Eq. 501, affirmed *Bankers' Trust Co. v. Second Nat. Bank*, 158 A. 343, 110 N.J.Eq. 64, and *Elrae Corporation v. Bankers' Trust Co.*, 158 A. 344, 110 N.J.Eq. 66.

68. N.Y.—*Bryan v. Baldwin*, 7 Lans. 174, affirmed 52 N.Y. 232.

69. W.Va.—*Crawford v. Le Fevre*, 88 S.E. 1087, 78 W.Va. 73.  
49 C.J. p 1001 note 24.

70. Ind.—*Eppert v. Lowish*, 168 N. E. 616, 91 Ind.App. 231, rehearing denied 169 N.E. 884, 91 Ind.App. 281.

49 C.J. p 1001 note 26.

71. Ind.—*Eppert v. Lowish*, supra.

**Notice held defective**

Where pledge contract authorized sale of pledged bonds without advertising, four-day notice of public sale published in newspaper merely reciting number and amount of

bonds and company issuing them was defective, and purchase by assignee of pledge was conversion.—*Eppert v. Lowish*, supra.

72. U.S.—*Bell v. Mills*, Cal., 123 F. 24, 59 C.C.A. 104.

73. Cal.—*First Nat. Bank v. Landreth*, 16 P.2d 1010, 128 Cal.App. 138.

N.Y.—*In re Kiamie's Estate*, 76 N.Y. S.2d 684, 191 Misc. 179.

Pa.—*Read v. Pennsylvania Co. for Insurance on Lives and Granting Annuities*, 12 A.2d 925, 338 Pa. 389.

W.Va.—*Highland v. Davis*, 195 S. E. 604, 119 W.Va. 501—*First Nat. Bank v. Neuhardt*, 183 S.E. 859, 117 W.Va. 70—*Fisher v. Neuhardt*, 183 S.E. 861, 117 W.Va. 80—*Corpus Juris* cited in *Berry v. Neuhardt*, 183 S.E. 858, 859, 117 W.Va. 17.

49 C.J. p 1001 note 28.

**Waiver after ineffective notice**

Technically, a notice of sale could no longer effectively constitute public notice after adjournment, and a further notice by publication should have been given before actual date of sale but, where the pledgor specifically waived any right to object to the sale on such ground, he could not subsequently contend that the sale was improper because of any irregularity as to publication.—*General Phoenix Corp. v. Cabot*, 89 N.E. 2d 238, 300 N.Y. 87.

74. Fla.—*Scott v. National City Bank of Tampa*, 146 So. 573, 107 Fla. 818.

out notice,<sup>75</sup> notwithstanding a statutory provision authorizing a private sale and prescribing the notice to be given in such cases;<sup>76</sup> or it may be implied from the surrounding circumstances.<sup>77</sup>

**By express stipulation.** The general rule requiring a pledgee to give notice of the sale of the pledged property is subject to such other agreements as the parties may make;<sup>78</sup> and, unless there is a statutory provision to the contrary,<sup>79</sup> the right of the pledgor to notice of sale may be waived by an express stipulation to that effect in the contract of pledge;<sup>80</sup> and, where the pledgor, at the time of making the pledge, waives notice of sale, he may not, after the sale of the pledge, complain of want of notice;<sup>81</sup> nor in such a case is the pledgee bound to notify the pledgor of the grounds on which he exercises the power of sale.<sup>82</sup> A stipulation in the contract authorizing the pledgee to make a public or private sale has been held to authorize him to sell without notice of the time or place of sale;<sup>83</sup> but there is also some authority to the con-

trary.<sup>84</sup> A waiver stipulation that the pledged property may be sold either at public or private sale without notice applies only to notice to the pledgor of a private sale,<sup>85</sup> and, if the pledgee elects to sell at public sale, he must give public notice thereof.<sup>86</sup> Although the agreement provides for public or private sale without notice, where notice of public sale is given, the pledgor is entitled to assume that a public sale will be had.<sup>87</sup>

**Without further notice.** An agreement authorizing a sale, on default, without further notice, waives notice of the time and place of sale,<sup>88</sup> but not the pledgor's right to actual notice by demand for payment or otherwise.<sup>89</sup>

**By agent.** An agent of the pledgor who has only special authority to make the pledge has no authority to waive a statutory notice of sale.<sup>90</sup>

## (2) Of Right to Sell without Notice

A pledgee having been given the right to sell without notice may waive such right.

75. Vt.—Thomas v. Graves, 95 A. 643, 89 Vt. 339.

49 C.J. p 1001 note 29.

76. Mich.—Wilkes v. Allegan Fruit, etc., Co., 206 N.W. 483, 233 Mich. 215.

49 C.J. p 1001 note 30.

77. N.Y.—Smith v. Craig, 105 N.E. 798, 211 N.Y. 456, Ann.Cas.1915B 937—Jacobs v. National Bank of Far Rockaway, 13 N.Y.S.2d 60.

78. N.Y.—Smith v. Craig, 105 N.E. 798, 211 N.Y. 456, Ann.Cas.1915B 937.

79. Ariz.—Atlantic Nat. Bank v. Moore, 242 P. 1009, 29 Ariz. 468, 43 A.L.R. 1184.

80. U.S.—Ulling v. Fink, C.C.A.Pa., 141 F.2d 58—Jones v. Kineo Trust Co., D.C.Me., 45 F.2d 795—In re Starks, D.C.Pa., 55 F.Supp. 66.

Ky.—Judy v. White, 38 S.W.2d 444, 238 Ky. 547.

N.Y.—In re Kiamie's Estate, 76 N.Y. S.2d 684, 191 Misc. 179—Jacobs v. National Bank of Far Rockaway, 13 N.Y.S.2d 60.

49 C.J. p 1001 note 35.

### Construction of agreement

Notes authorizing sale of collateral by holder without notice are construed strictly against maker.—Jones v. Kineo Trust Co., D.C.Me., 45 F.2d 795.

### Irrevocable right

A pledgee can sell pledged property without notice where pledgee and pledgor have so stipulated, and such right is irrevocable.—In re Kiamie's Estate, 76 N.Y.S.2d 684, 191 Misc. 179.

### Binding on surety

Where note expressly waives no-

tice of sale of collateral deposited as security for note, the waiver binds the surety as well as principal.—Read v. Pennsylvania Co. for Insurance on Lives and Granting Annuities, 12 A.2d 925, 338 Pa. 389.

81. Pa.—Empire Nat. Bank v. High Grade Oil Refining Co., 103 A. 602, 260 Pa. 255.

49 C.J. p 1002 note 36.

82. U.S.—McDougall v. Hazleton Tripod-Boiler Co., Tenn., 88 F. 217, 31 C.C.A. 487.

83. Ala.—Union Springs First Nat. Bank v. Blue, 101 So. 75, 20 Ala. App. 107.

49 C.J. p 1002 note 38.

84. Ohio.—Bates v. Wiles, 1 Handy 532, 12 Ohio Dec., Reprint, 274—Lester v. Hieman, 4 Ohio Dec., Reprint, 132, 1 Clev.L.Rep. 52.

85. Ark.—Union, etc., Trust Co. v. Harnwell, 250 S.W. 321, 158 Ark. 295.

49 C.J. p 1002 note 40.

86. U.S.—Clapp v. Associated Depositors, Toledo, Ohio, D.C.Ohio, 33 F.Supp. 686.

Pa.—Huntingdon Valley Trust Co. v. Norristown-Penn Trust Co., 196 A. 821, 329 Pa. 356.

49 C.J. p 1002 note 41.

### Election to sell at public sale

Provision of pledge agreement, authorizing sale of pledged property at any public or private sale in such manner and on such terms and conditions as pledgee deemed proper without notice, demand, or advertisement of any kind, did not give pledgee right to determine conditions of a public sale as well as of a private sale, and, if a public sale

were elected by pledgee, notice was required to be given and other requirements of a public sale met.—Clapp v. Associated Depositors, Toledo, Ohio, D.C.Ohio, 33 F.Supp. 686—49 C.J. p 1003 note 75 [a].

### Effect of failure to give public notice

(1) Where pledgee was under terms of collateral agreement with pledgor empowered to sell pledged security at public or private sale and notified attorneys for deceased pledgor's estate that public sale would be had, a sale held without notice to public, wherein pledgee purchased the pledged security for nominal price, was invalid, and pledgee held the security subject to provisions of the collateral agreement.—Huntingdon Valley Trust Co. v. Norristown-Penn Trust Co., 196 A. 821, 329 Pa. 356.

(2) The fact that pledgor received fair value from pledgee's purported public sale of pledged property would not validate the public sale which was otherwise invalid because no notice to public was given or other requirements of public sale met.—Clapp v. Associated Depositors, Toledo, Ohio, D.C.Ohio, 33 F.Supp. 686.

87. Pa.—Huntingdon Valley Trust Co. v. Norristown-Penn Trust Co., 196 A. 821, 329 Pa. 356.

88. Md.—Maryland F. Ins. Co. v. Dairymple, 25 Md. 242, 89 Am.D. 779.

89. La.—Smith v. Shippers' Oil Co., 45 So. 533, 120 La. 640.

49 C.J. p 1002 note 48.

90. Ga.—Van Arsdale v. Joiner, 44 Ga. 173.

The right of the pledgee to sell without notice may be waived by the pledgee,<sup>91</sup> even where it is stipulated that the sale may be made without notice,<sup>92</sup> and such waiver requires no new or independent consideration to support it.<sup>93</sup> The waiver may be made either expressly<sup>94</sup> or it may be implied from the pledgee's conduct,<sup>95</sup> such as his granting indefinite indulgence to the pledgor;<sup>96</sup> but it has been held that such power to sell without notice is not waived by a mere delay in making sale.<sup>97</sup>

*Recalling waiver.* Where such a waiver has been made, it cannot be recalled by the pledgee without notice to the pledgor and an opportunity to protect the pledge.<sup>98</sup>

## § 60. — Time, Place, Manner, and Conduct of Sale

- a. Time of sale
- b. Place of sale
- c. Manner and conduct of sale

### a. Time of Sale

The contract of pledge may specify the time for sale after default, but, where it does not, the sale should be made within a reasonable time.

Unless there is a special agreement making it the duty of the pledgee to sell within a specified time after default,<sup>99</sup> the pledgee is not bound to sell promptly on the pledgor's default,<sup>1</sup> but he may, at his election, do so.<sup>2</sup> The time of sale, however, must be reasonable,<sup>3</sup> and, where it is so, the pledgee is not liable because the market is in poor condition,<sup>4</sup> and he is not bound to postpone the sale, even though the property is then depreciated in value.<sup>5</sup>

On the other hand, where the weather is inclement, the bidders few, and the bids very low, it has been held that it is the duty of the pledgee to postpone the sale.<sup>6</sup>

*Where notice given.* Where notice of the time of sale has been given, the sale must be held at the time mentioned in the notice.<sup>7</sup>

### b. Place of Sale

A reasonable place must be fixed for the sale, and, where notice of sale is given, the sale must be held at the place mentioned in the notice.

The pledgee must fix a reasonable place for the sale of the property,<sup>8</sup> and, where notice of the place of sale has been given, the sale must be held at the place mentioned in the notice;<sup>9</sup> and, where the pledgor, on receiving due notice, makes no objection to the place of sale, he may not claim after the sale that the place was improper.<sup>10</sup> In order to constitute the sale a public one, it must be held in a public place where there may be competitive bidding.<sup>11</sup>

### c. Manner and Conduct of Sale

- (1) In general
- (2) Public or private sale
- (3) Good faith and diligence in general
- (4) Adequacy of price

#### (1) In General

In the absence of statutory or contractual provisions as to the manner of sale, the manner in which pledges are usually sold may be followed.

In the absence of a special agreement or statute as to the manner of sale, a sale of pledged property

91. D.C.—U. S. Trust Co. v. Blundon, 42 App.D.C. 500.

92. D.C.—U. S. Trust Co. v. Blundon, supra.  
N.Y.—Toplitz v. Bauer, 55 N.E. 1059, 161 N.Y. 325.

93. D.C.—U. S. Trust Co. v. Blundon, 42 App.D.C. 500.  
N.Y.—Toplitz v. Bauer, 55 N.E. 1059, 161 N.Y. 325.

94. N.Y.—Manning v. Heidelberg, 138 N.Y.S. 750, 153 App.Div. 790.

95. La.—Smith v. Shippers' Oil Co., 45 So. 533, 120 La. 640.

96. Tenn.—Moses v. Grainger, 58 S.W. 1067, 106 Tenn. 7, 53 L.R.A. 857.

49 C.J. p 1002 note 51.

97. Mich.—Wilkes v. Allegan Fruit, etc., Co., 206 N.W. 483, 233 Mich. 215.

49 C.J. p 1002 note 52.

98. N.Y.—Toplitz v. Bauer, 55 N.E. 1059, 161 N.Y. 325.

99. Tex.—Hazleton v. Holt, Civ. App., 285 S.W. 1115.  
49 C.J. p 1003 note 56.

1. Ga.—Thornton v. Martin, 42 S.E. 348, 116 Ga. 115.  
Iowa.—Robinson v. Hurley, 11 Iowa 410, 79 Am.D. 497.

2. Mass.—Whitman v. Boston Terminal Refrigerating Co., 124 N.E. 43, 233 Mass. 386.

3. Mass.—Guinzburg v. H. W. Downs Co., 43 N.E. 195, 165 Mass. 467, 52 Am.S.R. 525.  
49 C.J. p 1003 note 59.

4. N.Y.—Franklin Nat. Bank v. Newcombe, 37 N.Y.S. 271, 1 App. Div. 294, affirmed 51 N.E. 1090, 157 N.Y. 699.

49 C.J. p 1003 note 60.

5. Cal.—Hudgens v. Chamberlain, 120 P. 422, 161 Cal. 710.  
49 C.J. p 1003 note 61.

6. Mo.—Laclede Nat. Bank v. Richardson, 56 S.W. 1117, 156 Mo. 270, 79 Am.S.R. 528.

7. N.Y.—Genet v. Howland, 45 Barb. 560, 30 How.Pr. 360.

8. Mass.—Guinzburg v. H. W. Downs Co., 43 N.E. 195, 165 Mass. 467, 52 Am.S.R. 525.  
49 C.J. p 1003 note 66.

9. N.Y.—Genet v. Howland, 45 Barb. 560, 30 How.Pr. 360.

10. Mass.—Guinzburg v. H. W. Downs Co., 43 N.E. 195, 165 Mass. 467, 52 Am.S.R. 525.

11. U.S.—In re Thompson, D.C.Pa., 276 F. 313, affirmed, C.C.A., 234 F. 65, certiorari denied 43 S.Ct. 248, 260 U.S. 748, 67 L.Ed. 494.  
49 C.J. p 1003 note 71.

may be made in the same manner in which pledges are usually sold.<sup>12</sup> Where the pledge agreement authorizes either a public or private sale, the pledgee, having elected the manner of sale, is bound by his election and may not sell in any other manner.<sup>13</sup>

The pledgee must comply with special provisions as to the manner of sale contained in the contract of pledge<sup>14</sup> or in a statute,<sup>15</sup> unless the parties have expressly contracted otherwise.<sup>16</sup> If the pledgee sells as provided by law and by the contract, without doing anything to prevent a fair sale, the pledgor may not complain;<sup>17</sup> nor may he complain of irregularities which he himself has invited;<sup>18</sup> but the sale, whether public or private, must be fair and open.<sup>19</sup> A provision in the agreement for the sale of pledged assets contemplates a sale for cash.<sup>20</sup>

## (2) Public or Private Sale

### (a) Public sale

### (b) Private sale

### (a) Public sale

In the absence of a special agreement otherwise, a sale of pledged property must be at public auction.

In the absence of a special agreement otherwise,<sup>21</sup> a sale of pledged property must be at public auction,<sup>22</sup> after due advertisement or notice thereof, and an opportunity to the public to bid on the property,<sup>23</sup> and, as discussed supra § 59, after reasonable notice to the pledgor of the time and place of sale. Some statutes expressly declare these rules,<sup>24</sup> and a statute requiring public advertisement and sale of a pledge has been held to apply to an oral pledge.<sup>25</sup>

### (b) Private Sale

As a general rule a private sale is not binding on the pledgor in the absence of an express stipulation in the contract of pledge or acquiescence in the sale.

As a general rule a private sale is unauthorized and is not binding on the pledgor,<sup>26</sup> although a demand and notice on the part of the pledgee have been waived,<sup>27</sup> unless the parties have expressly stipulated in the contract of pledge that the sale may be a private one<sup>28</sup> or the pledgor has acqui-

12. Colo.—Drake v. Pueblo Nat. Bank, 96 P. 999, 44 Colo. 49.

13. U.S.—Clapp v. Associated Depositors, Toledo, Ohio, D.C. Ohio, 33 F.Supp. 686.

#### Notification as election

Where pledge agreement authorized pledgee to sell pledged property at either public or private sale and pledgee notified pledgor that the sale would be a public sale, pledgee was bound by his election and could not thereafter sell in any other manner.—Clapp v. Associated Depositors, Toledo, Ohio, supra.

14. Ariz.—Valley Nat. Bank v. Stewart, 89 P.2d 493, 53 Ariz. 328, 49 C.J. p 1003 note 74.

15. Ariz.—United Bank, etc., Co. v. Jones, 249 P. 747, 30 Ariz. 557, 49 C.J. p 1003 note 75.

#### What law governs

Pledge agreement made in another state required sale of securities thereunder in accordance with law of such state.—California Bank v. Daniel, 288 P. 7, 36 Ariz. 549.

16. Ga.—Halliday v. Stewart County Bank, 37 S.E. 721, 112 Ga. 461. Okl.—Ardmore State Bank v. Mason, 120 P. 1080, 30 Okl. 568, 39 L.R.A., N.S., 292.

17. U.S.—Corpus Juris cited in Faivret v. First Nat. Bank in Richmond, C.C.A. Cal., 160 F.2d 827, 831.

Cal.—Williams v. Parker, 157 P. 550, 30 Cal.App. 71.

18. U.S.—Faivret v. First Nat.

Bank in Richmond, C.C.A. Cal., 160 F.2d 827.

#### Timely objection necessary

A letter written by pledgor to pledgee objecting to the sale of pledged goods on warehouse premises because of a clause in the lease prohibiting an auction sale, did not constitute a valid objection within reasonable time where it was sent after notice of sale had been given and was received on the day of the sale.—Faivret v. First Nat. Bank in Richmond, supra.

19. N.Y.—Cole v. Manufacturers Trust Co., 299 N.Y.S. 418, 164 Misc. 741.

20. Pa.—Huntingdon Valley Trust Co. v. Norristown-Penn Trust Co., 196 A. 821, 329 Pa. 356.

21. Ark.—Union, etc., Trust Co. v. Harnwell, 250 S.W. 321, 158 Ark. 295.

49 C.J. p 1003 note 78.

22. N.J.—Moss Industries v. Irving Metal Co., 61 A.2d 159, 142 N.J.Eq. 704.

Wash.—Corpus Juris cited in Kolstad v. Younglove Grocery Co., 201 P.2d 142, 144, 32 Wash.2d 212, 49 C.J. p 1003 note 79.

23. Ark.—Union, etc., Trust Co. v. Harnwell, 250 S.W. 321, 158 Ark. 295.

24. N.D.—Reeves v. Bruening, 114 N.W. 313, 16 N.D. 398, 49 C.J. p 1004 note 83.

25. S.C.—Cooper-Smith Co. v. Bell, 134 S.E. 658, 137 S.C. 1, overruling

Sellers v. Hancock, 20 S.E. 13, 42 S.C. 40.

26. Ark.—Union, etc., Trust Co. v. Harnwell, 250 S.W. 321, 158 Ark. 295.

49 C.J. p 1004 note 86.

27. N.Y.—Strong v. National Mechanics' Banking Assoc., 45 N.Y. 718.

28. Ariz.—Atlantic Nat. Bank v. Korrick, 242 P. 1009, 29 Ariz. 468, 43 A.L.R. 1184.

49 C.J. p 1004 note 88.

#### "Private sale"

(1) A pledgee of negotiable securities as collateral for note, by making entries on its books showing a transfer of collateral and credit on notes without notice to pledgor, did not conduct a "private sale" within contract of pledge providing that on default pledgee might without notice sell collateral at public or private sale and become purchaser at such sale, word "sale" within contract meaning a sale where third persons bid or are given opportunity to bid and to become purchasers; the "private sale" which was within intention of parties was a private sale to be made in ordinary way, where competitive bidding is invited and is unrestricted and is fair and open.—Cole v. Manufacturers Trust Co., 299 N.Y.S. 418, 164 Misc. 741.

(2) Under such a contract the pledgor was not precluded from maintaining action for conversion of

esced in such sale.<sup>29</sup> A private sale may be valid under this rule, although a public sale is required by statute, since such statute, being for the benefit of the pledgor, may be waived by him;<sup>30</sup> but such an agreement is void where it is contrary to the public policy as expressed in the statute.<sup>31</sup> An attempted public sale which was void because of failure to comply with the statutory requirement, and was, therefore, of no effect, will not prevent a subsequent private sale authorized by the pledge agreement.<sup>32</sup>

collateral by pledgee which merely transferred collateral on its books on ground that pledgee allegedly paid market price for collateral, since price paid by pledgee was immaterial, determinative factor being whether pledgee actually conducted a private sale as required by contract.—*Cole v. Manufacturers Trust Co.*, 299 N.Y.S. 418, 164 Misc. 741.

(3) As used in a contract providing for sale of pledged property "private sale" comprehends something more than a mere taking over of the property by the pledgee at such price as he may elect to consider an offer. It must be a sale conducted in the manner usually and ordinarily followed in relation to private sales of property.—*Lowe v. Ozmun*, 86 P. 729, 732, 3 Cal.App. 387.

29. N.Y.—*Willoughby v. Comstock*, 3 Hill 389.  
S.C.—*Ex parte Fisher*, 20 S.C. 179.

30. Ariz.—*Atlantic Nat. Bank v. Korrick*, 242 P. 1009, 29 Ariz. 468, 43 A.L.R. 1184.

Okl.—*Ardmore State Bank v. Mason*, 120 P. 1080, 30 Okl. 568, 39 L.R.A., N.S., 292.

31. Okl.—*Burke v. Tarrant Inv. Co.*, 26 P.2d 949, 166 Okl. 179.

32. U.S.—*Clapp v. Associated Depositors*, Toledo, Ohio, D.C.Ohio, 33 F.Supp. 686.

Ariz.—*Valley Nat. Bank v. Stewart*, 89 P.2d 493, 53 Ariz. 328.

Private sale without notice after void public sale held valid.—*Clapp v. Associated Depositors*, Toledo, Ohio, D.C.Ohio, 33 F.Supp. 686.

33. U.S.—*Gins v. Mauser Plumbing Supply Co.*, C.C.A.N.Y., 148 F.2d 974.

Ind.—*National Mill Supply Co. v. State ex rel. Morton*, 6 N.E.2d 543, 211 Ind. 243, 109 A.L.R. 1101—*Eppert v. Lowish*, 168 N.E. 616, 91 Ind.App. 231, rehearing denied 169 N.E. 884, 91 Ind.App. 231.

Mo.—*Corpus Juris* quoted in *Mercantile-Commerce Bank & Trust Co. v. Kieselhorst Co.*, 164 S.W.2d 342, 347, 350 Mo. 30.—*Corpus Juris* cited in *Continental & Commercial Nat. Bank of Chicago v. Ricker*, 49 S.W.2d 20, 23, 330 Mo. 75.

W.Va.—*Corpus Juris* quoted in *Highland v. Davis*, 195 S.E. 604, 610, 119 W.Va. 501.  
49 C.J. p 1004 note 91.

#### Duty as trustee

A pledgee bank, acting as trustee in selling note and trust deed, pledged as collateral security for another note held by it and due at time of sale owed pledgor positive duty to use proper exertions to render collateral effective.—*Haake v. Union Bank & Trust Co.*, Mo.App., 54 S.W.2d 459.

34. Md.—*Kemp v. Kemp*, 16 A.2d 888, 178 Md. 645.

Mo.—*Corpus Juris* quoted in *Mercantile-Commerce Bank & Trust Co. v. Kieselhorst Co.*, 164 S.W.2d 342, 347, 350 Mo. 30.

W.Va.—*Corpus Juris* quoted in *Highland v. Davis*, 195 S.E. 604, 610, 119 W.Va. 501.  
49 C.J. p 1004 note 92.

35. U.S.—*Faivret v. First Nat. Bank in Richmond*, C.C.A.Cal., 160 F.2d 827.

Ind.—*Walner v. Capron*, 66 N.E.2d 64, 224 Ind. 267.

Iowa.—*Williams v. Herman*, 249 N. W. 215, 216 Iowa 499.

Mo.—*Corpus Juris* quoted in *Mercantile-Commerce Bank & Trust Co. v. Kieselhorst Co.*, 164 S.W.2d 342, 347, 350 Mo. 30.—*Corpus Juris* cited in *Continental & Commercial Nat. Bank of Chicago v. Ricker*, 49 S.W.2d 20, 23, 330 Mo. 75.

Wash.—*Dodge v. Scripps*, 37 P.2d 896, 179 Wash. 308, certiorari denied 55 S.Ct. 649, 295 U.S. 739, 79 L.Ed. 1686.

W.Va.—*Corpus Juris* quoted in *Highland v. Davis*, 195 S.E. 604, 610, 119 W.Va. 501.  
49 C.J. p 1004 note 93.

36. Mo.—*Corpus Juris* quoted in *Mercantile-Commerce Bank & Trust Co. v. Kieselhorst Co.*, 164 S.W.2d 342, 347, 350 Mo. 30.

Wash.—*Corpus Juris* cited in *Dodge v. Scripps*, 37 P.2d 896, 903, 179 Wash. 308.

W.Va.—*Corpus Juris* quoted in *Highland v. Davis*, 195 S.E. 604, 610, 119 W.Va. 501.  
49 C.J. p 1005 note 94.

### (3) Good Faith and Diligence in General

The pledgee in making the sale acts as trustee or agent of the pledgor and must act fairly and in good faith with reasonable skill and diligence.

In making the sale the pledgee is regarded as acting as a trustee,<sup>33</sup> or agent of the pledgor,<sup>34</sup> and accordingly must act fairly and in good faith,<sup>35</sup> and with a reasonable degree of skill and diligence<sup>36</sup> to conserve the interests of the pledgor<sup>37</sup> and of other persons concerned,<sup>38</sup> as well as to secure and protect the pledgee's own rights or interests.<sup>39</sup>

#### Proper care and diligence held shown

Mich.—*W. F. Sheetz & Co. v. Commonwealth Commercial State Bank*, 275 N.W. 781, 282 Mich. 96.

37. U.S.—*Faivret v. First Nat. Bank in Richmond*, C.C.A.Cal., 160 F.2d 827—*Clapp v. Associated Depositors*, Toledo, Ohio, D.C.Ohio, 33 F. Supp. 686.

Ariz.—*California Bank v. Daniel*, 288 P. 7, 36 Ariz. 549.

Ind.—*National Mill Supply Co. v. State ex rel. Morton*, 6 N.E.2d 543, 211 Ind. 243, 109 A.L.R. 1101.

Mo.—*Corpus Juris* quoted in *Mercantile-Commerce Bank & Trust Co. v. Kieselhorst Co.*, 164 S.W.2d 342, 347, 350 Mo. 30.

S.C.—*In re Lewis*, 21 S.E.2d 205, 201 S.C. 43.

Wash.—*Dodge v. Scripps*, 37 P.2d 896, 179 Wash. 308, certiorari denied 55 S.Ct. 649, 295 U.S. 739, 79 L.Ed. 1686.

W.Va.—*Corpus Juris* quoted in *Highland v. Davis*, 195 S.E. 604, 610, 119 W.Va. 501.  
49 C.J. p 1005 note 96.

38. Ariz.—*California Bank v. Daniel*, 288 P. 7, 36 Ariz. 549.

Mo.—*Corpus Juris* quoted in *Mercantile-Commerce Bank & Trust Co. v. Kieselhorst Co.*, 164 S.W. 2d 342, 347, 350 Mo. 30.

W.Va.—*Corpus Juris* quoted in *Highland v. Davis*, 195 S.E. 604, 610, 119 W.Va. 501.  
49 C.J. p 1005 note 97.

#### Guarantors of note

Pledgee of collateral securing note of bank guaranteed by directors of bank was a trustee with respect to collateral as to both directors and bank.—*California Bank v. Daniel*, 288 P. 7, 36 Ariz. 549.

39. Mo.—*Corpus Juris* quoted in *Mercantile-Commerce Bank & Trust Co. v. Kieselhorst Co.*, 164 S. W.2d 342, 347, 350 Mo. 30.

Wash.—*Dodge v. Scripps*, 37 P.2d 896, 179 Wash. 308, certiorari denied 55 S.Ct. 649, 295 U.S. 739, 79 L.Ed. 1686.

W.Va.—*Corpus Juris* quoted in *Highland v. Davis*, 195 S.E. 604, 610, 119 W.Va. 501.  
49 C.J. p 1005 note 98.

These rules apply, although the pledgee is authorized to sell without appraisal, advertisement, or notice,<sup>40</sup> or to purchase for himself.<sup>41</sup> The pledgee, however, is not bound to use extraordinary care and skill,<sup>42</sup> and it has been held that he is not required to exercise the same care, prudence, and diligence as a prudent man would exercise in the sale of his own property.<sup>43</sup> A sale otherwise open, public, and fair is not invalid because the pledgee desists from bidding at the request of an intending purchaser,<sup>44</sup> or because there is only one bidder;<sup>45</sup> or because the pledgee furnishes the purchaser with a large per cent of the purchase money and takes back a pledge of the property as security.<sup>46</sup>

**Exhibiting property.** In making the sale it is the pledgee's duty to exhibit the pledged property in such a manner as to attract buyers,<sup>47</sup> and to disclose to them the property to be sold;<sup>48</sup> but a statutory requirement that the property be present at the time and place of sale is substantially complied with when it is near-by and there is opportunity for inspection,<sup>49</sup> and, where the property sold is a note, the sale is not invalidated because made without the

physical presence of drafts issued therefor but not in the possession of, or known to, the pledgee.<sup>50</sup>

#### (4) Adequacy of Price

The pledgee must exercise reasonable care, skill, and diligence to obtain a fair and adequate price, but, where he so acts, mere inadequacy of price is no ground for setting aside the sale.

The pledgee must exercise reasonable care, skill, and diligence to obtain a fair and adequate price for the property;<sup>51</sup> he must use every reasonable means to obtain what the property is reasonably worth at the time of the sale.<sup>52</sup> According to some authority, if a pledgee sells to himself he must pay the reasonable market value,<sup>53</sup> but according to other authority the fact of a purchase for a nominal amount is not alone sufficient evidence to establish bad faith.<sup>54</sup> In the absence of fraud or unfair dealings the pledgee is required to obtain only the market value, and not the so-called actual value, of the property.<sup>55</sup> He must not unduly sacrifice the property,<sup>56</sup> even though he has the right to buy it in for himself.<sup>57</sup> The pledgee, however, is not required to watch the market and take advantage of the most favorable opportunity for selling;<sup>58</sup> and,

40. Mo.—*Corpus Juris* quoted in *Mercantile-Commerce Bank & Trust Co. v. Kieselhorst Co.*, 164 S.W.2d 342, 347, 350 Mo. 30.

W.Va.—*Corpus Juris* quoted in *Highland v. Davis*, 195 S.E. 604, 610, 119 W.Va. 501.

49 C.J. p 1005 note 99.

41. U.S.—*Dibert v. Wernicke*, Ohio, 214 F. 673, 131 C.C.A. 109.

Mo.—*Corpus Juris* quoted in *Mercantile-Commerce Bank & Trust Co. v. Kieselhorst Co.*, 164 S.W.2d 342, 347, 350 Mo. 30.

W.Va.—*Corpus Juris* quoted in *Highland v. Davis*, 195 S.E. 604, 610, 119 W.Va. 501.

42. Mich.—*Alexander v. Glass*, 299 N.W. 155, 298 Mich. 483.

R.I.—*Whitin v. Paul*, 13 R.I. 40.

43. Mass.—*Newsome v. Davis*, 133 Mass. 343.

49 C.J. p 1005 note 3.

44. N.Y.—*Corning v. Pond*, 29 Hun 129.

45. Mass.—*Guinzburg v. W. H. Downs Co.*, 43 N.E. 195, 165 Mass. 467, 52 Am.S.R. 525.

46. U.S.—*Morris v. East Side R. Co.*, Or., 104 F. 409, 43 C.C.A. 605.

47. Ohio.—*Merchants Banking, etc., Co. v. Ryder*, 25 Ohio Cir.Ct.N.S., 158.

48. Ill.—*Farrell v. Stafford*, 203 Ill. App. 357.

49 C.J. p 1005 note 3.

49. U.S.—*Faivret v. First Nat. Bank in Richmond*, C.C.A.Cal., 160 F.2d 327.

50. Ariz.—*California Bank v. Daniel*, 288 P. 7, 36 Ariz. 549.

51. Mo.—*Corpus Juris* cited in *Continental & Commercial Nat. Bank of Chicago v. Ricker*, 49 S.W.2d 20, 23, 330 Mo. 75.  
49 C.J. p 1005 note 9.

52. U.S.—*Faivret v. First Nat. Bank in Richmond*, C.C.A.Cal., 160 F.2d 827.

Md.—*Kemp v. Kemp*, 16 A.2d 888, 178 Md. 645.

Tex.—*Cox v. Republic Nat. Co.*, Civ. App., 112 S.W.2d 300, error dismissed.

49 C.J. p 1005 note 10.

53. Tex.—*Cox v. Republic Nat. Co.*, supra.

#### Liability for difference

A pledgee, who was authorized under collateral security agreement to sell stock on default of pledgor, was liable to judgment creditor of pledgor for difference between market value of stock and what pledgee paid for it.—*Cox v. Republic Nat. Co.*, supra.

54. N.Y.—*General Phoenix Corp. v. Cabot*, 89 N.E.2d 238, 300 N.Y. 87.

55. Cal.—*Central Nat. Bank of Oakland v. Peck*, 59 P.2d 599, 15 Cal. App.2d 512.

N.Y.—*Murray v. Orange County Associates*, 65 N.Y.S.2d 473, 137 Misc. 917.

#### Listed market value

Where pledge agreement provided that, if any of the collateral pledged to secure note depreciated in value,

plaintiff could demand additional collateral, and that, in event additional collateral was not deposited within a designated time after demand, plaintiff could elect to sell the collateral securities, and because of a depression the market value of the collateral declined, and plaintiff demanded additional collateral and, when additional collateral was not forthcoming, sold the collateral, the sale of the collateral was valid, even though the listed market value of the collateral did not represent the true value of the collateral.—*Mercantile-Commerce Bank & Trust Co. v. Kieselhorst Co.*, 164 S.W.2d 342, 350 Mo. 30.

**Burden to show authority of pledgee of commercial paper to dispose of it at less than its face value rests on person who asserts validity of pledgee's action in so disposing.**—*Love v. Rogers*, 150 So. 815, 168 Miss. 1.

56. U.S.—*Gins v. Mauser Plumbing Supply Co.*, C.C.A.N.Y., 148 F.2d 974—*Buder v. New York Trust Co.*, C.C.A.N.Y., 82 F.2d 168, 104 A.L.R. 1035.

Ind.—*Eppert v. Lowish*, 168 N.E. 616, 91 Ind.App. 231, rehearing denied 169 N.E. 884, 91 Ind.App. 231.  
49 C.J. p 1005 note 11.

57. Miss.—*Commercial-German Trust, etc., Bank v. Conner*, 75 So. 445, 114 Miss. 644.  
49 C.J. p 1005 note 12.

58. R.I.—*Whitin v. Paul*, 13 R.I. 40.

if the sale is conducted in good faith and with reasonable skill and diligence, mere inadequacy of price is no ground for setting aside the sale,<sup>59</sup> or for rendering the pledgee liable in damages,<sup>60</sup> unless the discrepancy is so great as to establish negligence or bad faith on his part and make him liable for the difference between the selling price and the actual value of the property;<sup>61</sup> and it has been held that, where the property is readily salable on the open market, at a definite market value, the mere failure of the pledgee at a private sale to sell at such value may of itself amount not only to a failure of ordinary and reasonable skill and diligence, but also, where the facts are plain, amount to such lack of good faith as to constitute fraud and conversion.<sup>62</sup>

## § 61. — Persons Who May Buy at Sale

### a. In general

#### b. Pledgee as purchaser

### a. In General

Persons associated with the pledgee have been held proper purchasers where they buy for themselves.

The validity of a sale to a particular person must be determined by the facts existing at the time of the sale.<sup>63</sup> The incapacity of a pledgee to purchase at his own sale does not prevent the agent or attorney of the pledgee from purchasing the property in good faith for himself,<sup>64</sup> and the sale is not rendered voidable by his subsequent sale of

the property to the pledgee.<sup>65</sup> An agent with whom a note has been left for collection and to whom collateral securities have been delivered for sale if necessary to secure the collection, is not a "holder" of such securities within a provision in the note authorizing the holders to sell the securities and to become the purchaser thereof, and, therefore, such agent may not become the purchaser at a sale made by him.<sup>66</sup> A pledge to an agent personally does not prevent his principal from purchasing at a sale thereof.<sup>67</sup>

**Partner.** It has been held that a general partner of a firm holding property in pledge may not purchase the property for himself;<sup>68</sup> but that this disability does not apply to a special partner, who is prohibited by statute from transacting any business on account of the firm.<sup>69</sup>

### b. Pledgee as Purchaser

- (1) Without authority
- (2) Under express authority

#### (1) Without Authority

- (a) In general
- (b) Purchase through third person
- (c) Unauthorized purchase as conversion

#### (a) In General

Unless specially authorized to do so a pledgee may not, as against the pledgor, become the purchaser of the property at his own sale.

Tex.—*King v. Texas Banking, etc., Co.*, 58 Tex. 669.

59. U.S.—*Stedham v. Swift & Co.*, C.C.A.Ga., 79 F.2d 648.

N.Y.—*General Phoenix Corp. v. Cabot*, 89 N.E.2d 238, 300 N.Y. 87—*In re Klamie's Estate*, 76 N.Y.S.2d 684, 191 Misc. 179.

49 C.J. p 1005 note 14.

**In determining responsibility of pledgee with authority to liquidate collateral and apply proceeds on indebtedness with respect to alleged sacrifice sale of certain pledged assets wisdom after the event is not the test.**—*Montclair Trust Co. v. Star Co.*, 50 A.2d 481, 139 N.J.Eq. 211, record remanded for amendment 57 A.2d 7, 141 N.J.Eq. 263, record remanded for amendment 57 A.2d 7, 141 N.J.Eq. 265.

**Evidence of inadequacy was held insufficient to show that pledgee's sale of collateral was invalid for lack of notice to pledgor or for bad faith of pledgee.**—*In re Klamie's Estate*, 76 N.Y.S.2d 684, 191 Misc. 179.

### Purchase by pledgee

Where the terms of the contract authorize the pledgee to sell and to

purchase on sale, and due notice of the sale is given to pledgor so that he has an opportunity to protect his interest, a low or inadequate price is not sufficient to establish that lack of good faith or diligence on part of pledgee which would warrant setting aside the sale.—*General Phoenix Corp. v. Cabot*, 89 N.E.2d 238, 300 N.Y. 87.

60. Mass.—*Whipple v. Dutton*, 56 N.E. 581, 175 Mass. 365.  
49 C.J. p 1006 note 15.

61. Tex.—*Anchor v. Gose*, Civ.App., 8 S.W.2d 690.  
49 C.J. p 1006 note 16.

62. Ga.—*Southern Exch. Bank v. Langston*, 127 S.E. 230, 33 Ga.App. 477.

Pa.—*Corpus Juris* quoted in *Brukas v. Union Nat. Bank & Trust Co. of Shenandoah*, 26 A.2d 663, 664, 345 Pa. 15.

**Property held not readily salable**  
Pa.—*Brukas v. Union Nat. Bank & Trust Co. of Shenandoah*, 26 A.2d 663, 345 Pa. 15.

63. Iowa.—*Williams v. Herman*, 249 N.W. 215, 216 Iowa 499.

64. Iowa.—*Corpus Juris* cited in

*Williams v. Herman*, 249 N.W. 215, 216 Iowa 499.

Md.—*Steelman v. Weiskittel*, 42 A. 216, 88 Md. 519.

### Son and associate

Pledgee's private sale of collateral to his son associated with him in business, after repeated unsuccessful efforts to sell to others, and notice to debtor could not be set aside where son was not father's agent and there was no proof that price was unfair, and, while such fact would cause the sale to be scrutinized, it would not alone invalidate it.—*Williams v. Herman*, 249 N.W. 215, 216 Iowa 499.

65. Md.—*Steelman v. Weiskittel*, 42 A. 216, 88 Md. 519.

66. Ohio.—*Moore v. Central Nat. Bank*, 12 Ohio Cir.Ct., N.S., 529, 31 Ohio Cir.Ct. 614.

67. Ind.—*Crescent City Bank v. Carpenter*, 26 Ind. 108.  
49 C.J. p 1006 note 22.

68. Or.—*Thomas v. Gilbert*, 101 P. 393, 104 P. 838, 55 Or. 14, Ann. Cas.1912A 516.

69. N.Y.—*Lewis v. Graham*, 4 Abb. Pr. 106.



The rules relating to the purchase by a mortgagee of the property mortgaged at a sale thereof by himself apply to the purchase by a pledgee of the property pledged;<sup>70</sup> and accordingly it is a well settled rule, that, unless specially authorized to do so, a pledgee after a default may not, as against the pledgor, become the purchaser of the property pledged at a sale thereof by himself.<sup>71</sup> Such a purchase, however, does not dissolve or change the relationship of pledgor and pledgee,<sup>72</sup> and is not void except in case of actual fraud,<sup>73</sup> but is merely voidable,<sup>74</sup> especially where the pledgee is the highest bidder for the property;<sup>75</sup> and passes title until the pledgor disaffirms the sale,<sup>76</sup> and as a condition to disaffirming the pur-

chase, the pledgor must offer to do equity,<sup>77</sup> which usually requires an offer to redeem by payment of the secured debt.<sup>78</sup>

Under this rule if the pledgee, either directly or indirectly, wrongfully becomes the purchaser at his own sale, the pledgor at his election, which must be exercised within such a reasonable time as to show due diligence,<sup>79</sup> may either avoid the sale, in which case the pledgee will hold the property subject to the same conditions as before,<sup>80</sup> without regard to the question of good faith or fairness in the conduct of the sale,<sup>81</sup> or the adequacy of the price realized;<sup>82</sup> or the pledgor may affirm the sale, and hold the pledgee responsible for the application of the proceeds,<sup>83</sup> in which case the title

70. Ala.—Barnett v. Dowdy, 93 So. 638, 207 Ala. 641.

Right of mortgagee to purchase see mortgages §§ 577, 733.

71. U.S.—Corpus Juris cited in Simon v. H. F. Wilcox Oil & Gas Co., C.C.A.Okl., 123 F.2d 25, 31.

Ind.—Fardy v. Mayerstein, 47 N.E. 2d 315, 231 Ind. 339.

Miss.—Corpus Juris cited in Enoch-Flowers, Limited, v. Bank of Forest, 157 So. 711, 173 Miss. 36, suggestion of error overruled 159 So. 407, 173 Miss. 36.

Mo.—Corpus Juris cited in State ex rel. Shull v. Liberty Nat. Bank of Kansas City, 53 S.W.2d 899, 902, 331 Mo. 386.

N.J.—Moss Industries v. Irving Metal Co., 61 A.2d 159, 142 N.J.Eq. 704—Corpus Juris cited in Passaic Nat. Bank & Trust Co. v. Owens, 162 A. 879, 881, 111 N.J.Eq. 486—Corpus Juris cited in Sokoloff v. Wildwood Pier & Realty Co., 155 A. 125, 127, 108 N.J.Eq. 362, affirmed 166 A. 218, 113 N.J.Eq. 159.

N.Y.—Jones v. National Chautauqua County Bank of Jamestown, 74 N.Y.S.2d 496, 272 App.Div. 521—First Trust & Deposit Co. v. Potter, 278 N.Y.S. 847, 155 Misc. 106—Berwin v. Newman, 85 N.Y.S.2d 568, affirmed 95 N.Y.S.2d 596, 276 App.Div. 994.

49 C.J. p 1006 note 29.

#### Private sale

The rule that pledgee, without pledgor's consent, may not purchase pledged chattel, directly or indirectly, at public sale, except where sale is under control of court of equity, and that if pledgee purchases pledged property the sale is voidable by pledgor, applies with even greater strictness to private sales.—Linker v. Batavian Nat. Bank of La Crosse, 12 N.W.2d 721, 244 Wis. 459.

Power to make private sale without notice is inconsistent with the thought that the donee of the power may be both the seller and the purchaser, and the words "or any

sale hereunder" within mortgage, authorizing mortgagee on mortgagor's failure to pay note to take immediate possession of property conveyed and sell real estate at public auction, and "in the event that such sale, or of any sale hereunder," authorizing mortgagee to purchase property, refer to the power and not to entire instrument, and hence, general power of sale embodied in mortgage related only to realty embodied in mortgage and not to collaterals.—De Merville v. Merchants & Farmers Bank of Greene County, 170 So. 756, 233 Ala. 204.

72. U.S.—Faivret v. First Nat. Bank in Richmond, D.C.Cal., 62 F.Supp. 1012, affirmed, C.C.A., 160 F.2d 827.

Mo.—Corpus Juris cited in State ex rel. Shull v. Liberty Nat. Bank of Kansas City, 53 S.W.2d 899, 902, 331 Mo. 386.

49 C.J. p 1006 note 30.

73. Mo.—Corpus Juris cited in State ex rel. Shull v. Liberty Nat. Bank of Kansas City, 53 S.W.2d 899, 902, 331 Mo. 386.

N.Y.—Berwin v. Newman, 85 N.Y.S.2d 568, affirmed 95 N.Y.S.2d 596, 276 App.Div. 994.

49 C.J. p 1006 note 31.

74. U.S.—Faivret v. First Nat. Bank in Richmond, D.C.Cal., 62 F.Supp. 1012, affirmed, C.C.A., 160 F.2d 827.

Mo.—Corpus Juris cited in State ex rel. Shull v. Liberty Nat. Bank of Kansas City, 53 S.W.2d 899, 902, 331 Mo. 386.

N.J.—Moss Industries v. Irving Metal Co., 61 A.2d 159, 142 N.J.Eq. 704.

N.Y.—Berwin v. Newman, 85 N.Y.S.2d 568, affirmed 95 N.Y.S.2d 596, 276 App.Div. 994.

49 C.J. p 1006 note 32.

75. Vt.—Thomas v. Graves, 95 A. 643, 89 Vt. 339.

49 C.J. p 1006 note 33.

76. Ala.—Persons v. Russell, 103 So. 543, 212 Ala. 506.

49 C.J. p 1007 note 34.

#### Voidable title

Pledgee of collateral note not given right to purchase at sale of collateral can gain at most only voidable title.—Seder v. Gould, 174 N.E. 311, 274 Mass. 223, 76 A.L.R. 700.

77. Ala.—Persons v. Russell, 103 So. 543, 212 Ala. 506—Barnett v. Dowdy, 93 So. 638, 207 Ala. 641.

78. Ala.—Persons v. Russell, 103 So. 543, 212 Ala. 506.

79. Ala.—Persons v. Russell, supra. 49 C.J. p 1007 note 37.

80. U.S.—Gins v. Mauser Plumbing Supply Co., C.C.A.N.Y., 148 F.2d 974.

Conn.—Moore v. Waterbury Tool Co., 199 A. 97, 124 Conn. 201, 116 A.L.R. 564.

Minn.—Erickson v. Midland Nat. Bank & Trust Co. of Minneapolis, 285 N.W. 611, 205 Minn. 224.

N.J.—Moss Industries v. Irving Metal Co., 61 A.2d 159, 142 N.J.Eq. 704—Corpus Juris cited in Sokoloff v. Wildwood Pier & Realty Co., 155 A. 125, 127, 108 N.J.Eq. 362, affirmed 166 A. 218, 113 N.J.Eq. 159—Elrae Corporation v. Bankers' Trust Co., 148 A. 652, 105 N.J.Eq. 501, affirmed Bankers' Trust Co. v. Second Nat. Bank, 158 A. 343, 110 N.J.Eq. 64, and Elrae Corporation v. Bankers' Trust Co., 158 A. 344, 110 N.J.Eq. 66.

N.Y.—Jones v. National Chautauqua County Bank of Jamestown, 74 N.Y.S.2d 496, 272 App.Div. 521.

49 C.J. p 1007 note 38.

81. Ala.—Persons v. Russell, 103 So. 543, 212 Ala. 506.

Ind.—Dulin v. National City Bank, 130 N.E. 426.

82. Ala.—Persons v. Russell, 103 So. 543, 212 Ala. 506.

N.Y.—Manning v. Heidelberg, 138 N.Y.S. 750, 153 App.Div. 790.

83. Minn.—Erickson v. Midland Nat. Bank & Trust Co. of Minneapolis, 285 N.W. 611, 205 Minn. 224.

N.Y.—Berwin v. Newman, 85 N.Y.S.

of the pledgee becomes perfect.<sup>84</sup> If he elects to affirm the sale, he must affirm it as an entirety.<sup>85</sup>

*The pledgee cannot avoid a sale which he has made to himself.*<sup>86</sup>

*The owner of property* pledged without his authority may avoid a sale made in bad faith by the pledgee to himself.<sup>87</sup>

### (b) Purchase through Third Person

A purchase by a third person for the pledgee is not binding on the pledgor.

Where the purchase is made nominally by a third person, but is merely colorable, and in reality is by or for the pledgee, it is not binding on the pledgor,<sup>88</sup> especially where the pledgee subsequently rescinds the sale and retakes the property.<sup>89</sup> A mere subsequent sale by a purchaser in good faith to the pledgee does not render the original sale voidable<sup>90</sup> or the pledgee liable for any profits made by him out of the property.<sup>91</sup>

### (c) Unauthorized Purchase as Conversion

Generally, an unauthorized purchase by the pledgee does not amount to a conversion.

Since an unauthorized purchase by the pledgee

is inoperative as long as he retains possession and control, it does not amount to a conversion of the property, and may not be so treated by the pledgor,<sup>92</sup> unless he thereafter exercises a dominion over the property inconsistent with his relationship as pledgee and with the rights of the pledgor.<sup>93</sup> On the other hand, even where the pledgee is authorized to bid at his own sale, if the sale is made in bad faith, without notice to the pledgor, it amounts to a conversion;<sup>94</sup> and where, in such a case, the pledgee professes that the property has been sold to a stranger, he cannot defeat a charge of conversion by showing that at all times he has had actual control of the property.<sup>95</sup>

### (2) Under Express Authority

The pledgor may authorize the pledgee to purchase the property pledged, but in purchasing the pledgee must exercise good faith, and must conform strictly to the provisions authorizing the purchase.

It is well settled that the pledgor, by the pledge agreement or otherwise, may authorize the pledgee, on default, to purchase the property pledged,<sup>96</sup> and apply the proceeds to the liquidation of the debt,<sup>97</sup> or he may consent to the pledgee's taking

2d 568, affirmed 95 N.Y.S.2d 596, 276 App.Div. 994.  
49 C.J. p 1007 note 41.

**Pledgor, by accepting as credit on original note amount paid by pledgee for collateral note, affirmed sale of collateral to pledgee.**—Seder v. Gould, 174 N.E. 311, 274 Mass. 223, 76 A.L.R. 700.

#### Effect of affirmation

Where a pledgor affirms an unauthorized sale by the pledgee to himself, his only right is to have credited on his debt the amount realized from the sale, with payment to him of the surplus, if any.—Erickson v. Midland Nat. Bank & Trust Co. of Minneapolis, 285 N.W. 611, 205 Minn. 224.

84. N.Y.—Bryan v. Baldwin, 52 N.Y. 232—Berwin v. Newman, 85 N.Y.S.2d 568, affirmed 95 N.Y.S.2d 596, 276 App.Div. 994.

85. Minn.—Erickson v. Midland Nat. Bank & Trust Co. of Minneapolis, 285 N.W. 611, 205 Minn. 224.

86. Mass.—Faulkner v. Hill, 104 Mass. 188.

87. Utah.—Foote v. Utah Commercial, etc., Bank, 54 P. 104, 17 Utah 283.

88. Iowa.—Corpus Juris cited in Williams v. Herman, 249 N.W. 215, 216 Iowa 499.  
49 C.J. p 1007 note 45.

89. U.S.—Leahy v. Lobdell, Mich., 80 F. 665, 26 C.C.A. 75.  
49 C.J. p 1007 note 46.

90. N.J.—Morris Canal, etc., Co. v. Lewis, 12 N.J.Eq. 323.  
R.I.—Earle v. Grant, 14 R.I. 228.

91. Neb.—Raben v. Aurora First Nat. Bank, 55 N.W. 1055, 37 Neb. 364.

92. Conn.—Moore v. Waterbury Tool Co., 199 A. 97, 124 Conn. 201, 116 A.L.R. 564.  
49 C.J. p 1008 note 50.

#### Repudiation by pledgor

(1) If the pledgee wrongfully purchases the pledged property, such a purchase is not a conversion if the pledgor repudiates the transaction and no change in the actual condition and situation of the property has occurred.—Moore v. Waterbury Tool Co., 199 A. 97, 124 Conn. 201, 116 A.L.R. 564.

(2) If an unauthorized sale to himself by a pledgee, who remains in possession and control of the pledged property, is disaffirmed by the pledgor, the contract of pledge remains in force, and, thereunder, the pledgee retains the right of possession, and hence cannot be charged with conversion.—Erickson v. Midland Nat. Bank & Trust Co. of Minneapolis, 285 N.W. 611, 205 Minn. 224.

93. Tex.—King v. Boerne State Bank, Civ.App., 159 S.W. 438.

94. Mo.—Ely Walker Dry Goods Co. v. Karnes, 9 S.W.2d 245, 223 Mo.App. 115.

49 C.J. p 1008 note 52.

95. Kan.—Lynn v. McCue, 147 P. 808, 94 Kan. 761.

96. U.S.—In re Burton Coal Co., D.C.Ill., 57 F.Supp. 361.

N.J.—Bardsley v. First Nat. Bank & Trust Co. of Montclair, 168 A. 665, 111 N.J.Law 512.

N.Y.—General Phoenix Corp. v. Cabot, 89 N.E.2d 238, 300 N.Y. 87—Murray v. Orange County Association, 65 N.Y.S.2d 473, 187 Misc. 917.

W.Va.—Highland v. Davis, 195 S.E. 604, 119 W.Va. 501.

49 C.J. p 1008 note 54.

#### Assignee of pledgee

Provision in note permitting sale of collateral and authorizing holder of note to purchase the collateral at sale was not unlawful, and pledgee's assignee was entitled to purchase collateral.—In re Burton Coal Co., D.C.Ill., 57 F.Supp. 361.

#### Pledgee or agent

An agreement in a promissory note, payment of which is secured by collateral securities, that, on a sale of the securities for default on the part of the maker, the holder of the note may become the purchaser of the securities, is valid; and the agent of the holder may purchase for his principal.—Metropolitan Loan & Trust Co. v. Schafer, 44 App. D.C. 356.

97. Ala.—Penn Mut. Life Ins. Co. v. Bancroft, 93 So. 566, 207 Ala. 617, 28 A.L.R. 1102.

over the property at an appraised value.<sup>98</sup> Some statutes expressly authorize the pledgee to purchase.<sup>99</sup> Where by the terms of the contract, or otherwise, the pledgee is authorized to buy at his own sale, a purchase made by him in compliance with the authority granted,<sup>1</sup> in good faith and for a fair consideration,<sup>2</sup> is valid and binding on the pledgor, and the pledgee acquires full right and title to the property,<sup>3</sup> and cannot be required to account for an increased price received by him on a resale.<sup>4</sup> In order that the sale may be effective, however, the pledgee must bring himself strictly within the terms of the contract authorizing him to purchase,<sup>5</sup> must exercise good faith toward the pledgor in selling and making the purchase,<sup>6</sup> and may not purchase it at a valuation so inadequate as to suggest fraud.<sup>7</sup> Where the pledgee is the purchaser of a collateral note and has credited the purchase price on the principal obligation,<sup>8</sup> he

may recover from the pledgor, as indorser, on default of the maker of the collateral note.

#### *Construction of provision authorizing purchase.*

If the pledge contract is unambiguous with respect to the right of the pledgee to purchase at his sale, it will be literally construed;<sup>9</sup> but, if it is ambiguous, it will be strictly construed against the pledgee.<sup>10</sup> A provision authorizing purchase at a public sale by necessary implication excludes the right to purchase at a private sale,<sup>11</sup> and the sale must in fact be public.<sup>12</sup> A provision authorizing a pledgee to purchase at his own sale has been held to require a public sale,<sup>13</sup> unless authority to purchase at a private sale is clearly given.<sup>14</sup> Such a provision has been held not to authorize a mere transfer of the collateral to the pledgee by satisfying the debt,<sup>15</sup> and will be invalid as far as it amounts to a mere forfeiture;<sup>16</sup> but it has been held that no particular form of transfer should

98. La.—*Florance v. Greene*, 8 Rob. 10.

99. U.S.—*Falvret v. First Nat. Bank in Richmond*, C.C.A.Cal., 160 F.2d 827.

Kan.—*Columbia Cas. Co. v. Sodini*, 156 P.2d 524, 159 Kan. 478, stating Illinois rule.

49 C.J. p 1008 note 58.

#### *In Puerto Rico*

(1) Where first and second auctions do not result in sale to another, ownership of collateral may pass to pledgee, who is obliged to give discharge for full amount of credit.—*Baldrich v. Rivera*, 32 Puerto Rico 781.

(2) The requirement that the pledgee give a discharge for the full amount of his credit applies only to "extrajudicial sales" and not to "judicial sales."—*Benitez v. Bank of Nova Scotia*, C.C.A.Puerto Rico, 125 F.2d 519, certiorari denied *Benitez Sampayo v. Bank of Nova Scotia*, 62 S.Ct. 1808, 316 U.S. 702, 86 L.Ed. 1770, rehearing denied 63 S.Ct. 24, 317 U.S. 706, 87 L.Ed. 563, certiorari denied 63 S.Ct. 31, 317 U.S. 624, 87 L.Ed. 505, rehearing denied 63 S.Ct. 153, 317 U.S. 708, 87 L.Ed. 565.

1. Mich.—*Frey v. Farmers & Mechanics Bank of Ann Arbor*, 262 N.W. 911, 273 Mich. 284. 49 C.J. p 1008 note 59.

2. Mass.—*Corpus Juris* cited in *Seder v. Gould*, 174 N.E. 311, 312, 274 Mass. 223, 76 A.L.R. 700. 49 C.J. p 1008 note 60.

3. Cal.—*Bank of America Nat. Trust & Savings Ass'n v. Reidy*, 101 P.2d 77, 15 Cal.2d 243.

Mass.—*Corpus Juris* cited in *Seder v. Gould*, 174 N.E. 311, 312, 274 Mass. 223, 76 A.L.R. 700.

Mich.—*Frey v. Farmers & Mechan-*

ics Bank of Ann Arbor, 262 N.W. 911, 273 Mich. 284.

49 C.J. p 1008 note 61.

#### *Assignee of pledgee*

Cal.—*Johnson v. Mortgage Guarantee Co.*, 4 P.2d 208, 117 Cal.App. 416.

4. Pa.—*Colonial Trust Co. v. Central Trust Co.*, 90 A. 189, 243 Pa. 268.

5. N.Y.—*Cole v. Manufacturers Trust Co.*, 299 N.Y.S. 418, 164 Misc. 741.

6. U.S.—*State Trust, etc., Bank v. Dunn*, C.C.A.Tex., 24 F.2d 477, reversed on other grounds 49 S.Ct. 184, 278 U.S. 582, 73 L.Ed. 518. 49 C.J. p 1009 note 63.

*Strictest good faith and utmost diligence*

S.C.—*In re Lewis*, 21 S.E.2d 205, 201 S.C. 43.

7. U.S.—*State Trust, etc., Bank v. Dunn*, C.C.A.Tex., 24 F.2d 477, reversed on other grounds 49 S.Ct. 184, 278 U.S. 582, 73 L.Ed. 518. 49 C.J. p 1009 note 65.

8. Mass.—*Seder v. Gould*, 174 N.E. 311, 274 Mass. 223, 76 A.L.R. 700.

9. Ala.—*Barnett v. Dowdy*, 93 So. 638, 207 Ala. 641.

Mo.—*Corpus Juris* quoted in *State ex rel. Shull v. Liberty Nat. Bank of Kansas City*, 53 S.W.2d 899, 902, 331 Mo. 386.

10. Mo.—*Corpus Juris* quoted in *State ex rel. Shull v. Liberty Nat. Bank of Kansas City*, 53 S.W.2d 899, 902, 331 Mo. 386. 49 C.J. p 1009 note 67.

#### *Particular contracts construed*

Use of phrase that "by sale pledgor's right of redemption should be extinguished," in pledge agreement, did not authorize pledgee to purchase.—*State ex rel. Shull v. Lib-*

erty Nat. Bank of Kansas City, 53 S.W.2d 899, 331 Mo. 386.

11. Ind.—*Fardy v. Mayerstein*, 47 N.E.2d 315, 221 Ind. 339.

12. N.J.—*Passaic Nat. Bank & Trust Co. v. Owens*, 162 A. 879, 111 N.J.Eq. 486.

*Unadvertised sale* in pledgee's private office attended by few interested persons, at which pledgee bought bonds, was not "public auction" extinguishing pledgor's equity.—*Passaic Nat. Bank & Trust Co. v. Owens*, supra.

13. Ark.—*Union, etc., Trust Co. v. Harnwell*, 250 S.W. 321, 158 Ark. 295.

49 C.J. p 1009 note 68.

14. Cal.—*Lowe v. Ozmun*, 86 P. 729, 3 Cal.App. 387.

49 C.J. p 1009 note 69.

15. Ark.—*Union & Mercantile Trust Co. v. Harnwell*, 250 S.W. 321, 158 Ark. 295.

Pa.—*Thomas v. Waters*, 38 A.2d 237, 350 Pa. 214.

A pledgee should not be permitted to utilize option of becoming purchaser at sale of pledged securities in any manner which would result in precluding possibility of competitive bidding or in dispensing with sale as ordinarily conducted.—*Cole v. Manufacturers Trust Co.*, 299 N.Y.S. 418, 164 Misc. 741.

*Pledgee's power to sell and to buy collateral under the terms of notes secured by collateral was not one to be executed by a mere taking.*—*Thomas v. Waters*, 38 A.2d 237, 350 Pa. 214.

16. Md.—*Kemp v. Kemp*, 16 A.2d 889, 178 Md. 645.

Agreements for appropriation as void see supra § 52.

be required under a provision authorizing the pledgee to purchase,<sup>17</sup> that the transaction should be upheld if made in good faith,<sup>18</sup> and that the acts of the pledgee in appropriating the collateral under a power to sell to himself at a private sale without notice must be judged by the facts and circumstances of the particular case.<sup>19</sup>

## § 62. — Operation and Effect of Sale in General

A proper sale by the pledgee binds the pledgor, but a sale illegally or improperly made may be set aside.

Where a sale of pledged property is made by the pledgee fairly and in good faith, the pledgor is bound by the sale,<sup>20</sup> although the property might have brought a higher price under other circumstances.<sup>21</sup> The pledgee is accountable only for the amount actually received by him;<sup>22</sup> and the sale constitutes a payment of the principal debt to the extent that funds for that purpose are realized from the sale.<sup>23</sup> On the other hand, where the sale is made illegally,<sup>24</sup> or where due regard is not paid to the interest of the pledgor and due care is not exercised, whereby the pledged property is sacrificed to the injury of the pledgor, the sale may be set aside,<sup>25</sup> or the pledgee may be required to account for any loss due to his carelessness or bad faith.<sup>26</sup> If the pledge remains in the possession of the pledgee after an invalid sale, he continues to hold it as a pledge, subject to the rights of the

pledgor as before the sale,<sup>27</sup> and subject to the pledgor's right to redeem.<sup>28</sup>

## § 63. — Invalid Sale as Conversion

- a. In general
- b. Remedies of pledgor or owner
- c. Measure of damages

### a. In General

A wrongful sale which puts the property beyond the pledgee's control constitutes a conversion.

Although the pledgee has a right to sell the pledged property on default of the pledgor, if he wrongfully sells the property so as to place it beyond his control it constitutes a conversion for which he is liable to the pledgor;<sup>29</sup> and it has been held that, even though an unauthorized purchase by the pledgee does not amount to a conversion, if, after such a purchase, the pledgee sells the property so as not to be able to return it to the pledgor on performance by him, he is liable for conversion.<sup>30</sup> Thus, a pledgee is liable for conversion where, when demand and notice are necessary, he wrongfully sells the property without demand or notice to the pledgor,<sup>31</sup> or otherwise sells it in violation of the rules of law governing such sales,<sup>32</sup> or in violation of the terms of the pledge,<sup>33</sup> or of the rights of the pledgor.<sup>34</sup> A sale with the consent of the pledgor does not, in the absence of fraud or bad faith, constitute a conversion;<sup>35</sup> nor

### Determination of character

The more closely a transfer of collateral to pledgee approximates a forfeiture, the more closely must court scrutinize the transaction to determine whether realization of the pledgee's value has been sought in good faith.—*Kemp v. Kemp*, supra.

17. Md.—*Kemp v. Kemp*, supra.

18. Md.—*Kemp v. Kemp*, supra.

19. Md.—*Kemp v. Kemp*, supra.

20. Ga.—*Claxton Bank v. Smith*, 129 S.E. 142, 34 Ga.App. 265.  
49 C.J. p 1009 note 71.

21. U.S.—*White v. Rahway Board of Assessors*, C.C.N.J., 16 F. 833.

22. Mo.—*Berlin v. Eddy*, 33 Mo. 426.

23. Ala.—*Jones v. Moore*, 102 So. 200, 212 Ala. 248.  
49 C.J. p 1009 note 75.

24. N.Y.—*Brightson v. Clafin*, 122 N.E. 458, 225 N.Y. 469.

25. Ala.—*Coleman v. Solomon*, 143 So. 576, 225 Ala. 407.  
49 C.J. p 1009 note 77.

### Burden of proof

(1) Burden is on pledgee, purchasing at own sale, to show that sale was fairly and openly made in strict compliance with power, and

that price was not so grossly inadequate as to raise presumption of bad faith.—*Coleman v. Solomon*, supra.

(2) Where collateral is sold in conformity with pledge, burden of proving that sale was unfair is on one asserting unfairness.—*Hiscock v. Varick Bank*, N.Y., 27 S.Ct. 681, 206 U.S. 28, 51 L.Ed. 945—*East Tennessee Nat. Bank of Knoxville v. Day*, D.C.Fla., 5 F.Supp. 473.

26. Ala.—*Adams v. Adams*, 73 So. 984, 199 Ala. 46.  
49 C.J. p 1009 note 78.

27. U.S.—*Gins v. Mauser Plumbing Supply Co.*, C.C.A.N.Y., 148 F.2d 974.

Mo.—*Tennent v. Union Cent. Life Ins. Co.*, 112 S.W. 754, 133 Mo. App. 345.

Pledgee, purchasing at grossly inadequate price, obtains only colorable title, and is accountable to pledgor for fair value of property at time of appropriation.—*Coleman v. Solomon*, 143 So. 576, 225 Ala. 407.

28. Hawaii.—*Okada v. Akahoshi*, 29 Hawaii 719.

Tex.—*Wilcox v. Dillard*, Civ.App., 3 S.W.2d 507.

29. Mass.—*Whitman v. Boston Ter-*

minal Refrigerating Co., 124 N.E. 43, 233 Mass. 386.

49 C.J. p 1009 note 83.

30. Ohio.—*Glidden v. Mechanics' Nat. Bank*, 42 N.E. 995, 53 Ohio St. 588, 43 L.R.A. 737.

49 C.J. p 1010 note 85.

31. Ala.—*Corpus Juris* cited in *Stanley v. People's Sav. Bank*, 157 So. 844, 846, 229 Ala. 446.

N.Y.—*Keleher v. O. Edwin Barnes, Inc.*, 259 N.Y.S. 398, 236 App.Div. 760—*Curtis v. Thomson*, 2 N.Y.S. 2d 418, 166 Misc. 870, affirmed 2 N.Y.S.2d 428, 253 App.Div. 806.

Okl.—*Buellesfeld v. Jones*, 105 P.2d 242, 187 Okl. 596—*Burke v. Tarrant Inv. Co.*, 26 P.2d 949, 166 Okl. 179.

49 C.J. p 1010 note 87.

32. Ga.—*Evans v. Odum*, 183 S.E. 669, 52 Ga.App. 453.

49 C.J. p 1010 note 88.

33. N.Y.—*Wheeler v. Newbould*, 16 N.Y. 392—*Kilpatrick v. Dean*, 4 N.Y.S. 708, 15 Daly 182.

34. U.S.—*Dibert v. Wernicke*, Ohio, 214 F. 673, 181 C.C.A. 109.

49 C.J. p 1010 note 90.

35. Conn.—*Hoyt v. Stuart*, 96 A. 166, 90 Conn. 41.

49 C.J. p 1010 note 91.

does a sale in accordance with the terms of the agreement of pledge;<sup>36</sup> and, where the property is lawfully sold and the pledgor given credit on his indebtedness in an amount greater than the face and interest of the debt, he has suffered no damage by reason of the sale and may not complain thereof.<sup>37</sup>

**Subsequent sale.** Where pledged property is converted by a wrongful sale thereof by the pledgee, a subsequent sale by the purchaser has been held to make him and the subsequent purchaser joint tort-feasors in the conversion.<sup>38</sup>

**Defenses.** It is no defense to a pledgee's liability for conversion by an unauthorized sale that he did not profit by the sale,<sup>39</sup> or that the pledgor afterward bought the property from the purchaser at about the price for which the pledgee sold it.<sup>40</sup> Where a part owner of property pledges it for his individual benefit, with the authority and consent of his coöwner, the pledgee is estopped to set up the coöwner's title as a defense to an action by the pledgor for its conversion.<sup>41</sup> The pledgee may set off the amount of his debt against the amount of the pledgor's recovery.<sup>42</sup>

#### b. Remedies of Pledgor or Owner

On a wrongful sale the pledgor may sue in trover for conversion, or he may maintain an action for damages, or

he may ratify the sale and sue for the proceeds as money received for his use, or may sue in equity where his remedy at law is inadequate. The real owner of property pledged by a third person may sue the pledgee for conversion by a wrongful sale.

The pledgor, on being informed of an unauthorized sale by the pledgee, may elect to ratify the sale and claim the benefit of the surplus,<sup>43</sup> or he may repudiate the sale and credit of the surplus and hold the pledgee responsible for the property.<sup>44</sup> Accordingly, on such a wrongful sale, the pledgor may sue either in trover for the conversion,<sup>45</sup> or he may maintain an action on the case for damages,<sup>46</sup> even though he is precluded by lapse of time from avoiding the sale;<sup>47</sup> or, if he elects to ratify the sale, he may sue in assumpsit for the proceeds, as money received to his use;<sup>48</sup> or, as discussed supra § 55, he may plead such conversion as a set-off to a suit on the original debt by the pledgee; or, where the circumstances are such that there is no adequate remedy at law, he may sue the pledgee in equity to recover the property,<sup>49</sup> or to recover the proceeds thereof.<sup>50</sup>

**Right of real owner.** An owner of property, pledged by a third person, may sue the pledgee for conversion by a wrongful sale,<sup>51</sup> although he permitted the property to be so pledged.<sup>52</sup> No recovery can be had where the alleged conversion was *damnum absque injuria*.<sup>53</sup>

#### What constitutes consent

Lessee's failure to reply to letter reciting that lessee had forfeited ownership of pledged securities does not amount to consent thereto.—*Leslie v. Brown Bros. Incorporation*, 283 P. 936, 208 Cal. 606.

36. Ind.—*Fagan v. Babacz*, 1 N.E.2d 299, 102 Ind.App. 558.

37. U.S.—*Pacific Impr. Co. v. Weldenfeld*, C.C.A.N.Y., 277 F. 224.

38. Tex.—*Hazleton v. Holt*, Civ. App., 285 S.W. 1115.

39. Tex.—*Hazleton v. Holt*, supra.

40. Wis.—*Ainsworth v. Bowen*, 9 Wis. 348.

49 C.J. p 1010 note 96.

41. Ala.—*Sharpe v. Birmingham Nat. Bank*, 7 So. 106, 87 Ala. 644.

42. Mass.—*Whitman v. Boston Terminal Refrigerating Co.*, 124 N.E. 43, 233 Mass. 386.

49 C.J. p 1010 note 98.

43. La.—*Corpus Juris* quoted in *W. F. Taylor Co. v. Whitbeck*, App., 159 So. 187, 189.

N.Y.—*Strong v. National Mechanics' Banking Assoc.*, 45 N.Y. 718.

**Date as of which proceeds credited**  
In action for amount due on open account brought against pledgor of cotton by pledgee who had made unauthorized sale at time when price

was higher than when sale was subsequently requested by pledgor, defendant pledgor was entitled to credit for proceeds of sale as of date of sale.—*W. F. Taylor Co. v. Whitbeck*, La.App., 159 So. 187.

44. La.—*Corpus Juris* quoted in *W. F. Taylor Co. v. Whitbeck*, App., 159 So. 187, 189.

N.Y.—*Strong v. National Mechanics' Banking Assoc.*, 45 N.Y. 718.

45. Ala.—*Stanley v. People's Sav. Bank*, 157 So. 844, 229 Ala. 446.

La.—*Corpus Juris* quoted in *W. F. Taylor Co. v. Whitbeck*, App., 159 So. 187, 189.

49 C.J. p 1010 note 3.

46. Ala.—*Stanley v. People's Sav. Bank*, 157 So. 844, 229 Ala. 446.

La.—*Corpus Juris* quoted in *W. F. Taylor Co. v. Whitbeck*, App., 159 So. 187, 189.

49 C.J. p 1011 note 4.

47. La.—*Corpus Juris* quoted in *W. F. Taylor Co. v. Whitbeck*, App., 159 So. 187, 189.

Mass.—*Lord v. Hartford*, 56 N.E. 609, 175 Mass. 320.

48. La.—*Corpus Juris* quoted in *W. F. Taylor Co. v. Whitbeck*, App., 159 So. 187, 189.

N.Y.—*Stearns v. Marsh*, 4 Den. 227, 47 Am.D. 248.

49. La.—*Corpus Juris* quoted in

*W. F. Taylor Co. v. Whitbeck*, App., 159 So. 187, 189.

Mo.—*Corpus Juris* cited in *State ex rel. Shull v. Liberty Nat. Bank of Kansas City*, 53 S.W.2d 899, 903, 331 Mo. 386.

49 C.J. p 1011 note 8.

50. La.—*Corpus Juris* quoted in *W. F. Taylor Co. v. Whitbeck*, App., 159 So. 187, 189.

Mo.—*Corpus Juris* cited in *State ex rel. Shull v. Liberty Nat. Bank of Kansas City*, 53 S.W.2d 899, 903, 331 Mo. 386.

49 C.J. p 1011 note 9.

51. N.Y.—*Smith v. Savin*, 36 N.E. 338, 141 N.Y. 315.

52. Ill.—*Hortman v. Illinois State Trust Co.*, 173 Ill.App. 234.

53. N.J.—*Kaufman v. Trust Co. of New Jersey*, 22 A.2d 279, 130 N.J. Eq. 346.

#### Proceeds properly paid

Alleged conversion by trust company of estate's stock pledged to the trust company by executor was *damnum absque injuria* and did not render trust company liable to estate, where the proceeds of the sales of all stocks by the trust company at the direction of the executor were used in payment of the estate's debts or were deposited to the estate's credit with the exception of a small

*Conditions precedent.* As a general rule, a tender of his debt by the pledgor is not necessary before bringing suit,<sup>54</sup> as it would be useless, since the pledgee has put it out of his power to perform his part of the contract.<sup>55</sup> Where the pledgee has bought the property at his own sale, the pledgor may not sue him in conversion unless he has first tendered the amount of his debt and demanded a return of the property, and the tender and demand have been refused by the pledgee;<sup>56</sup> nor may the sale be set aside unless the pledgor has paid or tendered the amount of the debt.<sup>57</sup>

### c. Measure of Damages

Generally, the pledgor may recover the actual amount of loss suffered by him by reason of a wrongful sale of the pledged property.

As a general rule the pledgor is entitled to recover of the pledgee the actual amount of the loss suffered by him by reason of the wrongful sale,<sup>58</sup> that is, the value of the pledged property at the time of conversion less the amount of the debt secured by the pledge;<sup>59</sup> and the fact that the pledgee denies the conversion will not deprive him of the right to deduct the principal debt from the amount of the collateral.<sup>60</sup> In determining this difference the pledgee will be charged with the actual or market value of the property at the time of conversion,<sup>61</sup> and, in the case of commercial paper,

its actual value at the time of sale is *prima facie* its face value.<sup>62</sup>

*Mingled property.* Where the pledgee without authority buys the property himself and so mingles it with the property of others that he cannot show the amounts realized therefrom, the pledgor may recover for the whole lot of his property at the price obtained by the pledgee for the best grade of such property.<sup>63</sup>

*Nominal damages.* It has been held that, where the amount of the secured debt equals or exceeds the value of the property converted, the pledgor is entitled to nominal damages only.<sup>64</sup>

## § 64. — Waiver of Defects and Ratification of Invalid Sale

Defects in the sale may be waived by the pledgor, or he may ratify an invalid sale so as to make it binding on him.

The pledgor may waive, either expressly or impliedly, his right to object to any defects in making a sale of the pledged property,<sup>65</sup> such as in respect of the time and place of sale;<sup>66</sup> or, after acquiring full knowledge of an invalid sale, he may ratify it, so as to make it binding on him,<sup>67</sup> and cure defects in the sale as to notice or publicity.<sup>68</sup> Such ratification need not be express, but may be implied, from the pledgor's acts,<sup>69</sup> unless he was

item for interest.—*Kaufman v. Trust Co. of New Jersey*, *supra*.

54. Kan.—*Lynn v. McCue*, 147 P. 808, 94 Kan. 761.  
49 C.J. p 1011 note 12.

55. N.Y.—*Ogden v. Lathrop*, 31 N. Y. Super. 643.

56. Ohio.—*Glidden v. Mechanics' Nat. Bank*, 42 N.E. 995, 53 Ohio St. 588, 43 L.R.A. 737.

57. Md.—*Kemp v. Kemp*, 16 A.2d 888, 178 Md. 645.

In absence of payment or tender of the amount of debt secured by pledge, court would not grant pledgee the partial relief of reinstating debt and pledge without showing of any advantage to pledgor therefrom.—*Kemp v. Kemp*, *supra*.

58. Ala.—*Corpus Juris* cited in *Stanley v. People's Sav. Bank*, 157 So. 844, 846, 229 Ala. 446.

Ill.—*Hortman v. Illinois State Trust Co.*, 173 Ill.App. 234.  
49 C.J. p 1011 note 19.

### Special assumption

Where pledgee sold pledged property at private sale without notice, in violation of express agreement that pledged property was not to be sold without pledgor's consent, pledgor could maintain special assumption to recover his actual dam-

ages for breach of contract.—*Stanley v. People's Sav. Bank*, 157 So. 844, 229 Ala. 446.

### Fair market value as standard

If trust company, holding as security on surety's note a master's certificate showing purchase of realty in another state by trust company at mortgage foreclosure sale, did not acquire a fee simple title to the realty and sold the realty in violation of the surety's rights under law of such state, the surety's only claim was a claim for damages against the trust company to be measured by the difference between the fair market value of the realty at time trust company disposed of it and amount actually received for the realty.—*Staten v. Louisville Trust Co.*, 158 S.W.2d 387, 289 Ky. 258.

59. Ala.—*Corpus Juris* cited in *Stanley v. People's Sav. Bank*, 157 So. 844, 846, 229 Ala. 446.

49 C.J. p 1011 note 20.

60. Colo.—*Hallack Lumber, etc., Co. v. Gray*, 34 P. 1000, 19 Colo. 149.

61. Tex.—*Hazleton v. Holt*, Civ. App., 285 S.W. 1115.  
49 C.J. p 1011 note 22.

62. Colo.—*Hallack Lumber Mfg. Co. v. Gray*, 34 P. 1000, 19 Colo. 149.  
Pa.—*Davis v. Funk*, 39 Pa. 243, 80 Am.D. 519.

63. La.—*Shexneider v. Simon Rice Milling Co.*, 83 So. 28, 145 La. 831.  
49 C.J. p 1011 note 24.

64. Ill.—*Cole v. Dalziel*, 13 Ill.App. 23.

65. N.J.—*Morris Canal, etc., Co. v. Lewis*, 12 N.J.Eq. 323.  
N.Y.—*Weir v. Dwyer*, 114 N.Y.S. 528, 62 Misc. 7.

66. N.Y.—*Weir v. Dwyer*, *supra*—*Willoughby v. Comstock*, 3 Hill 389.  
49 C.J. p 1012 note 35.

67. Cal.—*Anglo-California Trust Co. v. Holbrook*, 24 P.2d 169, 218 Cal. 531.

49 C.J. p 1012 note 36.

### Sale after bar of principal obligation

Pledgor's consent to pledgee's sale of pledge validated sale, notwithstanding limitations had run on principal obligation, where only persons with any claim to pledge were pledgor and pledgee.—*Anglo-California Trust Co. v. Holbrook*, *supra*.

68. Cal.—*Colton v. Oakland Sav. Bank*, 70 P. 225, 137 Cal. 376.  
49 C.J. p 1012 note 37.

69. Ga.—*Hall v. Vann*, 123 S.E. 172, 32 Ga.App. 281.  
49 C.J. p 1012 note 38.

without full knowledge of the facts at the time of such acts.<sup>70</sup> Thus, where he acts with full knowledge, ratification may be implied from the pledgor's accepting the proceeds of the sale,<sup>71</sup> although such acceptance is made under protest;<sup>72</sup> or from his recognition of the sale in a subsequent settlement;<sup>73</sup> or from his negotiations for a repurchase of the property;<sup>74</sup> or even from his mere acquiescence,<sup>75</sup> especially where such acquiescence is long continued.<sup>76</sup> Where counsel for the owner of collateral is present at the sale by the holder, and announces before the sale that he will present his objections to such sale to the court, the owner will not be held to have acquiesced in the sale by a failure to make further objection.<sup>77</sup>

*An unauthorized purchase by the pledgee* may be ratified by the pledgor's silence, acquiescence, or other conduct, with a full knowledge of all the material facts and circumstances,<sup>78</sup> unless, by reason of the pledgee's fraud, the sale is absolutely void.<sup>79</sup>

### § 65. — Restraining Sale

In a proper case, and where he has no adequate remedy at law, a pledgor may sue to restrain an unauthorized or invalid sale.

Subject to the rules relating to injunctions generally, the pledgor may sue to restrain an unauthorized or invalid sale by the pledgee, where, under the circumstances of the case, the pledgor has no adequate remedy at law,<sup>80</sup> as where the pledgee is insolvent and unable to respond in damages,<sup>81</sup> or where the property threatened to be sold does not have an ascertainable value,<sup>82</sup> or where the pledgee attempts to use his power of sale to secure for himself or another an unjust or unconscionable ad-

vantage.<sup>83</sup> However, a preliminary injunction against such a sale will not be granted except in a clear case, in order to prevent irreparable injury;<sup>84</sup> nor is the pledgor entitled to a judgment restraining the sale, where it does not appear that the pledgee is violating any agreement with him.<sup>85</sup> A sale will not be enjoined merely because a depression prevents realization of the full value of the collateral,<sup>86</sup> or because of the lender's oral agreement to extend time of payment where there was no fraud in obtaining the note and the lender is not insolvent.<sup>87</sup>

### § 66. — Title and Rights of Purchaser

A valid sale divests the pledgor of his title and vests it in the purchaser, but a purchaser at an invalid sale acquires only the pledgee's right or interest in the property.

Where a sale of pledged property by the pledgee, on default of the pledgor is legally and validly made in compliance with the terms of the pledge and the rules of law pertaining thereto, it divests the title of the pledgor and vests in the purchaser a good and valid title to the property pledged,<sup>88</sup> that is, all the right and interest in the property which the pledgor could empower the pledgee to sell at the time the pledge was given,<sup>89</sup> even though there may still remain a trust relationship between the pledgor and pledgee requiring the pledgee to pay any surplus over the amount due him to the pledgor;<sup>90</sup> and, where the purchaser buys in good faith, it is immaterial whether or not he had notice that the property was pledged.<sup>91</sup> Under this rule a bona fide purchaser of a pledged chose in action, where a sale thereof is authorized, may enforce it for its face value against the maker,<sup>92</sup> and is not

70. Ala.—Sharpe v. Birmingham Nat. Bank, 7 So. 106, 87 Ala. 644. 49 C.J. p 1012 note 39.

71. Ga.—McElmurray v. Heard, 119 S.E. 220, 30 Ga.App. 677. 49 C.J. p 1012 note 40.

72. Ga.—McElmurray v. Heard, supra—Kennedy v. Dexter Banking Co., 113 S.E. 819, 29 Ga.App. 95.

73. La.—Lafitte v. Godchaux, 35 La. Ann. 1161.

74. Cal.—Hill v. Finigan, 19 P. 494, 77 Cal. 267, 11 Am.S.R. 279.

75. Cal.—Rose v. Doe, 89 P. 135, 4 Cal.App. 680. 49 C.J. p 1012 note 44.

76. Cal.—Rose v. Doe, supra. 49 C.J. p 1012 note 45.

77. Mo.—Laclede Nat. Bank v. Richardson, 56 S.W. 1117, 156 Mo. 270.

78. U.S.—Hayward v. Elliot Nat.

Bank, Mass., 96 U.S. 611, 24 L.Ed. 855.

49 C.J. p 1012 note 48.

79. Ky.—Perkins v. Applegate, 85 S.W. 723, 27 Ky.L. 522.

80. N.Y.—Howley v. Charles Francis Press, 111 N.Y.S. 1080, 127 App. Div. 646.

49 C.J. p 1011 note 27.

81. N.Y.—Howley v. Charles Francis Press, supra.

82. N.Y.—Howley v. Charles Francis Press, supra.

83. Ala.—First Nat. Bank v. Forman, 160 So. 109, 230 Ala. 185.

84. Tex.—Labor Bank & Trust Co. v. Dow, Civ.App., 26 S.W.2d 925. 49 C.J. p 1012 note 31.

85. Ga.—Cooper v. National Fertilizer Co., 64 S.E. 650, 132 Ga. 529. 49 C.J. p 1012 note 32.

86. Ga.—Darien Bank v. Varner, 165 S.E. 82, 175 Ga. 193.

87. Ga.—Darien Bank v. Varner, supra.

88. Cal.—MacDonald v. Pacific Nat. Bank of San Francisco, 152 P.2d 360, 66 Cal.App.2d 357.

Pa.—Union Trust Co. of Pittsburgh v. Long, 164 A. 346, 309 Pa. 470—In re Doutrich's Estate, Orph., 54 Dauph.Co. 172.

49 C.J. p 1012 note 52.

Title held superior to that of subsequent judgment creditor Ga.—Carratt v. Swift & Co., 191 S. E. 926, 55 Ga.App. 858.

89. R.I.—Potter v. Thompson, 10 R. I. 1.

90. Cal.—MacDonald v. Pacific Nat. Bank of San Francisco, 152 P.2d 360, 66 Cal.App.2d 357.

91. Tex.—Brightman v. Reeves, 21 Tex. 70.

92. U.S.—Turner v. Metropolitan

limited to the recovery of the original debt.<sup>93</sup>

*Where sale invalid as against pledgor.* Where, by reason of the terms of the pledge or the rules of law not having been complied with, the sale is invalid as being in violation of the pledgor's rights, the purchaser, as a general rule, acquires only the pledgee's right or interest in the pledged property,<sup>94</sup> and is entitled to hold it, as against the pledgor, only to the extent of the original debt which it secured;<sup>95</sup> and further than this he acquires no title to the property as against the pledgor.<sup>96</sup> Where, however, the pledged collateral consists of a negotiable instrument, or other chose in action or property to which the pledgor has given the pledgee the indicia of ownership, a bona fide purchaser thereof takes absolute title, even as against the pledgor;<sup>97</sup> and the purchaser's rights are not affected by notice of the pledgor's rights after a part of the property has been delivered and paid for.<sup>98</sup> Fraud of the pledgee to which the purchaser is not a party does not vitiate the sale as to him.<sup>99</sup> Where the pledgee of a deed of trust and note secured thereby procured by fraud was not a holder in due course, and action on the note was barred by limitations, a purchaser of such instruments at a sale pursuant to the pledge agreement is not a holder in due course without notice of the defects.<sup>1</sup>

## § 67. Action to Foreclose Pledge

- a. Right of action
- b. Conditions precedent
- c. Defenses
- d. Proceedings in general

- Trust Co., Wash., 207 F. 495, 125 C.C.A. 157.  
 49 C.J. p 1013 note 56.  
 93. U.S.—*Morris v. East Side R. Co.*, Or., 104 F. 409, 43 C.C.A. 605.  
 94. Mont.—*Potter v. Lohse*, 77 P. 419, 31 Mont. 91.  
 49 C.J. p 1013 note 59.  
 95. Ill.—*Peacock v. Phillips*, 93 N.E. 415, 247 Ill. 467, 32 L.R.A., N.S., 42.  
 49 C.J. p 1013 note 60.  
 96. Ariz.—*United Bank, etc., Trust Co. v. Jones*, 249 P. 747, 30 Ariz. 557.  
 49 C.J. p 1013 note 61.  
 97. Cal.—*Brittan v. Oakland Sav. Bank*, 57 P. 84, 124 Cal. 282, 71 Am.S.R. 58, 44 P. 339, 112 Cal. 1.  
 49 C.J. p 1013 note 63.  
 98. N.Y.—*Morris v. Grant*, 34 Hun 377.  
 49 C.J. p 1013 note 64.  
 99. Ill.—*Cole v. Cosgrove*, 16 Ill. App. 167.  
 1. Cal.—*Howell v. Dowling*, 126 P. 2d 630, 52 Cal.App.2d 487.

2. N.Y.—*First Trust & Deposit Co. v. Potter*, 278 N.Y.S. 847, 155 Misc. 106.  
 Or.—*Corpus Juris* quoted in *Holt v. Guaranty & Loan Co.*, 296 P. 852, 855, 136 Or. 272.  
 49 C.J. p 1013 note 68.  
 3. Del.—*Claude Banta, Inc., v. Wilmington Suburban Water Co., Ch.*, 46 A.2d 876.  
 Mo.—*Corpus Juris* cited in *Hughes v. Community Bank of Dawn*, 78 S.W.2d 98, 100, 336 Mo. 305.  
 N.Y.—*Queen v. Fryer*, 249 N.Y.S. 651, 232 App.Div. 222—*First Trust & Deposit Co. v. Potter*, 278 N.Y.S. 847, 155 Misc. 106.  
 Or.—*Corpus Juris* quoted in *Holt v. Guaranty & Loan Co.*, 296 P. 852, 855, 136 Or. 272.  
 S.C.—*Corpus Juris* cited in *Judson Mills v. Norris*, 164 S.E. 919, 166 S.C. 422.  
 Tex.—*Hurlock v. Mitchell*, Civ.App., 98 S.W.2d 1005, error dismissed.  
 Wash.—*Corpus Juris* cited in *Kolstad v. Younglove Grocery Co.*, 201 P.2d 142, 144, 32 Wash. 212.  
 49 C.J. p 1013 note 70.

- e. Parties
- f. Pleading
- g. Evidence
- h. Decree or judgment
- i. Sale
- j. Rights of purchaser

### a. Right of Action

The pledgee, regardless of his other remedies, may file a bill to foreclose the pledge and obtain a sale of the collateral under an order of court.

Where the debt or obligation for which the property is pledged matures and is unpaid, or the pledgor otherwise defaults, the pledgee, regardless of any legal or summary remedy he may have,<sup>2</sup> may, at his election, file a bill in equity for the foreclosure of the pledge and a sale of the pledged property under an order of court;<sup>3</sup> and some statutes either expressly or impliedly authorize this remedy.<sup>4</sup> Resort to this remedy is particularly appropriate where there are conflicting claims as to the ownership and right of possession of the pledge,<sup>5</sup> or of the surplus,<sup>6</sup> or there are conflicting liens thereon.<sup>7</sup> It has been held, however, that, after the pledgee has recovered judgment against the pledgor, if the property pledged is subject to execution, a court of equity has no jurisdiction to entertain a bill to foreclose the pledgee's lien, because the remedy by execution is adequate.<sup>8</sup>

The advantages of such a foreclosure are that it concludes the rights of all parties in interest and prevents any recourse against the pledgee for violation of his duties to the pledgor or to third per-

4. Or.—*Corpus Juris* quoted in *Holt v. Guaranty & Loan Co.*, 296 P. 852, 855, 136 Or. 272.  
 49 C.J. p 1014 note 71.  
 5. Mo.—*Corpus Juris* cited in *Hughes v. Community Bank of Dawn*, 78 S.W.2d 98, 100, 336 Mo. 305.  
 Or.—*Corpus Juris* quoted in *Holt v. Guaranty & Loan Co.*, 296 P. 852, 855, 136 Or. 272.  
 S.C.—*Corpus Juris* cited in *Judson Mills v. Norris*, 164 S.E. 919, 166 S.C. 422.  
 49 C.J. p 1014 note 72.  
 6. N.Y.—*Gauntlett v. Patton*, 89 N.Y.S. 385, 96 App.Div. 627.  
 7. Ga.—*Buena Vista Loan, etc., Bank v. Grier*, 40 S.E. 284, 114 Ga. 398.  
 Vt.—*White River Sav. Bank v. Capital Sav. Bank, etc., Co.*, 59 A. 197, 77 Vt. 123, 107 Am.S.R. 754.  
 8. Ind.—*Indianapolis First Nat. Bank v. Root*, 3 N.E. 105, 107 Ind. 224.



sons<sup>9</sup> and that it enables the pledgee to buy at the sale.<sup>10</sup>

*Strict foreclosure.* The lien resulting from a pledge has been held to differ from that resulting from a mortgage in that it is subject to strict foreclosure.<sup>11</sup>

*Where suit to foreclose necessary.* In some cases the pledgee must resort to a judicial foreclosure of his lien, as where he has been wrongfully deprived by the pledgor of the possession of the property,<sup>12</sup> or is unable to find the pledgor,<sup>13</sup> or where for any other reason he cannot demand payment and give the pledgor notice of sale.<sup>14</sup>

*Where chose in action pledged.* Under ordinary circumstances a pledge of commercial paper or other chose in action must be enforced by collection, and a court of equity will not decree the foreclosure and sale thereof,<sup>15</sup> because the pledgee has, in such a case, a complete remedy at law on the pledged chose in action.<sup>16</sup> Where, however, special circumstances exist which call for equity jurisdiction, a pledge of commercial paper,<sup>17</sup> or of a note and mortgage,<sup>18</sup> or of a bond and mortgage,<sup>19</sup> may be foreclosed by a bill in equity.

#### b. Conditions Precedent

Compliance with conditions precedent to a suit to foreclose is necessary.

Under some statutes a prescribed notice must be given to the pledgor before the institution of the suit against the pledged property.<sup>20</sup> The pledgee is not required to return the collateral as a condition to suing to foreclose the lien of the pledge;<sup>21</sup> and, ordinarily, where the pledge is made to secure

an unliquidated demand, the pledgee may at once file his bill in equity to obtain a sale, without first proceeding at law to determine the amount of the principal debt.<sup>22</sup>

*Indemnity agreement.* Where one pledges his chattels to secure a debt due from a third person to the pledgee, the pledgee, in order to foreclose the pledge, must obtain a judgment establishing the debt;<sup>23</sup> but he is not required to exhaust collateral transferred to him before foreclosure, where the trust agreement is limited as to time only, and the time has expired.<sup>24</sup>

#### c. Defenses

Various matters have been considered as affording or not affording defenses in suits to foreclose a pledge.

This right to judicial foreclosure is not affected by the pledgee's recovery of a judgment against the pledgor and the appointment of a receiver for the pledgor's property;<sup>25</sup> and the pledgor cannot set up as a defense that he gave the pledge with an intention to defraud his creditors, since a conveyance, void as to creditors, is nevertheless good as between the parties.<sup>26</sup> A third person joined as defendant may set up a paramount and adverse title, and demand possession of the property.<sup>27</sup>

#### d. Proceedings in General

Proceedings to foreclose a pledge are governed by the general rules of equity procedure.

The general rules of equity procedure ordinarily apply in an action to foreclose a pledge, such as with respect to the service of process,<sup>28</sup> and as to the findings in the case.<sup>29</sup>

9. Me.—Boynton v. Payrow, 67 Me. 587.

Or.—Corpus Juris quoted in Holt v. Guaranty & Loan Co., 296 P. 852, 855, 136 Or. 272.

10. Or.—Corpus Juris quoted in Holt v. Guaranty & Loan Co., 296 P. 852, 855, 136 Or. 272.

11. Wash.—Freepons v. Elliott, 67 P.2d 924, 190 Wash. 348.

12. Ala.—American Pig Iron Storage Warrant Co. v. German, 28 So. 603, 126 Ala. 194, 85 Am.S.R. 21.

13. Ind.—Indiana, etc., R. Co. v. McKernan, 24 Ind. 62.  
N.Y.—Stearns v. Marsh, 4 Den. 227, 47 Am.D. 248.

14. N.Y.—Markham v. Jaudon, 41 N.Y. 235.  
49 C.J. p 1014 note 81.

15. Cal.—Traders Bank v. Wilcox, 183 P. 256, 42 Cal.App. 24.  
49 C.J. p 1014 note 83.

16. W.Va.—Whitaker v. Charleston Gas Co., 16 W.Va. 717.

17. N.Y.—Queen v. Fryer, 249 N.Y. S. 651, 232 App.Div. 222.  
49 C.J. p 1014 note 85.

18. Mich.—Clark v. Chapman, 184 N.W. 497, 215 Mich. 518.  
49 C.J. p 1014 note 86.

Where pledgor denies existence of pledge, state law forbidding sale of evidence of debt by pledgee does not prevent a decree establishing pledge and authorizing proceeding for foreclosure, since denial made it necessary for plaintiff to establish the pledge by a decree in equity.—Ingram v. Mandler, C.C.A.Okl., 56 F.2d 994.

19. Kan.—Blood v. Shepard, 77 P. 565, 69 Kan. 752.  
N.Y.—Porter v. Frazer, 27 N.Y.S. 517, 6 Misc. 553.

20. La.—Gentis v. Blasco, 15 La. Ann. 104.

21. Mo.—Swan v. Tabor, App., 266 S.W. 754.

22. Ala.—Jones v. Dimmick, 59 So. 623, 178 Ala. 296.  
49 C.J. p 1014 note 90.

23. Tex.—Killman v. Young, Civ. App., 171 S.W. 1065.

24. Wash.—Fidelity Nat. Bank v. Fox, 258 P. 335, 144 Wash. 494.

25. N.Y.—Pate v. Hoffman, 16 N.Y. S. 74, 61 Hun 386.

26. R.I.—Chafee v. A. & W. Sprague Mfg. Co., 14 R.I. 168.

27. Wash.—Washington Nat. Bldg., etc., Assoc. v. Saunders, 64 P. 546, 24 Wash. 321.

28. Tex.—Leyhe v. Leyhe, Civ.App., 220 S.W. 377.  
49 C.J. p 1015 note 98.

29. Findings held not inconsistent as to amount remaining unpaid.—Anglo-California Trust Co. v. Oakland R. Cos., 225 P. 452, 193 Cal. 451.

**Custody of property.** In an action to foreclose a pledge of property placed with a pledgeholder, the pledgee is entitled to its possession and to have it remain in the custody of the pledgeholder.<sup>30</sup>

**Jurisdiction.** The courts of the state in which the pledgee resides have power to decree a foreclosure of a pledge,<sup>31</sup> although the pledgor is a resident of a different state.<sup>32</sup> The setting up of a counterclaim by defendant does not oust the court of its equitable jurisdiction to decree a foreclosure.<sup>33</sup>

#### e. Parties

Generally, the pledgor and all other persons having an interest in the property should be made parties to proceedings to foreclose a pledge.

In an action to foreclose the pledge there should, as a general rule, be joined as parties defendant the pledgor,<sup>34</sup> or his personal representative,<sup>35</sup> and all other persons having an interest in the pledged property, with the right to redeem it,<sup>36</sup> such as a third person to whom the pledgor has assigned all his interest, and of whom the pledgee has knowledge.<sup>37</sup> The pledgor, however, although a proper, is not a necessary, party where he is without the jurisdiction of the court and no relief is prayed against him;<sup>38</sup> where the bankruptcy of the pledgor is averred;<sup>39</sup> or where the pledgee files a written consent of the pledgor that the property may be sold under a judicial decree, and the proceeds applied first to the payment of the pledgee and the remainder to the payment of a subsequently acquired lien of a third person.<sup>40</sup> The owner of the legal title to land is not a necessary party to a

suit for the sale of a contract for the sale and purchase of the land by the pledgee of such contract.<sup>41</sup> In an action on a note and to foreclose the lien on a collateral note, the payor of the collateral note, who indorsed it in blank, is not a necessary party defendant.<sup>42</sup>

**Intervention.** Where, pending the foreclosure action, the pledgor assigns his interest in the pledge, and also any right of action he may have against the pledgee for conversion, the assignee may intervene in the action to assert his rights.<sup>43</sup>

#### f. Pleading

- (1) In general
- (2) Joinder of causes of action

##### (1) In General

The bill or petition for foreclosure must allege facts sufficient to state a cause of action and defendant must interpose his defenses by proper plea or answer, in accordance with the rules of equity pleading generally.

Subject to the general rules of equity pleading, a bill or petition for the foreclosure of a pledge must allege facts sufficient to constitute a cause of action for a decree of foreclosure and sale;<sup>44</sup> and, where by statute, or by the terms of the contract, certain requisites are prescribed before suit for foreclosure can be brought, the bill or petition must allege compliance with the conditions,<sup>45</sup> or allege facts showing a sufficient excuse for failing to comply.<sup>46</sup> The allegations need not be made in formal terms, and the bill or petition is sufficient, as against a demurrer, where it states the substance of the contract of pledge;<sup>47</sup> and a consideration

30. Cal.—Ormsby v. De Borra, 52 P. 499, 5 Cal.Unrep.Cas. 947.

31. N.Y.—Coffin v. Chicago Northern Pac. Constr. Co., 67 Barb. 337.

32. N.Y.—Coffin v. Chicago Northern Pac. Constr. Co., supra.

33. Neb.—Morrissey v. Broomal, 56 N.W. 383, 37 Neb. 766.

34. Ala.—Oden-Elliott Lumber Co. v. Butler County Bank, 104 So. 3, 213 Ala. 84.

49 C.J. p 1015 note 7.

35. La.—Richardson v. Turner, 28 So. 158, 52 La.Ann. 1613.

49 C.J. p 1015 note 8.

36. Utah.—Hoyt v. Upper Marion Ditch Co., 76 P.2d 234, 94 Utah 134.

49 C.J. p 1015 note 9.

**Assignors of moneys due or to become due under public construction contract to secure payment of note are necessary parties in suit to enforce pledge.**—U. S. Fidelity & Guaranty Co. v. First Nat. Bank, 140 So. 755, 224 Ala. 375.

#### Maker of note

A maker of note, who owned stocks which he pledged as security to indorsers, was necessary party to action to foreclose the pledge by holder, to whom indorsers repurchased stocks and who knew that maker was owner of stocks, since, if judgment should be rendered against indorser and indorser should pay judgment, indorser could bring action for recoupment against maker who could first require the security to be returned on payment, and the security could not be returned if holder had foreclosed against indorser and sold the security.—Hoyt v. Upper Marion Ditch Co., 76 P.2d 234, 94 Utah 134.

37. Neb.—Brown v. Omaha Hotel Assoc., 88 N.W. 175, 63 Neb. 181.

38. Fla.—Springfield Co. v. Ely, 32 So. 392, 44 Fla. 319.

39. Ala.—Cleveland Storage Co. v. Guardian Trust Co., 136 So. 731, 223 Ala. 363.

40. Vt.—White River Sav. Bank v. Capital Sav. Bank, etc., Co., 59 A. 197, 77 Vt. 123, 107 Am.S.R. 754.

41. Ind.—Vaughn v. Cushing, 23 Ind. 184.

42. Tex.—Baldwin v. Jordan, Civ. App., 171 S.W. 1016.

43. Cal.—Loughborough v. McNevin, 14 P. 369, 15 P. 773, 74 Cal. 250, 5 Am.S.R. 435.

44. N.Y.—Farmers', etc., Nat. Bank v. Rogers, 1 N.Y.S. 757, 15 N.Y.Civ. Proc. 250.

49 C.J. p 1015 note 18.

45. Mass.—Falmouth Nat. Bank v. Cape Cod Ship Canal Co., 44 N.E. 617, 166 Mass. 550.

Tex.—Baldwin v. Jordan, Civ.App., 171 S.W. 1016.

46. Mass.—Falmouth Nat. Bank v. Cape Cod Ship Canal Co., 44 N.E. 617, 166 Mass. 550.

47. Ala.—Jones v. Dimmick, 59 So. 623, 178 Ala. 296.

49 C.J. p 1015 note 22.

for the contract need not be stated<sup>48</sup> or proved unless the want of consideration is set up by the answer.<sup>49</sup> It is sufficient to allege the pledgor's ownership of the property pledged without alleging how he acquired the property.<sup>50</sup> In an action on a principal obligation for the amount due thereon and for a foreclosure of plaintiff's lien on a note given as collateral, the petition is not insufficient because it does not allege that the collateral note was ever presented to the payor for payment,<sup>51</sup> or that payment thereof was ever refused;<sup>52</sup> nor is it insufficient because it does not allege that the payor of the collateral note had not paid it to plaintiff, or that defendant was not entitled to any credit on the principal note sued on, by reason of any payment on the collateral note, since such payments are defensive matters.<sup>53</sup> Defenses required to be specially pleaded cannot be availed of unless so pleaded.<sup>54</sup>

**Third person's interest.** Where it is desired to make a third person a party defendant, the complaint should allege his interest in the pledge.<sup>55</sup>

**Prayer for sale.** The bill or petition should contain a prayer for a decree for a sale of the property pledged;<sup>56</sup> but it will not be dismissed because it may appear on final hearing that it will not be necessary to sell all the property pledged, as prayed in the bill.<sup>57</sup>

**A plea of a previous tender** of the indebtedness is good without bringing the money into court.<sup>58</sup>

## (2) Joinder of Causes of Action

A suit to foreclose a pledgee's lien may be joined with a cause of action on the principal debt or obligation, or with a cause of action for an accounting, or with other remedies of the pledgee.

A cause of action to foreclose a pledgee's lien may be joined with a cause of action on the principal debt or obligation,<sup>59</sup> or with a cause of action for an accounting to determine the amount for which the lien may be enforced;<sup>60</sup> and on proper pleadings the pledgee may foreclose his lien on the pledge in a suit against the estate of the pledgor and others for conversion of the pledged property,<sup>61</sup> or in another proceeding in which the court may direct an equitable disposition of the property among the contesting claimants.<sup>62</sup> A foreclosure of the pledge may be had in a proceeding to foreclose a mortgage given as collateral.<sup>63</sup> Where the property is levied on in the pledgee's possession for another debt of the pledgor, the pledgee may have his lien enforced by joining in the proceedings, without resort to a separate suit for foreclosure.<sup>64</sup>

## g. Evidence

The rules of evidence in civil actions govern in suits to foreclose a pledge.

The general rules apply as to the admissibility of evidence in actions to foreclose a pledge,<sup>65</sup> and as to the weight and sufficiency thereof.<sup>66</sup> In a suit to foreclose a pledge, notes or mortgages held as collateral may be admitted as evidence,<sup>67</sup> as may also an order from the pledgor directing the property to be held in pledge.<sup>68</sup>

## h. Decree or Judgment

- (1) In general
- (2) Deficiency or personal judgment

### (1) In General

Generally, the pledgee, on establishing his case, is

48. Ohio.—Robinson v. Boyd, 53 N. E. 494, 60 Ohio St. 57.

49. Ohio.—Robinson v. Boyd, supra.

50. Wis.—Plankinton v. Hildebrand, 61 N.W. 839, 89 Wis. 209.

51. Tex.—Baldwin v. Jordan, Civ. App., 171 S.W. 1016.

52. Tex.—Baldwin v. Jordan, supra.

53. Tex.—Baldwin v. Jordan, supra.

54. Iowa.—Hiatt v. Hamilton, 243 N.W. 578, 215 Iowa 215.

#### Want of consideration

Defendant not specially pleading want of consideration for placing collateral could not rely on such defense as regards collateral, although pleading want of consideration for signature to note.—Hiatt v. Hamilton, supra.

55. Wis.—Plankinton v. Hildebrand, 61 N.W. 839, 89 Wis. 209.

49 C.J. p 1016 note 29.

56. Ala.—Stokes v. Dimmick, 48 So. 66, 157 Ala. 237.

49 C.J. p 1016 note 30.

57. U.S.—Land Title, etc., Co. v. Asphalt Co. of America, N.J., 121 F. 192, appeal dismissed 127 F. 1, 62 C.C.A. 23.

58. Cal.—Loughborough v. McNevin, 14 P. 369, 15 P. 773, 74 Cal. 250, 5 Am.S.R. 435.

59. Wis.—Plankinton v. Hildebrand, 61 N.W. 839, 89 Wis. 209.

49 C.J. p 1016 note 34.

60. Cal.—San Pedro Lumber Co. v. Reynolds, 44 P. 309, 111 Cal. 588.

61. Tex.—Zivley v. Lampasas First Nat. Bank, Civ.App., 39 S.W. 219.

62. Tex.—Clarke v. Dallas First State Bank, Civ.App., 150 S.W. 203.

63. Cal.—Caldwell v. Schrock, 58 P. 2d 216, 14 Cal.App.2d 316.

64. Ga.—Buena Vista Loan, etc.,

Bank v. Grier, 40 S.E. 284, 114 Ga. 398.

49 C.J. p 1016 note 38.

65. Cal.—Meyerholtz v. Paxton, 94 P. 78, 7 Cal.App. 237.

49 C.J. p 1016 note 40.

#### 66. Evidence held sufficient

La.—Tucker v. Legette, App., 200 So. 31.

Mo.—Hughes v. Community Bank of Dawn, 78 S.W.2d 98, 336 Mo. 305.

Wash.—Puget Sound Nat. Bank of Tacoma v. Olsen, 24 P.2d 613, 174 Wash. 200.

49 C.J. p 1016 note 41 [a].

#### Evidence held insufficient

Okl.—Potts v. First Nat. Bank, 287 P. 1003, 143 Okl. 140.

67. Cal.—Fresno First Nat. Bank v. Dusy, 42 P. 476, 110 Cal. 69—Ormsby v. De Borra, 52 P. 499, 5 Cal. Unrep.Cas. 947.

68. Cal.—Ormsby v. De Borra, supra.

entitled to an order for the sale of the collateral, and such other relief as is incidental to that prayed.

On establishing his case, the pledgee, unless the peculiar nature of the pledge makes a sale unnecessary,<sup>69</sup> is entitled to an order for the sale of the property pledged;<sup>70</sup> and in an action on a note secured by the pledge of unmatured vendor's lien notes, and for foreclosure, the court may foreclose the lien on the notes pledged and order them sold to satisfy the judgment on the note sued on, instead of foreclosing the vendor's lien retained in the collateral notes.<sup>71</sup> The court may also order such other relief as is incidental to that prayed for,<sup>72</sup> such as an accounting.<sup>73</sup>

Where property is to be sold, the court has the duty of prescribing the time within which it may be redeemed.<sup>74</sup> The period is a matter for the discretion of the court<sup>75</sup> which may reserve the power to extend the period,<sup>76</sup> and a judgment so reserving the power is interlocutory.<sup>77</sup>

Where separate property is pledged for separate debts, each parcel must be sold to pay the debt which it was given to secure,<sup>78</sup> and an order for a sale and application of proceeds in gross is error.<sup>79</sup>

Attorney's fees will be allowed where stipulated for, notwithstanding a statute providing that, on

the foreclosure of a mortgage, such fees must be fixed by the court;<sup>80</sup> and such fees may be deducted from the proceeds of sale where the pledgee is put to the necessity of overcoming legal obstructions in selling the collateral.<sup>81</sup> However, the allowance depends entirely on the contract of the parties,<sup>82</sup> and fees will not be allowed in the absence of stipulation therefor.<sup>83</sup>

**Objection to judgment.** A person who has no interest in the property pledged is not aggrieved by, and may not complain of, the sufficiency of the judgment against a pledgeholder in an action to foreclosure the pledge.<sup>84</sup>

**Appointment of a commissioner** to make the sale has been held to be within the discretion of the trial court.<sup>85</sup>

## (2) Deficiency or Personal Judgment

A personal judgment for any deficiency between the proceeds of the sale and the amount of the debt secured may be rendered against the pledgor.

A personal judgment may be rendered against the pledgor for any deficiency, between the proceeds of the sale and the amount of the debt secured,<sup>86</sup> and on confirmation of a report of sale the court may order an execution for the deficiency,

69. Tex.—Gulf Nat. Bank v. Bass, Civ.App., 177 S.W. 1019.  
49 C.J. p 1016 note 44.

Where certificate of deposit issued by bank was pledged as collateral security for valid note executed to bank by payee of certificate, bank was entitled on its cross bill for judgment for amount of note and for foreclosure of its lien to have face value of certificate credited on debt rather than to have certificate sold under special execution and proceeds of sale applied to payment of debt.—Hughes v. Community Bank of Dawn, 78 S.W.2d 98, 336 Mo. 305.

70. Mo.—Potter v. Whitten, 161 Mo. App. 118.  
49 C.J. p 1017 note 45.

Commercial paper  
N.Y.—Queen v. Fryer, 249 N.Y.S. 651, 232 App.Div. 222.

71. Tex.—City L. & T. Co. v. Stern-er, 124 S.W. 207, 57 Tex.Civ.App. 517.

72. Vt.—Thomas v. Graves, 95 A. 643, 89 Vt. 339.

73. Vt.—Thomas v. Graves, supra.  
49 C.J. p 1017 note 48.

74. Wis.—Security State Bank v. Monona Golf Club, 252 N.W. 287, 213 Wis. 581.

75. Wis.—Security State Bank v. Monona Golf Club, supra.

76. Wis.—Security State Bank v. Monona Golf Club, supra.

77. Wis.—Security State Bank v. Monona Golf Club, supra.

78. Cal.—Mahoney v. Caperton, 15 Cal. 313.

79. Cal.—Mahoney v. Caperton, supra.

80. Cal.—Hildreth v. Williams, 33 P. 1113, 4 Cal.Unrep.Cas. 141.  
Wash.—Fidelity Nat. Bank v. Fox, 258 P. 335, 144 Wash. 494.

81. Tenn.—Carolina Spruce Co. v. Black Mountain R. Co., 201 S.W. 770, 139 Tenn. 248.

82. Wyo.—State Bank of Wheatland v. Bagley Bros., 11 P.2d 572, 44 Wyo. 244, rehearing denied 13 P. 2d 564, 44 Wyo. 456.

83. Wyo.—State Bank of Wheatland v. Bagley Bros., supra.

**Allowance held improper**

Allowance of attorney's fees in pledge foreclosure proceeding was error, where contract of pledge did not stipulate for any, even though notes evidencing indebtedness provided for attorney's fees.—State Bank of Wheatland v. Bagley Bros., supra.

84. Cal.—Ormsby v. De Borra, 52 P. 499, 5 Cal.Unrep.Cas. 247.

85. Miss.—Enochs & Flowers v. Bank of Forest, 159 So. 407, 172 Miss. 36.

86. Mo.—Potter v. Whitten, 142 S. W. 453, 161 Mo.App. 118.  
49 C.J. p 1017 note 54.

**By consent**

In action on contract and to foreclose security pledged, defendant may waive sale of security and consent to personal judgment.—Tracey v. Blood, 3 P.2d 263, 78 Utah 385.

**In Puerto Rico**

(1) A creditor who had bought in at foreclosure sale in an equity suit before United States district court for Puerto Rico could recover a deficiency judgment.—Benitez v. Bank of Nova Scotia, C.C.A.Puerto Rico, 125 F.2d 519, certiorari denied Benitez Sampayo v. Bank of Nova Scotia, 62 S.Ct. 1308, 316 U.S. 702, 86 L.Ed. 1770, rehearing denied 63 S.Ct. 24, 317 U.S. 706, 87 L.Ed. 563, certiorari denied 63 S.Ct. 31, 317 U.S. 624, 87 L.Ed. 505, rehearing denied 63 S.Ct. 153, 317 U.S. 708, 87 L.Ed. 565—Sucesores De Jose Maria Ortiz v. Royal Bank of Canada, C.C.A.Puerto Rico, 68 F.2d 933.

(2) The statute providing that if, on alienation of pledge through public sale or auction, creditor becomes owner thereof, he shall be obligated to give discharge for full amount of his credit, refers only to extrajudicial sales before a notary and not to judicial sales.—Benitez v. Bank of Nova Scotia, C.C.A.Puerto Rico, 125 F.2d 519, certiorari denied Benitez

if any.<sup>87</sup> Where property is pledged to secure the debt of a third person, the pledge may be foreclosed without a personal judgment against the pledgor.<sup>88</sup> In some jurisdictions, however, a court of equity is without jurisdiction to adjudicate the question of deficiency.<sup>89</sup>

### i. Sale

- (1) In general
- (2) Pledgee as purchaser

#### (1) In General

A foreclosure sale of pledged property, except to the extent that it is controlled by special statutes, is governed by the rules and provisions relating to judicial sales.

A foreclosure sale of pledged property, except to the extent that it is controlled by special statutes, is governed by the rules and provisions relating to judicial sales.<sup>90</sup> Thus, a statutory provision requiring judicial sales to be advertised applies to a sale of property pledged as security and ordered sold by a foreclosure decree.<sup>91</sup> A formal levy on the property is not necessary to sustain a special execution in foreclosure of the pledged property in the possession of the judgment creditor.<sup>92</sup> The pledgee may not enter into any covenants with any others than the pledgor except the usual implied covenants to do nothing to destroy the pledge or its value or to encumber it,<sup>93</sup> but he must not deceive or defraud the purchaser by false representation.<sup>94</sup> If property is sold under a void decree,

the court may order its restitution so as to place the parties in the same position as before,<sup>95</sup> and may also order the sale set aside where there was fraud therein.<sup>96</sup> The fact that the order under which pledged property is sold is reversed on appeal does not affect the validity of the sale, where it can be referred to the statute relating to sales of pledged property under which it is valid.<sup>97</sup>

#### (2) Pledgee as Purchaser

On foreclosure and sale under an order of court the pledgee may become the purchaser.

Contrary to the rule which ordinarily forbids a pledgee from purchasing at his own sale of pledged property without judicial process, as discussed supra § 61, a pledgee may purchase the property at a foreclosure sale made under an order of court,<sup>98</sup> and, under a prayer for general relief in the foreclosure action, the court may confirm private sales previously made to the pledgee, where it may fairly be inferred from the facts found that the pledgor assented thereto.<sup>99</sup> By such a purchase the pledgee acquires the title to the property,<sup>1</sup> especially where the purchase is made with the pledgor's knowledge and consent;<sup>2</sup> and foreclosure and purchase at the sale are essential if the pledgee wishes to acquire title to the property.<sup>3</sup> The pledgee must account to the pledgor on the basis of the amount of his bid at the foreclosure sale;<sup>4</sup> and is entitled to credit for the amount of the pledgor's indebtedness,<sup>5</sup> and, in case of foreclosure sale of a mort-

*Sampayo v. Bank of Nova Scotia*, 63 S.Ct. 1308, 316 U.S. 702, 86 L.Ed. 1770, rehearing denied 63 S.Ct. 24, 317 U.S. 706, 87 L.Ed. 563, certiorari denied 63 S.Ct. 31, 317 U.S. 624, 87 L.Ed. 505, rehearing denied 63 S.Ct. 153, 317 U.S. 708, 87 L.Ed. 565.

*87. Wis.—Wilson v. Johnson*, 43 N.W. 148, 74 Wis. 337.

*88. Tex.—Patillo v. Citizens' Nat. Bank*, Civ.App., 197 S.W. 1054, 49 C.J. p 1017 note 56.

*89. Fla.—Florida Nat. Bank of Jacksonville v. Kasewitz*, 25 So. 271, 156 Fla. 761.

**Effect of improper adjudication.** A chancellor had no jurisdiction to adjudicate question of deficiency in proceeds of foreclosure sale of note and mortgage, pledged as collateral security for pledgor's note, to pay balance due on primary note, so that denial of such deficiency was not res judicata in pledgee's action for such balance.—*Florida Nat. Bank of Jacksonville v. Kasewitz*, supra.

*90. Mo.—Corpus Juris cited in Haake v. Union Bank & Trust Co.*, App., 54 S.W.2d 459, 463.

*91. Ky.—Cerulean Springs Bank v. Gardner*, 121 S.W. 608, 134 Ky. 632.

*92. Iowa.—Croft v. Colfax Electric Light, etc., Co.*, 85 N.W. 761, 113 Iowa 455.

*93. Mo.—Haake v. Union Bank & Trust Co.*, App., 54 S.W.2d 459.

*94. Mo.—Haake v. Union Bank & Trust Co.*, supra.

#### Duty of pledgee

A bank acting as trustee and officers acting as its agents in sale of note and trust deed, pledged as security for note held by it, were under no duty to tell purchaser that land had been sold under execution to enforce prior materialman's lien.—*Haake v. Union Bank & Trust Co.*, supra.

**Rule of caveat emptor applies to sale of pledged property, in absence of suppression of fact, coupled with false statement, by one under affirmative duty to tell truth, and an experienced banker, purchasing note from bank on foreclosure of securities pledged for payment of larger note held by it, took note subject to defects, liens, and encumbrances,**

of which he was bound to inform himself.—*Haake v. Union Bank & Trust Co.*, supra.

*95. Ky.—Brown v. Vancleave*, 21 S.W. 756, 14 Ky.L. 821.

*96. Wis.—Schmitt v. Schmitt*, 171 N.W. 655, 169 Wis. 28.

*97. S.C.—Tolbert v. Fouche*, 123 S.E. 859, 129 S.C. 338.

*98. Cal.—Horn v. Klatt*, 151 P.2d 149, 65 Cal.App.2d 510, 49 C.J. p 1017 note 66.

*99. Vt.—Thomas v. Graves*, 95 A. 643, 89 Vt. 339.

*1. Pa.—Huntingdon Valley Trust Co. v. Norristown-Penn Trust Co.*, 196 A. 321, 329 Pa. 356, 49 C.J. p 1017 note 68.

*2. Wash.—Munson v. American Sav. Bank, etc., Co.*, 86 P. 1047, 43 Wash. 549.

*3. Wash.—Carter v. Curlew Creamery Co.*, 147 P.2d 276, 20 Wash.2d 275, 151 A.L.R. 921.

*4. Wash.—Munson v. American Sav. Bank, etc., Co.*, 86 P. 1047, 43 Wash. 549.

*5. Wash.—Munson v. American Sav. Bank, etc., Co.*, supra.

gage, for expenses incurred in acquiring and perfecting title to the mortgaged property.<sup>6</sup> If the pledgor desires to redeem from such sale, he must offer to pay the debt.<sup>7</sup>

**Obligation to third person.** Where the pledgee has agreed to hold the pledge after paying his own claim as security for any damages that might accrue to a third person out of a contract with the pledgor, the pledgee's purchase of the pledged property at his own foreclosure sale does not affect his obligation to such third person.<sup>8</sup>

#### j. Rights of Purchaser

The foreclosure sale passes title as against the judgment debtor.

The foreclosure sale passes title as against the judgment debtor who does not question the proceeding until after sale,<sup>9</sup> unless the sale is impeached for fraud.<sup>10</sup> The purchaser is entitled to the income from the property from the date of sale;<sup>11</sup> and, where another person remains in possession from the date of the sale until its confirmation, he must account to the purchaser for the net income therefrom during such period.<sup>12</sup>

### VIII. ENFORCEMENT OF PLEDGED CHOSE IN ACTION

#### § 68. Right to Enforce

A person not a party to a pledge contract whereby a chose in action is pledged, and who is at best only an incidental beneficiary, may not sue thereon.

A person not a party to a pledge contract whereby a chose in action is pledged, and who is at best only an incidental beneficiary, may not sue thereon.<sup>13</sup>

The pledgor or pledgee as a party plaintiff in actions on bills and notes generally is discussed in

Bills and Notes § 551.

#### § 69. — Pledgor

The general rule is that a pledgor has the right to sue on a pledged chose in action prior to termination of the pledge.

Although there is some authority to the contrary,<sup>14</sup> the right of a pledgor to sue on a pledged chose in action prior to termination of the pledge is generally recognized,<sup>15</sup> especially if, where re-

6. Wash.—Munson v. American Sav. Bank, etc., Co., supra.

49 C.J. p 1017 note 72.

7. Or.—Hydraulic Min. Co. v. Smith, 196 P. 811, 100 Or. 86.

49 C.J. p 1018 note 73.

8. U.S.—Fetzer v. South Side Lumber Co., Wis., 202 F. 878, 121 C.C. A. 236.

9. Iowa.—Croft v. Colfax Electric Light, etc., Co., 85 N.W. 761, 113 Iowa 455.

#### Rights of purchaser

(1) Purchaser at foreclosure sale of collateral pledged to secure corporation's debt, which collateral consisted of tax certificates and a note secured by second deed of trust, acquired title to the collateral as against the corporation, whose charter had expired, its statutory trustees, its stockholders, and its receiver.—Santa Anita Corporation v. Walker, 106 P.2d 459, 106 Colo. 465.

(2) Where payee of note evidencing loan to corporation secured judgment on the note, party who purchased the judgment from such payee and, at execution sale under the judgment, purchased the collateral consisting of another note secured by a second deed of trust and paid for it by satisfaction of the judgment, could foreclose the second deed of trust to the extent of the amount of the judgment regardless of whether such party was a bona fide holder for value in due course,

since to that extent corporation was admittedly obligated on the original loan.—Santa Anita Corporation v. Walker, supra.

(3) Where corporation paid its note secured by second deed of trust, note was indorsed without recourse by payee and returned to corporation, and corporation thereafter pledged the note to secure a loan and agreed to extensions of time for payment, purchaser of the secured note within the extended time for payment, without notice of the history of the note except that it was pledged as collateral for corporation's debt, was a bona fide holder for value in due course entitled to enforce payment by foreclosure of the second deed of trust.—Santa Anita Corporation v. Walker, supra.

10. U.S.—Wheelwright v. St. Louis, etc., Canal Transp. Co., C.C.La., 56 F. 164.

49 C.J. p 1018 note 77.

11. Ohio.—Murphy v. Hardee, 22 Ohio Cir.Ct. 511, 12 Ohio Cir.Dec. 837.

12. Ohio.—Murphy v. Hardee, supra.

13. Minn.—Lincoln Finance Corporation v. Doe, 235 N.W. 392, 183 Minn. 19.

**Mortgagee under chattel mortgage** executed by one without title was not entitled in replevin action to insist on having owner's right to possess automobile conditioned on re-

payment of money pledged to secure mortgagor's return of car.—Lincoln Finance Corporation v. Doe, supra.

14. Wash.—Hodge v. Truax, 51 P.2d 357, 184 Wash. 360, 103 A.L.R. 420.

49 C.J. p 1018 note 81.

#### Right suspended

Indorsement and delivery of negotiable paper as collateral security before maturity pass legal title to holder, with power to collect by suit or otherwise, subject to rights of indorser as to application of proceeds, so that right of pledgor to recover on paper is suspended.—Gables Racing Ass'n v. Persky, 156 So. 392, 116 Fla. 77.

15. Idaho.—Corpus Juris quoted in Uhlig v. Diefendorf, 26 P.2d 801, 804, 53 Idaho 676.

Iowa.—Carter v. McClain, 244 N.W. 671, 215 Iowa 19.

Mass.—Boston Heating Co. v. Middleborough Sav. Bank, 193 N.E. 12, 288 Mass. 433.

N.Y.—Tioga County General Hospital v. Tidd, 298 N.Y.S. 460, 164 Misc. 273—Frensdorf v. Stumpf, 30 N.Y.S.2d 211—Corpus Juris cited in National Bank of Bay Ridge v. Albers, 278 N.Y.S. 381, 384.

49 C.J. p 1018 note 82.

#### Notes in pledgor's possession

U.S.—Sheehan v. Municipal Light & Power Co., C.C.A.N.Y., 151 F.2d 65.

#### Right of original pledgee

Original pledgee of notes from payee was presumptive owner and

covery is had, defendant will be protected from the assertion of further claims by the pledgee on the same chose in action.<sup>16</sup> This rule is recognized more particularly where he sues with the consent of,<sup>17</sup> or under agreement with,<sup>18</sup> or without objection by,<sup>19</sup> or for the use of,<sup>20</sup> the pledgee, or where the pledgee or his assignee refuses to sue,<sup>21</sup> or where the sum due on the pledged chose in action is greater than the amount of the debt secured.<sup>22</sup> Even where the pledgor is not regarded under ordinary circumstances as entitled to sue, where the pledgee is also obligor of the pledged collateral, the pledgor may join the pledgee as defendant.<sup>23</sup>

After termination of the pledge and return of the pledged collateral to the pledgor, he may sue to enforce it.<sup>24</sup> A right to retake possession of goods sold under a conditional sales contract conferring such right cannot be enforced by the original seller, where he has transferred the contract as collateral security.<sup>25</sup>

### § 70. — Pledgee

The pledgee ordinarily has the right to enforce and collect a pledged chose in action by suit thereon or by foreclosure proceedings.

Ordinarily the pledgee has the right to enforce and collect a pledged chose in action<sup>26</sup> by suit thereon,<sup>27</sup> or by foreclosure proceedings,<sup>28</sup> as by execu-

entitled to maintain action on notes as holder for value, notwithstanding payee bank's repledge of notes to another bank, where original payee had possession of notes and produced them at trial with apparent consent of last pledgee.—*National Bank of Bay Ridge in City of New York v. Albers*, 278 N.Y.S. 381, 244 App.Div. 127.

16. N.Y.—*Frensdorf v. Stumpf*, 30 N.Y.S.2d 211.

17. Ill.—*Reconstruction Finance Corporation v. Lucius*, 49 N.E.2d 852, 320 Ill.App. 57.  
49 C.J. p 1018 note 84.

18. Tex.—*Randolph v. Citizens Nat. Bank of Lubbock, Civ.App.*, 141 S.W.2d 1030, error dismissed, judgment correct.

19. Iowa.—*Gilman v. Heitman*, 113 N.W. 982, 137 Iowa 336.  
49 C.J. p 1018 note 85.

20. Ga.—*Camp v. Interstate Chemical Co.*, 89 S.E. 491, 18 Ga.App. 416.  
49 C.J. p 1018 note 86.

21. N.Y.—*Frensdorf v. Stumpf*, 30 N.Y.S.2d 211.  
49 C.J. p 1018 note 87.

22. Me.—*Rosenberg v. Cohen*, 143 A. 97, 127 Me. 260.  
49 C.J. p 1018 note 88.

23. Mo.—*Tennent v. Union Cent. L. Ins. Co.*, 112 S.W. 754, 133 Mo.App. 345.  
49 C.J. p 1018 note 91.

24. N.C.—*White v. Winslow*, 183 S.E. 284, 209 N.C. 207—*Ball-Thrash v. McCormick*, 78 S.E. 303, 162 N.C. 471.

25. N.Y.—*Rapp v. Mabbett Motor Car Co.*, 194 N.Y.S. 200, 201 App. Div. 283.

26. Ala.—*Williams v. Yates*, 157 So. 867, 229 Ala. 437—*Corpus Juris* cited in *Missouri State Life Ins. Co. v. Robertson Banking Co.*, 134 So. 25, 27, 223 Ala. 13.

Ark.—*Lehman v. First Nat. Bank*, 74 S.W.2d 773, 189 Ark. 604—*Schutt v. Arkansas Rice Growers'*

*Agr. Credit Corporation*, 39 S.W.2d 517, 183 Ark. 972.

Cal.—*Mitchell v. Automobile Owners Indemnity Underwriters*, 118 P.2d 815, 19 Cal.2d 1, 137 A.L.R. 923—*Exchange Bank v. Scholz*, 121 P.2d 526, 49 Cal.App.2d 232.

Fla.—*Corpus Juris* cited in *American Express Co. v. Stone*, 189 So. 694, 696, 138 Fla. 73.

Ind.—*Hammond Pure Ice & Coal Co. v. Heitman*, 47 N.E.2d 309, 221 Ind. 352, 145 A.L.R. 997.

La.—*Bank of Minden & Trust Co. v. Barron*, 152 So. 746, 178 La. 1023—*Bass v. Biggs*, 118 So. 861, 167 La. 126—*Tucker v. LeGette, App.*, 8 So.2d 339—*Del Bondio v. Albrecht, App.*, 181 So. 610—*Commercial Nat. Bank of Shreveport v. McDaniel, App.*, 156 So. 43.

N.Y.—*Corpus Juris* cited in *National Bank of Bay Ridge v. Albers*, 278 N.Y.S. 381, 384.

Ohio.—*Central Nat. Bank of Cleveland v. Mills*, 24 N.E.2d 607, 62 Ohio App. 413, certiorari denied *Central Nat. Bank of Cleveland v. O'Brien*, 61 S.Ct. 1114, 313 U.S. 593, 85 L.Ed. 1547.

Pa.—*Corpus Juris* cited in *Tioga No. 2 Bldg. Ass'n v. North Philadelphia Trust Co.*, 189 A. 708, 710, 125 Pa.Super. 234—*Corpus Juris* cited in *First Nat. Bank of New Wilmington v. Getty*, 179 A. 764, 766, 118 Pa.Super. 326.

Wash.—*Hodge v. Truax*, 51 P.2d 357, 184 Wash. 360, 103 A.L.R. 420.

W.Va.—*Corpus Juris* cited in *Hood v. Warner*, 1 S.E.2d 879, 880, 121 W.Va. 98.

49 C.J. p 1019 note 94.  
Foreclosure by pledgor held void  
Cal.—*Security-First Nat. Bank of Los Angeles v. Spring Street Properties*, 67 P.2d 720, 20 Cal.App.2d 618.

#### Lack of right to compromise

Fact that holder of commercial paper as collateral security cannot, except in extreme cases, compromise with maker of collateral and surrender paper for less than amount due thereon, does not conflict with rule

that indorsement and delivery of negotiable paper as collateral security before maturity pass legal title to holder, with power to collect by suit or otherwise.—*Gables Racing Ass'n v. Persky*, 156 So. 392, 116 Fla. 77.

#### Note secured by lien contract

Where contractor did not substantially perform mechanic's lien contract, bank which took pledge of negotiable note secured by lien contract, not as holder in due course, had no lien for which bank could recover on its claim in quantum meruit against makers.—*Continental Nat. Bank of Fort Worth v. Conner*, 214 S.W.2d 928, 147 Tex. 218.

#### Transfer of remedies

When owner of securities pledges them to secure payment of his own debt, he impliedly transfers right to remedies which will make securities available for payment of debt in case of his own default, and pledgee has control of property for time being and represents not only his own interest, but that of pledgor, in taking any proper action for preservation of property and collection and care of its proceeds.—*Security-First Nat. Bank of Los Angeles v. Spring Street Properties*, 67 P.2d 720, 20 Cal.App.2d 618.

27. Fla.—*Gables Racing Ass'n v. Persky*, 156 So. 392, 116 Fla. 77.  
La.—*Tucker v. LeGette, App.*, 8 So. 2d 339.

Mo.—*Welker v. Hayes*, 22 S.W.2d 1052, 224 Mo.App. 392—*Walker v. Hayes, App.*, 25 S.W.2d 523.

Pa.—*Corpus Juris* cited in *Tioga No. 2 Bldg. Ass'n v. North Philadelphia Trust Co.*, 189 A. 708, 710, 125 Pa.Super. 234—*Corpus Juris* cited in *First Nat. Bank of New Wilmington v. Getty*, 179 A. 764, 766, 118 Pa.Super. 326.  
49 C.J. p 1019 note 95.

28. Ala.—*Williams v. Yates*, 157 So. 867, 229 Ala. 437.

Cal.—*Exchange Bank v. Scholz*, 121 P.2d 526, 49 Cal.App.2d 232—*Beatty v. Pacific States Savings & Loan Co.*, 41 P.2d 378, 4 Cal.App.2d 692.

tory process and seizure of property covered by the pledged collateral.<sup>29</sup>

Even though the pledgee has express power of sale, he may, at his option, enforce the pledged collateral by suit.<sup>30</sup>

Where collateral is loaned in order that it may be used for the purpose of borrowing money, the person receiving such collateral has like power to collect it as though the borrowing had been done by the owner of such collateral.<sup>31</sup>

The pledgee's right of enforcement survives an assignment of the pledged collateral to a third person,<sup>32</sup> or the impounding thereof in a suit.<sup>33</sup>

The pledgee's right of action exists, even though the pledged chose in action is held by the pledgor for purposes of collection.<sup>34</sup>

Where suit has been begun by the pledgor for the enforcement of the right of action before his pledge of it to the pledgee, on his obtaining judgment, the pledgee or his assignee will be entitled to intervene and claim the proceeds, without allowance to the pledgor out of the funds for the expenses of his

suit.<sup>35</sup>

**Maturity of principal obligation.** The pledgee may enforce his right to collect the pledged chose in action either before<sup>36</sup> or after<sup>37</sup> maturity of the principal debt, or even though a contingent liability which the pledge was given to secure has not attached.<sup>38</sup> The pledgee cannot enforce collateral of which the pledgor is obligor prior to maturity of the debt for which it is pledged.<sup>39</sup>

**After payment of principal debt.** It has been both affirmed<sup>40</sup> and denied<sup>41</sup> that the pledgee may begin suit to enforce pledged collateral after payment of the principal debt. Partial payment of the principal debt does not preclude the pledgee from collecting on the pledged security.<sup>42</sup> Payment of the principal debt pending the pledgee's action to collect the pledged collateral does not ordinarily abate the pledgee's action,<sup>43</sup> although there is also authority to the contrary.<sup>44</sup>

**Under agreement.** Where the parties have made an agreement relating to the right of the pledgee to enforce collateral, their rights are governed thereby.<sup>45</sup>

Fla.—Howard v. Roberts, 156 So. 438, 116 Fla. 381—Gables Racing Ass'n v. Persky, 156 So. 392, 116 Fla. 77. 49 C.J. p 1019 note 98.

#### **Maker's rights not jeopardized**

Where maker of notes pledged mortgages as security, maker's rights were not jeopardized by pledgee's action in foreclosing mortgages and buying in properties, since on payment of amount due on notes he would be entitled to return of properties.—Gordon v. Mohawk Bond & Mortgage Co., 176 A. 422, 317 Pa. 257.

29. La.—Hollingsworth v. Ratcliff, 110 So. 422, 162 La. 281.

30. Ill.—Corn Belt Bank of Bloomington v. Forman, 264 Ill.App. 589. 49 C.J. p 1020 note 98.

31. Ill.—Naef v. Potter, 127 Ill.App. 106, affirmed 80 N.E. 1084, 226 Ill. 628, 11 L.R.A.-N.S., 1034.

32. N.C.—Davenport v. Vaughn, 137 S.E. 714, 193 N.C. 646. 49 C.J. p 1020 note 1.

33. U.S.—Gregory v. Pike, Mass., 67 F. 837, 15 C.C.A. 33, appeal dismissed 16 S.Ct. 431, 160 U.S. 643, 40 L.Ed. 566. 49 C.J. p 1020 note 2.

34. Mont.—National Bank of Republic v. American Brewing Co., 257 P. 1043, 79 Mont. 605.

35. U.S.—McDougall v. Hazelton Tripod-Boiler Co., Tenn., 88 F. 217, 31 C.C.A. 487.

36. Fla.—Gables Racing Ass'n v. Persky, 156 So. 392, 116 Fla. 77.

Mo.—Corpus Juris cited in McArthur v. Pemiscot County, 176 S.W.2d 618, 621.

Ohio.—Central Nat. Bank of Cleveland v. Mills, 24 N.E.2d 607, 62 Ohio App. 413, certiorari denied Central Nat. Bank of Cleveland v. O'Brien, 61 S.Ct. 1114, 313 U.S. 593, 85 L.Ed. 1547.

Wash.—Corpus Juris cited in Broadway Bank of Kansas City v. Whitaker, 30 P.2d 993, 994, 177 Wash. 62.

49 C.J. p 1020 note 6.

#### **Reason for rule**

If a note pledged as collateral security is supported by a valuable and legal consideration and is collected when due, but before the basic debt is due, it is no concern of the maker because he owes the entire note, and the overplus, if any, after the basic debt is paid, would go to the payee of note.—McArthur v. Pemiscot County, Mo., 176 S.W.2d 618—Farmers' State Bank v. Miller, 300 S.W. 834, 222 Mo.App. 633.

37. La.—People's Bank v. Cookston, App. 142 So. 285.

Ohio.—Central Nat. Bank of Cleveland v. Mills, 24 N.E.2d 607, 62 Ohio App. 413, certiorari denied Central Nat. Bank of Cleveland v. O'Brien, 61 S.Ct. 1114, 313 U.S. 593, 85 L.Ed. 1547.

Wash.—Corpus Juris cited in Broadway Bank of Kansas City v. Whitaker, 30 P.2d 993, 994, 177 Wash. 62.

49 C.J. p 1020 note 7.

38. Mass.—Pelonsky v. Wattendorf, 152 N.E. 337, 255 Mass. 558. 49 C.J. p 1020 note 9.

39. Cal.—Stradley v. Tout, 224 P. 469, 65 Cal.App. 530.

La.—Tucker v. Legette, App., 8 So.2d 339.

49 C.J. p 1020 note 10.

#### **Pledgor as indorser**

Pledgee cannot sue pledgor on negotiable paper held as pledge, although indorsed and guaranteed.—Sparks v. Caldwell, 108 P. 276, 157 Cal. 401—Stradley v. Tout, 224 P. 469, 65 Cal.App. 530.

40. Fla.—Brown v. Panama City First Nat. Bank, 97 So. 351, 86 Fla. 198.

49 C.J. p 1020 note 12.

41. Utah.—Utah Commercial, etc., Bank v. Fox, 140 P. 660, 44 Utah 323.

49 C.J. p 968 note 8 [b] (1), p 1020 note 13.

42. Ga.—Morrison v. Citizens', etc., Bank, 91 S.E. 509, 19 Ga.App. 434. 49 C.J. p 1021 note 15.

43. Tenn.—Johnson City First Nat. Bank v. Mann, 27 S.W. 1015, 94 Tenn. 17, 24, 27 L.R.A. 565. 49 C.J. p 1021 note 16.

44. N.Y.—Jackson v. Ehrsam, 123 N.Y.S. 986.

49 C.J. p 1021 note 17.

45. Mass.—Richmond v. Charlestown Five Cents Sav. Bank, 186 N.E. 551, 283 Mass. 330.

49 C.J. p 1021 note 18.



## § 71. — Assignee after Pledge

The assignee of a chose in action may enforce it despite a prior pledge thereof by the assignor.

The assignee of a chose in action may enforce it despite a prior pledge thereof by the assignor,<sup>46</sup> subject to the right of the obligor of the contract, if also the pledgee thereof, to retain an amount sufficient to pay the debt for which pledged.<sup>47</sup> The assignee of a pledgee, who takes the collateral security to secure the payment of a debt due to him by the pledgee, may enforce the pledged chose in action.<sup>48</sup>

## § 72. Duty to Enforce

The duty of a pledgor or pledgee to enforce a pledged chose in action is discussed infra §§ 73, 74.

Examine Pocket Parts for later cases.

## § 73. — Pledgor

On the pledge of a chose in action as collateral, the pledgor is primarily relieved of the responsibility for its enforcement.

On the pledge of a chose in action as collateral, the pledgor is primarily relieved of the responsibility for its enforcement.<sup>49</sup> Where the pledgor has the knowledge, power, and opportunity to enforce the collateral against the maker, however, he may not complain of loss by reason of the pledgee's failure to enforce it.<sup>50</sup>

## § 74. — Pledgee

- a. In general
- b. Diligence
- c. Agreements as to collection or enforcement
- d. Actions for neglect
- e. Damages and amount of recovery

## a. In General

It is ordinarily the duty of the pledgee to collect collateral as it falls due, whether or not the principal obligation is then due, and to secure the proceeds of collateral where waste or misappropriation is threatened.

Although there is some authority to the contrary,<sup>51</sup> it is ordinarily the duty of the pledgee to use due diligence in collecting collateral as it falls due,<sup>52</sup> whether or not the principal obligation is then due,<sup>53</sup> to take such steps as may be necessary to enforce collection,<sup>54</sup> and to secure the proceeds of collateral where waste or misappropriation is threatened.<sup>55</sup> The pledgee is not, however, bound to enforce a chose in action remaining in the joint control of the pledgee and the pledgor.<sup>56</sup> The United States as pledgee is not bound to collect collateral in excess of the sum due on the principal debt.<sup>57</sup>

Where the pledgor assumes an attitude hostile to the pledgee, the latter may be justified in compromising litigation for enforcement of pledged collateral for less than the face value of the claim.<sup>58</sup>

**Foreclosure**

Holder of collateral note empowering him to sell collateral without demand or notice had right as against mortgagors to foreclose mortgages assigned as collateral, where mortgage notes and taxes were overdue.—*Richmond v. Charlestown Five Cents Sav. Bank*, supra.

**Agency coupled with interest**

Under loan agreement stating that insurer had loaned to insured money in amount of value of insured goods lost in transit, repayable only out of net recovery which insurer might make from shipper, agency of insurer to collect was coupled with an interest, and was irrevocable. *N.Y.—Automobile Ins. Co. of Hartford, Conn. v. Hamburg-Amerika Line*, 297 N.Y.S. 200, 163 Misc. 491. *Wash.—Canadian Bank of Commerce v. John J. Sesnon Co.*, 123 P. 602, 68 Wash. 434.

46. *Mo.—Milliken-Helm Commn. Co. v. C. H. Albers Commn. Co.*, 147 S. W. 1065, 244 Mo. 38.

47. *Mo.—Milliken-Helm Commn. Co. v. C. H. Albers Commn. Co.*, supra. 49 C.J. p 1021 note 20.

48. *Fla.—Gables Racing Ass'n v. Persky*, 156 So. 392, 116 Fla. 77.

49. *Idaho.—Corpus Juris* quoted in *Uhlir v. Diefendorf*, 26 P.2d 801, 804, 53 Idaho 676. 49 C.J. p 1021 note 21.

50. *Idaho.—Corpus Juris* quoted in *Uhlir v. Diefendorf*, 26 P.2d 801, 804, 53 Idaho 676. 49 C.J. p 1021 note 22.

51. *Ark.—Cravens v. Barr*, 185 S.W. 1084, 123 Ark. 528. 49 C.J. p 1021 note 23.

52. *Ala.—Corpus Juris* cited in *Missouri State Life Ins. Co. v. Robertson Banking Co.*, 134 So. 25, 27, 223 Ala. 13.

*Fla.—Corpus Juris* cited in *American Express Co. v. Stone*, 189 So. 694, 696, 138 Fla. 73.

*Ga.—First Nat. Bank v. Hattaway*, 158 S.E. 565, 172 Ga. 731, 77 A.L.R. 375.

*Ky.—Corpus Juris* cited in *Erlanger Citizens Bank v. Williams*, 151 S. W.2d 381, 383, 286 Ky. 492.

*Tex.—Randolph v. Citizens Nat. Bank of Lubbock*, Civ.App., 141 S. W.2d 1030, error dismissed, judgment correct. 49 C.J. p 1021 note 25.

**Reason for rule**

It is his duty to collect the evidence of a debt pledged lest the remedy on the collateral be barred by the statute of limitations and he be held liable to the pledgor for failure adequately to protect the security left in his possession.—*Mitchell v. Automobile Owners Indemnity Underwriters*, 118 P.2d 815, 19 Cal.2d 1, 137 A.L.R. 923.

53. *Tex.—Daugherty v. Wiles*, Civ. App., 156 S.W. 1089, reversed on other grounds, *Com.App.*, 207 S.W. 900.

54. *Tex.—Randolph v. Citizens Nat. Bank of Lubbock*, Civ.App., 141 S. W.2d 1030, error dismissed, judgment correct.

55. *U.S.—State Nat. Bank v. Eureka Springs Syndicate Co.*, C.C.Ark., 178 F. 359. 49 C.J. p 1021 note 27.

56. *N.Y.—Wyckoff v. Ithaca Trust Co.*, 163 N.Y.S. 696, 177 App.Div. 137.

57. *U.S.—Taggart v. U. S.*, 17 Ct. Cl. 322.

58. *Okl.—Picher Bank v. Harris*, 229 P. 137, 100 Okl. 256, 40 A.L.R. 254. 49 C.J. p 1022 note 30.

*After payment of principal debt.* Payment of the secured debt by the pledgor to the pledgee operates as a discharge of the pledged securities, as discussed supra § 46, and, if they have already been collected by the pledgee, he is liable to the pledgor for the proceeds;<sup>59</sup> but, if he has not collected them, he is no longer under any obligation to do so,<sup>60</sup> and must hold them for redelivery to the pledgor on demand.<sup>61</sup>

*Overdue collateral.* Even where the paper accepted by the pledgee as collateral is overdue, it is his duty to use due diligence in collecting it,<sup>62</sup> and to sue on it, if necessary.<sup>63</sup>

*Liability for acts of agent or assignee.* In some jurisdictions, if the pledgee has exercised ordinary diligence in selecting an agent or attorney to whom he has intrusted the enforcement of the collateral, he is not responsible for loss occasioned by the negligence of such agent,<sup>64</sup> although in other jurisdictions he is held responsible under the general rule of respondeat superior.<sup>65</sup> Where loss results from the negligence of an assignee of the note from the pledgee,<sup>66</sup> or from the negligence of an agent selected by the pledgee without due care,<sup>67</sup> the pledgee is responsible.

*Ratification and waiver.* The pledgee is not lia-

ble for any loss where his course has been authorized or ratified by the pledgor,<sup>68</sup> or where the pledgor has waived the observance of the due diligence by the pledgee.<sup>69</sup>

## b. Diligence

### (1) Necessity

### (2) Sufficiency

### (1) Necessity

In the enforcement of a pledged chose in action by the pledgee, it is his duty to use ordinary diligence.

In the enforcement of a pledged chose in action by the pledgee, it is his duty to use ordinary diligence,<sup>70</sup> not only in making demand for payment or performance on the principal debtor,<sup>71</sup> but also in taking the necessary steps to fix the liability of parties secondarily liable,<sup>72</sup> in making sales when authorized,<sup>73</sup> and in prosecuting suit to judgment and execution, as discussed infra subdivision b (2) of this section, especially where there is danger of insolvency of the obligor of the collateral;<sup>74</sup> and, where loss has been proximately caused by his negligence in the enforcement or collection of pledged collateral, the pledgee is liable therefor to the pledgor.<sup>75</sup> In an action against the pledgee for failure to enforce collateral or

59. Ala.—Overstreet v. Nunn, 36 Ala. 666.

Iowa.—Brunson v. Ballow, 29 N.W. 794, 70 Iowa 34.

60. Me.—Overlock v. Hills, 8 Me. 383.

61. Me.—Overlock v. Hills, supra.

62. U.S.—Easton v. German-American Bank, C.C.N.Y., 24 F. 523, 23 Blatchf. 271, affirmed 8 S.Ct. 1297, 127 U.S. 532, 32 L.Ed. 210.

63. Ga.—Corpus Juris cited in Loflin v. Howard, 172 S.E. 831, 832, 48 Ga. App. 373.

64. N.Y.—Horne v. Loughman, 34 N.Y.S.2d 634, 264 App.Div. 124, 49 C.J. p 1022 note 37.

65. La.—Chaffe v. Purdy, 8 So. 923, 43 La. Ann. 389, 49 C.J. p 1024 note 80.

66. Dak.—Plymouth County Bank v. Gilman, 50 N.W. 194, 6 Dak. 304. Pa.—Farmers' Nat. Bank v. Nelson, 100 A. 136, 255 Pa. 455, L.R.A. 1917E 506.

67. Tenn.—Betterton v. Roope, 3 Lea 215, 31 Am.R. 633.

68. Ky.—Prentice v. Buxton, 3 B. Mon. 35.

69. N.C.—Silvey v. Axley, 23 S.E. 933, 118 N.C. 959, 49 C.J. p 1025 note 91.

70. Ky.—Deposit, etc., Bank v. Wright, 151 S.W. 679, 151 Ky. 274, 49 C.J. p 1025 note 92.

70. Ala.—First Nat. Bank v. Forman, 160 So. 109, 230 Ala. 185.

Ga.—Irwin v. Life & Cas. Ins. Co. of Tenn., 50 S.E.2d 354, 204 Ga. 582—Johnson v. Hinson, 4 S.E.2d 561, 188 Ga. 639—First Nat. Bank v. Hattaway, 158 S.E. 565, 172 Ga. 731, 77 A.L.R. 375—Loflin v. Howard, 172 S.E. 831, 48 Ga. App. 373. Ky.—Erlanger Citizens Bank v. Williams, 151 S.W.2d 381, 286 Ky. 492.

Minn.—First & American Nat. Bank of Duluth v. Whiteside, 292 N.W. 770, 207 Minn. 537.

Mont.—Rock Island Plow Co. v. Cut Bank Implement Co., 53 P.2d 116, 101 Mont. 117.

N.Y.—Horne v. Loughman, 34 N.Y.S.2d 634, 264 App.Div. 124.

N.D.—Ingstad v. Farmers' State Bank of Mandan, 237 N.W. 704, 61 N.D. 194.

49 C.J. p 1022 note 38.

### Discretion to foreclose

Fact that holder of purchase-money note secured by mortgage and pledged stock did not foreclose immediately on default of note but waited because of unfavorable economic conditions did not require cancellation of pledge which was made by vendor in order to enable purchaser to obtain purchase money, in absence of fraud of holder, since holder had discretion in determining when to foreclose where

neither note, mortgage, nor pledge required foreclosure at particular time.—Kottemann v. Audubon Homestead Ass'n, La.App., 171 So. 598.

### No duty to collect full amount

A pledgee is under no absolute duty to collect the full amount of the obligation, his duty being rather one of good faith and reasonable diligence in the realization of as much as possible for himself and the pledgor.—First & American Nat. Bank of Duluth v. Whiteside, 292 N.W. 770, 207 Minn. 537.

71. Colo.—Robertson v. Jackson First Nat. Bank, 186 P. 542, 67 Colo. 517.

49 C.J. p 1022 note 40.

72. Wis.—Walmer v. First Acceptance Co., 212 N.W. 638, 641, 192 Wis. 300, 51 A.L.R. 605.

49 C.J. p 1022 note 40.

73. Colo.—Robertson v. Jackson First Nat. Bank, 186 P. 542, 67 Colo. 517.

49 C.J. p 1022 note 41.

74. Minn.—Lamberton v. Windom, 12 Minn. 232, 90 Am.D. 301, 49 C.J. p 1022 note 43.

75. U.S.—International Shoe Co. v. Picard & Geismar, D.C.La., 30 F. Supp. 570, affirmed, C.C.A., Mayer v. Gras, 116 F.2d 733.

Ga.—Irwin v. Life & Cas. Ins. Co. of Tenn., 50 S.E.2d 354, 204 Ga. 582.

where such failure is set up as a defense, counterclaim, or set-off in an action on the principal debt, it is not enough to show that the collateral has not been collected,<sup>76</sup> but it must appear that the pledgee has been negligent,<sup>77</sup> and that loss has resulted to the pledgor from such negligence.<sup>78</sup> The pledgee is not held to so strict a liability as an indorsee of negotiable paper;<sup>79</sup> and, in case of failure to present at maturity, to protest, and give notice, he is not liable to the pledgor absolutely for the face value of the instrument, but is liable only in the event that loss resulted from his negligence and to the extent of such loss.<sup>80</sup>

## (2) Sufficiency

The diligence required of a pledgee in enforcing the collection of collaterals has been defined as that of an ordinarily prudent man in the conduct of his own business, as that required of a bailee for hire, and as that required of an agent or attorney.

The diligence required of the pledgee in enforcing the collection of collaterals has been defined as that of an ordinarily prudent man in the conduct of his own business,<sup>81</sup> as that required of a bailee for hire,<sup>82</sup> and as that required of an agent or attorney.<sup>83</sup> The pledgee is not charged with the active duty of watching the movements of the debtor, with a view to forestalling or frustrating any attempt at fraud on his part.<sup>84</sup> Extraordinary diligence is not required of the pledgee,<sup>85</sup> and, having exercised ordinary diligence, he is not respons-

ible for any loss through failure to enforce the collateral, even though he could have prevented such loss by the exercise of extraordinary care and diligence.<sup>86</sup>

What is sufficient diligence depends on the facts and circumstances of each particular case.<sup>87</sup> The pledgee is not bound to demand payment of collateral security before its maturity, although he may know at the time that payment would be made if insisted on.<sup>88</sup> Failure to comply with the directions of the pledgor to collect or sell the collateral may constitute negligence.<sup>89</sup> Where a collateral note is payable at a bank as to whose solvency the pledgee has no doubt, it is his duty to send the note to such bank for collection at maturity.<sup>90</sup> Where the collaterals are in turn secured by a lien on personal property, it is sufficient for the pledgee to reduce the collaterals to judgment, leaving the owner of the collaterals to subject the property and apply the proceeds to the payment of his debt.<sup>91</sup> Where the maker offers to settle the note by a delivery of specified property, the pledgee is not bound to communicate such offer to the pledgor.<sup>92</sup> The pledgee is not liable, however, where, in the exercise of a sound discretion, he refuses to accept payment of a bond in property, although requested to do so by the pledgor, and loss ensues.<sup>93</sup>

*Necessity of legal proceedings.* Where the circumstances are such that legal proceedings are re-

Mont.—Rock Island Plow Co. v. Cut Bank Implement Co., 53 P.2d 116, 101 Mont. 117.

N.Y.—Horne v. Loughman, 34 N.Y. S.2d 634, 264 App.Div. 124. 49 C.J. p 1022 note 44.

### Reason for rule

The rule rests on an implied contract, where there is no special agreement, that the pledgee will observe good faith and diligence in respect of its collection. If he is guilty of laches resulting in damages to the pledgor, he makes the paper his own and must account to his debtor on the principal debt for the sum which he could have made by pursuing the maker of the collateral paper with ordinary diligence.—Erlanger Citizens Bank v. Williams, 151 S.W.2d 381, 286 Ky. 492.

76. Ind.—Kiser v. Ruddick, 8 Blackf. 382.

Mo.—Amick v. Empire Trust Co., 296 S.W. 798, 802, 317 Mo. 157, 53 A.L.R. 1064.

77. Wash.—Citizens' Bank, etc., Co. v. Rudebeck, 156 P. 331, 90 Wash. 612.

49 C.J. p 1023 note 46.

78. Mo.—Amick v. Empire Trust

Co., 296 S.W. 798, 802, 317 Mo. 157, 53 A.L.R. 1064.

49 C.J. p 1023 note 47.

79. Ky.—Erlanger Citizens Bank v. Williams, 151 S.W.2d 381, 286 Ky. 492.

49 C.J. p 1023 note 48.

80. W.Va.—Kanawha Nat. Bank v. Harris, 123 S.E. 254, 96 W.Va. 419. 49 C.J. p 1023 note 49.

81. Ala.—Corpus Juris cited in First Nat. Bank of Birmingham v. Forman, 160 So. 109, 113, 230 Ala. 185. 49 C.J. p 1023 note 51.

82. Ala.—Corpus Juris quoted in First Nat. Bank of Birmingham v. Forman, 160 So. 109, 113, 230 Ala. 185.

49 C.J. p 1023 note 52.

83. Ala.—Corpus Juris quoted in First Nat. Bank of Birmingham v. Forman, 160 So. 109, 113, 230 Ala. 185.

Ky.—Erlanger Citizens Bank v. Williams, 151 S.W.2d 381, 286 Ky. 492. 49 C.J. p 1023 note 53.

84. Ala.—Corpus Juris quoted in First Nat. Bank of Birmingham v. Forman, 160 So. 109, 113, 230 Ala. 185.

La.—O'Kelly v. Ferguson, 22 So. 783, 49 La. Ann. 1230.

85. Ala.—Corpus Juris quoted in First Nat. Bank of Birmingham v. Forman, 160 So. 109, 113, 230 Ala. 185.

49 C.J. p 1023 note 55.

86. Ala.—Corpus Juris quoted in First Nat. Bank of Birmingham v. Forman, 160 So. 109, 113, 230 Ala. 185.

49 C.J. p 1023 note 56.

87. Ky.—Erlanger Citizens Bank v. Williams, 151 S.W.2d 381, 286 Ky. 492.

49 C.J. p 1023 note 57.

88. Ohio.—Roberts v. Thompson, 14 Ohio St. 1, 82 Am.D. 465.

89. Mo.—Amick v. Empire Trust Co., 296 S.W. 798, 317 Mo. 157, 53 A.L.R. 1064.

90. Ohio.—Mt. Vernon Bridge Co. v. Knox County Sav. Bank, 20 N.E. 339, 46 Ohio St. 224.

91. Tenn.—Chattanooga First Nat. Bank v. Chattanooga Pulley Co., 37 S.W. 8, 97 Tenn. 308.

92. Ala.—Rives v. McLosky, 5 Stew. & P. 330.

93. N.Y.—Rhineland v. Barrow, 17 Johns. 538.

quired to enforce and collect collateral in the exercise of due diligence, the pledgee is under a duty to bring suit,<sup>94</sup> and to prosecute it to execution and judgment.<sup>95</sup> The pledgee is not justified in failing to sue because of an intimation by the maker that he has a defense against the pledgor.<sup>96</sup> The pledgee should present the collateral in bankruptcy proceedings of the obligor;<sup>97</sup> but, where the circumstances are not such as to require legal proceedings in the exercise of due diligence, the pledgee need not bring suit.<sup>98</sup> He is not bound to sue an insolvent, where nothing could be gained by so doing;<sup>99</sup> nor is he under a duty to sue where suit might involve him in loss and expense.<sup>1</sup>

Where the pledgee has notice that the maker of a collateral note is in danger of insolvency, it is his duty to bring suit on it without delay;<sup>2</sup> but, where the maker is reputed in good financial circumstances, and the pledgee has not been requested to sue, an indulgence for a reasonable time will not render the pledgee liable for loss occasioned by the maker's unexpected insolvency.<sup>3</sup> In all such cases of indulgence, the length of time, the amount involved, and the circumstances of the debtor are to be considered.<sup>4</sup> In no event must the pledgee allow the collateral to be barred by the statute of limitations,<sup>5</sup> and he will be liable for all loss occasioned by his failure in this respect; and it is no defense

that the maker might not have availed himself of the bar of the statute.<sup>6</sup>

While the pledgee is not bound to surrender collateral to the pledgor to enable the latter to sue,<sup>7</sup> he is liable for loss occasioned by his failure to comply with the request of the pledgor either to take prompt action to collect or secure the collateral, or to surrender possession of it to the pledgor for that purpose.<sup>8</sup>

The pledgor cannot successfully object to compromise of a suit by the pledgee to collect pledged collateral where the pledgor has theretofore consented to such compromise.<sup>9</sup>

### c. Agreements as to Collection or Enforcement

Where the contract of pledge defines the duty of the pledgee with respect to collection of collateral, his duties are measured by the contractual provisions.

Where the contract of pledge defines the duties of the pledgee with respect to collection of collateral, his duties are measured by the contractual provisions,<sup>10</sup> and under a contract to collect choses in action the usual duty of due diligence in collection is imposed,<sup>11</sup> although it has been held that such a contract does not impose the duty to collect by legal proceedings.<sup>12</sup> A contract relieving the pledgee from the duty to use ordinary diligence in the collection of pledged collateral is valid,<sup>13</sup> and un-

94. Ky.—*Corpus Juris* cited in *Erlanger Citizens Bank v. Williams*, 151 S.W.2d 381, 384, 286 Ky. 492. 49 C.J. p 1024 note 65.

95. N.Y.—*Horne v. Loughman*, 34 N.Y.S.2d 634, 264 App.Div. 124. 49 C.J. p 1024 note 66.

96. N.Y.—*Wakeman v. Gowdy*, 23 N.Y.Super. 208.

97. U.S.—*Warburton v. Trust Co. of America*, C.C.Pa., 169 F. 974, affirmed 182 F. 769, 105 C.C.A. 201.

98. La.—*Friedlander v. Schmalinski*, 35 La.Ann. 520. 49 C.J. p 1024 note 69.

99. Ky.—*Corpus Juris* cited in *Erlanger Citizens Bank v. Williams*, 151 S.W.2d 381, 384, 286 Ky. 492. 49 C.J. p 1024 note 70.

1. Ala.—*Corpus Juris* cited in *First Nat. Bank v. Forman*, 160 So. 109, 113, 230 Ala. 185.

Mich.—*Rice v. Benedict*, 19 Mich. 132.

#### Need not proceed at peril

Pledgee of notes and mortgages need not proceed promptly at peril to realize on security, especially where pledgor, with knowledge of defaults, failed to request collection and renewed note secured by pledge. —*Ingstad v. Farmers' State Bank of Mandan*, 237 N.W. 704, 61 N.D. 194.

2. Ky.—*Corpus Juris* cited in *Erlanger Citizens Bank v. Williams*, 151 S.W.2d 381, 384, 286 Ky. 492—*Bonta v. Curry*, 3 Bush 678.

3. N.H.—*Goodall v. Richardson*, 14 N.H. 567.

4. U.S.—*Northwestern Nat. Bank v. J. Thompson, etc., Mfg. Co., S.D.*, 71 F. 113, 17 C.C.A. 638. 49 C.J. p 1024 note 74.

5. N.Y.—*Horne v. Loughman*, 34 N.Y.S.2d 634, 264 App.Div. 124. 49 C.J. p 1024 note 75.

6. Iowa.—*Ft. Dodge First Nat. Bank v. O'Connell*, 51 N.W. 162, 84 Iowa 377, 35 Am.S.R. 313. 49 C.J. p 1024 note 76.

7. Pa.—*Smouse v. Bail*, 1 Grant 397.

8. Ky.—*Roberts v. Farmers' Bank*, 80 S.W. 441, 118 Ky. 80, 25 Ky. Law 2296. 49 C.J. p 1024 note 78.

9. Ky.—*McDonald v. Green*, 12 Ky. Op. 62.

10. U.S.—*Commercial Nat. Bank of San Antonio v. Continental Bank & Trust Co. of New York, C.C.A. Tex.*, 88 F.2d 160, certiorari denied 57 S.Ct. 795, 301 U.S. 692, 81 L.Ed. 1348. 49 C.J. p 1025 note 84.

To be held and not collected  
If certified check deposited by em-

ployer with insurer issuing compensation policy was to be held by insurer and not be collected except in case of necessity, insurer would be pledgee and not debtor, and could not be held negligent as matter of law in not collecting certified check before failure of bank.—*Atlantic Bldg. Wrecking Co. v. Maryland Casualty Co.*, 3 N.E.2d 3, 295 Mass. 42.

#### "Recourse" construed

Wis.—*Winkler v. Magdeburg*, 76 N.W. 332, 100 Wis. 421. 53 C.J. p 655 note 15.

#### Settlement of claims

U.S.—*Commercial Nat. Bank of San Antonio v. Continental Bank & Trust Co. of New York, C.C.A. Tex.*, 88 F.2d 160, certiorari denied 57 S.Ct. 795, 301 U.S. 692, 81 L.Ed. 1348.

11. Ga.—*Pace v. Thomasville Bank*, 117 S.E. 741, 155 Ga. 585—*Citizens' Bank v. Shaw*, 65 S.E. 81, 132 Ga. 771.

12. U.S.—*Culver v. Wilkinson*, N.Y., 12 S.Ct. 832, 145 U.S. 205, 36 L.Ed. 676. 49 C.J. p 1025 note 87.

13. Tex.—*Guffey v. Farmers', etc., State Bank*, Civ.App., 250 S.W. 301.

der such a contract he is not liable for failure to enforce,<sup>14</sup> as where the agreement is simply to apply the proceeds of the collateral if paid at maturity.<sup>15</sup>

#### d. Actions for Neglect

Actions against a pledgee for failure to exercise proper care in the collection or enforcement of the pledged choses in action are controlled by rules of general application as to pleading, evidence, and trial.

Actions against a pledgee for failure to exercise proper care in the collection or enforcement of the pledged choses in action are controlled by rules of general application as to pleading<sup>16</sup> and evidence.<sup>17</sup> In an action by the pledgor against the pledgee for failure to exercise due diligence in the enforcement of collateral, or where the pledgor sets up such lack of diligence as a defense to a suit on the principal obligation, the creditor must account for the collaterals, as in the case of their loss, but having done so, the mere fact that they have not been collected is not even prima facie evidence of negligence;<sup>18</sup> and the burden is on the pledgor to prove negligence and damage,<sup>19</sup> although it has also been held that the burden is on the creditor to prove diligence,<sup>20</sup> especially where he was warned by the debtor of the embarrassed position of the maker,<sup>21</sup> or the collaterals consisted of numerous notes and accounts.<sup>22</sup> Where the pledgee has permitted securities pledged to him to become barred by limitations,<sup>23</sup> or has wrongfully surrendered collateral pledged to him,<sup>24</sup> the burden is on him to prove that his negligence or wrongful act has not injured the

pledgor. The solvency of the maker,<sup>25</sup> or an indorser,<sup>26</sup> for some time after maturity, together with the failure of the pledgee to collect is strong evidence of negligence, especially if other creditors have during that time enforced claims by suit,<sup>27</sup> while the insolvency of the maker at material times is evidence to rebut negligence.<sup>28</sup>

Where the facts are undisputed, it has been said that diligence is a question, not of fact, but of law, to be determined by the court on settled principles governing such cases;<sup>29</sup> but, where the evidence is conflicting, or the inferences to be drawn from facts proved are doubtful, the question is for the jury.<sup>30</sup> On conflicting evidence the amount of damages is for the jury.<sup>31</sup> A peremptory instruction for the pledgee is authorized where there is no evidence of his negligence.<sup>32</sup>

The usual rules govern instructions in proceedings involving the liability of a pledgee for negligence in the enforcement or collection of pledged collateral.<sup>33</sup>

#### e. Damages and Amount of Recovery

On establishing loss through the negligence of the pledgee, the pledgor is entitled to recover the amount of loss sustained by him, the measure of damages being the amount the pledgee would have collected in the exercise of due diligence.

On establishing loss through the negligence of the pledgee, the pledgor is entitled to recover not the value of the collaterals pledged, but the amount of loss sustained by him,<sup>34</sup> the measure of damages being the amount the pledgee would have collect-

14. Ga.—Coulter v. Wyly, 34 Ga. 239.

49 C.J. p 1025 note 89.

15. Colo.—Dowling v. Dowling, 30 P. 50, 2 Colo.App. 28.

Pa.—Ormsby v. Fortune, 16 Serg. & R. 302.

16. Ind.—Crume v. Brightwell, 122 N.E. 230, 69 Ind.App. 404.

49 C.J. p 1025 note 93.

17. Iowa.—Carter v. McClain, 244 N.W. 671, 215 Iowa 19.

49 C.J. p 1025 note 94.

#### Evidence held sufficient

(1) To show that note could have been collected if proper diligence had been exercised.—Hughes v. Martin, Tex.Civ.App., 150 S.W.2d 413, error refused.

(2) To show that note had value after pledged.—Hughes v. Martin, Tex.Civ.App., 150 S.W.2d 413, error refused.

#### Evidence held insufficient

(1) To establish amount of damages pledgor suffered.—Carter v. McClain, 244 N.W. 671, 215 Iowa 19.

(2) To show that pledged chose in

action was barred by statute of limitations.—Hughes v. Martin, Tex.Civ.App., 150 S.W.2d 413, error refused.

18. Mo.—Amick v. Empire Trust Co., 296 S.W. 798, 802, 317 Mo. 157, 53 A.L.R. 1064.

49 C.J. p 1025 note 95.

19. Iowa.—Carter v. McClain, 244 N.W. 671, 215 Iowa 19.

N.D.—Ingstad v. Farmers' State Bank of Mandan, 237 N.W. 704, 61 N.D. 194.

49 C.J. p 1025 note 96.

20. S.C.—Montague v. Stetts, 15 S. E. 968, 37 S.C. 200, 34 Am.S.R. 736.

21. Ind.—Slevin v. Morrow, 4 Ind. 425.

49 C.J. p 1025 note 98.

22. Ky.—Prentice v. Buxton, 3 B. Mon. 35.

23. Wyo.—Farm Inv. Co. v. Wyoming College, etc., 68 P. 561, 10 Wyo. 240.

24. N.Y.—Toplitz v. Bauer, 55 N.E. 1059, 161 N.Y. 325.

25. La.—Commercial Bank v. Martin, 1 La. Ann. 344, 45 Am.D. 87.

26. W.Va.—Rumsey v. Laidley, 12 S.E. 866, 34 W.Va. 721, 26 Am.S.R. 935.

27. Ky.—Hamilton v. Hamilton, 84 S.W. 1156, 27 Ky.Law 298.

28. Minn.—Slevin v. Morrow, 4 Ind. 425—Spencer v. Plano Mfg. Co., 81 N.W. 538, 79 Minn. 35.

29. N.Y.—Wakeman v. Gowdy, 23 N.Y.Super. 208.

30. Iowa.—Carter v. McClain, 244 N.W. 671, 215 Iowa 19.

Ky.—Erlanger Citizens Bank v. Williams, 151 S.W.2d 381, 286 Ky. 492.

49 C.J. p 1026 note 8.

31. Ga.—Gartrell v. Johns, 84 S.E. 175, 15 Ga.App. 671.

32. Mo.—Amick v. Empire Trust Co., 296 S.W. 798, 317 Mo. 157, 53 A.L.R. 1064.

33. Tex.—C. H. Larkin Co. v. Dawson, 83 S.W. 882, 37 Tex.Civ.App. 345.

49 C.J. p 1026 note 12 [a].

34. La.—Chaffe v. Purdy, 8 So. 923, 43 La. Ann. 389.

49 C.J. p 1026 note 13.

ed in the exercise of due diligence.<sup>35</sup> Where, however, it is admitted that the securities were worth their face value at the time of their delivery to the creditor, such value will, in the absence of a contrary showing, be presumed to continue until their maturity.<sup>36</sup> Where the pledgee by his negligence permits the collaterals to be barred by statutes of limitations, he will be charged with their value as of the date of their bar,<sup>37</sup> and not as of the date of maturity, since, if they had been collected after maturity, they would have been credited from the date of collection. In an action by the pledgor to recover profits realized by the pledgee from a purchase and sale of the collateral, the pledgee is entitled to allowance for commissions on the resale where it appears such sale was made by a firm of brokers of which he was a member.<sup>38</sup>

A pledgee unreasonably delaying collection of a pledged chose in action may be chargeable with interest.<sup>39</sup>

## § 75. Actions to Enforce

- a. Conditions precedent
- b. Defenses
- c. Parties
- d. Pleading and evidence
- e. Trial and judgment or decree

### a. Conditions Precedent

The pledgee may enforce the pledged chose in action without seeking to enforce the principal obligation, and the maker of a collateral note cannot compel the pledgee, before enforcing it, to exhaust other security held by him for the principal debt.

The pledgee may enforce the pledged chose in action without first seeking to enforce the principal obligation,<sup>40</sup> and without a previous attempt to sell the choses in action sued on.<sup>41</sup>

*Exhaustion of other security.* The maker of a collateral note cannot compel the pledgee, before enforcing it, to exhaust other security held by him for the principal debt,<sup>42</sup> even though the maker has a set-off available against the pledgor;<sup>43</sup> nor can a surety compel the pledgee to apply the proceeds of pledged property on a note to which he is a party, rather than to other notes for which the property was also held as security;<sup>44</sup> nor will an injunction be issued to restrain a pledgee from enforcing his collaterals while his debtors and the sureties on the collaterals are litigating their equities therein.<sup>45</sup>

### b. Defenses

As a general rule a recovery may be had on a pledged chose in action without regard to any defense which the pledgor may have on the principal debt.

As a general rule a recovery may be had on a pledged chose in action without regard to any defense which the pledgor may have on the principal debt,<sup>46</sup> such as a bar by limitations,<sup>47</sup> or to any breach of duty as between the pledgor and the pledgee,<sup>48</sup> such as a failure to collect other collateral.<sup>49</sup> Where the pledgee's entire interest rests on the contract of pledge, it has been held that he cannot recover on the collateral if the principal debt is entirely invalid.<sup>50</sup> The obligor may waive a defense which is available to him.<sup>51</sup>

In the absence of an agreement to the contrary, it is no defense to an action on the collateral by the pledgee that the pledgee has obtained an unsatisfied judgment against the pledgor;<sup>52</sup> that he has obtained judgment on another note held as collateral for the same debt;<sup>53</sup> that the payee of a note pledged it to secure a debt less than the

35. U.S.—American Exch. Bank v. Goetz, C.C.A.Wis., 283 F. 900, 49 C.J. p 1026 note 14.

36. Wyo.—Farm Inv. Co. v. Wyoming College, etc., 68 P. 561, 10 Wyo. 240.

37. Wyo.—Farm Inv. Co. v. Wyoming College, etc., supra.

38. Pa.—Plucker v. Teller, 34 A. 208, 174 Pa. 529, 52 Am.S.R. 825.

39. Md.—Felgner v. Slingluff, 71 A. 978, 109 Md. 474, 49 C.J. p 1026 note 18 [a].

40. N.D.—Baird v. Chamberlain, 236 N.W. 724, 60 N.D. 724. Or.—Cole v. Vinton, 20 P.2d 436, 142 Or. 313.

Pa.—South Side Bank of Scranton v. Raine, 160 A. 446, 306 Pa. 561.

Tex.—Hollins v. Mayfield Co., Civ. App., 23 S.W.2d 886—Central Nat.

Bank v. Latham & Co., Civ.App., 22 S.W.2d 765, error refused, 49 C.J. p 1026 note 19.

41. Wash.—Broadway Bank of Kansas City v. Whittaker, 30 P.2d 993, 177 Wash. 62, 49 C.J. p 1026 note 20.

42. Hawaii.—Merchants Collection Agency v. Mitchell, 32 Hawaii 343. Mich.—Shattuck v. Reed, 190 N.W. 649, 221 Mich. 155, 49 C.J. p 1026 note 21.

43. Hawaii.—Merchants Collection Agency v. Mitchell, 32 Hawaii 343, 49 C.J. p 1026 note 22.

44. Pa.—Denniston v. Hill, 34 A. 452, 173 Pa. 633.

45. S.C.—Goodwyn v. State Bank, 4 S.C.Eq. 389.

46. N.M.—Medler v. Childers, 131 P. 490, 17 N.M. 530, 533, 49 C.J. p 1027 note 25.

Extension of time of payment of note see Bills and Notes § 281.

47. Cal.—Puckhaber v. Henry, 93 P. 114, 152 Cal. 419, 125 Am.S.R. 75, 14 Ann.Cas. 844, 49 C.J. p 1027 note 26.

48. Ga.—Chandler v. Merchants', etc., Nat. Bank, 118 S.E. 785, 30 Ga.App. 694.

49. Ill.—Zollman v. Jackson Trust, etc., Bank, 87 N.E. 297, 238 Ill. 290, 32 L.R.A.,N.S., 858, 49 C.J. p 1027 note 28.

50. Neb.—Omaha Loan, etc., Assoc. v. Cocke, 165 N.W. 146, 101 Neb. 750.

51. Fla.—Gables Racing Ass'n v. Persky, 156 So. 392, 116 Fla. 77.

52. Mass.—Burnham v. Windram, 41 N.E. 305, 164 Mass. 313.

53. Ind.—Smith v. Hunter, 33 Ind. 106.

amount of the note;<sup>54</sup> that a suit by the pledgee against one of the parties to the instrument has failed;<sup>55</sup> that the pledgee took the note with the intention of making illegal use of it;<sup>56</sup> that an assignee of the pledgee who is a party to the action claims a lien on the pledge as security for a debt of the pledgee;<sup>57</sup> that other parties are claiming title to the note or its proceeds;<sup>58</sup> or that the pledgee has exchanged other collateral held by him for the principal debt, unless such exchange has caused a loss to the pledgor.<sup>59</sup> In a suit on a note by a purchaser from the pledgee, it is no defense that it was not proved that the pledgee made demand and served notice on the pledgor before the sale.<sup>60</sup>

**Failure to enforce principal debt.** The obligor may defeat an action by the pledgee on the collateral by proof of an agreement to sue first on the principal debt and a failure to do so,<sup>61</sup> but, without proof of a special agreement, it is not a good defense that the pledgee has not attempted to collect the principal debt.<sup>62</sup>

**Payment.** Payment of the pledged collateral to the pledgee is a good defense to an action thereon by him,<sup>63</sup> but, in the absence of a special agreement, it is no defense that the maker, with knowledge of the pledge, and without the pledgee's consent, has paid the pledgor.<sup>64</sup> Where a pledgee obtains a judgment against a pledgor, the subsequent payment of the principal debt by the pledgor does not serve to destroy any rights which the pledgee acquired against the maker of the pledged notes by

reason of the judgment.<sup>65</sup>

**Set-off.** The obligor is not entitled to set off money received by the pledgee from a person who was only secondarily liable on the pledgor's debt,<sup>66</sup> or to set off a debt due him from the pledgor but unconnected with the pledge.<sup>67</sup> The obligor cannot set off against the pledgee a claim against the pledgor reducing the security below the sum due the pledgee on the principal debt.<sup>68</sup>

**Equities between original parties.** One who has taken a negotiable instrument as collateral security for a debt which remains unpaid holds it, free from any equities existing between the original parties of which he had no notice, to the extent of the original indebtedness,<sup>69</sup> and subject to equities of which he takes with notice;<sup>70</sup> but, after payment of the principal debt, he retains the collateral subject to all equities existing between the original parties without regard to any question of notice.<sup>71</sup> The pledgee's action is not defeated by equities arising between the maker and the pledgor since the assignment and notice to the maker.<sup>72</sup>

**In the case of nonnegotiable choses in action,** equities between the original parties are ordinarily a valid defense to an action by the pledgee.<sup>73</sup>

**Nonnegotiable collateral used with negotiable instruments.** Where nonnegotiable instruments are pledged as collateral, in connection with negotiable instruments, some authorities hold that the rule that equities are unavailable on negotiable instruments in the hands of a bona fide holder before maturity applies also to the nonnegotiable collateral.<sup>74</sup>

54. Ga.—Harper v. Calhoun Nat. Bank, 153 S.E. 767, 43 Ga.App. 364.

55. Ala.—Williams v. Jones, 79 Ala. 119.

56. Mass.—Proctor v. Whitcomb, 137 Mass. 303.

57. N.Y.—Ridgway v. Bacon, 25 N.Y.S. 651, 72 Hun 211.

58. N.Y.—Moody v. Andrews, 39 N.Y.Super. 302, affirmed 64 N.Y. 641.

59. Pa.—Girard Fire & Marine Ins. Co. v. Marr, 46 Pa. 504.

60. N.Y.—Hatch v. Brewster, 53 Barb. 276.

**Enforcement after purchase by pledgee**

(1) In action on pledged notes where rights of pledgor were not involved, defense of lack of notice of sale of pledged notes was not open to maker.—First Nat. Bank v. Landreth, 16 P.2d 1010, 128 Cal.App. 138.

(2) Maker of pledged note cannot take advantage of statute prohibiting sale thereof by pledgee which was passed solely for pledg-

or's benefit.—First Nat. Bank v. Landreth, supra.

61. Ind.—Barr v. Kane, 32 Ind. 416.

62. U.S.—St. Louis Third Nat. Bank v. Harrison, C.C.Mo., 10 F. 243, 3 McCrary 316.

63. Pa.—Appeal of Scheppers, 17 A. 479, 125 Pa. 598.

49 C.J. p 1027 note 40.

64. Tenn.—Union Nat. Bank v. Waters, 9 Tenn.App. 608.

49 C.J. p 1027 note 41.

65. Ill.—Stombaugh v. Morey, 58 N.E.2d 545, 388 Ill. 392, 175 A.L.R. 254.

The pledgee's right to retain the judgment as against the pledgor was terminated by the payment of the principal debt, but that was a matter between the pledgee and the pledgor.—Stombaugh v. Morey, supra.

66. U.S.—Brown v. Pegram, Pa., 125 F. 577, 60 C.C.A. 383.

67. Ark.—Walker v. Brandon & Baugh, 4 S.W.2d 3, 176 Ark. 677. 49 C.J. p 1027 note 43.

68. Ark.—Walker v. Brandon, supra.

69. Minn.—German-American State Bank v. Lyons, 149 N.W. 658, 127 Minn. 390.

Okl.—M. Rumley Co. v. Koetter, 173 P. 116, 74 Okl. 204.

8 C.J. p 718 note 12 [d] (2)—49 C.J. p 1027 note 46.

70. Ill.—Barber v. General Automotive Corp., 240 Ill.App. 85.

La.—Freller Mercantile Co. v. Chaney, 83 So. 436, 146 La. 138.

71. Ill.—Barber v. General Automotive Corp., 240 Ill.App. 85.

N.Y.—Corpus Juris cited in In re Cooke's Estate, 264 N.Y.S. 336, 342, 147 Misc. 528.

72. U.S.—Eastern Tube Co. v. Harrison, C.C.Pa., 140 F. 519.

N.Y.—Moody v. Andrews, 39 N.Y.Super. 302, affirmed 64 N.Y. 641.

73. Minn.—Northwest Thresher Co. v. Hulburt, 115 N.W. 159, 103 Minn. 276.

49 C.J. p 1027 note 50.

74. Mo.—Borgess Inv. Co. v. Vette,

According to other authorities equities between the original parties are available on the nonnegotiable collateral.<sup>75</sup>

### c. Parties

The pledgee of a chose in action may ordinarily sue thereon in his own name, or in that of the pledgor, unless he has expressly agreed not to do so. In the absence of special circumstances or a statute so requiring, the pledgor is not a necessary party to a suit by the pledgee to enforce pledged collateral, but all persons claiming an interest in the pledge adverse to that of the pledgee should be joined in the action.

Ordinarily the pledgee of a chose in action may sue thereon in his own name,<sup>76</sup> or in that of the pledgor,<sup>77</sup> according to the practice in the respective jurisdictions, unless he has expressly agreed not to do so.<sup>78</sup> The pledgor has similarly been permitted to sue in his own name,<sup>79</sup> and under statutes requiring every action to be prosecuted "in the name of the real party in interest," it has been held that either the pledgor<sup>80</sup> or the pledgee<sup>81</sup>

may sue in his own name to enforce a pledged chose in action. Under a statute providing that the pledgee of evidences of debt "may collect the same when due," the pledgee may maintain an action thereon in his own name.<sup>82</sup> It has been held that suit to foreclose a pledged mortgage should be in the name of the pledgor,<sup>83</sup> or that the pledgor mortgagee should at least be brought in as a party defendant.<sup>84</sup>

After the obligation secured has been extinguished, the pledgee can no longer sue as the real party in interest.<sup>85</sup>

A contract giving the pledgor the right to sue in the pledgee's name will not be construed as preventing the pledgee from suing independently.<sup>86</sup>

*Propriety and necessity of joinder.* In the absence of special circumstances, or a statute so requiring,<sup>87</sup> the pledgor is not a necessary party to a suit by the pledgee to enforce pledged collateral;<sup>88</sup> but all persons claiming an interest in the

44 S.W. 754, 142 Mo. 560, 64 Am. S.R. 567.

49 C.J. p 1028 note 52.

75. La.—Maryland Fidelity, etc., Co. v. Johnston, 42 So. 357, 117 La. 880.

49 C.J. p 1028 note 53.

76. Ind.—Hammond Pure Ice & Coal Co. v. Heitman, 47 N.E.2d 309, 221 Ind. 352, 145 A.L.R. 997.

La.—Bank of Minden & Trust Co. v. Barron, 152 So. 746, 178 La. 1023—Del Bondio v. Albrecht, App., 181 So. 610.

Miss.—Morrison v. Gulf Oil Corporation, 196 So. 247, 189 Miss. 212.

N.Y.—Automobile Ins. Co. of Hartford, Conn., v. Hamburg-America Line, 297 N.Y.S. 200, 163 Misc. 491.

Or.—Cole v. Vinton, 20 P.2d 436, 142 Or. 313.

Tex.—Davis v. First Nat. Bank, Civ. App., 135 S.W.2d 259—Thaxton v. Whitesides, Civ.App., 54 S.W.2d 1059—Central Nat. Bank v. Latham & Co., Civ.App., 22 S.W.2d 765, error refused.

49 C.J. p 1028 note 54.

#### Necessity of protecting security

Right of pledgee to sue in his own name on note pledged depends on necessity to protect security in interest of pledgor.—Hodges v. Lake Summit Co., 152 S.E. 658, 155 S.C. 436.

77. Ky.—Crews v. Yowell, 76 S.W. 127, 25 Ky.Law 598.

78. Ga.—Coulter v. Wyly, 34 Ga. 239.

79. Mass.—Boston Heating Co. v. Middleborough Sav. Bank, 193 N.E. 12, 288 Mass. 433.

Court may direct pledgor to collect on hypothecated chose in action

for pledgee's benefit, instead of directing sale at probable sacrifice.—Queen v. Freyer, 240 N.Y.S. 111, 136 Misc. 466, reversed on other grounds 249 N.Y.S. 651, 232 App.Div. 222.

Reassignment of note held not necessary.—Buckman v. Hill Military Academy, 189 P.2d 575, 182 Or. 621.

Reindorsement or erasure of indorsements held not necessary.—Vermont Evaporator Co. v. Taft, 181 A. 100, 107 Vt. 400.

80. U.S.—Corpus Juris quoted in Brown v. New York Life Ins. Co., D.C.S.C., 22 F.Supp. 82, 90, reversed on other grounds, C.C.A., New York Life Ins. Co. v. Brown, 99 F.2d 199, certiorari denied Brown v. New York Life Ins. Co., 59 S.Ct. 487, 306 U.S. 638, 83 L.Ed. 1039.

49 C.J. p 1028 note 58.

Pledgor of a cause of action may sue in his own name even when the face value of the assigned chose is not greater than the face of the debt for which the chose has been assigned as collateral.—Brown v. New York Life Ins. Co., D.C.S.C., 22 F.Supp. 82, reversed on other grounds, C.C.A., New York Life Ins. Co. v. Brown, 99 F.2d 199, certiorari denied Brown v. New York Life Ins. Co., 59 S.Ct. 487, 306 U.S. 638, 83 L.Ed. 1039—49 C.J. p 1028 note 58 [b] (2).

81. U.S.—Corpus Juris quoted in Brown v. New York Life Ins. Co., D.C.S.C., 22 F.Supp. 82, 90, reversed on other grounds, C.C.A., New York Life Ins. Co. v. Brown, 99 F.2d 199, certiorari denied Brown v. New York Life Ins. Co.,

59 S.Ct. 487, 306 U.S. 638, 83 L.Ed. 1039.

49 C.J. p 1028 note 59.

#### Payment of pledgor's interest

Motion to dismiss complaint on ground that insurer was not real party in interest would be denied, where complaint stated that insurer had loaned to insured money in amount of insured goods lost in transit, repayable only out of net recovery which insurer might make from shipper, since insurer, having extinguished insured's interest, was real party in interest.—Automobile Ins. Co. of Hartford, Conn., v. Hamburg-America Line, 297 N.Y.S. 200, 163 Misc. 491.

82. Mont.—National Bank of Republic v. American Brewing Co., 257 P. 1043, 79 Mont. 605—New York Nat. Park Bank v. American Brewing Co., 257 P. 436, 79 Mont. 542.

83. Wis.—Gardinier v. Kellogg, 14 Wis. 605.

49 C.J. p 1029 note 62.

84. Ala.—Lunsford v. Marx, 102 So. 110, 212 Ala. 144.

49 C.J. p 1029 note 63.

85. S.C.—Hodges v. Lake Summit Co., 152 S.E. 658, 155 S.C. 436.

Wis.—Gross v. Heckert, 97 N.W. 952, 120 Wis. 314.

86. Mont.—National Bank of Republic v. American Brewing Co., 257 P. 1043, 79 Mont. 605.

49 C.J. p 1029 note 65.

87. Ky.—Taylor v. Hord, 30 S.W. 603, 17 Ky.Law 95.

49 C.J. p 1029 note 66.

88. Ala.—Missouri State Life Ins.



pledge adverse to that of the pledgee should be joined in the action,<sup>89</sup> unless their rights have been lost by the running of a statute of limitations.<sup>90</sup> If the obligor has a defense good as against the pledgor, the obligor must bring in the pledgor as a party and proceed with such defense.<sup>91</sup>

In an action by the pledgor the pledgee is a necessary party where he retains an interest in the pledged chose in action,<sup>92</sup> but not where he has transferred his interest.<sup>93</sup> So, where the ultimate ownership of the securities is not to be determined, the pledgor need not be joined as a party.<sup>94</sup> Although the pledgor may be held not to have the right to sue alone, the suit may properly be prosecuted in the names of both pledgee and pledgor.<sup>95</sup>

In an action against the pledgor for notifying the obligor not to pay the pledgee, the obligor is a necessary party.<sup>96</sup>

#### d. Pleading and Evidence

The general rules with respect to pleading and evidence apply in actions to enforce a pledged chose in action.

In accordance with the general rules of pleading, the pledgee must allege title or ownership in the pledged chose in action,<sup>97</sup> his right to enforce it against the maker or obligor,<sup>98</sup> and nonpayment

of the secured debt.<sup>99</sup> The pledgee need not allege the enforcement of the principal obligation.<sup>1</sup> It is not incumbent on plaintiff to negate in his original petition the existence of facts which are not inferable from his petition.<sup>2</sup> The indorsee of a note pledged with him as collateral, in order to recover thereon, need not aver specifically that he holds it as collateral.<sup>3</sup> Where the pledged collateral is negotiable and has been paid to the pledgor, the pledgee must plead that he is an innocent holder<sup>4</sup> and likely to lose his original debt if not realized through collection of the collateral.<sup>5</sup>

A purchaser from the pledgee must set forth the contract between the pledgee and the pledgor.<sup>6</sup>

A defendant desiring to prove equities against the pledgor, and to limit recovery on the pledged collateral to the amount of the original debt, must plead both the existence of the equities<sup>7</sup> and that the original debt is smaller than the face of the collateral.<sup>8</sup> Allegations in an answer, unconnected with the subject matter of the main action, are demurrable.<sup>9</sup>

The proof must conform to the pleadings.<sup>10</sup> The pledgee need not prove enforcement of the principal obligation.<sup>11</sup> Under the general issue the obligor, when sued by the pledgee, may prove that the chose in action was pledged to secure a differ-

Co. v. Robertson Banking Co., 134 So. 25, 223 Ala. 13.

Cal.—Tilden Lumber & Mill Co. v. Bacon Land Co., 3 P.2d 350, 116 Cal.App. 689.

49 C.J. p 1029 note 69.

In suit by assignee of pledgee of mortgage deposited as collateral security to enforce lien, mortgagee need not have been made party defendant if no relief had been prayed against him.—Gables Racing Ass'n v. Persky, 156 So. 392, 116 Fla. 77.

89. Miss.—Harrison v. Pike, 48 Miss. 46.

N.Y.—Ridgway v. Bacon, 25 N.Y.S. 651, 72 Hun 211.

N.C.—North Carolina Bank & Trust Co. v. Williams, 185 S.E. 18, 209 N.C. 806.

90. N.Y.—National Bank of Bay Ridge in City of New York v. Albers, 278 N.Y.S. 381, 244 App.Div. 127.

91. Colo.—Gold Glen Min., etc., Co. v. Dennis, 121 P. 677, 21 Colo. App. 284.

92. U.S.—Corpus Juris quoted in Brown v. New York Life Ins. Co., D.C.S.C., 22 F.Supp. 82, 90, reversed on other grounds, C.C.A., New York Life Ins. Co. v. Brown, 99 F.2d 199, certiorari denied Brown v. New York Life Ins. Co.,

59 S.Ct. 487, 306 U.S. 638, 83 L.Ed. 1039.

49 C.J. p 1029 note 72.

93. U.S.—Corpus Juris quoted in Brown v. New York Life Ins. Co., D.C.S.C., 22 F.Supp. 82, 90, reversed on other grounds, C.C.A., New York Life Ins. Co. v. Brown, 99 F.2d 199, certiorari denied Brown v. New York Life Ins. Co., 59 S.Ct. 487, 306 U.S. 638, 83 L.Ed. 1039.

49 C.J. p 1029 note 73.

94. N.Y.—Newcombe v. Lottimer, 12 N.Y.S. 381, 58 Hun 609, affirmed 28 N.E. 254, 128 N.Y. 618.

49 C.J. p 1029 note 74.

95. Mo.—Tennent v. Union Cent. L. Ins. Co., 112 S.W. 754, 133 Mo. App. 345.

96. N.C.—Woodard v. Sauls, 46 S. E. 507, 134 N.C. 274.

49 C.J. p 1029 note 77.

97. Tex.—Martin v. Lee County State Bank, Civ.App., 265 S.W. 1057.

49 C.J. p 1029 note 78.

98. La.—Louisiana Sav. Bank, etc., Co. v. Bussey, 27 La. Ann. 472.

99. Mont.—A. H. Averill Mach. Co. v. Bain, 148 P. 334, 50 Mont. 512. Tex.—Handley v. Canyon First Nat. Bank, Civ.App., 149 S.W. 742.

1. Or.—Cole v. Vinton, 20 P.2d 436, 142 Or. 313.

2. Tex.—Thaxton v. Whitesides, Civ.App., 54 S.W.2d 1059.

#### Exhaustion of other security

In suit on note held as collateral, requirement that other security be first exhausted was defensive pleading to be established by defendant.—Thaxton v. Whitesides, supra.

3. Ind.—Baxter v. Moore, 105 N.E. 588, 56 Ind.App. 472.

Wis.—Hilton v. Waring, 7 Wis. 492.

4. Tex.—Edwards v. Self, Civ.App., 280 S.W. 334.

5. Tex.—Edwards v. Self, supra.

6. Mont.—Springhorn v. Roberts, 250 P. 1112, 77 Mont. 395. 49 C.J. p 1029 note 84.

7. Ga.—Clydesdale Bank v. Black-shear Mfg. Co., 89 S.E. 1051, 18 Ga.App. 515.

8. Miss.—Harrison v. Pike, 48 Miss. 46.

49 C.J. p 1030 note 86.

9. Wash.—Harder v. McKinney, 60 P.2d 84, 187 Wash. 457.

10. La.—Commercial Nat. Bank of Shreveport v. McDaniel, App., 156 So. 43.

49 C.J. p 1030 note 87.

11. Or.—Cole v. Vinton, 20 P.2d 436, 142 Or. 313.

ent obligation of the pledgor's than that alleged by the pledgee not to have been paid.<sup>12</sup>

**Evidence.** Where the obligor proves equities as between him and the pledgor, some authorities hold that the burden of proof is on the pledgee to show that he is a bona fide holder before maturity,<sup>13</sup> to establish the existence of the secured debt,<sup>14</sup> the amount of the pledge,<sup>15</sup> that the principal debt has not been paid,<sup>16</sup> and the amount due thereon.<sup>17</sup> Such authorities also hold that the pledgee must further show what other security, if any, it holds for the principal debt,<sup>18</sup> that such other collateral is insufficient to satisfy the debt,<sup>19</sup> and that the circumstances are such as to require application of the pledged collateral in order to pay the principal debt.<sup>20</sup> Other authorities hold that, in the absence of proof to the contrary, there is a presumption that the principal obligation equals the face value of the collateral,<sup>21</sup> and that pledgee plaintiff is entitled to enforce collateral for the full face value thereof,<sup>22</sup> the burden being on the maker to prove the amount of the pledgor's debt to the pledgee less than the face of the collateral.<sup>23</sup> In an action by the original pledgee on repledged notes, where plaintiff produces the notes at trial with the apparent consent of the last pledgee, the want of consent or the bad faith of plaintiff is a matter of defense, and the burden of proof thereof is on the maker.<sup>24</sup>

The rules of general application govern questions of admissibility of evidence in proceedings by a pledgee to enforce pledged choses in action.<sup>25</sup>

Since the pledgee may be a bona fide holder of the pledged collateral only to the extent for which he holds it as security, as discussed *infra* § 76, the obligor of a pledged chose in action may introduce evidence of equities against the pledgor.<sup>26</sup>

The usual rules with respect to weight and sufficiency of evidence apply in proceedings by a pledgee to collect and enforce pledged choses in action.<sup>27</sup>

#### e. Trial and Judgment or Decree

Questions of fact should be submitted to the jury under proper instructions from the court. Where the obligor merely pledges collateral without assuming personal liability for the collateral or the principal debt, no personal judgment should be entered against him in a suit on the collateral by the pledgee.

In an action to enforce pledged choses in action, questions of fact should be submitted to the jury<sup>28</sup> under proper instructions from the court.<sup>29</sup>

Where the obligor merely pledges collateral without assuming personal liability for the collateral or the principal debt, no personal judgment should be entered against him in a suit on the collateral by the pledgee.<sup>30</sup> On foreclosure of pledged collateral the decree should fix the basis of distribution<sup>31</sup> and, where provided for, the amount of attorney's fees.<sup>32</sup>

### § 76. — Amount and Extent of Recovery

As a general rule the bona fide pledgee of a chose in action may enforce it for the entire amount thereof against the obligor, but, where the obligor proves a defense not available as a bar to recovery by the pledgee, but good as against the pledgor, the pledgee will be al-

12. Tex.—Handley v. Canyon First Nat. Bank, Civ.App., 149 S.W. 742.

13. La.—Calhoun v. David Burk Co., App., 153 So. 568.  
49 C.J. p 1030 note 90.

14. Tex.—Bruyere v. Liberty Nat. Bank of Waco, Civ.App., 262 S.W. 844.

15. Tex.—Thaxton v. Whitesides, Civ.App., 54 S.W.2d 1059.

16. N.C.—Corpus Juris cited in Tesh v. Rominger, 1 S.E.2d 98, 100, 215 N.C. 52.

Tex.—Blackburn v. Temple Nat. Bank, Civ.App., 216 S.W.2d 233, refused no reversible error.  
49 C.J. p 1030 note 91.

17. Neb.—Corpus Juris cited in State Bank of Omaha v. Todd, 240 N.W. 754, 755, 122 Neb. 557.

N.C.—Corpus Juris cited in Tesh v. Rominger, 1 S.E.2d 98, 100, 215 N.C. 52.

Tex.—Blackburn v. Temple Nat. Bank, Civ.App., 216 S.W.2d 233, refused no reversible error—Farwell v. Tingle, Civ.App., 280 S.W. 232.  
49 C.J. p 1030 note 92.

18. Tex.—Blackburn v. Temple Nat. Bank, Civ.App., 216 S.W.2d 233, refused no reversible error—Wharton v. Washington County State Bank, Civ.App., 153 S.W. 699.

19. Tex.—City Nat. Bank v. Pearce, Civ.App., 291 S.W. 291.  
49 C.J. p 1030 note 94.

20. Tex.—Blackburn v. Temple Nat. Bank, Civ.App., 216 S.W.2d 233, refused no reversible error.  
49 C.J. p 1030 note 95.

21. Ga.—Republic Truck Sales Corp. v. Padgett, 118 S.E. 435, 30 Ga. App. 474.  
49 C.J. p 1030 note 96.

22. Ill.—Hancock v. Hodgson, 4 Ill. 329—Gammon v. Huse, 9 Ill.App. 557, affirmed 100 Ill. 234.

23. Ga.—Republic Truck Sales Corp. v. Padgett, 118 S.E. 435, 30 Ga. App. 474.  
49 C.J. p 1030 note 98.

24. N.Y.—National Bank of Bay Ridge in City of New York v. Albers, 278 N.Y.S. 381, 244 App.Div. 127.

25. Hawaii.—Merchants Collection Agency v. Mitchell, 32 Hawaii 343.  
49 C.J. p 1030 note 1.

26. Ill.—Barber v. General Automotive Corp., 240 Ill.App. 85.  
49 C.J. p 1030 note 3.

27. Wash.—First State Bank of Kellogg v. Merritt, 1 P.2d 902, 163 Wash. 467.  
49 C.J. p 1030 note 5.

28. Ga.—Gartrell v. Johns, 84 S.E. 175, 15 Ga.App. 671.  
49 C.J. p 1030 note 7.

29. Mass.—Shattuck v. Eldredge, 53 N.E. 377, 173 Mass. 165.  
49 C.J. p 1030 note 9.

30. Tex.—Pattillo v. Citizens' Nat. Bank, Civ.App., 197 S.W. 1054.  
49 C.J. p 1030 note 10.

31. Tenn.—Carolina Spruce Co. v. Black Mountain R. Co., 201 S.W. 770, 139 Tenn., 248.

32. Tenn.—Carolina Spruce Co. v. Black Mountain R. Co., *supra*.  
49 C.J. p 1031 note 12.

lowed to recover only to the extent of the debt for which he holds the collateral as security.

As a general rule the bona fide pledgee of a chose in action may enforce it for the entire amount thereof against the obligor,<sup>33</sup> and will retain any surplus after the payment of his debt as trustee for the pledgor, as discussed *infra* § 78. On the other hand, where the obligor proves a defense not available as a bar to recovery by the pledgee, but good as against the pledgor, the pledgee will be allowed to recover only to the extent of the debt for which he holds the collateral as security.<sup>34</sup> So, where the suit is by the pledgee against one who became a party to the instrument for the accommodation of the pledgor,<sup>35</sup> or where the pledgor is also the maker of the collateral note sued on,<sup>36</sup> the amount of the pledgee's recovery will be restricted to the principal debt. Where the principal debt equals or exceeds the face of the collateral, the pledgee may recover the full amount of the collateral despite equities as between the obligor and pledgor.<sup>37</sup> In a suit to foreclose a mortgage by one to whom it has been wrongfully repledged by the original pledgee, plaintiff is entitled to receive only the amount for which it was originally pledged.<sup>38</sup>

A pledgee sued by the pledgor for damages arising

from breach of a contract between the parties pledged as collateral security may set off the principal debt as a defense;<sup>39</sup> but, if he does not do so, he may not object to recovery of full damages.<sup>40</sup>

*Interest, costs, and attorney's fees.* A pledgee recovering from a third person obligor may recover the costs of the action,<sup>41</sup> including attorney's fees,<sup>42</sup> where these are allowable as costs. It has been held that a pledgee can recover interest and attorney's fees only if such is provided for in the notes evidencing pledgor's indebtedness secured by the pledge.<sup>43</sup> It has also been held that a pledgee recovering from a third person obligor may as against the pledgor retain reasonable attorney's fees out of the surplus proceeds otherwise due the pledgor;<sup>44</sup> but a pledgee in a suit against the pledgor on collateral of which the pledgor is obligor cannot recover attorney's fees for prosecution of such suit<sup>45</sup> in the absence of an enforceable agreement to this effect.<sup>46</sup>

## § 77. Operation and Effect of Enforcement

The collection of the collateral by the pledgee bars any further action on it by the pledgor and operates as a discharge of the collateral.

The collection of the collateral by the pledgee

33. Cal.—Adolph Ramish, Inc., v. Woodruff, 40 P.2d 509, 2 Cal.2d 190, 96 A.L.R. 1146.

Ga.—Harper v. Calhoun Nat. Bank, 158 S.E. 767, 43 Ga.App. 364.

Ill.—Chicago Title & Trust Co. v. Rubin, 265 Ill.App. 509.

Tex.—Brown v. Cooper Co., Civ. App., 99 S.W.2d 637, error dismissed—Farmers' & Merchants' Nat. Bank of Abilene v. Hall, Civ. App., 70 S.W.2d 834.  
49 C.J. p 1031 note 14.

34. Cal.—Adolph Ramish, Inc., v. Woodruff, 40 P.2d 509, 2 Cal.2d 190, 96 A.L.R. 1146—Evans v. Robert Marsh & Co., 2 P.2d 882, 116 Cal.App. 441.

Ga.—Harper v. Calhoun Nat. Bank, 158 S.E. 767, 43 Ga.App. 364.  
La.—Steeg v. Codifer, 102 So. 407, 157 La. 298.

Tex.—Blackburn v. Temple Nat. Bank, Civ.App., 216 S.W.2d 233, refused no reversible error—Brown v. Cooper Co., Civ.App., 99 S.W.2d 637, error dismissed.

Wyo.—Corpus Juris cited in Wyoming Inv. Co. v. Wax, 18 P.2d 918, 922, 45 Wyo. 321.  
49 C.J. p 1031 note 16.

### Advancements

Pledgee's recovery on pledged mechanic's lien note must be limited, as to any advancements made by pledgee after maturity, to the extent that original holder could have recovered from makers, and, if con-

tract was not substantially performed, such recovery would be in personam only.—Blackburn v. Temple Nat. Bank, Tex.Civ.App., 216 S.W.2d 233, refused no reversible error.

### Part payment

(1) Defendants were entitled to credit for part payment made at payee's office, as against pledgee under prior pledge of note and mortgage, who subsequently acquired title by sale of pledge, where, at time of payment, note, after deducting payment, was for greater amount than pledgor's indebtedness.—Wyoming Inv. Co. v. Wax, 18 P.2d 918, 45 Wyo. 321.

(2) Pledgee of note and mortgage, who acquired title by sale of pledge, could recover full amount, less part payment, where other defenses good as against payee were not established.—Wyoming Inv. Co. v. Wax, *supra*.

In action against maker and indorser assigning notes to plaintiff as collateral, only amount of indorser's indebtedness secured could be recovered.—State Bank of Norwood v. Daggett, 263 N.Y.S. 715, 146 Misc. 808.

35. Ky.—Elk Valley Coal Co. v. Lexington Third Nat. Bank, 163 S.W. 766, 157 Ky. 617.  
49 C.J. p 1032 note 17.

36. U.S.—Louisiana Agricultural

Corp. v. Interstate Trust, etc., Co., C.C.A.La., 17 F.2d 751.

49 C.J. p 1032 note 18.

37. Conn.—Continental Credit Co. v. Ely, 100 A. 434, 91 Conn. 553.  
Ky.—Bedinger v. Citizens' Nat. Bank, 279 S.W. 622, 212 Ky. 486.

38. N.Y.—Merchants' Bank v. Livingston, 17 Hun 321, affirmed 79 N.Y. 618.

39. Mo.—Milliken-Helm Commn. Co. v. C. H. Albers Commn. Co., 147 S.W. 1065, 244 Mo. 38.

40. Mo.—Milliken-Helm Commn. Co. v. C. H. Albers Commn. Co., *supra*.

41. Tenn.—Hanover Nat. Bank v. Brown, Ch.App., 53 S.W. 206.

42. Tenn.—Hanover Nat. Bank v. Brown, *supra*.  
49 C.J. p 1032 note 25.

43. Tex.—Blackburn v. Temple Nat. Bank, Civ.App., 216 S.W.2d 233, refused no reversible error.

44. N.Y.—Mercantile Factors' Corp. v. Warner Bros. Pictures, 214 N. Y.S. 273, 215 App.Div. 530.  
Okl.—Picher Bank v. Harris, 229 P. 137, 100 Okl. 256, 40 A.L.R. 254.

45. N.Y.—Mercantile Factors' Corp. v. Warner Bros. Pictures, 214 N. Y.S. 273, 215 App.Div. 530.  
49 C.J. p 1032 note 28.

46. N.Y.—Mercantile Factors' Corp. v. Warner Bros. Pictures, *supra*.  
49 C.J. p 1032 note 29.

bars any further action on it by the pledgor,<sup>47</sup> and operates as a discharge of the collateral.<sup>48</sup> The amount realized constitutes a payment pro tanto of the secured debt.<sup>49</sup> A judgment ordering execution against pledged securities substitutes the judgment as collateral in place of the securities.<sup>50</sup> When the debt is collected by the pledgor, the debtor is relieved of further liability thereon,<sup>51</sup> and the pledgee is barred from any action thereon and the debtor is fully protected.<sup>52</sup> Where a bond of a third person has been assigned as security for a sum less than the amount of the bond, a judgment in favor of the assignee for the amount for which it was assigned as security, recovered in a suit on the bond brought by the assignee, does not satisfy and extinguish the bond as against the obligee.<sup>53</sup>

### § 78. Proceeds of Enforcement or Sale

In the collection of the pledged chose in action, as by

the foreclosure and sale of the property, the pledgee acts as the trustee of the pledgor.

On collection of pledged collateral the pledgee must account for the proceeds,<sup>54</sup> applying them to payment of the principal debt,<sup>55</sup> and paying over any surplus to the pledgor,<sup>56</sup> the pledgee being regarded as trustee for the pledgor as to any amount collected in excess of that due the pledgee.<sup>57</sup> Where the pledgor is permitted to sue, if he is successful he holds the proceeds as trustee for the pledgee to the extent of his interest.<sup>58</sup>

*Property or proceeds after foreclosure sale.* In the enforcement by the pledgee of a mortgage assigned to him, by foreclosure of the mortgage and sale of the property, he acts as trustee for the pledgor;<sup>59</sup> where he buys at the sale himself, he holds the land,<sup>60</sup> and, where he sells to another,

47. U.S.—Laughlin v. District of Columbia, Ct.Cl., 6 S.Ct. 472, 116 U.S. 485, 29 L.Ed. 701.

48. Fla.—Brown v. Panama City First Nat. Bank, 97 So. 351, 86 Fla. 198.

49 C.J. p 1033 note 32.

49. La.—Hennessey v. Stempel, 32 So. 394, 108 La. 159.

N.Y.—Marine Bank v. Vail, 19 N.Y. Super. 421.

50. Cal.—Anglo-California Trust Co. v. Oakland R. Cos., 225 P. 452, 193 Cal. 451.

49 C.J. p 1033 note 34.

51. Tex.—Randolph v. Citizens Nat. Bank of Lubbock, Civ.App., 141 S.W.2d 1030, error dismissed, judgment correct.

52. Tex.—Randolph v. Citizens Nat. Bank of Lubbock, Civ.App., 141 S.W.2d 1030, error dismissed, judgment correct.

53. N.J.—Brumagim v. Chew, 19 N.J.Eq. 130, affirmed 21 N.J.Eq. 520.

54. Cal.—Bank of America Nat. Trust & Savings Ass'n v. Reidy, 101 P.2d 77, 15 Cal.2d 243—Beatty v. Pacific States Savings & Loan Co., 41 P.2d 378, 4 Cal.App.2d 692.

49 C.J. p 1033 note 37.  
Duty of pledgee to account for proceeds where principal debt has been paid see supra § 74.

#### Allocation of proceeds

Where the parties in interest are before the court, the court may by appropriate orders allocate the sum received from the sale of the mortgaged property to the parties interested in accordance with their interest as evidenced by the respective debts.—Howard v. Roberts, 156 So. 438, 116 Fla. 381.

55. S.C.—Weatherly v. Medlin, 139 S.E. 633, 141 S.C. 290.

Tex.—Davis v. First Nat. Bank, Civ. App., 135 S.W.2d 259—Thaxton v. Whitesides, Civ.App., 54 S.W.2d 1059—Central Nat. Bank v. Latham & Co., Civ.App., 22 S.W.2d 765, error refused.

49 C.J. p 1033 note 38.

#### Maturity of principal debt

(1) The pledgee has no right to apply the proceeds to the payment of the debt until after default in the payment of such debt by the pledgor.—Gables Racing Ass'n v. Persky, 156 So. 392, 116 Fla. 77.

(2) Pledgee's retention in own name of cashier's check for interest coupons of bonds pledged as collateral security, even if classed as conversion, did not, as a matter of law, constitute application of checks in part payment of note, since note was not due.—In re Harriman Securities Corporation, D.C.N.Y., 9 F.Supp. 860, affirmed, C.C.A., 77 F.2d 999.

#### Knowledge that collateral is not debtor's property

Ordinarily, pledgee cannot apply interest collected on collateral security to payment of principal debt, where pledgee knows that collateral security is not property of debtor.—In re Harriman Securities Corporation, supra.

56. La.—Bass v. Biggs, 118 So. 861, 167 La. 126.

49 C.J. p 1033 note 39.

57. Cal.—Adolph Ramish, Inc., v. Woodruff, 40 P.2d 509, 2 Cal.2d 190, 96 A.L.R. 1146.

Ga.—Gleaton v. Bank of Arlington, 149 S.E. 438, 40 Ga.App. 291.

Ill.—Chicago Title & Trust Co. v. Rubin, 265 Ill.App. 509.

Miss.—Hart v. Moore, 158 So. 490, 171 Miss. 838.

Tex.—Brown v. Cooper Co., Civ.App., 99 S.W.2d 637, error dismissed—

Thaxton v. Whitesides, Civ.App., 54 S.W.2d 1059.

49 C.J. p 1033 note 41.

58. U.S.—Brown v. New York Life Ins. Co., D.C.S.C., 22 F.Supp. 82, reversed on other grounds, C.C.A., New York Life Ins. Co. v. Brown, 99 F.2d 199, certiorari denied Brown v. New York Life Ins. Co., 59 S.Ct. 487, 306 U.S. 638, 83 L.Ed. 1039.

N.Y.—Collins v. McWilliams, 175 N.Y.S. 850, 185 App.Div. 712.

Where pledgees obtained sheriff's deed on foreclosure by pledgors of mortgage pledged and on assignment of certificate of sale, land was affected by trust to convert it into money and pay over balance above amount of debt due from pledgors, or, upon pledgors' payment of debt, to release and quitclaim land to pledgors.—Freepons v. Elliott, 67 P. 2d 924, 190 Wash. 348.

59. Iowa.—Carter v. McClain, 244 N.W. 671, 215 Iowa 19.

Tex.—Smith v. Cook, Civ.App., 126 S.W.2d 1049, error dismissed, judgment correct.

49 C.J. p 1033 note 42.

Pledgor was entitled to be credited with the net amount of pledgee's bid for the property at the foreclosure sale, and pledgee could not charge pledgor with interest on the debt and with expenses incident to holding property until resold.—Phinney v. Cheshire County Sav. Bank, 16 A.2d 363, 91 N.H. 184.

60. Cal.—Bank of America Nat. Trust & Savings Ass'n v. Reidy, 101 P.2d 77, 15 Cal.2d 243.

Mich.—Corpus Juris cited in Crowley v. Atkinson's Estate, 296 N.W. 864, 866, 297 Mich. 15.

49 C.J. p 1033 note 43.

he holds the proceeds,<sup>61</sup> after the payment of his debt, in trust for the pledgor. The pledgee is not, however, under any obligation to bid at the sale,<sup>62</sup> and, where he notifies the pledgor that he will bid only enough to protect himself,<sup>63</sup> or that he will act solely for his own interests,<sup>64</sup> or where the parties have agreed that the pledgee may purchase free of trust,<sup>65</sup> or where he makes the pledgor a party to the foreclosure proceedings,<sup>66</sup> he may purchase at the sale, and on accounting for the purchase money is under no obligation to surrender the land to the pledgor upon tender of the amount of his debt.

Where the pledged collateral is secured by deed of trust, the pledgee may purchase at a sale conducted by the trustee without any obligation to account to the pledgor,<sup>67</sup> but is accountable for the surplus, if any, over the amount of the pledge.<sup>68</sup> The pledgee will hold the title free from the pledgor's right to redeem, on the latter's failure to pay the debt after reasonable notice.<sup>69</sup>

Long continued acquiescence on the part of the pledgor may prevent his questioning the pledgee's title.<sup>70</sup>

**PLEDGOR.** Defined see Pledges § 1.

**PLEGIS ACQUIETANDIS.** A writ that anciently lay for a surety against him for whom he was surety, if he paid not the money at the day.<sup>1</sup>

**PLEITO.** In Spanish law, suit; action; legal proceedings.<sup>2</sup>

**PLENA ET CELERIS JUSTITIA FIAT PARTIBUS.** See 49 C.J. p 1034 note 4.

**PLENARIO.** In Spanish law, full, without abbreviation, as the trial of a possessory action without omitting any step.<sup>3</sup>

**PLENARY.** Full, entire, complete, absolute, perfect, unqualified.<sup>4</sup>

#### Nature of title

Where title and possession are taken under sheriff's deed, title is vested in pledgee, is substituted for pledged choses in action, and is governed by law of pledges, and not of mortgages. —Freepons v. Elliott, 67 P.2d 924, 190 Wash. 348.

#### Equity of redemption foreclosed

It appears to be generally accepted that, when a pledgee holding as collateral security a note secured by mortgage forecloses the mortgage under the power of sale granted therein, or by a suit of foreclosure to which the pledgor is not made a party, without authority to purchase being expressly granted, only the mortgagor's equity of redemption is foreclosed. —Crowley v. Atkinson's Estate, 296 N.W. 864, 297 Mich. 15.

Mortgagee ceased to have interest in mortgages assigned to secure collateral note, and premises covered by mortgages, where selling price on foreclosure became credited on collateral note. —Richmond v. Charles-town Five Cents Sav. Bank, 186 N.E. 551, 283 Mass. 380.

61. Mich.—Corpus Juris cited in Crowley v. Atkinson's Estate, 296 N.W. 864, 866, 297 Mich. 15. N.Y.—In re Gilbert, 10 N.E. 148, 104 N.Y. 200.

The bidding in of the premises by purchaser did not constitute a sale in sense that price bid was payment of pledgor's indebtedness to pledgees so as to require pledgees to account for amount for which pledgees received in excess of amount of the

pledgor's indebtedness. —Riddle v. Todd, 28 N.E.2d 326, 306 Ill.App. 252.

62. Pa.—Plucker v. Teller, 34 A. 208, 174 Pa. 529, 52 Am.S.R. 825.

63. N.D.—Ingstad v. Farmers' State Bank of Mandan, 237 N.W. 704, 61 N.D. 194.

Pa.—Plucker v. Teller, 34 A. 208, 174 Pa. 529, 52 Am.S.R. 825.

64. Mo.—Schelp v. Nicholls, App., 300 S.W. 1031.

Tex.—Smith v. Cook, Civ.App., 126 S.W.2d 1049, error dismissed, judgment correct.

65. Mo.—Schelp v. Nicholls, App., 300 S.W. 1031.

Tex.—Smith v. Cook, Civ.App., 126 S.W.2d 1049, error dismissed, judgment correct.

66. Or.—Hydraulic Min. Co. v. Smith, 196 P. 811, 100 Or. 86. 49 C.J. p 1034 note 50.

67. Cal.—Sontag v. Stringer, 99 P. 2d 1098, 37 Cal.App.2d 663.

Tex.—Smith v. Cook, Civ.App., 126 S.W.2d 1049, error dismissed, judgment correct.

49 C.J. p 1034 note 51.

Complaint held not to state a cause of action for failure to allege a surplus or fraud. —Sontag v. Stringer, 99 P.2d 1098, 37 Cal.App.2d 663.

68. Cal.—Sontag v. Stringer, supra.

69. Kan.—Blood v. Shepard, 77 P. 565, 69 Kan. 752.

70. Mo.—Schelp v. Nicholls, App., 300 S.W. 1031.

49 C.J. p 1034 note 54.

1. Black L.D.

2. Escriche Diccionario.

Pleito de cedula

A suit tried by two or more branches of a chancilleria, under a presiding judge with a royal cedula. —Escriche Diccionario.

Pleitos de menor cuantia

Small causes. —Escriche Diccionario.

3. Escriche Diccionario.

4. Okl.—Mashunkashey v. Mashunkashey, 134 P.2d 976, 979, 191 Okl. 501.

#### Phrases

(1) "Plenary causes" see Actions § 1 c (1).

(2) "Plenary inspiration" see 44 C.J.S. p 407 note 7.

(3) "Plenary power" of legislature see Constitutional Law § 70 (1); of state to provide rural highways see Highways § 25; conferred on any municipality with respect to public utilities see Municipal Corporations § 1050; as used in defining the jurisdiction of a court see Courts § 15 a.

(4) "Plenary proceedings" see Actions § 1 h (1) (a).

(5) "Plenary review" of public service commission's action on application for contract motor carrier permit see Motor Vehicles § 103 h (1).

(6) "Plenary suit" see Actions § 1 j (1) (a); with reference to the revisory powers of bankruptcy courts see Bankruptcy § 593; as an action against collector of internal revenue see Internal Revenue § 859.

**PLENE ADMINISTRAVIT.** Literally "He has fully administered."<sup>5</sup>

In practice, a plea by an executor or administrator, see *Executors and Administrators* § 764.

**PLENE COMPUTAVIT.** See *Accounting* § 7 b (2).

**PLENIPOTENTIARY.** One who has full power to do a thing; a person fully commissioned to act for another. The term is applied in international law to ministers and envoys of the second rank of public ministers.<sup>6</sup>

**PLENTY.** Abundance; a full or adequate supply; sufficiency.<sup>7</sup>

**PLEURA.** The serous membrane enveloping the lungs and lining the walls of the thoracic cavity.<sup>8</sup>

*Pleural.* Relating to the pleura.<sup>9</sup>

**PLEURISY.** Inflammation of the outside lining or bag which contains the lungs; inflammation of the pleura.<sup>10</sup> In some cases the disease seems to pass off, but it leaves the lungs impaired to such an extent that the power of resistance is weakened and in the future, because of lack of resistance, lung trouble which may be serious may result.<sup>11</sup>

Pleurisy is classified in the medical journals as primary pleurisy and secondary pleurisy. The first class is pleurisy proper and the second class is simply an inflammation of the pleura in sympathy with some other organ disease or as an accompaniment of an organ disease.<sup>12</sup>

**PLIABLE.** Capable of being bent; easy to be bent or worked; flexible.<sup>13</sup>

**PLICA.** In Spanish law, the receptacle, closed and sealed, in which a document, as a will, is kept for future publication.<sup>14</sup>

**PLIGHT.** Condition; state; originally good or indifferent, now usually qualified as bad.<sup>15</sup>

**PLIMSOLL MARK.** See the C.J.S. title *Shipping* § 142, also 56 C.J. p 995 note 12.

**PLOT.** The word "plot," as a noun, is defined generally as meaning a secret plan to accomplish some wrong or unlawful object; stratagem; intrigue; conspiracy.<sup>16</sup>

With reference to literature and dramatic works the word "plot" means the story or narrative; the designed sequence of connected incidents. It is the thing which moves the play from cause to effect, and it means, as its etymology implies, a weaving together.<sup>17</sup> In this sense the word "plot" is distinguishable from "sequence of events" and "theme."<sup>18</sup> The word "plot" is treated in *Copyright and Literary Property* §§ 29, 113.

As a verb, the word "plot" is defined as meaning to lay plans for the accomplishment of; contrive or devise; usually in a bad sense.<sup>19</sup>

"Plot" has been distinguished from "advise" see 2 C.J.S. p 893 note 90, and "consult" see 16 C.J.S. p 1519 note 41.

**PLOTTAGE.** The capacity of development attributable to a tract of considerable size; value in a parcel of land for some larger use than is generally considered in a business locality, as for a theater or hotel;<sup>20</sup> the added value which accrues to two or

5. Burrill L.D.

6. Black L.D.

7. Century D.

"Plenty of change" see 14 C.J.S. p 396 note 91.1.

8. Stedman Med.D.

**Similarly expressed**

The outside covering of the lungs.—*Standard Life Ins. Co. of the South v. Strong*, 89 S.W.2d 367, 375, 19 Tenn.App. 404.

9. Stedman Med.D.

**Pleural effusion** is an effusion or collection of fluid which is in the pleural cavity or space.—*J. L. Williams & Sons v. Moore*, 177 S.W.2d 761, 762, 206 Ark. 766.

10. Tenn.—*Standard Life Ins. Co. of the South v. Strong*, 89 S.W.2d 367, 375, 19 Tenn.App. 404.

11. Tenn.—*Standard Life Ins. Co. of the South v. Strong*, supra.

12. Tenn.—*Standard Life Ins. Co. of the South v. Strong*, supra.

13. Webster New Int.D.

**Glass in a plastic condition** means that the glass is capable of being molded, not merely that it is pliable, or able to be indented or bent.—*Blair v. Jeannette-McKee Glass Works, C.C.Pa.*, 161 F. 355, 356.

14. Escriche Diccionario.

15. Webster New Int.D.

**Similarly expressed**

While in common usage there has been a departure from the significance indicated by the derivation of the word, it does not universally mean a dangerous condition.—*Texas, etc., R. Co. v. Echols*, 41 S.W. 488, 492, 17 Tex.Civ.App. 677.

16. New Standard D.

17. Cal.—*Golding v. RKO Radio Pictures, App.*, 193 P.2d 153, 163.

**Plot essential to dramatic production**

It is essential to a dramatic composition that it should tell some

story. The plot may be simple and it may be but the narration or representation of a single transaction, but it must repeat or mimic some action, speech, emotion, passion, or character, real or imaginary.—*Harold Lloyd Corporation v. Witwer, C. C.A.Cal.*, 65 F.2d 1, 24.

"The plot of a play is more than and different from the environment or setting of the characters . . . the action, scheme, or plot commonly consists in showing how human effort and intention is aided or thwarted by the greater forces with which poor humanity is surrounded."—*Frankel v. Irwin, D.C.N.Y.*, 34 F.2d 142, 144.

18. Cal.—*Golding v. RKO Radio Pictures, App.*, 193 P.2d 153, 163.

19. New Standard D.

20. N.J.—*In re Widening Mulberry St.*, 166 A. 447, 449, 11 N.J.Misc. 295.

more lots in one ownership, where the larger plot can be improved to better advantage than the individual lots;<sup>21</sup> the additional value which a plot has as against the aggregate value of the several lots which compose it;<sup>22</sup> a percentage added to the aggregate value of two or more contiguous lots when held in one ownership, as representing an increased value pertaining to a group of lots by reason of the fact that they admit of more advantageous disposition and improvement than a single lot.<sup>23</sup>

**PLOW.** As a noun, an agricultural implement drawn by animals or moved by steam power, used to cut the ground and turn it up so as to prepare it for the reception of seeds; an implement drawn by horses or other power, for making a furrow in and turning up the earth to prepare it for sowing or planting.<sup>24</sup> As an exempt tool or instrument of husbandry see Exemptions § 46 g.

As a verb, to break up or turn up the surface of the land with a plow.<sup>25</sup>

**PLOWBOTE.** See Common Lands § 4 b (2).

**PLUG.** As a slang expression, to keep perseveringly or doggedly at work, or in action; to plod.<sup>26</sup>

As used in railroad terminology the words "plugged" and "plugging yard" are defined in the C. J.S. title Railroads § 1, also 49 C.J. p 1035 notes 29-31.

**PLUMB.** Accurate; true; vertical.<sup>27</sup>

**PLUMBER.** One who fits dwellings and public buildings with tanks, pipes, traps, fittings, and fixtures for the conveyance of gas, water, and sewage;<sup>28</sup> a tradesman who furnishes, fits, and repairs gas, water, and soil pipes, cisterns, tanks, baths, waterclosets, and their fittings, and other sanitary and fire protection apparatus for a house or other building, including junctions in mains and sewers.<sup>29</sup> "Plumber" has been distinguished from "dealer" see 25 C.J.S. p 1043 note 7, and compared with "gas fitter" see 38 C.J.S. p 614 note 20, and "steamfitter."<sup>30</sup>

Governmental regulation of plumbers is treated in Health § 25 and Municipal Corporations § 286; and regulations which constitute a denial of equal protection of law are discussed in Constitutional Law § 511 h. For other constitutional provisions applicable to plumbers see the index to Constitutional Law. Occupation taxes and licensing provisions relating to plumbers are treated in Licenses § 30 c (3).

Phrases employing the word are set out in the note.<sup>31</sup>

**PLUMBING.** A plumber's occupation;<sup>32</sup> the art or trade of putting into buildings the tanks, pipes, traps, fittings, and fixtures for conveying water, gas, and sewage;<sup>33</sup> the installing, altering, or repairing of pipes, tanks, faucets, valves and other fixtures through which gas, water, waste, or sewage is conducted and carried;<sup>34</sup> the work of putting together pipes used for the disposal of sewage.<sup>35</sup> Also, the pipes, fittings, and fixtures themselves for the con-

21. N.Y.—Matter of New York, 217 N.Y.S. 544, 563, 127 Misc. 710. 49 C.J. p 1035 note 18.

22. N.Y.—Matter of Armory Bd., 72 N.Y.S. 37, 38, 35 Misc. 548.

23. N.Y.—People v. O'Donnel, 115 N.Y.S. 509, 511, 130 App.Div. 734. 49 C.J. p 1035 note 19.

24. Ark.—Leighton v. Lewis, 189 S.W. 672, 673, 126 Ark. 83.

25. Ark.—Leighton v. Lewis, supra. 49 C.J. p 1035 note 23.

"Double-disking" distinguished Ark.—Leighton v. Lewis, supra.

26. Webster New Int.D.

To "plug" a song means to boost, advertise, and promote the song.—Vogel v. Sheridan, 40 P.2d 946, 947, 4 Cal.App.2d 298.

27. Tex.—Kirby Lumber Co. v. Poindexter, Civ.App., 103 S.W. 439, 440.

In mechanics, in its primary sense, "plumb" means "vertical."—Kirby Lumber Co. v. Poindexter, supra—49 C.J. p 1035 note 35 [a].

28. N.Y.—People v. Osborne, 269 N.Y.S. 409, 414, 149 Misc. 676. 49 C.J. p 1035 note 37.

29. N.Y.—Corpus Juris quoted in People v. Osborne, 269 N.Y.S. 409, 414, 149 Misc. 676.

Pa.—Commonwealth v. Dougherty, 40 A.2d 902, 903, 156 Pa.Super. 520. 49 C.J. p 1035 note 38.

30. Miss.—Warburton - Beacham Supply Co. v. City of Jackson, 118 So. 606, 608, 151 Miss. 503.

31. Phrases

(1) "Employing plumber" see 30 C.J.S. p 224 notes 79-84.

(2) "Journeyman plumber" see 48 C.J.S. p 941 note 29.

(3) "Master plumber" see 55 C.J.S. p 981 note 60.

(4) "Plumber's snake," a flexible spring steel tape about sixty feet long, commonly used to clean out obstructed pipe drains.—Bellon v. Silver Gate Theatres, Inc., 47 P.2d 462, 466, 4 Cal.2d 1.

32. Miss.—Warburton - Beacham Supply Co. v. Jackson, 118 So. 606, 608, 151 Miss. 503.

N.Y.—Corpus Juris quoted in People v. Osborne, 269 N.Y.S. 409, 414, 149 Misc. 676.

33. N.Y.—Corpus Juris quoted in People v. Osborne, 269 N.Y.S. 409, 414, 149 Misc. 676.

Pa.—Commonwealth v. Haupt, 9 Pa. Dist. & Co. 107, 108.

Phrases

(1) "Plumbing business" see 12 C.J.S. p 801 note 60.

(2) "Plumbing material" see 57 C.J.S. p 450 note 48.

34. Me.—State v. Hahnel, 108 A. 755, 756, 118 Me. 452.

N.Y.—Corpus Juris quoted in People v. Osborne, 269 N.Y.S. 409, 414, 149 Misc. 676.

49 C.J. p 1036 note 42.

35. Minn.—State v. Foss, 180 N.W. 104, 105, 147 Minn. 281.

N.Y.—Corpus Juris quoted in People v. Osborne, 269 N.Y.S. 409, 414, 149 Misc. 676.

veyance of sewage from private dwellings;<sup>36</sup> and, in this sense, the more common use of the term includes only the water supply and house drainage systems, leaving gas fitting and hot water fitting in two separate classes.<sup>37</sup>

Plumbing is not regarded as a luxury or convenience only; it is an essential part of modern city dwelling.<sup>38</sup>

**PLUMBO-SOLVENCY.** The plumbo-solvency of water is the capacity of carbon dioxide, found to some extent in all natural water, to dissolve lead while water stands in or passes through lead pipe, and thus to render the water poisonous.<sup>39</sup>

**PLUNDER.** A word of very general meaning,<sup>40</sup> having no especial legal signification.<sup>41</sup>

As a noun "plunder" means booty, pillage, rapine, spoil; that which is taken from the enemy by force.<sup>42</sup>

As a verb, in its most common meaning, it signifies to take property from persons or places by open force, and this may be in the course of lawful war or by unlawful hostility.<sup>43</sup> In another and very common sense, to take by fraud; to spoil.<sup>44</sup> In this sense it is used to express the idea of taking property from a person or place, without just right, but not expressing the nature or quality of the wrong done.<sup>45</sup>

"Plunder" as a defamatory accusation see Libel and Slander § 70 a (2).

**PLUNDERAGE.** A maritime term for the embezzlement of goods on board a ship.<sup>46</sup>

**PLURAL.** Consisting of, or designating, two or

more.<sup>47</sup> While the word "plural" is defined as meaning any number except one,<sup>48</sup> sometimes it may be so expressed that it means only one.<sup>49</sup>

**PLURALIS NUMERUS EST DUOBUS CONTENTUS.** See 49 C.J. p 1036 note 64.

**PLURALITER.** In the plural.<sup>50</sup>

**PLURALITY.** A term meaning more than one.<sup>51</sup>

As a term used in elections see Elections § 241.<sup>52</sup>

**PLURES.** As the first word of maxims as to which there have been no recent applications see 49 C.J. p 1036 notes 69, 70.

**PLURIES WRIT.** See Executions § 85; Judgments § 548 b; Justices of Peace § 123 e, and Process § 21.

**PLUS.** A word indicating something added to that which has gone before.<sup>53</sup>

As the first word of maxims as to which there have been no recent applications see 49 C.J. p 1037 notes 73, 76, 78-80.

**PLUSH.** A textile fabric with a nap or shag on one side, longer and softer than velvet. It is made of silk, cotton, wool, etc., or a combination of materials.<sup>54</sup>

**PLUSPETITION.** In Spanish law, the judicial demand of more than is due in pecuniary or other relief.<sup>55</sup>

**PLY.** As a noun, a fold; a thickness.<sup>56</sup>

As a verb the word "ply" imports the performance of repeated acts of the same kind,<sup>57</sup> and means to

36. Cal.—In re Nicholls, 241 P. 399, 400, 74 Cal.App. 504.

N.Y.—Corpus Juris quoted in People v. Osborne, 269 N.Y.S. 409, 414, 149 Misc. 676.

37. Iowa.—Corpus Juris cited in State, for Use and Benefit of Sioux City v. Harrington, 296 N.W. 221, 223, 229 Iowa 1092.

N.Y.—Corpus Juris quoted in People v. Osborne, 269 N.Y.S. 409, 414, 149 Misc. 676—Bregman v. Winkler, 198 N.Y.S. 758, 759, 120 Misc. 488.

"Plumbing" distinguished from "gas fitting" see 38 C.J.S. p 614 note 20.

38. Pa.—Owen v. Johnson, 34 A. 549, 550, 174 Pa. 99.

39. Mass.—Horton v. Inhabitants of North Attleboro, 19 N.E.2d 15, 16, 302 Mass. 137.

40. U.S.—U. S. v. Pitman, D.C.Mass., 27 F.Cas.No.16,051, 1 Sprague, 196, 198.

41. U.S.—U. S. v. Stone, C.C.Tenn., 8 F. 232, 246.

49 C.J. p 1036 note 49.

42. U.S.—U. S. v. Stone, supra.

43. Mass.—Carter v. Andrews, 16 Pick. 1, 9.

Neb.—Hudson v. Schmid, 272 N.W. 406, 408, 132 Neb. 583.

44. U.S.—U. S. v. Pitman, D.C.Mass., 27 F.Cas.No.16,051, 1 Sprague 196, 198.

45. Mass.—Carter v. Andrews, 16 Pick. 1, 9.

Neb.—Hudson v. Schmid, 272 N.W. 406, 408, 132 Neb. 583.

46. U.S.—U. S. v. Stone, C.C.Tenn., 8 F. 232, 246.

47. Utah.—Freil v. Wood, 1 Utah 160, 165.

"Plural" wife is a polygamous woman, and is never the first wife.—Freil v. Wood, supra.

48. Utah.—Freil v. Wood, supra.

49. Iowa.—Pierson v. Armstrong, 1 Iowa 282, 295, 63 Am.D. 440.

50. Eng.—Roe v. Prideaux, 10 East 158, 103 Reprint 735.

51. U.S.—In re Dickerman, Cust. & Pat.App., 44 F.2d 876, 878.

52. "Estates in plurality" see Estates § 18.

53. Neb.—Central Bridge, etc., Co. v. Saunders County, 184 N.W. 220, 222, 106 Neb. 484.

49 C.J. p 1036 note 72.

54. U.S.—U. S. v. J. J. Gavin & Co., 23 Ct.Cust.App. 288, 291.

55. Escriche Diccionario.

56. Century D.

Applied to dressed lumber, "ply" means thickness.—Jaqua v. Witham, etc., Co., 7 N.E. 314, 315, 106 Ind. 545.

57. Conn.—New York, etc., R. Co. v. Scovill, 41 A. 246, 249, 71 Conn. 136, 71 Am.S.R. 159, 42 L.R.A. 157.



make regular trips, as a vessel plies between the two places.<sup>58</sup>

"Ply" has been held to be synonymous with, and also has been distinguished from, "handle" see 39 C.J.S. p 770 note 73.

**PLYWOOD.** A product made by taking thin strips of wood and gluing them together with cross laminations of different wood between them.<sup>59</sup>

**P. M.** See Abbreviations 1 C.J.S. p 276 note 5.

**PNEUMATIC.** Moved or worked, as a tool by pressure of air either by percussive action or by a rotary action; also, adapted for holding compressed air.<sup>60</sup>

**PNEUMOCONIOSIS.** There are three alternative spellings of the term for this disease; "pneumoconiosis," "pneumonconiosis," and "pneumonokoniosis."<sup>61</sup> The term is derived from three Greek words, "pneumono," meaning lung, "conio," meaning dust, and "osis," meaning abnormal or diseased condition.<sup>62</sup> It is a general term applied to chronic induration or fibrous inflammation of the lungs due to the inhalation of dust,<sup>63</sup> and is recognized as a generic term used to cover all dust diseases of the

lungs,<sup>64</sup> including silicosis.<sup>65</sup> Various names are given to the disease according to the kind of dust causing the inflammation,<sup>66</sup> such as "anthracosis," see 3 C.J.S. p 1395, "chalcosis," see 14 C.J.S. p 350, and "siderosis," see the C.J.S. definition Siderosis. Pneumoconiosis is not a germ disease.<sup>67</sup> It is an abnormal or diseased condition of the lung;<sup>68</sup> a lung disease attended by fibroid induration and pigmentation;<sup>69</sup> a disease of the lungs caused by habitual inhaling of minute mineral or metallic particles, as of coal dust in anthracosis,<sup>70</sup> quartz dust in silicosis, etc.<sup>71</sup>

"Pneumoconiosis" is a typical illustration of an occupational disease,<sup>72</sup> and is evidenced by pathological changes in the lung structure attributable to the effects of the inhalation of harmful dusts over a period of time.<sup>73</sup> The onset and progress of the disease is usually very slow, and the victim can continue work for a long time with a considerable degree of pneumoconiosis,<sup>74</sup> but the usual result is a greater degree of susceptibility to tuberculosis infection.<sup>75</sup>

**PNEUMONIA.** A well-known and malignant disease;<sup>76</sup> a bodily germ disease;<sup>77</sup> a disease due solely to germs;<sup>78</sup> also, an infection or disease which often follows severe bodily wounds and physical injuries.<sup>79</sup>

N.Y.—Commonwealth v. Long, 188 S.W. 334, 335, 171 Ky. 132.

58. Cal.—San Francisco v. Talbot, 63 Cal. 485, 487.

49 C.J. p 1037 note 83.

"Plying coastwise" see 14 C.J.S. p 1302 note 72.

59. U.S.—U. S. Plywood Co. v. United Plywood Corporation, 161 A. 913, 19 Del.Ch. 27.

60. Webster New Int.D.

# **Phrases**

(1) "Pneumatic tire" distinguished from "rubber hose" see 41 C.J.S. p 330 note 37.

(2) "Pneumatic tubes" are tubes for the transmission of parcels, operated by atmospheric pressure applied within the tubes.—Astor v. New York Arcade R. Co., 20 N.E. 594, 596, 113 N.Y. 93, 2 L.R.A. 789.

61. Minn.—Golden v. Lerch Bros., 300 N.W. 207, 210, 211 Minn. 30.

62. Mich.—Mercatante v. Michigan Steel Casting Co., 31 N.W.2d 712, 713, 320 Mich. 542.

63. Minn.—Golden v. Lerch Bros., 300 N.W. 207, 210, 211 Minn. 30.

64. Ind.—Walter Bledsoe & Co. v. Baker, App., 83 N.E.2d 620, 621.

65. Mich.—Mercatante v. Michigan Steel Casting Co., supra.

Mo.—Urie v. Thompson, 210 S.W.2d 98, 103.

# **Similarly expressed**

"The general term of . . . [silicosis], covering both metallic and mineral particles, is pneumoconiosis, which is acute in metal mining, quarrying, drilling, tunneling, smelting, foundries, potteries, glassworks, as well as in stone, marble, and granite manufacturing, especially in sand-blasting."—Svoboda v. Mandler, 275 N.W. 599, 600, 133 Neb. 433.

66. Minn.—Golden v. Lerch Bros., 300 N.W. 207, 210, 211 Minn. 30.

67. Minn.—Golden v. Lerch Bros., supra.

68. Ind.—Walter Bledsoe & Co. v. Baker, App., 83 N.E.2d 620, 621.

69. Idaho.—Brown v. St. Joseph Lead Co., 87 P.2d 1000, 1004, 60 Idaho 49.

70. Kan.—Allen v. Shell Petroleum Corporation, 68 P.2d 651, 657, 146 Kan. 67.

S.C.—LaCount v. General Asbestos & Rubber Co., 192 S.E. 262, 264, 184 S.C. 232.

71. S.C.—LaCount v. General Asbestos & Rubber Co., supra.

72. Kan.—Allen v. Shell Petroleum Corporation, 68 P.2d 651, 657, 146 Kan. 67.

Mo.—Bolosino v. Laclede-Christy Clay Products Co., App., 124 S.W. 2d 581, 583.

"Occupational disease" see 67 C.J.S. p 77 note 57—p 82 note 6.

73. Mo.—Urie v. Thompson, 210 S.W.2d 98, 103—Bolosino v. Laclede-Christy Clay Products Co., App., 124 S.W.2d 581, 583.

74. Minn.—Golden v. Lerch Bros., 300 N.W. 207, 210, 211 Minn. 30.

75. Minn.—Golden v. Lerch Bros., supra.

# **Similarly expressed**

Pneumoconiosis may develop into tuberculosis.—Rousu v. Collins Co., 157 A. 264, 265, 114 Conn. 24.

76. Tex.—St. Louis, etc., R. Co. v. Brosius, 105 S.W. 1131, 1136, 47 Tex.Civ.App. 647.

# **Particular kinds of pneumonia**

(1) "Broncho-pneumonia" defined see 12 C.J.S. p 372 note 19.

(2) "Lobar pneumonia" defined see 54 C.J.S. p 659 note 40.

(3) "Traumatic pneumonia" defined see the C.J.S. definition Traumatic.

77. Pa.—Gray v. Union Central Life Ins. Co., 22 A.2d 757, 758, 146 Pa. Super. 563.

78. Ohio.—Burns v. Employers' Liability Assur. Corp., 16 N.E.2d 316 321, 134 Ohio St. 222, 117 A.L.R. 733.

As a bacterial infection see 7 C.J.S. p 1316 note 98.

79. U.S.—Lux v. Western Casualty Co., C.C.A.Tex., 107 F.2d 1002, 1003

"Pneumonia" is variously described as an acute inflammation of the lungs;<sup>80</sup> an inflammation of the substance of the lungs;<sup>81</sup> a temporary inflammation of the lungs;<sup>82</sup> a disease characterized by inflammation of the lungs with exudation into lung tissue and resulting solidification of the tissue.<sup>83</sup>

"Pneumonia" has been distinguished from "bronchitis" see 12 C.J.S. p 372 note 17.

**PNEUMOTHORAX.** A partial collapse of the lung<sup>84</sup> caused by escape of air from the lung into the pleural cavity, either from rupture or puncture.<sup>85</sup> Pneumothorax occurs when the negative pressure maintained by the chest cavity, between the chest wall and lung, is transformed into a positive pressure by air entering the cavity either from without the chest wall, following trauma, or from the lung itself, causing the lung to collapse.<sup>86</sup> It may be caused by physical strain, coughing, laughing, riding, etc.,<sup>87</sup> and it often occurs without any plausible reason, as when a person, apparently in good health, is quietly lying in bed.<sup>88</sup> When the condition comes about suddenly it is called "spontaneous pneumothorax."<sup>89</sup>

**P. N. R.** See Abbreviations 1 C.J.S. p 276 note 5.

**POACH.** To steal game on a man's land.<sup>90</sup>

**POBRE.** In Spanish law, a poor person; pauper,<sup>91</sup> who is entitled to the gratuitous service of a lawyer to defend him.<sup>92</sup>

**POCK.** Another name for syphilis, or what has been called "French or Spanish pox."<sup>93</sup>

**POCKET.** A hollow;<sup>94</sup> a small bag inserted in a garment for carrying small articles.<sup>95</sup>

As a mining term "pocket" is defined in Mines and Minerals § 3 h.

As a verb, to conceal or suppress.<sup>96</sup>

In the plural, the term "pockets" ordinarily means to take money, etc., secretly or fraudulently.<sup>97</sup>

"Pocket" has been held synonymous with "hollow" see 40 C.J.S. p 417 note 6.

As an adjective the word "pocket" is defined as meaning suitable, as in size, shape, etc., for carrying in the pocket; related to one's pocketbook; pecuniary; not published; private; secret.<sup>98</sup>

Phrases employing the word "pocket" are set out in the note.<sup>99</sup>

**PODAGRA.** A specific name for "gout" see 38 C.J.S. p 965 note 20.

**PODER.** In Spanish law, power; authority, for example, to act for another.<sup>1</sup>

**PODIATRY.** See Physicians and Surgeons § 1.

**POD NET.** See Fish § 1.

**POENA.** As the first word of maxims as to which there have been no recent applications see 49 C.J. p 1038 notes 23-33.

**POINT.** A place having definite position but no extent in space; a place considered as to its position only.<sup>2</sup>

80. Ala.—Southern L., etc., Ins. Co. v. Drake, 117 So. 402, 217 Ala. 601.

81. La.—Beck v. Maryland Casualty Co., 2 La.A., Orleans, 16, 17.

82. Ill.—Metropolitan L. Ins. Co. v. Bergen, 64 Ill.App. 685, 688.

83. Ill.—Motusas v. Acme Burial Ass'n, 48 N.E.2d 539, 540, 319 Ill. App. 106.

84. Ind.—Red Cab v. Ziegner, 29 N.E.2d 330, 332, 108 Ind.App. 607.

La.—Spears v. Brown Paper Mill Co., App., 9 So.2d 332, 337.

85. La.—Spears v. Brown Paper Mill Co., supra.

86. La.—Dortch v. Louisiana Central Lumber Co., App., 30 So.2d 792, 796.

87. La.—Spears v. Brown Paper Mill Co., App., 9 So.2d 332, 337.

88. La.—Spears v. Brown Paper Mill Co., supra.

89. La.—Dortch v. Louisiana Central Lumber Co., App., 30 So.2d 792, 796.

90. Black L.D.

91. Escriche Diccionario.

92. Escriche Diccionario Suplemen- to.

93. Iowa.—Mills v. Flynn, 137 N.W. 1082, 1084, 157 Iowa 477.

94. U.S.—Maxim Mfg. Co. v. Imperial Mach. Co., C.C.A.III., 286 F. 79, 83.

95. Webster New Int.D.

96. Webster New Int.D.

As to pocket a venire  
U.S.—Keppeler v. Williams, Pa., 1 Dall. 29, 1 L.Ed. 23.

97. Ala.—Krasner v. State, 26 So.2d 519, 522, 32 Ala.App. 420.

98. Webster New Int.D.

99. Phrases

(1) "Pocket judgment" see 48 C.J. S. p 1133 note 19.

(2) "Pocket knife" defined see 51 C.J.S. p 460 note 83; distinguished from "bowie knife" see 11 C.J.S. p 761 note 30.

(3) "Pocket pistol" defined and distinguished from "belt pistol" see the C.J.S. title Weapons § 1, also 48 C.J. p 1210 note 14; and 10 C.J.S. p 245 note 79.

(4) "Pocket record," a statute so called.—Black L.D.

(5) "Pocket sheriff," in English law, a sheriff appointed by the sole authority of the crown, without the usual form of nomination by the judges in the exchequer.—Black L.D.

(6) "Pocket veto;" nonapproval of a legislative act by the president or state governor, with the result that it fails to become a law, not by a written disapproval (a veto in the ordinary form), but by remaining silent until the adjournment of the legislative body, when that expiration takes place before the expiration of the period allowed by the constitution for the examination of the bill by the executive.—Black L.D.  
1. Escriche Diccionario.

**Poder nacional**

A branch of the government as poder legislativo.—Escriche Diccionario.

**Poder para testar**

The authority to execute another's will.—Escriche Diccionario.

2. Tex.—Vergara v. Kenyon, Com. App., 261 S.W. 1009, 1011.

As a term in mathematics, that which has neither parts nor extent, but position only; an end of a line segment; a single intersection of two lines or curves, or of three surfaces, and so on.<sup>3</sup>

The word "point" has been held equivalent to, or synonymous with, "aim" see 3 C.J.S. p 506 note 9, "contention" see 17 C.J.S. p 175 note 19, and "fact" see 35 C.J.S. p 385 note 29; it has been compared with, or distinguished from "aim" see 3 C.J.S. p 506 note 10, and "level" see 52 C.J.S. p 1117 note 6.

The word "point" with respect to boundaries is defined in Boundaries § 4; as used in the printing trade as the standard unit of measure of type bodies see the C.J.S. title Weights and Measures § 1, also 49 C.J. p 1039 note 43; and as used in criminal statutes prohibiting pointing or exhibiting weapons see the C.J.S. title Weapons § 16, also 68 C.J. p 63 notes 99-7.

*Phrases* employing the term are set out in the note,<sup>4</sup> and for other phrases as to which more recent adjudications have not been found see 49 C. J. p 1040 notes 54-63.

—**In Practice.** The word "point," in practice, means a distinct proposition or question of law arising or propounded in a case.<sup>5</sup> In this sense, "point" with respect to briefs in appellate practice in civil actions is treated in Appeal and Error §§ 1324, 1326, in criminal prosecutions in Criminal Law § 1813, and in the federal courts in Federal Courts § 296 a. It has been held synonymous with "ground" see 38 C.J.S. p 1086 note 25, and "proposition" see Appeal and Error § 1323; and it has also been compared, with or distinguished from, "ground" see 38 C.J.S. p 1086 note 27.

### 3. Tex.—Vergara v. Kenyon, supra. 4. Phrases

(1) "Directly intermediate point" as used with respect to freight charges for carriers of goods see Carriers § 314 b (1).

(2) "Fire point" distinguished from "flash point" see 36 C.J.S. p 806 note 39.

(3) "Point of destination" with respect to delivery of goods by common carriers see Carriers § 171 c.

(4) "Point of intersection" of two streets or highways see Highways § 237. Defined and construed within statutes relating to right of way see Motor Vehicles § 351.

(5) "Point of juncture," also called "heel point," as the point where the leg, heel, and foot portions of hosiery join see 39 C.J.S. p 880 note 81.

(6) "Point of origin" as used with respect to rate making for carriers of goods see Carriers § 276.

(7) "Point of production" as used in statute exempting from tax motor vehicles used exclusively in transporting dairy or other farm products see Motor Vehicles § 94 e (3).

(8) "Point or aim" see 3 C.J.S. p 506 note 12.

(9) "Terminal point" see the C.J. S. title Railroads § 1, also 62 C.J. p 730 notes 18-20.

5. Ark.—Kent v. State, 41 S.W. 849, 851, 64 Ark. 247.

6. Black L.D.

### 7. Phrases

(1) "Points and authorities" synonymous with "brief" see 11 C.J.S. p 1138 note 18.

(2) "Point of law" see 52 C.J.S. p 1030 note 12.

(3) Other phrases employed in this sense as to which more recent adjudications have not been found see 49 C.J. p 1039 note 41.

*Point reserved.* In practice, a term described as follows: When, in the progress of the trial of a cause, an important or difficult point of law is presented to the court, and the court is not certain of the decision which should be given, it may reserve the point, that is, decide it provisionally as it is asked by the party, but reserve its more mature consideration for the hearing on a motion for a new trial, when if it shall appear that the first ruling was wrong, the verdict will be set aside.<sup>6</sup>

*Other phrases* employing the word "point" or the plural form "points" in this sense are set out in the note.<sup>7</sup>

**Pointer.** A machine used to point iron bolts.<sup>8</sup>

**Pointer dog.** See 27 C.J.S. p 1314 note 53.1.

**Pointing.** As used of dogs, standing and intently looking in one direction; the attitude taken in setting birds.<sup>9</sup>

In brick masonry, finishing up the lines of mortar, and replacing defective or broken brick in the walls;<sup>10</sup> a part of a brick mason's trade.<sup>11</sup>

**Poison.** See Poisons § 1 et seq.

**Poisoning.** The term may properly be used as an adjective, and one definition is poisonous.<sup>12</sup>

**Poisonous.** A word having a popular as well as a technical significance,<sup>13</sup> and defined as having the properties of a poison; containing poison; venomous.<sup>14</sup>

8. Mo.—Lang v. Kansas City Bolt & Nut Co., 110 S.W. 614, 131 Mo. App. 146.

9. Tenn.—Citizens' Rapid-Transit Co. v. Dew, 45 S.W. 790, 109 Tenn. 317, 66 Am.S.R. 754, 40 L.R.A. 518.

10. Minn.—Wilson v. Northwestern Mut. Acc. Assoc., 55 N.W. 626, 628, 53 Minn. 470.

11. Minn.—Wilson v. Northwestern Mut. Acc. Assoc., supra.

12. U.S.—Northwestern Nat. Life Ins. Co. v. Banning, C.C.A.Neb., 63 F.2d 736, 737.

13. N.C.—Simpson v. American Oil Co., 8 S.E.2d 813, 815, 217 N.C. 542.

14. Century D.

*Phrases* employing the word and as to which more recent adjudications have not been found see 49 C. J. p 1040 notes 81-85.

## POISONS

This Title includes regulation of manufacture, sale, and use of poisons; traffic in poisonous articles; liabilities for personal injuries from the sale, use, etc., thereof; violations of laws relating to poisons, and prosecution and punishment thereof as public offenses; and criminal administration of poisons, not constituting any other distinct offense.

*Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index*

### Analysis

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**See also descriptive word index in the back of this Volume**

### § 1. Definitions

"Poison" has been defined as any substance which, when introduced into the system, either directly or by absorption, produces violent, morbid, or fatal changes, or which destroys living tissue with which it comes in contact.

The words "poisonous" or "poison" have a popular as well as, perhaps, a technical significance.<sup>1</sup> "Poison" may be defined as any substance which,

when introduced into the system, either directly or by absorption, produces violent, morbid or fatal changes, or which destroys living tissue with which it comes in contact;<sup>2</sup> any agent which when introduced into the animal organism produces a morbid, noxious, or deadly effect;<sup>3</sup> any substance which by reason of an inherent deleterious property tends to destroy life or impair health when taken into the system;<sup>4</sup> a potion containing a noxious or deadly

1. N.C.—*Simpson v. American Oil Co.*, 8 S.E.2d 813, 217 N.C. 542.

2. U.S.—*Corpus Juris* quoted in *Watkins v. National Elec. Products Corp.*, C.C.A.Pa., 165 F.2d 980, 982.

49 C.J. p 1043 note 1.

In looser language, it probably is fair to describe the general uncritical concept of a poison as a substance which ordinarily has such a harmful or deadly chemical effect on the body that it ought not to be taken internally without technical familiarity or medical direction.—*Aubuchon v. Metropolitan Life Ins. Co.*, C.C.A.Mo., 142 F.2d 20, 23.

**Noxious potion or substance**

(1) "Noxious potion" and "noxious substance" both embrace poisons, although they are broader terms.—

*Runnels v. State*, 77 S.W. 458, 45 Tex.Cr. 446.

(2) "Noxious potion" and "noxious substance" defined see 66 C.J.S. p 721 note 34.

**Death by "poison"** to the average layman means death resulting from the taking of some substance commonly classed or called a poison.—*Hahn v. Home Life Ins. Co. of New York*, 84 S.W.2d 361, 363, 169 Tenn. 282.

3. Ariz.—*Stewart v. Robertson*, 40 P.2d 979, 983, 45 Ariz. 143. 49 C.J. p 1043 note 1 [a] (1), (4).

**Similar definitions**

(1) Any agent which, introduced into an organism, may chemically produce an injurious or deadly effect.—*Watkins v. National Elec. Products Corp.*, C.C.A.Pa., 165 F.2d 980, 982.

(2) Any substance that, when taken into the system, acts in a noxious manner by means not mechanical, tending to cause death or serious injury to health.—*Simpson v. American Oil Co.*, 8 S.E.2d 813, 217 N.C. 542—49 C.J. p 1043 note 1 [a] (2).

4. N.C.—*Simpson v. American Oil Co.*, supra.

49 C.J. p 1043 note 1 [a] (5).

**Similar definitions**

(1) Any substance, liquid, solid, or gaseous, which by reason of an inherent deleterious property tends to destroy life or impair health when taken into the system, as into the stomach, blood, or lungs.—*Urian v. Scranton Life Ins. Co.*, 165 A. 21, 22, 310 Pa. 144.

(2) Any substance which, when applied to body externally, or in any

ingredient;<sup>5</sup> also, such ingredient.<sup>6</sup> The term has also been defined as a substance which, in small doses, will destroy life;<sup>7</sup> but this definition has been said to be too restricted.<sup>8</sup> Poison usually denotes something received into the system by the mouth or breath.<sup>9</sup> The term includes narcotic drugs used in poisonous doses.<sup>10</sup>

*Cocaine* is classed as a narcotic drug.<sup>11</sup>

*Heroin* is a poison.<sup>12</sup>

"Infection" and "poisoning" are distinguishable in that, technically, the illness produced by bacteria themselves is referred to as infection, while that occasioned by the poison produced by such bacteria is referred to as poisoning.<sup>13</sup>

*Magendie* is a morphine solution;<sup>14</sup> it changes color on becoming stale.<sup>15</sup>

*Marijuana*. The definition of "marijuana" as used in a statute regulating the sale, possession, or distribution of narcotics may depend on the character of its use in the statute.<sup>16</sup> The word should be given its natural, ordinary, and commonly understood meaning, in the absence of any statutory

or well established technical meaning, unless it is plain from the statute that a different meaning is intended.<sup>17</sup> As used in such a statute the term has been said to mean the drug known as "marijuana";<sup>18</sup> the preparation or product from the plant scientifically known as *cannabis sativa*;<sup>19</sup> and not merely the flowering tops and leaves of the marijuana plant or weed.<sup>20</sup>

*Methyl or wood alcohol* is a poison.<sup>21</sup>

"Monoxide" has been defined as a form of poison resulting from inhalation of gas thrown off by gasoline engines, such as are used in the operation of tractors and automobiles.<sup>22</sup>

*Morphine*. A word in common use<sup>23</sup> with a well defined meaning;<sup>24</sup> a derivative of opium;<sup>25</sup> the principal alkaloid of opium.<sup>26</sup>

*Narcotic*. A substance which directly induces sleep, allaying sensibility and blunting the senses, and which, in large quantities, produces narcotism or complete insensibility.<sup>27</sup> The term "narcotic drugs" is sometimes defined by statute.<sup>28</sup>

*Opium*. A drug consisting of the inspissated juice of the opium poppy.<sup>29</sup> Its use has been

way introduced into the system, without acting mechanically, but by its own inherent qualities, is capable of destroying life.—*Stone v. Shaw Supply Co.*, 36 P.2d 606, 148 Or. 416—49 C.J. p 1043 note 1 [a] (3).

5. U.S.—*Aubuchon v. Metropolitan Life Ins. Co.*, C.C.A.Mo., 142 F.2d 20, 23, 24.

Mo.—*Cleaver v. Central States Life Ins. Co.*, 142 S.W.2d 474, 477, 346 Mo. 548, 129 A.L.R. 1094.

6. U.S.—*Aubuchon v. Metropolitan Life Ins. Co.*, C.C.A.Mo., 142 F.2d 20, 23.

Mo.—*Cleaver v. Central States Life Ins. Co.*, 142 S.W.2d 474, 477, 346 Mo. 548, 129 A.L.R. 1094.

7. U.S.—*Aubuchon v. Metropolitan Life Ins. Co.*, C.C.A.Mo., 142 F.2d 20, 23.

Colo.—*Equitable Life Assur. Soc. of U. S. v. Hemenover*, 67 P.2d 80, 82, 100 Colo. 231, 110 A.L.R. 1270.

The commonly understood definition of a poison would be a substance which, if taken internally in small doses, is capable of acting deleteriously on the body or of destroying life.—*Aubuchon v. Metropolitan Life Ins. Co.*, C.C.A.Mo., 142 F.2d 20, 23—49 C.J. p 1043 note 1 [a] (9).

8. Ga.—*Boswell v. State*, 39 S.E. 897, 114 Ga. 40.  
49 C.J. p 1043 note 1 [d].

9. Me.—*Perkins v. Kavanaugh*, 196 A. 645, 647, 135 Me. 344.

10. Puerto Rico.—*People v. Cancel*, 13 Puerto Rico 179.  
49 C.J. p 1043 note 2.

11. Tex.—*Baker v. State*, 58 S.W.2d 534, 535, 123 Tex.Cr. 209.

"Cocaine" defined see 14 C.J.S. p 1303 notes 90-92.

12. N.Y.—*Tidd v. Skinner*, 122 N.E. 247, 248, 225 N.Y. 422, 3 A.L.R. 1145.

"Heroin" defined see 39 C.J.S. p 897 notes 64-66.

13. Colo.—*New York Life Ins. Co. v. Mariano*, 76 P.2d 417, 418, 102 Colo. 18.

14. N.Y.—*Volk v. City of New York*, 19 N.Y.S.2d 53, 61, 269 App.Div. 247.

15. N.Y.—*Volk v. City of New York*, supra.

16. Utah.—*State v. Navaro*, 26 P.2d 955, 83 Utah 6.

"Marijuana" defined see 55 C.J.S. p 708 note 62-p 709 note 65.

17. Utah.—*State v. Navaro*, supra.

18. Utah.—*State v. Navaro*, supra. Various spellings of term see 55 C.J.S. p 708 note 63.

19. Utah.—*State v. Navaro*, supra.

20. Utah.—*State v. Navaro*, supra.

21. Vt.—*Fabor v. Green*, 47 A. 391, 72 Vt. 117.

70 C.J. p 1193 notes 4, 5 [a].

22. Mo.—*Adams v. Lilbourn Grain Co.*, 48 S.W.2d 147, 148, 226 Mo.App. 1030.

23. U.S.—*James v. U. S.*, C.C.A.Ark., 279 F. 111, 112.

24. Ky.—*Commonwealth v. Gabbart*, 169 S.W. 514, 160 Ky. 32.

25. U.S.—*McIntosh v. U. S.*, C.C.A., 1 F.2d 427, 428.

Okl.—*Jefferson v. State*, 244 P. 460, 461, 34 Okl.Cr. 56.

*Morphine hydrochloride and morphine sulphate* are subdivisions of morphine.

U.S.—*McIntosh v. U. S.*, C.C.A., 1 F.2d 427, 428.

Okl.—*Jefferson v. State*, 244 P. 460, 461, 34 Okl.Cr. 56.

26. Mont.—*State v. Brennan*, 300 P. 273, 275, 89 Mont. 479.

41 C.J. p 215 note 58.

#### Description; characteristics

(1) "Morphine" is a bitter crystalline narcotic alkaloid contained in opium.—*State v. Vallie*, 268 P. 493, 494, 82 Mont. 456.

(2) "Morphine" is an alkaloid of opium. Opium contains at least nine per cent of morphine. Morphine is regarded as one of the most useful of all drugs for the reason that when applied hypodermically it is unequaled as a pain-relieving drug. Morphine is not soluble in water.—*Baker v. State*, 58 S.W.2d 534, 123 Tex.Cr. 209.

27. N.Y.—*People v. Lee Foon*, 294 N.Y.S. 872, 874, 875, 250 App.Div. 616.

28. N.Y.—*People v. Lee Foon*, supra. Okl.—*Smith v. State*, 240 P. 656, 657, 32 Okl.Cr. 247.

29. Mont.—*State v. Brennan*, 300 P. 273, 275, 89 Mont. 479.

#### Habitat and manufacture

"Opium" is the product of a spe-

mainly in medicine, as an anodyne;<sup>30</sup> and it is classed by science among the active poisons.<sup>31</sup> It is also much used as an intoxicant, with baneful effects.<sup>32</sup>

Gum opium is opium in a very crude form, a lump form, containing various impurities, such as stones, seeds, ashes, etc., and of a varying alkaloidal strength.<sup>33</sup>

Opium ashes are a derivative of opium.<sup>34</sup>

Powdered opium is a drug prepared from gum opium by subjecting the latter to artificial heat at a temperature regulated so as to avoid any destruction of the alkaloids present, and maintained until the water has been dried out.<sup>35</sup>

Smoking opium is opium in a form for smoking, manufactured or produced from crude opium.<sup>36</sup>

*Pantopon* is a derivative of opium.<sup>37</sup>

*Paraphenylenediamine* is an aniline derivative of a poisonous nature.<sup>38</sup>

*Piomaine*. A poisonous product of putrefaction;<sup>39</sup> an alkaloid poison originating in dead or decaying matter;<sup>40</sup> a putrefactive alkaloid.<sup>41</sup>

*Yen shee* is the residuum left after a first smoking of opium.<sup>42</sup>

## § 2. Regulation of Sale, Possession, and Use

The state has a right to control and regulate the traffic of poisons and narcotic drugs.

The state has a right to control and regulate the traffic of poisons and narcotic drugs,<sup>43</sup> and any illegitimate and unlawful use of the habit-forming drugs is an injury to, and a fraud on, the state or the public as a whole.<sup>44</sup> While the federal government has no power to regulate and punish the sale of narcotics, as such,<sup>45</sup> nevertheless, as discussed infra §§ 10-13, the federal government participates in the regulation of dealings in narcotics by virtue of other powers possessed by it; and it has been said that the regulation and control of the use of narcotic drugs have long been recognized as the joint responsibility of the state and federal governments.<sup>46</sup> The object of the Uniform Narcotic Drug Act is to regulate and control the traffic in, and the use of, substances or preparations that are extremely injurious to the normal qualities and physical structures of human beings;<sup>47</sup> it is designed to make uniform the law relating to narcotic drugs,<sup>48</sup> and to parallel and supplement the federal narcotic laws.<sup>49</sup> A statute dealing with the sale of narcotics may be superseded by a later statute on the same subject,<sup>50</sup> and in some jurisdictions earlier statutes on the subject have been held to be impliedly repealed by the enactment of the Uniform Narcotic Drug Act.<sup>51</sup>

cies of the poppy plant which is grown in India, Turkey, Persia, and Egypt. The juice or sap of the plant is taken before it is ripe and dried. —*Baker v. State*, 58 S.W.2d 534, 123 Tex.Cr. 209.

30. U.S.—*Ex parte Yung Jon*, D.C. Or., 28 F. 308, 311.

46 C.J. p 1119 note 45.

31. U.S.—*Ex parte Yung Jon*, supra.

46 C.J. p 1119 note 46.

32. Or.—*Ex parte Mon Luck*, 44 P. 693, 694, 29 Or. 421, 54 Am.S.R. 304, 32 L.R.A. 738.

46 C.J. p 1119 note 47.

33. U.S.—*Merck v. U. S.*, N.Y., 151 F. 14, 15, 80 C.C.A. 510.

34. Philippine.—*U. S. v. Chong Ting*, 23 Philippine 120, 121—*U. S. v. Choa Tong*, 22 Philippine 562, 563.

35. U.S.—*Merck v. U. S.*, N.Y., 151 F. 14, 15, 80 C.C.A. 510.

46 C.J. p 1119 note 53.

36. U.S.—*Marks v. U. S.*, N.Y., 196 F. 476, 116 C.C.A. 250.

46 C.J. p 1119 note 54.

37. Ariz.—*Bishop v. Industrial Commission*, 127 P.2d 129, 59 Ariz. 331.

38. N.J.—*Zirpola v. Adam Hat Stores*, 4 A.2d 73, 74, 122 N.J.Law 21.

39. N.Y.—*People v. Buchanan*, 39 N. E. 846, 849, 145 N.Y. 1.

40. S.C.—*Housand v. Armour & Co.*, 175 S.E. 516, 518, 173 S.C. 268.

41. Ark.—*Drury v. Armour*, 216 S. W. 40, 43, 140 Ark. 371.

50 C.J. p 844 note 69.

42. U.S.—*U. S. v. Shelley*, N.Y., 33 S.Ct. 635, 637, 229 U.S. 239, 57 L. Ed. 1167.

Hawaii.—*Territory v. Ah Goon*, 22 Hawaii 31.

46 C.J. p 1119 note 43 [a].

43. La.—*State v. Martin*, 189 So. 109, 192 La. 704.

49 C.J. p 1043 notes 9, 10.

### Use of peyote

It is within the power of the legislature to determine whether the practice of using peyote is inconsistent with the good order, peace, and safety of the state.—*State v. Big Sheep*, 243 P. 1067, 75 Mont. 219 —49 C.J. p 1043 note 9 [a].

### License

Under some statutes chiropractors are not authorized to use or administer narcotic drugs for local anaesthetics without first having obtained a license to do so from state director of drugs and drugstores.—*Kavanagh v. Fowler*, C.C.A.Mich., 146 F. 2d 961.

44. Cal.—*People v. Brown*, 298 P. 503, 113 Cal.App. 492.

45. Ariz.—*Du Vall v. Board of Medical Examiners of Arizona*, 66 P.2d 1026, 49 Ariz. 329.

46. N.Y.—*Application of Palmer*, 87 N.Y.S.2d 655, 275 App.Div. 5, reversed on other grounds *Palmer v. Spaulding*, 87 N.E.2d 301, 299 N.Y. 368.

47. La.—*State v. Martin*, 192 So. 694, 193 La. 1036.

48. La.—*State v. Martin*, supra.

49. Ariz.—*State v. Wortham*, 160 P. 2d 352, 63 Ariz. 148.

N.Y.—*Application of Palmer*, 87 N.Y.S.2d 655, 275 App.Div. 5, reversed on other grounds *Palmer v. Spaulding*, 87 N.E.2d 301, 299 N.Y. 368—*People v. Gennaro*, 26 N.Y.S. 2d 336, 261 App.Div. 533, affirmed 39 N.E.2d 283, 287 N.Y. 657.

50. Mont.—*State v. Brennan*, 300 P. 273, 89 Mont. 479—*State v. Mah Sam Hing*, 295 P. 1014, 89 Mont. 178.

51. Nev.—*State v. Economy*, 130 P. 2d 264, 61 Nev. 394.

Okl.—*Rich v. State*, 66 P.2d 950, 61 Okl.Cr. 148.

W.Va.—*State v. Hinkle*, 41 S.E.2d 107, 129 W.Va. 393.

*"Economic poisons."* Some statutes regulate the use of, or dealings in, so-called "economic poisons," such poisons being defined to include substances intended to be used for preventing, destroying, or repelling insects, fungi bacteria, weeds, rodents, predatory animals, or any other form of plant or animal life constituting a pest.<sup>52</sup> Such statutes must be read as a whole in order properly to ascertain what they are intended to cover.<sup>53</sup>

### § 3. — Constitutionality of Statutes

Statutes regulating the possession, sale, and use of poisons, and narcotic or habit forming drugs, are uniformly held to be valid as within the police power of the state.

Statutes regulating the possession, sale, labeling, and use of poisons, and the possession, sale, dispensing, and prescribing of narcotic and habit-forming drugs, are uniformly held to be valid<sup>54</sup> as within the police power of the legislature,<sup>55</sup> and within its power to legislate for the public welfare.<sup>56</sup> They have been held not to be invalid because they discriminate between certain classes or persons,<sup>57</sup> because they prescribe what shall be presumptive evidence of guilt,<sup>58</sup> or because they contain provisions making it unnecessary to negative statutory exceptions in an indictment or information.<sup>59</sup> Such statutes do not infringe on the rights of liberty and property guaranteed by the fundamental law of the state;<sup>60</sup> nor do they violate the Fifth and Fourteenth Amendments to the Federal Constitution.<sup>61</sup>

Statutes of this nature are not rendered invalid, as vague and uncertain, by the use of such phrases as "legitimate use,"<sup>62</sup> "for actual and necessary purposes,"<sup>63</sup> "proper practice,"<sup>64</sup> "good faith,"<sup>65</sup> or "retail,"<sup>66</sup> without defining them; or by provisions prohibiting sale except on the prescription of a physician, or else on the "personal application of some respectable inhabitant of full age."<sup>67</sup> An act prohibiting the sale or delivery, or possession for the purpose of sale and delivery, of food or drink containing poison, is not invalid and unconstitutional, although so construed as to make a violation thereof an offense irrespective of knowledge of the presence of the poison in the article,<sup>68</sup> nor, on the other hand, is a statute unreasonable and unconstitutional which makes only a conscious and voluntary offense punishable, because under it one may have possession of the prohibited article innocently and without knowledge.<sup>69</sup> Statutes which confer power to regulate the manufacture, sale, and use of poison on public bodies or officers have been held constitutional.<sup>70</sup>

### § 4. — Construction and Operation of Statutes

The construction and operation of statutes relating to poisons are governed by the general principles applicable to all statutes.

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52. Cal.—People v. Worst, 136 P.2d 137, 57 Cal.App.2d Supp. 1028.

Substances held not within statute

(1) Tuberculin used in diagnosing tuberculosis in cattle.—Thome v. Superior Court in and for Merced County, 90 P.2d 364, 32 Cal.App.2d 521.

(2) Growing bush represented as a repellent to gophers.—People v. Worst, 136 P.2d 137, 57 Cal.App.2d Supp. 1028.

53. Cal.—People v. Worst, supra.

54. La.—State v. Bonoa, 136 So. 15, 172 La. 955.

49 C.J. p 1043 note 8.

Imprisonment of habitual users

Statute providing for imprisonment of any person who habitually uses narcotic drugs is constitutional.—Andrews v. Commonwealth, 229 S.W.2d 311, 312 Ky. 677—McGrew v. Commonwealth, 215 S.W.2d 996, 308 Ky. 838.

55. La.—State v. Martin, 139 So. 109, 192 La. 704.

49 C.J. p 1043 note 2.

56. Or.—Ex parte Mon Luck, 44 P.

693, 29 Or. 421, 54 Am.S.R. 804, 32 L.R.A. 738.

49 C.J. p 1043 note 10.

57. Ky.—Katzman v. Commonwealth, 130 S.W. 990, 140 Ky. 124, 140 Am.S.R. 359, 30 L.R.A., N.S., 519.

49 C.J. p 1043 note 11.

58. Mont.—State v. Mark, 220 P. 94, 69 Mont. 18.

49 C.J. p 1043 note 12.

59. Okl.—Ex parte Bryson, 205 P. 190, 21 Okl.Cr. 152.

60. Or.—Ex parte Mon Luck, 44 P. 693, 29 Or. 421, 54 Am.S.R. 804, 32 L.R.A. 738.

49 C.J. p 1044 note 14.

61. Okl.—Ex parte Bryson, 205 P. 190, 21 Okl.Cr. 152.

49 C.J. p 1044 note 15.

62. Ky.—Commonwealth v. Gabhart, 169 S.W. 514, 160 Ky. 32—Katzman v. Commonwealth, 130 S.W. 990, 140 Ky. 124, 140 Am.S.R. 359, 30 L.R.A., N.S., 519.

63. Ohio.—Miller v. State, 13 Ohio App. 171, 31 O.C.A. 289.

64. Ohio.—Miller v. State, supra.

65. Ill.—People v. Guagliata, 200

N.E. 169, 362 Ill. 427, 103 A.L.R. 1035.

66. Ky.—Katzman v. Commonwealth, 130 S.W. 990, 140 Ky. 124, 140 Am.S.R. 359, 30 L.R.A., N.S., 519.

67. Pa.—Commonwealth v. Yealy, 21 Pa.Dist. 543.

68. Conn.—State v. Annicelli, 113 A. 154, 96 Conn. 102.

69. Cal.—Ex parte Yun Quong, 114 P. 835, 159 Cal. 508, Ann.Cas.1912C 969.

70. Cal.—Gregory v. Hecke, 238 P. 787, 73 Cal.App. 268.

49 C.J. p 1044 note 24.

71. U.S.—Georgia Ass'n of Osteopathic Physicians & Surgeons v. Allen, C.C.A.Ga., 112 F.2d 52.

Ga.—McGee v. Bennett, 33 S.E.2d 577, 72 Ga.App. 271.

Pa.—Commonwealth v. LaRosa, Quar.Sess., 89 Pittsb.Leg.J. 267, 4 Fay.Leg.J. 187, 3 Monroe L.R. 101, 10 Som.Leg.J. 287, 55 York Leg. Rec. 66.

Persons intended to be protected

(1) Statutes requiring druggist, before delivering certain poisons, to satisfy himself that purchaser

penal in nature, are strictly construed and will not be extended by implication beyond their express terms.<sup>72</sup> Two statutes which are a part of the same act and are of equal dignity must be construed together.<sup>73</sup> Where used in statutes prohibiting the sale, disposal, furnishing, administering, or prescribing of narcotic drugs, except under certain conditions, the words "prescribe," "furnish," and "administer" are used in their ordinary sense.<sup>74</sup> The word "delivery" in a statute denouncing as an offense the making of a false representation for the purpose of procuring the delivery of a narcotic drug, has been held not to include a hypodermic injection personally administered by a physician.<sup>75</sup> The necessity of complying with statutes requiring registration of sales has been held not obviated by provisions relieving the seller of certain poisons from other restrictions pertaining to transactions in poisons.<sup>76</sup>

Statutes regulating the sale, introduction, and transportation of narcotics generally apply to physicians as well as to others,<sup>77</sup> except where the use of narcotic drugs is necessary in the treatment of disease, and then they may be prescribed only in

such quantities and manner as designated in the statute.<sup>78</sup> Under some statutes a chiroprapist may use local anaesthetics, including narcotics,<sup>79</sup> and he is, therefore, entitled to the issuance of a narcotic permit from the proper state official.<sup>80</sup> A statute making it unlawful for any person to deliver or sell any deadly poison unless on inquiry it be found that the purchaser is aware of its poisonous character has been held applicable to sellers of merchandise generally, and not restricted in its effect to pharmacists;<sup>81</sup> and the statutory inhibition has been held to apply whether the result of the use of the poison is occasioned by swallowing it, inhaling it, injecting it, or merely coming in close bodily contact with it.<sup>82</sup>

**Labeling.** The doctrine of ejusdem generis applies in construing a statute pertaining to the labeling of products containing a poison.<sup>83</sup> Statutes requiring the labeling of poisons ordinarily do not apply to articles of merchandise in the manufacture of which poison is incidentally used,<sup>84</sup> or to medicines which contain poisonous ingredients,<sup>85</sup> unless the ingredients make the medicine itself a poison.<sup>86</sup> A general statute applying to all persons

knows of their poisonous character, and that they are to be used for a legitimate purpose, and providing penalties for failure to do so, were passed to protect the purchaser, as well as the public.—*Flynt v. Rightmeyer*, 177 N.Y.S. 842, 107 Misc. 692.

(2) A person who is too drunk to understand the dangerous nature of a poison has been held to be within the class intended to be protected by such a statute.—*Bennett Drug Stores v. Mosely*, 20 S.E.2d 208, 67 Ga.App. 347.

#### Statute designed to decrease fatalities

Statute relating to sale or possession of barbiturate drugs or preparations was designed to meet the mounting increase in fatalities that were found to result from indiscriminate and unregulated use of barbiturate drugs or preparations commonly known as "Sleeping tablets."—*People on Complaint of Benedetto v. Wittpen*, 75 N.Y.S.2d 670, 190 Misc. 565.

72. Pa.—*Commonwealth v. Cohen*, 15 A.2d 730, 142 Pa.Super. 199, 49 C.J. p 1045 note 40.

#### Incarceration of addict

A statute providing for the commitment of persons addicted to the use of specified drugs does not authorize incarceration of a person addicted to a drug other than those specified.—*Groff v. Zimmerman*, 131 P.2d 822, 110 Colo. 150.

73. Tex.—*De Vine v. State*, 206 S.W.2d 247, 151 Tex.Cr. 179.

74. Tex.—*De Vine v. State*, supra, 49 C.J. p 1045 note 39.

#### Distinguished from selling

The word "prescribe," in statute making it unlawful to prescribe narcotic drugs, means the unlawful issuance of a prescription by a physician, and does not mean to sell a narcotic drug.—*Tonis v. Board of Regents of University of State of N. Y.*, 67 N.E.2d 245, 295 N.Y. 286.

75. Mass.—*King v. Solomon*, 81 N.E.2d 838, 323 Mass. 326.

76. Ohio.—*Krizen v. State*, 26 Ohio N.P.N.S., 358.

Violation of statutes regulating sale of narcotics as criminal offense see *infra* § 8.

77. Okl.—*Stout v. State*, 224 P. 375, 26 Okl.Cr. 390.

78. Okl.—*Stout v. State*, supra.

#### Statutory intent

Statute providing that physician may administer narcotics under certain circumstances was intended merely to exempt physicians personally administering narcotics in good faith from penal provisions relative to sale and distribution of narcotic drugs.—*King v. Solomon*, 81 N.E.2d 838, 323 Mass. 326.

79. Mich.—*Fowler v. Michigan Board of Pharmacy*, 20 N.W.2d 680, 312 Mich. 505.

80. Mich.—*Fowler v. Michigan Board of Pharmacy*, supra.

81. Or.—*Stone v. Shaw Supply Co.*, 36 P.2d 606, 148 Or. 416.

82. Or.—*Stone v. Shaw Supply Co.*, supra.

83. Ga.—*McGee v. Bennett*, 33 S.E.2d 577, 72 Ga.App. 271.  
Mo.—*McClaren v. G. S. Robins & Co.*, 162 S.W.2d 856, 349 Mo. 653.

#### Class of insecticides and fungicides

Statute requiring branding and statement of contents of packages containing calcium arsenate, lead arsenate, and dust mixtures containing sulphur, lead arsenate and lime, and "other insecticides and fungicides," used quoted words as embracing only insecticides and fungicides of the same class as those specifically enumerated; and subsequent enactment of statute, requiring ingredients of all insecticides to be stated on container indicated legislative intent not to include all insecticides and fungicides in previous statute.—*McGee v. Bennett*, 33 S.E.2d 577, 72 Ga.App. 271.

84. U.S.—*Boyd v. Frenchee Chemical Corporation*, D.C.N.Y., 37 F. Supp. 306.

49 C.J. p 1044 note 29.

Violation of labeling statutes as: Imposing civil liability see *infra* § 5.

Criminal offense see *infra* § 8.

85. Tenn.—*Wise v. Morgan*, 48 S.W.2d 971, 101 Tenn. 273, 44 L.R.A. 548, 49 C.J. p 1044 note 30.

86. La.—*Martin v. Jonesboro Drug Co.*, 7 La.App. 262.



selling poisons, and requiring the labeling of all poisons without restriction, is not repealed or affected by a subsequent statute applying only to persons of a class and to the sale of certain classified poisons,<sup>87</sup> and under such a general statute one making a sale of poison not labeled may be liable, although the substance may not be within the classification of poisons requiring a label under a later act applying to a certain class of persons.<sup>88</sup> A statute requiring persons selling medicine belonging to a class known as poisonous to mark the package with the word "poison" has been held to apply only to the sale of poisons usually sold by druggists and apothecaries and not to poisonous articles other than medicines,<sup>89</sup> and such statutes have been held not to apply to a druggist compounding medicine on a physician's prescription,<sup>90</sup> and likewise have been held not to apply to the sale of poisons in harmless mechanical mixtures, or in proprietary mixtures that are beneficial medicines.<sup>91</sup>

## § 5. Civil Liability Resulting from Sale, Use, or Exposure

The liability of one who manufactures, sells, or handles poisons, for death or injury resulting therefrom, is in general governed by the rules applicable to liability arising out of the manufacture, sale, or handling of inherently dangerous substances.

87. Kan.—Campbell v. Brown, 117 P. 1010, 85 Kan. 527.

88. Kan.—Campbell v. Brown, supra. 49 C.J. p 1044 note 34.

89. U.S.—Boyd v. Frenchee Chemical Corporation, D.C.N.Y., 37 F. Supp. 306. 49 C.J. p 1044 note 36.

### Cleaning preparations

(1) Statute penalizing every druggist who sells and delivers any arsenic . . . or "other substance . . . usually denominated as poisonous" without having the word "poison" thereon does not manifest an intent to include carbon tetrachloride, which is not a drug, but a grease solvent, sold commercially as a cleaning fluid.—McClaren v. G. S. Robins & Co., 162 S.W.2d 856, 349 Mo. 653.

(2) The purpose of statute providing for regulation of the practice of pharmacy was to regulate the compounding of physicians' prescriptions, preparing drugs, and dispensing them, or other products of the apothecary's calling, including poisonous substances, as an incident to the practice of pharmacy, and not to regulate or control the sale of a cleaning preparation which happened to be poisonous.—Boyd v.

Frenchee Chemical Corporation, D.C. N.Y., 37 F.Supp. 306.

90. Pa.—Commonwealth ex rel. Men-  
gle v. Sheriff of Philadelphia  
County, Quar.Sess., 16 Phila. 518,  
41 Leg.Int. 366.  
49 C.J. p 1044 note 37.

91. Tenn.—Wise v. Morgan, 48 S.  
W. 971, 101 Tenn. 273, 44 L.R.A.  
548.

92. Wis.—Beznor v. Howell, 233 N.  
W. 758, 203 Wis. 1.  
45 C.J. p 890 note 15.

93. Minn.—McCrosin v. Noyes  
Bros. & Cutler, Inc., 173 N.W. 566,  
143 Minn. 181.  
N.Y.—Willson v. Faxon, 101 N.E.  
799, 208 N.Y. 108, 47 L.R.A., N.S.,  
693, Ann.Cas.1914D 49.

### Sale to third person for own use

Where intestate came into possession of solvent lawfully and used it for purpose for which it was manufactured, it was immaterial that manufacturer sold solvent to a third person for third person's own use and not for resale.—Maize v. Atlantic Refining Co., 41 A.2d 850, 352 Pa. 51, 160 A.L.R. 449.

94. Neb.—Corpus Juris quoted in  
Rasmussen v. Benson, 275 N.W.  
674, 677, 133 Neb. 449, 122 A.L.R.  
1468, reheard 280 N.W. 890, 135  
Neb. 232, 122 A.L.R. 1475.

49 C.J. p 1045 note 41.

Poisons are familiar examples of substances recognized as inherently dangerous within the meaning of the rules relating to the liability of a manufacturer or seller for injury or death resulting therefrom.<sup>92</sup> Persons dealing in, and handling, poisons owe to the public a positive and active duty to limit the danger by labeling or otherwise conveying knowledge of the danger;<sup>93</sup> they are held to strict accountability, and must exercise the highest degree of care to prevent injury.<sup>94</sup> A manufacturer or vendor putting out and selling poisons, without notice to others of their dangerous nature or qualities, or with a misleading notice, or negligently in any other way, is liable for an injury to any third person which might have been reasonably foreseen by the manufacturer or dealer in the exercise of ordinary care;<sup>95</sup> and, further, actionable negligence may result merely from putting a poisonous product on the market, without a showing of negligence in some other or independent way.<sup>96</sup> It has been held to be gross negligence to keep a deadly poison in a bottle without a distinguishing mark or label, and to intermingle such bottle with other bottles containing drinkables.<sup>97</sup> On the other hand, a manufacturer is not necessarily liable for poisoning resulting, without negligence on his part, from the use of a poisonous substance in a manner contrary to his clear warnings;<sup>98</sup> and a patron who is ap-

### Authority to prescribe standards of care

United States surgeon general and other manufacturers of product containing carbon tetrachloride are not authorized to prescribe standards of care which will be determinative of manufacturer's liability in a state from carbon tetrachloride poisoning because of alleged lack of sufficient warning on container of a solvent containing such chemical.—Maize v. Atlantic Refining Co., 41 A.2d 850, 352 Pa. 51, 160 A.L.R. 449.

95. Wis.—Beznor v. Howell, 233 N.  
W. 758, 203 Wis. 1.

96. N.Y.—Petzold v. Roux Labora-  
tories, 11 N.Y.S.2d 565, 256 App.  
Div. 1096.

97. Cal.—Pell v. Herbert, 166 P.  
386, 33 Cal.App. 730.  
49 C.J. p 1045 note 49.

98. Mo.—McClaren v. G. S. Robins  
& Co., 162 S.W.2d 856, 349 Mo.  
653.

### Use without adequate ventilation

A chemical manufacturer was not liable for the death of a workman from carbon tetrachloride poisoning while workman was cleaning the inside of a boiler, where the container of carbon tetrachloride bore the manufacturer's warning that it contained a volatile solvent to be used with adequate ventilation and warn-

prised of the dangerous and poisonous character of a substance prior to its application may thereby assume the risk.<sup>99</sup>

Ordinarily, it is negligent to place poisons within the reach of young children or feeble-minded adults.<sup>1</sup> An unauthorized person who sells a deadly poison in violation of a statute making it unlawful for any person to deliver or sell any deadly poison, unless on inquiry it is found that the purchaser is aware of its poisonous character, is guilty of negligence per se;<sup>2</sup> and, where such a sale and delivery have been made to a child who in turn has given the poison to a younger child, the question whether the sale and delivery of the poison to the older child were the proximate cause of the injury to the younger depends on whether in the exercise of ordinary care a reasonably prudent person would have apprehended that the older child would give it to a younger child who, not knowing its peculiar and dangerous qualities, would misuse it.<sup>3</sup> On the other hand, one using a poison in connection with his work is not necessarily liable for an unforeseen injury therefrom to a child.<sup>4</sup> A widow may maintain an action for loss of consortium and death of her husband against one who wrongfully sold him opium, where the loss of consortium for a period prior to his death, and the death itself, were caused by the use of the drug,<sup>5</sup> and she may recover punitive damages where malice is alleged and proved.<sup>6</sup>

**Sale without label.** Failure to label a poisonous substance as required by statute is negligence per se,<sup>7</sup> and one who sells a poisonous substance without labeling it is liable in damages to one who, without fault, is injured thereby, where the violation of the statute is the proximate cause of the injury.<sup>8</sup> However, where statutes requiring the labeling of poisons are held not to apply to articles of merchandise which contain poison only as an incident to their manufacture, as discussed supra § 4, the absence of a label does not of itself give rise to a cause of action,<sup>9</sup> and the same result has been reached in the case of a sale of a poison without a label for use other than as a medicine.<sup>10</sup> It is not negligence under such statute for a druggist not to label as poison a medicine compounded on the prescription of a physician, although the medicine contains poison, or is of a poisonous nature.<sup>11</sup>

**Sale under false label.** One who puts on the market a deadly poison negligently labeled as a harmless medicine is liable to all persons who, without fault on their part, are injured by using it as such medicine, relying on the false label,<sup>12</sup> whether labeled by himself or an agent,<sup>13</sup> or whether sold to the injured person directly or to a middleman and by him resold to the injured person.<sup>14</sup>

**Use other than that for which sold.** A manufacturer or seller is generally not liable for injury arising from the use of a poisonous substance for a purpose other than that for which it is sold.<sup>15</sup> It

ing that prolonged breathing of vapor should be avoided, which warning had been adopted by manufacturers and approved by the United States surgeon general, since no negligence of the manufacturer was disclosed.—*McClaren v. G. S. Robins & Co.*, 162 S.W.2d 856, 349 Mo. 653.

99. N.Y.—*Petzold v. Roux Laboratories*, 11 N.Y.S.2d 565, 256 App. Div. 1096.

1. Pa.—*Mendola v. Sambol*, 71 A.2d 827, 166 Pa.Super. 351.

**Absence of order of responsible adult**

Violation of statute prohibiting sale of poisons to persons under specified age without written order of responsible adult is negligence per se for which seller is liable if sale is proximate cause of injuries to buyer.—*Eckerd's, Inc., v. McGhee*, 86 S.W.2d 570, 19 Tenn.App. 277.

2. Or.—*Stone v. Shaw Supply Co.*, 36 P.2d 606, 148 Or. 416.

3. Or.—*Stone v. Shaw Supply Co.*, supra.

4. Va.—*Dennis v. Odend'-Hal-Monks Corporation*, 28 S.E.2d 4, 182 Va. 77.

**Bottle kept in truck**

Fact that defendant's employee placed a bottle used generally in sale of a popular beverage and labeled as such but containing acid used in connection with defendant's work in defendant's truck parked in close proximity to a sand pile on which children, as defendant knew, were accustomed to play did not constitute negligence which would render defendant liable for damages resulting from a three-year-old boy obtaining bottle from truck and drinking part of contents, since child's acts were not reasonably foreseeable.—*Dennis v. Odend'-Hal-Monks Corporation*, 28 S.E.2d 4, 182 Va. 77.

5. S.D.—*Moberg v. Scott*, 175 N.W. 559, 42 S.D. 372.

6. S.D.—*Moberg v. Scott*, supra.

7. Wis.—*Mossrud v. Lee*, 157 N.W. 758, 163 Wis. 229.

49 C.J. p 1046 note 55—45 C.J. p 722 note 97.

8. Iowa.—*Burk v. Creamery Package Mfg. Co.*, 102 N.W. 793, 126 Iowa 730, 106 Am.S.R. 377.

49 C.J. p 1046 note 56.

9. Mo.—*McClaren v. G. S. Robins & Co.*, 162 S.W.2d 856, 349 Mo. 653.

49 C.J. p 1046 note 57.

10. Neb.—*Levin v. Muser*, 194 N.W. 672, 110 Neb. 515.

49 C.J. p 1046 note 59.

11. Tenn.—*Wise v. Morgan*, 48 S.W. 971, 101 Tenn. 273, 44 L.R.A. 548.

12. Ga.—*Blood Balm Co. v. Cooper*, 10 S.E. 118, 83 Ga. 457, 20 Am.S.R. 324, 5 L.R.A. 612.

49 C.J. p 1046 note 61.

13. N.Y.—*Thomas v. Winchester*, 6 N.Y. 397, 57 Am.D. 455.

14. N.Y.—*Thomas v. Winchester*, supra.

15. U.S.—*Boyd v. Frenchee Chemical Corporation*, D.C.N.Y., 37 F. Supp. 306.

49 C.J. p 1046 note 64.

**Consumption of shoe cleaner**

The manufacturer or seller of a shoe cleaner was not liable for death of child resulting from consumption thereof, where it appeared that cleaner was marketed in container clearly labeled to disclose use for which it was intended, thereby giving notice of dangers likely to result from human consumption there-

has been held that a manufacturer of poisonous fireworks is not liable for the death of a child eating them, since that was not the purpose for which they were sold, and they were not attractive to the taste;<sup>16</sup> but there is also authority holding a manufacturer of poisonous fireworks liable for the death of a child eating them where the jury was warranted in finding that they were attractive to the taste of children and injury by children eating them might reasonably have been anticipated.<sup>17</sup> In the absence of statutory requirement, a vendor either at wholesale or retail<sup>18</sup> of another's proprietary compound owes no duty to the purchaser, or to the public, to ascertain whether it contains ingredients which may be harmful or dangerous, if used for purposes other than those for which it was designed.<sup>19</sup>

**Exposure.** Where one who knows that a substance is poisonous carelessly or negligently leaves it where he knows, or has reason to know, or by ordinary care should know, that it may cause injury to some one ignorant of its character, he is liable for any injury resulting from such exposure,<sup>20</sup> and the same liability attaches to one who leaves exposed a substance not known to be poisonous where his lack of knowledge is due to his own negligence.<sup>21</sup> It has been stated broadly that, where a poisonous compound is kept on private premises, it is the duty of those responsible therefor to keep such poisonous compound in a safe place.<sup>22</sup> Hence, a person carelessly leaving poisonous liquor where a

guest may obtain and drink it is liable for the resulting injury,<sup>23</sup> and a landlord who assumes and owes a tenant and family the duty of preparing an apartment or premises for occupancy is obligated to leave no deleterious substance in such a position as will likely result in injury to the tenant or his family coming on the premises.<sup>24</sup> The duty has been held to be on a railroad company properly to inclose or guard a poisonous compound kept on its right of way, so as not to leave it accessible to trespassing cattle.<sup>25</sup> However, one who leaves a poisonous substance, which has been used in making tests, on a work bench in a testing room, separate from a public office, but entered therefrom, has been held not liable for injury to a child entering the room from the office and drinking the poison, and not negligent under the attractive nuisance doctrine.<sup>26</sup>

**Fumigation.** One using a dangerous agency, such as hydrocyanic gas or acid in fumigating a building, owes a high degree of care to all persons rightfully on the premises;<sup>27</sup> and the use of such agency for fumigation has been held to be an ultrahazardous activity imposing liability on the user for injury to persons rightfully on the premises, regardless of fault or negligence on his part.<sup>28</sup> As to trespassers, however, the user of the fumigating agent owes only the duty generally owed to trespassers,<sup>29</sup> and in this connection one may be a trespasser even in his own home during the period of the fumigation where, after due warnings and precautions, he has

of.—*Boyd v. Frenchee Chemical Corporation*, *supra*.

16. *Miss.—Victory Sparkler, etc., Co. v. Price*, 111 So. 437, 146 Miss. 192, 50 A.L.R. 1454.

17. *U.S.—Victory Sparkler & Specialty Co. v. Latimer*, C.C.A.Mo., 53 F.2d 3.

18. *Minn.—McCrossin v. Noyes Bros. & Cutler, Inc.*, 173 N.W. 566, 143 Minn. 181.

19. *Minn.—McCrossin v. Noyes Bros. & Cutler, Inc.*, *supra*.  
*Neb.—Levin v. Muser*, 194 N.W. 672, 110 Neb. 515.

20. *Ga.—Kelley v. Bristol*, 119 S.E. 334, 30 Ga.App. 725.

*Neb.—Corpus Juris* quoted in *Rasmussen v. Benson*, 275 N.W. 674, 677, 133 Neb. 449, 122 A.L.R. 1468, reheard 280 N.W. 890, 135 Neb. 232, 122 A.L.R. 1475.

*Okl.—Moore v. Rumsey*, 36 P.2d 15, 169 Okl. 103.

**Refuse dumped with landowner's permission.**

The fact that landowner permitted defendant to dump refuse on prem-

ises did not absolve defendant from duty of due care toward third persons killed by hydrogen sulphide emanating from tank dumped by defendant, knowing that numerous people visited dump to salvage metals without objection.—*Sarna v. American Bosch Magneto Corporation*, 195 N.E. 328, 290 Mass. 340.

21. *Ga.—Kelley v. Bristol*, 119 S.E. 334, 30 Ga.App. 725.

22. *Okl.—Moore v. Rumsey*, 36 P.2d 15, 169 Okl. 103.

23. *Ga.—Kelley v. Bristol*, 119 S.E. 334, 30 Ga.App. 725.

#### Store customer

Where operator of general store maintained drinking place and cup in room connected with the store, for refreshment of customers and patrons, customer who had frequently used the drinking place and cup at operator's direction was not a mere licensee when she entered cream room without specific permission and tasted water in cup, and, hence, such customer could recover for injuries resulting from injurious substances in the cup.—*Duensing v. Leaman*, 102 P.2d 992, 152 Kan. 42.

24. *Minn.—Martinson v. Neubert*, 185 N.W. 651, 150 Minn. 263.

25. *Okl.—Midland Valley R. Co. v. Rippe*, 161 P. 233, 61 Okl. 314.

26. *Ind.—Sugar Creek Creamery Co. v. Eads*, 158 N.E. 520, 87 Ind.App. 381.

Attractive nuisance doctrine generally see Negligence § 41.

27. *Cal.—Luthringer v. Moore*, 190 P.2d 1, 31 Cal.2d 489.

*Tenn.—Ellis v. Orkin Exterminating Co.*, 143 S.W.2d 108, 24 Tenn.App. 279.

28. *Cal.—Luthringer v. Moore*, 190 P.2d 1, 31 Cal.2d 489.

29. *Tenn.—Ellis v. Orkin Exterminating Co.*, 143 S.W.2d 108, 24 Tenn.App. 279.

*Wis.—Harder v. Maloney*, 26 N.W.2d 830, 250 Wis. 233.

#### Safe place statute

A trespasser entering closed building being fumigated with cyanide gas was not protected by the provisions of safe place statute.—*Harder v. Maloney*, *supra*.

wrongfully forced an entrance into the building.<sup>30</sup> Thus, persons using a fumigating agent have been held not liable for the death of a child which was caused by his own willful and disobedient act in returning to his home while it was being fumigated, and climbing through a window in violation of the instructions of his parents and the warnings of the fumigators.<sup>31</sup>

**Spraying.** One who is engaged in spraying or dusting fruit, vegetables, or other products with the use of an airplane, or otherwise, and who negligently spreads liquid or powder known to contain a dangerous proportion of arsenic or other poisons in such a manner as to endanger the lives of bees, animals, or property of another person in the immediate vicinity, may become liable for the damages resulting therefrom.<sup>32</sup>

**Contributory negligence.** It has been held that it is not contributory negligence, on the part of one offered a drink and handed a bottle, to drink directly out of the bottle,<sup>33</sup> and that it was not contributory negligence on the part of a mother, attributable to her child, to leave a bottle containing poison where the child could reach it, where the bottle was not labeled "poison," and the mother was not aware that it contained poison.<sup>34</sup> Where a mistake is made in delivering to a purchaser of another substance a wrapped-up package containing a bottle of poison properly labeled, the mistake being induced by the action of the purchaser, there is no liability on the part of the seller.<sup>35</sup>

## § 6. — Actions

### a. In general

### b. Civil action to enforce penalty

30. Tenn.—Ellis v. Orkin Exterminating Co., 143 S.W.2d 108, 24 Tenn.App. 279.

31. Tenn.—Ellis v. Orkin Exterminating Co., *supra*.

32. Cal.—Lenk v. Spezia, 213 P.2d 47, 95 Cal.App.2d 296.

33. Cal.—Pell v. Herbert, 166 P. 386, 33 Cal.App. 730.

34. Tenn.—Wise v. Morgan, 48 S.W. 971, 101 Tenn. 273, 44 L.R.A. 548.

35. Ill.—Hackett v. Pratt, 52 Ill. App. 346.

36. Ga.—Kelley v. Bristol, 119 S.E. 334, 30 Ga.App. 725.

49 C.J. p 1047 note 81.

37. Ill.—Grandt v. Chicago, etc., R. Co., 195 Ill.App. 187.

38. Md.—Flaccomio v. Eysink, 100 A. 510, 129 Md. 367.

49 C.J. p 1047 note 83.

39. Miss.—Dunagin-Whitaker Co. v. Montgomery, 78 So. 580, 117 Miss. 666.

### 40. Place of accrual

A cause of action for the death of a buyer brought about by the use of an article containing poison has been held to accrue where the buyer obtained and used the goods.—Darks v. Scudder-Gale Grocer Co., 130 S.W. 430, 146 Mo.App. 246.

### 41. Adding party defendant

In action against gas company for damages for negligently allowing liquid chlorine to be shipped in defective tank car and failing to make proper inspection thereof so that gas escaped and injured plaintiff who was working on street near car, defendant was held not entitled to bring in railway company as party defendant on ground of its negligent handling of car, where gas company was not merely passive and secondary wrongdoer, and addition of railway company would impede disposition of case.—DeMarchi v. Electro Bleaching Gas Co., 278 N.Y.S. 571, 155 Misc. 143.

## a. In General

Actions to recover for injury or death resulting from poison ordinarily are governed by the usual rules applicable in civil actions for damages, as for example, with respect to such matters as venue, parties, pleading, evidence, and trial.

An action based on negligence to recover damages arising from injuries due to poison, as in other actions for recovery of damages for negligence, is in form *ex delicto*;<sup>36</sup> but, where the negligent act involves a breach of warranty or contractual relationship, the action may be either *ex contractu* or *ex delicto*.<sup>37</sup> The remedy against a manufacturer, where one has purchased through a dealer, is in tort, since there is no contractual relationship;<sup>38</sup> and, in an action against a seller, where there is no express or implied warranty, the only hypothesis on which there can be a recovery for injuries arising from poison is that of negligence.<sup>39</sup>

**Venue.** The venue of actions arising out of injuries by poison is governed by the general rules applicable to causes of action sounding in damages.<sup>40</sup>

**Parties.** General rules prevail with respect to the parties to the action.<sup>41</sup>

**Pleading.** As in the case of pleadings in civil actions generally the declaration, complaint, or petition must allege the facts essential to a cause of action and must conform to the rules of pleading.<sup>42</sup> Thus, in order to recover for breach of implied warranty under the Uniform Sales Act, in the sale of whisky containing poison, it is necessary to allege the warranty in the declaration or complaint.<sup>43</sup> Allegations which are merely descriptive are not es-

42. La.—Martin v. Jonesboro Drug Co., 7 La.App. 262.

49 C.J. p 1047 note 88.

### Allegations held sufficient

Ga.—Bennett Drug Stores v. Mosely, 20 S.E.2d 208, 67 Ga.App. 347.

### Proof of poisons not specifically alleged

Allegation of complaint in action for injuries from use of deplatory cream that defendant "otherwise negligently and unlawfully prepared, manufactured, sold and directed the use of said cream" authorized proof of other poisons therein than those specifically alleged.—Hillick v. E. W. Edwards & Son, 256 N.Y.S. 313, 143 Misc. 277, modified and affirmed as modified by memorandum decision 257 N.Y.S. 945, 235 App.Div. 898.

Pearl v. Abraham & Straus, 257 N.Y.S. 946, 235 App.Div. 893, and Jacobs v. E. W. Edwards & Son, 257 N.Y.S. 947, 235 App.Div. 893.

43. Md.—Flaccomio v. Eysink, 100 A. 510, 129 Md. 367.

sential to the cause of action.<sup>44</sup> Where the circumstances are such that a seller of a compound containing poison was under no duty to acquire knowledge of the ingredients or qualities thereof, a complaint which alleges that the seller knew, or in the exercise of reasonable care ought to have known, that the compound contained poisonous matter, states no cause of action, since the allegations are in the alternative and neutralize each other.<sup>45</sup>

**Evidence.** In actions for the recovery of damages for injuries caused by poison, the general rules of evidence controlling in civil actions are applicable as to the burden of proof,<sup>46</sup> admissibility of evidence,<sup>47</sup> and the weight and sufficiency thereof.<sup>48</sup> It has been held, under a statute requiring a record of sales of poison and that the seller satisfy himself that the purchaser is aware of its dangerous character and that it is to be used for a legitimate purpose, that proof of failure to comply with the statute by one delivering a poison makes a *prima facie* case against him.<sup>49</sup> It has also been held unnecessary for plaintiff, as an essential part of a cause of action, to establish by direct proof that defendants had actually manufactured and distributed a dangerous and poisonous liquid.<sup>50</sup>

**Province of court and jury.** As in the trial of other actions, questions of fact are for the jury in

an action to recover damages for injury by poison.<sup>51</sup> Thus it is for the jury to say whether a workman is negligent in leaving poison acid unguarded where children are known to play;<sup>52</sup> whether certain articles containing poison were attractive to the taste of children;<sup>53</sup> whether, in an action for poisoning through mistake, a clerk was negligent in selling bichloride of mercury tablets where plaintiff's statement that he called for triple bromide tablets was disputed;<sup>54</sup> and whether a poisonous substance kept on a railroad company's right of way was kept in a safe place.<sup>55</sup> It has been held that, if a manufacturer or dealer in drugs puts a label on an article indicating that it is harmless, and the label is false and the article poisonous, he is as a matter of law liable, since proof of the fact is proof of the negligence, and it is not necessary to submit the question of negligence to the jury.<sup>56</sup> Ordinarily, the question whether any given substance is a poison is a matter of fact.<sup>57</sup> Whether or not the issuance of instructions by a manufacturer to operators with respect to the use of a poisonous and inherently dangerous preparation constituted an exercise of reasonable care has been held to present a question of fact.<sup>58</sup>

Questions of fact pertaining to an issue of contributory negligence are for the jury.<sup>59</sup> Thus

44. Ga.—*Keiley v. Bristol*, 119 S.E. 334, 30 Ga.App. 725.  
49 C.J. p 1047 note 91.

45. Minn.—*McCrossin v. Noyes Bros. & Cutler, Inc.*, 173 N.W. 566, 143 Minn. 181.

46. Iowa.—*Burk v. Creamery Package Mfg. Co.*, 102 N.W. 793, 126 Iowa 730, 106 Am.S.R. 377.  
49 C.J. p 1047 note 95.

**Presence of injurious ingredients**

Burden was on plaintiffs in actions for injuries from use of deplatory cream to prove that it contained injurious ingredients.—*Hillick v. E. W. Edwards & Son*, 256 N.Y.S. 313, 143 Misc. 277, modified and affirmed as modified by memorandum decision 257 N.Y.S. 945, 235 App.Div. 893, *Pearl v. Abraham & Straus*, 257 N.Y.S. 946, 235 App.Div. 893, and *Jacobs v. E. W. Edwards & Son*, 257 N.Y.S. 947, 235 App.Div. 893.

47. N.Y.—*Tidd v. Skinner*, 122 N.E. 247, 225 N.Y. 422, 3 A.L.R. 1145.  
49 C.J. p 1047 note 96.

48. S.D.—*Moberg v. Scott*, 175 N.W. 559, 42 S.D. 372.  
49 C.J. p 1047 note 97.

**Evidence held sufficient**

(1) To establish a cause of action generally.—*Maher v. Clairrol, Inc.*, 31 N.Y.S.2d 751, 263 App.Div. 848.

(2) To sustain finding of defendant's negligence.—*Sarna v. American Bosch Magneto Corporation*, 195 N.E. 328, 290 Mass. 340—49 C.J. p 1047 note 97 [a].

(3) To warrant finding that mother had told plaintiff and his family that in fumigating house exterminating company was going to use a gas that would kill anything that had blood in it.

U.S.—*J. R. Watkins Co. v. Raymond*, C.A.Minn., 184 F.2d 925—*Boyd v. Frenche Chemical Corporation*, D.C.N.Y., 37 F.Supp. 306.  
Tenn.—*Ellis v. Orkin Exterminating Co.*, 143 S.W.2d 108, 24 Tenn.App. 279.

49. Colo.—*Campbell v. Stamper Drug Co.*, 277 P. 770, 85 Colo. 508.

50. N.Y.—*Petzold v. Roux Laboratories*, 11 N.Y.S.2d 565, 256 App. Div. 1096.

**Inference**

On establishment of the other essential elements, the jury may infer that defendants had placed the dangerous and poisonous liquid in the bottle, by reason of the fact that it was there at the time it was used.—*Petzold v. Roux Laboratories*, *supra*.

51. Wis.—*Mossrud v. Lee*, 157 N.W. 758, 163 Wis. 229.  
49 C.J. p 1048 note 99.

**Questions held for jury**

(1) In general.—*Maize v. Atlantic Refining Co.*, 41 A.2d 850, 252 Pa. 51, 160 A.L.R. 449.

(2) Proximate cause.—*Stone v. Shaw Supply Co.*, 36 P.2d 606, 148 Or. 416—49 C.J. p 1048 note 99 [a].

(3) Dealer's knowledge of poisonous character of article.—*Victory Sparkler & Specialty Co. v. Latimer*, C.C.A.Mo., 53 F.2d 3.

**Evidence held insufficient for jury**  
Tenn.—*Eckerd's Inc. v. McGhee*, 86 S.W.2d 570, 19 Tenn.App. 277.

52. N.J.—*Neff v. Daniel*, 131 A. 900, 102 N.J.Law 422.

53. U.S.—*Victory Sparkler & Specialty Co. v. Latimer*, C.C.A.Mo., 53 F.2d 3.

54. N.Y.—*Moran v. Dake Drug Co.*, 134 N.Y.S. 995, affirmed 139 N.Y.S. 1134, 155 App.Div. 879.

55. Okl.—*Midland Valley R. Co. v. Rippe*, 161 P. 233, 61 Okl. 314.

56. Mo.—*Darks v. Scudder-Gale Grocer Co.*, 130 S.W. 430, 146 Mo. App. 246.

57. Mass.—*Commonwealth v. Kennedy*, 48 N.E. 770, 170 Mass. 18.

58. N.Y.—*Maher v. Clairrol, Inc.*, 31 N.Y.S.2d 751, 263 App.Div. 848.

59. Kan.—*Duensing v. Leaman*, 103 P.2d 992, 152 Kan. 42.

whether plaintiff was guilty of lack of ordinary care when he failed to take measures to ascertain the nature of a poisonous substance in a railroad car and in brewery refuse purchased for cattle feed and shipped in the car,<sup>60</sup> and whether plaintiff was guilty of contributory negligence in taking a poisonous drug without reading the label on the package,<sup>61</sup> are questions to be determined by the jury from the evidence. Where deceased was given strychnine instead of quinine, which he had called for, and had his wife prepare a dose which he took, with fatal results, the question of contributory negligence was held one for the jury.<sup>62</sup> However, the court should not submit to the jury the defense of contributory negligence in an action for damages resulting from the sale of a poisoned product where the evidence fails to disclose any negligence on the part of plaintiff.<sup>63</sup>

**Instructions.** The instructions must clearly state the law of the case,<sup>64</sup> and instructions are properly refused where they are confusing<sup>65</sup> or are predicated on only a part of the pleadings and evidence in the case.<sup>66</sup> Instructions which correctly state the applicable law are properly given.<sup>67</sup>

### b. Civil Action to Enforce Penalty

In some jurisdictions a civil action may be maintained to recover the penalty imposed for a violation of the statutes relating to poisons.

Under statutes relating to poisons in some jurisdictions the penalty imposed for a violation thereof may be recovered by civil action, quasi-criminal although civil in form.<sup>68</sup> Under a statute declaring it to be unlawful for any druggist or other person to sell cocaine except on the written prescription

of a duly registered physician, the penalty may be recovered from the proprietor of a drug store for a sale made by a clerk.<sup>69</sup> Where knowledge and intent are not essentials of the offense, it is no defense that a sale was not knowingly and willfully made.<sup>70</sup>

**Pleading.** In such an action the complaint should clearly state the facts constituting the offense.<sup>71</sup>

**Evidence.** As in the case of a criminal prosecution, in an action to recover a penalty under a statute relating to poisons, defendant has the burden of bringing himself within the provision of an exception by way of defense.<sup>72</sup> If the action is to recover a penalty for a sale, proof of other sales may be admissible to prove the manner in which defendant conducted his business,<sup>73</sup> the authority of a clerk making a sale,<sup>74</sup> or intent, where material.<sup>75</sup> Proof of intent or knowledge has been admitted for the consideration of the jury in determining the amount of the penalty.<sup>76</sup>

**Questions of law and fact.** Questions of fact ordinarily are for the jury,<sup>77</sup> such as whether a certain substance was a "poison" so as to subject a seller to a penalty imposed by a statute.<sup>78</sup>

**Instructions to the jury** are proper when they correctly present the law and the facts of the case, including the theory of the defense.<sup>79</sup>

## § 7. Offenses Generally and Prosecutions Therefor

- a. In general
- b. Indictments and informations
- c. Evidence
- d. Trial and verdict
- e. Sentence and punishment

60. Ill.—Grandt v. Chicago, etc., R. Co., 195 Ill.App. 187.

61. N.Y.—Moran v. Dake Drug Co., 134 N.Y.S. 995, affirmed 139 N.Y.S. 1134, 155 App.Div. 879.

62. Colo.—Campbell v. Stamper Drug Co., 277 P. 770, 85 Colo. 508.

63. Neb.—Rasmussen v. Benson, 275 N.W. 674, 133 Neb. 449, 122 A.L.R. 1468, affirmed 280 N.W. 890, 135 Neb. 232, 122 A.L.R. 1475.

64. Instructions held proper or erroneously refused

Ark.—Kennedy v. Clayton, 227 S.W. 2d 934.

Cal.—Luthringer v. Moore, 190 P.2d 1, 31 Cal.2d 489.

N.Y.—Petzold v. Roux Laboratories, 11 N.Y.S.2d 565, 256 App.Div. 1096.

Instructions held sufficiently favorable

Mass.—Sarna v. American Bosch

Magneto Corporation, 195 N.E. 328, 290 Mass. 340.

65. Cal.—Luthringer v. Moore, 190 P.2d 1, 31 Cal.2d 489.

66. Okl.—Midland Valley R. Co. v. Rippe, 161 P. 233, 61 Okl. 314.

67. N.Y.—Tidd v. Skinner, 122 N.E. 247, 225 N.Y. 422, 3 A.L.R. 1145. 49 C.J. p 1048 note 10.

68. Ill.—People v. Zito, 86 N.E. 1041, 237 Ill. 434—Chicago v. Montgomery, 191 Ill.App. 558.

Actions and other proceedings to enforce penalties generally see Penalties §§ 7-18.

69. Ill.—Zito v. People, 140 Ill.App. 611, affirmed 86 N.E. 1041, 237 Ill. 434.

70. Ill.—Chicago v. Greene, 192 Ill. App. 524.

49 C.J. p 1057 note 70.

71. Ill.—People v. Zito, 86 N.E. 1041, 237 Ill. 434.

49 C.J. p 1056 note 69.

72. Ill.—Chicago v. Brendecke, 170 Ill.App. 25.

73. Ill.—People v. Zito, 86 N.E. 1041, 237 Ill. 434.

74. Ill.—Zito v. People, 140 Ill.App. 611, affirmed 86 N.E. 1041, 237 Ill. 434.

75. Ill.—People v. Zito, 86 N.E. 1041, 237 Ill. 434.

76. Ill.—Chicago v. Greene, 192 Ill. App. 524.

77. Ill.—See Chicago v. Greene, 192 Ill.App. 528.

N.J.—Board of Pharmacy v. Morhauser, 114 A. 552, 96 N.J.Law 16.

78. N.J.—Board of Pharmacy v. Morhauser, 96 N.J.Law 16, 114 A. 552.

79. Ill.—Chicago v. Brendecke, 170 Ill.App. 25.

49 C.J. p 1057 note 78.

### a. In General

One who violates criminal statutes governing transactions in poisons may be prosecuted therefor, and in such a prosecution he may interpose any proper matter of defense.

The question whether a transaction with respect to poisons constitutes a criminal offense depends on the statutes of the particular jurisdiction.<sup>80</sup> Under some statutory provisions one is guilty of an offense who engages in the transportation of narcotics<sup>81</sup> or who, except in a safe place on his own premises, lays out a poison.<sup>82</sup> The manufacture of smoking opium within the United States, subject to the restrictions imposed by the federal statutes and those which may be prescribed by the states, is lawful.<sup>83</sup>

*Defenses in general.* As in other criminal cases, any proper matter of defense may be interposed,<sup>84</sup> such as lack of animus possidendi, where accused is charged with possession,<sup>85</sup> or a former conviction or acquittal of an offense so connected with the offense charged as to be an incident thereto.<sup>86</sup> In general, a conviction or acquittal under a city ordinance relating to narcotics cannot be pleaded as a bar to a prosecution for the same act constituting also an offense under a state law;<sup>87</sup> nor will a con-

viction under a federal statute bar prosecution for the same act under a local law by the terms of which it is also made an offense;<sup>88</sup> but one acquitted in a federal court on a charge of possessing a narcotic cannot be prosecuted for violation of a state law prohibiting the unauthorized possession of a narcotic where the narcotic statutes of the state expressly provide that no person shall be prosecuted for a violation thereof if such person has been acquitted or convicted under the federal narcotic laws of the same act or omission which, it is alleged, constitutes a violation of the state law.<sup>89</sup>

It is generally held that it is no defense to a prosecution for an illegal sale of a narcotic that the purchase was made, for the purpose of securing evidence for conviction,<sup>90</sup> by a detective<sup>91</sup> or informer.<sup>92</sup> Ignorance of the prohibitory provisions of a law constitutes no defense.<sup>93</sup> Under a statute prohibiting the selling of food or drink containing a poison, the lack of intent to violate the statute has been held not to be a defense.<sup>94</sup>

*Physicians.* Anti-narcotic statutes ordinarily exempt physicians from the operation of certain provisions thereof,<sup>95</sup> and permit them in good faith, and in the course of their professional practice, to

#### 80. Exception dependent on proportion of narcotic

Section of Narcotic Act providing that provisions of act shall not apply to preparations, prescriptions, and remedies which do not contain more than one fourth of a grain of morphine in one avoirdupois ounce does not exempt all tablets containing one fourth of a grain or less, but limits the exception to one fourth of a grain of morphine in one avoirdupois ounce.—*People v. Guagliata*, 200 N.E. 169, 362 Ill. 427, 103 A.L.R. 1035.

#### Felony or misdemeanor

Some statutes denouncing as a misdemeanor the unlawful use of narcotic drugs or the administering of such drugs to any other person except under advice of a licensed and practicing physician or dentist cover only the use of narcotics by the user or the administration of such drugs to another, and do not extend to the unlawful possession of narcotic drugs; and such unlawful possession, by virtue of other provisions, constitutes a felony.—*Spangler v. State*, 117 S.W.2d 63, 135 Tex.Cr. 36.

81. Cal.—*People v. One 1941 Mercury Sedan*, 168 P.2d 443, 74 Cal. App.2d 199.

#### Essential elements

In prosecution for transporting a narcotic, possession while a circumstance tending to prove transportation is not an essential element;

nor is knowledge of the exact character of the object or a specific intent to violate the law essential; but, as in the case of a prosecution for possession, there must be a knowledge of the presence of the object with intent to exercise, individually or jointly, control over it.—*People v. Watkins*, Cal.App., 214 P. 2d 414.

82. Okl.—*Voegeli v. State*, 133 P.2d 219, 75 Okl.Cr. 420.

Purpose of statute is to protect persons and animals from injury by being poisoned.—*Larrimore v. American Nat. Ins. Co.*, 89 P.2d 340, 184 Okl. 614.

"Safe place," under the statute, means a safe place in respect of the character of the substance as poison, that is, where it would not be likely to poison people or such animals as are within the protection of the law.—*Larrimore v. American Nat. Ins. Co.*, 89 P.2d 340, 184 Okl. 614.—*Voegeli v. State*, 133 P.2d 219, 75 Okl.Cr. 420.

83. U.S.—*U. S. v. Tom Yu*, D.C.Ariz., 1 F.Supp. 357.

Federal statutes restricting manufacture of smoking opium see *infra* § 12.

84. Mass.—*King v. Solomon*, 81 N.E. 2d 838, 323 Mass. 326.

85. Nev.—*State v. Chin Gim*, 224 P. 798, 47 Nev. 431.

49 C.J. p 1052 note 60.

86. Philippine.—*U. S. v. Lim Saco*, 11 Philippine 484.

49 C.J. p 1052 note 62.

87. Philippine.—*U. S. v. Ching Po*, 23 Philippine 578.

88. Philippine.—*U. S. v. Tan Oco*, 34 Philippine 772.

49 C.J. p 1052 note 63.

89. N.Y.—*People ex rel. Liss v. Superintendent of Women's Prison*, 25 N.E.2d 869, 282 N.Y. 115.

90. Mont.—*State v. Wong Hip Chung*, 241 P. 620, 74 Mont. 523.

49 C.J. p 1052 note 66.

91. Kan.—*State v. Lovell*, 272 P. 666, 127 Kan. 157.

92. Kan.—*State v. Lovell*, *supra*.

93. Philippine.—*U. S. v. Que-Quenco*, 12 Philippine 449.

Ignorance or mistake of law as defense generally see *Criminal Law* § 48.

94. Conn.—*State v. Annicelli*, 113 A. 154, 96 Conn. 102.

49 C.J. p 1052 note 70.

Intent in violation of food statutes generally see *Food* § 22.

95. Pa.—*Commonwealth v. Cohen*, 15 A.2d 730, 142 Pa.Super. 199.

Tex.—*De Vine v. State*, Civ.App., 206 S.W.2d 247.

Prescriptions see *infra* § 8.

#### Matter of defense

Exception of licensed physician acting in good faith from operation of law regulating sale and use of

prescribe, administer, and dispense narcotic drugs.<sup>96</sup> The right of a physician to make use of narcotics in the course of his practice carries with it the right to possess a narcotic, because possession is first necessary,<sup>97</sup> and the fact that a physician has come into possession of a narcotic by unlawful means does not necessarily mean that he cannot thereafter be in lawful possession thereof.<sup>98</sup> Where the exemption is in favor of "licensed physicians," without defining the term or restricting its application to physicians of any particular school, theory, or method, it has been held that the term refers to physicians licensed by the state through boards or agencies created by the legislature for the purpose.<sup>99</sup>

### b. Indictments and Informations

General rules apply to indictments and informations in prosecutions for violations of statutes relating to poisons. The proof in a prosecution for violation of statutes relating to poisons must conform to the indictment or information; but an immaterial variance is not fatal.

General rules apply to indictments and informations in prosecutions for violations of statutes relating to poisons.<sup>1</sup> An indictment or information will be held sufficient<sup>2</sup> or insufficient<sup>3</sup> according as it states facts necessary to constitute an offense, or

fails to do so. The indictment or information should set forth all the facts required by the statute to establish the offense and the facts necessary to bring defendant within the statutory provisions.<sup>4</sup> On the other hand, allegations charging the offense in the language of the statute, to which specific reference is made, ordinarily are sufficient,<sup>5</sup> at least in the absence of a special demurrer.<sup>6</sup> An indictment is not insufficient because of a failure to allege that accused "willfully and knowingly" had the narcotic in his possession where the statute does not use those words in defining the crime, but makes the mere possession of the narcotic, except in certain circumstances, an offense.<sup>7</sup>

**Intent.** In accordance with the general rule, as discussed in Indictments and Informations § 134, when the act, in general terms, is made indictable, a criminal intent need not be alleged unless from the language and effect of the law a purpose to require the allegation of such intent can be discovered.<sup>8</sup>

**Age or name of purchaser or seller.** An information has been held not fatally defective because of an absence of any statement of the age of the purchaser to whom a narcotic was alleged to have been unlawfully sold.<sup>9</sup> In some jurisdictions it is

narcotics constitutes matter of defense.—*People v. Kinsley*, 5 P.2d 938, 118 Cal.App. 593.

96. Tex.—*De Vine v. State*, Civ.App., 206 S.W.2d 247.

97. Tex.—*De Vine v. State*, supra.

**Actual care, control, and management**

"Possession," within the rule set forth in the text, means the actual care, control, and management of the narcotic.—*De Vine v. State*, supra.

98. Tex.—*De Vine v. State*, supra.

99. Pa.—*Commonwealth v. Cohen*, 15 A.2d 730, 142 Pa.Super. 199.

**Licensed osteopathic physicians** are "licensed physicians," excepted by Anti-Narcotic Act from prohibition of prescription of opium and derivatives thereof.—*Commonwealth v. Cohen*, supra.

1. Osteopath exceeding his authority

An indictment of licensed osteopath, exceeding his authority as such and invading field of medicine by prescribing narcotics, should charge violation of act making it misdemeanor to practice medicine without license, instead of violation of Anti-Narcotic Act.—*Commonwealth v. Cohen*, 15 A.2d 730, 142 Pa.Super. 199.

2. Cal.—*People v. Gin Shue*, 137 P.2d 742, 58 Cal.App.2d 625.—*People v. Kinsley*, 5 P.2d 938, 118 Cal.App. 593.

Fla.—*Simpson v. State*, 176 So. 515, 129 Fla. 127.

Ill.—*People v. Slade*, 48 N.E.2d 795, 319 Ill.App. 114.

Mont.—*State v. Brennan*, 300 P. 273, 89 Mont. 479.

Tex.—*Fawcett v. State*, 127 S.W.2d 905, 137 Tex.Cr. 14.

Utah.—*State v. Navaro*, 26 P.2d 955, 83 Utah 6.

Wash.—*State v. Harkness*, 96 P.2d 460, 1 Wash.2d 530.—*State v. Harkness*, 82 P.2d 541, 196 Wash. 234.

W.Va.—*State v. Hinkle*, 41 S.E.2d 107, 129 W.Va. 393.

49 C.J. p 1051 note 44.

### Fraud

Information, charging that defendant knew that name of person for whom drug was prescribed and name of prescribing physician were fraudulent and placed on prescription by forgery, sufficiently charged defendant with fraud so as to sustain a conviction of attempt to obtain narcotic drugs by fraud; and it was unnecessary to allege ownership or possession of drugs in some person, since offense charged did not involve attempt to injure anyone in respect of obtaining or converting property.—*State v. Logan*, 83 P.2d 1035, 59 Nev. 24.

**Falsification of dispensation record** Count of indictment charging defendant with falsifying his narcotic dispensation record by omitting therefrom designated amounts of

certain drugs which were dispensed by him between stated dates was sufficient, although it did not state time and place and person of each separate dispensation.—*Mitchell v. U. S.*, C.C.A.Okl., 143 F.2d 953.

3. Or.—*State v. He Quan Chan*, 232 P. 619, 113 Or. 168.  
49 C.J. p 1051 note 45.

4. Ill.—*People v. Sowrd*, 18 N.E.2d 176, 370 Ill. 140, 119 A.L.R. 1396.  
49 C.J. p 1051 note 46.

### False or forged prescription

Under a statute providing that no person shall make or utter any false or forged prescription or written order for any narcotic drug, it must be alleged that the instrument was forged and that accused knew that the instrument was false and forged.—*Beasley v. State*, 30 So.2d 379, 158 Fla. 824.

5. Cal.—*People v. Kinsley*, 5 P.2d 938, 118 Cal.App. 593.

Ill.—*People v. Slade*, 48 N.E.2d 795, 319 Ill.App. 114.

6. Cal.—*People v. Gelardi*, 175 P.2d 855, 77 Cal.App.2d 467.

7. S.C.—*State v. Freeland*, 91 S.E. 3, 106 S.C. 220.  
31 C.J. p 697 note 82 [a].

8. Cal.—*People v. Le Baron*, 268 P. 651, 269 P. 476, 92 Cal.App. 550.  
49 C.J. p 1051 note 52.

9. Mont.—*State v. Brennan*, 300 P. 273, 89 Mont. 479.



necessary to name the purchaser, where known, in an indictment charging sale of poison or narcotic drugs in violation of a statute,<sup>10</sup> while in others an indictment or information will not be quashed because the purchaser is not named.<sup>11</sup> It is not necessary in all cases to set forth the name of the person actually making the sale.<sup>12</sup> In some jurisdictions an objection to an information in that it fails to disclose to whom the narcotic was sold must be raised by a special demurrer and cannot be raised by a general demurrer.<sup>13</sup>

**Particular kind of drug.** According to some authorities, the allegations should charge not merely the possession or sale of "narcotic drugs," but should name the particular kind or character of the drug possessed or sold;<sup>14</sup> but there is also authority to the contrary.<sup>15</sup> It has been held that, where a specific drug is named, the possession of which is forbidden by statute, there need be no allegation that it was a narcotic drug.<sup>16</sup> Possession of the right quality and kind of marijuana is a positive factor which must be alleged under some statutes.<sup>17</sup>

**Quantity.** Where the quantity of a narcotic drug is part of the description of the offense, the indictment should show that the drug in question was possessed in a prohibited quantity.<sup>18</sup> However, where the statutes prohibit the sale or possession of preparations containing a narcotic in any amount, except under certain stated conditions, an allegation

that a preparation in defendant's possession contained more than a specified number of grains of the narcotic to the ounce is surplusage and of no legal effect.<sup>19</sup>

**Negating exceptions or exemptions.** In general, particularly under statutes in effect so providing or making exceptions or exemptions matters of defense, an indictment or information need not negative an exception or exemption contained in the statute.<sup>20</sup> Thus ordinarily it need not be alleged that possession or sale of a narcotic was not on a proper prescription.<sup>21</sup> An exception must be negated, however, where its inclusion is necessary to a complete definition or description of the offense.<sup>22</sup>

**Bill of particulars.** The granting or refusal of an application for a bill of particulars in a prosecution for violation of a narcotic statute ordinarily rests within the sound discretion of the court.<sup>23</sup> A request for a bill of particulars is sometimes proper where the allegations charge possession of a narcotic drug but do not specify the drug.<sup>24</sup>

**Issues, proof, and variance.** Proof of possession of opium will not sustain a conviction under an indictment charging possession of a preparation containing morphine;<sup>25</sup> and proof of past possession will not suffice under a statute prohibiting present possession;<sup>26</sup> nor will a proof of sale of heroin sustain a conviction under a statute regulating the sale of cocaine or eucaine, or their salts,

10. Okl.—Fletcher v. State, 101 P. 599, 2 Okl.Cr. 300, 23 L.R.A.N.S., 581.

49 C.J. p 1051 note 43.

Description of persons other than accused in indictments or informations generally see Indictments and Informations § 142.

11. Kan.—State v. Tabb, 261 P. 844, 124 Kan. 627.

12. Minn.—State v. Mayo, 136 N.W. 849, 118 Minn. 336.

49 C.J. p 1051 note 50.

13. Cal.—People v. Gelardi, 175 P. 2d 855, 77 Cal.App.2d 467—People v. Kinsley, 5 P.2d 938, 118 Cal.App. 593.

14. Tex.—Horton v. State, 58 S.W.2d 833, 123 Tex.Cr. 237—Baker v. State, 58 S.W.2d 534, 123 Tex.Cr. 209—Baker v. State, 58 S.W.2d 535, 123 Tex.Cr. 212.

#### **Allegations held sufficient**

An information, charging that defendant did willfully, unlawfully, and feloniously sell narcotic drugs, namely, "marijuana," in quantity exceeding one ounce, to named person, was broad enough to sustain conviction of peddling such drugs under Uniform Narcotic Drug Act, although such act does not name marijuana as

narcotic drug, since its definition of "cannabis," denominated as narcotic drug therein, embraces marijuana.—State v. Economy, 130 P.2d 264, 61 Nev. 394.

15. Cal.—People v. Gelardi, 175 P. 2d 855, 77 Cal.App. 467.

N.Y.—People v. Lee Foon, 9 N.E.2d 847, 275 N.Y. 229.

16. Tex.—Santos v. State, 53 S.W. 2d 609, 122 Tex.Cr. 69.

17. Ill.—People v. Sowrd, 18 N.E.2d 176, 370 Ill. 140, 119 A.L.R. 1396.

18. Or.—State v. He Quan Chan, 232 P. 619, 113 Or. 168.

19. Cal.—People v. Rose, 79 P.2d 737, 26 Cal.App.2d 513.

20. Cal.—People v. Kinsley, 5 P.2d 938, 118 Cal.App. 593.

Fla.—Cortina v. State, 184 So. 838. Tex.—Medina v. State, 193 S.W.2d 196, 149 Tex.Cr. 249.

31 C.J. p 722 note 64 [a]—49 C.J. p 1051 note 54, p 1052 note 56.

#### **Persons withdrawn from act**

Where statute provided that no person except manufacturer, wholesaler, or retailer of surgical instruments, apothecary, physician, dentist, veterinarian, nurse, or interne should possess hypodermic syringes, such exception related to persons

withdrawn from act and need not be negated in information based on statute.—People ex rel. Courtney v. Prystalski, 192 N.E. 908, 358 Ill. 198.

21. Cal.—People v. Harmon, 200 P. 2d 32, 89 Cal.App.2d 55—People v. Gelardi, 175 P.2d 855, 77 Cal.App.2d 467—People v. Smith, 129 P.2d 732, 54 Cal.App.2d 587—People v. Bill, 35 P.2d 645, 140 Cal.App. 389.

Iowa.—State v. Bailey, 209 N.W. 403, 202 Iowa 146.

Mont.—State v. Brennan, 300 P. 273, 89 Mont. 479—State v. Vallie, 268 P. 493, 82 Mont. 456.

Okla.—Carr v. State, 220 P. 479, 25 Okl.Cr. 289.

49 C.J. p 1051 note 54 [a].

22. Ill.—People ex rel. Courtney v. Prystalski, 192 N.E. 908, 358 Ill. 198.

31 C.J. p 721 note 59 [a] (1), (2)—49 C.J. p 1051 note 54.

23. Fla.—Simpson v. State, 176 So. 515, 129 Fla. 127.

24. N.Y.—People v. Lee Foon, 9 N.E.2d 847, 275 N.Y. 229.

25. Or.—State v. He Quan Chan, 232 P. 619, 113 Or. 168.

26. Philippine.—U. S. v. Tan Seng Ki, 28 Philippine 54.

49 C.J. p 1052 note 74.

in the absence of proof that heroin is one of the elements of such substances.<sup>27</sup> Under an indictment charging illegal importation, accused cannot be convicted of illegal possession with which he is not charged and which is not an element of the crime of importation.<sup>28</sup>

On the other hand, if the evidence establishes the gist of the offense, it is sufficient.<sup>29</sup> Thus, a charge of a sale of morphine, a derivative of opium, is sustained by proof of sale of morphine sulphate, a substance which is a subdivision of morphine.<sup>30</sup> Where the proof shows that a purchaser of a narcotic was known by the name alleged in the indictment, there is no variance notwithstanding it was not the true name of the purchaser.<sup>31</sup> Where neither time nor place is an essential element of illegal possession, a variation in the allegation and proof touching time and place is not material.<sup>32</sup> A variance between the indictment and the proof as to the exact quantity of the narcotic sold has been held immaterial.<sup>33</sup> Where a statute, by different sections, makes it a distinct offense to smoke opium and to possess paraphernalia for smoking, a conviction for possession of the paraphernalia will be sustained notwithstanding the proof showed that defendant was smoking opium.<sup>34</sup> Under an indictment containing two counts, one charging possession of a narcotic and the other charging a sale thereof, evidence of the sale, as well as the possession, of the narcotic is admissible.<sup>35</sup>

### c. Evidence

- (1) Presumptions and burden of proof
- (2) Admissibility
- (3) Weight and sufficiency

#### (1) Presumptions and Burden of Proof

General rules govern as to presumptions and burden of proof in a prosecution for violation of a criminal statute relating to poisons, except as they may be varied by any presumptions created by the statutes defining the particular offense.

General rules apply as to the burden of proof,<sup>36</sup> and presumptions,<sup>37</sup> in cases of this character, except as they may be varied by the presumptions, if any, created by the statutes defining the particular offense, such, for example, as that possession shall be prima facie evidence of an intent to sell or dispense,<sup>38</sup> or shall be presumptive evidence of a violation of the act,<sup>39</sup> or of unlawful use;<sup>40</sup> or that a sale was not made to one of an excepted class<sup>41</sup> or on a proper prescription.<sup>42</sup> The finding of a narcotic among defendant's effects will support an inference,<sup>43</sup> but does not give rise to a conclusive presumption<sup>44</sup> that it was there with defendant's knowledge.

Where the statute relating to poisons or narcotic drugs contains exceptions, a defendant desiring to avail himself of any of them by way of defense must show that he comes within its intent.<sup>45</sup> Thus, the burden is on one accused of illegal possession to show that his possession was lawful under a proviso

27. N.Y.—*People v. Donnelly*, 159 N. Y.S. 690, 173 App.Div. 713.

28. Philippine.—*U. S. v. Jose*, 34 Philippine 840.

29. U.S.—*McIntosh v. U. S.*, C.C.A. Ill., 1 F.2d 427.

#### Variance held not fatal

Where information charged felonious possession of a "preparation of cocaine," proof of felonious possession of "cocaine" was held not fatal variance, since statute penalized possession of either and defendant was not misled.—*People v. Bill*, 35 P. 2d 645, 140 Cal.App. 389.

#### Falsification of narcotic dispensation record

Where defendant was charged with falsifying his narcotic dispensation record, all that the government was required to do was to prove that the record was false.—*Mitchell v. U. S.*, C.C.A.Okl., 143 F.2d 953.

#### Proof of quantity held unnecessary

Where defendant was charged with unlawfully possessing flowering tops and leaves of Indian hemp, commonly known as marijuana, in violation of a particular statute, and not with unlawful possession of any extract, tincture, or other narcotic prepara-

tion as mentioned in another statute, the state was not required to prove that the items found and testified to contained two grains or more of marijuana to the avoirdupois ounce.—*People v. Oliver*, 152 P.2d 329, 66 Cal.App.2d 431.

30. Okl.—*Jefferson v. State*, 244 P. 460, 34 Okl.Cr. 56.

31. Ill.—*Chicago v. Montgomery*, 191 Ill.App. 558.

32. Philippine.—*U. S. v. Tan Coy*, 36 Philippine 974.

33. Ga.—*Renfroe v. State*, 187 S.E. 623, 54 Ga.App. 215.

34. Philippine.—*U. S. v. Go Tiao*, 11 Philippine 133.

35. Tex.—*Medina v. State*, 193 S.W. 2d 196, 149 Tex.Cr. 249.

#### 36. Possession

In a prosecution for unlawful possession, the burden of proving possession by accused rests on the prosecution.—*State v. Helmer*, 8 P.2d 412, 166 Wash. 602.

#### Shifting of burden

In prosecution for violating statute making it a misdemeanor to lay out poison except in a safe place on one's own premises, burden never shifts to defendant to show that poi-

son was placed in a safe place.—*Voegele v. State*, 133 P.2d 219, 75 Okl. Cr. 420.

37. Philippine.—*U. S. v. Sy Quingco*, 16 Philippine 416.

49 C.J. p 1053 note 90.

38. Wash.—*State v. Curtis*, 220 P. 769, 127 Wash. 278.

49 C.J. p 1053 note 92.

39. Mont.—*State v. Charlie Mun*, 246 P. 257, 76 Mont. 278.

N.C.—*State v. Ross*, 83 S.E. 307, 168 N.C. 130.

40. Philippine.—*U. S. v. Gan Lian Po*, 34 Philippine 830.

41. Miss.—*Miller v. State*, 63 So. 269, 105 Miss. 777.

42. Ill.—*People v. Montgomery*, 111 N.E. 578, 271 Ill. 580.

43. Cal.—*People v. Gory*, 170 P.2d 433, 28 Cal.2d 450—*People v. Cases*, 175 P.2d 19, 77 Cal.App.2d 255.

44. Cal.—*People v. Gory*, 170 P.2d 433, 28 Cal.2d 450.

45. Fla.—*Cortina v. State*, 134 So. 838, 135 Fla. 268.

Utah.—*Corpus Juris* quoted in *State v. Navaro*, 26 P.2d 955, 960, 83 Utah 6.

49 C.J. p 1053 note 93.

or exception of the statute under which he is being prosecuted,<sup>46</sup> or, where the animus possidendi is an element of the offense, to show honest ignorance of the fact of possession.<sup>47</sup> So, an accused who defends on the ground, made available by an exception in the statute, that possession or a sale was on a proper prescription,<sup>48</sup> or that a sale was made to a licensed physician<sup>49</sup> or for a legitimate purpose,<sup>50</sup> or a physician, who defends under a like exception, on the ground that a narcotic drug was administered by him in good faith,<sup>51</sup> has the burden of proving such matter of defense.

### (2) Admissibility

The admissibility of evidence in prosecutions for violations of statutes relating to poisons is governed by the rules applicable to the admissibility of evidence in criminal prosecutions generally.

General rules apply as to the admissibility of evidence.<sup>52</sup> Hence, under rules touching the competency of expert witnesses and the admissibility of opinion evidence, expert testimony is admissible<sup>53</sup> to show the character<sup>54</sup> or the effect of a drug,<sup>55</sup> or whether a certain use thereof is legitimate or proper medical practice;<sup>56</sup> and, in a prosecution for sale of a narcotic drug, proof of other sales

has been held admissible<sup>57</sup> to show intent,<sup>58</sup> but not where the guilty intent is proved by proving the commission of the act itself.<sup>59</sup> A confession,<sup>60</sup> an offer to plead guilty,<sup>61</sup> or an admission by a defendant<sup>62</sup> is admissible against him. Evidence has been held admissible to show the purpose of the possession of a narcotic drug,<sup>63</sup> and to show that narcotics found and seized were put up in packages such as are used by sellers of the drug.<sup>64</sup> Evidence is sometimes admissible to show the character and reputation of a place where narcotics were found<sup>65</sup> or delivered.<sup>66</sup> However, where accused is charged with one specific transaction, the illegal possession of a described quantity of narcotic drugs, not in the nature of a continuing offense, it has been held that proof of the character and general reputation of the place where the narcotics were found is not admissible.<sup>67</sup>

### (3) Weight and Sufficiency

As in other criminal cases, the evidence in a prosecution for violation of a statute relating to poisons must be sufficient to show the accused's guilt beyond a reasonable doubt.

The evidence, as in other criminal cases, must show the guilt of accused beyond a reasonable

46. Utah.—*Corpus Juris* quoted in *State v. Navaro*, 26 P.2d 955, 960, 83 Utah 6.

Wash.—*State v. Helmer*, 8 P.2d 412, 166 Wash. 602.  
49 C.J. p 1053 note 99.

47. Utah.—*Corpus Juris* quoted in *State v. Navaro*, 26 P.2d 955, 960, 83 Utah 6.  
49 C.J. p 1053 note 1.

48. Cal.—*People v. Harmon*, 200 P. 2d 32, 89 Cal.App.2d 55—*People v. Bill*, 35 P.2d 645, 140 Cal.App. 389.  
Mont.—*State v. Brennan*, 300 P. 273, 89 Mont. 479.

Utah.—*State v. Navaro*, 26 P.2d 955, 83 Utah 6.  
49 C.J. p 1053 note 2.

#### Prescription obtained by misrepresentations

One acquiring possession of narcotics on prescription of physician by misrepresenting his condition is presumptively guilty of unlawful possession, and, in prosecution for unlawfully possessing narcotics, burden is on him to show by reasonable and credible explanation his lawful possession thereof.—*State v. Strode*, 42 P.2d 603, 141 Kan. 721.

49. Miss.—*Miller v. State*, 63 So. 269, 105 Miss. 777.

50. Ky.—*Commonwealth v. Gabhart*, 169 S.W. 514, 160 Ky. 32—*Katzman v. Commonwealth*, 130 S.W. 990, 140 Ky. 124, 140 Am.S.R. 359, 30 L.R.A.,N.S., 519.

51. Okl.—*Huffman v. State*, 230 P. 272, 28 Okl.Cr. 296.

52. Va.—*Henderson v. Commonwealth*, 107 S.E. 700, 130 Va. 761.  
49 C.J. p 1053 note 7.

#### Evidence held admissible

##### (1) In general.

Cal.—*People v. Gin Hauk Jue*, App., 208 P.2d 717, 93 Cal.2d 72—*People v. Albright*, 196 P.2d 800, 87 Cal. App.2d 222.

Mont.—*State v. Neidamier*, 37 P.2d 670, 98 Mont. 124.

(2) Packages or bag containing narcotics.—*People v. Salo*, 167 P.2d 269, 73 Cal.App.2d 685—*People v. Bill*, 35 P.2d 645, 140 Cal.App. 389.

(3) Testimony as to defendant's possession of a syringe and hypodermic needle.—*People v. Noland*, 143 P.2d 86, 61 Cal.App.2d 364.

(4) Testimony of federal agent respecting recent smoking of opium pipe, method of preparation, and odor thereof in apartment.—*State v. Williams*, 153 A. 475, 9 N.J.Misc. 106.

#### Evidence held inadmissible

Tex.—*Martinez v. State*, 134 S.W.2d 276, 138 Tex.Cr. 51.

Wash.—*State v. Harkness*, 96 P.2d 460, 1 Wash.2d 530.

53. Ga.—*Boswell v. State*, 39 S.E. 897, 114 Ga. 40.  
49 C.J. p 1054 note 8.

54. Ga.—*Boswell v. State*, supra.

55. Wash.—*State v. Smith*, 174 P. 9, 103 Wash. 267.

56. Ky.—*Commonwealth v. Gabhart*, 169 S.W. 514, 160 Ky. 32—*Katzman v. Commonwealth*, 130 S.W. 990, 140 Ky. 124, 140 Am.S.R. 359, 30 L.R.A.,N.S., 519.

57. Minn.—*State v. Whipple*, 173 N. W. 801, 143 Minn. 403.  
49 C.J. p 1054 note 12.

58. Wash.—*State v. Ball*, 279 P. 735, 153 Wash. 316.  
49 C.J. p 1054 note 13.

59. Wash.—*State v. Smith*, 174 P. 9, 103 Wash. 267.

60. Philippine.—U. S. v. Lio Team, 23 Philippine 64.  
Confessions generally see *Criminal Law* §§ 816-843.

61. Wash.—*State v. Ball*, 279 P. 735, 153 Wash. 316.  
49 C.J. p 1054 note 16.

62. Philippine.—U. S. v. Ching Po, 23 Philippine 578.  
49 C.J. p 1054 note 17.

63. Ark.—*Starr v. State*, 265 S.W. 54, 165 Ark. 511.

64. Va.—*Henderson v. Commonwealth*, 107 S.E. 700, 130 Va. 761.

65. Philippine.—U. S. v. Sy Toon, 36 Philippine 738.  
49 C.J. p 1054 note 18.

66. Wash.—*State v. Shimoaka*, 251 P. 290, 141 Wash. 337.

67. Okl.—*Hurst v. State*, 219 P. 151, 25 Okl.Cr. 102.

doubt,<sup>68</sup> and its weight and sufficiency are to be | tested by general rules.<sup>69</sup> A reasonable doubt as

68. Wash.—State v. Helmer, 8 P.2d 412, 166 Wash. 602.

49 C.J. p 1054 note 22.

#### Proof held complete

Proof of unlawful sale of narcotic drugs beyond reasonable doubt completely proved crime, there being no element of intent involved.—State v. Linder, 287 P. 16, 156 Wash. 452.

#### Corpus delicti

In prosecution for possession of narcotics, defendant's connection with the narcotics need not be proved in order to establish the corpus delicti.—People v. Chan Chaun, 107 P. 2d 455, 41 Cal.App.2d 586.

69. Ga.—Butler v. State, 81 S.E. 370, 14 Ga.App. 446.

49 C.J. p 1054 note 23.

#### Evidence held sufficient

(1) To warrant conviction in general.

U.S.—Chan Chaun v. U. S., C.C.A. Cal., 144 F.2d 281—Stobble v. U. S., C.C.A.III., 91 F.2d 69—Ching Wan v. U. S., C.C.A. Cal., 35 F.2d 665.

Cal.—People v. Watkins, App., 214 P. 2d 414—People v. Gregoris, 161 P.2d 568, 70 Cal.App.2d 716—People v. Smith, 129 P.2d 732, 54 Cal.App. 2d 587—People v. Moreno, 79 P. 2d 390, 26 Cal.App.2d 334—People v. Contreras, 73 P.2d 647, 23 Cal. App.2d 547—People v. Terry, 63 P. 2d 307, 18 Cal.App.2d 199—People v. Rucker, 8 P.2d 938, 121 Cal.App. 361.

N.M.—State v. Walker, 223 P.2d 943, 54 N.M. 302.

(2) To sustain conviction as to male defendant but not as to female defendant.—Williams v. U. S., C.A. Tex., 182 F.2d 613, certiorari denied 71 S.Ct. 88.

(3) To show illegal possession.

Ala.—Perez v. State, 40 So.2d 344, 252 Ala. 242.

Cal.—People v. Rumley, App., 222 P. 2d 913—People v. Pascale, App., 221 P.2d 177—People v. Torres, App., 219 P.2d 480—People v. Agajanian, App., 218 P.2d 114—People v. Hardeman, 210 P.2d 283, 94 Cal. App.2d 51—People v. Brown, 206 P.2d 1095, 92 Cal.App.2d 360—People v. Harmon, 200 P.2d 32, 89 Cal. App.2d 55—People v. Physioc, 195 P.2d 23, 86 Cal.App.2d 650—People v. Shapiro, 194 P.2d 731, 85 Cal. App.2d 253—People v. Graves, 191 P.2d 32, 84 Cal.App.2d 531—People v. Hoff, 190 P.2d 616, 84 Cal.App. 2d 398—People v. Carlton, 189 P. 2d 299, 83 Cal.App.2d 475—People v. Cases, 175 P.2d 19, 77 Cal.App. 2d 255—People v. Salo, 167 P.2d 269, 73 Cal.App.2d 685—People v. Bassett, 156 P.2d 457, 68 Cal.App. 2d 241—People v. Sweeney, 153 P.2d 371, 66 Cal.App.2d 855—People v. Seely, 152 P.2d 454, 66 Cal.

App.2d 408—People v. Oliver, 152 P.2d 329, 66 Cal.App.2d 431—People v. Noland, 143 P.2d 86, 61 Cal. App.2d 364—People v. Ng King, 140 P.2d 426, 60 Cal.App.2d 239—People v. Terrazas, 108 P.2d 680, 42 Cal.App.2d 281—People v. Wong Fun, 103 P.2d 774, 39 Cal.App.2d 211—People v. Noland, 86 P.2d 863, 30 Cal.App.2d 386—People v. Rodrigues, 77 P.2d 503, 25 Cal.App.2d 393—People v. Hooper, 61 P.2d 370, 16 Cal.App.2d 704—People v. Gallagher, 55 P.2d 889, 12 Cal.App. 2d 434—People v. Torres, 43 P.2d 374, 5 Cal.App.2d 580—People v. Quong, 42 P.2d 386, 5 Cal.App.2d 137—People v. Bill, 35 P.2d 645, 140 Cal.App. 389—People v. Marquis, 34 P.2d 1056, 140 Cal.App. 72—People v. Sinclair, 19 P.2d 23, 129 Cal.App. 320—People v. Belli, 15 P.2d 809, 137 Cal.App. 269—People v. Turco, 285 P. 349, 104 Cal.App. 59.

Miss.—Harris v. State, 175 So. 342, 179 Miss. 38.

Nev.—Terrano v. State, 91 P.2d 67, 59 Nev. 247.

N.Y.—People v. Van Bramer, 257 N. Y.S. 99, 235 App.Div. 287, affirmed 185 N.E. 714, 261 N.Y. 505.

Okl.—Griffin v. State, 46 P.2d 382, 57 Okl.Cr. 176—Reagor v. State, 299 P. 516, 51 Okl.Cr. 66.

Tex.—Pulley v. State, Cr., 217 S.W. 2d 855—Lufkin v. State, 164 S.W. 2d 709, 144 Tex.Cr. 501—Carrizal v. State, 134 S.W.2d 287, 138 Tex. Cr. 103—Anderson v. State, 131 S.W.2d 961, 137 Tex.Cr. 461—Hernandez v. State, 129 S.W.2d 301, 137 Tex.Cr. 343—Ramirez v. State, 125 S.W.2d 597, 135 Tex.Cr. 442—Grove v. State, 51 S.W.2d 316, 121 Tex.Cr. 477.

Utah.—State v. Franco, 289 P. 100, 76 Utah 202.

Wash.—State v. Helmer, 8 P.2d 412, 166 Wash. 602.

49 C.J. p 1054 note 23 [a] (1).

(4) To show unlawful sale.

U.S.—U. S. v. Marzano, C.C.A.N.Y., 149 F.2d 923.

Cal.—People v. Johnson, App., 222 P. 2d 58—People v. Gelardi, 175 P. 2d 855, 79 Cal.App.2d 467—People v. Grijalva, 121 P.2d 32, 48 Cal. App.2d 690—People v. Rosales, 32 P.2d 652, 128 Cal.App. 473—People v. Spinoza, 30 P.2d 527, 137 Cal. App. 346—People v. Kinsley, 5 P.2d 938, 118 Cal.App. 593.

Ill.—People v. Guagliata, 200 N.E. 169, 362 Ill. 427.

Ind.—Smith v. State, 13 N.E.2d 562, 214 Ind. 169, rehearing denied 14 N.E.2d 1017, 214 Ind. 169.

Mont.—State v. Neidamier, 37 P.2d 670, 98 Mont. 124.

49 C.J. p 1054 note 23 [a] (11).

(5) To show unlawful possession and sale.—Commonwealth v. Eng

Chung, 28 A.2d 719, 150 Pa.Super. 445.

(6) To show unlawful possession and transportation.—People v. Cuoco, 193 P.2d 86, 85 Cal.App.2d 448—People v. Gibson, 149 P.2d 25, 64 Cal. App.2d 537—People v. Salas, 61 P.2d 771, 17 Cal.App.2d 75.

(7) To sustain conviction for obtaining, or attempting to obtain, narcotics by fraud, deceit, or misrepresentation.

Cal.—People v. Henry, 195 P.2d 478, 86 Cal.App.2d 785.

Ga.—Maddox v. State, 13 S.E.2d 113, 65 Ga.App. 15.

Nev.—State v. Logan, 83 P.2d 1035, 59 Nev. 24.

(8) To show defendant's knowledge of presence of narcotic.—People v. Carlton, 189 P.2d 299, 83 Cal. App.2d 475—People v. Johnston, 166 P.2d 638, 73 Cal.App.2d 488.

(9) To identify package or container of narcotics.

Cal.—People v. Smith, 129 P.2d 732, 52 Cal.App.2d 587.

Tex.—Lufkin v. State, 164 S.W.2d 709, 144 Tex.Cr. 501.

(10) To show nature of substance possessed by defendant.

Cal.—People v. Brown, 206 P.2d 1095, 92 Cal.App.2d 360.

Mont.—State v. Mah Sam Hing, 295 P. 1014, 89 Mont. 178.

(11) To show lack of good faith.—Smith v. State, 13 N.E.2d 562, 214 Ind. 169, rehearing denied 14 N.E. 2d 1017, 214 Ind. 169.

#### Evidence held insufficient

(1) To support conviction generally.

U.S.—Symons v. U. S., C.A. Cal., 178 F.2d 615—Ching Wan v. U. S., C.C. A. Cal., 35 F.2d 665.

Mont.—State v. Hood, 298 P. 354, 89 Mont. 432.

Okl.—Payne v. State, 283 P. 1030, 45 Okl.Cr. 432.

Tex.—Boyd v. State, 39 S.W.2d 55, 118 Tex.Cr. 532.

(2) To establish the corpus delicti.—People v. McDaniel, 140 P.2d 88, 59 Cal.App.2d 672.

(3) To sustain conviction of uttering a forged prescription for narcotic drugs.—Beasley v. State, 30 So.2d 379, 158 Fla. 824.

(4) To establish defendant's knowledge of presence of marijuana cigarettes in his automobile.—People v. Bledsoe, 171 P.2d 950, 75 Cal.App. 2d 862.

(5) To establish unlawful possession of a hypodermic syringe.—People, on Complaint of Burke, v. Steinberg, 73 N.Y.S.2d 475, 190 Misc. 413.

#### Admission

Defendant, who admitted that cigarettes found on him contained mari-

to the sufficiency of the evidence to establish guilt must be resolved in favor of accused.<sup>70</sup> Circumstantial<sup>71</sup> or presumptive<sup>72</sup> evidence, or evidence sufficient under the statute to establish a prima facie case,<sup>73</sup> may be sufficient to sustain a conviction. Guilty knowledge and intent to violate the law may be shown by the facts and circumstances of the case,<sup>74</sup> including the conduct of defendant and any false or misleading statements which he may have made to the arresting officers or others with relation to the material facts.<sup>75</sup> It has been held that the mere possession of a narcotic constitutes substantial evidence to sustain a finding that the possessor of the narcotic knew its nature.<sup>76</sup>

There may be a rebuttal of a presumptive<sup>77</sup> or prima facie<sup>78</sup> case, but it must be of all the possible elements or conditions under which the prima facie case may arise.<sup>79</sup> A defense that accused had no knowledge of the presence of the drug in his possession merely creates a conflict with a prima facie case made out by the prosecution showing possession.<sup>80</sup> While proof of possession of a prohibited drug may require accused to go forward with the evidence to the extent of creating in the minds of

the jury a reasonable doubt as to whether or not he had unlawfully acquired possession of the drug, if that is his defense rather than denial of possession of the drug,<sup>81</sup> he is not required to go to the extent of proving beyond a reasonable doubt that he lawfully acquired possession of the drug.<sup>82</sup>

#### d. Trial and Verdict

The trial of a prosecution for violation of statutes relating to poisons is governed by the usual rules in criminal prosecutions, as for example, with respect to such matters as instructions and the province of the court and the jury.

The province of the court and jury in a prosecution for an offense relating to poisons is governed by the rules of the particular jurisdiction as to the functions of the judge and jury in criminal cases generally.<sup>83</sup> Questions of fact are to be tried by the jury,<sup>84</sup> who are the sole judges of the weight to be given the evidence, where it is admissible and sufficient to raise an issue,<sup>85</sup> and of the weight to be given to the testimony of witnesses.<sup>86</sup> Thus, it is ordinarily for the jury to determine from the evidence the question of defendant's guilt in a prosecution for illegal possession or sale of a

juana, admitted that cigarettes contained a narcotic referred to in statute making illegal possession of certain narcotics an offense.—*People v. Savage*, 148 P.2d 654, 64 Cal.App.2d 314.

#### Probability of testimony

In prosecution for possession of prohibited drugs, testimony of federal narcotic agents was held not so improbable as to be unworthy of belief under evidence showing physical conditions preceding defendant's arrest.—*State v. Mah Sam Hing*, 295 P. 1014, 89 Mont. 178.

70. *Philippine—U. S. v. Sy Quingco*, 16 Philippine 416.  
49 C.J. p 1055 note 24.

71. *Philippine—U. S. v. Tin Masa*, 17 Philippine 463.  
49 C.J. p 1055 note 25.

72. *Mont.—State v. Charlie Mun*, 246 P. 257, 76 Mont. 278.  
49 C.J. p 1055 note 26.

73. *Kan.—State v. Miller*, 274 P. 245, 127 Kan. 487.  
49 C.J. p 1055 note 27.

74. *Cal.—People v. Gibson*, 149 P. 2d 25, 64 Cal.App.2d 537.

#### Character of narcotics; paraphernalia

The fact that possession of narcotics was with unlawful intent was demonstrated by the character of the narcotics found in apartment, and by presence in apartment of paraphernalia used in smoking opium.—

*People v. Chan Chaun*, 107 P.2d 455, 41 Cal.App.2d 586.

75. *Cal.—People v. Gibson*, 149 P. 2d 25, 64 Cal.App.2d 537.

#### Contradictory statements by several defendants

In prosecution of several defendants for illegal possession of narcotic, guilty knowledge may be inferred from false and contradictory statements made by defendants separately to arresting officers.—*People v. Torres*, Cal.App., 219 P.2d 480.

76. *Cal.—People v. Physioc*, 195 P. 2d 23, 86 Cal.App.2d 650—*People v. Carlton*, 189 P.2d 299, 81 Cal.App. 2d 475.

77. *Philippine—U. S. v. Gan Lian Po*, 34 Philippine 880.  
49 C.J. p 1055 note 28.

78. *Philippine—U. S. v. Bandoc*, 23 Philippine 14.  
Va.—*Henderson v. Commonwealth*, 107 S.E. 700, 130 Va. 761.

79. *Kan.—State v. Miller*, 274 P. 245, 127 Kan. 487.  
49 C.J. p 1055 note 30.

80. *Cal.—People v. Sweeney*, 153 P. 2d 371, 66 Cal.App.2d 855—*People v. Randolph*, 23 P.2d 777, 133 Cal. App. 192.

81. *Wash.—State v. Helmer*, 8 P. 2d 412, 166 Wash. 602.

82. *Wash.—State v. Helmer*, supra.

83. *Cal.—People v. Gibson*, 149 P. 2d 25, 64 Cal.App.2d 537.

Pa.—*Commonwealth v. Jones*, Quar. Sess., 46 Dauph.Co. 300.

84. *Cal.—People v. Ford*, 253 P. 966, 81 Cal.App. 449.

49 C.J. p 1055 note 34.

#### Questions held for jury

(1) Identity of packages.

U.S.—*Roush v. U. S.*, C.C.A.Fla., 47 F.2d 444.

Cal.—*People v. Belli*, 15 P.2d 809, 127 Cal.App. 269.

(2) Whether defendant threw package.—*People v. Salas*, 61 P.2d 771, 17 Cal.App.2d 75—*People v. Belli*, supra.

(3) Defendant's knowledge of the presence of narcotic.—*People v. Gory*, 170 P.2d 433, 28 Cal.2d 450—*People v. Quong*, 42 P.2d 386, 5 Cal. App.2d 137.

(4) Whether cigarettes seized in accused's room were a product of marijuana plant.—*State v. Shotts*, 22 So.2d 209, 207 La. 398, certiorari denied 68 S.Ct. 38, 326 U.S. 730, 90 L. Ed. 434.

(5) Whether poison was laid in a safe place in accordance with statute.—*Voegeli v. State*, 133 P.2d 219, 75 Okl.Cr. 420.

85. *Cal.—People v. Salo*, 167 P.2d 269, 73 Cal.App.2d 685—*People v. Gibson*, 149 P.2d 25, 64 Cal.App.2d 537.

86. *Cal.—People v. Rumley*, App. 222 P.2d 913—*People v. Gibson*, 149 P.2d 25, 64 Cal.App.2d 537.

49 C.J. p 1055 note 36.

narcotic or habit-forming drug;<sup>87</sup> to determine whether possession of a narcotic was obtained on a prescription for personal use;<sup>88</sup> what constitutes "proper practice" in prescribing narcotics;<sup>89</sup> whether a physician believed drugs obviously were needed in the treatment of persons prescribed for;<sup>90</sup> whether a sufficient degree of care was used by a druggist selling poison to satisfy himself that it was intended for legitimate purposes;<sup>91</sup> and whether a drug was arranged in a form suitable for sale within the meaning of a statute.<sup>92</sup> In the absence of a jury, the weight of the evidence is a matter for determination by the trier of facts.<sup>93</sup> Where the information charges accused in two counts, one for unlawful possession of narcotics with intent to sell and dispose, and the other with unlawfully acquiring the narcotic, a dismissal of the second count, unlawful acquisition, does not require a directed verdict of not guilty on the first.<sup>94</sup>

**Instructions.** The court should instruct the jury on the issue of fact presented in such manner as will enable them to determine, in view of the defense made by accused, whether or not there has been a violation of the statute under which the prosecution is being conducted.<sup>95</sup> Where the defense is based on an exception in the statute, the instructions should correctly present the exception,<sup>96</sup> and an instruction which excludes from consideration such an exception, which the jury might

have found to exist, is erroneous,<sup>97</sup> notwithstanding other instructions cover the exception where they are not connected and harmonized with the former instruction.<sup>98</sup> The instructions should correctly state the evidence<sup>99</sup> and also the law as to the fine and punishment which may be assessed by the jury.<sup>1</sup> Where there is a constitutional prohibition against commenting on the evidence, the court should not instruct the jury to view the testimony of any class of witnesses with caution or suspicion.<sup>2</sup>

Where the statute makes possession *prima facie* evidence of intent, it is proper to give instructions as to such presumption,<sup>3</sup> and generally instructions conforming to the statute are proper.<sup>4</sup> Notwithstanding the instructions as a whole are sufficient to inform the jury in a general way that defendant's knowledge of the presence of a narcotic in his effects must be shown, the circumstances may be such as to entitle him to a specific instruction indicating the necessity of such knowledge,<sup>5</sup> and it has been held error to read, and subsequently withdraw, an instruction to such effect designed to clarify the law in such a situation.<sup>6</sup>

**Verdict.** A verdict will ordinarily be liberally construed in the light of the issue made by the pleading.<sup>7</sup> Under an information charging unlawful possession of a narcotic with intent to sell, furnish, or dispose of it, a verdict of "guilty of pos-

87. U.S.—U. S. v. Frank, C.C.A.Pa., 82 F.2d 315.

Cal.—People v. Gin Shue, 137 P.2d 742, 58 Cal.App.2d 625—People v. Chan Chaun, 107 P.2d 455, 41 Cal. App.2d 536.

D.C.—Killian v. U. S., 29 F.2d 455, 58 App.D.C. 255.

N.J.—State v. Norwood, 98 A. 683, 87 N.J.Law 82—State v. Williams, 153 A. 475, 9 N.J.Misc. 106.

Wash.—State v. Wilson, 47 P.2d 21, 182 Wash. 319—State v. Sherwood, 6 P.2d 595, 166 Wash. 160.

88. Ark.—Starr v. State, 265 S.W. 54, 165 Ark. 511.

89. Okl.—Huffman v. State, 230 P. 272, 28 Okl.Cr. 296.  
49 C.J. p 1055 note 39.

90. Mass.—Commonwealth v. Noble, 119 N.E. 510, 230 Mass. 83, L.R.A. 1918C 667.

91. Ky.—Katzman v. Commonwealth, 130 S.W. 990, 140 Ky. 124, 140 Am.S.R. 359, 30 L.R.A.,N.S., 519.

92. Nev.—State v. Muldoon, 274 P. 922, 51 Nev. 322.

93. Cal.—People v. Brown, 206 P. 2d 1095, 92 Cal.App.2d 360.

94. Wash.—State v. Wilson, 47 P. 2d 21, 182 Wash. 319.

95. Ky.—Commonwealth v. Gabhart, 169 S.W. 514, 160 Ky. 32.  
49 C.J. p 1055 note 43.

**Instructions held not erroneous**  
Tex.—Hernandez v. State, 129 S.W. 2d 301, 137 Tex.Cr. 343—Valdez v. State, 117 S.W.2d 459, 135 Tex. Cr. 201.

Wash.—State v. Harkness, 96 P.2d 460, 1 Wash.2d 530.

**Instructions held properly refused**  
Cal.—People v. Noland, 143 P.2d 86, 61 Cal.App.2d 364.

Wash.—State v. Harkness, 96 P.2d 460, 1 Wash.2d 530.

#### Good faith

In prosecution of physician for unlawful sale of morphine, instructions that, where physician attends patient, it is presumed that treatment is given in good faith, that good faith means good intentions and honest exercise of best judgment as to patient's need, and that errors of judgment were not evidence of lack of good faith, sufficiently defined "good faith," as used in statute defining the offense, if any definition were necessary, as meaning without unlawful intention.—Smith v. State, 13 N.E.2d 562, 214 Ind. 169, rehearing denied 14 N.E.2d 1017, 214 Ind. 169.

96. Okl.—Huffman v. State, 230 P. 272, 28 Okl.Cr. 296.

49 C.J. p 1056 note 44.

97. Ark.—Starr v. State, 265 S.W. 54, 165 Ark. 511.

Tex.—Fyke v. State, 184 S.W. 197, 79 Tex.Cr. 247.

98. Ark.—Starr v. State, 265 S.W. 54, 165 Ark. 511.

99. N.Y.—People v. Davico, 156 N.Y. S. 399, 170 App.Div. 337.

Statement and review of evidence in instructions in criminal cases generally see Criminal Law § 1216.

1. Mont.—State v. Mark, 220 P. 94, 69 Mont. 18.

49 C.J. p 1056 note 50.

2. Wash.—State v. Smith, 174 P. 9, 103 Wash. 267.

49 C.J. p 1056 note 51.

3. Kan.—State v. Miller, 274 P. 245, 127 Kan. 437.

49 C.J. p 1056 note 47.

4. Nev.—State v. Muldoon, 274 P. 922, 51 Nev. 322.

49 C.J. p 1056 note 48.

5. Cal.—People v. Gory, 170 P.2d 433, 28 Cal.2d 450.

6. Cal.—People v. Gory, *supra*.

7. Wash.—State v. Lee, 220 P. 753, 127 Wash. 377.

session without intent to sell, furnish or dispose of same" is an acquittal.<sup>8</sup>

### e. Sentence and Punishment

The punishment which may be meted out for violation of statutes relating to poisons depends on the terms of the provisions, and, within the limits fixed by such statutes, the particular punishment in a given case rests in the sound discretion of the trial court.

The punishment for violation of statutory provisions relating to poisons depends on the terms of the statutes of the particular jurisdiction,<sup>9</sup> and, within the range fixed by statute, is a matter within the sound discretion of the trial court.<sup>10</sup> The discretion is a wide one,<sup>11</sup> and, while its exercise, within proper bounds, ordinarily will not be disturbed,<sup>12</sup> it should not be exercised arbitrarily.<sup>13</sup> A sentence approaching the maximum is not an abuse of discretion,<sup>14</sup> nor is a sentence of imprisonment for possession of narcotics under a state law, notwithstanding prior punishment in a federal court.<sup>15</sup> Although it is the practice of the court to impose only the minimum penalty for a first offense under an antinarcotic law, the rule may be disregarded in a case where a disposition to exploit the vice is shown.<sup>16</sup> Where the statute fixes the punishment at fine or imprisonment, the sentence cannot be both fine and imprisonment.<sup>17</sup> One who has been convicted under an invalid narcotic act cannot be held in custody on the ground that he violated a prior statute on the subject, where such prior statute relates only to second offenders and he was not charged with a second offense.<sup>18</sup>

## § 8. — Sales and Labeling, Prescriptions, and Possession and Use

- a. Sales, distribution, and labeling
- b. Prescriptions
- c. Possession and use

### a. Sales, Distribution, and Labeling

The guilt or innocence of one charged with a violation of a statute regulating the sale or distribution of poison depends on whether the accused's acts were such as to bring him within the terms of the statute.

The guilt or innocence of one charged with a violation of a statute regulating the sale, giving away, or distribution of poison depends on whether, by a fair construction, the facts of the particular case bring defendant within the provisions of the statute or statutory regulation.<sup>19</sup> Thus, whether a person "sells" or is engaged in selling poison or a narcotic drug depends on whether his acts are within the terms of the statute on a reasonable construction.<sup>20</sup> By like construction it is to be determined whether one is guilty of a violation of a statute making it an offense to give away,<sup>21</sup> dispose of,<sup>22</sup> or furnish<sup>23</sup> a narcotic drug, or the means of using it.<sup>24</sup> Like principles are applicable in determining whether there has been a violation of a statute requiring the recordation of a sale of poison,<sup>25</sup> or prohibiting mislabeling or misbranding of poison.<sup>26</sup>

### b. Prescriptions

Resort must be had to the statutes of the particular jurisdiction to determine whether the issuance of a prescription for a dangerous drug, or the sale or fur-

8. Wash.—State v. Lee, *supra*.

9. Mich.—In re Moynahan, 238 N. W. 169, 255 Mich. 497.

Nev.—State v. Economy, 130 P.2d 264, 61 Nev. 394.

Okl.—Ex parte Custer, Cr., 200 P.2d 781, opinion supplemented 203 P. 2d 889.

10. Wash.—State v. Shimoaka, 251 P. 290, 141 Wash. 337.

#### Sentences held not excessive

(1) Three years.—People v. Kin-sley, 5 P.2d 938, 118 Cal.App. 593.

(2) Ten years' imprisonment on each of two indictments, the sentences to run concurrently.—Moore v. Aderhold, C.C.A.Kan., 108 F.2d 729.

11. Philippine.—U. S. v. Delgado, 41 Philippine 372.

12. Philippine.—U. S. v. Akbal, 37 Philippine 5.  
49 C.J. p 1056 note 61.

13. Philippine.—U. S. v. Lim Sing, 23 Philippine 424.

14. Wash.—State v. Shimoaka, 251 P. 290, 141 Wash. 337.

15. Wash.—State v. Taylor, 253 P. 796, 142 Wash. 523.

16. Philippine.—U. S. v. Anastasio, 36 Philippine 915.  
49 C.J. p 1056 note 65.

17. Okl.—Scruggs v. State, 244 P. 838, 34 Okl.Cr. 97.

18. Nev.—Ex parte Medeiros, 64 P. 2d 346, 57 Nev. 301.

#### 19. Derivatives

Statute prohibiting sale of opium, morphine, and their derivatives has been held to extend to any derivative of drugs mentioned, including alkaloid cocaine.—State v. Mah Sam Hing, 295 P. 1014, 89 Mont. 178.

20. Ill.—See City of Chicago v. Truax Greene & Co., 192 Ill.App. 528.  
Philippine.—U. S. v. Look Chaw, 19 Philippine 343.  
49 C.J. p 1048 notes 13, 14.

21. Iowa.—State v. Korth, 217 N. W. 236, 204 Iowa 1360.  
49 C.J. p 1049 note 16.

#### Separate offense

Sale and gift of morphine are separate offenses under some statutes.—Boyd v. State, 39 S.W.2d 55, 118 Tex. Cr. 532.

22. Del.—State v. Handy, 105 A. 426, 30 Del. 224.  
49 C.J. p 1049 note 17.

23. N.Y.—People v. Davico, 156 N.Y. S. 399, 170 App.Div. 337.  
49 C.J. p 1049 note 18.

24. Philippine.—U. S. v. Co-Pinco, 10 Philippine 69.  
49 C.J. p 1049 note 19.

25. Del.—State v. Hopkins, 88 A. 473, 27 Del. 306.  
49 C.J. p 1049 note 21.

26. Cal.—Gregory v. Hecke, 238 P. 787, 73 Cal.App. 268.  
49 C.J. p 1049 note 22.

Construction and operation of labeling statutes generally see *supra* § 4.

nishing of a poison without a prescription, constitutes a criminal offense.

The statutes regulating the issuance of prescriptions for poison and narcotic and dangerous drugs contain varied provisions, and resort must be had to the statutes to determine under the facts of any given case whether the issuance of a prescription<sup>27</sup> or the sale<sup>28</sup> or furnishing<sup>29</sup> of a poison or drug without a prescription is unlawful. Under a statute permitting an exception in favor of a sale of narcotics on a written prescription, it is no defense to a prosecution against a pharmacist for an unlawful sale that the doctor telephoned to let the purchaser have the narcotic.<sup>30</sup> One who sells a poisonous drug to another without a prescription is guilty of the offense without reference to whether he is the proprietor of a drugstore or merely the employee of such proprietor.<sup>31</sup> Possession which was originally lawful because it was obtained on a valid prescription may become unlawful after the death of the patient for whom the prescription was issued.<sup>32</sup>

*Medical treatment of addicts.* Statutes making it unlawful to furnish to or prescribe narcotic and habit-forming drugs for habitual users thereof usually contain an exemption permitting the prescribing of such drugs to habitual users under treatment for addiction;<sup>33</sup> and, under these statutes it is held that, if the drug is prescribed in good faith to an addict under the professional care of the physician, and without any intent to evade the purpose of the act, there is no violation of the statute.<sup>34</sup> However, even in such cases the physician may not prescribe an amount in excess of that limited by the act as a daily treatment.<sup>35</sup>

*False prescription.* Under some statutes it is an

offense for any person, knowing a physician's prescription to have been falsely made, to present it to a druggist with intent to procure a narcotic drug;<sup>36</sup> and a drug addict has no more right to procure a narcotic by a false prescription, even though it is issued by a doctor from whom he is taking treatment, than any other person.<sup>37</sup> A prescription made in the name of a fictitious person, and unlawfully indorsed, in order to procure a narcotic drug, is a false prescription within the condemnation of the statute.<sup>38</sup> A statute of this nature, where confined by its terms to narcotic drugs, cannot be made the basis of a prosecution for obtaining a different kind of drug by the use of a false or forged prescription.<sup>39</sup>

### c. Possession and Use

In most jurisdictions the possession or use of narcotic and habit-forming drugs is unlawful except on the conditions and for the purposes specified by statute.

Under the statutes in most jurisdictions the possession or use of narcotic and habit-forming drugs is unlawful except on the conditions and for the purposes specified by the statutes.<sup>40</sup> Illegal sale and illegal possession constitute two different crimes under statutes prohibiting sale and possession of poisons or drugs.<sup>41</sup> Likewise, the provision of the Uniform Narcotic Drug Act making it an offense to obtain or to attempt to obtain a narcotic drug by fraud, deceit, misrepresentation, or subterfuge describes a crime distinct from the offense denounced by the provision of the act dealing with unlawful possession.<sup>42</sup> Merely being in possession, without a license, of opium and paraphernalia for smoking is sufficient to constitute a violation of the law.<sup>43</sup> Where the prohibitory statutes are not limited in

27. Tenn.—Hyde v. State, 174 S.W. 1127, 131 Tenn. 208.  
49 C.J. p 1049 note 23.

28. Ind.—Niswonger v. State, 102 N.E. 135, 179 Ind. 653, 46 L.R.A.N.S., 1.  
49 C.J. p 1049 note 30.

29. Minn.—State v. Whipple, 173 N.W. 801, 143 Minn. 403.  
49 C.J. p 1050 note 31.

30. Cal.—People v. Gelardi, 175 P. 2d 855, 77 Cal.App.2d 467.

31. Ga.—Oppenheim v. State, 77 S.E. 652, 12 Ga.App. 480.  
49 C.J. p 1049 note 30 [b].

32. Cal.—People v. Ard, 78 P.2d 254, 25 Cal.App.2d 630.

33. Wash.—State v. Harkness, 96 P. 2d 460, 1 Wash.2d 530.

34. Mass.—Commonwealth v. Noble,

119 N.E. 510, 230 Mass. 83, L.R.A. 1918C 667.

49 C.J. p 1050 note 34.

35. Cal.—In re Lord, 250 P. 711, 199 Cal. 773.

36. Wash.—State v. Harkness, 82 P. 2d 541, 196 Wash. 234.

37. Wash.—State v. Harkness, 96 P. 2d 460, 1 Wash.2d 530.

38. Wash.—State v. Harkness, supra—State v. Harkness, 82 P.2d 541, 196 Wash. 234.  
"Carrying a falsehood on its face, the prescription is falsely made."—State v. Harkness, 82 P.2d 541, 196 Wash. 234.

39. N.Y.—People, on Complaint of Benedetto, v. Wittpen, 75 N.Y.S.2d 670, 190 Misc. 565.

"Seconal"

Unsuccessful attempt to obtain from a pharmacist a sedative known as "seconal," which is a barbiturate

drug or preparation, by the use of a false and forged prescription, could not be prosecuted under statute prohibiting attempt to procure administration of a narcotic drug by false or forged prescription.—People, on Complaint of Benedetto, v. Wittpen, supra.

40. Cal.—People v. Rumley, App. 222 P.2d 913—People v. Barton, 119 P.2d 952, 48 Cal.App.2d 565.

La.—State v. Martin, 192 So. 694, 193 La. 1036.

Tex.—De Vine v. State, 206 S.W.2d 247, 151 Tex.Cr. 179.  
49 C.J. p 1050 note 37.

41. Philippine.—U. S. v. Look Chaw, 19 Philippine 343.  
49 C.J. p 1050 note 38.

42. La.—State v. Broadnax, 45 So. 2d 604, 216 La. 1003.

43. Philippine.—U. S. v. Uy-Kue-Beng, 12 Philippine 451.

49 C.J. p 1050 note 40.



their application to those persons who prescribe, dispense, deal in, and distribute narcotic drugs, but provide broadly that no person, unless authorized, shall possess a narcotic drug, an ordinary individual who is a possessor of a narcotic drug is amenable to the law.<sup>44</sup> Under some statutes the only perfect defense to a prosecution for possession is a valid prescription under the act.<sup>45</sup>

In general, in order to sustain a conviction for possession, the animus possidendi must be present.<sup>46</sup> In order that possession of a prohibited drug may constitute a violation of the statutes, the possession ordinarily must be immediate and exclusive, and the drug must be under the dominion and control of the person charged with possession.<sup>47</sup> However, exclusive possession need not be shown where two or more parties are jointly charged,<sup>48</sup> and, hence, one is guilty of violating a statute prohibiting the possession of narcotic drugs where such drug is found in the joint possession of him and another.<sup>49</sup>

Possession of a prohibited drug ordinarily is established when it is shown that a person has physical control thereof with intent to exercise such control, or, having had such physical control, has not

abandoned it and no other person has that possession.<sup>50</sup> The possession may be constructive, as well as actual,<sup>51</sup> and it is not indispensable to a conviction for unlawful possession to show that accused had the illegal drug on his person;<sup>52</sup> nor is possession at the very time of arrest essential.<sup>53</sup>

**Substances embraced.** Marijuana is ordinarily embraced within a statute prohibiting the possession of narcotics without a written prescription,<sup>54</sup> but, under some statutes, possession of marijuana is not a criminal offense unless it is of the specific quality and kind defined by the statute.<sup>55</sup> Some statutes prohibiting the possession of cannabis have been held to prohibit the possession of the green, growing plant and not to be limited in their application to the dried flowering or fruiting tops.<sup>56</sup>

**Possession by pharmacist or apothecary.** While a pharmacist or apothecary may lawfully possess narcotics,<sup>57</sup> such possession is ordinarily limited to the regular course of his business, that is, the dispensation of narcotics on a proper prescription of a duly licensed physician.<sup>58</sup>

**Attempt.** Under statutes making it a crime to attempt to commit an offense, it is unlawful for any

44. La.—State v. Martin, 192 So. 694, 193 La. 1036.

45. Cal.—People v. Cucco, 193 P.2d 86, 85 Cal.App.2d 448—People v. Randolph, 23 P.2d 777, 133 Cal.App. 192.

Prescriptions see *supra* subdivision b of this section.

46. Philippine.—U. S. v. Lim Poco, 25 Philippine 84.

49 C.J. p 1050 note 39.

In California

(1) Knowledge, in the sense of awareness of the prohibited drug, and as embraced within the concept of physical control with intent to exercise such control, is an essential element of the offense of possession.—People v. Gory, 170 P.2d 433, 28 Cal.2d 450—People v. Rumley, App., 222 P.2d 913—People v. Hardeman, 210 P.2d 283, 94 Cal.App.2d 51—People v. Martin, 172 P.2d 910, 76 Cal.App.2d 317—People v. Bledsoe, 171 P.2d 950, 75 Cal.App.2d 862.

(2) It has been said by some lower courts that neither intent nor knowledge is an element of this offense, and that the mere possession is a violation of the act.—People v. Cucco, 193 P.2d 86, 85 Cal.App.2d 448—People v. Sweeney, 153 P.2d 371, 66 Cal.App.2d 855—People v. Johnson, 152 P.2d 331, 66 Cal.App.2d 164—People v. Randolph, 23 P.2d 777, 133 Cal.App. 192.

(3) However, these authorities have been explained as meaning merely that knowledge of the char-

acter of the object and of the unlawfulness of possession thereof is immaterial.—People v. Gory, 170 P.2d 433, 28 Cal.2d 450—People v. Bledsoe, 171 P.2d 950, 75 Cal.App.2d 862.

47. Cal.—People v. Gory, 170 P.2d 433, 28 Cal.2d 450—People v. Johnston, 166 P.2d 633, 73 Cal.App.2d 488—People v. Bassett, 156 P.2d 457, 68 Cal.App.2d 241—People v. Sinclair, 19 P.2d 23, 129 Cal.App. 320—People v. Belli, 15 P.2d 809, 127 Cal.App. 269.

**Actual control and management**

In order to justify a conviction of unlawful possession of a prohibited drug there must be proof of actual control and management of the thing prohibited.—State v. Hood, 298 P. 354, 89 Mont. 432.

48. Cal.—People v. Rodrigues, 77 P. 2d 503, 25 Cal.App.2d 393.

49. Cal.—People v. Bill, 35 P.2d 645, 140 Cal.App. 389.

49 C.J. p 1050 note 37 [b].

50. Cal.—People v. Rumley, App., 222 P.2d 913—People v. Johnston, 166 P.2d 633, 73 Cal.App.2d 488—People v. Bassett, 156 P.2d 457, 68 Cal.App.2d 241.

51. Cal.—People v. Gallagher, 55 P. 2d 889, 12 Cal.App.2d 434.

49 C.J. p 1050 note 41.

**At least constructive possession**

In prosecution for possessing narcotic, state was bound to prove, not only that defendant had at least constructive possession of narcotic,

but that he knowingly possessed it.—People v. Martin, 172 P.2d 910, 76 Cal.App.2d 317.

52. Cal.—People v. Torres, App., 219 P.2d 480—People v. Agajanian, App., 218 P.2d 114—People v. Johnston, 166 P.2d 633, 73 Cal.App.2d 488—People v. Bassett, 156 P.2d 457, 68 Cal.App.2d 241—People v. Sinclair, 19 P.2d 23, 129 Cal.App. 320.

53. Cal.—People v. Johnston, 166 P. 2d 633, 73 Cal.App.2d 488—People v. Bassett, 156 P.2d 457, 68 Cal.App.2d 241—People v. Belli, 15 P. 2d 809, 127 Cal.App. 269.

54. Cal.—People v. Rumley, 222 P. 2d 913.

55. Ill.—People v. Sowrd, 18 N.E.2d 176, 370 Ill. 140, 119 A.L.R. 1396.

**Dried form; extraction of resin**

In order that possession of marijuana be unlawful within section of the Uniform Narcotics Drug Act defining "cannabis," it must appear that the marijuana was from the dried flowering or fruiting tops of the plant and that the resin had not been extracted.—People v. Sowrd, *supra*.

56. La.—State v. Bonoa, 136 So. 15, 172 La. 955.

Miss.—Harris v. State, 175 So. 342, 179 Miss. 38.

57. Tex.—Pulley v. State, Cr., 217 S. W.2d 855.

58. Tex.—Pulley v. State, *supra*.

person to attempt the possession which is made unlawful under the Uniform Narcotic Drug Act.<sup>59</sup>

## § 9. — Administering, or Mixing with Food or Drink

### a. In general

#### b. Criminal prosecutions

### a. In General

It is generally an offense under the statutes to administer to another, or to cause another to take, any poison or other destructive substance with intent to kill or injure.

In most, if not all, jurisdictions there are statutes making it an offense to administer to, or cause to be taken by another any poison, or other destructive substance with intent to kill or injure; and in order to constitute administering with intent to injure, under these statutes, it is not necessary that the poison be administered with the specific intent to do bodily harm, but it is sufficient if it is administered as a means for the accomplishment of another unlawful purpose.<sup>60</sup> Where one administers the poison with a malicious purpose, he may be guilty, even though ignorant of the poisonous nature of the substance.<sup>61</sup> It is not absolutely necessary that there should be an actual delivery of the poison to another.<sup>62</sup> It is immaterial whether the one taking the poison was caused to take it by being overcome by force,<sup>63</sup> or overreached by fraud,<sup>64</sup> or took it willingly to commit suicide, if furnished for that purpose,<sup>65</sup> and, where taken by another in the presence, and by direction, of accused, it is his act of administering.<sup>66</sup> Where poison is left intentionally, to be taken by another who takes it, it is administered.<sup>67</sup>

*Entering the stomach.* Administering does not take place within the statute unless some portion of

the poison actually enters the stomach of the person for whom it was intended,<sup>68</sup> but, where the poison is actually taken by the person whom accused intended to kill, there can be no question of the completion of the offense, even though the dose is insufficient.<sup>69</sup>

*Extent of injury.* When poison is administered and operates to derange the healthy organization of the system, temporarily or permanently, it is an injury within a statute making it an offense to administer poison to another with intent to injure.<sup>70</sup>

*Mixing with food or drink.* In many jurisdictions there are statutes making it a criminal offense to mingle poisons or other noxious substances with food, drink, or medicine with intent to injure or kill another,<sup>71</sup> and, under these statutes, administering forms no part of the offense,<sup>72</sup> which is complete when the mingling has taken place, coupled with the intent to injure,<sup>73</sup> even though the amount of poison or noxious substance mingled was not sufficient to cause injury.<sup>74</sup>

*What constitutes food or drink.* The word "food" as used in such statutes has been defined as any article used as food or drink by man, whether simple, mixed, or compound, including food adjuncts, such as condiments and spices.<sup>75</sup> It is not necessary that the article should then be in condition for immediate human consumption without further process.<sup>76</sup>

### b. Criminal Prosecutions

Prosecutions for administering poison, or mingling poison with food, drink, or medicine, are governed by the rules applicable in criminal cases generally.

General rules apply and govern in prosecutions for administering poison, or mingling poison with food, drink, or medicine.<sup>77</sup> It is no defense that accused, after mingling poison with food, attempted

59. La.—State v. Broadnax, 45 So. 2d 604, 216 La. 1003.

60. Mich.—People v. Edwards, 5 Mich. 22.

49 C.J. p 1057 note 82.

61. Ky.—Caywood v. Commonwealth, 13 Ky.Op. 576.

49 C.J. p 1057 note 83.

62. Fla.—Sumpter v. State, 11 Fla. 247.

49 C.J. p 1057 note 84.

63. Ohio.—Blackburn v. State, 23 Ohio St. 146.

64. Ohio.—Blackburn v. State, supra.

65. Ohio.—Blackburn v. State, supra.

66. Ohio.—Blackburn v. State, supra.

67. Tex.—Morrison v. State, 51 S.W. 358, 40 Tex.Cr. 473.

49 C.J. p 1057 note 89.

68. Fla.—Sumpter v. State, 11 Fla. 247.

49 C.J. p 1057 note 91.

69. Mass.—Commonwealth v. Kennedy, 48 N.E. 770, 170 Mass. 18.

49 C.J. p 1057 notes 92, 93.

70. Mich.—People v. Carmichael, 5 Mich. 10, 21, 71 Am.D. 769.

49 C.J. p 1058 note 95.

71. "Injury" as including "kill"

The word "injury," as used in statute punishing every person who willfully mingles any poison with any food, drink, or medicine, with intent that the poison shall be taken by any human to his injury, is broad enough to include in its scope the word

"kill."—Minter v. State, 129 P.2d 210, 75 Okl.Cr. 133.

72. Tex.—Garnet v. State, 1 Tex. App. 605, 28 Am.R. 425.

49 C.J. p 1058 note 98.

73. Tex.—Harkey v. State, 234 S.W. 221, 90 Tex.Cr. 212, 17 A.L.R. 1276.

49 C.J. p 1058 note 99.

74. Tex.—Runnels v. State, 77 S.W. 458, 45 Tex.Cr. 446.

75. Tex.—Harkey v. State, 234 S.W. 221, 90 Tex.Cr. 212, 17 A.L.R. 1276.

76. Tex.—Harkey v. State, supra.

49 C.J. p 1058 note 3.

77. The corpus delicti under these statutes consists of administering poison, or in mingling poison with food, drink, or medicine.—State v. Clark, 52 So. 691, 97 Miss. 806.

to remove it, but was prevented;<sup>78</sup> nor that a greater injury was produced than was anticipated.<sup>79</sup>

An indictment in which the charge is so laid as to bring the case precisely within the description of the offense as given in the statute, and alleging all the essential requisites that constitute it, is sufficient,<sup>80</sup> and, when this is done, other matters need not be alleged.<sup>81</sup> One who has allegedly poisoned another's food, which was not eaten, should be charged with a violation of the statute punishing one who willfully poisons food, rather than under a general statute dealing with attempts to commit crimes, where the general attempt statute by its terms is applicable only if no other provision is made by law for the punishment of an attempt.<sup>82</sup>

**Evidence.** The general rules of evidence in criminal cases apply.<sup>83</sup> The evidence must establish the fact that the substance was of the character denounced by the statute,<sup>84</sup> and was administered, or mingled in the food, drink, or medicine, by accused.<sup>85</sup> In a prosecution for administering poison to another, proof of a chemical analysis of the contents of the stomach should be adduced, if possible.<sup>86</sup>

**Questions of fact.** The intent<sup>87</sup> and guilt<sup>88</sup> of accused are questions for the jury.

**Instructions** are governed by the usual rules ap-

plicable in criminal cases.<sup>89</sup> Instructions which do not correctly present the question of intent are properly refused.<sup>90</sup>

## § 10. Offenses under Particular Federal Statutes and Prosecutions Therefor

Questions relating to criminal offenses under particular federal statutes are to be determined in the light of the statutory provisions and the facts of the case.

Questions relating to criminal offenses under particular federal statutes, and prosecutions therefor, are to be determined in the light of the language of the statutes and the particular facts of the case.<sup>91</sup> Under the Opium Poppy Control Act, 21 U.S.C.A. § 188 et seq, the production of opium poppies is prohibited except under license issued by the secretary of the treasury or his designated agent;<sup>92</sup> and the act has been held constitutional as necessary and proper for carrying into execution a treaty with foreign powers designed to eradicate the opium evil through the exercise of control over the production and distribution of raw opium.<sup>93</sup> The act is directed to the growth of opium yielding poppy plants within the United States as the source, not of an edible food product, but rather of raw opium,<sup>94</sup> and its validity does not depend on the finding of constitutional authority in congress to regulate a food product.<sup>95</sup>

78. Tex.—Harkey v. State, 234 S.W. 221, 90 Tex.Cr. 212, 17 A.L.R. 1276.

79. Mich.—People v. Carmichael, 5 Mich. 10, 71 Am.D. 769.

80. Miss.—State v. Clark, 52 So. 691, 97 Miss. 806.

49 C.J. p 1058 note 9.

81. Miss.—State v. Clark, supra.

49 C.J. p 1058 note 10.

82. Okl.—Minter v. State, 129 P.2d 210, 75 Okl.Cr. 133.

83. Evidence held admissible

Cal.—People v. Cline, 31 P.2d 1095, 138 Cal.App. 184.

84. Miss.—Osborne v. State, 1 So. 349, 64 Miss. 318.

49 C.J. p 1058 note 11.

85. Fla.—Joe v. State, 6 Fla. 591, 65 Am.D. 579.

49 C.J. p 1058 note 12.

Evidence held sufficient

Cal.—People v. Torres, 192 P.2d 45, 84 Cal.App.2d 787—People v. Cline, 31 P.2d 1095, 138 Cal.App. 184.

Mich.—People v. Mitchell, 298 N.W. 495, 298 Mich. 172.

86. Fla.—Joe v. State, 6 Fla. 591, 65 Am.D. 579.

87. Tex.—Harkey v. State, 234 S.W. 221, 90 Tex.Cr. 212, 17 A.L.R. 1276.

88. Tex.—Harkey v. State, supra.

89. Instructions held not erroneous

Cal.—People v. Cline, 31 P.2d 1095, 138 Cal.App. 184.

90. Mich.—People v. Carmichael, 5 Mich. 10, 71 Am.D. 769.

49 C.J. p 1058 note 15.

91. Marihuana Act

(1) In order to authorize conviction for making an illegal transfer of marihuana in violation of the Marihuana Tax Act, the government was not required to prove that a formal demand had been made on defendant for a written order of transfer, but it was sufficient to establish that a request for the order form was made subsequent to the transfer and that defendant had no such order form.—Hensley v. U. S., 160 F.2d 257, 82 U.S.App.D.C. 14, certiorari denied 67 S.Ct. 1305, 331 U.S. 817, 91 L.Ed. 1835, rehearing denied 67 S.Ct. 1530, 331 U.S. 867, 91 L.Ed. 1871.

(2) An indictment charging violations of Marihuana Act was not defective in that it charged that sale of the drug was not made in pursuance of a written order on a form issued in blank for that purpose "by the Commissioner of Internal Revenue", whereas the act requires that the form be issued by the secretary of treasury, in view of fact that the power to prescribe the order form

had been delegated to the commissioner of internal revenue pursuant to authority contained in the Act.—Kinnison v. U. S., 158 F.2d 403, 81 U.S.App.D.C. 312, certiorari denied 67 S.Ct. 966, 330 U.S. 834, 91 L.Ed. 1281.

92. U.S.—Stutz v. Bureau of Narcotics of Department of Treasury of U. S., D.C.Cal., 56 F.Supp. 810.

93. U.S.—Stutz v. Bureau of Narcotics of Department of Treasury of U. S., supra.

Wisdom or success of legislation

The constitutionality of Opium Poppy Control Act does not depend on the wisdom or success of such legislation as a method of discharging obligation of United States under International Opium Convention of 1912 to control production and distribution of raw opium, as long as a rationally sound basis exists for congressional determination that such legislation is appropriately related to the discharge of constitutional powers.—Stutz v. Bureau of Narcotics of Department of Treasury of U. S., supra.

94. U.S.—Stutz v. Bureau of Narcotics of Department of Treasury of U. S., supra.

95. U.S.—Stutz v. Bureau of Narcotics of Department of Treasury of U. S., supra.

## § 11. — Anti-Narcotic Act

- a. In general
- b. Validity of act and regulations thereunder
- c. Particular offenses under act
- d. Criminal prosecutions

## a. In General

The declared object of the anti-narcotic act is to provide revenue, and whatever moral effect is attained by the law is incidental to its operation as a revenue measure. The act should be construed as a whole and with a view to avoiding a conclusion of unconstitutionality.

The declared object of the federal narcotic law, commonly known as the Harrison Narcotic Act or the Harrison Anti-Narcotic Act, is to provide revenue;<sup>96</sup> and, although its purpose has been said to be to restrict the distribution of narcotics to medical purposes only,<sup>97</sup> to minimize the spread of addiction to the use of drugs,<sup>98</sup> and to accomplish a moral purpose,<sup>99</sup> whatever moral effect is attained by the law is purely incidental to its operation as a revenue measure.<sup>1</sup> Direct control of medical practice in the states is beyond the power of the federal government,<sup>2</sup> and incidental regulation of such practice by congress through a taxing act cannot extend to matters inappropriate and unnecessary to

reasonable enforcement of the measure;<sup>3</sup> hence, the act will not be construed to be a regulation of professional conduct.<sup>4</sup> In accordance with the principle that a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional,<sup>5</sup> but also to avoid grave doubts as to its constitutionality,<sup>6</sup> the act will be assumed to be a taxing measure,<sup>7</sup> since congress has no power to restrain the purchase of opiates and other drugs.<sup>8</sup>

In determining whether the statutory provisions have been violated, the original anti-narcotic act and the amendments thereto should be construed as a whole.<sup>9</sup> Those provisions of the act which regulate and restrict traffic in the outlaw drug, and which are criminal provisions, should be strictly construed.<sup>10</sup> A single sale of narcotics by a person not authorized to sell them constitutes a crime.<sup>11</sup> The act is not aimed at all purchases or sales of the specified drugs,<sup>12</sup> but at sales of such drugs in violation of the statutory requirements, enacted as aids to the enforcement of the taxes imposed by the act;<sup>13</sup> and all those persons who register and pay the taxes required of them in their several classes may lawfully purchase, sell, dispense, or distribute narcotic drugs in or from an original stamped package.<sup>14</sup>

96. U.S.—Linder v. U. S., Wash., 45 S.Ct. 446, 268 U.S. 5, 69 L.Ed. 819, 39 A.L.R. 229—Nigro v. U. S., C.C. A.Mo., 117 F.2d 624, 133 A.L.R. 1128—U. S. v. Anthony, D.C.Cal., 15 F.Supp. 553.

La.—State v. Vaccaro, 8 So.2d 299, 200 La. 476.

**Prevention of dealings without taxes**  
At least one purpose of Harrison Anti-Narcotic Act was to prevent dealing in narcotics on which no taxes had been paid.—Flowers v. U. S., C.C.A.Neb., 83 F.2d 78.

97. U.S.—Trader v. U. S., C.C.A.Pa., 260 F. 923, certiorari denied 40 S. Ct. 119, 251 U.S. 555, 64 L.Ed. 412.

98. U.S.—U. S. v. Balint, N.Y., 42 S. Ct. 301, 258 U.S. 250, 66 L.Ed. 604.

99. U.S.—U. S. v. Jin Fuey Moy, Pa., 36 S.Ct. 658, 241 U.S. 394, 60 L.Ed. 1061, Ann.Cas.1917D 854—Thompson v. U. S., Mo., 258 F. 196, 169 C.C.A. 264, certiorari denied 40 S. Ct. 57, 251 U.S. 553, 64 L.Ed. 411.

1. U.S.—Linder v. U. S., Wash., 45 S.Ct. 446, 268 U.S. 5, 69 L.Ed. 819, 39 A.L.R. 229—Nigro v. U. S., C.C. A.Mo., 7 F.2d 553.

49 C.J. p 1059 note 22.

**Regulation under guise of revenue**

The Harrison Anti-Narcotic Act is an act regulating the sale of drugs under the guise of a revenue statute.—People v. Gennaro, 26 N.Y.S.2d 336,

261 App.Div. 533, affirmed 39 N.E.2d 283, 287 N.Y. 657.

2. U.S.—Linder v. U. S., Wash., 45 S.Ct. 446, 268 U.S. 5, 69 L.Ed. 819, 39 A.L.R. 229.

49 C.J. p 1060 note 46.

3. U.S.—Linder v. U. S., supra.

4. U.S.—Linder v. U. S., supra—U. S. v. Anthony, D.C.Cal., 15 F.Supp. 553.

5. U.S.—Linder v. U. S., Wash., 45 S.Ct. 446, 268 U.S. 5, 69 L.Ed. 819, 39 A.L.R. 229—U. S. v. Anthony, D. C.Cal., 15 F.Supp. 553.

6. U.S.—Linder v. U. S., Wash., 45 S.Ct. 446, 268 U.S. 5, 69 L.Ed. 819, 39 A.L.R. 229.

7. U.S.—Nigro v. U. S., Mo., 48 S. Ct. 388, 276 U.S. 332, 341, 72 L.Ed. 600, answer conformed to, C.C.A., 27 F.2d 1019.

49 C.J. p 1060 note 43.

8. U.S.—Blockburger v. U. S., Ill., 52 S.Ct. 180, 284 U.S. 299, 76 L.Ed. 306.

49 C.J. p 1060 note 44.

9. U.S.—Flowers v. U. S., C.C.A. Neb., 83 F.2d 78.

**Production of synthetic morphine**

Efforts to produce synthetic morphine have been held to involve no violation of laws which regulate dealings only in derivatives of opium and coca leaves.—U. S. v. Liss, C.C.

A.N.Y., 137 F.2d 995, certiorari denied 64 S.Ct. 78, 320 U.S. 773, 88 L. Ed. 462, Londoner v. U. S., 64 S.Ct. 78, 320 U.S. 773, 88 L.Ed. 462, Cohen v. U. S., 64 S.Ct. 79, 320 U.S. 773, 88 L.Ed. 463, Mainella v. U. S., 64 S.Ct. 79, 320 U.S. 773, 88 L.Ed. 465, Fox v. U. S., 64 S.Ct. 79, 320 U.S. 773, 88 L.Ed. 463, and Lowenstein v. U. S., 64 S.Ct. 79, 320 U.S. 773, 88 L.Ed. 463.

**Specific intent**

The government is not obligated to show any specific intent.—Coulston v. U. S., C.C.A.Okla., 51 F.2d 178.

10. U.S.—U. S. v. Doremus, D.C. Tex., 246 F. 958, reversed on other grounds 39 S.Ct. 214, 249 U.S. 86, 63 L.Ed. 493.

49 C.J. p 1060 note 45.

11. U.S.—Nicoli v. Briggs, C.C.A. Kan., 83 F.2d 375.

12. U.S.—Blockburger v. U. S., Ill., 52 S.Ct. 180, 284 U.S. 299, 76 L.Ed. 306—Nigro v. U. S., C.C.A.Mo., 117 F.2d 624, 133 A.L.R. 1128—U. S. v. Anthony, D.C.Cal., 15 F.Supp. 553.

13. U.S.—Blockburger v. U. S., Ill., 52 S.Ct. 180, 284 U.S. 299, 76 L.Ed. 306.

14. U.S.—Flowers v. U. S., C.C.A. Neb., 83 F.2d 78.

Failure to register and pay tax see infra subdivision c (1) of this section.

Selling or purchasing from unstamp-

*What constitutes sale.* The word "sale" in the anti-narcotic act is used in its ordinary and popular sense.<sup>15</sup> It has been held that there is a sale within the meaning of the act when the parties have agreed on all terms of sale of the narcotic and nothing remains but payment by the buyer, although the seller retains possession until payment,<sup>16</sup> and where, if the transaction were a lawful one, seller could maintain an action for the purchase price of the goods.<sup>17</sup> In any event, such circumstances are sufficient to show an unlawful dealing in narcotics.<sup>18</sup> On the other hand, it has been held that a sale of narcotics under the act is not complete unless either the purchase price has been paid or the property delivered.<sup>19</sup>

"Selling," within the meaning of the statute, is not confined to parting with one's own property.<sup>20</sup> The delivery or transfer of a narcotic hypodermically and the receipt of payment for such hypodermic injection has been held to have all the component parts of a sale.<sup>21</sup> A sale is complete when the drug is delivered on the buyer's direction, even though the drug is not personally handled by the buyer.<sup>22</sup>

*Exempt preparations and remedies.* The anti-narcotic act exempts from its operation the manufacture, sale, distribution, giving away, dispensing, or possession of certain preparations and remedies which do not contain more than a prescribed amount

of a narcotic drug,<sup>23</sup> provided this is done for medicinal purposes and the manufacturer, producer, compounding, or vendor, including a dispensing physician, keeps a record.<sup>24</sup> Under this provision, not all physicians, but only "dispensing" physicians, are required to keep records;<sup>25</sup> the physician must be one who manufactures, produces, compounds, or vends, or possibly only one who vends, the drugs,<sup>26</sup> and no record need be kept by physicians administering to patients whom they personally attend.<sup>27</sup> The words "preparations and remedies," as used in this provision, have been construed to mean actual medicinal preparations and remedies such as a druggist or physician would normally dispense.<sup>28</sup>

#### b. Validity of Act and Regulations Thereunder

The validity of the federal anti-narcotic act has frequently been upheld; and under it needful administrative regulations may be made which have the effect of law.

The constitutionality of the act has been upheld in numerous decisions as a valid exercise by congress of the authority given it by the Constitution<sup>29</sup> to enforce an excise tax,<sup>30</sup> and as not being a mere attempt to invade,<sup>31</sup> or an invasion of,<sup>32</sup> a power not delegated, the reserved police power of the states; and, the legislation being within the taxing power of congress, it is not a matter of objection that its effect may be to accomplish another purpose as well as the raising of revenue.<sup>33</sup> Provisions

ed package see *infra* subdivision c (2) of this section.

15. U.S.—*Affronti v. U. S.*, C.C.A. Mo., 145 F.2d 8.

#### More giving of information

A physician who gave government informer name of man from whom heroin might be secured to dose race horses, without any prearrangement with such man or expectation of remuneration, was not guilty of selling or purchasing narcotics either as principal, aider and abettor, or accessory before the fact.—*Morel v. U. S.*, C.C.A. Ohio, 127 F.2d 827.

16. U.S.—*Fisk v. U. S.*, C.C.A. Tenn., 279 F. 12—*Hammer v. U. S.*, N.Y., 349 F. 336, 161 C.C.A. 344.

17. U.S.—*Fisk v. U. S.*, C.C.A. Tenn., 279 F. 12.

18. U.S.—*Leon v. U. S.*, C.C.A. Cal., 290 F. 384, certiorari denied 44 S. Ct. 37, 263 U.S. 710, 68 L.Ed. 518.

19. U.S.—*Barnett v. U. S.*, C.C.A. Wash., 171 F.2d 721.

20. U.S.—*Jin Fuey Moy v. U. S.*, Pa., 41 S.Ct. 98, 254 U.S. 189, 65 L.Ed. 214—*Nigro v. U. S.*, C.C.A. Mo., 117 F.2d 624, 133 A.L.R. 1128.

Participation in sale by issuance of prescription see *infra* subdivision c (3) of this section.

21. U.S.—*Ratigan v. U. S.*, C.C.A. Wash., 88 F.2d 919, certiorari denied 57 S.Ct. 938, 301 U.S. 705, 81 L.Ed. 1359, rehearing denied 58 S. Ct. 52, 302 U.S. 774, 82 L.Ed. 600.

22. U.S.—*Ratigan v. U. S.*, *supra*.

23. U.S.—*Young v. U. S.*, Hawaii, 62 S.Ct. 510, 315 U.S. 257, 86 L.Ed. 832.  
49 C.J. p 1062 note 89.

"*Paregoric*" is a preparation of limited narcotic content within provision in Harrison Narcotic Act exempting preparations of limited narcotic content.—*Morris v. U. S.*, C.C. A. Tex., 123 F.2d 957.

"*Smoking opium*," "opium prepared for smoking"

The exemption does not apply to "smoking opium" or "opium prepared for smoking" as neither of such substances is a remedy or a preparation sold as a medicine.—*Chin Gum v. U. S.*, C.C.A. Mass., 149 F.2d 575, motion denied 150 F.2d 765—49 C.J. p 1060 note 49 [c].

24. U.S.—*Young v. U. S.*, Hawaii, 62 S.Ct. 510, 315 U.S. 257, 86 L.Ed. 832.

25. U.S.—*Young v. U. S.*, *supra*.

26. U.S.—*Young v. U. S.*, Hawaii, 62

S.Ct. 510, 315 U.S. 257, 86 L.Ed. 832.

27. U.S.—*Young v. U. S.*, *supra*.

28. U.S.—*Statson v. U. S.*, 257 F. 689, 168 C.C.A. 639.  
49 C.J. p 1060 note 49.

29. U.S.—*Ballistreri v. U. S.*, C.C.A. Cal., 100 F.2d 928—*Beland v. U. S.*, C.C.A. Tex., 100 F.2d 289, certiorari denied 59 S.Ct. 485, 306 U.S. 636, 83 L.Ed. 1037—*Mauk v. U. S.*, C. C.A. Or., 88 F.2d 557, certiorari denied 58 S.Ct. 17, 302 U.S. 684, 82 L.Ed. 527—*Cook v. U. S.*, C.C.A. Okl., 33 F.2d 509, certiorari denied 50 S.Ct. 34, 280 U.S. 588, 74 L.Ed. 633.

49 C.J. p 1059 notes 24, 25.

30. U.S.—*U. S. v. Doremus*, Tex., 39 S.Ct. 214, 249 U.S. 86, 63 L.Ed. 493.  
49 C.J. p 1059 note 27.

31. U.S.—*U. S. v. Doremus*, *supra*.

32. U.S.—*Watson v. U. S.*, C.C.A. Idaho, 16 F.2d 52, certiorari denied 47 S.Ct. 576, 274 U.S. 739, 71 L. Ed. 1818.

49 C.J. p 1059 note 29.

33. U.S.—*U. S. v. Doremus*, Tex., 39 S.Ct. 214, 249 U.S. 86, 63 L.Ed. 493.

49 C.J. p 1059 note 30.

genuinely calculated to aid in enforcing the revenue features of the act, such as the provision prohibiting the retail sale of narcotics without a prescription,<sup>34</sup> or a sale except on the written order of the buyer on a prescribed form,<sup>35</sup> and regardless of whether or not the buyer is one of the class required to register under the act,<sup>36</sup> have been held valid, as have the administrative features of the act.<sup>37</sup>

**Regulations under act.** Congress has empowered the secretary of the treasury to make all needful rules and regulations for carrying into effect the provisions of the act;<sup>38</sup> and the secretary of the treasury is further authorized to confer his powers respecting regulations on the commissioner of narcotics or the commissioner of internal revenue.<sup>39</sup> A regulation which is needful and made in pursuance of carrying the statute into effect has the effect of law, violation of which may be the subject of a criminal penalty.<sup>40</sup> In general, if the regulation fulfills the purpose of the law, and is not in effect an addition to or limitation on it, it is valid.<sup>41</sup> A regulation requiring the name and address of a person on a prescription by which he obtains narcotics has been held reasonable, proper, and needful.<sup>42</sup> So, too, a ruling of the commissioner of internal revenue excluding from the exemption of registered physicians whose who, as a rule, do not see their patients, but base most of their prescriptions on written statements sent through the mail and who prescribe the same remedy for all alike, has been upheld.<sup>43</sup>

On the other hand, only such rules or regulations as are required for the enforcement of the act are valid under this provision.<sup>44</sup> A regulation specifying the drugs or the quantity thereof which a phy-

sician may prescribe to an addict, or specifying the frequency of prescriptions, would be not only contrary to the law, but would also make the law unconstitutional as being clearly a regulation of the practice of medicine;<sup>45</sup> and a rule requiring a physician to be in personal attendance on a patient "away from his office" to come within the exemption of the provision, requiring a physician to keep a record of drugs dispensed or distributed "except such as may be dispensed or distributed to a patient upon whom such physician . . . shall personally attend," has been held void, as contrary to the language of the act and not necessary to its enforcement.<sup>46</sup>

### c. Particular Offenses under Act

- (1) Failure to register and pay tax
- (2) Selling or purchasing from unstamped package
- (3) Absence or misuse of order forms
- (4) Possession

#### (1) Failure to Register and Pay Tax

Under the anti-narcotic act it is an offense for one to manufacture, sell, deal in, or distribute certain narcotic drugs without registering with the collector of internal revenue and paying the special tax required by the act.

Under the anti-narcotic act every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away certain narcotic drugs listed therein must register with the collector of internal revenue of the district, and pay a special tax.<sup>47</sup> This section applies to such persons as dealers, physicians, dentists, veterinarians, and other practitioners, who may lawfully deal in or handle narcotics;<sup>48</sup> and no one is required to register ex-

34. U.S.—Webb v. U. S., Tenn., 39 S. Ct. 217, 249 U.S. 96, 63 L.Ed. 497—Saunders v. U. S., 260 F. 386, 171 C.C.A. 252.

35. U.S.—Nigro v. U. S., Mo., 48 S. Ct. 388, 276 U.S. 332, 72 L.Ed. 600, answer conformed to, C.C.A., 27 F. 2d 1019.

49 C.J. p 1059 note 32.

36. U.S.—U. S. v. Wong Sing, Utah, 43 S.Ct. 7, 260 U.S. 18, 67 L.Ed. 105—Lawrence v. U. S., C.C.A.Okla., 28 F.2d 608.

37. U.S.—Stetson v. U. S., Mich., 257 F. 689, 168 C.C.A. 639.

Validity of statutory presumption or prima facie evidence rule see infra subdivision d (3) (a) of this section.

38. U.S.—Lewis v. U. S., C.A.Wash., 170 F.2d 43.

39. U.S.—Lewis v. U. S., supra.

40. U.S.—Lewis v. U. S., supra.

41. U.S.—U. S. v. Joseph Fleming, etc., Co., D.C.Pa., 251 F. 932, 49 C.J. p 1060 note 38.

42. U.S.—Lewis v. U. S., C.A.Wash., 170 F.2d 43.

43. U.S.—Tucker v. Williamson, D. C.Ohio, 229 F. 201.

44. U.S.—Hurwitz v. U. S., C.C.A. Mo., 280 F. 109.

45. U.S.—U. S. v. Anthony, D.C.Cal., 15 F.Supp. 553.

46. U.S.—Hurwitz v. U. S., supra.

47. U.S.—Flowers v. U. S., C.C.A. Neb., 83 F.2d 78.

#### Single Infraction

An unregistered person of the class required to register, who gives away morphine, although in only a single instance, is indictable for failure to register.—Weare v. U. S., C.C.A. Minn., 1 F.2d 617—Bethea v. U. S., C.C.A.Ill., 1 F.2d 290.

#### On whom tax imposed

The tax is imposed not on a retail purchaser for his own use but on importers, manufacturers, producers, dealers, and practitioners, persons who deal in and dispense the drugs.—Nigro v. U. S., C.C.A.Mo., 117 F. 2d 624, 133 A.L.R. 1128.

#### Liability as principal

Where defendant had no interest in common with addicts, but admittedly assisted another to make sale of cocaine, he was liable as a principal.—Carpenter v. U. S., C.C.A.Ga., 53 F.2d 174.

48. U.S.—Flowers v. U. S., C.C.A. Neb., 83 F.2d 78.

#### Ordinary or dictionary meanings

Words "physician," "dentist," or "veterinary surgeon" in provision requiring such persons to register in order to handle narcotics were used in their ordinary or dictionary meaning.—Flowers v. U. S., supra.

cept those who import, deal in, manufacture, sell, or distribute or give away the narcotics embraced within the act.<sup>49</sup> Accordingly, one who peddles<sup>50</sup> or purchases<sup>51</sup> narcotics from unstamped packages is not required to register, and cannot be convicted for failure to do so. In other words, this section applies to offenses that may be committed only by a limited class of persons, namely, persons eligible and required to register under the provisions of the act;<sup>52</sup> only those who dispense from stamped packages and constitute the classes which must pay taxes.<sup>53</sup>

Under the anti-narcotic act and departmental regulations, registration is permitted by, and limited to, physicians, and other practitioners or persons qualified or authorized under the laws of the various jurisdictions to distribute, dispense, give away, or administer narcotics.<sup>54</sup> Thus the right to register and pay a tax under the statute depends on the right to dispense under the state laws.<sup>55</sup> Neither a collector of internal revenue nor any other administrative officer has a discretion to refuse registration to a practicing physician licensed under the laws of a state.<sup>56</sup> The word "dispense" in the act applies to physicians, and they must register under the act,<sup>57</sup> and a physician who dispenses and who is also a dealer in narcotic drugs must register as both under the act;<sup>58</sup> but a physician who does not dispense narcotics is not required to register.<sup>59</sup> An

osteopath who is not authorized to use narcotic drugs under the statutes of the particular state is not entitled to register under the anti-narcotic act,<sup>60</sup> whereas an osteopath authorized to use narcotics under the state law is entitled to registration.<sup>61</sup>

Those persons required to register must do so according to their manner of dealing, and the amount of taxes payable by them differs as their manner of dealing differs.<sup>62</sup> No one registered in his particular statutory category may lawfully invade the field of those in other categories, since his registration and the amount of the tax paid fix his status.<sup>63</sup>

*Place of registration.* One registering under the act must register in the district where the business is to be carried on, notwithstanding his "place of business" or "office" may be elsewhere.<sup>64</sup>

## (2) Selling or Purchasing from Unstamped Package

It is unlawful under the federal anti-narcotic act for any person to purchase, sell, dispense, or distribute, except in or from an original stamped package, any of the drugs mentioned in the act.

Under the federal anti-narcotic act it is unlawful to purchase, sell, dispense, or distribute any of the drugs mentioned in the act, except in or from original stamped packages.<sup>65</sup> This provision is of general application and applies to all persons,<sup>66</sup> and is

49. U.S.—Eng Jung v. U. S., C.C.A. N.J., 46 F.2d 66.

### Sale as distinct from possession

These provisions apply to the business of selling narcotics as distinct from mere possession thereof.—Stetson v. U. S., Mich., 257 F. 689, 168 C.C.A. 639.

50. U.S.—Flowers v. U. S., C.C.A. Neb., 83 F.2d 78—Martin v. U. S., C.C.A.Tenn., 20 F.2d 785.

"Other practitioners" in provision requiring such persons to register do not mean illicit, curbstone peddlers.—Flowers v. U. S., C.C.A.Neb., 83 F. 2d 78.

51. U.S.—Ross v. U. S., C.C.A.Tenn., 23 F.2d 679.

52. U.S.—Roberts v. U. S., C.C.A. Mo., 96 F.2d 39—Acuna v. U. S., C.C.A.Tex., 74 F.2d 359—Stokes v. U. S., C.C.A.Mo., 39 F.2d 440—Butler v. U. S., C.C.A.Okla., 20 F.2d 570. 49 C.J. p 1062 note 3 [a].

53. U.S.—Russell v. U. S., C.C.A.N.Y., 26 F.2d 363—Martin v. U. S., C.C.A.Tenn., 20 F.2d 785.

54. U.S.—Kavanagh v. Fowler, C.C. A.Mich., 146 F.2d 961—Perry v. Larson, D.C.Fla., 25 F.Supp. 728. 49 C.J. p 1060 notes 55, 56.

55. U.S.—Perry v. Larson, C.C.A.

Fla., 104 F.2d 728—Perry v. Larson, D.C.Fla., 25 F.Supp. 728—Conover v. Maloney, D.C.N.J., 16 F. Supp. 419.

### Naturopaths

Under state statute providing for practice of naturopathy with proviso denying authority to practice "materia medica," a naturopath was not a "physician" entitled to register and pay tax under federal narcotic drug act.—Perry v. Larson, C.C.A.Fla., 104 F.2d 728.

56. U.S.—Georgia Ass'n of Osteopathic Physicians & Surgeons v. Allen, C.C.A.Ga., 112 F.2d 52. 49 C.J. p 1060 note 57.

57. U.S.—U. S. v. Case, 8 Puerto Rico Fed. 255.

58. U.S.—Blunt v. U. S., Ill., 255 F. 332, 166 C.C.A. 502, certiorari denied 39 S.Ct. 290, 249 U.S. 608, 63 L.Ed. 800.

59. U.S.—Pendleton v. U. S., C.C.A. W.Va., 290 F. 388.

60. U.S.—Georgia Ass'n of Osteopathic Physicians & Surgeons v. Allen, C.C.A.Ga., 112 F.2d 52—Burke v. Kansas State Osteopathic Ass'n, C.C.A.Kan., 111 F.2d 250—Conover v. Maloney, D.C.N.J., 16 F.Supp. 419.

61. U.S.—Waldo v. Poe, D.C.Wash., 14 F.2d 749.

49 C.J. p 1060 notes 51, 58.

62. U.S.—Flowers v. U. S., C.C.A. Neb., 83 F.2d 78.

63. U.S.—Flowers v. U. S., supra.

64. U.S.—Wallace v. U. S., Ill., 243 F. 300, 156 C.C.A. 80, certiorari denied 38 S.Ct. 11, 245 U.S. 650, 62 L.Ed. 531.

65. U.S.—Flowers v. U. S., C.C.A. Neb., 83 F.2d 78.

"Stamped package," within statute, means a package which has appropriate tax-paid stamps, and proof that drug found in defendant's possession had never been in a stamped package, but had been lawfully manufactured and delivered to army without stamps and labeled accordingly, did not establish any defense.—Frazier v. U. S., 163 F.2d 817, 82 U.S.App.D.C. 332, affirmed 69 S.Ct. 201, 335 U.S. 497, 93 L.Ed. 187, rehearing denied 69 S.Ct. 488, 336 U.S. 907, 93 L.Ed. 1072.

A single sale of unstamped narcotics is a crime.—Nicoli v. Briggs, C.C.A.Kan., 83 F.2d 375.

66. U.S.—Acuna v. U. S., C.C.A.Tex., 74 F.2d 359—Stokes v. U. S., C.C.A.

not limited to those required to register and pay a special tax.<sup>67</sup>

One who has registered and paid the tax required of persons in the class to which the handler belongs may purchase, sell, dispense, or distribute, as his registration may contemplate, provided he does so in or from the original stamped package.<sup>68</sup> A person who is registered is not, in order that he may lawfully sell, required to sell both in and from an original stamped package,<sup>69</sup> and a sale of drugs does not constitute a crime under this particular section, even though it is made in an unstamped package, unless it is made also from an unstamped package.<sup>70</sup> Wholesalers may sell in the original stamped package,<sup>71</sup> but they are not allowed to sell by retail from such a package;<sup>72</sup> retail dealers may sell or dispense from, but not in, the original stamped package;<sup>73</sup> registered physicians and others of that class may administer from an original stamped package, but may not sell in such a package.<sup>74</sup> In short, some may lawfully sell and handle in, and some from, an original stamped package, depending on their registration, but not both in and from.<sup>75</sup>

**Intent.** Knowledge is a necessary element to constitute an offense under these provisions relating to sales, purchases, or dispensing from unstamped packages, and one who innocently buys drugs in containers bearing counterfeit revenue stamps is not guilty of a violation.<sup>76</sup>

### (3) Absence or Misuse of Order Forms

Except in certain circumstances, it is unlawful under the anti-narcotic act to sell, barter, or give away any of the drugs mentioned in the act unless in pursuance of a written order on a prescribed form. A written order is not necessary in the case of dispensing or distribution of a narcotic by a physician, dentist, or veterinary surgeon in good faith in the course of his professional practice.

The act, with certain exceptions, forbids the selling, bartering, exchanging, or giving away of the drugs mentioned except in pursuance of a written order on a prescribed form,<sup>77</sup> and also makes it unlawful for any person to obtain by means of the prescribed order forms any of the prohibited drugs for any purpose other than the use, sale, or distribution thereof in the conduct of a lawful business in such drugs or in the legitimate practice of a profession.<sup>78</sup> This provision applies not only to registered dealers, but to all sellers<sup>79</sup> and to single sales.<sup>80</sup> Criminal intent is not an element of the offense of selling narcotics in violation of the provision requiring a written order on a prescribed form.<sup>81</sup> A sale knowingly made on fictitious and forged orders constitutes a sale within the inhibition of the act.<sup>82</sup> Where there is a sale in violation of the act, it is immaterial that there was no actual loss of revenue by the government;<sup>83</sup> and, where money is paid by government agents for purchase of a narcotic sold in violation of the act, it is immaterial that in making the purchase they intended to take the money on the arrest of the seller and hold it for evidence.<sup>84</sup>

Mo., 39 F.2d 440—Butler v. U. S., C.C.A.Okl., 20 F.2d 570.  
49 C.J. p 1061 note 68.

#### Equal application to all persons

Provision making it unlawful to sell narcotics not in or from original stamped package applies equally to registered physicians, dentists, veterinary surgeons, and other practitioners, and to all other persons, whether or not registered.—Flowers v. U. S., C.C.A.Neb., 83 F.2d 78.

67. U.S.—Acuna v. U. S., C.C.A.Tex., 74 F.2d 359.  
49 C.J. p 1061 note 68.

68. U.S.—Flowers v. U. S., C.C.A.Neb., 83 F.2d 78.

69. U.S.—Hale v. U. S., C.C.A.W.Va., 89 F.2d 578—Flowers v. U. S., C.C.A.Neb., 83 F.2d 78.

70. U.S.—Hale v. U. S., C.C.A.Tex., 89 F.2d 578.

71. U.S.—Hale v. U. S., C.C.A.W.Va., 89 F.2d 578—Flowers v. U. S., C.C.A.Neb., 83 F.2d 78.

72. U.S.—Flowers v. U. S., *supra*.

73. U.S.—Hale v. U. S., C.C.A.W.Va., 89 F.2d 578—Flowers v. U. S., C.C.A.Neb., 83 F.2d 78.

74. U.S.—Flowers v. U. S., C.C.A.Neb., 83 F.2d 78.

75. U.S.—Flowers v. U. S., *supra*.

76. U.S.—Nigro v. U. S., C.C.A.Mo., 4 F.2d 781.

77. D.C.—Williams v. U. S., 4 F.2d 432, 55 App.D.C. 239.  
49 C.J. p 1061 note 71.

#### Purchase for own use

This provision does not purport to punish the purchaser who acquires drugs for his own use.—Nigro v. U. S., C.C.A.Mo., 117 F.2d 624, 133 A.L.R. 1128.

78. U.S.—U. S. v. Direct Sales Co., D.C.S.C., 44 F.Supp. 623, affirmed, C.C.A., 131 F.2d 835, affirmed 63 S.Ct. 1265, 319 U.S. 703, 87 L.Ed. 1674.

#### Knowledge of diversion of narcotic

Where a physician regularly and with unusual frequency ordered from a wholesale drug dealer one thousand one-half grain tablets of morphine sulphate at a time, and physician, with negligible exceptions, ordered no other preparations from dealer, dealer was bound to know that phy-

sician was diverting morphine into unlawful channels, particularly after dealer was told that twenty-six and ninety-six one hundredths per cent of all physicians convicted of violations of narcotic laws were dealer's customers.—U. S. v. Direct Sales Co., *supra*.

79. U.S.—Stokes v. U. S., C.C.A.Mo., 39 F.2d 440.  
49 C.J. p 1060 note 53, p 1061 note 72.

80. U.S.—Hosier v. U. S., Va., 260 F. 155, 171 C.C.A. 191, certiorari denied 40 S.Ct. 54, 250 U.S. 674, 63 L.Ed. 1201.

81. U.S.—Daugherty v. U. S., C.C.A. Minn., 2 F.2d 691, rehearing denied 4 F.2d 344, reversed on other grounds 46 S.Ct. 156, 269 U.S. 380, 70 L.Ed. 309.

82. U.S.—C. M. Spring Drug Co. v. U. S., C.C.A.Mo., 12 F.2d 852.

83. U.S.—Bush v. U. S., C.C.A.La., 16 F.2d 709—Hoyt v. U. S., C.C.A. N.Y., 273 F. 792.

84. U.S.—Smith v. U. S., C.C.A.Mo., 284 F. 673, certiorari denied 43 S.Ct. 362, 261 U.S. 617, 67 L.Ed. 829.



*Use of drugs in professional practice.* By virtue of an exception in the statute, a written order is not necessary in the case of dispensing or distribution of a narcotic by a physician, dentist, or veterinary surgeon in the course of his professional practice.<sup>85</sup> However, a physician, dentist, or veterinary surgeon may not sell or dispense the drugs mentioned in the act without the order on the prescribed form, except in the course of his professional practice<sup>86</sup> in good faith;<sup>87</sup> and he must make and keep the record required.<sup>88</sup> The only way in which a physician can dispose of a prohibited narcotic which he has ordered from a wholesaler is by direct administration to his patients in the legitimate practice of his profession;<sup>89</sup> he cannot merely sell it<sup>90</sup> or give it away.<sup>91</sup> In order to sustain the physician's privilege, there must be both a patient and a dispensing in the course of professional practice only;<sup>92</sup> and the absence of the element of dispensation in the course of professional practice only will of itself destroy the physician's privilege.<sup>93</sup>

The statute does not prescribe the diseases for which a narcotic may be supplied;<sup>94</sup> nor is there any dogmatic rule which the courts have laid down for the purpose of determining what is good or bad professional practice,<sup>95</sup> and the question of what constitutes bona fide medical practice must be de-

termined on a consideration of the evidence and attending circumstances.<sup>96</sup> What the law punishes is not bad judgment in a physician, but bad faith.<sup>97</sup> In order to be entitled to the benefit of the exception, the practice of the profession must be real and genuine, and resort to it may not be had as a subterfuge to cover an otherwise unlawful dispensing of the taxable drug;<sup>98</sup> and mere pretense of such practice cannot legalize forbidden sales or otherwise nullify valid provisions of the statute,<sup>99</sup> or defeat such regulations as may be fairly appropriate to its enforcement within the proper limitations of a revenue measure.<sup>1</sup>

*Dispensation to addicts.* A physician who in good faith dispenses small quantities of such a drug to an addict, to be administered for the relief of conditions incident to such addiction, is within the exception;<sup>2</sup> good faith moderate dispensation to an addict for self-administration does not constitute an offense.<sup>3</sup> However, giving or dispensing a drug to which the act applies, for the purpose of satisfying the craving of an addict for the drug, is not dispensing or distributing it in the course of professional practice only so as to come within the exception.<sup>4</sup>

*Quantity of narcotic.* Although there is no limitation or exception in the act as to the amount of the

85. U.S.—*Mitchell v. U. S.*, C.C.A. Okl., 143 F.2d 953—*Weaver v. U. S.*, C.C.A.Neb., 111 F.2d 603—*Towbin v. U. S.*, C.C.A.Colo., 93 F.2d 861.

86. U.S.—*U. S. v. Brandenburg*, C.C. A.N.J., 155 F.2d 110—*Mitchell v. U. S.*, C.C.A.Okl., 143 F.2d 953—*Heller v. U. S.*, C.C.A.S.C., 104 F.2d 446—*Hawkins v. U. S.*, C.C.A. Ga., 90 F.2d 551, certiorari denied 58 S.Ct. 118, 302 U.S. 733, 82 L.Ed. 566—*Freeman v. U. S.*, C.C.A.Ga., 86 F.2d 243, certiorari denied 57 S.Ct. 323, 229 U.S. 616, 81 L.Ed. 454.

49 C.J. p 1061 note 74.

87. U.S.—*U. S. v. Brandenburg*, C.C. A.N.J., 155 F.2d 110—*Hawkins v. U. S.*, C.C.A.Ga., 90 F.2d 551, certiorari denied 58 S.Ct. 118, 302 U.S. 733, 86 L.Ed. 566.

49 C.J. p 1061 note 75.

88. U.S.—*Thompson v. U. S.*, Mo., 258 F. 196, 169 C.C.A. 264, certiorari denied 40 S.Ct. 57, 251 U.S. 553, 64 L.Ed. 411.

49 C.J. p 1061 note 76.

89. U.S.—*U. S. v. Direct Sales Co.*, D.C.S.C., 44 F.Supp. 623, affirmed, C.C.A., 131 F.2d 835, affirmed 63 S.Ct. 1265, 319 U.S. 703, 87 L.Ed. 1674.

90. U.S.—*U. S. v. Direct Sales Co.*, supra.

49 C.J. p 1061 note 79.

91. U.S.—*U. S. v. Direct Sales Co.*, supra.

92. U.S.—*Glatzmayer v. U. S.*, C.C. A.Tex., 84 F.2d 192.

93. U.S.—*Glatzmayer v. U. S.*, supra.

94. U.S.—*Strader v. U. S.*, C.C.A. Okl., 72 F.2d 589.

95. U.S.—*U. S. v. Anthony*, D.C.Cal., 15 F.Supp. 553.

#### No abstract concept

What is good practice in a particular case is not to be determined by any abstract concept but by the opinion of experts whose testimony may be given in court.—*U. S. v. Anthony*, supra.

#### Ordinary care

Question of whether physician used good professional practice in dispensing of narcotics so as to determine whether he violated Harrison Narcotic Act must be determined under rule that physician is not guarantor of cure and merely warrants that he will exercise ordinary care.—*U. S. v. Anthony*, supra.

96. U.S.—*Linder v. U. S.*, Wash., 45 S.Ct. 446, 268 U.S. 5, 69 L.Ed. 819, 39 A.L.R. 229—*Moore v. U. S.*, C.C. A.Ga., 128 F.2d 887, certiorari denied 63 S.Ct. 46, 317 U.S. 629, 87 L.Ed. 508—*U. S. v. Anthony*, D.C. Cal., 15 F.Supp. 553.

97. U.S.—*U. S. v. Anthony*, supra.

98. U.S.—*Freeman v. U. S.*, C.C.A. Ga., 86 F.2d 243, certiorari denied 57 S.Ct. 323, 229 U.S. 616, 81 L.Ed. 454.

99. U.S.—*Linder v. U. S.*, Wash., 45 S.Ct. 446, 268 U.S. 5, 69 L.Ed. 819, 39 A.L.R. 229—*Freeman v. U. S.*, C.C.A.Ga., 86 F.2d 243, certiorari denied 57 S.Ct. 323, 229 U.S. 616, 81 L.Ed. 454.

1. U.S.—*Linder v. U. S.*, Wash., 45 S.Ct. 446, 268 U.S. 5, 69 L.Ed. 819, 39 A.L.R. 229.

2. U.S.—*U. S. v. Brandenburg*, C.C. A.N.J., 155 F.2d 110—*Strader v. U. S.*, C.C.A.Okl., 72 F.2d 589.

49 C.J. p 1061 note 82.

3. U.S.—*Weaver v. U. S.*, C.C.A.Neb., 111 F.2d 603—*U. S. v. Anthony*, D.C.Cal., 15 F.Supp. 553.

4. U.S.—*U. S. v. Abdallah*, C.C.A.N. Y., 149 F.2d 219, certiorari denied 66 S.Ct. 29, 326 U.S. 724, 90 L.Ed. 429—*U. S. v. Lindenfeld*, C.C.A.N. Y., 142 F.2d 829, certiorari denied 65 S.Ct. 89, 323 U.S. 761, 89 L.Ed. 609—*Heller v. U. S.*, C.C.A.S.C., 104 F.2d 446—*Grigg v. Bolton*, C.C.A. Mont., 53 F.2d 158, certiorari denied 52 S.Ct. 311, 235 U.S. 538, 76 L.Ed. 931.

49 C.J. p 1061 note 81.

mentioned narcotics a physician may prescribe,<sup>5</sup> there is authority to the effect that a physician issuing, and a dealer filling, a prescription for an unreasonable and unusual amount of a drug to which the act applies, unless the prescription indicates the necessity therefor, would be guilty of a violation of the statute.<sup>6</sup> As has been stated, prescribing grossly inordinate quantities negatives the notion that the physician was in fact administering treatment rather than merely catering to the satisfaction of the drug craving.<sup>7</sup>

**Prescriptions.** A physician is not guilty of an offense if he issues a prescription in good faith as a physician, believing the recipient to be a bona fide patient, for the purpose of curing disease or relieving suffering.<sup>8</sup> Moreover, it has been held that the mere issuance of a prescription by a physician, even though not in the course of his professional practice,<sup>9</sup> and even though done with the intent and purpose that the person to whom it is given will obtain a drug,<sup>10</sup> is not an offense under the provisions of the act; the filling of the prescription and acquisition of the drug are necessary to constitute the completed offense.<sup>11</sup> However, a sale made by a physician by means of a prescription not issued in the course of his professional practice is unlawful, and, hence, a physician issuing such a prescription may be guilty of an offense where the narcotic is obtained by the use thereof.<sup>12</sup>

In brief, under the guise of treating a patient a physician may not, by issuing prescriptions, make it possible for drugs to be peddled or for known addicts merely to satisfy their craving.<sup>13</sup> Accordingly the court may inquire into the sufficiency and propriety of the reasons assigned by the physician for the issuance of prescriptions for narcotics.<sup>14</sup>

It has been held that a prescription issued by a physician, not in good faith and in the course of his professional practice only, is not a prescription under the exception in favor of a sale, dispensation, or distribution of narcotics by a dealer to a consumer in pursuance of a written prescription issued by a physician,<sup>15</sup> and that a druggist who knowingly fills such a prescription is guilty of a violation of the law,<sup>16</sup> the physician being guilty of aiding and abetting the sale.<sup>17</sup> However, it is further held that the responsibility for issuance of the prescription is on the physician,<sup>18</sup> and that the act does not place on a druggist the burden of inquiry into the intent and purpose of the physician in issuing it.<sup>19</sup> Hence, in the absence of knowledge of unlawful issuance, if the druggist keeps within the limitations of a prescription issued by a registered physician, he is protected thereby.<sup>20</sup>

The statute does not regulate the frequency of prescriptions,<sup>21</sup> or compel a conclusion of bad faith to be drawn in all cases where the prescription is not limited to one dosage or several dosages.<sup>22</sup>

5. U.S.—U. S. v. Anthony, D.C.Cal., 15 F.Supp. 558.

49 C.J. p 1061 note 77.

6. U.S.—U. S. v. Curtis, D.C.N.Y., 229 F. 288.

49 C.J. p 1061 note 80.

7. U.S.—U. S. v. Brandenburg, C.C. A.N.J., 155 F.2d 110.

8. U.S.—Strader v. U. S., C.C.A.Okla., 72 F.2d 589.

9. U.S.—Alton v. U. S., C.C.A.Ariz., 3 F.2d 992.

49 C.J. p 1061 note 78.

10. U.S.—Strader v. U. S., C.C.A.Okla., 72 F.2d 589.

11. U.S.—U. S. v. Abdallah, C.C.A.N.Y., 149 F.2d 219, certiorari denied 66 S.Ct. 29, 326 U.S. 724, 90 L.Ed. 429—Strader v. U. S., C.C.A.Okla., 72 F.2d 589.

49 C.J. p 1061 note 78 [a].

#### Prescriptions filled after arrest

Where defendant was charged with unlawfully dispensing morphine by issuance of prescriptions to a drug addict, the fact that prescriptions were not filled until after defendant's arrest did not preclude conviction.—U. S. v. Abdallah, C.C.A.N.Y., 149 F.2d 219, certiorari denied 66 S.Ct. 29, 326 U.S. 724, 90 L.Ed. 429.

12. U.S.—U. S. v. Bloom, C.C.A.N.Y.,

164 F.2d 556, certiorari denied 68 S.Ct. 726, 333 U.S. 857, 92 L.Ed. 1137—U. S. v. Brandenburg, C.C.A.N.J., 162 F.2d 980, certiorari denied 68 S.Ct. 80, 332 U.S. 769, 92 L.Ed. 354—U. S. v. Brandenburg, C.C.A.N.J., 155 F.2d 110—Nigro v. U. S., C.C.A.Mo., 117 F.2d 624, 133 A.L.R. 1128—Heller v. U. S., C.C.A.S.C., 104 F.2d 446—U. S. v. Hipsch, D.C.Mo., 34 F.Supp. 270.

49 C.J. p 1061 note 79.

#### Innocence of druggist

Where a physician issues a prescription to an addict not in the course of his professional practice, and the addict on such prescription purchases the narcotic, the physician participates in an illegal sale even if the druggist is innocent.—Nigro v. U. S., C.C.A.Mo., 117 F.2d 624, 133 A.L.R. 1128—U. S. v. Hipsch, D.C.Mo., 34 F.Supp. 270.

#### Druggist's failure to follow directions

The wrongful act cannot be excused because druggist does not follow directions precisely, or takes advantage of opportunity to expand illegal traffic.—U. S. v. Abdallah, C.C.A.N.Y., 149 F.2d 219, certiorari denied 66 S.Ct. 29, 326 U.S. 724, 90 L.Ed. 429.

13. U.S.—U. S. v. Brandenburg, C.C. A.N.J., 155 F.2d 110.

14. U.S.—Freeman v. U. S., C.C.A.Ga., 86 F.2d 243, certiorari denied 57 S.Ct. 323, 229 U.S. 616, 81 L.Ed. 454.

15. U.S.—Webb v. U. S., Tenn., 39 S.Ct. 217, 249 U.S. 96, 63 L.Ed. 497—Doremus v. U. S., C.C.A.Tex., 262 F. 849, 13 A.L.R. 853, certiorari denied 40 S.Ct. 483, 253 U.S. 487, 64 L.Ed. 1026.

16. U.S.—Doremus v. U. S., supra.

49 C.J. p 1061 note 84.

17. U.S.—Manning v. U. S., C.C.A.Mo., 287 F. 800.

49 C.J. p 1061 note 85.

18. U.S.—Eckert v. U. S., C.C.A.Mo., 7 F.2d 257.

19. U.S.—Doremus v. U. S., C.C.A.Tex., 262 F. 849, 13 A.L.R. 853, certiorari denied 40 S.Ct. 483, 253 U.S. 487, 64 L.Ed. 1026.

49 C.J. p 1061 note 87.

20. U.S.—U. S. v. Joseph Fleming, etc., Co., D.C.Pa., 251 F. 932.

49 C.J. p 1062 note 88.

21. U.S.—U. S. v. Anthony, D.C.Cal., 15 F.Supp. 553.

22. U.S.—U. S. v. Anthony, supra.

## (4) Possession

Mere possession of a narcotic is not made an offense under the anti-narcotic act; but possession coupled with other circumstances, such as failure to register and pay the tax, may constitute an offense.

Although, under certain provisions of the anti-narcotic act, possession of any of the drugs to which it applies will give rise to presumption of a violation thereof, as discussed *infra* subdivision d (3)(a) of this section, nevertheless mere possession in itself of such drugs,<sup>23</sup> such as having a small amount of opium for personal use,<sup>24</sup> is not made unlawful. However, the act makes possession by one who, although required to register, has not registered and paid the special tax provided for, unlawful *per se*,<sup>25</sup> and does not merely provide a rule of evidence.<sup>26</sup>

## d. Criminal Prosecutions

- (1) Indictments and informations
- (2) Defenses
- (3) Evidence
- (4) Trial
- (5) Sentence and punishment

## (1) Indictments and Informations

An indictment under the anti-narcotic act is sufficient if it describes the offense with sufficient clearness to show a violation of law, to enable the accused to know the nature of the accusation, and to plead the judgment in bar of further prosecution.

As in criminal cases generally, it is enough to sustain an indictment, under this statute, that the offense be described with sufficient clearness to show a violation of law, and to enable accused to know the nature and cause of the accusation and to plead the judgment, if one is rendered, in bar of further prosecution;<sup>27</sup> and slight confusion of language will not serve to render an indictment or information uncertain and ambiguous.<sup>28</sup> An indictment charging the offense substantially in the form or language of the statute ordinarily is sufficient, at least where it charges specific overt acts with respect to all the defendants;<sup>29</sup> but the prosecution is not aided by a reference in the indictment to a statutory amendment where the indictment does not charge any facts necessary to bring the case within the purview of the amendment.<sup>30</sup>

Since the mere issuance of a prescription is not an offense under the act, an indictment which charges that a physician issued and wrote a prescription in violation of, and contrary to, the provisions of the act, and not in the course of his professional practice, states no offense;<sup>31</sup> but, where the indictment charges a physician with making a sale without the prescribed order therefor, and by means of a prescription not issued in the course of his professional practice, it is sufficient, since a sale without the order is a violation of the act, even if made under the guise of a prescription.<sup>32</sup> In a

23. U.S.—Pierriero v. U. S., C.C.A. Va., 271 F. 912.

49 C.J. p 1062 note 98.

24. U.S.—Wallace v. U. S., Ill., 243 F. 300, 156 C.C.A. 80, certiorari denied 38 S.Ct. 11, 245 U.S. 650, 62 L.Ed. 531—U. S. v. Wilson, D.C. Tenn., 225 F. 82.

25. U.S.—U. S. v. Jin Fuey Moy, Pa., 36 S.Ct. 658, 241 U.S. 394, 60 L.Ed. 1061, Ann.Cas.1917D 854.

49 C.J. p 1062 note 3.

26. U.S.—U. S. v. O'Hara, D.C.R.I., 242 F. 749.

27. U.S.—U. S. v. Behrman, N.Y., 42 S.Ct. 303, 258 U.S. 280, 66 L.Ed. 619.

49 C.J. p 1062 note 7.

#### **Allegations held sufficient**

##### (1) In general.

U.S.—Mauk v. U. S., C.C.A.Or., 88 F. 2d 557, certiorari denied 58 S.Ct. 17, 302 U.S. 684, 82 L.Ed. 527—Du Vall v. U. S., C.C.A.Ariz., 82 F. 2d 382, certiorari denied 56 S.Ct. 751, 298 U.S. 667, 80 L.Ed. 1391—Hood v. U. S., C.C.A.Okl., 43 F.2d 353—Parmagini v. U. S., C.C.A.Cal., 42 F.2d 721, certiorari denied 51 S.Ct. 344, 283 U.S. 818, 75 L.Ed. 1434—Stokes v. U. S., C.C.A.Mo., 39 F. 2d 440.

D.C.—Cromer v. U. S., 142 F.2d 697,

78 U.S.App.D.C. 400, certiorari denied 84 S.Ct. 1274, 332 U.S. 760, 88 L.Ed. 1588.

##### (2) Sale or purchase from unstamped package.

U.S.—Hood v. U. S., C.C.A.Okl., 76 F. 2d 275—Stokes v. U. S., C.C.A.Mo., 39 F.2d 440—Smith v. U. S., C.C.A.Okl., 38 F.2d 632—Cook v. U. S., C.C.A.Okl., 33 F.2d 509, certiorari denied 50 S.Ct. 34, 280 U.S. 583, 74 L.Ed. 633.

D.C.—Randolph v. U. S., 165 F.2d 20, 83 U.S.App.D.C. 19.

49 C.J. p 1062 note 7 [a] (2).

##### (3) Sale or possession without having registered and paid special tax.—Dickerson v. U. S., C.A.N.C., 175 F.2d 440—Wygant v. U. S., C.C.A.Or., 6 F.2d 148—49 C.J. p 1062 note 7 [a] (4).

(4) Sale without order on prescribed form.—Ryles v. U. S., C.A.Okl., 172 F.2d 72, vacated on other grounds 69 S.Ct. 882, 336 U.S. 949, 93 L.Ed. 1104—Hawkins v. U. S., C.C.A.Ga., 90 F.2d 551, certiorari denied 58 S.Ct. 118, 302 U.S. 733, 82 L.Ed. 566—Mauk v. U. S., C.C.A.Or., 88 F.2d 557, certiorari denied 58 S.Ct. 17, 302 U.S. 684, 82 L.Ed. 527—49 C.J. p 1062 note 7 [a] (5).

##### (5) Sale of morphine by means of

hypodermic administration.—Ratigan v. U. S., C.C.A.Wash., 88 F.2d 919, certiorari denied 57 S.Ct. 938, 301 U.S. 705, 81 L.Ed. 1359, rehearing denied 58 S.Ct. 52, 302 U.S. 774, 82 L.Ed. 600—U. S. v. Ratigan, D.C.Wash., 7 F.Supp. 491.

#### **Allegations held insufficient**

U.S.—Hale v. U. S., C.C.A.W.Va., 89 F.2d 578.

49 C.J. p 1062 note 7 [b].

28. U.S.—U. S. v. Hoyt, D.C.N.Y., 255 F. 927, affirmed, C.C.A., 273 F. 792.

29. U.S.—Beland v. U. S., C.C.A.Tex., 100 F.2d 289, certiorari denied 59 S.Ct. 485, 306 U.S. 636, 83 L.Ed. 1037—O'Neill v. U. S., C.C.A.Neb., 19 F.2d 322—Ray v. U. S., C.C.A.Tenn., 10 F.2d 359.

31 C.J. p 715 note 10 [b]—49 C.J. p 1062 note 7 [c].

30. U.S.—Johnson v. U. S., C.C.A.Cal., 294 F. 753.

31. U.S.—Aiton v. U. S., C.C.A.Ariz., 3 F.2d 992—U. S. v. Leach, D.C. Mich., 291 F. 788.

32. U.S.—Jin Fuey Moy v. U. S., Pa., 41 S.Ct. 98, 254 U.S. 189, 65 L.Ed. 214—Foreman v. U. S., Va., 255 F. 621, 166 C.C.A. 655.

prosecution for dealing in narcotics, it is not sufficient to allege merely that accused was a dealer and a person required by law to register and pay the special tax provided; the allegations should go further and aver that accused did not register and pay the tax.<sup>38</sup> An indictment charging accused with having made a sale without registering must charge that he was required to register under the act;<sup>34</sup> but an indictment charging a sale which was not in or from a stamped package<sup>35</sup> or a sale not in pursuance of a written order on the prescribed form<sup>36</sup> need not allege that the seller failed, or was required, to register, since these provisions apply to all persons. An indictment charging a sale of narcotics from unstamped containers need not further allege that the sale was not on a written order.<sup>37</sup> An indictment charging an illegal sale need not specifically state whether the narcotic sold was in a stamped or unstamped package.<sup>38</sup> It is unnecessary for the indictment to allege that accused deprived the government of revenue.<sup>39</sup> In an indictment for selling morphine an allegation that morphine is a salt or a derivative of opium is not necessary.<sup>40</sup>

**Duplicity.** If the indictment contains a sufficient allegation of an offense under the act, incomplete allegations therein respecting other offenses may be disregarded as surplusage,<sup>41</sup> and such additional

allegations, not sufficient in themselves to charge an offense, will not invalidate the indictment as double.<sup>42</sup> An indictment is not double because it charges a sale in one count and transportation in another,<sup>43</sup> or purchase and sale;<sup>44</sup> or because it charges accused with selling and dispensing as a physician in one count, and as a dealer in another.<sup>45</sup>

**Time.** Where time is an element of the offense, it should be alleged;<sup>46</sup> hence, an indictment for failure to keep records for the time prescribed by the act should bring the offense within the statutory period.<sup>47</sup>

**Intent.** Where intent or knowledge is not an element of the particular offense under the act, the indictment need not allege it.<sup>48</sup>

**Place of sale and identity of purchaser.** The place of sale<sup>49</sup> and the identity of the purchaser<sup>50</sup> should be alleged, unless unknown, in which event the sale should be alleged to have been made to a person or persons unknown.<sup>51</sup>

**Negating exceptions or exemptions.** By the provisions of the act an indictment or information charging an offense thereunder need not negative the exemptions contained therein,<sup>52</sup> and this extends to every exception or exemption to the entire act which may be relied on.<sup>53</sup> Hence, it has been

33. U.S.—Bowdry v. U. S., C.C.A. Okl., 26 F.2d 791.

34. U.S.—Smith v. U. S., C.C.A. Okl., 17 F.2d 723, certiorari denied 47 S.Ct. 770, 274 U.S. 762, 71 L.Ed. 1339.

49 C.J. p 1063 note 16.

35. U.S.—Ballestrero v. U. S., C.C. A.Cal., 5 F.2d 508.

49 C.J. p 1063 note 17.

36. U.S.—Coleman v. U. S., C.C.A. Cal., 3 F.2d 243.

37. U.S.—Smith v. U. S., C.C.A. Okl., 17 F.2d 723, certiorari denied 47 S.Ct. 770, 274 U.S. 762, 71 L.Ed. 1339.

38. U.S.—Sauvain v. U. S., C.C.A. Mo., 31 F.2d 732.

39. U.S.—Du Vall v. U. S., C.C.A. Ariz., 32 F.2d 332, certiorari denied 56 S.Ct. 751, 298 U.S. 667, 80 L.Ed. 1391.

40. U.S.—James v. U. S., C.C.A. Tex., 61 F.2d 912, certiorari denied 53 S.Ct. 404, 288 U.S. 613, 77 L.Ed. 987.

41. U.S.—Bowdry v. U. S., C.C.A. Okl., 26 F.2d 791—Smith v. U. S., C.C.A. Okl., 17 F.2d 723, certiorari denied 47 S.Ct. 770, 274 U.S. 762, 71 L.Ed. 1339.

42. U.S.—Bowdry v. U. S., C.C.A. Okl., 26 F.2d 791.

49 C.J. p 1063 note 21.

43. U.S.—Ching Wan v. U. S., C.C. A.Cal., 35 F.2d 665—McIntosh v. White, C.C.A. Kan., 21 F.2d 934.

44. U.S.—Ching Wan v. U. S., C.C. A.Cal., 35 F.2d 665.

45. U.S.—Loewenthal v. U. S., C.C.A. Ohio, 274 F. 563, certiorari denied 42 S.Ct. 54, 277 U.S. 644, 66 L.Ed. 413.

46. U.S.—U. S. v. Gaag, D.C. Mont., 237 F. 728.

49 C.J. p 1063 note 8.

47. U.S.—U. S. v. Gaag, supra.

48. U.S.—U. S. v. Balint, N.Y., 42 S. Ct. 301, 258 U.S. 250, 66 L.Ed. 604.

49 C.J. p 1063 note 26.

49. U.S.—Miller v. U. S., C.C.A. Miss., 288 F. 816.

50. U.S.—Miller v. U. S., supra.

#### Omission held not fatal

Counts of indictment charging violation in language of the act were not so vague as to be invalid because they described violations in general terms without naming persons to whom the drugs were sold or delivered, although it would have been better practice to name such persons.—Ong v. U. S., C.C.A. Va., 131 F.2d 175.

**Sale for use of unspecified addicts.** Indictment, charging that drugs were sold to a named purchaser for

purpose of satisfying the cravings of unspecified addicts under physician's prescription given in bad faith not in course of his professional practice, was sufficient notwithstanding it did not charge a sale of drugs to a known addict.—U. S. v. Brandenburg, C.C.A. N.J., 155 F.2d 110.

51. U.S.—Miller v. U. S., C.C.A. Miss., 288 F. 816—Gregory v. U. S., C.C.A. S.C., 272 F. 119.

52. U.S.—Chin Gum v. U. S., C.C.A. Mass., 149 F.2d 575, motion denied 150 F.2d 765—Nigro v. U. S., C.C. A. Mo., 117 F.2d 624, 133 A.L.R. 1128—Haggerty v. U. S., C.C.A. Minn., 52 F.2d 11, certiorari denied 52 S.Ct. 203, 284 U.S. 685, 76 L.Ed. 578—Daugherty v. U. S., C.C.A. Minn., 2 F.2d 691, rehearing denied 4 F.2d 344, reversed on other grounds 46 S.Ct. 156, 269 U.S. 360, 70 L.Ed. 309—Brown v. U. S., C.C. A. Ala., 2 F.2d 589, certiorari denied 45 S.Ct. 638, 268 U.S. 702, 69 L.Ed. 1166—Weare v. U. S., C.C.A. Minn., 1 F.2d 617—Bethea v. U. S., C.C.A. Ill., 1 F.2d 290—Hurwitz v. U. S., C.C.A. Mo., 299 F. 449, certiorari denied 45 S.Ct. 95, 266 U.S. 613, 69 L. Ed. 468.

53. U.S.—U. S. v. Loewenthal, D.C. Ohio, 257 F. 444, affirmed 274 F. 563.

49 C.J. p 1063 note 23.

held that an indictment which charges the sale of a preparation of opium, containing two grains of opium to the fluid ounce, and that the preparation was sold not for medicinal purposes, but for the purpose of evading the provisions of the act, is not only sufficient but is unnecessarily specific in negating the exception of sale for medicinal use,<sup>54</sup> and, therefore, that an indictment charging such a sale, but which does not negative a sale for medicinal purpose, is not demurrable.<sup>55</sup> However, it has been held that an indictment for violation of the provisions pertaining to stamped packages must negative a sale "in" and also "from" an original stamped package inasmuch as such exception is contained in the enacting clause of the statute.<sup>56</sup>

Where the indictment does not show accused to be a physician, it need not challenge the rights peculiar to physicians;<sup>57</sup> but an indictment which alleges that defendant was a registered physician and issued prescriptions as such should then go further and negative the physician's privilege.<sup>58</sup> In a prosecution against a physician an allegation that dispensation of the drug was not in the course of his professional practice only is sufficient;<sup>59</sup> such an allegation is not deemed to be a mere conclusion of the pleader,<sup>60</sup> but is rather an allegation of the ultimate fact that the dispensing by the physician was not done by him as a physician.<sup>61</sup>

**Bill of particulars.** A bill of particulars is sometimes appropriate where accused requires more spe-

cific information as to the charge against him,<sup>62</sup> as where the indictment is couched in such language that he may be surprised by the production of evidence for which he is unprepared.<sup>63</sup> So, in a proper case, accused may be entitled to a bill of particulars setting forth the date of possession of a narcotic<sup>64</sup> or the place where it was purchased and delivered.<sup>65</sup> However, the grant or refusal of a bill of particulars in a prosecution for violation of the anti-narcotic law rests in the sound discretion of the court,<sup>66</sup> and a motion for a bill of particulars is properly denied where the counts of the indictment charge the violations as fully as is necessary to enable accused to prepare his defense.<sup>67</sup>

**Variance.** As in other criminal prosecutions, the question of variance depends on whether there is a material disagreement between the averments of the indictment and the proof of some matter essential to the charge.<sup>68</sup> In a prosecution for an unlawful sale, the allegation and proof as to the identity of the purchaser should be in accord<sup>69</sup> to the end that accused will be protected against a second prosecution for the same offense.<sup>70</sup> Where the offense charged was a sale and the proof showed that defendant issued prescriptions on which narcotics were sold, it was held that there was no variance, or at least no fatal variance.<sup>71</sup> The proof should agree with the indictment as to the narcotic drug alleged in charging the offense.<sup>72</sup> Thus, where the indictment charges a sale of morphine, a conviction cannot be sustained on proof of a sale of

54. U.S.—*Oliver v. U. S.*, C.C.A.W.Va., 267 F. 544.

55. U.S.—*Nelson v. U. S.*, C.C.A.Ala., 298 F. 93.

56. U.S.—*Hale v. U. S.*, C.C.A.W.Va., 89 F.2d 578.

57. U.S.—*Phillipian v. U. S.*, C.C.A.Mich., 20 F.2d 532.

58. U.S.—*Glatzmayer v. U. S.*, C.C.A.Tex., 84 F.2d 192.

The better practice in drawing up an indictment charging physician with sale of drugs in violation of Harrison Anti-Narcotic Act would have been to include an allegation that the drugs were dispensed by him not in good faith "in the course of his professional practice only," but failure to do so would not render indictment fatally defective.—*Nigro v. U. S.*, C.C.A.Mo., 117 F.2d 624, 133 A.L.R. 1128.

**Allegations held sufficient**

Indictment alleging that sales of morphine were not made in course of professional practice, or in good faith, or for legitimate medical purposes, and that buyer was free from any disease for which morphine was indicated, and received drug merely

to gratify craving therefor, was held sufficiently to negative statutory exception permitting physician to dispense drugs to patient in course of professional practice.—*Ratigan v. U. S.*, C.C.A.Wash., 88 F.2d 919, certiorari denied 57 S.Ct. 938, 301 U.S. 705, 81 L.Ed. 1359, rehearing denied 58 S.Ct. 52, 302 U.S. 774, 82 L.Ed. 600.

59. U.S.—*Freeman v. U. S.*, C.C.A.Ga., 86 F.2d 243, certiorari denied 57 S.Ct. 323, 299 U.S. 616, 81 L.Ed. 454—*Glatzmayer v. U. S.*, C.C.A.Tex., 84 F.2d 192.

60. U.S.—*Freeman v. U. S.*, C.C.A.Ga., 86 F.2d 243, certiorari denied 57 S.Ct. 323, 299 U.S. 616, 81 L.Ed. 454—*Glatzmayer v. U. S.*, C.C.A.Tex., 84 F.2d 192.

61. U.S.—*Glatzmayer v. U. S.*, supra.

62. U.S.—*Ong v. U. S.*, C.C.A.W.Va., 131 F.2d 175—*Nigro v. U. S.*, C.C.A.Mo., 117 F.2d 624, 133 A.L.R. 1128.

Bills of particulars in criminal prosecutions generally see *Indictments and Informations* § 156.

63. U.S.—*O'Neill v. U. S.*, C.C.A.Neb., 19 F.2d 322.

64. U.S.—*Lett v. United States*, C.C.A.Okl., 15 F.2d 686.

65. U.S.—*Lett v. U. S.*, C.C.A.Okl., 15 F.2d 690.

66. U.S.—*Taylor v. U. S.*, C.C.A.Mo., 19 F.2d 813.

**Discretion held not abused**

U.S.—*Hood v. U. S.*, C.C.A.Okl., 78 F.2d 150—*O'Neill v. U. S.*, C.C.A.Neb., 19 F.2d 322.

67. U.S.—*Taylor v. U. S.*, C.C.A.Mo., 19 F.2d 813.

**68. Variance held not fatal**

D.C.—*Cromer v. U. S.*, 142 F.2d 697, 78 U.S.App.D.C. 400, certiorari denied 64 S.Ct. 1274, 322 U.S. 760, 88 L.Ed. 1588.

69. U.S.—*Strader v. U. S.*, C.C.A.Okl., 72 F.2d 589.  
49 C.J. p 1064 note 45.

70. U.S.—*Jackson v. U. S.*, C.C.A.Mo., 297 F. 20.  
49 C.J. p 1064 note 46.

71. U.S.—*Nigro v. U. S.*, C.C.A.Mo., 117 F.2d 624, 133 A.L.R. 1128.  
49 C.J. p 1064 note 47.

72. U.S.—*Coleman v. U. S.*, C.C.A.Neb., 26 F.2d 870.

sulphate of hydrochloride.<sup>73</sup> However, although there is some authority to the contrary,<sup>74</sup> proof of a sale of morphine hydrochloride has been held sufficient to sustain conviction for a sale of morphine sulphate, a derivative of opium, morphine being a derivative of opium, and morphine sulphate and morphine hydrochloride being subdivisions of morphine;<sup>75</sup> and a charge of selling morphine will be met by proof of a sale of morphine hydrochloride<sup>76</sup> or of morphine sulphate.<sup>77</sup>

## (2) Defenses

The accused, in a prosecution under the anti-narcotic act, may avail himself of the usual defenses in criminal proceedings, and also any of the exceptions or exemptions contained in the act.

In prosecutions under the anti-narcotic act accused, in addition to availing himself of such defenses as are common in all criminal proceedings, may prove himself within any of the exceptions or exemptions contained in the act.<sup>78</sup> It is not a defense in such a prosecution that drugs were furnished to addicts under the provisions of a state law in conflict with the act,<sup>79</sup> although proof of such circumstance might be a matter to be considered in mitigation of punishment;<sup>80</sup> nor is it a defense that accused's acts were not intended and did not tend to violate or defeat the revenue provisions of the act,<sup>81</sup> or that accused acted as agent for another.<sup>82</sup> In a prosecution charging a sale without registry and payment of the special tax it is no defense that accused tendered the tax required and offered to register, and that the officer had refused to receive the tax or permit registry.<sup>83</sup>

**Entrapment.** As in other criminal prosecutions, as discussed in Criminal Law § 45, entrapment is a defense in prosecutions under the act in question.<sup>84</sup>

## (3) Evidence

- (a) Presumptions
- (b) Burden of proof
- (c) Admissibility
- (d) Weight and sufficiency

### (a) Presumptions

In addition to the presumptions common to all criminal prosecutions, a presumption of unlawful sale or purchase arises under the anti-narcotic act from the possession of unstamped narcotics, provided such possession is a conscious one and is personal and exclusive.

In addition to the presumptions common to all criminal prosecutions, a presumption of unlawful sale or purchase arises under the provisions of the act from possession, unstamped, of the drugs mentioned in the act,<sup>85</sup> and the statutory presumption or prima facie evidence rule, arising out of possession of the proscribed drug, has been held to be legal, reasonable, and constitutional.<sup>86</sup> While possession and control create a presumption of unlawful dealing,<sup>87</sup> nevertheless, unless the necessity of registering is shown, possession will not create a presumption under the sections pertaining to a failure to register.<sup>88</sup> The presumptions created by the act are of fact, not of law,<sup>89</sup> and they are rebuttable.<sup>90</sup>

In order to raise the presumption the possession must be personal and exclusive.<sup>91</sup> However, it is held that the possession of a confederate is the possession of a principal defendant,<sup>92</sup> although that of one from whom a mere go-between makes a purchase is not the possession of the go-between.<sup>93</sup> The statutory rule of prima facie evidence becomes operative on proof that the package when sold bore no stamps, and it is not necessary to go further and prove that the narcotic sold was not taken from

73. U.S.—Coleman v. U. S., *supra*.

74. U.S.—Guilbeau v. U. S., C.C.A. La., 288 F. 731.

75. U.S.—McIntosh v. U. S., C.C.A. Ill., 1 F.2d 427.

76. U.S.—Cain v. U. S., C.C.A. Minn., 19 F.2d 472.

49 C.J. p 1064 note 51.

77. U.S.—Williams v. U. S., C.C.A. Tex., 294 F. 682.

78. U.S.—Stetson v. U. S., Mich., 257 F. 689, 168 C.C.A. 639.

79. U.S.—Simmons v. U. S., C.C.A. Tenn., 300 F. 321.

49 C.J. p 1064 note 35.

80. U.S.—Simmons v. U. S., *supra*.

81. U.S.—Barbot v. U. S., C.C.A.S.C., 273 F. 919.

82. U.S.—Taylor v. U. S., C.C.A. Mo., 19 F.2d 813.

83. U.S.—Miller v. U. S., C.C.A. Miss., 288 F. 816.

49 C.J. p 1064 note 39.

84. U.S.—Newman v. U. S., C.C.A. W. Va., 299 F. 128.

49 C.J. p 1064 note 41.

85. U.S.—Beland v. U. S., C.C.A. Tex., 100 F.2d 289, certiorari denied 59 S.Ct. 485, 306 U.S. 636, 83 L.Ed. 1037—Mullaney v. U. S., C.C.A. Mont., 82 F.2d 638.

49 C.J. p 1065 notes 65 [a], 66.

86. U.S.—Mullaney v. U. S., *supra*—Pierriero v. U. S., C.C.A. Va., 271 F. 912.

D.C.—Goode v. U. S., 149 F.2d 377, 80 U.S.App.D.C. 67.

49 C.J. p 1059 note 35.

87. D.C.—Williams v. U. S., 4 F.2d 432, 55 App.D.C. 239.

88. U.S.—Lamento v. U. S., C.C.A. Mo., 4 F.2d 901.

49 C.J. p 1065 note 70.

89. U.S.—Di Salvo v. U. S., C.C.A. Mo., 2 F.2d 222.

90. U.S.—Ezzard v. U. S., C.C.A. Okl., 7 F.2d 808.

91. U.S.—Grantello v. U. S., C.C.A. Mo., 3 F.2d 117.

49 C.J. p 1065 note 71.

**Landlord's constructive possession** of narcotic which was actually in possession of tenants, to whom rooms in house occupied by him were separately leased, cannot be presumed.—Eng Jung v. U. S., C.C.A. N.J., 46 F.2d 66.

92. U.S.—Willsman v. U. S., C.C.A. Mo., 286 F. 852.

93. U.S.—Willsman v. U. S., *supra*.

an original stamped package.<sup>94</sup> Possession sufficient to raise the presumptions may be proved prima facie by acts, conduct, or declarations of the party accused, or by circumstantial evidence;<sup>95</sup> but it has been held that the presumption can arise only from a conscious possession.<sup>96</sup>

**Venue.** The statutory presumption of an unlawful sale or purchase arising from the possession of an unstamped package has been held not to include the subject of venue;<sup>97</sup> but there is also some authority to the contrary.<sup>98</sup>

### (b) Burden of Proof

As in all criminal cases, the burden is on the prosecution to prove the guilt of the accused, and the burden is on the accused to adduce evidence of distinct and substantial matters of defense.

As in all criminal cases, the burden rests on the prosecution to prove the guilt of accused<sup>99</sup> beyond a reasonable doubt,<sup>1</sup> whereas the burden rests on accused to adduce evidence of distinct and substantial matters of defense<sup>2</sup> or to overcome any presumption adverse to him created by the act.<sup>3</sup> The burden is on accused to prove himself within any exception or exemption contained in the act and on which he relies;<sup>4</sup> and, where accused relies on the defense that a sale shown to have been made

by him was made on a written order on the prescribed form,<sup>5</sup> or that he had registered and paid the special tax imposed by the act,<sup>6</sup> or that he was not required to register under the act,<sup>7</sup> or that his possession was not unlawful,<sup>8</sup> he has the burden of proving such defense.

### (c) Admissibility

The admissibility of evidence in prosecutions under the federal anti-narcotic act is governed by the rules respecting the admissibility of evidence in criminal cases generally.

In prosecutions under the act, general rules respecting the admission of evidence in criminal cases apply;<sup>9</sup> and in the application of these rules it has been held that, in a prosecution of a physician for an unlawful sale, evidence as to recognized medical practice is admissible to show that accused did or did not come within the exemption as to dispensing drugs in the course of his professional practice.<sup>10</sup> So, evidence of the quantity of narcotics purchased by a physician,<sup>11</sup> and the record required by law to be kept of his disposition thereof,<sup>12</sup> are admissible on the question whether he was using the drugs in the practice of his profession in good faith, or whether he was engaged in handling them as merchandise.<sup>13</sup> A physician will not be permitted to show that in dispensing narcotics he

94. U.S.—*Flowers v. U. S.*, C.C.A. Neb., 33 F.2d 78.

95. D.C.—*Williams v. U. S.*, 4 F.2d 432, 55 App.D.C. 239.

96. U.S.—*Ezzard v. U. S.*, C.C.A.Okl., 7 F.2d 893.

49 C.J. p 1065 note 75.

97. U.S.—*De Bellis v. U. S.*, C.C.A. Ill., 23 F.2d 948, certiorari denied *Debellis v. U. S.*, 48 S.Ct. 420, 276 U.S. 634, 72 L.Ed. 743.

49 C.J. p 1065 note 67.

98. U.S.—*Casey v. U. S.*, C.C.A. Wash., 20 F.2d 752, affirmed 48 S.Ct. 373, 276 U.S. 413, 72 L.Ed. 632, rehearing denied 48 S.Ct. 603, 276 U.S. 413, 72 L.Ed. 632.

D.C.—*Killian v. U. S.*, 29 F.2d 455, 58 App.D.C. 255.

99. U.S.—*Towbin v. U. S.*, C.C.A. Colo., 93 F.2d 861.

1. U.S.—*Sullivan v. U. S.*, C.C.A. Okl., 233 F. 365.

2. U.S.—*Sauvain v. U. S.*, C.C.A.Mo., 31 F.2d 732.

49 C.J. p 1064 note 56.

3. D.C.—*Goode v. U. S.*, 149 F.2d 377, 80 U.S.App.D.C. 67.

4. U.S.—*Landsborough v. U. S.*, C.C.A.Ohio, 163 F.2d 436, certiorari denied 69 S.Ct. 51, 335 U.S. 826, 93 L.Ed. 380.

49 C.J. p 1064 note 58.

5. U.S.—*Sauvain v. U. S.*, C.C.A.Mo.,

31 F.2d 732—*Martinez v. U. S.*, C.C. A.La., 25 F.2d 302.

#### Burden not on government

Government need not prove that narcotic was purchased without written order on form prescribed.—*Chin Gum v. U. S.*, C.C.A.Mass., 149 F.2d 575, motion denied 150 F.2d 765.

6. U.S.—*Flowers v. U. S.*, C.C.A. Neb., 33 F.2d 78.

49 C.J. p 1065 note 60.

7. U.S.—*Pierriero v. U. S.*, C.C.A. Va., 271 F. 912, followed in *Senick v. U. S.*, 271 F. 918.

8. U.S.—*Landsborough v. U. S.*, C.C.A.Ohio, 163 F.2d 436, certiorari denied 69 S.Ct. 51, 335 U.S. 826, 93 L.Ed. 380.

D.C.—*Frazier v. U. S.*, 163 F.2d 817, 82 U.S.App.D.C. 332, affirmed 69 S.Ct. 201, 335 U.S. 497, 93 L.Ed. 187, rehearing denied 69 S.Ct. 438, 336 U.S. 907, 93 L.Ed. 1072.

49 C.J. p 1065 note 62.

#### 9. Evidence held admissible

(1) In general.—*U. S. v. Abdallah*, C.C.A.N.Y., 149 F.2d 219, certiorari denied 68 S.Ct. 29, 326 U.S. 724, 90 L.Ed. 429—*Stahl v. U. S.*, C.C.A.Mo., 144 F.2d 909—*Weaver v. U. S.*, C.C.A.Neb., 111 F.2d 603—*Silverman v. U. S.*, C.C.A.Mass., 59 F.2d 636, certiorari denied 53 S.Ct. 89, 237 U.S. 640, 77 L.Ed. 554.

(2) Character of examination made by physician before he prescribed

for persons applying for prescriptions.—*U. S. v. Brandenburg*, C.C.A.N.J., 162 F.2d 980, certiorari denied 68 S.Ct. 80, 332 U.S. 769, 92 L.Ed. 354.

(3) Price of bootleg morphine.—*Hawkins v. U. S.*, C.C.A.Ga., 90 F.2d 551, certiorari denied 58 S.Ct. 118, 302 U.S. 733, 82 L.Ed. 566.

(4) Conversations between government agents and helpers and informer relating to plans to procure sales of narcotics.—*Hayes v. U. S.*, C.C.A. Neb., 52 F.2d 883.

#### Evidence held inadmissible

*U.S.—Flowers v. U. S.*, C.C.A.Neb., 33 F.2d 78.

10. U.S.—*Melanson v. U. S.*, Tex., 256 F. 783, 168 C.C.A. 129.

49 C.J. p 1065 note 80.

#### Methods of treating drug addiction

In prosecution of physician for issuing to addicts prescriptions for narcotic not on order forms, medical testimony concerning methods of treating drug addiction was properly admitted.—*Hawkins v. U. S.*, C.C.A.Ga., 90 F.2d 551, certiorari denied 58 S.Ct. 118, 302 U.S. 733, 82 L.Ed. 566.

11. U.S.—*Hoyt v. U. S.*, C.C.A.N.Y., 273 F. 792.

12. U.S.—*Sims v. U. S.*, C.C.A.Okl., 268 F. 234.

13. U.S.—*Sims v. U. S.*, supra, 49 C.J. p 1065 note 83.

was complying with a state law,<sup>14</sup> and thus he cannot, for example, show that those to whom he sold drugs were registered as addicts and entitled to have the drugs dispensed to them under a state law.<sup>15</sup>

Violation of the act being provable *prima facie* by acts, conduct, or declarations of accused, or by circumstantial evidence,<sup>16</sup> testimony showing the circumstances surrounding the transaction is admissible.<sup>17</sup> Testimony as to the delivery and identification of a package of drugs by a purchaser to another government witness, who delivered it to the chemist for analysis, is material and relevant.<sup>18</sup> In the prosecution of a drug company for unlawful sales under the act, it is not proper to admit evidence of the relative volume of narcotic sales of accused as compared with other dealers.<sup>19</sup> Since the act has defined a lawful business in narcotics thereunder, on a prosecution for a violation of the act, evidence varying from the statutory definition will not be admitted to show what constitutes a lawful business.<sup>20</sup>

**Other offenses.** Proof of other transactions in which accused sold or furnished narcotics is admissible to show that accused was dealing in or dispensing such drugs,<sup>21</sup> as is proof that subsequent to a sale a large quantity of a similar drug was found on the premises of accused.<sup>22</sup> However, evidence that accused, who was an habitual user of a narcotic, had possession of a quantity of the drug months before and in another district, was held not admissible to show unlawful dealing at another time and place.<sup>23</sup>

#### (d) Weight and Sufficiency

As in other criminal cases, the proof in a prosecution

under the federal anti-narcotic act, in order to sustain a conviction, must be sufficient to establish the guilt of the accused beyond a reasonable doubt.

There must be proof of guilt beyond a reasonable doubt,<sup>24</sup> and facts and circumstances which merely give rise to suspicion of the guilt of accused are legally insufficient to sustain a conviction.<sup>25</sup> If the evidence is such as to raise a reasonable doubt as to whether the practice followed by a physician was proper or improper, the doubt must be resolved in favor of good faith.<sup>26</sup>

On the other hand, substantial evidence tending to prove each and every material allegation of the indictment will sustain a conviction.<sup>27</sup> Possession by accused, coupled with the presumption arising therefrom, has been held sufficient to sustain a conviction;<sup>28</sup> and it has been held that unlawful sale and possession of narcotics may be proved *prima facie* by the acts and conduct of accused,<sup>29</sup> or by his declarations or admissions,<sup>30</sup> or by circumstantial evidence.<sup>31</sup> It is not necessary to a successful prosecution for an unlawful sale to show both that the narcotic when sold was not contained in an original stamped package and also that it did not come from an original stamped package;<sup>32</sup> proof of either, as the circumstances call for, will suffice.<sup>33</sup> A conviction for the sale or distribution of smoking opium or opium prepared for smoking, without a written order on the prescribed form, does not require proof of a quantitative as well as a qualitative analysis thereof.<sup>34</sup>

In applying the foregoing rules, particular evidence has been held sufficient or insufficient to establish that accused was dealing in narcotics in violation of the act;<sup>35</sup> that there was a "sale" of

14. U.S.—Hoyt v. U. S., C.C.A.N.Y., 273 F. 792.

15. U.S.—Hoyt v. U. S., *supra*.

16. D.C.—Williams v. U. S., 4 F.2d 432, 55 App.D.C. 239.

17. U.S.—Tam Shi Yan v. U. S., N. Y., 224 F. 422, 140 C.C.A. 116. 49 C.J. p 1065 note 90.

18. D.C.—Williams v. U. S., 4 F.2d 432, 55 App.D.C. 239.

19. U.S.—C. M. Spring Drug Co. v. U. S., C.C.A.Mo., 12 F.2d 852.

20. U.S.—U. S. v. Joseph Fleming, etc., Co., D.C.Pa., 251 F. 932.

21. U.S.—Taylor v. U. S., C.C.A.Mo., 19 F.2d 813.

49 C.J. p 1066 note 91.

#### Prescriptions issued to others

In a prosecution against a physician for dispensing narcotics not in the course of his professional practice, prescriptions issued by him to parties other than those named in the indictment constitute relevant and material evidence on the issue of

his good faith.—Freeman v. U. S., C.C.A.Ga., 86 F.2d 243, certiorari denied 57 S.Ct. 323, 299 U.S. 616, 81 L.Ed. 454.

22. U.S.—Parisi v. U. S., C.C.A.N.Y., 279 F. 253.

23. U.S.—Paris v. U. S., Okl., 260 F. 529, 171 C.C.A. 213.

49 C.J. p 1066 note 93.

24. U.S.—Eng Jung v. U. S., C.C.A. N.J., 46 F.2d 66.

25. U.S.—Eng Jung v. U. S., *supra*. 49 C.J. p 1066 note 12.

26. U.S.—U. S. v. Anthony, D.C.Cal., 15 F.Supp. 553.

27. U.S.—Fisk v. U. S., C.C.A.Tenn., 279 F. 12.

28. U.S.—U. S. v. Mule, C.C.A.N.Y., 45 F.2d 132.

D.C.—Frazier v. U. S., 163 F.2d 817, 82 U.S.App.D.C. 332, affirmed 69 S.Ct. 201, 335 U.S. 497, 93 L.Ed. 187, rehearing denied 69 S.Ct. 488, 336 U.S. 907, 93 L.Ed. 1072.

49 C.J. p 1066 note 8.

29. U.S.—Harrison v. U. S., C.C.A. N.Y., 7 F.2d 259.

30. U.S.—Harrison v. U. S., *supra*. D.C.—Williams v. U. S., 4 F.2d 432, 55 App.D.C. 239.

**Defendant's voluntary statement to police that he had purchased drug from a dope peddler, although subsequently denied by him, was itself evidence on which conviction might be sustained.**—Goode v. U. S., 149 F.2d 377, 80 U.S.App.D.C. 67.

31. D.C.—Williams v. U. S., 4 F.2d 432, 55 App.D.C. 239.

32. U.S.—Flowers v. U. S., C.C.A. Neb., 83 F.2d 78.

33. U.S.—Flowers v. U. S., *supra*.

34. U.S.—Chin Gum v. U. S., C.C.A. Mass., 149 F.2d 575, motion denied 150 F.2d 765.

#### 35. Evidence held sufficient

(1) To warrant conviction generally.

U.S.—U. S. v. Cook, C.A.Ill., 184 F.2d 642—U. S. v. Williams, C.A.Ill.,



narcotics;<sup>36</sup> that a sale by accused was made without registering and paying the special tax imposed by the act;<sup>37</sup> that accused was guilty of a sale as an accessory before the fact;<sup>38</sup> that a purchase or sale of narcotics was not in or from an original stamped package;<sup>39</sup> that a sale was not made pursuant to a written order on the prescribed form;<sup>40</sup> that a drug was not obtained on a stolen order;<sup>41</sup> that dispensing or distributing by a physician was not in good faith in the course of his professional practice;<sup>42</sup> that a sale was not on a prescription<sup>43</sup> or was on one known to have been unlawfully issued;<sup>44</sup> that the possession of drugs was unlawful;<sup>45</sup> and to show that morphine hydrochloride is a derivative of opium.<sup>46</sup>

*Agent's opinion as to weakness of case.* The question of the strength or weakness of the case is a matter to be deduced by the jury from the evidence before it, and not from some opinion held as to its weakness by some agent or agents who do not even testify.<sup>47</sup>

*Several counts.* In view of the presumption created by the statute, the government makes out a complete case, on proof of a sale, under each count of an indictment which charges failure to register and pay the tax, to secure a written order, or to sell out of an unstamped package;<sup>48</sup> and thus on proof of a single sale, and in the absence of any proof by defendant, the government is entitled

175 F.2d 715—*Chin Gum v. U. S.*, C.C.A.Mass., 149 F.2d 575, motion denied 150 F.2d 765—*Morris v. U. S.*, C.C.A.Tex., 123 F.2d 957—*Chadwick v. U. S.*, C.C.A.Tex., 117 F.2d 902, certiorari denied 61 S.Ct. 1109, 313 U.S. 585, 85 L.Ed. 1541—*Mehan v. U. S.*, C.C.A.Mo., 112 F.2d 561—*Louie Hung v. U. S.*, C.C.A.Cal., 111 F.2d 325—*Roberts v. U. S.*, C.C.A.Mo., 96 F.2d 39—*Mullaney v. U. S.*, C.C.A.Mont., 82 F.2d 638—*Gowling v. U. S.*, C.C.A.Tenn., 64 F.2d 796—*Rendleman v. U. S.*, C.C.A.Wash., 38 F.2d 779—*Martin v. U. S.*, C.C.A.Tex., 36 F.2d 954, certiorari denied 50 S.Ct. 351, 281 U.S. 746, 74 L.Ed. 1158.

D.C.—*Macaboy v. U. S.*, 160 F.2d 279, 82 U.S.App.D.C. 53—*Dear Check Quong v. U. S.*, 160 F.2d 251, 82 U.S.App.D.C. 8.

49 C.J. p 1066 note 96 [a].

(2) To establish that defendant knowingly aided and abetted seller of narcotics, rendering him guilty as principal—*Terry v. U. S.*, C.C.A.Va., 51 F.2d 49.

(3) To warrant jury's finding that one defendant was principal as to each of two sales by codefendant—*Quercia v. U. S.*, C.C.A.Mass., 70 F.2d 997.

(4) To identify the drugs—*Cromer v. U. S.*, 142 F.2d 697, 78 U.S.App.D.C. 400, certiorari denied 64 S.Ct. 1274, 322 U.S. 760, 88 L.Ed. 1588.

(5) To show that search of informer before purchase was made of defendant was sufficiently thorough for sending informer on his mission.—*Dear Check Quong v. U. S.*, 160 F.2d 251, 82 U.S.App.D.C. 8.

#### Evidence held insufficient

(1) To warrant conviction generally.—*Morel v. U. S.*, C.C.A.Ohio, 127 F.2d 827—*Eng Jung v. U. S.*, C.C.A.N.J., 46 F.2d 66—49 C.J. p 1066 note 96 [b].

(2) To sustain conviction of physician for fraudulently executing and signing record required by reve-

nue law showing amount of drugs dispensed and distributed.—*Towbin v. U. S.*, C.C.A.Colo., 93 F.2d 861.

#### Evidence held sufficient

U.S.—*Smith v. U. S.*, C.C.A.Mo., 284 F. 673, 679—*U. S. v. Hipsch*, D.C. Mo., 34 F.Supp. 270.

37. U.S.—*Sauvain v. U. S.*, C.C.A.Mo., 31 F.2d 732.

49 C.J. p 1066 note 97.

#### Evidence held insufficient

U.S.—*Eng Jung v. U. S.*, C.C.A.N.J., 46 F.2d 66.

49 C.J. p 1066 note 97 [b].

38. U.S.—*Parisi v. U. S.*, C.C.A.N.Y., 279 F. 253.

49 C.J. p 1066 note 98.

#### Evidence held sufficient

U.S.—*Du Verney v. U. S.*, C.C.A.Cal., 181 F.2d 853—*Landsborough v. U. S.*, 168 F.2d 486, certiorari denied 69 S.Ct. 51, 335 U.S. 826, 93 L.Ed. 380—*Sorrentino v. U. S.*, C.C.A.Cal., 163 F.2d 627—*Affronti v. U. S.*, C.C.A.Mo., 145 F.2d 3—*Acuna v. U. S.*, C.C.A.Tex., 74 F.2d 359—*Cook v. U. S.*, C.C.A.Okl., 33 F.2d 509, certiorari denied 50 S.Ct. 34, 280 U.S. 533, 74 L.Ed. 633.

49 C.J. p 1066 note 99 [a].

#### Evidence held insufficient

U.S.—*Beland v. U. S.*, C.C.A.Tex., 117 F.2d 958, certiorari denied 61 S.Ct. 1110, 313 U.S. 585, 85 L.Ed. 1541, rehearing denied 62 S.Ct. 54, 314 U.S. 708, 86 L.Ed. 565.

49 C.J. p 1066 note 99 [b].

#### Evidence held sufficient

U.S.—*Chin Gum v. U. S.*, C.C.A.Mass., 149 F.2d 575, motion denied 150 F.2d 765.

49 C.J. p 1066 note 1 [a].

#### Evidence held insufficient

U.S.—*Sullivan v. U. S.*, C.C.A.Okl., 283 F. 865.

#### Evidence held sufficient

(1) To warrant conviction in general.—*U. S. v. Brandenburg*, C.C.A.N.J., 162 F.2d 980, certiorari denied 68 S.Ct. 80, 332 U.S. 769, 92 L.Ed. 354—*U. S. v. Abdallah*, C.C.A.N.Y.,

149 F.2d 219, certiorari denied 66 S.Ct. 29, 326 U.S. 724, 90 L.Ed. 429—*Mitchell v. U. S.*, C.C.A.Okl., 143 F.2d 953—*U. S. v. Simon*, C.C.A.N.J., 119 F.2d 679, certiorari denied *Simon v. U. S.*, 62 S.Ct. 78, 314 U.S. 623, 86 L.Ed. 500—*Nigro v. U. S.*, C.C.A.Mo., 117 F.2d 624, 133 A.L.R. 1128—*Heller v. U. S.*, C.C.A.S.C., 104 F.2d 446—*Ratigan v. U. S.*, C.C.A.Wash., 88 F.2d 919, certiorari denied 57 S.Ct. 933, 301 U.S. 705, 81 L.Ed. 1359, rehearing denied 58 S.Ct. 52, 302 U.S. 774, 82 L.Ed. 600—49 C.J. p 1066 note 3 [a].

(2) To support inference that acts of a physician and a wholesale drug dealer with respect to physician's purchase of morphine sulphate tablets from dealer were performed pursuant to a mutual understanding and a preconcerted design that the narcotic law was to be violated.—*U. S. v. Direct Sales Co.*, D.C.S.C., 44 F.Supp. 623, affirmed 131 F.2d 835, certiorari granted 63 S.Ct. 753, 318 U.S. 749, 89 L.Ed. 1125, affirmed 63 S.Ct. 1265, 319 U.S. 703, 87 L.Ed. 1674.

#### Evidence held insufficient

U.S.—*Wesson v. U. S.*, C.A.Ark., 172 F.2d 931—*U. S. v. Anthony*, D.C. Cal., 15 F.Supp. 553.

#### Evidence held sufficient

U.S.—*Montgomery v. U. S.*, C.C.A.Ill., 290 F. 961.

44. U.S.—*Jackson v. U. S.*, C.C.A.Mo., 297 F. 20.

49 C.J. p 1066 note 5.

45. U.S.—*Graham v. U. S.*, C.C.A.Okl., 15 F.2d 740, certiorari denied *O'Fallon v. U. S.*, 47 S.Ct. 587, 274 U.S. 743, 71 L.Ed. 1321.

49 C.J. p 1066 note 6.

#### Evidence held sufficient

U.S.—*Bethea v. U. S.*, C.C.A.Ill., 1 F.2d 290.

47. U.S.—*Flowers v. U. S.*, C.C.A.Neb., 83 F.2d 78.

48. U.S.—*Ballerini v. Aderholt*, C.C.A.Ga., 44 F.2d 352.

ask for a conviction on all or any one of such counts in the indictment.<sup>49</sup>

#### (4) Trial

As in other criminal cases, questions of fact are for the jury in a prosecution under the anti-narcotic act; and in determining whether to take the case from the jury by directing a verdict, the court will take that view of the evidence which is most favorable to the party against whom the direction is asked. The instructions in a prosecution under the anti-narcotic act should distinctly and fairly submit to the jury the questions of fact to be determined by them, and should not invade the province of the jury or be misleading or prejudicial.

As is the general rule in criminal cases, in a prosecution under the narcotic act questions of fact are to be tried by the jury.<sup>50</sup> Thus it is for the determination of the jury whether the treatment of a patient, to whom a physician has dispensed drugs, was in good faith;<sup>51</sup> whether the drugs were dispensed in the course of a physician's professional practice<sup>52</sup> or to pander to the habits of an addict;<sup>53</sup> whether a prescription for a narcotic was issued in good faith;<sup>54</sup> or whether a druggist filling prescriptions knew the true character in which persons having them filled sought to procure the drug, and that they were addicts.<sup>55</sup>

*Taking case from jury.* In considering a motion to direct a verdict the court will take that view of the evidence which is most favorable to the party against whom the direction is asked;<sup>56</sup> and, if there is substantial testimony which, if believed, would warrant conviction, a motion by defendant for a directed verdict will be overruled;<sup>57</sup> but, in the absence of such testimony, to the exclusion of every hypothesis but that of guilt, the court should direct a verdict in favor of accused.<sup>58</sup> A request for leave to present a motion for a directed verdict in the absence of the jury is addressed to the discretion of the court,<sup>59</sup> and, where no abuse of the discretion occurs, a denial of such motion is not error.<sup>60</sup>

*Instructions.* Where, taking into account the entire charge, the instructions distinctly and fairly submit to the jury the question of fact to be determined by them,<sup>61</sup> and are not misleading<sup>62</sup> or prejudicial to accused,<sup>63</sup> and correctly state the law,<sup>64</sup> they are not subject to exception. A charge sufficiently submitting to the jury the issue of good faith of accused in issuing a prescription for a narcotic to a supposed patient is proper,<sup>65</sup> as is an instruction that tells the jury that the prohibited drugs must be prescribed by a physician in the course of his professional practice only.<sup>66</sup>

9. U.S.—Ballerini v. Aderholt, supra.

#### 10. Questions held for jury

(1) In general.—Banks v. U. S., C.A.Wash., 147 F.2d 628—Flowers v. U. S., C.C.A.Neb., 83 F.2d 78—Mullaney v. U. S., C.C.A.Mont., 82 F.2d 638—U. S. v. Singer, D.C.N.Y., 3 F.Supp. 863.

(2) Possession.—Mullaney v. U. S., C.C.A.Mont., 82 F.2d 638.

(3) Entrapment.—Reddish v. U. S., C.C.A.Mo., 55 F.2d 657.

(4) Whether unlawful sale of narcotics was completed by delivery hereof to buyer.—Barnett v. U. S., C.A.Wash., 171 F.2d 721.

Evidence held insufficient to take question to jury  
U.S.—Towbin v. U. S., C.C.A.Colo., 93 F.2d 861.

11. U.S.—U. S. v. Brandenburg, C.C.A.N.J., 155 F.2d 110—Moore v. U. S., C.C.A.Ga., 128 F.2d 887, certiorari denied 63 S.Ct. 46, 317 U.S. 629, 87 L.Ed. 508—Hawkins v. U. S., C.C.A.Ga., 90 F.2d 551, certiorari denied 58 S.Ct. 118, 302 U.S. 733, 82 L.Ed. 566—Freeman v. U. S., C.C.A.Ga., 86 F.2d 243, certiorari denied 57 S.Ct. 323, 299 U.S. 616, 81 L.Ed. 454.

9 C.J. p 1067 note 16.

12. U.S.—U. S. v. Lindenfeld, C.C.A.N.Y., 142 F.2d 829, certiorari denied 65 S.Ct. 89, 323 U.S. 761, 89 L.

Ed. 609—Oakshette v. U. S., Ga., 260 F. 830, 171 C.C.A. 556.

53. U.S.—Teter v. U. S., C.C.A.Ind., 12 F.2d 224, certiorari denied 47 S.Ct. 99, 273 U.S. 706, 71 L.Ed. 850.

54. U.S.—Boehm v. U. S., C.C.A.Minn., 21 F.2d 283.

55. U.S.—Melanson v. U. S., Tex., 256 F. 783, 168 C.C.A. 129.

56. U.S.—Hodge v. U. S., C.C.A.Tenn., 13 F.2d 596.

57. U.S.—Ryan v. U. S., C.C.A.Mo., 283 F. 975, appeal dismissed 44 S.Ct. 132, 263 U.S. 727, 68 L.Ed. 528, 49 C.J. p 1067 note 22.

58. U.S.—Morel v. U. S., C.C.A.Ohio, 127 F.2d 827—Towbin v. U. S., C.C.A.Colo., 93 F.2d 861—Willsman v. U. S., C.C.A.Mo., 286 F. 852.

59. U.S.—Ng Sing v. U. S., C.C.A.Cal., 8 F.2d 919.

60. U.S.—Ng Sing v. U. S., supra.

61. U.S.—Senick v. U. S., C.C.A.Va., 271 F. 918—Pierriero v. U. S., C.C.A.Va., 271 F. 912.

Instructions held proper or not erroneous

U.S.—Stoppelli v. U. S., C.A.Cal., 183 F.2d 391, certiorari denied 71 S.Ct. 88, rehearing denied 71 S.Ct. 237—Mitchell v. U. S., C.C.A.Okla., 143 F.2d 953—Young v. U. S., C.C.A.Hawaii, 119 F.2d 399, reversed on other grounds 62 S.Ct. 510, 315 U.S. 257, 86 L.Ed. 832—Silverman v.

U. S., C.C.A.Mass., 59 F.2d 636, certiorari denied 53 S.Ct. 89, 287 U.S. 640, 77 L.Ed. 554.

Instructions held properly refused  
U.S.—Mullaney v. U. S., C.C.A.Mont., 82 F.2d 638.

62. U.S.—C. M. Spring Drug Co. v. U. S., C.C.A.Mo., 12 F.2d 852, 49 C.J. p 1067 note 27.

63. U.S.—Baumboy v. U. S., C.C.A.Cal., 24 F.2d 512, 49 C.J. p 1067 note 28.

64. U.S.—Di Salvo v. U. S., C.C.A.Mo., 2 F.2d 222, 49 C.J. p 1067 note 29.

65. U.S.—Melanson v. U. S., Tex., 256 F. 783, 168 C.C.A. 129.

Instruction held inadvisable but not prejudicial

Charge that moral purpose of statute to prevent use of narcotics would be defeated if physicians could dispense them irrespective of good faith, although statute was primarily one for revenue, was held not error, or at least not prejudicial, but inadvisable.—Du Vall v. U. S., C.C.A.Ariz., 82 F.2d 382, certiorari denied 56 S.Ct. 751, 298 U.S. 667, 80 L.Ed. 1391.

66. U.S.—Trader v. U. S., C.C.A.Pa., 260 F. 923, certiorari denied 40 S.Ct. 119, 251 U.S. 555, 64 L.Ed. 412, 49 C.J. p 1067 note 31.

It has been held proper, under appropriate circumstances, to instruct a jury that the conduct of government agents in effecting a sale was not dishonorable and was in the performance of their duty.<sup>67</sup> Where the defense relies on, and there is evidence tending to show, entrapment, accused is entitled to an instruction on the law applicable thereto.<sup>68</sup> Instructions to the effect that an incidental purpose of the act was to prevent sales being made to addicts,<sup>69</sup> and to discourage trade in the narcotics mentioned in the act,<sup>70</sup> have been held proper. An instruction requested by accused which ignores indispensable conditions of the defense relied on by him should be refused.<sup>71</sup> Failure of the court to define a word so generally used and so well understood as the word "sale" has been held not error.<sup>72</sup>

*Invasion of province of jury.* It is an invasion of the province of the jury for the court to state to the jury that they are justified in believing a fact, which, if believed, necessarily leads to a verdict of guilty;<sup>73</sup> but, where the court in its charge assumes the existence as a fact of that which, following the evidence, it would be impossible for it rationally not to assume, the charge is not objectionable.<sup>74</sup>

#### (5) Sentence and Punishment

Sentence or punishment may be imposed on a convicted offender in accordance with the terms of the act and the counts on which he has been convicted.

Sentence or punishment may be imposed on a convicted offender in accordance with the terms of the act.<sup>75</sup> Where separate and distinct offenses are set forth in separate counts of an indictment, on a plea of guilty to all counts, accused may be sentenced on each,<sup>76</sup> the sentence to run concurrently.<sup>77</sup> The language of the statute is not to be construed as

imposing a single punishment for a violation of the distinct requirements of the sections dealing with unstamped packages and written orders when accomplished by one and the same sale;<sup>78</sup> each offense is subject to the penalty prescribed.<sup>79</sup> The penalties provided for in the original act have been held applicable to the amendments thereto.<sup>80</sup>

### § 12. — Manufacture of Smoking Opium

- a. In general
- b. Criminal prosecutions

#### a. In General

Under the federal statutes, the manufacture of smoking opium by persons other than United States citizens is subject to such restrictions by way of taxation and otherwise as to be virtually prohibited.

The federal statutes impose an internal revenue tax on opium manufacture in the United States for smoking purposes, and require the filing of such bond with the collector of internal revenue as may by regulation be prescribed;<sup>81</sup> and such statutes are constitutional, although they prohibit such manufacture only by persons other than citizens of the United States,<sup>82</sup> and although the tax is so high as to amount to a prohibition of such manufacture.<sup>83</sup>

The purpose of the original act pertaining to the manufacture of smoking opium was to regulate such manufacture,<sup>84</sup> and it applied to any process by which crude opium was converted into a product fit for smoking.<sup>85</sup> On the other hand, "manufacture of smoking opium" within the meaning of the original statute was held to contemplate only a process by which crude opium was converted into smoking opium,<sup>86</sup> and the mere mixing of smoking opium with the residue of opium which has been smoked and then put through a purifying process was not

67. U.S.—C. M. Spring Drug Co. v. U. S., C.C.A.Mo., 13 F.2d 852.

68. U.S.—Di Salvo v. U. S., C.C.A.Mo., 2 F.2d 222.

49 C.J. p 1067 note 33.

69. U.S.—Trader v. U. S., C.C.A.Pa., 250 F. 923, certiorari denied 40 S.Ct. 119, 251 U.S. 555, 64 L.Ed. 412.

70. U.S.—Oliver v. U. S., C.C.A.W.Va., 267 F. 544.

49 C.J. p 1067 note 35.

71. U.S.—Thompson v. U. S., Mo., 253 F. 196, certiorari denied 40 S.Ct. 57, 251 U.S. 553, 64 L.Ed. 411.

72. U.S.—Affronti v. U. S., C.C.A.Ma., 145 F.2d 3.

73. U.S.—C. M. Spring Drug Co. v. U. S., C.C.A.Mo., 13 F.2d 852.

49 C.J. p 1067 note 37.

74. U.S.—Crampton v. U. S., C.C.A.Mo., 16 F.2d 231.

75. Sentences held proper

(1) Two years and two months.—Boehm v. U. S., C.C.A.Minn., 21 F.2d 283—Bailey v. U. S., C.C.A.Ill., 284 F. 126.

(2) Four years.—Reese v. White, C.C.A.Kan., 25 F.2d 65.

(3) Five years' imprisonment, to run concurrently, on each of five counts on which accused was convicted.—Boehm v. U. S., C.C.A.Minn., 21 F.2d 283.

76. D.C.—Solomon v. U. S., 28 F.2d 554, 58 App.D.C. 182.

77. D.C.—Solomon v. U. S., supra.

78. U.S.—Blockburger v. U. S., Ill., 52 S.Ct. 180, 284 U.S. 299, 76 L.Ed. 306.

79. U.S.—Blockburger v. U. S., supra.

80. U.S.—Alston v. U. S., 47 S.Ct. 634, 274 U.S. 289, 71 L.Ed. 1052—Reese v. U. S., C.C.A.Mich., 14 F.2d 606.

81. U.S.—Lee Mow Lin v. U. S., Mo., 250 F. 694, 162 C.C.A. 656, certiorari denied 38 S.Ct. 581, 247 U.S. 518, 62 L.Ed. 1245.

82. U.S.—Lee Mow Lin v. U. S., supra.

49 C.J. p 1068 note 54.

83. U.S.—Lee Mow Lin v. U. S., supra.

49 C.J. p 1068 note 55.

Constitutionality of poison acts generally see supra § 3.

84. U.S.—Marks v. U. S., N.Y., 196 F. 476, 116 C.C.A. 250.

49 C.J. p 1068 note 57 [a].

85. U.S.—Marks v. U. S., supra.

86. U.S.—Shelley v. U. S., N.Y., 198 F. 88, 117 C.C.A. 294.

the manufacture of smoking opium under that act.<sup>87</sup>

The purpose of the act, as amended, it has been said, is to prohibit the manufacture of smoking opium,<sup>88</sup> and the act, as amended, prohibits the preparation of opium suitable for smoking purposes from the residue of smoked, or partially smoked, opium.<sup>89</sup> The mixing of water with an extract of opium fit for smoking for the purpose of making it less thick and strong has been held not to be within the prohibition of the act.<sup>90</sup> The statute being a taxing act,<sup>91</sup> its prohibition is not more extensive than its taxing clause;<sup>92</sup> hence, if the article manufactured is not taxable thereunder, there is no violation of the act in its production.<sup>93</sup>

Since the act prohibits merely the manufacture of smoking opium by aliens, it is not an offense for an alien who engages in such manufacture to fail to give the bond required by the act and the regulations thereunder of those who may legally engage therein;<sup>94</sup> hence an accused, shown at the trial to be an alien, cannot be lawfully convicted on such a charge.<sup>95</sup> In the absence of a showing of properly adopted regulations, as required under the act, there can be no conviction on a charge of manufacturing smoking opium without giving the bond specified by law;<sup>96</sup> nor can there be a conviction for a failure to stamp the opium in such a permanent manner as to denote the payment of the internal revenue tax thereon, in the absence of proof that such a stamp existed, or that the proper official with the approval of the secretary of the treasury had by regulation required any stamps for such purpose.<sup>97</sup>

### b. Criminal Prosecutions

Prosecutions under the federal act dealing with the manufacture of smoking opium are governed by the usual rules applicable in criminal cases, as for example, with respect to the indictment and the admissibility, or the weight and sufficiency, of evidence.

Prosecutions under the act are governed by the rules applicable in criminal prosecutions generally, as, for example, with respect to the sufficiency of the indictment to charge the essential elements of the offense denounced by the statute,<sup>98</sup> and the admissibility<sup>99</sup> or the weight and sufficiency<sup>1</sup> of the evidence.

**Sentence and punishment.** One who, on conviction of a violation of the statute, receives the minimum sentence prescribed by the statute cannot raise the objection that a sentence exceeding the minimum would be invalid because the statute imposes no maximum, and, hence, leaves the extent of the punishment entirely to the discretion of the court, thus permitting the infliction of cruel and unusual punishments in violation of the constitution.<sup>2</sup> The punishment fixed by the act being for each and every violation of the sections thereof, it has been held that there can be only one penalty for the violation of a section, although it should be violated by the same act in different ways.<sup>3</sup>

## § 13. — Narcotic Drugs Import and Export Act

- a. In general
- b. Indictment
- c. Evidence
- d. Trial, sentence, and punishment

### a. In General

Under the narcotic drugs import and export act it is an offense knowingly to receive, conceal, buy, or sell opium, or to facilitate the transportation, concealment, or sale of opium, which has been unlawfully imported.

Under the Narcotic Drugs Import and Export Act, frequently referred to as the Jones-Miller Act, it is an offense to receive, conceal, buy, sell, or to facilitate the transportation, concealment, or sale of any narcotic drug after importation, other than as excepted in the statute, defendant knowing it to be imported contrary to law.<sup>4</sup> The act is constitu-

87. U.S.—U. S. v. Shelley, N.Y., 33 S.Ct. 635, 229 U.S. 239, 57 L.Ed. 1167.

88. U.S.—U. S. v. Sischo, D.C.Wash., 262 F. 1001, affirmed, C.C.A., 270 F. 958, reversed on other grounds 43 S.Ct. 511, 262 U.S. 165, 67 L.Ed. 925.

49 C.J. p 1068 note 51.

89. U.S.—Charley Toy v. U. S., C.C. A.N.Y., 266 F. 326, certiorari denied 41 S.Ct. 13, 254 U.S. 639, 65 L.Ed. 492.

90. U.S.—Seidler v. U. S., N.Y., 228 F. 336, 142 C.C.A. 628.

91. U.S.—U. S. v. Shelley, N.Y., 33 S.Ct. 635, 229 U.S. 239, 57 L.Ed. 1167.

92. U.S.—U. S. v. Shelley, supra.

93. U.S.—U. S. v. Shelley, supra.

94. U.S.—Lee Mow Lin v. U. S., Mo., 240 F. 408, 153 C.C.A. 334, certiorari denied 38 S.Ct. 581, 247 U.S. 518, 62 L.Ed. 1245.

95. U.S.—Lee Mow Lin v. U. S., supra.

96. U.S.—Chin Sing v. U. S., Ill., 227 F. 397, 142 C.C.A. 93.

97. U.S.—Chin Sing v. U. S., supra.

98. U.S.—Lee Mow Lin v. U. S., Mo., 250 F. 694, 162 C.C.A. 656, certiorari denied 38 S.Ct. 581, 247 U.S. 518, 62 L.Ed. 1245.

49 C.J. p 1069 note 72.

99. U.S.—Lee Mow Lin v. U. S.,

supra—Tam Shi Yan v. U. S., N. Y., 224 F. 422, 140 C.C.A. 116.

49 C.J. p 1069 note 73.

1. U.S.—Charley Toy v. U. S., C.C. A.N.Y., 266 F. 326, certiorari denied 41 S.Ct. 13, 254 U.S. 639, 65 L.Ed. 492—Lee Dock v. U. S., N. Y., 224 F. 431, 140 C.C.A. 125.

49 C.J. p 1069 note 74.

2. U.S.—Lee Mow Lin v. U. S., Mo., 250 F. 694, 162 C.C.A. 656, certiorari denied 38 S.Ct. 581, 247 U.S. 518, 62 L.Ed. 1245.

3. U.S.—Charley Toy v. U. S., C.C. A.N.Y., 266 F. 326, certiorari denied 41 S.Ct. 13, 254 U.S. 639, 65 L.Ed. 492.

4. U.S.—Iponmatsu Urichi v. U. S.,

tional<sup>5</sup> and not an invasion of the police power of the states.<sup>6</sup> Its aim is to stamp out the existence of narcotics in this country except for legitimate medical purposes.<sup>7</sup> The act was held not repealed by the Harrison Narcotic Act which expressly disclaims such purpose.<sup>8</sup> It has been held that possession of the prescribed narcotic does not give exclusive federal jurisdiction,<sup>9</sup> and, where the possession comes from a source having no apparent connection with any direct importation, the case may well be dealt with under a state statute.<sup>10</sup>

Unlawful importation<sup>11</sup> and knowledge thereof<sup>12</sup> are essential elements of the offense. However, it is not necessary, in order to constitute unlawful importation, that the narcotic be actually landed, or carried across the customs lines,<sup>13</sup> the offense being committed when the narcotic is brought into the territorial limits of the United States.<sup>14</sup> Neither system nor intent is an essential element of the offense of unlawfully concealing narcotic drugs which have been imported contrary to law.<sup>15</sup>

Possession of the narcotic is not a requisite of the offense of facilitating the transportation thereof or of the offense of facilitating the concealment thereof.<sup>16</sup> In this connection the term "facilitate"

should be given its common and ordinary definition, namely, to make easy or less difficult; to free from difficulty or impediment;<sup>17</sup> and anything done to make a continuance of the transportation of the narcotic less difficult will constitute facilitation of its transportation.<sup>18</sup> Accordingly, where a trunk containing the narcotic is landed for customs inspection, facilitation of transportation may take place within the prohibition of the statute notwithstanding the trunk is not actually moved except by customs officers.<sup>19</sup>

### b. Indictment

The indictment in a prosecution for violation of the narcotic drugs import and export act should contain allegations sufficient to set forth the offense and should be direct and certain as to the particular circumstances of the crime.

As in charging statutory offenses generally, the indictment should contain all the essential allegations requisite to constitute the offense,<sup>20</sup> and should be direct and certain as to the particular circumstances of the crime charged.<sup>21</sup> Unlawful importation, being a necessary element of the crime, must be alleged.<sup>22</sup> In a prosecution for facilitating the sale of unlawfully imported narcotics, an allegation

C.C.A.Hawaii, 281 F. 525, certiorari denied 43 S.Ct. 92, 260 U.S. 729, 67 L.Ed. 485.

#### Possession by one of several defendants

In prosecution of several defendants for concealing and transporting morphine, it was not necessary that each of defendants should have the narcotics but only that one or more of them had possession while the other aided in the illicit transaction to which the possession was incidental.—U. S. v. Cohen, C.C.A.N.Y., 124 F.2d 164, certiorari denied Bernstein v. U. S., 63 S.Ct. 796, 315 U.S. 811, 86 L.Ed. 1210, rehearing denied 62 S.Ct. 941, 316 U.S. 707, 86 L.Ed. 1774.

#### Forfeiture

An opium derivative prepared for smoking was contraband and subject to forfeiture under narcotic drug import and export act.—Leong Chong Wing v. U. S., C.C.A.Wash., 95 F.2d 903.

5. U.S.—Stein v. U. S., C.C.A.Cal., 166 F.2d 851, certiorari denied 68 S.Ct. 1512, 334 U.S. 844, 92 L.Ed. 1768.

Constitutionality of poison acts generally see supra § 3.

6. U.S.—Shepard v. U. S., Cal., 236 F. 73, 149 C.C.A. 283.

8. U.S.—Copperthwaite v. U. S., C.C.A.Ky., 37 F.2d 846—Gee Woe v. U. S., La., 250 F. 428, 162 C.C.A. 498, certiorari denied 39 S.Ct. 8, 248 U.S. 562, 63 L.Ed. 422.

#### Nature of acts

The Import Act is a customs law whereas the Harrison Act is a revenue law.—Copperthwaite v. U. S., C.C.A.Ky., 37 F.2d 846.

9. U.S.—U. S. v. Ah Hung, D.C.N.Y., 243 F. 762.  
49 C.J. p 1069 note 92.

10. U.S.—U. S. v. Ah Hung, supra.

11. U.S.—Pon Wing Quong v. U. S., C.C.A.Cal., 111 F.2d 751—U. S. v. Ah Hung, D.C.N.Y., 243 F. 762.

12. U.S.—Kalos v. U. S., C.C.A.Utah, 9 F.2d 268—U. S. v. Tom Yu, D.C.Ariz., 1 F.Supp. 357.

13. U.S.—U. S. v. Lee Foo Yung, D.C.N.Y., 46 F.Supp. 147—U. S. v. Caminta, D.C.Pa., 194 F. 903.

14. U.S.—U. S. v. Lee Foo Yung, D.C.N.Y., 46 F.Supp. 147—U. S. v. Caminta, D.C.Pa., 194 F. 903.

#### Three mile limit

The fact of importation is established when a boat containing the narcotic crosses the three-mile limit approaching the United States.—Pon Wing Quong v. U. S., C.C.A.Cal., 111 F.2d 751.

Specific intent need not be shown.—Coulston v. U. S., C.C.A.Okl., 51 F.2d 178.

16. U.S.—Pon Wing Quong v. U. S., C.C.A.Cal., 111 F.2d 751.

17. U.S.—Pon Wing Quong v. U. S., supra.

18. U.S.—Pon Wing Quong v. U. S., supra.

19. U.S.—Pon Wing Quong v. U. S., supra.

The placing of customs label on trunk to permit trunk to pass without customs inspection constituted facilitation of its transportation within terms of statute.—Pon Wing Quong v. U. S., supra.

20. U.S.—Hood v. U. S., C.C.A.Okl., 43 F.2d 353.  
49 C.J. p 1069 note 99.

#### Allegations held sufficient

(1) In general.—Shafer v. U. S., C.C.A.Cal., 179 F.2d 929, certiorari denied 70 S.Ct. 1024, 339 U.S. 979, 94 L.Ed. ——Hood v. U. S., C.C.A.Okl., 78 F.2d 150.

(2) Knowledge that drugs were imported contrary to law.—Jindra v. U. S., C.C.A.Fla., 69 F.2d 429, certiorari denied 54 S.Ct. 869, 292 U.S. 651, 78 L.Ed. 1501.

21. U.S.—Proffitt v. U. S., C.C.A.Cal., 264 F. 299.

that the importation was not under any regulation prescribed by the control board may be treated as surplusage.<sup>23</sup> A count under the act may properly be joined with a count charging a violation of the Harrison Anti-Narcotic Act,<sup>24</sup> and in such case each count charges a separate and distinct offense.<sup>25</sup>

**Bill of particulars.** The grant or refusal of a bill of particulars in a prosecution for violation of the narcotic drugs import and export act rests in the sound discretion of the court.<sup>26</sup> A bill of particulars is properly refused where the indictment is sufficiently certain to enable accused to prepare his defense and to plead jeopardy should he again be indicted.<sup>27</sup>

**Issues, proof, and variance.** In general, under a count charging that defendant knowingly and unlawfully received and concealed a narcotic which had been unlawfully imported, the proof should be sufficient to show that the narcotic was concealed by accused, that it had been unlawfully imported, and that accused knew that it had been unlawfully imported;<sup>28</sup> and, under a count charging that defendant knowingly and unlawfully facilitated the transportation of a narcotic which had been imported unlawfully, the proof should show that accused had facilitated the transportation of the narcotic, that it had been unlawfully imported, and that accused knew that it had been unlawfully imported.<sup>29</sup> A variance between the indictment and the proof as to the amount of the drug is not necessarily fatal.<sup>30</sup>

### c. Evidence

- (1) Presumptions and burden of proof
- (2) Admissibility and weight or sufficiency

#### (1) Presumptions and Burden of Proof

In a prosecution under the narcotic drugs import and export act, although the government has the burden of proving the accused's guilt, it is aided by the statutory presumption, arising from unexplained possession and concealment of any of the specified drugs, that they were unlawfully imported and that the accused had knowledge thereof.

As in other criminal cases, the burden of proof is on the government, and every element of the offense must be proved by evidence sufficient to satisfy the jury beyond a reasonable doubt.<sup>31</sup> However, while the burden of proving guilt never shifts from the government,<sup>32</sup> it is aided in carrying this burden by certain presumptions arising under the provisions of the act,<sup>33</sup> such as the presumption that opium or smoking opium found in the country was unlawfully imported,<sup>34</sup> and the presumption, arising from unexplained possession and concealment of any of the drugs within the provisions of the act, of unlawful importation<sup>35</sup> and knowledge of such unlawful importation by accused.<sup>36</sup> As has been stated, possession of the narcotic drug in the absence of a satisfactory explanation by defendant creates, without more, an inference of guilt,<sup>37</sup> so that there is cast on the person found in possession of a narcotic drug the burden of showing that it came into his possession lawfully.<sup>38</sup> The provi-

23. U.S.—Jindra v. U. S., C.C.A. Fla., 69 F.2d 429, certiorari denied 54 S.Ct. 869, 292 U.S. 651, 78 L.Ed. 1501.

24. U.S.—Foster v. U. S., C.C.A.Cal., 11 F.2d 100.

49 C.J. p 1069 note 2.

25. U.S.—Mills v. Aderhold, C.C.A. Kan., 110 F.2d 765.

26. U.S.—Hood v. U. S., C.C.A.Okl., 78 F.2d 150.

**Discretion held not abused.**

U.S.—Hood v. U. S., C.C.A.Okl., 78 F.2d 150.

27. U.S.—Hood v. U. S., supra.

28. U.S.—Frank v. U. S., C.C.A.Mo., 37 F.2d 77.

29. U.S.—Frank v. U. S., supra.

30. D.C.—Cromer v. U. S., 142 F.2d 697, 78 U.S.App.D.C. 400, certiorari denied 64 S.Ct. 1274, 322 U.S. 760, 88 L.Ed. 1588.

31. U.S.—Morlen v. U. S., C.C.A. Cal., 13 F.2d 625.

32. U.S.—Gonzales v. U. S., C.C.A. Cal., 162 F.2d 870.

33. **Venue**

In prosecution for unlawful con-

cealment of narcotics, venue was presumed where defendant was shown to have had possession.—Mulaney v. U. S., C.C.A.Mont., 82 F.2d 688—49 C.J. p 1070 note 10 [b].

34. U.S.—Pon Wing Quong v. U. S., C.C.A.Cal., 111 F.2d 751.

49 C.J. p 1069 note 6.

**When presumption applies**

The presumption that opium prepared for smoking, found within the United States, has been imported contrary to law does not apply until the opium is found within the United States.—U. S. v. Tom Yu, D.C. Ariz., 1 F.Supp. 357.

35. U.S.—U. S. v. Feinberg, C.C.A. Ill., 123 F.2d 425, certiorari denied Feinberg v. U. S., 69 S.Ct. 626, 315 U.S. 801, 86 L.Ed. 1201—U. S. v. Moe Liss, C.C.A.N.Y., 105 F.2d 144 —Colletti v. U. S., C.C.A.Ohio, 53 F.2d 1017, certiorari denied 52 S. Ct. 459, 285 U.S. 559, 76 L.Ed. 947 —Parmagini v. U. S., C.C.A.Cal., 42 F.2d 721, certiorari denied 51 S.Ct. 344, 283 U.S. 818, 75 L.Ed. 1434—Copperthwaite v. U. S., C.C.A.Ky., 37 F.2d 846—Frank v. U. S., C.C.A.Mo., 37 F.2d 77.

49 C.J. p 1070 note 7.

**Necessity of trial and proof of possession**

The presumption arising from unexplained possession does not obtain until defendant is placed on trial and proof is made by the government of the possession of the drug by defendant.—U. S. v. Tom Yu, D. C. Ariz., 1 F.Supp. 357.

36. U.S.—U. S. v. Feinberg, C.C.A. Ill., 123 F.2d 425, certiorari denied Feinberg v. U. S., 69 S.Ct. 626, 315 U.S. 801, 86 L.Ed. 1201—U. S. v. Moe Liss, C.C.A.N.Y., 105 F.2d 144 —Frank v. U. S., C.C.A.Mo., 37 F. 2d 77.

37. U.S.—Hood v. U. S., C.C.A.Okl., 78 F.2d 150.

**Prima facie evidence of guilt**

The fact that defendant was carrying narcotics furnished prima facie evidence of guilt in prosecution for willfully facilitating the transportation of narcotics.—U. S. v. Li Fat Tong, C.C.A.N.Y., 152 F.2d 850.

38. U.S.—U. S. v. Li Fat Tong, supra—Howard v. U. S., C.C.A.Ill., 75 F.2d 562, certiorari denied 55 S. Ct. 654, 295 U.S. 740, 79 L.Ed. 1687.

sions of the act creating presumptions from the fact of possession have been held to apply to the narcotics mentioned in the act regardless of whether their importation is restricted or absolutely barred.<sup>39</sup> Where un rebutted, such a presumption, when it arises, is sufficient to sustain a conviction.<sup>40</sup>

The statutory provisions creating presumptions growing out of possession merely establish a rule of evidence, not substantive law creating offenses,<sup>41</sup> and are constitutional.<sup>42</sup> They do not violate the Fifth Amendment to the Federal Constitution as requiring accused to take the stand, or as destroying the presumption of innocence,<sup>43</sup> or as requiring defendant to be a witness against himself.<sup>44</sup> Such provisions of the act do not constitute a denial of due process of law.<sup>45</sup> The provision that possession of the narcotic shall be deemed sufficient evidence to authorize conviction unless defendant explains the possession to the satisfaction of the jury is not unconstitutional as authorizing the jury to adjudge its satisfaction of the explanation on its own whim or reason without any standard of measurement.<sup>46</sup> Provisions of this nature, however, are penal and in contravention of common-law principles, and, hence, must be strictly construed.<sup>47</sup>

The presumptions created by the act are rebuttable,<sup>48</sup> and a defendant found in possession of a narcotic may overcome the inferences of unlawful importation and knowledge thereof by satisfactory proof that in his case possession of narcotics did

not involve a violation of the statute, either because the narcotics were not imported contrary to law or because he had no knowledge of unlawful importation.<sup>49</sup> While the burden of overcoming the statutory presumptions is on accused,<sup>50</sup> there is no burden on him to establish that the drug was lawfully brought into the United States;<sup>51</sup> he is only called on to explain his possession of the drug to the satisfaction of the jury,<sup>52</sup> although in this connection defendant's explanation of his possession of the narcotic must not only be believed by the jury but must also be one that shows a possession which is lawful under the statute.<sup>53</sup>

*Character or purpose of possession.* Possession of any sort is sufficient to raise the presumption and place on accused the burden of explaining the possession to the satisfaction of the jury.<sup>54</sup> Possession for use, for example, does not differ in legal effect from possession for any other illegitimate purpose, such as for sale or distribution.<sup>55</sup>

## (2) Admissibility and Weight or Sufficiency

General rules have been applied in prosecutions under the narcotic drugs import and export act as to the admissibility of evidence and the weight and sufficiency thereof; and, under the statute, possession of a prohibited narcotic, unless satisfactorily explained, is sufficient evidence to authorize conviction.

General rules have been applied in prosecutions under the act as to the admissibility of the evidence,<sup>56</sup> and the weight and sufficiency thereof to sustain a conviction.<sup>57</sup> By virtue of the statutes,

39. U.S.—Hooper v. U. S., C.C.A. Cal., 16 F.2d 868.

40. U.S.—Hood v. U. S., C.C.A.Okla., 72 F.2d 150.

41 C.J. p 1070 note 10.

41. U.S.—U. S. v. Tom Yu, D.C. Ariz., 1 F.Supp. 357.

49 C.J. p 1069 note 83.

42. U.S.—U. S. v. Moe Liss, C.C.A. N.Y., 105 F.2d 144—Gee Woe v. U. S., C.C.A.La., 250 F. 428, 162 C.C. A. 498, writ of certiorari denied 39 S.Ct. 8, 248 U.S. 562, 63 L.Ed. 422.

43. U.S.—Ng Choy Fong v. U. S., Cal., 245 F. 305, 157 C.C.A. 497, certiorari denied 38 S.Ct. 190, 245 U.S. 669, 62 L.Ed. 539.

44. U.S.—Yee Hem v. U. S., Ohio, 45 S.Ct. 470, 268 U.S. 178, 69 L. Ed. 904—Rosenberg v. U. S., C.C. A.Cal., 13 F.2d 369.

45. U.S.—Yee Hem v. U. S., Ohio, 45 S.Ct. 470, 268 U.S. 178, 69 L.Ed. 904—U. S. v. Yee Fing, D.C.Mont., 223 F. 154.

46. U.S.—Gonzales v. U. S., C.C.A. Cal., 162 F.2d 870.

Standard sufficiently set forth

The satisfaction of the jury as to

the explanation turns on whether or not the possession was within the exceptions provided in the statutes, and, hence, the standard is sufficiently set forth—Gonzales v. U. S., C.C.A.Cal., 162 F.2d 870.

47. U.S.—U. S. v. One Studebaker Roadster Motor No. GE-1387, Serial No. 1411692, D.C.Tenn., 40 F.2d 557.

48. U.S.—Pon Wing Quong v. U. S., C.C.A.Cal., 111 F.2d 751—Gee Woe v. U. S., C.C.A.La., 250 F. 428, 162 C.C.A. 498, certiorari denied 39 S.Ct. 8, 248 U.S. 562, 63 L.Ed. 422 —U. S. v. Sischo, D.C.Wash., 262 F. 1001, affirmed 270 F. 958, reversed on other grounds 43 S.Ct. 511, 262 U.S. 165, 67 L.Ed. 925.

49. U.S.—U. S. v. Feinberg, C.C.A. Ill., 123 F.2d 425, certiorari denied Feinberg v. U. S., 69 S.Ct. 626, 315 U.S. 801, 86 L.Ed. 1201.

50. U.S.—White v. U. S., C.C.A.Cal., 16 F.2d 870, certiorari denied 47 S.Ct. 660, 274 U.S. 745, 71 L.Ed. 1326.

51. U.S.—U. S. v. Turner, C.C.A.N. Y., 65 F.2d 587.

52. U.S.—U. S. v. Turner, supra.

53. U.S.—U. S. v. Feinberg, C.C.A. Ill., 123 F.2d 425, certiorari denied Feinberg v. U. S., 62 S.Ct. 626, 315 U.S. 801, 86 L.Ed. 1201—U. S. v. Moe Liss, C.C.A.N.Y., 105 F.2d 144.

54. U.S.—Pitta v. U. S., C.C.A.Cal., 164 F.2d 601.

55. U.S.—Ferrari v. U. S., C.A.Cal., 169 F.2d 353—Pitta v. U. S., C.C.A. Cal., 164 F.2d 601.

56. U.S.—Gin Bock Sing v. U. S., C.C.A.Cal., 8 F.2d 976.

49 C.J. p 1070 note 12.

### Evidence held admissible

U.S.—Silverman v. U. S., C.C.A. Mass., 59 F.2d 636, certiorari denied 53 S.Ct. 89, 287 U.S. 640, 77 L.Ed. 554.

### 57. Evidence held sufficient

#### (1) In general.

U.S.—U. S. v. Cook, C.A.Ill., 184 F.2d 642—Du Verney v. U. S., C.A.Cal., 181 F.2d 853—U. S. v. Cohen, C.A. N.Y., 177 F.2d 523, certiorari denied Cohen v. U. S., 70 S.Ct. 568, 339 U.S. 914, 94 L.Ed. —, rehearing denied 70 S.Ct. 664, 339 U.S. 936, 94 L.Ed. — —U. S. v. Williams, C.A.Ill., 175 F.2d 715—Pon v. U. S., C.C.A.Mass., 168 F.2d 373

possession of a prohibited narcotic is deemed sufficient evidence to authorize conviction unless defendant satisfactorily explains such possession,<sup>58</sup> and, hence, in the absence of a satisfactory explanation of possession, proof of importation is unnecessary.<sup>59</sup>

#### d. Trial, Sentence, and Punishment

The trial of a prosecution for violation of the narcotic drugs import and export act is governed by the usual rules, as for example, with respect to such matters as the province of the court and jury and the propriety of the instructions. Sentence may be imposed in accordance with the terms of the act.

In a trial on an indictment for a violation of the act, the usual rules prevail as to the province of the court and the jury.<sup>60</sup> It is for the jury to determine whether accused has satisfactorily explained his possession of illegally imported opium.<sup>61</sup> A motion to direct a verdict in favor of defendant is properly denied where there is sufficient evidence

to take the case to the jury.<sup>62</sup>

**Instructions.** The general rules governing instructions in criminal prosecutions apply.<sup>63</sup> It is error for the court to instruct the jury that there is no evidence to rebut the presumption of defendant's knowledge of unlawful importation where defendant has expressly testified that he had no such knowledge.<sup>64</sup> Where the instructions fairly and correctly state to the jury the general rules of law pertinent on a particular defense interposed by accused, he cannot complain of a refusal of the court to give a requested instruction on the subject.<sup>65</sup> A requested instruction is properly refused where it embraces an incomplete and inadequate statement of the law<sup>66</sup> or where it is not correct as applied to the testimony in the case.<sup>67</sup>

**Sentence and punishment.** Where, on conviction on an indictment containing two counts, a sentence

—Stein v. U. S., C.C.A.Cal., 166 F. 2d 851, certiorari denied 68 S.Ct. 1512, 334 U.S. 844, 92 L.Ed. 1768—U. S. v. Perillo, C.C.A.N.Y., 164 F. 2d 645—Pitta v. U. S., C.C.A.Cal., 164 F.2d 601—Sorrentino v. U. S., C.C.A.Cal., 163 F.2d 627—Adams v. U. S., 152 F.2d 743—U. S. v. Li Fat Tong, C.C.A.N.Y., 152 F.2d 650—Brady v. U. S., C.C.A.Cal., 148 F.2d 394—Kramer v. U. S., C.C.A.Cal., 147 F.2d 202—Wong Chin Pung v. U. S., C.C.A.Or., 142 F.2d 57—U. S. v. Cohen, C.C.A.N.Y., 124 F.2d 164, certiorari denied Bernstein v. U. S., 62 S.Ct. 796, 315 U.S. 811, 86 L.Ed. 1210, rehearing denied 62 S.Ct. 941, 316 U.S. 707, 86 L.Ed. 1774—Chadwick v. U. S., C.C.A.Tex., 117 F.2d 902, certiorari denied 61 S.Ct. 1109, 313 U.S. 585, 85 L.Ed. 1541—Pon Wing Quong v. U. S., C.C.A.Cal., 111 F.2d 751—Louie Hung v. U. S., C.C.A.Cal., 111 F.2d 325—U. S. v. Adelman, C.C.A.N.Y., 107 F.2d 497—Lee Dip v. U. S., C.C.A.Cal., 92 F.2d 802, certiorari denied 58 S.Ct. 526, 303 U.S. 638, 82 L.Ed. 1099—Gowling v. U. S., C.C.A.Tenn., 64 F.2d 796—Miller v. U. S., C.C.A.Ill., 53 F.2d 316.

D.C.—Macaboy v. U. S., 160 F.2d 279, 82 U.S.App.D.C. 53—Dear Check Quong v. U. S., 160 F.2d 251, 82 U.S.App.D.C. 8.

49 C.J. p 1070 note 13 [a].

(2) To sustain conviction on theory that accused and another were jointly engaged in narcotic transportation venture.—Colletti v. U. S., C.C.A.Ohio, 53 F.2d 1017, certiorari denied 52 S.Ct. 459, 285 U.S. 559, 76 L.Ed. 947.

(3) To identify the drugs.—Cromer v. U. S., 142 F.2d 697, 78 U.S.App. D.C. 400, certiorari denied 64 S.Ct. 1274, 322 U.S. 760, 88 L.Ed. 1588.

#### Evidence held insufficient

U.S.—Hubby v. U. S., C.C.A.Tex., 150 F.2d 165—Beland v. U. S., C.C.A.Tex., 117 F.2d 958, certiorari denied 61 S.Ct. 1110, 313 U.S. 585, 85 L.Ed. 1541, rehearing denied 62 S.Ct. 54, 314 U.S. 708, 86 L.Ed. 565—U. S. v. Bonanzi, C.C.A.N.Y., 94 F.2d 570—U. S. v. Willis, D.C.Cal., 85 F.Supp. 745.

49 C.J. p 1070 note 13 [b].

58. U.S.—Stoppelli v. U. S., C.A.Cal., 183 F.2d 391, certiorari denied 71 S.Ct. 88, rehearing denied 71 S.Ct. 237—U. S. v. Feinberg, C.C.A.Ill., 123 F.2d 425, certiorari denied Feinberg v. U. S., 69 S.Ct. 626, 315 U. S. 801, 86 L.Ed. 1201—Leong Chong Wing v. U. S., C.C.A.Wash., 95 F.2d 903—Hood v. U. S., C.C.A.Okl., 78 F.2d 150.

Presumptions arising from possession see supra subdivision c (1) of this section.

#### Provision unaffected by Opium Poppy Control Act

The Opium Poppy Control Act does not invalidate the statutory provision that unexplained possession of narcotic drugs shall be deemed sufficient to authorize conviction under the statute penalizing importation of narcotics into the United States or facilitating its transportation or concealment, insofar as provision is applicable to possession of cocaine, a derivative of coca leaves.—U. S. v. Williams, C.A.Ill., 175 F.2d 715.

59. U.S.—Hood v. U. S., C.C.A.Okl., 78 F.2d 150.

#### 60. Questions held for jury

(1) In general.—U. S. v. Toscano, C.C.A.N.Y., 166 F.2d 524—U. S. v. Feinberg, C.C.A.Ill., 123 F.2d 425, certiorari denied Feinberg v. U. S., 62 S.Ct. 626, 315 U.S. 801, 86 L.Ed. 1201—U. S. v. Uwanawich, C.C.A.N.

Y., 102 F.2d 45, certiorari denied Uwanawich v. U. S., 59 S.Ct. 775, 306 U.S. 658, 83 L.Ed. 1055—Jindra v. U. S., C.C.A.Fla., 69 F.2d 429, certiorari denied 54 S.Ct. 869, 292 U.S. 651, 78 L.Ed. 1501—Borgfeldt v. U. S., C.C.A.Cal., 67 F.2d 967—U. S. v. Mule, C.C.A.N.Y., 45 F.2d 132—U. S. v. Giner, D.C.N.Y., 43 F.Supp. 863.

(2) Whether defendant knew that packages in his possession contained drugs.—Henry Woo v. U. S., C.C.A.W.Va., 73 F.2d 897, certiorari denied 55 S.Ct. 512, 294 U.S. 714, 79 L.Ed. 1248.

61. U.S.—Boyd v. U. S., C.C.A.Cal., 30 F.2d 900—Vachuda v. U. S., C.C.A.N.Y., 21 F.2d 409.

62. U.S.—Henry Woo v. U. S., C.C.A.W.Va., 73 F.2d 897, certiorari denied 55 S.Ct. 512, 294 U.S. 714, 79 L.Ed. 1248.

63. U.S.—Shafer v. U. S., C.A.Cal., 179 F.2d 829, certiorari denied 70 S.Ct. 1024, 339 U.S. 979, 94 L.Ed.

#### Instructions held not erroneous

U.S.—Stoppelli v. U. S., C.A.Cal., 183 F.2d 391, certiorari denied 71 S.Ct. 88, rehearing denied 71 S.Ct. 237—U. S. v. Moe Liss, C.C.A.N.Y., 105 F.2d 144—Henry Woo v. U. S., C.C.A.W.Va., 73 F.2d 897, certiorari denied 55 S.Ct. 512, 294 U.S. 714, 79 L.Ed. 1248—Jindra v. U. S., C.C.A.Fla., 69 F.2d 429, certiorari denied 54 S.Ct. 869, 292 U.S. 651, 78 L.Ed. 1501.

64. U.S.—U. S. v. Turner, C.C.A.N.Y., 65 F.2d 587.

65. U.S.—Morlen v. U. S., C.C.A.Cal., 13 F.2d 625.

66. U.S.—Borgfeldt v. U. S., C.C.A.Cal., 67 F.2d 967.

67. U.S.—Borgfeldt v. U. S., supra.



is imposed in excess of what might be imposed on the first count, and the punishment is such as was authorized by the second count, which is good and supported by sufficient evidence, accused is not prejudiced by such sentence.<sup>68</sup> An alien, having plead-

ed guilty to a violation of the act, and who has been ordered to be deported in accordance with its provisions, cannot contend that he was only convicted for the possession of smoking opium, since he could not be so accused under the act.<sup>69</sup>

**POKER.** Defined see Gaming § 1 a (3).

**POLACK.** A Pole; a Polander.<sup>1</sup>

**POLAND.** A country constituting a distinct and individual part of Europe.<sup>2</sup>

**POLARISCOPE.** The word "polariscope" is derived from the Greek words "polos," a pole, and "skopeo," to view.<sup>3</sup> It is an optical instrument for exhibiting or measuring the polarization of light, or for examining substances in polarized light;<sup>4</sup> an instrument of science used in laboratories.<sup>5</sup> Many forms of the instrument have been contrived,<sup>6</sup> and it is composed of many parts which vary in details of structure so that its operation requires special knowledge and experience.<sup>7</sup> One of the uses of the instrument is to test sugar for tariff purposes, and regulations dealing with such tests are treated in Customs Duties § 36.

**POLARIZATION.** See Electricity § 1 c.

**POLAR STAR RULE.** The name given to the rule, generally referred to as the cardinal rule for construction of written documents, that the intent of

the maker of a written document, as gathered from its four corners, shall prevail unless such intent antagonizes a statute or is against public policy.<sup>8</sup>

The application of this rule to particular instruments is treated in various titles throughout this work, particular reference being made to Bills and Notes § 42, Contracts § 295, Deeds § 83, Insurance § 291, and to the C.J.S. title Wills § 590, also 69 C.J. p 52 note 26—p 59 note 43.

**POLE.** A word having more than one meaning.<sup>9</sup> Primarily, a piece of wood or metal of much greater height than thickness;<sup>10</sup> a heavy piece of timber.<sup>11</sup>

Also, one of that Slavic people, or their descendants, who founded Poland.<sup>12</sup>

"Pole," as a linear measurement, is defined in the C.J.S. title Weights and Measures § 1, also 49 C. J. p 1070 note 13.

**POLICE.** In legal usage the word "police" is not a term of indefinite meaning,<sup>13</sup> although it has three significations.<sup>14</sup> The first relates to the measures which are adopted to keep order, the laws and ordinances on cleanliness, health, the markets, etc.; the

68. U.S.—Rosenberg v. U. S., C.C.A. Cal., 13 F.2d 369.

69. U.S.—Chung Que Fong v. Nagle, C.C.A. Cal., 15 F.2d 789.

1. N.Y.—Koninski v. Vieser, 161 N. Y.S. 129, 131, 97 Misc. 259.

2. N.Y.—Koninski v. Vieser, 161 N. Y.S. 129, 130, 131, 97 Misc. 259.

#### Historical note

"Poland is recognized by all of the reliable historians and geographers as a distinct part of Europe. Through its many vicissitudes that country and its people have maintained a distinct individuality with distinct race, tastes, ideals and aspirations. . . . No people of modern times have clung with greater tenacity and devotion to their national and racial traditions and aspirations in the face of political and economic oppression than the Poles. Their history goes back to the tenth century, and in the seventeenth century they stood in the first rank among the powers of the world."—Koninski v. Vieser, supra.

3. U.S.—U. S. v. International For-

warding Co., 9 Ct.Cust.App. 156, 157, 158.

4. U.S.—U. S. v. International Forwarding Co., supra.

5. U.S.—U. S. v. Bartram Bros., N. Y., 131 F. 833, 835, 65 C.C.A. 557.

6. U.S.—U. S. v. International Forwarding Co., 9 Ct.Cust.App. 156, 157, 158.

7. U.S.—U. S. v. Bartram Bros., N. Y., 131 F. 833, 835, 65 C.C.A. 557.

8. Ky.—Hanks v. McDanell, 210 S. W.2d 784, 785, 307 Ky. 243.

9. Ky.—Kentucky, etc., Power Co. v. Gilliam, 276 S.W. 983, 984, 210 Ky. 820.

10. Tex.—Stemmons v. Dallas Power, etc., Co., Civ.App., 212 S.W. 222, 224.

49 C.J. p 1070 note 11.  
"Boom pole" see 11 C.J.S. p 523 note 35.

11. Ky.—Howard v. Chesapeake, etc., R. Co., 90 S.W. 950, 28 Ky.L. 891.

12. New Standard D.

#### Term officially recognized

The Russian government, on Aug. 14, 1914, issued a proclamation addressed to the "Poles," duly signed by Nicholas, commander and chief and general adjutant of all the armies of Russia.—Koninski v. Vieser, 161 N.Y.S. 129, 131, 97 Misc. 259.

13. Miss.—Monet v. Jones, 18 Miss. 237, 243.

In colloquial speech "police" is ordinarily understood as applying only to the uniformed constabulary, but that is only one of its meanings.—Norris v. Mayor and City Council of Baltimore, 192 A. 531, 543, 172 Md. 667.

14. Md.—Corpus Juris cited in Norris v. Mayor and City Council of Baltimore, 192 A. 531, 540, 172 Md. 667.

Miss.—Monet v. Jones, 18 Miss. 237, 243.

N.D.—State v. Frazier, 167 N.W. 510, 515, 39 N.D. 430.

Okl.—Lakeview, Inc., v. Davidson, 26 P.2d 760, 765, 166 Okl. 171.

S.C.—Green v. City of Bennettsville, 15 S.E.2d 334, 337, 197 S.C. 313.

second has for its object to procure to the authorities the means of detecting even the smallest attempts to commit crime, in order that the guilty may be arrested before their plans are carried into execution and delivered to the justice of the country; the third comprehends the laws, ordinances, and other measures which require the citizens to exercise their rights in a particular form.<sup>15</sup>

Blackstone and Cooley have treated the meaning of the word "police,"<sup>16</sup> and Jeremy Bentham wrote that "Police is in general a system of precaution, either for the prevention of crime or calamities."<sup>17</sup> Later legal writers have stated that "police" has also been divided into "administrative police," which has for its object to maintain constantly public order in every part of the general administration, and "judiciary police," which is intended principally to prevent crimes by punishing criminals.<sup>18</sup>

The word "police" is variously defined as meaning policy, civil organization, the regulation, discipline, and control of a community; civil administration; enforcement of law; public order;<sup>19</sup> that species of superintendence by magistrates which has principally for its object the maintenance of public

tranquillity among its citizens;<sup>20</sup> the internal regulations and government of a kingdom or state;<sup>21</sup> the government of a city or town;<sup>22</sup> the administration of the laws and regulations of a city or incorporated town or borough.<sup>23</sup> In a more restricted sense it is the department of government which is concerned with maintenance of order and enforcement of law;<sup>24</sup> and the term is particularly applied to those officers who are appointed for the purpose of the maintenance of public tranquillity among the citizens.<sup>25</sup>

As a verb, "police" means to watch, guard, or maintain order in.<sup>26</sup>

The term "police" is treated in various places throughout the title *Municipal Corporations*, reference being made to the index to that title. The powers of county police officers are discussed in Counties § 137. The powers, duties and functions of state police or rangers are treated in the C.J.S. title States § 66, also 59 C.J. p 122 note 17—p 123 note 25.

*Police regulation.* The term is used to define a power which resides in the state.<sup>27</sup> In its primary or narrow sense it refers to the exercise of the

15. Md.—*Corpus Juris* cited in *Norris v. Mayor and City Council of Baltimore*, 192 A. 531, 540, 172 Md. 667.

N.D.—*State v. Frazier*, 167 N.W. 510, 515, 39 N.D. 430.

Okl.—*Lakeview, Inc. v. Davidson*, 26 P.2d 760, 765, 166 Okl. 171.

S.C.—*Green v. City of Bennettsville*, 15 S.E.2d 334, 337, 197 S.C. 313.

The term includes regulations for the safety of the public and is not limited to sanitary or health regulations.—*Lakeview, Inc. v. Davidson*, 26 P.2d 760, 765, 166 Okl. 171.

16. Judge Cooley, in his *Constitutional Limitations* wrote that the police of a state, in a comprehensive sense, embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others.

N.J.—*Levine v. State*, 166 A. 300, 301, 110 N.J.Law 467.

Or.—*Commissioners of Canals & Locks Co. v. Willamette Transp., etc., Co.*, 6 Or. 220, 222, 223.

49 C.J. p 1071 note 18 [a].

Blackstone defines the public po-

lice and economy as "the due regulation and domestic order of the kingdom, whereby the inhabitants of a state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious and inoffensive in their respective stations."

N.J.—*Levine v. State*, 166 A. 300, 301, 110 N.J.Law 467.

Pa.—*Commonwealth v. McHale*, 97 P. 407, 408.

17. N.J.—*Levine v. State*, 166 A. 300, 301, 110 N.J.Law 467.

Or.—*Commissioners of Canals & Locks Co. v. Willamette Transp., etc., Co.*, 6 Or. 220, 222.

49 C.J. p 1071 note 17.

*Continuing Bentham quotation*

"Its business may be distributed into eight distinct branches: (a) Police for the prevention of offenses; (b) police for the prevention of calamities; (c) police for the prevention of epidemic diseases; (d) police of charity; (e) police of interior communications; (f) police of public amusements; (g) police for recent intelligence; (h) police for registration."—*Commissioners of Canals & Locks Co. v. Willamette Transp., etc., Co.*, 6 Or. 220, 222.

18. S.C.—*Green v. City of Bennettsville*, 15 S.E.2d 334, 337, 197 S.C. 313.

49 C.J. p 1071 note 18.

19. Md.—*Norris v. Mayor and City*

*Council of Baltimore*, 192 A. 531, 543, 172 Md. 667.

20. Okl.—*Lakeview, Inc. v. Davidson*, 26 P.2d 765, 766, 166 Okl. 171.

S.C.—*Green v. City of Bennettsville*, 15 S.E.2d 334, 337, 197 S.C. 313.

49 C.J. p 1071 note 20.

21. N.Y.—*People v. New Jersey Cent. R. Co.*, 42 N.Y. 283, 314.

22. Conn.—*Dibble v. Merriman*, 52 Conn. 214, 215.

N.Y.—*People v. New Jersey Cent. R. Co.*, 42 N.Y. 283, 314.

23. Conn.—*Dibble v. Merriman*, 52 Conn. 214, 215.

N.Y.—*People v. New Jersey Cent. R. Co.*, 42 N.Y. 283, 314.

24. Md.—*Norris v. Mayor and City Council of Baltimore*, 192 A. 531, 543, 172 Md. 667.

25. Conn.—*State v. Hine*, 21 A. 1024, 1025, 59 Conn. 50, 10 L.R.A. 83.

49 C.J. p 1071 note 19.

"Policeman" defined see *Municipal Corporations* § 568 notes 97-16.

26. Century D.

Cause land to be "policed," by which term was meant the employment of one to ride over the premises and keep off trespassers.—*Clark v. Cochran*, 85 So. 250, 254, 79 Fla. 788.

27. Wash.—*In re O'Neill*, 83 P. 104, 106, 41 Wash. 174, 3 L.R.A.N.S. 558, 6 Ann.Cas. 869.

It is difficult to define the scope of the term. It has been the subject

police power to protect the health, lives, and morals of the people.<sup>28</sup> In its broader acceptance it embraces everything to promote the general welfare; everything essential to the great public needs.<sup>29</sup> In the plural, such provisions of law as are designed to protect the lives, limbs, health, comfort, and quiet of citizens and to secure them in the enjoyment of their property;<sup>30</sup> regulations adopted in the exercise of "police power."<sup>31</sup>

Police regulations are discussed in various connections throughout this work, particular reference being made to Carriers § 188, Constitutional Law § 98, and District of Columbia §§ 3-5. Consult also the Descriptive-Word Index.

*Other phrases* employing the word are set out in the note.<sup>32</sup>

**POLICIA.** In Spanish law, the science or art of government.<sup>33</sup>

**POLICITACION.** In Spanish law, a promise or offer.<sup>34</sup>

**POLICY.** The word "policy" is defined as meaning a settled or definite course or method adopted by a government,<sup>35</sup> institution, body, or individual.<sup>36</sup>

As applied to a rule of law, "policy" refers to its probable effect, tendency, or object, considered with respect to the social or political well-being of a state.<sup>37</sup>

The word is employed as the name of a game or form of gambling, and is treated in this connection in Gaming § 1 b (3), and as constituting a lottery in Lotteries § 10. The word "policy" is defined in Insurance § 1. For other references consult the index to this title sub verbo "Contract or policy."

### Policy of the Law

The term is difficult to define.<sup>38</sup> It has been considered to refer to the purpose and spirit of the substantive laws of a state, whether such laws be found in the constitution and statutes or in judicial records.<sup>39</sup> The term has been said to be synony-

of much discussion by the courts and its application has sometimes been sarcastically criticized as the use of an indefinable something to sustain legislation unsupportable on any other ground.—In re O'Neill, supra.

28. Ky.—Mitchell v. Cumberland Tel. etc. Co., 221 S.W. 547, 549, 188 Ky. 263, 10 A.L.R. 946.

29. N.D.—State v. Northwestern Pac. R. Co., 172 N.W. 324, 331, 43 N.D. 556.

30. Miss.—Dantzler Lumber Co. v. Texas, etc., R. Co., 80 So. 770, 775, 119 Miss. 328, 4 A.L.R. 1669. 49 C.J. p 1072 note 57.

31. Ohio.—Myers v. City of Defiance, 36 N.E.2d 162, 167, 67 Ohio App. 159.

### 32. Phrases

(1) "Police character;" said to be a person who is under the surveillance and under the suspicion of the police, and is liable to be arrested by the police.—See State v. Clancy, 125 S.W. 458, 459, 225 Mo. 654.

(2) "Police measures;" laws providing for preservation of the public peace, health, and safety.—State ex rel. Hughes v. Cleveland, 141 P.2d 192, 200, 47 N.M. 230.

(3) "Police purposes" are such purposes as arise ordinarily in the administration of the affairs of cities and towns, in the exercise by the police of their power and duty to promote the public health, convenience, and welfare.—Sessions v. Crunkilton, 20 Ohio St. 349, 353—49 C.J. p 1072 note 54. See also Municipal Corporations § 411.

### Phrases elsewhere discussed

(1) "Police board" see Municipal Corporations § 564.

(2) "Police car" as a motor vehicle see Motor Vehicles § 1; and consult index to that title.

(3) "Police chief" see Municipal Corporations § 565.

(4) "Police clerk" see Municipal Corporations § 590.

(5) "Police commissioners" see Municipal Corporations § 565 a.

(6) "Police court" defined see Courts § 11; for jurisdiction of police courts generally, and of police courts of particular states consult the indexes to the titles Courts and Criminal Law; legislative and municipal power in respect of police courts see Courts § 131.

(7) "Police department" see Municipal Corporations § 563; and consult the Descriptive-Word Index.

(8) "Police force" see Municipal Corporations § 563.

(9) "Police inspector" see Municipal Corporations § 590.

(10) "Police judge" or "justice" defined, and as a judicial and municipal officer see Judges §§ 2 b, 3; for jurisdiction in general, consult index to title Criminal Law, and enforcement of ordinances see Municipal Corporations § 322.

(11) "Police juries" as governing bodies of parishes comparable to county boards see Counties § 74.

(12) "Police jurisdiction" see 50 C.J.S. p 1092 note 49.

(13) "Police magistrate" defined see Judges § 2 c.

(14) "Police matron" see Municipal Corporations §§ 568, 590.

(15) "Police officer" see Municipal Corporations § 568.

(16) "Police ordinances" see 67 C.J.S. p 521 note 76.

(17) "Police power" in general see Constitutional Law §§ 174-198; of municipal corporations see Municipal Corporations §§ 126-137; in respect of motor vehicles consult the index to the title Motor Vehicles. For other applications and specific uses of the term see the Descriptive-Word Index.

(18) "Police surgeon" see Municipal Corporations § 590.

33. Escribiche Diccionario.

34. Escribiche Diccionario.

35. Cal.—Lockheed Aircraft Corp. v. Superior Court of Los Angeles County, 171 P.2d 21, 24, 28 Cal.2d 481, 166 A.L.R. 701.

N.C.—Williamson v. City of High Point, 195 S.E. 90, 97, 213 N.C. 96.

36. Cal.—Lockheed Aircraft Corporation v. Superior Court in and for Los Angeles County, 171 P.2d 21, 24, 28 Cal.2d 481, 166 A.L.R. 701.

37. Mo.—Dille v. St. Luke's Hospital, 196 S.W.2d 615, 620, 355 Mo. 436—State v. Bowman, 170 S.W. 700, 701, 184 Mo.App. 549. 49 C.J. p 1072 note 64.

38. Mo.—Johnston v. Chicago Great Western R. Co., App., 164 S.W. 260, 262.

39. Mo.—In re Rahn, 291 S.W. 120, 122, 316 Mo. 492, 51 A.L.R. 877, 883—Johnston v. Chicago Great Western R. Co., App., 164 S.W.2d 260, 262.

mous with "public policy."<sup>40</sup>

### Public Policy

The term "public policy" is perhaps the most expansive and widely comprehensive phrase known to the law.<sup>41</sup> It has been said that the doctrine of public policy originated in England in the early part of the Fifteenth Century,<sup>42</sup> and that the principle of public policy owes its existence to the very sources from which the common law is supplied.<sup>43</sup> The phrase is used in several senses, and it may mean the common law or general statutory law of the state, and it may mean the prevalent notions of justice and general fundamental conceptions of

right and wrong, and it may mean both.<sup>44</sup> It is a vague, indefinite, and nebulous term,<sup>45</sup> and the decisions under this branch of the law are in such confusion as to have provoked the remark by Burroughs, J., in *Richardson v. Mellish*, 2 Bing. 229,<sup>46</sup> which is set out *infra* p 218 note 36. It is a term of broad significance,<sup>47</sup> although the decisions of some courts have given it a limited legal meaning.<sup>48</sup> It is a relative term,<sup>49</sup> sometimes used in a very vague, loose, or inaccurate sense,<sup>50</sup> and it must be interpreted in the light of the circumstances surrounding the particular transaction.<sup>51</sup>

Being of such vague and uncertain meaning,<sup>52</sup> and of such variable quantity,<sup>53</sup> the term "public

40. Ark.—*Bene v. New York Life Ins. Co.*, 87 S.W.2d 979, 981, 191 Ark. 714.

Fla.—*State ex rel. Gibbs v. Bloodworth*, 184 So. 1, 5, 134 Fla. 369.

Mo.—*Dille v. St. Luke's Hospital*, 196 S.W.2d 615, 620, 355 Mo. 436. 49 C.J. p 1073 note 70.

41. Ky.—*Bankers Bond Co. v. Buckingham*, 97 S.W.2d 596, 600, 265 Ky. 712.

42. **Origin of public policy doctrine**  
"Public policies in general are those considerations of public interest and morality which the state enforces by legislation or judicial action. The earliest trace of this principle in the English Law Reports is found in a case decided in the reign of Henry the Fifth in 1414, when a dyer had contracted not to use his art within a certain town for a certain time, and the court went upon the principle that it was not good for the realm; that it was against public policy for men to bind themselves not to exercise their trades. The principle of public policy has never been repudiated and its application has varied with changing conditions and public opinion."—*In re Andrus' Will*, 281 N.Y.S. 831, 846, 156 Misc. 263.

43. N.Y.—*In re Andrus' Will*, *supra*.

44. N.Y.—*Thuna v. Wolf*, 223 N.Y.S. 765, 771, 130 Misc. 306.

45. Del.—*Tracey v. Franklin*, 67 A. 2d 56, 58.

Tex.—*Corpus Juris* cited in *Griggs Canning Co. v. Josey*, 164 S.W.2d 835, 842, 139 Tex. 623.

50 C.J. p 857 note 44.

#### Similarly expressed

In *Egerton v. Brownlow*, 4 H.L. Cas. 1, 10 Reprint 359, Baron Parke said, "This (public policy) is a vague and unsatisfactory term and calculated to lead to uncertainty and error, when applied to the decisions of legal rights; it is capable of being understood in different senses; it may and does, in its ordinary sense, mean 'political expedience' or that

which is best for the common good of the community; and in that sense there may be every variety of opinion, according to the education, habits, talents and dispositions of each person, who is to decide whether an act is against public policy or not. To allow this to be the ground of judicial decision would lead to the greatest uncertainty and confusion."—*Woodruff v. Berry*, 40 Ark. 251, 262.

46. Del.—*Tracey v. Franklin*, 67 A. 2d 56, 58.

47. Mo.—*Dille v. St. Luke's Hospital*, 196 S.W.2d 615, 620, 355 Mo. 436.

48. N.Y.—*Glaser v. Glaser*, 12 N.E. 2d 305, 306, 307, 276 N.Y. 296.

49. Ohio.—*Dixon v. Van Sweringen Co.*, 166 N.E. 887, 889, 121 Ohio St. 56.

50. N.Y.—*Glaser v. Glaser*, 12 N.E. 2d 305, 307, 276 N.Y. 296—*Mertz v. Mertz*, 3 N.E.2d 597, 599, 271 N.Y. 466, 108 A.L.R. 1120—*People v. Hawkins*, 51 N.E. 257, 260, 157 N.Y. 1, 68 Am.S.R. 736, 42 L.R.A. 490—*Leviton v. Leviton*, 6 N.Y.S.2d 535, 538.

51. Ohio.—*Dixon v. Van Sweringen Co.*, 166 N.E. 887, 889, 121 Ohio St. 56.

52. Del.—*Ringling v. Ringling Bros.-Barnum & Bailey Combined Shows, Ch.*, 49 A.2d 603, 609.

Fla.—*Corpus Juris* quoted in *Knott v. State*, 186 So. 788, 795, 136 Fla. 184—*Corpus Juris* quoted in *City of Leesburg v. Ware*, 153 So. 87, 89, 113 Fla. 760.

Ill.—*Colgrove v. Lowe*, 175 N.E. 569, 570, 340 Ill. 860.

Ind.—*Underwriters v. State ex rel. Morgan*, 5 N.E.2d 908, 912, 211 Ind. 463.

Mo.—*Corpus Juris* quoted in *Dille v. St. Luke's Hospital*, 196 S.W.2d 615, 619, 620, 355 Mo. 436.

N.Y.—*Corpus Juris* cited in *Rozell v. Rozell*, 8 N.Y.S.2d 901, 903, 256 App.Div. 61.

N.D.—*James v. Young*, 43 N.W.2d 692, 697.

Tex.—*Corpus Juris* quoted in *Meadows v. Edwards*, Civ.App., 116 S.W.2d 831, 834.

Vt.—*Corpus Juris* quoted in *State v. Barnett*, 3 A.2d 521, 526, 110 Vt. 221.

Wis.—*Good v. Starker*, 257 N.W. 299, 301, 216 Wis. 253.

50 C.J. p 857 note 44.

#### Similarly expressed

(1) The meaning of the phrase "public policy" is vague and variable.

U.S.—*Twin City Pipe Line Co. v. Harding Glass Co.*, Ark., 51 S.Ct. 476, 477, 283 U.S. 353, 75 L.Ed. 1112, 83 A.L.R. 1168.

Ala.—*Lowery v. Zorn*, 9 So.2d 872, 874, 243 Ala. 285.

Tenn.—*Home Beneficial Ass'n v. White*, 177 S.W.2d 545, 546, 180 Tenn. 585.

(2) "Public policy" is a vague phantasmagoria of legal concepts, when an effort is made to give the term meaning aside from consideration of constitution and statutes.—*Sirman v. Sloss Realty Co.*, 129 S.W.2d 602, 606, 198 Ark. 534.

(3) "Public policy" is that vague and undefinable concept—the will of the public.—*Simmons v. Newton*, 174 S.E. 703, 707, 173 Ga. 806.

53. Fla.—*Corpus Juris* quoted in *Knott v. State*, 186 So. 788, 795, 136 Fla. 184—*Corpus Juris* quoted in *City of Leesburg v. Ware*, 153 So. 87, 89, 113 Fla. 760.

Ill.—*Colgrove v. Lowe*, 175 N.E. 569, 570, 340 Ill. 860.

Ind.—*Underwriters v. State ex rel. Morgan*, 5 N.E.2d 908, 912, 211 Ind. 463.

Mo.—*Corpus Juris* quoted in *Dille v. St. Luke's Hospital*, 196 S.W.2d 615, 619, 620, 355 Mo. 436.

N.Y.—*Corpus Juris* cited in *Rozell v. Rozell*, 8 N.Y.S.2d 901, 903, 256 App.Div. 61.

Tex.—*Corpus Juris* quoted in *Mead-*

policy" has frequently been said not to be susceptible of exact or precise definition.<sup>54</sup> Mr. Chief Justice Story, in his work on Conflict of Laws, writing on the doctrine of public policy states, "Public policy is in its nature so uncertain and fluctuating, varying with the habits and fashions of the day, with the growth of commerce and the usages of trade, that it is difficult to determine its limits with any degree of exactness. It has never been defined by the courts, but has been left loose and free from

definition in the same manner as fraud."<sup>55</sup> Thus, while it has been stated that no exact or precise definition of the term "public policy" has ever been given or can be found,<sup>56</sup> and that a correct definition, at once concise and comprehensive, has not yet been formulated by the courts,<sup>57</sup> nevertheless the courts have often found it necessary to define the juridical meaning of the term,<sup>58</sup> and it has been variously defined.<sup>59</sup>

In the case of Egerton v. Brownlow, 4 H.L.Cas.

*ows v. Edwards*, Civ.App., 116 S.W.2d 831, 834.

Vt.—*Corpus Juris* quoted in *State v. Barnett*, 3 A.2d 521, 526, 110 Vt. 221.

50 C.J. p 857 note 45.

54. Ark.—*Corpus Juris* cited in *Jeffries v. State*, for Use of Woodruff County, 205 S.W.2d 194, 196, 212 Ark. 213.

Fla.—*Corpus Juris* quoted in *Knott v. State*, 186 So. 788, 795, 136 Fla. 184—*Corpus Juris* quoted in *City of Leesburg v. Ware*, 153 So. 87, 89, 113 Fla. 760.

Ill.—*Groome v. Freyn Engineering Co.*, 28 N.E.2d 274, 279, 374 Ill. 113—*Colgrove v. Lowe*, 175 N.E. 569, 570, 340 Ill. 360—*Shore Management Corporation v. Erickson*, 41 N.E.2d 972, 314 Ill.App. 571.

Ind.—*Underwriters v. State ex rel. Morgan*, 5 N.E.2d 908, 912, 211 Ind. 463.

Md.—*Mayor and Council of City of Baltimore v. Maryland Casualty Co.*, 190 A. 250, 253, 171 Md. 667, 111 A.L.R. 305.

Mo.—*Corpus Juris* quoted in *Dille v. St. Luke's Hospital*, 196 S.W.2d 615, 619, 620, 355 Mo. 436.

N.J.—*Schaffer v. Federal Trust Co.*, 28 A.2d 75, 79, 132 N.J.Eq. 235.

N.Y.—*Corpus Juris* cited in *Rozell v. Rozell*, 8 N.Y.S.2d 901, 903, 256 App.Div. 61.

S.C.—*Grant v. Butt*, 17 S.E.2d 689, 693, 198 S.C. 298.

Tex.—*Corpus Juris* cited in *Griggs Canning Co. v. Josey*, 164 S.W.2d 835, 842, 139 Tex. 623—*Corpus Juris* quoted in *Meadows v. Edwards*, Civ.App., 116 S.W.2d 831, 834.

Vt.—*Corpus Juris* quoted in *State v. Barnett*, 3 A.2d 521, 526, 110 Vt. 221.

50 C.J. p 857 note 46.

#### Similarly stated

(1) "Public policy" is difficult, and perhaps impossible, to define.—*Smith v. Bell*, 41 S.E.2d 695, 700, 129 W.Va. 749.

(2) "Appellant says the condition subsequent is not against public policy. In *Woodruff v. Berry*, 40 Ark. 251, and again in *Paul v. Stukeley*, 126 Ark. 389, 189 S.W. 676, L.R.A.1917B, 888 we had occasion to consider a definition of 'public policy' as applicable to the facts in those cases. It

is possible that since these cases, the words 'public policy' have experienced such an expansion in use and meaning that 'no exact and precise definition . . . can be found' to fit all cases."—*Jeffries v. State*, for Use of Woodruff County, 205 S.W.2d 194, 196, 212 Ark. 213.

55. Mich.—*Skutt v. City of Grand Rapids*, 266 N.W. 344, 346, 275 Mich. 258—*McNamara v. Gargett*, 36 N.W. 218, 221, 68 Mich. 454, 13 Am.S.R. 355.

Mo.—*Lipscomb v. Adams*, 91 S.W. 1046, 1048, 193 Mo. 530, 112 Am.S. R. 500.

Okl.—*Christ's Methodist Church v. Macklanburg*, 177 P.2d 1008, 1011, 198 Okl. 297—*Pendleton v. Greever*, 193 P. 885, 887, 80 Okl. 35, 17 A.L.R. 317—*Union Cent. Life Ins. Co. v. Champlin*, 65 P. 836, 837, 11 Okl. 184, 55 L.R.A. 109.

#### Similarly expressed

(1) The courts have not defined the term.

U.S.—*Twin City Pipe Line Co. v. Harding Glass Co.*, Ark., 51 S.Ct. 476, 477, 283 U.S. 353, 75 L.Ed. 1112, 83 A.L.R. 1168.

Ala.—*Lowery v. Zorn*, 9 So.2d 872, 874, 243 Ala. 285.

Tenn.—*Home Beneficial Ass'n v. White*, 177 S.W.2d 545, 546, 180 Tenn. 585.

(2) Public policy has never been defined by the courts, but has been let loose and free from definition in the same manner as fraud.—*State ex rel. Gibbs v. Bloodworth*, 184 So. 1, 5, 134 Fla. 369.

(3) "Indeed, the term is as difficult to define with accuracy as the word 'fraud' or the term 'public welfare'."

Fla.—*Knott v. State*, 186 So. 788, 795, 136 Fla. 184—*City of Leesburg v. Ware*, 153 So. 87, 89, 113 Fla. 760.

Mich.—*Sipes v. McGhee*, 25 N.W.2d 638, 642, 316 Mich. 614—*Skutt v. City of Grand Rapids*, 266 N.W. 344, 346, 275 Mich. 258.

N.J.—*Girard Trust Co. v. Schmitz*, 20 A.2d 21, 29, 129 N.J.Eq. 444.

Ohio.—*Pittsburgh, C. C. & St. L. R. Co. v. Kinney*, 115 N.E. 505, 507, 95 Ohio St. 64, L.R.A.1917D 641, Ann. Cas.1918B 286.

(4) The term is as difficult to define as the words "fraud," "equity," or "welfare."—*Kintz v. Harriger*, 124 N.W. 168, 170, 99 Ohio St. 240.

56. Ark.—*Corpus Juris* cited in *Jeffries v. State*, 205 S.W.2d 194, 196, 212 Ark. 213.

Ky.—*Bankers Bond Co. v. Buckingham*, 97 S.W.2d 596, 600, 265 Ky. 712.

Mo.—*Corpus Juris* quoted in *Dille v. St. Luke's Hospital*, 196 S.W.2d 615, 620, 355 Mo. 436.

N.D.—*Mees v. Grewer*, 245 N.W. 813, 814, 63 N.D. 74.

Tex.—*Corpus Juris* quoted in *Meadows v. Edwards*, Civ.App., 116 S.W.2d 831, 834.

50 C.J. p 858 note 47.

57. Fla.—*Knott v. State*, 186 So. 788, 795, 136 Fla. 184—*City of Leesburg v. Ware*, 153 So. 87, 89, 113 Fla. 760.

Mich.—*Sipes v. McGhee*, 25 N.W.2d 638, 642, 316 Mich. 614—*Skutt v. City of Grand Rapids*, 266 N.W. 344, 346, 275 Mich. 258.

N.J.—*Girard Trust Co. v. Schmitz*, 20 A.2d 21, 29, 129 N.J.Eq. 444.

Ohio.—*Kintz v. Harriger*, 124 N.E. 168, 170, 99 Ohio St. 240, 12 A.L.R. 1240—*Pittsburgh, etc., R. Co. v. Kinney*, 115 N.E. 505, 507, 95 Ohio St. 64, 67, L.R.A.1917D 641, Ann. Cas.1918B 286.

#### Similarly expressed

The words "public policy" cannot be given a definition which will afford a standard for application in the manifold situations which arise.—*Christ's Methodist Church v. Macklanburg*, 177 P.2d 1008, 1011, 198 Okl. 297.

58. N.Y.—*Glaser v. Glaser*, 12 N.E. 2d 305, 307, 276 N.Y. 296—*Mertz v. Mertz*, 3 N.E.2d 597, 599, 271 N.Y. 466, 108 A.L.R. 1120—*F. A. Straus & Co. v. Canadian Pac. Ry. Co.*, 173 N.E. 564, 566, 254 N.Y. 407—*People v. Hawkins*, 51 N.E. 257, 260, 157 N.Y. 1, 68 Am.S.R. 736, 42 L.R.A. 490—*Hanfeld v. A. Broido, Inc.*, 3 N.Y.S.2d 463, 465, 167 Misc. 85—*Leviton v. Leviton*, 6 N.Y.S.2d 535, 538.

59. Ill.—*People ex rel. Nelson v. Wiersema State Bank*, 197 N.E. 537, 542, 361 Ill. 75, 101 A.L.R. 501.

1, 196, 10 Reprint 359, Lord Brougham stated, "By public policy is intended that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or is against the public good."<sup>60</sup> Lord Brougham's definition has been approved in American jurisdictions,<sup>61</sup> and is frequently restated<sup>62</sup> with minor variations,<sup>63</sup> the most common statement being that public policy is that principle of the law which holds that no one can lawfully do that which has a

tendency to be injurious to the public or against the public good.<sup>64</sup> With respect to the administration of the law, the courts have frequently quoted and often approved of this statement.<sup>65</sup>

"Public policy" is further defined as being that rule of law which declares that no one can lawfully do that which tends to injure the public, or is detrimental to the public good;<sup>66</sup> the principle which declares that no one can lawfully do that which has a tendency to be injurious to the public welfare.<sup>67</sup>

60. Colo.—*Fearnley v. De Mainville*, 39 P. 73, 75, 5 Colo.App. 441.

61. Ill.—*People ex rel. Nelson v. Wiersema State Bank*, 197 N.E. 537, 542, 361 Ill. 75, 101 A.L.R. 501.

Ky.—*Bankers Bond Co. v. Buckingham*, 97 S.W.2d 596, 600, 265 Ky. 712.

N.J.—*Girard Trust Co. v. Schmitz*, 20 A.2d 21, 29, 129 N.J.Eq. 144.

N.Y.—*Rozell v. Rozell*, 8 N.Y.S.2d 901, 903, 256 App.Div. 61.

Ohio.—*Campbell v. Monumental Life Ins. Co., App.*, 34 N.E.2d 268, 274.

Accepted in a multitude of cases

Wis.—*Good v. Starker*, 257 N.W. 299, 301, 216 Wis. 253.

62. Ky.—*Bankers Bond Co. v. Buckingham*, 97 S.W.2d 596, 600, 265 Ky. 712.

La.—*Furlong v. National Life & Accident Ins. Co. of Tennessee*, 169 So. 431, 434, 185 La. 352, 106 A.L.R. 40—*National Life & Accident Ins. Co. v. Turner, App.*, 174 So. 646, 648.

N.D.—*Mees v. Grewer*, 245 N.W. 813, 814, 63 N.D. 74.

S.D.—*El. P. Wilbur Trust Co. v. Fahrendorf*, 265 N.W. 1, 3, 64 S.D. 124.

Wis.—*Good v. Starker*, 257 N.W. 299, 301, 216 Wis. 253.

50 C.J. p 858 note 49 [a] (2).

63. No person

Public policy is that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public or against public good.

Iowa.—*Preston v. Howell*, 257 N.W. 415, 420, 219 Iowa 230, 97 A.L.R. 1140.

Kan.—*Master Builders' Ass'n of Kansas v. Carson*, 296 P. 693, 694, 132 Kan. 606.

N.J.—*Schaffer v. Federal Trust Co.*, 28 A.2d 75, 79, 132 N.J.Eq. 235—*Elzey v. Ajax Heating Co.*, 158 A. 851, 852, 10 N.J.Misc. 281.

S.D.—*Bartron v. Codington County*, 2 N.W.2d 337, 343, 68 S.D. 309, 140 A.L.R. 550.

Wash.—*Grover v. Zook*, 87 P. 638, 642, 643, 44 Wash. 489, 120 Am.S.R. 1012, 7 L.R.A.N.S., 582, 12 Ann. Cas. 192.

50 C.J. p 858 note 49 [a] (4).

No subject or citizen

Public policy is that principle of law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public or against the public good.

Ill.—*Buell v. Lanski*, 232 Ill.App. 500, 510.

N.D.—*Glass v. Swimaster Corp.*, 21 N.W.2d 468, 472, 74 N.D. 282—*Ness v. City of Fargo*, 251 N.W. 843, 845, 64 N.D. 231.

Wis.—*Hawkins Realty Co. v. Hawkins State Bank*, 236 N.W. 657, 662, 205 Wis. 406.

50 C.J. p 858 note 49 [a] (5).

No citizen

"Public policy" is the legal principle that no citizen can lawfully do that which has tendency to be injurious to public or against public good.

Mont.—*State v. Gateway Mortuaries*, 287 P. 156, 157, 87 Mont. 225, 68 A.L.R. 1512.

Wash.—*Makinen v. George*, 142 P.2d 910, 917, 19 Wash.2d 340.

64. U.S.—*German Baptist Orphans' Home v. Union Banking Co., D.C. Mich.*, 13 F.Supp. 814, 816.

Ark.—*Corpus Juris* quoted in *Bene v. New York Life Ins. Co.*, 87 S.W. 2d 979, 981, 191 Ark. 714.

Fla.—*Corpus Juris* quoted in *State ex rel. Gibbs v. Bloodworth*, 184 So. 1, 5, 134 Fla. 369.

Ill.—*Knass v. Madison & Kedzie State Bank*, 188 N.E. 836, 842, 354 Ill. 554.

Ind.—*Iroquois Underwriters v. State ex rel. Morgan*, 5 N.E.2d 908, 912, 211 Ind. 463.

Ky.—*Hanks v. McDaniel*, 210 S.W. 2d 784, 786, 307 Ky. 243—*Corpus Juris* quoted in *Scott County Board of Education v. McMillen*, 109 S.W.2d 1201, 1206, 270 Ky. 483.

Md.—*Mayor and Council of City of Baltimore v. Maryland Casualty Co.*, 190 A. 250, 253, 171 Md. 667, 111 A.L.R. 305.

Mo.—*Dille v. St. Luke's Hospital*, 196 S.W.2d 615, 620, 355 Mo. 436.

N.J.—*Jorgenson v. Metropolitan Life Ins. Co.*, 55 A.2d 2, 5, 136 N.J.Law 148—*Allen v. Commercial Casualty Ins. Co.*, 37 A.2d 37, 39, 131 N.J.Law 475.

N.D.—*Corpus Juris* quoted in *James v. Young*, 43 N.W.2d 692, 697.

Tex.—*Corpus Juris* quoted in *Cheney v. Coffey*, 113 S.W.2d 162, 165, 131 Tex. 212—*Corpus Juris* quoted in *Meadows v. Edwards, Civ.App.*, 116 S.W.2d 831, 834—*McQueen v. Stephens, Civ.App.*, 100 S.W.2d 1053, 1055.

50 C.J. p 858 note 49.

65. Colo.—*Russell v. Courier Printing & Pub. Co.*, 95 P. 936, 938, 43 Colo. 321.

Mo.—*Corpus Juris* quoted in *Dille v. St. Luke's Hospital*, 196 S.W.2d 615, 620, 355 Mo. 436.

66. Ark.—*Corpus Juris* quoted in *Bene v. New York Life Ins. Co.*, 87 S.W.2d 979, 981, 191 Ark. 714.

Fla.—*Corpus Juris* quoted in *State ex rel. Gibbs v. Bloodworth*, 184 So. 1, 5, 134 Fla. 369.

Tex.—*Corpus Juris* quoted in *Meadows v. Edwards, Civ.App.*, 116 S.W.2d 831, 834.

50 C.J. p 858 note 50.

Similarly expressed

(1) The underlying basis of the doctrine has often been stated thus: No one can lawfully do that which tends to injure the public or is detrimental to the public good.—*Lowery v. Zorn*, 9 So.2d 872, 874, 243 Ala. 285.

(2) Public policy, with respect to the administration of the law, is that rule of law which declares that no one can lawfully do that which tends to injure the public or is detrimental to the public good.—*Russell v. Courier Printing & Publishing Co.*, 95 P. 936, 938, 43 Colo. 321.

(3) Public policy is that principle of law which provides that parties cannot agree to do anything which has a tendency to be injurious to the public or against the public good.—*Girard v. Anderson*, 257 N.W. 400, 403, 219 Iowa 142.

67. Ill.—*People ex rel. Nelson v. Wiersema State Bank*, 197 N.E. 537, 542, 361 Ill. 75, 101 A.L.R. 501.

Ky.—*Bankers Bond Co. v. Buckingham*, 97 S.W.2d 596, 600, 265 Ky. 712.

Mo.—*State ex rel. City of St. Louis v. Public Service Commission of*

"Public policy" is also defined as the public good;<sup>68</sup> the public interest;<sup>69</sup> the manifest will of the state,<sup>70</sup> which must and does vary with habits, capacities, and opportunities of the public.<sup>71</sup> In a narrower sense,<sup>72</sup> public policy is the principles under which freedom of contract or private dealing is restricted by law for the good of the community.<sup>73</sup> Another statement, sometimes referred to as a definition,<sup>74</sup> is that whatever contravenes good morals or any established interests of society is against public policy.<sup>75</sup> Thus, anything which tends clearly to injure public health, the public morals, the public confidence in the purity of the administration of the law, or to undermine that

sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel, is against public policy;<sup>76</sup> or, stated conversely, whatever is not forbidden by statute or contrary to judicial decision, or against the public health, morals, safety, or welfare, or the like, is not against public policy.<sup>77</sup>

In a judicial sense, public policy does not mean simply sound policy, or good policy, but it means the policy of a state established for the public weal either by law, by courts, or by general consent.<sup>78</sup> In the administration of law by a court, public policy is essentially different from what may be public policy in the view of a legislative body.<sup>79</sup>

Missouri, 73 S.W.2d 393, 399, 335 Mo. 448.

N.Y.—*Rozell v. Rozell*, 3 N.Y.S.2d 901, 903, 256 App.Div. 61.

Ohio.—*Campbell v. Monumental Life Ins. Co.*, App., 34 N.E.2d 268, 274.

68. U.S.—*Magee v. McNany*, D.C. Pa., 10 F.R.D. 5, 12.

Ark.—*Corpus Juris* quoted in *Bene v. New York Life Ins. Co.*, 87 S.W. 2d 979, 981, 191 Ark. 714.

Fla.—*Corpus Juris* quoted in *State ex rel. Gibbs v. Bloodworth*, 184 So. 1, 5, 134 Fla. 369.

Mo.—*Corpus Juris* quoted in *Dille v. St. Luke's Hospital*, 196 S.W.2d 615, 620, 355 Mo. 436.

N.D.—*Glass v. Swimaster*, 21 N.W.2d 468, 472, 74 N.D. 282—*Ness v. City of Fargo*, 251 N.W. 843, 845, 64 N. D. 231.

50 C.J. p 858 note 53.

69. N.J.—*Cameron v. International Alliance of Theatrical Stage Employees and Moving Picture Operators of U. S. and Canada, Local Union No. 384, of Hudson County*, 176 A. 692, 699, 118 N.J.Eq. 11, 97 A.L.R. 594.

70. Mich.—*Lieberthal v. Glens Falls Indem. Co. of Glens Falls, N. Y.*, 24 N.W.2d 547, 549, 316 Mich. 37.

N.D.—*In re McKee's Estate*, 3 N.W. 2d 797, 798, 71 N.D. 545.

50 C.J. p 859 note 60 [a].

71. N.D.—*In re McKee's Estate*, 3 N.W.2d 797, 798, 800, 71 N.D. 545—*Chaffee v. Farmers' Co-op. El. Co.*, 168 N.W. 616, 618, 39 N.D. 585.

72. Ky.—*Central West Casualty Co. v. Stewart*, 58 S.W.2d 366, 248 Ky. 137.

73. Ark.—*Corpus Juris* quoted in *Bene v. New York Life Ins. Co.*, 87 S.W.2d 979, 981, 191 Ark. 714.

Fla.—*Corpus Juris* quoted in *State ex rel. Gibbs v. Bloodworth*, 184 So. 1, 5, 134 Fla. 369.

Ky.—*Central West Casualty Co. v. Stewart*, 58 S.W.2d 366, 248 Ky. 137.

Tex.—*Corpus Juris* quoted in *Meadows v. Edwards*, Civ.App., 116 S. W.2d 831, 834.

50 C.J. p 858 note 51.

74. Wis.—*Good v. Starker*, 257 N. W. 299, 301, 216 Wis. 253.

75. Wis.—*Good v. Starker*, supra.

**Justice Story's statement**

(1) That which "conflicts with the morals of the time, and contravenes any established interest of society" is contrary to public policy.

Ill.—*Carnack v. Great Am. Indem. Co.*, 75 N.E.2d 521, 525, 332 Ill.App. 354.

Mo.—*Dille v. St. Luke's Hospital*, 196 S.W.2d 615, 620, 355 Mo. 436—*State v. Bowman*, 170 S.W. 700, 701, 184 Mo.App. 549.

N.J.—*Girard Trust Co. v. Schmitz*, 20 A.2d 21, 29, 129 N.J.Eq. 444.

N.Y.—*Henfeld v. A. Broido, Inc.*, 3 N.Y.S.2d 463, 465, 167 Misc. 85.

N.D.—*James v. Young*, 43 N.W.2d 692, 697.

Vt.—*State v. Barnett*, 3 A.2d 521, 526, 110 Vt. 221.

(2) This statement by Justice Story is sometimes referred to as "one of the best definitions."

Mo.—*Dille v. St. Luke's Hospital*, 196 S.W.2d 615, 620, 355 Mo. 436—*State v. Bowman*, 170 S.W. 700, 701, 184 Mo.App. 549.

N.J.—*Girard Trust Co. v. Schmitz*, 20 A.2d 21, 29, 129 N.J.Eq. 444.

Vt.—*State v. Barnett*, 3 A.2d 521, 526, 110 Vt. 221.

76. U.S.—*Magee v. McNany*, D.C. Pa., 10 F.R.D. 5, 12.

Pa.—*Goodyear v. Brown*, 26 A. 665, 666, 155 Pa. 514, 20 L.R.A. 838, 35 Am.S.R. 903.

77. Ohio.—*Dixon v. Van Sweringen Co.*, 166 N.E. 887, 889, 121 Ohio St. 56.

Okl.—*Board of County Com'rs of Tulsa County v. Mullins*, 217 P.2d 835, 841.

78. Fla.—*Corpus Juris* quoted in *State ex rel. Gibbs v. Bloodworth*, 184 So. 1, 5, 134 Fla. 369.

Ga.—*Corpus Juris* quoted in *David v. Atlantic Co.*, 26 S.E.2d 650, 653, 69 Ga.App. 643.

La.—*Corpus Juris* quoted in *National Life & Accident Ins. Co. v. Turner*, App., 174 So. 646, 648.

Md.—*Corpus Juris* quoted in *Mayor and Council of City of Baltimore v. Maryland Casualty Co.*, 190 A. 250, 253, 171 Md. 667, 111 A.L.R. 305.

N.Y.—*International Ass'n of Machinists v. E. C. Stearns & Co.*, 36 N.Y.S.2d 156, 159, 178 Misc. 661—*In re Andrus' Will*, Sur., 281 N.Y. S. 831, 846, 156 Misc. 268—*Clough v. Gardiner*, 182 N.Y.S. 803, 806, 111 Misc. 244—*Herzog v. Stern*, 265 N.Y.S. 72, 74, 48 Misc. 25.

Tex.—*Corpus Juris* quoted in *Cheney v. Coffey*, 113 S.W.2d 162, 165, 131 Tex. 212.

**As defined by Daniel Webster** in the case of *Girard v. Mayor, Aldermen and Citizens of Philadelphia*, Pa., 2 How., U.S., 127, 177, 11 L.Ed. 205, it means the policy of a state established for the public weal, "either by law, by courts or general consent."—*Hollis v. Drew Theological Seminary*, 95 N.Y. 166, 172—*Domres v. Storms*, 260 N.Y.S. 335, 336, 236 App.Div. 630—*In re Lampson's Will*, 53 N.Y.S. 531, 532, 33 App.Div. 49.

**Similarly expressed**

(1) Public policy does not mean simply sound policy or good policy, but it means the law of the state as found in the constitution, statutes, or judicial records.—*Chubbuck v. Holloway*, 234 N.W. 314, 315, 182 Minn. 225.

(2) Public policy does not mean simply sound or good policy, but it means the policy of the state established for the public weal either by law or by judicial decision.—*Hanfeld v. A. Broido, Inc.*, 3 N.Y.S.2d 463, 465, 167 Misc. 85.

79. Okl.—*Cameron & Henderson v. Franks*, 184 P.2d 965, 972, 199 Okl. 143.

Where a legislative body is concerned, the term "public policy" is employed in a less technical sense,<sup>80</sup> and may be and often is nothing more than expediency,<sup>81</sup> political expediency,<sup>82</sup> or the policy on which governmental affairs are conducted for the time being;<sup>83</sup> public sentiment.<sup>84</sup> With the courts public policy must, and may only, be a reliance on consistency with sound policy and good morals as to the consideration or thing to be done,<sup>85</sup> although notions of expediency and justice, which at times are called "public policy," may exercise a controlling influence in the development of the law.<sup>86</sup>

It has been said that in this country difficulty and confusion have resulted because of the failure of the courts uniformly to determine the sources of public policy.<sup>87</sup> In a general way the public policy of a state is its attitude toward certain acts, transactions, and practices, as declared in the constitution and statutes, and in the common law found in the opinions of the court of last resort.<sup>88</sup> A some-

what similar statement has been made to the effect that the public policy of a state is established either by the constitution and laws of the state or by the judicial decisions of the courts of the state or by general consent, and general consent is usually manifested by the constitution and laws of the state or by the judicial decisions of the courts of the state.<sup>89</sup> When public policy is found in the constitutions, statutes, or ordinances it is referred to as "written public policy," and when it is declared by judicial decision or by public opinion it is referred to as "unwritten public policy."<sup>90</sup>

Primarily it is for the lawmakers to determine the public policy of the state,<sup>91</sup> for the public policy of a state is a law of the state,<sup>92</sup> and is a legislative and not a judicial function,<sup>93</sup> and it is not the function of the judiciary to declare what is the public policy of the state respecting matters on which the legislature has spoken<sup>94</sup> or to create or announce a public policy of its own.<sup>95</sup>

Pa.—*Mamlin v. Genoe*, 17 A.2d 407, 409, 340 Pa. 320.  
50 C.J. p 858 note 54.

80. Fla.—*Corpus Juris* quoted in *State ex rel. Gibbs v. Bloodworth*, 134 So. 1, 5, 134 Fla. 369.  
50 C.J. p 858 note 54.

81. Fla.—*Corpus Juris* quoted in *State ex rel. Gibbs v. Bloodworth*, 134 So. 1, 5, 134 Fla. 369.

Pa.—*Mamlin v. Genoe*, 17 A.2d 407, 409, 340 Pa. 320.  
50 C.J. p 858 note 55.

82. Fla.—*Corpus Juris* quoted in *State ex rel. Gibbs v. Bloodworth*, 134 So. 1, 5, 134 Fla. 369.  
Ohio.—*Hurd v. Robinson*, 11 Ohio St. 232, 238.

83. Fla.—*Corpus Juris* quoted in *State ex rel. Gibbs v. Bloodworth*, 134 So. 1, 5, 134 Fla. 369.  
50 C.J. p 858 note 57.

84. Fla.—*Corpus Juris* quoted in *State ex rel. Gibbs v. Bloodworth*, 134 So. 1, 5, 134 Fla. 369.

Md.—*Corpus Juris* cited in *Mayor and Council of City of Baltimore v. Maryland Casualty Co.*, 190 A. 250, 253, 171 Md. 657, 111 A.L.R. 305.  
50 C.J. p 858 note 58.

85. Pa.—*Mamlin v. Genoe*, 17 A.2d 407, 409, 340 Pa. 320.  
50 C.J. p 858 note 54.

86. N.Y.—*Mertz v. Mertz*, 3 N.E.2d 597, 598, 599, 271 N.Y. 466, 108 A.L.R. 1120.

87. N.J.—*Girard Trust Co. v. Schmitz*, 20 A.2d 21, 29, 129 N.J. Eq. 444.

88. Ky.—*Central West Casualty Co. v. Stewart*, 58 S.W.2d 366, 248 Ky. 137.

89. Pa.—*In re Mohler's Estate*, 22 A.2d 680, 682, 343 Pa. 299.

90. Iowa.—*Truax v. Ellett*, 15 N.W. 2d 361, 367, 234 Iowa 1217.  
Ohio.—*Kintz v. Harriger*, 124 N.E. 168, 170, 99 Ohio St. 240, 12 A.L.R. 1240.

91. U.S.—*Building Service Emp. Intern. Union, Local 262 v. Gazam*, Wash., 70 S.Ct. 784, 787, 339 U.S. 532, 94 L.Ed. — *Twin City Pipe Line Co. v. Harding Glass Co.*, Ark., 51 S.Ct. 476, 478, 283 U.S. 353, 75 L.Ed. 1112, 83 A.L.R. 1168—*Prudential Ins. Co. of America v. Petril*, D.C.Pa., 43 F.Supp. 768, 774.

Mo.—*State ex rel. City of St. Louis v. Public Service Commission of Missouri*, 73 S.W.2d 393, 399, 335 Mo. 448.

Mont.—*State ex rel. McCarten v. Corwin*, 177 P.2d 189, 194, 119 Mont. 520.

#### Similarly expressed

It pertains to the lawmaking power to define.

Cal.—*Smith v. San Francisco & N. P. Ry. Co.*, 47 P. 582, 587, 588, 115 Cal. 584, 35 L.R.A. 309, 56 Am.S.R. 119.

Del.—*Ringling v. Ringling Bros.-Barnum & Bailey Combined Shows, Ch.*, 49 A.2d 603, 609.

S.C.—*Alderman v. Alderman*, 181 S. E. 397, 904, 178 S.C. 9, 105 A.L.R. 102.

92. Tex.—*London Terrace v. McAlister*, Civ.App., 179 S.W.2d 515, 517.

93. Mo.—*State ex rel. City of St. Louis v. Public Service Commission of Missouri*, 73 S.W.2d 393, 400, 335 Mo. 448.

N.J.—*Chelsea-Wheeler Coal Co. v.*

*Marvin*, 24 A.2d 403, 406, 131 N.J. Eq. 76.

See Constitutional Law § 154.

#### Restricted power of courts

"In our judicial system the power of courts to formulate pronouncements of public policy is sharply restricted; otherwise they would become judicial legislatures rather than instrumentalities for the interpretation of law."—*Mamlin v. Genoe*, 17 A.2d 407, 409, 340 Pa. 320.

94. Mont.—*Young v. Board of Trustees of Broadwater County High School*, 4 P.2d 725, 727, 90 Mont. 576.

95. Mo.—*State ex rel. City of St. Louis v. Public Service Commission of Missouri*, 73 S.W.2d 393, 400, 335 Mo. 448.

#### Similarly expressed

"The right of a court to declare what is or is not in accord with public policy does not extend to specific economic or social problems which are controversial in nature and capable of solution only as the result of a study of various factors and conditions. It is only when a given policy is so obviously for or against public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community in so declaring. There must be a positive, well-defined, universal public sentiment, deeply integrated in the customs and beliefs of the people and in their conviction of what is just and right and in the interests of the public weal. Familiar illustrations are those involving unreasonable restraints of marriage or of trade, exclusive arrangements for obtaining



Fundamental public policy is declared in the constitutions,<sup>96</sup> and, when a constitution declares and defines certain public policies, such public policies must be paramount,<sup>97</sup> although statutes conflict and judicial decisions be to the contrary.<sup>98</sup> If public policy is not declared by constitution it is to be looked for in legislative enactments,<sup>99</sup> and, when the legislature speaks on a particular subject over which it has constitutional power to legislate,

its utterance is the public policy of the state,<sup>1</sup> and such utterances are conclusive<sup>2</sup> unless they contravene some constitutional provision,<sup>3</sup> and the courts are required to give effect to such policy.<sup>4</sup> When the public policy of the state on any particular subject is established by legislative enactment it is not unalterable, but may change with changing legislation,<sup>5</sup> but, if a change in that policy is desired, application must be made to the legislature, and not to

divorces, suppression of bids for public contracts, interference with freedom of conscience or religion. If, in the domain of economic and social controversies, a court were, under the guise of the application of the doctrine of public policy, in effect to enact provisions which it might consider expedient and desirable, such action would be nothing short of judicial legislation, and each such court would be creating positive laws according to the particular views and idiosyncrasies of its members. Only in the clearest cases, therefore, may a court make an alleged public policy the basis of judicial decision."—*Mamlin v. Genoe*, 17 A.2d 407, 409, 340 Pa. 320.

96. Tex.—District Grand Lodge No. 25 Grand United Order of Odd Fellows v. Jones, 160 S.W.2d 915, 920, 138 Tex. 537.

97. Ohio.—Kintz v. Harriger, 124 N.E. 168, 170, 99 Ohio St. 240, 12 A.L.R. 1240.

#### Similarly expressed

If the constitution fixes the public policy, then neither statutes nor court decisions may go contrary to the standards so fixed.—*Knott v. State*, 186 So. 788, 795, 136 Fla. 184.

98. Ohio.—Kintz v. Harriger, 124 N.E. 168, 170, 99 Ohio St. 240, 12 A.L.R. 1240.

#### Similarly stated

(1) There is no public policy of a state forbidding the legislature from doing anything which the constitution does not prohibit.—*Batesville Casket Co. v. Fields*, 155 S.W.2d 743, 745, 288 Ky. 104.

(2) An act authorized by the constitution is not against the public policy of the state.—*State v. Lincoln County Power Dist. No. 1*, 111 P.2d 528, 530, 60 Nev. 401.

99. Tex.—District Grand Lodge No. 25 Grand United Order of Odd Fellows v. Jones, 160 S.W.2d 915, 920, 138 Tex. 537.

1. U.S.—*U. S. v. Trans-Missouri Freight Ass'n*, Kan., 17 S.Ct. 540, 559, 166 U.S. 290, 41 L.Ed. 1007.—*Wilson & Co. v. N. L. R. B.*, C.C. A.3, 162 F.2d 310, 314.—*Prudential Ins. Co. of America v. Petril*, D.C. Pa., 43 F.Supp. 768, 774.

Ill.—*People ex rel. Healy v. Shedd*, 89 N.E. 332, 334, 241 Ill. 155—

*Harding v. American Glucose Co.*, 55 N.E. 577, 599, 182 Ill. 551, 64 L.R.A. 738, 74 Am.S.R. 189.

Minn.—*Park Const. Co. v. Independent School Dist. No. 32*, Carver County, 296 N.W. 475, 477, 209 Minn. 182, 135 A.L.R. 59.

Mont.—*Hames v. City of Polson*, 215 P.2d 950, 956—*State ex rel. McCarty v. Corwin*, 177 P.2d 189, 194, 119 Mont. 520.—*Mieyr v. Federal Surety Co. of Davenport*, Iowa, 34 P.2d 982, 984, 97 Mont. 503.—*State v. Gateway Mortuaries*, 287 P. 156, 157, 87 Mont. 225, 68 A.L.R. 1512.

N.Y.—*Rozell v. Rozell*, 8 N.Y.S.2d 901, 903, 256 App.Div. 61.

Wis.—*Hughes v. Fetter*, 42 N.W.2d 452, 454, 287 Wis. 35.

#### Similarly expressed

(1) When the legislature has spoken and enacted a law embodying a certain principle, the policy is determined.

Mich.—*Lieberthal v. Glens Falls Indem. Co. of Glens Falls*, N. Y., 24 N.W.2d 547, 549, 316 Mich. 37. N.D.—*In re McKee's Estate*, 3 N.W.2d 797, 798, 800, 71 N.D. 545.—*Chaffee v. Farmers' Co-op. Bl. Co.*, 168 N.W. 616, 618, 39 N.D. 585.

(2) When the legislature enacts a law within the limits of the constitution, the enactment in so far as it bears on the matter of public policy is conclusive.—*Lieberthal v. Glens Falls Indem. Co. of Glens Falls*, N. Y., supra.

(3) If the constitution or statutes speak on a subject, the policy of the state is necessarily fixed to that extent, and whatever they authorize or approve is sanctioned by public policy, and whatever they prohibit is against public policy.—*Central West Casualty Co. v. Stewart*, 58 S.W.2d 366, 248 Ky. 137.

(4) The power to determine what the policy of the law shall be rests with the legislature within constitutional limitations.—*In re Andrus' Will*, 281 N.Y.S. 831, 846, 156 Misc. 268.—*Herzog v. Stern*, 265 N.Y.S. 72, 74, 48 Misc. 25.

(5) Subject to constitutional restrictions, the legislature of a state has sole power to say what the public policy of the state shall be.—*City and County of Denver v. Tihen*, 235 P. 777, 780, 781, 77 Colo. 212.

(6) Public policy is the policy of the common law, equity, or statutory, with statutes paramount.—*Federal Trade Commission v. Paramount Famous-Lasky Corporation*, C.C.A., 57 F.2d 152, 154.

(7) The principles of public policy are largely in the keeping of the legislature.—*State v. Tabasso Homes*, 28 A.2d 248, 252, 3 Terry, Del., 110.

(8) "It is a naked assumption to say that any matter allowed by the Legislature is against public policy. The best indication of public policy is to be found in the enactment of our legislature."—*State ex rel. City of St. Louis v. Public Service Commission of Missouri*, 73 S.W.2d 393, 400, 335 Mo. 448.—*State v. Clarke*, 54 Mo. 17, 36.

(9) The legislature has the paramount authority to promulgate the public policy of this state in matters of taxation as in all other matters.—*Natural Gas Pipe Line Co. v. State Commission of R. & T.*, 125 P.2d 397, 400, 155 Kan. 416.

2. Ky.—*Allin v. American Indemnity Co.*, 55 S.W.2d 44, 45, 246 Ky. 396.—*Eversole v. Eversole*, 185 S. W. 487, 489, 169 Ky. 793, L.R.A. 1916E 593.

Tex.—District Grand Lodge No. 25 Grand United Order of Odd Fellows v. Jones, 160 S.W.2d 915, 920, 138 Tex. 537.

3. Tex.—District Grand Lodge No. 25 Grand United Order of Odd Fellows v. Jones, supra.

#### Similarly expressed

If the constitution is silent but a public policy is fixed by statute, then in so far as the statutes reach without violating organic law the courts may not contravene by decisions the standards fixed by statute.—*Knott v. State*, 186 So. 788, 795, 136 Fla. 184.

4. N.Y.—*In re Andrus' Will*, Sur., 281 N.Y.S. 831, 846, 156 Misc. 268.—*Herzog v. Stern*, 265 N.Y.S. 72, 74, 48 Misc. 25.

5. Ill.—*Albers v. Lamson*, 42 N.E. 2d 627, 629, 630, 380 Ill. 35.

#### Subsequent enactments

Any action which by legislation, or in the absence of legislation thereon, by the decisions of the court, has been held contrary to the public policy of the state is no long-

the judiciary.<sup>6</sup>

There are innumerable subjects not specifically treated either by constitution or by statute, and as to these the public policy of the state is declared by the court of last resort.<sup>7</sup> That is, in the absence of any declaration of public policy on a particular subject in the constitutions and statutes, it may be determined from judicial decisions,<sup>8</sup> the function of the judiciary in this connection being solely to determine and declare what is the public policy of the state or nation as such policy is found expressed in

the constitution, statutes, and judicial decisions of the state or nation.<sup>9</sup>

The statement is frequently made that the term "public policy" means the law of the state as found declared in its constitution, its statutory enactments, and its judicial records,<sup>10</sup> and there is uniform agreement that the public policy of a state or nation is declared by the constitution and by the legislative acts, and, where these two sources are silent, by the declarations of the courts.<sup>11</sup> Although some cases go even further and recognize that when

er contrary to the public policy when such action is expressly authorized by subsequent legislative enactments.—*Albers v. Lamson*, supra.

6. Ky.—*Eversole v. Eversole*, 185 S. W. 487, 489, 169 Ky. 793, L.R.A. 1916E 593.

N.D.—*In re McKee's Estate*, 3 N.W. 2d 797, 800, 71 N.D. 545.

7. Ky.—*Central West Casualty Co. v. Stewart*, 58 S.W.2d 366, 248 Ky. 137.

8. Mo.—*State ex rel. City of St. Louis v. Public Service Commission of Missouri*, 73 S.W.2d 393, 400, 335 Mo. 448.

Mont.—*Hames v. City of Polson*, 215 P.2d 950, 956.

9. Mo.—*State ex rel. City of St. Louis v. Public Service Commission of Missouri*, 73 S.W.2d 393, 400, 335 Mo. 448.

#### Proper instances for judicial declaration

Generally speaking, the legislature is the body to declare the public policy of a state and to ordain changes therein. This is peculiarly so where a matter of expediency is up for consideration. In many cases, on questions of good morals, as opposed to mere expediency, the courts may declare and apply the public policy of the state; again, where an alteration in public policy on any point of general interest has actually taken place, and is indicated by long-continued change of conduct on the part of the people affected, when such a change has become practically universal, the courts may recognize this fact and declare the governing public policy accordingly.—*Mamlin v. Genoe*, 17 A.2d 407, 409, 340 Pa. 320—*Commonwealth v. Hall*, 140 A. 626, 630, 631, 291 Pa. 341, 58 A.L.R. 1023.

10. U.S.—*Building Service Emp. Intern. Union, Local 262 v. Gazam*, Wash., 70 S.Ct. 784, 787, 339 U.S. 532, 94 L.Ed. — *Michigan Millers Mut. Fire Ins. Co. v. Canadian Northern Ry. Co.*, C.C.A. Minn., 152 F.2d 292, 296—*Order of United Commercial Travelers of America v. Meinsen*, C.C.A.Mo., 131

F.2d 176, 179—*Prudential Ins. Co. of America v. Petrill*, D.C.Pa., 43 F. Supp. 768, 774.

Ala.—*Denton v. Alabama Cotton Co-op. Ass'n*, 7 So.2d 504, 506, 30 Ala.App. 429.

Del.—*Skillman v. Conner*, 193 A. 563, 565, 8 W.W.Harr. 402.

Fla.—*Knott v. State*, 186 So. 788, 795, 136 Fla. 184.

Ga.—*Corpus Juris* quoted in *David v. Atlantic Co.*, 26 S.E.2d 650, 653, 69 Ga.App. 643.

Md.—*Corpus Juris* quoted in *Mayor and Council of City of Baltimore v. Maryland Casualty Co.*, 190 A. 250, 253, 171 Md. 667, 111 A.L.R. 305.

Mich.—*Lieberthal v. Glens Falls Indem. Co. of Glens Falls, N. Y.*, 24 N.W.2d 547, 549, 316 Mich. 37.

Minn.—*Chubbuck v. Holloway*, 234 N.W. 314, 315, 182 Minn. 225.

Mo.—*State ex rel. Gaines v. Canada*, 113 S.W.2d 783, 785, 342 Mo. 121.

N.J.—*Schaffer v. Federal Trust Co.*, 28 A.2d 75, 79, 132 N.J.Eq. 235.

N.Y.—*In re Rhinelander's Estate*, 47 N.E.2d 681, 683, 290 N.Y. 31—*Glaser v. Glaser*, 12 N.E.2d 305, 307, 276 N.Y. 296—*Mertz v. Mertz*, 3 N.E.2d 597, 599, 271 N.Y. 466, 108 A.L.R. 1120—*Domres v. Storms*, 260 N.Y.S. 335, 336, 236 App.Div. 630—*Hazeltine Research v. De Wald Radio Mfg. Corp.*, 84 N.Y.S. 597, 602, 194 Misc. 81—*In re Andrus' Will*, 281 N.Y.S. 831, 846, 156 Misc. 268—*Leviton v. Leviton*, 6 N.Y.S.2d 535, 538.

N.D.—*In re McKee's Estate*, 3 N.W. 2d 797, 800, 71 N.D. 545.

Okl.—*Corpus Juris* quoted in *Board of County Com'rs of Tulsa County v. Mullins*, 217 P.2d 835, 841—*Cameron & Henderson v. Franks*, 184 P.2d 965, 972, 199 Okl. 143.

S.C.—*Cyant v. Butt*, 17 S.E.2d 689, 692, 693, 694, 198 S.C. 298.

50 C.J. p. 859 note 60.

N.D.—*In re McKee's Estate*, 3 N.W. 2d 797, 800, 71 N.D. 545.

Okl.—*Corpus Juris* quoted in *Board of County Com'rs of Tulsa County v. Mullins*, 217 P.2d 835, 841—*Cameron & Henderson v. Franks*, 184 P.2d 965, 972, 199 Okl. 143.

S.C.—*Cyant v. Butt*, 17 S.E.2d 689, 692, 693, 694, 198 S.C. 298.

50 C.J. p. 859 note 60.

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50 C.J. p. 859 note 60.

N.D.—*In re McKee's Estate*, 3 N.W. 2d 797, 800, 71 N.D. 545.

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S.C.—*Cyant v. Butt*, 17 S.E.2d 689, 692, 693, 694, 198 S.C. 298.

(2) The public policy of the state is found in the public laws, statutes, and decisions of this court.—*Bergeon v. Mullinix*, 78 N.E.2d 297, 302, 399 Ill. 470.

(3) That a policy reflected by the established trend of constitutional or statutory provisions, or of the decisions of the courts, or of administrative practices, is public in character, is generally accepted.—*Bartton v. Codington County*, 2 N.W.2d 337, 343, 344, 68 S.D. 309, 140 A.L.R. 550.

(4) In order to determine public policy the federal and state constitutions, statutes, and court decisions are looked to.—*Jeffries v. State*, 205 S.W.2d 194, 196, 212 Ark. 213.

(5) The public policy of a state does not depend exclusively on legislation, but may be the result of judicial construction and announcement.—*Griffin v. McCoach*, C.C.A. Tex., 123 F.2d 550, 551.

11. U.S.—*Prudential Ins. Co. of America v. Petrill*, D.C.Pa., 43 F. Supp. 768, 774.

Ill.—*People ex rel. Nelson v. Wiersema State Bank*, 197 N.E. 537, 542, 361 Ill. 75, 101 A.L.R. 501—*Colgrove v. Lowe*, 175 N.E. 569, 570, 343 Ill. 360—*Shore Management Corporation v. Erickson*, 41 N.E.2d 972, 314 Ill.App. 571—*American State Bank of Bloomington v. National Life Ins. Co.*, 17 N.E.2d 256, 261, 297 Ill.App. 137.

Ky.—*Eagle v. City of Corbin*, 122 S. W.2d 798, 803, 275 Ky. 808—*Allin v. American Indemnity Co.*, 55 S. W.2d 44, 45, 246 Ky. 396—*Eversole v. Eversole*, 185 S.W. 487, 489, 169 Ky. 793, L.R.A.1916E 593.

Mont.—*Reed v. Jackson County*, 142 S.W.2d 862, 865, 346 Mo. 720—*Rutledge v. First Presbyterian Church of Stockton*, 212 S.W. 859, 860, 278 Mo. 326—*Streedbeck v. Benson*, 80 P.2d 861, 863, 107 Mont. 110—*State ex rel. Holt v. District Court of First Judicial Dist. in and for Lewis and Clark County*, 63 P.2d 1026, 1029, 103 Mont. 438—*Mieyr v. Federal Surety Co. of Davenport, Iowa*, 34 P.2d 982, 984, 97 Mont. 503—*Young v. Board of Trustees of Broadwater County*

ex rel. Holt v. District Court of First Judicial Dist. in and for Lewis and Clark County, 63 P.2d 1026, 1029, 103 Mont. 438—*Mieyr v. Federal Surety Co. of Davenport, Iowa*, 34 P.2d 982, 984, 97 Mont. 503—*Young v. Board of Trustees of Broadwater County*

ex rel. Holt v. District Court of First Judicial Dist. in and for Lewis and Clark County, 63 P.2d 1026, 1029, 103 Mont. 438—*Mieyr v. Federal Surety Co. of Davenport, Iowa*, 34 P.2d 982, 984, 97 Mont. 503—*Young v. Board of Trustees of Broadwater County*

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ex rel. Holt v. District Court of First Judicial Dist. in and for Lewis and Clark County, 63 P.2d 1026, 1029, 103 Mont. 438—*Mieyr v. Federal Surety Co. of Davenport, Iowa*, 34 P.2d 982, 984, 97 Mont. 503—*Young v. Board of Trustees of Broadwater County*

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ex rel. Holt v. District Court of First Judicial Dist. in and for Lewis and Clark County, 63 P.2d 1026, 1029, 103 Mont. 438—*Mieyr v. Federal Surety Co. of Davenport, Iowa*, 34 P.2d 982, 984, 97 Mont. 503—*Young v. Board of Trustees of Broadwater County*

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ex rel. Holt v. District Court of First Judicial Dist. in and for Lewis and Clark County, 63 P.2d 1026, 1029, 103 Mont. 438—*Mieyr v. Federal Surety Co. of Davenport, Iowa*, 34 P.2d 982, 984, 97 Mont. 503—*Young v. Board of Trustees of Broadwater County*

ex rel. Holt v. District Court of First Judicial Dist. in and for Lewis and Clark County, 63 P.2d 1026, 1029, 103 Mont. 438—*Mieyr v. Federal Surety Co. of Davenport, Iowa*, 34 P.2d 982, 984, 97 Mont. 503—*Young v. Board of Trustees of Broadwater County*

ex rel. Holt v. District Court of First Judicial Dist. in and for Lewis and Clark County, 63 P.2d 1026, 1029, 103 Mont. 438—*Mieyr v. Federal Surety Co. of Davenport, Iowa*, 34 P.2d 982, 984, 97 Mont. 503—*Young v. Board of Trustees of Broadwater County*

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public policy cannot be determined from the constitution, the statutes, and the decisions of the courts, recourse may be had to the constant practice of government officials,<sup>12</sup> sometimes referred to as administrative practices,<sup>13</sup> in the much-cited case of *Hartford Fire Insurance Company v. Chicago, Milwaukee & St. Paul Railway Company*<sup>14</sup> is expressed what is known as the "limited rule,"<sup>15</sup> which is as follows: The public policy of a state or nation must be determined by its constitution, laws, and judicial decisions,<sup>16</sup> not by the varying opinions of laymen, lawyers, or judges as to the demands of the interests of the public;<sup>17</sup> that is, that resort will not

be had to sources of information other than the constitution, the statutes, and legislative enactments.<sup>18</sup> In this connection the statement has frequently been made that for the purposes of juridical application it may be regarded as settled that a state has no public policy, properly cognizable by the courts, which is not derived or derivable by clear implication from the established law of the state, as found in the constitution, statutes, and judicial decisions;<sup>19</sup> and some judicial tribunals even more cautiously hold that a state can have no public policy except that to be found in the statutory laws and constitution.<sup>20</sup>

High School, 4 P.2d 725, 727, 90 Mont. 576.

#### Similarly expressed

The public policy of a state is defined by its legislative enactments or by its courts of last resort, or both.—*McDonald v. Pacific States Life Ins. Co.*, 124 S.W.2d 1157, 1162, 344 Mo. 1.

12. U.S.—*U. S. v. Trans-Missouri Freight Ass'n*, Kan., 17 S.Ct. 540, 559, 166 U.S. 290, 41 L.Ed. 1007—*Wilson & Co. v. N. L. R. B.*, C.C.A. 8, 162 F.2d 310, 314—*Prudential Ins. Co. of America v. Petril*, D.C. Pa., 48 F.Supp. 768, 774.

Ill.—*Groome v. Freyn Engineering Co.*, 28 N.E.2d 274, 279, 374 Ill. 113—*Colgrove v. Lowe*, 175 N.E. 569, 570, 343 Ill. 360—*Zeigler v. Illinois Trust & Savings Bank*, 91 N.E. 1041, 1045, 245 Ill. 180, 28 L.R.A.N.S., 1112, 19 Ann.Cas. 127—*Harding v. American Glucose Co.*, 55 N.E. 577, 599, 182 Ill. 551, 64 L.R.A. 733, 74 Am.S.R. 139—*Shore Management Corporation v. Erickson*, 41 N.E.2d 972, 314 Ill. App. 571.

Mich.—*Skutt v. City of Grand Rapids*, 266 N.W. 344, 346, 275 Mich. 253.

#### Similarly expressed

The practice of officers in the course of administration.—*Russell v. Johnson*, 46 N.E.2d 219, 225, 220 Ind. 649.

13. S.D.—*Bartron v. Codington County*, 2 N.W.2d 337, 344, 68 S. D. 309, 140 A.L.R. 550.

#### Practice of the executive department

Ill.—*People ex rel. Healy v. Shedd*, 89 N.E. 332, 334, 241 Ill. 155.

14. U.S.—*Hartford Fire Ins. Co. v. Chicago, M. & St. P. R. Co.*, Iowa, 70 F. 201, 17 C.C.A. 62, 30 L.R.A. 193, affirmed 20 S.Ct. 33, 175 U.S. 91, 44 L.Ed. 84.

15. N.J.—*Girard Trust Co. v. Schmitz*, 20 A.2d 21, 29, 129 N.J. Eq. 444.

16. U.S.—*Lichty v. Carbon County Agr. Ass'n*, D.C.Pa., 31 F.Supp. 809,

810—*Marcus Brown Holding Co. v. Feldman*, D.C.N.Y., 269 F. 306, 316.

Ill.—*Groome v. Freyn Engineering Co.*, 28 N.E.2d 274, 279, 374 Ill. 113.

Md.—*Corpus Juris* quoted in *Mayor and Council of City of Baltimore v. Maryland Casualty Co.*, 190 A. 250, 253, 171 Md. 667, 111 A.L.R. 305.

Mo.—*State ex rel. Smith v. Bowman*, 170 S.W. 700, 701, 184 Mo.App. 549.

N.Y.—*In re Rhinelander's Estate*, 47 N.E.2d 681, 683, 290 N.Y. 31—*Glaser v. Glaser*, 12 N.E.2d 305, 307, 276 N.Y. 296—*Mertz v. Mertz*, 3 N.E.2d 597, 599, 271 N.Y. 466, 108 A.L.R. 1120—*F. A. Straus & Co. v. Canadian Pac. Ry. Co.*, 173 N.E. 564, 566, 254 N.Y. 407—*Corpus Juris* cited in *Rozell v. Rozell*, 3 N.Y.S.2d 901, 903, 256 App.Div. 61—*Hanfeld v. A. Brodlo, Inc.*, 3 N. Y.S.2d 463, 465, 167 Misc. 85—*Leviton v. Leviton*, 6 N.Y.S.2d 535, 538.

Okl.—*Gable v. Salvation Army*, 100 P.2d 244, 247, 186 Okl. 687.

S.C.—*Alderman v. Alderman*, 181 S. E. 897, 902, 178 S.C. 9, 105 A.L.R. 102.

50 C.J. p. 859 note 61.

17. U.S.—*Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.*, Iowa, 70 F. 201, 202, 17 C.C.A. 62, 30 C.C.A. 193, affirmed 20 S.Ct. 33, 175 U.S. 91, 44 L.Ed. 84—*U. S. v. Bank of New York & Trust Co.*, D.C.N.Y., 10 F.Supp. 269, 271.

Fla.—*Nicholson v. Good Samaritan Hospital*, 199 So. 344, 347, 145 Fla. 360, 133 A.L.R. 809—*Atlantic C. L. R. R. Co. v. Beazley*, 45 So. 761, 762, 54 Fla. 311.

Ill.—*Groome v. Freyn Engineering Co.*, 28 N.E.2d 274, 280, 374 Ill. 113.

Mo.—*State ex rel. Smith v. Bowman*, 170 S.W. 700, 701, 184 Mo. App. 549.

N.J.—*Girard Trust Co. v. Schmitz*, 20 A.2d 21, 29, 129 N.J. Eq. 444.

18. Ill.—*Groome v. Freyn Engineering Co.*, 28 N.E.2d 274, 279, 374 Ill. 113.

Md.—*Corpus Juris* quoted in *Mayor*

and Council of City of Baltimore v. Maryland Casualty Co., 190 A. 250, 253, 171 Md. 667, 111 A.L.R. 305.

50 C.J. p. 859 note 62.

19. U.S.—*Lichty v. Carbon County Agr. Ass'n*, D.C.Pa., 31 F.Supp. 809, 810.

N.Y.—*Rozell v. Rozell*, 3 N.Y.S.2d 901, 903, 256 App.Div. 61.

Okl.—*Gable v. Salvation Army*, 100 P.2d 244, 247, 186 Okl. 687.

S.C.—*Grant v. Butt*, 17 S.E.2d 689, 693, 198 S.C. 298—*Alderman v. Alderman*, 181 S.E. 897, 902, 178 S.C. 9, 105 A.L.R. 102—*Weeks v. New York Life Ins. Co.*, 122 S.E. 586, 587, 128 S.C. 223, 35 A.L.R. 1482.

**Judge Story**, in the case of *Girard v. Mayor, Aldermen and Citizens of Philadelphia*, Pa., 2 How., U.S., 127, 197, 11 L.Ed. 205, said, "Nor are we at liberty to look at general considerations of the supposed public interests and policy of Pennsylvania upon this subject beyond what its constitution and laws and judicial decisions make known to us. The question, what is the public policy of a state, and what is contrary to it, if inquired into beyond these limits, will be found to be one of great vagueness and uncertainty, and to involve discussions which scarcely come within the range of judicial duty and functions, and upon which men may and will complexly differ."—*Cross v. U. S. Trust Co.*, 30 N.E. 125, 128, 131 N.Y. 330, 15 L.R.A. 606, 27 Am.S.R. 597—*Hollis v. Drew Theological Seminary*, 95 N.Y. 166, 172—*Clough v. Gardiner*, 182 N.Y.S. 803, 807, 111 Misc. 244.

20. N.Y.—*Glaser v. Glaser*, 12 N.E. 2d 305, 306, 307, 276 N.Y. 296—*Mertz v. Mertz*, 3 N.E.2d 597, 599, 271 N.Y. 466, 108 A.L.R. 1120—*F. A. Straus & Co. v. Canadian Pac. Ry. Co.*, 173 N.E. 564, 566, 254 N. Y. 407—*People v. Hawkins*, 51 N. E. 257, 260, 157 N.Y. 1, 68 Am.S.R. 736, 42 L.R.A. 490—*Marburg v. Cole*, 26 N.Y.S.2d 77, 84, 261 App. Div. 324—*Hanfeld v. A. Brodlo*,

While it has been said that the "limited rule" is supported by the weight of authority,<sup>21</sup> the rule has also been criticized,<sup>22</sup> and much broader rules have been announced,<sup>23</sup> and the United States supreme court has broadened the rule that was laid down in the *Hartford Fire Insurance Company case*,<sup>24</sup> and, with other courts, will consider the constitution, laws, judicial decisions, and as well the applicable principles of the common law.<sup>25</sup> In many jurisdictions it is recognized that public policy may be established by general consent as well as by law or the courts,<sup>26</sup> and a number of courts have stated that public policy is sometimes declared by constitution, sometimes by statutes, and sometimes by judicial decision; but more often it abides only in the customs and conventions of the people, in their clear consciousness and conviction of what is naturally and inherently just and right between man and

man, and, when a course of conduct is cruel or shocking to the average man's conception of justice, such course of conduct must be held to be obviously contrary to public policy, although such policy has never been so written in the bond, whether it be constitution, statute, or decree of court.<sup>27</sup> In stating what is perhaps the broadest rule it has been said that it is unwise to attempt to limit the sources which may be consulted to determine whether a policy has become so fixed in the community mind or conscience that it may be regarded as the public policy of the state.<sup>28</sup>

One source determinative of the public policy of the state is the federal Constitution,<sup>29</sup> but there are many matters of state policy over which the United States supreme court has no jurisdiction,<sup>30</sup> and as to these matters each state has the right to declare

Inc., 3 N.Y.S.2d 463, 465, 167 Misc. 85—*Leviton v. Leviton*, 6 N.Y.S.2d 535, 538.

Okl.—*Cameron & Henderson v. Franks*, 184 P.2d 965, 972, 199 Okl. 143.

#### Similarly expressed

The state has no public policy except that found in its constitution and laws, which are made by the law-making power and not by administrative officers acting solely on their own ideas of public policy in promulgating a rule or so-called regulation.—*State ex rel. McCarten v. Corwin*, 177 P.2d 189, 194, 119 Mont. 520.

21. Md.—*Mayor and City Council of City of Baltimore v. Maryland Casualty Co.*, 190 A. 250, 253, 171 Md. 667, 111 A.L.R. 305.

22. N.J.—*Girard Trust Co. v. Schmitz*, 20 A.2d 21, 29, 129 N.J. Eq. 444.

#### Criticism expressed

"It has frequently been said that such public policy is a composite of constitutional provisions, statutes and judicial decisions, and some courts have gone so far as to hold that it is limited to these. The obvious fallacy of such a conclusion is quite apparent from the most superficial examination. When a contract is contrary to some provision of the constitution, we say it is prohibited by the constitution, not by public policy. When a contract is contrary to a statute, we say it is prohibited by a statute, not by a public policy. When a contract is contrary to a settled line of judicial decisions, we say it is prohibited by the law of the land, but we do not say it is contrary to public policy. Public policy is the cornerstone—the foundation of all constitutions, statutes and judicial decisions; and

its latitude and longitude, its height and its depth, greater than any or all of them. If this be not true, whence came the first judicial decision on matter of public policy? There was no precedent for it, else it would not have been the first."

Fla.—*Knott v. State*, 186 So. 788, 795, 136 Fla. 184—*City of Leesburg v. Ware*, 153 So. 87, 89, 113 Fla. 760.

Mich.—*Spes v. McGhee*, 25 N.W.2d 638, 642, 316 Mich. 614—*Skutt v. City of Grand Rapids*, 266 N.W. 344, 346, 275 Mich. 258.

N.J.—*Girard Trust Co. v. Schmitz*, 20 A.2d 21, 29, 129 N.J. Eq. 444.

Ohio.—*Pittsburgh, C. C. & St. L. R. Co. v. Kinney*, 115 N.E. 505, 507, 95 Ohio St. 64, L.R.A.1917D 641, Ann.Cas.1918B 286—*Snyder v. Ridge Hill Memorial Park*, 22 N.E. 2d 559, 566, 61 Ohio App. 271.

23. N.J.—*Girard Trust Co. v. Schmitz*, 20 A.2d 21, 29, 129 N.J. Eq. 444.

50 C.J. p 859 note 64.

24. N.J.—*Girard Trust Co. v. Schmitz*, supra.

25. U.S.—*Twin City Pipe Line Co. v. Harding Glass Co., Ark.*, 51 S.Ct. 476, 477, 478, 283 U.S. 353, 75 L. Ed. 1112, 83 A.L.R. 1168.

Tenn.—*Home Beneficial Ass'n v. White*, 177 S.W.2d 545, 546, 180 Tenn. 585.

26. Fla.—*State ex rel. Gibbs v. Bloodworth*, 184 So. 1, 5, 134 Fla. 369.

Ga.—*David v. Atlantic Co.*, 26 S.E.2d 650, 653, 69 Ga.App. 643.

La.—*National Life & Accident Ins. Co. v. Turner*, App., 174 So. 646, 648.

Md.—*Mayor and Council of City of Baltimore v. Maryland Casualty Co.*, 190 A. 250, 253, 171 Md. 667, 111 A.L.R. 305.

N.Y.—*Hollis v. Drew Theological Seminary*, 95 N.Y. 166, 172—*Domres v. Storms*, 260 N.Y.S. 335, 336, 236 App.Div. 630—*In re Lampson's Will*, 53 N.Y.S. 531, 532, 33 App.Div. 49—*International Ass'n of Machinists v. E. C. Stearns & Co.*, 36 N.Y.S.2d 156, 159, 178 Misc. 661—*In re Andrus' Will*, 281 N.Y.S. 831, 846, 156 Misc. 268—*Clough v. Gardiner*, 182 N.Y.S. 803, 806, 111 Misc. 244—*Herzog v. Stern*, 265 N.Y.S. 72, 74, 43 Misc. 25.

Okl.—*Cameron & Henderson v. Franks*, 184 P.2d 965, 972, 199 Okl. 143.

Tex.—*Cheney v. Coffey*, 113 S.W.2d 162, 165, 131 Tex. 212.

27. Fla.—*Knott v. State*, 186 So. 788, 795, 136 Fla. 184—*City of Leesburg v. Ware*, 153 So. 87, 89, 113 Fla. 760.

Mich.—*Spes v. McGhee*, 25 N.W.2d 638, 642, 316 Mich. 614—*Skutt v. City of Grand Rapids*, 266 N.W. 344, 346, 275 Mich. 258.

N.J.—*Girard Trust Co. v. Schmitz*, 20 A.2d 21, 29, 129 N.J. Eq. 444.

Ohio.—*Pittsburgh, C. C. & St. L. R. Co. v. Kinney*, 115 N.E. 505, 507, 95 Ohio St. 64, L.R.A.1917D 641, Ann.Cas.1918B 286.

#### Statement used in part

Ohio.—*Snyder v. Ridge Hill Memorial Park*, 22 N.E.2d 559, 566, 61 Ohio App. 271.

28. S.D.—*Bartron v. Codrington County*, 2 N.W.2d 337, 344, 68 S. D. 309, 140 A.L.R. 550.

29. Ark.—*Jeffries v. State, for Use of Woodruff County*, 205 S.W.2d 194, 196, 212 Ark. 213.

30. N.J.—*Girard Trust Co. v. Schmitz*, 20 A.2d 21, 29, 129 N.J. Eq. 444.

N.Y.—*Glaser v. Glaser*, 12 N.E.2d 305, 306, 276 N.Y. 296.

its own public policy, and in so doing is exercising its inherent, indefinable police power.<sup>31</sup>

In the application of the foregoing general rules, various statements have been made concerning the proper sources for the determination of the public policy of particular jurisdictions.<sup>32</sup>

It has been said that public policy is a changing concept;<sup>33</sup> a wide domain of shifting sands;<sup>34</sup> and it was stated by Burroughs, J., in the case of *Richardson v. Mellish*, 2 Bing. 229, 252, 9 E.C.L. 557, 130 Reprint 294,<sup>35</sup> that "Public policy is a very unruly horse and when once you get astride it you never know where it will carry you."<sup>36</sup> Set out *supra* p

209 notes 53, 55 are statements to the effect that public policy is a variable quantity, and varies with the habits and fashions of the day. Other statements of similar import have been made to the effect that public policy imports something uncertain and fluctuating according to the changing economic needs, social customs, and moral aspirations of the people;<sup>37</sup> and that as the habits, opinions, and welfare of a people vary with the times, so public policy may vary,<sup>38</sup> and so public policy may mean one thing today and another tomorrow, one thing in this place and another in that;<sup>39</sup> and what may be the public policy of one state or county may not be

31. Colo.—*City and County of Denver v. Thien*, 235 P. 777, 781, 77 Colo. 212.

32. Public policy of the United States government

(1) Ordinarily, public policy of the United States government is shaped and defined by the federal Constitution and acts of congress, and it is the United States supreme court which not only has the right but the power and authority to announce the public policy of the United States.—*Sirman v. Sloss Realty Co.*, 129 S.W.2d 602, 606, 198 Ark. 534.

(2) It is difficult to determine the public policy of the United States government from any single activity.—*Sirman v. Sloss Realty Co.*, *supra*.

Public policy of New Jersey

(1) "Perhaps the best statement as to the sources of information for the determination of public policy in New Jersey is to be found in *Bigelow v. Old Dominion Copper, etc., Company*, 1908, 74 N.J.Eq. 457, 71 A. 153, 174. As stated by Chancellor Pitney: '... the public policy of New Jersey is not occult or mysterious, nor are its sources far to seek. Subject to the federal Constitution and a written Constitution of our own, the people of this state have adopted in the main the common law and equity system of England, and this obtains here subject to modification by the Legislature. Add to these that New Jersey expects all persons and corporations to observe the law or abide by the consequences, and we have the public policy of New Jersey in a nutshell.'"*Girard Trust Co. v. Schmitz*, 20 A.2d 21, 29, 129 N.J.Eq. 444.

(2) "The sources determinative of public policy are, among others, our federal and state constitutions, our public statutes, our judicial decisions, the applicable principles of the common law, the acknowledged prevailing concepts of the federal and state governments relating to

and affecting the safety, health, morals, and general welfare of the people for whom government—with us—is factually established."—*Allen v. Commercial Casualty Ins. Co.*, 37 A.2d 37, 39, 131 N.J.Law 475.

Public policy of New York

The public policy of New York is to be found in its constitution, its laws, and its judicial decisions.—*Moscow Fire Ins. Co. of Moscow, Russia v. Bank of New York & Trust Co.*, 294 N.Y.S. 648, 672, 161 Misc. 903.

Public policy of North Dakota

The public policy of the state of North Dakota is determined by its own legislature.—*In re McKee's Estate*, 3 N.W.2d 797, 798, 71 N.D. 545.

Public policy of Oregon

The policy of the state is shown by its constitution and enacted laws. The public policy of the state of Oregon is not indicated by measures which have been introduced in the legislature, but have not been enacted into law.—*Safeway Stores v. City of Portland*, 42 P.2d 162, 171, 149 Or. 581.

33. U.S.—*New Amsterdam Casualty Co. v. Jones*, C.C.A.Mich., 135 F.2d 191, 194.

34. S.C.—*Grant v. Butt*, 17 S.E.2d 689, 693, 198 S.C. 298—*Alderman v. Alderman*, 181 S.E. 897, 902, 178 S.C. 9, 105 A.L.R. 102—*Weeks v. New York Life Ins. Co.*, 122 S.E. 586, 587, 128 S.C. 223, 35 A.L.R. 1482—*MacKendree v. Southern States Life Ins. Co.*, 99 S.E. 806, 807, 112 S.C. 335.

35. Del.—*Tracey v. Franklin*, 67 A. 2d 56, 58.

36. Del.—*Tracey v. Franklin*, *supra*. Fla.—*Story v. First Nat. Bank & Trust Co. in Orlando*, 156 So. 101, 103, 115 Fla. 436.

Ind.—*Iroquois Underwriters v. State ex rel. Morgan*, 5 N.E.2d 908, 912, 211 Ind. 463.

Md.—*Mayor and Council of City of Baltimore v. Maryland Casualty Co.*, 190 A. 250, 253, 171 Md. 667, 111 A.L.R. 305.

N.J.—*Girard Trust Co. v. Schmitz*, 20 A.2d 21, 29, 129 N.J.Eq. 444. Tenn.—*Draughon v. Fox-Pelletier Corporation*, 126 S.W.2d 329, 333, 174 Tenn. 457.

Continuing Judge Burroughs' statement

"It may lead you from the sound law. It is never argued at all but when other points fail."—*Woodruff v. Berry*, 40 Ark. 251, 261.

37. Okl.—*Gable v. Salvation Army*, 100 P.2d 244, 247, 186 Okl. 687.

S.C.—*Grant v. Butt*, 17 S.E.2d 689, 693, 198 S.C. 298—*Alderman v. Alderman*, 181 S.E. 897, 902, 178 S.C. 9, 105 A.L.R. 102.

50 C.J. p 857 note 45 [a].

Similarly expressed

Public policy is necessarily variable, and it changes with changing conditions.—*F. A. Strauss & Co. v. Canadian Pac. Ry. Co.*, 173 N.E. 564, 566, 254 N.Y. 407—*Hanfeld v. A. Brodco Inc.*, 3 N.Y.S.2d 463, 465, 167 Misc. 85—*In re Andrus' Will*, 281 N.Y.S. 831, 846, 156 Misc. 268.

38. Ind.—*Franklin Fire Ins. Co. v. Moll*, 58 N.E.2d 947, 950, 115 Ind. App. 289—*Hodnick v. Fidelity Trust Co.*, 183 N.E. 488, 491, 96 Ind.App. 342.

39. Md.—*Mayor and Council of City of Baltimore v. Maryland Casualty Co.*, 190 A. 250, 253, 171 Md. 667, 111 A.L.R. 305.

Similarly expressed

(1) The very reverse of that which is the policy of the public at one time may become public policy at another; hence no fixed rules can be given by which to determine what is public policy.—*Nicholson v. Good Samaritan Hospital*, 199 So. 344, 347, 145 Fla. 360, 133 A.L.R. 809.

(2) "Public policy, therefore, is variable; and that which is contrary to the policy of the public at one time may become public policy at another time."—*Gordon v. Gordon*, 182 S.W. 220, 222, 168 Ky. 409, L.R.A.1916D 576, Ann.Cas.1917D 886.

the public policy in another.<sup>40</sup> However, it has also been said that public policy is variable only in so far as the habits, capacities, and opportunities of the public have become varied and complex, and the principles to be applied have always remained unchanged and unchangeable.<sup>41</sup>

While the statement has been made that public policy is to a great extent a matter of individual opinion, because what one man or judge might think against public policy another might think altogether excellent public policy,<sup>42</sup> this statement is subject to the qualification that the courts must always endeavor to apply to the facts of a particular case a general rule of law which they find expressed in statute or judicial decision or which they formulate to meet new conditions; and, even in formulating a rule, individual notion of public policy may be given effect only where the court finds that its notion of public policy is so generally held and so obviously sound that it is in fact a part of the law of the state.<sup>43</sup> Therefore, manifestly what is the public policy of a state and what is contrary to it is not to be measured by the private convictions or notions of the persons who happen to be exercising judicial functions.<sup>44</sup>

When a statute declares a public policy in respect of a matter, it applies to all citizens of the state alike,<sup>45</sup> and is applicable to all portions of the state,<sup>46</sup> and it prohibits each and every citizen from

acting contrary to the declaration of the statute.<sup>47</sup>

Public policy is a question of law, and not a question of fact,<sup>48</sup> and is evidenced by the expression of the will of the legislature contained in statutory enactments;<sup>49</sup> but, before a court is warranted in invoking the principle of public policy, it must be firmly and solemnly convinced that an existent public policy is clearly revealed.<sup>50</sup> The courts have pointed out the limitations both of judicial declaration of public policy and of the application of the theory, and have made it clear that the theory of public policy embodies a doctrine of vague and variable quality and, unless deducible in the given circumstances from constitutional or statutory provisions, should be accepted as the basis of a judicial determination, if at all, only with the utmost circumspection.<sup>51</sup> There are no fixed rules by which to determine what acts are repugnant to public policy;<sup>52</sup> but it is well established that no phase of private relations shall be contrary to public policy,<sup>53</sup> although the courts will not characterize a transaction as invalid because it is contrary to public policy unless the transaction contravenes some positive statute or some well-established rule of law.<sup>54</sup> It is regarded as a sound principle that a rule of law, not statutory, will not be grounded or based on public policy when the enforcement thereof will not accomplish any public good, and its non-enforcement will not result in any public injury.<sup>55</sup>

40. Ind.—Franklin Fire Ins. Co. v. Moll, 58 N.E.2d 947, 950, 115 Ind. App. 289—Hodnick v. Fidelity Trust Co., 183 N.E. 488, 491, 96 Ind.App. 342.

41. Fla.—State ex rel. Gibbs v. Bloodworth, 184 So. 1, 5, 134 Fla. 369.

42. Ill.—Wakefield v. Van Tassell, 66 N.E. 830, 831, 202 Ill. 41, 65 L.R.A. 511, 95 Am.S.R. 207.

N.J.—Girard Trust Co. v. Schmitz, 20 A.2d 21, 30, 129 N.J.Eq. 444.  
Okla.—Cameron & Henderson v. Franks, 184 P.2d 965, 972, 199 Okl. 143.

43. Cal.—Smith v. San Francisco & N. P. Ry. Co., 47 P. 582, 587, 588, 115 Cal. 584, 35 L.R.A. 309, 56 Am.S.R. 119.

S.C.—Alderman v. Alderman, 181 S.E. 897, 904, 178 S.C. 9, 105 A.L.R. 102.

44. N.Y.—Mertz v. Mertz, 3 N.E.2d 597, 599, 271 N.Y. 466, 108 A.L.R. 1120.

45. Mont.—Hames v. City of Polson, 215 P.2d 950, 955—Mieyr v. Federal Surety Co. of Davenport, Iowa, 34 P.2d 982, 984, 97 Mont. 503.

S.D.—Bartron v. Codington County,

2 N.W.2d 337, 343, 68 S.D. 309, 140 A.L.R. 550.

#### Similarly expressed

"It seems clear to us, therefore, from the great weight of judicial authority, that no act or transaction should be held to be void as against public policy unless it contravenes some positive, well-defined expression of the settled will of the people of the state or nation, as an organized body politic, which expression must be looked for and found in the Constitution, statutes, or judicial decisions of the state or nation, and not in the varying personal opinions and whims of judges or courts, charged with the interpretation and declaration of the established law, as to what they themselves believe to be the demands or interests of the public."

Mo.—In re Rahn, 291 S.W. 120, 123, 316 Mo. 492, 51 A.L.R. 77.

N.J.—Girard Trust Co. v. Schmitz, 20 A.2d 21, 29, 30, 129 N.J.Eq. 444.

45. Wis.—Good v. Starker, 257 N.W. 299, 301, 216 Wis. 253.

46. Colo.—City and County of Denver v. Tihen, 235 P. 777, 780, 781, 77 Colo. 212.

47. Wis.—Good v. Starker, 257 N.W. 299, 301, 216 Wis. 253.

48. N.J.—Allen v. Commercial Casualty Ins. Co., 37 A.2d 37, 39, 131 N.J.Law 475.

50 C.J. p 859 note 65.

49. N.Y.—F. A. Strauss & Co. v. Canadian Pac. Ry. Co., 173 N.E. 564, 566, 254 N.Y. 407—Hanfeld v. A. Brodco Inc., 3 N.Y.S.2d 463, 465, 167 Misc. 85—In re Andrus' Will, 281 N.Y.S. 331, 346, 156 Misc. 268.

50. S.D.—Bartron v. Codington County, 2 N.W.2d 337, 344, 68 S.D. 309, 140 A.L.R. 550.

51. N.D.—James v. Young, 43 N.W. 2d 692, 697.

52. N.J.—Girard Trust Co. v. Schmitz, 20 A.2d 21, 29, 129 N.J.Eq. 444.

53. Fla.—City of Leesburg v. Ware, 153 So. 87, 90, 113 Fla. 760.

54. Cal.—Smith v. San Francisco & N. P. Ry. Co., 47 P. 582, 587, 588, 115 Cal. 584, 35 L.R.A. 309, 56 Am.S.R. 119.

Del.—Ringling v. Ringling Bros.—Barnum & Bailey Combined Shows, Ch. 49 A.2d 603, 609.

S.C.—Alderman v. Alderman, 181 S.E. 897, 904, 178 S.C. 9, 105 A.L.R. 102.

55. Tex.—Griggs Canning Co. v.

It has been suggested that public policy is a principle of judicial legislation or interpretation founded on the current needs of the community,<sup>56</sup> and the term implies ascertainment of public needs and a declaration of law in view of the public interest affected,<sup>57</sup> but in exercising their legitimate functions the courts do no more than declare the existence of a policy revealed to them by a process of interpretation, and this they do to safeguard that which the community wants, and not what an ideal community ought to want.<sup>58</sup>

Public policy is a course of social behavior whereby the rational adherence to the moral code is required of all who receive, or assert a claim to, the protection of the sovereignty,<sup>59</sup> and therefore only those claims which are consonant with the purpose and spirit of the law can be within public policy.<sup>60</sup> It frequently is designated the policy of the law, or public policy in relation to the administration of the law,<sup>61</sup> and it is considered to be a rule of law representing the policy of the law in relation to its administration.<sup>62</sup>

Public policy has its basis in the promotion of the public good,<sup>63</sup> the basic principle of the doctrine

being the good of the whole people,<sup>64</sup> and it means the interest of persons other than the parties,<sup>65</sup> and therefore that interest may not be set at naught by the acts or conduct of any party alone.<sup>66</sup>

Public policy regards the primary principles of equity and justice,<sup>67</sup> is always in accord with the purpose and spirit of the law,<sup>68</sup> and is sometimes expressed under the title of social and industrial justice, as it is conceived by our body politic.<sup>69</sup> The statement has been made that back of every law there is something which is conventionally referred to as public policy,<sup>70</sup> and public policy is regarded as the inarticulate background of the penal law.<sup>71</sup>

Public policy exists and functions generally within a state for the protection and regulation of matters of public morals, public health, public safety, public welfare, and similar and related subjects, and condemns that which conflicts with the morals of the time and contravenes any established interest of society.<sup>72</sup> It has reference to the general principles by which public affairs are conducted,<sup>73</sup> and, as applied to a rule of law, it refers to statutes which have for their purpose the regulation of personal conduct and relations in the interest of the public

Josey, 164 S.W.2d 835, 842, 139 Tex. 623.

56. S.D.—Bartron v. Codington County, 2 N.W.2d 337, 343, 68 S.D. 309, 140 A.L.R. 550.

57. N.H.—Heath v. Heath, 159 A. 418, 419, 85 N.H. 419.

58. S.D.—Bartron v. Codington County, 2 N.W.2d 337, 343, 68 S.D. 309, 140 A.L.R. 550.

59. Cal.—Howard v. Adams, App., 98 P.2d 1057, 1060.

60. Okl.—Christ's Methodist Church v. Macklanburg, 177 P.2d 1008, 1011, 198 Okl. 297.

"That which is done lawfully may not be said to be against public policy."—Jenkins v. First Nat. Bank, D.C.Tex., 26 F.Supp. 312, 314.

61. La.—Furlong v. National Life & Accident Ins. Co., 169 So. 431, 434, 135 La. 352, 106 A.L.R. 40.

Md.—Mayor and Council of City of Baltimore v. Maryland Casualty Co., 190 A. 250, 253, 171 Md. 667, 111 A.L.R. 305.

N.J.—Hizey v. Ajax Heating Co., 158 A. 851, 852, 10 N.J.Misc. 81.

N.D.—Mees v. Grewer, 245 N.W. 813, 814, 63 N.D. 74.

S.D.—E. P. Wilbur Trust Co. v. Fahrendorf, 265 N.W. 1, 3, 64 S.D. 124.

Wash.—Grover v. Zook, 87 P. 638, 642, 643, 44 Wash. 489, 120 Am. S.R. 1012, 7 L.R.A., N.S., 582, 12 Ann.Cas. 192.

62. N.Y.—Moscow Fire Ins. Co. of Moscow, Russia v. Bahk of New York & Trust Co., 294 N.Y.S. 648, 672, 161 Misc. 903.

63. Iowa.—Briley v. Board of Sup'rs of Story County, 287 N.W. 242, 244, 227 Iowa 55.

64. N.Y.—In re Andrus' Will, Sur., 281 N.Y.S. 831, 156 Misc. 268.

#### Similarly expressed

"Its principle inhibits that which has a tendency to be injurious to the good of all."—Cameron & Henderson v. Franks, 184 P.2d 965, 972, 199 Okl. 143.

65. N.Y.—Rozell v. Rozell, 8 N.Y.S. 2d 901, 903, 256 App.Div. 61—Moncel Realty Corporation v. Whitestone Farms, 68 N.Y.S.2d 673, 676, 188 Misc. 431.

66. N.Y.—Moncel Realty Corporation v. Whitestone Farms, supra, 50 C.J. p 858 note 51 [b].

#### Public policy transcends individual rights

N.J.—Cameron v. International Alliance of Theatrical Stage Employees and Moving Picture Operators of U. S. and Canada, Local Union No. 384, of Hudson County, 176 A. 692, 699, 118 N.J.Eq. 11, 97 A.L.R. 594.

67. Fla.—Knott v. State, 186 So. 788, 795, 136 Fla. 184—City of Leesburg v. Ware, 153 So. 87, 89, 113 Fla. 760.

Mich.—Sipes v. McGhee, 25 N.W.2d 638, 642, 316 Mich. 614—Skutt v. City of Grand Rapids, 266 N.W. 344, 346, 275 Mich. 258.

N.J.—Girard Trust Co. v. Schmitz, 20 A.2d 21, 30, 129 N.J.Eq. 444.

68. Okl.—Christ's Methodist Church v. Macklanburg, 177 P.2d 1008, 1011, 198 Okl. 297.

69. Fla.—Knott v. State, 186 So. 788, 795, 136 Fla. 184—City of Leesburg v. Ware, 153 So. 87, 89, 113 Fla. 760.

Mich.—Sipes v. McGhee, 25 N.W.2d 638, 642, 316 Mich. 614—Skutt v. City of Grand Rapids, 266 N.W. 344, 346, 275 Mich. 258.

N.J.—Girard Trust Co. v. Schmitz, 20 A.2d 21, 30, 129 N.J.Eq. 444.

70. N.Y.—Mertz v. Mertz, 8 N.E.2d 597, 598, 599, 271 N.Y. 466, 108 A.L.R. 1120.

#### Underlies all judicial action

Public policy is not a circumscribed legal principle adverted to only in a particular case but, rather, underlies all judicial action.—Jorgenson v. Metropolitan Life Ins. Co., 55 A.2d 2, 5, 136 N.J.Law 148.

71. Cal.—Howard v. Adams, App., 98 P.2d 1057, 1060.

72. W.Va.—Smith v. Bell, 41 S.E.2d 695, 700, 129 W.Va. 749.

73. Fla.—Story v. First Nat. Bank & Trust Co. in Orlando, 156 So. 101, 103, 115 Fla. 436.

welfare.<sup>74</sup> In substance it may be said to be the community common sense and common conscience extended and applied throughout the state to matters of public morals, public health, public safety, public welfare, and the like, being that general and well-settled public opinion relating to man's plain palpable duty to his fellow man, having due regard to all the circumstances of each particular relation and situation.<sup>75</sup> It operates as a ban against gambling or wagering contracts, contracts involving wrongful acts or omissions, contracts which tend to injure the public service, contracts injuriously affecting the administration of justice, contracts in restraint of trade, and numerous other intolerable practices and undertakings of like nature, and it tends to produce, and is reflected in, constitutional provisions, enactments of statutes, and judicial pronouncements which would render illegal or unenforceable acts and conduct inimical to the welfare of the public.<sup>76</sup>

"Public policy" has been said to be synonymous with "policy of the law" see *supra* p 209 note 40, and "public order" see 67 C.J.S. p 521 note 73, and is practically synonymous with "public good" see 38 C.J.S. p 936 note 12.1.

It has been distinguished from "comity" see *Conflict of Laws* § 3 b (2)..

The doctrine of public policy is frequently applied to contractual undertakings, and in this connection the term is defined in *Contracts* § 211. Agreements contrary to public policy because of interference with the administration of government in general are treated in *Contracts* §§ 212-222, and agreements contrary to public policy because of interference with the course of justice in *Contracts* §§ 223-232. Agreements affecting marital relations and therefore contrary to public policy are discussed in *Contracts* §§ 233-237, and agreements which are in restraint of trade and therefore contrary to public policy in *Contracts* §§ 238-258. Various other agreements which are contrary to public policy are discussed in *Contracts* §§ 259-271.

The doctrine of public policy is not restricted in its application to contractual relations. Public policy disapproves the total exclusion of property from social commerce for long periods of time, and for

that reason general restraints on the alienation of property are contrary to public policy, as stated in *Property* § 13. Testamentary limitations on the alienation of property, as well as other testamentary conditions and restrictions to which the doctrine of public policy is applicable are treated in the C.J.S. title *Wills* §§ 979-991, also 69 C.J. p 660 note 41-p 672 note 4. Trust conditions and restrictions of the same nature are discussed in the C.J.S. title *Trusts* § 78, also 65 C.J. p 333 note 50. See also *Perpetuities* § 2.

The term "public policy" is defined in *Conflict of Laws* § 4 e (4) in connection with the well-established principle that foreign law or rights based thereon will not be given effect or enforced if opposed to the settled public policy of the forum.

In addition to its application to agreements affecting the marital relation as previously stated, the doctrine of public policy is also applied to other incidents of the domestic relationship. Marriage is fostered and protected by public policy, as stated in *Marriage* § 1 b, and public policy requires that the marriage should be surrounded with every safeguard, and its severance allowed only in the manner and for the causes specified by law, as stated in *Divorce* § 8. For other particular applications of the doctrine to the domestic relationship see the indexes to the titles *Adoption of Children*, *Divorce*, *Husband and Wife*, *Marriage*, and *Parent and Child*.

Applications of the doctrine of public policy are to be found not only in almost every title in this work, but frequently to a variety of situations within a single title. By way of illustration, the stare decisis rule and the law of the case rule are both founded on public policy, as stated in *Courts* §§ 187, 195. In general, insurance contracts as a class are upheld on the grounds of public policy, as stated in *Insurance* § 239, and the "war clause" or "military service clause" under which the company stipulates for a reduction of liability or exemption from liability altogether in case the insured dies while engaged in military or naval service in time of war is not considered to be contrary to public policy, as stated in *Insurance* § 241 b. However, the doctrine of public policy is applied to render void and

74. Fla.—*Story v. First Nat. Bank & Trust Co. in Orlando*, *supra*.

75. Fla.—*Knott v. State*, 136 So. 788, 795, 136 Fla. 184—*City of Leesburg v. Ware*, 153 So. 87, 89, 113 Fla. 760.

Iowa.—*Truax v. Ellett*, 15 N.W.2d 861, 367, 234 Iowa 1217.

Mich.—*Sipes v. McGhee*, 25 N.W.2d

638, 642, 316 Mich. 614—*Skutt v. City of Grand Rapids*, 266 N.W. 344, 346, 275 Mich. 258.

N.J.—*Girard Trust Co. v. Schmitz*, 20 A.2d 21, 29, 129 N.J.Eq. 444.

Ohio.—*Snyder v. Ridge Hill Memorial Park*, 22 N.E.2d 559, 566, 61 Ohio App. 271.

50 C.J. p 858 note 58 [a].

#### Similarly expressed

Public policies, in general, are those considerations of public interest and morality which the state enforces by legislation or judicial action.—*In re Andrus' Will*, 281 N.Y. S. 831, 846, 156 Misc. 268.

76. W.Va.—*Smith v. Bell*, 41 S.E.2d 695, 700, 129 W.Va. 749.



unenforceable a policy of insurance issued to a person without an insurable interest in the subject matter, as discussed in Insurance § 175 a; and the doctrine is also applied where the assignee or beneficiary feloniously causes the death of the insured, preventing the wrongdoer from recovering on the policy, as discussed in Insurance § 1171.

For other specific applications of the doctrine of public policy consult the indexes to the various titles and also the Descriptive-Word Index.

**POLICYHOLDER.** See Insurance § 49.

**POLING.** A method of moving railroad cars, and defined in this connection in the C.J.S. title Railroads § 1, also 49 C.J. p 1073 note 74.

**POLISH.** To make smooth and glossy by mechanical process, usually by friction; to burnish; to give luster to; as to polish glass, metals, etc.<sup>77</sup>

**POLITIAE LEGIBUS, NON LEGES POLITIIS, ADAPTANDÆ.** See 49 C.J. p 1073 note 77.

**POLITIC.** A derivative from a root signifying "citizen."<sup>78</sup>

**POLITICAL.** A word of broad meaning,<sup>79</sup> said to have many shades of meaning.<sup>80</sup> In its higher and true sense "political" means that which pertains to the government of a nation.<sup>81</sup> So used, "political" is defined to mean belonging to the science of government; treating of polity or politics; as political theories;<sup>82</sup> of or pertaining to the conduct of government;<sup>83</sup> of or pertaining to, or incidental to the

exercise of, functions vested in those charged with the conduct of the government;<sup>84</sup> pertaining to policy or the administration of government;<sup>85</sup> relating to the management of affairs of state.<sup>86</sup>

"Political" is also defined to mean having or conforming to, a polity, or settled system of administration, as a political body or government;<sup>87</sup> having an organized system of government, administering a polity, as a fully developed political community.<sup>88</sup>

In a generic sense, "political" means of or pertaining to the exercise of the rights and privileges or the influence by which individuals of a state seek to determine or control its public policy; having to do with the organization or action of individuals, parties, or interests which seek to control the appointment or action of those who manage the affairs of a state.<sup>89</sup>

The term "political" in its broadest sense includes the entire system of laws, constitutional and statutory, of a government,<sup>90</sup> and should not be narrowed so as to be exclusively applied to groups and parties advocating political views or policies.<sup>91</sup>

In its ordinary meaning the term is not limited to something pertaining merely to the actual management of a government by individuals for the time holding office thereunder, but the essential significance in proper and ordinary use of the word includes anything pertaining to the establishment of a form of government.<sup>92</sup>

**Political power.** The policy of government or its administration.<sup>93</sup> It may be exercised either in the formation or administration of government or both,

77. Webster New Int.D.

With respect to the manufacture of steel strips "polishing" is a process of improving the surface by the use of emery and buffing wheels, and planishing or glancing is apparently the same process carried out a little more elaborately.—U. S. v. Crucible Steel Co., N.Y., 137 F. 384, 386, 69 C.C.A. 576.

78. Ohio.—Wiesenthal v. Wickersham, 28 N.E.2d 512, 515, 64 Ohio App. 124.

"Body politic" see 11 C.J.S. p 380 notes 60-73.

79. Iowa.—State ex rel. Maley v. Civic Action Committee, 28 N.W. 2d 467, 470, 238 Iowa 851.

80. Ky.—Norton v. Letton, 111 S.W.2d 1053, 1057, 1060, 271 Ky. 353.

81. Ky.—Norton v. Letton, supra. Wis.—In re Kemp, 16 Wis. 359, 396.

82. Idaho.—Fisher v. Masters, 83 P. 2d 212, 217, 59 Idaho 366.

Similarly defined

"Political" means of or pertaining to polity or politics, or the conduct

of government, referring in the widest application to the judicial, executive, and legislative branches.—Norton v. Letton, 111 S.W.2d 1053, 1057, 271 Ky. 353.

83. Iowa.—State ex rel. Maley v. Civic Action Committee, 28 N.W. 2d 467, 470, 238 Iowa 851.

84. Ariz.—Sorenson v. Maricopa County Super. Ct., 254 P. 230, 231, 31 Ariz. 421.

Iowa.—State ex rel. Maley v. Civic Action Committee, 28 N.W.2d 467, 470, 238 Iowa 851.

Ky.—Norton v. Letton, 111 S.W.2d 1053, 1057, 1058, 271 Ky. 353.

85. Ill.—People v. Morgan, 90 Ill. 558, 563.

Iowa.—Corpus Juris cited in State ex rel. Maley v. Civic Action Committee, 28 N.W.2d 467, 470, 238 Iowa 851.

86. Ariz.—Sorenson v. Maricopa County Super. Ct., 254 P. 230, 231, 31 Ariz. 421.

Idaho.—Fisher v. Masters, 83 P.2d 212, 217, 59 Idaho 366.

Iowa.—State ex rel. Maley v. Civic Action Committee, 28 N.W.2d 467, 470, 238 Iowa 851.

Ky.—Norton v. Letton, 111 S.W.2d 1053, 1057, 271 Ky. 353.

87. Ky.—Norton v. Letton, supra.

88. Idaho.—Fisher v. Masters, 83 P.2d 212, 217, 59 Idaho 366.

89. Cal.—Lockheed Aircraft Corp. v. Superior Court of Los Angeles County, 171 P.2d 21, 24, 28 Cal.2d 481, 166 A.L.R. 701.

Iowa.—State ex rel. Maley v. Civic Action Committee, 28 N.W.2d 467, 470, 238 Iowa 851.

Ky.—Norton v. Letton, 111 S.W.2d 1053, 1057, 271 Ky. 353.

90. Wis.—In re Kemp, 16 Wis. 359, 396.

91. Ky.—Norton v. Letton, 111 S.W. 2d 1053, 1057, 271 Ky. 353.

92. Mass.—Commonwealth v. McCarthy, 183 N.E. 495, 497, 281 Mass. 253, 85 A.L.R. 1141.

93. Ill.—People v. Morgan, 90 Ill. 558, 562.

and it embraces all governmental powers exercised by one department or another, or the officers of one or the other.<sup>94</sup>

"Political power" has been distinguished from "judicial power" see 50 C.J.S. p 571 note 82.

**Political purpose.** A term which has been defined as being a purpose in furtherance of a political right;<sup>95</sup> a purpose to influence the exercise of political rights.<sup>96</sup>

**Political subdivision.** The term is broad and comprehensive and denotes any division of a state made by the proper authorities thereof, acting within their constitutional powers, for the purpose of carrying out those functions of the state which by long usage and inherent necessities of government have always been regarded as public;<sup>97</sup> a division of a parent entity for some governmental purpose.<sup>98</sup> The term may be used in more than one sense, and it may designate a true governmental subdivision such as a county, township, etc., or it may have a broader meaning, denoting any subdivision of the state created for a public purpose although authorized to exercise a portion of the sovereign power of the state only to a limited degree.<sup>99</sup>

Broadly speaking, a political subdivision of a

state is a subdivision thereof to which has been delegated certain functions of local government.<sup>1</sup>

Municipalities are political subdivisions of the state, and the term "political subdivision" is applied to cities, towns, and villages as stated in Municipal Corporations § 3 b (2); and also to counties see Counties § 1; to drainage districts see Drains § 6 b; to election districts see Elections § 53; to sanitary districts see Health § 5; to levee districts see Levees and Flood Control § 14; and to school districts see the C.J.S. title Schools and School Districts § 24, also 49 C.J. p 1077 note 56 [e], [f], and 56 C.J. p 194 note 99 [a].

As used in the Missouri constitution, with reference to the appellate jurisdiction of the supreme court, the term "political subdivision of a state" is discussed in Courts § 407.

*Other phrases* employing the word "political" are set out in the note.<sup>2</sup>

**POLITICS.** The word "politics" means the science<sup>3</sup> and art<sup>4</sup> of government; the science dealing with the organization, regulation, and administration of a state, in both its internal and external affairs; political science.<sup>5</sup>

As used in the Bill of Rights declaring that all political power is inherent in the people it consists of the three great attributes of sovereignty, namely, legislative, executive, and judicial authority.—Stewart v. Polk County, 30 Iowa 9, 18, 1 Am.R. 238.

94. Ill.—People v. Morgan, 90 Ill. 558, 562.

The power conferred on a county to raise revenue by taxation is a political power.—Stark County v. Henry County, 158 N.E. 116, 117, 326 Ill. 535, 54 A.L.R. 777.

95. U.S.—U. S. v. Wurzbach, D.C. Tex., 31 F.2d 774, 776.

96. Mass.—Commonwealth v. McCarthy, 183 N.E. 495, 497, 281 Mass. 253, 85 A.L.R. 1141.

97. U.S.—Commissioner of Internal Revenue v. Shamburg's Estate, C. C.A.2, 144 F.2d 998, 1004.

98. N.M.—Gibbany v. Ford, 225 P. 577, 579, 29 N.M. 621.

99. U.S.—Commissioner of Internal Revenue v. Shamburg's Estate, C. C.A.2, 144 F.2d 998, 1004.

1. La.—Corpus Juris cited in Commander v. Board of Com'rs of Buras Levee Dist., 11 So.2d 605, 607, 202 La. 325.

49 C.J. p 1077 note 56.

## 2. Phrases

(1) "Political action" see 1 C.J.S. p 327 note 20.6.

(2) "Political boss" see 11 C.J.S. p 530 note 23.

(3) "Political campaign" see 12 C.J.S. p 890 notes 42, 43.

(4) "Political character" see 14 C.J.S. p 401 note 70.1.

(5) "Political committee" see 15 C.J.S. p 585.

(6) "Political corporation" defined see Corporations § 18. See also Municipal Corporations § 1 c.

(7) "Political department" see 26 C.J.S. p 716 note 42.

(8) "Political discretion" see 27 C.J.S. p 138 note 87.

(9) "Political division" see 27 C.J.S. p 512 notes 87–89.

(10) "Political issues;" in the international field, such matters as the recognition of new governments or the making of treaties, not the direct determination of questions of property.—Banco de Espana v. Federal Reserve Bank of New York, C.C.A.N.Y., 114 F.2d 438, 442.

(11) "Political occurrence" see 67 C.J.S. p 84 note 64.

(12) "Political offenses" as extraditable see Extradition § 26.

(13) "Political offices" see Officers § 2.

(14) "Political organization" ordinarily synonymous with "political party" see Elections § 84 a.

(15) "Political party" see Elections § 84.

(16) "Political questions" see Constitutional Law §§ 145–149.

(17) "Political right" and "political rights" defined and distinguished from "civil rights" see Civil Rights § 2; distinguished from "legal right" see 52 C.J.S. p 1043 note 96. See also the title index to Constitutional Law.

(18) "Political status;" a legal state or condition by which a person becomes the subject of a particular country.

U.S.—U. S. v. Wong Kim Ark, Cal., 18 S.Ct. 456, 459, 460, 169 U.S. 649, 42 L.Ed. 890.

Eng.—Udny v. Udny, [1869] L.R. 1 H.L.Sc. 441, 2 E.R.C. 782.

49 C.J. p 1077 note 50.

3. Cal.—Lockheed Aircraft Corp. v. Superior Court of Los Angeles County, 171 P.2d 21, 24, 28 Cal.2d 481, 166 A.L.R. 701.

Okl.—Dorsett v. State, 289 P. 298, 304, 144 Okl. 33.

4. Cal.—Lockheed Aircraft Corp. v. Superior Court of Los Angeles County, 171 P.2d 21, 24, 28 Cal.2d 481, 166 A.L.R. 701.

5. Cal.—Lockheed Aircraft Corp. v. Superior Court of Los Angeles County, supra.

**POLIZA.** In Spanish law, an order or instrument to receive or collect money; or authenticating the legitimacy of something; a policy of insurance.<sup>6</sup>

**POLL.** As a noun, a number or aggregate of heads;<sup>7</sup> a list or register of heads or individuals<sup>8</sup> who vote at an election;<sup>9</sup> the register of the names of electors who may vote at an election.<sup>10</sup> Also, a vote.<sup>11</sup>

In the plural "polls," as the places to which voters go to cast their ballots, see Elections § 1 j (5).

As a verb, to single out, one by one, of a number of persons.<sup>12</sup>

As an adjective, cut or shaved smooth or even; out in a straight line without indentation.<sup>13</sup>

*Phrases* employing the word "poll" are set out in the note.<sup>14</sup>

**POLLICITATION.** In the civil law, a sort of contract arising from a promise made by one party only, without any consent or acceptance by the other; but this peculiar kind of obligation exists only from an individual toward a body politic or government.<sup>15</sup>

**POLLUTE.** To corrupt or defile.<sup>16</sup>

*Pollution.* The act of polluting; the state of being polluted.<sup>17</sup>

Pollution of natural watercourses is treated in the C.J.S. title Waters §§ 43-57, 67 C.J. p 767 note 27-p 799 note 86; the liability of municipalities for such pollution is considered in Municipal Corporations § 885. Pollution of the atmosphere as a nuisance, see Nuisances § 23. For other particular applications and specific uses of the term consult the Descriptive-Word Index.

**POLLY.** A synonym of "Mary" see Names § 8.

**POLYCYTHEMIA.** An increase in the globular elements of the blood; hyperglobulism.<sup>18</sup> Polycythemia is a chronic condition of slow, insidious development, in which the red blood cells increase to exceed the maximum normal count of five million per cubic millimeter and the hemoglobin content of the blood increases to exceed the maximum normal of eighty-five per cent.<sup>19</sup>

In the present state of medical knowledge, the cause of the condition is not known, but its symptoms are materially different from food poisoning.<sup>20</sup>

**POLYGAMIA EST PLURIUM SIMUL VIRORUM UXORUMVE CONNUBIUM.** See 49 C.J. p 1078 note 93.

**POLYGAMIST.** One who practices polygamy.<sup>21</sup> In some jurisdictions polygamists are deprived of the right to vote see Elections § 33.

**POLYGAMOUS MARRIAGE.** See Marriage § 1.

**POLYGAMY.** As the proper name for the crime of bigamy see Bigamy § 1.

**POLYGON.** A figure having many angles;<sup>22</sup> a closed figure bounded by straight lines or arcs, especially more than four;<sup>23</sup> a plane figure having many angles and consequently many sides, especially one whose perimeter consists of more than four sides;<sup>24</sup> a figure, generally a plane closed figure, having many angles, and hence many sides, especially one of more than four angles.<sup>25</sup>

**POLYGRAPH.** An instrument for recording tracings of several different pulsations simultaneously,

6. Escriche Diccionario.

7. La.—De Soto Parish v. Williams 31 So. 647, 648, 49 La. Ann. 422, 426, 37 L.R.A. 761.

Tex.—Clary v. Hurst, 138 S.W. 566, 569, 104 Tex. 423.

8. La.—De Soto Parish v. Williams, 31 So. 647, 648, 49 La. Ann. 422, 426, 37 L.R.A. 761.

9. Tex.—Clary v. Hurst, 138 S.W. 566, 569, 104 Tex. 423.

10. La.—De Soto Parish v. Williams, 31 So. 647, 648, 49 La. Ann. 422, 426, 37 L.R.A. 761.

11. La.—De Soto Parish v. Williams, supra.

49 C.J. p 1078 note 68.

12. Black L.D.

13. Black L.D.

14. *Phrases*

(1) "Deed poll" see Deeds § 1 a (3).

(2) "Poll of jurors" in civil actions see the C.J.S. title Trial § 490, 64 C.J. p 1059 note 78-p 1061 note 24; in criminal actions see Criminal Law § 1392.

(3) "Poll parish" see the C.J.S. title Religious Societies § 1, also 49 C.J. p 1078 notes 77-79.

(4) "Poll tax;" a term meaning a capitation tax, or tax on the person simply without any reference to his property or occupation as stated in the C.J.S. title Taxation §§ 1068-1072, 61 C.J. p 1534 note 74-p 1536 note 35, also 9 C.J. p 1281 notes 76, 77, 49 C.J. p 1078 notes 80-87.

15. Mass.—McCulloch v. Eagle Ins. Co., 1 Pick. 278, 283.

16. Ind.—Young v. State, 141 N.E. 309, 311, 194 Ind. 221.

49 C.J. p 1078 note 88.

17. Ind.—Young v. State, supra.

18. Stedman Med.D.

19. U.S.—Miller v. Lykes Bros.—Ripley S. S. Co., C.C.A.La., 98 F.2d 185, 186.

20. U.S.—Miller v. Lykes Bros.—Ripley S. S. Co., supra.

21. Webster New Int.D.

22. U.S.—Solomon v. Renstrom, D.C. Neb., 57 F.Supp. 223, 225.

23. U.S.—Welin Davit & Boat Corporation v. C. M. Lane Life Boat Co., D.C.N.Y., 38 F.2d 685, 688—Solomon v. Renstrom, D.C.Neb., 57 F.Supp. 223, 225.

24. U.S.—Solomon v. Renstrom, supra.

25. U.S.—Renstrom v. Solomon, Cust. & Pat.App., 133 F.2d 942, 944—Solomon v. Renstrom, D.C.Neb., 57 F.Supp. 223, 225.

as of the heart and one or more of the arteries.<sup>26</sup> The word is sometimes used to designate the lie detector test.<sup>27</sup>

**POLYMANIA.** See *Insane Persons* § 2 c.

**POLYMERIDS.** When a vegetable or marine oil is heated, certain of the molecules fuse, and, by that process, form larger and structurally more complex bodies than existed prior to the application of the heat, and these bodies are called "polymerids."<sup>28</sup>

**POLYMERIZATION.** The word "polymerization" means a fusing or joining together.<sup>29</sup> It is the chemical process in which relatively simple molecules of a compound become complex by combination amongst themselves.<sup>30</sup>

**POLYNEURITIC INSANITY.** See *Insane Persons* § 2 b (5).

**POMACE.** The substance of apple or of similar fruit crushed by grinding.<sup>31</sup>

**POND.** For the common signification of the word as a body of water naturally or artificially confined, and usually of less extent than a lake, see the C.J.S. title *Waters* § 103, also 49 C.J. p 1079 notes 7-10, 67 C.J. p 849 note 14.

"Pond" has been distinguished from "borrow pit" see 11 C.J.S. p 529 note 88, and "stream", see the C.J.S. title *Waters* § 2, also 49 C.J. p 1079 note 12, 67 C.J. p 849 note 15.

**PONDERANTUR TESTES, NON NUMERANTUR.** See 49 C.J. p 1079 note 13.

**PONDERE, NUMERO, ET MENSURA.** See 49 C.J. p 1079 note 14.

26. Webster New Int.D.

27. Mich.—*People v. Becker*, 2 N.W. 2d 503, 505, 300 Mich. 562, 139 A. L.R. 1171.

Admissibility of evidence obtained by means of lie detector see *Criminal Law* § 967.

Lie detector described see 26 C.J.S. p 1255 note 2.

28. U.S.—*Vegetable Oil Products Co. v. Dorward & Sons Co.*, D.C. Cal., 53 F.Supp. 281, 284.

29. U.S.—*Vegetable Oil Products Co. v. Dorward & Sons Co.*, supra.

30. D.C.—*Carbide & Carbon Chemicals Corporation v. Coe*, 102 F.2d 236, 237, 69 App.D.C. 372.

**Polymerization resin**

The term "polymerization resin" is used to distinguish a resin which is formed directly by the polymerization of a chemical compound, with-

out passing through a preliminary stage of condensation.—*Carbide & Carbon Chemicals Corporation v. Coe*, supra.

31. Ind.—*Abel v. State*, 163 N.E. 91, 92, 200 Ind. 283.

**Pomace wine**

Any product made by the addition of water and sugar to the pomace of grapes from which the juice has theretofore been partially expressed and by fermenting the mixture until a fermented beverage is produced.—*U. S. v. Sixty Barrels of Wine*, D.C. Mo., 225 F. 846, 848.

32. *Escrache Diccionario*.

33. U.S.—*In re The Mackinaw*, D.C. Or., 165 F. 351, 352.

49 C.J. p 1080 note 21.

34. Kan.—*Golden v. Cockrill*, 1 Kan. 259, 266, 81 Am.D. 510.

35. Webster New Int.D.

**PONTAZGO.** In Spanish law, bridge toll.<sup>32</sup>

**PONTOON.** In nautical language, a lighter; a low flat vessel resembling a barge.<sup>33</sup>

**PONY.** Although defined by the lexicographers as a small horse,<sup>34</sup> in common usage "pony" is not synonymous with "horse" see 41 C.J.S. p 329 note 29.

As an adjective, of a size smaller than usual.<sup>35</sup>

**POOL.** As a noun the word "pool" is defined as meaning a small body of standing or stagnant water, and in this sense is treated in the C.J.S. title *Waters* § 2.

"Pool" as a game is defined in *Gaming* § 1 b (3); with relation to bets or wagers the word is defined in § 1 c (2). In this sense various related terms, "auction pool," "combination pool," "pool seller," "pool selling," "french pool," "pool table," and "pool ticket" are also defined in *Gaming* § 1.

The term is also employed to denote a combination of persons contributing money to be used for increasing or depressing the market price of commodities as discussed in *Monopolies* § 1. The word "pool" also means a surrender of certain individual rights and powers to the common holder for the benefit of all, on the theory that accruing benefits gained by joint venture outweigh the individual rights surrendered.<sup>36</sup>

As a verb, "pool" is defined as meaning to contribute to a common fund on the basis of a mutual division of profits or losses, or to make a common interest.<sup>37</sup>

Phrases employing the term "pool" are set out in the note.<sup>38</sup>

#### Phrases

(1) "Pony homestead" see *Exemptions* § 1.

(2) "Pony-truck" as a part of a railroad locomotive see the C.J.S. title *Railroads* § 1.

36. Ill.—*McInerney v. Nachman*, 3 N.E.2d 105, 109, 286 Ill.App. 477.

Ky.—*Burley Tobacco Society v. Munroe*, 146 S.W. 725, 730, 148 Ky. 289.

37. S.C.—*Burch v. South Carolina Cotton Growers' Co-op. Ass'n*, 187 S.E. 422, 424, 181 S.C. 295.

#### 38. Phrases

(1) "Pool car" see *Railroads* § 1.

(2) "Pool full" see *Navigable Waters* § 88.

(3) "Pool measure;" an allowance claimed by ancient custom in the port of London of one chaldron to every score, the basis of which measure is the chaldron, a well-known

**POOLING.** An aggregation of property or capital belonging to different persons, with a view to common liabilities and profits.<sup>39</sup>

**POOLROOM.** A room where the game of pool is played.<sup>40</sup> By usage the term has been held to be synonymous with "pool hall."<sup>41</sup> The term is defined as a place where people resort to bet on races, etc., in Gaming § 1 f.

**POOR.** The term "poor" is used in two senses.<sup>42</sup> In one sense it is used simply as opposed to the term "rich."<sup>43</sup> Thus ordinary laborers, mechanics, and artisans are spoken of as poor people, without a thought of describing persons who are other than self-supporting.<sup>44</sup> In the other sense, the term is used to describe that class who are entirely destitute and helpless, and therefore dependent on public charity,<sup>45</sup> and it is in this sense that the word is employed in Paupers § 1.

The word "poor" is defined as meaning destitute of property; indigent; needy;<sup>46</sup> wanting in material resources or goods.<sup>47</sup> As used in charitable be-

quests the term "poor" is discussed in Charities § 42 b.

The word "poor" has been held equivalent to, or synonymous with, "destitute" see 26 C.J.S. p 1245 note 99, "indigent" see 42 C.J.S. p 1363 note 16, "necessitous" see 65 C.J.S. p 270 note 74.1, and "pauper" see Paupers § 1.

Phrases employing the word are set out in the note.<sup>48</sup>

**POP.** Explode.<sup>49</sup>

**POPCORN.** A food see Foods § 1.

**POPPYCOCK.** Trivial; stuff.<sup>50</sup>

**POPULAR.** Of or pertaining to the people; constituted by or depending on the people, especially the common people.<sup>51</sup>

**POPULATION.** The whole number of people or inhabitants in a country or a portion of the country.<sup>52</sup> Also a part of the inhabitants in any way

quantity, being a multiple of so many bushels; a measure by the ordinary chaldron with a certain allowance of one chaldron over in twenty.—Parish v. Thompson, 3 East 525, 530, 102 Reprint 698.

(4) "Pool stock" see Corporations § 215.

39. U.S.—American Biscuit & Mfg., etc., Co. v. Klotz, C.C.La., 44 F. 721, 725.

"Pooling contracts" defined see Monopolies § 1.

40. La.—Town of Eros v. Powell, 68 So. 632, 634, 137 La. 342.

41. Ark.—Wright v. Aaron, 215 S.W. 2d 725, 214 Ark. 254.

42. Kan.—City of Liberal v. Blankenship, 21 P.2d 893, 894, 136 Kan. 475—State v. Osawkee Tp., 14 Kan. 418, 421, 19 Am.R. 99.

Ohio.—Risner v. State ex rel. Martin, 9 N.E.2d 151, 153, 55 Ohio App. 151.

43. Kan.—City of Liberal v. Blankenship, 21 P.2d 893, 894, 136 Kan. 475—State v. Osawkee Tp., 14 Kan. 418, 421, 19 Am.R. 99.

Ohio.—Risner v. State ex rel. Martin, 9 N.E.2d 151, 153, 55 Ohio App. 151.

49 C.J. p 1080 note 52.

44. Kan.—City of Liberal v. Blankenship, 21 P.2d 893, 894, 136 Kan. 475—State v. Osawkee Tp., 14 Kan. 418, 421, 422, 19 Am.R. 99.

45. Kan.—City of Liberal v. Blankenship, 21 P.2d 893, 894, 136 Kan. 475—State v. Osawkee Tp., 14 Kan. 418, 422, 19 Am.R. 99.

Ohio.—Risner v. State ex rel. Mar-

tin, 9 N.E.2d 151, 153, 55 Ohio App. 151.

46. Kan.—State v. Osawkee Tp., 14 Kan. 418, 421, 19 Am.R. 99.

Wis.—Hoffen's Estate, 36 N.W. 407, 409, 70 Wis. 522.

47. Kan.—State v. Osawkee Tp., 14 Kan. 418, 423, 19 Am.R. 99.

Wis.—Hoffen's Estate, 36 N.W. 407, 409, 70 Wis. 522.

#### 48. Phrases

(1) "Poor law" see 52 C.J.S. p 1029 note 9.

(2) "Poor person" defined generally see 70 C.J.S. p 689 note 86, and defined as used in statutes providing for paupers see Paupers § 1; as synonymous with "destitute" see 26 C.J.S. p 1245 note 1.

(3) "Poor relations" as used in a will see the C.J.S. title Wills § 670, also 49 C.J. p 1082 notes 83, 84.

(4) Other phrases as to which more recent adjudications have not been found see 49 C.J. p 1081 note 70 —p 1082 note 82.

49. Ill.—Sargent Co. v. Shukair, 138 Ill.App. 380, 384.

#### Phrases

(1) "Pop holes" see 40 C.J.S. p 409 note 95.

(2) "Pop shots;" in blasting or quarrying, explosions of light charges of dynamite, which have been inserted in holes drilled in large fragments of rock, for the purpose of breaking up the rock.

Kan.—Harper v. Iola Portland Cement Co., 93 P. 179, 76 Kan. 612. Minn.—Brede v. Minnesota Crushed

Stone Co., 178 N.W. 820, 821, 146 Minn. 406.

50. U.S.—U. S. v. M. Kraus & Bros., C.C.A.N.Y., 149 F.2d 773, 776.

51. Century D.

#### Phrases

(1) "Popular election" see Elections § 1 j (5).

(2) "Popular government" see 38 C.J.S. p 968 note 70.

(3) "Popular or qui tam actions" see Penalties § 8 d.

(4) "Popular sovereignty;" in the abstract, the right of each man to do precisely as he pleases with himself, and with all those things which exclusively concern him. Applied to government, the principle that a general government shall do all those things which pertain to it, and that the local governments shall do precisely as they please in respect of those matters which exclusively concern them.—Perrysburg v. Ridgway, 140 N.E. 595, 598, 108 Ohio St. 245.

(5) "Popular use;" the occasional and precarious enjoyment of property by members of society in their individual capacities—without the power to enforce such enjoyment according to law.—Gilmer v. Lime Point, 18 Cal. 229, 238.

52. N.Y.—Matter of Silkman, 84 N. Y.S. 1025, 1031, 88 App.Div. 102.

#### Rural population

(1) The phrase is understood to signify a people scattered over the country and engaged in agricultural pursuits or some similar avocation requiring a considerable area of territory for its support.—State v. Eld-

distinguished from the rest, as the German population of New York.<sup>53</sup>

The classification of counties according to population is treated in Counties § 4, and the classification of cities in Municipal Corporations § 36. The population of a particular district for official purposes is treated in Census § 6.

**POPULIST.** A member of the people's party.<sup>54</sup>

**POPULUS.** As the first word of maxims as to which there have been no recent applications see 49 C.J. p 1083 notes 10, 11.

**POBCELAIN.** A highly finished translucent kind of pottery, usually glazed.<sup>55</sup> It has been distinguished from "earthenware" see 28 C.J.S. p 615 note 46.1.

**PORCH.** The word "porch" is used in a variety of senses, differing somewhat in different localities in this country.<sup>56</sup> It may be applied to a shelter in front of a door, and it may be used as a generic term to include a shelter with closed sides as well as one with pillars.<sup>57</sup> Thus, the forms that a porch may take are various;<sup>58</sup> it may be an open appendage attached to the inclosed part of the building;<sup>59</sup> it may be inclosed save for the doorway, and it may be open to the outside on three sides, with its outer corners supported by columns or piers, and it may

extend above by more than one story.<sup>60</sup> It may be large enough to serve as a covered walk.<sup>61</sup>

Practically all of the definitions indicate that a porch is a particular kind of entrance,<sup>62</sup> and, when the word is employed by architects in its technical sense, it denotes an entrance or open vestibule in connection with a doorway.<sup>63</sup> Whatever may have been the meaning of the word "porch" in ancient times, it is said that in modern architecture it is always a part of a building;<sup>64</sup> an integral part of a house;<sup>65</sup> but from the standpoint of building line restrictions a porch is something apart from the main body of the house, as discussed in Municipal Corporations § 1705.

Many good definitions of the word "porch" have been given,<sup>66</sup> and it has been defined as meaning an entranceway or vestibule;<sup>67</sup> an open passageway;<sup>68</sup> a portico;<sup>69</sup> a terrace;<sup>70</sup> a veranda;<sup>71</sup> a covered entrance to a building;<sup>72</sup> It has also been defined to be a covered place of entrance to a building and differentiated from its principal mass;<sup>73</sup> a covered way or entrance, whether inclosed or uninclosed;<sup>74</sup> an exterior appendage to a building, forming a covered approach or vestibule to a doorway.<sup>75</sup>

"Porch" is embraced in the definition of "portico,"<sup>76</sup> and has been held a broad enough term to embrace such structures as a marquee,<sup>77</sup> a sleeping porch,<sup>78</sup> and a sun porch;<sup>79</sup> but it does not embrace

son, 13 S.W. 263, 264, 76 Tex. 302, 7 L.R.A. 733.

(2) The phrase has been distinguished from "town population."—State v. Eldson, supra.

Other phrases as to which more recent adjudications have not been found see 49 C.J. p 1082 notes 6-8.

53. N.Y.—Matter of Silkman, 84 N.Y.S. 1025, 1038, 88 App.Div. 102.

54. Neb.—Porter v. Flick, 84 N.W. 262, 263, 60 Neb. 773, 778.

55. U.S.—Sargent Co. v. U. S., 4 Cust.App. 462, 463.  
49 C.J. p 1083 note 13.

56. Mo.—Conrad v. Boogher, 214 S.W. 211, 214, 201 Mo.App. 644.

57. Pa.—Barker v. Hillgrove, 2 Pa. Dist. & Co. 469, 472.

58. Del.—McDermott v. Wilson, 174 A. 282, 284, 20 Del.Ch. 212.

Ill.—Hieronimus v. Moran, 111 N.E. 1022, 1025, 272 Ill. 254.

59. Ill.—Brandenburg v. Lager, 112 N.E. 321, 324, 272 Ill. 622.

60. Del.—McDermott v. Wilson, 174 A. 282, 284, 20 Del.Ch. 212.

Ill.—Hieronimus v. Moran, 111 N.E. 1022, 1025, 272 Ill. 254.

61. Wash.—Miller v. American Unitarian Assoc., 171 P. 520, 521, 100 Wash. 555.

62. Tex.—Weatherby v. Travelers Indemnity Co., Civ.App., 171 S.W. 2d 540, 541.

63. Pa.—Reading City v. Yeager, 62 Pa.Super. 268, 270.

64. Wash.—Miller v. American Unitarian Assoc., 171 P. 520, 521, 100 Wash. 555.

Does not mean an isolated independent structure, but a part of a dwelling house or residence.—Sowers v. Holy Nativity Church, 131 A. 785, 787, 149 Md. 434.

65. Tex.—Stuckert v. Morris, Civ. App., 194 S.W.2d 606, 608.

66. Tex.—Corpus Juris cited in Weatherby v. Travelers Indemnity Co., Civ.App., 171 S.W.2d 540, 541.  
49 C.J. p 1083 notes 16-22.

67. Ill.—Brandenburg v. Lager, 112 N.E. 321, 324, 272 Ill. 622.

68. Ill.—Brandenburg v. Lager, supra.

69. Ill.—Hieronimus v. Moran, 111 N.E. 1022, 1025, 272 Ill. 254.  
49 C.J. p 1083 note 28.

70. Pa.—Reading City v. Yeager, 62 Pa.Super. 268, 272.

71. Ill.—Brandenburg v. Lager, 112 N.E. 321, 324, 272 Ill. 622.  
49 C.J. p 1083 note 30.

72. Tex.—Weatherby v. Travelers Indemnity Co., Civ.App., 171 S.W. 2d 540, 541.

73. Del.—McDermott v. Wilson, 174 A. 282, 284, 20 Del.Ch. 212.

Ill.—Hieronimus v. Moran, 111 N.E. 1022, 1025, 272 Ill. 254.

74. Del.—McDermott v. Wilson, 174 A. 282, 284, 20 Del.Ch. 212.

Ill.—Hieronimus v. Moran, 111 N.E. 1022, 1025, 272 Ill. 254.

75. Del.—McDermott v. Wilson, 174 A. 282, 284, 20 Del.Ch. 212.

Ill.—Hieronimus v. Moran, 111 N.E. 1022, 1025, 272 Ill. 254.

76. Mass.—Attorney General v. Ayer, 20 N.E. 451, 452, 148 Mass. 584.

77. Md.—Baltimore v. Nirdlinger, 102 A. 1014, 1019, 131 Md. 600.

78. Mo.—Conrad v. Boogher, 214 S.W. 211, 214, 201 Mo.App. 644.

#### Sleeping porch

An exterior construction designed to afford a place for open-air sleeping, with a certain amount of protection from the elements.—Conrad v. Boogher, supra.

79. N.J.—Dalstan v. Circle Amusement Co., 22 A.2d 245, 130 N.J.Eq. 354.

a porte-cochere<sup>80</sup> or a flight of steps from the street to the second story of a building.<sup>81</sup>

"Porch" and "portico" have been held to be synonymous,<sup>82</sup> and the terms have also been distinguished.<sup>83</sup>

"Porch" as used in deeds with respect to building restrictions is discussed in Deeds § 164.

**PORCION.** A Spanish word which, as applied to land, is not a technical term, and means no more than portion or parcel in English.<sup>84</sup>

**POREIN.** As a Greek word meaning to give or beget see Parent 67 C.J.S. p 624 note 8.

**PORK.** The flesh of swine, fresh, or salted, used for food.<sup>85</sup>

**POERNOGRAPHIC.** Of or pertaining to obscene literature; obscene; licentious.<sup>86</sup>

**PORT.** The word "port" is somewhat indefinite, and its meaning is not exact, but depends on the connection in which it is used.<sup>87</sup> The term is used in two senses, and in popular understanding it denotes a particular place, but in a larger acceptation a "port" comprises under one name a district of

many places classed together for the purposes of revenue.<sup>88</sup> The word "port" is variously defined as meaning an artificial or natural harbor or haven;<sup>89</sup> a harbor<sup>90</sup> or shelter<sup>91</sup> to vessels from a storm;<sup>92</sup> a sheltered inlet, cove, bay, or recess, into which vessels can enter and in which they can lie in safety from storm;<sup>93</sup> the waters within the gate, or door, or outlet toward the sea.<sup>94</sup> Also, a commercial point to which vessels resort;<sup>95</sup> a place intended for loading or unloading goods;<sup>96</sup> a place where ships are accustomed to load and unload goods, or to take on and let off passengers, and where persons and merchandise are allowed to pass into and out of the realm;<sup>97</sup> a place either on the sea coast or on a river, where ships stop for the purpose of loading and unloading, from whence they depart and where they finish their voyages;<sup>98</sup> the place where port authorities are exercising jurisdiction.<sup>99</sup>

A port, in common sea phrase, may be said to be any safe station for ships;<sup>1</sup> but in legal usage a port is a place for arriving and lading and unlading of ships in a manner prescribed by law, and near to which is a city or town for the accommodation of marines and the securing and vending of their merchandise;<sup>2</sup> a place where persons and merchandise are allowed to pass into and out of the realm and at which customs officers are stationed for the

80. Tex.—Weatherby v. Travelers Indemnity Co., Civ.App., 171 S.W. 2d 540, 541.

81. Mich.—People v. Carpenter, 1 Mich. 273, 282, 284.

82. Pa.—Commonwealth v. Clara, 18 Phila. 261, 264.

83. Mass.—Attorney General v. Ayer, 20 N.E. 451, 452, 148 Mass. 584.

84. Tex.—State v. Ortiz, 90 S.W. 1084, 1086, 99 Tex. 475.

85. U.S.—Vita Food Products, Inc., v. U. S., 24 C.C.P.A. Customs 248, 254.

Ind.—Whitson v. Culbertson, 7 Ind. 195, 196.

#### Phrases

(1) "Mess pork" see 57 C.J.S. p 1072 note 27.

(2) "Pork hogs" see 40 C.J.S. p 405 note 22.

(3) "Pork house" see 41 C.J.S. p 366 note 83.

86. N.Y.—People on Complaint of Savery v. Gotham Book Mart, 285 N.Y.S. 563, 567, 158 Misc. 240.

"Pornographic book" see 11 C.J.S. p 521 note 97.5.

87. U.S.—Campbell v. American Export Lines, D.C.N.Y., 32 F.Supp. 43, 45.

49 C.J. p 1084 note 41.

88. Or.—Straw v. Harris, 103 P. 777, 779, 54 Or. 424.

89. Or.—Straw v. Harris, supra.

#### A haven and something more

A port is a haven, and somewhat more, that is, for arriving and unloading ships, etc.—The Cuzco, D.C. Wash., 225 F. 169, 176—49 C.J. p 1084 note 50.

90. N.Y.—Wall v. East River Ins. Co., 10 N.Y.Super. 264, 287—De Longuemere v. New York F. Ins. Co., 10 Johns. 120, 125.

91. Ala.—Mobile Bay Pilotage Comrs v. The Cuba, 28 Ala. 185, 196.

92. N.Y.—Wall v. East River Ins. Co., 10 N.Y.Super. 264, 287—De Longuemere v. New York F. Ins. Co., 10 Johns. 120, 125.

93. Or.—Straw v. Harris, 103 P. 777, 779, 54 Or. 424.

94. U.S.—U. S. v. New Bedford Bridge, C.C.Mass., 27 F.Cas.No.15, 867, 1 Woodb. & M. 401, 493.

95. Ala.—Mobile Bay Pilotage Comrs. v. The Cuba, 28 Ala. 185, 196.

96. U.S.—The Baldhill, C.C.A.N.Y., 42 F.2d 123, 125.

49 C.J. p 1084 note 52.

It includes the natural shelter surrounding water, and also the sheltered water produced by artificial jetties, etc.—The Baldhill, supra.

97. U.S.—Campbell v. American Ex-

port Lines, D.C.N.Y., 32 F.Supp. 43, 45—Hamburg-American Steam Packet Co., v. U. S., N.Y., 250 F. 747, 762, 163 C.C.A. 79.

98. U.S.—Hamburg-American Steam Packet Co. v. U. S., supra.

La.—Packwood v. Walden, 7 Mart. N.S., 81, 83.

49 C.J. p 1084 note 51.

Place on high seas where ships are not accustomed to stop, or to take on or to discharge cargoes, where vessels cannot anchor, and which is not a place of safety for either ship or goods, cannot be regarded as a port.—Campbell v. American Export Lines, D.C.N.Y., 32 F. Supp. 43, 45—Hamburg-American Steam Packet Co. v. U. S., N.Y., 250 F. 747, 764, 163 C.C.A. 79.

99. U.S.—Yone Suzuki v. Central Argentine R. Co., C.C.A.N.Y., 27 F.2d 795, 802.

1. Md.—The Wharf Case, 3 Bland 361, 369.

2. Or.—Corpus Juris cited in State ex rel. Mitchell v. U. S. Fidelity & Guaranty Co., 24 P.2d 1037, 1042, 144 Or. 535.

49 C.J. p 1085 note 53.

The legal limits of a port are such as are fixed or recognized by the statutes of the state or of the United States.—Devato v. Eight Hundred and Twenty-Three Barrels of Plumbago, D.C.N.Y., 20 F. 510, 513.

purpose of inspecting or appraising imported goods.<sup>3</sup> In this sense a port may exist on the frontier, where the foreign communication is by land.<sup>4</sup>

In the commercial sense and by the most ancient definitions, a port is an inclosed place where vessels laide and unload goods for export or import.<sup>5</sup>

As used in policies of marine insurance, the term "port" may embrace any place where it is customary to load or unload vessels see Insurance § 312 d.

"Port" has been held to be synonymous with "district" see 27 C.J.S. p 366 note 90.2, and has been compared with, or distinguished from, "high seas" see 39 C.J.S. p 899 note 18.1, and "place" see 70 C.J.S. p 1094 note 59. "Port" and "harbor" have been held to be synonymous, and the terms have also been distinguished see 39 C.J.S. p 774 notes 54, 55.

Phrases employing the word "port" are set out in the note,<sup>6</sup> and for additional phrases as to which more recent adjudications have not been found see 49 C.J. p 1086 notes 78-98.

**PORTABLE.** Capable of being borne or carried; easily transported;<sup>7</sup> movable.<sup>8</sup>

"Portable" has been distinguished from "stationary."<sup>9</sup>

**PORTE-COCHERE.** A term, derived from "porte" (gate) and cochiere from "coche" (coach), borrowed from the French.<sup>10</sup> It is a large gateway allowing vehicles to drive into a courtyard.<sup>11</sup> Sometimes in the United States it is applied erroneously to a covered carriageway, or carriage porch.<sup>12</sup> In this sense it may or may not be inclosed by gates or doors, the inclosed porte-cochere being well-known in this country.<sup>13</sup> However, in the United States, it is not used exclusively to signify a carriage porch.<sup>14</sup>

**PORTER.** The term "porter" literally means a doorkeeper or one who is in charge of a door or a gate;<sup>15</sup> but in the development of the language it has come to have a broader meaning and may designate an attendant in a sleeping car or parlör car who makes up the berths and waits on the passengers,<sup>16</sup> or it may refer to one who carries burdens or luggage for hire, as at hotels or railway stations.<sup>17</sup>

3. U.S.—Hamburg-American Steam Packet Co. v. U. S., N.Y., 250 F. 747, 762, 163 C.C.A. 79.

4. U.S.—Hamburg-American Steam Packet Co. v. U. S., supra.

5. U.S.—Devato v. Eight Hundred and Twenty-Three Barrels of Plumbago, D.C.N.Y., 20 F. 510, 515. 49 C.J. p 1085 note 57.

#### Place of actual use

"Not any place within the geographical limits of the same name where ships might load and unload, but where they in fact do so, i. e., where they are accustomed to do so."—Campbell v. American Export Lines, D.C.N.Y., 32 F.Supp. 43, 45—Devato v. Eight Hundred and Twenty-Three Barrels of Plumbago, D.C. N.Y., 20 F. 510, 516.

#### 6. Phrases

(1) "Domestic port" distinguished from "foreign port" see Foreign 36 C.J.S. p 1247 note 67.

(2) "Foreign port" see 36 C.J.S. p 1247 notes 60-67.

(3) "Home port" see the C.J.S. title Shipping § 3, also 29 C.J. p 768 note 35—p 769 note 38.

(4) "Port charges" see the C.J.S. title Shipping § 41, 58 C.J. p 197 note 42—p 198 note 59.

(5) "Port of delivery" see the C.J. S. title Seamen § 102, also 49 C.J. p 1086 note 65.

(6) "Port of departure" see 26 C.J. S. p 718 note 70.

(7) "Port of destination" defined and distinguished from "port of dis-

charge" see 26 C.J.S. p 1245 note 88. For construction of the term in marine insurance policies see Insurance § 334 b (2) (b).

(8) "Port of discharge" see 26 C.J. S. p 1330 note 48, also the C.J.S. title Seamen § 30, 49 C.J. p 1086 note 70. For construction of the term in marine insurance policies see Insurance § 334 b (3) (a).

(9) "Port of documentation" see the C.J.S. title Shipping § 3, also 49 C.J. p 1086 note 71.

(10) "Port of entry" within revenue laws see Customs Duties § 98; power to establish ports of entry for airplanes crossing international border see Commerce § 136.

(11) "Port of registry or enrollment" see the C.J.S. title Shipping § 3, 58 C.J. p 32 note 32.

(12) "Port of unlivery" see the C.J.S. title Seamen § 102, also 49 C.J. p 1086 note 75.

(13) "Port regulations" see Commerce § 37.

(14) "Port risk" within terms of marine insurance policy see Insurance § 312 a.

(15) "Port warden" see the C.J.S. title Shipping § 3, also 49 C.J. p 1083 note 70.

(16) "Safe port" see the C.J.S. title Shipping § 52, also 49 C.J. p 1086 note 77.

7. Mass.—McDonough v. Almy, 105 N.E. 1012, 1015, 218 Mass. 409, Ann. Cas.1915D 855.

8. N.C.—Goff v. Pope, 83 N.C. 123, 124, 126.

49 C.J. p 1086 note 2.

#### Phrases

(1) "Portable crane" see 21 C.J.S. p 1035 note 92.1; distinguished from "fixed crane" see 36 C.J.S. p 886 note 86.

(2) "Portable electric lamp" see Electricity § 1 b.

(3) "Portable engine" see 30 C.J.S. p 251 note 13.

9. N.C.—Goff v. Pope, 83 N.C. 123, 125.

10. Mo.—Conrad v. Boogher, 214 S. W. 211, 215, 201 Mo.App. 644.

Tex.—Corpus Juris quoted in Weatherby v. Travelers Indemnity Co., Civ.App., 171 S.W.2d 540, 541.

11. Mass.—Hart v. Rueter, 111 N.E. 1045, 1047, 223 Mass. 207.

Tex.—Corpus Juris quoted in Weatherby v. Travelers Indemnity Co., Civ.App., 171 S.W.2d 540, 541.

12. Mass.—Hart v. Rueter, 111 N.E. 1045, 1047, 223 Mass. 207.

Mo.—Conrad v. Boogher, 214 S.W. 211, 215, 201 Mo.App. 644.

13. Mo.—Conrad v. Boogher, supra.

14. Mo.—Conrad v. Boogher, supra.

15. Ill.—Kaplan v. U. S. Fidelity & Guaranty Co., 255 Ill.App. 437, 443.

16. Ill.—Kaplan v. U. S. Fidelity & Guaranty Co., supra.

17. Ill.—Kaplan v. U. S. Fidelity & Guaranty Co., supra. 49 C.J. p 1087 note 18.



The word "porter" is also the name of a variety of beer as stated in *Intoxicating Liquors* § 13.

**PORTFOLIO.** A portable case for keeping, usually without folding, loose papers, prints, drawings, or the like; such a case used for documents of state; hence the office and functions of a minister of state or member of cabinet; as to receive the portfolio of war.<sup>18</sup>

It has been held synonymous with "position."<sup>19</sup>

**PORTICO.** A word usually applied to a shelter in front of a door, although formerly in its classic sense, and possibly still in close discrimination, suggesting length and a roof supported by pillars.<sup>20</sup> It is defined as meaning a veranda.<sup>21</sup> The term has been held to include such structures as a marquee see 55 C.J.S. p 802 note 50, and porch see ante p 227 note 76. "Portico" and "porch" have been held to be synonymous, and the terms have also been distinguished see ante p 228 notes 82, 83.

**PORTION.** A word variously defined as, or used as meaning, a division;<sup>22</sup> a part;<sup>23</sup> a part of anything, either separated from a whole or merely considered by itself without actual separation.<sup>24</sup> Also an allotted part;<sup>25</sup> a share;<sup>26</sup> a parcel;<sup>27</sup> a division in a distribution;<sup>28</sup> a share of an estate or the like, received by gift or inheritance.<sup>29</sup>

The term may be employed as referring to a legacy,<sup>30</sup> a widow's award<sup>31</sup> or distributive share,<sup>32</sup> or that part of a parent's estate, or of the estate of one standing in the place of a parent, which is given to a child.<sup>33</sup>

When applied to property acquired from one's ancestor, the word is the most comprehensive which can be used, broad enough to include, and intended to cover, all the property or estate thus received.<sup>34</sup>

"Portion" has been held equivalent to, or synonymous with, "block" see 11 C.J.S. p 364 note 59, "lot" see 54 C.J.S. p 841 note 47, "part" see 67 C.J.S. p 878 note 36, and "share."<sup>35</sup>

Phrases employing the term "portion" are set out in the note.<sup>36</sup>

**PORTION LÉGITIME.** Under the law of Spain, portion légitime is only the usufruct of one third of a testator's property as to which the widow is known in Spain as a "forced heir."<sup>37</sup>

**PORTLAND CEMENT.** See 14 C.J.S. p 61 note 97.

**PORTO RICO.** See Puerto Rico post.

**PORTRAIT.** A carved or molded figure; a statue; a sculpture; also, a visible representation or likeness, an image, a copy; a likeness of an individual produced by art.<sup>38</sup> The word "portrait" includes any representation of a person, whether by photograph, painting, or sculpture, and a manikin in form, features, and likeness of a human model is a portrait.<sup>39</sup>

**PORTUS EST LOCUS IN QUO EXPORTANTUR ET IMPORTANTUR MERES.** See 49 C.J. p 1088 note 68.

**POSE.** Affirm;<sup>40</sup> to state as a proposition.<sup>41</sup>

18. Webster New Int.D.

19. Mont.—Smith v. School District No. 18, Pondera County, 139 P.2d 518, 523, 115 Mont. 102.

20. Mass.—Attorney General v. Ayer, 20 N.E. 451, 452, 148 Mass. 584.

21. Ill.—Hieronymus v. Moran, 111 N.E. 1022, 1025, 272 Ill. 254.

22. Ill.—Dickison v. Dickison, 28 N.E. 792, 793, 138 Ill. 541, 32 Am.S.R. 163.

23. Ala.—Holly v. State, 54 Ala. 238, 240.  
49 C.J. p 1087 note 27.

24. Wash.—School Dist. No. 103, Clark County v. Wilson, 31 P.2d 533, 534, 177 Wash. 304.

25. Ky.—Lecompte v. Davis' Ex'r, 148 S.W.2d 292, 294, 285 Ky. 433.

Wash.—School Dist. No. 103, Clark County v. Wilson, 31 P.2d 533, 534, 177 Wash. 304.

26. Ky.—Lecompte v. Davis' Ex'r, 148 S.W.2d 292, 294, 285 Ky. 433.

Wash.—School Dist. No. 103, Clark County v. Wilson, 31 P.2d 533, 534, 177 Wash. 304.

49 C.J. p 1087 note 28.

27. Ky.—Lecompte v. Davis' Ex'r, 148 S.W.2d 292, 294, 285 Ky. 433.

28. Ky.—Lecompte v. Davis' Ex'r, supra.

29. Ky.—Lecompte v. Davis' Ex'r, supra.

30. Or.—Stubbs v. Abel, 233 P. 852, 859, 114 Or. 610.

31. Ill.—Weaver v. Weaver, 109 Ill. 225, 231—Pavlicek v. Roessler, 121 Ill.App. 219, 222, 223.

32. Ill.—Pavlicek v. Roessler, supra.

33. Ky.—Lecompte v. Davis' Ex'r, 148 S.W.2d 292, 294, 285 Ky. 433.  
49 C.J. p 1087 note 33.

34. Pa.—Appeal of Lewis, 108 Pa. 133, 137.

35. Pa.—Appeal of Lewis, supra—Rankin's Estate, 41 Pa.Super. 410, 415.

36. Phrases

(1) "A portion of" is defined as meaning a component part of a given substance which may or may not be separated from the whole.—In re Kilborn's Will, 2 N.Y.S.2d 896, 899, 166 Misc. 627. As not synonymous with "included in" see 42 C.J.S. p 527 note 45.

(2) "Marriage portion" see 55 C.J. S. p 802 notes 54, 55.

(3) Other phrases as to which more recent adjudications have not been found see 49 C.J. p 1088 notes 35–49.

37. N.Y.—In re Smith's Estate, 48 N.Y.S.2d 631, 634, 182 Misc. 711. See Legitima 52 C.J.S. p 1049 note 74.

38. N.Y.—Young v. Greneker Studios, 26 N.Y.S.2d 357, 358, 175 Misc. 1027.

39. N.Y.—Young v. Greneker Studios, supra.

40. Ill.—Campbell v. Morris, 224 Ill. App. 569, 573.

41. Ill.—Campbell v. Morris, supra.

**POSITION.** An indefinite term,<sup>42</sup> defined as meaning place, site, station;<sup>43</sup> situation;<sup>44</sup> the spot where a person or thing is placed or takes a place;<sup>45</sup> the state of being placed;<sup>46</sup> the place where anything is or is placed;<sup>47</sup> the manner in which anything is placed with reference to other things.<sup>48</sup>

The word is also defined as meaning posture;<sup>49</sup> rank;<sup>50</sup> and in this latter sense an approved definition of "position" is relative place, situation or standing; specifically official rank or status.<sup>51</sup> It is said that the term may include that of an officer or may be limited to that of an employee.<sup>52</sup>

"Position" has been held to be synonymous with "bed" see 10 C.J.S. p 224 note 71.1, "berth" see 10 C.J.S. p 346, "billet" see 10 C.J.S. p 387 note 38.1, "dignity" see 26 C.J.S. p 1307 note 6.1, "duty" see 28 C.J.S. p 596 note 91.1, "incumbency" see 42 C.J.S. p 547 note 17.1, "intendency" see 46 C.J.S. p 1102, "place" see 70 C.J.S. p 1094 note 57, "portfolio" see ante p 230 note 19, "post,"<sup>53</sup> "professorship,"<sup>54</sup> "rank,"<sup>55</sup> and "situation."<sup>56</sup>

It has been distinguished from "employment" see 30 C.J.S. p 234 note 77.

The distinction between a "position" and an "office," with respect to public office generally is discussed in Officers § 2 a. The distinction between "position" and "employment," "office," and "place" with respect to municipal employment or office holding is treated in Municipal Corporations § 701.

**POSITIVE.** Absolute;<sup>57</sup> arbitrarily laid down;<sup>58</sup> certain;<sup>59</sup> confident; decisive; indisputable;<sup>60</sup> determined by declaration, enactment, or convention, and not by nature;<sup>61</sup> direct; opposed to circumstantial;<sup>62</sup> express;<sup>63</sup> incontestable; sure; not doubtful; not admitting of doubt or denial; undeniable.<sup>64</sup>

As an electrical term, "positive" is defined in Electricity § 1 b.

"Positive" has been distinguished from "probable."<sup>65</sup>

"Phrases" employing the word are set out in the

42. N.Y.—People v. England, 45 N.Y.S. 12, 13, 16 App.Div. 97.

43. Ind.—Ittenbach v. Thomas, 96 N.E. 21, 27, 48 Ind.App. 420.

#### Phrases

(1) "Position of danger" see 25 C.J.S. p 999 note 62.

(2) "Social position" held synonymous with "rank" or "station."—Thill v. Pohlman, 41 N.W. 385, 386, 76 Iowa 638.

(3) Other phrases as to which more recent adjudications have not been found see 49 C.J. p 1089 notes 85-92.

44. Ind.—Ittenbach v. Thomas, 96 N.E. 21, 27, 48 Ind.App. 420.

N.C.—Jones v. Tuck, 48 N.C. 202, 205.

45. Ind.—Ittenbach v. Thomas, 96 N.E. 21, 27, 48 Ind.App. 420.

46. N.C.—Jones v. Tuck, 48 N.C. 202, 205.

47. Conn.—Redgate v. Doyle, 195 A. 196, 198, 123 Conn. 291.

48. Conn.—Redgate v. Doyle, supra.

49. N.C.—Jones v. Tuck, 48 N.C. 202, 205.

50. N.Y.—Matter of Brown, 141 N.Y.S. 193, 195, 80 Misc. 4.

51. Mont.—Smith v. School District No. 18, Pondera County, 139 P.2d 518, 521, 115 Mont. 102.

52. N.Y.—People v. England, 45 N.Y.S.2d 12, 13, 16 App.Div. 97.

53. Mont.—Smith v. School District No. 18, Pondera County, 139 P.2d 518, 522, 115 Mont. 102.

54. Mont.—Smith v. School District No. 18, Pondera County, supra.

55. N.Y.—In re Brown, 141 N.Y.S. 193, 195, 80 Misc. 4.

56. Mont.—Smith v. School District No. 18, Pondera County, 139 P.2d 518, 522, 115 Mont. 102.

57. Idaho.—Molyneux v. Twin Falls Canal Co., 35 P.2d 651, 656, 54 Idaho 619, 94 A.L.R. 1264.

58. Idaho.—Corpus Juris quoted in Molyneux v. Twin Falls Canal Co., 35 P.2d 651, 656, 54 Idaho 619, 94 A.L.R. 1264.

N.Y.—Packard Co. v. New York, 137 N.Y.S. 9, 13, 151 App.Div. 941.

59. Idaho.—Corpus Juris quoted in Molyneux v. Twin Falls Canal Co., 35 P.2d 651, 656, 54 Idaho 619, 94 A.L.R. 1264.

49 C.J. p 1089 note 96.

60. Idaho.—Corpus Juris quoted in Molyneux v. Twin Falls Canal Co., 35 P.2d 651, 656, 54 Idaho 619, 94 A.L.R. 1264.

Va.—Dejarnette v. Commonwealth, 75 Va. 867, 872.

61. Idaho.—Corpus Juris quoted in Molyneux v. Twin Falls Canal Co., 35 P.2d 651, 656, 54 Idaho 619, 94 A.L.R. 1264.

N.Y.—Packard Co. v. New York, 137 N.Y.S. 9, 13, 151 App.Div. 941.

62. Idaho.—Corpus Juris quoted in Molyneux v. Twin Falls Canal Co., 35 P.2d 651, 656, 54 Idaho 619, 94 A.L.R. 1264.

Pa.—Schrack v. McKnight, 84 Pa. 26, 30.

63. Idaho.—Corpus Juris quoted in

Molyneux v. Twin Falls Canal Co., 35 P.2d 651, 656, 54 Idaho 619, 94 A.L.R. 1264.

49 C.J. p 1089 note 2.

64. U.S.—In re Hollywood Cabaret, C.C.A.N.Y., 5 F.2d 651, 657.

Idaho.—Corpus Juris quoted in Molyneux v. Twin Falls Canal Co., 35 P.2d 651, 656, 54 Idaho 619, 94 A.L.R. 1264.

#### Similarly defined

(1) Not admitting of doubt, condition, or qualification.

Idaho.—Corpus Juris quoted in Molyneux v. Twin Falls Canal Co., 35 P.2d 651, 656, 54 Idaho 619, 94 A.L.R. 1264.

Va.—Dejarnette v. Commonwealth, 75 Va. 867, 872.

(2) That which is clearly expressed.

Idaho.—Corpus Juris quoted in Molyneux v. Twin Falls Canal Co., 35 P.2d 651, 656, 54 Idaho 619, 94 A.L.R. 1264.

Va.—Dejarnette v. Commonwealth, supra.

(3) Definitely or formally laid down or imposed; prescribed by express enactment; hence, explicitly or unqualifiedly expressed; admitting of no doubt, condition, qualification, or discretion; compelling assent or obedience; peremptory; indisputable; explicit; definite; decisive; also, colloquially, downright; absolute; as, a positive declaration, promise, instruction, proof, lie.—Molyneux v. Twin Falls Canal Co., 35 P.2d 651, 656, 54 Idaho 619, 94 A.L.R. 1264.

65. U.S.—In re Hollywood Cabaret, C.C.A.N.Y., 5 F.2d 651, 658.

note,<sup>66</sup> and for additional phrases as to which more recent adjudications have not been found see 49 C.J. p 1090 notes 17, 25-27.

**POSITIVELY.** Certainly; without doubt.<sup>67</sup>

"Positively" has been compared with "actually" see 1 C.J.S. p 1445 note 42.

**POSITO; POSITUS.** As the first words of maxims as to which there have been no recent applications see 49 C.J. p 1090 notes 40, 41.

**POSSE.** A force with legal authority; a detachment; an armed band.<sup>68</sup> The word "posse" also means possibility,<sup>69</sup> being chiefly used in this sense in the phrase "in posse" which is discussed in 42 C.J. S. p 491 note 31.

**POSSESS.** According to its etymology, the word "possess" means to sit upon.<sup>70</sup> It is variously defined as meaning to have and to hold;<sup>71</sup> to have actual control, care, and management of;<sup>72</sup> and not a passing control, fleeting and shadowy in nature;<sup>73</sup> to enjoy in person;<sup>74</sup> to occupy in person;<sup>75</sup> to have a just right to;<sup>76</sup> to be master of.<sup>77</sup>

The term "possess," used in connection with property, is defined in Property § 14; and in connection with statutes relating to unlawful possession of intoxicating liquors is defined in Intoxicating Liquors § 222 b.

"Possess" has been held equivalent to, or synonymous with, "control," see 18 C.J.S. p 33 note 68.1, "hold," see 40 C.J.S. p 407 note 62, "occupy," see 67 C.J.S. p 83 note 36, and "own," see 67 C.J.S. p 548 note 75. It is substantially synonymous with "kept" see 51 C.J.S. p 427 note 61.

**Possessing.** The present participle of the verb "possess."<sup>78</sup>

**Possessed.** A variable term, having different meanings depending on the circumstances in which it is used.<sup>79</sup> It may imply no more than a corporeal having,<sup>80</sup> and it is defined as meaning held by lawful title.<sup>81</sup> There is nothing in the word "possessed" which imports legal title as distinct from beneficial ownership;<sup>82</sup> and it sometimes implies no more than that one has a property in a thing; that he has it as owner; that it is his.<sup>83</sup> In this sense it may be used even though an intruder may have excluded the owner for the time being.<sup>84</sup> It is only in its technical or strictly legal sense that it can be limited to mean only actual physical possession, or the right of immediate actual possession.<sup>85</sup>

**POSSESSIO.** In the civil law that condition of fact under which one can exercise his power over a corporeal thing at his pleasure, to the exclusion of all others.<sup>86</sup>

**Maxims.** "Possessio" as the first word of maxims

#### 68. Phrases

(1) "Positive and negative evidence" see Evidence § 2.

(2) "Positive duty" see 28 C.J.S. p 598 notes 20, 21.

(3) "Positive fraud" see Fraud § 2.

(4) "Positive head" see 39 C.J.S. p 806 note 56.

(5) "Positive knowledge" distinguished from "belief" see 10 C.J.S. p 238 note 49.

(6) "Positive law" see 52 C.J.S. p 1028 note 98-p 1029 note 4.

(7) "Positive proof" see Evidence § 4.

(8) "Positive servitude" see Easements § 3.

(9) "Positive wrong" is a wrongful act, willfully committed.—Padgett v. Missouri Motor Distributing Corporation, Mo., 177 S.W.2d 490, 492.

(10) "Sale positive" see the C.J.S. title Sales § 1, also 49 C.J. p 1090 note 34.

67. S.C.—Kottman v. Ayer, 32 S.C.L. 552, 572.

68. Webster New Int.D.

Posse comitatus see the C.J.S. title Sheriffs and Constables § 34, 57 C.J. p 733 note 78-p 774 note 89.

69. La.—Guidry v. Cairn, 160 So. 622, 624, 625, 181 La. 895.

70. Me.—Fuller v. Fuller, 24 A. 946, 947, 84 Me. 475.

71. Me.—Fuller v. Fuller, supra.

72. U.S.—U. S. v. Wainer, C.A.III., 170 F.2d 603, 606.

Mo.—State v. Cooper, App., 32 S.W. 2d 1098, 1099.

49 C.J. p 1090 note 51.

Phrases employing the word "possess" and as to which more recent adjudications have not been found see 49 C.J. p 1091 notes 68, 70, 73, 74, 76, 82.

73. U.S.—U. S. v. Wainer, C.A.III., 170 F.2d 603, 606.

Mo.—State v. Cooper, App., 32 S.W. 2d 1098, 1099.

74. N.Y.—In re Von Kleist's Will, 270 N.Y.S. 435, 240 App.Div. 436.

75. Me.—Fuller v. Fuller, 24 A. 946, 947, 84 Me. 475.

49 C.J. p 1090 note 56.

76. Kan.—Tripp v. U. S. Fire Ins. Co. of New York, 44 P.2d 236, 238, 141 Kan. 897.

Ky.—Nevin v. Louisville Trust Co., 79 S.W.2d 688, 689, 258 Ky. 187.

49 C.J. p 1090 note 52.

77. Kan.—Tripp v. U. S. Fire Ins. Co. of New York, 44 P.2d 236, 238, 141 Kan. 897.

Ky.—Nevin v. Louisville Trust Co., 79 S.W.2d 688, 689, 258 Ky. 187.

49 C.J. p 1090 note 46.

78. Webster New Int.D.

Phrases employing the word "possessing," and as to which more recent adjudications have not been found see 49 C.J. p 1091 notes 79, 80.

79. Cal.—In re Dillingham, 238 P. 367, 369, 196 Cal. 525.

Mich.—Thompson v. Moran, 7 N.W. 180, 181, 44 Mich. 602.

80. Cal.—In re Dillingham, 238 P. 367, 369, 196 Cal. 525.

49 C.J. p 1091 note 63.

81. N.C.—Wooten v. White, 34 S.E. 508, 509, 125 N.C. 403.

Phrases employing the word "possessed" and as to which more recent adjudications have not been found see 49 C.J. p 1091 notes 66-85.

82. Pa.—Thomson v. Fidelity Trust Co., 110 A. 770, 773, 268 Pa. 203.

83. Mich.—Thompson v. Moran, 7 N.W. 180, 181, 44 Mich. 602.

84. Mich.—Thompson v. Moran, supra.

85. Ky.—Bingham v. Commonwealth, 244 S.W. 781, 783, 196 Ky. 318.

86. Black L.D.  
49 C.J. p 1092 note 87.

as to which there have been no recent applications see 49 C.J. p 1092 notes 88-90, p 1108 notes 56, 57, 59.

**POSSESSION.** It has been said that in common speech and in legal terminology no term is more ambiguous than the word "possession,"<sup>87</sup> whether considered in its relation to real property or personal property, and this is especially true when it occurs in statutory provisions.<sup>88</sup> The term has a variety of meanings,<sup>89</sup> and disassociated from the context of a writing, and unexplained by surrounding circumstances, it is susceptible of different meanings,<sup>90</sup> and may mean several things, or combinations of them.<sup>91</sup> It is interchangeably used to describe actual possession and constructive possession,<sup>92</sup> which often so shade into one another that it is difficult to say where one ends and the other begins.<sup>93</sup>

Possession expresses the closest relation of fact which can exist between a corporeal thing and the person who possesses it, implying an actual physical contact, as by sitting or standing upon a thing;<sup>94</sup>

denoting custody coupled with a right or interest of proprietorship;<sup>95</sup> and "possession" is inclusive of "custody," although "custody" is not tantamount to "possession."<sup>96</sup> In its full significance, "possession" connotes domination or supremacy of authority.<sup>97</sup> It implies a right and a fact; the right to enjoy annexed to the right of property, and the fact of the real detention of a thing which would be in the hands of a master or of another for him.<sup>98</sup> It also implies a right to deal with property at pleasure and to exclude other persons from meddling with it.<sup>99</sup> Possession involves power of control and intent to control,<sup>1</sup> and all the definitions contained in recognized law dictionaries indicate that the element of custody and control is involved in the term "possession."<sup>2</sup>

While it has been said that the word "possession" is capable of no exact definition,<sup>3</sup> and that efforts of courts and jurists to fix its meaning with some definiteness and certainty have availed little to clarify its ambiguity,<sup>4</sup> it nevertheless has a variety of definitions and interpretations.<sup>5</sup> It is variously defined as meaning the act<sup>6</sup> or state<sup>7</sup> of possessing;

87. Conn.—Hancock v. Finch, 9 A.2d 811, 812, 126 Conn. 121.

Kan.—Tripp v. U. S. Fire Insurance Co. of New York, 44 P.2d 236, 238, 141 Kan. 897.

Neb.—Boyd v. Travelers Fire Ins. Co., 22 N.W.2d 700, 702, 147 Neb. 237.

R.I.—Bennett Chevrolet Co. v. Bankers & Shippers Ins. Co. of New York, 190 A. 863, 864, 58 R.I. 16, 109 A.L.R. 1077.

Tex.—Gibbs v. Corbett, Civ.App., 292 S.W. 260, 261.  
49 C.J. p 1093 note 92.

88. Tex.—Gibbs v. Corbett, supra.  
49 C.J. p 1093 notes 93-95.

89. R.I.—Bennett Chevrolet Co. v. Bankers & Shippers Ins. Co. of New York, 190 A. 863, 864, 58 R.I. 16, 109 A.L.R. 1077.

90. Ky.—Pemberton v. Hardin, 80 S.W.2d 589, 590, 258 Ky. 538—Nevin v. Louisville Trust Co., 79 S.W.2d 688, 258 Ky. 187.

91. N.Y.—In re Merritt's Estate, 46 N.Y.S.2d 497, 504, 182 Misc. 1026.

92. U.S.—National Safe Deposit Co. v. Stead, Ill., 34 S.Ct. 209, 212, 232 U.S. 58, 58 L.Ed. 504.

Neb.—Boyd v. Travelers Fire Ins. Co., 22 N.W.2d 700, 702, 147 Neb. 237.

R.I.—Bennett Chevrolet Co. v. Bankers & Shippers Ins. Co. of New York, 190 A. 863, 864, 58 R.I. 16, 109 A.L.R. 1077.

93. U.S.—National Safe Deposit Co. v. Stead, Ill., 34 S.Ct. 209, 212, 232 U.S. 58, 67, 58 L.Ed. 504.

Neb.—Boyd v. Travelers Fire Ins. Co., 22 N.W.2d 700, 702, 147 Neb. 237.

94. N.C.—Cross v. Seaboard Air Line R. Co., 90 S.E. 14, 16, 172 N.C. 119.

95. Or.—Goodrich Silvertown Stores v. Collins, Or., 115 P.2d 332, 335, 167 Or. 40.

W.Va.—Gibson v. St. Paul Fire & Marine Ins. Co., 184 S.E. 562, 563, 117 W.Va. 156.

96. Or.—Goodrich Silvertown Stores v. Collins, 115 P.2d 332, 335, 167 Or. 40.

W.Va.—Gibson v. St. Paul Fire & Marine Ins. Co., 184 S.E. 562, 563, 117 W.Va. 156.

97. Conn.—Hancock v. Finch, 9 A.2d 811, 812, 126 Conn. 121.

W.Va.—Gibson v. St. Paul Fire & Marine Ins. Co., 184 S.E. 562, 563, 117 W.Va. 156.

98. Cal.—Sunol v. Hepburn, 1 Cal. 254, 263.

99. Ill.—Smith v. Thorne, 9 N.E.2d 651, 291 Ill.App. 610.

49 C.J. p 1094 note 13 [a] (2).

1. U.S.—U. S. v. Curzio, C.A.Pa., 170 F.2d 354, 357.

2. Mo.—State v. Lane, 297 S.W. 708, 709, 221 Mo.App. 148.

Tex.—National Fire Ins. Co. v. Davis, Civ.App., 179 S.W.2d 316, 318.

3. Neb.—Boyd v. Travelers Fire Ins. Co., 22 N.W.2d 700, 702, 147 Neb. 237.

4. R.I.—Bennett Chevrolet Co. v. Bankers & Shippers Ins. Co. of

New York, 190 A. 863, 864, 58 R.I. 16, 109 A.L.R. 1077.

5. Tex.—Gibbs v. Corbett, Civ.App., 292 S.W. 260, 261.

6. Kan.—Tripp v. U. S. Fire Ins. Co. of New York, 44 P.2d 236, 238, 141 Kan. 897.

Ky.—Nevin v. Louisville Trust Co., 79 S.W.2d 688, 689, 258 Ky. 187.  
La.—State v. Crappel, 160 So. 309, 311, 181 La. 715.  
49 C.J. p 1093 note 98.

#### Phrases

(1) "Reduction to possession" signifies the conversion of a right existing as a claim into actual custody and enjoyment.—Corpus Juris cited in Newell v. McLaughlin, 9 A.2d 815, 819, 126 Conn. 138—53 C.J. p 666 notes 66, 67.

(2) "To reduce into possession" is to take into possession.—Klee v. Grant, 23 N.Y.S. 855, 856, 861, 4 Misc. 88.

(3) "To reduce to possession" is to change a right existing as an actionable claim into actual custody and enjoyment.—Klee v. Grant, supra—53 C.J. p 666 note 67.

(4) Other phrases as to which more recent adjudications have not been found see 49 C.J. p 1098 note 8—p 1099 note 53.

7. Kan.—Tripp v. U. S. Fire Ins. Co. of New York, 44 P.2d 236, 238, 141 Kan. 897.

Ky.—Nevin v. Louisville Trust Co., 79 S.W.2d 688, 689, 258 Ky. 187.  
La.—State v. Crappel, 160 So. 309, 311, 181 La. 715.

possessing, or holding as one's own;<sup>8</sup> ownership, whether rightful or wrongful;<sup>9</sup> owning or having thing in one's power.<sup>10</sup>

It is further defined as meaning custody and control;<sup>11</sup> actual care, control, and management;<sup>12</sup> actual control by physical occupation;<sup>13</sup> the present right and power to control a thing;<sup>14</sup> the detention and control of the manual or ideal custody of anything which may be the subject of property, for one's use or enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercises it in one's place and name;<sup>15</sup> the detention or enjoyment of a thing which a man holds or exercises by himself or by another who keeps or exercises it in his name;<sup>16</sup> that condition of fact under which one

can exercise his power over a corporeal thing at his pleasure, to the exclusion of all other persons.<sup>17</sup>

In law, the term is defined as meaning an act, fact, or condition of a person having such control of property that he may legally enjoy it to the exclusion of others having no better right than himself;<sup>18</sup> the physical control of a thing which belongs of right to unqualified ownership in such a manner as to exclude control by other persons.<sup>19</sup>

The word "possession" is also defined as meaning the thing possessed;<sup>20</sup> that which anyone occupies, owns, or controls;<sup>21</sup> and in this sense, as applied to the thing possessed, the word is frequently employed in the plural,<sup>22</sup> denoting property in the aggregate; wealth;<sup>23</sup> and it may include real

3. Miss.—*Harness v. State*, 95 So. 64, 130 Miss. 673.

9. Ky.—*Field Furniture Co. v. Community Loan Co.*, 79 S.W.2d 211, 215, 257 Ky. 825.

10. Ill.—*Smith v. Thorne*, 9 N.E.2d 651, 291 Ill.App. 610.

Ky.—*Fox v. Commonwealth*, 43 S.W.2d 52, 53, 240 Ky. 811.—*Commonwealth v. Lee*, 264 S.W. 1112, 1113, 204 Ky. 575.

49 C.J. p 1094 note 11.

11. Ohio.—*Kane v. State*, 177 N.E. 650, 651, 39 Ohio App. 456.

49 C.J. p 1093 note 5.

#### Similarly defined

(1) Control of and dominion over.—*State v. Lane*, 297 S.W. 708, 709, 221 Mo.App. 148—49 C.J. p 1093 note 3.

(2) The control or custody of a thing for occupation and enjoyment.—*Starits v. Avery*, 213 N.W. 769, 771, 204 Iowa 401.

(3) Having personal charge of and exercising the right of ownership and control.—*Terry v. State*, 275 S.W. 837, 838, 101 Tex.Cr. 267—*Newton v. State*, 250 S.W. 1036, 1037, 94 Tex.Cr. 288.

(4) Not only a mere physical holding, but also including control of the thing possessed with the right to dispose of it in any manner the possessor sees fit.—*State v. Jones*, 194 P. 585, 587, 114 Wash. 144.

12. Tex.—*Vanderhider v. State*, 265 S.W. 1041, 1042, 93 Tex.Cr. 648—49 C.J. p 1093 note 99.

Temporary care of property does not rise to the dignity of possession within the ordinarily legal meaning of that term.

Conn.—*Hancock v. Finch*, 9 A.2d 811, 812, 126 Conn. 121.

Or.—*Goodrich Silvertown Stores v. Collins*, 115 P.2d 332, 335, 167 Or. 40.

W.Va.—*Gibson v. St. Paul Fire & Marine Ins. Co.*, 184 S.E. 562, 563, 117 W.Va. 156.

13. Tex.—*Stewart v. Patterson*, Civ. App., 204 S.W. 768, 771. 49 C.J. p 1093 note 1.

14. Del.—*State v. Shockley*, 126 A. 181, 32 Del. 492. 49 C.J. p 1094 note 13.

15. Tex.—*Corpus Juris* quoted in *National Fire Ins. Co. v. Davis*, Civ.App., 179 S.W.2d 316, 318. 49 C.J. p 1093 note 6.

16. Cal.—*People v. McKinney*, 50 P. 2d 827, 828, 9 Cal.App.2d 523.

Tex.—*National Fire Ins. Co. v. Davis*, Civ.App., 179 S.W.2d 316, 318. 49 C.J. p 1093 note 7.

#### Similarly defined

The detention of, or dominion over, a thing.—*State v. Crappel*, 160 So. 309, 310, 181 La. 715.

17. Ill.—*Smith v. Thorne*, 9 N.E.2d 651, 291 Ill.App. 610. 49 C.J. p 1094 note 15.

18. Ky.—*Nevin v. Louisville Trust Co.*, 79 S.W.2d 688, 689, 258 Ky. 187.

La.—*State v. Crappel*, 160 So. 309, 310, 181 La. 715.

Miss.—*Falkner v. State*, 98 So. 691, 692, 134 Miss. 253.

Neb.—*Boyd v. Travelers Fire Ins. Co.*, 22 N.W.2d 700, 702, 147 Neb. 237.

Tex.—*National Fire Ins. Co. v. Davis*, Civ.App., 179 S.W.2d 316, 318.

"What constitutes such possession depends upon the subject-matter and the legal system involved; but, in general, all legal systems recognize as having possession him, (as a thief) who has actual physical control of a thing and holds it for himself, the Roman and Civil law distinguishing these elements as the corpus of possession (detention, or naturalis possessio) and the animus

possidendi, calling the two together simply possession, or civilis possessio. English law does not expressly recognize this distinction but distinguishes custody, where one does not exercise the physical control for his own purposes, from possession."—*Tripp v. U. S. Fire Ins. Co. of New York*, 44 F.2d 236, 238, 141 Kan. 897.

19. N.Y.—*Colten v. Jacques Marchais, Inc.*, 61 N.Y.S.2d 269, 271.

#### Similarly expressed

Possession is such control of property that the person having it may legally enjoy it to the exclusion of others, and it means that which one occupies or controls.—*Shell v. State*, 42 S.W.2d 19, 20, 184 Ark. 248.

20. U.S.—*Connell v. Vermilya-Brown Co.*, C.C.A.N.Y., 164 F.2d 924, 927.

Miss.—*Harness v. State*, 95 So. 64, 130 Miss. 673.

N.Y.—*Crowe v. Elmhurst Contracting Co.*, 74 N.Y.S.2d 445, 447, 191 Misc. 585.

49 C.J. p 1094 note 19.

21. U.S.—*Cornell v. Vermilya-Brown Co.*, C.C.A.N.Y., 164 F.2d 924, 927.

N.Y.—*Crowe v. Elmhurst Contracting Co.*, 74 N.Y.S.2d 445, 447, 191 Misc. 585.

49 C.J. p 1094 note 19.

22. Wis.—*First Wisconsin Trust Co. v. Helmholtz*, 225 N.W. 181, 183, 198 Wis. 573.

49 C.J. p 1096 note 45.

"Possessions" compared with or distinguished from "curtilage" see 25 C.J.S. p 67 note 29.

23. U.S.—*Cornell v. Vermilya-Brown Co.*, C.C.A.N.Y., 164 F.2d 924, 927.

N.Y.—*Crowe v. Elmhurst Contracting Co.*, 74 N.Y.S.2d 445, 447, 191 Misc. 585—*In re Corrado's Will*, 10 N.Y.S.2d 315, 317, 170 Misc. 385.

49 C.J. p 1094 note 19.

estate where such is the intention, although this is not the technical signification.<sup>24</sup>

It is also defined as meaning dominion; as, foreign possessions;<sup>25</sup> and, while in this sense the term is not a word of art descriptive of a recognized geographical or governmental entity, it is employed in a number of federal statutes to describe the area to which various congressional statutes apply.<sup>26</sup>

The use of the word "possession" with qualifying adjectives is common in the law,<sup>27</sup> and possession may be actual<sup>28</sup> or constructive.<sup>29</sup> Possession may also be adverse, see Adverse Possession § 1 et seq, *animo domini*,<sup>30</sup> by relation of law,<sup>31</sup> civil, see Property § 14, contested,<sup>32</sup> continuous, see Adverse Possession § 125 b, corporeal, see 20 C.J.S. p 235 notes 8, 9, derivative, see 26 C.J.S. p 981 note 48, disputed,<sup>33</sup> distinct or exclusive, see Adverse Possession §§ 47-52, effective, see 28 C.J.S. p 839 note 13, hostile, see Adverse Possession §§ 53-124, in fact,<sup>34</sup> in law,<sup>35</sup> innocent, see 43 C.J.S. p 1204 note 10, lawful, see Adverse Possession § 21, legal, see 52 C.J.S. p 1044 note 15, mixed, see Adverse Possession § 193, naked, see 64 C.J.S. p 1083 note 6, natural,<sup>36</sup> open, notorious, and visible, see Adverse Possession §§ 41-46, peaceable, see Adverse Possession § 140 b, scrambling,<sup>37</sup> substantial,<sup>38</sup> true,<sup>39</sup> under color of title,<sup>40</sup> and virtual.<sup>41</sup>

"Possession" has been held equivalent to, or synonymous with, "care" see 12 C.J.S. p 1144 note 6, and "seizin" see Property § 14.

It has been compared with, or distinguished from, "access" see 1 C.J.S. p 412 note 77, "care" see 12 C.J.S. p 1144 note 9, "conceal" see 15 C.J.S. p 793 note 73, "custody" and "custody of property" see 25 C.J.S. p 70 notes 95, 2, "dependency" see 26 C.J.S. p 719 note 8, "detention" see 26 C.J.S. p 1256 note 15, "occupancy" and "occupation" see the C.J.S. title Property § 14, "receiving and concealing" see 15 C.J.S. p 794 note 7, and "seizin" see Property § 14.

"Possession" in the sense of ownership, and as a degree of title, and as indicating the holding or retaining of property in one's power or control, is treated in Property § 14.

What constitutes "possession" within the meaning of statutes relating to the unlawful possession of intoxicants is treated in Intoxicating Liquors § 222 b. "Possession" as an element of the offense of receiving stolen goods is discussed in the C.J.S. title Receiving Stolen Goods § 6, also 53 C.J. p 505 note 38-p 506 note 52. Criminal responsibility for the unlawful possession of weapons is treated in the C.J.S. title Weapons §§ 3-15, also 68 C.J. p 16 note 77-p 63 note 92.

For other particular applications and specific uses of the term consult the indexes to such titles as Adverse Possession, Burglary, Deeds, Landlord and Tenant, and Mortgages; and see the Descriptive-Word Index.

24. Me.—Blaisdell v. Hight, 69 Me. 306, 308, 31 Am.R. 278.  
49 C.J. p 1096 note 47.

25. U.S.—Connell v. Vermilya-Brown Co., C.C.A.N.Y., 164 F.2d 924, 927.

N.Y.—Crowe v. Elmhurst Contracting Co., 74 N.Y.S.2d 445, 447, 191 Misc. 585.  
49 C.J. p 1094 note 19.

26. U.S.—Vermilya-Brown Co. v. Connell, N.Y., 69 S.Ct. 140, 145, 335 U.S. 377, 93 L.Ed. 93.

27. Kan.—Tripp v. U. S. Fire Insurance Co. of New York, 44 P.2d 236, 238, 141 Kan. 897.

28. Tex.—Gibbs v. Corbett, Civ.App., 292 S.W. 260, 261.  
49 C.J. p 1096 note 50.  
"Actual possession" generally see 1 C.J.S. p 1435 note 88-p 1437 note 23, and Adverse Possession §§ 19-40.

29. Tex.—Gibbs v. Corbett, Civ.App., 292 S.W. 260, 261.  
49 C.J. p 1096 note 51.  
See the index to the title Adverse Possession, and also Property § 14.

30. La.—Vicksburg, etc., R. Co. v. Le Rosen, 26 So. 854, 856, 52 La. Ann. 192.

31. N.J.—Bacon v. Sheppard, 11 N. J.Law 197, 198, 20 Am.D. 583.  
49 C.J. p 1097 note 71.

32. N.J.—Powell v. Mayo, 24 N.J.Eq. 178, 181.  
49 C.J. p 1097 note 73.

33. Ala.—Southern R. Co. v. Hall, 41 So. 135, 136, 145 Ala. 224.  
N.J.—Powell v. Mayo, 24 N.J.Eq. 178, 181.

34. N.J.—Bacon v. Sheppard, 11 N. J.Law 197, 198, 20 Am.D. 583.  
49 C.J. p 1097 note 81.  
"Possession in fact" as synonymous with "actual possession" see 1 C.J. S. p 1436 note 16.

35. N.Y.—Churchill v. Onderdonk, 59 N.Y. 134, 136.  
"Possession in law" distinguished from "actual possession" see 1 C. J.S. p 1437 note 21.

36. Black L.D.

37. Scrambling possession

(1) A possession without any savor of the legitimate enjoyment of property rights, and neither sought nor secured on any such account, but which is only scrambled for by one party or by both because of some supposed advantage it may command in a pending struggle.—Dyer v. Reitz, 14 Mo.App. 45, 46.

(2) A struggle for possession on the land itself, not such a contest as is waged in the courts.—Spiers v. Duane, 54 Cal. 176, 177—56 C.J. p 884 note 36.

38. S.C.—McColman v. Wilkes, 34 S. C.L. 465, 471, 51 Am.D. 637.  
49 C.J. p 1098 note 92.

39. Cal.—Sunol v. Hepburn, 1 Cal. 254, 263.  
49 C.J. p 1098 note 93.

40. Pa.—See Whitney v. Backus, 24 A. 51, 52, 149 Pa. 29.

41. S.C.—McColman v. Wilkes, 34 S.C.L. 465, 471, 51 Am.D. 637.  
49 C.J. p 1098 note 96.

**POSSESSOR.** One who possesses; one who has possession.<sup>42</sup> | **POSSESSORY.** Of or pertaining to possession or a possessor; of the nature of possession.<sup>43</sup>

<sup>42</sup> Black L.D.

<sup>43</sup> C.J. p 1108 note 61.

"Bona fide possessor" see 11 C.J.S.  
p 388 notes 58-62.

<sup>43</sup> Webster New Int.D.

**Phrases**

(1) "Possessory action" see Ac-  
tions § 1 a (20).

(2) "Possessory claim" see 14 C.J.

S. p 1186 notes 4, 5.

(3) "Possessory claimant" see 14  
C.J.S. p 1191 note 65.

## POSSESSORY WARRANT

This Title includes summary proceedings to determine the fact of previous peaceable possession of personal property and to restore it to such previous possessor; nature and scope of the remedy in general; grounds of such proceedings and defenses thereto; by and against whom and as to what property they may be maintained; procedure therein; judgments and enforcement thereof; review of proceedings; and costs in such proceedings.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

### Analysis

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See also descriptive word index in the back of this Volume

### § 1. Definition, Nature, and Purpose

The proceeding by possessory warrant is a summary remedy given by statute for the recovery of a personal chattel which has been taken by fraud, violence, enticement, or seduction from the possession of the party complaining, or which, having been in his recent possession, has disappeared and is believed to be in the possession of the party complained against.

The proceeding by possessory warrant is a summary remedy given by the Georgia code for the recovery of a personal chattel<sup>1</sup> which has been taken by fraud, violence, enticement, or seduction from the possession of the party complaining,<sup>2</sup> or which, having been in his recent possession, has disappeared and is believed to be in the possession of the party complained against.<sup>3</sup> The proceeding is summary, harsh, and in derogation of the common law,<sup>4</sup> and quasi-criminal in its nature.<sup>5</sup> The purpose of the proceeding is to protect and quiet the possession of personalty,<sup>6</sup> but only as against acts which are inhibited by statute, as discussed infra § 4.

A possessory warrant is not the proper remedy to recover possession of property where the title<sup>7</sup> or right to possession<sup>8</sup> is in dispute. Bail trover is the appropriate remedy to try these issues, as discussed in the C.J.S. title Replevin § 344 et seq, also 65 C.J. p 158 note 30 et seq, and in Georgia trover is a statutory remedy in which plaintiff may recover damages or the property itself, as considered in the C.J.S. title Replevin § 377, also 65 C.J. p 172 note 73 et seq.

### § 2. Construction of Statutes

Statute authorizing possessory warrants should be strictly construed.

Since the proceeding is summary, harsh, and in derogation of the common law, as discussed supra § 1, the statute authorizing it should be strictly construed;<sup>9</sup> and especially so, since the proceeding un-

1. Ga.—Peacock v. American Plant Co., 175 S.E. 262, 49 Ga.App. 267, 49 C.J. p 1111 note 2.

2. Ga.—Peacock v. American Plant Co., supra—Dennard v. Butler, 58 S.E. 297, 2 Ga.App. 198.

3. Ga.—Copeland v. Lucas, 64 S.E. 113, 6 Ga.App. 6, 8, 49 C.J. p 1111 note 4.

4. Ga.—Overstreet v. Dees, 184 S.E. 368, 52 Ga.App. 689, 49 C.J. p 1111 note 13.

5. Ga.—Overstreet v. Dees, supra.

6. Ga.—Thaxton v. Fain, 157 S.E. 886, 43 Ga.App. 125, 49 C.J. p 1111 note 5.

7. Ga.—Thaxton v. Fain, supra—

Elrod v. Edwards, 153 S.E. 785, 41 Ga.App. 490.

49 C.J. p 1111 note 7.

8. Ga.—Dew v. Smith, 61 S.E. 282, 130 Ga. 564, 49 C.J. p 1111 note 8.

9. Ga.—Ellis v. Gisl, 47 S.E.2d 825, 77 Ga.App. 56—Overstreet v. Dees, 184 S.E. 368, 52 Ga.App. 689, 49 C.J. p 1111 note 13.



der the statute, to a certain extent, partakes of a criminal nature.<sup>10</sup>

### § 3. Persons by and against Whom Remedy Available

- a. Persons in whose favor remedy available
- b. Persons against whom remedy available

#### a. Persons in Whose Favor Remedy Available

One who had actual possession of the property at the time or shortly before the defendant's taking or receiving possession in violation of the statute may recover possession by possessory warrant.

One who had actual possession of the property at the time or shortly before defendant's taking or receiving possession in violation of the statute may recover possession by possessory warrant.<sup>11</sup> Thus, a consignee of goods cannot recover them from a carrier by possessory warrant in the absence of a bill of lading, it appearing under these circumstances that he never had actual or constructive possession of the goods,<sup>12</sup> and the president of a corporation cannot maintain a possessory warrant in his own name to recover possession of the corporate property of which he has had no prior possession either as an officer or an individual.<sup>13</sup>

**Landlords.** In addition to the ordinary cases in which a possessory warrant will issue a landlord has the right to repossess crops by possessory warrant in all cases where the cropper unlawfully sells or otherwise disposes of any part of a crop, or excludes the landlord from possession thereof, while the title thereto remains in the landlord, as discussed in Landlord and Tenant §§ 816, 822. A landlord is entitled to recover by possessory warrant under this special section, without showing a compliance with the requirements of the general section,<sup>14</sup> but not in the absence of evidence of acts by

the cropper in violation of the landlord section.<sup>15</sup>

**Persons jointly interested.** Where two persons are jointly interested in personal property, either legally or equitably, and one of them delivers the possession of it to a third person, the other cannot recover possession of it by possessory warrant sued out by himself alone.<sup>16</sup> A possessory warrant cannot be brought as between those jointly interested with respect to a share of the joint property, until there has been a division into shares and an assignment to the owners separately.<sup>17</sup> If, however, by the terms of partnership, one partner must have and has had the exclusive possession of certain personalty, in order to carry out the objects of the partnership, the warrant will, at his instance, lie against his copartner who has deprived him of possession by fraud.<sup>18</sup>

**Principals.** The possession of property by an agent is in law the possession of his principal, and suffices to support a proceeding by possessory warrant whenever the former, after demand, has refused to deliver the property to the latter,<sup>19</sup> or whenever there has been a wrongful taking from the agent's possession by a third person.<sup>20</sup> A father who has placed personal property in the possession of his son to use or manage may recover it by possessory warrant from his son who has converted it to his own use,<sup>21</sup> or from a third person to whom the son has transferred it.<sup>22</sup> A father may recover by possessory warrant a chattel taken from his minor son who was in possession of it by his father's permission.<sup>23</sup>

**Tenants.** A warrant will lie at the instance of a tenant who has been deprived of his lawfully acquired, quiet, and peaceable possession of property by the landlord, although title is in the latter.<sup>24</sup> Also a tenant who has been wrongfully deprived of the rented premises by his landlord may recover by possessory warrant the "domestic fixtures" which

10. Ga.—Welman v. Harris, Ga.Dec. Pt. II 63.

11. Ga.—Cobb v. Megrath, 36 Ga. 625—Smith v. Wood, 194 S.E. 829, 57 Ga.App. 189—Bracewell v. Moore, 151 S.E. 664, 40 Ga.App. 832.

12. Ga.—Bass v. Glover, 63 Ga. 745, 747, 49 C.J. p 1111 note 16.

13. Ga.—McEvoy v. Hussey, 64 Ga. 314.

14. Ga.—Visage v. Bowers, 50 S.E. 952, 122 Ga. 760—Landrum v. Smith, 57 S.E. 913, 1 Ga.App. 215.

15. Ga.—Visage v. Bowers, 50 S.E. 952, 122 Ga. 760.

16. Ga.—Askew v. Nicholson, 10 S.E. 1089, 84 Ga. 478.

17. Ga.—Peebles v. Morris, 3 S.E. 89, 77 Ga. 536, 49 C.J. p 1112 note 22.

18. Ga.—Ivey v. Hammock, 68 Ga. 428.

19. Ga.—Industrial Lumber Co. v. Strickland, 30 S.E.2d 792, 71 Ga.App. 298—Headrick Bros. v. Wheat, 174 S.E. 545, 49 Ga.App. 149.

49 C.J. p 1112 note 24.

**Refusal of bailee**

Where a partnership, succeeding to all of the assets of corporation, demanded of bailees of corporation return of personalty loaned by cor-

poration to bailees, on refusal by bailees to deliver property, possessory warrant by partnership was appropriate remedy.—Industrial Lumber Co. v. Strickland, 30 S.E.2d 792, 71 Ga.App. 298.

20. Ga.—Hillyer v. Brogden, 67 Ga. 24—Bracewell v. Moore, 151 S.E. 664, 40 Ga.App. 832.

21. Ga.—Roseberry v. Roseberry, 31 Ga. 122.

22. Ga.—Roseberry v. Roseberry, supra.

23. Ga.—Wynn v. Harrison, 35 S.E. 643, 111 Ga. 816.

24. Ga.—Ivey v. Hammock, 68 Ga. 428.

he has attached to the premises for his own comfort and convenience.<sup>25</sup>

#### b. Persons against Whom Remedy Available

A possessory warrant will lie against anyone who has unlawfully taken or received possession of personal property in the modes detailed in the statute.

A possessory warrant will lie against anyone who has unlawfully taken or received possession of personal property in the modes detailed in the statute.<sup>26</sup> Thus the warrant will lie against a principal who has the power, custody, and control of the chattel, even though it is in the actual possession of the agent.<sup>27</sup>

**Public officers.** Public officers who, in the discharge of their official duties, take possession of property under a valid statute are not amenable to a proceeding by possessory warrant,<sup>28</sup> although a warrant may issue where the officer's act is under an invalid statute.<sup>29</sup>

**Purchasers at judicial sales.** The warrant will not lie against the purchaser at a judicial sale made under the forms prescribed by law, on the ground that the trespass was committed by a levying officer in taking possession of the property, since the purchaser did not participate in the tort.<sup>30</sup>

### § 4. Grounds .

A possessory warrant lies only where it is shown that the defendant acquired possession of the property in dispute in one of the modes prescribed by the statute.

A possessory warrant lies only where it is shown that defendant acquired possession of the property in dispute in one of the modes prescribed by the

statute.<sup>31</sup> Since the statute is strictly construed, as discussed supra § 2, unless it clearly appears that possession was acquired by defendant in one of the modes inhibited by the statute, there is nothing for the other proceedings to rest on.<sup>32</sup>

**Fraud.** If one obtains the possession alone by fraud, a possessory warrant will lie against him at the instance of the person injured,<sup>33</sup> but it will not lie where the title is obtained by fraud and the possession accompanies it by the consent of the owner.<sup>34</sup> Even where the defrauded party withdraws his consent and tenders back what he received in the exchange, the continued possession is not the statutory possession on which the issue of the warrant is authorized.<sup>35</sup>

**Force or duress.** The warrant lies whenever personal property has been taken from the possession of the complaining party by force or violence.<sup>36</sup> So, too, the warrant lies when a husband under duress of threats to prosecute him criminally delivers to a third person property belonging to his wife without her consent,<sup>37</sup> and the fact that the wife subsequently, under duress of threats to prosecute her husband, assented to the retention of possession, will not affect her right to invoke the remedy.<sup>38</sup>

**Enticement.** Where a personal chattel is taken by enticement from the possession of another, a possessory warrant lies at the instance of the injured party to recover possession thereof.<sup>39</sup>

**Consent.** Where possession of the property was obtained by none of the means inhibited by the statute, but by consent, express or implied, a posses-

25. Ga.—Raymond v. Strickland, 52 S.E. 619, 124 Ga. 504, 3 L.R.A., N.S., 69.

26. Ga.—Manning v. Mitcherson, 69 Ga. 447, 47 Am.R. 764.

49 C.J. p 1112 note 34.

27. Ga.—Manning v. Mitcherson, supra.

49 C.J. p 1112 note 35.

28. Ga.—Raiford v. Hyde, 36 Ga. 93.

49 C.J. p 1113 note 37.

29. Ga.—Reeves v. Gay, 18 S.E. 61, 32 Ga. 309—Cunningham v. Campbell, 33 Ga. 625.

30. Ga.—Finney v. Fechtner, 54 Ga. 501.

31. Ga.—Davis v. Logan, 57 S.E.2d 568, 206 Ga. 524—J. L. Stifel & Sons v. McCormick, 1 S.E.2d 220, 59 Ga.App. 449—Weatherby v. Gentry, 179 S.E. 170, 50 Ga.App. 618—Peacock v. American Plant Co., 175 S.E. 262, 49 Ga.App. 267.

49 C.J. p 1113 note 41.

#### Assignment by defendant

Right to maintain possessory warrant proceeding was not divested by defendant's assignment of interest in property to insurance company prior to suit.—Thaxton v. Fain, 157 S.E. 886, 43 Ga.App. 125.

32. Ga.—Dennard v. Butler, 53 S.E. 297, 2 Ga.App. 198.

49 C.J. p 1113 note 43.

#### Impounding animals

(1) Generally.—Weatherby v. Gentry, 179 S.E. 170, 50 Ga.App. 618—Burch v. Holliday, 172 S.E. 581, 48 Ga.App. 237—Smith v. Wheelchel, 74 S.E. 573, 11 Ga.App. 45—49 C.J. p 1113 note 43 [a].

(2) Owner could not by possessory warrant recover animal impounded when it strayed on impounder's land, regardless of whether animal had committed actual damage.—Weatherby v. Gentry, supra.

(3) Possessory warrant will lie where impounder fails to comply

with law and his possession changes to a wrongful and tortious act.—Goodwill v. Peoples, 53 S.E. 1115, 2 Ga.App. 673.

33. Ga.—Ward v. Capital Automobile Co., 186 S.E. 700, 53 Ga.App. 537.

49 C.J. p 1113 note 44.

34. Ga.—Ward v. Capital Automobile Co., supra.

49 C.J. p 1113 note 45.

35. Ga.—Amos v. Dougherty, 65 Ga. 612.

36. Ga.—Felton v. Underwood, 71 S.E. 498, 9 Ga.App. 369.

49 C.J. p 1113 note 47.

37. Ga.—Harris v. Webb, 28 S.E. 620, 101 Ga. 84.

38. Ga.—Harris v. Webb, supra.

39. Ga.—Mann v. Waters, 30 Ga. 207.

49 C.J. p 1113 note 50.

sory warrant will not lie.<sup>40</sup> However, where consent is limited to a particular time after which the property shall be returned on demand, a continued possession after demand is ground for issuing the warrant.<sup>41</sup> Possession lawfully acquired but subsequently changed to a wrongful tortious and fraudulent one is a proper case for a possessory warrant.<sup>42</sup>

*Possession received without legal authority.* The warrant lies whenever property in the recent peaceable and lawfully acquired possession of one person has disappeared without his knowledge and consent, and has been received into the possession of another without lawful authority.<sup>43</sup>

### § 5. Property Subject to Warrant

The remedy is invocable to quiet the possession of all kinds of personal property of which the holder had the immediate possession and use.

The remedy is invocable to quiet the possession of all kinds of personal property of which the holder had the immediate possession and use,<sup>44</sup> of concealed property as well as where it is held openly.<sup>45</sup> It does not issue for the recovery of immature crops still a part of the land,<sup>46</sup> or of shrubbery and flowers attached to the realty.<sup>47</sup>

### § 6. Procedure in General

Prior possession in the plaintiff is a condition precedent to the right to maintain the proceeding, and possession of the property in the defendant at the time the warrant is issued is necessary. Since the proceeding is summary and special, statutory requirements as to procedure must be followed.

Prior possession in plaintiff is a condition precedent to the right to maintain the proceeding.<sup>48</sup> In some cases, the prior possession of defendant may be in law the prior possession of plaintiff sufficient to support a proceeding by possessory warrant.<sup>49</sup> Where recovery is sought on the ground of taking

by fraud, violence, or enticement, it is not necessary to show plaintiff's prior possession within any limit of time preceding the issuing out of the warrant, provided defendant does not show four years' uninterrupted possession.<sup>50</sup> It is only where defendant does show four years' uninterrupted possession that plaintiff's right to recover is lost under the statute.<sup>51</sup>

*Defendant's possession.* Possession of the property in defendant at the time the warrant is issued is necessary,<sup>52</sup> although personal physical possession is not necessary if it is shown that the property is in his power, custody, or control, or in the possession of some agent or custodian holding it for defendant or in collusion with him.<sup>53</sup> Where defendant's possession, originally lawful, subsequently becomes unlawful, the property may be recovered by possessory warrant, even though the case is not within the words of the statute.<sup>54</sup>

*Jurisdiction.* Since the proceeding is summary and special, as discussed supra § 1, the jurisdiction must clearly appear on the face of the papers.<sup>55</sup> Where a possessory warrant is sued out before a magistrate having jurisdiction, the magistrate making the order alone has power to enforce the execution of it.<sup>56</sup>

*Venue.* Possessory warrant may be had in the county where the property in dispute is found,<sup>57</sup> and the statutory requirement in this respect is presumably satisfied by bringing the proceedings in the county where defendant is found.<sup>58</sup>

*Affidavit for warrant.* The affidavit is the foundation of the proceeding.<sup>59</sup> It is not necessary that it should be sworn to before the judge issuing the warrant; it may be sworn to before anyone having power to administer the oath.<sup>60</sup> The affidavit required by the statute must be made by the injured party,<sup>61</sup> his agent or attorney in fact or at law.<sup>62</sup>

40. Ga.—Peacock v. American Plant Co., 175 S.E. 262, 49 Ga.App. 267, 49 C.J. p 1113 note 51.

41. Ga.—Drawdy v. Lane, 89 S.E. 302, 18 Ga.App. 275—Grantham v. Lance, 79 S.E. 481, 13 Ga.App. 555.

42. Ga.—Sheriff v. Thompson, 42 S.E. 738, 116 Ga. 436.

43. Ga.—Hogan v. O'Dell, 146 S.E. 43, 39 Ga.App. 43.

44. Ga.—Landrum v. Smith, 57 S.E. 913, 1 Ga.App. 215.

45. Ga.—Caton v. Ganey, 63 Ga. 331.

46. Ga.—Gainous v. Martin, 72 S.E. 1100, 10 Ga.App. 210.

47. Ga.—Bingham v. Haines, 102 S.E. 923, 25 Ga.App. 136.

48. Ga.—Smith v. Wood, 194 S.E. 829, 57 Ga.App. 189—Bracewell v. Moore, 151 S.E. 664, 40 Ga.App. 832, 49 C.J. p 1114 note 61.

49. Ga.—Industrial Lumber Co. v. Strickland, 30 S.E.2d 792, 71 Ga.App. 298.

50. Ga.—New v. Le Hardy, 46 Ga. 616.

51. Ga.—Mills v. Glover, 22 Ga. 319.

52. Ga.—Butler v. Lazenby, 68 S.E. 521, 8 Ga.App. 88.

53. Ga.—Butler v. Lazenby, supra.

54. Ga.—Sheriff v. Thompson, 42 S.E. 738, 116 Ga. 436.

55. Ga.—Caton v. Ganey, 63 Ga. 331.

56. Ga.—Mills v. Glover, 22 Ga. 319.

57. Ga.—Meredith v. Knott, 84 Ga. 222.

58. Ga.—Mills v. Glover, 22 Ga. 319.

59. Ga.—McEvoy v. Hussey, 64 Ga. 314.

60. Ga.—Caton v. Ganey, 63 Ga. 331.

61. Ga.—Sherill v. Parrott, 26 Ga. 388.

62. Ga.—Jordan v. Owens, 67 Ga. 616—Overstreet v. Dees, 184 S.E. 368, 52 Ga.App. 689.

63. Ga.—Caton v. Ganey, 63 Ga. 331.

64. Ga.—Mills v. Glover, 22 Ga. 319.

65. Ga.—Meredith v. Knott, 84 Ga. 222.

66. Ga.—Mills v. Glover, 22 Ga. 319.

67. Ga.—McEvoy v. Hussey, 64 Ga. 314.

68. Ga.—Caton v. Ganey, 63 Ga. 331.

69. Ga.—Mills v. Glover, 22 Ga. 319.

70. Ga.—Meredith v. Knott, 84 Ga. 222.

71. Ga.—Mills v. Glover, 22 Ga. 319.

72. Ga.—McEvoy v. Hussey, 64 Ga. 314.

If made by one in a representative capacity, it must clearly appear that it is made in behalf of the party represented, if that is the fact,<sup>63</sup> or else it will be taken as the affidavit of affiant individually.<sup>64</sup>

In deciding what averments will suffice, regard must be had to the general scope and scheme of the statute, and to what, in the nature of things, is practicable or impracticable, in applying it to the actual cases which it is intended to reach,<sup>65</sup> as, for example, the allegation of defendant's residence in a certain county, to give jurisdiction where the statute places it in the county where the property is found,<sup>66</sup> or the description of the property for purposes of identification.<sup>67</sup> Where proceedings are brought under the special section relating to landlords and croppers, it is not necessary that the affidavit should contain allegations required in proceedings under the general sections.<sup>68</sup> An affidavit and a possessory warrant is amendable to the same extent and with the same consequences as in the case of ordinary declarations.<sup>69</sup>

**Execution of warrant.** Under the statutory provisions for execution and return of the warrant, authorizing the officer having the warrant to arrest defendant and seize the property, it has been held that a superior court has no jurisdiction by mandamus to enforce the order of the inferior court to imprison defendant on failure to produce the property, the inferior court which issued the warrant having sole power to execute its own orders.<sup>70</sup> An order of an inferior court in a habeas corpus proceeding discharging a defendant in a suit for possessory warrant from jail, to which he had been committed for failure to deliver the property to the sheriff, may be reviewed on certiorari, even though there is no statute providing for such procedure, the court having constitutional power to correct errors by writ of certiorari.<sup>71</sup> The officer executing the warrant is declared by statute to be the authorized

custodian of the property until final judgment is rendered if there is no certiorari, or until the certiorari is finally disposed of, if one has been properly sanctioned,<sup>72</sup> and it is the duty of the officer to retain custody of it until final hearing and judgment,<sup>73</sup> and he should not be interfered with while he is discharging this duty,<sup>74</sup> unless it is made to appear that he is allowing the property to be removed beyond the jurisdiction of the state, that he is insolvent and has no sufficient bond, or the securities on his bond are insolvent, or other sufficient reason exists for a court of equity to entertain a proceeding quia timet.<sup>75</sup> Where no such reason appears, an injunction will not lie to prevent the officer leaving the property in the possession of defendant.<sup>76</sup>

### § 7. Hearing

On the return of the warrant the magistrate is required to hear the evidence in a summary way. The sole issue to be determined is in whose lawfully acquired, quiet, and peaceable possession the property last was, and the burden is on the plaintiff to support the facts contained in his affidavit by competent and sufficient evidence.

The magistrate, on the return of the warrant, is required by the statute to hear the evidence in a summary way.<sup>77</sup> However, the parties should always be allowed a reasonable opportunity to bring forward their proof.<sup>78</sup> A continuance, however, in order to obtain testimony, is properly refused where such evidence is irrelevant.<sup>79</sup>

**Issues.** Since the proceeding is not the proper remedy to recover possession of property where the title or right to possession is involved, as discussed supra § 1, the sole issue to be determined on the trial of the proceeding is in whose lawfully acquired, quiet, and peaceable possession the property last was,<sup>80</sup> and whether possession thereof has been obtained from such party in any of the several modes prohibited by the statute.<sup>81</sup> The issue raised

63. Ga.—McEvoy v. Hussey, supra.  
49 C.J. p 1114 note 78.

64. Ga.—McClain v. Cherokee Iron Co., 58 Ga. 233.

65. Ga.—Claton v. Ganey, 63 Ga. 331.

49 C.J. p 1114 note 80.

66. Ga.—Claton v. Ganey, supra.

67. Ga.—Mitcham v. Cochran, 45 S. E. 989, 119 Ga. 184.

68. Ga.—Visage v. Bowers, 50 S.E. 952, 122 Ga. 760.

69. Ga.—Grant v. Kelley, 163 S.E. 242, 44 Ga.App. 830.

70. Ga.—Sherill v. Parrott, 26 Ga. 388.

71. Ga.—Livingston v. Livingston, 24 Ga. 379.

72. Ga.—Davis v. Logan, 57 S.E.2d 568, 206 Ga. 524—Sumner v. Bell, 44 S.E. 973, 118 Ga. 240—McCants v. Underwood, 29 S.E.2d 287, 70 Ga.App. 641.

73. Ga.—Sumner v. Bell, 44 S.E. 973, 118 Ga. 240—McCants v. Underwood, 29 S.E.2d 287, 70 Ga.App. 641.

74. Ga.—Sumner v. Bell, 44 S.E. 973, 118 Ga. 240.

75. Ga.—Sumner v. Bell, supra.

76. Ga.—Sumner v. Bell, supra.

77. Ga.—Welman v. Harris, Ga.Dec. Pt. II 63.

78. Ga.—Marchman v. Todd, 15 Ga. 25.

79. Ga.—Mann v. Waters, 30 Ga. 207.

49 C.J. p 1115 note 92.

80. Ga.—Cravey v. Druggists Co-op. Ice Cream Co., 19 S.E.2d 845, 66 Ga.App. 909—Wadsworth v. Olive, 186 S.E. 590, 53 Ga.App. 539—Elrod v. Edwards, 153 S.E. 785, 41 Ga. App. 490.

49 C.J. p 1115 note 95.

81. Ga.—Mann v. Waters, 30 Ga. 207—Wadsworth v. Olive, 186 S.E. 590, 53 Ga.App. 539.

**Acquisition of possession**  
Sole question is as to manner in which defendant acquired possession.

by a possessory warrant does not involve criminal intent,<sup>82</sup> and so a finding for defendant in a search-warrant proceeding establishing lack of criminal intent does not bar a later proceeding by possessory warrant against him.<sup>83</sup>

**Evidence.** On the hearing the burden rests on plaintiff to support the facts contained in his affidavit by competent and sufficient evidence.<sup>84</sup> He establishes a prima facie case, however, by showing that he was in prior, peaceable possession of the property, and that it later was found in defendant's possession.<sup>85</sup> The burden then shifts to defendant.<sup>86</sup> The burden is also on defendant to establish four years' prior possession, the affirmative defense allowed under the statute, where he sets it up.<sup>87</sup>

The evidence must be confined to the question of possession solely, and any other evidence not pertinent to that issue, exclusively, the magistrate has no right to receive,<sup>88</sup> although evidence tending to show title is admissible for the purpose of identifying the property,<sup>89</sup> and showing prior possession in plaintiff.<sup>90</sup> There have been decisions holding the evidence as to various matters sufficient<sup>91</sup> or insufficient<sup>92</sup> on the hearing on the return of the warrant. Thus, where the undisputed evidence shows that a lienholder of personal property surrendered possession to one who later returned the property to the rightful owner, a judgment in favor of the owner and against the lienholder in proceedings brought by the lienholder is justified by the evidence.<sup>93</sup> Where it appears that plaintiff had never voluntarily parted with possession of her goods and that they were obtained by defendant to secure an indebtedness of plaintiff's husband or father, without her consent and without authority of law, a finding for plaintiff is justified.<sup>94</sup>

**Questions of fact.** Whether plaintiff has or has not consented is a question of fact which must vary in each particular case, and may, or may not, be inferred, according to the circumstances which may have been proved.<sup>95</sup>

### § 8. Determination

If the magistrate finds from the evidence that possession of the property has been obtained from the plaintiff in any of the modes prohibited by statute, it is his duty to restore possession to the plaintiff, on his giving the bond required by statute, but, if the plaintiff fails to establish such facts, or if the defendant shows quiet and peaceful possession of the property in himself, the warrant should be dismissed.

Generally, no final order disposing of the property should be made by the primary court until after it is produced and placed within the power of the court or its officers.<sup>96</sup> If the return of the warrant shows that the property could not be found, the magistrate hears evidence on the ability of defendant to produce, and, if he decides against defendant on that issue, he may order defendant to be committed to jail until the property shall be produced.<sup>97</sup>

If the magistrate finds from the evidence that possession of the property has been obtained from plaintiff in any of the modes prohibited by the statute, it is his duty to restore possession to plaintiff,<sup>98</sup> on his giving the bond required by statute,<sup>99</sup> which is conditioned to have the property forthcoming to answer in any suit brought by defendant in relation to any lien or claim on it within four years thereafter;<sup>1</sup> or on plaintiff's failure to give such bond to turn over the property to defendant on his giving a like bond.<sup>2</sup> Where the property has been turned over to defendant on plaintiff's failure to give bond, the court cannot later, by parol order and without notice to defendant, retake

—Mann v. Waters, 30 Ga. 207—Burch v. Holliday, 172 S.E. 581, 48 Ga.App. 237—Mathewson v. Brigman Motors Co., 98 S.E. 98, 23 Ga.App. 304.

82. Ga.—Claton v. Ganey, 63 Ga. 331.

83. Ga.—Claton v. Ganey, supra.

84. Ga.—Welman v. Harris, Ga.Dec. Pt. II 63—Wadsworth v. Olive, 186 S.E. 590, 53 Ga.App. 539.

85. Ga.—Wadsworth v. Olive, supra. 49 C.J. p 1115 note 1.

86. Ga.—Marchman v. Todd, 15 Ga. 25.

87. Ga.—New v. Le Hardy, 46 Ga. 616.

88. Ga.—Welman v. Harris, Ga.Dec. Pt. II 63—Thaxton v. Fain, 157 S.E. 886, 43 Ga.App. 125—Jones v. Berry, 151 S.E. 538, 40 Ga.App. 813.

89. Ga.—Mitcham v. Cochran, 45 S.E. 889, 119 Ga. 181.

90. Ga.—Mitcham v. Cochran, supra. —Mann v. Waters, 30 Ga. 207.

91. Ga.—Grant v. Kelley, 163 S.E. 243, 44 Ga.App. 830—Bracewell v. Moore, 151 S.E. 664, 40 Ga.App. 832.

92. Ga.—Smith v. Wood, 194 S.E. 829, 57 Ga.App. 189—Smith v. Whitaker, 148 S.E. 746, 40 Ga.App. 73.

93. Ga.—Dennard v. Butler, 58 S.E. 297, 2 Ga.App. 198.

94. Ga.—Copeland v. Lucas, 64 S.E. 113, 6 Ga.App. 6.

95. Ga.—Marchman v. Todd, 15 Ga. 25—Butler v. Lazenby, 68 S.E. 521, 8 Ga.App. 88.

96. Ga.—Davis v. Logan, 57 S.E.2d 568, 206 Ga. 524—McCants v. Underwood, 29 S.E.2d 287, 70 Ga.App. 641.

49 C.J. p 1115 note 11.

97. Ga.—Nash v. Mangum, 81 S.E. 883, 141 Ga. 648. 49 C.J. p 1115 note 12.

98. Ga.—Sheriff v. Thompson, 42 S.E. 738, 116 Ga. 436. 49 C.J. p 1115 note 13.

99. Ga.—Hillyer v. Brogden, 67 Ga. 24. 49 C.J. p 1115 note 14.

Failure of judgment to require successful plaintiff in possessory warrant proceedings to give bond was held not reversible error, where proper bond was actually given.—Headrick Bros. v. Wheat, 174 S.E. 545, 49 Ga.App. 149.

1. Ga.—Hillyer v. Brogden, 67 Ga. 24.

2. Ga.—Roseberry v. Roseberry, 31 Ga. 122.

the property and give it to plaintiff on his giving bond, even though his failure to give bond in the first instance was excusable.<sup>3</sup> A decree in favor of plaintiff and against defendant, if it conforms to the statutory requirements in other respects, is not invalidated by its containing a warrant for the arrest of a third person who wrongfully took the property from plaintiff and placed it in the possession of defendant.<sup>4</sup>

If plaintiff fails on the hearing to support the facts contained in his affidavit by competent and sufficient evidence, it is the duty of the magistrate to dismiss the proceeding for want of jurisdiction, and leave plaintiff for redress to the ordinary proceedings at law.<sup>5</sup> If defendant satisfactorily shows quiet and peaceable possession of the property in himself,<sup>6</sup> or in himself and those under whom he claims,<sup>7</sup> for four years next immediately preceding the issuance of the warrant, it is the duty of the magistrate to dismiss the proceeding, without any bond to plaintiff for its forthcoming.<sup>8</sup>

*Effect of dismissal.* When a possessory warrant proceeding is dismissed without a trial on the merits, it is the officer's duty to return the property to the person from whom it was taken under the warrant,<sup>9</sup> but the dismissal will not be regarded as an adjudication of the right of possession in favor of defendant.<sup>10</sup>

*Mode of restoring property.* The final order, when proper to be made by the primary court, should be for delivery of the property to the officer and then by the officer to the party.<sup>11</sup>

## § 9. — Review by Certiorari

Under a permissive statute certiorari will lie to re-

view the decision of a magistrate in proceedings on a possessory warrant.

Under a permissive statute certiorari will lie to review the decision of a magistrate in proceedings on a possessory warrant,<sup>12</sup> even though rendered out of term,<sup>13</sup> but not the verdict of a jury to which an appeal from the magistrate's order had been taken without authority of law, such proceedings on appeal being a nullity, and there being no law to review by certiorari in such cases.<sup>14</sup> Under an early statute it was held that certiorari to review the decision of the magistrate did not lie, notwithstanding the constitutional provision.<sup>15</sup> Certiorari will not lie on the ground of evidence newly discovered since the trial,<sup>16</sup> or in cases where trover, and not possessory warrant, is the proper remedy.<sup>17</sup>

*Proceedings.* Certiorari from a decision in a proceeding by possessory warrant must be sued out within the time prescribed by statute,<sup>18</sup> and must be directed against the adverse party in the warrant,<sup>19</sup> as, for example, against the adverse party individually where the warrant is sued out by him individually,<sup>20</sup> and not against the firm of which he is a member.<sup>21</sup> The writ of certiorari must be served on the magistrate who tried the case within the time prescribed by statute unless service is waived,<sup>22</sup> and written notice of the sanction of petition for service, and of the time and place of hearing, is required by the statute to be given to the adverse party, unless such notice is waived in writing.<sup>23</sup>

Under statutory provisions the notice of intention to apply for a writ of certiorari when served on the opposite party operates as a supersedeas for a cer-

3. Ga.—Duckworth v. Duckworth, 43 Ga. 265.

4. Ga.—Savannah, etc., R. Co. v. Wilcox, 48 Ga. 432.  
49 C.J. p 1116 note 18.

5. Ga.—J. L. Stifel & Sons v. McCormick, 1 S.E.2d 220, 59 Ga.App. 449.  
49 C.J. p 1116 note 19.

6. Ga.—New v. Le Hardy, 46 Ga. 616—Mills v. Glover, 22 Ga. 319.

7. Ga.—Gaillard v. Hudson, 8 S.E. 534, 81 Ga. 738.

8. Ga.—Bush v. Rawlins, 5 S.E. 761, 80 Ga. 583.  
49 C.J. p 1116 note 22.

9. Ga.—Barton v. Thompson, 80 S. E. 30, 13 Ga.App. 786.

10. Ga.—Roseberry v. Roseberry, 31 Ga. 122.  
49 C.J. p 1116 note 25.

11. Ga.—McClain v. Cherokee Iron

Co., 58 Ga. 233—Roseberry v. Roseberry, 31 Ga. 122.

12. Ga.—Carter v. Commander, 35 Ga. 265—McCants v. Underwood, 29 S.E.2d 287, 70 Ga.App. 641.

13. Ga.—Carter v. Commander, 35 Ga. 265.

14. Ga.—Gassett v. Duke, 34 S.E. 168, 108 Ga. 816.

15. Ga.—Heard v. Heard, 18 Ga. 739.

16. Ga.—Marchman v. Todd, 15 Ga. 25.

17. Ga.—Brown v. Todd, 53 S.E. 678, 124 Ga. 939.

18. Ga.—Smith v. Whitaker, 148 S. E. 746, 40 Ga.App. 73.

*Decision of county judge*  
Ga.—Robin v. Nobles, 36 Ga. 271.

19. Ga.—McClain v. Cherokee Iron Co., 58 Ga. 233.

20. Ga.—McClain v. Cherokee Iron Co., supra.

21. Ga.—McClain v. Cherokee Iron Co., supra.

22. *Magistrate's answer to writ of certiorari waives statutory service of writ and petition on magistrate.*  
—Peacock v. American Plant Co., 175 S.E. 262, 49 Ga.App. 267.

23. Ga.—New v. Le Hardy, 46 Ga. 616—Peacock v. American Plant Co., 175 S.E. 262, 49 Ga.App. 267.

*Answer of magistrate to certiorari in possessory-warrant proceeding stating that defendant came to co-defendant by whom he was notified that possessory warrant had been sued out, and that property should not be turned over to him until after hearing thereof, was held sufficient to establish notice to defendant of pendency of proceeding in absence of exception or traverse to answer.*  
—Wadsworth v. Olive, 186 S.E. 590, 53 Ga.App. 539.

tain number of days,<sup>24</sup> and the writ of certiorari when granted operates as a supersedeas until the final hearing.<sup>25</sup> Thus it is not error for a superior court judge in sanctioning the petition for certiorari to stay the entire proceedings until the further order of the court.<sup>26</sup> However, if no notice of application is given to the opposite party, and a writ of certiorari is subsequently granted, notice of the granting of the writ must be given to the officer to hold him personally liable for delivery under the order of the magistrate.<sup>27</sup>

The superior court, in hearing a certiorari, has full jurisdiction over all issues of fact,<sup>28</sup> but is restricted to the errors alleged to have been committed by the primary court on the trial.<sup>29</sup>

**Determination.** Unless the judgment complained of is demanded under the evidence adduced on the hearing,<sup>30</sup> the superior court, may, in its discretion, remand the case and order a new trial or rehearing,<sup>31</sup> or make a final disposition of a proceeding by possessory warrant without sending it back for a new trial,<sup>32</sup> even though the evidence before the magistrate was conflicting on controlling issues;<sup>33</sup> fixing the amount of the bond to be given if the

magistrate failed to do so.<sup>34</sup> However, the court has no power to order the delivery of the property in dispute to plaintiff without the bond required by the statute;<sup>35</sup> nor can it make final order requiring one party to a proceeding to deliver the property directly to the other.<sup>36</sup>

All issues under the Possessory Warrant Act are mixed questions of law and fact, and whenever the finding of the primary court is against the principles of equity and justice, a new trial should be ordered.<sup>37</sup> However, the superior court, on certiorari, cannot order a rehearing on the ground of newly discovered evidence since the trial of the proceeding.<sup>38</sup>

**Enforcement of judgment of reversal.** When the property is, in pursuance of the judgment, turned over to plaintiff, on his giving the bond required by the statute, the judgment is performed, and if certiorari is afterward sued out and judgment reversed, defendant is left to the ordinary remedies, and the court cannot attach plaintiff for contempt in failing to obey its order to redeliver the property which he has sold before reversal and cannot produce.<sup>39</sup>

**POSSIBILITAS.** As the first word of a maxim as to which there have been no recent applications see 49 C.J. p 1117 note 1.

**POSSIBILITY.** In a legal sense the word "possibil-

ity" means a contingency,<sup>1</sup> an uncertain thing which may happen.<sup>2</sup> However, it is not always to be taken in its absolute or literal sense, but rather as having the practical meaning which the law ordinarily ascribes to such abstract terms.<sup>3</sup>

24. Ga.—King v. Haley, 90 S.E. 715, 146 Ga. 85—McCants v. Underwood, 29 S.E.2d 287, 70 Ga.App. 641—Smith v. Whitaker, 148 S.E. 746, 40 Ga.App. 73.

**Failure to serve notice of application**

Where certiorari is applied for within time prescribed by law, proceeding is not rendered moot and subject to dismissal merely because petition failed to give notice of intention to certiorari possessory-warrant case, as provided by statute, and did not obtain certiorari until opposite party had given bond for property under statute.—Smith v. Whitaker, supra.

25. Ga.—King v. Haley, 90 S.E. 715, 146 Ga. 85—McCants v. Underwood, 29 S.E.2d 287, 70 Ga.App. 641.

26. Ga.—McCants v. Underwood, supra.

27. Ga.—King v. Haley, 90 S.E. 715, 146 Ga. 85.

28. Ga.—McCants v. Underwood, 29 S.E.2d 287, 70 Ga.App. 641—Henderson v. Henderson, 71 S.E. 876, 9 Ga.App. 559.

**Issues not moot**

Fact that defendant, after judge of superior court had sanctioned petition for certiorari from order of justice committing defendant to jail for failure to produce property described in possessory warrant, voluntarily executed bond to officer executing warrant, which bond obligated defendant and surety to care for property described in warrant until certiorari was determined and property was called for by officer did not demand finding by superior court judge that issues raised by certiorari were moot.—McCants v. Underwood, 29 S.E.2d 287, 70 Ga.App. 641.

29. Ga.—Marchman v. Todd, 15 Ga. 25.

30. Ga.—Wadsworth v. Olive, 186 S.E. 590, 53 Ga.App. 539.

31. Ga.—McCants v. Underwood, 29 S.E.2d 287, 70 Ga.App. 641—Wadsworth v. Olive, 186 S.E. 590, 53 Ga.App. 539.

32. Ga.—McCants v. Underwood, 29

S.E.2d 287, 70 Ga.App. 641—Wadsworth v. Olive, 186 S.E. 590, 53 Ga.App. 539.

49 C.J. p 1116 note 43.

**Warrant dismissed**

Ga.—McCants v. Underwood, 29 S.E.2d 287, 70 Ga.App. 641.

33. Ga.—McCants v. Underwood, supra.

49 C.J. p 1117 note 44.

34. Ga.—West v. Williams, 11 S.E. 505, 84 Ga. 665.

35. Ga.—McClain v. Cherokee Iron Co., 58 Ga. 233.

36. Ga.—McClain v. Cherokee Iron Co., supra.

37. Ga.—Marchman v. Todd, 15 Ga. 25.

38. Ga.—Marchman v. Todd, supra.

39. Ga.—Johnson v. Yoemans, 41 Ga. 368.

1. Cal.—Vandegrift v. Riley, 30 P. 2d 516, 522, 220 Cal. 340.

49 C.J. p 1117 note 5.

2. N.C.—Bodenhamer v. Welch, 89 N.C. 78, 81.

3. Pa.—Frame v. Prudential Ins.

The word "possibility" is sometimes applied to an estate or an interest in property, and in this sense is treated in Estates § 5 and in the C.J.S. title Wills § 85, also 68 C.J. p 498 note 89—p 499 note 98. The assignability of a possibility is treated in Assignments § 12.

*Phrases* employing the word are set out in the note.<sup>4</sup>

**POSSIBLE.** The word "possible" is derived from the Latin words "*potis*," meaning able or capable, and "*esse*," meaning to be.<sup>5</sup> It is defined as meaning capable of being done;<sup>6</sup> capable of being, becoming, or coming to pass;<sup>7</sup> capable of existing or of being conceived or thought of;<sup>8</sup> liable to happen, or to come to pass;<sup>9</sup> that which can or may be done;<sup>10</sup> free to happen or not;<sup>11</sup> not contrary to the nature of things;<sup>12</sup> neither necessitated nor precluded.<sup>13</sup> "Possible" means that something may or may not occur; that may chance; dependent on contingency;<sup>14</sup> and the word is frequently employed to describe a contingency which may but is not likely to occur.<sup>15</sup> The word "possible" is also used

at times to intensify the meaning of such words as "might" or "could."<sup>16</sup>

"Possible" has been held to be equivalent to, or synonymous with, "may be" see 57 C.J.S. p 460 note 60, "practicable,"<sup>17</sup> "reasonable,"<sup>18</sup> and "reasonably practicable."<sup>19</sup>

It has been compared with, or distinguished from, "actual" see 1 C.J.S. p 1433 note 51, "impossible" see 42 C.J.S. p 409 note 75.1, "natural" see 65 C.J.S. p 40 note 38, "necessary" see 65 C.J.S. p 270 note 66.1, "practicable,"<sup>20</sup> "probable,"<sup>21</sup> and "susceptible."<sup>22</sup>

*Phrases* employing the word are set out in the note.<sup>23</sup>

**POSSIBLY.** By any power, mental or physical, that is possible; by extreme or improbable chance; perhaps.<sup>24</sup>

#### POST (English).

As a noun. The word "post" is derived from "*positi*," the horses which were used in carrying

Co. of America, 56 A.2d 76, 77, 358 Pa. 103.

#### 4. Phrases

(1) "Possibility of reverter" see Estates § 105 b.

(2) "Reasonable possibility" is no more than a possibility.—Bonner v. State, 18 So. 226, 229, 107 Ala. 97.

(3) Other phrases as to which more recent adjudications have not been found see 49 C.J. p 1118 notes 20, 21.

5. La.—Guidry v. Caire, 160 So. 622, 625, 181 La. 895.

6. Wash.—Corpus Juris quoted in In re Eaton's Estate, 16 P.2d 433, 434, 170 Wash. 280.

49 C.J. p 1118 note 25.

7. La.—Guidry v. Caire, 160 So. 622, 625, 181 La. 895.

Tex.—Polk v. Davidson, 196 S.W. 2d 632, 634, 145 Tex. 200.

8. Kan.—Topeka City R. Co. v. Higgs, 16 P. 667, 674, 38 Kan. 375, 5 Am.S.R. 754.

9. Kan.—Topeka City R. Co. v. Higgs, supra.

10. Md.—Potomac Edison Co. v. State, for Use of Hoffman, 177 A. 163, 170, 168 Md. 156.

11. La.—Guidry v. Caire, 160 So. 622, 625, 181 La. 895.

Tex.—Polk v. Davidson, 196 S.W.2d 632, 634, 145 Tex. 200.

12. La.—Guidry v. Caire, 160 So. 622, 625, 181 La. 895.

49 C.J. p 1118 note 28.

13. La.—Guidry v. Caire, supra.

Tex.—Polk v. Davidson, 196 S.W.2d 632, 634, 145 Tex. 200.

14. Tex.—Polk v. Davidson, supra.

15. Md.—Potomac Edison Co. v. State, for Use of Hoffman, 177 A. 163, 170, 168 Md. 156.

"That which cannot be perceived or imagined may quite well be possible."—Stearns v. Graves, 111 P.2d 882, 887, 62 Idaho 312.

16. Md.—Potomac Edison Co. v. State, for Use of Hoffman, 177 A. 163, 170, 168 Md. 156.

17. Md.—Potomac Edison Co. v. State, for Use of Hoffman, supra.

Or.—Corpus Juris cited in Sullivan v. Mountain States Power Co., 9 P.2d 1038, 1047, 139 Or. 282.

S.C.—Fort Sumter Hotel v. South Carolina Tax Commission, 21 S.E. 2d 393, 396, 201 S.C. 50.

49 C.J. p 1118 note 29.

18. Or.—Sullivan v. Mountain States Power Co., 9 P.2d 1038, 1047, 139 Or. 282.

19. Md.—Potomac Edison Co. v. State, for Use of Hoffman, 177 A. 163, 170, 168 Md. 156.

20. Wash.—State v. Kuykendall, 222 P. 211, 213, 128 Wash. 88.

49 C.J. p 1118 note 29 [b].

**Distinction stated**  
Things which are possible may never happen, but those which are natural or probable are those which do happen, and happen with such frequency or regularity as to become a matter of definite inference.—Corpus Juris quoted in In re Eaton's

Estate, 16 P.2d 433, 434, 435, 170 Wash. 280—50 C.J. p 420 note 73.

#### Not necessarily synonymous

Ill.—Williams v. Rittenhouse & Embree Co., 64 N.E. 995, 997, 198 Ill. 602.

49 C.J. p 1118 note 29 [a].

#### Not synonymous

U.S.—In re Kenilworth Bldg. Corporation, C.C.A.Ill., 105 F.2d 678, 676 —In re Philadelphia & Reading Coal & Iron Co., C.C.A.Pa., 104 F. 2d 126, 127—In re Northern Redwood Lumber Co., D.C.Cal., 43 F. Supp. 15, 17.

W.Va.—Beech Fork Coal Co. v. Pocahontas Corporation, 152 S.E. 785, 788, 109 W.Va. 39.

21. Wash.—In re Eaton's Estate, 16 P.2d 433, 434, 435, 170 Wash. 280.

22. Tenn.—Bensdorff v. Uhllein, 177 S.W. 481, 482; 132 Tenn. 193, 2 A.L.R. 1364.

#### 23. Phrases

(1) "As far as possible" see 6 C.J.S. p 785 note 93.

(2) "As soon as possible" see 6 C.J.S. p 783 note 24—p 784 note 49.

(3) "Reasonably possible" would mean substantially the same as "practicable."—Woody v. South Carolina Power Co., 24 S.E.2d 121, 124, 202 S.C. 73.

(4) Other phrases as to which more recent adjudications have not been found see 49 C.J. p 1118 note 32—p 1119 note 42.

24. Pa.—Eichenhofer v. Philadelphia, 93 A. 1065, 1067, 248 Pa. 365.



letters or dispatches and were kept or placed at fixed stations,<sup>25</sup> and in one sense the word means a mode of conveying written or unwritten intelligence to and from appointed stations at regular intervals or whenever the performance of such service may properly be required.<sup>26</sup>

In a different sense, a piece of timber, metal (solid or built-up), or other solid substance, of considerable size, set upright, and intended as a support to a weight or structure resting upon it, or as a firm point of attachment for something.<sup>27</sup>

The word "post" is also defined as meaning an office or employment; a position, as of trust or emolument; situation; especially, a public office;<sup>28</sup> and in this sense the word "post" has been held to be synonymous with "office" see *Officers* § 1 a, and "position" see ante p 231 note 53.

As a military term the word "post" is defined in *Army and Navy* § 104 a.

As a verb. It has been said that the popular meaning of the word "post," as a verb, corresponds with that meaning attached to it by lexicographers.<sup>29</sup> It is defined as meaning to advertise;<sup>30</sup> to publish, announce, or advertise by or as by the use of a placard;<sup>31</sup> to placard;<sup>32</sup> to attach to a post, a wall, or other usual place of affixing public notices;<sup>33</sup> to attach to a signpost or other usual place of affixing public notices;<sup>34</sup> to nail, attach, affix, or otherwise fasten up physically and to display in a conspicuous manner, and not theoretically;<sup>35</sup> to bring to the notice or attention of the public by affixing to a post<sup>36</sup> or wall,<sup>37</sup> or putting up

in some public place;<sup>38</sup> to stick up in a public place;<sup>39</sup> as, to post a notice<sup>40</sup> or playbill.<sup>41</sup>

The word "post" is further defined as meaning to dispatch by post or mail; to place in the post office or mail box for transmittal; to mail; to send through the post office.<sup>42</sup>

*Posting.* The present participle of "post."<sup>43</sup> When the word "posting" is employed in the sense of dispatching mail matter it means placing in the post office or in a letter box,<sup>44</sup> and, when the term is used as denoting the act of putting up a notice in a public place, it has been held that "posting" is not made by printing or recording a notice in a book or on a card and keeping it on a desk.<sup>45</sup>

The word "posting" is also employed as meaning the giving of notice to a tavern dealer not to sell intoxicating liquors to a certain person, as stated in *Intoxicating Liquors* § 440.

Posting of rates by carriers of goods is treated in *Carriers* § 302 a (1), and by carriers of passengers in *Carriers* § 572. Posting of notice by innkeepers regarding the deposit of property of guests to establish a limitation of liability in the event of loss is discussed in *Innkeepers* § 17 c (2).

*Posted.* Preterit and past participle of "post."<sup>46</sup> Among bookkeepers the word "posted" is a well-known term meaning to transfer original entries of business transactions from a day book or journal to a methodically abridged and classified record called a ledger.<sup>47</sup>

As a prefix. After; afterwards.<sup>48</sup>

25. Black L.D.

26. U.S.—U. S. v. Kochersperger, C. C.Pa., 26 F.Cas.No.15,541.

27. U.S.—Kirkner-Bender Fire-Escape Co. v. Chicago Beach Hotel Co., Ill., 116 F. 359, 362, 58 C.C.A. 579. 49 C.J. p 1120 note 50.

28. New Standard D.

29. Pa.—Pittsburgh v. Pittsburgh R. Co., 103 A. 372, 373, 259 Pa. 558 —Pittsburgh R. Co. v. Public Serv. Commn., 66 Pa.Super. 243, 249.

30. Ark.—Tedford v. Emison, 34 S. W.2d 214, 216, 182 Ark. 1054. Cal.—Penn v. Dyba, 1 P.2d 461, 464, 115 Cal.App. 67. 49 C.J. p 1120 note 58.

31. Wyo.—Texas Co. v. Maloney, 44 P.2d 903, 904, 48 Wyo. 280.

32. Cal.—Penn v. Dyba, 1 P.2d 461, 464, 115 Cal.App. 67. Wyo.—Corpus Juris cited in Texas Co. v. Maloney, 44 P.2d 903, 904, 48 Wyo. 280. 49 C.J. p 1120 note 65.

33. Cal.—Penn v. Dyba, 1 P.2d 461, 464, 115 Cal.App. 67. 49 C.J. p 1120 note 60.

**Similarly defined**

(1) To affix to a post (as especially formerly, before a sheriff's office or in some other public place) wall, or other usual place for public notices.—Penn v. Dyba, supra.

(2) To affix (a paper, etc.) to a post or in a prominent position.—Rex v. Minhinick, 13 Ont.W.N. 440, 441.

34. Ark.—Tedford v. Emison, 34 S. W.2d 214, 216, 182 Ark. 1054. 49 C.J. p 1120 note 61.

35. N.Y.—Epp v. Bowman-Biltmore Hotels Corporation, 12 N.Y.S.2d 384, 388, 171 Misc. 338.

36. Wis.—Pedro v. Grootemaat, 183 N.W. 153, 155, 174 Wis. 412. 49 C.J. p 1120 note 62.

37. Pa.—Pittsburgh v. Pittsburgh R. Co., 103 A. 372, 373, 259 Pa. 558—Pittsburgh R. Co. v. Public Serv. Commn., 66 Pa.Super. 243, 249.

38. Wis.—Allen v. Allen, 91 N.W. 218, 220, 114 Wis. 615. 49 C.J. p 1120 notes 62, 64.

39. Ont.—Rex v. Minhinick, 13 Ont. W.N. 440, 441.

40. Ark.—Tedford v. Emison, 34 S. W.2d 214, 216, 182 Ark. 1054. Cal.—Penn v. Dyba, 1 P.2d 461, 464, 115 Cal.App. 67.

Tex.—Stanford v. State, 268 S.W. 161, 162, 99 Tex.Cr. 111.

41. Tex.—Stanford v. State, supra.

42. Cal.—Diggs v. El Royale Corp., 154 P.2d 444, 445, 446, 67 Cal.App. 2d 341.

43. Webster New Int.D.

44. Cal.—Diggs v. El Royale Corp., 154 P.2d 444, 445, 67 Cal.App.2d 341.

45. N.Y.—Epp v. Bowman-Biltmore Hotels Corporation, 12 N.Y.S.2d 384, 388, 171 Misc. 338.

46. Webster New Int.D.

47. Kan.—Arnold v. Barner, 163 P. 805, 806, 100 Kan. 36.

48. Burrill L.D.

*Phrases* employing the English word "post" and its cognate forms are set out in the note.<sup>49</sup>

**POST (Latin).** A Latin word meaning "after." It is employed in a report or text-book to send the reader to a subsequent part of the book.<sup>50</sup>

*Post litem motam.* The literal meaning of the phrase is "After the suit was commenced or the controversy had arisen," or "After a dispute has arisen,"<sup>51</sup> and it is applied to declarations made after the controversy to which they relate had arisen,<sup>52</sup> and also to writing made for the purpose of comparison under like circumstances.<sup>53</sup>

The *post litem motam* rule does not apply to contradictory statements made out of court and offered for the purpose simply of attacking the credit of the witness, as stated in the C.J.S. title Witnesses § 614, also 70 C.J. p 1126 note 68.

*Other phrases* employing the Latin word "post" are set out in the note.<sup>54</sup>

*Maxims.* "Post" as the first word of maxims as to which there have been no recent applications see 49 C.J. p 1122 notes 16, 17.

**POSTAGE.** See Post Office § 23.

**POSTAGE STAMP.** See Post Office § 24.

**POSTAL CARD.** See Post Office § 24.

**POSTEA.** In the common-law practice, a formal statement indorsed on the *nisi prius* record which

gives an account of the proceedings at the trial of the action.<sup>55</sup>

**POSTER.** A large bill posted for advertising;<sup>56</sup> a placard posted or displayed in a public place as an announcement or advertisement.<sup>57</sup>

**POSTERI; POSTERIORA; POSTERIORE; POSTERIORES.** As the first words of maxims as to which there have been no recent applications see 49 C.J. p 1122 notes 9-12.

**POSTERITY.** It has been said that there is no broader or more comprehensive term than the word "posterity" which embraces not only children, but descendants to the remotest generations;<sup>58</sup> and it is defined as meaning all the descendants of a person in a direct line to the remotest generation.<sup>59</sup>

"Posterity" has been held to be equivalent to, or synonymous with, "increase" see 42 C.J.S. p 545 note 85.

**POSTHUMOUS.** Born after the father's death; being or appearing after that to which it owes existence has ceased to appear or be; arising or continuing after a person's death.<sup>60</sup>

**POSTHUMUS; POSTLIMINIUM.** As the first words of maxims as to which there have been no recent applications see 49 C.J. p 1122 notes 21, 25.

**POSTLIMINARY.** Done or carried on subsequently or as a conclusion; subsequent.<sup>61</sup> A word which is

#### 49. Phrases

(1) "Post concussion syndrome" is an injury to the brain tissue which may follow a severe concussion of the brain, caused by trauma.—*Ralston v. Baldwin Locomotive Works*, 41 A.2d 361, 363, 156 Pa.Super. 573.

(2) "Post exchange" and "post funds" see Army and Navy § 105 b.

(3) "Posted person" as the person named in a notice given to a tavern keeper not to sell intoxicating liquor to such person see Intoxicating Liquors § 440.

(4) "Posting a notice" see Notice § 18.

(5) "Post road" and "post route" see Post Office § 1.

(6) "Post traumatic psychosis" see Insane Persons § 3 d.

(7) Other phrases as to which more recent adjudications have not been found see 49 C.J. p 1120 notes 71-74.

50. Black L.D.

51. Eng.—*Berkeley Peerage Case*, 4 Campb. 401, 406, 11 E.R.C. 319.

52. Tex.—*Kirby v. Boaz*, 91 S.W. 642, 41 Tex.Civ.App. 282.

53. U.S.—*Hickory v. U. S.*, Ark, 14 S.Ct. 334, 151 U.S. 303, 306, 38 L.Ed. 170.

Mass.—*King v. Donahue*, 110 Mass. 155, 156, 14 Am.R. 539.

#### 54. Phrases

(1) "Post diem;" after the day.—Black L.D.

(2) "Post hoc, ergo propter hoc" is defined as after this, therefore on account of the fallacy of arguing from mere temporal sequence to cause and effect relationship.—*Balenger v. Southern Worsted Corp.*, 40 S.E.2d 681, 682, 209 S.C. 463.

(3) "Post mortem;" literally, "After death."—Black L.D. Post mortem examination see 32 C.J.S. p 1147 note 19.

(4) "Post obit contracts" see the C.J.S. title Usury § 25, also 66 C.J. p 195 notes 79, 80.

55. Black L.D.

#### Blackstone quoted

"Whatever, in short, is done subsequent to the joining of issue and awarding the trial, it is entered on record, and is called a *postea*. The substance of which is, that *postea*,

afterwards, the said plaintiff and defendant appeared by their attorneys at the place of trial; and a jury, being sworn, found such a verdict; or, that the plaintiff, after the jury sworn, made default, and did not prosecute his suit; or, as the case may happen. This is added to the roll, which is now returned to the court from which it was sent; and the history of the cause, from the time it was carried out, is thus continued by the *postea*."—3 Blackstone Comm. c xxiv, quoted in *Van Demark v. Sartorius*, 7 A.2d 168, 169, 122 N.J.Law 503.

56. Fla.—*State v. Pensacola, etc.*, R. Co., 9 So. 89, 92, 27 Fla. 403.  
Ont.—*Rex v. Minhninnick*, 13 Ont.W. N. 440, 441.

57. Ont.—*Rex v. Minhninnick*, supra.

58. Ky.—*Breckenridge v. Denny*, 8 Bush 523, 527.

59. Black L.D.

60. New Standard D.

"Posthumous child" see 14 C.J.S. p 1109 notes 68-70.

61. Webster New Int.D.

not of dubious, or recondite, or confusing significance, even though not frequently employed.<sup>62</sup> It is the antonym of "preliminary."<sup>63</sup>

**POSTLIMINY.** In the civil law, the doctrine or fiction of the law by which the restoration of a person to any status or right formerly possessed by him was considered as relating back to the time of his original loss or deprivation.<sup>64</sup> The doctrine of postliminy as applied in time of war is treated in

the C.J.S. title War § 26, also 67 C.J. p 393 note 34—p 394 note 36.

**POSTMARK.** See Post Office § 1.

**POSTMASTER.** See Post Office § 1.

**POSTMASTER GENERAL.** See Post Office § 4.

**POSTNUPTIAL.** After marriage.<sup>65</sup>

62. U.S.—McComb v. C. A. Swanson & Sons, D.C.Neb., 77 F.Supp. 716, 733.

63. U.S.—McComb v. C. A. Swanson & Sons, *supra*.

64. Black L.D.

65. Black L.D.

**Phrases**

(1) "Postnuptial contract" defined see Husband and Wife § 89.

(2) "Postnuptial settlement" see the index to the title Husband and Wife.

## POST OFFICE

This Title includes conduct and regulation of communication by mail; constitutional and statutory provisions relating thereto; establishment, organization, and powers of post office department; establishment, change, and discontinuance of post offices, post roads, postal routes, etc.; appointment and removal, rights, powers, duties, and liabilities of postmasters and other postal officers and agents; carriage of the mails and contracts therefor; mailable matter, rates of postage thereon, and receipt and delivery thereof; and violations of postal laws.

*Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index*

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- IV. OFFENSES AGAINST POSTAL LAWS, §§ 34-64**
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**I. IN GENERAL****§ 1. Terminology**

- a. Post office
- b. Postmaster; post road and post route
- c. Other terms

**a. Post Office**

The term "post office" embraces a room or building for the local transaction of the business of the mails and the business of keeping, forwarding, and distributing mailable matter.

The term "post office," as commonly understood, embraces two distinct meanings: (1) A room, apartment, or building at an appointed stage for the local transaction of the business of the mails.<sup>1</sup> (2) The business of keeping, forwarding, and distributing mailable matter.<sup>2</sup>

**b. Postmaster; Post Road and Post Route**

A postmaster is an instrument used by the government to discharge its function in the carriage of mail.

A post road is a public highway whose use by the post is prescribed or authorized by law.

A postmaster is an instrument used by the government to discharge its function in the carriage or delivery of mail.<sup>3</sup> A post road is a public highway, whose use by the post is prescribed or authorized by law;<sup>4</sup> a highway by land or water made by statute an avenue over which mails may be lawfully transmitted.<sup>5</sup>

A "post route" is the appointed course or prescribed line of transportation of mails;<sup>6</sup> a post road or definite portion thereof over which mails are usually transported by contract.<sup>7</sup>

**c. Other Terms**

Various other terms have been defined, such as "mail" and "mail matter."

Various other terms have been defined in connection with post office.<sup>8</sup>

1. U.S.—U. S. v. Kochersperger, C. C.Pa., 26 F.Cas.No.15,541.  
49 C.J. p 1131 note 3.

2. U.S.—U. S. v. Marselis, D.C.N.Y., 26 F.Cas.No.15,724, 2 Blatchf. 111.  
49 C.J. p 1131 note 4.

3. U.S.—U. S. v. Rogde, D.C.S.D., 214 F. 283.

4. U.S.—U. S. v. Kochersperger C. C.Pa., 26 F.Cas.No.15,541.

"Postal route" and "post road" as synonymous

N.D.—Cosgriff v. Tri-State Telephone & Telegraph Co., 107 N.W. 525, 527, 15 N.D. 210.

49 C.J. p 1121 note 94 [a].

5. U.S.—Philadelphia, etc., R. Co. v. U. S., 13 Ct.Cl. 199, affirmed 103 U.S. 703, 26 L.Ed. 454.

49 C.J. p 1131 note 7.

6. U.S.—Philadelphia, etc., R. Co. v. U. S., supra.

7. U.S.—Philadelphia, etc., R. Co. v. U. S., supra.

**8. Beat**

A beat is a letter addressed to a person not to be found in the district.—Goode v. U. S., Mass., 16 S.Ct. 136, 137, 159 U.S. 663, 40 L.Ed. 297.

**Decoy letters**

(1) Decoy letters, within the meaning of the postal laws, are letters prepared and mailed on purpose to detect offenders against those laws.—U. S. v. Whittier, C.C.Mo., 28 F.Cas.No.16,688, 5 Dill. 35.

(2) Use of decoy letters as basis for prosecuting offenses against postal laws see infra §§ 38, 56.

**Fraud order**

(1) A fraud order is one directing the post office of the addressee to return all mail of such addressee to the senders, sending it back to the senders directly if the name of such sender is on the envelope, and, when such name is not on the envelope, to send the same to the dead letter office so that that branch of the de-

partment can return the letters to the senders, both classes of mail first being stamped "fraudulent."—Donnell Mfg. Co. v. Wyman, C.C.Mo., 156 F. 415.

(2) Fraud order and return of mail to sender generally see infra § 22.

**Nix**

A letter addressed to a fictitious person or to a place where there is no post office; a decoy letter used by the post-office inspectors for the purpose of discovering any meddling or interference with the mails.—Goode v. U. S., Mass., 16 S.Ct. 136, 137, 159 U.S. 663, 40 L.Ed. 297.—U. S. v. Denicke, C.C.Ga., 35 F. 407, 408.

**Nix basket**

A receptacle for unmailable matter.—U. S. v. Denicke, supra.

**Postmark**

The word "postmark" used as a noun means the mark or stamp of a

**Mail.** The term "mail" as defined by the courts has several distinct meanings: The whole body of matter transported by the postal agents, or any letter or package forming a component part of it;<sup>9</sup> the portable bag, valise, or other receptacle in which letters, packages, or papers are carried;<sup>10</sup> the vehicle by means of which they are transported, or any other means employed for their carriage and delivery by public authority;<sup>11</sup> the placing of letters or parcels in the post office to be delivered under the public authority.<sup>12</sup>

**Mail matter.** The term "mail matter" includes letters, packets, etc., received for transmission and to be transmitted by post to the persons to whom such matter is directed.<sup>13</sup> It does not include telegraphic correspondence as such.<sup>14</sup>

## § 2. Control and Regulation of Postal Service

The control and regulation of the postal service is vested in congress by the federal Constitution.

By the Constitution of the United States article

I, § 8, power is vested in congress to establish post offices and post roads.<sup>15</sup> This power embraces the regulation of the entire postal system of the country.<sup>16</sup> When the power to establish post offices and post roads was surrendered to the congress it was as a complete power, and the grant carried with it the right to exercise all the powers which made that power effective.<sup>17</sup>

Under its postal power congress may designate what shall be carried in the mail, as discussed infra § 21, the routes over which the mail shall be carried,<sup>18</sup> the offices where letters and other documents shall be received to be distributed or forwarded,<sup>19</sup> the transportation of the mail,<sup>20</sup> and it may prescribe all measures necessary to secure its safe and speedy transit, and the prompt delivery of its contents.<sup>21</sup>

In conducting the post office department, the United States is engaged in discharging a governmental function.<sup>22</sup> However, the power of congress over the mails is not absolute.<sup>23</sup> It must be considered in the light of definite prohibitions in

post office on mail matter handled there; and as a verb it means to put a postmark on, as a letter.—Application of George, 57 N.Y.S.2d 494, 496, 185 Misc. 671.

**"Render" distinguished from "mail"**  
Ill.—Manufacturers' & Merchants' Mut. Ins. Co. v. Zeitinger, 48 N. E. 179, 180, 168 Ill. 286, 61 Am.S.R. 105.

9. U.S.—U. S. v. Inabnet, D.C.S.C., 41 F. 130, 131—U. S. v. Marselis, C.C.N.Y., 26 F.Cas.No.15,724, 2 Blatchf. 108, 110.

10. U.S.—U. S. v. Kochersperger, C. C.Pa., 26 F.Cas.No.15,541.  
49 C.J. p 1132 note 12.

11. N.Y.—Wynen v. Schappert, 6 Daly 558, 55 How.Pr. 156.  
49 C.J. p 1132 note 13.

12. N.Y.—National Butchers', etc., Bank v. De Groot, 48 N.Y.Super. 341.

### "Mailed"

"The word 'mailed,' when applied to a letter, means that it was properly prepared for transmission in the due course of mail, and that it was placed in the custody of the officer charged with the duty of forwarding the mail."—Southern Engine & Boiler Works v. Vaughan, 135 S.W. 913, 915, 98 Ark. 388.

13. U.S.—U. S. v. Huggett, C.C.Ohio, 40 F. 636, 641—U. S. v. Rapp, C.C. Ga., 30 F. 818, 820.

14. 19 Opinion Attorney General 650.

15. U.S.—Transcontinental & Western Air v. Farley, C.C.A.N.Y., 71 F. 2d 288, certiorari denied 55 S.Ct.

119, 293 U.S. 603, 79 L.Ed. 695—Acret v. Harwood, D.C.Cal., 41 F. Supp. 492—U. S. v. Certain Parcels of Land in Town of Denton of Caroline County, D.C.Md., 30 F. Supp. 372.

Cal.—Postal Tel.-Cable Co. v. Railroad Commission, 254 P. 258, 200 Cal. 463.

Fla.—Florida Motor Lines v. State Railroad Commission, 132 So. 851, 101 Fla. 1018.

Ind.—Lutz v. Arnold, 193 N.E. 840, 208 Ind. 480, rehearing overruled 196 N.E. 702, 208 Ind. 480.

Ohio.—Black v. City of Berea, 32 N. E.2d 1, 137 Ohio St. 611, 132 A.L.R. 1391.

16. U.S.—Public Clearing House v. Coyne, Ill., 24 S.Ct. 789, 194 U.S. 497, 48 L.Ed. 1092.  
49 C.J. p 1132 note 21.

### Full control of mails

Congress, under its power to establish post offices and post roads, has full control of mails.—Bogy v. U. S., C.C.A.Tenn., 96 F.2d 734, certiorari denied 59 S.Ct. 68, 305 U.S. 608, 83 L.Ed. 387.

17. U.S.—Ex parte Rapier, 12 S.Ct. 374, 143 U.S. 110, 36 L.Ed. 93.

Ohio.—Black v. City of Berea, 32 N. E.2d 1, 137 Ohio St. 611, 132 A.L.R. 1391.

18. U.S.—Ex parte Rapier, 12 S.Ct. 374, 143 U.S. 110, 36 L.Ed. 93—Ex parte Jackson, N.Y., 96 U.S. 727, 24 L.Ed. 877.

19. U.S.—Ex parte Rapier, 12 S.Ct. 374, 143 U.S. 110, 36 L.Ed. 93—Ex parte Jackson, N.Y., 96 U.S. 727, 24 L.Ed. 877.

20. U.S.—Ex parte Rapier, 12 S.Ct. 374, 143 U.S. 110, 36 L.Ed. 93—Ex parte Jackson, N.Y., 96 U.S. 727, 24 L.Ed. 877.

21. U.S.—Ex parte Rapier, 12 S.Ct. 374, 143 U.S. 110, 36 L.Ed. 93—Ex parte Jackson, N.Y., 96 U.S. 727, 24 L.Ed. 877.

22. U.S.—Transcontinental & Western Air v. Farley, C.C.A.N.Y., 71 F. 2d 288, certiorari denied 55 S.Ct. 119, 293 U.S. 603, 79 L.Ed. 695.  
49 C.J. p 1132 note 27.

23. U.S.—Burco, Inc. v. Whitworth, C.C.A.Md., 81 F.2d 721, certiorari denied 56 S.Ct. 670 (two cases), 297 U.S. 924, 80 L.Ed. 1008—Jones v. Securities and Exchange Commission, C.C.A.N.Y., 79 F.2d 617, certiorari denied in part Jones v. Securities and Exchange Commission, 56 S.Ct. 497 (fourth case), 297 U.S. 705, 80 L.Ed. 993, certiorari granted in part 56 S.Ct. 497 (fifth case), 297 U.S. 699, 80 L.Ed. 988, reversed in part on other grounds 56 S.Ct. 654, 298 U.S. 1, 80 L.Ed. 1015—Securities and Exchange Commission v. Timetrust, Inc., D.C.Cal., 28 F.Supp. 34.

**Federal statutes within postal power**  
Public Utility Holding Company Act was not within constitutional power of congress to establish post roads and post offices as applied to holding company sought to be reorganized under Bankruptcy Act, no question of fraud or improper use of mails being involved, in view of necessity for district court's approval of reorganization plan.—Burco, Inc. v. Whitworth, C.C.A.Md., 81 F.2d 721,

the federal Constitution<sup>24</sup> and is subject to the limitations imposed by the Bill of Rights.<sup>25</sup> Congress may not exercise its postal powers to meet evils which are not spread or perpetuated by the use of the mails.<sup>26</sup>

**Power of states.** The postal power of congress is not subject to state authority<sup>27</sup> and the states may not interfere with federal activities under the postal power.<sup>28</sup>

### § 3. — Post Roads and Post Routes

Congress has established various post roads and post routes, but the post roads are the property of the states through which they pass.

Acting under its constitutional authority, congress has enacted legislation, 39 U.S.C.A. § 481, establishing various post roads,<sup>29</sup> such as all the waters of the United States during the time the mail is carried thereon,<sup>30</sup> all railroads or parts of railroads and all air routes which are now, and

hereafter may be, in operation,<sup>31</sup> all canals during the time the mail is carried thereon,<sup>32</sup> and all letter carrier routes established in any city or town for the collection and delivery of mail matter.<sup>33</sup> It is also provided by statute, 39 U.S.C.A. § 482, that all public roads and highways which are kept up and maintained as such are post routes.<sup>34</sup>

The power to establish post roads, it is said, was given to enable the general government "to make, repair, keep open, and improve post roads, whenever the exercise of any such independent, national power shall be deemed proper for effectuating the satisfactory transportation of the mail,"<sup>35</sup> and is generally construed to mean such roads as were regularly laid out by authority of the states or by counties under the laws of the states.<sup>36</sup> Nevertheless congress may continue as a post route a road once established as a post road even after it shall have been discontinued as a state road,<sup>37</sup> and congress may also construct de novo a post road with-

certiorari denied 56 S.Ct. 670 (two cases), 297 U.S. 724, 80 L.Ed. 1008.

**Federal Securities Act of 1933** is not improper regulation of mails.—Securities and Exchange Commission v. Crude Oil Corporation of America, D.C.Wis., 17 F.Supp. 164, affirmed, C.C.A., 93 F.2d 844.

24. U.S.—In re American States Public Service Co., D.C.Md., 12 F.Supp. 667, modified on other grounds, C.C.A., Burco, Inc. v. Whitworth, 81 F.2d 721, certiorari denied 56 S.Ct. 670, two cases, 297 U.S. 724, 80 L.Ed. 1008.

25. U.S.—Securities and Exchange Commission v. Timetrust, Inc., D. C.Cal., 28 F.Supp. 34.

Personal, civil, and political rights see Constitutional Law §§ 199-214.

26. U.S.—Electric Bond & Share Co. v. Securities and Exchange Commission, C.C.A.N.Y., 92 F.2d 580, affirmed 58 S.Ct. 673, 303 U.S. 419, 82 L.Ed. 936, 115 A.L.R. 105.

27. Fla.—Florida Motor Lines v. State Railroad Commission, 132 So. 851, 101 Fla. 1018.

28. U.S.—Johnson v. State of Maryland, Md., 41 S.Ct. 16, 254 U.S. 51, 65 L.Ed. 126.

Applicability of state and local regulations to mail motor vehicles see Motor Vehicles § 21.

"The decided cases which indicate the limits of state regulatory power in relation to the federal mail service involve situations where state regulation involved a direct, physical interference with federal activities under the postal power or some direct, immediate burden on the performance of the postal functions."

Railway Mail Ass'n v. Corsi, N.Y., 65 S.Ct. 1483, 1488, 326 U.S. 88, 89 L.Ed. 2072.

**Statutes or ordinances as infringing power**

(1) In general.  
Ind.—Lutz v. Arnold, 193 N.E. 840, 208 Ind. 480, rehearing overruled 196 N.E. 702, 208 Ind. 480.

Mo.—Ex parte Williams, 139 S.W.2d 485, 345 Mo. 1121, certiorari denied Williams v. Golden, 61 S.Ct. 42, 311 U.S. 675, 85 L.Ed. 434, 49 C.J. p 1132 note 20 [a].

(2) Provision of New York civil rights law forbidding labor organizations from denying membership therein because of race, color, or creed, as applied to railway postal clerks association, is not repugnant to constitutional provision conferring on congress the authority over postal matters, and hence is not unconstitutional as an attempt to regulate a federal instrumentality since the law does not impinge on federal mail service or the power of the government to conduct it.—Railway Mail Ass'n v. Corsi, N.Y., 65 S.Ct. 1483, 326 U.S. 88, 89 L.Ed. 2072.

(3) Virginia securities law, construed as permitting the state corporation commission to issue order restraining foreign association from using United States mails in such a manner as to commit criminal act in Virginia by sale of securities without permit, is not an unconstitutional attempt to regulate use of United States mails.—Travelers Health Ass'n v. Commonwealth, 51 S.E.2d 263, 188 Va. 877, affirmed Travelers Health Ass'n v. Commonwealth of Virginia ex rel. State Corp. Commission, 70 S.Ct. 927, 339 U.S. 643, 94 L.Ed. —.

29. Idaho.—Ada County v. Wright, 92 P.2d 134, 60 Idaho 394.

Applicability of state regulations to mail motor vehicles see Motor Vehicles § 21.

Constitutional authority of congress see supra § 2.

Construction and maintenance of telegraph lines along post roads see the C.J.S. title Telegraphs and Telephones § 24, also 62 C.J. p 29 note 87 et seq.

"Post road" and "post route" defined see supra § 1 b.

30. U.S.—Buck v. Kuykendall, D.C. Wash., 295 F. 197, reversed on other grounds 45 S.Ct. 324, 267 U.S. 307, 69 L.Ed. 623, 38 A.L.R. 286, 49 C.J. p 1132 note 30.

31. U.S.—Buck v. Kuykendall, supra.  
N.Y.—Rumsey v. New York & N. E. R. Co., 17 N.Y.S. 672, 63 Hun 200, affirmed 33 N.E. 338, 137 N.Y. 563, 49 C.J. p 1132 note 31.

32. U.S.—Buck v. Kuykendall, D.C. Wash., 295 F. 197, reversed on other grounds 45 S.Ct. 324, 267 U.S. 307, 69 L.Ed. 623, 38 A.L.R. 286.

33. Ohio.—Black v. City of Berea, 32 N.E.2d 1, 137 Ohio St. 611, 132 A.L.R. 1391, 49 C.J. p 1133 note 36.

34. N.Y.—Postal Tel.-Cable Co. v. Depew, Etc., Conduit Co., 222 N.Y. S. 104, 129 Misc. 591, 49 C.J. p 1133 note 37.

35. Ky.—Dickey v. Maysville, etc., Turnp. Road Co., 7 Dana 113.

36. U.S.—Cleveland, etc., R. Co. v. Franklin Canal Co., C.C.Pa., 5 F. Cas.No.2,890.

37. Ky.—Dickey v. Maysville, etc., Turnp. Road Co., 7 Dana 113.



in a state with the consent of the state<sup>38</sup> by payment of just compensation<sup>39</sup> or by exercise of the right of eminent domain;<sup>40</sup> but not otherwise.<sup>41</sup> Congress is not authorized to adopt and use state roads as post roads without compensation if any should be just and should be demanded.<sup>42</sup>

*Property in post roads.* The post roads of the United States are the property of the states through

which they pass;<sup>43</sup> they may temporarily part with the possession of them by charter, and the grantees, while the charter continues, have the right to preserve such roads, and prevent their threatened destruction.<sup>44</sup> The United States has the mere right of transit over these roads for the purpose of carrying the mail,<sup>45</sup> and in case of an obstruction of this right its laws provide an adequate remedy.<sup>46</sup>

## II. POST OFFICE DEPARTMENT, POST OFFICES, POSTMASTER, AND OTHER OFFICERS AND EMPLOYEES

### § 4. Postmaster General

- a. In general
- b. Power to negotiate and conclude postal conventions
- c. Liability

#### a. In General

The management of the business of the post office is lodged with the postmaster general and his assistants.

By statute, 5 U.S.C.A. § 361 et seq, the management of the post office business of the country is placed in the hands of the postmaster general and his assistants,<sup>47</sup> and the postmaster general is vested with a wide discretion in the management thereof.<sup>48</sup> It is his duty to superintend generally the business of,<sup>49</sup> and to execute all laws relating to, the postal service.<sup>50</sup> To this end he has power to promulgate postal regulations which are controlling and have the force of laws,<sup>51</sup> subject to the limitations that the regulations must not be inconsistent with the Postal Act<sup>52</sup> and that they do not trench on legislative power but are designed and purport only to be administrative in character.<sup>53</sup>

Nevertheless the postmaster general is merely

the agent of the government; and none of his acts except those which are within the scope of his authority and conformable to law are obligatory on the government,<sup>54</sup> and where rights, duties, and obligations are defined by statute they cannot be taken away or abridged by regulations promulgated by him.<sup>55</sup>

*Control by president.* In the discharge of those duties which are prescribed by law the postmaster general is not subject to the control of the president.<sup>56</sup>

#### b. Power to Negotiate and Conclude Postal Conventions

The postmaster general is authorized, by and with the advice and consent of the president, to negotiate and conclude postal treaties or conventions between the United States and foreign countries.

By statute, 5 U.S.C.A. § 372, the postmaster general is authorized, by and with the advice and consent of the president, to negotiate and conclude postal treaties or conventions between the United States and foreign countries.<sup>57</sup> Postal conventions are a part of the postal laws and regulations,<sup>58</sup> but it has been held that they are not statutes or

38. Ky.—Dickey v. Maysville, etc., Turnp. Road Co., supra.  
49 C.J. p 1133 note 42.

39. Ky.—Dickey v. Maysville, etc., Turnp. Road Co., supra.

40. Ky.—Dickey v. Maysville, etc., Turnp. Road Co., supra.

41. Ky.—Dickey v. Maysville, etc., Turnp. Road Co., supra.  
49 C.J. p 1133 note 45.

42. Ky.—Dickey v. Maysville, etc., Turnp. Road Co., supra.

43. U.S.—Cleveland, etc., R. Co. v. Franklin Canal Co., C.C.Pa., 5 F. Cas.No.2,890.

44. U.S.—Cleveland, etc., R. Co. v. Franklin Canal Co., supra.

45. U.S.—Cleveland, etc., R. Co. v. Franklin Canal Co., supra.

46. U.S.—Cleveland, etc., R. Co. v. Franklin Canal Co., supra.

47. U.S.—Transcontinental & Western Air v. Farley, C.C.A.N.Y., 71 F.2d 288, certiorari denied 55 S.Ct. 119, 293 U.S. 603, 79 L.Ed. 695.  
49 C.J. p 1134 note 72.

Mandamus to compel performance of duties by postmasters general see Mandamus §§ 119 b, 137.

48. U.S.—Transcontinental & Western Air v. Farley, supra.  
49 C.J. p 1135 note 73.

49. U.S.—Ex parte Willman, D.C. Ohio, 277 F. 819.

50. U.S.—Ex parte Willman, supra.

51. U.S.—Fussell v. U. S., C.C.A., Fla., 100 F.2d 995—U. S. v. Sehon Chinn, D.C.W.Va., 85 F.Supp. 558. Ohio.—Black v. City of Berea, 32 N. E.2d 1, 137 Ohio St. 611, 132 A.L.R. 1391.  
49 C.J. p 1135 note 76.

52. U.S.—Myrick v. U. S., Mass., 219 F. 1, 134 C.C.A. 619.  
49 C.J. p 1135 note 77.

53. U.S.—Petersen v. U. S., Hawaii, 287 F. 17.

54. U.S.—Brown v. U. S., D.C., 9 How. 487, 13 L.Ed. 228.  
49 C.J. p 1135 note 79.

55. U.S.—Boody v. U. S., C.C.Me., 3 F.Cas.No.1,636, 1 Woodb. & M. 150.  
49 C.J. p 1135 note 80.

56. U.S.—U. S. v. Kendall, D.C., 26 F.Cas.No.15,517, 5 Cranch C.C. 163, affirmed 12 Pet. 524, 9 L.Ed. 1181.

57. U.S.—Standard Fruit & Steamship Co. v. U. S., 103 Ct.Cl. 659.  
49 C.J. p 1135 notes 82 [a], 83.

58. U.S.—Four Packages of Cut Diamonds v. U. S., N.Y., 256 F. 305, 167 C.C.A. 477—Standard Fruit & Steamship Co. v. U. S., 103 Ct.Cl. 659.

laws because they are not enacted by congress.<sup>59</sup> Postal conventions have the same force and effect as any other regulation issued by the postmaster general under authority of law.<sup>60</sup> By a convention concluded under this authority all matters may be provided for which are appropriate subjects of regulation by the post office department.<sup>61</sup>

In the absence of an enabling statute, the postmaster general is not authorized to negotiate a postal convention providing for the payment of indemnity for the loss of registered articles or letters;<sup>62</sup> but authority has been conferred by a statute, 39 U.S.C.A. § 381, permitting him to establish a uniform system of registration, and to provide for a limited indemnity for first-class registered matter lost in the mails.<sup>63</sup>

### c. Liability

The postmaster general is not responsible for the negligence of postmasters or their deputies or assistants.

The postmaster general is not responsible for the negligence of postmasters or their deputies or assistants.<sup>64</sup> Public policy requires the recognition and application of this rule.<sup>65</sup>

## § 5. Chief Clerk

Where the official duties of the chief clerk of the post office department embrace all matters relating to finance in the department, he is not entitled to charge a commission for negotiating loans for the use of the department.

Under a postal regulation providing for a division of finance under the superintendence of the chief clerk who shall be treasurer of the department, the official duties of the chief clerk of the post office department embrace all matters relating to finance in that department, and in consequence he is not entitled to charge a commission for negotiating loans for the use of the department.<sup>66</sup>

## § 6. Post Offices

### a. In general

#### b. Lease of buildings for post offices

### a. In General

The postmaster general is required by law to establish post offices at such places as he may deem expedient on post roads established by law.

By express statutory provision, 39 U.S.C.A. § 1, the postmaster general is required to establish post offices at such places as he may deem expedient on post roads established by law.<sup>67</sup> The power to discontinue post offices is incident to the power to establish them<sup>68</sup> unless there is some provision in the acts of congress restraining its exercise,<sup>69</sup> and postmasters occupy their offices subject to the contingency that such offices may be so discontinued.<sup>70</sup> Under the statutes, 39 U.S.C.A. §§ 2, 3, the power to discontinue post offices on designated grounds is now expressly conferred by statute, subject to the limitation that no post office established at any county seat shall be abolished or discontinued by reason of any consolidation of post offices made by the postmaster general;<sup>71</sup> and, where such consolidation has taken place, such post office must be reestablished regardless of any view the postmaster general may entertain in respect of the public interests affected.<sup>72</sup>

**Removal.** Under a statute providing that a post office in a designated city shall not be removed from its present location until after a certain date and that remonstrants against its removal shall indemnify the government for any additional expenses growing out of any contract for another site, if the post office is illegally removed from its present location, it cannot be restored thereto unless the indemnity provided for is furnished, and this indemnity must be tendered in due form by the remonstrants and within a reasonable time.<sup>73</sup>

**Acquisition of property for post offices.** The federal government has authority under the federal Constitution to acquire property necessary or suitable for post offices.<sup>74</sup> By act of congress, 40 U.S.C.A. § 341, the secretary of the treasury is authorized and directed to acquire by purchase, condem-

59. U.S.—Four Packages of Cut Diamonds v. U. S., C.C.A.N.Y., 256 F. 305, 167 C.C.A. 477.

Postal conventions as treaties see the C.J.S. title Treaties § 1, also 63 C.J. p 827 note 25.

60. U.S.—Standard Fruit & Steamship Co. v. U. S., 103 Ct.Cl. 659.

61. 19 Opinion Attorney General 513—19 Opinion Attorney General 39—15 Opinion Attorney General 462.

62. 15 Opinion Attorney General 462.

63. 22 Opinion Attorney General 363.

64. Ala.—Raisler v. Oliver, 12 So. 238, 97 Ala. 710, 38 Am.S.R. 213. 49 C.J. p 1135 note 89.

65. Ala.—Raisler v. Oliver, supra. 66. U.S.—Brown v. U. S., D.C., 9 How. 487, 18 L.Ed. 228.

67. U.S.—Ware v. U. S., Pa., 4 Wall. 617, 18 L.Ed. 389. 49 C.J. p 1133 notes 52-54.

"Post office" defined see supra § 1 a.

68. U.S.—Ware v. U. S., supra. 49 C.J. p 1133 note 55.

69. U.S.—Ware v. U. S., supra.

70. U.S.—Ware v. U. S., supra. 49 C.J. p 1133 note 57.

71. D.C.—U. S. v. Cortelyou, 26 App. D.C. 298, appeal dismissed 26 S.Ct. 759, 201 U.S. 649, 50 L.Ed. 905.

72. D.C.—U. S. v. Cortelyou, supra. 49 C.J. p 1133 note 60. Mandamus to compel reestablishment see Mandamus § 210.

73. 9 Opinion Attorney General 315.

74. U.S.—U. S. v. Certain Parcels of Land in Town of Denton of Caroline County, D.C.Md., 30 F.Supp. 372.

Condemnation proceedings see Eminent Domain § 1 et seq.

nation, or otherwise such sites as he may deem necessary for post offices in the states, territories, and possessions of the United States.<sup>75</sup> If the secretary acts arbitrarily or capriciously the courts may intervene to restrain the exercise of the power conferred by statute;<sup>76</sup> but, if it is not affirmatively shown that the secretary has acted arbitrarily or capriciously in selecting the site, his decision is conclusive and is not subject to judicial review.<sup>77</sup> The secretary may select sites already in public use if he does not act arbitrarily or without reasonable regard for the state or municipal interest involved.<sup>78</sup>

#### b. Lease of Buildings for Post Offices

The postmaster general is authorized to lease premises for the use of post offices of certain classes.

The postmaster general, under the power to establish post offices, may designate the places, that is, the localities, at which the mails are to be received,<sup>79</sup> and he may lease property to be used for a post office where the power to do so is expressly conferred on him by statute, 39 U.S.C.A. § 11, or is necessarily implied.<sup>80</sup>

*Requisites of lease.* In the absence of a statutory requirement, the contracts of the post office department for the renting of post office accommodations need not be in writing.<sup>81</sup>

*Termination of lease.* The lease may be canceled on the occurrence of such contingencies as may

be provided for in the lease,<sup>82</sup> such as a provision that on notice to the lessor the lease may be canceled by the government whenever the post office department shall decide to move the office into a government-owned building which shall have been provided for it.<sup>83</sup> A statute providing that a lease shall cease and terminate whenever a post office can be moved into a government building becomes a part of a lease executed by the government although no express provision is inserted in the lease,<sup>84</sup> and the repeal of the statute after the lease has been executed does not abrogate the provision as an implied term of the lease.<sup>85</sup>

Where the tenancy of the United States on premises leased for a post office is from year to year, it may be terminated by giving such notice as is required by the law of the state in which the property is situated.<sup>86</sup>

*Rents.* Where the government breaches the lease, the lessor is entitled to recover such rents as are due.<sup>87</sup> The amount of rental which the lessor may recover depends on the terms of the lease.<sup>88</sup> Where the lease is breached by the government, the lessor can claim no better position as to the amount which he may recover than that which would have existed if the contract had been performed by both parties.<sup>89</sup> Where the post office is removed prior to the expiration of the term of the lease, there must be deducted from the stipulated rental such amounts as were saved by

75. U.S.—U. S. v. Certain Parcels of Land in Town of Denton of Caroline County, *supra*.

76. U.S.—U. S. v. Certain Parcels of Land in Town of Denton of Caroline County, *supra*.

77. U.S.—U. S. v. Certain Parcels of Land in Town of Denton of Caroline County, *supra*.

78. U.S.—U. S. v. Certain Parcels of Land in Town of Denton of Caroline County, *supra*.

79. U.S.—Chase v. U. S., Ind., 15 S. Ct. 174, 155 U.S. 489, 502, 39 L.Ed. 284.

80. U.S.—Chase v. U. S., *supra*.  
49 C.J. p 1134 note 64.

81. U.S.—Little v. U. S., 19 Ct.Cl. 272, 278.  
49 C.J. p 1134 note 66.

82. U.S.—Postnikoff v. U. S., 78 Ct. Cl. 576.

83. U.S.—Postnikoff v. U. S., *supra*.

84. U.S.—Eastern Bldg. Corporation v. U. S., 96 Ct.Cl. 399, certiorari denied 63 S.Ct. 45, 317 U.S. 650, 37 L.Ed. 523.

85. Repeal statute held not retro-active

U.S.—Eastern Bldg. Corporation v. U. S., *supra*.

#### Execution of new lease

Where property was leased to the government for post office purposes in October 1922, in accordance with negotiations begun in 1921, with the understanding that if and when the Act of March 3, 1885, 23 U.S.St. at L. p 386, prohibiting the insertion of a noncancellable clause in post office leases was repealed, a lease without such clause would be substituted for the original lease; and where subsequent to the repeal of said act by the Act of June 19, 1922, 42 U.S.St. at L. p 655, a new lease, without such cancellation clause, was prepared by the post office department and submitted to the lessor in December 1923, and properly signed and recorded, it was held that the second lease was executed solely for the purpose of effectuating the original understanding of the parties, was a valid lease, and was not void for want of consideration.—Twin Cities Properties, Clayton, Mo., v. U. S., 87 Ct.Cl. 531.

86. 18 Opinion Attorney General 215.

87. U.S.—Twin Cities Properties v. U. S., 90 Ct.Cl. 119.  
Personal liability of postmaster see *infra* § 7 g.

#### Rent on building in ceded territory

The postmaster general could properly refuse the demand of the insular government of Puerto Rico for rent for the post office building at San Juan which belonged to the Spanish government and came into the possession of the United States with the cession of Puerto Rico.—23 Opinion Attorney General 571.

88. U.S.—Twin Cities Properties v. U. S., 90 Ct.Cl. 119.

#### Rent as dependant on annual appropriation

Where a lease has been entered into under the express authorization of an act of congress, the obligation of the government to pay the rent stipulated in the lease was not dependent on an annual appropriation by congress to pay the rent as it accrued.—Twin Cities Properties v. U. S., 90 Ct.Cl. 119.

89. U.S.—Twin Cities Properties v. U. S., 90 Ct.Cl. 119.

the lessor by reason of the removal of the post office, such as expenses for heat, light, power, and other services.<sup>90</sup> One who has leased premises to be used as a post office is not entitled to recover the rental value thereof, where he has defaulted under an express contract by not paving a street and grading an alley in accordance with the proposal for lease.<sup>91</sup>

Where the lease by its terms may be canceled on notice by the post office prior to the expiration of the term of the lease, the lessor is not entitled to recover rent for any period subsequent to a valid cancellation of the lease.<sup>92</sup> Where the post office is continued on the leased premises after the expiration of the lease with no agreement as to rental, the lessor is entitled to reasonable compensation for such occupancy.<sup>93</sup>

In the absence of a provision to the contrary in the lease, the lessor is not, on the abandonment of the demised premises by the post office in violation of the lease, required to relet for the protection of the government, but the lessor may at his election suffer the premises to remain vacant and recover his rent for the remainder of the term.<sup>94</sup>

## § 7. Postmasters

- a. In general
- b. Selection and qualification
- c. Title to, and possession of, office
- d. Term of office, removal, and vacancies
- e. Compensation
- f. Exemptions
- g. Duties and liabilities

### a. In General

A postmaster is an officer under the United States, and in order to be eligible he must be competent to take the required oath of office.

A postmaster is an officer under the United States and his office is one of profit.<sup>95</sup> Postmasters are not common carriers and there is no analogy between them.<sup>96</sup>

**Eligibility.** One who is not in legal contemplation competent to take the required oath of office is not eligible to appointment as postmaster.<sup>97</sup>

### b. Selection and Qualification

The appointment and qualification of postmasters are regulated by federal statutes.

The statutes, 39 U.S.C.A. §§ 31-31d, make provision for the appointment of postmasters.<sup>98</sup> Under the statute, 39 U.S.C.A. § 31, nomination by the president, confirmation by the senate, the signing of the commission and affixing to it the seal of the United States are all the acts necessary to render the appointment complete.<sup>99</sup> The appointment is not rendered invalid by the subsequent death of the president before the transmission of the commission to the appointee<sup>1</sup> even though it is necessary that the person appointed should perform certain acts before he can legally enter on the duties of the office.<sup>2</sup>

**Qualification.** The statute, 39 U.S.C.A. § 34, requires that a bond shall be given by every postmaster.<sup>3</sup> The bond is a part of an integrated system of postal regulations<sup>4</sup> and the primary purpose of the bond is to protect the government and to insure the inviolability of government property.<sup>5</sup> Elaborate provisions have been promulgated by the post office department regarding surety companies which are authorized to write bonds, the limitation on the penal sum of the bond with relation to the paid-up capital and surplus of the surety, and the status and qualification of surety companies.<sup>6</sup>

90. U.S.—Twin Cities Properties v. U. S., 90 Ct.Cl. 119.

91. U.S.—McManus v. U. S., C.C.A. Tex., 10 F.2d 971.

92. U.S.—Eastern Bldg. Corporation v. U. S., 96 Ct.Cl. 438, certiorari denied 63 S.Ct. 45, 317 U.S. 650, 87 L.Ed. 523—Eastern Bldg. Corporation v. U. S., 96 Ct.Cl. 399, certiorari denied 63 S.Ct. 45, 317 U.S. 650, 87 L.Ed. 523.

93. U.S.—Leech v. U. S., 63 Ct.Cl. 657.

94. U.S.—Twin Cities Properties v. U. S., 90 Ct.Cl. 119.

95. La.—State v. Barham, 137 So. 862, 173 La. 488.  
"Postmaster" defined see supra § 1 b.

Power of postmaster to contract for carrying mails see infra § 27.

96. Ala.—Raisler v. Oliver, 12 So. 238, 97 Ala. 710, 38 Am.S.R. 213.

Pa.—Schroyer v. Lynch, 8 Watts 453.

97. 18 Opinion Attorney General 181.  
49 C.J. p 1135 note 94.

98. U.S.—Myers v. U. S., Ct.Cl., 47 S.Ct. 21, 272 U.S. 52, 71 L.Ed. 160.  
49 C.J. p 1135 note 95.

**Fraudulent agreement in connection with appointment**

In action for fraudulently obtaining agreement from plaintiff, before appointment as postmaster, to retain another as assistant, and using agreement to obtain plaintiff's removal, evidence was held insufficient to authorize verdict for plaintiff, and court erred in overruling motion for new trial.—Wilbanks v. Dunn, 14 S. E.2d 229, 64 Ga.App. 787.

99. U.S.—U. S. v. Le Baron, Ala., 19 How. 73, 15 L.Ed. 525.

1. U.S.—U. S. v. Le Baron, supra.

2. U.S.—U. S. v. Le Baron, supra.

3. U.S.—U. S., for Use and Benefit of Midland Loan Finance Co. v. National Surety Corporation, Minn., 60 S.Ct. 458, 309 U.S. 165, 84 L.Ed. 677.  
49 C.J. p 1136 note 5.

4. U.S.—U. S., for Use and Benefit of Midland Loan Finance Co. v. National Surety Corporation, supra.

5. U.S.—U. S., for Use and Benefit of Midland Loan Finance Co. v. National Surety Corporation, D.C. Minn., 23 F.Supp. 411, affirmed, C. C.A., 103 F.2d 450, affirmed 60 S.Ct. 458, 309 U.S. 165, 84 L.Ed. 677.

6. U.S.—U. S., for Use and Benefit

Under statute, 5 U.S.C.A. § 377, the bond must be made to the United States.<sup>7</sup> The bond must be duly executed by the postmaster; otherwise it is not such a bond as is provided for by the statute.<sup>8</sup> Likewise, it does not constitute a binding contract until approved and accepted by the postmaster general.<sup>9</sup>

#### c. Title to, and Possession of, Office

A duly appointed and qualified postmaster is authorized to take charge of the post office to which he has been appointed and to demand and receive government property in the custody of his predecessor.

After a postmaster has been duly appointed and has qualified by giving bond, he is authorized to take charge of the post office and to demand and receive from his predecessor in office the government property in his custody;<sup>10</sup> and for this purpose it is lawful for him or for his assistant acting under his authority to enter the post office and, if the property be unlawfully withheld from him, to take it by force, if necessary;<sup>11</sup> and this is so although the post office is a part of the building the title to which is in the former postmaster who is in possession at the time of entry.<sup>12</sup> A person is not entitled to take charge of the office of postmaster where the postmaster general fails or refuses to deliver his commission to him and another person is nominated and confirmed as the postmaster.<sup>13</sup>

The generally accepted method of testing the right of a postmaster to hold office is to sue at law in the court of claims for salary.<sup>14</sup> Even if a suit to obtain possession of the office of postmaster is maintainable in equity, the postmaster general is an indispensable party.<sup>15</sup>

#### d. Term of Office, Removal, and Vacancies

The president has the power to remove postmasters without the consent of the senate.

The president has, by virtue of the federal Constitution, article II § 2 clause 2, the sole power of removal of postmasters, the power not being subject in its exercise to the consent of the senate.<sup>16</sup> As much of the statute as attempts to make the president's power of removal of a postmaster dependent on the consent of the senate is in violation of the provisions set forth, and invalid.<sup>17</sup> No particular form of removal of a postmaster is prescribed; if the incumbent has notice that he has been removed and another appointed, and the appointing power in fact makes such appointment and recognizes the appointee as the legal officer, it is sufficient.<sup>18</sup>

*Suspension, vacation, or termination of office.* Under the Tenure of Office Act, 16 U.S.St. at L. p. 6, which is no longer in force, the president had authority to suspend a postmaster, his commission being in terms "subject to the conditions prescribed by law."<sup>19</sup> Notwithstanding a statute providing that no person shall hold the office of postmaster who does not reside at the place where the office is kept, until action is taken by the postmaster general, a postmaster does not vacate his office by remaining out of the neighborhood of the office.<sup>20</sup> If he keeps an office by an assistant, he is still responsible for the department and to individuals who should be injured by any negligence of duty in the office.<sup>21</sup>

One who is postmaster ceases to be such on the discontinuance of the post office.<sup>22</sup> While there is

of Midland Loan Finance Co. v. National Surety Corporation, D.C. Minn., 23 F.Supp. 411, affirmed, C. C.A., 103 F.2d 450, affirmed 60 S. Ct. 458, 309 U.S. 165, 84 L.Ed. 677.

7. U.S.—U. S., for Use and Benefit of Midland Loan Finance Co. v. National Surety Corporation, D.C. Minn., 23 F.Supp. 411, affirmed, C. C.A., 103 F.2d 450, affirmed 60 S.Ct. 458, 309 U.S. 165, 84 L.Ed. 677.

Idaho.—Idaho Gold Reduction Co. v. Croghan, 56 P. 164, 6 Idaho 471. Persons entitled to sue on bond see *infra* § 8 e.

8. Idaho.—Idaho Gold Reduction Co. v. Croghan, *supra*.

9. U.S.—Postmaster General v. Norvell, D.C.Pa., 19 F.Cas.No.11,310, 61p. 106.  
49 C.J. p 1136 note 9.

10. N.H.—Sterling v. Warden, 51 N. H. 217, 242, 12 Am.R. 80.

11. N.H.—Sterling v. Warden, *supra*.  
49 C.J. p 1136 note 13.

12. N.H.—Sterling v. Warden, *supra*.

13. U.S.—Curran v. Higgiston, D.C. Mass., 18 F.Supp. 969.

14. U.S.—Curran v. Higgiston, *supra*.

15. U.S.—Curran v. Higgiston, *supra*.

16. U.S.—Curran v. Higgiston, D.C. Mass., 18 F.Supp. 969.  
49 C.J. p 1136 notes 1, 2.

17. U.S.—Myers v. U. S., Ct.Cl., 47 S.Ct. 21, 272 U.S. 52, 122, 71 L.Ed. 160.  
49 C.J. p 1136 note 3.

18. N.H.—Sterling v. Warden, 51 N. H. 217, 12 Am.R. 80.

Failure of postmaster general to deliver commission  
Plaintiff's allegation that he was

eligible for appointment as postmaster, that his name was sent to senate and appointment confirmed, that commission was signed and sent to postmaster general, but never delivered to plaintiff, and that he qualified, that subsequently president sent defendant's name as postmaster, and that nomination was confirmed, disclosed that refusal or failure to deliver commission to plaintiff, together with subsequent appointment of defendant, were to be treated as tantamount to removal from office, even if plaintiff was duly appointed.—Curran v. Higgiston, D.C. Mass., 18 F.Supp. 969.

19. U.S.—Embry v. U. S., Ct.Cl., 100 U.S. 680, 25 L.Ed. 772.

20. U.S.—U. S. v. Pearce, C.C.Mich., 27 F.Cas.No.16,020, 2 McLean 14.

21. U.S.—U. S. v. Pearce, *supra*.

22. U.S.—Ware v. U. S., Pa., 4 Wall. 617, 18 L.Ed. 389.

some authority to the contrary,<sup>23</sup> the better view is that his term of office does not expire on a change in the class of his office by increase or decrease of salary.<sup>24</sup> He is entitled to remain in office during the term for which he was appointed unless sooner removed according to law.<sup>25</sup>

**Filling vacancies.** Under the federal Constitution, article XI § 2, providing that the president shall have power to fill up "all Vacancies that may happen during the Recess of the Senate" by granting commissions which shall expire at the end of the next session, where a vacancy in a postmastership occurred during the session of the senate which failed to confirm an appointment, the president may then in recess appoint a person to fill the vacancy by temporary commission to expire at the end of the next session of the senate.<sup>26</sup> The expression in the constitution "all vacancies that may happen during the recess" signifies all vacancies that may happen to exist during the recess.<sup>27</sup>

#### e. Compensation

- (1) In general
- (2) Expenses connected with running office
- (3) Readjustment and increase
- (4) Withholding commissions

##### (1) In General

The compensation allowed postmasters is fixed and controlled by congress.

Congress has power to fix and control the salaries of postmasters, and an amount fixed at any one time may be added to, or taken from, at will.<sup>28</sup>

**Postmasters of first, second, and third classes.** Under the statute, 39 U.S.C.A. § 54, now superseded by 39 U.S.C.A. § 858, provision was made for compensation to postmasters of the first, second, and third classes.<sup>29</sup> The whole theory of the statutes, it is said, is that every postmaster shall receive a salary dependent on, and regulated by, the amount of business done at his office;<sup>30</sup> and this is represented by the normal and natural sale of stamps, not sales of stamps unlawfully induced.<sup>31</sup> If there are no receipts in an office and nothing on which to base the compensation of the postmaster, no allowance can be made therefor.<sup>32</sup>

**Postmasters of fourth class.** Under the statute, 39 U.S.C.A. § 57, now superseded by 39 U.S.C.A. § 858, provision was made for compensation of postmasters of the fourth class.<sup>33</sup>

**Compensation during suspension.** A person appointed by the president to perform the duties of a postmaster, suspended under the Tenure of Office Act, is entitled to the salary and emoluments of the office while he performs the duties of the suspended officer.<sup>34</sup> The latter is "not entitled to pay or emolument while not performing its duties because of his suspension."<sup>35</sup>

##### (2) Expenses Connected with Running Office

The postmaster general is authorized by statute to allow postmasters of the first and second class reasonable sums for expenses connected with the running of their offices.

The statute, 39 U.S.C.A. § 64, permits the postmaster general to allow postmasters of the first and second class reasonable sums for expenses connected with the running of their offices.<sup>36</sup> This

23. 18 Opinion Attorney General 271.

24. U.S.—Wilson v. U. S., 26 Ct.Cl. 186, affirmed 12 S.Ct. 539, 144 U.S. 24, 36 L.Ed. 332—16 Opinion Attorney General 18.

25. 16 Opinion Attorney General 18.

26. 30 Opinion Attorney General 314.

49 C.J. p 1136 note 24.

27. 30 Opinion Attorney General 314.

28. U.S.—Embry v. U. S., Ct.Cl., 100 U.S. 686, 25 L.Ed. 772.

29. U.S.—U. S. v. Foster, Mass., 34 S.Ct. 666, 233 U.S. 515, 58 L.Ed. 1034.

49 C.J. p 1137 note 28.

Assigning office of fourth class to third class

Where the office of a postmaster of the fourth class is assigned to the third class at a designated sal-

ary from a designated date, a postmaster is entitled, if he performs the duties of the office, to compensation at the rate of that salary from that date, without regard to his appointment by the president and confirmation by the senate; nor can his salary be affected by any subsequent order made by a superior officer.—U. S. v. Wilson, Ct.Cl., 12 S.Ct. 539, 144 U.S. 24, 36 L.Ed. 332.

30. U.S.—U. S. v. Foster, Mass., 34 S.Ct. 666, 233 U.S. 515, 58 L.Ed. 1034—U. S. v. Wilson, Ct.Cl., 12 S.Ct. 539, 144 U.S. 24, 36 L.Ed. 332.

31. U.S.—U. S. v. Foster, Mass., 34 S.Ct. 666, 233 U.S. 515, 58 L.Ed. 1034.

49 C.J. p 1137 note 30.

32. U.S.—Ware v. U. S., Pa., 4 Wall. 617, 18 L.Ed. 389.

33. U.S.—Fussell v. U. S., C.C.A. Fla., 100 F.2d 995

49 C.J. p 1137 note

#### Commission on stamps canceled

Statute authorizing compensation of postmasters by commissions on canceled stamps "on matter actually mailed at their office" manifests intent that compensation be made on the basis of business regularly done under normal circumstances.—Fussell v. U. S., supra.

**Postal regulation** providing that postmasters and post offices of fourth class shall not claim credit for cancellation of postage stamps on matter diverted from other post offices to their post office for mailing, etc., is reasonable and valid.—Fussell v. U. S., supra.

34. U.S.—Embry v. U. S., Ct.Cl., 100 U.S. 680, 685, 25 L.Ed. 772.

35. U.S.—Embry v. U. S., supra.

36. U.S.—Moffett v. U. S., 37 Ct.Cl. 499.

49 C.J. p 1137 note 38.

Under former statute

Under the act of June 22, 1854, 10

statute, it is said, allows the postmaster general to do justice to his subordinates in the manner prescribed,<sup>37</sup> but does not invest him with discretion to allow reimbursement to one postmaster and refuse it to another.<sup>38</sup> It has further been held that the provision that no such allowance shall be made except on the order of the postmaster general merely prohibits such allowance from being made by other administrative officers,<sup>39</sup> and does not exclude a postmaster from judicial redress.<sup>40</sup>

Under postal regulations by which the department fixes a maximum sum which it will allow for rent, the allowance made by the department to a postmaster for the purpose of renting an office is not an absolute allowance, but is to be disbursed by him as agent of the United States, and must be accounted for under the strict law of agency.<sup>41</sup> If he secures an office for less than the allowance, he is entitled to retain therefrom only the amount actually expended.<sup>42</sup> If he contracts to pay more than the allowance for a building or room, and sublets a portion for a sum which, together with the allowance, exceeds the rent paid, he must credit the excess to the government to be deducted from the allowance.<sup>43</sup>

### (3) Readjustment and Increase

Salaries of postmasters of the various classes are to be readjusted in accordance with statutory directions.

Under the statute, 39 U.S.C.A. § 54, now superseded by 39 U.S.C.A. § 858, which provides for readjustment of the salaries of postmasters of the various classes at stated intervals, the postmaster general is to ascertain the revenue of each office at designated intervals and, on a state of facts to be furnished under oath by the postmaster, he fixes the compensation;<sup>44</sup> and this process is called "readjustment."<sup>45</sup> After a postmaster's salary has been

fixed, a readjustment by the postmaster general must be made before it can be increased.<sup>46</sup> The readjustment is an executive act,<sup>47</sup> requiring the exercise of skill and discretion,<sup>48</sup> taking effect in all cases prospectively;<sup>49</sup> and, if it is not performed, the law imposes no obligation on the government to pay an increased salary;<sup>50</sup> and the postmaster cannot recover for adjustment of salary unless there has actually been a readjustment by the postmaster general.<sup>51</sup> Courts cannot treat executive duties as performed when they have been neglected, or enforce rights dependent for their existence on a prior performance by an executive officer of duties he failed to perform.<sup>52</sup>

*Mandamus to compel readjustment.* If the postmaster general fails to do his duty in the matter of readjusting a postmaster's salary, he may be compelled by mandamus to do so,<sup>53</sup> but the court cannot direct the postmaster general as to what adjustment should be made.<sup>54</sup> After a readjustment has been made by the postmaster general, he is beyond the reach of the compulsory process of mandamus;<sup>55</sup> nor in these circumstances will mandamus issue to compel a subsequent postmaster general to readjust the salary so fixed by his predecessor.<sup>56</sup>

### (4) Withholding Commissions

The postmaster general is authorized by statute to withhold the commissions of a postmaster in certain instances.

The statute, 39 U.S.C.A. § 45, authorizes the postmaster general to withhold commissions of a postmaster in certain instances.<sup>57</sup> The statute is applicable only to postmasters whose accounts are pending and unsettled, and gives the postmaster general no authority to make an order reducing the compensation of a postmaster after his accounts have been settled and allowed.<sup>58</sup> The postmaster general may, in a proper case, withhold commis-

U.S.St. at L. pp 298, 299, authorizing the postmaster general in his discretion to make an extra allowance to postmasters for extra labor and expense in certain cases, it was held that no postmaster had a right to such allowance until it was made him by the postmaster general, and the action of the latter in the premises was final, and not subject to judicial review.—U. S. v. Davis, C.C. Or., 25 F.Cas.No.14,927, Deady 294.  
37. U.S.—Moffett v. U. S., 37 Ct.Cl. 499.  
38. U.S.—Moffett v. U. S., supra.  
39. U.S.—Moffett v. U. S., supra.  
40. C.J. p 1137 note 41.  
41. U.S.—Moffett v. U. S., supra.  
42. U.S.—U. S. v. Conan, C.C.Wis., 92 F. 104.

43. U.S.—U. S. v. Conan, supra.  
44. D.C.—U. S. v. Key, 10 D.C. 328.  
49 C.J. p 1137 note 50.  
45. U.S.—U. S. v. Key, supra.  
46. U.S.—U. S. v. McLean, Ct.Cl., 95 U.S. 750, 24 L.Ed. 579.  
49 C.J. p 1138 note 52.  
47. U.S.—U. S. v. McLean, supra—Trask v. U. S., 27 Ct.Cl. 330.  
48. D.C.—U. S. v. Key, 10 D.C. 328.  
49. U.S.—U. S. v. Ewing, Ct.Cl., 22 S.Ct. 480, 184 U.S. 140, 46 L.Ed. 471.  
49 C.J. p 1138 note 55.  
50. U.S.—U. S. v. McLean, Ct.Cl., 95 U.S. 750, 24 L.Ed. 579—Peysert v. U. S., 41 Ct.Cl. 311.

51. U.S.—Peysert v. U. S., supra.  
49 C.J. p 1138 note 57.  
52. U.S.—U. S. v. McLean, Ct.Cl., 95 U.S. 750, 24 L.Ed. 579—Trask v. U. S., 27 Ct.Cl. 330.  
53. U.S.—U. S. v. McLean, Ct.Cl., 95 U.S. 750, 24 L.Ed. 579.  
49 C.J. p 1138 note 60.  
Mandamus to public officers generally see Mandamus § 118 et seq.  
54. U.S.—Birdsong v. U. S., 34 Ct.Cl. 437.  
55. D.C.—U. S. v. Keys, 10 D.C. 328.  
56. D.C.—U. S. v. Keys, supra.  
57. U.S.—U. S. v. Bryant, D.C.Ky., 41 F.Supp. 1009.  
58. U.S.—Jaedicke v. U. S., Kan., 85 F. 372, 29 C.C.A. 199.  
49 C.J. p 1138 note 65.

sions,<sup>59</sup> but, having allowed them, he cannot recover them without due process of law.<sup>60</sup> The statute does not imply that the postmaster general shall impose a penalty or forfeiture on the postmaster as a punishment;<sup>61</sup> but inasmuch as the returns are false they may not be used as a basis to fix the compensation,<sup>62</sup> and, therefore, power is given the postmaster general to fix the compensation;<sup>63</sup> and in doing so he has to consider the circumstances and determine what is reasonable, approximating what the postmaster would have received if his returns had been correct, whether the returns were false for inadvertence, incompetency in himself, or his assistant, or for the purpose of fraudulently increasing his compensation.<sup>64</sup>

An order made in pursuance of the statute is not conclusive on a postmaster that his returns of business are actually false in fact,<sup>65</sup> or a conclusive determination that the postmaster is not entitled to any commissions as such,<sup>66</sup> or that his compensation shall be absolutely fixed and limited by the allowance made.<sup>67</sup>

#### f. Exemptions

In the absence of statute, a postmaster is not exempt from road duty or from arrest in civil cases.

A postmaster is not exempt from road duty imposed on the inhabitants by the legislature of the state of which he is a citizen, in the absence of an act of congress exempting postmasters from such duty.<sup>68</sup> The mere incumbency of the office of postmaster constitutes no privilege from arrest in civil cases in an action of tort for obtaining credit under false pretenses.<sup>69</sup>

#### g. Duties and Liabilities

##### (1) In general

##### (2) As to moneys coming into postmaster's hands

##### (3) As to mail matter

#### (1) In General

The postmaster is under the duty to locate the post office and to continue it at a place suitable and reasonably convenient for the use of the public.

In the discharge of his duties as such, a postmaster is bound to locate the post office and to continue it at a place suitable and reasonably convenient for the use of the public;<sup>70</sup> he is bound to exercise his judgment for the public benefit and any contract by which this exercise of his judgment is sold for his private emolument interferes with the proper discharge of his duties as a public officer, and such contract is against public policy and void.<sup>71</sup>

A postmaster acting by legal authority as the agent of the United States government in renting premises for a post office is not personally liable for rent after removal of the post office from the premises rented by direction of the government.<sup>72</sup>

*Arrangement of schedules for delivery and collection of mail.* The postmaster is authorized, and it is his duty, to arrange all schedules for the collection and delivery of mails,<sup>73</sup> and so to arrange them as to conform to the instructions of the postmaster general.<sup>74</sup>

#### (2) As to Moneys Coming into Postmaster's Hands

The postmaster is under the duty to keep safely all moneys which may come into his hands by virtue of his official position.

It is the duty of a postmaster to keep safely all moneys which may come into his hands by virtue of his official position,<sup>75</sup> and to account for and disburse them as required by law and by the rules of the United States post office department,<sup>76</sup> although they may have been stolen or embezzled without his fault.<sup>77</sup> He must pay over the public funds in his hands at the expiration of each successive

59. U.S.—U. S. v. Bryant, D.C.Ky., 41 F.Supp. 1009.

49 C.J. p 1138 note 65.

60. U.S.—U. S. v. Case, D.C.N.Y., 49 F. 270.

61. U.S.—U. S. v. Jaedicke, D.C. Kan., 73 F. 100.

62. U.S.—U. S. v. Jaedicke, supra.

63. U.S.—U. S. v. Jaedicke, supra.

64. U.S.—U. S. v. Jaedicke, supra.

65. U.S.—U. S. v. Dumas, La., 13 S.Ct. 872, 149 U.S. 278, 283, 37 L. Ed. 734.

66. U.S.—U. S. v. Dumas, supra.

67. U.S.—U. S. v. Dumas, supra. 49 C.J. p 1138 note 74.

68. S.C.—State v. Laurens Dist. Road Comrs., 25 S.C.L. 210.

Exemptions:

From work on roads generally see Highways § 307.

Of:

Contractors and carriers of mail from arrest see infra § 31 d. Postmaster from jury service see Juries § 153 a.

69. Vt.—Bartlett v. Bonnazzi, 98 A. 80, 90 Vt. 284.

Exemption of federal officer from arrest see Arrest §§ 3, 29 d.

70. Cal.—Spence v. Harvey, 22 Cal. 336, 83 Am.D. 69.

71. Cal.—Spence v. Harvey, supra.

72. N.Y.—Herrick v. Wiltsie, 160 N. Y.S. 1109, 96 Misc. 185.

49 C.J. p 1138 note 80.

73. U.S.—Rush v. U. S., 33 Ct.Cl. 417.

74. U.S.—Rush v. U. S., supra.

75. U.S.—U. S., for Use and Benefit of Midland Loan Finance Co. v. National Surety Corporation, Minn., 60 S.Ct. 458, 309 U.S. 165, 84 L.Ed. 677.

Ohio.—Seward v. National Surety Co., 165 N.E. 537, 120 Ohio St. 47.

76. Ohio.—Seward v. National Surety Co., supra.

77. Ohio.—Seward v. National Surety Co., supra.



quarter of his service,<sup>78</sup> and no preliminary demand of payment is necessary to put him in default for failure to pay over such funds,<sup>79</sup> and no proof of such demand having been made is requisite to sustain an action against him.<sup>80</sup>

### (3) As to Mail Matter

- (a) In general
- (b) Destruction or theft of stamps
- (c) Refusal to deliver mail
- (d) Loss or theft of mail

#### (a) In General

Postmasters are under the duty to care for and to forward mail matter coming into their hands.

Postmasters are under obligation to care for,<sup>81</sup> and to forward,<sup>82</sup> or, as discussed *infra* § 31, make delivery of, mail matter coming into their hands, subject to the limitation that the matter is not such as the law declares to be nonmailable.

*Delivery of registered letter containing bank deposit to impostor.* Where an impostor, by forging a depositor's name, induced a bank to send the deposit by registered mail, and, by impersonating the depositor, induced the postmaster to deliver the package, the postmaster was not liable to the defrauded depositor, there being no privity of contract between them.<sup>83</sup>

#### (b) Destruction or Theft of Stamps

A postmaster is entitled to credit for stamps which have been destroyed without his fault before he sold or used them, but he is liable if stamps are stolen or lost or they get into the hands of persons who might use them.

A postmaster should have credit for stamps which he is charged with when he can show that they were

destroyed without fault of his own before he sold or used them;<sup>84</sup> but if the stamps should be stolen or lost or should get into the hands of those who might use them and thus deprive the government of so much revenue, the postmaster should be held for them.<sup>85</sup> If he destroys them by his own wanton act or negligently suffers them to be destroyed, he is liable.<sup>86</sup>

If stamps were sent to a postmaster by mail, they will be charged against him at the time they were sent, and the presumption is that he received them;<sup>87</sup> but, if the postmaster general is satisfied by proof furnished by the postmaster that he never received the stamps, he is not legally responsible for them.<sup>88</sup> If a postmaster asserts that he returned stamps to the department, which never came, and proves that he mailed them, he is entitled to credit, since in sending them he does his duty and the subsequent loss of them is not his loss.<sup>89</sup>

#### (c) Refusal to Deliver Mail

The wrongful refusal of a postmaster to deliver a letter or newspaper to a person to whom it was sent constitutes a tort.

A postmaster who wrongfully refuses to deliver a letter or newspaper to a person to whom it was sent is guilty of a tortious act which renders him liable for the resulting damages.<sup>90</sup> The conversion should be clearly proved,<sup>91</sup> and withholding of the mails should be shown to be without cause or right,<sup>92</sup> and plaintiff must establish his title thereto by unquestioned evidence.<sup>93</sup>

Either trover<sup>94</sup> or case<sup>95</sup> is a proper remedy; and it has been held that the aggrieved party also has a remedy by replevin<sup>96</sup> or mandamus,<sup>97</sup> but not by injunction.<sup>98</sup>

78. 4 Opinion Attorney General 304.

79. 4 Opinion Attorney General 304.

80. 4 Opinion Attorney General 304.

81. U.S.—Spinney v. U. S., 32 Ct.Cl. 397.

82. U.S.—Dunlop v. Munroe, D.C., 8 F.Cas.No.4,167, 1 Cranch C.C. 536, affirmed 7 Cranch 242, 3 L.Ed. 329. N.Y.—Teall v. Felton, 1 N.Y. 537, 49 Am.D. 352.

83. Ark.—Polk v. Garrison, 258 S. W. 531, 162 Ark. 624.

84. U.S.—9 Opinion Attorney General 105. 49 C.J. p 1139 note 94.

85. 9 Opinion Attorney General 105. 49 C.J. p 1139 note 95.

86. 9 Opinion Attorney General 105.

49 C.J. p 1139 note 96.

87. 9 Opinion Attorney General 105.

88. 9 Opinion Attorney General 105.

89. 9 Opinion Attorney General 105.

90. U.S.—Teal v. Felton, N.Y., 12 How. 284, 13 L.Ed. 990.

49 C.J. p 1139 note 2.

Criminal liability of postmaster detaining, delaying, or opening mail see *infra* § 60.

Duty of postmaster to deliver mail see *infra* § 31.

91. N.Y.—Teall v. Felton, 3 Barb. 512, affirmed 1 N.Y. 537, 49 Am.D. 352, affirmed 12 How. 284, 13 L. Ed. 990.

92. N.Y.—Teall v. Felton, 3 Barb. 512, affirmed 1 N.Y. 537, 49 Am.D.

352, affirmed 12 How. 284, 13 L.Ed. 990.

93. N.Y.—Teall v. Felton, 3 Barb. 512, affirmed 1 N.Y. 537, 49 Am.D. 352, affirmed 12 How. 284, 13 L.Ed. 990.

94. U.S.—Teal v. Felton, N.Y., 12 How. 284, 13 L.Ed. 990.

Mail matter as subject to conversion see the C.J.S. title Trover and Conversion § 21, also 65 C.J. p 22 note 29.

95. Ala.—Moody v. Keener, 7 Port. 218.

49 C.J. p 1139 note 7.

96. U.S.—Boardman v. Thompson, C.C.Ky., 12 F. 675.

97. U.S.—Boardman v. Thompson, *supra*.

Mandamus to public officers generally see Mandamus § 118 et seq.

98. U.S.—Boardman v. Thompson, *supra*.

*Jurisdiction of courts.* State courts have jurisdiction of actions of trover or case for wrongful refusal to deliver mail.<sup>99</sup>

(d) Loss or Theft of Mail

- aa. In general
- bb. Default or misfeasance of clerks or assistants
- cc. Actions to enforce liability

aa. In General

A postmaster is liable for damages resulting from the loss or theft of mail matter which has come into his hands where such loss or theft is due to his negligence or wrongful act.

A postmaster is liable for damages resulting from the loss or theft of mail matter which has come into his hands where such loss or theft is due to his negligence<sup>1</sup> or wrongful act.<sup>2</sup> Nevertheless, a postmaster is not liable as a common carrier<sup>3</sup> or as an insurer.<sup>4</sup> He is held to ordinary diligence in the discharge of the duties of his office, and can only be made liable for loss occasioned by want of such diligence.<sup>5</sup>

bb. Default or Misfeasance of Clerks or Assistants

A postmaster is responsible for the default and misfeasance of his clerks or assistants appointed by him where he has been negligent in his selection or in his superintendence of such clerks or assistants.

A postmaster is not responsible for the default and misfeasance of his clerks or assistants, although appointed by him, and under his control, unless it be shown that the postmaster was negligent in not exercising proper care and prudence in the selection of suitable and competent persons to perform the duties of clerks or deputy assistants,<sup>6</sup> or unless it be shown that the postmaster himself was negligent in the duty resting on him properly to superintend such clerks or assistants in the performance of the particular acts or duty, the doing of

which or the omission to do which caused the loss and injury.<sup>7</sup> On the other hand, if he is negligent in either respect mentioned, he is liable for any loss resulting from such negligence.<sup>8</sup> Exemption from liability for default or misfeasance of his clerks or assistants is available to the postmaster only in cases where they are appointed in pursuance of some law expressly authorizing it, so that by virtue of the law and the appointment the appointees become in some sort public officers themselves; and if a postmaster employs a clerk or assistant independently of express authority, who is paid by him out of his own salary or means, he is liable for his default or misfeasance as any private person would be for the acts of his agent or employee; in such cases the doctrine of respondeat superior applies.<sup>9</sup> If the loss be occasioned by the negligence of clerks who were not regularly appointed and sworn as his assistants, the postmaster will be responsible.<sup>10</sup>

*Action against personal representative.* Whether or not an action will lie against a postmaster in his lifetime for money feloniously taken out of a letter by one of his clerks, it has been held that no action will lie therefor against his personal representatives after his death.<sup>11</sup>

cc. Actions to Enforce Liability

State courts have jurisdiction of actions for damages resulting from loss or theft of mail caused by the negligence of the postmaster in the discharge of his official duties.

State courts have jurisdiction of actions for damages accruing from loss or theft of mail caused by negligence of the postmaster in the discharge of his official duties.<sup>12</sup>

Case will lie against a postmaster for negligence whereby a letter containing money was stolen from his office;<sup>13</sup> but an action for money had and received is not a proper form of action to recover the money.<sup>14</sup>

99. U.S.—Teal v. Felton, N.Y., 13 How. 284, 13 L.Ed. 990.  
Ala.—Moody v. Keener, 7 Port. 218.

1. Idaho.—Idaho Gold Reduction Co. v. Croghan, 56 P. 164, 6 Idaho 471.  
49 C.J. p 1189 note 13.  
Liability on bond see infra § 8.

2. Idaho.—Idaho Gold Reduction Co. v. Croghan, supra.  
Criminal liability of postmaster for embezzling or stealing mail matter see infra § 56.

3. Ala.—Raisler v. Oliver, 12 So. 238, 97 Ala. 710, 38 Am.S.R. 213.  
49 C.J. p 1189 note 15.

4. U.S.—U. S. v. Rogde, D.C.S.D., 214 F. 283.  
49 C.J. p 1140 note 16.

5. Ala.—Raisler v. Oliver, 12 So. 38, 97 Ala. 710, 38 Am.S.R. 213.  
49 C.J. p 1140 note 17.

6. Ala.—Raisler v. Oliver, 12 So. 238, 97 Ala. 710, 38 Am.S.R. 213.  
49 C.J. p 1140 note 18.

7. Ala.—Raisler v. Oliver, supra.  
49 C.J. p 1140 note 18.

8. U.S.—Dunlop v. Munroe, D.C., 7 Cranch 242, 3 L.Ed. 329.  
Pa.—Schroyer v. Lynch, 8 Watts 453.

9. Ala.—Raisler v. Oliver, 12 So. 238, 97 Ala. 710, 38 Am.S.R. 213.  
49 C.J. p 1140 note 21.

10. Me.—Bishop v. Williamson, 11 Me. 495.  
Vt.—Christy v. Smith, 23 Vt. 663.

11. N.Y.—Franklin v. Low, 1 Johns. 396.  
49 C.J. p 1140 note 24.

12. Ala.—Raisler v. Oliver, 12 So. 238, 97 Ala. 710, 38 Am.S.R. 213.  
49 C.J. p 1140 note 25.

13. S.C.—Coleman v. Frazier, 38 S. C.L. 146, 53 Am.D. 727.  
49 C.J. p 1140 note 26.

14. Vt.—Danforth v. Grant, 14 Vt. 283, 39 Am.D. 224.  
49 C.J. p 1140 note 27.

**Pleading.** General rules of pleading in civil actions ordinarily are applicable,<sup>15</sup> including rules governing issues, proof, and variance.<sup>16</sup> Where it is intended to charge a postmaster for the negligence of his assistants, the pleadings must be made up according to the case, and his liability will result only from his own neglect in not properly superintending the discharge of their duties in his office.<sup>17</sup> However, a count in the alternative charging the loss to have been caused by the misfeasance of defendant or some other person employed by him is good on general demurrer.<sup>18</sup> With respect to negligence, it will be sufficient to declare generally that the loss complained of was occasioned by defendant's carelessness and negligence.<sup>19</sup>

**Evidence.** General rules governing evidence in civil actions usually apply<sup>20</sup> with respect to the burden of proof and presumptions<sup>21</sup> and the admissibility of evidence<sup>22</sup> and its weight and sufficiency.<sup>23</sup>

**Review.** General rules pertaining to the review of judgments and orders in civil actions ordinarily are applicable.<sup>24</sup>

## § 8. — Liability of Postmaster and Sureties on Official Bond

- a. For what losses liable
- b. Amount recoverable on bond
- c. Period of liability
- d. Discharge from liability
- e. Proceedings to enforce liability

### a. For What Losses Liable

- (1) In general
- (2) Public money or property
- (3) Money order funds
- (4) Stamps; funds remitted to depository

## (1) In General

The sureties on the bond of a postmaster are liable for various losses, including loss of registered mail resulting from the negligence of the postmaster.

Liability on the bond of a postmaster is governed by the terms of the bond, the duties secured, and the statute under which the bond is given, and, under this rule, sureties on postmasters' bonds have been held responsible for various losses.<sup>25</sup>

**Registered letters or packages.** Where registered mail is lost through the negligence of a postmaster, the sureties on his bond, conditioned as required by statute, are liable for the loss,<sup>26</sup> and the sureties are liable on such bond for money embezzled by the postmaster from registered letters.<sup>27</sup> It has also been held that the postmaster and his sureties are liable absolutely on the bond for the value of registered mail delivered to the postmaster, which was stolen without negligence on his part;<sup>28</sup> but later decisions, among which is a decision of the supreme court of the United States, have definitely decided the rule to the contrary.<sup>29</sup> Under postal regulations a postmaster and his sureties are responsible for registered mail lost when a post office has been robbed only if the depredation or loss is due to negligence or disregard of the regulations;<sup>30</sup> and in order to authorize a recovery on the bond, there must not only be negligence or disregard of regulations, but there must be a causal connection between the loss and the negligence or disregard of regulations.<sup>31</sup> It has similarly been held in construing these regulations that a postmaster is not liable for the loss of a registered package, which in the usual course came into the possession of a sworn clerk in his office, not appointed by him, but in the classified civil service, without his knowledge, and which was lost or stolen

15. U.S.—Dunlop v. Munroe, D.C., 7 Cranch 242, 3 L.Ed. 329.

16. Vt.—Christy v. Smith, 23 Vt. 663.

49 C.J. p 1140 note 30 [a].

17. U.S.—Dunlop v. Munroe, D.C., 7 Cranch 242, 3 L.Ed. 329.

49 C.J. p 1140 note 28.

18. U.S.—Dunlop v. Munroe, D.C., 8 F.Cas.No.4,167, 1 Cranch C.C. 536, affirmed 7 Cranch 242, 3 L.Ed. 329.

19. Vt.—Christy v. Smith, 23 Vt. 663.

49 C.J. p 1140 note 30.

20. Ala.—Raisler v. Oliver, 12 So. 238, 97 Ala. 710, 38 Am.S.R. 213.

21. Ala.—Raisler v. Oliver, *supra*.

49 C.J. p 1140 note 31.

22. Ala.—Raisler v. Oliver, *supra*.

49 C.J. p 1140 note 32.

23. U.S.—Dunlop v. Munroe, D.C., 7 Cranch 242, 3 L.Ed. 329.

49 C.J. p 1141 note 33.

24. Presumptions on appeal

In an action against a postmaster for the value of the contents of registered letters alleged to have been lost, in the absence of any showing to the contrary on the record, the appellate court will, in order to sustain the rulings of the court below, presume that his clerk or assistant is employed without express authority.—Raisler v. Oliver, 12 So. 238, 97 Ala. 710, 38 Am.S.R. 213.

25. U.S.—U. S. v. Barker, Pa., 100 F. 34, 40 C.C.A. 264.

49 C.J. p 1142 note 75.

Bond of postmaster generally see *supra* § 7 b.

Liability on bonds of officers:

Generally see Officers §§ 155-177.

Deputy and assistant postmasters see *infra* § 9.

Federal officers generally see the C.J.S. title United States §§ 53-56, also 65 C.J. p 1287 note 73 et seq.

26. Ariz.—U. S. v. Griswold, 76 P. 596, 8 Ariz. 453.

27. U.S.—Gibson v. U. S., N.H., 208 F. 534, 125 C.C.A. 536.

28. Ariz.—U. S. v. Griswold, 80 P. 317, 9 Ariz. 304.

29. U.S.—Deal v. U. S., Alaska, 47 S.Ct. 613, 274 U.S. 277, 71 L.Ed. 1045—U. S. v. Rogde, D.C.S.D., 214 F. 283.

30. U.S.—Deal v. U. S., Alaska, 47 S.Ct. 613, 274 U.S. 277, 71 L.Ed. 1045.

49 C.J. p 1142 note 71.

31. U.S.—Deal v. U. S., *supra*.

therefrom without his negligence or wrongdoing or disregard of the regulations.<sup>32</sup>

### (2) Public Money or Property

A postmaster and his sureties are liable on a bond conditioned on the faithful discharge of his duty for the loss of public moneys coming into the hands of the postmaster.

A postmaster and his sureties are liable on a bond conditioned on the faithful discharge of his duty for the loss of public moneys coming into the hands of the postmaster, although such moneys may have been lost without fault or negligence on his part.<sup>33</sup> The policy of the government of the United States requires that principals and sureties on the bond of postmasters shall be held liable at all events,<sup>34</sup> and the only exceptions are those provided for by the acts of congress.<sup>35</sup> It has been held, however, that money collected on C. O. D. parcels and held by a postmaster for use in purchasing money orders to be sent to the senders of the parcels is not public money until it is used to purchase money orders, for the embezzlement of which the postmaster's bond is liable, within the statute prescribing the duty of postmasters in respect of public moneys coming into their possession.<sup>36</sup> Similarly it has been held that a registered package containing money belonging to the United States, but which is not such that it may be "ordered by the Postmaster General to be transferred or paid out," is not public money, within such statute, and that a postmaster and his sureties are not liable as insurers under the statute for the loss thereof.<sup>37</sup>

**Robbery by postmaster.** The sureties on a postmaster's bond are liable to the government for loss of public moneys due to an act of robbery by the postmaster of a carrier to whom he had delivered the money to be carried through the mails to the postal depository.<sup>38</sup>

### (3) Money Order Funds

A postmaster and his sureties are liable on his bond

for money order funds received by him and not accounted for.

In addition to the statute, 39 U.S.C.A. § 46, requiring postmasters to keep safely all public moneys collected by them or which may come into their possession, it is further provided by statute, 39 U.S.C.A. § 736, that "all money received for the sale of money orders, including all fees thereon . . . shall be deemed and taken to be money-order funds and money in the Treasury of the United States."<sup>39</sup> Money order funds are accordingly part of the public moneys of the United States, as considered *infra* § 17, and a postmaster and his sureties are liable on his bond for money order funds received by him and not accounted for,<sup>40</sup> although they may have been lost through burglary without fault or negligence on his part;<sup>41</sup> and his liability is not affected by the fact that the United States furnished the building and the safe therein, both of which he was required to use and from which the property was taken by the burglars.<sup>42</sup> The only way provided by statute for a postmaster to obtain relief in case of robbery or larceny is by applying to the postmaster general,<sup>43</sup> in which case, if the evidence is satisfactory to that officer, he may, in his discretion, allow the postmaster credit for the amount thus lost.<sup>44</sup> So, also, the postmaster and his sureties are liable for money order funds embezzled by a clerk in charge of the money order accounts and money order funds of the post office,<sup>45</sup> and the facts that the clerk who embezzled money was not appointed by the principal in the bond and that the tenure of office of the clerk was held under a civil service act do not affect the obligation of the bond.<sup>46</sup>

It has been held, however, that funds in other offices on which a postmaster could draw are not money order funds in his custody within the meaning of the statute and postal regulations.<sup>47</sup> Moneys collected on C. O. D. parcels and held by the postmaster for use in purchasing money orders to be sent to the senders of the parcels are not "money order funds" for the embezzlement of which the

32. U.S.—U. S. v. Rogde, D.C.S.D., 214 F. 288.

33. U.S.—U. S. v. Fordyce, D.C.Ky., 122 F. 962.  
49 C.J. p 1141 note 39.

34. U.S.—U. S. v. Morrison, C.C.S.C., 26 F.Cas.No.15,817, Chase 521, 524.  
49 C.J. p 1141 note 40.

35. U.S.—U. S. v. Morrison, *supra*.  
49 C.J. p 1141 note 41.

36. U.S.—Smyer v. U. S., Ala., 47

S.Ct. 375, 273 U.S. 333, 71 L.Ed. 667, 51 A.L.R. 780.  
49 C.J. p 1141 note 42.

37. U.S.—Deal v. U. S., Alaska, 47 S.Ct. 613, 274 U.S. 277, 71 L.Ed. 1045.

38. U.S.—U. S. v. Jones, C.C.La., 36 F. 759.

39. U.S.—Smyer v. U. S., Ala., 47 S.Ct. 375, 273 U.S. 333, 71 L.Ed. 667, 51 A.L.R. 780.  
49 C.J. p 1141 note 47.

40. U.S.—U. S. v. Fordyce, D.C.Ky., 122 F. 962.

41. U.S.—U. S. v. Fordyce, *supra*.

42. U.S.—U. S. v. Fordyce, *supra*.  
49 C.J. p 1141 note 52.

43. U.S.—U. S. v. Fordyce, *supra*.

44. U.S.—U. S. v. Fordyce, *supra*.

45. U.S.—U. S. v. Adamo, C.C.A. Mass., 54 F.2d 764—Bryan v. U. S., Cal., 90 F. 473, 33 C.C.A. 617, 53 L.R.A. 218.

46. U.S.—Bryan v. U. S., *supra*.

47. U.S.—U. S. v. Norton, Tex., 107 F. 412, 46 C.C.A. 387.

postmaster and his sureties are liable within the statute, 39 U.S.C.A. § 736, providing that "all money received for the sale of money-orders, including all fees thereon . . . shall be deemed and taken to be money-order funds and money in the Treasury of the United States."<sup>48</sup>

#### (4) Stamps; Funds Remitted to Depository

A postmaster and his sureties are liable on his bond for stamps received by him and not accounted for.

A postmaster and his sureties are liable on his bond for stamps received by him and not accounted for, although they may have been lost through burglary and without fault or negligence on his part;<sup>49</sup> and he is not relieved from such liability by the fact that the United States furnished the building and the safe therein, both of which he was required to use and from which the property was taken by the burglars.<sup>50</sup> A statute which provides "that it shall be the duty of the postmaster general to provide and furnish to all deputy postmasters, and to all other persons applying and paying therefor, suitable postage stamps," etc., authorizes the postmaster general to deliver postage stamps to a deputy postmaster without repayment; and the sureties on the official bond of a postmaster are liable for postage stamps so received by their principal.<sup>51</sup>

*Funds remitted to depository.* A postmaster and his sureties are not liable for loss of funds which, in the discharge of his official duty, the postmaster had remitted by registered package to the depository of his office by reason of the negligence or misconduct of the depository after the reception of the package by him.<sup>52</sup> This is so, although the postal regulations provide that the postmaster shall not take credit in his cash book or weekly statement for money sent by him until he has received the certificate of deposit.<sup>53</sup>

#### b. Amount Recoverable on Bond

A postmaster and his sureties are bound to pay the actual loss sustained by the government within the amount of the penalty fixed by the bond.

A postmaster and his sureties are bound to pay the actual loss which the government may sustain by any failure to discharge his duties faithfully<sup>54</sup> within the amount of the penalty fixed by the bond but not in excess thereof.<sup>55</sup> Where a registered package is lost through the negligence of the postmaster,<sup>56</sup> or money contained in a registered letter is embezzled by him,<sup>57</sup> the government's recovery is not limited to the sum which the government obligates itself to pay the sender of registered mail in case of loss, but it is entitled to recover from the sureties the full amount lost.<sup>58</sup>

#### c. Period of Liability

Unless otherwise qualified by statute the liability of sureties on the bond of a postmaster extends to and covers the due performance of his official duties during his term of office under the appointment or commission which placed him in office at the time the bond was given.

Except when and to the extent that the rule may have been changed or qualified by statute, 39 U.S.C.A. § 38,<sup>59</sup> the liability of sureties on the bond of a postmaster extends to and covers the due performance of his official duties during his term of office under the appointment or commission which placed him in office at the time the bond was given.<sup>60</sup> The exception in the statute applies as well to a vacancy caused by expiration of commission, as by removal, suspension, resignation, or death;<sup>61</sup> but it applies only in the case of a vacancy.<sup>62</sup> After the postmaster's commission has expired, it has been held that the sureties may lawfully assume possession of the post office and the government property therein and depute one of their number, or another person, as acting postmaster, to perform the duties of the office until a successor is appointed to take possession.<sup>63</sup>

48. U.S.—Smyer v. U. S., Ala., 47 S.Ct. 375, 273 U.S. 333, 335, 71 L. Ed. 667, 51 A.L.R. 780.  
49 C.J. p 1143 note 53.

49. U.S.—U. S. v. Fordyce, D.C.Ky., 123 F. 962.

50. U.S.—U. S. v. Fordyce, supra.

51. U.S.—U. S. v. Mason, C.C.Ohio, 26 F.Cas.No.15,737, 2 Bond 183.

52. N.M.—U. S. v. Swan, 45 P. 980, 8 N.M. 401.

53. N.M.—U. S. v. Swan, supra.  
49 C.J. p 1143 note 65.

54. U.S.—Jaedicke v. U. S., Kan., 85 F. 372, 23 C.C.A. 199.

55. U.S.—Boody v. U. S., C.C.Me., 3

F.Cas.No.1,636, 1 Woodb. & M. 150  
—Lawrence v. U. S., C.C.Mich., 15  
F.Cas.No.8,145, 2 McLean 581.

56. Ariz.—U. S. v. Griswold, 76 P. 596, 8 Ariz. 453.

57. U.S.—Gibson v. U. S., N.H., 208 F. 534, 125 C.C.A. 536.

58. U.S.—Gibson v. U. S., supra.  
49 C.J. p 113 notes 80–82.

59. U.S.—U. S. v. National Sur. Corp., D.C.N.J., 71 F.Supp. 14.  
49 C.J. p 1143 note 83.

60. U.S.—Postmaster General v. Reeder, N.J., 19 F.Cas.No.11,311, 4 Wash.C.C. 678—20 Opinion Attorney General 447.

61. 20 Opinion Attorney General 447.

#### Successor without color of authority

Where postmaster's son, after postmaster's death, assumed duties of postmaster without color of authority and thereafter postmaster's account showed a deficiency arising in part during service of postmaster and in part during service of his son, surety on postmaster's bond was liable for the defalcation, not only as to the postmaster, but also as to the son.—U. S. v. National Sur. Corp., D. C.N.J., 71 F.Supp. 14.

62. U.S.—U. S. v. Wright, D.C.N.J., 28 F.Cas.No.16,776.  
49 C.J. p 1143 note 88.

63. 20 Opinion Attorney General 447.

*Successive bonds.* While the sureties on a second bond are not liable for a shortage in the accounts of the postmaster occurring before the bond executed by them took effect,<sup>64</sup> equity may consider the two sets of sureties as jointly responsible for the defaults occurring after the giving of the second bond.<sup>65</sup>

Under the existing statute, 39 U.S.C.A. § 36, whenever any postmaster is required to execute a new bond, all payments made by him after its execution may, if the postmaster general or the comptroller general deem it just, be applied first to discharge any balance which may be due from the postmaster under his old bond.<sup>66</sup>

#### d. Discharge from Liability

- (1) In general
- (2) Indulgence or forbearance

##### (1) In General

Various matters have been considered as discharging or failing to discharge the sureties on the bond of a postmaster, such as the taking of a second bond.

Various matters have been considered as discharging or failing to discharge the sureties on the bond of a postmaster.<sup>67</sup> The order of the postmaster general to the postmaster not to remit the money he may receive, but to retain it to answer his drafts, does not discharge the sureties,<sup>68</sup> although the order is issued subsequent to the execution of the bond.<sup>69</sup> The sureties are liable for noncompliance by the postmaster with subsequent as well as with past laws or orders until his official term expires if the orders are such as are justified by law.<sup>70</sup>

*Taking of second bond.* The giving of a new

official bond by a postmaster does not discharge his sureties under the old bond either for the past or subsequent defaults of his principal,<sup>71</sup> unless the new bond is given under a statute which declares in terms or by just construction that it shall have that effect.<sup>72</sup>

##### (2) Indulgence or Forbearance

The sureties on a postmaster's bond are not discharged by mere indulgence or forbearance on the part of the government, but the sureties are discharged by the government's failure to bring suit on the bond within the time limited by statute.

Mere indulgence or forbearance on the part of the government toward a postmaster who is in default, in the absence of fraud, will not discharge his sureties from their obligations on his bond.<sup>73</sup> Likewise, the fact that the government continued a postmaster in office after discovery of a defalcation, and delayed to disclose it, will not relieve his sureties from liability for subsequent defalcations.<sup>74</sup>

*Delay in bringing suit.* In the absence of a statute so providing, neither a postmaster nor his sureties are discharged from liability on his bond by the neglect of the postmaster general to sue, within the time prescribed by law, for balances due from the postmaster.<sup>75</sup> The responsibility of the postmaster general is superadded to, not substituted for, that of the obligors.<sup>76</sup>

By statute, 39 U.S.C.A. § 40, it is now provided that, if it shall appear on the settlement of the account of any postmaster that he is indebted to the United States, the sureties cannot be held liable for such indebtedness unless suit therefor shall be instituted within three years after the close of the account.<sup>77</sup> The statute commences to run from

64. U.S.—U. S. v. Van Steinberg, D. C.Iowa, 77 F. 860.

49 C.J. p 1143 note 93.

Discharge from liability by giving new bond see *infra* subdivision d (1) of this section.

65. U.S.—Postmaster-Gen. v. Munger, C.C.N.Y., 19 F.Cas.No.11,309, 2 Paine 189.

66. U.S.—U. S. v. Honsman, Mont., 70 F. 581, 17 C.C.A. 283.

49 C.J. p 1143 note 96.

Prior to the enactment of this or similar statutes, there was a conflict of authority as to whether moneys received subsequent to the execution of the last bond could, before its discharge, be applied to a former indebtedness accrued while the former bond was in force.—Postmaster-Gen. v. Furber, C.C.Me., 19 F.Cas.No. 11,308, 4 Mason 333—Postmaster-Gen. v. Norvell, D.C.Pa., 19 F.Cas. No.11,310, 4 Gilp. 106.

67. Increase of responsibility

(1) An act of congress increasing rates of postage, and consequently the responsibility of the postmaster's sureties, will not discharge them.—Postmaster-Gen. v. Munger, C.C.N.Y., 19 F.Cas.No.11,309, 2 Paine 189.

(2) It would be otherwise, however, if the act of congress enlarged the powers of the postmaster, or superadded new duties, whereby he was made the receiver of other moneys than for postages.—Postmaster-Gen. v. Munger, *supra*.

68. U.S.—Postmaster-Gen. v. Reeder, C.C.N.J., 19 F.Cas.No.11,311, 4 Wash.C.C. 678.

49 C.J. p 1144 note 15.

69. U.S.—Boody v. U. S., C.C.Me., 3 F.Cas.No.1,636, 1 Woodb. & M. 150, 163.

70. U.S.—Boody v. U. S., *supra*.

49 C.J. p 1144 note 17.

71. U.S.—Postmaster-Gen. v. Reeder, N.J., 19 F.Cas.No.11,311, 4 Wash.C.C. 678.

49 C.J. p 1144 note 19.

72. U.S.—Postmaster-Gen. v. Munger, C.C.N.Y., 19 F.Cas.No.11,309, 2 Paine 189.

73. U.S.—U. S. v. Wright, D.C.N.Y., 28 F.Cas.No.16,776.

49 C.J. p 1144 note 1.

74. U.S.—U. S. v. Wright, *supra*.

49 C.J. p 1144 note 2.

75. U.S.—Locke v. Postmaster-Gen., C.C.Mass., 15 F.Cas.No.8,441, 3 Mason 446.

49 C.J. p 1144 note 3.

76. U.S.—Dox v. U. S. Postmaster-Gen., N.Y., 1 Pet. 318, 7 L.Ed. 160.

77. U.S.—U. S. v. Arthur, D.C.Fla., 68 F.Supp. 936.

49 C.J. p 1144 note 8.

Repeal of statute

The statute, 39 U.S.C.A. § 40, was

the time the postmaster's account is "closed," by audit and settlement,<sup>78</sup> not by the default or by the principal's ceasing to be postmaster.<sup>79</sup> Where the action on the bond is for recovery of amounts embezzled by a clerk during the postmaster's term of office, the statute begins to run when demand is made on the surety by a post office inspector under direction of an assistant postmaster general, and not when notice from the general accounting office is given to the surety.<sup>80</sup> Where an amended petition states a new and different cause of action not within the original *lis pendens*, it does not relate back to the commencement of the action so as to prevent limitations from running in favor of the sureties of a new cause of action alleged in the amendment.<sup>81</sup>

#### e. Proceedings to Enforce Liability

- (1) In general
- (2) Defenses
- (3) Persons entitled to sue
- (4) Pleading, evidence, and trial

##### (1) In General

Such courts have jurisdiction to entertain actions on bonds of postmasters as are designated by statute.

not repealed by 6 U.S.C.A. § 5, requiring suits on the official bonds of any officer chargeable with public money to be instituted within five years to hold the sureties liable, since the latter act is a general statute manifestly intended to cover cases not otherwise provided for.—*U. S. v. Arthur*, D.C.Fla., 68 F.Supp. 936.—*U. S. v. Maxwell*, D.C.Ga., 286 F. 740, reversed on other grounds, C.C.A., 293 F. 584.

#### Letter constituting settlement and closing of account

A letter from the general accounting office to the surety on former postmaster's official bond, stating that an audit of former postmaster's account showed a specified balance due the United States and that former postmaster was short in his fixed credit account in a stated amount, and requesting remittance to the postmaster at New York City, constituted a "settlement and closing of the account" of former postmaster within statute relieving surety from liability for principal's defalcation if suit therefor is not instituted within three years after the close of such account.—*U. S. v. Bryant*, D.C.Ky., 41 F.Supp. 1009.

#### Under former statute

By the act of March 3, 1835, 4 U.S. St. at L., pp 102, 103, c 64, § 3, the sureties on a postmaster's bond were discharged from all liability by two years' delay to bring suit after a de-

fault in not paying, when required by law, a quarterly balance found due by the auditor.—*Postmaster-Gen. v. Rice*, D.C.Pa., 19 F.Cas.No. 11,312, Gilp. 554—49 C.J. p 1144 note 6.

78. U.S.—*U. S. v. Cash*, C.C.A.Ga., 293 F. 584.

49 C.J. p 1144 note 9.

#### Action held timely

Where postmaster's account showing deficiency was closed on May 3, 1937, action on postmaster's bond brought on Aug. 16, 1939, was timely.—*U. S. v. National Sur. Corp.*, D.C.N.J., 71 F.Supp. 14.

79. U.S.—*U. S. v. Cash*, C.C.A.Ga., 293 F. 584.

80. U.S.—*U. S. v. Arthur*, D.C.Fla., 68 F.Supp. 936.

81. U.S.—*U. S. v. Norton*, Tex., 107 F. 412, 46 C.C.A. 387.

82. U.S.—*U. S. for Use and Benefit of Midland Loan Finance Co. v. National Surety Corporation*, Minn., 60 S.Ct. 458, 309 U.S. 165, 84 L.Ed. 677.

Ariz.—*U. S. v. Griswald*, 76 P. 596, 8 Ariz. 453.

#### Enforcement of officers' bonds:

Generally see Officers §§ 167-177. Federal officers generally see the C.J.S. title United States § 56, also 65 C.J. p 1289 note 97 et seq.

83. U.S.—*Postmaster-General v.*

The rules governing the enforcement of officers' bonds, especially bonds of federal officers, ordinarily apply to the enforcement of bonds of postmasters except as it may otherwise be specifically provided by statute.<sup>82</sup> Such courts as are designated by statute have jurisdiction to entertain actions on bonds of postmasters.<sup>83</sup>

#### (2) Defenses

Various defenses have been urged and considered in actions on bonds of postmasters, including claims for credit.

In actions on bonds of postmasters various defenses have been urged.<sup>84</sup> In an action on a postmaster's bond to recover for money embezzled by him, it is not a defense that the senders of the letters were negligent in sending the money.<sup>85</sup> Voluntary payment to a creditor of the government may not be set up as a defense.<sup>86</sup> It is no defense to an action on the bond, to recover public funds unaccounted for, that such funds were embezzled by a clerk appointed under the civil service laws.<sup>87</sup>

*Claims for credit.* In an action on a postmaster's bond, a claim for a credit may be set up if the claim, in accordance with statutory requirements, has been duly presented to the department desig-

Early, Ga., 12 Wheat. 136, 6 L.Ed. 577.

49 C.J. p 1144 note 22.

Jurisdiction of United States district courts see Federal Courts § 308.

#### 84. Matters urged as defense

Under post-office regulation prohibiting granting of credit on commissions to postmasters as respects mail diverted from other post offices, fact that such diversion was not solicited was no defense in action against postmaster and her surety for commissions retained and disallowed.—*Fussell v. U. S.*, C.C.A.Fla., 100 F.2d 995.

*Acquittal under indictment for making false and fraudulent returns of the business done at his office, for the purpose of increasing his compensation, is not a bar to an action by the United States on the bond of a postmaster to recover the amount found due, on the adjustment of his accounts, as shown by the same returns.*—*U. S. v. Jaedicke*, D.C.Kan., 73 F. 100—49 C.J. p 1145 note 26.

85. U.S.—*Gibson v. U. S.*, N.H., 208 F. 534, 125 C.C.A. 536.

49 C.J. p 1145 note 24.

86. U.S.—*U. S. v. Keebler*, N.C., 9 Wall. 83, 19 L.Ed. 574.

87. U.S.—*U. S. v. Bryan*, C.C.Cal., 32 F. 290, affirmed 90 F. 473, 33 C. C.A. 617, 53 L.R.A. 218.

nated by statute for allowance and rejected;<sup>88</sup> but such credit is not so available unless the claim had been presented and rejected in whole or in part before the commencement of the suit,<sup>89</sup> or unless, as provided by statute, at the time of trial it appears that defendant was in possession of vouchers not before in his power to procure and that he was prevented from presenting the claim for credit by some unavoidable accident.<sup>90</sup>

The statutory requirement of presentment for claims for allowance and rejection thereof does not prevent a postmaster, against whom suit is brought for default on his official bond, from defending by showing that the money, or a part thereof claimed by the government, never actually came into his hands, without presenting the claim to the post office department, and having it disallowed.<sup>91</sup>

### (3) Persons Entitled to Sue

The postmaster general may sue on a postmaster's official bond, but, without the consent of the United States, a private person may not bring suit on such a bond.

The postmaster general may sue on bonds given by postmasters for the faithful discharge of the duties imposed on them by their office.<sup>92</sup> However, it is well settled that, in the absence of special statutory authorization, a private person cannot sue on a postmaster's bond payable to the United States for moneys coming into his hands in his official capacity and lost through his negligence or default.<sup>93</sup> Under such circumstances, the United States may sue for the benefit of the injured person and recover from the sureties on the offi-

cial bond of the postmaster the full amount of the loss.<sup>94</sup>

### (4) Pleading, Evidence, and Trial

The general rules of pleading, evidence, and trial in civil actions are applicable in an action on the bond of a postmaster.

General rules of pleading in civil actions, especially in actions on official bonds, ordinarily apply in actions on bonds of postmasters.<sup>95</sup> A petition in a suit against a postmaster for breach of his bond which alleges the time, manner, and substance of the breach sufficiently to enable him to defend is sufficient as against him.<sup>96</sup> In an action on a postmaster's bond for loss by theft of government money from a registered package, a complaint alleging that the loss was due to the postmaster's negligence and disregard of postal laws and regulations, in failing to use ordinary care to protect the package, although subject to motion to make more definite, is sufficient as against a general demurrer.<sup>97</sup> In an action to recover the value of registered mail negligently lost by him, brought by the United States for the benefit of the injured person, it is not necessary to allege that the suit is brought for his benefit, but it will be sufficient that the facts stated in the complaint show that such is the case.<sup>98</sup>

General rules as to issues, proof, and variance, especially in actions on other officers' bonds, apply in actions on postmasters' bonds.<sup>99</sup>

*Evidence.* In actions on postmasters' bonds the general rules in civil actions ordinarily apply with

88. U.S.—U. S. v. Davis, C.C.Or., 25 F.Cas.No.14,927, Deady 294.

89. Ariz.—U. S. v. Barnard, 25 P. 523, 1 Ariz. 319.

49 C.J. p 1145 note 29.

90. U.S.—Ware v. U. S., Pa., 4 Wall. 617, 18 L.Ed. 389.

49 C.J. p 1145 note 31.

91. U.S.—Norton v. U. S., Tex., 81 F. 819, 26 C.C.A. 637.

49 C.J. p 1145 note 32.

92. U.S.—Postmaster General v. Early, Ga., 12 Wheat. 136, 6 L.Ed. 577—Postmaster General v. Furbur, C.C.Me., 19 F.Cas.No.11,308, 4 Mason 333.

93. U.S.—Corpus Juris quoted in U. S., for Use and Benefit of Midland Loan Finance Co. v. National Surety Corporation, D.C.Minn., 23 F. Supp. 411, 418, affirmed, C.C.A., 103 F.2d 450, affirmed 60 S.Ct. 458, 30 U.S. 165, 84 L.Ed. 677.

49 C.J. p 1145 note 35.

Without the consent of the United States a private person may not bring suit on a postmaster's bond

payable to the United States.—U. S., for Use and Benefit of Midland Loan Finance Co. v. National Surety Corporation, Minn., 60 S.Ct. 458, 309 U. S. 165, 84 L.Ed. 677.

Fact that bond had been supplanted by new bond obtained when he was elevated from acting postmaster to postmaster did not authorize a third person to maintain action.—U. S., for Use and Benefit of Midland Loan Finance Co. v. National Surety Corporation, D.C.Minn., 23 F. Supp. 411, affirmed, C.C.A., 103 F.2d 450, affirmed 60 S.Ct. 458, 309 U.S. 165, 84 L.Ed. 677.

94. Ariz.—U. S. v. Griswold, 76 P. 596, 8 Ariz. 453.

Moral obligation to reimburse injured persons

The government may proceed to recover on a postmaster's bond for the total loss incurred and has a moral obligation to disburse the proceeds to persons who may have sustained the loss.—U. S., for Use and Benefit of Midland Loan Finance

Co. v. National Surety Corporation, D.C.Minn., 23 F. Supp. 411, affirmed, C.C.A., 103 F.2d 450, affirmed 60 S.Ct. 458, 309 U.S. 165, 84 L.Ed. 677.

95. Ariz.—U. S. v. Griswold, 76 P. 596, 8 Ariz. 453.

Plea of counterclaim for extra services and expenses incurred by a postmaster must show that the office kept by defendant was within the act authorizing an allowance therefor.—U. S. v. Davis, C.C.Or., 25 F.Cas. No. 14,927, Deady 294.

96. U.S.—U. S. v. Maxwell, D.C.Ga., 286 F. 740.

49 C.J. p 1145 note 39.

97. U.S.—Deal v. U. S., C.C.A.Alaska, 11 F.2d 3, 5, reversed on other grounds 47 S.Ct. 613, 274 U.S. 277, 71 L.Ed. 1045.

98. Ariz.—U. S. v. Griswold, 76 P. 596, 8 Ariz. 453.

99. U.S.—U. S. v. Kennard, N.Y., 101 F. 39, 41 C.C.A. 173—U. S. v. Barker, Pa., 100 F. 34, 40 C.C.A. 264.

49 C.J. p 1145 note 47.



respect to evidence,<sup>1</sup> including presumptions and burden of proof,<sup>2</sup> and the admissibility<sup>3</sup> and weight and sufficiency<sup>4</sup> of the evidence, and with respect to trial.<sup>5</sup>

### § 9. Deputy and Assistant Postmasters

The office of assistant postmaster is recognized by law, and he, together with the sureties on his bond, ordinarily is liable for losses and injuries caused by his own defaults or negligence.

The office of assistant postmaster is recognized by law, and appropriations are made by congress for paying such officers.<sup>6</sup> An assistant postmaster can be removed by that authority only in which by law the power of appointment is vested.<sup>7</sup>

*Liability of deputy or assistant postmasters.* It is very generally held that deputy or assistant postmasters are liable for losses and injuries caused by their own defaults or negligence.<sup>8</sup> However, it has also been held that in order to render this rule applicable it is essential that they should be duly appointed officers of the department recognized by law<sup>9</sup> and that one who is not authorized to act as deputy by any regular appointment or authority but was merely occasionally employed and allowed by the postmaster to act in the office as an assistant or servant in receiving and delivering letters should not be held liable for a loss, although occasioned solely by his own default.<sup>10</sup>

*Bond and liability thereon.* Assistant postmasters are required by statute, 39 U.S.C.A. § 132, to give bond to the United States<sup>11</sup> and, as a measure of self-protection, a postmaster may exact a bond from his deputy.<sup>12</sup>

A postmaster who has repaid to the United States post office funds embezzled by an assistant postmaster cannot maintain an action against the assistant and a bonding company which has given security to the United States for the faithful performance of his duty by the assistant for the purpose of recovering the deficit, since the bond was given to, and for the protection of, the United States only.<sup>13</sup> Furthermore, the government as obligee of a deputy postmaster's bond may not maintain an action on the bond for the benefit of the postmaster who voluntarily has paid to the government the shortages of his deputy.<sup>14</sup> Where, however, the bond is given to the postmaster instead of to the United States, it has been held that a complaint in an action by the postmaster against the assistant and sureties on his bond which alleges that the assistant postmaster had neglected actually and faithfully to account for stamps, moneys, and mail matter turned over to him by the postmaster and stating the amount of the shortage, sufficiently alleges a breach of the bond without an allegation of the assistant's negligence.<sup>15</sup> Neither the negligence or carelessness of a postmaster, obligee in a bond given by an assistant postmaster, nor the incompetence of the principal in the bond constitutes a defense to an action on the bond for loss occasioned by the principal's failure to account for funds coming into his hands.<sup>16</sup>

The statute, 39 U.S.C.A. § 40, prescribing a three-year limitation for suits against sureties on a postmaster's bond has no application to actions against sureties on a bond given to the postmaster by his assistant.<sup>17</sup>

1. U.S.—U. S. v. Bryant, D.C.Ky., 41 F.Supp. 1009.

2. N.M.—U. S. v. Swan, 45 P. 980, 8 N.M. 401.  
49 C.J. p 1146 note 48 [a].

3. U.S.—U. S. v. Bryant, D.C.Ky., 41 F.Supp. 1009.  
49 C.J. p 1146 note 49.

*Records of post office department and general accounting office are competent evidence.*—U. S. v. Bryant, supra.

4. U.S.—U. S. v. Bryant, supra.  
49 C.J. p 1146 note 50.

#### Prima facie evidence

(1) In action against former postmaster and surety on his official bond to recover money allegedly illegally withheld from United States, records of the post office department and the general accounting office, disclosing that an audit of former postmaster's quarterly account showed a balance due the United States, made a prima facie case that former postmaster was indebted to the United States in the amount shown.—U. S. v. Bryant, supra.

(2) Other prima facie evidence see 49 C.J. p 1146 note 50 [a].

5. U.S.—Deal v. U. S., C.C.A.Alaska, 11 F.2d 3, reversed on other grounds 47 S.Ct. 613, 274 U.S. 277, 71 L.Ed. 1045.  
49 C.J. p 1146 note 50 [b].

6. U.S.—McBride v. U. S., Utah, 101 F. 821, 42 C.C.A. 38.  
Formerly it was held that under the postal regulations an assistant postmaster was not an officer of the government.—Coleman v. Frazier, 38 S.Ct.L. 146, 53 Am.D. 727.

7. 17 Opinion Attorney General 475.  
Postmaster may cause deputy's removal.—Massachusetts Bonding & Insurance Co., C.C.A.Wis., 54 F.2d 1039.

8. Ala.—Raisler v. Oliver, 12 So. 233, 97 Ala. 719, 38 Am.S.R. 213.  
49 C.J. p 1146 note 53.

9. S.C.—Bolan v. Williamson, 3 S.C. L. 181.

10. S.C.—Bolan v. Williamson, supra.

11. U.S.—U. S. v. American Sur. Co. of N. Y., C.A.Ohio, 172 F.2d 135, certiorari denied 69 S.Ct. 1494, 337 U.S. 930, 93 L.Ed. 1737.

12. U.S.—Massachusetts Bonding & Insurance Co., C.C.A.Wis., 54 F.2d 1039.

13. Alaska.—Wiles v. U. S. Fidelity, etc., Co., 6 Alaska 48.

14. U.S.—Massachusetts Bonding & Insurance Co. v. U. S., C.C.A.Wis., 54 F.2d 1039.

15. Ariz.—Lassetter v. Becker, 224 P. 810, 26 Ariz. 224, 230.

16. Ariz.—Lassetter v. Becker, supra.  
49 C.J. p 1147 note 58.

17. Tenn.—Wills v. Hurst, 49 S.W. 740, 101 Tenn. 656.

Limitations of actions on postmasters' bonds see supra § 8 d (2).

## § 10. Clerks or Employees in Post Office

- a. In general
- b. Compensation and fines
- c. Liability

### a. In General

Provision is made by the statutes for the appointment of post office clerks and employees who may be required to give bond.

Provision is made by the statutes for the appointment of clerks and employees in post offices,<sup>18</sup> and they may be required by the postmaster general under the statute, 39 U.S.C.A. § 132, to give bond to the United States conditioned for the faithful discharge of all duties and trusts imposed on them either by law or by the rules and regulations of the post office department.<sup>19</sup> A new bond may be substituted under the procedure stated in the statute, 39 U.S.C.A. § 815;<sup>20</sup> and under the amendment to 6 U.S.C.A. § 3 the payment and acceptance of the annual premium on corporate surety bonds furnished by postal employees are a compliance with the statute requiring the renewal of bonds of federal officers every four years after their dates.<sup>21</sup>

**Removal and retirement.** Postal clerks and employees are removable in such manner as the law provides, and, where they are in the classified civil service, they may be dismissed for such cause and in such manner as the statute, 5 U.S.C.A. § 652, provides.<sup>22</sup>

Postal clerks and employees within the provi-

sions of the Civil Service Retirement Act, 5 U.S.C.A. § 691 et seq, may retire or be retired in accordance with its provisions.<sup>23</sup>

### b. Compensation and Fines

A post office clerk or employee is entitled to such compensation as is fixed by law.

A clerk or employee in a post office is entitled to such compensation as is provided for by law.<sup>24</sup> Statutes which in terms "authorize" the postmaster general to classify and fix the salaries of clerks and employees of post offices do not confer a mere discretionary power but are held to impose a duty or obligation to classify and fix such salaries in the manner prescribed by the statute.<sup>25</sup>

The official position of a clerk or employee in a post office and the amount of his salary must be determined by the roster of the office approved by the postmaster general,<sup>26</sup> and, where he is borne on the roster as occupying a designated position, he can recover only the salary attached to that position, although he in fact performs the duties of a position to which a higher salary is attached.<sup>27</sup> So it has been held that, where a postal clerk is lawfully employed in work that is not inconsistent with his general business under his general employment as a postal clerk, he remains a postal clerk, and is entitled only to compensation as such.<sup>28</sup>

The time spent by a local post office clerk outside of office hours in preparation for an examination required by the post office department is not overtime work for which the clerk may recover extra compensation.<sup>29</sup>

18. U.S.—U. S. v. American Sur. Co. of N. Y., C.A.Conn., 172 F.2d 135, certiorari denied 69 S.Ct. 1494, 337 U.S. 930, 93 L.Ed. 1737.

19. U.S.—U. S. v. American Sur. Co. of N. Y., supra.  
Liability on bond see infra subdivision c (2) of this section.

**Government securities in lieu of bond**

Under 6 U.S.C.A. § 15, postal employees may deposit government securities in a sum equal to amount of bond.—U. S. v. American Sur. Co. of N. Y., supra.

20. U.S.—U. S. v. American Sur. Co. of N. Y., supra.

21. U.S.—U. S. v. American Sur. Co. of N. Y., supra.

22. U.S.—Bennett v. U. S., 89 Ct.Cl. 322.

D.C.—Levine v. Farley, 107 F.2d 186, 70 App.D.C. 381, certiorari denied 60 S.Ct. 377, 308 U.S. 622, 84 L.Ed. 519.

**Conduct tending to disrupt service**  
Publication in newspapers of false reports that post office clerks were

discriminated against and in some instances dismissed because of union activities, for purpose of intimidation or bringing pressure to bear on officials whose duty it was to preserve efficiency of service, would constitute conduct tending to disrupt service for which clerk participating therein could be dismissed.—Levine v. Farley, supra.

23. U.S.—Wennstrom v. U. S., D.C. N.Y., 37 F.Supp. 519.

**Discretion of administrative officers**

Where the provisions of the Civil Service Retirement Act, 5 U.S.C.A. § 691 et seq, have been complied with and the rights of plaintiff have been fully exercised, his reduction in grade and retirement were matters solely within the discretion of the authorized administrative officers.—Bennett v. U. S., 89 Ct.Cl. 322.

**Disposition of retirement fund of deceased employee**

Under statute, 5 U.S.C.A. § 724 (d), providing that money payable from retirement fund of federal postal system may be paid to an administratrix, it is implied that adminis-

tration expenses should be payable out of the fund, and that such payment is not prohibited by statute, 5 U.S.C.A. § 729, providing that money payable from retirement fund shall not be assignable or subject to legal process.—In re Holder's Estate, 35 N.Y.S.2d 1020, 264 App.Div. 898.

24. U.S.—Gayhart v. U. S., 83 Ct.Cl. 499.

**Effect of Economy Act and amendment thereto**

D.C.—Farley v. U. S. ex rel. Welch, 92 F.2d 533, 67 App.D.C. 382.

25. 19 Opinion Attorney General 324.

49 C.J. p 1147 note 62.

26. U.S.—Gayhart v. U. S., 82 Ct.Cl. 499.

49 C.J. p 1147 note 63.

27. U.S.—Gayhart v. U. S., supra.  
49 C.J. p 1147 notes 63, 64.

28. U.S.—Wells v. U. S., 49 Ct.Cl. 48.

49 C.J. p 1147 note 65.

29. U.S.—Deland v. U. S., 77 Ct.Cl. 55.

*Insufficient appropriation.* Where by statute an appropriation has been made for the hire of temporary and auxiliary clerks for a fiscal year, the postmaster general is not justified in incurring a deficiency in respect of their employment, although the failure to incur the deficiency will seriously cripple the service.<sup>30</sup> The authority to employ temporary and auxiliary clerks is dependent entirely on an appropriation for that purpose, in view of a statute providing that no executive department shall expend in any one fiscal year any sum in excess of the appropriations made by congress for that fiscal year.<sup>31</sup>

*Fines.* A statute giving the postmaster general authority to fix the salary of post office clerks confers no authority on him to impose fines and enforce their collection from such salaries,<sup>32</sup> and fines imposed under invalid regulations providing for the imposition thereof may be recovered back.<sup>33</sup> It is of no consequence whether or not the clerk on whom the fine was imposed had notice of the regulation, since a departmental regulation contrary to law is no regulation.<sup>34</sup>

### c. Liability

- (1) In general
- (2) Liability on bond

#### (1) In General

In discharging their duties, postal clerks are bound to use only such care and diligence as a prudent man exercises in his own affairs.

Postal clerks are bound to use only such care and diligence in the discharge of their duties as a prudent man exercises in his own affairs.<sup>35</sup> However, where a clerk received a letter containing money to be sent by mail as a registered letter under a mutually mistaken belief that letters could

be registered to the place to which it was addressed, and then on discovering the mistake without authority from the sender of the letter sent it by mail unregistered by direction of his superior officer, and it was lost, both he and the superior officer are liable to the sender for its value.<sup>36</sup>

#### (2) Liability on Bond

The sureties on the bond of a post office clerk or employee are liable within the penalty of the bond for the loss sustained by the government because of the default of the principal.

The sureties on the bond of a clerk or employee in a post office are liable under the terms of the bond for the default of the principal.<sup>37</sup> The liability of the sureties continues for a default of the principal whether or not a renewal premium is paid for a later year.<sup>38</sup> Where the bond is conditioned on the faithful discharge of the duties and trusts imposed and for the accounting of all moneys, mail matter, and other property which shall come into the hands of the postal clerk or employee, the sureties on a clerk's bond are not liable for funds which never came into the hands of the clerk, but which came into the hands of another postal clerk.<sup>39</sup>

*Amount recoverable.* The government may recover the loss sustained within the amount of the penalty fixed by the bond.<sup>40</sup> In the absence of proof of special damages, the recovery is necessarily remitted to a nominal amount in order to carry costs in favor of the United States.<sup>41</sup>

Where a post office clerk or employee embezzles money contained in a registered letter or package, the United States may recover on his official bond the full amount lost if it is not in excess of the penalty of the bond, although it is only responsible in case of the loss of a registered letter

30. 30 Opinion Attorney General 157.

31. 30 Opinion Attorney General 157.

32. U.S.—*Sherlock v. U. S.*, 43 Ct.Cl. 161.

33. U.S.—*Sherlock v. U. S.*, *supra*.

34. U.S.—*Sherlock v. U. S.*, *supra*.

35. U.S.—*Dunlop v. Munroe*, D.C., 8 F.Cas.No.4,167, 1 Cranch C.C. 536, affirmed 7 Cranch 242, 3 L.Ed. 329.

36. Mass.—*Fitzgerald v. Burrill*, 106 Mass. 446.

37. U.S.—*U. S. v. American Sur. Co. of N. Y.*, C.A.Conn., 172 F.2d 135, certiorari denied 69 S.Ct. 1494, 337 U.S. 930, 93 L.Ed. 1737.

Bond of clerks and employees generally see *supra* subdivision a of this section.

38. U.S.—*U. S. v. American Sur. Co. of N. Y.*, *supra*.

39. Clerk in postal contract station Where a drugstore company's officer was a postal clerk in charge of a postal contract station located in the drugstore, but he took no active part in the conduct of the station and received none of the funds embezzled by another person appointed postal clerk at the station, the sureties on the bond of the drugstore company's officer were not liable.—*U. S. v. Adamo*, C.C.A.Mass., 54 F.2d 764.

40. Penalty as cumulative or continuous

Under surety bond conditioned upon faithful performance of duties by a postal employee, where bond had no stated period of duration, was re-

newed annually by payment of premiums and did not contain express limiting provisions, penalty of bond was cumulative rather than merely continuous, irrespective of facts that premium was paid by employee, that bond was required as condition of employment, and that bond was on a government form, and hence where embezzlements had occurred in a number of successive years before discovery, government was entitled to recover an amount up to the penal sum of the bond, for each year in which defalcations occurred.—*U. S. v. American Sur. Co. of N. Y.*, C.A.Conn., 172 F.2d 135, certiorari denied 69 S.Ct. 1494, 337 U.S. 930, 93 L.Ed. 1737.

41. U.S.—*U. S. v. American Surety Co., Md.*, 163 F. 228, 89 C.C.A. 658.

or package for an amount not exceeding fifty dollars.<sup>42</sup> When recovery has been had by the United States, it holds the amount recovered above the amount it has paid on a trust for the benefit of those injured,<sup>43</sup> and the money will be paid over to those entitled thereto.<sup>44</sup>

**Apportionment of loss.** Where the bond makes no provision for apportionment of loss and there was no such identity between a company which insured the safe transmission of the registered package stolen and defendant which insured the conduct of the postal employee as to risk or subject matter, as would warrant the right to contribution, there can be no apportionment of loss.<sup>45</sup>

**Proceedings to enforce liability.** The enforcement of bonds of clerks and employees in post offices is governed ordinarily by the rules governing the enforcement of bonds of other officers and especially bonds of federal officers.<sup>46</sup> Where an insurer of the safe transmission of registered packages indemnified the senders, the packages having been stolen by a post office employee, and the United States for the benefit of the senders and insurer sued on the bond of such employee, the questions as to which insurer's liability was primary are for determination by the chief postal inspector under statutes and postal laws and regulations, providing for forwarding of moneys recovered to the chief inspector and directing that he shall determine on satisfactory evidence the proper persons or owners to whom the money shall be restored, and such questions cannot be determined by the federal district court in an action on the post office employee's bond.<sup>47</sup>

## § 11. Letter Carriers

Letter carriers in city delivery service and rural letter carriers are considered *infra* §§ 12, 13.

Examine Pocket Parts for later cases.

## § 12. — In City Delivery Service

- a. In general
- b. Hours of work and compensation
- c. Duties and liabilities

### a. In General

Letter carriers in city delivery service are appointed by the postmaster general and they are required to give bond.

Under the statute, 39 U.S.C.A. § 151, letter carriers in city delivery service shall be employed for the free delivery of mail matter, as frequently as the public business may require.<sup>48</sup> The power to appoint letter carriers is vested in the postmaster general<sup>49</sup> and he alone has the power to appoint them.<sup>50</sup>

**Bond.** Under the statute, 39 U.S.C.A. § 157, every letter carrier shall give a bond with sureties, to be approved by the postmaster general, for the safe custody and delivery of all mail matter, and the faithful account and payment of all money received by him.<sup>51</sup>

**Removal and suspension.** Subject to the provisions of the classified civil service statute, 5 U.S.C.A. § 652, providing for written charges, notice, and an opportunity to be heard,<sup>52</sup> incident to the power of appointment of letter carriers is the power of removal<sup>53</sup> or suspension.<sup>54</sup> The power to remove or suspend letter carriers is vested in the

42. U.S.—U. S. v. U. S. Fidelity, etc., Co., C.C.A.Ky., 247 F. 16.  
49 C.J. p 1148 note 76.

43. U.S.—U. S. v. U. S. Fidelity, etc., Co., *supra*.

44. U.S.—U. S. Fidelity, etc., Co. v. U. S., Cal., 246 F. 483, 158 C.C.A. 497.

49 C.J. p 1148 note 78.

45. U.S.—U. S. Fidelity, etc., Co. v. U. S., *supra*.

### 46. Defenses

Where, in an action to recover the penalty for breach of a bond given by a postal clerk, conditioned to discharge faithfully all the duties and trusts imposed on him, it is shown that he opened letters coming into his hands and stole the contents, it is no defense that the United States is not liable to the senders for the loss.—U. S. v. American Surety Co., Md., 163 F. 228, 89 C.C.A. 658.

72 C.J.S.—18

47. U.S.—U. S. v. U. S. Fidelity, etc., Co., C.C.A.Ky., 247 F. 16.

48. Letter carriers are officers of the United States within certain statutes.—U. S. v. McCrory, Ala., 91 F. 295, 33 C.C.A. 515.

**Wearing of the uniform** prescribed by the postmaster general under the statute, 39 U.S.C.A. § 154, is required while letter carriers are on duty.—King v. U. S., 32 Ct.Cl. 234.

49. U.S.—U. S. v. McCrory, Ala., 91 F. 295, 33 C.C.A. 515.

49 C.J. p 1148 note 81.

50. U.S.—Corcoran v. U. S., 38 Ct.Cl. 341.

51. U.S.—Boerner v. U. S., C.C.A.N.Y., 117 F.2d 387—U. S. v. McCrory, Ala., 91 F. 295, 33 C.C.A. 515.  
49 C.J. p 1150 note 42.

Liability on bond see *infra* subdivision c of this section.

52. U.S.—U. S. v. Postmaster of City of Buffalo, D.C.N.Y., 221 F. 687.

### Effect of post-office rule

Although a rule obtained in the post office department which provided that no carrier should be removed except for cause and on written charges of which the carrier had full notice and an opportunity to make a defense, in the absence of some specific provision of law which gave a carrier a permanent place on the regular carrier roll, his removal from that roll was a matter beyond review by the courts, as by compelling payment of salary as though he had not been removed.—Dearie v. U. S., 36 Ct.Cl. 5—49 C.J. p 1148 note 90.

53. U.S.—Beuhring v. U. S., 45 Ct.Cl. 404.  
49 C.J. p 1148 note 83.

54. U.S.—Beuhring v. U. S., *supra*.

postmaster general alone,<sup>55</sup> and a removal or suspension must be on the direct order of the postmaster general.<sup>56</sup> A postmaster has no authority to remove or suspend a carrier without the approval of the postmaster general,<sup>57</sup> the approval of the first assistant postmaster general being insufficient.<sup>58</sup> However, it has been held that a removal by the first assistant postmaster general, approved by the postmaster general, is valid and effective.<sup>59</sup>

**Reinstatement.** The resignation of a letter carrier and its acceptance constitutes such a separation from his position as is contemplated by a civil service rule governing reinstatement and providing for the reinstatement in the departments in which they formerly served of men separated without delinquencies or misconduct on their parts from competitive positions on certificates from the civil service commission.<sup>60</sup> However, under a civil service rule providing that any person who has been separated from the service by reason of a reduction of force specifically required by law may be reinstated without regard to the length of time he has been separated from the service, where certain carriers were separated from the service by the abolition of free delivery service at a designated town, by the postmaster general, acting in the exercise of his discretion, the former carriers are not entitled to be reinstated on the reestablishment of free delivery service in that town.<sup>61</sup>

**Reduction of rating of letter carriers.** The power conferred on the postmaster general to employ letter carriers includes, the power to reduce them to the list of substitutes,<sup>62</sup> and, in the absence of evidence to the contrary, when a postmaster general takes action of this character, it must be assumed that his discretion was lawfully exercised.<sup>63</sup> Nevertheless, the only way in which the postmaster general can legally reduce a carrier from a higher

to a lower grade and thereby reduce his salary is to proceed in the manner set forth in the statutes governing the matter.<sup>64</sup> If the statutes require tests of the efficiency of the carriers before reducing their rating, the postmaster general is without authority arbitrarily to change the rating without any test of efficiency.<sup>65</sup>

**Retirement.** Letter carriers within the provisions of the Civil Service Retirement Act, 5 U.S.C.A. § 691 et seq, may retire or be retired in accordance with its provisions.<sup>66</sup> Under the statute, 5 U.S.C.A. § 724, on separation from the service under the conditions specified, a letter carrier is entitled to a refund of moneys withheld from his salary for pension purposes.<sup>67</sup> An action to recover the refund may be maintained by the letter carrier<sup>68</sup> and he is not required first to exhaust remedies before the civil service commission.<sup>69</sup> In such action the government may counterclaim for losses sustained by reason of the conduct of the letter carrier.<sup>70</sup> General rules ordinarily are applicable with respect to burden of proof<sup>71</sup> and the admissibility<sup>72</sup> and weight and sufficiency<sup>73</sup> of the evidence.

#### b. Hours of Work and Compensation

- (1) In general
- (2) Extra service

##### (1) In General

The right of a letter carrier to salary depends on appointment which is wholly a matter of statute.

The right of a letter carrier to salary depends on appointment, which is wholly a matter of statute.<sup>74</sup> Under the existing statute, 39 U.S.C.A. § 852 et seq, with certain exceptions carriers shall be required to work not more than eight hours per day, and a postmaster is without authority to increase or diminish the number of hours constitut-

55. U.S.—Corcoran v. U. S., 38 Ct. Cl. 341.

56. U.S.—Beuhring v. U. S., 45 Ct. Cl. 404.

57. U.S.—Beuhring v. U. S., supra—Corcoran v. U. S., 38 Ct. Cl. 341.

58. U.S.—Beuhring v. U. S., 45 Ct. Cl. 404.

59. U.S.—Kellom v. U. S., 55 Ct. Cl. 174.

49 C.J. p 1148 note 89.

60. U.S.—U. S. v. Buffalo Postmaster, D.C.N.Y., 221 F. 687.

61. 22 Opinion Attorney General 663.

49 C.J. p 1149 note 94.

62. U.S.—Dearie v. U. S., 36 Ct. Cl. 5.

63. U.S.—Dearie v. U. S., supra.

64. U.S.—Spanhake v. U. S., 55 Ct. Cl. 70.

65. U.S.—Spanhake v. U. S., supra.

66. U.S.—Wennstrom v. U. S., D.C. N.Y., 37 F.Supp. 519.

67. U.S.—Boerner v. U. S., D.C.N.Y., 30 F.Supp. 635, affirmed, C.C.A., 117 F.2d 387, certiorari denied 61 S.Ct. 1120, 313 U.S. 587, 85 L.Ed. 1542.

68. U.S.—Boerner v. U. S., supra.

69. U.S.—Boerner v. U. S., supra.

70. N.Y.—Boerner v. U. S., C.C.A. N.Y., 117 F.2d 387, certiorari denied 61 S.Ct. 1120, 313 U.S. 587, 85 L.Ed. 1542.

71. Burden of carrier to explain losses

Where federal government established that it had accepted the burden for losses of postal matter after fair investigation, carrier whose duty it was to make safe delivery and to account for all losses caused the government had burden of explaining losses if he would avoid liability therefor on counterclaim.—Boerner v. U. S., supra.

72. Evidence held admissible U.S.—Boerner v. U. S., supra.

73. Evidence held sufficient U.S.—Boerner v. U. S., supra.

74. U.S.—Hallenbeck v. U. S., 48 Ct. Cl. 475—Rush v. U. S., 33 Ct. Cl. 417.

ing a day's work as fixed by the statute.<sup>75</sup> Under its provisions the carrier is entitled to eight hours' work and to his pay if work is not furnished to him.<sup>76</sup>

A delivery carrier's service may be made to begin when he arrives at the post office, and to end when he completes his delivery.<sup>77</sup> A collecting carrier's service may be made to begin when he reaches the first mail box on each tour, and to end when he delivers such mail matter at the post office.<sup>78</sup>

*As a substitute.* Where a letter carrier accepts the terms of an order which takes his name from the roll of regular letter carriers and places it on the roll of substitutes, without objection or protest, he thereby assents to the arrangement, and cannot recover the compensation of a regular carrier while paid for his services as a substitute.<sup>79</sup> He must stand on the kind of service which he agreed to enter and for which he had been compensated.<sup>80</sup> So a substitute cannot recover for the time when he is required to report and hold himself in readiness for assignment to service,<sup>81</sup> or for the time spent by him in qualifying himself to perform the service when the regular letter carrier ceases to perform it.<sup>82</sup>

*During suspension.* When a letter carrier is suspended, nothing being said as to deprivation of pay, and is afterward restored to duty, he is entitled to his pay during the period of suspension.<sup>83</sup> In order to deprive him of his statutory compensation two things, it is said, are essential: That the power so to do must be lodged directly, or by necessary implication, in some official hand;<sup>84</sup> and that the power must be exercised actually and expressly, and not indirectly or by implication.<sup>85</sup>

## (2) Extra Service

If emergencies or the needs of the service require it, a letter carrier may be employed in excess of eight hours per day and receive overtime pay.

Under the statute, 39 U.S.C.A. § 854, if emergencies or the needs of the service require it, a letter carrier may be employed in excess of eight hours per day and receive overtime pay.<sup>86</sup>

It has been said, however, that the statute does not authorize a postmaster to employ a letter carrier to work more than eight hours a day except where it may be required by the public service.<sup>87</sup> In order to entitle carriers to extra pay, they must be actually "employed," that is to say, actually engaged in performing services for the post office,<sup>88</sup> and the employment must be for the benefit of the government,<sup>89</sup> and not for the convenience of the carrier.<sup>90</sup>

The services must be performed with the knowledge and consent of the postmaster,<sup>91</sup> because otherwise the government would not be a party to any contract of employment therefor.<sup>92</sup> However, letter carriers will be considered as "employed" within the meaning of the act, and entitled to extra pay, either where the postmaster requests or directs the services to be performed<sup>93</sup> or where in good faith they perform postal duties more than eight hours a day with the knowledge and consent of the postmaster.<sup>94</sup> While subordinates have no authority to require overtime from letter carriers without the consent of the postmaster,<sup>95</sup> when overtime has been necessarily made under the supervision of subordinates who report the fact to the postmaster and he takes no steps to check or otherwise regulate such overtime, his consent thereto must be presumed.<sup>96</sup> So it has been held that, where extra services are performed at the request of the postmaster, the carrier will be entitled to extra pay, although the postmaster understood that the services were to be voluntary<sup>97</sup> or although he forbade the carriers to register overtime,<sup>98</sup> since he is without power to require actual services without compensation contrary to the intent of the statute.<sup>99</sup>

75. U.S.—Rush v. U. S., *supra*.

76. U.S.—U. S. v. Gates, Ct.Cl., 13 S.Ct. 570, 148 U.S. 134, 37 L.Ed. 396.

49 C.J. p 1149 note 6.

77. U.S.—Seville v. U. S., 33 Ct.Cl. 495.

78. U.S.—Seville v. U. S., *supra*.

79. U.S.—Dearie v. U. S., 36 Ct.Cl. 5.

80. U.S.—Dearie v. U. S., *supra*.

81. U.S.—Dearie v. U. S., *supra*.

82. U.S.—Kingston v. U. S., 44 Ct.Cl. 44.

83. U.S.—Steele v. U. S., 40 Ct.Cl. 403—Corcoran v. U. S., 38 Ct.Cl. 341.

84. U.S.—Corcoran v. U. S., *supra*.

85. U.S.—Steele v. U. S., 40 Ct.Cl. 403—Corcoran v. U. S., 38 Ct.Cl. 341.

86. U.S.—Rush v. U. S., 33 Ct.Cl. 417.

49 C.J. p 1149 note 17.

87. U.S.—Rush v. U. S., *supra*.

49 C.J. p 1149 note 18.

88. U.S.—U. S. v. McCrory, Ala., 119 F. 861, 56 C.C.A. 373.

49 C.J. p 1149 note 19.

89. U.S.—King v. U. S., 32 Ct.Cl. 234.

90. U.S.—King v. U. S., *supra*.

91. U.S.—U. S. v. Post, Ct.Cl., 13 S.Ct. 567, 148 U.S. 124, 37 L.Ed. 392.

49 C.J. p 1149 note 22.

92. U.S.—Laurey v. U. S., 32 Ct.Cl. 259.

93. U.S.—Rush v. U. S., 33 Ct.Cl. 417—Laurey v. U. S., 32 Ct.Cl. 259.

94. U.S.—Rush v. U. S., 33 Ct.Cl. 417.

49 C.J. p 1149 note 25.

95. U.S.—Seville v. U. S., 33 Ct.Cl. 495.

96. U.S.—Chicago Letter Carriers v. U. S., 34 Ct.Cl. 531.

97. U.S.—Laurey v. U. S., 32 Ct.Cl. 259.

98. U.S.—Laurey v. U. S., *supra*.

99. U.S.—Laurey v. U. S., *supra*.

The method of computing overtime compensation is fixed by the statute, 39 U.S.C.A. § 854.<sup>1</sup>

*Character of employment.* Where the statute does not specify how the carrier must be employed, or of what such employment is to consist, in order to entitle him to extra pay, it is necessary only that he should be a letter carrier and be lawfully employed in work that is not inconsistent with his general business under his employment as a letter carrier.<sup>2</sup> A claim for extra services and pay may include an employment of a letter carrier, not only in the delivery and collection of mail matter,<sup>3</sup> but also for work done in the post office during the intervals between trips for delivering and collecting mail matter, which is authorized by the postal regulations and required by the postmaster.<sup>4</sup>

*Set-off against claim for overtime.* Under the provisions of the statute, if a letter carrier is employed in excess of eight hours on any day during the month he is entitled to extra pay therefor, although during the residue of the month he may have worked less than eight hours each day.<sup>5</sup> The government cannot set off against a claim for extra hours' work on certain days a deficit of hours occurring because the carrier worked less than eight hours on Sundays and legal holidays.<sup>6</sup> The only set-off that can be maintained is when the carrier is absent from duty without leave.<sup>7</sup>

*Substitute carriers.* Where the statute is, in terms, limited to letter carriers, it does not authorize the giving of extra pay to substitute letter carriers for work in excess of eight hours.<sup>8</sup>

*Waiver.* The compensation of a letter carrier for services in excess of eight hours a day is fixed by statute, and not by contract, and a postmaster has no authority to increase or diminish it, or to take it away, even though the carrier consents to serve without compensation.<sup>9</sup>

### c. Duties and Liabilities

A letter carrier has regularly prescribed duties to perform, and the sureties on his bond are liable for such defaults of the carrier as are covered by the bond.

A letter carrier has regularly prescribed duties to perform.<sup>10</sup> The duty of collecting letters and packages to be registered, imposed on letter carriers by the order of the postmaster general, is within the scope of the office of the letter carrier, and germane to the previous duties pertaining to it.<sup>11</sup>

*Liability on bond.* The bond of a letter carrier extends to and covers all duties prescribed by subsequent legislation or regulation of the same kind as those previously pertaining to the office, which are within its scope and naturally belong to its business.<sup>12</sup> The sureties on a carrier's bond are liable for his embezzlement of private funds collected by him for transmission to senders of C. O. D. parcels delivered by him,<sup>13</sup> and the United States may maintain an action against a surety for money embezzled by the carrier from registered letters, although the owners of the letters have made no claim against the government for indemnity and nothing has been paid to them.<sup>14</sup>

### § 13. — Rural Letter Carriers

Rural letter carriers may be appointed and required to give bond.

The postmaster general is authorized by law to appoint rural letter carriers.<sup>15</sup> Under the statute, 39 U.S.C.A. § 197, now superseded by 39 U.S.C.A. § 867, on the appointment of rural delivery carriers, the agents of the department estimate the length of the routes, and the carriers are assigned to the different classes accordingly.<sup>16</sup> Where a rural delivery route is found by actual measurement to be longer than its distance, estimated at the time of the carrier's appointment, the postmaster general may correct the error so as to bring the carrier into the class in which the distance traveled entitles him to be,<sup>17</sup> but the carrier cannot

1. Computation under previous statutes

U.S.—Post v. U. S., 27 Ct.Cl. 244, affirmed 13 S.Ct. 567, 148 U.S. 124, 37 L.Ed. 392.

2. U.S.—U. S. v. Post, 13 S.Ct. 567, 148 U.S. 124, 37 L.Ed. 392—Laurey v. U. S., 32 Ct.Cl. 259.

3. U.S.—U. S. v. Post, Ct.Cl., 12 S.Ct. 567, 148 U.S. 124, 37 L.Ed. 392, affirmed 27 Ct.Cl. 244.

4. U.S.—U. S. v. Post, supra.

5. U.S.—U. S. v. Gates, Ct.Cl., 13 S.Ct. 570, 148 U.S. 134, 37 L.Ed. 396.

6. U.S.—U. S. v. Gates, supra.

7. U.S.—U. S. v. Gates, supra.

8. U.S.—Alderman v. U. S., 44 Ct.Cl. 35.  
49 C.J. p 1150 note 38.

9. U.S.—Rush v. U. S., 35 Ct.Cl. 223.  
49 C.J. p 1150 note 40.

10. U.S.—U. S. v. McCrory, Ala., 91 F. 295, 33 C.C.A. 515.

11. U.S.—National Surety Co. v. U. S., Neb., 129 F. 70, 63 C.C.A. 512.

12. U.S.—National Surety Co. v. U. S., supra.

49 C.J. p 1150 note 43.

Bond of letter carrier generally see supra subdivision a of this section.

13. U.S.—U. S. v. Bloys, D.C.Tex., 19 F.2d 364.

14. U.S.—National Surety Co. v. U. S., Neb., 129 F. 70, 73, 63 C.C.A. 512.

49 C.J. p 1150 note 45.

15. U.S.—Hallenbeck v. U. S., 48 Ct.Cl. 475.

16. U.S.—Hallenbeck v. U. S., supra.

17. U.S.—Hallenbeck v. U. S., supra.

maintain an action for back pay during the period of the mistake.<sup>18</sup>

**Bond.** The government may require the execution of a bond by a rural mail carrier.<sup>19</sup> The sureties on the bond are liable for damages occasioned by a breach of the bond<sup>20</sup> not to exceed the amount of the bond.<sup>21</sup>

#### § 14. Railway Postal Clerks

The statutes make provision for railway postal clerks and their compensation.

The appointment of one as a railway postal clerk without a civil service examination at a time when such examination is not required by statute is valid,<sup>22</sup> although he does not take the oath of office and enter on his duties until after a date when a civil service examination is required as a preliminary to the making of an appointment.<sup>23</sup>

Under the statute, 39 U.S.C.A. § 610, now superseded by 39 U.S.C.A. § 866, railway postal clerks were divided into two classes, and seven grades, and the salary for each grade was designated;<sup>24</sup> and, under the statute, 39 U.S.C.A. § 618 a, commonly referred to as the Terminal Reclassification Act, provision is made for the terminal post office system, and the clerks in the terminal post offices shall be classified as railway postal clerks.<sup>25</sup>

#### § 15. Mail Clerks of Armed Forces

Enlisted men of the armed forces may be selected as mail clerks in their respective services and required to give bond.

Under the statutes, 39 U.S.C.A. §§ 134, 135, 138, enlisted men of the United States Navy, Marine Corps, Coast Guard, and Army may be selected as mail clerks and required to take the oath of office and give a bond to the United States.<sup>26</sup>

#### § 16. Post Office Inspectors

The postmaster general has statutory authority to appoint post office inspectors.

Provision is made by statute, 39 U.S.C.A. § 692, for the appointment of post office inspectors by the postmaster general.<sup>27</sup> Under regulations of the post office department so providing, a post office inspector cannot recover pay for such time as he was excused from performing the duties of his office by reason of sickness,<sup>28</sup> although there is no express statutory authority for the regulation.<sup>29</sup>

#### § 17. Postal Revenues, Property, Funds, and Accounts

Postal receipts, including fees from the money order business, may be deposited in federal reserve banks, or in their member banks, as revenue of the government.

Post office money order funds are part of the public moneys of the United States.<sup>30</sup> Under the statute, 12 U.S.C.A. § 391, providing that the "revenue" of the government, or any part thereof, "may" be deposited in federal reserve banks, it has been held that all postal receipts, including fees only from the money order business, are "revenues of the Government" within the meaning of this provision, and may be deposited in federal

18. U.S.—Hallenbeck v. U. S., supra.

19. U.S.—U. S. v. Williams, D.C. Idaho, 41 F.2d 229.

20. In absence of proof of special damages suffered by the government by reason of the carrier's wrongful act, such as his employment of other persons to deliver the mail, the government is entitled to recover only a nominal amount.—U. S. v. Williams, supra.

21. U.S.—U. S. v. Williams, supra.

22. 19 Opinion Attorney General 410.

Railway postal clerk as passenger see Carriers § 548.

23. 19 Opinion Attorney General 410.

49 C.J. p 1151 note 53.

24. D.C.—Farley v. U. S. ex rel. Welch, 92 F.2d 533, 67 App.D.C. 382.

**Compensation under former statute** (1) In construing a former statute, U.S.Rev.St. § 4025, it was held that the statute authorized and fixed

the compensation of railway postal clerks and constituted an express contract and that the postmaster general could not, by his appointment, either detract from or enlarge the compensation.—Hartman v. U. S., 40 Ct.Cl. 133.

(2) In other decisions the contrary view was maintained.—Gleeson v. U. S., 23 Ct.Cl. 207—Gleeson v. U. S., 22 Ct.Cl. 82, reversed on other grounds 8 S.Ct. 502, 124 U.S. 255, 31 L.Ed. 421.

**Traveling expenses under former regulations**

Formerly railway postal clerks were under necessity of paying their own traveling expenses.—Parshall v. U. S., Mo., 147 F. 433, 77 C.C.A. 457—49 C.J. p 1151 note 58.

25. D.C.—Farley v. Abbetmeier, 114 F.2d 569, 72 App.D.C. 260.

**Statute held not retroactive**

D.C.—U. S. ex rel. Welch v. Farley, D.C., 18 F.Supp. 75, affirmed Farley v. U. S. ex rel. Welch, 92 F.2d 533, 67 App.D.C. 382.

**Effect of Economy Act and amendment thereto**

D.C.—Farley v. U. S. ex rel. Welch, 92 F.2d 533, 67 App.D.C. 382.

**Transfer of clerks out of terminals** D.C.—Farley v. Abbetmeier, 114 F.2d 569, 72 App.D.C. 260.

**26. Navy mail clerks**

Absolute power was conferred on the postmaster general and secretary of the navy to designate in their uncontrolled discretion navy mail clerks, and the special designation by the postmaster general of a navy mail clerk for the Atlantic Fleet after his selection by the secretary of the navy but without the promulgation by the secretary of the navy of a general regulation covering the designation of a navy mail clerk for the Atlantic Fleet was valid.—31 Opinion Attorney General 320.

27. U.S.—Small v. U. S., 45 Ct.Cl. 13.

28. U.S.—Small v. U. S., supra.

29. U.S.—Small v. U. S., supra.

49 C.J. p 1151 note 64.

30. U.S.—Woodruff v. U. S., C.C. Kan., 58 F. 766.



reserve banks or in their member banks.<sup>31</sup> The statute relating to "revenues," it has been said, is permissive as to deposits in federal reserve banks.<sup>32</sup>

It has been held that the statute, 39 U.S.C.A. § 47, providing that any postmaster having public money belonging to the government at an office in a city or town where there is no designated depository may deposit it at his own risk and in his official capacity in any national or state bank in the city in which the postmaster resides, does not deprive the United States of any rights or interest in cashier's checks and drafts purchased by the postmaster in his official capacity from public money received in operation of the post office in view of a further provision that postmasters shall keep safely, without loaning, using, depositing in any unauthorized bank, or exchanging for other funds all the public money collected by them, or which may come into their hands.<sup>33</sup> A deposit of post-office receipts in the joint name of the postmaster and his assistant does not make them jointly responsible therefor to the government.<sup>34</sup>

Under the provisions of a statute, 31 U.S.C.A. § 73, now repealed and covered by 39 U.S.C.A. §§ 794-794 f, all accounts of the post office, in common with other public accounts, were to be adjusted quarterly, with such vouchers as the postmaster general might prescribe.<sup>35</sup> The auditor of the treasury for the post office department was regarded as the custodian of all accounts arising in the post office department or relative thereto, with the vouchers necessary to a correct adjustment thereof, this custody being subject, however, to the control of the postmaster general.<sup>36</sup> These accounts were to be regarded as papers in the treasury department within a statute providing that the court of claims should have power to call on any depart-

ment for any information or papers which may be necessary.<sup>37</sup>

## § 18. Contracts for Post Office Supplies

Contracts for supplies for the post office department shall be made by the postmaster general in his name.

Under the statute, 5 U.S.C.A. § 366, as amended contracts for supplies for the post office department shall be made by the postmaster general in his name subject to his approval.<sup>38</sup> The power to make contracts for supplies for the post office department is subject to the condition that congress has made an appropriation to pay for the supplies.<sup>39</sup>

*Advertisements and persons with whom contract made.* It has been provided by statute, 41 U.S.C.A. § 5, that all contracts for supplies in any of the departments of the government shall be made by advertising a sufficient time previously for proposals with respect thereto when the public exigencies do not require the immediate delivery of the articles or the immediate performance of the services,<sup>40</sup> and, prior to its amendment the statute, 5 U.S.C.A. § 366, provided that the purchasing agent in making purchases of supplies necessary for the post office department should advertise as provided by law and award contracts for such supplies to the lowest responsible bidder in pursuance of existing law.<sup>41</sup> These statutes are broad enough to prohibit the renewal or extension of a contract at the pleasure of the postmaster general without advertisement.<sup>42</sup>

It is competent for the postmaster general in advertising for proposals for furnishing the post-office department with supplies to reserve "the right to reject any and all bids, if in his judgment the interests of the government required it" and

31. 30 Opinion Attorney General 553.

49 C.J. p 1153 note 16.

Deposit of postal savings funds with banks see *infra* § 68.

32. 30 Opinion Attorney General 553.

33. U.S.—U. S. v. Adams, D.C.Wash., 9 F.2d 624, affirmed, C.C.A., 24 F. 2d 907.

34. U.S.—Trafton v. U. S., C.C.Me., 24 F.Cas.No.14,135, 3 Story 646.

35. 8 Opinion Attorney General 125. 49 C.J. p 1154 note 22.

36. 20 Opinion Attorney General 677.

37. 20 Opinion Attorney General 677.

38. Purchasing agent

Prior to the amendment of the

statute, 5 U.S.C.A. § 366, there existed the office of purchasing agent for the post office department who was subject to the direction and control of the postmaster general and who made the contract for supplies in the name of the postmaster general subject to his approval. Under the statute responsibility rested on the postmaster general.—Thomson v. U. S., 37 App.D.C. 461.

Contracts with United States generally see the C.J.S. title United States §§ 81-116, also 65 C.J. p 1810 note 45 et seq.

*Particular statutes relating to postal cards*

The postmaster general is authorized to contract for, purchase, and inspect paper for the printing of postal cards which are furnished un-

der a statute which authorizes the postmaster general to furnish postal cards "manufactured of good stiff paper, of such quality, form, and size as he may deem best adapted for general use."—30 Opinion Attorney General 241.

39. 27 Opinion Attorney General 584.

49 C.J. p 1154 note 30.

40. 26 Opinion Attorney General 231—22 Opinion Attorney General 40.

49 C.J. p 1154 note 31.

41. 13 Opinion Attorney General 174.

42. 13 Opinion Attorney General 174.

49 C.J. p 1154 note 33.

to act on such reservation.<sup>43</sup> Where there is no express provision as to the persons with whom the department shall contract or to whom proposals shall be addressed by advertising, the advertisements for bids may be limited to those only who are able to do the work or furnish the supplies needed by the department;<sup>44</sup> and in the absence of any statutory prohibition the postmaster general may award a contract for furnishing supplies to a firm, it being the lowest bidder, one of the members of which is an officer of the department.<sup>45</sup> So, also, it has been held that a statute, prohibiting employees of the post-office department from becoming interested in mail contracts or acting as agents for mail contractors, does not forbid an employee from supplying it at agreed rates with any device or improvement invented and patented by him that may be useful or con-

venient in the postal service.<sup>46</sup>

**Bids.** Where the advertisement requires the proposals to be made on blank forms furnished by the department, the omission or erasure of immaterial words in the proposal of a bidder does not affect the validity of his bid.<sup>47</sup> An award of contract, by the issuance of an order of the postmaster general in the usual way and its transmittal to the bidder, thus indicating the acceptance of his proposal, is sufficient, and, when received by the latter, the award thus made is beyond recall, and the agreement is complete and binding on the government.<sup>48</sup>

**Construction and operation of contract.** Rules applicable to the construction and operation of contracts generally apply to contracts for the furnishing of supplies to the post office department.<sup>49</sup>

### III. MAILABLE MATTER, TRANSMISSION AND DELIVERY OF MAIL, AND MONEY ORDERS

#### § 19. Mailable Matter

There is a clear cut division between mailable and nonmailable matter under the postal laws.

There is a clear cut division between mailable and nonmailable matter under the postal laws.<sup>50</sup>

#### § 20. — Classes

- a. In general
- b. First-class matter
- c. Second-class matter
- d. Third-class matter
- e. Fourth-class matter

##### a. In General

Congress has divided mailable matter into four classes, which are generally described by objective standards which refer in part to their contents but not to the quality of their contents.

Congress has divided mailable matter into four classes.<sup>51</sup> The four classes of mailable matter are generally described by objective standards which refer in part to their contents but not to the quality of their contents,<sup>52</sup> and congress has not committed to the postmaster general or to anyone else the matter of determining what should be carried in the mails as matter of one class and what as matter of another class, but has reserved to itself that power exclusively, itself making the classification.<sup>53</sup> The postmaster general and his subordinates are required to use judgment and discretion, and it may sometimes be a matter of much difficulty to identify a publication as one included in the category prescribed by congress;<sup>54</sup> but their discretion is limited to this question of identification;<sup>55</sup> and it is not competent for the postmaster general and his subordinates to add anything to the statute or take any-

43. 14 Opinion Attorney General 683.

44. 15 Opinion Attorney General 326.  
49 C.J. p 1154 note 35.

45. 24 Opinion Attorney General 557.  
49 C.J. p 1154 note 36.

46. 10 Opinion Attorney General 2.  
47. 15 Opinion Attorney General 226.

48. 15 Opinion Attorney General 226.

49. U.S.—Plimpton Mfg. Co. v. U. S., 15 Ct.Cl. 14.  
49 C.J. p 1155 note 41.

Construction and operation of contracts:  
Generally see Contracts §§ 294-372.

With United States see the C.J.S. title United States §§ 91-94, also 65 C.J. p 1335 note 97 et seq.

50. U.S.—Hannegan v. Esquire, Inc., App.D.C., 66 S.Ct. 456, 327 U.S. 146, 90 L.Ed. 586.

"Mail matter" defined see supra § 1.

51. U.S.—Hannegan v. Esquire, Inc., App.D.C., 66 S.Ct. 456, 327 U.S. 146, 90 L.Ed. 586.

52. U.S.—Hannegan v. Esquire, Inc., supra.

53. D.C.—Payne v. U. S., 20 App.D.

C. 581, appeal dismissed 24 S.Ct. 849, 192 U.S. 602, 48 L.Ed. 583.

54. D.C.—Payne v. U. S., supra.

55. D.C.—Payne v. U. S., supra.

##### Fact-finding agency

The statute, providing four classifications for mail and making it postmaster's duty to determine to which group a particular parcel belongs, constitutes postmaster a fact-finding agency and makes his act in classifying mail quasi-judicial.—Esquire, Inc. v. Walker, D.C.D.C., 55 F.Supp. 1015, reversed on other grounds 151 F.2d 49, 80 U.S.App.D.C. 145, affirmed 66 S.Ct. 456, 327 U.S. 146, 90 L.Ed. 586.

thing from it;<sup>56</sup> they can only apply the law as it exists.<sup>57</sup>

### b. First-Class Matter

Mailable matter of the first class embraces letters or postal cards wholly or partly in writing.

Under statutory provisions, 39 U.S.C.A. § 222, mailable matter of the first class embraces letters, postal cards, and, subject to some exceptions, all matters wholly or partly in writing.<sup>58</sup>

### c. Second-Class Matter

- (1) In general
- (2) Conditions admitting publications to second class
- (3) Conditions imposed on admission to second class
- (4) Suspension or revocation of second-class mail privileges generally
- (5) Review by courts

#### (1) In General

Mailable matter of the second class embraces all newspapers or other periodical publications issued at stated intervals and as frequently as four times a year if they are within the conditions named in other statutory provisions relating to matter of this class.

Under statutory provisions, 39 U.S.C.A. § 224, mailable matter of the second class embraces all newspapers or other periodical publications issued at stated intervals and as frequently as four times a year if they are within the conditions named in other statutory provisions relating to matter of this class.<sup>59</sup> The second-class privilege is a form of subsidy,<sup>60</sup> and the rates prescribed for this class of matter, which are much lower than those pre-

scribed for other classes of mail matter, and the resulting pecuniary advantages to the publishers of newspapers and periodicals taken in connection with the exceptional administrative and other privileges accorded them undoubtedly work a very great discrimination in their favor;<sup>61</sup> but these rates are granted periodicals meeting the requirements of the statute to encourage the distribution of periodicals which disseminate the particular information required by the statute so that the public good may be served,<sup>62</sup> and the validity of legislation of this character is upheld on the ground that its purpose is to secure to the public the benefits to result from "the wide dissemination of intelligence as to current events."<sup>63</sup> The second-class privilege is granted only on the application of a publisher for entry of his publication to that class.<sup>64</sup> On such an application a searching investigation of the character of the publication is made by the postmaster general under rules and regulations prescribed by him,<sup>65</sup> although such rules or regulations cannot add anything to the characteristics required by statutory provisions,<sup>66</sup> and, if the publication is found to be entitled to the second-class privilege, a permit to that effect is issued.<sup>67</sup> A person who fully and fairly complies with all the requirements of the statute with respect to the admission of a publication to the mails as second-class matter acquires a positive legal right to have it so carried.<sup>68</sup>

*Periodical publications.* By the express provisions of the statute, 39 U.S.C.A. § 224, in order to entitle a publication to second-class postage rates, it must be a "periodical publication,"<sup>69</sup> and the terms "periodicals" and "periodical publications" are synonymous.<sup>70</sup> The requirement that mail matter of the second class shall be a "periodical publication"

56. D.C.—Payne v. U. S., 20 App.D.C. 581, appeal dismissed 24 S.Ct. 849, 192 U.S. 602, 48 L.Ed. 583.

49 C.J. p 1155 note 47.

57. D.C.—Hitchcock v. Smith, 34 App.D.C. 521, affirmed 33 S.Ct. 6, 226 U.S. 53, 57 L.Ed. 119.

58. U.S.—Hannegan v. Esquire, Inc., App.D.C., 66 S.Ct. 456, 327 U.S. 146, 90 L.Ed. 586.

49 C.J. p 1155 note 49.

59. U.S.—Hannegan v. Esquire, Inc., App.D.C., 66 S.Ct. 456, 327 U.S. 146, 90 L.Ed. 586.

60. U.S.—Hannegan v. Esquire, Inc., supra—U. S. ex rel. Rodriguez v. Weekly Publications, D.C.N.Y., 68 F.Supp. 767.

61. U.S.—Lewis Pub. Co. v. Morgan, N.Y., 33 S.Ct. 867, 229 U.S. 288, 57 L.Ed. 1190.

62. U.S.—Hannegan v. Esquire, Inc.,

App.D.C., 66 S.Ct. 456, 327 U.S. 146, 90 L.Ed. 586.

63. U.S.—Lewis Pub. Co. v. Morgan, N.Y., 33 S.Ct. 867, 229 U.S. 288, 57 L.Ed. 1190.

64. U.S.—U. S. v. Burleson, App.D.C., 41 S.Ct. 352, 255 U.S. 407, 65 L.Ed. 704—U. S. ex rel. Rodriguez v. Weekly Publications, D.C.N.Y., 68 F.Supp. 767.

65. U.S.—U. S. v. Burleson, App.D.C., 41 S.Ct. 352, 255 U.S. 407, 65 L.Ed. 704—U. S. ex rel. Rodriguez v. Weekly Publications, D.C.N.Y., 68 F.Supp. 767.

66. D.C.—Payne v. U. S., 20 App.D.C. 581, appeal dismissed 24 S.Ct. 849, 192 U.S. 602, 48 L.Ed. 583.

49 C.J. p 1155 note 47 [a].

67. U.S.—U. S. v. Burleson, App.D.C., 41 S.Ct. 352, 255 U.S. 407, 65 L.Ed. 704—U. S. ex rel. Rodriguez

v. Weekly Publications, D.C.N.Y., 68 F.Supp. 767.

68. U.S.—U. S. ex rel. Rodriguez v. Weekly Publications, D.C.N.Y., 68 F.Supp. 767.

D.C.—Payne v. U. S., 20 App.D.C. 581, appeal dismissed 24 S.Ct. 849, 192 U.S. 602, 48 L.Ed. 583.

69. D.C.—U. S. v. Cortelyou, 28 App.D.C. 570, 5 L.R.A.N.S., 166.

70. D.C.—Smith v. Payne, 22 App.D.C. 463, affirmed 24 S.Ct. 595, 194 U.S. 104, 48 L.Ed. 893—Payne v. Houghton, 22 App.D.C. 234, affirmed 24 S.Ct. 590, 194 U.S. 88, 48 L.Ed. 888.

"Periodical" means that it must be like a newspaper printed at given periods or not less than four times a year.—Esquire, Inc. v. Walker, D.C.D.C., 55 F.Supp. 1015, reversed on other grounds 151 F.2d 49, 80 U.S. App.D.C. 145, affirmed 66 S.Ct. 456, 327 U.S. 146, 90 L.Ed. 586.

means that it shall not only have the feature of periodicity, but that it shall be a periodical in the ordinary sense of the term,<sup>71</sup> and, although it complies in all respects with other conditions imposed by statute as a prerequisite to the transmission of mail as matter of the second class, as discussed infra subdivision c (2) of this section, it will not be considered a "periodical publication" unless it is a periodical publication in the ordinary sense of the term.<sup>72</sup>

*Publications issued by institutions of learning.* Within the statute, 39 U.S.C.A. § 229, providing that periodical publications issued by regularly incorporated institutions of learning shall be admitted to the mails as second-class matter, institutions of learning are those organizations of a permanent nature, wherein instruction is given in the higher branches of education only, and which owe their origin to private or public munificence, and are established solely for the public good and not for private gain.<sup>73</sup> An incorporated educational institution conducting a correspondence college for the gain and profit of its stockholders is not a regularly incorporated institution of learning.<sup>74</sup>

*Magazine issued with newspaper.* The statute, 39 U.S.C.A. § 228, providing that publishers of matter of the second class may, without subjecting it to extra postage, fold within their regular issues a supplement, the matter of which must be germane to the publication which it supplements, has no application to a magazine issued with a newspaper which is a separate and distinct periodical having no connection whatever with the newspaper either in its physical form or in the nature of its contents.<sup>75</sup> Such magazine and paper are, however, entitled to second-class rates of postage under the provisions of the statute, 39 U.S.C.A. § 224, as being a publication "issued at stated intervals and as frequently as four times a year."<sup>76</sup>

*Sample copies.* Although by existing statutory provisions, 39 U.S.C.A. § 283, sample copies of publications of the second class shall be accepted for

mailing at the second-class rates to the extent of ten per cent of the weight of copies mailed to subscribers during the calendar year, prior to the enactment of this statute postal regulations limiting the amount of sample copies had been held valid,<sup>77</sup> although there was some authority to the contrary.<sup>78</sup>

*Examination of second-class mail.* Under the statute, 39 U.S.C.A. § 225, providing that matter of the second class may be examined at the office of mailing, and, if found to contain matter which is subject to a higher rate of postage, the higher rate of postage shall be charged, it has been stated that such provision means more than examining the bundle or wrapper, but means an examination of the contents of the printed matter.<sup>79</sup>

## (2) Conditions Admitting Publications to Second Class

The statute specifies four conditions on which a publication, except as otherwise provided by law, shall be admitted to the second class, but it does not specify that they shall be the only requisites.

The statute, 39 U.S.C.A. § 226, specifies four conditions on which a publication, except as otherwise provided by law, shall be admitted to the second class,<sup>80</sup> but it does not declare that they shall be the only requisites.<sup>81</sup>

The first condition is that it must regularly be issued at stated intervals as frequently as four times a year, and bear a date of issue, and be numbered consecutively.<sup>82</sup> However, this condition is limited by the express provision of statute, 39 U.S.C.A. § 224, that the publication must be a periodical publication, as discussed supra subsection (1) of this subdivision, and, accordingly, it has been held that books complete in themselves and which have no connection with each other are not entitled to be classified as second-class mail matter merely because, in compliance with the statutory requirements, they are serially issued at stated intervals more than four times a year, bear dates of issue, and are numbered consecutively;<sup>83</sup> and the postmaster general can exclude them from second-class

71. U.S.—Houghton v. Payne, App. D.C., 24 S.Ct. 590, 194 U.S. 88, 48 L.Ed. 888.

D.C.—U. S. v. Cortelyou, 28 App.D.C. 570, 5 L.R.A., N.S., 166.

72. U.S.—Houghton v. Payne, App. D.C., 24 S.Ct. 590, 194 U.S. 88, 48 L.Ed. 888.

D.C.—U. S. v. Cortelyou, 28 App.D.C. 570, 5 L.R.A., N.S., 166.

73. D.C.—U. S. v. Payne, 20 App.D.C. 606.

74. D.C.—Columbian Correspondence College v. Wynne, 25 App.D.C. 149 —U. S. v. Payne, 20 App.D.C. 606.

75. 25 Opinion Attorney General 594.

49 C.J. p 1156 note 72.

76. 25 Opinion Attorney General 594.

77. U.S.—Lewis Pub. Co. v. Wyman, C.C.Mo., 182 F. 13, 104 C.C.A. 453, affirmed 33 S.Ct. 599, 228 U.S. 610, 57 L.Ed. 989.

78. U.S.—U. S. v. Atlanta Journal Co., Ga., 210 F. 275, 127 C.C.A. 123.

79. D.C.—Esquire, Inc., v. Walker, D.C., 55 F.Supp. 1015, reversed on other grounds 151 F.2d 49, 80 U.S.

App.D.C. 145, affirmed 66 S.Ct. 456, 327 U.S. 146, 90 L.Ed. 586.

80. U.S.—Hannegan v. Esquire, Inc., App.D.C., 66 S.Ct. 456, 327 U.S. 146, 90 L.Ed. 586.

81. U.S.—Houghton v. Payne, App. D.C., 24 S.Ct. 590, 194 U.S. 88, 48 L.Ed. 888.

49 C.J. p 1156 note 59.

82. U.S.—Hannegan v. Esquire, Inc., App.D.C., 66 S.Ct. 456, 327 U.S. 146, 90 L.Ed. 586.

83. U.S.—Houghton v. Payne, App. D.C., 24 S.Ct. 590, 194 U.S. 88, 48

mail notwithstanding they have been heretofore transmitted as such by his predecessors in office.<sup>84</sup>

The second condition is that the publication must be issued from a known office of publication.<sup>85</sup> Under this condition, the fact that the magazine part of the publication is edited and printed in one place, and the newspaper in another, is not material, if they are both issued from the same place.<sup>86</sup>

The third condition is that it must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguished printed books for preservation from periodical publications.<sup>87</sup> Under this condition the fact that a publication, having the characteristics of a book, is not bound when issued, or intended for preservation, is immaterial,<sup>88</sup> as it is not to be inferred from this condition that in order to constitute a book the publication must have a substantial binding.<sup>89</sup>

The fourth condition is that it must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and must have a legitimate list of subscribers.<sup>90</sup> A "legitimate list of subscribers" within this condition means a list of subscribers taken at more than a nominal price, and that the price must have been paid by the subscriber or some one in his behalf or under obligation to pay the price,<sup>91</sup> and subscriptions taken at a nominal price or without price do not answer the requirements of the statute in that particular and may not be counted in making up a legitimate list.<sup>92</sup> The condition that it must be originated and published for the dissemination of information of a public character or devoted to literature, sciences, or arts, or some special industry supplies the standards which relate to the format

of the publication and to the nature of its contents,<sup>93</sup> but not to their quality, worth, or value.<sup>94</sup> Accordingly, the words "literature" or "arts" mean no more than productions which convey ideas by words, pictures, or drawings.<sup>95</sup> Thus, the postmaster general does not have discretion to deny periodicals the second-class rate if in his view they do not contribute to the public good,<sup>96</sup> and has no power to prescribe the standard for literature or art which a mailable periodical disseminates,<sup>97</sup> since such a power would constitute a power of censorship which is so abhorrent to tradition that a purpose to grant it should not be easily inferred.<sup>98</sup> Therefore, the postmaster general has the power to determine whether a periodical which is mailable contains information of a public character, literature, or art,<sup>99</sup> but not the power to determine whether the contents meet some standard of the public good or welfare.<sup>1</sup>

The statute, 39 U.S.C.A. § 226, also provides that regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates, shall not be admitted to the second-class rate, and the word "primarily" means "chiefly" or "principally;"<sup>2</sup> and the words "regular publications designed primarily for advertising purposes" mean publications chiefly or principally designed for advertising purposes.<sup>3</sup> A newspaper otherwise entitled to be admitted to the second class would violate the law by mailing under the second-class rate only where the papers mailed are designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates.<sup>4</sup> Whether or not the chief or principal design of any publication is for such purposes is a question of fact which must be determined by the postmaster general in each individual case from the evidence he may be able to obtain.<sup>5</sup>

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| <p>L.Ed. 888, followed in <i>Smith v. Payne</i>, 24 S.Ct. 595, 194 U.S. 104, 48 L.Ed. 893.</p> <p>84. U.S.—<i>Houghton v. Payne</i>, App. D.C., 24 S.Ct. 590, 194 U.S. 88, 48 L.Ed. 888, followed in <i>Smith v. Payne</i>, 24 S.Ct. 595, 194 U.S. 104, 48 L.Ed. 893.</p> <p>85. U.S.—<i>Hannegan v. Esquire, Inc.</i>, App.D.C., 66 S.Ct. 456, 327 U.S. 146, 90 L.Ed. 586.</p> <p>86. 25 Opinion Attorney General 594.</p> <p>87. U.S.—<i>Hannegan v. Esquire, Inc.</i>, App.D.C., 66 S.Ct. 456, 327 U.S. 146, 90 L.Ed. 586.</p> <p>88. U.S.—<i>Houghton v. Payne</i>, App. D.C., 24 S.Ct. 590, 194 U.S. 88, 48 L.Ed. 888, followed in <i>Smith v. Payne</i>, 24 S.Ct. 595, 194 U.S. 104, 48 L.Ed. 893.</p> <p>89. U.S.—<i>Houghton v. Payne</i>, App.</p> | <p>D.C., 24 S.Ct. 590, 194 U.S. 88, 48 L.Ed. 888, followed in <i>Smith v. Payne</i>, 24 S.Ct. 595, 194 U.S. 104, 48 L.Ed. 893.</p> <p>90. U.S.—<i>Hannegan v. Esquire, Inc.</i>, App.D.C., 66 S.Ct. 456, 327 U.S. 146, 90 L.Ed. 586.</p> <p>91. U.S.—<i>Myrick v. U. S.</i>, Mass., 219 F. 1, 134 C.C.A. 619.</p> <p>Pa.—Commonwealth v. <i>Kehoe-Berge Coal Co.</i>, Quar.Sess., 41 Luz.Leg. Reg. 173.</p> <p>92. U.S.—<i>Myrick v. U. S.</i>, Mass., 219 F. 1, 134 C.C.A. 619.</p> <p>93. U.S.—<i>Hannegan v. Esquire, Inc.</i>, App.D.C., 66 S.Ct. 456, 327 U.S. 146, 90 L.Ed. 586.</p> <p>94. U.S.—<i>Hannegan v. Esquire, Inc.</i>, supra.</p> <p>95. U.S.—<i>Hannegan v. Esquire, Inc.</i>, supra.</p> | <p>96. U.S.—<i>Hannegan v. Esquire, Inc.</i>, supra.</p> <p>97. U.S.—<i>Hannegan v. Esquire, Inc.</i>, supra.</p> <p>98. U.S.—<i>Hannegan v. Esquire, Inc.</i>, supra.</p> <p>99. U.S.—<i>Hannegan v. Esquire, Inc.</i>, supra.</p> <p>1. U.S.—<i>Hannegan v. Esquire, Inc.</i>, supra.</p> <p>2. U.S.—<i>Lewis Pub. Co. v. Wyman</i>, Mo., 182 F. 13, 104 C.C.A. 453, affirmed 33 S.Ct. 599, 228 U.S. 610, 57 L.Ed. 989.</p> <p>3. 16 Opinion Attorney General 303.</p> <p>4. U.S.—<i>U. S. v. Atlanta Journal Co.</i>, C.C.Ga., 185 F. 656, error dismissed 33 S.Ct. 775, 229 U.S. 605, 57 L.Ed. 1348.</p> <p>5. 16 Opinion Attorney General 303.</p> |
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### (3) Conditions Imposed on Admission to Second Class

Statutes requiring the filing and publishing of certain sworn statements of ownership, etc., and the marking of matter as "advertisements," are intended merely to supplement existing legislation relative to second-class matter.

The statute, 39 U.S.C.A. § 233, requiring the filing and publishing of certain sworn statements of ownership, etc., and the statute, 39 U.S.C.A. § 234, requiring the marking of matter as "advertisements" were intended merely to supplement existing legislation relative to second-class mail matter, and to impose additional conditions for admission to the privileged class of mail,<sup>6</sup> and were not enacted as an exercise of legislative power to regulate the press or curtail its freedom.<sup>7</sup> The statute, 39 U.S.C.A. § 233, requiring statement of ownership, etc., it has been said, applies only to such publications as are regularly entered as second-class mail matter;<sup>8</sup> and the statement of circulation should cover the whole bona fide paid circulation, however attained, whether sold over the counter, distributed through news agencies and news routes, or disposed of in any other way.<sup>9</sup>

### (4) Suspension or Revocation of Second-Class Mail Privileges Generally

#### (a) Power to suspend or revoke

#### (b) Hearing

#### (a) Power to Suspend or Revoke

The power to suspend or revoke admission to the privilege of second-class mail is a necessary incident to the power to grant it.

The power to suspend or revoke admission to the privilege of second-class mail is a necessary incident to the power to grant it;<sup>10</sup> and this power is recognized by statute, the constitutionality of which has been upheld.<sup>11</sup> A permit issued by the post office department permitting certain publications to the privilege of second-class mail matter, which by its own terms continues in effect until revoked, is a mere license,<sup>12</sup> and the postmaster general is not

bound by the construction placed by a predecessor in office on the statute relating to second-class mail matter, so as to preclude him from revoking such a certificate which had been issued by such predecessor, where no vested right has been created by such certificate.<sup>13</sup> Furthermore, in order to authorize a revocation of admission of a publication to the privilege of second-class mail matter, it is not necessary that the permit should contain a specific reservation of the right to revoke.<sup>14</sup> However, an order revoking a second-class mailing permit for failure to comply with the fourth condition of the statute, 39 U.S.C.A. § 226, because the publication does not contribute to the public good, has been held invalid,<sup>15</sup> since the postmaster general does not have discretion to deny periodicals the second-class rate if in his view they do not contribute to the public good, as discussed *supra* c (2) of this section.

#### (b) Hearing

When a publication has been accorded second-class mail privileges, the permit may not be suspended or revoked until a hearing shall have been granted to the persons interested.

Under statutory provisions, 39 U.S.C.A. § 232, when a publication has been accorded second-class mail privileges, the permit may not be suspended or revoked until a hearing shall have been granted to the persons interested.<sup>16</sup> However, where a temporary permit is issued according second-class mail privileges to a publication until the post office department shall determine whether it is admissible as second-class mail matter, and the department for several years delays action on the publisher's application for second-class mail privileges, this does not entitle him to a hearing on his application before the department acts as in case of a revocation of a privilege once granted.<sup>17</sup> A notice that at a certain time and place publishers will be given a hearing to show cause why their second-class permit should not be revoked on grounds designated in the notice is sufficiently specific,<sup>18</sup> and hearings to determine whether permits admitting to second-class

6. U.S.—Lewis Pub. Co. v. Morgan, N.Y., 33 S.Ct. 867, 229 U.S. 288, 57 L.Ed. 1190.

7. U.S.—Lewis Pub. Co. v. Morgan, *supra*.

8. 29 Opinion Attorney General 550.

9. 30 Opinion Attorney General 244.

10. U.S.—U. S. v. Burleson, App.D.C., 41 S.Ct. 352, 255 U.S. 407, 65 L.Ed. 704.

49 C.J. p 1156 note 90.

11. U.S.—U. S. v. Burleson, *supra*.

12. D.C.—Payne v. Houghton, 22 App.D.C. 234, affirmed 24 S.Ct. 590,

194 U.S. 88, 48 L.Ed. 888, followed in Smith v. Payne, 22 App.D.C. 463, affirmed 24 S.Ct. 595, 194 U.S. 104, 48 L.Ed. 893.

13. U.S.—Houghton v. Payne, App.D.C., 24 S.Ct. 590, 194 U.S. 88, 48 L.Ed. 888.

49 C.J. p 1157 note 93.

14. U.S.—U. S. v. Burleson, App.D.C., 41 S.Ct. 352, 255 U.S. 407, 65 L.Ed. 704—Smith v. Hitchcock, App.D.C., 33 S.Ct. 6, 226 U.S. 53, 57 L.Ed. 119.

15. U.S.—Hannegan v. Esquire, Inc.,

App.D.C., 66 S.Ct. 456, 327 U.S. 146, 90 L.Ed. 586.

16. U.S.—Hannegan v. Esquire, Inc., App.D.C., 66 S.Ct. 456, 327 U.S. 146, 90 L.Ed. 586—Lewis Pub. Co. v. Wyman, C.C.Mo., 152 F. 787.

17. U.S.—Lewis Pub. Co. v. Wyman, C.C.Mo., 168 F. 752, modified on other grounds 182 F. 13, 104 C.C. A. 453, affirmed 33 S.Ct. 599, 228 U.S. 610, 57 L.Ed. 989.

49 C.J. p 1157 note 96.

18. D.C.—Hitchcock v. Smith, 34 App.D.C. 521, affirmed 33 S.Ct. 6, 226 U.S. 53, 57 L.Ed. 119.

mail privileges shall be revoked are necessarily more informal than judicial hearings, and no fixed or arbitrary rules can be laid down as to whether a sufficient hearing has been given.<sup>19</sup> The only duty of the officer at the hearing is to hear, and, if the interested parties are given a chance to offer evidence, they are not denied a hearing within the meaning of this statute.<sup>20</sup>

### (5) Review by Courts

The decision of the postmaster general refusing to admit matter to the mails as second-class matter or revoking an order granting the privilege calls for the exercise of judgment and discretion on the part of the postmaster general, and is entitled to great weight, and, unless clearly erroneous, it will not be disturbed.

The decision of the postmaster general refusing to admit matter to the mails as second-class matter or revoking an order granting that privilege calls for the exercise of judgment and discretion on the part of the postmaster general<sup>21</sup> and is entitled to great weight,<sup>22</sup> and, unless clearly erroneous, it will not be disturbed.<sup>23</sup> Nevertheless, the courts have the power to review orders of this kind<sup>24</sup> and will do so where the order is clearly erroneous<sup>25</sup> or where the postmaster general acted without authority of law or in excess of the power granted him.<sup>26</sup> The general question of the extent and limitations of the judicial power to supervise the determination of the postmaster general with respect to the admission of publications to carriage in the mails at second-class rates is not affected by differences in the form of relief sought, whether mandamus in one case or injunction in another,<sup>27</sup> except that greater circumspection should be exercised where the remedy sought is injunction, which may have a continued mandatory operation.<sup>28</sup>

#### *Review of application for second-class mail privi-*

*leges.* Where, on application for second-class mail privileges, a temporary permit is granted until the post office department shall determine whether the publication is admissible as second-class mail matter, the fact that the department delays for several years to take final action on the application for the privilege does not give the courts authority to review the action of the postmaster general in refusing to grant a hearing before the department acts on the application, as in the case of revocation of a privilege once granted.<sup>29</sup>

### d. Third-Class Matter

Mailable matter of the third class includes books, circulars, and other matter wholly in print, except newspapers and other periodicals entered as second-class matter, proof sheets, corrected proof sheets, and manuscript copy accompanying them, merchandise, including farm and factory products, and all other mailable matter not included in the first, second, or fourth classes.

Under statute, 39 U.S.C.A. § 235, mailable matter of the third class includes books, circulars, and other matter wholly in print, except newspapers and other periodicals entered as second-class matter, proof sheets, corrected proof sheets, and manuscript copy accompanying them, merchandise, including farm and factory products, and all other mailable matter not included in the first, second, or fourth classes.<sup>30</sup> Books, being expressly classified as third-class matter and so made liable to a higher rate of postage than second-class matter, cannot be removed from the third class and brought into the second by the simple device of publishing them in a series at regular intervals of time,<sup>31</sup> and this is so whether such publications are reprints of well-known works or new matter,<sup>32</sup> and although every publication devotes a few pages to matters relating to its circulation and to questions and answers relating to athletics.<sup>33</sup>

19. D.C.—Hitchcock v. Smith, *supra*.

20. U.S.—Smith v. Hitchcock, App. D.C., 33 S.Ct. 6, 226 U.S. 53, 57 L. Ed. 119.

49 C.J. p 1157 note 99 [a] (3), [b].

21. U.S.—Bates, etc., Co. v. Payne, App.D.C., 24 S.Ct. 595, 194 U.S. 106, 48 L.Ed. 894.

D.C.—U. S. v. Cortelyou, 28 App.D.C. 570, 12 L.R.A., N.S., 166.

22. D.C.—Hitchcock v. Tousey, 34 App.D.C. 535, affirmed 33 S.Ct. 6, 226 U.S. 53, 57 L.Ed. 119—Hitchcock v. Smith, 34 App.D.C. 521, affirmed 33 S.Ct. 6, 226 U.S. 53, 57 L.Ed. 119.

23. U.S.—U. S. v. Burleson, App.D.C., 41 S.Ct. 352, 255 U.S. 407, 65 L.Ed. 704.

49 C.J. p 1157 note 4.

24. U.S.—Bates, etc., Co. v. Payne, App.D.C., 24 S.Ct. 595, 194 U.S. 106, 48 L.Ed. 894.

49 C.J. p 1157 note 5.

25. D.C.—U. S. v. Cortelyou, 28 App. D.C. 570, 12 L.R.A., N.S., 166.

26. U.S.—Lewis Pub. Co. v. Wyman, C.C.Mo., 152 F. 787.

D.C.—Payne v. U. S., 20 App.D.C. 581, appeal dismissed 24 S.Ct. 849, 192 U.S. 602, 48 L.Ed. 583.

27. D.C.—Columbian Correspondence College v. Wynne, 25 App.D.C. 149. 49 C.J. p 1157 note 8.

28. D.C.—Payne v. Houghton, 22 App.D.C. 234, affirmed 24 S.Ct. 590, 194 U.S. 88, 48 L.Ed. 888, followed in Smith v. Payne, 22 App.D.C. 463, affirmed 24 S.Ct. 595, 194 U.S. 104, 48 L.Ed. 893.

29. U.S.—Lewis Pub. Co. v. Wyman, C.C.Mo., 152 F. 752, modified on other grounds 182 F. 13, 104 C.C.A. 453, affirmed 33 S.Ct. 599, 228 U.S. 610, 57 L.Ed. 989.

30. U.S.—Bittleston Collection Agency v. U. S., 75 Ct.Cl. 681.

31. U.S.—Houghton v. Payne, App. D.C., 24 S.Ct. 590, 194 U.S. 88, 48 L.Ed. 888.

D.C.—Hitchcock v. Tousey, 34 App. D.C. 535, affirmed 33 S.Ct. 6, 226 U.S. 53, 57 L.Ed. 119.

32. D.C.—Payne v. Houghton, 22 App.D.C. 234, affirmed 24 S.Ct. 590, 194 U.S. 88, 48 L.Ed. 888.

33. D.C.—Hitchcock v. Smith, 34 App.D.C. 521, affirmed 33 S.Ct. 6, 226 U.S. 53, 57 L.Ed. 119.

### e. Fourth-Class Matter

Mailable matter of the fourth class includes mail matter in excess of a certain weight, and includes books, and all other mailable matter not included in the first, second, or third classes.

Under statute, 39 U.S.C.A. § 240, mailable matter of the fourth class includes mail matter in excess of a certain weight, and includes books, and all other mailable matter not included in the first, second, or third classes.<sup>34</sup>

## § 21. — Exclusion of Matter from Mails

- a. In general
- b. Constitutionality of statutes
- c. Particular classes of matter excluded from mails
- d. Determination as to mailability and review

### a. In General

Constitutional power of congress to establish post offices and post roads includes, as a necessary incident, the right to determine what may be carried in the mails and what shall not be carried.

Since the constitutional power of congress to establish post offices and post roads embraces the regulation of the entire postal system, as discussed supra § 2, it includes, as a necessary incident, the right to determine what may be carried in the mails and what shall not be so carried,<sup>35</sup> and to prescribe the size, weight, shape, and character of the con-

tents of every mailable package, and limit the superscription,<sup>36</sup> and impose penalties for the violation of its regulations to be enforced through the courts.<sup>37</sup> Thus, the power of congress over the mails is not limited to the protection of the facilities of the mails,<sup>38</sup> but may be exercised to prevent the use of the mails for purposes which it deems objectionable to sound public policy,<sup>39</sup> or injurious to the public morals,<sup>40</sup> or inimical to the general welfare.<sup>41</sup> Hence, congress may enact reasonable regulations to prevent the mails from being used as instruments of fraud and imposition.<sup>42</sup> The use of the postal service is not a matter of right, but of privilege, limited by the statutes declaring certain classes of matter to be nonmailable,<sup>43</sup> and, when congress lays down a valid regulation pertinent to the use of the mails, it may withdraw the privilege of that use from those who disobey.<sup>44</sup> It has been said that it is doubtless within the power of the government to withdraw or discontinue its postal system entirely.<sup>45</sup>

**Enforcement.** In the enforcement of regulations excluding matter from the mail, a distinction is to be made between what is intended to be kept free from inspection, such as letters, and sealed packages subject to letter postage, and what is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, purposely left in a condition to be examined.<sup>46</sup> Regulations with respect to printed matter open to examination in some cases

34. U.S.—Hannegan v. Esquire, Inc., App.D.C., 66 S.Ct. 456, 327 U.S. 146, 90 L.Ed. 586—Bittleston Collection Agency v. U. S., 75 Ct.Cl. 681.

35. U.S.—Public Clearing House v. Coyne, Ill., 24 S.Ct. 789, 194 U.S. 497, 48 L.Ed. 1092.  
49 C.J. p 1158 note 16.

36. U.S.—Warren v. U. S., Kan., 183 F. 718, 106 C.C.A. 156, 33 L.R.A., N.S., 800.

37. U.S.—U. S. v. Loring, D.C.Ill., 91 F. 881.

D.C.—Dauphin v. Key, 11 D.C. 203.

38. U.S.—Electric Bond & Share Co. v. Securities and Exchange Commission, C.C.A.N.Y., 92 F.2d 580, affirmed 58 S.Ct. 678, 303 U.S. 419, 82 L.Ed. 936, 115 A.L.R. 105.

39. U.S.—Electric Bond & Share Co. v. Securities and Exchange Commission, supra—Butler v. U. S., C.C.A.Utah, 53 F.2d 800.

Exclusion from mails of matter relating to stocks and securities see Licenses §§ 72-78.

### Effect of proprietary interest

The power probably may be regarded as even more comprehensive than that exercised over interstate commerce, since the government's interest in the mails is proprietary

as well as regulatory.—Electric Bond & Share Co. v. Securities and Exchange Commission, C.C.A.N.Y., 92 F.2d 580, affirmed 58 S.Ct. 678, 303 U.S. 419, 82 L.Ed. 936, 115 A.L.R. 105.

40. U.S.—Ex parte Jackson, N.Y., 96 U.S. 727, 24 L.Ed. 877.  
49 C.J. p 1158 note 16 [a].

41. U.S.—Bogy v. U. S., C.C.A.Tenn., 96 F.2d 734, certiorari denied 59 S.Ct. 68, 305 U.S. 608, 83 L.Ed. 387—Electric Bond & Share Co. v. Securities and Exchange Commission, C.C.A.N.Y., 92 F.2d 580, affirmed 58 S.Ct. 678, 303 U.S. 419, 82 L.Ed. 936, 115 A.L.R. 105.

42. U.S.—Oklahoma-Texas Trust v. Securities and Exchange Commission, C.C.A.10, 100 F.2d 888—Securities & Exchange Commission v. Torr, D.C.N.Y., 15 F.Supp. 315, reversed on other grounds, C.C.A., 87 F.2d 446.

43. U.S.—Gitlow v. Kieley, D.C.N.Y., 44 F.2d 227, affirmed, C.C.A., 49 F.2d 1077, certiorari denied 52 S.Ct. 29, 284 U.S. 648, 76 L.Ed. 550—Acret v. Harwood, D.C.Cal., 41 F. Supp. 492.

D.C.—Pike v. Walker, 121 F.2d 37, 73 App.D.C. 289, certiorari denied

62 S.Ct. 94, 314 U.S. 625, 86 L.Ed. 502, rehearing denied 62 S.Ct. 117, 314 U.S. 710, 86 L.Ed. 566.

49 C.J. p 1158 note 19.

**Conformity to postal laws and regulations** is required of publishers seeking privilege of sending publication through mails.—Gitlow v. Kieley, D.C.N.Y., 44 F.2d 227, affirmed, C.C.A., 49 F.2d 1077, certiorari denied 52 S.Ct. 29, 284 U.S. 648, 76 L.Ed. 550.

### Not special privilege

Mail service is not a special privilege, but is a highway over which all business must travel.—Esquire, Inc., v. Walker, 151 F.2d 49, 180 U.S. App.D.C. 145, affirmed Hannegan v. Esquire, Inc., 66 S.Ct. 456, 327 U.S. 146, 90 L.Ed. 586.

44. U.S.—Electric Bond & Share Co. v. Securities and Exchange Commission, N.Y., 58 S.Ct. 678, 303 U.S. 419, 82 L.Ed. 936, 115 A.L.R. 105—Egan v. U. S., C.C.A.Mo., 137 F.2d 369, certiorari denied 64 S.Ct. 195, 320 U.S. 788, 88 L.Ed. 474.

45. U.S.—U. S. v. Journal Co., Inc., D.C.Va., 197 F. 415.

46. U.S.—Ex parte Jackson, N.Y., 96 U.S. 727, 24 L.Ed. 877.



may be enforced by the officers of the postal service on their own inspection, as where the object is exposed and shows that it is prohibited.<sup>47</sup> However, letters and sealed packages subject to letter postage in the mails can be opened and examined only under like warrant issued on similar oath or affirmation particularly describing the thing to be seized as is required when papers are subjected to search in one's own household.<sup>48</sup> Nevertheless, regulations for the exclusion of this class of matter from the mails may be enforced on competent evidence of their violation obtained in other ways,<sup>49</sup> as from the persons receiving the letters or packages,<sup>50</sup> or from the agents depositing them in the post office, or others cognizant of the fact.<sup>51</sup>

### b. Constitutionality of Statutes

Although statutes designating what may be carried in the mails and what must be excluded therefrom must be consistent with the rights of the people as reserved by the Constitution, statutes which forbid the use of the mails for the transmission of designated classes of letters, circulars, newspapers, publications, etc., have been uniformly upheld as not being in violation of any constitutional provision.

Although statutes designating what may be carried in the mails and what must be excluded therefrom must be consistent with the rights of the people as reserved by the Constitution,<sup>52</sup> and congressional exclusion of matter from the mails must rest directly on regulation of the mails which is use of the mails or things mailed, and not on a regulation of the user,<sup>53</sup> statutes which forbid the use of the mails for the transmission of designated classes of letters, circulars, newspapers, publications, etc., have been uniformly upheld as not being in violation of any constitutional provision.<sup>54</sup> Thus the courts have upheld the validity of statutes forbid-

ding the transmission of a wide variety of mail matter, such as letters, circulars, newspapers and publications concerning lotteries,<sup>55</sup> matter in furtherance of schemes to defraud,<sup>56</sup> matter on the surface of which appears language, scurrilous, defamatory, threatening, or calculated and obviously intended to reflect injuriously on the character or conduct of others,<sup>57</sup> matter alleging or advocating treason, or forcible resistance to any law of the United States,<sup>58</sup> and obscene, lewd, lascivious, indecent, or filthy matter.<sup>59</sup>

*Places over which congress has no control.* It is not necessary that congress should have the power to deal with crime or immorality within the states in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality.<sup>60</sup>

### c. Particular Classes of Matter Excluded from Mails

Various classes of matter are excluded from the mails by statutes.

Under the provisions of the Criminal Code, 18 U. S.C.A. § 1463, all matter otherwise mailable by law on the envelope or outside cover or wrapper of which, and all post cards on which, any delineations, epithets, terms, or language of an indecent, lewd, lascivious, or obscene character are written or printed or otherwise impressed or apparent are expressly declared to be nonmailable matter, and the postmaster general is thereby vested with power to exclude such matter from the mails.<sup>61</sup> However, the postmaster general may not exclude such matter from the mail unless the inscriptions thereon are libelous, scurrilous, defamatory, or reflect injuri-

47. U.S.—Ex parte Jackson, supra.  
49 C.J. p 1162 note 97.

48. U.S.—Ex parte Jackson, supra.  
49 C.J. p 1162 note 98.

49. U.S.—Ex parte Jackson, supra.

50. U.S.—Ex parte Jackson, supra.

51. U.S.—Ex parte Jackson, supra.

52. U.S.—Securities & Exchange Commission v. Torr, D.C.N.Y., 15 F.Supp. 315, reversed on other grounds, C.C.A., 87 F.2d 446.

D.C.—Pike v. Walker, 121 F.2d 37, 73 App.D.C. 289, certiorari denied 62 S.Ct. 94, 314 U.S. 625, 86 L.Ed. 502, rehearing denied 62 S.Ct. 117, 314 U.S. 710, 86 L.Ed. 566.

53. U.S.—In re American States Public Service Co., D.C.Md., 12 F.Supp. 667, modified on other grounds, C.C.A., Burco, Inc. v. Whitworth, 81 F.2d 721, certiorari denied 56 S.Ct. 670, two cases, 297 U.S. 724, 80 L.Ed. 1008.

54. U.S.—U. S. v. Burleson, App.D.C., 41 S.Ct. 352, 255 U.S. 470, 65 L.Ed. 704.

49 C.J. p 1158 note 22.

Constitutional right of freedom of speech and of press see Constitutional Law § 213.

Due process of law in creation or definition of offenses see Constitutional Law § 580.

Exclusion from mails as denial of equal protection of laws see Constitutional Law § 563.

55. U.S.—Horner v. U. S., N.Y., 12 S.Ct. 407, 143 U.S. 207, 36 L.Ed. 126.

49 C.J. p 1158 note 23.

56. U.S.—Public Clearing House v. Coyne, Ill., 24 S.Ct. 789, 194 U.S. 497, 48 L.Ed. 1092—Missouri Drug Co. v. Wyman, C.C.Mo., 129 F. 623.

57. U.S.—Warren v. U. S., Kan., 183 F. 718, 106 C.C.A. 156, 33 L.R.A., N.S., 800.

58. U.S.—U. S. v. Burleson, App.D.C., 41 S.Ct. 352, 255 U.S. 407, 65 L.Ed. 704.

49 C.J. p 1159 note 26.

59. U.S.—Coomer v. U. S., Okl., 213 F. 1, 129 C.C.A. 617.

49 C.J. p 1159 note 27.

60. U.S.—Ex parte Rapier, 12 S.Ct. 374, 143 U.S. 110, 36 L.Ed. 93—Securities & Exchange Commission v. Crude Oil Corporation of America, C.C.A.Wis., 93 F.2d 844.

61. U.S.—Davis v. Brown, C.C.Ohio, 103 F. 909.

Mailing indecent, libelous, defamatory, or threatening matter on envelopes, wrappers, or postal cards as criminal offense see *infra* § 47.

**Matter held properly excluded**

U.S.—Hardy v. Goldman, D.C.N.Y., 38 F.Supp. 1011.

D.C.—Shoemaker v. Burke, 92 F.2d 205, 67 App.D.C. 281, 112 A.L.R. 1142.

ously on another's character or conduct,<sup>62</sup> and the libel law determines whether the inscribed words are defamatory.<sup>63</sup> Thus, the words, in order to be defamatory and, therefore, nonmailable, must charge some identifiable person with something.<sup>64</sup> Hence, the statute has no application to the defamation of a state.<sup>65</sup>

*Letters, circulars, and advertisements concerning lotteries.* Under a statute providing that no letters, packages, postal cards, or circulars concerning any lottery or gift enterprise or similar scheme, and no newspaper, circular, or publication of any kind containing any advertisement of any lottery, gift, enterprise, or similar scheme, shall be deposited in, or carried by, the mails of the United States, it was held that letters or circulars concerning lotteries, whether considered legal or illegal, might be excluded from the mails<sup>66</sup> if known, and not merely supposed or suspected, to concern lotteries.<sup>67</sup> However, letters addressed to lottery associations or lottery agents could not, simply because they were thus addressed, be deemed to be letters concerning lotteries and as such excluded.<sup>68</sup> By the provisions of this statute, newspapers which publish in their columns advertisements for lotteries, or similar schemes, could be excluded from the mails; but, inasmuch as exclusion of newspapers and other publications from the mails is highly arbitrary in its character, it could be justified only where the statute was clearly applicable to the supposed objectionable publication.<sup>69</sup> There were various decisions under this statute as to what were, or were not, lotteries.<sup>70</sup>

*Matter in violation of Espionage Act.* One of the purposes of the Espionage Act is to prevent dissemination and distribution through the mails of publications intended to embarrass the government in its successful prosecution of war,<sup>71</sup> and to the

end that a united front should be presented to the enemy.<sup>72</sup> Thus, it excludes from the mails any publication, the natural effect of which is to encourage resistance to a law of the United States, and the words of which are used in an endeavor to persuade to resistance,<sup>73</sup> although the duty to resist is not mentioned directly, and the interests of the persons addressed in resistance are not directly suggested.<sup>74</sup> Accordingly, it has been held that newspaper articles, denouncing the war, the government, the president, and congress, and wartime legislation, and impliedly counseling violations of the draft law, stating that soldiers in large numbers were becoming insane, etc., render the newspaper nonmailable on the ground that it was conveying false reports and false statements with intent to promote the success of the enemies of the United States, and attempting to cause disloyalty and refusal of duty in the military and naval forces and obstruct the recruiting and enlistment service of the United States.<sup>75</sup> Hence, where a newspaper publishes nonmailable matter of this character so frequently as to justify the presumption that it will continue to do so, the postmaster general may revoke the privilege not merely as to particular issues containing such matter, but indefinitely for the future, subject to the publisher's right to secure a renewal on proper application and proof that the paper will conform to the law.<sup>76</sup>

*Matter tending to incite arson, murder, or assassination.* Under a statute declaring nonmailable matter of a character tending to incite arson, murder, or assassination, a newspaper which published articles encouraging insurrections against the government and destruction of the established society and which approved and justified the crimes committed in the Russian Revolution could be excluded from the mails.<sup>77</sup> This, it was said, was not a censorship of the press but merely a refusal of the

62. U.S.—American Civil Liberties Union v. Kiely, C.C.A.N.Y., 40 F. 2d 451.

63. U.S.—American Civil Liberties Union v. Kiely, *supra*.

64. U.S.—American Civil Liberties Union v. Kiely, *supra*.

Inscription on envelopes charging conviction was "frameup," and making general charges against state, system, or indefinite class, was held not to render envelopes nonmailable. —American Civil Liberties Union v. Kiely, *supra*.

65. U.S.—American Civil Liberties Union v. Kiely, *supra*.

66. 15 Opinion Attorney General 203.

Mailing matter concerning lotteries or similar schemes as criminal offense see *infra* §§ 53-55.

67. 18 Opinion Attorney General 306.

68. 18 Opinion Attorney General 306.

69. U.S.—Post Pub. Co. v. Murray, Mass., 230 F. 773, 145 C.C.A. 83, certiorari denied 36 S.Ct. 725, 241 U.S. 675, 60 L.Ed. 1232.

70. U.S.—Post Pub. Co. v. Murray, *supra*.  
49 C.J. p 1160 note 61.

What constitutes "lottery" generally see Lotteries §§ 1-10.

71. U.S.—Masses Pub. Co. v. Pat-

ten, N.Y., 246 F. 24, 158 C.C.A. 250, L.R.A.1918C 79, Ann.Cas.1918B 999.

72. U.S.—U. S. v. Burleson, App.D. C., 41 S.Ct. 352, 255 U.S. 407, 65 L.Ed. 704.

73. U.S.—Masses Pub. Co. v. Pat-  
ten, N.Y., 246 F. 24, 158 C.C.A. 250,  
L.R.A.1918C 79, Ann.Cas.1918B 999.

74. U.S.—Masses Pub. Co. v. Pat-  
ten, *supra*.

75. U.S.—U. S. v. Burleson, App.D.  
C., 41 S.Ct. 352, 255 U.S. 407, 65  
L.Ed. 704.  
49 C.J. p 1160 note 67.

76. U.S.—U. S. v. Burleson, *supra*.

77. D.C.—Burleson v. U. S., 274 F.  
749, 51 App.D.C. 65.  
49 C.J. p 1161 note 70.

government to distribute mail matter tending to its own destruction.<sup>78</sup>

*Obscene matter and articles adapted for immoral use.* Under the statute, 18 U.S.C.A. § 1461, all matter which is obscene, lewd, and lascivious, and every article or thing designed or intended for the prevention of conception or procuring of abortion, or intended or adapted for any indecent or immoral use, and all matter giving information how any of these things may be obtained, are expressly declared to be nonmailable matter, and may be excluded from the mails.<sup>79</sup> However, in order to bar matter from the mails as obscene, the standard must be the likelihood that the matter will so arouse the salacity of the reader to whom it is sent as to outweigh any literary, scientific, or other merits it may have in that reader's hands.<sup>80</sup> The fact that some of the phrases of a publication may stimulate the senses of some persons is insufficient to bar the publication from the mails if the publication as a whole is not stimulating to the senses of the ordinary reader.<sup>81</sup> The provisions of the statute relating to the prevention of conception or procuring of abortion do not exclude from the mails properly prepared information intended for properly qualified persons.<sup>82</sup> Thus, it does not prohibit the distribution of properly prepared information to phy-

sicians or other qualified persons.<sup>83</sup>

*Poisons.* Under the statute declaring poisons to be nonmailable matter, it was held that the authority of the postmaster general to prescribe regulations for the mailing of poisons or compositions containing poison not outwardly or of their own force dangerous or injurious to life, health, or property was limited to regulations as to the "preparation and packing" thereof.<sup>84</sup>

#### d. Determination as to Mailability and Review

The postmaster general is vested with power to determine what matter is mailable, and it is his duty to do so. In determining what matter is nonmailable the postmaster general is required to use judgment and discretion, and his decision is regarded as conclusive, unless he has exceeded his authority, and the courts will not interfere with such action unless it is clearly shown to be wrong.

The postmaster general is vested with power to determine what matter is mailable,<sup>85</sup> and it is his duty to do so.<sup>86</sup> Such questions, it has been said, can be decided most conveniently by those who are charged with the administration of the postal laws.<sup>87</sup> In determining what matter is nonmailable the postmaster general is required to use judgment and discretion.<sup>88</sup> Every intendment of the law is in favor of his action,<sup>89</sup> and his decision is regarded as con-

78. D.C.—Burleson v. U. S., supra.  
79. U.S.—Anderson v. Patten, D.C. N.Y., 247 F. 382.  
49 C.J. p 1161 note 75.

Mailing obscene, lewd, or lascivious matter as criminal offense see infra §§ 38-41.

**Validity of obscenity laws** is recognition that mails may not be used to satisfy all tastes, no matter how perverted.—Hannegan v. Esquire, Inc., App.D.C., 66 S.Ct. 456, 327 U.S. 146, 90 L.Ed. 586.

80. D.C.—Walker v. Popenoe, 149 F. 2d 511, 80 U.S.App.D.C. 129.

**Serious works of physiology, medicine, science, and sex instruction**, expressed in decent language, are not "obscene, lewd, or lascivious" within statute barring such publications from the mails.—Walker v. Popenoe, supra.

81. D.C.—Walker v. Popenoe, supra.  
**Work on marriage**

The pamphlet called "Preparing for Marriage," containing detailed information and advice regarding the physical and emotional aspects of marriage, was not "obscene" within statute barring obscene, lewd, or lascivious publications from the mails.—Walker v. Popenoe, supra.

82. D.C.—Consumers Union of U. S. v. Walker, 145 F.2d 33, 79 U.S. App.D.C. 223.

83. U.S.—U. S. v. Nicholas, C.C.A. N.Y., 97 F.2d 510.  
D.C.—Consumers Union of U. S. v. Walker, 145 F.2d 33, 79 U.S.App. D.C. 223.

#### Qualified persons

(1) Where pamphlet concerning contraceptive materials was intended to be distributed by nonprofit membership organization, engaged in business of testing and analyzing quality of merchandise offered generally for sale, for use solely of its members, on certification in each instance that applicant was married and used prophylactics on advice of physician, there was a fair and reasonable limitation, and postmaster was unauthorized to bar the pamphlet from the mails.—Consumers Union of U. S. v. Walker, supra.

(2) Magazines dealing with contraception, published in foreign country and addressed to local editor of the magazine, which were not subject to forfeiture, should be delivered to local editor as one in whose hands the magazines would be lawful, notwithstanding possibility that editor might subsequently misuse his privilege.—U. S. v. Nicholas, C.C.A.N.Y., 97 F.2d 510.

**In absence of showing that addressee would not abuse the information contained therein**, book

dealing with contraception mailed from abroad, although not subject to forfeiture, should be sent to dead letter office without prejudice to sender's rights to recover his property, rather than delivered to addressee.—U. S. v. Nicholas, supra.

84. U.S.—Bruce v. U. S., C.C.A.Mo., 202 F. 98, 120 C.C.A. 370.  
49 C.J. p 1161 note 77.

85. U.S.—Davis v. Brown, C.C.Ohio, 103 F. 909.  
Philippine.—Sotto v. Ruiz, 41 Philippine 468.

86. U.S.—Masses Pub. Co. v. Patten, N.Y., 246 F. 24, 158 C.C.A. 250, L.R.A.1918C 79, Ann.Cas.1918B 999.—Missouri Drug Co. v. Wyman, C.C.Mo., 129 F. 623.

87. U.S.—Missouri Drug Co. v. Wyman, supra.

88. U.S.—Roth v. Goldman, C.A.N.Y., 172 F.2d 788, certiorari denied 59 S.Ct. 1514, 337 U.S. 938, 93 L. Ed. 1743.—American Civil Liberties Union v. Kiely, C.C.A.N.Y., 40 F.2d 451.—Masses Pub. Co. v. Patten, N.Y., 246 F. 24, 158 C.C.A. 250, L.R.A.1918C 79, Ann.Cas.1918B 999.

89. Philippine.—Sotto v. Ruiz, 41 Philippine 468.  
49 C.J. p 1161 note 83.

clusive,<sup>90</sup> unless he has exceeded his authority,<sup>91</sup> and the courts will not interfere with such action unless it is clearly shown to be wrong.<sup>92</sup> Nevertheless, such action may be subject to revision by the courts<sup>93</sup> which have power in a proper proceeding to grant appropriate relief.<sup>94</sup> Thus, a decision excluding matter from the mails as nonmailable is subject to review by the court where it is clearly wrong<sup>95</sup> or, as otherwise expressed, where there is a clear mistake of law as applied to the admitted facts,<sup>96</sup> or an abuse of discretion,<sup>97</sup> or excess of authority.<sup>98</sup> Where matter has been improperly excluded from the mails, the party aggrieved has a remedy by injunction to compel the postmaster general to transmit through the mails the matter improperly excluded therefrom;<sup>99</sup> but an injunction is not warranted where the decision is not clearly wrong,<sup>1</sup> and, where judicial review is sought by action for an injunction, the review should not be overextensive.<sup>2</sup> Furthermore, the burden of proof is in all cases on the party claiming that matter has been wrongfully excluded from the mails,<sup>3</sup> or that the postmaster general has exceeded his power and exercised it wantonly and maliciously,<sup>4</sup> and this should be done by a preponderance of the evidence.<sup>5</sup>

## § 22. — Fraud Orders and Return of Mail to Sender

- a. In general
- b. Constitutionality of statutes
- c. Application of statutes

- d. Proceedings
- e. Review of decisions granting fraud orders

### a. In General

Under the statutes the postmaster general, on evidence satisfactory to him, is authorized to deny the right to receive mail to any person or corporation engaged in one of the schemes or enterprises therein described, and, when the postmaster general acts under these statutes, he issues what is called a "fraud order".

The right of the postmaster general to exclude letters or to refuse to permit their delivery to persons addressed is wholly statutory,<sup>6</sup> and, in order to authorize the postmaster general to exclude matter from the mails, the facts must in some aspect be sufficient to permit him under the statute to make the order.<sup>7</sup> Under the statutes the postmaster general, on evidence satisfactory to him, is authorized to deny the right to receive mail to any person or corporation engaged in one of the schemes or enterprises therein described,<sup>8</sup> and, when the postmaster general acts under these statutes, he issues what is called a "fraud order,"<sup>9</sup> which is defined supra § 1, and the postmaster is bound to obey such an order unless the postmaster general exceeded his authority in making it.<sup>10</sup> Hence, when the postmaster general is satisfied that any person or corporation is engaged in one of the schemes or enterprises therein described, he may and should issue a fraud order forbidding the delivery of registered letters, and the payment of

90. D.C.—Shoemaker v. Burke, 92 F.2d 205, 67 App.D.C. 281, 112 A.L.R. 1142.

49 C.J. p 1161 note 84.

#### Discretion held not abused

Order of postmaster general excluding from the mails as obscene, lewd, or lascivious, a book consisting of many "waggish tales," supposed to have been brought down from another era and clime, but constituting in fact American-made or shared smoking room jests and stories, obscene by any refined standards, was not abuse of administrative discretion or power.—Roth v. Goldman, C.A.N.Y., 172 F.2d 788, certiorari denied 69 S.Ct. 1514, 337 U.S. 938, 93 L.Ed. 1743.

91. D.C.—Shoemaker v. Burke, 92 F.2d 205, 67 App.D.C. 281, 112 A.L.R. 1142.

92. U.S.—Gitlow v. Kiely, D.C.N.Y., 44 F.2d 227, affirmed, C.C.A., 49 F.2d 1077, certiorari denied 52 S.Ct. 29, 284 U.S. 648, 76 L.Ed. 550.

D.C.—Shoemaker v. Burke, 92 F.2d 205, 67 App.D.C. 281, 112 A.L.R. 1142.

49 C.J. p 1161 note 84.

93. Philippine.—Sotto v. Ruiz, 41 Philippine 468.

94. U.S.—American School of Magnetic Healing v. McAnnulty, Mo., 23 S.Ct. 33, 187 U.S. 94, 47 L.Ed. 90.

95. Philippine.—Sotto v. Ruiz, 41 Philippine 468.

96. U.S.—American School of Magnetic Healing v. McAnnulty, Mo., 23 S.Ct. 33, 187 U.S. 94, 47 L.Ed. 90.

97. Philippine.—Sotto v. Ruiz, 41 Philippine 468.

98. Philippine.—Sotto v. Ruiz, supra.

99. U.S.—Gitlow v. Kiely, D.C.N.Y., 44 F.2d 227, affirmed, C.C.A., 49 F.2d 1077, certiorari denied 52 S.Ct. 29, 284 U.S. 648, 76 L.Ed. 550.

49 C.J. p 1161 note 92.

1. U.S.—Gitlow v. Kiely, D.C.N.Y., 44 F.2d 227, affirmed, C.C.A., 49 F.2d 1077, certiorari denied 52 S.Ct. 29, 284 U.S. 648, 76 L.Ed. 550.

2. U.S.—Roth v. Goldman, C.C.A. N.Y., 172 F.2d 788, certiorari denied 69 S.Ct. 1514, 337 U.S. 938, 93 L.Ed. 1743.

3. U.S.—Masses Pub. Co. v. Patten, N.Y., 246 F. 24, 158 C.C.A. 250, L.R.A.1918C 79, Ann.Cas.1918B 999.

4. U.S.—Masses Pub. Co. v. Patten, supra.

5. U.S.—Masses Pub. Co. v. Patten, supra.

6. U.S.—American School of Magnetic Healing v. McAnnulty, Mo., 23 S.Ct. 33, 187 U.S. 94, 47 L.Ed. 90.

D.C.—Pike v. Walker, 121 F.2d 37, 73 App.D.C. 289, certiorari denied 62 S.Ct. 94, 314 U.S. 625, 86 L.Ed. 502, rehearing denied 62 S.Ct. 177, 314 U.S. 710, 86 L.Ed. 566.

7. U.S.—American School of Magnetic Healing v. McAnnulty, Mo., 23 S.Ct. 33, 187 U.S. 94, 47 L.Ed. 90.

8. D.C.—Pike v. Walker, 121 F.2d 37, 73 App.D.C. 289, certiorari denied 62 S.Ct. 94, 314 U.S. 625, 86 L.Ed. 502, rehearing denied 62 S.Ct. 177, 314 U.S. 710, 86 L.Ed. 566.

49 C.J. p 1162 note 7.

9. D.C.—Pike v. Walker, supra.

10. U.S.—Gargilis v. Gleavy, D.C. Mass., 45 F.Supp. 721.

49 C.J. p 1162 note 10.

money orders to such person or corporation,<sup>11</sup> and such person or corporation is not entitled to receive through the mails either the registered letters or money orders provided for in the statute when the postmaster general has made an order forbidding the delivery of such articles.<sup>12</sup> Although former statutory provisions were in terms confined to registered letters and money orders, and it was accordingly held that no order could validly be made depriving a citizen or corporation of the ordinary use of the mails, notwithstanding his or its violation of some provision of the statute,<sup>13</sup> the present statutory provision, 39 U.S.C.A. § 259, permits the order to include any other letters or mail matter directed to any such person or company, and the effect of the provision is to deny all mail facilities to those shown to have violated any provision of the statute.<sup>14</sup>

The obvious purpose of the statute is to purge the mails of objectionable or nonmailable matter,<sup>15</sup> so as to protect the public from fraudulent practices through use of the mails,<sup>16</sup> and to prevent future injury to the public by denying the use of the mails to aid a fraudulent scheme,<sup>17</sup> and not to impose punishment on violators,<sup>18</sup> and, therefore, congress wisely provided that such mails could be arrested at the destination offices and returned to the senders with the advice that such mail was ensnaring innocent senders.<sup>19</sup> Thus, the decisive factor in the issuance of a fraud order is not whether anyone complains of fraud or was in fact defrauded,<sup>20</sup> but whether the mails are being used to project a scheme which may result in obtaining money from members of the public by means of

false and fraudulent statements.<sup>21</sup>

*Opening registered letters.* Under the provisions of the statute, neither the making of a fraud order nor its enforcement requires or permits the opening of any registered letter, and the statute expressly prohibits the opening of any such registered letter by the postmaster not addressed to him.<sup>22</sup>

### b. Constitutionality of Statutes

The statutes authorizing the postmaster general to deny the use of postal facilities to a person or corporation which, on satisfactory evidence to him, is found to be engaged in a violation of some provision of the statutes have been held constitutional.

The constitutionality of the statutes in so far as they confer authority on the postmaster general to direct a postmaster to refuse the delivery of registered letters or the payment of money orders to a person or corporation which, on evidence satisfactory to him, is found to be engaged in a violation of some provision of the statutes has been very generally upheld.<sup>23</sup> So, also, while there are a limited number of decisions in which it is either held or said that congress is without power to enact a provision denying all mail facilities whatever to those shown to have violated any provision of the statutes,<sup>24</sup> the constitutionality of that part of the statute which so provides has been upheld by a decision of the supreme court of the United States,<sup>25</sup> by decisions of the federal courts,<sup>26</sup> and of the Philippine courts,<sup>27</sup> and by an opinion of the attorney general of the United States.<sup>28</sup>

11. U.S.—New Orleans Nat. Bank v. Merchant, C.C.La., 18 F. 841.

49 C.J. p 1162 note 8.

12. U.S.—New Orleans Nat. Bank v. Merchant, supra.

49 C.J. p 1162 note 9.

13. D.C.—Dauphin v. Key, 11 D.C. 203.

49 C.J. p 1162 note 11.

14. U.S.—Public Clearing House v. Coyne, III., 24 S.Ct. 789, 194 U.S. 497, 48 L.Ed. 1092.

49 C.J. p 1162 note 13.

15. U.S.—Acret v. Harwood, D.C. Cal., 41 F.Supp. 492.

D.C.—Farley v. Heininger, 105 F.2d 79, 70 App.D.C. 200, certiorari denied Heininger v. Farley, 60 S.Ct. 110, 308 U.S. 587, 84 L.Ed. 491—New v. Tribond Sales Corp., 19 F.2d 671, 57 App.D.C. 197.

16. U.S.—Commissioner of Internal Revenue v. Heininger, 64 S.Ct. 249, 320 U.S. 467, 88 L.Ed. 171.

Employment of counsel

Policy of statutes is not to deter

persons from employing counsel to assist in presenting bona fide defense to a proposed fraud order.—Commissioner of Internal Revenue v. Heininger, supra.

17. U.S.—Donaldson v. Read Magazine, App.D.C., 68 S.Ct. 591, 333 U.S. 178, 92 L.Ed. 628.

18. U.S.—Donaldson v. Read Magazine, supra—Commissioner of Internal Revenue v. Heininger, 64 S.Ct. 249, 320 U.S. 467, 88 L.Ed. 171.

19. U.S.—Donnell Mfg. Co. v. Wyman, C.C.Mo., 156 F. 415.

20. U.S.—Fairfield Floral Co. v. Bradbury, C.C.Me., 89 F. 393.

D.C.—Farley v. Heininger, 105 F.2d 79, 70 App.D.C. 200, certiorari denied Heininger v. Farley, 60 S.Ct. 110, 308 U.S. 587, 84 L.Ed. 491.

21. D.C.—Farley v. Heininger, 105 F.2d 79, 70 App.D.C. 200, certiorari denied Heininger v. Farley, 60 S.Ct. 110, 308 U.S. 587, 84 L.Ed. 491.

22. U.S.—Enterprise Sav. Assoc. v. Zumstein, Ohio, 67 F. 1000, 15 C. C.A. 153—Commerford v. Thompson, C.C.Ky., 1 F. 417, 2 Flipp. 611.

23. U.S.—Donaldson v. Read Magazine, App.D.C., 68 S.Ct. 591, 333 U.S. 178, 92 L.Ed. 628.

49 C.J. p 1162 note 16.

24. U.S.—Fairfield Floral Co. v. Bradbury, C.C.Me., 89 F. 393—Hoover v. McChesney, C.C.Ky., 81 F. 472.

25. U.S.—Donaldson v. Read Magazine, 68 S.Ct. 591, 333 U.S. 178, 92 L.Ed. 628.

49 C.J. p 1163 note 13.

26. U.S.—American School of Magnetic Healing v. McAnnulty, 102 F. 565, reversed on other grounds 23 S.Ct. 33, 187 U.S. 94, 47 L.Ed. 90.

49 C.J. p 1163 note 19.

27. Philippine.—Reyes v. Topacio, 44 Philippine 207.

28. 21 Opinion Attorney General 313.

### c. Application of Statutes

The mail-fraud statutes apply to schemes for the distribution of money, etc., by lot, chance, or drawing of any kind, and to all schemes or devices for obtaining money or property of any kind by means of false or fraudulent pretenses, representations, or promises.

The mail-fraud statutes apply to schemes for the distribution of money, etc., by lot, chance, or drawing of any kind, and to all schemes or devices for obtaining money or property of any kind by means of false or fraudulent pretenses, representations, or promises.<sup>29</sup> With respect to the first class of cases, although the rule was formerly otherwise,<sup>30</sup> the statutes include all lotteries, whether or not fraudulent.<sup>31</sup> However, no case can be brought within the second class except on a showing of actual fraud in fact.<sup>32</sup> The statute was not intended to cover any case which the postmaster general might regard as based on false opinions,<sup>33</sup> or, in other words, it is not the design of the statute to vest the postmaster general with authority to determine between contradictory views held in apparent good faith and the subject of merits or demerits of which may fairly be said to be a matter of opinion.<sup>34</sup> On the other hand, the issuance of fraud orders is justified in case of misrepresentations of fact as distinguished from mere statements of opinion and laudatory statements used in advertising,<sup>35</sup> if made with intent to deceive,<sup>36</sup> or where the al-

leged nonmailable matter makes extravagant and unfounded claims in support of the article sought to be sold;<sup>37</sup> and what might otherwise be a legitimate business or profession may be so conducted as to render it a fraud and deception and authorize the issuance of a fraud order.<sup>38</sup> The statutes are not restricted to schemes or devices which are wanting in all the elements of a legitimate business,<sup>39</sup> and the government is not called on to separate the legitimate from the illegitimate matter but will suppress the whole from the mails.<sup>40</sup> It is not material to the power to issue a fraud order that the business in question is so successful that the time when the fraud in the schemes will find its victims is delayed indefinitely, as long as it is certain that such time will come, and may come, sooner or later, dependent on contingencies which neither the promisors nor the investors can control or forecast.<sup>41</sup> In any event, however, it has been said that the fraudulent intent in any particular case should be made clearly to appear before a fraud order is made.<sup>42</sup>

In order to be subject to the mail-fraud statutes, it is not necessary that an advertisement make an express misrepresentation,<sup>43</sup> but it is sufficient if it is so artfully designed as to mislead those responding to it.<sup>44</sup> The determination as to whether advertisements constituted part of a fraudulent

29. U.S.—Public Clearing House v. Coyne, Ill., 24 S.Ct. 789, 194 U.S. 497, 48 L.Ed. 1092.

D.C.—Degge v. Hitchcock, 35 App. D.C. 218.

**Salaciously-minded persons**, as well as innocent persons, are entitled to the protection of mail-fraud statutes against schemes calculated to prey on their curiosity.—Farley v. Simmons, 99 F.2d 343, 69 App.D.C. 110, certiorari denied 59 S.Ct. 244, 305 U.S. 651, 83 L.Ed. 422, rehearing denied 59 S.Ct. 356, 305 U.S. 676, 83 L.Ed. 438.

**Intention to make false and fraudulent misrepresentations** by means of circulars and letters transmitted through the mails, and then obtain money from the credulous, constitutes a scheme.—Harris v. Rosenberger, Mo., 145 F. 449, 76 C.C.A. 225, 13 L.R.A., N.S., 762.

30. 17 Opinion Attorney General 77. 49 C.J. p 1163 note 23.

31. U.S.—Public Clearing House v. Coyne, Ill., 24 S.Ct. 789, 194 U.S. 497, 48 L.Ed. 1092.

49 C.J. p 1163 note 24.

#### Test

Under statute authorizing fraud order by postmaster general, test whether contest is a "lottery" or "scheme for distribution of money by chance" is whether success in

any given contest depends on skill or on chance, and, if award of prize depends on exercise by participants of judgment, plan is not a "lottery" since then element of chance is lacking and winning depends on exercise of superior knowledge or skill.—National Conference on Legalizing Lotteries v. Farley, 96 F.2d 861, 63 App.D.C. 319, certiorari denied 59 S.Ct. 85, 305 U.S. 624, 83 L.Ed. 399.

32. D.C.—Farley v. Heininger, 105 F.2d 79, 70 App.D.C. 200, certiorari denied Heininger v. Farley, 60 S.Ct. 110, 308 U.S. 587, 84 L.Ed. 491. 49 C.J. p 1163 notes 26, 27.

33. U.S.—Reilly v. Pinkus, N.J., 70 S.Ct. 110, 338 U.S. 269, 94 L.Ed. —.

D.C.—Farley v. Heininger, 105 F.2d 79, 70 App.D.C. 200, certiorari denied Heininger v. Farley, 60 S.Ct. 110, 308 U.S. 587, 84 L.Ed. 491. 49 C.J. p 1163 note 26.

34. U.S.—Leach v. Carlisle, C.C.A. Ill., 267 F. 61, affirmed 42 S.Ct. 227, 258 U.S. 138, 66 L.Ed. 511.

35. U.S.—Missouri Drug Co. v. Wyman, C.C.Mo., 129 F. 623.

36. U.S.—Reilly v. Pinkus, N.J., 70 S.Ct. 110, 338 U.S. 269.

37. U.S.—Leach v. Carlisle, C.C.A. Ill., 267 F. 61, affirmed 42 S.Ct. 227, 258 U.S. 138, 66 L.Ed. 511.

38. U.S.—Branaman v. Harris, C.C. Mo., 189 F. 461—People's U. S. Bank v. Gilson, C.C.Mo., 140 F. 1, affirmed 161 F. 286, 88 C.C.A. 332.

39. D.C.—Farley v. Heininger, 105 F.2d 79, 70 App.D.C. 200, certiorari denied Heininger v. Farley, 60 S.Ct. 110, 308 U.S. 587, 84 L.Ed. 491. 49 C.J. p 1163 note 31.

40. U.S.—People's U. S. Bank v. Gilson, C.C.Mo., 140 F. 1, affirmed 161 F. 286, 88 C.C.A. 332.

41. D.C.—Farley v. Heininger, 105 F.2d 79, 70 App.D.C. 200, certiorari denied Heininger v. Farley, 60 S.Ct. 110, 308 U.S. 587, 84 L.Ed. 491.

42. U.S.—Reilly v. Pinkus, N.J., 70 S.Ct. 110, 338 U.S. 269. 49 C.J. p 1164 note 34.

43. D.C.—Farley v. Simmons, 99 F. 2d 343, 69 App.D.C. 110, certiorari denied 59 S.Ct. 244, 305 U.S. 651, 83 L.Ed. 422, rehearing denied 59 S.Ct. 356, 305 U.S. 676, 83 L.Ed. 438.

**Words "no obscenity"** in one advertisement were not controlling in respect of such advertisement and were immaterial in respect of other advertisements where advertisements gave false impression that goods were obscene.—Farley v. Simmons, supra.

44. D.C.—Farley v. Simmons, supra.

scheme in violation of mail-fraud statutes would be made in the light of the effect which the advertisements would most probably produce on ordinary minds.<sup>45</sup>

#### d. Proceedings

Since it is essential that the evidence of a violation of the statute be satisfactory to the postmaster general in order to authorize the issuance of a fraud order, an investigation and hearing are necessary to determine whether or not the statute has been violated. No particular form of hearing is required and no particular person need conduct the hearing, and rules of evidence need not be applied with all the strictness with which they are required to be applied in proceedings in a court.

While the fraud-order statutes do not in terms require a hearing,<sup>46</sup> it is essential that the evidence of a violation of the statute be satisfactory to the postmaster general in order to authorize the issuance of a fraud order,<sup>47</sup> otherwise, by the express terms of the statute, he is without power to act.<sup>48</sup> Hence, an investigation and hearing are necessary to determine whether or not the statute

has been violated.<sup>49</sup> While it has been said that it is competent for the post office department to determine ex parte that a person or corporation is using the mails in conducting a scheme to defraud and base a fraud order on such finding,<sup>50</sup> although on demand a full and fair hearing should be permitted,<sup>51</sup> it has been held that a fraud order, to be of any effect, must be on an investigation and hearing at which evidence is received both for and against the party against whom the fraud order is sought,<sup>52</sup> or at least an opportunity is given him to present evidence.<sup>53</sup>

The methods and procedure of a court hearing are not required,<sup>54</sup> and no particular form of hearing is necessary and no particular person need conduct the hearing.<sup>55</sup> A large amount of discretion in the conduct of the hearing is reposed in the person conducting it,<sup>56</sup> and such person is not bound to apply the rules of evidence with all the strictness with which they are required to be applied in proceedings in a court.<sup>57</sup> Thus, the person

#### Advertising medium

Where seller of innocent but worthless photographs and books advertised booklet on "Art of Love," cartoon booklets, and "actual photos, Montmartre Type," in "pulp" magazines containing salacious stories and advertisements, evidence that other publications of similar names were known to be grossly obscene, although other similar publications were not obscene, authorized fraud order, since an advertiser is bound by the consequences of his choice of magazines, which made his advertisements misleading, irrespective of whether he knew the contents of such magazines in advance of publication.—Farley v. Simmons, supra.

45. U.S.—Donaldson v. Read Magazine, App.D.C., 68 S.Ct. 591, 333 U.S. 178, 92 L.Ed. 628—Bersoff v. Donaldson, 174 F.2d 494, 84 U.S.App.D.C. 226.

**Advertisements as a whole** may be completely misleading, although every sentence separately considered is literally true. This may be because things are omitted that should be said, or because they are composed or purposely printed in such way as to mislead.—Donaldson v. Read Magazine, App.D.C., 68 S.Ct. 591, 333 U.S. 178, 92 L.Ed. 628.

**Fact that representations were of religious nature** is no defense to fraud.—Fields v. Hannegan, 162 F.2d 17, 82 U.S.App.D.C. 234, certiorari denied 68 S.Ct. 83, 332 U.S. 773, 92 L.Ed. 358.

#### Protection of trusting

People have a right to assume that fraudulent advertising traps will not be laid to ensnare them.

Laws are made to protect the trusting as well as the suspicious.

U.S.—Donaldson v. Read Magazine, App.D.C., 68 S.Ct. 591, 333 U.S. 178, 92 L.Ed. 628.

D.C.—Bersoff v. Donaldson, 174 F.2d 494, 84 U.S.App.D.C. 226.

#### Trained and experienced persons

Fact that false statement may be obviously false to those who are trained and experienced does not change its character or take away its power to deceive others less experienced.—Fields v. Hannegan, 162 F.2d 17, 82 U.S.App.D.C. 234, certiorari denied 68 S.Ct. 83, 332 U.S. 773, 92 L.Ed. 358.

46. D.C.—Bersoff v. Donaldson, 174 F.2d 494, 84 U.S.App.D.C. 226.

**Administrative Procedure Act** confining prescribed procedure to cases of adjudication required by statute to be determined on the record after opportunity for an agency hearing, does not apply to a hearing held before a trial examiner in the post office department to determine recommendations for issuance of mail fraud order by the postmaster general since fraud order statutes require no hearing.—Bersoff v. Donaldson, supra.

47. U.S.—New Orleans Nat. Bank v. Merchant, C.C.La., 18 F. 841. 49 C.J. p 1164 note 35.

48. U.S.—New Orleans Nat. Bank v. Merchant, supra. 49 C.J. p 1164 note 35.

49. U.S.—Donnell Mfg. Co. v. Wyman, C.C.Mo., 156 F. 415.

50. U.S.—Elliott Works v. Frisk, D.C.Iowa, 58 F.2d 820—People's U. S. Bank v. Gilson, C.C.Mo., 140 F.

1, affirmed 161 F. 286, 88 C.C.A. 332.

51. U.S.—Elliott Works v. Frisk D.C.Iowa, 58 F.2d 820.

52. U.S.—Donnell Mfg. Co. v. Wyman, C.C.Mo., 156 F. 415.

53. U.S.—Donnell Mfg. Co. v. Wyman, C.C.Mo., supra.

54. U.S.—Elliott Works v. Frisk D.C.Iowa, 58 F.2d 820.

55. U.S.—Crane v. Nichols, D.C. Tex., 1 F.2d 33.

49 C.J. p 1164 note 45.

#### Acting postmaster general

D.C.—Plapao Laboratories v. Farley 92 F.2d 228, 67 App.D.C. 304, certiorari denied 58 S.Ct. 56, 302 U.S. 732, 82 L.Ed. 566.

56. U.S.—Reilly v. Pinkus, N.J., 71 S.Ct. 110, 338 U.S. 269.

57. U.S.—Elliott Works v. Frisk, D.C.Iowa, 58 F.2d 820.

D.C.—Farley v. Simmons, 99 F.2d 343, 69 App.D.C. 110, certiorari denied 59 S.Ct. 244, 305 U.S. 651 83 L.Ed. 422, rehearing denied 51 S.Ct. 356, 305 U.S. 676, 83 L.Ed. 438.

#### Experiments

Refusing to permit experiment before him was held within discretion of postal solicitor holding hearing concerning allegedly fraudulent scheme involving preparation claimed to charge batteries.—Elliott Works v. Frisk, D.C.Iowa, 58 F.2d 820.

#### Hearsay evidence

(1) A hearing held by assistant solicitor of post office department which resulted in fraud order against magazine advertiser, was

whose conduct is being investigated may properly be required to assume the burden of proof to show that his business is legitimate.<sup>58</sup> It has been held that the person whose conduct is being investigated must be given a reasonable opportunity to cross-examine witnesses on the vital issue of fraudulent intent,<sup>59</sup> and that an undue limitation of this right of cross-examination constitutes error.<sup>60</sup> The granting or refusal of a continuance is within the discretion of the person conducting the hearing,<sup>61</sup> and a fraud order will not be considered erroneous because of the denial of a general request for a continuance made without any showing of facts to support it.<sup>62</sup>

*Hearing pending.* If a date several weeks in advance is fixed for a hearing on the question of the issuance of a fraud order against a person or company, the postmaster general is without power to direct all mail addressed to such person or company to be withheld in the meantime.<sup>63</sup> However, a stipulation under which a person against whom a fraud order had been prepared agreed that mail addressed to him might be impounded by the post office authorities pending a hearing on the fraud order is proper.<sup>64</sup>

*Modification or suspension of fraud order.* A mail-fraud order prohibiting the use of the mails is similar to an equitable injunction to restrain future conduct,<sup>65</sup> and, like such an injunction, should

be subject to modification whenever it appears that one or more of the restraints imposed are no longer needed to protect the public.<sup>66</sup> Thus, where the postmaster general concludes that the fraud order is broader than is necessary to reach the fraud proved, he has not only the power but the duty to reduce its scope to what is essential for that purpose.<sup>67</sup> However, where, after issuing a fraud order, the postmaster general ceases to be satisfied and so found and certified, he has no authority to suspend the order,<sup>68</sup> but it is his duty to revoke it;<sup>69</sup> and, if the finding on which the order was based is revoked, this in effect constitutes a revocation of the order.<sup>70</sup>

#### e. Review of Decisions Granting Fraud Orders

- (1) In general
- (2) Injunction

##### (1) In General

The decision of the postmaster general granting a fraud order will not be reviewed by the courts, where it is fairly arrived at, and there is substantial evidence to support it, so that it cannot justly be said to be palpably wrong and, therefore, arbitrary.

The decision of the postmaster general granting a fraud order will not be reviewed by the courts, where it is fairly arrived at, and there is substantial evidence to support it, so that it cannot justly be said to be palpably wrong and, therefore, arbitrary.<sup>71</sup> Nevertheless, within a limited

not vitiated by the consideration of post office inspector's hearsay testimony repeating statements made by magazine salesman concerning nature of contents of the magazine, including advertisements complained of.—*Farley v. Simmons*, 99 F.2d 343, 69 App.D.C. 110, certiorari denied 59 S.Ct. 244, 305 U.S. 651, 83 L.Ed. 422, rehearing denied 59 S.Ct. 356, 305 U.S. 676, 83 L.Ed. 438.

(2) At hearing before postal solicitor concerning allegedly fraudulent scheme involving preparation claimed to charge batteries, testimonials could properly be refused consideration as hearsay.—*Elliott Works v. Frisk*, D.C.Iowa, 58 F.2d 820.

58. U.S.—*People's U. S. Bank v. Gilson*, C.C.Mo., 140 F. 1, affirmed 161 F. 286, 88 C.C.A. 332.

59. U.S.—*Reilly v. Pinkus*, N.J., 70 S.Ct. 110, 338 U.S. 269.

60. U.S.—*Reilly v. Pinkus*, supra.

#### Prejudicial error

Where in proceeding looking to entry of fraud order by postmaster general witnesses for government relied on general professional knowledge acquired in part from medical text-books on which they relied, re-

fusal to permit cross-examination concerning statements in other medical books, some of which were shown to be respectable authorities, was prejudicial error, even though some of the books were merely medical dictionaries which government experts testified they would not consult to ascertain the efficacy of a remedy, and the fact-finding official indicated that he had read the excluded materials and would have made the same adverse findings if such materials had been admitted.—*Reilly v. Pinkus*, supra.

61. U.S.—*Elliott Works v. Frisk*, D.C.Iowa, 58 F.2d 820.

62. U.S.—*Branaman v. Harris*, C.C.Mo., 189 F. 461.

63. U.S.—*Donnell Mfg. Co. v. Wyman*, C.C.Mo., 156 F. 415, 49 C.J. p 1164 note 48.

64. U.S.—*In re Rice*, D.C.N.Y., 256 F. 858.

49 C.J. p 1164 note 49.

65. U.S.—*Donaldson v. Read Magazine*, App.D.C., 68 S.Ct. 591, 333 U.S. 178, 92 L.Ed. 628.

66. U.S.—*Donaldson v. Read Magazine*, supra.

67. U.S.—*Donaldson v. Read Magazine*, supra.

zine, supra.—*Pinkus v. Reilly*, C.A.N.J., 170 F.2d 786, affirmed 70 S.Ct. 110, 338 U.S. 269, 84 L.Ed. —.

Party benefited by modification may not complain of modification of fraud order.—*Donaldson v. Read Magazine*, App.D.C., 68 S.Ct. 591, 333 U.S. 178, 92 L.Ed. 628.

68. U.S.—*New Orleans Nat. Bank v. Merchant*, C.C.La., 18 F. 841.

69. U.S.—*New Orleans Nat. Bank v. Merchant*, supra.

49 C.J. p 1164 note 38.

70. U.S.—*New Orleans Nat. Bank v. Merchant*, supra.

71. U.S.—*Elliott Works v. Frisk*, D.C.Iowa, 58 F.2d 820.—*Acet v. Harwood*, D.C.Cal., 41 F.Supp. 492.—*Wheeler v. Farley*, D.C.Cal., 7 F.Supp. 438, appeal dismissed 55 S.Ct. 144, 293 U.S. 526, 79 L.Ed. 637.

D.C.—*Farley v. Heininger*, 105 F.2d 79, 70 App.D.C. 200, certiorari denied *Heininger v. Farley*, 60 S.Ct. 110, 308 U.S. 589, 84 L.Ed. 491.—*Farley v. Simmons*, 99 F.2d 343, 69 App.D.C. 110, certiorari denied 59 S.Ct. 244, 305 U.S. 651, 83 L.Ed. 422, rehearing denied 59 S.Ct. 356, 305 U.S. 676, 83 L.Ed. 438.—National Conference on Legalizing Lotteries *v. Farley*, 96 F.2d



range, courts of equity will grant relief against fraud orders,<sup>72</sup> but the power of a court of equity to review a fraud order issued by the postmaster general is limited to a determination of whether, from the evidence adduced the hearing, there is substantial evidence in fact, as distinguished from opinion, to support the order.<sup>73</sup> Hence, one who is injured by a fraud order may apply to the courts for redress in cases where it is shown that the postmaster general exceeded his authority,<sup>74</sup> or that his act was palpably wrong<sup>75</sup> or an unwarranted arbitrary invasion of the rights of the party against whom the order was issued;<sup>76</sup> and this is so even if the order was made after a hearing.<sup>77</sup>

**Certiorari.** The decision of the postmaster general that a fraud order shall issue cannot be reviewed by certiorari because the decision is not the exercise of a judicial function,<sup>78</sup> and for the further reason that, if there was an arbitrary exercise of statutory power or a ruling in excess of the jurisdiction conferred by statute on the postmaster, appropriate relief might be obtained in a court of equity.<sup>79</sup>

**Mandamus** will not lie to compel the annulment of a fraud order where the director of the posts did not exceed his authority in making the order.<sup>80</sup>

## (2) Injunction

The enforcement of a fraud order will not be enjoined when fairly arrived at and supported by substan-

tial evidence, where there is any evidence to support the order, or where it is not palpably wrong.

In accordance with the general rules applicable to the granting of injunctions against public officers, as discussed in Injunctions §§ 108, 109, the enforcement of a fraud order will not be enjoined when fairly arrived at<sup>81</sup> and supported by substantial evidence,<sup>82</sup> where there is any evidence to support the order,<sup>83</sup> or where it is not palpably wrong.<sup>84</sup> In any event, a preliminary injunction will not issue unless the court is clearly convinced that plaintiff would ultimately prevail,<sup>85</sup> and a very strong showing is necessary to warrant the granting of an order for a preliminary injunction.<sup>86</sup> Accordingly, in applying these principles, it has been held that the enforcement of a fraud order will not be enjoined where the business involved is shown to be one for which the postal system cannot lawfully be used.<sup>87</sup> So an injunction will not lie against the enforcement of a fraud order where plaintiff admitted quackery in his electric belt business, but claimed that the course of business indicated by the past had been mended by the employment of a licensed physician, nothing being shown concerning his professional qualifications and his pecuniary independence of plaintiff and the electric belt business,<sup>88</sup> and an injunction will not issue to prevent the detaining by a postmaster of letters addressed to the secretary of a lottery company under the direction of the postmaster gen-

861, 68 App.D.C. 319, certiorari denied 59 S.Ct. 85, 305 U.S. 624, 83 L. Ed. 399—Piapao Laboratories v. Farley, 92 F.2d 228, 67 App.D.C. 304, certiorari denied 58 S.Ct. 56, 302 U.S. 732, 82 L.Ed. 566.

49 C.J. p 1164 note 51.

72. U.S.—Aycock v. O'Brien, C.C.A. Cal., 28 F.2d 817.

49 C.J. p 1165 note 52.

73. U.S.—Donaldson v. Read Magazine, App.D.C., 68 S.Ct. 591, 333 U.S. 178, 92 L.Ed. 628—Jarvis v. Shackleton Inhaler Co., C.C.A. Mich., 136 F.2d 116—Pinkus v. Reilly, D.C.N.J., 71 F.Supp. 993, affirmed, C.A., 170 F.2d 786, affirmed 70 S.Ct. 110, 338 U.S. 269, 94 L.Ed. — —Pinkus v. Walker, D. C.N.J., 61 F.Supp. 610.

### Evidence held sufficient

U.S.—Reilly v. Pinkus, N.J., 70 S.Ct. 110, 338 U.S. 269, 94 L.Ed. — —Wanning v. Williams, C.A.Cal., 173 F.2d 95—Roth v. Goldman, C.A. N.Y., 173 F.2d 788, certiorari denied 69 S.Ct. 1514, 337 U.S. 938, 93 L.Ed. 1743—Elliott Works v. Frisk, D.C.Iowa, 58 F.2d 820.

D.C.—Bersoff v. Donaldson, 174 F.2d 494, 84 U.S.App.D.C. 226—Farley v. Heininger, 105 F.2d 79, 70 App.D.C. 200, certiorari denied Heininger v.

Farley, 60 S.Ct. 110, 308 U.S. 587, 84 L.Ed. 491—National Conference on Legalizing Lotteries v. Farley, 96 F.2d 861, 68 App.D.C. 319, certiorari denied 59 S.Ct. 85, 305 U.S. 624, 83 L.Ed. 399.

### Evidence held insufficient

U.S.—Pinkus v. Walker, D.C.N.J., 61 F.Supp. 610.

74. U.S.—American School of Magnetic Healing v. McAnnulty, Mo., 23 S.Ct. 33, 187 U.S. 94, 47 L.Ed. 90.

49 C.J. p 1164 note 54.

75. U.S.—Hurley v. Dolan, C.C.A. Mass., 297 F. 825.

Philippine.—Reyes v. Topacio, 44 Philippine 207.

76. U.S.—Crane v. Nichols, D.C.Tex., 1 F.2d 33.

77. U.S.—American School of Magnetic Healing v. McAnnulty, Mo., 23 S.Ct. 33, 187 U.S. 94, 47 L.Ed. 90.

78. U.S.—Degge v. Hitchcock, App. D.C., 33 S.Ct. 639, 229 U.S. 162, 57 L.Ed. 1135.

D.C.—Maury v. Hitchcock, 35 App. D.C. 228.

79. U.S.—Degge v. Hitchcock, App. D.C., 33 S.Ct. 639, 229 U.S. 162, 57 L.Ed. 1135.

80. Philippine.—Reyes v. Topacio, 44 Philippine 207.

81. U.S.—Leach v. Carille, Ill., 42 S.Ct. 227, 258 U.S. 139, 66 L.Ed. 511.

82. U.S.—Leach v. Carille, supra—Bailey Gaunce Oil & Refining Co. v. Duncan, D.C.La., 10 F.Supp. 280. D.C.—Fields v. Hannegan, 162 F.2d 17, 82 U.S.App.D.C. 234, certiorari denied 68 S.Ct. 88, 332 U.S. 773, 92 L.Ed. 258.

83. D.C.—Farley v. Simmons, 99 F. 2d 343, 69 App.D.C. 110, certiorari denied Simmons v. Farley, 59 S.Ct. 244, 305 U.S. 651, 83 L.Ed. 422, rehearing denied 59 S.Ct. 356, 305 U.S. 676, 83 L.Ed. 438.

49 C.J. p 1164 note 62.

84. D.C.—New v. Tribond Sales Corp., 19 F.2d 671, 57 App.D.C. 197.

85. U.S.—Sanden v. Morgan, D.C.N. Y., 225 F. 266.

86. U.S.—Branaman v. Harris, C.C. Mo., 189 F. 461.

87. U.S.—Fairfield Floral Co. v. Bradbury, C.C.Me., 89 F. 393.

88. U.S.—Hall v. Willcox, C.C.N.Y., 225 F. 333.

eral where the pleadings fail to show that the letters had no connection with the lottery business.<sup>89</sup>

On the other hand, if the order is palpably wrong or without any evidence to sustain it, an injunction will issue against its enforcement, if it appears that the enforcement of the order will inflict irreparable injury and that no adequate remedy at law exists.<sup>90</sup> In order to warrant a court in issuing an injunction restraining the enforcement of a fraud order, it should be averred and shown that there is at least a reasonable doubt on the merits,<sup>91</sup> and a bill to enjoin a fraud order will not be sustained unless it makes a clear prima facie case that the facts could not possibly support the order or that complainant's legal or constitutional right has been violated,<sup>92</sup> and such a bill is insufficient where it shows a hearing on due notice on charges of fraud clearly within the statute but does not show what proofs were adduced.<sup>93</sup>

Rules of evidence governing actions generally and suits for injunctions in relation to burden of proof,<sup>94</sup> presumptions,<sup>95</sup> and weight and sufficiency<sup>96</sup> of evidence apply in suits to enjoin the enforcement of fraud orders. However, as to the admissibility of evidence, it has been held that the decision must be based on the administrative

record alone,<sup>97</sup> and that evidence involving the merits of the controversy at the hearing before the postmaster general may not be considered as evidence,<sup>98</sup> since the court on such an application is not acting as a court of review but only on the question whether the postmaster general in the hearing and the execution of the fraud order acted arbitrarily and whether the order was issued in the absence of any evidence to sustain it, or whether the order as issued was induced by any other error of law.<sup>99</sup>

### § 23. Postage

Postage is the fee charged by law for carrying letters, packets, and documents by the public mails, and, except in certain cases specially provided for by law, postage on all matter is required to be prepaid by stamps at the time of mailing.

Postage is the fee charged by law for carrying letters, packets, and documents by the public mails,<sup>1</sup> and, except in certain cases specially provided for by law, postage on all matter is required to be prepaid by stamps at the time of mailing.<sup>2</sup> Although congress has divided mailable matter into several classes and prescribed the rates of postage to be charged for each class, the rates charged must not discriminate between competing businesses of the same kind.<sup>3</sup> Under a statute providing that all

89. U.S.—Commerford v. Thompson, C.C.Ky., 1 F. 417, 2 Filipp. 611.

90. U.S.—Jarvis v. Shackelton Inhaler Co., C.C.A.Mich., 136 F.2d 116—Pinkus v. Reilly, D.C.N.J., 71 F.Supp. 993, affirmed, C.A., 170 F.2d 786, affirmed 70 S.Ct. 110, 338 U.S. 269, 94 L.Ed. —Pinkus v. Walker, D.C.N.J., 61 F.Supp. 610. 49 C.J. p 1164 note 70.

91. D.C.—Pike v. Walker, 121 F.2d 37, 73 App.D.C. 289, certiorari denied 62 S.Ct. 94, 314 U.S. 625, 86 L.Ed. 502, rehearing denied 62 S.Ct. 177, 314 U.S. 710, 86 L.Ed. 566.

#### Necessity of prejudice

Where alleged wrongdoers were given due notice of charge of violation of mail-fraud statutes, were given a hearing at which they were represented by counsel, and were permitted the fullest latitude in making their defense before the trial examiner, even if manner of making up findings of facts was improper and failure of postmaster general to acquaint himself with the evidence before signing fraud order was irregular, some prejudice must be shown to have resulted to alleged wrongdoers to justify the issuance of an injunction restraining enforcement of fraud order.—Pike v. Walker, supra.

#### Complaint held insufficient

Where complaint seeking to enjoin

postmaster from carrying out fraud order issued by postmaster general alleged that plaintiff had been engaged in business of furnishing to customers a service which consisted of placing a prayer card containing customer's name in a machine called a cosmic generator, which gathered from the ether and distributed forces which had a beneficent effect on health of customers, particularly of customers who had faith, complaint stated no cause of action and was properly dismissed.—Neher v. Harwood, C.C.A.Cal., 128 F.2d 846, 158 A.L.R. 1116, certiorari denied 63 S.Ct. 57, 317 U.S. 659, 87 L.Ed. 529.

92. U.S.—Appleby v. Cluss, C.C.N.J., 160 F. 984.

93. U.S.—Appleby v. Cluss, supra.

94. U.S.—Sanden v. Morgan, D.C.N.Y., 225 F. 266.

49 C.J. p 1165 note 74.

95. U.S.—Hall v. Willcox, C.C.N.Y., 225 F. 333.

49 C.J. p 1165 note 75.

96. U.S.—Jarvis v. Shackelton Inhaler Co., C.C.A.Mich., 136 F.2d 116.

#### Evidence held sufficient to sustain fraud order

U.S.—Donaldson v. Read Magazine, App.D.C., 68 S.Ct. 591, 333 U.S. 178, 92 L.Ed. 628.

D.C.—Cable v. Walker, 152 F.2d 23, 80 U.S.App.D.C. 283, certiorari de-

nied 66 S.Ct. 1349, 328 U.S. 860, 90 L.Ed. 1631.

49 C.J. p 1165 note 76 [a].

97. U.S.—Pinkus v. Reilly, C.A.N.J., 170 F.2d 786, affirmed 70 S.Ct. 110, 338 U.S. 269, 94 L.Ed. —Jarvis v. Shackelton Inhaler Co., C.C.A.Mich., 136 F.2d 116.

#### Nonprejudicial error

In action to restrain postmaster from obeying an order of acting postmaster general excluding manufacturer from use of mails in conducting its business, district court erred in admitting evidence in addition to that appearing in administrative record before acting postmaster general but the error did not require reversal where findings and conclusions clearly demonstrated that they were based solely on evidence before solicitor for post office department.—Jarvis v. Shackelton Inhaler Co., supra.

98. U.S.—Elliott Works v. Frisk, D.C.Iowa, 58 F.2d 820.

99. U.S.—Elliott Works v. Frisk, supra.

1. Black L.D.

2. 25 Opinion Attorney General 354. 49 C.J. p 1151 note 67.

3. D.C.—Esquire, Inc., v. Walker, 151 F.2d 49, 80 U.S.App.D.C. 145, affirmed Hannegan v. Esquire, Inc., 66 S.Ct. 456, 327 U.S. 146, 90 L.Ed. 586.

mail matter of the first class on which one full rate of postage has been prepaid shall be forwarded to its destination, charged with the unpaid rate to be collected on delivery, letters on which postage has not been fully prepaid at the time of mailing them should be charged at the office of delivery only with the amount of the deficiency.<sup>4</sup> A letter on which postage has not been fully paid may be retained until such payment is made.<sup>5</sup>

Under a statute fixing the postage rates on books consisting wholly of reading matter or reading matter with incidental blank spaces for students' notation, school work books having perforated pages capable of removal in the daily class work of the student are books within the meaning of the statute,<sup>6</sup> even though they lack the feature of permanency,<sup>7</sup> since congress is assumed to have intended the well settled meaning of the words used in the statute.<sup>8</sup> Therefore, such a statute does not authorize an administrative regulation interposing the additional factor of permanency.<sup>9</sup> Post office regulations defining the term "books" in aid of statutes prescribing the rate of postage on books, which were not defined by congress, have been held reasonable,<sup>10</sup> and as having the force and effect of law.<sup>11</sup>

*Recovery of postage paid.* Under a statute providing that the postmaster general in his discretion may authorize a refund of any postage paid on any mail matter for which service is not rendered, or is collected in excess of the lawful rate, it has been held that such statute does not create a right to sue,<sup>12</sup> but such right of action exists only when the postmaster general has been satisfied that the requirements of the statute have been met,<sup>13</sup> and this, under the statute, depends entirely on the dis-

cretion of the postmaster general.<sup>14</sup> However, it has been held that the payment of excess postage is the proper subject matter of an action at law,<sup>15</sup> and that the special remedy under the statute is not necessarily exclusive.<sup>16</sup> Furthermore, where newspapers intended for shipment by express were sent to the station in the same conveyance as those intended for mailing, and on the failure of the express company to take charge of them were weighed and shipped by mail, the amount paid for the transportation of such papers was not paid under a mistake which entitles the publisher to recover either the total sum or the difference between that sum and the express rates on the newspapers so transported.<sup>17</sup>

## § 24. Postage Stamps, Stamped Envelopes, and Postal Cards

- a. Postage stamps
- b. Stamped envelopes
- c. Postal cards

### a. Postage Stamps

A postage stamp is evidence of the prepayment of the charges imposed by the government for carrying matter through the mails.

A postage stamp is evidence of the prepayment of the charges imposed by the government for carrying matter through the mails.<sup>18</sup> Postage stamps pass from hand to hand and may be used by any person who holds them,<sup>19</sup> but there is no contract, either express or implied, that the government will reimburse a purchaser in case of loss of stamps which have been purchased,<sup>20</sup> and the government does not guarantee the holder against loss by destruction of the stamps while in his possession.<sup>21</sup>

4. 14 Opinion Attorney General 186.  
49 C.J. p 1151 note 69.

5. 16 Opinion Attorney General 5.

6. D.C.—McCormick-Mathers Pub.  
Co. v. Hannegan, 161 F.2d 873, 82  
U.S.App.D.C. 97.

7. D.C.—McCormick-Mathers Pub.  
Co. v. Hannegan, supra.

8. D.C.—McCormick-Mathers Pub.  
Co. v. Hannegan, supra.

9. D.C.—McCormick-Mathers Pub.  
Co. v. Hannegan, supra.

10. U.S.—Bittleston Collection  
Agency v. U. S., 75 Ct.Cl. 681.

11. U.S.—Bittleston Collection  
Agency v. U. S., supra.

12. U.S.—Montgomery Ward & Co.,  
for Use of Pettibone v. U. S., 94 Ct.  
Cl. 309.

13. U.S.—Montgomery Ward & Co.  
for Use of Pettibone v. U. S., supra.

14. U.S.—Montgomery Ward & Co.  
for Use of Pettibone v. U. S., supra.

*Refund not allowed*

Where plaintiff, after affixing postage stamps to a shipment of catalogues, delivered such shipment to a railroad company to be carried as freight to a certain point and there to be mailed, and, where in a railroad wreck catalogues were thrown into a river, and the catalogues so stamped were lost and never recovered, and, where the postmaster general ruled that the value of the stamps could not be refunded, it was held that plaintiff is not entitled to recover.—Montgomery Ward & Co., for Use of Pettibone v. U. S., supra.

15. U.S.—Schreiber v. U. S., C.C.A.  
Ill., 129 F.2d 836, 141 A.L.R. 1394.  
—Lewis Pub. Co. v. Wyman, C.C.

A.Mo., 182 F. 13, affirmed 33 S.Ct.  
599, 228 U.S. 610, 57 L.Ed. 989.

*Excess not recoverable where alleged excess was properly demanded by postmaster.*—Schreiber v. U. S., C.C.A.Ill., 129 F.2d 836, 141 A.L.R. 1394.

16. U.S.—Schreiber v. U. S., supra.

17. U.S.—Journal, etc., Co. v. U. S.,  
Ct.Cl., 41 S.Ct. 202, 254 U.S. 581,  
65 L.Ed. 415.

18. U.S.—United States v. One Zum-  
stein Briefmarken Katalog 1938,  
D.C.Pa., 24 F.Supp. 516, 519.  
49 C.J. p 1121 note 90½.

19. U.S.—Montgomery Ward & Co.  
for Use of Pettibone v. U. S., 94  
Ct.Cl. 309.

20. U.S.—Montgomery Ward & Co.,  
for Use of Pettibone v. U. S., supra.

21. U.S.—Montgomery Ward & Co.,

Since the statute, 39 U.S.C.A. § 361, provides that postage stamps and stamped envelopes shall be furnished by the postmaster general to all postmasters and kept for sale at all post offices, and each postmaster shall be held accountable for all such stamps and envelopes furnished to him, the only disposition that a postmaster can make of stamps intrusted to him is the sale thereof at their face value for cash to third persons,<sup>22</sup> and they may not be sold for any larger or less sum than the values indicated on their faces.<sup>23</sup> The postmaster general has power to prescribe regulations requiring postmasters to make proper returns of sales of stamps at their respective offices, and such regulations have the force of law.<sup>24</sup>

**Sale of "specimen" stamps.** The sale of newspaper and periodical stamps as a "specimen" under order of an assistant postmaster general to all persons willing to pay face value therefor, in accordance with a circular sent throughout the community, never canceled or repudiated by the postmaster general, is not unlawful, and the government, having ratified the sale by accepting the proceeds thereof, cannot maintain replevin for the recovery of the stamps so sold on the theory that they were stolen, embezzled, and purloined from the United States and are still its property.<sup>25</sup>

**Defacing or canceling stamps.** Since stamps, under the statute, 39 U.S.C.A. § 365, are to be defaced by the postmaster at the mailing office in such manner as the postmaster general may direct, under the statute, 39 U.S.C.A. § 367, relating to the method of canceling stamps the postmaster general is authorized to substitute for the black printing inks and writing fluids used under the postal regulations any canceling ink which is uniform and which actual experiment and test have shown to his satisfaction to be best calculated to guard against fraud, and to order its use in all post offices where stamps are canceled.<sup>26</sup>

**As securities.** Postage stamps are not securities of the United States within the meaning of a statute requiring the name of each person whose portrait shall be placed on any of the plates for securities of the United States to be inscribed be-

low the portrait,<sup>27</sup> and the postmaster general is not obliged to insert names of persons in connection with portraits on postage stamps.<sup>28</sup> Under statutes forbidding the making of anything in the likeness of, or similitude to, the "securities" of the United States and declaring that securities of the United States shall include stamps, canceled postage stamps are not securities or obligations of the United States.<sup>29</sup> It has been held otherwise, however, in respect of uncanceled obsolete postage stamps which resemble in general appearance ordinary postage stamps, and which are calculated to mislead the casual observer into thinking that they are ordinary postage stamps, and susceptible of use as such.<sup>30</sup>

#### b. Stamped Envelopes

Except as otherwise provided by law, the postmaster general is required to provide suitable letter and newspaper envelopes, to be known as stamped envelopes, and to sell them, as nearly as may be, at the cost of procuring them, with the addition of the value of the postage stamps impressed thereon.

Except where authority is given by statute, 39 U.S.C.A. § 363, to sell them at a discount to certain designated agents who will agree to resell them without discount under rules to be prescribed by the postmaster general, the postmaster general is required by law to provide suitable letter and newspaper envelopes, to be known as stamped envelopes, and to sell them, as nearly as may be, at the cost of procuring them, with the addition of the value of the postage stamps impressed thereon;<sup>31</sup> and no stamped envelopes or newspaper wrappers shall be sold by the post office department at less, in addition to the legal postage, than the cost, including all salaries, clerical, and other expenses connected therewith.<sup>32</sup>

#### c. Postal Cards

A postal card is a card bearing a printed stamp and issued by a government as a convenient substitute for paper and envelope, and a post card is an unofficial card transmissible through the mails on the prepayment of the same postage as a postal card.

A postal card is a card bearing a printed stamp and issued by a government as a convenient substitute for paper and envelope,<sup>33</sup> and a post card is

for Use of Pettibone v. U. S., supra.

22. U.S.—U. S. v. Douglass, D.C.S. C., 33 F. 381.

49 C.J. p 1152 note 76.

23. 25 Opinion Attorney General 354.

24. U.S.—U. S. v. Foster, Mass., 34 S.Ct. 666, 233 U.S. 515, 58 L.Ed. 1074.

25. U.S.—U. S. v. Walter Scott Stamp Co., C.C.N.Y., 87 F. 721.

26. 18 Opinion Attorney General 131.

27. 26 Opinion Attorney General 231.

28. 26 Opinion Attorney General 231.

29. 27 Opinion Attorney General 125—20 Opinion Attorney General 691.

30. 28 Opinion Attorney General 201.

31. 25 Opinion Attorney General 354.

49 C.J. p 1152 note 88.

32. 25 Opinion Attorney General 354.

33. U.S.—Wolpa v. United States, C. C.Neb., 86 F.2d 35, 49 C.J. p 1121 note 91.

an unofficial card transmissible through the mails on prepayment of the same postage as a postal card.<sup>34</sup> The issuance of postal cards is authorized by the statute authorizing and directing the postmaster general to furnish and issue postal cards<sup>35</sup> and this statute imposes on him the duty of issuing postal cards and charges him with responsibility as to their quality.<sup>36</sup>

## § 25. Money Orders

- a. In general
- b. Negotiability

### a. In General

A money order is an order for a specified sum of money, not less than, or exceeding, the amounts designated by statute, made out at a money order office, on a blank form prescribed by law and the post office regulations, and payable at some other money order office. The government exercises a governmental power in the establishment and operation of the postal money order system.

A money order is an order for a specified sum of money, not less than, or exceeding, the amounts designated by statute, made out at a money order office, on a blank form prescribed by law and the post office regulations, and payable at some other money order office.<sup>37</sup> The person who purchases the money order is known as the remitter, and the person to whom it is payable as the payee.<sup>38</sup> The establishment of the postal money order system was a voluntary act of the government<sup>39</sup> for the convenience of the public,<sup>40</sup> and is merely an incident of the postal system and was inaugurated to enable the citizens to transmit small sums safe-

ly through the mails,<sup>41</sup> and, as it had the right to do, it made such provisions as it saw fit as to the issuance and payment of the orders and in other particulars.<sup>42</sup> The government exercises a governmental power for the public benefit in the establishment and operation of the postal money order system,<sup>43</sup> and is not engaging in commercial transactions,<sup>44</sup> notwithstanding it may have some aspects of commercial banking.<sup>45</sup> Thus the issuance of postal money orders is a governmental function rather than a commercial function.<sup>46</sup>

**Indorsement.** The provision that the payee may by written indorsement direct it to be paid to any other person does not require that the indorsement shall be by the hands of the payee, but it will be sufficient if the payee directs another to indorse his name on the order.<sup>47</sup> So also, by the express provisions of this statute, more than one indorsement of a money order renders it invalid and not payable.<sup>48</sup>

**Recovery by United States of wrong or fraudulent payment.** Under a statute providing that, where money of the post office department has been paid to any person in consequence of fraudulent representations, or by the mistake, collusion, or misconduct of any officer or other employee in the postal service, the postmaster general shall cause suit to be brought to recover such wrong or fraudulent payment, the United States may recover the amount paid out on money orders fraudulently issued from the persons to whom it was paid regardless of the good faith of such persons in acquiring the orders.<sup>49</sup>

34. U.S.—*Wolpa v. United States*, supra.

49 C.J. p 1121 note 97.

35. U.S.—*Wolpa v. United States*, supra.

36. D.C.—*Thomson v. U. S.*, 37 App. D.C. 461.

37. U.S.—*U. S. v. Long*, C.C.Ga., 30 F. 678.

49 C.J. p 1152 note 95.

Money order funds as public moneys of the United States see supra § 17.

Under former procedure a money order was issued along with what was termed in the postal service a "letter of advice."—*U. S. v. Long*, supra—49 C.J. p 1152 note 98.

38. U.S.—*U. S. v. Long*, supra.

39. U.S.—*Former Corporation v. U. S.*, 66 Ct.Cl. 83.

40. U.S.—*U. S. v. Northwestern Nat. Bank & Trust Co. of Minneapolis*, D.C.Minn., 35 F.Supp. 484—*Former Corporation v. U. S.*, 66 Ct.Cl. 83.

Primary object is to further the safety of the postal system and to insure the sanctity of the mails from loss and theft.—*U. S. v. Northwestern Nat. Bank & Trust Co. of Minneapolis*, D.C.Minn., 35 F.Supp. 484.

41. D.C.—*Jaselli v. Riggs Nat. Bank*, 36 App.D.C. 159, 31 L.R.A., N.S., 763, Ann.Cas.1912C 119.

49 C.J. p 1152 note 96.

42. U.S.—*Former Corporation v. U. S.*, 66 Ct.Cl. 83.

43. U.S.—*U. S. v. Northwestern Nat. Bank & Trust Co. of Minneapolis*, D.C.Minn., 35 F.Supp. 484—*Bolognesi v. U. S.*, N.Y., 189 F. 335, 111 C.C.A. 67, 36 L.R.A., N.S., 143, certiorari denied 32 S.Ct. 525, 223 U.S. 726, 56 L.Ed. 632.

44. U.S.—*U. S. v. Northwestern Nat. Bank & Trust Co. of Minneapolis*, D.C.Minn., 35 F.Supp. 484—*Bolognesi v. U. S.*, N.Y., 189 F. 335, 111 C.C.A. 67, 36 L.R.A., N.S., 143, certiorari denied 32 S.Ct. 525, 223 U.S. 726, 56 L.Ed. 632.

45. U.S.—*U. S. v. Northwestern Nat. Bank & Trust Co. of Minneapolis*, D.C.Minn., 35 F.Supp. 484.

46. U.S.—*Currency Services v. Matthews*, D.C.Wis., 90 F.Supp. 40—*U. S. v. Northwestern Nat. Bank & Trust Co. of Minneapolis*, D.C.Minn., 35 F.Supp. 484—*Bolognesi v. U. S.*, N.Y., 189 F. 335, 111 C.C.A. 67, 36 L.R.A., N.S., 143, certiorari denied 32 S.Ct. 525, 223 U.S. 726, 56 L.Ed. 632.

47. D.C.—*Jaselli v. Riggs Nat. Bank*, 36 App.D.C. 159, 31 L.R.A., N.S., 763, Ann.Cas.1912C 119.

48. Mont.—*Moore v. Skyles*, 82 P. 799, 33 Mont. 135, 114 Am.S.R. 801, 3 L.R.A., N.S., 136.

49. U.S.—*U. S. v. Northwestern Nat. Bank & Trust Co. of Minneapolis*, D.C.Minn., 35 F.Supp. 484. 49 C.J. p 1153 note 8.

**Negligence of postal employee**

Where bank telephoned branch post office and was erroneously advised by unidentified clerk that described postal money orders were

*Liability of government in case of wrong payment.* Under Postal Regulations 1902 § 1006 the post office department disclaims any responsibility after a money order has once been paid, "but in case of wrong payment it will endeavor to recover the amount for the owner, provided such wrong payment was not brought about through the fault of the remitter, payee, or indorsee."<sup>50</sup>

*Repayment of order.* Under a statute providing that the postmaster issuing a money order shall repay the amount of it on application of the person who obtained it, and the return of the order, the remitter of the order cannot revoke it and demand back his money against the will of the payee after it has come into the possession of the latter, since by the express provisions of the statute, in order to enable the former to obtain a repayment of the funds deposited, he must produce the order.<sup>51</sup> The payee of the order, on complying with the requirements of the law and of the regulations of the post office department, is entitled to payment of the money on demand;<sup>52</sup> and the remitter of the order cannot, previous to its being paid, by any notice that he may give to the office at which it is payable, forbid the payment thereof to the payee.<sup>53</sup>

*Lost money orders.* The government may make such regulations as it deems fit with respect to the payment of lost money orders,<sup>54</sup> and under the statutes the issuance and payment of warrants for lost money orders are placed within the judgment of the postmaster general or under rules and regulations issued by him,<sup>55</sup> and payment for a lost money order can only be secured by proof satisfactory to him.<sup>56</sup>

## b. Negotiability

Postal money orders are not negotiable instruments.

Since the issuance of postal money orders is a governmental function rather than a commercial function, as discussed supra subdivision a of this section, postal money orders are not negotiable instruments<sup>57</sup> subject to the defenses permitted to bona fide holders for value by the law merchant,<sup>58</sup> and necessarily whoever takes one is charged with knowledge of that fact.<sup>59</sup>

## § 26. Deposit, Collection, and Forwarding of Mail Matter

The postmaster general may determine what shall be regarded as a depository for mail.

The postmaster general may determine what shall be regarded as a depository for mail,<sup>60</sup> and the depository so designated becomes an authorized depository, that is to say, a depository authorized by the post office department as a receptacle for the receipt or delivery of mail matter.<sup>61</sup> He may designate as such a depository boxes privately owned and controlled, and placed in buildings or otherwise on any mail route.<sup>62</sup> A letter is properly mailed when it is addressed, stamped, and deposited in the proper place for the receipt of the mails to be delivered under the public authority,<sup>63</sup> such as the post office,<sup>64</sup> or a street letter box,<sup>65</sup> or a mail chute under the control of the postal department.<sup>66</sup> So also, it has been held that a statute providing that every railway postal clerk or other carrier of the mails shall receive any mail matter presented to him if properly prepaid by stamps and deliver it at the next post office at which he arrives includes city letter carriers<sup>67</sup> and rural route mail

valid and bank thereupon cashed the orders which in fact were invalid, the negligence of the unidentified postal clerk did not prejudice government's right to refuse payment of the spurious orders or to recover money paid by government to bank on presentation of the orders before invalidity of the orders was discovered.—U. S. v. Northwestern Nat. Bank & Trust Co. of Minneapolis, supra.

50. D.C.—Jaselli v. Riggs Nat. Bank, 36 App.D.C. 159, 172, 31 L.R.A.N.S., 763, Ann.Cas.1912C 119.

51. 14 Opinion Attorney General 119.

52. 14 Opinion Attorney General 119.

53. 14 Opinion Attorney General 119.

54. U.S.—Former Corporation v. U. S., 66 Ct.Cl. 83.

55. U.S.—Former Corporation v. U. S., supra.

56. U.S.—Former Corporation v. U. S., supra.

57. U.S.—U. S. v. Northwestern Nat. Bank & Trust Co. of Minneapolis, D.C.Minn., 35 F.Supp. 484. 49 C.J. p 1153 note 4.

58. U.S.—U. S. v. Northwestern Nat. Bank & Trust Co. of Minneapolis, supra. 49 C.J. p 1153 note 5.

59. D.C.—Jaselli v. Riggs Nat. Bank, 36 App.D.C. 159, 31 L.R.A.N.S., 763, Ann.Cas.1912C 119.

60. U.S.—Pakas v. U. S., N.Y., 240 F. 350, 153 C.C.A. 276, affirmed 38 S.Ct. 148, 245 U.S. 467, 62 L.Ed. 406. 49 C.J. p 1166 note 80.

61. U.S.—U. S. v. Sehon Chinn, D.C. W.Va., 85 F.Supp. 558—Pakas v. U. S., N.Y., 240 F. 350, 153 C.C.A. 276,

affirmed 38 S.Ct. 148, 245 U.S. 467, 62 L.Ed. 406.

62. U.S.—Pakas v. U. S., supra.

63. Me.—Casco Nat. Bank v. Shaw, 10 A. 67, 79 Me. 376, 1 Am.S.R. 319.

49 C.J. p 1166 note 83. Presumption from mailing as to delivery of mail matter see Evidence § 136.

64. Mo.—Ward v. D. A. Morr Transfer, etc., Co., 95 S.W. 964, 119 Mo. App. 83. 49 C.J. p 1166 note 84.

65. Me.—Casco Nat. Bank v. Shaw, 10 A. 67, 79 Me. 376, 1 Am.S.R. 319. 49 C.J. p 1166 note 85.

66. Ohio.—Hitz v. Ohio Fuel Gas Co., 183 N.E. 768, 43 Ohio App. 484.

67. N.Y.—Wynen v. Schappert, 6 Daly 558, 55 How.Pr. 156.

carriers,<sup>68</sup> and that a letter addressed and stamped and handed to either of them is properly "mailed."<sup>69</sup>

Word "*deposit*," as applied to mail matter, refers to such matter as is left in any way for official transmission with a post office employee in the course of his employment.<sup>70</sup>

## § 27. Contracts for Carrying Mails

- a. In general
- b. Advertisements and bids
- c. Duration
- d. Form, requisites, and sufficiency
- e. Construction and operation
- f. Modification
- g. Performance or breach
- h. Annulment, vacation, or suspension

### a. In General

Generally the power to contract for the carriage of the mails is, by statute, vested in the postmaster general.

Generally the power to contract for the carriage of the mails is, by statute, vested in the postmaster general,<sup>71</sup> and, in the absence of statute, a postmaster has no authority to make contracts with respect to the mail-messenger service, or to direct it, and cannot bind the government for that purpose.<sup>72</sup> The collector of customs is under no disability by reason of his office to contract with the government for the carriage of the mails,<sup>73</sup> and a corporation organized under the laws of any state in the United States is an American citizen within a statute authorizing bids by "American citizens" for the carrying of mails on American steamships between ports of the United States and foreign ports.<sup>74</sup>

*Damages for refusal to award contract.* An indemnity agreed on as the amount to be paid for canceling a contract affords the measure of damages for illegally refusing to award it.<sup>75</sup>

*"Miss mails."* As used in a contract to carry the

mails, wherein the contractor agrees to be responsible for any "miss mails" which occur on the part of the mail route on which he has to transport the mails, the term "miss mails" means that the parties were stipulating for the accidental or casual omissions to deliver the mail within the prescribed period.<sup>76</sup>

### b. Advertisements and Bids

The manifest objects of statutes providing for advertisements and bids as to general mail lettings is to secure for the government the benefit of competition, to obtain efficiency and economy in service, and to prevent favoritism.

The manifest objects of statutes providing for advertisements and bids as to general mail lettings is to secure for the government the benefit of competition,<sup>77</sup> to obtain efficiency and economy in the service,<sup>78</sup> and to prevent favoritism.<sup>79</sup> Nevertheless, other statutes dispense with the necessity of advertisements and bids in enumerated cases, such, for instance, as temporary mail lettings,<sup>80</sup> and contracts with railway companies<sup>81</sup> or with the owners or masters of steamships, steamboats, or other vessels, plying on the waters, or between ports, of the United States, for carrying the mails on such routes.<sup>82</sup>

*New advertisements and bids.* Where part of an established post route is found to be impracticable, that portion of it may be changed by the post office department without thereby creating a new route requiring a new advertisement and bid.<sup>83</sup> A proposal for expedited and increased service, with the order made thereon, does not constitute a new contract requiring a new advertisement,<sup>84</sup> but makes simply an alteration of the existing contract in a manner authorized by statute.<sup>85</sup> So it has been held that the postmaster general may accept a proposal from a steamship company, the holder of a contract with the government for performing second-class mail service, to perform first-class mail service on the condition that, if the proposal be accepted, the

Pa.—Pearce v. Laught, 101 Pa. 507, 47 Am.R. 737.

68. Mo.—Seneca Co. v. Ellison, 208 S.W. 103, 203 Mo.App. 179.

69. Mass.—Kenney v. Boston Mut. Life Ins. Co., 28 N.E.2d 490, 306 Mass. 282.

49 C.J. p 1166 note 89.

70. U.S.—Walster v. U. S., C.C.N.Y., 42 F. 891.

18 C.J. p 559 note 87.

71. U.S.—New York Cent. R. Co. v. U. S., 21 Ct.Cl. 468.

49 C.J. p 1166 note 92.

72. U.S.—Slavens v. U. S., Ct.Cl., 25

S.Ct. 229, 196 U.S. 229, 49 L.Ed. 457.

49 C.J. p 1166 note 93.

73. 14 Opinion Attorney General 388.

74. 20 Opinion Attorney General 161.

49 C.J. p 1166 note 95.

75. U.S.—Garfield v. U. S., Ct.Cl., 93 U.S. 242, 23 L.Ed. 779.

76. Ala.—Davis v. Wade, 4 Ala. 208.

77. U.S.—Garfield v. U. S., Ct.Cl., 93 U.S. 242, 23 L.Ed. 779.

49 C.J. p 1166 note 96 [a].

78. U.S.—Garfield v. U. S., supra.

79. U.S.—Garfield v. U. S., supra.

80. 13 Opinion Attorney General 473.

49 C.J. p 1167 note 3.

81. 5 Opinion Attorney General 373.

49 C.J. p 1167 note 4.

82. 13 Opinion Attorney General 565.

83. U.S.—U. S. v. Barlow, Colo., 10 S.Ct. 77, 132 U.S. 271, 33 L.Ed. 346.

84. U.S.—Griffith v. U. S., 22 Ct.Cl. 165, appeal dismissed 11 S.Ct. 1065, 141 U.S. 212, 35 L.Ed. 719.

85. U.S.—Griffith v. U. S., supra.

existing contract shall be rescinded,<sup>86</sup> but the company should be required to stipulate for the safety of the government that, in consideration of the above, the existing contract shall, at the option of the government, be void in case some party other than the company shall be the successful bidder for first-class service.<sup>87</sup> On the other hand, where a contract has been entered into for foreign mail service for a term of ten years, no authority exists to make a new contract with the same party for five years in lieu of the ten years<sup>88</sup> unless the party procured the contract by new bidding after due advertisement.<sup>89</sup> A condition may not be inserted in a contract by which the postmaster general and the contractor may subsequently vary the terms of the contract, both as to price of ships and rate of compensation, without submitting the rate to the effect of competition, because otherwise it would indirectly empower the postmaster general to make a contract without inviting bids.<sup>90</sup> So also, under a statute providing that all contracts for carrying the mails shall be awarded to the lowest bidder tendering sufficient guaranties for faithful performance, it has been held that if the lowest bidder fails to enter into a contract and perform the service, the postmaster general cannot legally contract with the next lowest bidder who will agree to perform the service at his bid for the whole term, without readvertising,<sup>91</sup> and that, after once advertising and failing to secure a contractor, a contract cannot be lawfully made with a person who has not been a bidder on a proposition informally submitted for the contract term.<sup>92</sup>

**Requisites and sufficiency.** As a condition precedent to the making of a valid contract for carrying the mails, the advertisements for bids must satisfy the statutory requirements,<sup>93</sup> and no amount of precision in the bid can obviate a want of compliance with the statute in the advertisement.<sup>94</sup> If the statute provides that the advertisement shall state the time and frequency of the service, no valid contract can be made on an advertisement which does

not comply with this requirement.<sup>95</sup> Under a statute empowering the postmaster general to enter into contracts with American citizens for the carrying of mails on American steamships, between ports of the United States and ports in foreign countries, the mail service on such lines to be equitably distributed, and contracts to be made with the lowest responsible bidder for the performance of the mail service on each route, the postmaster general is required to advertise for separate proposals for each separate and distinct line of service.<sup>96</sup> Specific information in an advertisement of existing conditions within the government's knowledge and not within the knowledge of the bidders must be regarded as in the nature of a warranty on which the bidders are entitled to rely.<sup>97</sup>

**Bids.** Bids must conform to all proper and reasonable administrative regulations of the post office department.<sup>98</sup> A bid may be signed by a person without writing his name at the foot of the instrument.<sup>99</sup> In the absence of statutory authority, the post office department has no power to enforce a rule that bids for carrying the mails should not be withdrawn after a certain time, whether or not accepted,<sup>1</sup> and this is so although the bidder promised not to withdraw the bid before the department decides on it because the common law refuses to hold any man responsible for what he has promised<sup>2</sup> unless he has either received a valuable consideration or bound himself by a sealed instrument.<sup>3</sup> However, notice must be given in order to constitute a withdrawal,<sup>4</sup> and mere intention to withdraw does not constitute a withdrawal.<sup>5</sup>

**Acceptance or rejection of bids.** Where advertisements and bids for mail contracts are made necessary by statute, all contracts for carrying the mails are required to be awarded to the lowest bidder tendering sufficient guaranties for faithful performance in accordance with the terms of the advertisement,<sup>6</sup> except that, in case of contracts for ocean mail service on American vessels, the postmaster

86.	20	Opinion	Attorney	General
304.				
87.	20	Opinion	Attorney	General
304.				
88.	20	Opinion	Attorney	General
321.				
89.	20	Opinion	Attorney	General
321.				
90.	20	Opinion	Attorney	General
161.				
91.	13	Opinion	Attorney	General
473.				
49 C.J. p 1167	note 15.			
92.	13	Opinion	Attorney	General
473.				

93.	29	Opinion	Attorney	General
389—14		Opinion	Attorney	General
389.				
94.	14	Opinion	Attorney	General
389.				
95.	14	Opinion	Attorney	General
389.				
96.	29	Opinion	Attorney	General
389.				
49 C.J. p 1167	note 21.			
97.	U.S.—Utah, etc.,	Stage Co. v. U.		
S., 39 Ct.Cl.	420, affirmed	26 S.Ct.		
69, 199 U.S.	414, 50 L.Ed.	251.		
49 C.J. p 1167	note 22.			

98.	17	Opinion	Attorney	General
285.				
99.	9	Opinion	Attorney	General
174.				
49 C.J. p 1167	note 24.			
1.	9	Opinion	Attorney	General
174.				
2.	9	Opinion	Attorney	General
174.				
3.	9	Opinion	Attorney	General
174.				
4.	9	Opinion	Attorney	General
174.				
5.	9	Opinion	Attorney	General
174.				
6.	U.S.—Cosgrove v. U. S.,	31 Ct.Cl.		
332.				



general may reject all bids not in his opinion reasonable for the obtaining of the purposes named.<sup>7</sup> The first-mentioned provision is subject to limitations contained in another statute that all bids be accompanied by a bond with approved sureties to perform the services proposed in the bid.<sup>8</sup> Where the postmaster general is empowered by statute to enter into contracts for carrying the mails without preliminary advertisements and bids, he may disregard a bid made on an advertisement to carry mail over a designated route, and, without advertising, make a contract with another party.<sup>9</sup>

### c. Duration

The statute limiting the duration of a contract for carrying the mails does not prescribe the duration of the contract made under its provisions, but merely fixes a maximum time which the postmaster general may not exceed.

Since the statute, 39 U.S.C.A. § 436, provides that, except as otherwise provided by law, no contract for carrying the mails shall be made for a term longer than four years, and no contract for carrying the mails on the seas shall be made for a term longer than two years, the only limitation of time which can be placed on the postmaster general is that prescribed by this statute.<sup>10</sup> This statute, it has been held, does not prescribe the duration of the contract made under its provisions, but merely fixes a maximum time which the postmaster general may not exceed.<sup>11</sup> Under a statute authorizing the postmaster general to make a contract with American citizens for the carrying of mails to foreign ports on American vessels, for a term not less than five, and not more than ten, years in duration, whenever the service begins under a contract, no matter what its character, the term has begun, and no power exists to make that term longer than ten years.<sup>12</sup>

*Implied contract.* A continuance of service after the termination of a written contract for carrying the mails for a designated term of years creates no obligation of a renewed contract on a like compen-

sation and for the same duration of time.<sup>13</sup> The more reasonable implication is that the service is temporary, and terminable at the option of either party.<sup>14</sup>

### d. Form, Requisites, and Sufficiency

No particular form of contract is necessary, and the acceptance by the post office department of the proposal of a bidder after public notice to carry the mails in accordance therewith creates a contract.

No particular form of contract is necessary.<sup>15</sup> The acceptance by the post office department of the proposal of a bidder after public notice to carry the mails in accordance therewith creates a contract of the same force and effect as though a formal contract had been written out and signed by the parties,<sup>16</sup> and where the postmaster general states the terms on which a mail transportation service may be performed, and a railroad company acquiesces and performs, it constitutes a contract.<sup>17</sup> So a contract to carry the mails by a railroad company is entered into by the acceptance of the railroad company of a so-called "distance circular" providing that it should be carried subject to acts of congress and rules and regulations of the post office department.<sup>18</sup> While it is provided by statute that contracts entered into by the post office department should be in the name of the United States, the non-observance of this requirement will not invalidate a contract made for, and in behalf of, the United States which is otherwise unobjectionable.<sup>19</sup>

### e. Construction and Operation

General principles governing the construction and operation of contracts apply to contracts for carrying the mails.

General principles governing the construction and operation of contracts apply to contracts for carrying the mails.<sup>20</sup> A contract for postal car facilities, which makes the liability of the United States conditional on future appropriations, is valid, and becomes operative if appropriations are subsequently made;<sup>21</sup> and if a contract, dependent on an appropriation for its validity, does not exceed the ap-

7. 29 Opinion Attorney General 194.

49 C.J. p 1168 note 32.

8. 17 Opinion Attorney General 293.

9. 5 Opinion Attorney General 373.

10. U.S.—New York, etc., R. Co. v. U. S., 21 Ct.Cl. 468—Chicago, etc., R. Co. v. U. S., 14 Ct.Cl. 125, reversed on other grounds 104 U.S. 627, 26 L.Ed. 893.

11. U.S.—Eastern R. Co. v. U. S.,

20 Ct.Cl. 23, affirmed 9 S.Ct. 320, 129 U.S. 391, 32 L.Ed. 730.

12. 20 Opinion Attorney General 161.

13. U.S.—Jacksonville, etc., R. Co. v. U. S., Ct.Cl., 7 S.Ct. 48, 118 U.S. 626, 30 L.Ed. 273.

14. U.S.—Jacksonville, etc., R. Co. v. U. S., 21 Ct.Cl. 155, affirmed 7 S.Ct. 48, 118 U.S. 626, 30 L.Ed. 273.

15. U.S.—Garfield v. U. S., Ct.Cl., 93 U.S. 242, 23 L.Ed. 779.

16. U.S.—Garfield v. U. S., supra.

17. U.S.—Texas, etc., R. Co. v. U. S., 28 Ct.Cl. 379.

18. U.S.—Great Northern R. Co. v. U. S., Minn., 236 F. 433, 149 C.C.A. 485.

49 C.J. p 1169 note 81.

19. 18 Opinion Attorney General 112.

49 C.J. p 1170 note 83.

20. U.S.—Huse v. U. S., Ct.Cl., 32 S.Ct. 119, 222 U.S. 496, 56 L.Ed. 285.

49 C.J. p 1170 note 85.

21. U.S.—New York Cent., etc., R. Co. v. U. S., 21 Ct.Cl. 468.

propriation it will be deemed valid, although the appropriation is exhausted.<sup>22</sup> Nevertheless, a contract with the postmaster general for carrying the mails to a foreign country, which by its terms is to commence when it is ratified by congress, and to be void in case such ratification is withheld, does not bind either party until the ratification stipulated for is given;<sup>23</sup> and such a contract does not bind the postmaster general who makes it, or his successor, to recommend the ratification of the contract to congress;<sup>24</sup> and, if congress does not ratify the contract, the contractor has no right to carry the mail,<sup>25</sup> and the postmaster general has no lawful authority to permit letters or packages to be transported by him from one post office to another.<sup>26</sup>

#### f. Modification

While contracts for carrying the mails customarily provide that the postmaster general may discontinue the services whenever the public interest require such discontinuance, in no other mode can the contract be changed except as provided by statute or by the mutual assent of the parties.

While contracts for transportation of the mails customarily provide that the postmaster general may discontinue the services whenever the public interest in his judgment shall require such discontinuance on payment by the government of a designated indemnity, as discussed *infra* § 30, in no other mode can the contract be changed except, as provided by statute, by advertisement and bids as in the case of original contracts,<sup>27</sup> or by the mutual assent of the parties;<sup>28</sup> and any attempted change by the United States will render it liable in damages in the same manner, and to the same extent, as a private party.<sup>29</sup> Furthermore, an authorized contract for the carriage of the mails by a postmaster general can no more be changed by his successor without the assent of the contractor than by himself, the change of incumbents not in anywise affecting or impairing the rights of the contractors.<sup>30</sup> So, where a contract for continuous service

in the carriage of mails by a railroad company has been entered into, and performance thereof commenced and continued by the company, the contract, the terms of which are specified, cannot be changed or modified by the mere protest of the company,<sup>31</sup> and no action can be predicated on such protest, the remedy of the company being in a refusal to perform.<sup>32</sup>

#### g. Performance or Breach

A contractor should be released from further obligations under a contract for carrying the mails where performance is impossible.

In accordance with elementary principles, where a contract for carriage of the mails is impossible of performance and the parties entered into the contract with a mutual want of information for which neither can be properly held responsible, the contractor should be released from further obligations under it.<sup>33</sup>

#### h. Annulment, Vacation, or Suspension

Contracts for carriage of the mails may be annulled or vacated by the postmaster general on grounds prescribed by statute, by the postal regulations, or by the contract itself.

Contracts for carriage of the mails may be annulled or vacated by the postmaster general on grounds prescribed by statute, by the postal regulations, or by the contract itself.<sup>34</sup> Thus violation of the statute prohibiting contractors from delivery of the mails to a person not authorized to receive them is a ground for the annulment of the contract.<sup>35</sup>

*Combination to prevent bidding.* Under a statute making it a ground for annulling a contract for the carriage of the mails that the contractor entered into a combination to prevent bids for carrying the mails, or made any agreement to induce any other person not to bid on such contract, the contracts held by parties to an agreement, which is in violation of this statute, are subject to annulment, by the postmaster general,<sup>36</sup> and it is immaterial

22. U.S.—New York Cent., etc., R. Co. v. U. S., *supra*.

23. 9 Opinion Attorney General 10.

24. 9 Opinion Attorney General 10.

25. 9 Opinion Attorney General 10.

26. 9 Opinion Attorney General 10.

27. U.S.—Cosgrove v. U. S., 31 Ct. Cl. 332.

28. U.S.—Great Northern R. Co. v. U. S., Minn., 236 F. 433, 149 C.C.A. 485.

29. U.S.—Great Northern R. Co. v. U. S., *supra*.

30. 3 Opinion Attorney General 1.

31. U.S.—Chicago, etc., R. Co. v. U. S., 57 Ct.Cl. 300—Texas, etc., R. Co. v. U. S., 28 Ct.Cl. 379, 390.

49 C.J. p 1170 note 99.  
32. U.S.—Chicago, etc., R. Co. v. U. S., 57 Ct.Cl. 300—New York, etc., R. Co. v. U. S., 53 Ct.Cl. 222, affirmed 40 S.Ct. 67, 251 U.S. 123, 64 L.Ed. 182.

33. 3 Opinion Attorney General 492.

34. U.S.—Slavens v. U. S., Ct.Cl., 25

S.Ct. 229, 196 U.S. 229, 49 L.Ed. 457.

49 C.J. p 1170 note 3.

Annulment of contract for violation of statutes relating to transfer, assignment, or subletting of contracts see *infra* § 29.

35. 15 Opinion Attorney General 70.

36. U.S.—Pacific Air Transport v. U. S., 98 Ct.Cl. 649.

**Held combination to prevent competitive bidding**

Agreement among operators of air mail lines to carry out a device by which extensions of existing lines would be granted and contracts for

that the postmaster general consented to the agreement to allocate the contracts without competitive bidding,<sup>37</sup> or that the postmaster general urged such agreement on the parties,<sup>38</sup> since the statute makes no exception of a combination or agreement consented to, or instigated by, a public officer.<sup>39</sup> However, this statute does not authorize annulment of the contract of a successful bidder by reason of the fact that he had transferred his contract to another person, who was a competitor in the bidding, since this does not show any combination to prevent bidding,<sup>40</sup> and it is not a ground for annulment of a contract for carriage of the mails that one person bid for the contract in behalf of himself and others unless the arrangement was made and designed to defraud the government by preventing competition in the bids, or in some other way.<sup>41</sup>

*Failure to perform service or disobedience of instructions.* The postmaster general may annul a contract in accordance with a stipulation therein contained that he might do so in case of repeated failures, or for a failure, to perform services according to contract.<sup>42</sup> So also, if a contractor refused, after being instructed so to do, to give information as to the preparations made by him for the performance of his contract, it may be annulled.<sup>43</sup>

*On discontinuance or curtailment of services on route.* The postal regulations authorize the postmaster general to discontinue or curtail the service on any route in whole or in part whenever, in his judgment, the public interest shall require it, or for any other cause, on allowing as full indemnity to the contractor one month's pay on the amount of services dispensed with and a pro rata compensation for the amount of services retained and continued;<sup>44</sup> and, where on discontinuing part of the services the contractor refuses to accept the re-

maining work at a lower compensation, the postmaster general may annul the contract on allowing one month's pay as indemnity and relet the remaining services.<sup>45</sup> The power to terminate the contract by order of discontinuance allowing one month's extra pay is not predicated on an abandonment of the entire service.<sup>46</sup> Furthermore, after discontinuing the contract, the government is free to make such contracts as may be deemed best.<sup>47</sup> Accordingly, after a portion of the service is discontinued, the department may permit the balance to be performed by others without first giving the contractor an opportunity to perform.<sup>48</sup> The regulation authorizes a discontinuance for the purpose of readvertising and reletting the service on an increased schedule, in preference to permitting the contractor to perform the increased service at the pro rata to which he will be entitled under his contract.<sup>49</sup> The exercise by the postmaster general of his authority to discontinue the contract cannot be reversed by the courts, in the absence of the existence of a fraudulent motive or bad faith,<sup>50</sup> and relief to the contractor for hardships resulting from his mistake in making an improvident contract can only be obtained at the hands of congress.<sup>51</sup>

*Restoration of suspended contract.* Where a mail transportation service, suspended because of alleged imperfect performance, is restored on condition that the contractor shall pay the cost of the service during suspension, he is bound thereby, and cannot thereafter recover from the government the amount paid by it for such service, and deducted from the moneys due him.<sup>52</sup>

## § 28. — Bonds

a. In general

b. Scope, extent, and period of liability

such extensions would be sublet to other selected operators was a combination to avoid competitive bidding for such contracts.—*Pacific Air Transport v. U. S.*, *supra*.

*Evidence held to show violation of statute and that there were accordingly valid grounds for the annulment of plaintiffs' mail route certificates, and that the several annulments did not constitute breaches of contract for which plaintiffs would be entitled to recover damages.*—*Pacific Air Transport v. U. S.*, *supra*.

37. *U.S.—Pacific Air Transport v. U. S.*, *supra*.

38. *U.S.—Pacific Air Transport v. U. S.*, *supra*.

39. *U.S.—Pacific Air Transport v. U. S.*, *supra*.

40. 9 Opinion Attorney General 331.

41. *U.S.—Hegness v. Chilberg, Alaska*, 224 F. 28, 139 C.C.A. 493. 49 C.J. p 1171 note 6.

42. *Minn.—Gaines v. Trengrove*, 79 N.W. 1045, 77 Minn. 349. 49 C.J. p 1171 note 7.

43. 9 Opinion Attorney General 392.

44. *U.S.—Travis v. U. S.*, Ct.Cl., 25 S.Ct. 233, 196 U.S. 239, 49 L.Ed. 461.—*Slavens v. U. S.*, Ct.Cl., 25 S.Ct. 229, 196 U.S. 229, 49 L.Ed. 457.

45. *U.S.—Travis v. U. S.*, Ct.Cl., 25 S.Ct. 233, 196 U.S. 239, 49 L.Ed. 461.—*Slavens v. U. S.*, Ct.Cl., 25 S.Ct. 229, 196 U.S. 229, 49 L.Ed. 457.

46. *U.S.—Travis v. U. S.*, Ct.Cl., 25 S.Ct. 233, 196 U.S. 239, 49 L.Ed. 461.—*Slavens v. U. S.*, Ct.Cl., 25 S.Ct. 229, 196 U.S. 229, 49 L.Ed. 457.

47. *U.S.—Miller v. U. S.*, Ct.Cl., 34 S.Ct. 570, 233 U.S. 1, 58 L.Ed. 823.

48. *U.S.—Miller v. U. S.*, 47 Ct.Cl. 146, affirmed 34 S.Ct. 570, 233 U.S. 1, 58 L.Ed. 823.

49. 19 Opinion Attorney General 146.

50. *U.S.—Miller v. U. S.*, Ct.Cl., 34 S.Ct. 570, 233 U.S. 1, 58 L.Ed. 823.—*Slavens v. U. S.*, Ct.Cl., 25 S.Ct. 229, 196 U.S. 229, 49 L.Ed. 457.

51. *U.S.—Miller v. U. S.*, Ct.Cl., 34 S.Ct. 570, 233 U.S. 1, 58 L.Ed. 823.

52. *U.S.—Woodlief v. U. S.*, 26 Ct. Cl. 457.

c. Discharge or release of sureties  
d. Enforcement and cancellation

a. In General

The object of the statute requiring all bids for carrying the mails to be accompanied by a bond with approved sureties to perform the services proposed in the bid is to protect the government from imposition through worthless bids, and other statutory provisions requiring contracts for carrying the mails to be awarded to the lowest bidder must be construed in connection with the requirements of this statute.

The object of the statute requiring all bids for carrying the mails to be accompanied by a bond with approved sureties to perform the services proposed in the bid is to protect the government from imposition through worthless bids,<sup>53</sup> and other statutory provisions requiring contracts for carrying the mails to be awarded to the lowest bidder must be construed in connection with the requirements of this statute.<sup>54</sup> Even if the statutory requirements have been complied with in point of form, if the postmaster general is satisfied from other sources of information that the bond is worthless, he may and should treat the bid as though the bond had not accompanied it.<sup>55</sup> A bond appearing on its face to have been altered should not be accepted<sup>56</sup> unless by a note or in some way it is attested that the change was made with the assent of the parties.<sup>57</sup> The law does not require that there should be witnesses to the bond, but it is expedient, and safety requires them.<sup>58</sup> An admitted clerical error in a contractor's bond due to a mistake of a clerk in the post office department will not be permitted to operate to the prejudice of the contractor.<sup>59</sup>

b. Scope, Extent, and Period of Liability

General rules governing the scope and extent of liability on officers' bonds apply to bonds of mail contractors.

General rules governing the scope and extent of liability on officers' bonds apply to bonds of mail

contractors.<sup>60</sup> The sureties of a mail contractor are responsible to the government for the whole term of the contract,<sup>61</sup> and as well after the death of their principal as before,<sup>62</sup> and on the death of the principal, before the expiration of the term for which the contract was made, are bound to fulfill its stipulation,<sup>63</sup> or, in case of nonfulfillment, are liable for the damages which may ensue from letting it at a higher price.<sup>64</sup>

c. Discharge or Release of Sureties

Any change in the terms of the contract for carrying the mails releases the sureties on the contract for subsequent liability thereon, and if a material change is made in the bond by interlineation or otherwise, subsequent to its execution, the instrument is thereby rendered void.

Any change in the terms of a contract for carrying the mails releases the sureties on the contract from subsequent liability thereon,<sup>65</sup> and if a material change is made in the bond by interlineation or otherwise, subsequent to its execution, the instrument is thereby rendered void<sup>66</sup> unless it can clearly be shown that after the change the parties assented to it and still acknowledge the signing and sealing as their act.<sup>67</sup> So, where the contractors have fully performed their duties in accordance with the terms of the contract, and their accounts have been adjusted and settled, and the route discontinued, this operates as a discharge of the sureties.<sup>68</sup>

d. Enforcement and Cancellation

An action will lie against the contractor and the sureties on his bid for a breach of the bond; general rules relating to the burden of proof and the admissibility and weight and sufficiency of the evidence in actions on bonds apply in such actions.

An action will lie against the contractor and the sureties on his bid for a breach of the bond.<sup>69</sup> It is no defense to such action that, previous to the time when the surety entered into his obligation, the government had taken the obligation of another surety for the performance by the principal of the same contract<sup>70</sup> or that an action brought to enforce

53.	17	Opinion	Attorney	General
293.				
54.	17	Opinion	Attorney	General
293.				
55.	17	Opinion	Attorney	General
293.				
56.	17	Opinion	Attorney	General
285.				
57.	17	Opinion	Attorney	General
285.				
58.	17	Opinion	Attorney	General
285.				
59.	5	Opinion	Attorney	General
546.				

60.	U.S.—U. S. v. Alcorn, C.C.Mo.,
145 F. 995.	
49 C.J. p 1168 note 48.	
Scope and extent of liability on official bonds generally see Officers § 161.	
61.	6 Opinion Attorney General
410.	
62.	6 Opinion Attorney General
410.	
49 C.J. p 1168 note 51.	
63.	6 Opinion Attorney General
410.	
64.	6 Opinion Attorney General
410.	
65.	20 Opinion Attorney General

321—18	Opinion Attorney General
414.	
Discharge of sureties on official bonds generally see Officers § 165.	
66.	17 Opinion Attorney General
285.	
67.	17 Opinion Attorney General
285.	
68.	18 Opinion Attorney General
414.	
49 C.J. p 1169 note 58.	
69.	20 Opinion Attorney General
293.	
70.	U.S.—National Surety Co. v. U. S., N.Y., 123 F. 294, 59 C.C.A. 479.

it had been voluntarily dismissed.<sup>71</sup> Furthermore, it has been held that, where there are two independent undertakings, by one of which the principal and sureties shall be liable for the amount of the bond as liquidated damages to be recovered in an action of debt on the bond in case of a breach thereof, and the other constituting a contract of indemnity to pay the government an amount contingent on the actual loss to the government occasioned by breach of stipulations to perform the service by the bidder, a recovery on the latter bond for actual damages, occasioned by a breach of its provisions, constitutes no bar to an action on the other bond to recover the sum fixed as liquidated damages;<sup>72</sup> but there is also authority directly to the contrary.<sup>73</sup>

*Evidence.* General rules relating to the burden of proof<sup>74</sup> and the admissibility<sup>75</sup> and weight and sufficiency<sup>76</sup> of the evidence in actions on bonds or official bonds apply in actions on bonds of this character.

*Cancellation.* A bill by the surety on a contractor's bond to procure the cancellation thereof will not be entertained where complainant has an adequate remedy at law.<sup>77</sup>

## § 29. — Transfer, Assignment, or Subletting of Contracts

The purposes of the statutes relating to the transfer, assignment, or subletting of contracts for the carriage of the mails are to prevent liability of the government on the contract to any person other than the accepted bidder and to prevent speculating contractors from reaping a profit. Under these statutes the subletting or transfer of a contract for the carriage of the mails without the consent of the postmaster general empowers the postmaster general to terminate the contract.

The purposes of the statutes relating to the transfer, assignment, or subletting of contracts for the carriage of the mails, are to prevent liability of the

government on the contract to any person other than the accepted bidder<sup>78</sup> and to prevent speculating contractors from reaping a profit out of the government by subletting for a sum smaller than contracted for.<sup>79</sup> Under these statutes the subletting or transfer of a contract for the carriage of the mails without the consent of the postmaster general,<sup>80</sup> or for a sum smaller than that for which the contractor agreed to perform the services,<sup>81</sup> empowers the postmaster general to terminate the contract, and an annulment of the contract on this ground is effective even though no reason is assigned.<sup>82</sup>

Nevertheless, under these statutes, the subletting or transfer of a contract for the carriage of the mails without the consent of the postmaster general,<sup>83</sup> or for a sum smaller than that for which the original contractor had stipulated to perform the contract,<sup>84</sup> does not render the original contract void, but merely voidable at the option of the government, it being discretionary with the postmaster general whether or not he shall annul the contract;<sup>85</sup> nor does the statute making null and void all assignments or transfers of contracts for transporting the mail in any way affect the original contract for carrying the mails, but operates only on the assignment or transfer thereof.<sup>86</sup> Since the statutes relating specifically to contracts for the carriage of the mails prohibit the assignment, transfer, or subletting of any contracts for the carriage of the mails without the consent of the postmaster general, and declare that contracts in violation thereof shall be "null and void," it has accordingly been held that, because these contracts are illegal, the parties acquire no rights under them and they will not be enforced,<sup>87</sup> and, prior to the enactment of these statutes, it had been held, under the statute relating to transfers of public contracts generally, that one to whom a contract for carrying the

71. U.S.—National Surety Co. v. U. S., *supra*.

49 C.J. p 1169 note 63.

72. U.S.—U. S. v. Alcorn, C.C.Mo., 145 F. 995.

73. U.S.—U. S. v. Oliver, C.C.La., 36 F. 758.

74. U.S.—U. S. v. McCoy, Wash., 24 S.Ct. 528, 193 U.S. 593, 48 L.Ed. 805.

49 C.J. p 1169 note 66.

Burden of proof on official bonds generally see Officers § 176 a.

75. U.S.—National Surety Co. v. U. S., N.Y., 123 F. 294, 59 C.C.A. 479. 49 C.J. p 1169 note 67.

76. U.S.—U. S. v. McCoy, Wash., 24 S.Ct. 528, 193 U.S. 593, 48 L.Ed. 805.

49 C.J. p 1169 note 68.

77. D.C.—Pechstein v. Smith, 14 App.D.C. 27.

78. N.Y.—Oregon SS. Co. v. Otis, 3 N.E. 485, 100 N.Y. 446, 53 Am.R. 221, appeal dismissed 6 S.Ct. 523, 116 U.S. 548, 29 L.Ed. 719.

79. Tex.—Myers v. Pickett, 16 S.W. 643, 81 Tex. 53.

80. U.S.—McGinnis v. U. S., 27 Ct. Cl. 146—16 Opinion Attorney General 61.

49 C.J. p 1172 note 33.

*Surety on bond*

When, on mail carrier's default, surety on a bond takes over contract to carry mail, he stands for all practical purposes in shoes of contractor and becomes the contractor within statutes restricting assignment or transfer of any mail con-

tracts.—Clemons v. Huckaby, 37 So. 2d 504, 251 Ala. 419.

81. Tex.—Myers v. Pickett, 16 S.W. 643, 81 Tex. 53.

82. U.S.—McGinnis v. U. S., 27 Ct. Cl. 146.

83. Ala.—Clemons v. Huckaby, 37 So.2d 504, 251 Ala. 419.

49 C.J. p 1172 note 36.

84. Tex.—Myers v. Pickett, 16 S.W. 643, 81 Tex. 53.

85. Ala.—Clemons v. Huckaby, 37 So.2d 504, 251 Ala. 419.

49 C.J. p 1172 note 38.

86. Pa.—Peet v. Knight, 2 Pa.Co. 445.

87. Ga.—Nix v. Bell, 66 Ga. 664.

Pa.—Peet v. Knight, 2 Pa.Co. 445. 49 C.J. p 1172 note 45.

mails had been transferred could maintain no action thereon against the United States,<sup>88</sup> although it would seem that such a transfer would not be absolutely void under the statute, but that the government might treat the contract as annulled or recognize the transfer at its option, as discussed in the C.J.S. title United States § 95, also 65 C.J. p 1345 note 10.

*Agreements not forbidden by statutes.* The statutes relating to the transfer or assignment of mail contracts do not prevent one who has contracted for carrying the mails from lawfully contracting with, or employing, another to perform for him the services required by the contract,<sup>89</sup> since the statute does not debar the contractor from having the assistance of servants<sup>90</sup> or prevent a person who is actually agent for another, but who contracts in his own name, from holding the contract for the benefit of the person who performs the service, and agreeing to collect and hold the pay for him and as his property when received.<sup>91</sup>

*Permission to sublet contract.* Where a contract is sublet with the permission of the postmaster general, it creates a privity of contract between the subcontractor and the United States on which he can maintain an action,<sup>92</sup> and this privity extends not only to compensation for services performed, but to extra pay for services dispensed with.<sup>93</sup>

*Requisites and sufficiency of contract of subletting.* A statute providing that, when any person who has contracted for carrying the mails shall lawfully sublet any such contract, he shall file in the office of the postmaster general a copy of the contract, notice of which shall be sent to the general accounting office, contemplates only written contracts, and in no event can a contract for carrying the mails be sublet by an oral contract.<sup>94</sup>

*Breach of contract of subletting.* After a contract of subletting or substitution has been made and approved by the postmaster general, a breach there-

of by either party will render him liable in damages to the other.<sup>95</sup>

*Termination of subcontract.* The postmaster general's approval of a subcontract for the carrying of the mails can be withdrawn at any time,<sup>96</sup> and such withdrawal will have the effect of terminating the contractual relations between the contractor and his subcontractor;<sup>97</sup> and if, for any of the reasons stated in the original contract and also in the subcontract, the postmaster general should annul the former, the latter would fall with it.<sup>98</sup> Where a contract of subletting stipulated for a discharge thereof on the removal of the contractor before the expiration of his term, the contractor may refuse a contract for increased service without becoming liable in damages to the subcontractor.<sup>99</sup>

If a subcontractor for the conveyance of the mails abandons his contract, the post office department may employ temporary service on the route,<sup>1</sup> and may reinstate the original contractor without permitting the subcontractor to resume service under the subcontract.<sup>2</sup> Without the consent of that department the subcontractor cannot be reinstated by the contractor.<sup>3</sup>

*Bonds of subcontractors.* A bond given by a subcontractor or assignee of a mail contract, sublet in violation of the statute which renders the subletting null and void, is also null and void,<sup>4</sup> and its invalidity may be asserted in an action thereon, notwithstanding defendant was a party to the illegal act.<sup>5</sup> If, however, the contract between the parties does not amount to an assignment or transfer of the mail contract, the bond may be enforced.<sup>6</sup>

## § 30. Rates or Compensation for Carrying Mails

- a. In general
- b. Air carriers
- c. Railroad companies

88. U.S.—St. Paul, etc., R. Co. v. U. S., Ct.Cl., 5 S.Ct. 366, 112 U.S. 733, 28 L.Ed. 861.

49 C.J. p 1172 note 30.

89. Ala.—Clemons v. Huckaby, 37 So.2d 504, 251 Ala. 419.

49 C.J. p 1172 note 47.

When surety on bond, on mail carrier's default, took over contract to carry mail, surety could get someone else to do the work for him without violation of the statute restricting assignment or transfer of mail contracts.—Clemons v. Huckaby, supra.

90. Me.—Frye v. Burdick, 67 Me. 408.

91. N.Y.—Oregon SS. Co. v. Otis, 3 N.E. 485, 100 N.Y. 446, 450, 53 Am. R. 221, appeal dismissed 6 S.Ct. 523, 116 U.S. 548, 29 L.Ed. 719.

92. U.S.—Salisbury v. U. S., 28 Ct. Cl. 52.

49 C.J. p 1173 note 50.

93. U.S.—Salisbury v. U. S., supra.

94. 16 Opinion Attorney General 280.

95. Tex.—Fort Worth, etc., R. Co. v. Nabers, Civ.App., 288 S.W. 265. 49 C.J. p 1173 note 54.

96. Minn.—Gaines v. Trengrove, 79 N.W. 1045, 77 Minn. 349.

97. Minn.—Gaines v. Trengrove, supra.

98. Minn.—Gaines v. Trengrove, supra.

99. Ind.—Wingate v. McNamar, 28 Ind. 481.

1. La.—Logan v. Woodlief, 17 So. 698, 47 La. Ann. 1142.

2. La.—Logan v. Woodlief, supra.

3. La.—Logan v. Woodlief, supra.

4. Pa.—Peet v. Knight, 2 Pa.Co. 445.

5. Pa.—Peet v. Knight, supra.

6. Ga.—Moon v. Potter, 42 S.E. 43, 115 Ga. 673.

- d. Ocean carriers
- e. Effect of suspension or discontinuance of service
- f. Extra compensation
- g. Deductions and fines
- h. Overpayments and recovery thereof
- i. Waiver of, or estoppel to claim, compensation

#### a. In General

Where contracts for carrying the mails are made on advertisements and bids for the service, the compensation is fixed by the contract in accordance with the amount of the bid accepted.

Where, as discussed supra § 27 b, contracts for carrying the mails are made on advertisements and bids for the service, the compensation is fixed by the contract in accordance with the amount of the bid accepted.<sup>7</sup>

*Reduction of speed and compensation.* A proposition for a reduction of speed with a corresponding reduction of compensation may be dealt with by the postmaster general as in his judgment the good of the service and the interests of the public may demand.<sup>8</sup> The statute relating to expedited service has no application to a situation of this character and imposes no restriction on the postmaster general in dealing therewith.<sup>9</sup>

- 7. U.S.—Gregory v. U. S., 100 Ct.Cl. 319.
- 8. 17 Opinion Attorney General 240.
- 9. 17 Opinion Attorney General 240.
- 10. U.S.—Wightman v. U. S., 23 Ct. Cl. 144.
- 11. U.S.—Salisbury v. U. S., 28 Ct. Cl. 404.
- 12. U.S.—Alvord v. U. S., Ct.Cl., 95 U.S. 356, 24 L.Ed. 414.
- 13. U.S.—Transcontinental & Western Air v. Civil Aeronautics Board, App.D.C., 69 S.Ct. 756, 336 U.S. 601, 93 L.Ed. 911—Capital Airlines v. Civil Aeronautics Board, 171 F.2d 339, 84 U.S.App.D.C. 176, certiorari denied 69 S.Ct. 890, 336 U.S. 961, 93 L.Ed. 1113—Pan American Airways v. Civil Aeronautics Board, 171 F.2d 139, 84 U.S.App.D.C. 96.

#### Power of board

Where board properly required air carrier separately to report expenses of holding company originally incurred by air carrier, failure to make such report necessitated board's judgment allocation of certain per cent of air carrier's executive department expense to holding company in determining compensation for carrying the mail and such allocation which involved a large degree

of judgment was well within the powers of the board.—Pan American Airways v. Civil Aeronautics Board, supra.

#### Presumptions

Where statute empowering board to fix fair and reasonable rates for transportation of air mail was not necessarily retroactive and was as apt with respect to the future as it was to the past, court was required to give great weight to presumption against retroactivity and to limited legislative purpose apparent from history.—Transcontinental & Western Air v. Civil Aeronautics Board, 169 F.2d 893, 83 U.S.App.D.C. 358, affirmed 69 S.Ct. 756, 336 U.S. 601, 93 L.Ed. 911.

#### Just compensation

Congress, in enacting statute authorizing board to fix fair and reasonable rate of compensation for transportation of mail by aircraft, did not intend that board should determine and pay just compensation in the sense in which that term is used in Fifth Amendment to federal Constitution.—Capital Airlines v. U. S., 90 F.Supp. 926, 116 Ct.Cl. 850, certiorari denied 71 S.Ct. 121.

#### Intervention

(1) In proceeding by board for determination of mail rates to be paid to certificated transatlantic air mail

*Voluntary service.* Where voluntary service is accepted by the department, and congress passes an act referring the claim therefor and directing how damages thereon, if any, shall be computed, the service is thereby validated and the contractor entitled to compensation.<sup>10</sup> The fact that the postmaster general made the order irregularly will not deprive the contractor of his right to compensation when he has performed the services ordered.<sup>11</sup>

*Presentation of claim for compensation.* Presentation of a claim for compensation to the second assistant postmaster general, his being the proper office in the department for considering it, is equivalent to, and a compliance with, any rule requiring presentation to the postmaster general.<sup>12</sup>

#### b. Air Carriers

Under statutory provisions the civil aeronautics board is empowered and directed to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft.

Under statutory provisions the civil aeronautics board is empowered and directed, on its own initiative, or on petition of the postmaster general or an air carrier, to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft,<sup>13</sup> and to make such rates effective

carriers, board could permit noncertificated transatlantic airline carrying cargo between many of the same areas and points without advantage of mail payments to intervene and could limit intervention to final rate determinations and to issues involving extent, if any, to which ordinary cargo operations of mail carriers should be underwritten with mail pay.—Seaboard & Western Airlines v. Civil Aeronautics Board, C.A.D.C., 181 F.2d 515, certiorari denied, 70 S.Ct. 997, 339 U.S. 963, 94 L.Ed. —.

(2) Under statute providing that board is empowered on its own initiative or on petition of postmaster general or of air carrier to determine reasonable rates for compensation for transportation of mail by aircraft, presence of postmaster general is intended to protect the public interest, and hence a private objecting air carrier is not entitled to intervene on sole ground of protection of the public interest.—Seaboard & Western Airlines v. Civil Aeronautics Board, supra.

Under prior statutory provisions, where air mail contracts were annulled by the postmaster general by virtue of statutory authority, it was held that such annulment did not forfeit air mail pay earned by plaintiffs under the contracts before such

from such date as it shall determine to be proper;<sup>14</sup> but such statutory provisions are not intended to underwrite the profitable operation of the carrier's business<sup>15</sup> or to indemnify the carrier against loss and guarantee any return on the investments,<sup>16</sup> since such a construction in practical effect would have the tendency to transform it into a cost-plus system of regulation.<sup>17</sup> It has been stated that in the administration of these statutory provisions a computation of the revenues and expenses of the carrier is required,<sup>18</sup> since the board in fixing and determining the fair and reasonable rates of compensation should take into consideration the need of the air carrier to insure the performance of the service and to maintain and continue the development of air transportation required for commerce, postal service, and national defense.<sup>19</sup> However, these statutory provisions do not give the board authority to make rates retroactive beyond the date on which the carrier's petition was filed.<sup>20</sup> Since the statutory provisions require notice and hearing, notice and an opportunity to be heard are requisite

to the validity of an order of the board as to rates,<sup>21</sup> and, where no issue is framed on the subject of the order, as required by the rules of the civil aeronautics board, and no evidence is received on the subject, the order of the board is without the requisite notice and opportunity to be heard.<sup>22</sup>

**Judicial review.** Under the statute providing that any order, affirmative or negative, issued by the board, except any order in respect of any foreign air carrier subject to presidential approval, shall be subject to review by a designated court, it has been held that temporary rate orders are not reviewable,<sup>23</sup> since they are not final.<sup>24</sup> By the provisions of the statute the right of review is limited to a person having a substantial interest in such order,<sup>25</sup> and, since the presence of the postmaster general in a rate proceeding is for the protection of the public interest, an objecting private air carrier is not entitled to appeal an order determining the rate of mail pay on the sole ground of protecting the public interest.<sup>26</sup>

annulment, and not paid to plaintiffs at the time of such annulment; and plaintiffs were therefore entitled to recover the amount of such accrued pay.—*Pacific Air Transport v. U. S.*, 98 Ct.Cl. 649.

14. U.S.—*Transcontinental & Western Air v. Civil Aeronautics Board*, App.D.C., 69 S.Ct. 756, 336 U.S. 601, 93 L.Ed. 911.

15. U.S.—*Capital Airlines v. Civil Aeronautics Board*, 171 F.2d 339, 84 U.S.App.D.C. 176, certiorari denied 69 S.Ct. 890, 336 U.S. 961, 93 L.Ed. 1113.

16. U.S.—*Capital Airlines v. U. S.*, 90 F.Supp. 926, 116 Ct.Cl. 850, certiorari denied 71 S.Ct. 121.

17. U.S.—*Transcontinental & Western Air v. Civil Aeronautics Board*, App.D.C., 69 S.Ct. 756, 336 U.S. 601, 93 L.Ed. 911.

18. D.C.—*Pan American Airways v. Civil Aeronautics Board*, 171 F.2d 139, 84 U.S.App.D.C. 96.

#### Set-offs

Where civil aeronautics board had set up reserve against receivables due from Axis and Axis-dominated countries for carriage of mail appearing on air carrier's books as revenue and such receivables later became collectible and board determined that such amounts would not be treated as income in computation of net revenue of air carrier in test year in determining compensation for carrying the mail, board properly directed that when postmaster general should collect any of the old ac-

counts he should set them off against the amounts otherwise due the air carrier.—*Pan American Airways v. Civil Aeronautics Board*, 171 F.2d 139, 84 U.S.App.D.C. 96.

19. U.S.—*Transcontinental & Western Air v. Civil Aeronautics Board*, App.D.C., 69 S.Ct. 756, 336 U.S. 601, 93 L.Ed. 911.

D.C.—*Seaboard & Western Airlines v. Civil Aeronautics Board*, C.A., 181 F.2d 515, certiorari denied 70 S.Ct. 997, 339 U.S. 963, 94 L.Ed. —  
—*Pan American Airways v. Civil Aeronautics Board*, 171 F.2d 139, 84 U.S.App.D.C. 96.

#### Reasonable return

Since the board may consider need of air carrier for compensation to insure transportation of mail and enable carrier under efficient management to continue development of air transportation for postal service and national defense, a carrier is entitled to reasonable return plus need measured by economical management, and any excess used to offset uneconomical management or operation is not permitted.—*Seaboard & Western Airlines v. Civil Aeronautics Board*, C.A.D.C., 181 F.2d 515, certiorari denied 70 S.Ct. 997, 339 U.S. 963, 94 L.Ed. —.

20. U.S.—*Transcontinental & Western Air v. Civil Aeronautics Board*, App.D.C., 69 S.Ct. 756, 336 U.S. 601, 93 L.Ed. 911.

#### Unchallenged order

Final rate fixed by order of civil aeronautics board for carrying of mail by an airline could not be revised retroactively by board to cov-

er period in which order was unchallenged.—*Capital Airlines v. Civil Aeronautics Board*, 171 F.2d 339, 84 U.S.App.D.C. 176, certiorari denied 69 S.Ct. 890, 336 U.S. 961, 93 L.Ed. —.

21. D.C.—*Pan American Airways v. Civil Aeronautics Board*, 171 F.2d 139, 84 U.S.App.D.C. 96.

22. D.C.—*Pan American Airways v. Civil Aeronautics Board*, supra.

23. U.S.—*Seaboard & Western Airlines v. Civil Aeronautics Board*, C.A.D.C., 181 F.2d 515, certiorari denied, 70 S.Ct. 997, 339 U.S. 963, 94 L.Ed. —.

24. D.C.—*Seaboard & Western Airlines v. Civil Aeronautics Board*, supra.

25. D.C.—*Seaboard & Western Airlines v. Civil Aeronautics Board*, supra.

#### Denial of intervention

Under the statute providing that a person having a substantial interest may appeal from an order of the civil aeronautics board, court of appeals could review orders denying air carrier intervention in proceeding for determination of mail pay to be allowed other air carriers only if those orders disposed of any rights of intervenor by effectually denying them.—*Seaboard & Western Airlines v. Civil Aeronautics Board*, supra.

26. D.C.—*Seaboard & Western Airlines v. Civil Aeronautics Board*, supra.



### c. Railroad Companies

- (1) In general
- (2) Land grant railroads

#### (1) In General

Statutory provisions require all railway common carriers to transport such mail matter as may be offered for transportation by the United States for which service they are to receive a fair and reasonable compensation to be fixed by the Interstate Commerce Commission.

Although a railway company owes no common-carrier obligation to either the United States or the general public to transport mail,<sup>27</sup> on the enactment of the statute which requires all railway common carriers to transport such mail matter as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the postmaster general,<sup>28</sup> it became not only proper, but necessary, that provision be made for compensating them,<sup>29</sup> and the statute accordingly declared that they should be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith.<sup>30</sup> To this end the statute empowered and directed the Interstate Commerce Commission to fix the fair and reasonable compensation which the carrier is entitled to receive,<sup>31</sup> and to prescribe the methods for ascertaining such rates,<sup>32</sup> and to make such classification of carriers as may be just and reasonable and, where just and equitable, fix general rates applicable to all car-

riers in the same classification;<sup>33</sup> and this last provision does not preclude an examination of the general rate applicable to a particular carrier,<sup>34</sup> but, on the contrary, requires the commission to take rates paid to other carriers into account.<sup>35</sup> Such rates are to be fixed by the Interstate Commerce Commission only after notice and hearing,<sup>36</sup> and the determination of the commission as to fair and reasonable compensation to a railroad for carrying the mail is given presumptive weight<sup>37</sup> and places the burden on the carrier to show that the general rate is unfair and unreasonable as applied to it,<sup>38</sup> and the burden is not on the commission to show that the rate is fair and reasonable.<sup>39</sup>

By virtue of these provisions, the commission is authorized to state a fair and reasonable rate of compensation for mail service rendered from and after the date of application for such determination.<sup>40</sup> The statute provides that after a specified time from the entry of the rate order the postmaster general or a carrier is authorized to apply for a reexamination of the order,<sup>41</sup> and under this provision, where the commission changes the classification of a carrier as to give it a higher general classification and rate of compensation, the carrier is entitled to compensation at such rate from the date of the order effecting the change.<sup>42</sup> Where application is made for reexamination, the commission has power to determine that the rate of compensation being received is proper and sufficient,

27. U.S.—Louisville & N. R. Co. v. Alabama Public Service Commission, D.C.Ala., 93 F.Supp. 544—Southern Ry. Co. v. Alabama Public Service Commission, D.C.Ala., 91 F.Supp. 980.

Va.—Fleming v. Commonwealth ex rel. Clinchfield R. Co., 61 S.E.2d 1, 191 Va. 288.

28. U.S.—U. S. v. Jones, Ct.Cl., 69 S.Ct. 787, 336 U.S. 641, 93 L.Ed. 938, rehearing denied 69 S.Ct. 1150, 1151, 337 U.S. 920, 93 L.Ed. 1729. 49 C.J. p 1173 note 65.

29. U.S.—New York Cent. R. Co. v. U. S., 65 Ct.Cl. 115, affirmed 49 S.Ct. 260, 279 U.S. 73, 73 L.Ed. 619.

30. U.S.—U. S. v. Jones, Ct.Cl., 69 S.Ct. 787, 337 U.S. 641, 93 L.Ed. 938, rehearing denied 69 S.Ct. 1150, 1151, 337 U.S. 920, 93 L.Ed. 1729.

31. U.S.—U. S. v. Jones, supra—New Jersey & N. Y. R. Co. v. U. S., 80 Ct.Cl. 243.

32. U.S.—U. S. v. Jones, Ct.Cl., 69 S.Ct. 787, 336 U.S. 641, 93 L.Ed. 938, rehearing denied 69 S.Ct. 1150, 1151, 337 U.S. 920, 93 L.Ed. 1729. 49 C.J. p 1173 note 70.

#### Method of computation construed

The order of the Interstate Commerce Commission, under statute, that "in computing the miles of service of a storage car or lesser unit, the maximum space authorized in either direction of a round-trip car run shall be regarded as the space to be computed in both directions unless any part of the car containing such unit be used by the railroad company in the return movement," was held to include, under the term "lesser unit," "closed-pouch space" and not solely "storage-space" units.—Chicago & B. I. R. Co. v. U. S., 72 Ct.Cl. 407.

33. U.S.—U. S. v. Jones, Ct.Cl., 69 S.Ct. 787, 336 U.S. 641, 93 L.Ed. 938, rehearing denied 69 S.Ct. 1150, 1151, 337 U.S. 920, 93 L.Ed. 1729—New Jersey & N. Y. R. Co. v. U. S., 80 Ct.Cl. 243.

34. U.S.—U. S. v. Jones, Ct.Cl., 69 S.Ct. 787, 336 U.S. 641, 93 L.Ed. 938, rehearing denied 69 S.Ct. 1150, 1151, 337 U.S. 920, 93 L.Ed. 1729.

35. U.S.—U. S. v. Jones, supra.

36. U.S.—U. S. v. Jones, supra.

37. U.S.—U. S. v. Jones, supra.

38. U.S.—U. S. v. Jones, supra.

39. U.S.—U. S. v. Jones, supra.

40. U.S.—Nevada County Narrow Gauge R. Co. v. U. S., 65 Ct.Cl. 327, affirmed 49 S.Ct. 260, 279 U.S. 73, 73 L.Ed. 619—New York Cent. R. Co. v. U. S., 65 Ct.Cl. 115, affirmed 49 S.Ct. 260, 279 U.S. 73, 73 L.Ed. 619.

41. U.S.—U. S. v. Jones, Ct.Cl., 69 S.Ct. 787, 336 U.S. 641, 93 L.Ed. 938, rehearing denied 69 S.Ct. 1150, 1151, 337 U.S. 920, 93 L.Ed. 1729.

42. U.S.—Macon, D. & S. R. Co. v. U. S., 79 Ct.Cl. 298—Macon, D. & S. R. Co. v. U. S., 78 Ct.Cl. 251.

#### Acquiescence

The acceptance by a railroad for a short period of time, without protest, of continued payment for transportation of mails at former classification rates less than those of a new classification effected by an order of the Interstate Commerce Commission, did not amount to acquiescence on the part of the carrier or bar its right to recover compensation at the higher classification rate.—Macon, D. & S. R. Co. v. U. S., 79 Ct.Cl. 298—Macon, D. & S. R. Co. v. U. S., 78 Ct.Cl. 251.

or it may find that the carrier is entitled to more and order that it be paid,<sup>43</sup> and, since the application for reexamination initiates the proceeding, the order for increased rates should relate to the time it was filed.<sup>44</sup> In other words, if the claim of the railroads is just they should be paid the increased rates from the moment the application is filed.<sup>45</sup> The rate of pay for storage space of cars on round-trip mail routes, as fixed retroactively by the Interstate Commerce Commission, applies on the return trip where no part thereof was used by the railroad company,<sup>46</sup> and the carrier's right thereto is not defeated by the failure of the post office department to restate the service accordingly.<sup>47</sup>

It has been held that an order of the commission refusing to increase an allowance to a railroad mail carrier is a negative order, and not an affirmative order, within the Urgent Deficiencies Act, 28 U.S.C.A. § 41, giving the district court jurisdiction of cases to enjoin, set aside, annul, or suspend orders of the commission.<sup>48</sup> Furthermore, it has been stated that congress cannot be assumed to have made the extraordinary remedy of the Urgent Deficiencies Act applicable for the determination of the validity of railroad mail orders, even if affirmative.<sup>49</sup> However, the absence from the Railway Mail Pay Act, 39 U.S.C.A. § 523 et seq, of a provision for judicial review and the denial of jurisdiction under the Urgent Deficiencies Act, 28 U.S.C.A. § 41, does not preclude every character of judicial review,<sup>50</sup> as, under certain circumstances, such as the failure of the commission to order payment of the full amount payable under the finding of reasonable compensation, or if the order for

additional compensation is confiscatory, the court of claims may have jurisdiction, as discussed in Federal Courts § 330, and, since the district courts have jurisdiction of any civil action relating to the postal laws, a suit will lie if the commission is alleged to have acted in excess of authority or otherwise illegally.<sup>51</sup>

*Prior to the obligatory statute* considered above, no railroad company, except those aided by land grants, discussed infra subsection (2) of this subdivision, could be compelled to carry the mails,<sup>52</sup> and such a company was at liberty to decline the service if it chose to do so.<sup>53</sup> Under former statutes which fixed maximum rates for the carrying of mails by railroad companies, the compensation for carrying the mails by such companies was entirely within the discretion of the postmaster general, subject to the limitation as to the maximum imposed by congress.<sup>54</sup> A railroad company was not necessarily entitled to the maximum rate allowed by law, but the postmaster general could make contracts at lower rates if he was able to do so,<sup>55</sup> the statutes merely fixing a maximum price, beyond which he could not incur a liability,<sup>56</sup> and of which the carrier was bound to take notice.<sup>57</sup> Furthermore, it has been held that, even in the absence of any contract, express or implied, where a railroad renders service under compulsion as a public necessity, expecting that a satisfactory arrangement will be made, and the department accepts the services, it should in conscience be paid for.<sup>58</sup>

*Inferior service substituted by agreement.* Where the government accepts from a railroad company an inferior substituted service in lieu of an agreed

43. U.S.—Nevada County Narrow Gauge R. Co. v. U. S., 65 Ct.Cl. 327, affirmed 49 S.Ct. 260, 279 U.S. 73, 73 L.Ed. 619—New York Cent. R. Co. v. U. S., 65 Ct.Cl. 115, affirmed 49 S.Ct. 260, 279 U.S. 73, 73 L.Ed. 619.

44. U.S.—Nevada County Narrow Gauge R. Co. v. U. S., 65 Ct.Cl. 327, affirmed 49 S.Ct. 260, 279 U.S. 73, 73 L.Ed. 619.

49 C.J. p 1174 note 77.

45. U.S.—U. S. v. New York Cent. R. Co., Ct.Cl., 49 S.Ct. 260, 279 U.S. 73, 79, 73 L.Ed. 619.

49 C.J. p 1174 note 78.

46. U.S.—Chicago, etc., R. Co. v. U. S., 63 Ct.Cl. 585.

47. U.S.—Chicago, etc., R. Co. v. U. S., supra.

49 C.J. p 1174 note 80.

48. U.S.—U. S. v. Griffin, Ga., 58 S. Ct. 601, 303 U.S. 226, 82 L.Ed. 764. Actions to enjoin or set aside orders of Interstate Commerce Commis-

sion generally see Commerce § 148 d (3).

49. U.S.—U. S. v. Griffin, supra.

50. U.S.—U. S. v. Griffin, supra.

51. U.S.—U. S. v. Griffin, supra.

**Action held not arbitrary**

Determination of Interstate Commerce Commission that general rates applicable to a particular class of carriers for carrying mail were fair and reasonable as applied to particular railroad was not arbitrary or unreasonable under the particular circumstances disclosing that commission in the initial stage made its statistical and mathematical computations under a particular plan and in the final stage qualified such computations by the consideration of other pertinent factors.—U. S. v. Jones, Ct.Cl., 69 S.Ct. 787, 336 U.S. 641, 93 L.Ed. 938, rehearing denied 69 S.Ct. 1150, 1151, 337 U.S. 920, 93 L.Ed. 1729.

52. U.S.—U. S. v. New York, etc., R.

Co., Ct.Cl., 49 S.Ct. 260, 279 U.S. 73, 73 L.Ed. 619.

49 C.J. p 1174 note 83.

53. U.S.—Alabama Great Southern R. Co. v. U. S., 25 Ct.Cl. 30, affirmed 12 S.Ct. 306, 142 U.S. 615, 35 L.Ed. 1134.

49 C.J. p 1174 note 83.

54. U.S.—Atchison, etc., R. Co. v. U. S., Kan., 32 S.Ct. 702, 225 U.S. 640, 56 L.Ed. 1238.

49 C.J. p 1174 note 85.

55. U.S.—Chicago, etc., R. Co. v. U. S., 49 Ct.Cl. 463, affirmed 37 S.Ct. 241, 242 U.S. 621, 61 L.Ed. 533.

49 C.J. p 1174 note 86.

56. U.S.—Alabama Great Southern R. Co. v. U. S., 25 Ct.Cl. 30, affirmed 12 S.Ct. 306, 142 U.S. 615, 35 L.Ed. 1134—18 Opinion Attorney General 248.

57. U.S.—Alabama Great Southern R. Co. v. U. S., supra.

58. U.S.—Chicago, etc., R. Co. v. U. S., 48 Ct.Cl. 149.

service rendered impossible of performance by a washout of a railroad company's tracks and pays fifty per cent of the contract price which the railroad company accepts without objection or reservation, no action will lie for further compensation.<sup>59</sup>

## (2) Land Grant Railroads

Under the land grant acts, railroads aided by land grants are obliged to carry the mails, and statutory provisions allowing land grant railroads a certain per cent of the full compensation to be paid railroads generally for carrying the mails are not subject to judicial review.

Under the land grant acts, railroads aided by land grants are obliged to carry the mails,<sup>60</sup> and, since it is provided by statute that United States mails shall be transported on railroads receiving land grants in aid of their construction at such price as congress may by law direct, statutory provisions allowing land grant railroads a certain per cent of the full compensation to be paid railroads generally for carrying the mails are not subject to judicial review.<sup>61</sup> In order to constitute a land grant within the statutes, the lands granted must aid or help the construction;<sup>62</sup> and a road so constructed is a land aided or land grant road, and not otherwise.<sup>63</sup> However, the burden imposed by the statutes attaches on the acceptance of the aid,<sup>64</sup> no matter how disproportionate to the cost of constructing the road aided.<sup>65</sup> The provisions of the statutes limiting the amount of compensation attach to all tracks of a land grant company,<sup>66</sup> in-

cluding those subsequently built,<sup>67</sup> although a railroad built partly by a land grant is entitled, for transportation of the mails, to full rates for such portion of the road as was not aided by the land grant.<sup>68</sup> The provisions of the statutes are not confined to the mere transportation of the mails, but include all services in connection therewith,<sup>69</sup> and they attach to the carrier like an easement or charge,<sup>70</sup> and affect every carrier which may thereafter use the road whatever the nature of its tenure,<sup>71</sup> although it received none of the land and obtained no benefit from the grant.<sup>72</sup>

*Matter not within purview of statute.* The statutes governing the compensation to be paid to land grant railroads do not include, as part of the mail, empty mail bags, which, by another statute, are classified with other property of the United States for transportation by freight or express.<sup>73</sup>

*Estoppel of government to enforce statutes.* Inaction of the post office department for a long period to require a land aided railroad to transport mail at eighty per cent of the compensation of other railroads which are not land aided does not estop it to force such road to transport mails at the eighty per cent rate.<sup>74</sup>

## d. Ocean Carriers

Under the statute providing for the compensation for the carriage of mail by ocean carriers, in the case of a vessel of the United States the postmaster general

59. U.S.—Chicago, etc., R. Co. v. U. S., 46 Ct.Cl. 396.

49 C.J. p 1179 note 75.

60. U.S.—New York, etc., R. Co. v. U. S., Ct.Cl., 40 S.Ct. 67, 251 U.S. 123, 64 L.Ed. 182.

49 C.J. p 1174 note 82.

61. U.S.—Missouri Pac. R. Co. v. U. S., Ct.Cl., 46 S.Ct. 598, 271 U.S. 603, 70 L.Ed. 1109.

49 C.J. p 1174 note 90.

62. U.S.—Grand Trunk Western R. Co. v. U. S., Ct.Cl., 40 S.Ct. 309, 252 U.S. 112, 64 L.Ed. 484—Chicago, etc., R. Co. v. U. S., 14 Ct.Cl. 125, reversed on other grounds 104 U.S. 687, 26 L.Ed. 893.

### Effect of release

(1) Under Transportation Act, railroad acquired status of a nonland grant road for purpose of determining rates for transportation of United States mail immediately on filing required release with secretary of interior, and its right was not conditioned on subsequent approval of the release by secretary.—Seaboard Air Line R. Co. v. U. S., 83 F.Supp. 1012, 113 Ct.Cl. 437, certiorari denied 70 S.Ct. 88, 338 U.S. 848, 94 L.Ed. —.

(2) Where purported releases filed

by railroad with secretary of interior for purpose of securing status of a nonland grant road for purpose of determining rates for transportation of United States mail did not conform with requirements prescribed by secretary when they were filed, but a few weeks thereafter the releases were approved by secretary despite their variance, railroad's transition from a land grant to a nonland grant road did not take place until date of secretary's approval.—Southern Pac. Co. v. U. S., 69 F.Supp. 211, 107 Ct.Cl. 513, certiorari denied 68 S.Ct. 55, 332 U.S. 757, 92 L.Ed. 342.

63. U.S.—Grand Trunk Western R. Co. v. U. S., Ct.Cl., 40 S.Ct. 309, 252 U.S. 112, 64 L.Ed. 484—Chicago, etc., R. Co. v. U. S., 14 Ct.Cl. 125, reversed on other grounds 104 U.S. 687, 26 L.Ed. 893.

64. U.S.—Grand Trunk Western R. Co. v. U. S., Ct.Cl., 40 S.Ct. 309, 252 U.S. 112, 64 L.Ed. 484.

65. U.S.—Grand Trunk Western R. Co. v. U. S., supra.

66. U.S.—Chicago, etc., R. Co. v. U. S., Ct.Cl., 30 S.Ct. 470, 217 U.S. 180, 54 L.Ed. 721.

67. U.S.—Chicago, etc., R. Co. v. U. S., Ct.Cl., 30 S.Ct. 470, 217 U.S. 180, 54 L.Ed. 721.

68. U.S.—U. S. v. Alabama, etc., R. Co., Ct.Cl., 12 S.Ct. 306, 142 U.S. 615, 35 L.Ed. 1134.

49 C.J. p 1174 note 97.

69. U.S.—Missouri Pac. R. Co. v. U. S., 60 Ct.Cl. 183—Missouri Pac. R. Co. v. U. S., 59 Ct.Cl. 524.

49 C.J. p 1174 note 98.

70. U.S.—Grand Trunk Western R. Co. v. U. S., Ct.Cl., 40 S.Ct. 309, 252 U.S. 112, 64 L.Ed. 484.

49 C.J. p 1175 note 99.

71. U.S.—Grand Trunk Western R. Co. v. U. S., supra.

49 C.J. p 1175 notes 99, 1.

72. U.S.—Grand Trunk Western R. Co. v. U. S., supra—Chicago, etc., R. Co. v. U. S., Ct.Cl., 30 S.Ct. 470, 217 U.S. 180, 54 L.Ed. 721.

73. U.S.—St. Louis, etc., R. Co. v. U. S., Ct.Cl., 40 S.Ct. 120, 251 U.S. 198, 64 L.Ed. 225.

49 C.J. p 1175 note 3.

74. U.S.—Grand Trunk Western R. Co. v. U. S., 53 Ct.Cl. 473, affirmed 40 S.Ct. 309, 252 U.S. 112, 64 L.Ed. 484.

may allow compensation not in excess of a designated maximum.

Under the statute, 39 U.S.C.A. § 654, and similar statutes, in the case of a vessel of the United States, the postmaster general may allow for carriage of mail by ocean carriers compensation not in excess of a designated maximum,<sup>75</sup> and where he fixes the compensation at the maximum rate he may not pay less.<sup>76</sup> The annulment by act of congress of a contract for the carriage of ocean mails is not intended to operate on a voyage previously started by one of the vessels of the contractor,<sup>77</sup> and, such vessel having made the round trip, the contractor is entitled to compensation therefor.<sup>78</sup>

Since the postmaster general, by statute, may require the transportation by any steamships of mail between the United States and any foreign port at the compensation fixed under authority of law, except as otherwise provided by treaty or convention, all ships, regardless of flag, are required to transport such mail tendered by the postmaster general, or his representative, under penalty of a fine and a refusal of clearance.<sup>79</sup> Thus, where mail is transported to a foreign port without any express contract but in accordance with the above statutory provisions, and it is not shown that the carrier agreed to look to some one else for its compensation, the primary liability to pay for these services is on the United States,<sup>80</sup> since the carrier, except where the United States has disavowed liability for the charges for the carrying of convention mails prior to demanding the services under this section,<sup>81</sup> has the right to assume that the one who demanded the service intended to pay for it,<sup>82</sup>

and a contract to pay compensation is implied.<sup>83</sup> Furthermore, where the carrier looks primarily to the United States for payment, although there has been a disavowal of liability by the United States subsequent to the demand for services under this section which is protested by the carrier, the United States is liable for the payment of the compensation provided for in the postal laws and regulations,<sup>84</sup> especially where convention and nonconvention mails are commingled.<sup>85</sup>

#### e. Effect of Suspension or Discontinuance of Service

The authority of the postmaster general, under the postal regulations, to discontinue or curtail the service on any route in whole or in part on allowing as full indemnity to the contractor one month's pay on the amount of the services dispensed with, and a pro rata compensation for the amount of services retained and continued, is, in substance, incorporated in the instructions given by the department to bidders for contracts, and constitutes a part of the contract when made.

The authority of the postmaster general, under the postal regulations, to discontinue or curtail the service on any route in whole or in part whenever, in his judgment, the public interest shall require it, or for any other cause, on allowing as full indemnity to the contractor one month's pay on the amount of services dispensed with, and a pro rata compensation for the amount of services retained and continued, is, in substance, incorporated in the instructions given by the department to bidders for contracts, and constitutes a part of the contract when made.<sup>86</sup> The contractor takes the risk if the exercise of this authority might leave only the indemnity stipulated, that is, one month's extra pay.<sup>87</sup>

75. U.S.—Pacific Mail SS. Co. v. U. S., 28 Ct.Cl. 1.

#### Comptroller general

There was no justification for the comptroller general's application of a rate and classification lower than that certified to him by the post office department and provided by the contract for carrying mails.—United Fruit Co. v. U. S., 93 Ct.Cl. 97.

#### Foreign ports

In determining compensation for carrying mails between ports of United States and ports of Canal Zone, latter are considered foreign ports.—Luckenbach S. S. Co. v. U. S., Ct.Cl. 50 S.Ct. 148, 280 U.S. 173, 74 L.Ed. 356.

"Sea postage," within meaning of prior statute, is difference between total postage and United States inland postage, plus inland postage of foreign receiving country when charged, and all intermediate transit charges when made.—Pacific Mail SS. Co. v. U. S., 28 Ct.Cl. 1.

#### Compensation of particular carriers determined

U.S.—United Fruit Co. v. U. S., 93 Ct.Cl. 97—Dollar Steamship Lines v. U. S., 84 Ct.Cl. 346—American-West African Line, Inc., v. U. S., 76 Ct.Cl. 235, certiorari denied 54 S.Ct. 48, 290 U.S. 628, 78 L.Ed. 547.

76. U.S.—Pacific Mail SS. Co. v. U. S., 28 Ct.Cl. 1.

77. U.S.—Pacific Mail SS. Co. v. U. S., Ct.Cl. 103 U.S. 721, 26 L.Ed. 419.

78. U.S.—Pacific Mail SS. Co. v. U. S., Ct.Cl. 103 U.S. 721, 26 L.Ed. 419.

79. U.S.—United Fruit Co. v. U. S., 81 F.Supp. 502, 112 Ct.Cl. 519.

80. U.S.—United Fruit Co. v. U. S., 103 Ct.Cl. 303.

81. U.S.—Standard Fruit & Steamship Co. v. U. S., 103 Ct.Cl. 659.

#### Effect of convention

Where defendant disavowed liability, claiming that obligation was

assumed by country under whose flag the ship was registered in accordance with postal convention provisions, no recovery of compensation was allowed for the carriage of convention mails after such refusal.—Standard Fruit & Steamship Co. v. U. S., supra.

82. U.S.—United Fruit Co. v. U. S., 81 F.Supp. 502, 112 Ct.Cl. 519—United Fruit Co. v. U. S., 103 Ct.Cl. 303.

83. U.S.—United Fruit Co. v. U. S., 103 Ct.Cl. 303.

84. U.S.—United Fruit Co. v. U. S., 81 F.Supp. 502, 112 Ct.Cl. 519.

85. U.S.—United Fruit Co. v. U. S., 81 F.Supp. 502, 112 Ct.Cl. 519.

86. 19 Opinion Attorney General 146.

49 C.J. p 1175 note 17.

87. U.S.—Slavens v. U. S., Ct.Cl. 25 S.Ct. 229, 196 U.S. 229, 49 L.Ed. 457.

The extra pay given by the contract for services dispensed with is not a penalty for breach of contract, but a compensation for changes in the service,<sup>88</sup> and is in the nature of liquidated damages.<sup>89</sup> Thus, it was held that the contractor was entitled to the extra pay provided for in the regulations and contract, when the postmaster general availed himself of his right thereunder to discontinue the service by reason of the Civil War,<sup>90</sup> although the contractor's routes lay within the enemies' lines,<sup>91</sup> or where the postmaster general, on refusal of the contractor to perform the services contracted for at a reduced rate, transferred the service to another person.<sup>92</sup> The claim for extra compensation does not accrue until payment thereof is due, namely, one month after the end of the current quarter.<sup>93</sup>

*Right as affected by default of contractor.* If the contractor is himself in default for neglect or failure to perform and the contract is annulled on that ground by the department,<sup>94</sup> or the service is discontinued at the request of the defaulting contractor himself, he cannot recover the one month's extra pay;<sup>95</sup> but, if the discontinuance is only in part, the contractor's right to extra pay is not forfeited by subsequent misconduct on the other part, although the one may be set off against the other.<sup>96</sup>

*Right of subcontractor to extra pay.* The privity of contract between a subcontractor and the United States created by the subletting of the original contract with the permission of the postmaster general, as discussed supra § 29, extends not only to compensation for services performed but to extra pay for services dispensed with,<sup>97</sup> and the subcontractor may sue to recover such extra pay,<sup>98</sup> and the fact that the contract sublet was obtained by fraudulent and corrupt practices will not affect the right of the subcontractor to extra pay on discontinuing the contract where he performed the service apparently in good faith and without notice of

the corrupt and fraudulent practices which had secured it.<sup>99</sup>

#### f. Extra Compensation

- (1) Additional service
- (2) Expedited service
- (3) Additional and expedited service

##### (1) Additional Service

- (a) In general
- (b) Contracts requiring additional service without compensation

##### (a) In General

A contractor, in the absence of an express contract so providing, is not entitled to extra compensation, although by statute the postmaster general is empowered to allow a contractor compensation for additional service.

Where service performed by a mail contractor in addition to that required by an express contract between him and the government is voluntary, the government is not liable for such additional service,<sup>1</sup> since a contractor, in the absence of an express contract so providing, is not entitled to extra compensation,<sup>2</sup> although by statute the postmaster general is empowered to allow a contractor compensation for additional service,<sup>3</sup> but before it can be paid it must appear that the sum to be paid is expressed in the order and added on the books of the department,<sup>4</sup> and that service additional to that required by the contract has been performed.<sup>5</sup> A proposal for increased service with the order made thereon does not constitute a new contract, but simply an alteration of the existing contract in the manner provided by statute.<sup>6</sup>

*Delivery within eighty rods of railroad station.* Under regulations so providing, the delivery of the mails by a railway carrier within eighty rods of a railway station is included as part of the railroad route, and the railway company is not entitled to additional pay for such services<sup>7</sup> in the absence

88. U.S.—Salisbury v. U. S., 28 Ct. Cl. 52.

89. U.S.—Mordecai v. U. S., 19 Ct. Cl. 11.

90. U.S.—Campbell v. U. S., 19 Ct. Cl. 320.

49 C.J. p 1176 note 21.

91. U.S.—Campbell v. U. S., supra.

92. U.S.—Wreford v. U. S., 32 Ct. Cl. 415.

49 C.J. p 1176 note 23.

93. U.S.—Salisbury v. U. S., 28 Ct. Cl. 404.

94. U.S.—Huse v. U. S., 44 Ct. Cl. 19, affirmed 32 S.Ct. 119, 222 U.S. 496, 56 L.Ed. 285.

95. U.S.—Walsh v. U. S., 21 Ct. Cl. 268.

96. U.S.—Walsh v. U. S., supra.

97. U.S.—Garman v. U. S., 34 Ct. Cl. 237—Salisbury v. U. S., 28 Ct. Cl. 52.

98. U.S.—Salisbury v. U. S., supra.

99. U.S.—Garman v. U. S., 34 Ct. Cl. 237.

1. U.S.—St. Louis Southwestern R. Co. v. U. S., Ct. Cl., 43 S.Ct. 490, 262 U.S. 70, 67 L.Ed. 868.

49 C.J. p 1175 note 12.

2. U.S.—Gregory v. U. S., 100 Ct. Cl. 319.

#### Increased mail

Contractor who, for a stated sum, agreed for a definite period to carry the mail "whatever may be its size,

weight or increase" during the term of the contract, is not entitled to recover extra compensation because of increased mail.—Gregory v. U. S., supra.

3. 3 Opinion Attorney General 1. 49 C.J. p 1176 note 34.

4. U.S.—Cosgrove v. U. S., 31 Ct. Cl. 332.

5. U.S.—Cosgrove v. U. S., supra.

6. U.S.—Griffith v. U. S., 22 Ct. Cl. 165, appeal dismissed 11 S.Ct. 1005, 141 U.S. 212, 35 L.Ed. 719.

7. U.S.—Jacksonville, etc., R. Co. v. U. S., 21 Ct. Cl. 155, affirmed 7 S.Ct. 48, 118 U.S. 626, 30 L.Ed. 273. 49 C.J. p 1176 note 38.

of an express contract so providing.<sup>8</sup> The pay for such services must be held to be included in the general compensation fixed for the routes.<sup>9</sup>

*Delivery to elevated railway station.* The carriage of the mails up and down the steps at elevated railroad stations is called for by a contract for performing the covered regulation wagon, mail messenger, transfer, and mail station service on a mail route, in which the contractor agreed to take the mails from and deliver them to the post offices, mail stations, and cars, since delivery of the mail at the foot of the steps would not be sufficient.<sup>10</sup>

*Additional services performed on request of unauthorized agent.* A contractor for carrying the mails is not entitled to extra compensation for services outside the terms of his contract, which were performed in compliance with the unauthorized demand of the local postmaster, where, on protest to the postmaster general, the contractor was promptly relieved from such services and another contract was made for their performance.<sup>11</sup>

*Increased weight resulting from enactment of parcel post law.* Under a statute authorizing the postmaster general to add to the compensation for transportation of mails on railroad routes for the remainder of the contract term not exceeding a certain per cent thereof, because of the increased weight resulting from the enactment of the parcel post provision, the power of the postmaster general to grant or withhold additional compensation within the limit set is conclusive except on congress, so that a railroad company cannot by reason of an increase in the weight of the mails due to the postal provision maintain a claim for additional compensation in excess of that allowed by its contract.<sup>12</sup>

*Quarters for distribution of registered mail.* Regulations requiring railroad companies to provide at stations where transfer clerks are employed suitable and sufficient rooms for handling and storing the mails were intended to embrace transfer service at those points where mails are transferred from one railway company to another, but not to include the furnishing of quarters free of expense for the distribution of registered mail where it is

handled in all respects as in a local post office.<sup>13</sup>

*Who may sue for extra compensation.* Where a contract for mail carriage was sublet, without filing a copy of the subcontract or obtaining the written consent of the postmaster general, and the government, although accepting the service performed by the subcontractor, neither had nor recognized any contractual relation except with his principal, treating the former as the agent of the latter, an action for extra service exacted by the government over his protest, but performed by the subcontractor, was properly brought by and in the name of the contractor.<sup>14</sup>

*On reversal of direction of route.* Under postal regulations which authorize the postmaster general to change schedules of departures and arrivals in all cases without increase in pay provided that the running time be not abridged, if the direction of a mail route is reversed but the change requires no greater speed or increase of distance, the carrier is not entitled to any increase in pay, even though the change may involve him in serious loss.<sup>15</sup>

#### (b) Contracts Requiring Additional Service without Compensation

Within well-defined limitations, the postmaster general may incorporate in contracts for the carriage of the mails and enforce stipulations requiring the performance of new or additional service without extra compensation.

Within well-defined limitations, the postmaster general may incorporate in contracts for the carriage of the mails and enforce stipulations requiring the performance of new or additional service without extra compensation.<sup>16</sup> The purpose of the provisions is to require performance without additional compensation for new or additional service which might arise from improved methods in the transaction of business of the post office department and in the increased demand or service resulting from the growth and development of towns and cities,<sup>17</sup> and gives to the postmaster general very considerable discretion calling for additional service which might result from these causes without compensation.<sup>18</sup> The phrase "new and additional service" is generally held to mean such service as only increases the volume of the

8. U.S.—Minneapolis, etc., R. Co. v. U. S., 24 Ct.Cl. 350.

9. U.S.—Jacksonville, etc., R. Co. v. U. S., 21 Ct.Cl. 155, affirmed 7 S. Ct. 48, 118 U.S. 626, 30 L.Ed. 273.

10. U.S.—U. S. v. Utah, etc., Stage Co., 26 S.Ct. 69, 199 U.S. 414, 50 L. Ed. 251.

11. U.S.—Travis v. U. S., Ct.Cl., 25 S.Ct. 233, 196 U.S. 239, 49 L.Ed.

461—Slavens v. U. S., Ct.Cl., 25 S. Ct. 229, 196 U.S. 229, 49 L.Ed. 457.

12. U.S.—St. Louis Southwestern R. Co. v. U. S., Ct.Cl., 43 S.Ct. 490, 262 U.S. 70, 67 L.Ed. 868.

13. U.S.—Bush v. U. S., 55 Ct.Cl. 38, 49 C.J. p 1177 note 46.

14. U.S.—Hunt v. U. S., Ct.Cl., 42 S. Ct. 5, 257 U.S. 125, 66 L.Ed. 163.

15. U.S.—In re Smith, 26 Ct.Cl. 178.

16. U.S.—Slavens v. U. S., Ct.Cl., 25 S.Ct. 229, 196 U.S. 229, 49 L.Ed. 457, 49 C.J. p 1177 note 48.

17. U.S.—U. S. v. Utah, etc., Stage Co., Ct.Cl., 26 S.Ct. 69, 199 U.S. 414, 50 L.Ed. 251.

18. U.S.—U. S. v. Utah, etc., Stage Co., supra.

kind of service specified in the contract,<sup>19</sup> and as a general rule no claim can be made for extra compensation for such services.<sup>20</sup> However, the phrase is not one of exact meaning, defining the precise extent of the obligation incurred, and permits the court to give it a reasonable construction with a view to doing justice between the parties,<sup>21</sup> and if the services, although of the same character, greatly increase the burden of the contractor and are not such as are contemplated by either of the parties when the contract was made, the contractor will be entitled to extra compensation;<sup>22</sup> and it is also well settled that the postmaster cannot under contracts of the character under consideration order services of a different character not within the contractual arrangement.<sup>23</sup> New and additional service is not service differing in kind.<sup>24</sup>

## (2) Expedited Service

Under the statute providing compensation for expedited service in the carrying of mail, "expedited service" means a speedier performance of each trip than was originally stipulated.

Under the statute, 39 U.S.C.A. § 441, providing compensation for expedited service in the carrying of mail, "expedited service" means a speedier performance of each trip than was originally stipulated for.<sup>25</sup> "Men and horses" are included in the term "stock and carriers" as used in the statute,<sup>26</sup> and increased compensation for expedited service is to be calculated on the basis of the necessary men and stock required to perform the service under the original contract.<sup>27</sup> The "fifty per centum upon the contract as originally let," within the meaning of the statute, is fifty per cent on the compensation for all the service rendered both as originally stipulated and as increased by additional service,<sup>28</sup> which is to be determined by the rates fixed in the original contract.<sup>29</sup> The statutory limitation on the amount of compensation to be allowed for expedited mail service is equally

obligatory on both parties, limiting the authority of the postmaster general, and notifying the contractor of such limitation;<sup>30</sup> and, if the compensation allowed is in excess of the statute, the action of the postmaster general is ultra vires, and to that extent void,<sup>31</sup> and, if shown by the evidence to be materially in excess, the contract will be deemed to have been made in mutual mistake of fact.<sup>32</sup> The postmaster general must decide all the facts existing and prospective which relate to expedited mail service, and from his decision, which is the result of his judgment and discretion, no appeal lies.<sup>33</sup> A proposal for expedited service with the order made therein does not constitute a new contract, but simply an alteration of the existing contract in the manner authorized by the statute.<sup>34</sup>

**Actions.** An order expediting service ordinarily is received as evidence of its value, but if made in mistake of fact or through fraudulent representations, and rescinded by the postmaster general, the contractor must prove his case,<sup>35</sup> although where the government seeks to set aside an order of expedition on the ground that the compensation exceeds the limitation of the statute the burden of proof is on it.<sup>36</sup>

## (3) Additional and Expedited Service

A contractor may be entitled to compensation for both additional and expedited service.

Where the postmaster general increases expedition and requires additional service by one order at the same time, and the contractor performs accordingly, he is entitled to compensation for both.<sup>37</sup>

## g. Deductions and Fines

The postmaster is authorized to make deductions from the pay of contractors for failures to perform service according to contract, and impose fines on them for other delinquencies; and when mail contracts are made they become subject to the provision of the statute, and the authority to make deductions and to impose fines becomes a part of the contract.

19. U.S.—Union Transfer Co. v. U. S., 36 Ct.Cl. 216—Otis v. U. S., 20 Ct.Cl. 315, affirmed 7 S.Ct. 449, 130 U.S. 115, 30 L.Ed. 609.

20. U.S.—Slavens v. U. S., Ct.Cl., 25 S.Ct. 229, 196 U.S. 229, 49 L.Ed. 457.

49 C.J. p 1177 note 52.

21. U.S.—U. S. v. Utah, etc., Stage Co., Ct.Cl., 26 S.Ct. 69, 199 U.S. 414, 50 L.Ed. 251.

22. U.S.—U. S. v. Utah, etc., Stage Co., supra.

49 C.J. p 1177 note 54.

23. U.S.—Freund v. U. S., Ct.Cl.,

43 S.Ct. 70, 260 U.S. 60, 67 L.Ed. 131.

49 C.J. p 1178 note 55.

24. U.S.—Woolverton v. U. S., 27 Ct. Cl. 292.

25. 17 Opinion Attorney General 166.

26. U.S.—U. S. v. Platt, Cal., 15 S.Ct. 498, 157 U.S. 113, 39 L.Ed. 639—U. S. v. Voorhees, Neb., 10 S.Ct. 841, 135 U.S. 550, 34 L.Ed. 258.

27. U.S.—U. S. v. Voorhees, supra.

28. U.S.—Allman v. U. S., Ct.Cl., 9 S.Ct. 632, 131 U.S. 31, 33 L.Ed. 51, overruling 17 Opinion Attorney General 166.

49 C.J. p 1178 note 61.

29. U.S.—Allman v. U. S., supra.

30. U.S.—Parker v. U. S., 26 Ct.Cl. 344.

31. U.S.—Parker v. U. S., supra.

32. U.S.—Parker v. U. S., supra.

33. U.S.—Griffith v. U. S., 22 Ct.Cl. 165, appeal dismissed 11 S.Ct. 1005, 141 U.S. 212, 35 L.Ed. 719.

34. U.S.—Griffith v. U. S., supra.

35. U.S.—Parker v. U. S., 26 Ct.Cl. 344.

49 C.J. p 1178 note 68.

36. U.S.—Parker v. U. S., supra.

37. U.S.—Salisbury v. U. S., 28 Ct. Cl. 404.

The postmaster general is authorized to make deductions from the pay of contractors for failures to perform service according to contract, and impose fines on them for other delinquencies,<sup>38</sup> and when mail contracts are made they become subject to the provision of the statute, and the authority to make deductions and to impose fines becomes a part of the contract.<sup>39</sup> Fines imposed by virtue of the statute are in the nature of liquidated damages for the public inconvenience caused by a contractor's negligence,<sup>40</sup> and take contracts for carrying the mails out of the ordinary rules of law regulating penalties and liquidated damages.<sup>41</sup>

*Contractors subject to statute.* Except as to contractors for transporting the mail between the United States and a foreign country who are governed by a statute somewhat different in its provisions, the statute applies to all contractors whether they be natural persons or corporations.<sup>42</sup>

*Grounds for deductions or fines.* Under the statute under consideration, a railroad which enters into a contract to carry the mails on the conditions prescribed by law, among which are that contracts shall be made for the conveyance of the mails with due frequency and speed, and that the postmaster general shall require all railroads carrying mails to comply with the terms of their contracts as to time of arrival and departure of said mails, is liable to fines or deductions from its compensation for failure to maintain its mail train schedules;<sup>43</sup> and an omission by the post office department for a number of years to exercise its power to impose fines or make deductions on this ground, where the delays were of less than twenty-four hours, does not prevent it from exercising its power in case of shorter delays.<sup>44</sup> So the violation of a statute prohibiting the contractor from delivering mail matter to a person not authorized to receive it

authorizes the imposition of a fine,<sup>45</sup> and, where a railway company refuses or neglects to execute its contract by furnishing the necessary space in a depot for the proper handling of the mails, the department may rent it and withhold the cost thereof from the contract earnings of the road.<sup>46</sup> On the other hand, under a statute providing that no pay shall be allowed for the use of "wooden full railway post-office cars run in any train between adjoining steel cars," the postmaster general is not authorized to refuse compensation to the contractor because it had run wooden cars in its trains between the engine and steel underframe cars and adjoining steel underframe cars.<sup>47</sup> Where certain mail containers carried on plaintiff's road were destined for a connecting line, the station of which was more than eighty rods distant, plaintiff's duty in connection therewith ceased when they left the cars of plaintiff, and it became the duty of defendants under their own postal regulations to transfer them to their destination and to provide for their carriage, and a deduction from the compensation of the railroad of the cost of such transfer is unauthorized.<sup>48</sup>

*Discretion of postmaster general.* The postmaster general is the judge whether deductions shall be made or fines imposed,<sup>49</sup> and it has very generally been held that the power conferred on the postmaster general to make deductions for failure to perform services according to contract or to impose fines for other delinquencies is discretionary,<sup>50</sup> and his decision is not reviewable by the courts<sup>51</sup> in the absence of fraud<sup>52</sup> or a manifest abuse<sup>53</sup> or excess<sup>54</sup> of the power conferred on him by the statute. He may make deductions or impose fines according as it may seem to him just and proper to do so under the particular circumstances of the case,<sup>55</sup> and prior to statutory amendment spe-

38. U.S.—Chicago, etc., R. Co. v. U. S., Ct.Cl., 8 S.Ct. 1194, 127 U.S. 406, 32 L.Ed. 180.

49 C.J. p 1179 note 76.

**Provision essential**

"The service to be performed is of such a character that a provision of that kind is essential to the successful performance of the most important function incident to the executive branch of the Government."—Otis v. U. S., 24 Ct.Cl. 61, 72.

39. U.S.—Otis v. U. S., supra.

40. U.S.—Parker v. U. S., 26 Ct.Cl. 344.

41. U.S.—Parker v. U. S., supra.

42. U.S.—Chicago, etc., R. Co. v. U. S., Ct.Cl., 8 S.Ct. 1194, 127 U.S. 406, 32 L.Ed. 180.

49 C.J. p 1179 note 82.

43. U.S.—Kansas City Southern R. Co. v. U. S., Ct.Cl., 40 S.Ct. 257, 252 U.S. 147, 64 L.Ed. 500—Louisville, etc., R. Co. v. U. S., 53 Ct.Cl. 238.

44. U.S.—Kansas City Southern R. Co. v. U. S., Ct.Cl., 40 S.Ct. 257, 252 U.S. 147, 64 L.Ed. 500—Louisville, etc., R. Co. v. U. S., 53 Ct.Cl. 238.

45. 15 Opinion Attorney General 70.

46. U.S.—Missouri Pac. R. Co. v. U. S., 47 Ct.Cl. 377.

47. U.S.—Missouri Pac. R. Co. v. U. S., 53 Ct.Cl. 12.

48. U.S.—Chicago, etc., R. Co. v. U. S., 52 Ct.Cl. 490.

49. U.S.—Parker v. U. S., 26 Ct.Cl. 344—Otis v. U. S., 24 Ct.Cl. 61.

49 C.J. p 1179 note 92.

50. U.S.—Minneapolis, etc., R. Co. v. U. S., 24 Ct.Cl. 350.

49 C.J. p 1179 note 93.

51. U.S.—Allman v. U. S., Ct.Cl., 9 S.Ct. 632, 131 U.S. 31, 33 L.Ed. 51—Parker v. U. S., 26 Ct.Cl. 344.

52. U.S.—Minneapolis, etc., R. Co. v. U. S., 24 Ct.Cl. 350.

53. U.S.—Great Northern R. Co. v. U. S., Minn., 236 F. 433, 149 C.C.A. 485.

54. U.S.—Great Northern R. Co. v. U. S., supra—Minneapolis, etc., R. Co. v. U. S., 24 Ct.Cl. 350.

49 C.J. p 1180 note 97.

55. 18 Opinion Attorney General 313—14 Opinion Attorney General 179.



cifically authorizing a change or remission of fines and deductions in his discretion it had been held that where a deduction had been ordered by the postmaster general, and he subsequently became satisfied that the order was made under a misapprehension of the facts, he could rescind it.<sup>56</sup>

*Amount of fine imposed.* The statute places no limitation on the amount of the fine which may be imposed against the contractor;<sup>57</sup> and, under postal laws and regulations providing that the fine shall in each case be such as the postmaster general may impose in view of the gravity of the delinquency, the penalty imposed may be commensurate to the loss sustained by the government by reason of such delinquency.<sup>58</sup> The exercise by the postmaster general of his discretion as to the amount of fine imposed cannot be reviewed by the courts unless he manifestly abuses or exceeds the power thus conferred on him.<sup>59</sup>

*From what moneys collected.* The power to impose a fine can be exercised as long as there is money remaining due on the particular contract violated,<sup>60</sup> since the authority to impose a fine, as a general rule, is limited to the subject matter of the particular contract violated and to the payments which would otherwise be due to the contractor,<sup>61</sup> and the postmaster general cannot deduct a fine from moneys due on other contracts.<sup>62</sup> It has been held, however, that a contract for carriage of the mails may be so drafted as to authorize the postmaster general to deduct from compensation due under it the amount of a fine imposed for delinquency under a previous contract fully completed.<sup>63</sup>

*Evidence of imposition or payment of fine.* A document authenticated by the postmaster general, under the seal of the department, reciting the imposition of a fine on a mail route contractor is admissible as evidence of such fact,<sup>64</sup> and is sufficient prima facie to support a charge against the contractor, in his account with the department, of the amount of the fine;<sup>65</sup> but it is not sufficient

evidence that the fine has been paid, so as to authorize a judgment for its amount against a subcontractor, through whose fault it was incurred.<sup>66</sup>

*Exclusiveness of remedy.* Although under the present statute it is provided that contractors shall also be answerable in damages for the proper care and transportation, and be accountable for any loss or damage resulting by reason of the failure to exercise due care, under the prior statute, not so providing, it was held that where the postal authorities established regulations for imposition of fines and making deductions for failure to perform services according to contracts, and for other delinquencies, and contracts for carrying the mails were made in contemplation of these regulations, the only remedy of the United States in case of default of contractors resulting in loss of mails was through the imposition of fines and the making of deductions,<sup>67</sup> although it was also held that such remedy was not exclusive.<sup>68</sup> Furthermore, under the prior statute, it was held that the United States could not sue the contractor for breach of contract;<sup>69</sup> and especially was this so where the post office department, with full knowledge of the facts, deducted from the compensation of a mail carrier a penalty for loss and damage to mail.<sup>70</sup>

*Under contracts for carriage of mails to foreign countries.* Under the former statute authorizing imposition of fines on contractors for carriage of mail to foreign countries, it was held that the power of the postmaster general to impose a fine on a contractor for the transmission of mails to and from foreign countries for any unreasonable or unnecessary delay in the departure of the mails, or in the performance of the trips, was limited to the cases and for the causes specified in the act.<sup>71</sup> Furthermore, it was held that a recommendation made by the postmaster general to the secretary of the navy to make a deduction from the pay of a contractor, on the ground that a portion of the service was performed by a steamer not of the class stipulated for in the contract, was not the imposition of a fine, within the terms of that act.<sup>72</sup>

56. 18 Opinion Attorney General 313.

57. U.S.—Great Northern R. Co. v. U. S., Minn., 236 F. 433, 149 C.C.A. 485.

58. U.S.—Great Northern R. Co. v. U. S., supra.  
49 C.J. p 1180 note 3.

59. U.S.—Great Northern R. Co. v. U. S., supra.

60. U.S.—Parker v. U. S., 26 Ct.Cl. 344.

49 C.J. p 1180 note 5.

61. U.S.—Parker v. U. S., supra.

62. U.S.—Parker v. U. S., supra.  
49 C.J. p 1180 note 7.

63. U.S.—Great Northern R. Co. v. U. S., Minn., 236 F. 433, 149 C.C.A. 485.

64. U.S.—U. S. v. McCoy, Wash., 104 F. 669, 44 C.C.A. 125.

65. U.S.—U. S. v. McCoy, supra.

66. La.—Riley v. Hart, 3 La. Ann. 184.

67. U.S.—U. S. v. Atlantic Coast

Line R. Co., N.C., 215 F. 56, 131 C. C.A. 364, L.R.A.1915A 374.

49 C.J. p 1180 note 13.

68. U.S.—United Fruit Co. v. U. S., C.C.A.La., 33 F.2d 664.

69. U.S.—U. S. v. United Fruit Co., D.C.Mass., 292 F. 308.

70. U.S.—Union Pac. R. Co. v. U. S., Utah, 219 F. 427, 134 C.C.A. 325.

71. U.S.—U. S. v. Collins, C.C.N.Y., 25 F.Cas.No.14,834, 4 Blatchf. 142.

72. U.S.—U. S. v. Collins, supra.

### h. Overpayments and Recovery Thereof

Under a statute providing for the recovery of wrongful or fraudulent payments of compensation, overpayments which have been made in consequence of fraudulent representations, or under a mistake of fact, or by reason of misconstruction or misapprehension of the law by an officer of the department, may be recovered.

Under a statute providing for the recovery of wrongful or fraudulent payments of compensation, it has been held that, where overpayments have been made to mail contractors in consequence of fraudulent representations,<sup>73</sup> or under a mistake of fact,<sup>74</sup> or by reason of misconstruction or misapprehension of the law by an officer of the department,<sup>75</sup> they may be recovered in an action by the government,<sup>76</sup> or the money so paid out may be deducted from other money due the payee,<sup>77</sup> without waiting for the amount of the overpayments to be ascertained by suit,<sup>78</sup> or a counterclaim therefor may be set up in an action by the contractor to recover compensation due him.<sup>79</sup> In this way, a multiplicity of suits and circuitry of action are avoided.<sup>80</sup> However, the statute does not extend to a case where an additional allowance was not in excess of the maximum permitted, where no fraud is shown on the part of the contractor or of a post office employee, and where there was no mistake of fact.<sup>81</sup>

**Estoppel.** The inaction of the post office department during a long period does not furnish any estoppel against the government.<sup>82</sup>

**Actions.** Rules governing actions for recovery of payments generally apply to actions against mail contractors to recover money obtained by them fraudulently or through mistake.<sup>83</sup>

### i. Waiver of, or Estoppel to Claim, Compensation

A mail contractor may waive, or be estopped to claim, compensation.

A mail contractor accepting compensation for services at a certain rate without objection will be held to have assented to such rate and cannot recover more than the sum so accepted,<sup>84</sup> and he cannot recover on an implied contract for a greater amount.<sup>85</sup> So also, it has been held that, where service, whether rightly or wrongfully, is demanded as mail service and is rendered and paid for as such without protest, the contractor waives any right to additional pay.<sup>86</sup> Furthermore, where a mail contractor renders service within the route of another contractor, and allows the latter to receive pay therefor from the government, without objection, he is estopped to call on the government for payment.<sup>87</sup> On the other hand, where a mail carrier has no means of knowing the amount of compensation to which he is entitled, and accepts what is paid to him on the assurance that it is the full amount of the agreed compensation, he is not concluded by his acquiescence,<sup>88</sup> and a mail contractor carrying mails between the post office and trains transporting it, who performs under protest services which should have been performed by the railroad company, is entitled to recover from it the value of the services so performed, the services not being performed without expectation of pay on his part.<sup>89</sup> The filing of an application for increased rates with the Interstate Commerce Commission has been held to be a sufficient protest against existing rates.<sup>90</sup>

**Evidence of waiver.** The fact that a railroad company has claimed and been awarded compen-

73. U.S.—U. S. v. Platt, Cal., 15 S. Ct. 498, 157 U.S. 113, 39 L.Ed. 639. 49 C.J. p 1181 note 20.

74. U.S.—Grand Trunk Western R. Co. v. U. S., Ct.Cl., 40 S.Ct. 309, 252 U.S. 112, 64 L.Ed. 484. 49 C.J. p 1181 note 21.

75. U.S.—Wisconsin Cent. R. Co. v. U. S., Ct.Cl., 17 S.Ct. 45, 164 U.S. 190, 41 L.Ed. 399. 49 C.J. p 1181 note 22.

76. U.S.—U. S. v. Platt, Cal., 15 S. Ct. 498, 157 U.S. 113, 39 L.Ed. 639. 49 C.J. p 1181 note 23.

77. U.S.—U. S. v. Carr, Ct.Cl., 10 S. Ct. 182, 132 U.S. 644, 33 L.Ed. 483. 49 C.J. p 1181 note 24.

78. U.S.—Grand Trunk Western R. Co. v. U. S., Ct.Cl., 40 S.Ct. 309, 252 U.S. 112, 64 L.Ed. 484.

79. U.S.—Cosgrove v. U. S., 31 Ct. Cl. 332.

**Recovery on counterclaims denied**  
U.S.—Pacific Air Transport v. U. S., 98 Ct.Cl. 649.

80. U.S.—Wisconsin Cent. R. Co. v. U. S., Ct.Cl., 17 S.Ct. 45, 164 U.S. 190, 41 L.Ed. 399.

81. U.S.—Griffith v. U. S., 22 Ct.Cl. 165, appeal dismissed 11 S.Ct. 1005, 141 U.S. 212, 35 L.Ed. 719.

82. U.S.—Grand Trunk Western R. Co. v. U. S., 53 Ct.Cl. 473, affirmed 40 S.Ct. 309, 252 U.S. 112, 64 L.Ed. 484.

49 C.J. p 1181 note 31.  
Running of statute of limitations against government see Limitations of Actions § 15 a (1).

83. U.S.—U. S. v. Voorhees, Neb., 10 S.Ct. 841, 135 U.S. 550, 34 L.Ed. 258.

49 C.J. p 1181 note 33.

84. U.S.—U. S. v. New York, etc.,

R. Co., Ct.Cl., 49 S.Ct. 260, 279 U.S. 73, 73 L.Ed. 619.

49 C.J. p 1182 notes 35, 36.

85. U.S.—New York, etc., R. Co. v. U. S., Ct.Cl., 40 S.Ct. 67, 251 U.S. 123, 64 L.Ed. 182.

49 C.J. p 1182 note 36.

86. U.S.—Central Pac. R. Co. v. U. S., Ct.Cl., 17 S.Ct. 35, 164 U.S. 93, 41 L.Ed. 362.

49 C.J. p 1182 note 37.

87. U.S.—Utica, etc., R. Co. v. U. S., 22 Ct.Cl. 265.

49 C.J. p 1182 note 38.

88. U.S.—Pacific Mail SS. Co. v. U. S., 28 Ct.Cl. 1.

89. Wis.—Grossbier v. Chicago, etc., R. Co., 181 N.W. 746, 173 Wis. 503.

90. U.S.—U. S. v. New York Cent. R. Co., Ct.Cl., 49 S.Ct. 260, 279 U.S. 73, 73 L.Ed. 619.

49 C.J. p 1182 note 41.

sation for certain services in connection with the mails, and at the same time has failed to make any charge or claim for certain other services, is evidence of a waiver of any claim for the latter services.<sup>91</sup>

### § 31. Carriage and Delivery of Mails

- a. In general
- b. Arrival and departure of mails; frequency of service
- c. Delivery
- d. Rights, duties, and liabilities of carriers and contractors
- e. Liability of government for lost mail

#### a. In General

Congress has full constitutional power to reserve to the postal department a monopoly of the business of receiving, transmitting, and delivering mails.

Congress has full constitutional power to reserve to the postal department a monopoly of the business of receiving, transmitting, and delivering mails,<sup>92</sup> and by statutes the monopoly of carrying the mails is secured to the post office department.<sup>93</sup> In so doing the government is engaged in the discharge of a governmental function,<sup>94</sup> and it has assumed exclusive charge and carriage of the mails, prohibiting anyone other than the government from engaging therein.<sup>95</sup> Nevertheless, this monopoly extends only to letters, packets of letters, and like mailable matter, and not to the transportation of merchandise in parcels or packages of such a character as might be carried through the mails;<sup>96</sup>

and it has been said that congress perhaps lacks the constitutional power to create such a monopoly.<sup>97</sup> In accordance with general rules the courts have held that these statutes must be construed strictly because they are penal statutes<sup>98</sup> and also because they are in derogation of common right,<sup>99</sup> although there are opinions of the attorney general in which the opposite conclusion has been reached.<sup>1</sup>

*Power to detain letters.* Where the statutes merely provide for the enforcement of penalties against unauthorized carriers of letters on the mail routes, it is not competent for the post office department to detain a bag containing letters carried on a mail route contrary to law.<sup>2</sup>

*Mailed matter as property.* The United States has a property right in the mails<sup>3</sup> and has a direct interest in protecting the property it has in the transportation of the mails.<sup>4</sup> By postal regulations the rights of the addressee or sender as to a mailed letter prior to its delivery have been settled.<sup>5</sup> Under these regulations a writer or sender may now apply for a letter, which is put in the mail, and when it is properly identified, the postmaster must return it to him, or telegraph to the post office of the addressee, whose postmaster must return it to the post office where mailed, if it has not been delivered.<sup>6</sup>

#### b. Arrival and Departure of Mails; Frequency of Service

It rests altogether in the discretion of the postmaster

91. U.S.—Central Pac. R. Co. v. U. S., Ct.Cl., 17 S.Ct. 35, 164 U.S. 93, 41 L.Ed. 362.

92. U.S.—Williams v. Wells, etc., Express, Ark., 177 F. 352, 101 C.C. A. 328, 35 L.R.A.N.S., 1034, 21 Ann. Cas. 699.

93. U.S.—Blackham v. Gresham, C. C.N.Y., 16 F. 609, 21 Blatchf. 354, 49 C.J. p 1182 note 45.

94. Ill.—Barker v. Chicago, etc., R. Co., 90 N.E. 1057, 243 Ill. 482, 134 Am.S.R. 382, 26 L.R.A.N.S., 1058.

#### Service of United States

Whoever performs these functions is in the service of the United States. —*Edna Ins. Co. v. Illinois Cent. R. Co.*, 6 N.E.2d 189, 365 Ill. 303, certiorari granted 57 S.Ct. 939, 301 U.S. 679, 81 L.Ed. 1338, certiorari dismissed 58 S.Ct. 269, 303 U.S. 652, 82 L.Ed. 505.

95. Ill.—Barker v. Chicago, etc., R. Co., 90 N.E. 1057, 243 Ill. 482, 134 Am.S.R. 382, 26 L.R.A.N.S., 1058. Conveyance of mail matter out of mail see *infra* § 36.

96. U.S.—Williams v. Wells, etc.,

Express, Ark., 177 F. 352, 101 C.C. A. 328, 35 L.R.A.N.S., 1034, 21 Ann.Cas. 699.

97. U.S.—*Ex parte* Jackson, N. Y., 96 U.S. 727, 24 L.Ed. 877—*Williams v. Wells, etc.*, Express, Ark., 177 F. 352, 101 C.C.A. 328, 35 L.R.A.N.S., 1034, 21 Ann.Cas. 699.

98. Mass.—Dwight v. Brewster, 1 Pick. 50, 11 Am.D. 133.

99. U.S.—U. S. v. U. S. Express Co., C.C.Ill., 28 F.Cas.No.16,602, 5 Biss. 91.

1. 21 Opinion Attorney General 394, 49 C.J. p 1183 note 53.

2. 4 Opinion Attorney General 349.

3. U.S.—*In re* Debs, Ill., 15 S.Ct. 900, 158 U.S. 564, 39 L.Ed. 1092—*U. S. v. Atlantic Coast Line R. Co.*, N.C., 215 F. 56, 131 C.C.A. 364, L. R.A.1915A 374.

D.C.—*Boeing Air Transport v. Farley*, 75 F.2d 765, 64 App.D.C. 162, followed in *Pennsylvania Airlines v. Farley*, 75 F.2d 769, 64 App.D.C. 166, certiorari denied *Pacific Air Transport v. Farley*, 55 S.Ct. 637, 294 U.S. 728, 79 L.Ed. 1258.

50 C.J. p 737 note 27 [a].

4. D.C.—*Boeing Air Transport v. Farley*, 75 F.2d 765, 64 App.D.C. 162, followed in *Pennsylvania Airlines v. Farley*, 75 F.2d 769, 64 App.D.C. 166, certiorari denied *Pacific Air Transport v. Farley*, 55 S.Ct. 637, 294 U.S. 728, 79 L.Ed. 1258.

5. Tenn.—*Traders' Nat. Bank v. First Nat. Bank*, 217 S.W. 977, 142 Tenn. 229.

6. Tenn.—*Traders' Nat. Bank v. First Nat. Bank*, *supra*. Regulations as to reclaiming letters as affecting contracts by mail see *Contracts* § 52 b.

#### Prior conflict

(1) There have been decisions holding that a mailed letter prior to its delivery is the property of the addressee.—*Kennedy v. Dr. David Kennedy Corp.*, 66 N.Y.S. 225, 32 Misc. 480—50 C.J. p 737 note 27 [b], [d].

(2) There are also decisions holding that such a letter is the property of the sender.—*U. S. v. Bullington*, C.C.Ala., 170 F. 121—50 C.J. p 737 note 27 [c].

general, where the power has been conferred on him by congress, to determine at what hours the mail shall leave particular places and arrive at others and to determine whether it shall leave the same place only once or more frequently.

It rests altogether in the discretion of the postmaster general, where the power has been conferred on him by congress, to determine at what hours the mail shall leave particular places and arrive at others<sup>7</sup> and to determine whether it shall leave the same place only once a day or more frequently.<sup>8</sup> His decision is absolute when the discretion is committed to him by the laws of the United States, and cannot be controlled by a state or by the courts.<sup>9</sup> However, under a contract for carrying the mails between two points agreeably to a schedule appended which regulates the time of arrival and departure only at the ends of the route, the postmaster general cannot require the contractor to deliver the mails at an intermediate point at a particular hour of the day, since this would be the making of a new schedule, while the postmaster general has power only to change the schedule.<sup>10</sup>

### c. Delivery

Postmasters are under the obligation to care for and deliver mail which comes into their hands, and if a letter has been delivered to the person to whom it is directed, or to his authorized agent, all authority of the government over the letter and responsibility therefor is at an end.

Postmasters are under obligation to care for and deliver mail which comes into their hands<sup>11</sup> in so far as possible to the individual,<sup>12</sup> firm,<sup>13</sup> or corporation<sup>14</sup> for whom it is intended.

*Enjoining delivery of mail.* Where conflicting claims are set up in respect of letters addressed to a firm which has ceased to exist, the postmaster may be enjoined from delivering the letters until it shall be finally ascertained by the court who is legally entitled to them.<sup>15</sup> However, the court has no power to command the postmaster "to refrain from withholding" the letters from plaintiffs in such a suit.<sup>16</sup> Generally, where an injunction is sought to prevent delivery of mails in case of conflicting claims thereto, the court will not grant an injunction unless the party seeking it demonstrates by the evidence that he has a clear right to receive the mail<sup>17</sup> and that failure of the post office department to deliver it to him impairs a substantial right.<sup>18</sup> Furthermore, a court will not interfere with a ruling of the post office department as to delivery of mail in case of conflicting claim thereto unless palpable error appears.<sup>19</sup>

*Effect of delivery.* While any letter which gets into the mails is within the protection of the United States from the time it is received by the postal authorities until its possession is surrendered voluntarily and rightfully to the one entitled to receive it,<sup>20</sup> if a letter has been delivered to the person to whom it is directed, or to his authorized agent, all authority of the government over the letter and responsibility therefor is at an end;<sup>21</sup> and such is the case where a letter is surrendered to the writer thereof on demand therefor by him at any time before it is placed in transit.<sup>22</sup> Beyond the protection of the mail while discharging the functions of postal service with respect to it the federal government has no rightful power or legal concern.<sup>23</sup>

7. U.S.—Neil v. State of Ohio, Ohio, 3 How. 720, 11 L.Ed. 800.

8. U.S.—Neil v. State of Ohio, supra.

#### Discriminatory delivery service

Businessmen of one city were entitled, following directive of postmaster general relating to reduction of mail delivery service, to receive same sort of mail delivery service as that received by businessmen of a nearby city, and could not be discriminated against as compared with mail delivery service received by businessmen of such city.—Fite v. Payne, D. C. Tex., 91 F.Supp. 896, reversed on other grounds, C.A., Payne v. Fite, 184 F.2d 977.

9. U.S.—Neil v. State of Ohio, Ohio, 3 How. 720, 11 L.Ed. 800.

10. 9 Opinion Attorney General 252.

11. Mich.—Nevius v. Lansingburgh Bank, 10 Mich. 547.  
49 C.J. p 1183 note 60.

72 C.J.S.—21

Liability of postmaster for refusal to deliver mail see supra § 7.

#### Duty to complete contract

When a postage stamp, in accordance with the fixed amount for postal service, is attached to a piece of mail, it is the duty of the post office in which such mail is deposited to complete the contract for which it has been paid.—Fite v. Payne, D.C. Tex., 91 F.Supp. 21, reversed on other grounds, C.A., Payne v. Fite, 184 F.2d 977.

12. U.S.—Fite v. Payne, D.C. Tex., 91 F.Supp. 21, reversed on other grounds, C.A., Payne v. Fite, 184 F.2d 977.  
49 C.J. p 1183 note 61.

13. U.S.—Griffith v. W. S. Vick Grocery Co., C.C.A. Ky., 272 F. 246.

14. U.S.—Griffith v. W. S. Vick Grocery Co., supra.  
49 C.J. p 1183 note 63.

15. 13 Opinion Attorney General 395.

16. 13 Opinion Attorney General 406.

17. U.S.—Central Trust Co. v. Central Trust Co., Ill., 30 S.Ct. 341, 216 U.S. 251, 54 L.Ed. 469, 17 Ann. Cas. 1066.

49 C.J. p 1183 note 66.

18. U.S.—Griffith v. W. S. Vick Grocery Co., C.C.A. Ky., 272 F. 246.

19. U.S.—Central Trust Co. v. Central Trust Co., Ill., 30 S.Ct. 341, 216 U.S. 251, 54 L.Ed. 469, 17 Ann. Cas. 1066.  
49 C.J. p 1183 note 68.

20. U.S.—U. S. v. Bullington, C.C. Ala., 170 F. 121.

21. U.S.—U. S. v. Bullington, supra.  
49 C.J. p 1184 note 71.

22. U.S.—U. S. v. Bullington, supra.

23. U.S.—U. S. v. Safford, D.C. Mo., 66 F. 942.

#### d. Rights, Duties, and Liabilities of Carriers and Contractors

- (1) Exemption from arrest
- (2) Lost, stolen, or delayed mail
- (3) Loss of mail equipment

##### (1) Exemption from Arrest

A mail carrier is exempt from arrest on civil process while engaged in such service, but the rule is different where the process is issued on a charge of felony.

While a mail carrier is exempt, as a matter of public policy, from arrest on civil process while engaged in such service,<sup>24</sup> the rule is different where the process is issued on a charge of felony<sup>25</sup> or other criminal offense affecting the public welfare.<sup>26</sup>

##### (2) Lost, Stolen, or Delayed Mail

- (a) Liability to individuals
- (b) Liability to the government

##### (a) Liability to Individuals

While persons or corporations carrying the mails are not common carriers in respect of such service, and as such liable to the senders or addressees of lost or stolen mail, individuals or railroad companies carrying the mails may be liable for a loss caused by negligence or misfeasance.

Neither persons<sup>27</sup> nor corporations<sup>28</sup> carrying the mails under contract with the government, nor corporations carrying mails not under contract but by compulsion of statute,<sup>29</sup> are common carriers in respect of such service, and as such liable to the senders or addressees of lost or stolen mail delivered to them for carriage or those subrogated to their

rights, but are public agents of the United States, employed to perform a governmental function.<sup>30</sup> The fact that a corporation is a common carrier of goods for the public as well as a contractor with the government for carrying the mails does not transform it into a common carrier as to the mails.<sup>31</sup> So also, contractors for the carriage of the mails, whether individuals<sup>32</sup> or corporations,<sup>33</sup> are not private carriers of the mails and liable to individuals as such, since they do not carry for individuals or receive any compensation from them.<sup>34</sup> An individual member of the public is not a party to a contract between the government and a person or corporation for carrying mail,<sup>35</sup> and such a contract is not made for his benefit,<sup>36</sup> although there is an indirect benefit or interest in the addressee or sender in the performance of the contract.<sup>37</sup> However, such indirect benefit or interest is too indirect to make him a privy to the contract, so as to have a right of action thereon<sup>38</sup> or to justify a suit under the mail contract in his own right without the consent of the United States.<sup>39</sup> Furthermore, where suit by the United States on the contract is authorized and such authorization is subsequently revoked, suit cannot be brought in the name of the United States on behalf of the senders of the mail and their private insurers.<sup>40</sup>

*On theory of relationship of master and servant.* The relationship of master and servant does not exist between the sender or addressee of mail matter and a railroad company carrying the mails under contract with the government or under requirements of constitution or statute so as to ren-

24. U.S.—U. S. v. Barney, C.C.N.Y., 24 F.Cas.No.14,525, 3 Hughes 545, 2 Wheel.Cr. 513.

49 C.J. p 1184 note 82.

Property used in carrying mails as exempt from attachment see Attachment § 74 b (8).

25. U.S.—U. S. v. Kirby, Ky., 7 Wall. 482, 19 L.Ed. 278.

26. U.S.—U. S. v. Hart, N.Y., 26 F. Cas.No.15,316, Pet.C.C. 390, 3 Wheel.Cr. 304.

49 C.J. p 1184 note 84.

27. Miss.—Foster v. Metts, 55 Miss. 77, 30 Am.R. 504.

49 C.J. p 1184 note 85—10 C.J. p 52 note 73.

28. U.S.—Bankers' Mut. Casualty Co. v. Minneapolis, etc., R. Co., Minn., 117 F. 434, 54 C.C.A. 608, 65 L.R.A. 397, error dismissed 24 S.Ct. 325, 192 U.S. 371, 48 L.Ed. 484.

49 C.J. p 1184 note 86.

29. U.S.—Bankers' Mut. Casualty Co. v. Minneapolis, etc., R. Co., supra.

Iowa.—Boston Ins. Co. v. Chicago, etc., R. Co., 92 N.W. 88, 118 Iowa 423, 59 L.R.A. 796.

30. Ohio.—Conwell v. Voorhees, 13 Ohio 523, 542, 42 Am.D. 206.

49 C.J. p 1184 notes 85, 86.

31. Ala.—Central R., etc., Co. v. Lampley, 76 Ala. 357, 52 Am.R. 334.

49 C.J. p 1184 note 89.

32. Miss.—Foster v. Metts, 55 Miss. 77, 30 Am.R. 504.

33. Iowa.—Boston Ins. Co. v. Chicago, etc., R. Co., 92 N.W. 88, 118 Iowa 423, 59 L.R.A. 796.

34. Miss.—Foster v. Metts, 55 Miss. 77, 30 Am.R. 504.

35. Ill.—Aetna Ins. Co. v. Illinois Cent. R. Co., 6 N.E.2d 189, 365 Ill. 303, certiorari granted 57 S.Ct. 939, 301 U.S. 679, 81 L.Ed. 1338, certiorari dismissed 58 S.Ct. 269, 302 U.S. 652, 82 L.Ed. 505.

49 C.J. p 1184 note 88—10 C.J. p 52 note 73.

36. Ill.—Aetna Ins. Co. v. Illinois Cent. R. Co., supra.

37. U.S.—U. S., on Behalf of Federal Ins. Co. v. U. S. Lines Co., D.C. N.Y., 24 F.Supp. 427.

Iowa.—Boston Ins. Co. v. Chicago, R. I. & P. R. Co., 92 N.W. 88, 118 Iowa 423, 59 L.R.A. 796.

38. U.S.—U. S., on Behalf of Federal Ins. Co. v. U. S. Lines Co., D.C. N.Y., 24 F.Supp. 427.

Iowa.—Boston Ins. Co. v. Chicago, R. I. & P. R. Co., 92 N.W. 88, 118 Iowa 423, 59 L.R.A. 796.

39. U.S.—U. S., on Behalf of Federal Ins. Co., v. U. S. Lines Co., D.C.N.Y., 24 F.Supp. 427.

40. U.S.—U. S., on Behalf of Federal Ins. Co., v. U. S. Lines Co., supra.

Authority to sue in name of United States generally see the C.J.S. title United States § 193, also 65 C.J. p 1419 notes 99-2.

der the company liable for loss of mail to the addressee, since neither the sender nor the addressee has any control over the railroad company in the handling of mail matter.<sup>41</sup>

*For negligence or misfeasance of contractor or carrier or his agents or servants.* Individuals who contract with the government to carry the mails are liable to the addressees or sendees of mail delivered to them for transportation for a loss thereof caused by their own negligence, misfeasance, or default in the discharge of their duties.<sup>42</sup> Although there is some authority to the contrary,<sup>43</sup> the better rule is that an individual contractor for the carriage of the mails is not liable to the owners of letters lost by the negligence of a carrier employed by him, where the contractor has used proper care in employing persons of suitable skill and diligence,<sup>44</sup> or for the theft of a letter by such carrier,<sup>45</sup> these decisions proceeding on the principle that the carrier employed by the contractor acts as a public agent in the discharge of a public duty and not as a mere servant of the contractor who employs him,<sup>46</sup> and that he alone is liable for loss or injury caused by his negligence or misfeasance.<sup>47</sup> Thus, in case of theft by the carrier, it has been held that an additional reason for holding the contractor not liable is that, even if the carrier were considered an agent of the contractor and would be liable for his acts within the scope of his employment, the contractor would not be liable for his crimes.<sup>48</sup>

*Railroad companies.* The decisions relating to the liability of a railroad company to the sender or addressee of mail matter, or one subrogated to their rights, are conflicting. On the one hand,

there is authority to the effect that a railroad company carrying mails owes no duty whatever to the sender, addressee, or owner of the contents of any letter or package contained in the mails which can be made the basis of an action at law.<sup>49</sup> Furthermore it has been held that railway employees when handling mail are agents of the United States for whose negligence the railroad is not liable.<sup>50</sup> On the other hand, it has been held that a railroad company carrying the mails, whether under contract or by compulsion, is a public agent of the United States employed in performing a government function, and as such is liable to the owner of mails lost through its negligence or to those subrogated to his rights,<sup>51</sup> but that it is not liable for the negligent or tortious acts of its employees, subagents, or subordinates, in the selection of whom it has exercised ordinary care.<sup>52</sup> However, there is authority to the contrary of this last proposition, it being held that the status of a railroad company carrying mails under contract with the government is that of bailee for hire, and that it is liable to the sender of mail for the loss or theft thereof caused through the negligence or want of care of its agents or servants employed in the general business of transportation, and not for the special business of transporting the mails.<sup>53</sup>

#### (b) Liability to the Government

While railroad or steamship companies carrying the mails are not liable as common or private carriers, they are liable as government agents.

Railroad or steamboat companies carrying the mails, either by virtue of contract or statutory requirement, are neither common<sup>54</sup> nor private<sup>55</sup>

41. Iowa.—Boston Ins. Co. v. Chicago, etc., R. Co., 92 N.W. 88, 118 Iowa 423, 59 L.R.A. 796.

49 C.J. p 1184 note 93.

42. Va.—Sawyer v. Corse, 17 Gratt. 230, 58 Va. 230, 94 Am.D. 445.

49 C.J. p 1185 note 94.

43. Va.—Sawyer v. Corse, supra.

44. N.H.—Hutchins v. Brackett, 22 N.H. 252, 53 Am.D. 248.

Ohio.—Conwell v. Voorhees, 13 Ohio 523, 42 Am.D. 206.

45. Miss.—Foster v. Metts, 55 Miss. 77, 30 Am.R. 504.

46. Miss.—Foster v. Metts, supra.

49 C.J. p 1185 note 98.

47. Miss.—Foster v. Metts, supra.

49 C.J. p 1185 note 98.

48. Miss.—Foster v. Metts, supra.

49. U.S.—German State Bank v. Minneapolis, etc., R. Co., C.C.Minn., 113 F. 414, affirmed 117 F. 434, 54 C.C.A. 608, 65 L.R.A. 397, error dis-

missed 24 S.Ct. 325, 192 U.S. 371, 48 L.Ed. 484.

49 C.J. p 1185 note 3.

50. Ill.—Aetna Ins. Co. v. Illinois Cent. R. Co., 6 N.E.2d 189, 365 Ill. 303, certiorari granted 57 S.Ct. 939, 301 U.S. 679, 81 L.Ed. 1338, certiorari dismissed 58 S.Ct. 269, 302 U.S. 652, 82 L.Ed. 505.

**Declaration held not fatally defective**

Ill.—Aetna Ins. Co. v. Illinois Cent. R. Co., 283 Ill.App. 527, reversed on other grounds 6 N.E.2d 189, 365 Ill. 303, certiorari granted 57 S.Ct. 939, 301 U.S. 679, 81 L.Ed. 1338, certiorari dismissed 58 S.Ct. 269, 302 U.S. 652, 82 L.Ed. 505.

51. U.S.—Bankers' Mut. Casualty Co. v. Minneapolis, etc., R. Co., Minn., 117 F. 434, 439, 54 C.C.A. 608, 65 L.R.A. 397, error dismissed 24 S.Ct. 325, 192 U.S. 371, 48 L.Ed. 484.

52. U.S.—Bankers' Mut. Casualty

Co. v. Minneapolis, etc., R. Co., supra.

49 C.J. p 1185 note 5.

53. Mo.—Skaggs v. Missouri-Kansas-Texas R. Co., 73 S.W.2d 302, 228 Mo. 808.

49 C.J. p 1185 note 6.

**Instruction held not erroneous**

Plaintiff's instruction, in action against railroad company for loss of chicks shipped by mail, was held not erroneous as based on theory that defendant, as common carrier, was engaged in transporting mail and liable for its subordinate's negligence.—Skaggs v. Missouri-Kansas-Texas R. Co., supra.

54. U.S.—United Fruit Co. v. U. S., C.C.A.La., 33 F.2d 664.

49 C.J. p 1185 note 7.

55. U.S.—U. S. v. Atlantic Coast Line R. Co., D.C.N.C., 206 F. 190, affirmed 215 F. 66, 131 C.C.A. 364, L.R.A.1915A 374.

Iowa.—Boston Ins. Co. v. Chicago,

carriers, and not liable as such;<sup>56</sup> but they are liable as government agents and as such are subject to postal regulations to the same extent as any other branch of the post office.<sup>57</sup> Since the United States has a property right in the mails, as discussed *supra* subdivision a of this section, such companies may be liable to the government as parties to a private contract for damages resulting from loss or delay of mails due to their negligence<sup>58</sup> or to the dishonesty of their employees<sup>59</sup> unless the mail in question is nonmailable matter.<sup>60</sup> In such a case the government is entitled to recover the full value of the property lost in the mails regardless of the extent of the government's own loss or liability,<sup>61</sup> and it is immaterial whether the amount sued for exceeds the liability of the government as fixed by the postal regulations<sup>62</sup> or whether payment has been made to the sender before recovery.<sup>63</sup>

### (3) Loss of Mail Equipment

A railroad company carrying the mail under a contract may be liable for the loss of mail equipment.

A railroad company carrying the mails under a contract providing that, in consideration of the payment of a stipulated sum for the service, it would "accept and perform the service upon the conditions prescribed by law and the regulations of the department," may be liable to the United States for the loss of mail equipment directly caused by the negligence of its employees.<sup>64</sup>

#### e. Liability of Government for Lost Mail

The government is not liable to the owner of mail lost in transportation.

The government is not liable to the owner of mail lost in transportation.<sup>65</sup>

### § 32. — Undelivered Letters and Request for Return

In complying with a statute which provides that the

postmaster general may direct publication of a list of undelivered letters at any post office in a regularly published newspaper which has the largest circulation within the post-office delivery, the postmaster general is the only judge as to what paper has the largest circulation. Under a statute requiring the return of an uncalled-for letter to the writer, where there is a return address, a presumption may arise that the postmaster has discharged his duty.

In complying with a statute which provides that the postmaster general may direct publication of a list of undelivered letters at any post office, in the newspaper, regularly published, within the post office delivery which has the largest circulation within such delivery, the postmaster general is the only judge as to which paper has the largest circulation.<sup>66</sup> A newspaper publisher has no cause of action against a postmaster for refusing to give him the publication of a list of uncalled-for letters,<sup>67</sup> even though the refusal is malicious.<sup>68</sup> A refractory postmaster, it has been said, can be dealt with only by complaint to a superior or perhaps to a grand jury.<sup>69</sup> Under a statute requiring the return of an uncalled-for letter to the writer, where he has indorsed on the outside thereof his name and address without additional charge for postage, if such letter is not returned it has been held that the postmaster is presumed to have discharged his duty by delivering the letter to the addressee in person or by mail where the postmaster at the place of delivery knew the whereabouts of the addressee and the letter had a return address on it and was not returned to the sender as required by the statute.<sup>70</sup>

### § 33. The Franking Privilege

By statute, a privilege or right, known as the "franking privilege," or the right to use the "penalty envelope," has been conferred on certain persons by virtue of which they may transmit certain matter through the mail free of postage. The privilege exists only in favor of those who are within the terms of the statute.

By statute, a privilege or right, known as the "franking privilege,"<sup>71</sup> or the right to use the

etc., R. Co., 92 N.W. 88, 118 Iowa 423, 59 L.R.A. 796.

56. U.S.—U. S. v. Atlantic Coast Line R. Co., C.C.N.C., 189 F. 779. 49 C.J. p 1185 notes 7, 8.

57. U.S.—United Fruit Co. v. U. S., C.C.A.La., 33 F.2d 664.

58. U.S.—U. S. v. Atlantic Coast Line R. Co., N.C., 215 F. 56, 131 C.C.A. 364, L.R.A.1915A 374—U. S. v. Atlantic Coast Line R. Co., C.C. N.C., 189 F. 779.

59. U.S.—United Fruit Co. v. U. S., C.C.A.La., 33 F.2d 664.

60. U.S.—U. S. v. Atlantic Coast Line R. Co., N.C., 215 F. 56, 131 C.C.A. 364, L.R.A.1915A 374. 49 C.J. p 1186 note 14.

61. U.S.—U. S., on Behalf of Federal Ins. Co., v. U. S. Lines Co., D.C. N.Y., 24 F.Supp. 427.

Proceeds in excess of its own loss would be held by the government for the benefit of users of the mail who suffered a loss of their property.—U. S., on Behalf of Federal Ins. Co., v. U. S. Lines Co., *supra*.

62. U.S.—United Fruit Co. v. U. S., C.C.A.La., 33 F.2d 664.

63. U.S.—United Fruit Co. v. U. S., *supra*.

64. U.S.—Union Pac. R. Co. v. U. S., Utah, 219 F. 427, 134 C.C.A. 325. 49 C.J. p 1186 note 18.

65. U.S.—U. S. v. Atlantic Coast Line R. Co., N.C., 215 F. 56, 131 C.C.A. 364, L.R.A.1915A 374.

66. Pa.—Fosters v. McKibben, 4 Pa. L.J.R. 303, affirmed 14 Pa. 168.

67. N.Y.—Strong v. Campbell, 11 Barb. 135. 49 C.J. p 1184 note 76.

68. Pa.—Fosters v. McKibben, 4 Pa. L.J.R. 303, affirmed 14 Pa. 168.

69. Pa.—Fosters v. McKibben, *supra*.

70. Va.—Myers v. Bibbie Grocery Co., 138 S.E. 570, 148 Va. 282.

71. Bouvier, Rawles 3d ed, L.D.

"penalty envelope,"<sup>72</sup> has been conferred on certain persons by virtue of which they may transmit certain matter through the mail free of postage.<sup>73</sup> The franking privilege exists only in favor of those who are within the terms of the statutes.<sup>74</sup> Under a statute,<sup>39</sup> U.S.C.A. § 321, granting the franking privilege to matter relating to official business, the privilege exists in favor of officers of the United States government,<sup>75</sup> and this privilege extends to all officers of the United States, whether or not departmental,<sup>76</sup> regardless of where they are located,<sup>77</sup> although under earlier statutes the privilege was restricted to officers of the government located at the seat of government.<sup>78</sup>

*Parcel post matter.* The phrase in the statute, 39 U.S.C.A. § 321, referring to "any letters, packages, or other matter relating exclusively to the business of the Government," is broad enough to cover any class thereafter established.<sup>79</sup> Thus penalty envelopes and labels may be used in sending, by parcel post, fourth-class mail matter not exceeding in weight the limit fixed by statute.<sup>80</sup>

*Duty to furnish and prepare envelopes.* The statute, 39 U.S.C.A. § 321, does not impose on the executive departments at Washington the duty of furnishing penalty envelopes to the various subordinate officers throughout the United States who are under their supervision, but whose offices are not offices in those departments, except in cases where that duty is required by other statutory provisions.<sup>81</sup> However, where the envelopes are not furnished by the departments, they may be prepared for their own use by the officers authorized to use them.<sup>82</sup> The express provision of the statute that every letter or package relating to the business of the government of the United States must be indorsed with the proper designation of the office from which it is transmitted with a statement of the penalty imposed by the statute for an unlawful use of the envelope does not require that

the penalty on the envelopes should be printed rather than written.<sup>83</sup>

*Penalty envelopes used by Philippine Islands.* Congress having intended that the government for the Philippine Islands should be regarded as a branch of the war department, the penalty envelopes used for the transmission of official mail from those islands were, accordingly, required to bear the indorsement of the war department.<sup>84</sup>

*Free registration of letters or packets.* Construing the provision of statute, 39 U.S.C.A. § 384, that any letters or packets relating to the official business of the post office department may be registered "by any of the executive departments or bureaus" thereof without the payment of any registry fee, it has been held that a department officer, who in the course of public business is called temporarily to discharge his official duties at some place away from the seat of government, during such absence and for such duties, comes within the meaning of the words "Executive Departments, or Bureaus thereof," and, in the discharge of his duties, is entitled to make use of the facilities of registry without the payment of a fee;<sup>85</sup> but the statute does not embrace subordinate officers of the government permanently and regularly located elsewhere than in Washington.<sup>86</sup> Although the statute is no longer in force, the privilege of free registration was at one time, by express statutory provision, extended to pension agents.<sup>87</sup>

*Members elect of congress; unseated members.* Members elect of either house of congress may exercise the franking privilege from the commencement of their term, although no session has actually been called, and they have not therefore been able to take the oath of office,<sup>88</sup> but a member who has been unseated has no right thereafter to exercise the privilege.<sup>89</sup>

*Delegation of franking privilege.* Prior to the

72. 17 Opinion Attorney General 529.

73. Webster Int.D. 26 C.J. p 1048 notes 2, 3.

74. 11 Opinion Attorney General 23.

75. 17 Opinion Attorney General 529.

49 C.J. p 1186 note 24.

"Official mail matter" means that which relates to the business of the government.—17 Opinion Attorney General 183—49 C.J. p 1186 note 28.

76. 16 Opinion Attorney General 455.

77. 23 Opinion Attorney General 316.

78. 15 Opinion Attorney General 262.

79. 30 Opinion Attorney General 112.

80. 30 Opinion Attorney General 112.

81. 16 Opinion Attorney General 455.

82. 16 Opinion Attorney General 455.

83. 16 Opinion Attorney General 455.

49 C.J. p 1187 note 35 [a].

84. 24 Opinion Attorney General 534.

85. 23 Opinion Attorney General 316—18 Opinion Attorney General 49.

86. 23 Opinion Attorney General 316.

49 C.J. p 1187 note 40.

87. 26 Opinion Attorney General 181—25 Opinion Attorney General 617.

88. 16 Opinion Attorney General 271—5 Opinion Attorney General 358.

49 C.J. p 1187 note 43.

89. 19 Opinion Attorney General 592.

49 C.J. p 1187 note 44.



enactment of the statute, 39 U.S.C.A. § 335, making it unlawful to lend or permit the use of the franking privilege, it was held that the franking privilege was a strictly personal privilege and could not be delegated by one enjoying it to any other person,<sup>90</sup> although it had been held that the postmaster general could by regulation authorize officers in, or belonging to, the various executive de-

partments legally designable as chief clerks, whether of the departments proper or of the bureaus therein, to enjoy free communications.<sup>91</sup>

*Federal reserve notes.* The Federal Reserve Act has been held to prohibit the sending of federal reserve notes through the mails under penalty envelopes or labels by members of the federal reserve board.<sup>92</sup>

#### IV. OFFENSES AGAINST POSTAL LAWS

##### § 34. In General

The particular statutory offenses against the postal laws, with the adjective rules of law applicable thereto, are considered infra §§ 35-64.

Examine Pocket Parts for later cases.

##### § 35. Obstructing Passage of Mail

The statute making it a criminal offense knowingly and willfully to obstruct or retard the passage of the mail, or its carrier, applies only to persons who know that the acts performed will obstruct or retard the passage of the mail, or its carrier, and who perform them with the intention that such shall be their operation.

The statute making it a criminal offense knowingly and willfully to obstruct or retard the passage of the mail, or its carrier, 18 U.S.C.A. § 1701, is not unconstitutional.<sup>93</sup> The statute applies only to persons who know that the acts performed will obstruct or retard the passage of the mail, or its carrier, and who perform them with the intention that such shall be their operation;<sup>94</sup> but when the acts which create the obstruction are in themselves unlawful the intention to obstruct will be imputed to their author, although the attainment of other ends may have been his primary object.<sup>95</sup> The statute has no reference to acts lawful in themselves, from the execution of which a temporary delay to the mails unavoidably follows;<sup>96</sup> and if an obstruction is necessarily caused thereby it is not a crime.<sup>97</sup> By the term "passage of the mails" is meant the transmission of mail matter from the time it is deposited in a place designated by law or by the rules of the post office department up

to the time it is delivered to the person to whom it is addressed.<sup>98</sup>

Although obstruction of the mails is a statutory offense, the government may obtain an injunction against a continuing obstruction and enforce it by proceedings in contempt.<sup>99</sup>

##### § 36. Conveyance of Mail Matter Out of Mail

- a. In general
- b. Over post route
- c. By private express

###### a. In General

Within the statute prohibiting the collecting, receiving, or carrying of any letter or packet contrary to law by anyone concerned in carrying the mails, a letter is a message in writing and a packet is two or more letters under one cover. The conveyance or transmission of letters or packets by private hands without compensation, or by special messenger employed for the particular occasion only, is not prohibited.

Within the statute prohibiting the collecting, receiving, or carrying of any letter or packet, or causing or procuring the same to be done contrary to law, by anyone concerned in carrying the mails, 18 U.S.C.A. § 1693, a letter is a message in writing<sup>1</sup> and a packet is two or more letters under one cover,<sup>2</sup> but not a package containing other articles.<sup>3</sup> The fact that a letter relating to the package accompanies it does not constitute a violation of the statute, where a further statute excepts from its operation the carrying of letters to the person to whom the package is intended to be delivered.<sup>4</sup>

90. 13 Opinion Attorney General 157—11 Opinion Attorney General 35.

91. 13 Opinion Attorney General 2.  
92. 30 Opinion Attorney General 456.

93. U.S.—U. S. v. Sears, D.C.Ky., 55 F. 268.  
49 C.J. p 1187 notes 53, 54.

94. U.S.—U. S. v. Claypool, D.C.Mo., 14 F. 137.  
49 C.J. p 1188 note 56.

95. U.S.—U. S. v. Hall, D.C.Ga., 206 F. 484.  
49 C.J. p 1188 note 57.

96. U.S.—Harper v. Endert, C.C.Cal., 103 F. 911.  
49 C.J. p 1188 note 58.

97. U.S.—U. S. v. Kane, D.C.Or., 19 F. 42, 9 Sawy. 614.  
49 C.J. p 1188 note 59.

98. U.S.—U. S. v. Claypool, D.C.Mo., 14 F. 137.  
49 C.J. p 1187 note 55.

99. U.S.—In re Debs, Ill., 15 S.Ct. 900, 158 U.S. 564, 39 L.Ed. 1092.

1. Mass.—Dwight v. Brewster, 1 Pick. 50, 11 Am.D. 133.

2. U.S.—U. S. v. Chaloner, D.C.Me., 25 F.Cas.No.14,777, 1 Ware 214.  
Mass.—Dwight v. Brewster, 1 Pick. 50, 11 Am.D. 133.

3. U.S.—U. S. v. Chaloner, D.C.Me., 25 F.Cas.No.14,777, 1 Ware 214.  
49 C.J. p 1188 note 68.

4. Mass.—Dwight v. Brewster, 1 Pick. 50, 11 Am.D. 133.

*By private persons or special messengers.* Under express provisions in the statute, 18 U.S.C.A. § 1696 (c), the conveyance or transmission of letters or packets by private hands without compensation, or by special messenger employed for the particular occasion only, is not prohibited.<sup>5</sup>

### b. Over Post Route

In accordance with express statutory provisions, whoever, having charge or control of a conveyance which regularly performs trips on any post route or from one place to another between which the mail is carried, carries otherwise than in the mail letters or packets, except those of a particular nature, is guilty of an offense.

In accordance with express statutory provisions, 18 U.S.C.A. § 1694, whoever, having charge or control of a conveyance which regularly performs trips on any post route or from one place to another between which the mail is carried, carries otherwise than in the mail letters or packets, except those of a particular nature, is guilty of an offense.<sup>6</sup> A letter or order, although unsealed, directing merchandise to be sent by the return boat as a commercial transaction is within the prohibition of the statute.<sup>7</sup> The persons designated in the statute are not guilty of the offense therein described unless the letters or packets are carried with their knowledge and consent.<sup>8</sup>

*Current business of carrier.* The statute creates an exception with respect to letters or packets which relate to the current business of the carrier, and as used in the statute, the phrase "current business of the carrier" means that business which is, at any particular time, in the present course of the carrier's transactions.<sup>9</sup> In order that a carrier may avail himself of the benefit of the exception, it is essential: (1) That the letters should be the letters of the carrier itself, that is to say, letters written by or addressed to the carrier.<sup>10</sup> (2) That

they should relate to its own current business.<sup>11</sup>

The statute does not permit free transportation of letters and packets belonging to railroads or persons other than the carrier,<sup>12</sup> whether such letters or packets relate to the current business of the carrier<sup>13</sup> or to the business of the railroad for which the letters or packets are carried.<sup>14</sup>

### c. By Private Express

In accordance with provisions of the statute, one who establishes a private express, one of the purposes of which is the carrying of letters or packets over a post route, and one who carries a letter or packet in his private express are guilty of offenses.

In accordance with provisions of the statute, 18 U.S.C.A. § 1696, which has been upheld as constitutional,<sup>15</sup> one who establishes a private express, one of the purposes of which is the carrying of letters or packets over a post route,<sup>16</sup> and one who carries a letter or packet in his private express,<sup>17</sup> whether carried with or without distinct compensation,<sup>18</sup> are guilty of offenses. "Letters or packets" within the meaning of the statute include communications in writing conveyed from one person to another,<sup>19</sup> and do not include a package of merchandise which by reason of its weight and character might lawfully be transmitted through the mails.<sup>20</sup> The statute does not prohibit private express companies making regular trips over established post routes from engaging in the business of carrying such parcels for hire.<sup>21</sup>

If the mail is actually carried over a railroad under the authority of the post office department, with the assent of, and by an arrangement with, the railroad corporation, this is sufficient to constitute the railroad a post route within the meaning of the statute, although there is no formal written contract.<sup>22</sup> Letter-carrier routes are post routes

5. U.S.—U. S. v. Easson, D.C.N.Y., 18 F. 590.  
49 C.J. p 1190 notes 5, 6.

6. U.S.—U. S. v. Bromley, N.Y., 12 How. 88, 13 L.Ed. 905.  
49 C.J. p 1189 note 89.

**Exception in case of letters relating to cargo**  
U.S.—U. S. v. U. S. Express Co., C.C. Ill., 28 F.Cas.No.16,602, 5 Biss. 91.  
49 C.J. p 1189 note 91—p 1190 note 94.

7. U.S.—U. S. v. Bromley, N.Y., 12 How. 88, 13 L.Ed. 905.

8. U.S.—U. S. v. Hall, C.C.Pa., 26 F.Cas.No.15,281.  
49 C.J. p 1190 note 3.

9. U.S.—U. S. v. Erie R. Co., N.Y., 35 S.Ct. 193, 235 U.S. 513, 59 L. Ed. 335.  
17 C.J. p 408 note 7.

10. U.S.—U. S. v. Southern Pac. Co., D.C.Ariz., 29 F.2d 433.  
49 C.J. p 1190 notes 95, 97.

11. U.S.—U. S. v. Southern Pac. Co., supra.  
49 C.J. p 1190 note 98.

12. U.S.—U. S. v. Southern Pac. Co., supra.

13. 28 Opinion Attorney General 537.

14. U.S.—U. S. v. Southern Pac. Co., D.C.Ariz., 29 F.2d 433.

15. U.S.—U. S. v. Thompson, D.C. Mass., 28 F.Cas.No.16,489.

16. U.S.—U. S. v. Thompson, supra.  
49 C.J. p 1189 notes 70, 73.

**"Private express"**

An express owned and managed by a private person for his private benefit or profit, and not as a branch

of the public service or under government control, is a "private express."—U. S. v. Easson, D.C.N.Y., 18 F. 590.

17. U.S.—U. S. v. Gray, D.C.Mass., 26 F.Cas.No.15,253—U. S. v. Thompson, D.C.Mass., 28 F.Cas.No. 16,489.

18. U.S.—U. S. v. Thompson, supra.

19. U.S.—Williams v. Wells Fargo & Co. Express, Ark., 177 F. 352, 101 C.C.A. 328, 35 L.R.A., N.S., 1034, 21 Ann.Cas. 699.  
49 C.J. p 1189 note 76.

20. U.S.—Williams v. Wells Fargo & Co. Express, supra.

21. U.S.—Williams v. Wells Fargo & Co. Express, supra.

22. U.S.—U. S. v. Thompson, D.C. Mass., 28 F.Cas.No.16,489.

in the meaning of the statute,<sup>23</sup> but the streets of a city for which no free delivery of mail matter is provided are not post routes,<sup>24</sup> and the statute does not prohibit its citizens from arranging with a private agency for the carriage and delivery of their mail matter within the city, including sealed letters on which no United States postage has been paid.<sup>25</sup>

*'Regular trips or at stated periods.'* Provision for a delivery daily, once, twice, or thrice, as the case may be, over the streets of a city, wherever mentioned, is a provision for a delivery "by regular trips or at stated periods," within the prohibition of the statute.<sup>26</sup>

*Liability for acts of agents.* The owner of a private express is not liable for any acts of his agents which were not authorized by him either expressly or impliedly,<sup>27</sup> but if his instructions are in general terms not to carry any mailable matter and he still assented to, or approved of, the carrying of what was mailable, he violates the statute whether or not he knew that the statute embraced such matter.<sup>28</sup>

*Evidence and trial.* General rules of evidence<sup>29</sup> and trial<sup>30</sup> in criminal cases apply in prosecutions for this offense.

### 37. Mailing Unmailable Matter Generally

Under express statutory provisions, it is an offense to deposit in the mails a letter containing a threat to injure another with intent to extort money, matter tending to incite arson, murder, or assassination, matter containing a threat to injure the president of the United States, or nonmailable matter with intent to kill or injure another person.

Under express statutory provisions, 18 U.S.C.A. § 876, it is an offense knowingly to deposit or cause to be deposited in any authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, with intent to extort money, any letter addressed to any other person containing any threat to injure the person of the addressee or of another.<sup>31</sup> Where there are two or more defendants, it is sufficient,

under the statute, if one of the defendants mailed, and the other or others caused him to mail, the letter,<sup>32</sup> or if all of the defendants caused a third person to mail the letter.<sup>33</sup>

*Matter tending to incite arson, murder, etc.* While, in the absence of statute so providing, the mailing of matter counseling murder, arson, or treason may not constitute an offense against the United States,<sup>34</sup> by statute, 18 U.S.C.A. § 1461, it is an offense against the United States to mail matter of a character tending to incite arson, murder, or assassination.<sup>35</sup> In construing this statute, it has been held that, if articles in a newspaper sent through the mails have a tendency to incite murder or assassination, it is not necessary to constitute the offense to show any specific intent on the part of accused in writing, publishing, or mailing them,<sup>36</sup> or that accused knew that the articles were of a character tending to incite murder or assassination,<sup>37</sup> he being confessedly familiar with the contents thereof.

Where an indictment alleges that a newspaper contained matter of a character to incite, in the minds of persons reading it, murder and assassination, and also sets out the objectionable language in full, the additional particular averment that it was so nonmailable is not required.<sup>38</sup> An indictment, alleging that accused knowingly, willfully, unlawfully, and feloniously deposited in the post office a newspaper containing matter intended to incite murder and assassination is sufficient, without specifically alleging that he knew that the paper contained matter intending to incite murder and assassination<sup>39</sup> or comprehended its import.<sup>40</sup>

*Matter containing threat to injure president.* In order to constitute a violation of the statute, 18 U.S.C.A. § 871, which makes it an offense for any person knowingly and willfully to deposit or cause to be deposited for conveyance any letter, paper, writing, print, missive, or document containing "any threat to take the life of or to inflict bodily harm upon the President of the United States," it is necessary that the writer intended that the

1. U.S.—U. S. v. Basson, D.C.N.Y., 18 F. 590—Blackham v. Gresham, 16 F. 609, 21 Blatchf. 354.

14 Opinion Attorney General 152.

14 Opinion Attorney General 152.

U.S.—U. S. v. Basson, D.C.N.Y., 18 F. 590.

U.S.—U. S. v. Thompson, D.C. Mass., 28 F.Cas.No.16,489. C.J. p 1189 note 84.

28. U.S.—U. S. v. Thompson, supra.

29. Burden of proof

U.S.—U. S. v. Adams, D.C.N.Y., 24 F. Cas.No.14,421. 49 C.J. p 1189 note 88 [a].

30. Instructions

U.S.—U. S. v. Thompson, D.C.Mass., 28 F.Cas.No.16,489.

31. U.S.—Spencer v. Hunter, C.C.A. Kan., 139 F.2d 828.

32. U.S.—Spencer v. Hunter, supra.

33. U.S.—Spencer v. Hunter, supra.

34. 26 Opinion Attorney General 555.

35. U.S.—Magon v. U. S., Cal., 248 F. 201, 160 C.C.A. 279. 49 C.J. p 1201 note 40.

36. U.S.—Magon v. U. S., supra.

37. U.S.—Magon v. U. S., supra.

38. U.S.—Magon v. U. S., supra.

39. U.S.—Magon v. U. S., supra.

40. U.S.—Magon v. U. S., supra.

letter be communicated to the president and thereby influence his action.<sup>41</sup>

*Mailing or delivery of nonmailable matter with intent to kill or injure another.* The statute relating to the offense of depositing for mail or delivery by mail of certain nonmailable matter with intent to kill or injure another, 18 U.S.C.A. § 1716, creates two distinct offenses, one of which consists in depositing or causing to be deposited the non-mailable matter<sup>42</sup> and the other in delivering it or causing it to be delivered.<sup>43</sup>

Where the offense charged is depositing, or causing to be deposited for mailing and delivery, poison with intent to kill, etc., a designated person, it is not necessary to allege that the letter deposited for mailing was sent to any particular person, or at what point or post office it was addressed.<sup>44</sup> Where the offense alleged in the indictment is causing to be delivered by mail poison to a designated person with intent to injure him, it is sufficient to show a violation of the statute in this respect.<sup>45</sup> The indictment may also be so drawn as to include both offenses.<sup>46</sup> A conviction under the statute cannot be had on an indictment charging a violation of a postal regulation relating to the transmission through the mails of a composition containing poison, but held insufficient because the regulation was beyond the jurisdiction of the postmaster general.<sup>47</sup>

*Mailing prize-fight films.* Under a statute, now repealed, which prohibited the depositing of prize-fight films in the mails, it was held that a transportation by mail was not necessary to the offense.<sup>48</sup>

### § 38. Mailing Obscene, Lewd, or Lascivious Matter

#### a. In general

- b. Elements of offense
- c. Persons liable

#### a. In General

In accordance with statutory provisions, it is an offense knowingly to deposit for mailing or delivery any obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character.

In accordance with statutory provisions, 18 U.S.C.A. § 1461, which have been upheld as constitutional<sup>49</sup> and a valid exercise of the power to establish a postal system,<sup>50</sup> it is an offense knowingly to deposit for mailing or delivery any obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character.<sup>51</sup> The substance of the offense is the employment of, or attempt to employ, the mails for the transmission of obscene matter,<sup>52</sup> and, since the statute is applicable only to use of the mails, it is not objectionable as prohibiting the deposit of such matter in private depositories or other places over which congress has no control.<sup>53</sup> The purpose of the statute is to prevent the use of the mails to circulate or deliver matter to corrupt the morals of people.<sup>54</sup>

Construction of the statute must be reasonable, having regard to the manifest object had in view in its enactment,<sup>55</sup> but inasmuch as it is highly penal it cannot be construed to include acts not fairly within its letter and spirit.<sup>56</sup> It is not to be construed only by the specific words used in the statute, but its meaning must be arrived at from the general language used, the circumstances under which the thing was written, and in the light of the purposes of the particular act and evils sought to be remedied by its passage.<sup>57</sup> The words "obscene, lewd, or lascivious," as used in the statute, describe one and the same offense<sup>58</sup> and signify that form of

41. U.S.—U. S. v. French, D.C.Fla., 243 F. 785.  
49 C.J. p 1202 note 47.

42. U.S.—Murray v. U. S., W.Va., 247 F. 874, 160 C.C.A. 96.  
49 C.J. p 1202 note 49.

43. U.S.—Murray v. U. S., supra.

44. U.S.—Murray v. U. S., supra.  
49 C.J. p 1202 note 51.

45. U.S.—Estabrook v. U. S., C.C.A. Mo., 28 F.2d 150.  
49 C.J. p 1202 note 52.

46. U.S.—Kerr v. U. S., C.C.A.Cal., 11 F.2d 227, certiorari denied 46 S.Ct. 639, 271 U.S. 689, 70 L.Ed. 1153.  
49 C.J. p 1202 note 53.

47. U.S.—Bruce v. U. S., C.C.A.Md., 202 F. 98, 120 C.C.A. 370.  
49 C.J. p 1202 note 54.

48. U.S.—Atlanta Enterprises v. Crawford, D.C.Ga., 22 F.2d 834.

49. U.S.—Rebhuhn v. Cahill, D.C.N.Y., 31 F.Supp. 47.  
49 C.J. p 1190 note 11.

50. U.S.—Coomer v. U. S., Okl., 213 F. 1, 129 C.C.A. 617.

51. U.S.—U. S. v. Peller, C.A.N.Y., 170 F.2d 1006.

52. U.S.—U. S. v. Harris, D.C.Nev., 122 F. 551—U. S. v. Brazéan, C.C. R.I., 78 F. 464.

53. U.S.—Coomer v. U. S., Okl., 213 F. 1, 129 C.C.A. 617—Tyomies Pub. Co. v. U. S., Mich., 211 F. 385, 128 C.C.A. 47.

54. U.S.—Swearingen v. U. S., Kan., 16 S.Ct. 562, 161 U.S. 446, 40 L.Ed. 765.

49 C.J. p 1190 notes 12, 13.

55. U.S.—U. S. v. Rebhuhn, C.C.A. N.Y., 109 F.2d 512, certiorari denied Rebhuhn v. U. S., 60 S.Ct. 976, 310 U.S. 629, 84 L.Ed. 1399—U. S. v. Dennett, C.C.A.N.Y., 39 F.2d 564, 76 A.L.R. 1092—U. S. v. Males, D. C.Ind., 51 F. 41.

56. U.S.—U. S. v. Barlow, D.C.Utah, 56 F.Supp. 795, appeal dismissed 65 S.Ct. 25, 323 U.S. 805, 89 L.Ed. 642.

49 C.J. p 1191 note 15.

57. U.S.—Krause v. U. S., C.C.A.Md., 29 F.2d 248.

58. U.S.—Swearingen v. U. S., Kan., 16 S.Ct. 562, 161 U.S. 446, 40 L.Ed. 765.

immorality which has relation to sexual impurity.<sup>59</sup> The words have the same meaning as is given to them at common law<sup>60</sup> in prosecutions for obscene libel.<sup>61</sup>

**Matter inclosed in envelope or wrapper.** The mailing of a sealed letter containing obscene matter in an envelope on which nothing appears but the name and address of the sender is a violation of the statute,<sup>62</sup> but the mailing of such sealed letters addressed to the sender himself is not an offense.<sup>63</sup> Books,<sup>64</sup> newspapers,<sup>65</sup> writings,<sup>66</sup> or other publications<sup>67</sup> of an obscene, lewd, or lascivious character are not rendered mailable by sealing them in envelopes or otherwise wrapping them up.

**Film.** Exposed film, although undeveloped, constitutes a picture or print within the meaning of the statute,<sup>68</sup> and hence the mailing of an exposed film which on being developed will reveal pictures of an obscene or lewd character is a violation of the statute.<sup>69</sup>

**Matter objectionable in part only.** In order to constitute an offense under the statute it is not essential that the entire contents of the matter mailed should be nonmailable;<sup>70</sup> nor is it essential to the commission of the offense that the offender's responsibility for its being put in the mail should ex-

tend to its entire contents.<sup>71</sup>

**Use of decoy letters.** It is not an objection to a conviction of sending obscene, lewd, or lascivious matter through the mail that the matter was sent in response to a decoy letter written by a government officer.<sup>72</sup>

## b. Elements of Offense

In order to constitute a violation of the statute the matter sent by mail must have a tendency to corrupt and deprave the morals of those whose minds are open to such influences. Knowledge of the contents of the matter mailed is a necessary element of the offense, but if the contents are known to the sender intent is immaterial.

In order to constitute a violation of the statute the matter sent by mail must have a tendency to corrupt and deprave the morals of those whose minds are open to such influences and into whose hands it may fall by arousing or implanting in such minds lewd or lascivious thoughts or sexual desires,<sup>73</sup> or the matter must be such as may be characterized as filthy.<sup>74</sup> The mere fact that the writing is concerned with matters pertaining to the sexes or with sexual relations is not sufficient to bring it within the statute,<sup>75</sup> and so the mailing of serious works of physiology, medicine, science, and sex instruction expressed in decent language ordinarily do not vio-

59. U.S.—U. S. v. Barlow, D.C.Utah, 56 F.Supp. 795, appeal dismissed 65 S.Ct. 25, 323 U.S. 805, 89 L.Ed. 642—Rebhuhn v. Cahill, D.C.N.Y., 31 F.Supp. 47.

49 C.J. p 1191 note 18.

60. U.S.—Knowles v. U. S., S.D., 170 F. 409, 95 C.C.A. 579.

49 C.J. p 1191 note 19.

61. U.S.—U. S. v. Barlow, D.C.Utah, 56 F.Supp. 795, appeal dismissed 65 S.Ct. 25, 323 U.S. 805, 89 L.Ed. 642—Rebhuhn v. Cahill, D.C.N.Y., 31 F.Supp. 47.

49 C.J. p 1191 note 20.

62. U.S.—Andrews v. U. S., Cal., 16 S.Ct. 798, 162 U.S. 420, 40 L.Ed. 1023.

49 C.J. p 1193 notes 45, 46.

**Under former statute** which did not in terms include letters, it was held that no offense was committed by depositing in the mails an obscene letter inclosed in an envelope or wrapper upon which there is nothing but the name and address of the sender.—U. S. v. Chase, Mass., 10 S. Ct. 756, 135 U.S. 255, 34 L.Ed. 117—49 C.J. p 1192 note 43 [a].

63. U.S.—U. S. v. Reinheimer, D.C. Pa., 233 F. 545.

49 C.J. p 1193 note 47.

64. U.S.—U. S. v. Nathan, D.C.Iowa, 61 F. 936.

65. U.S.—U. S. v. Janes, D.C.Cal., 74 F. 545.

66. U.S.—U. S. v. Gaylord, D.C.Ill., 50 F. 410.

67. U.S.—U. S. v. Peller, C.A.N.Y., 170 F.2d 1006.

68. **Motion picture film** U.S.—U. S. v. Peller, C.A.N.Y., 170 F.2d 1006.

69. U.S.—U. S. v. Peller, supra.

70. U.S.—Griffin v. U. S., Mass., 248 F. 6, 160 C.C.A. 146.

49 C.J. p 1193 note 52.

71. U.S.—U. S. v. Harman, D.C.Kan., 38 F. 827.

72. U.S.—Weathers v. U. S., C.C.A. Fla., 117 F.2d 585.

49 C.J. p 1193 note 55.

**Entrapment and instigation generally** see Criminal Law § 45.

73. U.S.—U. S. v. Barlow, D.C.Utah, 56 F.Supp. 795, appeal dismissed 65 S.Ct. 25, 323 U.S. 805, 89 L.Ed. 642.

49 C.J. p 1191 note 24.

**The test for determining whether matter is obscene, lewd, or lascivious within the statute is whether its language has a tendency to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands it may fall by arousing or implanting in such minds lewd or lascivious thoughts or desires.**—U. S. v. Goldstein, D.C.

N.J., 73 F.Supp. 875—U. S. v. Barlow, D.C.Utah, 56 F.Supp. 795, appeal dismissed 65 S.Ct. 25, 323 U.S. 805, 89 L.Ed. 642—U. S. v. Bebout, D. C.Ohio, 28 F. 522—49 C.J. p 1191 note 21.

## Advocacy of plural marriages

Editorials advocating restoration of celestial or plural marriages because God allegedly has restored the principle thereof, did not contain obscene, lewd or lascivious matter within the statute.—U. S. v. Barlow, D.C.Utah, 56 F.Supp. 795, appeal dismissed 65 S.Ct. 25, 323 U.S. 805, 89 L.Ed. 642.

## 74. Corruption of minds and morals

(1) Letters characterized as filthy under a statute which declares unmailable "every obscene, lewd, or lascivious, and every filthy book . . . letter" etc., are unmailable although they are not calculated to corrupt the addressee's minds and morals.—U. S. v. Limehouse, S.C., 52 S.Ct. 412, 285 U.S. 424, 76 L.Ed. 843—U. S. v. Dempsey, D.C.Ark., 188 F. 450.

(2) The actual effect on the mind of the recipient is immaterial.—Verner v. U. S., C.A.Wash., 183 F.2d 184.

**Letter held filthy within statute**—U.S.—Verner v. U. S., supra.

75. U.S.—U. S. v. Goldstein, D.C.N. J., 73 F.Supp. 875.

late the statute<sup>76</sup> unless the publication is such as will so arouse the salacity of the reader as to outweigh any literary, scientific, or other merits it may possess.<sup>77</sup> The statute is not violated by mailing matter which is coarse, vulgar, indecent, abusive, scurrilous, or even libelous,<sup>78</sup> unless the matter may be characterized as filthy.<sup>79</sup> The fact that language is libelous will not take it out of the inhibition of the statute, if it is otherwise of such a character as to bring it within the meaning of the statute.<sup>80</sup>

**Nature of words used.** In order to justify a conviction under the statute it is not essential that the letter or publication alleged to be nonmailable be in any particular words,<sup>81</sup> but its evil character may appear in the structure of the sentences, and either directly or indirectly by innuendo or suggestion, or in the thought conveyed.<sup>82</sup> While there is some authority to the contrary,<sup>83</sup> the better view is that, where the necessary inference from the words in the matter mailed is obscene, it is not essential to constitute the offense that the words used were themselves obscene.<sup>84</sup> Nevertheless, if the letter or publication is in itself unobjectionable on its face, the sender cannot be convicted on an undisclosed motive or intent.<sup>85</sup>

**Knowledge, intent, or motive.** Knowledge of the contents of the letters, writing, publication, etc., deposited for mailing or delivery at the time of so depositing them is an indispensable element of the offense denounced by the statute.<sup>86</sup> If matter so

deposited is of a nonmailable character and the contents thereof are known to the sender, he is guilty of a violation of the statute regardless of his intent or motive in sending it,<sup>87</sup> and, accordingly, it is not a defense that his motive was good.<sup>88</sup> It is not material that the sender did not regard the matter to be of the character forbidden by statute to be carried through the mails.<sup>89</sup>

**Prepayment of postage.** Prepayment of postage is not a constituent of the offense of sending obscene matter through the mail,<sup>90</sup> there being no statutory requirement to that effect.<sup>91</sup>

**Depositing in mail.** It is an indispensable element of the offense that the nonmailable matter be deposited for mailing and delivery.<sup>92</sup> When the other elements of the offense are present, the offense is completed by depositing the nonmailable matter in the mail,<sup>93</sup> and it is not necessary to constitute the offense that the matter should be delivered to the sender or to any other person.<sup>94</sup>

### c. Persons Liable

Corporations, as well as individuals, may be guilty of the offense of depositing an obscene publication in the mail. It is not essential to a conviction that the accused personally deposited the nonmailable matter in the mail; it is sufficient if the act was done with his authorization, or with his knowledge and consent.

Corporations, as well as individuals, may be guilty of the offense of depositing an obscene publication in the mail.<sup>95</sup> It is not essential to the offense of mailing nonmailable matter that it should have been

76. U.S.—U. S. v. Dennett, C.C.A.N. Y., 39 F.2d 564, 76 A.L.R. 1092.

77. U.S.—U. S. v. Goldstein, D.C.N. J., 73 F.Supp. 875.  
49 C.J. p 1191 note 24 [a], [b].

**Publication of obscene matter as educational treatise**

The statute against mailing obscene matter does not intend that treatment of sex in writing be reduced to the standard of a child's library, but it does not intend that the publication of obscene and licentious accounts of ordinary sexual relation shall be justified under the guise of publishing an educational treatise.—U. S. v. Goldstein, supra.

78. U.S.—Dysart v. U. S., Tex., 47 S. Ct. 234, 272 U.S. 655, 71 L.Ed. 461.  
49 C.J. p 1191 note 26.

79. U.S.—U. S. v. Limehouse, S.C., 52 S.Ct. 412, 285 U.S. 424, 76 L.Ed. 843.

80. U.S.—U. S. v. Clifford, C.C.W. Va., 104 F. 296.

81. U.S.—Sales v. U. S., Mo., 258 F. 597, 169 C.C.A. 537—U. S. v. Moore, D.C.Mo., 129 F. 159.

82. U.S.—Sales v. U. S., Mo., 258 F. 597, 169 C.C.A. 537.  
49 C.J. p 1192 note 29.

83. U.S.—U. S. v. Lamkin, C.C.Va., 73 F. 459.

84. U.S.—U. S. v. Goldstein, D.C.N. J., 73 F.Supp. 875.  
49 C.J. p 1192 note 31.

**Offering matter for sale**

Letter offering photographs and reading matter for sale at stated prices was held obscene within the statute.—O'Neal v. U. S., C.C.A.Ill., 56 F.2d 51.

85. U.S.—Sales v. U. S., Mo., 258 F. 597, 169 C.C.A. 537.  
49 C.J. p 1192 note 32.

86. U.S.—Price v. U. S., Cal., 17 S. Ct. 366, 165 U.S. 311, 41 L.Ed. 727.  
49 C.J. p 1192 note 33.

87. U.S.—Verner v. U. S., C.A. Wash., 183 F.2d 184—U. S. v. Dennett, C.C.A.N.Y., 39 F.2d 564, 76 A.L.R. 1092.

49 C.J. p 1192 note 34.

**Intent not controlling**

U.S.—U. S. v. Goldstein, D.C.N.J., 73 F.Supp. 875.

88. U.S.—U. S. v. Dennett, C.C.A.N. Y., 39 F.2d 564, 76 A.L.R. 1092.  
49 C.J. p 1192 note 35.

89. U.S.—Rosen v. U. S., N.Y., 16 S. Ct. 434, 161 U.S. 29, 40 L.Ed. 606.  
49 C.J. p 1192 note 36.

90. U.S.—U. S. v. Harris, D.C.Nev., 122 F. 551—U. S. v. Janes, D.C.Cal., 74 F. 545.

91. U.S.—U. S. v. Harris, D.C.Nev., 122 F. 551.

92. U.S.—U. S. v. Brazeau, C.C.R.I., 78 F. 464.  
49 C.J. p 1192 note 39.

93. U.S.—U. S. v. Strewl, C.C.A.N. Y., 99 F.2d 474, certiorari denied Strewl v. U. S., 59 S.Ct. 489, 306 U.S. 638, 83 L.Ed. 1039, rehearing denied 59 S.Ct. 590, 306 U.S. 668, 83 L.Ed. 1063, motion denied 162 F.2d 819, certiorari denied 68 S.Ct. 92, 332 U.S. 801, 92 L.Ed. 381.  
49 C.J. p 1192 note 41.

94. U.S.—Ackley v. U. S., Mo., 200 F. 217, 118 C.C.A. 403.

95. U.S.—U. S. v. New York Herald Co., C.C.N.Y., 159 F. 296.

personally deposited in the mail by accused himself.<sup>96</sup> It is sufficient if the act was authorized by him<sup>97</sup> or that it was committed with his knowledge and acquiescence;<sup>98</sup> and it has even been held that he may be liable if the objectionable matter is deposited in the mail as a natural and probable consequence of an act intentionally done by him with knowledge that such will be its natural and probable effect.<sup>99</sup>

*Aider or abettor.* It has been held that one who prepares for another an obscene communication knowing that he will deposit it in the mail may be indicted and convicted as a principal under a statute providing that whoever directly commits any act constituting an offense defined in any law of the United States or aids, abets, induces, or procures its commission is a principal.<sup>1</sup>

### § 39. — Indictment

- a. In general
- b. Setting out obscene matter
- c. Knowledge of contents of matter mailed
- d. Issues, proof, and variance

#### a. In General

The indictment must be sufficiently definite to advise the accused of the charge and to enable him to avail himself of his conviction or acquittal as a protection against further prosecution for the same offense.

Under the general rules the indictment must disclose the nature of the offense with sufficient definiteness to advise accused with what he is charged and to enable him to avail himself of his conviction or acquittal as a protection against further prosecution for the same offense.<sup>2</sup> It is sufficient to allege that the publication mailed was "obscene, lewd, and lascivious" without adding "and of an in-

decent character,"<sup>3</sup> but the addition of the word "indecent" will not render the indictment bad.<sup>4</sup>

While it has been held that an indictment for sending through the mail obscene, lewd, or lascivious matter will be sufficient if it describes the particular matter so as to identify it and then allege in the language of the statute that it was of the character therein described,<sup>5</sup> it has also been held necessary that the indictment should allege that the matter mailed was of the character declared nonmailable by the statute and that it is not sufficient merely to set out a copy of the matter mailed, leaving its nonmailable character to be inferred therefrom,<sup>6</sup> and that an indictment defective in this respect is not cured by the conclusion of a subsequent count "contrary to the form of the statute."<sup>7</sup> In accordance with the rule that it is not essential to the commission of the offense that the entire contents of the publication be objectionable, it is not necessary for the indictment to allege that the entire publication containing the alleged nonmailable matter was nonmailable.<sup>8</sup>

It has been held that an indictment sufficiently charges that defendant deposited an obscene letter in the post office "for mailing and delivery," although not in that precise language, where the plain and reasonable meaning of the language used was that such was the purpose with which the letter was deposited in the post office.<sup>9</sup> It will not be sufficient to allege in general terms that newspapers containing obscene matter were "deposited for mailing and delivery,"<sup>10</sup> it must be alleged that the newspapers were addressed or that direction was given for mailing or delivery.<sup>11</sup>

*Innuendo.* It is not necessary to add anything by way of innuendo to an indictment which sets out the articles alleged to be nonmailable, if no meaning

96. U.S.—*Demolli v. U. S.*, Colo., 144 F. 363, 75 C.C.A. 365, 6 L.R.A., N.S., 424, 7 Ann.Cas. 121.  
49 C.J. p 1193 note 57.

97. U.S.—*Bates v. U. S.*, C.C.III., 10 F. 92, 10 Biss. 70.

98. U.S.—*Burton v. U. S.*, Minn., 142 F. 57, 73 C.C.A. 243.  
49 C.J. p 1193 note 59.

99. U.S.—*Demolli v. U. S.*, Colo., 144 F. 363, 75 C.C.A. 365, 6 L.R.A., N.S., 424.  
49 C.J. p 1193 note 60.

1. *Hawaii*.—*U. S. v. Popov*, 4 Hawaii Fed. 386.  
49 C.J. p 1193 note 62.

2. U.S.—*Winters v. U. S.*, Kan., 201 F. 845, 120 C.C.A. 175, certiorari

denied 33 S.Ct. 773, 229 U.S. 614, 57 L.Ed. 1352.  
49 C.J. p 1193 note 65.

3. U.S.—*U. S. v. O'Donnell*, C.C.N.Y., 165 F. 218.  
49 C.J. p 1194 note 66.

4. U.S.—*Lockhart v. U. S.*, S.D., 250 F. 610, 162 C.C.A. 626.

5. U.S.—*Bates v. U. S.*, C.C.III., 10 F. 92, 10 Biss. 70.

6. U.S.—*U. S. v. Clifford*, C.C.W.Va., 104 F. 296.

7. U.S.—*U. S. v. Clifford*, *supra*.

8. U.S.—*Coomer v. U. S.*, Okl., 213 F. 1, 129 C.C.A. 617.

Pictures comprising part of publication  
On a prosecution for depositing in

the mails alleged nonmailable pictures, the indictment need not refer to the entire publication of which the pictures were only a portion, the language accompanying the pictures not being alleged to be obscene and it only being necessary that the jury should consider so much of the context as is essential to a proper understanding of what is claimed to be in violation of the statute.—*Tyomies Pub. Co. v. U. S.*, Mich., 211 F. 385, 128 C.C.A. 47.

9. U.S.—*Rinker v. U. S.*, Kan., 151 F. 755, 81 C.C.A. 379.  
49 C.J. p 1195 note 87.

10. U.S.—*U. S. v. Brazeau*, C.C.R.I., 78 F. 464.

11. U.S.—*U. S. v. Brazeau*, *supra*.  
49 C.J. p 1195-note 89.

for the language is claimed except such as it would convey to any ordinary reader.<sup>12</sup>

*Matter of defense.* Since the statute contains no exceptions to the rule making obscene publications nonmailable, the fact that a publication which would ordinarily be classed as within its meaning might lawfully be sent to certain persons does not render it necessary to aver in the indictment that it was not sent to such persons, it being matter of defense to show that it was sent to such persons.<sup>13</sup>

#### b. Setting Out Obscene Matter

The indictment may omit the obscene matter as being of such a character as is not proper to be spread upon the records of the court, provided the crime charged is described sufficiently to inform the accused of the nature of the charge against him.

The constitutional right of accused to be informed of the nature and cause of the accusation against him is not infringed by the omission from the indictment of indecent and obscene matter, alleged as not proper to be spread upon the records of the court,<sup>14</sup> provided the crime charged, however general the language used, is so described as reasonably to inform accused of the nature of the charge sought to be established against him;<sup>15</sup> and in such case accused may apply to the court before the trial is entered on for a bill of particulars, showing what parts of the paper would be relied on by the prosecution as being obscene, lewd, and lascivious, which motion will be granted or refused, as the court, in the exercise of a sound legal discretion, may find necessary to the ends of justice.<sup>16</sup> Nevertheless, if the indictment omits to set out the offensive matter as being of such a character as is not proper to be spread upon the records of the court, there should be sufficient in the indictment to describe the thing alleged to have been mailed and to distinguish it from other matter so that accused may be apprised with reasonable certainty of the identical matter which he is charged with having deposited in the mails.<sup>17</sup>

#### c. Knowledge of Contents of Matter Mailed

The indictment must contain an allegation that the accused had knowledge of the contents of the matter mailed at the time of mailing.

Since knowledge of the contents of the matter mailed at the time of mailing is an indispensable element of the offense, an indictment which contains no allegation of such knowledge is fatally defective.<sup>18</sup> It has been held that an allegation that accused "did unlawfully and knowingly deposit" in the mails certain obscene matter is insufficient for this purpose, if objection is taken on motion to quash before trial<sup>19</sup> or by demurrer;<sup>20</sup> but it has been held that an allegation that accused "unlawfully, wilfully and knowingly," "unlawfully and knowingly," or "knowingly" deposited certain obscene matter in the mail, if defective for the purpose of charging knowledge of the offensive character of the matter mailed, is at least sufficient after verdict,<sup>21</sup> the view being taken that the defect, if any, is one of form only.<sup>22</sup> An averment that accused knowingly deposited, in a post office for mailing, circulars giving information how, where, or by whom and by what means obscene, lewd, and lascivious books might be obtained, and that defendant unlawfully and knowingly meant and intended thereby to give such information, is a sufficient averment that defendant knew the character and contents of such circulars, and it is not necessary to set them out or further to characterize or describe the books referred to therein other than to aver that they are obscene, lewd, and lascivious.<sup>23</sup>

#### d. Issues, Proof, and Variance

General rules as to issues, proof, and variance apply in prosecutions for sending obscene matter through the mails.

General rules as to issues, proof, and variance, as considered in Indictments and Informations §§ 244-270, apply in prosecutions for sending obscene matter through the mails.<sup>24</sup>

12. U.S.—Lockhart v. U. S., S.D., 250 F. 610, 162 C.C.A. 636.

13. U.S.—U. S. v. Clarke, D.C.Mo., 38 F. 500.

14. U.S.—Bartell v. U. S., S.D., 33 S.Ct. 383, 227 U.S. 427, 57 L.Ed. 583.

49 C.J. p 1194 note 69.

15. U.S.—Rosen v. U. S., N.Y., 16 S. Ct. 434, 161 U.S. 29, 40 L.Ed. 606.

49 C.J. p 1194 note 70.

16. U.S.—Bartell v. U. S., S.D., 33 S.Ct. 383, 227 U.S. 427, 57 L.Ed. 583.

49 C.J. p 1194 note 71.

17. U.S.—Winters v. U. S., Kan., 201 F. 845, 120 C.C.A. 175, certiorari denied 33 S.Ct. 773, 229 U.S. 614, 57 L.Ed. 1352.

49 C.J. p 1194 note 72.

18. U.S.—U. S. v. Clifford, C.C.W. Va., 104 F. 296.

49 C.J. p 1195 note 80.

19. U.S.—U. S. v. Reid, D.C.Mich., 73 F. 289.

20. U.S.—U. S. v. Clifford, C.C.W. Va., 104 F. 296.

21. U.S.—Price v. U. S., Cal., 17 S. Ct. 366, 165 U.S. 311, 41 L.Ed. 727.

49 C.J. p 1195 note 83.

22. U.S.—U. S. v. Reid, D.C.Mich., 73 F. 289.

49 C.J. p 1195 note 84.

23. U.S.—Shepard v. U. S., Utah, 160 F. 584, 87 C.C.A. 436, certiorari denied 29 S.Ct. 682, 212 U.S. 571, 53 L.Ed. 655.

24. U.S.—U. S. v. Rebhuhn, C.C.A. N.Y., 109 F.2d 512, certiorari denied Rebhuhn v. U. S., 60 S.Ct. 976, 310 U.S. 629, 84 L.Ed. 1399.

49 C.J. p 1195 note 4.



# § 40. — Evidence

General rules of evidence in criminal cases apply in prosecutions for mailing obscene, lewd, or lascivious matter.

In accordance with the rule in criminal cases generally, in a prosecution for mailing obscene, lewd, or lascivious matter, the prosecution has the burden of proving every essential element of the offense.<sup>25</sup> Where the publication is of some scientific or literary value so that it could lawfully pass through the mails if directed to properly qualified persons, the prosecution must prove that accused has abused the conditional privilege which the law gives him.<sup>26</sup>

**Admissibility.** Rules for the admissibility of evidence in criminal cases generally are applicable in a prosecution for mailing obscene, lewd, or lascivious matter.<sup>27</sup> Correspondence by a post office official carried on with accused through the mails for the sole purpose of obtaining evidence on which to base the prosecution is admissible.<sup>28</sup> Where the particular portions of the writing claimed to be obscene are marked, other portions thereof cannot be read in evidence;<sup>29</sup> nor can clauses of alleged similar character be read from other books by way of illustration.<sup>30</sup> Proof of the reputation for chastity of the addressee of the letter alleged to be nonmailable is irrelevant and inadmissible.<sup>31</sup> Evidence as to the effect of letters on the minds and conduct of the recipients thereof is not admissible on the issue whether the letters were obscene, lewd, or filthy.<sup>32</sup>

*Weight and sufficiency* of the evidence is governed by general rules.<sup>33</sup> The elements of the offense must be proved beyond a reasonable doubt,<sup>34</sup> but they may be proved by circumstantial as well as direct evidence.<sup>35</sup> Failure to introduce the envelopes in which obscene matter was mailed does not necessarily constitute failure to prove that such matter was sent through the mails.<sup>36</sup>

# § 41. — Trial

General principles applicable in the trial of criminal cases apply in prosecutions for mailing obscene, lewd, or lascivious matter.

In accordance with general principles applicable in the trial of criminal cases, as a general rule, in prosecutions for sending obscene, lewd, or lascivious matter through the mails, the question whether or not matter is "obscene," "lewd," or "lascivious" is one for the jury, under appropriate instructions from the court as to the meaning of these terms as contemplated by the statute under which the indictment was framed.<sup>37</sup> Nevertheless, it is for the court to determine in the first instance whether matter claimed to have been obscene, lewd, or lascivious is capable of having such tendency;<sup>38</sup> and if it has no such tendency,<sup>39</sup> or could not by any reasonable interpretation be held to come within the prohibition of that statute,<sup>40</sup> the court may so instruct the jury as a matter of law. A verdict for accused should not be directed if there is evidence to support the charge,<sup>41</sup> but the sufficiency of the

25. U.S.—U. S. v. Bebout, D.C.Ohio, 28 F. 522.

49 C.J. p 1196 note 6 [a].

26. U.S.—U. S. v. Rebhuhn, C.C.A. N.Y., 109 F.2d 512, certiorari denied Rebhuhn v. U. S., 60 S.Ct. 976, 310 U.S. 629, 84 L.Ed. 1399.

27. **Identity of obscene matter**

Evidence tending to prove the identity of the obscene matter is admissible.—Tyomies Pub. Co. v. U. S., Mich., 211 F. 385, 128 C.C.A. 47—49 C.J. p 1196 note 9.

**Motive or intent**

A letter is not admissible to show motive or intent where it has no bearing on the matter.—U. S. v. North, D.C.Or., 184 F. 151.

**Opinions of experts** are admissible to show the standing of the challenged publication.—U. S. v. Rebhuhn, C.C.A.N.Y., 109 F.2d 512, certiorari denied Rebhuhn v. U. S., 60 S.Ct. 976, 310 U.S. 629, 84 L.Ed. 1399.

28. U.S.—Andrews v. U. S., Cal., 16 S.Ct. 798, 162 U.S. 420, 40 L.Ed. 1023.

29. U.S.—U. S. v. Bennett, C.C.N.Y., 24 F.Cas.No.14,571, 16 Blatchf. 338.

30. U.S.—U. S. v. Bennett, supra.

31. U.S.—Robbins v. U. S., Cal., 229 F. 987, 144 C.C.A. 269.  
49 C.J. p 1196 note 15.

32. U.S.—Verner v. U. S., C.A. Wash., 183 F.2d 184.

33. **Evidence held sufficient**

(1) To charge defendant with knowledge of contents of books.—U. S. v. Rebhuhn, C.C.A.N.Y., 109 F. 2d 512, certiorari denied Rebhuhn v. U. S., 60 S.Ct. 976, 310 U.S. 629, 84 L.Ed. 1399.

(2) To connect defendants with mailing.—U. S. v. Rebhuhn, C.C.A.N.Y., 109 F.2d 512, certiorari denied Rebhuhn v. U. S., 60 S.Ct. 976, 310 U.S. 629, 84 L.Ed. 1399—Dampier v. U. S., C.C.A.Idaho, 2 F.2d 329.

(3) To show other matters.—U. S. v. Rebhuhn, C.C.A.N.Y., 109 F.2d 512, certiorari denied Rebhuhn v. U. S., 60 S.Ct. 976, 310 U.S. 629, 84 L.Ed. 1399—49 C.J. p 1196 note 18 [a].

**Evidence held insufficient for conviction**

U.S.—U. S. v. Goldstein, D.C.N.J., 73 F.Supp. 875.

34. U.S.—Lau Fook Kau v. U. S., C. C.A.Hawaii, 34 F.2d 86—U. S. v. Bebout, D.C.Ohio, 28 F. 522.

49 C.J. p 1196 note 20.

35. U.S.—Ross v. U. S., C.C.A.Cal., 103 F.2d 600—O'Neal v. U. S., C.C. A.Ill., 56 F.2d 51.

49 C.J. p 1196 note 21.

36. U.S.—O'Neal v. U. S., supra.

37. U.S.—Burststein v. U. S., C.A.Cal., 178 F.2d 665.

49 C.J. p 1196 note 25.

38. U.S.—U. S. v. Dennett, C.C.A.N.Y., 39 F.2d 564, 76 A.L.R. 1092—U. S. v. Barlow, D.C.Utah, 56 F. Supp. 795, appeal dismissed 65 S. Ct. 25, 323 U.S. 805, 89 L.Ed. 642.  
49 C.J. p 1196 note 26.

39. U.S.—Rosen v. U. S., N.Y., 16 S. Ct. 434, 161 U.S. 29, 40 L.Ed. 606.

40. U.S.—U. S. v. Journal Co., Inc., D.C.Va., 197 F. 415.

41. U.S.—Dunlop v. U. S., Ill., 17 S. Ct. 375, 165 U.S. 486, 41 L.Ed. 799—Dysart v. U. S., C.C.A.Tex., 4 F. 2d 765, reversed on other grounds 47 S.Ct. 234, 272 U.S. 655, 71 L.Ed. 461.

evidence for submission to the jury is for the court to decide.<sup>42</sup>

General rules in criminal cases apply to the giving and refusing of instructions in prosecutions for this offense.<sup>43</sup>

## § 42. Information as to Obtaining Obscene, Lewd, or Lascivious Matter

Under the statute which makes it an offense to give information as to the obtaining of obscene, lewd, or lascivious matter by depositing or causing to be deposited for mailing or delivery any card, letter, or circular containing such information, the offense is complete when a card, letter, or circular giving such information is deposited in the mail.

It is made an offense by statute, 18 U.S.C.A. § 1461, to give information directly or indirectly, where, how, from whom, or by what means, any obscene, lewd, lascivious, or filthy book, pamphlet, picture, writing, or other publication of an indecent character may be obtained by depositing or causing to be deposited for mailing or delivery any written or printed card, letter, or circular containing such information. The gist of the offense is the mailing of matter giving information of the character therein designated,<sup>44</sup> and the offense is complete when a card, letter, or circular giving such information is deposited in the mail.<sup>45</sup> The letter or circular giving the information need not describe the objectionable matter or state its character;<sup>46</sup> it is sufficient if the writing, although unobjectionable on its face, gives information as to where matter of the character specified in the statute can be obtained.<sup>47</sup> Also it is not necessary that an unlawful intent should exist as to any particular matter with respect to which the statute prohibits information to be given through the mails.<sup>48</sup>

*Indictment.* While it is proper in an indictment

for this offense that the card, circular, or letter giving the information should be so described or set out as to identify the offense,<sup>49</sup> it is not necessary that the card, circular, or letter be set forth in full,<sup>50</sup> and it is not necessary that all the words constituting the information should be pleaded with the particularity used in cases for libel and forgery.<sup>51</sup> It will be sufficient to describe the character of the book, pamphlet, or picture of which information is given and leave further disclosures to the introduction of evidence.<sup>52</sup> It is not necessary to allege that an unlawful intent existed as to any particular objectionable matter<sup>53</sup> or to allege ownership or possession of the objectionable matter since this is not an offense under the statute,<sup>54</sup> although an allegation of ownership is proper merely as the statement of a fact tending to interpret a letter.<sup>55</sup> In like manner, it is not necessary to allege that the information was given to one who inquired for or desired it<sup>56</sup> or that the letter actually conveyed the prohibited information to a particular person or persons.<sup>57</sup>

*Evidence and trial.* General rules with respect to evidence<sup>58</sup> and trial<sup>59</sup> apply in prosecutions for this offense.

## § 43. Information as to Preventing Conception or Procuring Abortion

In accordance with express statutory provisions, it is an offense for a person to mail information relating to the prevention of conception or to the procurement of abortion.

In accordance with the express provisions of the statute, 18 U.S.C.A. § 1461, it is an offense for a person to mail a written or printed card, circular, book, pamphlet, advertisement, or notice of any kind

### 42. Evidence held sufficient to go to jury

U.S.—Smith v. U. S., C.C.A.Tex., 63 F.2d 110.

43. U.S.—U. S. v. Levine, C.C.A.N.Y., 83 F.2d 156.

49 C.J. p 1196 note 23.

44. U.S.—Grimm v. U. S., Mo., 15 S.Ct. 470, 156 U.S. 604, 39 L.Ed. 550.

45. U.S.—U. S. v. Grimm, D.C.Mo., 50 F. 528, affirmed 15 S.Ct. 470, 156 U.S. 604, 39 L.Ed. 550.

46. U.S.—De Gignac v. U. S., Ill., 113 F. 197, 52 C.C.A. 71, certiorari denied 22 S.Ct. 941, 186 U.S. 482, 46 L.Ed. 1266.

47. U.S.—De Gignac v. U. S., supra.

49 C.J. p 1197 note 34.

48. U.S.—Grimm v. U. S., Mo., 15 S.

Ct. 470, 156 U.S. 604, 39 L.Ed. 550.

49 C.J. p 1197 note 36.

49. U.S.—Grimm v. U. S., Mo., 15 S.Ct. 470, 156 U.S. 604, 39 L.Ed. 550.

50. U.S.—U. S. v. Rebhuhn, C.C.A.N.Y., 109 F.2d 512, certiorari denied Rebhuhn v. U. S., 60 S.Ct. 976, 310 U.S. 629, 34 L.Ed. 1399.

51. U.S.—De Gignac v. U. S., Ill., 113 F. 197, 52 C.C.A. 71, certiorari denied 22 S.Ct. 941, 186 U.S. 482, 46 L.Ed. 1266.

49 C.J. p 1197 note 39.

52. U.S.—Grimm v. U. S., Mo., 15 S.Ct. 470, 156 U.S. 604, 39 L.Ed. 550.

49 C.J. p 1197 note 40.

53. U.S.—Grimm v. U. S., Mo., 15 S.Ct. 470, 156 U.S. 604, 39 L.Ed. 550.

54. U.S.—De Gignac v. U. S., Ill., 113 F. 197, 52 C.C.A. 71, certiorari

denied 22 S.Ct. 941, 186 U.S. 482, 46 L.Ed. 1266.

55. U.S.—Grimm v. U. S., Mo., 15 S.Ct. 470, 156 U.S. 604, 39 L.Ed. 550.

56. U.S.—De Gignac v. U. S., Ill., 113 F. 197, 52 C.C.A. 71, certiorari denied 22 S.Ct. 941, 186 U.S. 482, 46 L.Ed. 1266.

57. U.S.—U. S. v. Grimm, C.C.Mo., 45 F. 558.

### 58. Evidence held admissible

U.S.—U. S. v. Grimm, D.C.Mo., 50 F. 528, affirmed 15 S.Ct. 470, 156 U.S. 604, 39 L.Ed. 550.

49 C.J. p 1197 note 34 [a].

### Evidence held sufficient

U.S.—Burststein v. U. S., C.A.Cal., 178 F.2d 665.

### 59. Instructions held proper

U.S.—Burststein v. U. S., supra.

giving information directly or indirectly where, how, or from whom articles designed or intended to prevent conception or to produce abortion may be obtained,<sup>60</sup> or information as to where and by whom any act by any person of any kind for procuring or producing an abortion will be done or performed.<sup>61</sup> The statute must be given a reasonable construction.<sup>62</sup>

The offense of sending through the mails information as to where articles to prevent conception may be obtained<sup>63</sup> or as to how or where or by whom an abortion may be procured<sup>64</sup> is complete when the matter containing the information is deposited for mailing. In order to constitute the offense of sending through the mails information as to the place where an article to produce an abortion may be obtained, it is not necessary that the article should, in fact, be at the place designated.<sup>65</sup> If a person uses the mails to give information that he elects, intends, or is willing to perform an illegal abortion he is guilty, although he does not expressly or impliedly bind himself to operate;<sup>66</sup> but, while no obligation, promise, or assurance is essential, there must be the indication of a positive intent that the act will be done and not merely that it may perhaps be performed.<sup>67</sup> Where one mails matter within the prohibition of the statute, it is not material whether the inducement to do so was sent to him by mail or otherwise.<sup>68</sup>

**Knowledge and intent.** In order to render a person liable for mailing information as to where articles to prevent conception might be obtained, it is necessary that he have an intent that the articles to which the information pertained should be used for the condemned purposes.<sup>69</sup> Actual knowledge

that the articles were nonmailable is unnecessary where the articles were designed, adapted, and intended for the prevention of conception.<sup>70</sup> An intent to violate the statute need not be apparent from the matter mailed,<sup>71</sup> and a letter, although innocent on its face, may convey the prohibited information.<sup>72</sup>

**Description of articles.** It is not necessary that the matter mailed, giving information as to where or from whom articles for the prevention of conception or the production of abortion may be obtained, should indicate any particular article or thing or its properties.<sup>73</sup> It will be sufficient that accused states in the matter mailed that the remedies can be furnished by him and where and under what circumstances they can be obtained.<sup>74</sup>

**Efficacy of article or possibility of legitimate use.** It is not a defense to a prosecution for sending matter through the mail giving information as to where articles to prevent conception may be procured that the article would not be effective for that purpose<sup>75</sup> or that the article may have a legitimate use.<sup>76</sup>

**Decoy letters.** It is not an objection to a conviction for sending through the mail matter containing information as to preventing conception or procuring abortion that the matter was sent in response to a decoy letter written by a government officer or agent,<sup>77</sup> or even by a private citizen desirous of enforcing the law;<sup>78</sup> that the letter was never delivered to the sender or any other person;<sup>79</sup> or that, by reason of the fact that the information was sent in response to a decoy letter signed by a fictitious name, it could never have reached the person addressed.<sup>80</sup> Where the decoy letter is sent

60. U.S.—Ackley v. U. S., Mo., 200 F. 217, 118 C.C.A. 403.  
49 C.J. p 1197 note 49.

**What constitutes notice**

A written slip of paper without address or signature, giving information as to how an article designed to prevent conception may be obtained, is a notice within the meaning of the statute, although not volunteered, but sent in reply to a letter asking for the information.—U. S. v. Foote, C.C.N.Y., 25 F.Cas.No. 15,128, 13 Blatchf. 418.

**Information given indirectly**

If an advertisement gives the forbidden information indirectly it is as much within the prohibition of the law as though it were given in direct terms.—U. S. v. Kelly, C.C.Nev., 26 F.Cas.No.15,514, 3 Sawy. 556.

61. U.S.—Bours v. U. S., Wis., 229 F. 960, 144 C.C.A. 242.—U. S. v. Breinholm, D.C.Wash., 208 F. 492.

62. U.S.—Davis v. U. S., C.C.A.Ohio, 62 F.2d 473.

63. U.S.—Ackley v. U. S., Mo., 200 F. 217, 118 C.C.A. 403.

64. D.C.—Kemp v. U. S., 41 App.D. C. 539, 51 L.R.A.N.S., 825.

65. U.S.—U. S. v. Bott, C.C.N.Y., 24 F.Cas.No.14,626, 11 Blatchf. 346.

66. U.S.—Bours v. U. S., Wis., 229 F. 960, 144 C.C.A. 242.

67. U.S.—Bours v. U. S., supra.

68. U.S.—Ackley v. U. S., Mo., 200 F. 217, 118 C.C.A. 403.

69. U.S.—Davis v. U. S., C.C.A.Ohio, 62 F.2d 473.

70. U.S.—U. S. v. Currey, D.C.Or., 206 F. 322.

71. U.S.—Bours v. U. S., Wis., 229 F. 960, 144 C.C.A. 242.  
49 C.J. p 1197 note 53.

72. U.S.—Bours v. U. S., supra.  
49 C.J. p 1197 note 53.

73. U.S.—U. S. v. Kelly, C.C.Nev., 26 F.Cas.No.15,514, 3 Sawy. 556.

74. U.S.—U. S. v. Kelly, D.C.Mass., 26 F.Cas.No.15,515, 2 Sprague 77.

75. U.S.—Ackley v. U. S., Mo., 200 F. 217, 118 C.C.A. 403.—Bates v. U. S., C.C.Ill., 10 F. 92, 10 Biss. 70.

76. U.S.—Ackley v. U. S., Mo., 200 F. 217, 118 C.C.A. 403.

77. U.S.—Weathers v. U. S., C.C.A. Fla., 126 F.2d 118, certiorari denied 62 S.Ct. 1267, 316 U.S. 681, 86 L. Ed. 1754.  
49 C.J. p 1198 note 62.

78. U.S.—Ackley v. U. S., Mo., 200 F. 217, 118 C.C.A. 403.

79. U.S.—Ackley v. U. S., supra.

80. D.C.—Kemp v. U. S., 41 App.D. C. 539, 51 L.R.A.N.S., 825.

by a government officer, it is immaterial whether he acted on his own initiative or on complaints from others.<sup>81</sup>

#### § 44. — Indictment

- a. Prevention of conception
- b. Obtaining articles for procuring abortion
- c. Where or by whom abortion may be had

##### a. Prevention of Conception

An indictment for mailing a letter containing information as to the procurement of an article intended to prevent conception must be certain and specific, and it must state the nature of the article.

In accordance with well-settled rules governing indictments generally, an indictment for mailing a letter containing information where, or from whom, an article intended to prevent conception may be obtained must contain averments of the facts which constitute the offense intended to be charged so certain and specific that accused not only may know the particular charge against him,<sup>82</sup> but may be able to prove a judgment of conviction or acquittal in bar of a second prosecution arising out of the same facts;<sup>83</sup> and if the indictment satisfies this requirement it is sufficient.<sup>84</sup> The indictment must state what the article consisted of,<sup>85</sup> but if several articles are mentioned in the indictment it need not specify or allege which of them is relied on for conviction.<sup>86</sup> It is sufficient to allege that accused knew that the letter mailed gave the prohibited information,<sup>87</sup> and it is not necessary to allege that accused knew that the articles described therein were nonmailable where the indictment shows that they were designed and adapted and intended for preventing conception.<sup>88</sup> Since it is the mailing of the letter which is denounced by the statute, and not the writing of it or causing it to be written, it is unnecessary to allege that defendant wrote the letter or caused it to be written,<sup>89</sup> nor it is neces-

sary to allege that the letter containing the information was ever delivered to any person;<sup>90</sup> it will be sufficient for the indictment to show that it was deposited in the post office and was thus mailed for delivery, since the deposit for mailing constitutes the offense.<sup>91</sup>

##### b. Obtaining Articles for Procuring Abortion

An indictment for mailing a letter giving information as to the obtaining of an article for the procuring of an abortion must in some way identify the letter, and for that purpose the letter should be set out in the indictment or a sufficient reason given for not doing so.

An indictment for mailing a letter giving information where, how, and from whom might be obtained an article for the procuring of abortion must in some way identify the letter to the end that accused may be informed of the nature of the charge<sup>92</sup> and that a judgment may be pleaded in bar to a second prosecution for the same offense,<sup>93</sup> and for that purpose the letter should be set out in the indictment<sup>94</sup> or a sufficient reason given for not doing so;<sup>95</sup> but it is not necessary that the letter set out be such that a stranger would know it gave the information<sup>96</sup> or that the indictment should contain explanatory matter to show that it gave the information.<sup>97</sup>

*Variance.* Rules relating to variance between allegations and proof in criminal prosecutions generally, as considered in Indictments and Informations §§ 254-270, apply in prosecutions for the offense under consideration.<sup>98</sup>

##### c. Where or by Whom Abortion May Be Had

An indictment for giving information through the mails as to where or by whom an abortion may be had must contain allegations sufficient to sustain the charge.

An indictment for giving information through the mails as to where or by whom any act or operation for procuring or producing abortion will be done or performed must contain allegations sufficient to sustain the charge,<sup>99</sup> and, where the words,

81. D.C.—Kemp v. U. S., *supra*.

82. U.S.—U. S. v. Pupke, D.C.Mo., 133 F. 243.

83. U.S.—Floren v. U. S., N.D., 186 F. 961, 108 C.C.A. 577.  
49 C.J. p 1198 note 73.

84. U.S.—Pilson v. U. S., N.Y., 249 F. 328, 161 C.C.A. 336.  
49 C.J. p 1198 note 74.

85. U.S.—U. S. v. Pupke, D.C.Mo., 133 F. 243.  
49 C.J. p 1198 note 75.

86. U.S.—U. S. v. Currey, D.C.Or., 206 F. 322.

87. U.S.—U. S. v. Currey, *supra*.

72 C.J.S.—22

88. U.S.—U. S. v. Currey, *supra*.  
49 C.J. p 1198 note 78.

89. U.S.—U. S. v. Currey, *supra*.

90. U.S.—Ackley v. U. S., Mo., 200 F. 217, 118 C.C.A. 403.

91. U.S.—Ackley v. U. S., *supra*.

92. U.S.—U. S. v. Tubbs, D.C.N.Y., 94 F. 356.

93. U.S.—U. S. v. Tubbs, *supra*.  
49 C.J. p 1198 note 85.

94. U.S.—U. S. v. Tubbs, *supra*—  
U. S. v. Kaltmeyer, C.C.Mo., 16 F. 760, 5 McCrary 260.

95. U.S.—U. S. v. Tubbs, D.C.N.Y., 94 F. 356.

49 C.J. p 1199 note 87.

96. U.S.—U. S. v. Breinholt, D.C. Wash., 208 F. 492.

49 C.J. p 1199 note 88.

97. U.S.—Grimm v. U. S., Mo., 15 S. Ct. 470, 156 U.S. 604, 609, 39 L.Ed. 550.

49 C.J. p 1199 note 89.

98. *Variance held not fatal*  
D.C.—Kemp v. U. S., 41 App.D.C. 539,  
541, 51 L.R.A.N.S., 825.

49 C.J. p 1199 note 92.

99. U.S.—Bours v. U. S., Wis., 229 F. 960, 144 C.C.A. 242.

*Indictment held sufficient*

U.S.—Weathers v. U. S., C.C.A.Fla., 117 F.2d 585.

49 C.J. p 1199 note 95 [a].

in a letter mailed do not apparently convey the prohibited information, it must charge that they were intended to give such information.<sup>1</sup> An indictment for this offense is fatally defective in charging that accused by his letter intended to give information only as to where or by whom an abortion "might" be produced, not as to where or by whom it "would" be produced,<sup>2</sup> and in failing to allege facts that would support a construction of the letter as conveying and intending to convey information that the act would be performed.<sup>3</sup> An indictment which charges that accused knowingly deposited in the post office a letter, giving information as to where an abortion could be performed, sufficiently charges that accused knew of the contents of the letter.<sup>4</sup>

#### § 45. — Evidence and Trial

General rules of evidence and trial apply in prosecutions for mailing information pertaining to the prevention of conception or the procurement of abortion.

General rules of evidence<sup>5</sup> and trial<sup>6</sup> apply in prosecutions for mailing information pertaining to the prevention of conception or the procurement of abortion.

#### § 46. Articles Designed to Procure Abortion or Prevent Conception

In order to constitute a violation of the statute making it an offense to mail articles designed for procuring abortion or preventing conception, it is sufficient that the article was put up in a form and described in a manner intended to insure its unlawful use by anyone desiring to accomplish that result, and into whose hands it might fall.

In order to constitute a violation of the statute making it an offense to mail articles designed for preventing conception or producing abortion, 18 U. S.C.A. § 1461, it is sufficient that the article, when

deposited, was put up in a form, and described in a manner, calculated to insure its use to prevent conception or procure abortion, by anyone desiring to accomplish that result, and into whose hands it might fall.<sup>7</sup> Accused cannot show, in defense, that the article deposited in the mail would not in fact have any tendency to prevent conception or procure abortion, and that its harmless character was known to him when he deposited it.<sup>8</sup> The offense is complete when such objectionable article is knowingly deposited in the mail.<sup>9</sup>

#### § 47. Indecent, Libelous, Defamatory, or Threatening Matter on Envelopes, Wrappers, or Postal Cards

In accordance with statutory provisions, it is a criminal offense for any person knowingly to deposit in the mail matter upon the envelope or outside cover or wrapper of which, or any postal card upon which, any delineations, epithets, terms, or language of an indecent, lewd, lascivious, or obscene character, or of a libelous, scurrilous, defamatory, or threatening character, is written or printed.

In accordance with statutory provisions, 18 U.S.C.A. §§ 1463, 1718, it is a criminal offense for any person knowingly to deposit in the mail matter upon the envelope or outside cover or wrapper of which, or any postal card upon which, any delineations, epithets, terms, or language of an indecent, lewd, lascivious, or obscene character,<sup>10</sup> or of a libelous, scurrilous, defamatory, or threatening character,<sup>11</sup> or calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another,<sup>12</sup> is written or printed, or otherwise impressed or apparent. Within the meaning of the statute, "delineation" signifies representations expressed otherwise than by language.<sup>13</sup> The offense defined by these provisions is distinct and separate from the

1. U.S.—Bours v. U. S., Wis., 229 F. 960, 144 C.C.A. 242.

2. U.S.—Bours v. U. S., supra.

3. U.S.—Bours v. U. S., supra.

4. U.S.—Stayton v. U. S., Tex., 213 F. 224, 129 C.C.A. 568, certiorari denied 34 S.Ct. 998, 234 U.S. 764, 58 L.Ed. 1582.

5. U.S.—U. S. v. Kline, D.C.Pa., 201 F. 954.

49 C.J. p 1199 note 3.

#### Intent

Evidence showing absence of intent that article or thing described in circular deposited in mails should be used for unlawful purposes to prevent conception is material since intent is an essential element of the offense, and exclusion thereof is er-

ror.—Davis v. U. S., C.C.A.Ohio, 62 F.2d 473.

#### 6. Question for jury

In prosecution for mailing letter concerning procurement of abortion, evidence whether there was unlawful entrapment of defendant who sent letter in answer to decoy letter sent out by post office inspector was for jury.—Weathers v. U. S., C.C.A.Wis., 126 F.2d 118, certiorari denied 62 S.Ct. 1267, 316 U.S. 681, 86 L. Ed. 1754.

7. U.S.—U. S. v. Bott, C.C.N.Y., 24 F.Cas.No.14,626, 11 Blatchf. 346.

8. U.S.—U. S. v. Bott, supra.

9. U.S.—U. S. v. Bott, supra.

10. U.S.—U. S. v. Davis, C.C.Tenn., 38 F. 326.

49 C.J. p 1200 note 10.

11. Mo.—Griffin v. Pembroke, 64 Mo. App. 263.

49 C.J. p 1200 note 11.

12. U.S.—Warren v. U. S., Kan., 183 F. 718, 106 C.C.A. 156, 33 L.R.A., N.S., 800.

49 C.J. p 1200 note 12.

13. U.S.—U. S. v. Dodge, D.C.Pa., 70 F. 235.

49 C.J. p 1200 note 9—13 C.J. p 474 note 64 [a].

#### "Display" applicable to delineations

The term "display," as used in the statute prohibiting the mailing of any matter in envelopes with a style of display intended to reflect on the character or conduct of another, is as applicable to delineations as it is to writing or printing.—U. S. v. Dodge, supra.

offense of mailing obscene, lewd, or lascivious matter.<sup>14</sup>

The statute is intended to operate as a protection against delineations or words which will convey or imply insult, threat, or harm to the person addressed, operating either directly in injuring his feelings, or indirectly by attracting the notice of other persons, and raising injurious inferences,<sup>15</sup> and also to protect the government from being made a tool or assistant in the exposure of the matter therein described.<sup>16</sup> The protection concerning the mail service contained in this statute is clearly within the purview of congress<sup>17</sup> and is not objectionable as denying or abridging freedom of speech, as considered in Constitutional Law § 213 a. The statute, being of a penal character, should be strictly construed,<sup>18</sup> and there can be no extension of the statute by construction beyond its terms.<sup>19</sup> Both the purpose and the terms of the act fairly construed must appear to have been violated in order to sustain a charge.<sup>20</sup>

In order to render matter nonmailable as being of libelous, scurrilous, defamatory,<sup>21</sup> or threatening<sup>22</sup> character, or as being calculated and obviously intended to reflect injuriously on the character or conduct of another,<sup>23</sup> this fact must be apparent from an inspection of the envelope, cover, wrapper, or postal card on which it is written. The design and intent must appear from that, and not from extrinsic facts averred or shown.<sup>24</sup> According to some decisions the statute cannot be extended by construction to cases where there is no outside

wrapper or cover at all, even though such cases may be within the reason and policy of the statute,<sup>25</sup> and it has accordingly been held that a newspaper<sup>26</sup> or circular<sup>27</sup> without a wrapper, the address being written on the paper or circular itself, of a scurrilous and defamatory nature, and so folded as to expose it to view, is not nonmailable matter within the statute; but there is also authority directly to the contrary.<sup>28</sup> It has also been held that a string or cord wrapped around papers or other mailable matter with a tag attached thereto for the purpose of writing the address is an outside wrapper within the meaning of the statute,<sup>29</sup> and that the writing of any of the matter prohibited by the statute on such tag is written upon an outside wrapper and subjects the writer to the penalty provided by the statute.<sup>30</sup>

The other elements of the offense being present, the contents of the envelope or wrapper, upon which the prohibited matter appears, are immaterial.<sup>31</sup> Inasmuch as a prosecution under the statute does not proceed as one for libel, it is immaterial whether the objectionable language be true or false,<sup>32</sup> and it is also immaterial whether accused was actuated by public spirit or private malice.<sup>33</sup>

In a prosecution for violation of the statute, the court must first determine as a matter of law whether the writing in question is within the prohibition of the statute<sup>34</sup> and should consider whether there is any privilege attaching to the writing in question.<sup>35</sup>

14. U.S.—Botsford v. U. S., Ohio, 215 F. 510, 132 C.C.A. 22, certiorari denied 34 S.Ct. 998, 234 U.S. 763, 58 L.Ed. 1581.  
49 C.J. p 1200 note 14.

15. U.S.—In re Barber, D.C.Wis., 75 F. 980—U. S. v. Nathan, D.C.Iowa, 61 F. 936.

16. Hawaii.—U. S. v. Uchiyama, 3 Hawaii Fed. 431.  
49 C.J. p 1200 note 16.

17. U.S.—In re Barber, D.C.Wis., 75 F. 980.

18. U.S.—Corpus Juris cited in McKnight v. U. S., C.C.A.Cal., 78 F.2d 931, 932.  
49 C.J. p 1200 note 19.

19. U.S.—In re Barber, D.C.Wis., 75 F. 980.

Charge of mismanagement of finances written on a postal card is not nonmailable matter within the statute.—McKnight v. U. S., C.C.A.Cal., 78 F.2d 931.

20. U.S.—U. S. v. Higgins, D.C.Ky., 194 F. 539.  
49 C.J. p 1200 note 21.

21. U.S.—McKnight v. U. S., C.C.A.Cal., 78 F.2d 931.  
49 C.J. p 1200 note 24.

22. Mo.—Griffin v. Pembroke, 64 Mo. App. 263.

23. U.S.—U. S. v. Davidson, D.C.N.Y., 244 F. 523—U. S. v. Brown, C. Ct., 43 F. 135.

24. U.S.—U. S. v. Brown, supra.  
Mo.—Griffin v. Pembroke, 64 Mo.App. 263.

25. U.S.—U. S. v. Higgins, D.C.Ky., 194 F. 539—U. S. v. Gee, D.C.Mich., 45 F. 194.  
49 C.J. p 1201 note 28.

26. U.S.—U. S. v. Higgins, D.C.Ky., 194 F. 539.

27. U.S.—U. S. v. Gee, D.C.Mich., 45 F. 194.

28. U.S.—U. S. v. Burnell, D.C.Iowa, 75 F. 824.  
49 C.J. p 1201 note 31.

29. Hawaii.—U. S. v. Uchiyama, 3 Hawaii Fed. 431.

30. Hawaii.—U. S. v. Uchiyama, supra.

31. U.S.—U. S. v. Anderson, D.C. Mont., 268 F. 696.  
49 C.J. p 1201 note 33 ½.

32. U.S.—Warren v. U. S., Kan., 183 F. 718, 160 C.C.A. 156, 33 L.R.A., N.S., 800.

33. U.S.—Warren v. U. S., supra.

34. U.S.—McKnight v. U. S., C.C.A.Cal., 78 F.2d 931.

35. U.S.—McKnight v. U. S., supra.

#### Political propaganda

Where postal cards, mailed as political propaganda to defeat candidate's election, did not per se offend statute, charge that cards were libelous, where it was not contended that charges were false, must be considered in light of rule that publication of truthful information regarding candidates for public office is for interest of public, and therefore privileged.—McKnight v. U. S., supra.

## § 48. — Mail Matter from Creditors and Collection Agencies

The statute prohibiting the mailing of libelous, defamatory, or threatening matter on wrappers or envelopes covers mail matter from creditors and collection agencies addressed to debtors and bearing externally visible charges or imputations of habitual refusal to pay debts, threats of suits, etc.

The statute prohibiting the mailing of libelous, defamatory, or threatening matter on wrappers or envelopes, 18 U.S.C.A. § 1718, covers mail matter from creditors and collection agencies addressed to debtors and bearing externally visible charges or imputations of habitual refusal to pay debts, threats of suits, etc.,<sup>36</sup> not alone because it is of a threatening character, but because it is calculated and obviously intended to reflect injuriously on the character and conduct of others,<sup>37</sup> whether upon a letter<sup>38</sup> or a postal card.<sup>39</sup>

## § 49. Matter in Furtherance of Scheme or Artifice to Defraud, Etc.

- a. In general
- b. Gist of offense
- c. Elements of offense
- d. Persons liable
- e. Defenses

### a. In General

The statute making it an offense to use the mail in furtherance of schemes or artifices to defraud is a valid exercise of the constitutional power of congress and should be construed broadly to carry out its purpose.

A violation of the statute, 18 U.S.C.A. § 1341, making it an offense to use the mail in furtherance of schemes or artifices to defraud is an offense against the United States.<sup>40</sup> The statute is a valid exercise of the constitutional power of congress,<sup>41</sup> and is not in contravention of any provision of the federal Constitution.<sup>42</sup> Congress may make the use of the mails in furtherance of the scheme denounced by the statute a criminal offense, although it is without power to forbid the scheme itself,<sup>43</sup> and it may make each putting of a letter in a post office a separate offense without rendering the statute objectionable on the ground that it infringes the constitutional prohibition of inflicting cruel and unusual punishment.<sup>44</sup>

The purpose of the statute is to prevent the use of the mails in aid of schemes and artifices to defraud others of their money and property,<sup>45</sup> and the statute must be construed broadly to carry out its purpose.<sup>46</sup> It has not been repealed by the provisions of the Securities Act, 15 U.S.C.A. § 77 q, which prohibit the fraudulent sale of securities by mail.<sup>47</sup>

### b. Gist of Offense

The gist of the offense under the mail-fraud statute is not the scheme to defraud but the use, or attempted use, of the mails in execution of the scheme.

The gist of the offense under the mail-fraud statute is not the scheme to defraud,<sup>48</sup> or the devising thereof,<sup>49</sup> or the fraudulent design which is

36. U.S.—U. S. v. Prendergast, D.C. Or., 237 F. 410.  
49 C.J. p 1201 note 35.

**Dunning letters enclosed in black envelopes**

The sending through the mail by a collection agency of dunning letters, inclosed in black envelopes, addressed in white lettering, the purpose of which was universally known to the post office employees, is a "delineation," within the act.—U. S. v. Dodge, D.C.Pa., 70 F. 235.

37. U.S.—U. S. v. Prendergast, D.C. Or., 237 F. 410.

38. U.S.—U. S. v. Brown, C.C.Vt., 43 F. 135.

49 C.J. p 1201 note 37.

39. U.S.—U. S. v. Prendergast, D.C. Or., 237 F. 410.

49 C.J. p 1201 note 38.

40. U.S.—Stryker v. U. S., C.C.A. Colo., 95 F.2d 601.

Using mails to defraud in violation of Securities Act, 15 U.S.C.A. § 77, see Licenses §§ 72-78.

**State law**

(1) The crimes of using the mails to defraud and conspiring so to do are crimes cognizable only by the

laws of the United States and are unknown to the New York law.—People ex rel. Marks v. Brophy, 58 N.E.2d 497, 293 N.Y. 469.

(2) The mail-fraud statute is not dependent on state law in the sense that what is done must also be a crime thereunder.—U. S. v. Randle, D.C.La., 39 F.Supp. 759.

41. U.S.—Badders v. U. S., Kan., 36 S.Ct. 367, 240 U.S. 391, 60 L.Ed. 706—U. S. v. Loring, D.C.Ill., 91 F. 881.

Exclusion of matter from mails under power of congress see *supra* § 21.

42. U.S.—Badders v. U. S., Kan., 36 S.Ct. 367, 240 U.S. 391, 60 L.Ed. 706—New v. U. S., Cal., 245 F. 710, 158 C.C.A. 112, certiorari denied 38 S.Ct. 334, 246 U.S. 665, 62 L.Ed. 928.

43. U.S.—Badders v. U. S., Kan., 36 S.Ct. 367, 240 U.S. 391, 60 L.Ed. 706.

44. U.S.—Badders v. U. S., *supra*.

45. U.S.—Stryker v. U. S., C.C.A. Colo., 95 F.2d 601—Fournier v. U. S., C.C.A.Ill., 58 F.2d 3, certiorari denied 52 S.Ct. 647, 286 U.S. 565,

76 L.Ed. 1297—U. S. v. Procter & Gamble Co., D.C.Mass., 47 F.Supp. 676—Wilson v. U. S., N.Y., 190 F. 427, 111 C.C.A. 231.  
49 C.J. p 1202 note 61.

46. U.S.—Spillers v. U. S., C.C.A. Tex., 47 F.2d 893—U. S. v. Procter & Gamble Co., D.C.Mass., 47 F. Supp. 676.

The word "defraud" must be construed broadly.—U. S. v. Buckner, C. C.A.N.Y., 108 F.2d 921, certiorari denied Buckner v. U. S., 60 S.Ct. 613, 309 U.S. 669, 84 L.Ed. 1016—U. S. v. McKay, D.C.Mich., 45 F.Supp. 1007.

47. U.S.—Edwards v. U. S., Okl., 61 S.Ct. 669, 312 U.S. 473, 85 L.Ed. 957—U. S. v. Rollnick, C.C.A.N.Y., 91 F.2d 911—U. S. v. Montgomery, D.C.N.M., 21 F.Supp. 770—U. S. v. Alluan, D.C.Tex., 13 F.Supp. 289.

48. U.S.—Boatright v. U. S., C.C.A. Mo., 105 F.2d 737—Worthington v. U. S., C.C.A.Ill., 64 F.2d 936—Cochran v. U. S., C.C.A.Minn., 41 F.2d 193.

49 C.J. p 1203 note 62.

49. U.S.—Holmes v. U. S., C.C.A. Neb., 134 F.2d 125, certiorari denied 63 S.Ct. 1434, 319 U.S. 776, 87

merely an element of the offense,<sup>50</sup> but the use, or attempted use, of the mails in execution of the scheme;<sup>51</sup> and the mailing of a letter in execution of the unlawful scheme constitutes the corpus delicti.<sup>52</sup>

### c. Elements of Offense

- (1) In general
- (2) Scheme to defraud
- (3) Use of mails

#### (1) In General

The elements of the offense under the mail-fraud statute must be present to sustain a conviction.

The elements of the offense under the mail-fraud

L.Ed. 1722—Stapp v. U. S., C.C.A. Tex., 120 F.2d 898.

49 C.J. p 1203 note 63.

#### No crime

The devising of a scheme or artifice to defraud or to obtain money by means of fraud or false pretenses is not a crime under the mail-fraud statute.—Harper v. U. S., C.C.A.Mo., 143 F.2d 795—Baker v. U. S., C.C.A. Ark., 115 F.2d 533, certiorari denied 61 S.Ct. 711, 312 U.S. 692, 85 L.Ed. 1128, rehearing denied 61 S.Ct. 731, 312 U.S. 715, 85 L.Ed. 1128, 312 U.S. 715, 85 L.Ed. 1145; motion denied, C.C.A., 139 F.2d 721, rehearing denied 65 S.Ct. 1399, 325 U.S. 894, 89 L.Ed. 2005—Busch v. U. S., C.C.A. Mo., 52 F.2d 79, certiorari denied Greible v. U. S., 52 S.Ct. 209, 284 U.S. 687, 76 L.Ed. 580.

50. U.S.—Whitehead v. U. S., Ala., 245 F. 385, 157 C.C.A. 547, certiorari denied 38 S.Ct. 191, 245 U.S. 670, 62 L.Ed. 540.

51. U.S.—U. S. v. Crummer, C.C.A. Kan., 151 F.2d 958, certiorari denied 68 S.Ct. 704, 327 U.S. 785, 90 L.Ed. 1012—Weatherby v. U. S., C. C.A.Okl., 150 F.2d 465—Marshall v. U. S., C.C.A.Cal., 146 F.2d 618, 157 A.L.R. 241—U. S. v. Berg, C.C. A.N.J., 144 F.2d 173—Harper v. U. S., C.C.A.Mo., 143 F.2d 795—Mitchell v. U. S., C.C.A.N.M., 142 F.2d 480, certiorari denied 65 S.Ct. 49, 323 U.S. 747, 89 L.Ed. 598—Bozell v. U. S., C.C.A.Ohio, 139 F.2d 153, certiorari denied 64 S.Ct. 937, 321 U.S. 800, 88 L.Ed. 1087, rehearing denied 64 S.Ct. 1054, 322 U.S. 768, 88 L.Ed. 1594—Holmes v. U. S., C. C.A.Neb., 134 F.2d 125, certiorari denied 63 S.Ct. 1434, 319 U.S. 776, 87 L.Ed. 1722—Gates v. U. S., C.C. A.Colo., 122 F.2d 571, certiorari denied 62 S.Ct. 478, 314 U.S. 698, 86 L.Ed. 558, and 62 S.Ct. 483, 314 U.S. 698, 86 L.Ed. 558—Rosenberg v. U. S., C.C.A.N.M., 120 F.2d 935—Stapp v. U. S., C.C.A.Tex., 120 F.2d 898—Lelles v. U. S., C.C.A.Wash., 120 F.2d 447, certiorari denied 62

S.Ct. 108, 314 U.S. 626, 86 L.Ed. 503—U. S. v. Lowe, C.C.A.Wis., 115 F. 2d 596, certiorari denied Lowe v. U. S., 61 S.Ct. 441, 311 U.S. 717, 85 L.Ed. 466—Baker v. U. S., C.C.A. Ark., 115 F.2d 533, certiorari denied 61 S.Ct. 711, 312 U.S. 692, 85 L.Ed. 1128, rehearing denied 61 S. Ct. 731, 312 U.S. 715, 85 L.Ed. 1145, motion denied 139 F.2d 721. Rehearing denied 65 S.Ct. 1399, 325 U.S. 894, 89 L.Ed. 2005—U. S. v. Minnec, C.C.A.Ill., 104 F.2d 575, certiorari denied Minnec v. U. S., 60 S.Ct. 94, 308 U.S. 577, 84 L.Ed. 484—Stryker v. U. S., C.C.A.Colo., 95 F.2d 601—Mackett v. U. S., C. C.A.Wis., 90 F.2d 462—Lonergan v. U. S., C.C.A.Wash., 88 F.2d 591, reversed on other grounds 58 S.Ct. 430, 303 U.S. 33, 82 L.Ed. 630—Rude v. U. S., C.C.A.Colo., 74 F.2d 673—Hartzell v. U. S., C.C.A.Iowa, 72 F.2d 569, certiorari denied 55 S.Ct. 216, 293 U.S. 621, 79 L.Ed. 708—Armstrong v. U. S., C.C.A.N. M., 65 F.2d 853—Worthington v. U. S., C.C.A.Ill., 64 F.2d 936—Butler v. U. S., C.C.A.Utah, 53 F.2d 800—Busch v. U. S., C.C.A.Mo., 52 F. 2d 79, certiorari denied Greible v. U. S., 52 S.Ct. 209, 284 U.S. 687, 76 L.Ed. 580—U. S. v. Quimby, C.C.A. N.Y., 51 F.2d 167—Havener v. U. S., C.C.A.Kan., 49 F.2d 196, certiorari denied 52 S.Ct. 24, 284 U.S. 644, 76 L.Ed. 547—Cochran v. U. S., C.C.A.Minn., 41 F.2d 193—U. S. v. Corlin, D.C.Cal., 44 F.Supp. 940—U. S. v. Shecter, D.C.Pa., 35 F. Supp. 11—U. S. v. Brown, D.C.N.Y., 5 F.Supp. 81, affirmed, C.C.A., 79 F. 2d 321, certiorari denied McCarthy v. U. S., 56 S.Ct. 309, 296 U.S. 650, 80 L.Ed. 462—U. S. v. Rucker, D. C.Okl., 1 F.Supp. 590.

49 C.J. p 1203 note 65.

52. U.S.—U. S. v. Cohen, C.C.A.N. Y., 145 F.2d 82, certiorari denied 65 S.Ct. 558, 323 U.S. 799, 89 L.Ed. 637, four cases, and 65 S.Ct. 554, 323 U.S. 800, 89 L.Ed. 638—Bozell v. U. S., C.C.A.Ohio, 139 F.2d 153, certiorari denied 64 S.Ct. 937, 321

statute are a scheme to defraud, as discussed infra subdivision c (2) of this section, and a use of the mails to execute the scheme, or attempting to do so, as discussed infra subdivision c (3) of this section. Both of these elements must be present to sustain a conviction,<sup>53</sup> and the offense is complete and a conviction authorized if both elements are shown to exist.<sup>54</sup> The present statute is broader in its provisions than those of a former statute, and the offense consists of fewer elements.<sup>55</sup>

#### (2) Scheme to Defraud

- (a) In general
- (b) Intent to defraud
- (c) Representations used

U.S. 800, 88 L.Ed. 1087, rehearing denied 64 S.Ct. 1054, 322 U.S. 768, 88 L.Ed. 1594—U. S. v. Jones, C.C. N.Y., 10 F. 469, 20 Blatchf. 235.

53. U.S.—U. S. v. Berg, C.C.A.N.J., 144 F.2d 173—Cohen v. U. S., C.C. A.N.J., 50 F.2d 819—U. S. v. Decker, D.C.Md., 51 F.Supp. 15, affirmed, C.C.A., Decker v. U. S., 140 F.2d 378, 151 A.L.R. 754—U. S. v. Corlin, D.C.Cal., 44 F.Supp. 940.

49 C.J. p 1203 note 71.

54. U.S.—Decker v. U. S., C.C.A.Md., 140 F.2d 378, 151 A.L.R. 754—Clarke v. U. S., C.C.A.Wash., 132 F.2d 538, certiorari denied 63 S.Ct. 992, 318 U.S. 789, 87 L.Ed. 1155—Glover v. U. S., C.C.A.Ga., 125 F.2d 291, certiorari denied 62 S.Ct. 1280, 316 U.S. 690, 86 L.Ed. 1761—Weiss v. U. S., C.C.A.La., 122 F.2d 675, certiorari denied 62 S.Ct. 300, 314 U.S. 687, 86 L.Ed. 550, rehearing denied 62 S.Ct. 478, 314 U.S. 716, 86 L.Ed. 570—Norman v. U. S., C.C.A. Tenn., 100 F.2d 905, certiorari denied 59 S.Ct. 790, 306 U.S. 660, 83 L.Ed. 1057—Alexander v. U. S., C. C.A.Mo., 95 F.2d 873, certiorari denied 59 S.Ct. 99, 305 U.S. 637, 83 L.Ed. 409, Debeh v. U. S., 59 S.Ct. 99, 305 U.S. 637, 83 L.Ed. 409, Lindsay v. U. S., 59 S.Ct. 100, 305 U.S. 637, 83 L.Ed. 409 and 59 S.Ct. 100, 305 U.S. 637, 83 L.Ed. 410—Stryker v. U. S., C.C.A.Colo., 95 F. 2d 601—Hass v. U. S., C.C.A.Iowa, 93 F.2d 427—Butler v. U. S., C.C.A. Utah, 53 F.2d 800—U. S. v. Ames, D.C.N.Y., 39 F.Supp. 885.

D.C.—Deaver v. U. S., 155 F.2d 740, 81 U.S.App.D.C. 148, certiorari denied 67 S.Ct. 121, 329 U.S. 766, 91 L.Ed. 659.

49 C.J. p 1203 note 72.

55. U.S.—U. S. v. Goldman, D.C. Ohio, 207 F. 1002, affirmed 220 F. 57, 135 C.C.A. 625.

49 C.J. p 1203 note 68.



- (d) Lawfulness or unlawfulness of scheme
- (e) Success of scheme or efficacy to defraud
- (f) Benefit accruing to accused

(a) In General

The first element of the offense under the mail-fraud statute is a scheme devised, or intended to be devised, to defraud or for obtaining money or property by means of false or fraudulent pretenses. The statute includes any scheme or artifice to defraud or to obtain money or property by means of false or fraudulent pretenses.

The first element of the offense under the mail-fraud statute is a scheme devised, or intended to be devised, to defraud or for obtaining money or

property by means of false or fraudulent pretenses.<sup>56</sup> The statute includes any scheme or artifice of whatsoever nature, the purpose of which is to defraud or to obtain money or property by means of false or fraudulent pretenses,<sup>57</sup> provided the scheme is intended to be carried into effect,<sup>58</sup> and it is not limited to the particular frauds enumerated therein.<sup>59</sup> The word "devise," as used in the statute, it is said conveys the idea of being devious, contriving, disingenuous; a scheme or plan whose appearance differs from the reality; an artifice, trick, false pretense, or token.<sup>60</sup>

A scheme or artifice to defraud within the statute consists in forming some plan or devising some trick to perpetrate a fraud on another.<sup>61</sup> The

56. U.S.—Crosby v. U. S., C.A.Okl., 183 F.2d 373—U. S. v. Crummer, C.C.A.Kan., 151 F.2d 958, certiorari denied 66 S.Ct. 704, 327 U.S. 785, 90 L.Ed. 1012—Graham v. U. S., C.C.A.N.M., 120 F.2d 543—U. S. v. Momsen, C.C.A.Wis., 115 F.2d 635, certiorari denied Mosen v. U. S., 61 S.Ct. 805, 312 U.S. 701, 85 L.Ed. 1134—U. S. v. Lowe, C.C.A.Wis., 115 F.2d 596, certiorari denied Lowe v. U. S., 61 S.Ct. 441, 311 U.S. 717, 85 L.Ed. 466—Baker v. U. S., C.C.A.Ark., 115 F.2d 533, certiorari denied 61 S.Ct. 711, 312 U.S. 692, 85 L.Ed. 1128, rehearing denied 61 S.Ct. 731, 312 U.S. 715, 85 L.Ed. 1145; motion denied, C.C.A., 139 F.2d 721, rehearing denied 65 S.Ct. 1399, 325 U.S. 894, 89 L.Ed. 2005—Aiken v. U. S., C.C.A.S.C., 108 F.2d 182—U. S. v. Minnec, C.C.A.Ill., 104 F.2d 575, certiorari denied Minnec v. U. S., 60 S.Ct. 94, 308 U.S. 577, 84 L.Ed. 484—Mazurosky v. U. S., C.C.A.Or., 100 F.2d 958—Stryker v. U. S., C.C.A.Colo., 95 F.2d 601—Hass v. U. S., C.C.A.Iowa, 93 F.2d 427—Stumbo v. U. S., C.C.A.Ky., 90 F.2d 828, certiorari denied 58 S.Ct. 282, 302 U.S. 755, 82 L.Ed. 584—Rude v. U. S., C.C.A.Colo., 74 F.2d 673—Worthington v. U. S., C.C.A.Ill., 64 F.2d 936—Fournier v. U. S., C.C.A.Ill., 58 F.2d 3, certiorari denied 52 S.Ct. 647, 286 U.S. 565, 76 L.Ed. 1297—Cohen v. U. S., C.C.A.N.J., 50 F.2d 819—Barrett v. U. S., C.C.A.Mo., 33 F.2d 115—Havener v. U. S., C.C.A.Kan., 49 F.2d 196, certiorari denied 52 S.Ct. 24, 284 U.S. 644, 76 L.Ed. 547—U. S. v. Decker, D.C.Md., 51 F.Supp. 15, affirmed, C.C.A., Decker v. U. S., 140 F.2d 378, 151 A.L.R. 754—U. S. v. Corlin, D.C.Cal., 44 F.Supp. 940—U. S. v. Shecter, D.C.Pa., 35 F.Supp. 11—U. S. v. Graham, D.C.N.Y., 8 F.Supp. 87—U. S. v. Gasomiser Corp., D.C.Del., 7 F.R.D. 712.

49 C.J. p 1203 note 69.

57. U.S.—Foshay v. U. S., C.C.A.

Minn., 68 F.2d 205, certiorari denied 54 S.Ct. 531, 291 U.S. 674, 78 L.Ed. 1063—Fournier v. U. S., C.C.A.Ill., 58 F.2d 3, certiorari denied 52 S.Ct. 647, 286 U.S. 565, 76 L.Ed. 1297—U. S. v. McKay, D.C.Mich., 45 F.Supp. 1007.

49 C.J. p 1207 note 34, p 1208 note 41.

58. U.S.—Streep v. U. S., N.Y., 16 S.Ct. 244, 160 U.S. 128, 40 L.Ed. 365—Lemon v. U. S., Ark., 164 F. 953, 90 C.C.A. 617.

59. U.S.—MacKnight v. U. S., C.C.A.Mass., 263 F. 832, certiorari denied 40 S.Ct. 586, 253 U.S. 493, 64 L.Ed. 1029.

49 C.J. p 1208 note 40.

60. U.S.—Stockton v. U. S., Ill., 205 F. 462, 123 C.C.A. 530, 46 L.R.A., N.S., 936.

61. U.S.—U. S. v. Corlin, D.C.Cal., 44 F.Supp. 940—U. S. v. Dexter, D.C.Iowa, 154 F. 890.

**Schemes or artifices within statute**

(1) Use of checks to defraud.—U. S. v. Feldman, C.C.A.N.Y., 136 F. 2d 394, affirmed 64 S.Ct. 1082, 322 U.S. 487, 88 L.Ed. 1408, 154 A.L.R. 982, rehearing denied 65 S.Ct. 26, 323 U.S. 811, 89 L.Ed. 646—U. S. v. Lowe, C.C.A.Wis., 115 F.2d 596, certiorari denied Lowe v. U. S., 61 S.Ct. 441, 311 U.S. 717, 85 L.Ed. 466—Federman v. U. S., C.C.A.Ind., 36 F.2d 441, certiorari denied 50 S.Ct. 246, 281 U.S. 729, 74 L.Ed. 1146—U. S. v. Citrin, D.C.N.Y., 58 F.Supp. 766.

(2) Fraud by fiduciary.—U. S. v. Groves, C.C.A.N.Y., 122 F.2d 87, certiorari denied Groves v. U. S., 62 S.Ct. 135, 314 U.S. 670, 86 L.Ed. 536—U. S. v. Buckner, C.C.A.N.Y., 108 F.2d 921, certiorari denied Buckner v. U. S., 60 S.Ct. 613, 309 U.S. 669, 84 L.Ed. 1016.

(3) Scheme to obtain advantage by corrupting a public official.—Bradford v. U. S., C.C.A.La., 129 F.2d 274, affirmed 130 F.2d 630, certiorari denied 63 S.Ct. 205, 317 U.S. 683, 87 L.Ed. 547—Shushan v. U. S., C.C.A.

La., 117 F.2d 110, 133 A.L.R. 1040, certiorari denied 61 S.Ct. 1085, 313 U.S. 574, 85 L.Ed. 1531, rehearing denied 62 S.Ct. 53, 314 U.S. 706, 86 L.Ed. 564, certiorari denied Newman v. U. S., 61 S.Ct. 1086, 313 U.S. 574, 85 L.Ed. 1532, rehearing denied 62 S.Ct. 53, 314 U.S. 706, 86 L.Ed. 564, certiorari denied Waguespack v. U. S., 61 S.Ct. 1086, 313 U.S. 574, 85 L.Ed. 1532, rehearing denied 62 S.Ct. 53, 314 U.S. 706, 86 L.Ed. 564—U. S. v. McKay, D.C.Mich., 45 F.Supp. 1007.

(4) Scheme to induce purchase of stock.—Foshay v. U. S., C.C.A.Minn., 68 F.2d 205, certiorari denied 54 S.Ct. 531, 291 U.S. 674, 78 L.Ed. 1063—U. S. v. Brown, D.C.N.Y., 5 F.Supp. 81, affirmed, C.C.A., 79 F.2d 321, certiorari denied McCarthy v. U. S., 56 S.Ct. 309, 296 U.S. 650, 80 L.Ed. 462—49 C.J. p 1208 note 44 [e].

(5) Financial statements for purpose of obtaining credit.—U. S. v. Yorsaner, D.C.N.Y., 20 F.Supp. 902—49 C.J. p 1208 note 44 [b].

(6) Other schemes within statute.—U. S. v. Stever, Ky., 32 S.Ct. 51, 222 U.S. 167, 56 L.Ed. 145—Whitson v. U. S., C.C.A.Cal., 122 F.2d 1016—Shushan v. U. S., C.C.A.La., 117 F.2d 110, 133 A.L.R. 1040, certiorari denied 61 S.Ct. 1085, 313 U.S. 574, 85 L.Ed. 1531, rehearing denied 62 S.Ct. 53, 314 U.S. 706, 86 L.Ed. 564, certiorari denied Newman v. U. S., 61 S.Ct. 1086, 313 U.S. 574, 85 L.Ed. 1532, rehearing denied 62 S.Ct. 53, 314 U.S. 706, 86 L.Ed. 564, certiorari denied Miller v. U. S., 61 S.Ct. 1086, 313 U.S. 574, 85 L.Ed. 1532, rehearing denied 62 S.Ct. 53, 314 U.S. 706, 86 L.Ed. 564—U. S. v. Dillard, C.C.A.N.Y., 101 F.2d 829, certiorari denied

scheme to defraud condemned is not confined to devices by which it is intended that the customer shall receive nothing for his money,<sup>62</sup> but the statutory scheme may be found in any plan to get money or property of others by deceiving them as to the substantial identity of the thing which they are to receive in exchange.<sup>63</sup> So, a scheme whereby customers are to be induced to part with their money by leading them to believe they are receiving something different from, superior to, and worth more than what is actually being sold, is within the statute,<sup>64</sup> although the thing to be sold will approximate in commercial value the price to be asked and received.<sup>65</sup>

A single scheme to defraud may involve a multiplicity of ways and means of action and procedure,<sup>66</sup> and it may be such that the complete execution of it would involve the commission of more than one criminal offense.<sup>67</sup> In order to bring a scheme within the statute, it must be fraudulent in its inception,<sup>68</sup> but a scheme is not incomplete because ways and means for carrying it into ef-

fect are subsequently to be devised.<sup>69</sup> In order to sustain a conviction, there need not be a scheme definitely devised in the first instance with respect to the particular instruments of fraud<sup>70</sup> or the particular proposed victims;<sup>71</sup> it is sufficient if, after the devising of a scheme of general features, it is shown that, in the execution thereof, particular instruments and particular victims were developed and the use attempted to be made of them.<sup>72</sup> It is not necessary that the scheme should be fraudulent on its face.<sup>73</sup> Where a person who devised a scheme to defraud by use of the mails prior to the enactment of the statute continued his scheme thereafter, his continuance constitutes a devising of a scheme after the taking effect of the statute.<sup>74</sup>

As a general rule, the elements of fraud developed in civil cases are applicable to prosecutions under the statute.<sup>75</sup> It is not necessary that the scheme in furtherance of which the mails are used should constitute a fraud either at common law or by statute,<sup>76</sup> or give rise to a civil action

*Dilliard v. U. S.*, 59 S.Ct. 484, 306 U.S. 635, *Koven v. U. S.*, 59 S.Ct. 484, 83 L.Ed. 1036, and *Donegan v. U. S.*, 59 S.Ct. 484, 83 L.Ed. 1036—*Alexander v. U. S.*, C.C.A.Mo., 95 F.2d 873, certiorari denied 59 S.Ct. 99, 305 U.S. 637, 83 L.Ed. 409, *Debeh v. U. S.*, 59 S.Ct. 99, 305 U.S. 637, 83 L.Ed. 409, *Lindsay v. U. S.*, 59 S.Ct. 100, 305 U.S. 637, 83 L.Ed. 409 and 59 S.Ct. 100, 305 U.S. 637, 83 L.Ed. 410—*Stephens v. U. S.*, C.C.A.Cal., 41 F.2d 440, certiorari denied *Spicer v. U. S.*, 51 S.Ct. 83, 282 U.S. 880, 75 L.Ed. 777—*U. S. v. McKay*, D.C.Mich., 45 F.Supp. 1007—*U. S. v. Classic*, D.C.La., 35 F.Supp. 457—*O'Hara v. U. S.*, Ohio, 129 F. 551, 64 C.C.A. 81—49 C.J. p 1208 note 44.

#### Schemes or artifices not within statute

*U.S.—Epstein v. U. S.*, C.C.A.Mich., 174 F.2d 754—*Rude v. U. S.*, C.C.A.Colo., 74 F.2d 673, 49 C.J. p 1209 note 45.

62. *D.C.—Deaver v. U. S.*, 155 F.2d 740, 81 U.S.App.D.C. 148, certiorari denied 67 S.Ct. 121, 329 U.S. 766, 91 L.Ed. 659, 49 C.J. p 1208 note 39.

63. *U.S.—U. S. v. Holdsworth*, D.C.Me., 77 F.Supp. 148—*Charles v. U. S.*, C.C.A.S.C., 213 F. 707—*Harrison v. U. S.*, C.C.A.Ohio, 200 F. 662, *D.C.—Deaver v. U. S.*, 155 F.2d 740, 81 U.S.App.D.C. 148, certiorari denied 67 S.Ct. 121, 329 U.S. 766, 91 L.Ed. 659.

64. *U.S.—Rude v. U. S.*, C.C.A.Colo., 74 F.2d 673—*U. S. v. Holdsworth*, D.C.Me., 77 F.Supp. 148.

65. *U.S.—U. S. v. New South Farm*

& Home Co., Fla., 36 S.Ct. 505, 507, 241 U.S. 64, 60 L.Ed. 890—*Rude v. U. S.*, C.C.A.Colo., 74 F.2d 673—*U. S. v. Holdsworth*, D.C.Me., 77 F.Supp. 148.

66. *U.S.—Mansfield v. U. S.*, C.C.A.Tex., 155 F.2d 952, certiorari denied *Brown v. U. S.*, 67 S.Ct. 364, 329 U.S. 792, 91 L.Ed. 678—*U. S. v. MacAlpine*, C.C.A.Ill., 129 F.2d 737—*Weiss v. U. S.*, C.C.A.Ill., 122 F.2d 675, certiorari denied 62 S.Ct. 300, 314 U.S. 687, 86 L.Ed. 550, rehearing denied 62 S.Ct. 478, 314 U.S. 716, 86 L.Ed. 570.

67. *U.S.—Mansfield v. U. S.*, C.C.A.Tex., 155 F.2d 952, certiorari denied *Brown v. U. S.*, 67 S.Ct. 364, 329 U.S. 792, 91 L.Ed. 678—*U. S. v. MacAlpine*, C.C.A.Ill., 129 F.2d 737—*Weiss v. U. S.*, C.C.A.La., 122 F.2d 675, certiorari denied 62 S.Ct. 300, 314 U.S. 687, 86 L.Ed. 550, rehearing denied 62 S.Ct. 478, 314 U.S. 716, 86 L.Ed. 570—*U. S. v. Procter & Gamble Co.*, D.C.Mass., 47 F.Supp. 676.

68. *U.S.—U. S. v. Bachman*, D.C.Pa., 246 F. 1009, 49 C.J. p 1207 note 35.

69. *U.S.—Weiss v. U. S.*, C.C.A.La., 122 F.2d 675, certiorari denied 62 S.Ct. 300, 314 U.S. 687, 86 L.Ed. 550, rehearing denied 62 S.Ct. 478, 314 U.S. 716, 86 L.Ed. 570—*Goldman v. U. S.*, Ohio, 220 F. 57, 135 C.C.A. 635.

70. *U.S.—U. S. v. Farmer*, D.C.N.Y., 218 F. 929.

49 C.J. p 1203 note 75.

71. *U.S.—U. S. v. Farmer*, supra.

49 C.J. p 1203 note 76.

72. *U.S.—U. S. v. Farmer*, supra.

73. *U.S.—Oesting v. U. S.*, Cal., 234 F. 304, 148 C.C.A. 206, certiorari denied 37 S.Ct. 241, 242 U.S. 647, 61 L.Ed. 544.

49 C.J. p 1207 note 27 [a], p 1208 note 38.

Acts innocent in themselves may in combination constitute a "fraud" or intention to commit fraud, as basis of conviction of using the mails to defraud—*Holmes v. U. S.*, C.C.A.Neb., 134 F.2d 125, certiorari denied 63 S.Ct. 1434, 319 U.S. 776, 87 L.Ed. 1722—*U. S. v. McKay*, D.C.Mich., 45 F.Supp. 1007.

74. *U.S.—Myers v. U. S.*, N.Y., 223 F. 919, 139 C.C.A. 399, certiorari denied 37 S.Ct. 13, 242 U.S. 627, 61 L.Ed. 535.

49 C.J. p 1204 note 78.

75. *U.S.—Epstein v. U. S.*, C.A.Mich., 174 F.2d 754—*U. S. v. Buckner*, C.C.A.N.Y., 108 F.2d 921, certiorari denied *Buckner v. U. S.*, 60 S.Ct. 613, 309 U.S. 669, 84 L.Ed. 1016—*U. S. v. Brown*, C.C.A.N.Y., 79 F.2d 321, certiorari denied *McCarthy v. U. S.*, 56 S.Ct. 309, 296 U.S. 650, 80 L.Ed. 462—*Poshay v. U. S.*, C.C.A.Minn., 68 F.2d 205, certiorari denied 54 S.Ct. 531, 291 U.S. 674, 78 L.Ed. 1063.

76. *U.S.—U. S. v. McKay*, D.C.Mich., 45 F.Supp. 1007.

49 C.J. p 1208 note 37.

#### Prosecution for false pretenses

The mail-fraud statute is broad in scope and not limited by the common-law rules applicable to a prosecution for false pretenses—*Deaver v. U. S.*, 155 F.2d 740, 81 U.S.App.D.

for deceit.<sup>77</sup> The scheme must embrace active or actual fraud, and mere constructive fraud is insufficient.<sup>78</sup>

**Extortion by force or threats.** A scheme to extort money by force or threats is not within the mail-fraud statute.<sup>79</sup>

### (b) Intent to Defraud

An intent to defraud must exist at the time the mails are used in furtherance of the scheme.

In order to bring a case within the operation of the statute, an intent to defraud must exist.<sup>80</sup> There can be an intent to defraud, even though the scheme is not successful,<sup>81</sup> and even though the person against whom it is directed may know that the facts represented to him are not as they actually exist.<sup>82</sup> The intent must exist at the time the mails are used in furtherance of the scheme to defraud.<sup>83</sup> An intent to defraud cannot be found in any mere expression of honest opinion as to quality<sup>84</sup> or as to future performance,<sup>85</sup> or

a mere puffing or exaggeration in respect of articles possessing substantial merit if within proper or reasonable bounds.<sup>86</sup> When a proposed seller sends advertisements through the mail assigning to an article offered for sale qualities which it does not possess and falsely asserting the existence of certain advantages, he exceeds the limits of "puffing" and engages in false representations and pretenses and is guilty of a violation of the statute.<sup>87</sup>

### (c) Representations Used

The mail-fraud statute includes representations of law or fact, expressed or implied, or representations as to the past, present, or future. Knowledge of the accused as to the truth or falsity of representations made by him is an essential element of the offense.

In order to constitute a violation of the mail-fraud statute, it is not necessary that there should be actual misrepresentations as to an existing fact.<sup>88</sup> The statute includes everything designed to defraud by misrepresentations as to the past and present,<sup>89</sup> or by promises as to the future.<sup>90</sup> A

C. 148, certiorari denied 67 S.Ct. 121, 329 U.S. 766, 91 L.Ed. 659.

77. U.S.—Epstein v. U. S., C.A. Mich., 174 F.2d 754—U. S. v. Groves, C.C.A.N.Y., 122 F.2d 87, certiorari denied Groves v. U. S., 62 S.Ct. 135, 314 U.S. 670, 86 L.Ed. 536—U. S. v. McKay, D.C.Mich., 45 F.Supp. 1007.

78. U.S.—Epstein v. U. S., C.A.Mich., 174 F.2d 754—Bradford v. U. S., C. C.A.La., 129 F.2d 274, affirmed 130 F.2d 630, certiorari denied 63 S.Ct. 205, 317 U.S. 683, 87 L.Ed. 547—Shushan v. U. S., C.C.A.La., 117 F.2d 110, 133 A.L.R. 1040, certiorari denied 61 S.Ct. 1085, 313 U.S. 574, 85 L.Ed. 1531, rehearing denied 62 S.Ct. 53, 314 U.S. 706, 86 L.Ed. 564, certiorari denied Newman v. U. S., 61 S.Ct. 1086, 313 U.S. 574, 85 L.Ed. 1532, rehearing denied 62 S.Ct. 53, 314 U.S. 706, 86 L.Ed. 564, certiorari denied Miller v. U. S., 61 S.Ct. 1086, 313 U.S. 574, 85 L.Ed. 1532, rehearing denied 62 S.Ct. 53, 314 U.S. 706, 86 L.Ed. 564.

79. U.S.—Norton v. U. S., C.C.A.Cal., 92 F.2d 753—U. S. v. Zalewski, D. C.Ky., 29 F.Supp. 755.  
49 C.J. p 1209 note 45 [c].

The word "defraud," as used in mail-fraud statute, does not include threats and coercion through fear or force.—U. S. v. McKay, D.C.Mich., 45 F.Supp. 1007.

80. U.S.—Rice v. U. S., C.C.A.N.M., 149 F.2d 601—Troutman v. U. S., C.C.A.Colo., 100 F.2d 628—Norton v. U. S., C.C.A.Cal., 92 F.2d 753—

Fournier v. U. S., C.C.A.Ill., 58 F. 2d 8, certiorari denied 52 S.Ct. 647, 286 U.S. 565, 76 L.Ed. 1297—U. S. v. McKay, D.C.Mich., 45 F.Supp. 1007—U. S. v. Corlin, D.C.Cal., 44 F.Supp. 940—U. S. v. Zalewski, D. C.Ky., 29 F.Supp. 755—U. S. v. Gasomiser Corp., D.C.Del., 7 F.R. D. 712.

49 C.J. p 1204 note 80.

### Sale of stock in legitimate mining operation

Where the dominant purpose and object of an enterprise are to engage in legitimate mining operations, and the sale of mining stock, through use of the mails is purely subordinate to that end, such purposes lend themselves to legitimacy and tend to deny criminal intent to defraud in selling the stock.—Estep v. U. S., C.C.A.Utah, 140 F.2d 40.

81. U.S.—U. S. v. Zalewski, D.C.Ky., 29 F.Supp. 755.

82. U.S.—U. S. v. Zalewski, supra.

83. U.S.—Watlington v. U. S., Okl., 233 F. 247, 147 C.C.A. 253, certiorari denied 37 S.Ct. 214, 242 U.S. 645, 61 L.Ed. 543—U. S. v. Wooten, D.C.S.C., 29 F. 702.

### Known circumstances determinative

Defendants' motives and intentions are judged by known circumstances existing when representations were made.—Norcott v. U. S., C. C.A.Ill., 65 F.2d 913, certiorari denied U. S. v. Norcott, 54 S.Ct. 130, 290 U.S. 694, 78 L.Ed. 597, U. S. v. Bennett, 54 S.Ct. 130, 290 U.S. 694, 78 L.Ed. 597, U. S. v. Packer, 54 S. Ct. 130, 290 U.S. 694, 78 L.Ed. 597, U. S. v. Carroll, 54 S.Ct. 130, 290 U.S. 694, 78 L.Ed. 597, and U. S. v. Needham, 54 S.Ct. 130, 290 U.S. 694, 78 L.Ed. 597.

84. U.S.—Harrison v. U. S., Ohio, 200 F. 662, 119 C.C.A. 78.

85. U.S.—Harrison v. U. S., supra.

86. D.C.—Deaver v. U. S., 155 F.2d 740, 81 U.S.App.D.C. 148, certiorari denied 67 S.Ct. 121, 329 U.S. 766, 91 L.Ed. 659.

49 C.J. p 1204 note 84.

87. U.S.—U. S. v. New South Farm, etc., Co., Fla., 36 S.Ct. 505, 241 U. S. 64, 60 L.Ed. 890, Ann.Cas.1917C 455—Harris v. Rosenberger, Mo., 145 F. 449, 76 C.C.A. 225, 13 L.R. A.N.S., 762, certiorari denied 27 S.Ct. 778, 203 U.S. 591, 51 L.Ed. 331.

### Value of stock

Representations as to value, soundness, and worth of securities may go so far beyond what may be considered the proper limits of exaggerating enthusiasm of normal salesman, or the mistaken judgment of the honest man, as to impress them with badge of "fraud" as basis of prosecution for using the mails to defraud.—Holmes v. U. S., C.C.A. Neb., 134 F.2d 125.

88. U.S.—Fournier v. U. S., C.C.A. Ill., 58 F.2d 3, certiorari denied 52 S.Ct. 647, 286 U.S. 565, 76 L.Ed. 1297—U. S. v. McKay, D.C.Mich., 45 F.Supp. 1007.

D.C.—Deaver v. U. S., 155 F.2d 740, 81 U.S.App.D.C. 148, certiorari denied 67 S.Ct. 121, 329 U.S. 766, 91 L.Ed. 659.

49 C.J. p 1204 note 87.

89. U.S.—U. S. v. McKay, D.C.Mich., 45 F.Supp. 1007.

49 C.J. p 1204 note 88.

90. U.S.—U. S. v. Grayson, C.C.A.N.

fraud or deception which would justify a conviction for using the mails to defraud may be either by express words or by implication reasonably derived therefrom by the reader.<sup>91</sup> Misrepresentations of law as well as of fact may bring the case within the statute, since deception may be practiced on the unsophisticated and unlearned, even though the representations made were those of law.<sup>92</sup>

**Knowledge of falsity.** Knowledge of accused as to the truth or falsity of representations made by him is an essential element of the offense,<sup>93</sup> and such knowledge must exist at the time the mails were used for the purpose of executing the scheme.<sup>94</sup> If accused believed in the truth of the representations made by him, it matters not how visionary or illusory the scheme may be, there is no violation of the statute.<sup>95</sup> On the other hand, the statute is violated if the party making the representations had no belief that they were true,<sup>96</sup> or if the representations were made with a reckless disregard as to whether they were true or false,<sup>97</sup> it being the duty of the party sending out representations through the mail to make such investigation as is necessary to enable him honestly to sign and send them out.<sup>98</sup> He must exercise such discretion in ascertaining the facts as would

be expected of a reasonably prudent person.<sup>99</sup> Representations, in order to be justified, cannot fairly exceed what was believed to be actually true.<sup>1</sup>

#### (d) Lawfulness or Unlawfulness of Scheme

In order that there may be a violation of the mail-fraud statute, it is not necessary that all or even the main part of the business or scheme should be of a fraudulent character.

In order that there may be a violation of the mail-fraud statute, it is not necessary that all or even the main part of the business or scheme should be of a fraudulent character.<sup>2</sup> If fraudulent in important and continuing branches of its activities, the enterprise as a whole may properly be characterized as a fraudulent scheme.<sup>3</sup> The statute includes schemes to defraud by means of false pretenses, although used in the prosecution of an established business legitimate if honestly conducted.<sup>4</sup> The intent to use lawfully the money obtained by a fraudulent scheme does not render the scheme less fraudulent.<sup>5</sup>

#### (e) Success of Scheme or Efficacy to Defraud

In order to authorize a conviction under the mail-fraud statute, it is not essential that the fraudulent scheme should have met with success.

Y., 166 F.2d 863—U. S. v. McKay, D.C.Mich., 45 F.Supp. 1007.  
49 C.J. p 1204 note 89.

91. U.S.—U. S. v. Holdsworth, D.C. Me., 77 F.Supp. 148.  
49 C.J. p 1204 note 90.

#### Concealment of insolvency

Where mortgage and loan business became insolvent, the continuance of the business, payment of interest, sending out of statements as before, with concealment of the known insolvency, as respects mail fraud, constituted a false pretense that the firm's affairs were as they had been in the past.—Zimmerman v. U. S., C. A.Tex., 171 F.2d 790.

#### Offering for sale

Loan company offering notes and live-stock mortgages for sale to banks impliedly represented bona fides of transactions.—Butler v. U. S., C.C.A.Utah, 53 F.2d 800.

92. U.S.—Lesselyoung v. U. S., C.C. A.Minn., 18 F.2d 472, certiorari denied 48 S.Ct. 31, 275 U.S. 535, 72 L.Ed. 412.

49 C.J. p 1204 note 91.

93. U.S.—West v. U. S., C.C.A.Colo., 68 F.2d 96.

49 C.J. p 1204 note 92.

94. U.S.—Benham v. U. S., C.C.A. Ohio, 13 F.2d 558, certiorari denied 47 S.Ct. 111, 273 U.S. 721, 71 L.Ed. 858.

95. U.S.—Sandals v. U. S., Ohio, 213 F. 569, 130 C.C.A. 149.  
49 C.J. p 1205 note 94.

**Subsequent business adversity** does not necessarily spell fraud.—Gold v. U. S., C.C.A.Minn., 36 F.2d 16.

96. U.S.—Van Riper v. U. S., C.C.A. N.Y., 13 F.2d 961, certiorari denied Ackerson v. U. S., 47 S.Ct. 102, 273 U.S. 702, 71 L.Ed. 848.  
49 C.J. p 1205 note 95.

#### Repetition after true statement becomes false

The continuous repetition of what was once a true statement but had become false and was known to be false at the time of the repetition is enough to constitute a "scheme to defraud" within terms of statute.—U. S. v. Dilliard, C.C.A.N.Y., 101 F.2d 829, certiorari denied Dilliard v. U. S., 59 S.Ct. 484, 306 U.S. 635, 83 L.Ed. 1036, Koven v. U. S., 59 S.Ct. 484, 306 U.S. 635, 83 L.Ed. 1036, and Donegan v. U. S., 59 S.Ct. 484, 306 U.S. 635, 83 L.Ed. 1036.

97. U.S.—West v. U. S., C.C.A.Colo., 68 F.2d 96.  
49 C.J. p 1405 note 96.

**Self-delusion** will not justify an otherwise baseless representation to others.—Estep v. U. S., C.C.A.Utah, 140 F.2d 40—Hawley v. U. S., C.C.A. Colo., 133 F.2d 966.

98. U.S.—Stone v. U. S., C.C.A. Tenn., 113 F.2d 70—Slakoff v. U. S., C.C.A.Pa., 8 F.2d 9.

99. U.S.—Stone v. U. S., C.C.A. Tenn., 113 F.2d 70.

1. U.S.—Stunz v. U. S., C.C.A.Mo., 27 F.2d 575.

2. U.S.—Barnes v. U. S., 25 F.2d 61, certiorari denied 49 S.Ct. 12, 278 U.S. 607, 73 L.Ed. 533.  
49 C.J. p 1206 note 23.

**Lawfulness in form and appearance**  
Even though business is lawful in form and appearance, an enterprise cannot be furthered by sending fraudulent representations through the mails.—Securities and Exchange Commission v. Timetrust, Inc., D.C. Cal., 28 F.Supp. 34.

3. U.S.—Stephens v. U. S., C.C.A. Cal., 41 F.2d 440, certiorari denied Spicer v. U. S., 51 S.Ct. 83, 282 U.S. 880, 75 L.Ed. 777.

4. U.S.—Sparks v. U. S., Tenn., 241 F. 777, 154 C.C.A. 479.  
49 C.J. p 1206 note 24.

5. U.S.—Hyney v. U. S., C.C.A. Mich., 44 F.2d 134, certiorari denied 51 S.Ct. 347, 283 U.S. 824, 75 L.Ed. 1438.

In order to authorize a conviction under the mail-fraud statute, it is not essential that the fraudulent scheme should have met with success,<sup>6</sup> or that anyone should have been actually defrauded;<sup>7</sup> the crime is complete before the letter designed to mislead or otherwise used in carrying out the scheme to defraud is received by the intended victim.<sup>8</sup> The damage resulting from the fraudulent scheme is not an essential ingredient of the offense,<sup>9</sup> and the damage calculated to result may be large or small.<sup>10</sup> The scheme is not required to be reasonable<sup>11</sup> or practical,<sup>12</sup> and it is not even necessary to a conviction that the matter mailed should be of a nature calculated to be effective in carrying out the fraudulent scheme.<sup>13</sup> It is enough if, hav-

ing devised the scheme to defraud, defendant, with a view of executing it, deposits in the post office letters which he thinks may assist in carrying it into effect, although they may be absolutely ineffective therefor.<sup>14</sup>

#### (f) Benefit Accruing to Accused

It is not an element of the offense that the accused obtained any benefit by the execution of the scheme.

It is not an element of the offense that accused obtained any benefit by the execution of the scheme,<sup>15</sup> or that he intended<sup>16</sup> or expected<sup>17</sup> to realize any benefit to himself from the execution of the scheme, or to convert the money obtained thereby to his own use.<sup>18</sup>

6. U.S.—U. S. v. Feldman, C.C.A.N.Y., 136 F.2d 394, affirmed 64 S.Ct. 1082, 322 U.S. 487, 88 L.Ed. 1408, 154 A.L.R. 982, rehearing denied 65 S.Ct. 26, 323 U.S. 811, 89 L.Ed. 646—Glover v. U. S., C.C.A.Ga., 135 F.2d 291, certiorari denied 62 S.Ct. 1280, 316 U.S. 690, 86 L.Ed. 1761—Baker v. U. S., 115 F.2d 532, certiorari denied 61 S.Ct. 711, 312 U.S. 692, 85 L.Ed. 1128, rehearing denied 61 S.Ct. 731, 312 U.S. 715, 85 L.Ed. 1145, motion denied, C.C.A., 139 F.2d 721, rehearing denied 65 S.Ct. 1399, 325 U.S. 894, 89 L.Ed. 2005—Norman v. U. S., C.C.A.Tenn., 100 F.2d 905, certiorari denied 59 S.Ct. 790, 306 U.S. 660, 83 L.Ed. 1057—Muench v. U. S., C.C.A.Mo., 96 F.2d 332—Hill v. U. S., C.C.A.Ga., 73 F.2d 223—Butler v. U. S., C.C.A.Utah, 53 F.2d 800—Busch v. U. S., C.C.A.Mo., 53 F.2d 79, certiorari denied Greible v. U. S., 52 S.Ct. 209, 224 U.S. 687, 76 L.Ed. 580—Cohen v. U. S., C.C.A.N.J., 50 F.2d 819—Cochran v. U. S., C.C.A.Minn., 41 F.2d 193—Clymer v. U. S., C.C.A.Colo., 38 F.2d 581—U. S. v. McKay, D.C.Mich., 45 F.Supp. 1007—U. S. v. Corlin, D.C.Cal., 44 F.Supp. 940—U. S. v. Ames, D.C.N.Y., 39 F.Supp. 885—U. S. v. Zalewski, D.C.Ky., 29 F.Supp. 755.

D.C.—Deaver v. U. S., 155 F.2d 740, 81 U.S.App.D.C. 148, certiorari denied 67 S.Ct. 121, 329 U.S. 766, 91 L.Ed. 659.

49 C.J. p 1206 note 25.

7. U.S.—U. S. v. Berg, C.C.A.N.J., 144 F.2d 173—Blue v. U. S., C.C.A.Ohio, 138 F.2d 351, certiorari denied 64 S.Ct. 1046, 322 U.S. 736, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Clark v. U. S., 64 S.Ct. 1046, 322 U.S. 736, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Pardee v. U. S., 64 S.Ct. 1046, 322 U.S. 737, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed.

1596—Stapp v. U. S., C.C.A.Tex., 120 F.2d 898—Hass v. U. S., C.C.A.Iowa, 93 F.2d 427—Norton v. U. S., C.C.A.Cal., 92 F.2d 753—Butler v. U. S., C.C.A.Utah, 53 F.2d 800—Schauble v. U. S., C.C.A.Mo., 40 F.2d 363—U. S. v. McKay, D.C.Mich., 45 F.Supp. 1007—U. S. v. Ames, D.C.N.Y., 39 F.Supp. 885.

49 C.J. p 1207 note 26.

8. U.S.—Whitehead v. U. S., Ala., 245 F. 385, 157 C.C.A. 547, certiorari denied 38 S.Ct. 191, 245 U.S. 670, 62 L.Ed. 540.

9. U.S.—Cowl v. U. S., C.C.A.Neb., 35 F.2d 794—U. S. v. McKay, D.C.Mich., 45 F.Supp. 1007—Wilson v. U. S., N.Y., 190 F. 427, 111 C.C.A. 231.

49 C.J. p 1207 note 26 [b].

10. U.S.—Glover v. U. S., C.C.A.Ga., 125 F.2d 291, certiorari denied 62 S.Ct. 1280, 316 U.S. 690, 86 L.Ed. 1761.

D.C.—Deaver v. U. S., 155 F.2d 740, 81 U.S.App.D.C. 148, certiorari denied 67 S.Ct. 121, 329 U.S. 766, 91 L.Ed. 659.

11. U.S.—Glover v. U. S., C.C.A.Ga., 125 F.2d 291, certiorari denied 62 S.Ct. 1280, 316 U.S. 690, 86 L.Ed. 1761—U. S. v. Zalewski, D.C.Ky., 29 F.Supp. 755.

#### Person of ordinary intelligence

The fact that the scheme would not have deceived a person of ordinary intelligence does not relieve the wrongdoer from liability.

U.S.—U. S. v. Monjar, D.C.Del., 47 F.Supp. 421, affirmed, C.C.A., 147 F.2d 916, certiorari denied Monjar v. U. S., 65 S.Ct. 1191, two cases, 325 U.S. 859, 89 L.Ed. 1979, Cook v. U. S., 65 S.Ct. 1192, 325 U.S. 859, 89 L.Ed. 1979, Drew v. U. S., 65 S.Ct. 1192, 325 U.S. 859, 89 L.Ed. 1979, Jones v. U. S., 65 S.Ct. 1192, 325 U.S. 859, 89 L.Ed. 1979, Moore v. U. S., 65 S.Ct. 1192, 325 U.S. 859, 89 L.Ed. 1980, Candlin v. U. S., 65 S.Ct. 1193, 325 U.S. 859, 89

L.Ed. 1980, Fitzpatrick v. U. S., 65 S.Ct. 1193, 325 U.S. 859, 89 L.Ed. 1980, Lindh v. U. S., 65 S.Ct. 1193, 325 U.S. 859, 89 L.Ed. 1980, Candlin v. U. S., 65 S.Ct. 1193, 325 U.S. 859, 89 L.Ed. 1980, Cruser v. U. S., 65 S.Ct. 1194, 325 U.S. 859, 89 L.Ed. 1981, and Maddams v. U. S., 65 S.Ct. 1194, 325 U.S. 859, 89 L.Ed. 1981—Securities and Exchange Commission v. Timetrust, Inc., D.C.Cal., 28 F.Supp. 34.

D.C.—Deaver v. U. S., 155 F.2d 740, 81 U.S.App.D.C. 148, certiorari denied 67 S.Ct. 121, 329 U.S. 766, 91 L.Ed. 659.

49 C.J. p 1207 note 27 [c].

12. U.S.—Glover v. U. S., C.C.A.Ga., 125 F.2d 291, certiorari denied 62 S.Ct. 1280, 316 U.S. 690, 86 L.Ed. 1761.

D.C.—Deaver v. U. S., 155 F.2d 740, 81 U.S.App.D.C. 148, certiorari denied 67 S.Ct. 121, 329 U.S. 766, 91 L.Ed. 659.

13. U.S.—U. S. v. Main, D.C.Tex., 28 F.Supp. 550—U. S. v. Spielberger, D.C.Va., 28 F.Supp. 380.

49 C.J. p 1207 note 27.

14. U.S.—U. S. v. Berg, C.C.A.N.J., 144 F.2d 173—U. S. v. Spielberger, D.C.Va., 28 F.Supp. 380.

49 C.J. p 1207 note 28.

15. U.S.—Butler v. U. S., C.C.A.Utah, 53 F.2d 800.

D.C.—Deaver v. U. S., 155 F.2d 740, 81 U.S.App.D.C. 148, certiorari denied 67 S.Ct. 121, 329 U.S. 766, 91 L.Ed. 659.

49 C.J. p 1207 note 30.

16. U.S.—Barnes v. U. S., C.C.A.Minn., 25 F.2d 61, certiorari denied 49 S.Ct. 12, 278 U.S. 607, 73 L.Ed. 533.

49 C.J. p 1207 note 31.

17. U.S.—Butler v. U. S., C.C.A.Utah, 53 F.2d 800.

49 C.J. p 1207 note 32.

18. U.S.—Butler v. U. S., supra.

49 C.J. p 1207 note 33.

## (3) Use of Mails

- (a) In general
- (b) Time and number of mailings
- (c) Person to whom mail directed
- (d) Mailing by agents or employees
- (e) Nature and contents of matter mailed

## (a) In General

The second element of the offense under the mail-fraud statute is a use of the mails for the purpose of executing the scheme or artifice to defraud or attempting to do so.

The second element of the offense under the mail-fraud statute is a use of the mails for the purpose of executing the scheme or artifice to defraud

or attempting to do so.<sup>19</sup> The mails must be used with the intent of assisting in the execution of the scheme or artifice.<sup>20</sup>

An intent to use the mails to effect a scheme to defraud need not be embraced in the scheme in order to constitute the offense of using the mails to defraud,<sup>21</sup> and, in order to sustain a conviction under the statute, it is sufficient if, a scheme to defraud having been devised by accused, the mails were actually used in effecting or attempting to effect the scheme.<sup>22</sup> When a person does an act with knowledge that use of the mails will follow in the usual course of business, or where such use may reasonably be foreseen, although not actually intended, he has caused the mails to be used,<sup>23</sup> al-

19. U.S.—Kann v. U. S., Md., 65 S. Ct. 148, 323 U.S. 88, 89 L.Ed. 88, 157 A.L.R. 406—Crosby v. U. S., C.A.Okl., 183 F.2d 373—U. S. v. Crummer, C.C.A.Kan., 151 F.2d 958, certiorari denied 66 S.Ct. 704, 327 U.S. 785, 90 L.Ed. 1013—Graham v. U. S., C.C.A.N.M., 120 F.2d 543—Baker v. U. S., C.C.A.Ark., 115 F.2d 533, certiorari denied 61 S.Ct. 711, 312 U.S. 692, 85 L.Ed. 1138, rehearing denied 61 S.Ct. 731, 312 U.S. 715, 85 L.Ed. 1145, motion denied, C.C.A., 139 F.2d 721, rehearing denied 65 S.Ct. 1399, 325 U.S. 894, 89 L.Ed. 2005—Mazurosky v. U. S., C.C.A.Or., 100 F.2d 958—Stryker v. U. S., C.C.A.Colo., 95 F.2d 601—Hass v. U. S., C.C.A.Iowa, 93 F.2d 427—Stumbo v. U. S., C.C.A.Ky., 90 F.2d 828, certiorari denied 58 S.Ct. 282, 302 U.S. 755, 82 L.Ed. 584—Fournier v. U. S., C.C.A.Ill., 58 F.2d 3, certiorari denied 52 S.Ct. 647, 286 U.S. 565, 76 L.Ed. 1297—Cohen v. U. S., C.C.A.N.J., 50 F.2d 819—Barrett v. U. S., C.C.A.Mo., 33 F.2d 115—U. S. v. Decker, D.C.Md., 51 F.Supp. 15, affirmed, C.C.A., Decker v. U. S., 140 F.2d 378, 151 A.L.R. 754—U. S. v. Corlin, D.C.Cal., 44 F.Supp. 940—U. S. v. Graham, D.C.N.Y., 8 F.Supp. 87—U. S. v. Gasomiser Corp., D.C.Del., 7 F.R.D. 712.  
49 C.J. p 1203 note 69.

Use of mails as gist of offense see supra subdivision b of this section.

**Basis for jurisdiction**

It is the use of the mails for the purpose of executing the scheme which gives federal courts jurisdiction over the offense.—Mitchell v. U. S., C.C.A.N.M., 142 F.2d 480, certiorari denied 65 S.Ct. 49, 323 U.S. 747, 89 L.Ed. 598—Rosenberg v. U. S., C.C.A.N.M., 120 F.2d 935.

**Alternative means of using mail**

The statute penalizing a person who with intent to defraud shall for purpose of executing the scheme place or cause to be placed any let-

ter in any post office or shall knowingly cause to be delivered any such letter describes three alternative means by which one may commit crime of use of mails to defraud, but does not charge three separate crimes.—Holdsworth v. U. S., C.A.Me., 179 F.2d 933.

20. U.S.—U. S. v. Berg, C.C.A.N.J., 144 F.2d 173—Barnes v. U. S., C.C.A.Minn., 25 F.2d 61, certiorari denied 49 S.Ct. 12, 278 U.S. 607, 73 L.Ed. 533—U. S. v. McKay, D.C.Mich., 45 F.Supp. 1001—Brewer v. U. S., C.C.A.N.Y., 290 F. 807, certiorari denied 44 S.Ct. 35, 263 U.S. 707, 68 L.Ed. 517.

21. U.S.—Richardson v. U. S., C.C.A.Tenn., 150 F.2d 58—Rosenbloom v. Hunter, C.C.A.Kan., 143 F.2d 673—Blue v. U. S., C.C.A.Ohio, 138 F.2d 351, certiorari denied 64 S.Ct. 1046, 322 U.S. 736, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Clark v. U. S., 64 S.Ct. 1046, 322 U.S. 736, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Pardee v. U. S., 64 S.Ct. 1046, 322 U.S. 737, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596—Guardalibini v. U. S., C.C.A.Ala., 128 F.2d 984—Stapp v. U. S., C.C.A.Tex., 120 F.2d 898—Goodman v. U. S., C.C.A.Pa., 97 F.2d 197, certiorari dismissed 59 S.Ct. 363, 305 U.S. 578, 83 L.Ed. 364—Wolpa v. U. S., C.C.A.Neb., 86 F.2d 35, certiorari denied 57 S.Ct. 317, 299 U.S. 611, 81 L.Ed. 451—U. S. v. Weisman, C.C.A.N.Y., 83 F.2d 470, certiorari denied Weisman v. U. S., 57 S.Ct. 22, 299 U.S. 560, 81 L.Ed. 412, rehearing denied 57 S.Ct. 113, 299 U.S. 621, 81 L.Ed. 457—Bogy v. U. S., C.C.A.Tenn., 96 F.2d 734, certiorari denied Bogy v. U. S., 59 S.Ct. 68, 305 U.S. 608, 83 L.Ed. 387.  
49 C.J. p 1205 note 1.

Under an early statute it was essential that an intent to use the

mails in furtherance of a scheme to defraud should have existed at the time the scheme was devised and constitute a part of the scheme.—Morris v. U. S., C.C.A.Ark., 7 F.2d 785, certiorari denied 46 S.Ct. 205, 270 U.S. 640, 70 L.Ed. 775—49 C.J. p 1205 note 99 [a].

22. U.S.—Mansfield v. U. S., C.C.A.Tex., 155 F.2d 952, certiorari denied Browne v. U. S., 67 S.Ct. 364, 329 U.S. 792, 91 L.Ed. 678—U. S. v. Cohen, C.C.A.N.Y., 145 F.2d 82, certiorari denied 65 S.Ct. 553, 323 U.S. 799, 89 L.Ed. 637, four cases, and 65 S.Ct. 554, 323 U.S. 800, 89 L.Ed. 638—Rosenbloom v. Hunter, C.C.A.Kan., 143 F.2d 673—Decker v. U. S., C.C.A.Md., 140 F.2d 378, 151 A.L.R. 754—Blue v. U. S., C.C.A.Ohio, 138 F.2d 351, certiorari denied 64 S.Ct. 1046, 322 U.S. 736, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Clark v. U. S., 64 S.Ct. 1046, 322 U.S. 736, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596—Stapp v. U. S., C.C.A.Tex., 120 F.2d 898—Morris v. U. S., C.C.A.La., 112 F.2d 522, certiorari denied 61 S.Ct. 41, 311 U.S. 653, 85 L.Ed. 418—Goodman v. U. S., C.C.A.Pa., 97 F.2d 197, certiorari dismissed 59 S.Ct. 363, 305 U.S. 578, 83 L.Ed. 364—Bogy v. U. S., C.C.A.Tenn., 96 F.2d 734, certiorari denied Bogy v. U. S., 59 S.Ct. 68, 305 U.S. 608, 83 L.Ed. 387—U. S. v. Classic, D.C.La., 35 F.Supp. 457—U. S. v. Weisman, C.C.A.N.Y., 83 F.2d 470, certiorari denied Weisman v. U. S., 57 S.Ct. 22, 299 U.S. 560, 81 L.Ed. 412, rehearing denied 57 S.Ct. 113, 299 U.S. 621, 81 L.Ed. 457.  
49 C.J. p 1205 note 2.

23. U.S.—Richardson v. U. S., C.C.A.Tenn., 150 F.2d 58—U. S. v. Cohen, C.C.A.N.Y., 145 F.2d 82, certiorari denied 65 S.Ct. 553, 323 U.S. 799, 89 L.Ed. 638, four cases, and 65 S.Ct. 554, 323 U.S. 800, 89

though the use may be incidental<sup>24</sup> and without the consent or knowledge of the participants charged.<sup>25</sup> Although the scheme may have been carefully designed to avoid using the mails altogether, if, in the execution of the scheme, the mails are in fact used, the act is violated,<sup>26</sup> but it has been held that, where use of the mails could not reasonably have been foreseen, accused is not guilty of causing the mails to be used.<sup>27</sup>

### (b) Time and Number of Mailings

Each separate use of the mails in the execution of a continuing scheme constitutes a separate and distinct offense. Use of the mails after the fruits of the fraud have been received, for the purpose of retaining them, is within the purview of the mail-fraud statute, but use of

the mails after the scheme has been completed or abandoned does not violate the statute.

While the scheme or plan to defraud by use of the mails must be planned or devised before the actual use of the mails,<sup>28</sup> its consummation may be brought about by one or many mailings.<sup>29</sup> Each separate use of the mails in the execution of a continuing scheme constitutes a separate and distinct offense.<sup>30</sup> A letter which is mailed as merely a step in a general scheme to defraud at an early stage in the proceedings, although not in furtherance of the execution of the final scheme, is nevertheless within the scope of the statute.<sup>31</sup> The use of the mails, even after the fruits of the fraud have been received, for the purpose of assisting in retaining them,<sup>32</sup> or to lull the victim into a false

L.Ed. 638—Blue v. U. S., C.C.A. Ohio, 138 F.2d 351, certiorari denied 64 S.Ct. 1046, 322 U.S. 736, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Clark v. U. S., 64 S.Ct. 1046, 322 U.S. 736, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Pardee v. U. S., 64 S.Ct. 1046, 322 U.S. 737, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596—Smith v. U. S., C.C.A.Ga., 61 F.2d 681, certiorari denied 53 S.Ct. 401, 238 U.S. 608, 77 L.Ed. 983, and Ellis v. U. S., 53 S.Ct. 402, 238 U.S. 607, 77 L.Ed. 982. Followed in C. C.A., Fowler v. Aderhold, 73 F.2d 998—Spillers v. U. S., C.C.A.Tex., 47 F.2d 893.

"Knowingly," within mail-fraud statute, does not involve absolute knowledge or intent, but it is sufficient if use of mails may fairly be foreseen by defendant as step in execution of scheme to defraud, or that steps in causal chain resulting in delivery through mails should have been knowingly set on foot.—U. S. v. Weisman, C.C.A.N.Y., 83 F.2d 470, certiorari denied Weisman v. U. S., 57 S.Ct. 22, 299 U.S. 560, 81 L.Ed. 412, rehearing denied 57 S.Ct. 113, 299 U.S. 621, 81 L.Ed. 457.

#### Checks deposited in bank

(1) One who deposited check in bank for collection became liable for every link in the chain of events which he had set in motion which reasonably or ordinarily required use of mails to complete the transaction including the use of the mails by the correspondent bank in New York to notify collecting bank that item had been paid.—Moffitt v. U. S., C.C.A.Okla., 154 F.2d 402, certiorari denied 66 S.Ct. 1343, 328 U.S. 853, 90 L.Ed. 1625.

(2) Where accused corporate president and vice-president, in order to conceal, by false entries on corpo-

rate books, withdrawals of corporate funds for their own benefit, collected through a local bank checks drawn on corporation's bank account, accused "caused" local bank to forward checks by mail to drawee bank within the mail fraud statute notwithstanding absence of express directions from accused to local bank.—U. S. v. Decker, D.C.Md., 51 F.Supp. 15, affirmed Decker v. U. S., 140 F.2d 378, 151 A.L.R. 754.

24. U.S.—Blue v. U. S., C.C.A. Ohio, 138 F.2d 351, certiorari denied 64 S.Ct. 1046, 322 U.S. 736, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Clark v. U. S., 64 S.Ct. 1046, 322 U.S. 736, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Pardee v. U. S., 64 S.Ct. 1046, 322 U.S. 737, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596—Bogy v. U. S., C.C.A.Tenn., 96 F.2d 734, certiorari denied Bogy v. U. S., 59 S.Ct. 68, 305 U.S. 608, 83 L.Ed. 387—McCutchan v. U. S., C. C.A.Mo., 70 F.2d 658, certiorari denied 55 S.Ct. 79, 293 U.S. 568, 79 L.Ed. 667.

D.C.—Deaver v. U. S., 155 F.2d 740, 81 U.S.App.D.C. 148, certiorari denied 67 S.Ct. 121, 329 U.S. 766, 91 L.Ed. 659.

25. U.S.—Blue v. U. S., C.C.A. Ohio, 138 F.2d 351, certiorari denied 64 S.Ct. 1046, 322 U.S. 736, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Clark v. U. S., 64 S.Ct. 1046, 322 U.S. 736, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Pardee v. U. S., 64 S.Ct. 1046, 322 U.S. 737, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596.

26. U.S.—Freeman v. U. S., Ill., 244 F. 1, 156 C.C.A. 429, certiorari denied 38 S.Ct. 12, 245 U.S. 654, 62

L.Ed. 533—Farmer v. U. S., N.Y., 223 F. 903, 139 C.C.A. 341, certiorari denied 35 S.Ct. 940, 238 U.S. 638, 59 L.Ed. 1500.

27. U.S.—Moffitt v. U. S., C.C.A.Okla., 154 F.2d 402, certiorari denied 66 S.Ct. 1343, 328 U.S. 853, 90 L.Ed. 1625.

28. U.S.—U. S. v. Herzig, D.C.N.Y., 26 F.2d 487.

29. U.S.—U. S. v. Herzig, supra.

30. U.S.—Weatherby v. U. S., C.C.A. Okla., 150 F.2d 465—Mitchell v. U. S., C.C.A.N.M., 142 F.2d 480, certiorari denied 65 S.Ct. 49, 323 U.S. 747, 89 L.Ed. 598—Bozel v. U. S., C.C.A. Ohio, 139 F.2d 153, certiorari denied 64 S.Ct. 937, 321 U.S. 800, 88 L.Ed. 1087, rehearing denied 64 S.Ct. 1054, 322 U.S. 768, 88 L.Ed. 1594—Stumbo v. U. S., C.C. A.Ky., 90 F.2d 828, certiorari denied 58 S.Ct. 282, 302 U.S. 755, 82 L.Ed. 584—U. S. ex rel. Bernstein v. Hill, C.C.A.Pa., 71 F.2d 159—U. S. v. Holdsworth, D.C.Me., 9 F. R.D. 198, appeal dismissed, C.C.A., 179 F.2d 933.

49 C.J. p 1205 note 10.

31. U.S.—U. S. v. McKay, D.C.Mich., 45 F.Supp. 1007—Edwards v. U. S., Ohio, 249 F. 686, 161 C.C.A. 596, certiorari denied 248 U.S. 560, 39 S.Ct. 7, 63 L.Ed. 422.

32. U.S.—Blue v. U. S., C.C.A. Ohio, 138 F.2d 351, certiorari denied 64 S.Ct. 1046, 322 U.S. 736, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Clark v. U. S., 64 S.Ct. 1046, 322 U.S. 736, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Pardee v. U. S., 64 S.Ct. 1046, 322 U.S. 737, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596—Davis v. U. S., C.C.A.Mich., 125 F.2d 144—U. S. v. Spielberg, D. C.Va., 28 F.Supp. 380—Freeman v. U. S., Ill., 244 F. 1, 156 C.C.A. 429,

sense of security<sup>33</sup> and inaction,<sup>34</sup> or to restore confidence and allay discontent,<sup>35</sup> or to postpone discovery,<sup>36</sup> or to stimulate active support for the enterprise,<sup>37</sup> is within the purview of the statute.

The use of the mails after the scheme has been completed or abandoned is not a use for the purpose of executing the scheme and, therefore, the statute is not violated.<sup>38</sup>

### (c) Person to Whom Mail Directed

Under the mail-fraud statute it is immaterial to what person the mail is sent.

If matter is mailed in execution of, or by way of, an attempt to execute a scheme to defraud, an offense is committed under the mail-fraud statute, and it is immaterial to what person it is sent.<sup>39</sup> Accordingly it is not necessary that the mails be used in communicating with the person or persons

intended to be defrauded,<sup>40</sup> and it is sufficient if it is mailed to another in furtherance of the scheme.<sup>41</sup> The sending through the mails of letters by several accused persons to each other may constitute the offense,<sup>42</sup> and one who causes a letter to be delivered by mail to himself pursuant to a fraudulent scheme commits the offense.<sup>43</sup> The taking of a letter by accused from the post office, although it was mailed to him by his agent, is sufficient as a basis for a prosecution under the statute if the letter is otherwise of the character condemned thereby.<sup>44</sup>

### (d) Mailing by Agents or Employees

Mailing of letters by agents or employees of the accused in furtherance of his scheme to defraud is sufficient to establish violation of the mail-fraud statute by the accused.

In order to be guilty of mailing letters in fur-

certiorari denied 38 S.Ct. 12, 245 U.S. 654, 62 L.Ed. 533.

33. U.S.—U. S. v. Bowcott, C.A.Ill., 170 F.2d 173, certiorari denied 69 S.Ct. 482, 335 U.S. 911, 93 L.Ed. 444—Mitchell v. U. S., C.C.A.N.M., 126 F.2d 550, certiorari denied 62 S.Ct. 1307, 316 U.S. 702, 86 L.Ed. 1771, rehearing denied 65 S.Ct. 855, 324 U.S. 887, 89 L.Ed. 1436—Davis v. U. S., C.C.A.Mich., 125 F.2d 144—McNear v. U. S., C.C.A.Kan., 60 F.2d 861—Lewis v. U. S., C.C.A.Cal., 38 F.2d 406.

34. U.S.—Marshall v. U. S., C.C.A.Cal., 146 F.2d 618, 157 A.L.R. 241—Blue v. U. S., C.C.A.Ohio, 138 F.2d 351, certiorari denied 64 S.Ct. 1046, 322 U.S. 736, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Clark v. U. S., 64 S.Ct. 1046, 322 U.S. 736, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Pardee v. U. S., 64 S.Ct. 1046, 322 U.S. 737, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596—Davis v. U. S., C.C.A.Mich., 125 F.2d 144—U. S. v. Spielberg, D.C.Va., 28 F. Supp. 380.

35. U.S.—Brady v. U. S., C.C.A.Cal., 26 F.2d 400, certiorari denied 49 S.Ct. 24, 278 U.S. 621, 73 L.Ed. 542, 49 C.J. p 1205 note 7.

36. U.S.—Davis v. U. S., C.C.A.Mich., 125 F.2d 144.

37. U.S.—Brady v. U. S., C.C.A.Cal., 26 F.2d 400, certiorari denied 49 S.Ct. 24, 278 U.S. 621, 73 L.Ed. 542.

38. U.S.—U. S. v. Cohen, C.C.A.N.Y., 145 F.2d 82, certiorari denied 65 S.Ct. 553, 323 U.S. 799, 89 L.Ed. 637, four cases, and 65 S.Ct. 554, 323 U.S. 800, 89 L.Ed. 638—Marshall

v. U. S., C.C.A.Cal., 146 F.2d 618, 157 A.L.R. 241—U. S. v. Decker, D.C.Md., 51 F.Supp. 15, affirmed Decker v. U. S., 140 F.2d 378, 151 A.L.R. 754—Mitchell v. U. S., C.C.A.N.M., 126 F.2d 550, certiorari denied 62 S.Ct. 1307, 316 U.S. 702, 86 L.Ed. 1771, rehearing denied 65 S.Ct. 855, 324 U.S. 887, 89 L.Ed. 1436—U. S. v. Riedel, C.C.A.Ill., 126 F.2d 81—McNear v. U. S., C.C.A.Kan., 60 F.2d 861—U. S. v. McKay, D.C.Mich., 45 F.Supp. 1007—U. S. v. McKay, D.C.Mich., 45 F.Supp. 1001—U. S. v. Main, D.C.Tex., 28 F. Supp. 550.

### Lulling communication

The rule that sending of a lulling communication through the mails after defrauded party has parted with money constitutes an offense within mail-frauds statute is applicable only where the scheme is continuing and the communication is transmitted by mail during its existence, or where the scheme contemplates and consists of several parts and the mails are used in furtherance of it before it is fully completed—Mitchell v. U. S., C.C.A.N.M., 118 F.2d 653.

### Schemes held executed or abandoned

U.S.—Kann v. U. S., Md., 65 S.Ct. 148, 323 U.S. 88, 89 L.Ed. 88, 157 A.L.R. 406—Stapp v. U. S., C.C.A.Tex., 120 F.2d 898—Merrill v. U. S., C.C.A.Mont., 95 F.2d 669—U. S. v. McKay, D.C.Mich., 45 F.Supp. 1007—U. S. v. McKay, D.C.Mich., 45 F.Supp. 1001.

### Schemes held not completed

U.S.—King v. U. S., C.C.A.Ark., 144 F.2d 729, certiorari denied 65 S.Ct. 711, 324 U.S. 854, 89 L.Ed. 1413—Decker v. U. S., C.C.A.Md., 140 F.2d 378, 151 A.L.R. 754—Steiner v. U. S., C.C.A.La., 134 F.2d 931, certiorari denied 63 S.Ct. 1439, 319 U.

S. 774, 87 L.Ed. 1721—Hines v. U. S., C.C.A.N.M., 131 F.2d 971—U. S. v. Lowe, C.C.A.Wis., 115 F.2d 596, certiorari denied Lowe v. U. S., 61 S.Ct. 441, 311 U.S. 717, 85 L.Ed. 466—Hart v. U. S., C.C.A.La., 112 F.2d 128, certiorari dismissed 61 S.Ct. 6, 311 U.S. 722, 85 L.Ed. 471, certiorari denied 61 S.Ct. 60, 311 U.S. 684, 85 L.Ed. 441, rehearing denied 61 S.Ct. 131, 311 U.S. 726, 85 L.Ed. 473—Bogy v. U. S., C.C.A.Tenn., 96 F.2d 734, certiorari denied Bogy v. U. S., 59 S.Ct. 68, 305 U.S. 608, 83 L.Ed. 387—Corbett v. U. S., C.C.A.Mo., 89 F.2d 124—U. S. v. Vidaver, D.C.Va., 73 F.Supp. 382—U. S. v. Citrin, D.C.N.Y., 58 F.Supp. 766.

39. U.S.—Ader v. U. S., C.C.A.Ill., 284 F. 13, certiorari denied 43 S.Ct. 247, 260 U.S. 746, 67 L.Ed. 493.

49 C.J. p 1205 note 11.

40. U.S.—Blue v. U. S., C.C.A.Ohio, 138 F.2d 351, certiorari denied 64 S.Ct. 1046, 322 U.S. 736, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Clark v. U. S., 64 S.Ct. 1046, 322 U.S. 736, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Pardee v. U. S., 64 S.Ct. 1046, 322 U.S. 737, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596.

49 C.J. p 1206 note 12.

41. U.S.—McNear v. U. S., C.C.A.Kan., 60 F.2d 861.

42. U.S.—Steward v. U. S., C.C.A.Mo., 300 F. 769.

43. U.S.—U. S. v. Guest, C.C.A.N.Y., 74 F.2d 730, certiorari denied Guest v. U. S., 55 S.Ct. 654, 295 U.S. 742, 79 L.Ed. 1688.

44. U.S.—Trent v. U. S., Mo., 228 F. 648, 143 C.C.A. 170.



therance of a scheme to defraud within the purview of the mail-fraud statute, accused need not personally have mailed the letters;<sup>45</sup> it is sufficient if the letters have been mailed by agents or employees of accused in furtherance of his scheme to defraud.<sup>46</sup> Responsibility cannot be avoided by the use of an innocent agency intentionally employed to reach and use the mails in effecting a scheme to defraud.<sup>47</sup>

#### (c) Nature and Contents of Matter Mailed

In order that an offense under the mail-fraud statute may be committed, the matter mailed must have some relation to, and must be a step in the execution or attempted execution of, the scheme or artifice to defraud.

In order that an offense under the mail-fraud statute may be committed, the matter mailed must have some relation to, and must be a step in the execution or attempted execution of, the scheme or artifice to defraud.<sup>48</sup> It is not necessary to a conviction under the statute that the letter or other matter mailed in furtherance of the scheme to de-

fraud should, on its face or by its terms, contain anything criminal or objectionable,<sup>49</sup> disclose a fraudulent purpose,<sup>50</sup> or show that it was in furtherance of a scheme to defraud;<sup>51</sup> and it is of no importance whether the contents thereof are true or false.<sup>52</sup> The matter mailed may be wholly innocuous in itself, and yet be evidentiary of the crime charged.<sup>53</sup> All that is necessary is that the letter mailed be designed or calculated to aid or assist in the execution or attempted execution of a scheme to defraud already devised.<sup>54</sup>

**Signature.** Accused may be guilty of the offense, although he has not personally signed the letter.<sup>55</sup>

#### d. Persons Liable

All who with criminal intent join themselves to the principal scheme to defraud by use of the mails may be guilty of violation of the statute, and each party is liable for the acts of the other parties.

In order to render one liable to a prosecution under the statute it is not necessary that he should

45. U.S.—Clarke v. U. S., C.C.A. Wash., 132 F.2d 538—Alexander v. U. S., C.C.A.Mo., 95 F.2d 873, certiorari denied 59 S.Ct. 99, 305 U.S. 637, 83 L.Ed. 409, and Debeh v. U. S., 59 S.Ct. 99, 305 U.S. 637, 83 L.Ed. 409, Lindsay v. U. S., 59 S.Ct. 100, 305 U.S. 637, 83 L.Ed. 409, and 59 S.Ct. 100, 305 U.S. 637, 83 L.Ed. 410—Davis v. U. S., C.C.A.Tex., 55 F.2d 550, certiorari denied 52 S.Ct. 646, 286 U.S. 564, 76 L.Ed. 1296—Butler v. U. S., C.C.A.Utah, 53 F.2d 800.

#### Presence at time of posting

Defendant's presence at time of posting of letter forming basis of prosecution for using the mails to defraud was not necessary to sustain conviction.—King v. U. S., C.C.A. Ark., 144 F.2d 729, certiorari denied 65 S.Ct. 711, 324 U.S. 854, 89 L.Ed. 1413.

46. U.S.—Barnard v. U. S., C.C.A. Cal., 16 F.2d 451, certiorari denied 47 S.Ct. 575, 274 U.S. 736, 71 L.Ed. 1316.

49 C.J. p 1206 note 15.

#### Employees of collection bank

Defendants, depositing forged checks in banks of certain city for collection in another city pursuant to scheme to defraud, must be held to have caused letters, transmitting checks to bank in latter city, to be placed in mails by employees of former bank as defendants' agents.—Goodman v. U. S., C.C.A.Pa., 97 F.2d 197, certiorari dismissed 59 S.Ct. 363, 305 U.S. 578, 83 L.Ed. 364.

47. U.S.—Blue v. U. S., C.C.A.Ohio, 138 F.2d 351, certiorari denied 64 S.Ct. 1046, 323 U.S. 736, 88 L.Ed. 1570, rehearing denied 64 S.Ct.

1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Clark v. U. S., 64 S.Ct. 1046, 322 U.S. 736, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Pardee v. U. S., 64 S.Ct. 1046, 322 U.S. 737, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596—Stapp v. U. S., C.C.A.Tex., 120 F.2d 898—Crech v. Hudspeth, C.C.A. Kan., 112 F.2d 603.

49 C.J. p 1210 note 71.

Foreseeability of use of mails as affecting guilt see supra subdivision c (3) (a) of this section.

48. U.S.—Kann v. U. S., Md., 65 S.Ct. 148, 323 U.S. 88, 89 L.Ed. 88, 157 A.L.R. 406—Richardson v. U. S., C.C.A.Tenn., 150 F.2d 58—U. S. v. Berg, C.C.A.N.J., 144 F.2d 173—Stapp v. U. S., C.C.A.Tex., 120 F.2d 898—Morgan v. U. S., C.C.A. Ark., 98 F.2d 473, certiorari denied 59 S.Ct. 229, rehearing denied 59 S.Ct. 248, 305 U.S. 674, 83 L.Ed. 437—Kercheval v. U. S., C.C.A. Tex., 36 F.2d 766, certiorari denied 50 S.Ct. 351, 281 U.S. 745, 74 L.Ed. 1157—U. S. v. Decker, D.C.Md., 51 F.Supp. 15, affirmed, C.C.A., Decker v. U. S., 140 F.2d 378, 151 A.L.R. 754—U. S. v. McKay, D.C.Mich., 45 F.Supp. 1007—U. S. v. McKay, D.C.Mich., 45 F.Supp. 1001—U. S. v. Main, D.C.Tex., 28 F.Supp. 550.

49 C.J. p 1206 note 22.

#### Success of letters as test

The fact that letters may or may not have been successful may be considered, but is not sole test of whether letters were in furtherance of alleged continuing scheme to defraud.—U. S. v. Carruthers, C.C.A.

Ill., 152 F.2d 512, certiorari denied 66 S.Ct. 805, 327 U.S. 787, 90 L.Ed. 1014, rehearing denied 66 S.Ct. 816, 327 U.S. 817, 90 L.Ed. 1040, rehearing denied 66 S.Ct. 897, 327 U.S. 819, 90 L.Ed. 1014.

#### Letter held not related to scheme

U.S.—Richardson v. U. S., C.C.A. Tenn., 150 F.2d 58.

49. U.S.—Holmes v. U. S., C.C.A. Neb., 134 F.2d 125, certiorari denied 63 S.Ct. 1434, 319 U.S. 776, 87 L.Ed. 1722—U. S. v. Main, D.C. Tex., 28 F.Supp. 550.

49 C.J. p 1206 note 16.

50. U.S.—U. S. v. Berg, C.C.A.N.J., 144 F.2d 173—Holmes v. U. S., C.C.A.Neb., 134 F.2d 125, certiorari denied 63 S.Ct. 1434, 319 U.S. 776, 87 L.Ed. 1722—U. S. v. Main, D.C. Tex., 28 F.Supp. 550.

49 C.J. p 1206 note 17.

51. U.S.—Morgan v. U. S., C.C.A. Ark., 98 F.2d 473, certiorari denied 59 S.Ct. 229, 305 U.S. 643, 83 L.Ed. 419, rehearing denied 59 S.Ct. 248, 305 U.S. 674, 83 L.Ed. 437—U. S. v. Main, D.C.Tex., 28 F.Supp. 550.

49 C.J. p 1206 note 18.

52. U.S.—Robinson v. U. S., C.C.A. Cal., 33 F.2d 238.

49 C.J. p 1206 note 19.

53. U.S.—U. S. v. Herzog, D.C.N.Y., 26 F.2d 487.

54. U.S.—Robinson v. U. S., C.C.A. Cal., 33 F.2d 238—Chew v. U. S., C.C.A.Ark., 9 F.2d 348.

55. U.S.—Davis v. U. S., C.C.A.Tex., 55 F.2d 560, certiorari denied 52 S.Ct. 646, 286 U.S. 564, 76 L.Ed. 1296—Butler v. U. S., C.C.A.Utah, 53 F.2d 800.

have been the originator of the fraudulent scheme in which he participated,<sup>56</sup> or that he should have been a party to the formation of the scheme.<sup>57</sup> If he knowingly joined it subsequent to its formation, he is as much responsible as though he had joined in the scheme at the time of its formation,<sup>58</sup> and all who with criminal intent join themselves to the principal scheme may be guilty of violation of the statute,<sup>59</sup> even though their participation in the scheme may be slight,<sup>60</sup> or although they may know nothing but their own share in the aggregate wrongdoing.<sup>61</sup>

Each person who is knowingly a party to the

scheme is liable for the acts of the other parties,<sup>62</sup> and a person, even though he is not immediately concerned in a particular transaction, may nonetheless be liable if the transaction is within the general scope of a scheme on which all had embarked.<sup>63</sup> So, where several persons devise or participate in a scheme to defraud intending to execute the scheme by using the mails, or knowing, or having reason to believe, that the mails would be used in execution of the scheme, the act of one participant in using the mails or causing the mails to be used in furtherance of the scheme is the act of all, and all may be guilty of the offense.<sup>64</sup> A

56. U.S.—U. S. v. Flemming, D.C. Ill., 18 F. 907.

49 C.J. p 1209 note 47.

57. U.S.—Blue v. U. S., C.C.A. Ohio, 138 F.2d 351, certiorari denied 64 S.Ct. 1046, 322 U.S. 736, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Clark v. U. S., 64 S.Ct. 1046, 322 U.S. 736, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Pardee v. U. S., 64 S.Ct. 1046, 322 U.S. 737, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596—Bogy v. U. S., C.C.A. Tenn., 96 F.2d 734, certiorari denied Bogy v. U. S., 59 S.Ct. 68, 305 U.S. 608, 83 L.Ed. 387—Alexander v. U. S., C.C.A. Mo., 95 F.2d 873, certiorari denied 59 S.Ct. 99, 305 U.S. 637, 83 L.Ed. 409, Debeh v. U. S., 59 S.Ct. 99, 305 U.S. 637, 83 L.Ed. 409 and 59 S.Ct. 100, 305 U.S. 637, 83 L.Ed. 409—Reuban v. U. S., C.C.A. Ill., 86 F.2d 464, certiorari denied 57 S.Ct. 513, 300 U.S. 671, 81 L.Ed. 877—Laven v. U. S., C.C.A. Ill., 86 F.2d 464, certiorari denied 57 S.Ct. 513, 300 U.S. 671, 81 L.Ed. 877, rehearing denied 57 S.Ct. 782, 301 U.S. 712, 81 L.Ed. 1364—Rollnick v. U. S., C.C.A. Ill., 86 F.2d 464, certiorari denied 57 S.Ct. 511, 300 U.S. 671, 81 L.Ed. 877.

58. U.S.—Kaplan v. U. S., C.C.A.N.Y., 18 F.2d 939.

59. U.S.—Mazurosky v. U. S., C.C.A. Or., 100 F.2d 958—Taggart v. U. S., C.C.A. Colo., 63 F.2d 285.

49 C.J. p 1209 note 50.

#### Physical presence

The nature of the offense of using the mails to defraud is such that a defendant could participate in its commission, even though he was not physically present.—King v. U. S., C.C.A. Ark., 144 F.2d 729, certiorari denied 65 S.Ct. 711, 324 U.S. 854, 89 L.Ed. 1413.

60. U.S.—Blue v. U. S., C.C.A. Ohio, 138 F.2d 351, certiorari denied 64 S.Ct. 1046, 322 U.S. 736, 88 L.Ed.

1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Clark v. U. S., 64 S.Ct. 1046, 322 U.S. 736, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Pardee v. U. S., 64 S.Ct. 1046, 322 U.S. 737, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596—Bogy v. U. S., C.C.A. Tenn., 96 F.2d 734, certiorari denied Bogy v. U. S., 59 S.Ct. 68, 305 U.S. 608, 83 L.Ed. 387—Silkworth v. U. S., C.C.A.N.Y., 10 F.2d 711, certiorari denied 46 S.Ct. 475, 271 U.S. 664, 70 L.Ed. 1139.

61. U.S.—Silkworth v. U. S., supra. 49 C.J. p 1209 note 52.

62. U.S.—Blue v. U. S., C.C.A. Ohio, 138 F.2d 351, certiorari denied 64 S.Ct. 1046, 322 U.S. 736, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Clark v. U. S., 64 S.Ct. 1046, 322 U.S. 736, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Pardee v. U. S., 64 S.Ct. 1046, 322 U.S. 737, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596—Alexander v. U. S., C.C.A. Mo., 95 F.2d 873, certiorari denied 59 S.Ct. 99, 305 U.S. 637, 83 L.Ed. 409, Debeh v. U. S., 59 S.Ct. 99, 305 U.S. 637, 83 L.Ed. 409, Lindsay v. U. S., 59 S.Ct. 100, 305 U.S. 637, 83 L.Ed. 409 and 59 S.Ct. 100, 305 U.S. 637, 83 L.Ed. 410—Belt v. Zerbst, C.C.A. Kan., 82 F.2d 18, certiorari denied 56 S.Ct. 835, 298 U.S. 667, 80 L.Ed. 1391—Belt v. U. S., C.C.A. Tex., 73 F.2d 888, certiorari denied 55 S.Ct. 513, 294 U.S. 713, 79 L.Ed. 1247—U. S. v. Corlin, D.C. Cal., 44 F.Supp. 940.

#### Agency

In a scheme to defraud which contemplates use of the mails one and all become agents of the entire group.—Weiss v. U. S., C.C.A. La., 120 F.2d 472, rehearing denied 122 F.2d 675, certiorari denied 62 S.Ct. 300, 314 U.S. 687, 86 L.Ed. 550, rehearing

denied 62 S.Ct. 478, 314 U.S. 716, 86 L.Ed. 570—U. S. v. Wimberly, D.C. La., 34 F.Supp. 904.

63. U.S.—U. S. v. Epstein, C.C.A.N.Y., 154 F.2d 806, certiorari denied 66 S.Ct. 1350, 328 U.S. 858, 90 L.Ed. 1629—U. S. v. Cohen, C.C.A.N.Y., 145 F.2d 82, certiorari denied 65 S.Ct. 553, 323 U.S. 799, 89 L.Ed. 637, four cases, and 65 S.Ct. 554, 323 U.S. 800, 89 L.Ed. 638.

64. U.S.—Kann v. U. S., Md., 65 S.Ct. 148, 323 U.S. 88, 89 L.Ed. 88, 157 A.L.R. 406—Kann v. U. S., C.C.A. Md., 140 F.2d 380, certiorari granted 64 S.Ct. 938, 321 U.S. 761, 88 L.Ed. 1059, reversed 65 S.Ct. 148, 323 U.S. 88, 89 L.Ed. 88, 157 A.L.R. 406—Blue v. U. S., C.C.A. Ohio, 138 F.2d 351, certiorari denied 64 S.Ct. 1046, 322 U.S. 736, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Clark v. U. S., 64 S.Ct. 1046, 322 U.S. 736, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Pardee v. U. S., 64 S.Ct. 1046, 322 U.S. 737, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596—Steiner v. U. S., C.C.A. La., 134 F.2d 931, certiorari denied 63 S.Ct. 1439, 319 U.S. 774, 87 L.Ed. 1721—Weiss v. U. S., C.C.A. La., 120 F.2d 472, rehearing denied 122 F.2d 675, certiorari denied 62 S.Ct. 300, 314 U.S. 687, 86 L.Ed. 550, rehearing denied 62 S.Ct. 478, 314 U.S. 716, 86 L.Ed. 570—Baker v. U. S., C.C.A. Ark., 115 F.2d 533, certiorari denied 61 S.Ct. 711, 312 U.S. 692, 85 L.Ed. 1128, rehearing denied 61 S.Ct. 731, 312 U.S. 715, 85 L.Ed. 1145, motion denied, C.C.A., 139 F.2d 721, rehearing denied 65 S.Ct. 1399, 325 U.S. 894, 89 L.Ed. 2005—Mackett v. U. S., C.C.A. Wis., 90 F.2d 462—Reuben v. U. S., C.C.A. Ill., 86 F.2d 464, certiorari denied 57 S.Ct. 513, 300 U.S. 671, 81 L.Ed. 877—Laven v. U. S., C.C.A. Ill., 86 F.2d 464, certiorari denied 57 S.Ct. 513, 300 U.S. 671, 81 L.Ed. 877, rehearing denied 57 S.Ct. 782,

former participant, who has ended his association with the fraudulent scheme long before the mails were used, is not an aider or abettor under the statute.<sup>65</sup>

While a corporate officer who devises a scheme to obtain money by false pretenses or promises and uses the mails in furtherance of such scheme is guilty of a violation of the statute,<sup>66</sup> a managing officer of a corporation cannot be convicted of using the mails to defraud if he did not know of, or participate in, the scheme,<sup>67</sup> no matter how careless and negligent he may have been in the management of the affairs of the corporation.<sup>68</sup>

### e. Defenses

As a general rule, in a prosecution for violation of the mail-fraud statute, the accused may interpose as a defense any matter which constitutes a bar to the prosecution or a legal excuse or justification for the act.

As a general rule, in a prosecution for violation of the mail-fraud statute, accused may interpose as a defense any matter which constitutes a bar to the prosecution or a legal excuse or justification for the act.<sup>69</sup> Matters which do not constitute a bar to the prosecution or which do not constitute a legal excuse or justification for the act are not available as a defense.<sup>70</sup> Ordinarily, good faith of accused is a complete defense,<sup>71</sup> but an honest belief in the success of an enterprise does not excuse or justify fraudulent representations or activities.<sup>72</sup>

*Scheme obnoxious to state laws.* It is not an objection to a prosecution under the statute that the scheme to carry out which the assistance of the mails is to be invoked is obnoxious to some state law,<sup>73</sup> or that it is of a character responsible to the police powers of the state only,<sup>74</sup> and has no

301 U.S. 712, 81 L.Ed. 1364—Rollnick v. U. S., C.C.A.Ill., 86 F.2d 464, certiorari denied 57 S.Ct. 511, 300 U.S. 671, 81 L.Ed. 877—Belt v. Zerbst, C.C.A.Kan., 82 F.2d 18, certiorari denied 56 S.Ct. 835, 298 U.S. 667, 80 L.Ed. 1391—Belt v. U. S., C.C.A.Tex., 73 F.2d 888, certiorari denied 55 S.Ct. 513, 294 U.S. 713, 79 L.Ed. 1247—Corpus Juris cited in Smith v. U. S., C.C.A.Ga., 61 F.2d 681, 685, certiorari denied 53 S.Ct. 401, 288 U.S. 608, 77 L.Ed. 983, and Ellis v. U. S., 53 S.Ct. 402, 288 U.S. 607, 77 L.Ed. 982, followed in, C.C.A., Fowler v. Aderhold, 73 F.2d 998.

49 C.J. p 1209 note 53—p 1210 note 58.

### Receipt of letter

The act of one in receiving a letter in the execution of the scheme is the act of all.—Grant v. U. S., C.C.A.Ky., 268 F. 443, certiorari denied 41 S.Ct. 538, 256 U.S. 700, 65 L.Ed. 1178.

65. U.S.—Blue v. U. S., C.C.A.Ohio, 138 F.2d 351, certiorari denied 64 S.Ct. 1046, 322 U.S. 736, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Clark v. U. S., 64 S.Ct. 1046, 322 U.S. 736, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Pardee v. U. S., 64 S.Ct. 1046, 322 U.S. 737, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596.

### Change from express and telegraph to mails

Where accused had been a party to a scheme to defraud during a period when the persons conducting it had done so solely by means of express and telegraph companies, and was not shown to have had any connection with his former confederates after they commenced unlawfully to

use the mails for such purpose, he was not guilty of a violation of the statute.—Dalton v. U. S., Ill., 154 F. 461, 83 C.C.A. 317.

66. U.S.—Barrett v. U. S., C.C.A.Mo., 33 F.2d 115.

49 C.J. p 1210 note 60.

67. U.S.—U. S. v. Foster, D.C.Tex., 10 F.2d 577.

68. U.S.—Foster v. U. S., supra.

### 69. True representations

Where defendants were charged with use of mails in executing scheme to defraud based on sale of compound as cure for certain disease or ailment, offense charged was not committed if compound constituted cure or remedy for disease or ailment as represented.—West v. U. S., C.C.A.Colo., 68 F.2d 96.

### 70. Matters not constituting defense

(1) In prosecution for using mails to defraud in sale of gold mine stock, if letters were mailed in execution of scheme to defraud, it was no defense that thereafter company was successful in that and other ventures.—Little v. U. S., C.C.A.Colo., 73 F.2d 861, 96 A.L.R. 889.

(2) Fact that defendant's conviction for embezzlement under a state statute was reversed by state supreme court was not a defense to indictment under mail fraud statute.—Dunham v. U. S., C.C.A.Fla., 125 F.2d 895.

(3) That the mails were employed in executing a part of a scheme to defraud immediately after it was devised, and at various times before entire scheme was completely devised, was no defense.—Weiss v. U. S., C.C.A.La., 122 F.2d 675, certiorari denied 62 S.Ct. 300, 314 U.S. 687, 86 L.Ed. 550, rehearing denied 62 S.Ct. 478, 314 U.S. 716, 86 L.Ed. 570.

(4) The fact that a partnership relation exists between person committing offense and person to be defrauded does not absolve former from criminal responsibility.—Stryker v. U. S., C.C.A.Colo., 95 F.2d 601.

(5) Where indictment for using mails to defraud charged scheme to palm off to customers enticed into defendants' store by false advertising, cheap, shoddy suits as suits advertised as having value greater than actual value and as being obtainable at special price because purchaser's deposit had been forfeited, that prospective customers had opportunity to inspect suits before purchasing did not prevent scheme from being fraudulent.—Rude v. U. S., C.C.A.Colo., 74 F.2d 673.

(6) Other matters not constituting defense.—Knight v. U. S., C.C.A.Tex., 123 F.2d 959—49 C.J. p 1210 note 64 [a].

71. U.S.—Coleman v. U. S., C.C.A.Tex., 167 F.2d 837—Gold v. U. S., C.C.A.Minn., 36 F.2d 16—U. S. v. Corlin, D.C.Cal., 44 F.Supp. 940.

72. U.S.—U. S. v. Oldenburg, C.C.A.Ill., 135 F.2d 616—Foshay v. U. S., C.C.A.Minn., 68 F.2d 205, certiorari denied 54 S.Ct. 531, 291 U.S. 674, 78 L.Ed. 1063.

D.C.—Deaver v. U. S., 155 F.2d 740, 81 U.S.App.D.C. 148, certiorari denied 67 S.Ct. 121, 329 U.S. 766, 91 L.Ed. 659.

49 C.J. p 1210 note 64 [a] (6).

73. U.S.—Muench v. U. S., C.C.A.Mo., 96 F.2d 332.

49 C.J. p 1210 note 65.

74. U.S.—U. S. v. Farmer, D.C.N.Y., 218 F. 929.

### Scheme by election commissioners

Mere fact that alleged scheme or artifice to defraud originated with respect to, and in course of, dis-

relation to any law of the United States,<sup>75</sup> since the prosecution is for using the mails in executing a scheme to defraud.<sup>76</sup>

**Use of decoy letters.** The fact that letters taken from a post office pursuant to a scheme to defraud were decoy letters does not render their receipt any less an offense, if they were written in an effort to detect, and not to induce the commission of, a crime;<sup>77</sup> but, if there were no reasonable grounds to suspect defendants of misusing the mails, neither the course of the officials nor the conviction can be sanctioned.<sup>78</sup>

## § 50. — Indictment

### a. In general

### b. Statement of scheme to defraud

charge of defendants' duties as primary election commissioners did not relieve defendants of criminal responsibility on ground that since it was policy of congress to leave conduct of election of its members to state laws, administered by state officers, defendants could not be charged and tried for crime denounced by statute punishing use of mails to promote frauds.—U. S. v. Classic, D.C.La., 35 F.Supp. 457.

75. U.S.—Hendrey v. U. S., Tenn., 233 F. 5, 147 C.C.A. 75.

76. U.S.—O'Hara v. U. S., Ohio, 129 F. 551, 64 C.C.A. 81.

77. U.S.—Goldman v. U. S., Ohio, 220 F. 57, 135 C.C.A. 625.  
49 C.J. p 1210 note 69.

78. U.S.—Goldman v. U. S., supra.

79. U.S.—U. S. v. Smith, D.C.Neb., 29 F.2d 926—Benham v. U. S., C.C.A. Ohio, 7 F.2d 271.

### Testing sufficiency by demurrer

The proper way to test legal sufficiency of indictment for using mails to defraud is by demurrer.—Lamb v. U. S., C.C.A.Ga., 115 F.2d 157.

### Indictment held insufficient

U.S.—U. S. v. Rucker, D.C.Okl., 1 F. Supp. 590.

80. U.S.—Holmes v. U. S., C.C.A. Neb., 134 F.2d 125, certiorari denied 63 S.Ct. 434, 319 U.S. 776, 87 L.Ed. 1722—Cornes v. U. S., C.C.A. Ariz., 119 F.2d 127—Cowl v. U. S., C.C.A.Neb., 35 F.2d 794—Krotkiewicz v. U. S., C.C.A.Mich., 19 F.2d 421—U. S. v. Main, D.C.Tex., 28 F. Supp. 550.

**Irrelevant or immaterial matters** are properly excluded from the indictment.—Busch v. U. S., C.C.A.Mo., 52 F.2d 79, certiorari denied Greible v. U. S., 52 S.Ct. 209, 284 U.S. 687, 76 L.Ed. 580—U. S. v. Wimberly, D.C.La., 34 F.Supp. 904.

- c. Statement of use of mails
- d. Issues, proof, and variance

### a. In General

An indictment for violation of the mail-fraud statute must state the nature of the accusation and the facts essential to constitute the offense with sufficient certainty and definiteness to enable the accused to prepare his defense and to plead any judgment in bar of a further prosecution therefor.

In accordance with the rules applicable in criminal prosecutions generally, an indictment for violation of the mail-fraud statute must state the nature of the accusation and the facts essential to constitute the offense with sufficient certainty and definiteness to enable accused to prepare his defense and to plead any judgment in bar of a further prosecution therefor.<sup>79</sup> When this is done, the indictment is sufficient,<sup>80</sup> and it will not be held in-

### Indictments held not indefinite or uncertain

U.S.—U. S. v. Crummer, C.C.A.Kan., 151 F.2d 958, certiorari denied 66 S.Ct. 704, 327 U.S. 785, 90 L.Ed. 1012—Lonergan v. U. S., C.C.A. Wash., 88 F.2d 591, reversed on other grounds 58 S.Ct. 430, 303 U.S. 33, 82 L.Ed. 630—Wolpa v. U. S., C.C.A.Neb., 86 F.2d 35, certiorari denied 57 S.Ct. 317, 299 U.S. 611, 81 L.Ed. 451—Wheeler v. U. S., C.C.A.Cal., 77 F.2d 216, certiorari denied 55 S.Ct. 927, 295 U.S. 765, 79 L.Ed. 1707, rehearing denied 56 S.Ct. 83, 296 U.S. 661, 80 L.Ed. 471, certiorari denied Wheeler v. Clark, 56 S.Ct. 154, 296 U.S. 631, 80 L.Ed. 448, rehearing denied 56 S.Ct. 246, 296 U.S. 663, 80 L.Ed. 473—Gridley v. U. S., C.C.A.Mich., 44 F.2d 716, certiorari denied 51 S.Ct. 351, 283 U.S. 327, 75 L.Ed. 1441—U. S. v. Herzog, D.C.N.Y., 26 F.2d 487—Chew v. U. S., C.C.A.Ark., 9 F.2d 348—U. S. v. Gilbert, D.C.Ohio, 31 F.Supp. 195.

### Indictments held sufficient

U.S.—U. S. v. Carruthers, C.C.A.Tll., 152 F.2d 512, certiorari denied 66 S.Ct. 805, rehearing denied 66 S.Ct. 816, 327 U.S. 817, 90 L.Ed. 1040, rehearing denied 66 S.Ct. 897, 327 U.S. 819, 90 L.Ed. 1014—U. S. v. Crummer, C.C.A.Kan., 151 F.2d 958, certiorari denied 66 S.Ct. 704, 327 U.S. 785, 90 L.Ed. 1012—U. S. v. Monjar, C.C.A.Del., 147 F.2d 916, certiorari denied 65 S.Ct. 1191, two cases, 325 U.S. 859, 89 L.Ed. 1979, Cook v. U. S., 65 S.Ct. 1192, 325 U.S. 859, 89 L.Ed. 1979, Drew v. U. S., 65 S.Ct. 1192, 325 U.S. 859, 89 L.Ed. 1979, Jones v. U. S., 65 S.Ct. 1192, 325 U.S. 859, 89 L.Ed. 1979, Moore v. U. S., 65 S.Ct. 1192, 325 U.S. 859, 89 L.Ed. 1979, Candlin v. U. S., 65 S.Ct. 1193, 325 U.S. 859, 89 L.Ed. 1980, Fitzpatrick v. U.

S., 65 S.Ct. 1193, 325 U.S. 859, 89 L.Ed. 1980, Lindh v. U. S., 65 S.Ct. 1193, 325 U.S. 859, 89 L.Ed. 1981, Willard v. U. S., 65 S.Ct. 1193, 325 U.S. 859, 89 L.Ed. 1980, Cruser v. U. S., 65 S.Ct. 1194, 325 U.S. 859, 89 L.Ed. 1981, and Maddams v. U. S., 65 S.Ct. 1194, 325 U.S. 859, 89 L.Ed. 1981—Rosenbloom v. Hunter, C.C.A.Kan., 143 F.2d 673—Ballard v. U. S., C.C.A.Cal., 138 F.2d 540, reversed on other grounds 64 S.Ct. 882, 322 U.S. 78, 88 L.Ed. 1148—Steiner v. U. S., C.C.A.La., 134 F.2d 931, certiorari denied 63 S.Ct. 1439, 319 U.S. 974, 87 L.Ed. 1721—Holmes v. U. S., C.C.A.Neb., 134 F.2d 125, certiorari denied 63 S.Ct. 434, 319 U.S. 776, 87 L.Ed. 1722—Beckett v. Hudspeth, C.C.A.Kan., 131 F.2d 195—Bozel v. Hudspeth, C.C.A.Kan., 126 F.2d 535—Cornes v. U. S., C.C.A.Ariz., 119 F.2d 127—Shushan v. U. S., C.C.A.La., 117 F.2d 110, 133 A.L.R. 1040, certiorari denied 61 S.Ct. 1085, 313 U.S. 574, 85 L.Ed. 1531, rehearing denied 62 S.Ct. 53, 314 U.S. 706, 85 L.Ed. 564, certiorari denied Newman v. U. S., 61 S.Ct. 1086, 313 U.S. 574, 85 L.Ed. 1532, rehearing denied 62 S.Ct. 53, 314 U.S. 706, 86 L.Ed. 564, certiorari denied Miller v. U. S., 61 S.Ct. 1086, 313 U.S. 574, 85 L.Ed. 1532, rehearing denied 62 S.Ct. 53, 314 U.S. 706, 86 L.Ed. 564, certiorari denied Waguespack v. U. S., 61 S.Ct. 1086, 313 U.S. 574, 85 L.Ed. 1532, rehearing denied 62 S.Ct. 53, 314 U.S. 706, 86 L.Ed. 564—U. S. v. Mommson, C.C.A.Wis., 115 F.2d 635, certiorari denied Mommson v. U. S., 61 S.Ct. 805, 312 U.S. 701, 85 L.Ed. 1134—Baker v. U. S., C.C.A.Ark., 115 F.2d 533, certiorari denied 61 S.Ct. 711, 312 U.S. 692, 85 L.Ed. 1128, rehearing denied 61 S.Ct. 731, 312 U.S. 715, 85 L.Ed. 1145, motion denied 139 F.2d 721, re-

sufficient by reason of purely formal defects.<sup>81</sup> The indictment need only allege the elements specified in the statute.<sup>82</sup> It need not allege the violation of a particular statute,<sup>83</sup> or follow the language of the statute if the averments bring the charge within the substance and true meaning of the statute.<sup>84</sup>

**Bill of particulars.** In accordance with the rule in criminal prosecutions generally, accused is entitled to a bill of particulars where the charges are so general in their nature that they do not fully advise him of the specific acts with which he is charged so that he may properly prepare his defense.<sup>85</sup> An indefinite description of the matter mailed is a proper ground for requesting a bill of particulars.<sup>86</sup> The court need not require the gov-

ernment to give additional information unless it is necessary to protect the rights of accused.<sup>87</sup>

**Persons accused.** The person accused should be properly designated or identified,<sup>88</sup> and it is improper to couple an alias with the real name of accused where there is no question of identity.<sup>89</sup> Since each party to a scheme to defraud is an agent of the entire group, as discussed supra § 49, an allegation which charges an act by one of the parties acting in concert with the others is sufficient to charge all the parties to the scheme with the commission of the act.<sup>90</sup> The failure to name a participant in a scheme to defraud in one indictment does not estop the government to prosecute such participant under a subsequent indictment.<sup>91</sup>

**Joinder of offenses.** The mail-fraud statute con-

hearing denied 65 S.Ct. 1399, 325 U.S. 894, 89 L.Ed. 2005—Wagner v. U. S., C.C.A.Fla., 110 F.2d 595, certiorari denied 60 S.Ct. 1104, 310 U.S. 643, 84 L.Ed. 1411—Spivey v. U. S., C.C.A.Ala., 109 F.2d 181, certiorari denied 60 S.Ct. 1079, 310 U.S. 631, 84 L.Ed. 1401—U. S. v. Minnec, C.C.A.Ill., 104 F.2d 575. Certiorari denied Minnec v. U. S., 60 S.Ct. 94, 308 U.S. 57, 84 L.Ed. 484—U. S. v. Womack, C.C.A.Ill., 98 F.2d 742—Lee v. U. S., C.C.A.Ga., 91 F.2d 326, certiorari denied 58 S.Ct. 263, 302 U.S. 745, 82 L.Ed. 576—Frischia v. U. S., C.C.A.Fla., 63 F.2d 977, certiorari denied 53 S.Ct. 797, 289 U.S. 762, 77 L.Ed. 1505—McClintock v. U. S., C.C.A.Kan., 60 F.2d 839—Johnson v. U. S., C.C.A.Cal., 59 F.2d 42, certiorari denied 53 S.Ct. 83, 287 U.S. 631, 77 L.Ed. 547—Butler v. U. S., C.C.A.Utah, 53 F.2d 800—Munch v. U. S., C.C.A.Fla., 38 F.2d 1017—U. S. v. Procter & Gamble Co., D.C.Mass., 47 F.Supp. 676—U. S. v. McKay, D.C.Mich., 45 F.Supp. 1007—U. S. v. Carpenter, D.C.N.Y., 44 F.Supp. 654—U. S. v. Classic, D.C.La., 35 F.Supp. 457—U. S. v. Wimberly, D.C.La., 34 F.Supp. 904—U. S. v. Bogy, D.C.Tenn., 16 F.Supp. 407, affirmed Bogy v. U. S., 96 F.2d 734, certiorari denied 59 S.Ct. 68, 305 U.S. 608, 83 L.Ed. 387.

49 C.J. p 1210 note 78 [a].

81. U.S.—U. S. v. Carruthers, C.C.A.Ill., 152 F.2d 512, certiorari denied 66 S.Ct. 805, rehearing denied 66 S.Ct. 816, 327 U.S. 817, 90 L.Ed. 1040, rehearing denied 66 S.Ct. 897, 327 U.S. 819, 90 L.Ed. 1014—U. S. v. Momsen, C.C.A.Wis., 115 F.2d 635, certiorari denied Momsen v. U. S., 61 S.Ct. 805, 312 U.S. 701, 85 L.Ed. 1134.

49 C.J. p 1211 note 74.

**Loose statement of elements of crime will not invalidate indictment**

for using mails to defraud.—Cowl v. U. S., C.C.A.Neb., 35 F.2d 794.

82. U.S.—U. S. v. Young, Ala., 34 S.Ct. 303, 232 U.S. 155, 58 L.Ed. 548.

49 C.J. p 1211 note 79.

83. U.S.—Holmes v. U. S., C.C.A.Neb., 134 F.2d 125, certiorari denied 63 S.Ct. 434, 319 U.S. 776, 87 L.Ed. 1722.

84. U.S.—Olsen v. U. S., C.C.A.N.Y., 287 F. 85—Grey v. U. S., Ill., 172 F. 101, 96 C.C.A. 415—Lemon v. U. S., Ark., 164 F. 953, 90 C.C.A. 617.

85. U.S.—U. S. v. Halsey, Stuart & Co., D.C.Wis., 4 F.Supp. 662.

**Bill of particulars properly granted**

(1) To show approximate time when scheme referred to in charge was devised by defendants.—U. S. v. National Title Guaranty Co., D.C.N.Y., 12 F.Supp. 473.

(2) To show whether certain alleged false representations charged in indictment were written or oral, and, if written, in what manner, and, if oral, by whom made.—U. S. v. National Title Guaranty Co., D.C.N.Y., 12 F.Supp. 473.

(3) To show properties, mortgages, and certificates involved.—U. S. v. National Title Guaranty Co., D.C.N.Y., 12 F.Supp. 473.

(4) To show substance of telephone conversations and representations made by salesmen and agents, and also names of such persons.—U. S. v. National Title Guaranty Co., D.C.N.Y., 12 F.Supp. 473.

(5) To show copies of letters containing false representations used in scheme.—U. S. v. National Title Guaranty Co., D.C.N.Y., 12 F.Supp. 473.

(6) To show whether it was claimed that accused in any way partici-

pated in the scheme in preparing notice of bond sale as set forth in indictment, and if any false representations or promises were claimed to have been made by that accused, the time and manner thereof, and the person to whom made.—U. S. v. McKay, D.C.Mich., 45 F.Supp. 1007.

(7) To inform defendants as to how and in what way described drafts figured in prosecution, and what relationship such drafts bore to alleged scheme and artifice of defendants to defraud.—U. S. v. Leche, D.C.La., 34 F.Supp. 982, affirmed, C.C.A., Leche v. U. S., 113 F.2d 246.

86. U.S.—Baker v. U. S., C.C.A.Ark., 115 F.2d 533, certiorari denied 61 S.Ct. 711, 312 U.S. 692, 85 L.Ed. 1128, rehearing denied 61 S.Ct. 731, 312 U.S. 715, 85 L.Ed. 1145.

87. U.S.—Hass v. U. S., C.C.A.Iowa, 93 F.2d 427—U. S. v. National Title Guaranty Co., D.C.N.Y., 12 F.Supp. 473.

**Bill of particulars held properly denied**

U.S.—Grell v. U. S., C.C.A.Mo., 112 F.2d 861—Hartzell v. U. S., C.C.A.Iowa, 72 F.2d 569, certiorari denied 55 S.Ct. 216, 293 U.S. 621, 79 L.Ed. 708.

88. U.S.—U. S. v. Grayson, C.C.A.N.Y., 166 F.2d 863.

49 C.J. p 1210 note 73 [a].

89. U.S.—U. S. v. Grayson, C.C.A.N.Y., 166 F.2d 863.

90. U.S.—U. S. v. Wimberly, D.C.La., 34 F.Supp. 904.

91. U.S.—Alexander v. U. S., C.C.A.Mo., 95 F.2d 873, certiorari denied 59 S.Ct. 99, 305 U.S. 637, 83 L.Ed. 409, Debeh v. U. S., 59 S.Ct. 99, 305 U.S. 637, 83 L.Ed. 409, and Lindsay v. U. S., 59 S.Ct. 100, 305 U.S. 637, 83 L.Ed. 409, and 59 S.Ct. 100, 305 U.S. 637, 83 L.Ed. 410.

tains no restriction as to the number of counts an indictment may contain<sup>92</sup> or the period within which the several offenses charged must have been committed.<sup>93</sup>

**Negating matter of defense.** In accordance with the rules in criminal prosecutions generally, the indictment need not negative matters of defense.<sup>94</sup>

**Matters of evidence.** The indictment need not allege evidentiary facts<sup>95</sup> or set out evidence to show the manner in which the scheme to defraud would be made effective.<sup>96</sup>

**Surplusage.** As in other prosecutions, surplusage will not vitiate an indictment for using the mails to defraud, and may be disregarded.<sup>97</sup>

#### b. Statement of Scheme to Defraud

- (1) In general
- (2) Description of scheme
- (3) Representations used
- (4) Designation of persons

##### (1) In General

An indictment for violation of the mail-fraud statute must allege that a scheme of the character denounced

by the statute was devised or intended to be devised. It need not allege success of the scheme.

An indictment for violation of the mail-fraud statute must allege that a scheme of the character denounced by the statute was devised or intended to be devised;<sup>98</sup> and for this purpose, it is sufficient to allege that accused on a given day had devised a scheme to defraud.<sup>99</sup> The indictment must state facts which show that there was something of value, within the meaning of the statute, of which the named victim could be defrauded.<sup>1</sup>

It is not necessary that the scheme set out in the indictment should appear to be fraudulent on its face,<sup>2</sup> and an indictment which describes the entire scheme as devised and charges it to be in some, but not in all, essential respects fraudulent is not defective.<sup>3</sup> An indictment is not insufficient as showing only a preparation to devise a scheme to defraud because ways and means for carrying it into effect were subsequently to be devised,<sup>4</sup> and it has been held that an indictment is not rendered bad by the fact that allegations show that representations made were inconsistent with each other.<sup>5</sup> Where an indictment sufficiently charges a scheme or artifice to defraud, the fact that it also added

92. U.S.—Stern v. U. S., N.Y., 223 F. 762, 139 C.C.A. 292.

93. U.S.—Stern v. U. S., supra.

Under an early statute only three offenses committed within the six calendar months could be joined in the same indictment.—Ex parte Henry, S.C., 8 S.Ct. 142, 123 U.S. 372, 31 L.Ed. 174.—U. S. v. Clark, D.C.Pa., 125 F. 92.—U. S. v. Nye, C.C.Ohio, 4 F. 888.

94. U.S.—U. S. v. Monjar, D.C.Del., 47 F.Supp. 421, affirmed, C.C.A., 147 F.2d 916, certiorari denied Monjar v. U. S., 65 S.Ct. 1191, two cases, 325 U.S. 859, 89 L.Ed. 1979, Cook v. U. S., 65 S.Ct. 1192, 325 U.S. 859, 89 L.Ed. 1979, Drew v. U. S., 65 S.Ct. 1192, 325 U.S. 859, 89 L.Ed. 1979, Jones v. U. S., 65 S.Ct. 1192, 325 U.S. 859, 89 L.Ed. 1979, Moore v. U. S., 65 S.Ct. 1192, 325 U.S. 859, 89 L.Ed. 1980, Candlin v. U. S., 65 S.Ct. 1193, 325 U.S. 859, 89 L.Ed. 1980, Fitzpatrick v. U. S., 65 S.Ct. 1193, 325 U.S. 859, 89 L.Ed. 1980, Lindh v. U. S., 65 S.Ct. 1193, 325 U.S. 859, 89 L.Ed. 1980, Willard v. U. S., 65 S.Ct. 1193, 325 U.S. 859, 89 L.Ed. 1980, Cruser v. U. S., 65 S.Ct. 1194, 325 U.S. 859, 89 L.Ed. 1981, and Maddams v. U. S., 65 S.Ct. 1194, 325 U.S. 859, 89 L.Ed. 1981.

49 C.J. p 1215 note 56.

95. U.S.—Graham v. U. S., C.C.A.N.M., 120 F.2d 543.—U. S. v. Womack, C.C.A.Ill., 98 F.2d 742.—Smith v. U. S., C.C.A.Ga., 61 F.2d 681, certiorari denied 58 S.Ct. 401, 288 U.S. 608, 77 L.Ed. 983, and Ellis v. U. S., 53 S.Ct. 402, 288 U.S. 607, 77 L.Ed. 982, followed in, C.C.A., Fowler v. Aderhold, 78 F.2d 998.—U. S. v. Shecter, D.C.Pa., 35 F.Supp. 11.

96. U.S.—Freeman v. U. S., Ill., 244 F. 1, 156 C.C.A. 429, certiorari denied 38 S.Ct. 12, 245 U.S. 654, 62 L.Ed. 533.

49 C.J. p 1215 note 54.

97. U.S.—U. S. v. Buckner, C.C.A.N.Y., 108 F.2d 921, certiorari denied Buckner v. U. S., 60 S.Ct. 613, 309 U.S. 669, 84 L.Ed. 1016.

49 C.J. p 1211 note 77.

98. U.S.—Bauman v. U. S., C.C.A.La., 156 F.2d 534.

49 C.J. p 1211 note 82.

#### Scheme held sufficiently alleged

U.S.—Richardson v. U. S., C.C.A.Tenn., 150 F.2d 58.—U. S. v. Lowe, C.C.A.Wis., 115 F.2d 596, certiorari denied Lowe v. U. S., 61 S.Ct. 441, 311 U.S. 717, 85 L.Ed. 466.—Muench v. U. S., C.C.A.Mo., 96 F.2d 332.—Johnson v. U. S., C.C.A.Ky., 82 F.2d 500, certiorari denied 56 S.Ct. 957, 298 U.S. 688, 80 L.Ed. 1407.—Czarlinsky v. U. S., C.C.A.N.M., 54 F.2d 889, certiorari denied 52 S.Ct. 406, 285 U.S. 549, 76 L.Ed. 940.—Cowl v. U. S., C.C.A.Neb., 35 F.2d 794.—U. S. v. Proctor & Gamble Co., D.C.Mass., 47 F.Supp. 676.—U. S. v. Zalewski, D.C.Ky., 29 F.Supp. 755.—U. S. v. Brown, D.C.N.Y., 5 F.Supp. 81, affirmed, C.C.A., 79 F.2d 321, certiorari denied Mc-

Carthy v. U. S., 56 S.Ct. 309, 296 U.S. 650, 80 L.Ed. 462.—Foster v. U. S., Ohio, 178 F. 165, 101 C.C.A. 485.—U. S. v. Horman, D.C.Ohio, 118 F. 780.

99. U.S.—Wilson v. U. S., N.Y., 190 F. 427, 111 C.C.A. 231.

49 C.J. p 1211 note 83.

1. U.S.—U. S. v. Wimberly, D.C.La., 34 F.Supp. 904.

#### Civil or political rights

An indictment charging that defendants used the mails in furtherance of a scheme to defraud by making false primary election returns is demurrable in the absence of a showing that by the alleged scheme the persons to be defrauded were or could have been deprived of money or property of some value other than mere civil or political rights.—U. S. v. Randle, D.C.La., 39 F.Supp. 759.

2. U.S.—Link v. U. S., C.C.A.Colo., 30 F.2d 342.—Rowe v. Boyle, C.C.A.Wash., 268 F. 809, certiorari denied 41 S.Ct. 218, 254 U.S. 656, 65 L.Ed. 460.

3. U.S.—Link v. U. S., C.C.A.Colo., 30 F.2d 342.

33 C.J. p 1211 note 84.

4. U.S.—Goldman v. U. S., Ohio, 220 F. 57, 135 C.C.A. 625.

49 C.J. p 1211 note 85.

5. U.S.—Byron v. U. S., Or., 259 F. 371, 170 C.C.A. 347, certiorari denied 40 S.Ct. 177, 251 U.S. 556, 64 L.Ed. 412.

49 C.J. p 1211 note 86.

the words "in and by inducing by false and fraudulent representations and pretenses" persons to part with their money does not limit the government to the common-law offense of obtaining money or property by false pretenses.<sup>6</sup>

**Intent to defraud.** Since an intent to defraud is a necessary element of the offense, it is essential that the indictment allege an intent to defraud;<sup>7</sup> and this may be done by stating facts from which such intent must be necessarily inferred,<sup>8</sup> without the use of the word "intent."<sup>9</sup>

**Success of scheme.** The indictment need not allege the success of the scheme<sup>10</sup> or that the objects of the scheme were actually accomplished,<sup>11</sup> or that anyone had actually lost money or had been defrauded by the execution of the scheme alleged through the use of the mails.<sup>12</sup>

**Benefit accruing to accused.** It is not necessary to allege in the indictment that accused expected to,<sup>13</sup> or did,<sup>14</sup> benefit from the execution of the scheme to defraud, or that he intended to, or did,

convert the money obtained by the execution of such scheme to his own use.<sup>15</sup> If an intention to convert is charged, it is unnecessary to specify the manner in which the conversion was accomplished.<sup>16</sup>

## (2) Description of Scheme

The scheme should be charged with sufficient particularity to enable the accused to know the charge against him and to protect himself against further prosecution for the same offense.

The indictment must describe the alleged scheme with such certainty as clearly to inform accused of the charge against him, and of the nature of the evidence to be adduced in proof of the execution of the scheme,<sup>17</sup> by direct and positive averment, and not inferentially;<sup>18</sup> and an indictment which fails to meet this requirement is defective in substance and is not aided or cured by verdict.<sup>19</sup> Nevertheless, it is only essential to charge the scheme with such particularity as will enable accused to know the charge against him and what he will be required to meet on the trial,<sup>20</sup> and that the indict-

6. U.S.—Wilson v. U. S., N.Y., 190 F. 427, 432, 111 C.C.A. 231.  
49 C.J. p 1212 note 87.

7. U.S.—Troutman v. U. S., C.C.A. Colo., 100 F.2d 628.  
49 C.J. p 1213 note 3.

### Allegations held sufficient

U.S.—Busch v. U. S., C.C.A.Mo., 52 F.2d 79, certiorari denied Greible v. U. S., 52 S.Ct. 209, 284 U.S. 687, 76 L.Ed. 580.

8. U.S.—Hass v. U. S., C.C.A.Iowa, 93 F.2d 427—U. S. v. Holdsworth, D.C.Me., 77 F.Supp. 148.  
49 C.J. p 1213 note 4.

9. U.S.—Kriebel v. U. S., C.C.A.Ill., 8 F.2d 692, certiorari denied 46 S.Ct. 119, 269 U.S. 582, 70 L.Ed. 424, and Pommery v. U. S., 46 S.Ct. 120, 296 U.S. 583, 70 L.Ed. 424.

10. U.S.—Muench v. U. S., C.C.A.Mo., 96 F.2d 332.

11. U.S.—Cornes v. U. S., C.C.A.Ariz., 119 F.2d 127—Lonergan v. U. S., C.C.A.Wash., 88 F.2d 591, reversed on other grounds 58 S.Ct. 430, 303 U.S. 33, 82 L.Ed. 630.

12. U.S.—Baker v. U. S., C.C.A.Ark., 115 F.2d 533, certiorari denied 61 S.Ct. 711, 312 U.S. 692, 85 L.Ed. 1123, rehearing denied 61 S.Ct. 731, 312 U.S. 715, 85 L.Ed. 1145, motion denied, C.C.A., 139 F.2d 721, rehearing denied 65 S.Ct. 1399, 325 U.S. 894, 89 L.Ed. 2005—Hass v. U. S., C.C.A.Iowa, 93 F.2d 427—U. S. v. Rowe, C.C.A.N.Y., 56 F.2d 747, certiorari denied Rowe v. U. S., 52 S.Ct. 579, 286 U.S. 554, 76 L.Ed. 1289.

49 C.J. p 1212 note 98.

### Value of property sold

Allegation that lots were worthless was held unnecessary to establish crime of using mails to defraud in sale thereof.—Cowl v. U. S., C.C.A.Neb., 35 F.2d 794.

13. U.S.—Levinson v. U. S., C.C.A.Ohio, 5 F.2d 567, certiorari denied 46 S.Ct. 23, 269 U.S. 564, 70 L.Ed. 414.

14. U.S.—Nelson v. U. S., C.C.A.Ark., 16 F.2d 71—Chew v. U. S., C.C.A.Ark., 9 F.2d 348—Linn v. U. S., Ill., 234 F. 543, 148 C.C.A. 309.

15. U.S.—Harper v. U. S., C.C.A.Mo., 143 F.2d 795.

49 C.J. p 1215 note 51.

16. U.S.—U. S. v. Loring, D.C.Ill., 91 F. 381.

17. U.S.—U. S. v. Crummer, C.C.A.Kan., 151 F.2d 958, certiorari denied 66 S.Ct. 704, 327 U.S. 785, 90 L.Ed. 1012—U. S. v. Beck, C.C.A.Ill., 118 F.2d 178, certiorari denied Beck v. U. S., 61 S.Ct. 1121, 313 U.S. 587, 85 L.Ed. 1542—Wolpa v. U. S., C.C.A.Neb., 86 F.2d 35, certiorari denied 57 S.Ct. 317, 299 U.S. 611, 81 L.Ed. 451—Rude v. U. S., C.C.A.Colo., 74 F.2d 673—U. S. v. Halsey, Stuart & Co., D.C.Wis., 4 F.Supp. 662.

49 C.J. p 1212 note 38.

18. U.S.—Dalton v. U. S., Ill., 127 F. 544, 62 C.C.A. 238.

19. U.S.—U. S. v. Hess, Cal., 8 S.Ct. 571, 124 U.S. 483, 31 L.Ed. 516.

20. U.S.—U. S. v. Crummer, C.C.A.Kan., 151 F.2d 958, certiorari denied 66 S.Ct. 704, 327 U.S. 785, 90 L.Ed. 1012—U. S. v. Beck, C.C.A.Ill., 118 F.2d 178, certiorari denied

Beck v. U. S., 61 S.Ct. 1121, 313 U.S. 587, 85 L.Ed. 1542—U. S. v. Momsen, C.C.A.Wis., 115 F.2d 635, certiorari denied Momsen v. U. S., 61 S.Ct. 805, 312 U.S. 701, 85 L.Ed. 1134—Boatright v. U. S., C.C.A.Mo., 105 F.2d 737—U. S. v. Minnec, C.C.A.Ill., 104 F.2d 575, certiorari denied Minnec v. U. S., 60 S.Ct. 94, 308 U.S. 277, 84 L.Ed. 484—Hass v. U. S., C.C.A.Iowa, 93 F.2d 427—Goddard v. U. S., C.C.A.Utah, 86 F.2d 884—Wolpa v. U. S., C.C.A.Neb., 86 F.2d 35, certiorari denied 57 S.Ct. 317, 299 U.S. 611, 81 L.Ed. 451—Weber v. U. S., C.C.A.Utah, 80 F.2d 687—Rude v. U. S., C.C.A.Colo., 74 F.2d 673—Havener v. U. S., C.C.A.Kan., 49 F.2d 196, certiorari denied 52 S.Ct. 24, 284 U.S. 644, 76 L.Ed. 547—Brady v. U. S., C.C.A.Kan., 24 F.2d 397, certiorari denied 49 S.Ct. 10, 278 U.S. 603, 73 L.Ed. 531—Brady v. U. S., C.C.A.Kan., 24 F.2d 399—U. S. v. Shecter, D.C.Pa., 35 F.Supp. 11—U. S. v. Brown, D.C.N.Y., 5 F.Supp. 81, affirmed, C.C.A., 79 F.2d 321, certiorari denied McCarthy v. U. S., 56 S.Ct. 309, 296 U.S. 650, 80 L.Ed. 462—U. S. v. Halsey, Stuart & Co., D.C.Wis., 4 F.Supp. 662.

49 C.J. p 1212 note 91.

### Bill of particulars

In charging the use of the mails to defraud, where the scheme is set out in the indictment with a degree of certainty sufficient to show its existence and character and fairly to acquaint defendant with the particular fraudulent scheme charged against him, but defendant is entitled to further identification or specification, his remedy is to apply for



ment be such as will avoid another prosecution for the same offense.<sup>21</sup> It is not necessary that the scheme be set forth with that particularity as to time, place, and circumstance which would be required if the scheme itself, and not the use of the post office in the execution thereof, was the gist of the offense,<sup>22</sup> or with the detail and particularity necessary in an indictment for the specific offense of obtaining property through false representations,<sup>23</sup> or an indictment for swindling or a like crime.<sup>24</sup>

The indictment should disclose the facts or elements which constitute the scheme or artifice,<sup>25</sup> and an indictment which merely uses the words of the statute in setting out the scheme, without alleging the particulars which constitute the scheme, is insufficient.<sup>26</sup> If the allegations as a whole describe the scheme to defraud, it is not necessary that each paragraph of a count describe the offense.<sup>27</sup> It is also unnecessary for the indictment to identify each defendant with the particular role that he was to take in the execution of the

a bill of particulars.—U. S. v. Crummer, C.C.A.Kan., 151 F.2d 958, certiorari denied 66 S.Ct. 704, 327 U.S. 785, 90 L.Ed. 1012.

#### Allegations held sufficient

U.S.—Reining v. U. S., C.C.A.Fla., 167 F.2d 362, certiorari denied 69 S.Ct. 49, 335 U.S. 830, 93 L.Ed. 383—Mansfield v. U. S., C.C.A.Tex., 185 F.2d 952, certiorari denied Browne v. U. S., 67 S.Ct. 384, 329 U.S. 792, 91 L.Ed. 678—U. S. v. Crummer, C.C.A.Kan., 151 F.2d 958, certiorari denied 66 S.Ct. 704, 327 U.S. 785, 90 L.Ed. 1012—U. S. v. Beck, C.C.A.Ill., 118 F.2d 178, certiorari denied Beck v. U. S., 61 S.Ct. 1121, 313 U.S. 587, 85 L.Ed. 1542—U. S. v. Buckner, C.C.A.N.Y., 108 F.2d 921, certiorari denied Buckner v. U. S., 60 S.Ct. 613, 309 U.S. 669, 84 L.Ed. 1016—Hass v. U. S., C.C.A.Iowa, 93 F.2d 427—Wolpa v. U. S., C.C.A.Neb., 86 F.2d 35, certiorari denied 57 S.Ct. 317, 299 U.S. 611, 81 L.Ed. 451—Weber v. U. S., C.C.A.Utah, 80 F.2d 687—Rude v. U. S., C.C.A.Colo., 74 F.2d 673—Worthington v. U. S., C.C.A.Ill., 64 F.2d 936—Havener v. U. S., C.C.A.Kan., 49 F.2d 196, certiorari denied 52 S.Ct. 24, 284 U.S. 644, 76 L.Ed. 547—Cochran v. U. S., C.C.A.Minn., 41 F.2d 193—Cowl v. U. S., C.C.A.Neb., 35 F.2d 794—Brady v. U. S., C.C.A.Kan., 24 F.2d 397, certiorari denied 49 S.Ct. 10, 278 U.S. 603, 78 L.Ed. 531—Brady v. U. S., C.C.A.Kan., 24 F.2d 399—U. S. v. Procter & Gamble Co., D.C.Mass., 47 F. Supp. 676—U. S. v. Monjar, D.C.Del., 47 F. Supp. 421, affirmed, C.C.A., 147 F.2d 916, certiorari denied 65 S.Ct. 1191, two cases, 325 U.S. 859, 89 L.Ed. 1979, Cook v. U. S., 65 S.Ct. 1192, 325 U.S. 859, 89 L.Ed. 1979, Drew v. U. S., 65 S.Ct. 1192, 325 U.S. 859, 89 L.Ed. 1979, Moore v. U. S., 65 S.Ct. 1192, 325 U.S. 859, 89 L.Ed. 1979, Jones v. U. S., 65 S.Ct. 1192, 325 U.S. 859, 89 L.Ed. 1979, Moore v. U. S., 65 S.Ct. 1192, 325 U.S. 859, 89 L.Ed. 1980, Candlin v. U. S., 65 S.Ct. 1193, 325 U.S. 859, 89 L.Ed. 1980, Fitzpatrick v. U. S., 65 S.Ct. 1193, 325 U.S. 859, 89 L.Ed. 1980, Lindh v. U. S., 65 S.Ct. 1193, 325 U.S. 859, 89 L.Ed. 1980, Willard v. U. S., 65 S.Ct. 1193, 325 U.S. 859, 89 L.Ed. 1980, Crusier v. U. S., 65 S.Ct. 1194,

325 U.S. 859, 89 L.Ed. 1981, and Maddams v. U. S., 65 S.Ct. 1194, 325 U.S. 859, 89 L.Ed. 1981.

49 C.J. p 1212 note 91 [a].

#### Statement of contract held proper

U.S.—Whitehead v. U. S., Ala., 245 F. 385, 157 C.C.A. 547, certiorari denied 38 S.Ct. 191, 245 U.S. 670, 62 L.Ed. 540.

49 C.J. p 1210 note 73 [b].

21. U.S.—Weber v. U. S., C.C.A.Utah, 80 F.2d 687—U. S. v. Brown, D.C.N.Y., 5 F.Supp. 81, affirmed, C.C.A., 79 F.2d 321, certiorari denied McCarthy v. U. S., 56 S.Ct. 309, 296 U.S. 650, 80 L.Ed. 462—Grant v. U. S., C.C.A.Ky., 268 F. 443, certiorari denied 41 S.Ct. 538, 256 U.S. 700, 65 L.Ed. 1178.

#### Allegations held sufficient

U.S.—U. S. v. Beck, C.C.A.Ill., 118 F.2d 178, certiorari denied Beck v. U. S., 61 S.Ct. 1121, 313 U.S. 587, 85 L.Ed. 1542—Wolpa v. U. S., C.C.A.Neb., 86 F.2d 35, certiorari denied 57 S.Ct. 317, 299 U.S. 611, 81 L.Ed. 451—Roper v. U. S., C.C.A.Colo., 54 F.2d 845.

22. U.S.—U. S. v. Crummer, C.C.A.Kan., 151 F.2d 958, certiorari denied 66 S.Ct. 704, 327 U.S. 785, 90 L.Ed. 1012—Leche v. U. S., C.C.A.La., 118 F.2d 246, certiorari denied 62 S.Ct. 73, 314 U.S. 617, 86 L.Ed. 496, rehearing denied 62 S.Ct. 295, 314 U.S. 712, 86 L.Ed. 567—U. S. v. Lowe, C.C.A.Wis., 115 F.2d 596, certiorari denied Lowe v. U. S., 61 S.Ct. 441, 311 U.S. 717, 85 L.Ed. 466—Baker v. U. S., C.C.A.Ark., 115 F.2d 533, certiorari denied 61 S.Ct. 711, 312 U.S. 692, 85 L.Ed. 1128, rehearing denied 61 S.Ct. 731, 312 U.S. 715, 85 L.Ed. 1145, motion denied, C.C.A., 139 F.2d 721, rehearing denied 65 S.Ct. 1399, 325 U.S. 894, 89 L.Ed. 2005—Hass v. U. S., C.C.A.Iowa, 93 F.2d 427—Wolpa v. U. S., C.C.A.Neb., 86 F.2d 35, certiorari denied 57 S.Ct. 317, 299 U.S. 611, 81 L.Ed. 451—Weber v. U. S., C.C.A.Utah, 80 F.2d 687—Rude v. U. S., C.C.A.Colo., 74 F.2d 673—Worthington v. U. S., C.C.A.Ill., 64 F.2d 936—Busch v. U. S., C.C.A.Mo., 52 F.2d 79, certiorari denied Greible v. U. S., 52 S.Ct. 209, 284

U.S. 687, 76 L.Ed. 580—Havener v. U. S., C.C.A.Kan., 49 F.2d 196, certiorari denied 52 S.Ct. 24, 284 U.S. 644, 76 L.Ed. 547—Cochran v. U. S., C.C.A.Minn., 41 F.2d 193—Cowl v. U. S., C.C.A.Neb., 35 F.2d 794.

49 C.J. p 1212 note 93.

#### Executed scheme

An indictment is not fatally defective because it charges an executed scheme by alleging that defendant falsely represented or pretended certain things, instead of alleging that it was the plan that defendant would falsely represent and pretend such things.—U. S. v. Momsen, C.C.A.Wis., 115 F.2d 635, certiorari denied Monsen v. U. S., 61 S.Ct. 805, 312 U.S. 701, 85 L.Ed. 1134.

23. U.S.—Preeman v. U. S., Ill., 244 F. 1, 156 C.C.A. 429, certiorari denied 38 S.Ct. 12, 245 U.S. 654, 62 L.Ed. 533.

49 C.J. p 1212 note 94.

24. U.S.—Whitehead v. U. S., Ala., 245 F. 385, 157 C.C.A. 547, certiorari denied 38 S.Ct. 191, 245 U.S. 670, 62 L.Ed. 540.

25. U.S.—U. S. v. Halsey, Stuart & Co., D.C.Wis., 4 F.Supp. 662.

26. U.S.—U. S. v. Halsey, Stuart & Co., supra.

27. U.S.—U. S. v. Monjar, D.C.Del., 47 F.Supp. 421, affirmed, C.C.A., 147 F.2d 916, certiorari denied Monjar v. U. S., 65 S.Ct. 1191, two cases, 325 U.S. 859, 89 L.Ed. 1979, Cook v. U. S., 65 S.Ct. 1192, 325 U.S. 859, 89 L.Ed. 1979, Drew v. U. S., 65 S.Ct. 1192, 325 U.S. 859, 89 L.Ed. 1979, Jones v. U. S., 65 S.Ct. 1192, 325 U.S. 859, 89 L.Ed. 1979, Moore v. U. S., 65 S.Ct. 1192, 325 U.S. 859, 89 L.Ed. 1980, Candlin v. U. S., 65 S.Ct. 1193, 325 U.S. 859, 89 L.Ed. 1980, Lindh v. U. S., 65 S.Ct. 1193, 325 U.S. 859, 89 L.Ed. 1980, Willard v. U. S., 65 S.Ct. 1193, 325 U.S. 859, 89 L.Ed. 1980, Crusier v. U. S., 65 S.Ct. 1194, 325 U.S. 859, 89 L.Ed. 1981, and Maddams v. U. S., 65 S.Ct. 1194, 325 U.S. 859, 89 L.Ed. 1981.



scheme.<sup>28</sup>

*Reference for description to another count.* An indictment, which sets out the scheme in detail in the first count, may in other counts describe it by reference to the first.<sup>29</sup> If the incorporation by reference of the alleged scheme is sufficiently clear and specific, the indictment will be sufficient, even though the count describing the scheme is quashed.<sup>30</sup>

### (3) Representations. Used

The particular false representation made or contemplated in furtherance of the scheme should be alleged, and its falsity should be pointed out. The indictment must allege that the accused had knowledge of the falsity of the representations, and that such knowledge existed at the time the mails were used.

The particular false representation made or contemplated in furtherance of the scheme should be alleged,<sup>31</sup> and its falsity should be pointed out,<sup>32</sup> at least where there is no averment of any intent to convert the moneys obtained to accused's own use;<sup>33</sup> but the allegations with respect to the false representations need not be made with the high degree of particularity or certainty requisite in charging unlawful use of the mails.<sup>34</sup> The indictment need not expressly allege that the false rep-

resentations were an integral part of the scheme to defraud where such fact is necessarily inferred.<sup>35</sup> When the alleged transactions, as conducted, sufficiently constitute false representations, the lack of an allegation of a particular false representation in words is immaterial.<sup>36</sup> More than one false representation may be charged as long as they are part of the same scheme.<sup>37</sup>

Since it is the devising or intending to devise the scheme which constitutes the element of the offense, it is not necessary to allege that the representations which the scheme contemplated would be made were actually made<sup>38</sup> directly to any person or class of persons.<sup>39</sup>

*Knowledge of falsity.* The indictment must allege that accused had knowledge of the falsity of the representations made by him in furtherance of the scheme to defraud,<sup>40</sup> and that such knowledge existed at the time the mails were used for the purpose of executing the scheme.<sup>41</sup> The omission of an allegation of this character, it is said, is one of matter of substance, and not a defect of form only.<sup>42</sup>

### (4) Designation of Persons

The indictment should describe by name the individuals intended to be defrauded, or charge a scheme to

28. U.S.—Alexander v. U. S., C.C.A. Mo., 95 F.2d 873, certiorari denied 59 S.Ct. 99, 305 U.S. 637, 83 L.Ed. 409, Debeh v. U. S., 59 S.Ct. 99, 305 U.S. 637, 83 L.Ed. 409, Lindsay v. U. S., 59 S.Ct. 100, 305 U.S. 637, 83 L.Ed. 409, and 59 S.Ct. 100, 305 U.S. 637, 83 L.Ed. 410.

29. U.S.—Riddell v. U. S., Or., 244 F. 695, 157 C.C.A. 143, certiorari denied 38 S.Ct. 134, 245 U.S. 668, 62 L.Ed. 539.

49 C.J. p 1212 note 96.

30. U.S.—Aiken v. U. S., C.C.A.S.C., 108 F.2d 182.

31. U.S.—U. S. v. Brown, C.C.A.N.Y., 79 F.2d 321, certiorari denied McCarthy v. U. S., 56 S.Ct. 309, 296 U.S. 650, 80 L.Ed. 462—Beck v. U. S., C.C.A.Mo., 33 F.2d 107—U. S. v. Bernard, C.C.N.Y., 84 F. 634.

32. U.S.—U. S. v. Bernard, supra.

33. U.S.—U. S. v. Bernard, supra. 49 C.J. p 1213 note 17.

34. U.S.—Hyney v. U. S., C.C.A. Mich., 44 F.2d 134, certiorari denied 51 S.Ct. 347, 233 U.S. 824, 75 L.Ed. 1438.

Statement of use of mails see infra subdivision c of this section.

#### Cure by bill of particulars

An indictment is not demurrable for failure to allege the particulars in which the representations charged were false, where such defects

could be cured by furnishing a bill of particulars.—U. S. v. Palmieri, C. C.N.Y., 169 F. 490—49 C.J. p 1213 note 18, p 1214 note 19.

#### Nature of representations sufficiently alleged

U.S.—U. S. v. Rowe, C.C.A.N.Y., 56 F. 2d 747, certiorari denied Rowe v. U. S., 52 S.Ct. 579, 286 U.S. 554, 76 L.Ed. 1289—Hyney v. U. S., C.C.A. Mich., 44 F.2d 134, certiorari denied 51 S.Ct. 347, 233 U.S. 824, 75 L.Ed. 1438—U. S. v. Carpenter, D. C.N.Y., 44 F.Supp. 654—U. S. v. Shecter, D.C.Pa., 35 F.Supp. 11—U. S. v. Wimberly, D.C.La., 34 F. Supp. 904—U. S. v. Spielberger, D. C.Va., 28 F.Supp. 380.

#### Falsity of representations sufficiently alleged

U.S.—Hass v. U. S., C.C.A.Iowa, 93 F.2d 427—Norcott v. U. S., C.C.A. Ill., 65 F.2d 913, certiorari denied U. S. v. Norcott, 54 S.Ct. 130, 290 U.S. 694, 78 L.Ed. 597, U. S. v. Bennett, 54 S.Ct. 130, 290 U.S. 694, 78 L.Ed. 597, U. S. v. Packer, 54 S. Ct. 130, 290 U.S. 694, 78 L.Ed. 597, U. S. v. Carroll, 54 S.Ct. 130, 290 U.S. 694, 78 L.Ed. 597, and U. S. v. Needham, 54 S.Ct. 130, 290 U. S. 694, 78 L.Ed. 597—Busch v. U. S., C.C.A.Mo., 52 F.2d 79, certiorari denied Greible v. U. S., 52 S.Ct. 209, 284 U.S. 687, 76 L.Ed. 580—U. S. v. Shecter, D.C.Pa., 35 F. Supp. 11—U. S. v. Wimberly, D.C.

La., 34 F.Supp. 904—U. S. v. Graham, D.C.N.Y., 8 F.Supp. 87.

35. U.S.—U. S. v. Stevens, D.C.N.Y., 13 F.Supp. 909.

36. U.S.—U. S. v. Holdsworth, D.C. Me., 77 F.Supp. 148.

37. U.S.—Silkworth v. U. S., C.C.A. N.Y., 10 F.2d 711, certiorari denied 46 S.Ct. 475, 271 U.S. 664, 70 L.Ed. 1139—Myers v. U. S., N.Y., 223 F. 919, 139 C.C.A. 399, certiorari denied 37 S.Ct. 13, 242 U.S. 627, 61 L.Ed. 535.

38. U.S.—Graham v. U. S., C.C.A.N. M., 120 F.2d 543—Lonergan v. U. S., C.C.A.Wash., 88 F.2d 591, reversed on other grounds 58 S.Ct. 430, 303 U.S. 33, 82 L.Ed. 630.

39. U.S.—Hyney v. U. S., C.C.A. Mich., 44 F.2d 134, certiorari denied 51 S.Ct. 347, 233 U.S. 824, 75 L.Ed. 1438.

40. U.S.—U. S. v. Brown, C.C.A.N.Y., 79 F.2d 321, certiorari denied McCarthy v. U. S., 56 S.Ct. 309, 296 U.S. 650, 80 L.Ed. 462.

49 C.J. p 1214 note 22.

41. U.S.—Benham v. U. S., C.C.A. Ohio, 13 F.2d 558, certiorari denied 47 S.Ct. 111, 273 U.S. 721, 71 L.Ed. 858.

49 C.J. p 1214 note 23.

42. U.S.—Krotkiewicz v. U. S., C.C. A.Mich., 19 F.2d 421—U. S. v. Ball, D.C.Pa., 294 F. 750.

defraud the public generally, or a class of persons not capable of being resolved into individuals.

If the indictment does not charge a scheme to defraud the public generally, or a class not capable of being resolved into individuals, but clearly imports an intention to defraud definite individuals, it must describe them by name,<sup>43</sup> or give a good and true reason for the omission,<sup>44</sup> as that such names are to the grand jury unknown.<sup>45</sup> An indictment is not defective as failing to give the names of the individuals intended to be defrauded or to allege that they were not known where it alleges that the scheme was to defraud, not an individual or group of individuals, but the general public or a class of persons not resolvable into individuals.<sup>46</sup> It is sufficient to allege that defendant devised or intended to devise any scheme or artifice to defraud generally, and set forth only the names of the intended victims if known, or, if unknown, then the class of persons to be defrauded.<sup>47</sup> An indictment alleging a scheme to defraud the public generally and also certain persons therein named sufficiently describes the persons to be defrauded.<sup>48</sup> An indictment is not insufficient because it restricts the class of persons to be defrauded to ignorant persons;<sup>49</sup> It is sufficient if the purpose was to defraud any person or persons whomsoever.<sup>50</sup>

*Persons who were defrauded.* It is not necessary to allege the names of the persons who parted with money or property in reliance on the representations,<sup>51</sup> especially where the allegations of the indictment cannot be construed as charging accused with intending to defraud only those persons who were induced to part with their money.<sup>52</sup> The use of the term "victims," in describing the persons alleged to be defrauded, is not prejudicial.<sup>53</sup>

*Persons receiving mail.* The statute does not require the names of the persons to whom delivery of the mail is made to be stated.<sup>54</sup>

### c. Statement of Use of Mails

- (1) In general
- (2) Nature and contents of matter mailed

#### (1) In General

An indictment for violation of the mail-fraud statute must allege that the mails were used for the purpose of executing or attempting to execute the scheme or artifice to defraud.

An indictment for violation of the mail-fraud statute must allege that the mails were used for the purpose of executing or attempting to execute the scheme or artifice to defraud,<sup>55</sup> and it must

43. U.S.—Berry v. U. S., C.C.A. Ala., 15 F.2d 634.

49 C.J. p 1213 note 8.

#### Technical misnomer

A count of an indictment drawn under the mail-fraud statutes was not objectionable for charging that defendant devised a scheme to defraud the national housing administration instead of charging that the scheme was to defraud the federal housing administration.—Hartwell v. U. S., C.C.A. Ala., 107 F.2d 359.

44. U.S.—Berry v. U. S., C.C.A. Ala., 15 F.2d 634—Larkin v. U. S., Ill., 107 F. 697, 46 C.C.A. 588.

45. U.S.—Durland v. U. S., Pa., 16 S.Ct. 508, 161 U.S. 306, 40 L.Ed. 709.

49 C.J. p 1213 note 10.

46. U.S.—Wolpa v. U. S., C.C.A. Neb., 86 F.2d 35, certiorari denied 57 S.Ct. 317, 299 U.S. 611, 81 L.Ed. 451.

49 C.J. p 1213 note 11.

47. U.S.—Hyney v. U. S., C.C.A. Mich., 44 F.2d 134, certiorari denied 51 S.Ct. 347, 283 U.S. 824, 75 L.Ed. 1438.

48. U.S.—Kriebel v. U. S., C.C.A. Ill., 8 F.2d 692, certiorari denied 46 S.Ct. 119, 269 U.S. 582, 70 L.Ed. 424, and 46 S.Ct. 120, 269 U.S. 583, 70 L.Ed. 424.

49. U.S.—Lesselyoung v. U. S., C.C. A. Minn., 18 F.2d 472, certiorari de-

nied 48 S.Ct. 31, 275 U.S. 535, 72 L.Ed. 412.

50. U.S.—Lesselyoung v. U. S., supra.

51. U.S.—Norcott v. United States, C.C.A. Ill., 65 F.2d 913, certiorari denied U. S. v. Norcott, 54 S.Ct. 130, 290 U.S. 694, 78 L.Ed. 597, U. S. v. Bennett, 54 S.Ct. 130, 290 U.S. 694, 78 L.Ed. 597, U. S. v. Pack-er, 54 S.Ct. 130, 290 U.S. 694, 78 L.Ed. 597, U. S. v. Carroll, 54 S.Ct. 130, 290 U.S. 694, 78 L.Ed. 597, and U. S. v. Needham, 54 S.Ct. 130, 290 U.S. 694, 78 L.Ed. 597—U. S. v. Main, D.C. Tex., 28 F.Supp. 550.

52. U.S.—U. S. v. Main, supra.

53. U.S.—Stearn v. U. S., C.C.A. Va., 18 F.2d 465, certiorari denied 48 S.Ct. 36, 275 U.S. 539, 72 L.Ed. 414.

54. U.S.—Baker v. U. S., C.C.A. Ark., 115 F.2d 533, certiorari denied 61 S.Ct. 711, 312 U.S. 692, 85 L.Ed. 1128, rehearing denied 61 S.Ct. 731, 312 U.S. 715, 85 L.Ed. 1145, motion denied, C.C.A., 139 F.2d 721, rehearing denied 65 S.Ct. 1399, 325 U.S. 894, 89 L.Ed. 2005.

#### Fictitious persons

In prosecution for using mails in furtherance of scheme to defraud by representing that defendants had discovered and were applying, at their hospitals, a sure cure for certain diseases and ailments, the fact

that in two counts defendants were charged with having caused the mail matter to be delivered to fictitious names employed by post office inspectors was not material.—Baker v. U. S., supra.

55. U.S.—Bauman v. U. S., C.C.A. La., 156 F.2d 534—Huntley v. Schilder, C.C.A. Okl., 125 F.2d 250—U. S. v. Monjar, D.C. Del., 47 F. Supp. 421, affirmed, C.C.A., 147 F.2d 916, certiorari denied Monjar v. U. S., 65 S.Ct. 1191, two cases, 325 U.S. 859, 89 L.Ed. 1979, Cook v. U. S., 65 S.Ct. 1192, 325 U.S. 859, 89 L.Ed. 1979, Drew v. U. S., 65 S.Ct. 1192, 325 U.S. 859, 89 L.Ed. 1979, Jones v. U. S., 65 S.Ct. 1192, 325 U.S. 859, 89 L.Ed. 1979, Moore v. U. S., 65 S.Ct. 1192, 325 U.S. 859, 89 L.Ed. 1980, Candlin v. U. S., 65 S.Ct. 1193, 325 U.S. 859, 89 L.Ed. 1980, Fitzpatrick v. U. S., 65 S.Ct. 1193, 325 U.S. 859, 89 L.Ed. 1980, Willard v. U. S., 65 S.Ct. 1193, 325 U.S. 859, 89 L.Ed. 1980, Cruser v. U. S., 65 S.Ct. 1194, 325 U.S. 859, 89 L.Ed. 1981, and Maddams v. U. S., 65 S.Ct. 1194, 325 U.S. 859, 89 L.Ed. 1981—U. S. v. Brown, D.C.N.Y., 5 F.Supp. 81, affirmed, C.C.A., 79 F.2d 321, certiorari denied McCarthy v. U. S., 56 S.Ct. 309, 296 U.S. 650, 80 L.Ed. 462.

49 C.J. p 1214 notes 28, 30.

plead the mailing of the matter with great certainty as to time, place, and circumstance, where that is necessary in order to advise accused of the exact nature of the accusation against him, so that he may properly prepare his defense, and be able to make use of a conviction or acquittal as a protection against any further prosecution for the same offense.<sup>56</sup> An allegation which specifically charges the use of the mails and that the scheme was one which reasonably contemplated the use of the mails may be sufficient,<sup>57</sup> and it need not definitely state accused's connection with the mailing of the matter.<sup>58</sup> Under an indictment alleging that accused caused a certain letter to be delivered by mail, it was held not necessary to allege how, or in what way, or by what means, accused caused the letter to be mailed.<sup>59</sup> An allegation that accused deposited, or caused to be deposited, a letter or packet in the post office<sup>60</sup> or in an authorized depository for mail matter in a stated city,<sup>61</sup> that accused took or received a letter or packet from the post office,<sup>62</sup> or that accused caused matter to be delivered by mail,<sup>63</sup> sufficiently charges use of the mails, and it has been held that an indictment which charges that accused caused to be advertised in a newspaper as of a certain date a scheme to defraud subscribers is not fatally defective, al-

though it fails to allege the time when the newspaper was placed in the mails.<sup>64</sup> It is not necessary to use the word "knowingly" in charging the depositing of letters in the mails in execution of a scheme to defraud, where this is necessarily implied from the other averments.<sup>65</sup>

Failure of the indictment to allege the date when the scheme for using the mails to defraud was devised does not vitiate the indictment on the ground that, for all that appears, the offense charged was barred or could have been barred by the statute of limitations, where the indictment shows that the letters in furtherance of the scheme were written and mailed within the period prescribed by the statute for prosecutions for using the mails to defraud.<sup>66</sup> For the same reason an indictment which alleges the devising of the scheme on one date and the use of the mails on another is not objectionable as charging the commission of the offense on two separate dates.<sup>67</sup> An indictment which alleges that a scheme was formed on a designated date and continued and consummated from day to day until another designated date charges but one scheme to defraud.<sup>68</sup> An indictment which shows that the mailing did not take place until after the scheme was consummated does not charge an offense under the statute.<sup>69</sup>

56. U.S.—Colburn v. U. S., Mo., 223 F. 590, 139 C.C.A. 136, certiorari denied 36 S.Ct. 163, 239 U.S. 643, 60 L.Ed. 483.

49 C.J. p 1215 notes 42, 43.

57. U.S.—Hyney v. U. S., C.C.A. Mich., 44 F.2d 134, certiorari denied 51 S.Ct. 347, 283 U.S. 824, 75 L.Ed. 1438.

49 C.J. p 1214 notes 29, 30.

#### Averments held sufficient

U.S.—Mitchell v. U. S., C.C.A.N.M., 126 F.2d 550, certiorari denied 62 S.Ct. 1307, 316 U.S. 702, 86 L.Ed. 1771, rehearing denied 65 S.Ct. 855, 324 U.S. 887, 89 L.Ed. 1436—Havener v. U. S., C.C.A.Kan., 49 F.2d 196, certiorari denied 52 S.Ct. 24, 284 U.S. 644, 76 L.Ed. 547—Cochran v. U. S., C.C.A.Minn., 41 F.2d 193—U. S. v. Procter & Gamble Co., D.C.Mass., 47 F.Supp. 676.

49 C.J. p 1214 notes 29[a], 30[a].

58. U.S.—Lamb v. U. S., C.C.A.Ga., 115 F.2d 157—Hart v. U. S., C.C.A.La., 112 F.2d 122, certiorari dismissed 61 S.Ct. 6, 311 U.S. 722, 85 L.Ed. 491, certiorari denied 61 S.Ct. 60, 311 U.S. 684, 85 L.Ed. 441, rehearing denied 61 S.Ct. 131, 311 U.S. 726, 85 L.Ed. 473—Spivey v. U. S., C.C.A.Ala., 109 F.2d 181, certiorari denied 60 S.Ct. 1079, 310 U.S. 631, 84 L.Ed. 1401.

59. U.S.—Graham v. U. S., C.C.A.N.M., 120 F.2d 543—Smith v. U. S.,

C.C.A.Ga., 61 F.2d 631, certiorari denied 53 S.Ct. 401, 288 U.S. 608, 77 L.Ed. 983, and Ellis v. U. S., 53 S.Ct. 402, 288 U.S. 607, 77 L.Ed. 982, followed in, C.C.A., Fowler v. Aderhold, 73 F.2d 998.

#### Causing mails to be used

In prosecution for causing mails to be used to promote fraud, indictment need not allege that letter was placed or caused to be placed in mails for purpose of executing scheme to defraud.—U. S. v. Graham, D.C.N.Y., 8 F.Supp. 87.

60. U.S.—Graham v. U. S., C.C.A.N.M., 120 F.2d 543.

31 C.J. p 696 note 67 [a]—49 C.J. p 1214 note 31.

61. U.S.—U. S. v. Herzog, D.C.N.Y., 26 F.2d 487.

62. U.S.—Stokes v. U. S., Ala., 15 S.Ct. 617, 157 U.S. 187, 39 L.Ed. 667.

63. U.S.—Hyney v. U. S., C.C.A. Mich., 44 F.2d 134, certiorari denied 51 S.Ct. 347, 283 U.S. 824, 75 L.Ed. 1438.

#### Delivery according to direction

Indictment charging that defendant caused to be sent and delivered by post office a letter addressed to himself, pursuant to fraudulent scheme to obtain money under promise of furnishing garments for homework, was held sufficient without charging that defendant caused let-

ter to be delivered according to direction thereon.—U. S. v. Guest, C.C.A.N.Y., 74 F.2d 730, certiorari denied Guest v. U. S., 55 S.Ct. 654, 295 U.S. 742, 79 L.Ed. 1688.

64. U.S.—Weatherby v. U. S., C.C.A. Okl., 150 F.2d 465.

65. U.S.—Samuels v. U. S., Kan., 232 F. 536, 146 C.C.A. 494, Ann. Cas.1917A 711.

66. U.S.—Lelles v. U. S., C.C.A. Wash., 120 F.2d 447, certiorari denied 62 S.Ct. 108, 314 U.S. 626, 86 L.Ed. 503—Munch v. U. S., C.C.A. Fla., 24 F.2d 518.

67. U.S.—Sandals v. U. S., Ohio, 213 F. 569, 130 C.C.A. 149.

68. U.S.—U. S. v. Herzog, D.C.N.Y., 26 F.2d 487.

49 C.J. p 1215 note 47.

69. U.S.—Dybre v. Hudspeth, C.C.A.Kan., 106 F.2d 286.

#### Use of mails before consummation of scheme sufficiently shown

U.S.—Bauman v. U. S., C.C.A.La., 156 F.2d 534—U. S. v. Wernhardt, C.C.A.Ind., 153 F.2d 472, certiorari denied 66 S.Ct. 1350, 328 U.S. 858, 90 L.Ed. 1629—Rosenbloom v. Hunter, C.C.A.Kan., 143 F.2d 673—U. S. v. Leche, D.C.La., 34 F.Supp. 982, affirmed, C.C.A., Leche v. U. S., 118 F.2d 246, certiorari denied 62 S.Ct. 73, 314 U.S. 617, 86 L.Ed. 496, rehearing denied 62 S.Ct. 295, 314

*Intent to execute by use of mails.* It is not necessary to allege that accused intended as a part of the scheme to use the mail to carry out the purposes of the scheme,<sup>70</sup> as was the case under an earlier statute.<sup>71</sup>

## (2) Nature and Contents of Matter Mailed

It is not necessary to set out in the indictment the contents of the matter mailed provided it is sufficiently identified.

While it has been said that it would be better pleading to set out in the indictment the contents of the letters or other matter deposited in the mails in furtherance of the scheme to defraud,<sup>72</sup> the courts have uniformly held that it is not necessary, to the sufficiency of the indictment, to do so,<sup>73</sup> provided the letter or other matter is sufficiently identified.<sup>74</sup> It is not necessary to descend into particulars in describing the communication<sup>75</sup> or to identify it so specifically that no other communication would fit the description.<sup>76</sup> The indictment need not allege specifically that the letters or other communications had any directions thereon.<sup>77</sup> It is unnecessary to allege that the letter was inclosed in an envelope<sup>78</sup> on which was placed the proper postage,<sup>79</sup> since the term "letter," when used in the indictment, signifies a communication

inclosed, sealed, and stamped, and being carried as first-class mail.<sup>80</sup> In like manner, it is unnecessary to allege that postal cards were official government postal cards<sup>81</sup> or that accused had placed proper postage on them.<sup>82</sup>

In accordance with principles considered, supra § 49 c (3), the letter or other writing set out in the indictment must have had some relation to the scheme,<sup>83</sup> and it must have been deposited in the mail with the intent of assisting in carrying the scheme into effect;<sup>84</sup> but the fact that a letter does not show on its face that it was sent in furtherance of the scheme does not render the indictment insufficient.<sup>85</sup> The indictment need not show in what way the letter could have aided in carrying out the scheme;<sup>86</sup> it is enough to allege that it was mailed in the execution of the scheme,<sup>87</sup> unless the letter or writing clearly shows on its face that it probably could not have had any effect in the furtherance of the scheme.<sup>88</sup>

The indictment need not allege that the matter mailed in furtherance of the scheme indicated on its face an intent to defraud,<sup>89</sup> or that it was calculated to be effective in carrying out the scheme,<sup>90</sup> or that the contents of the letter or other matter mailed in furtherance of the scheme to defraud were false.<sup>91</sup> Where the indictment alleges

U.S. 712, 86 L.Ed. 567—U. S. v. Spielberg, D.C.Va., 28 F.Supp. 380.

70. U.S.—Wolpa v. U. S., C.C.A.Neb., 86 F.2d 35, certiorari denied 57 S. Ct. 317, 299 U.S. 611, 81 L.Ed. 451.

49 C.J. p 1211 note 80, p 1214 note 26.

71. U.S.—U. S. v. Young, Ala., 34 S.Ct. 303, 232 U.S. 155, 58 L.Ed. 548.

49 C.J. p 1211 note 81, p 1214 note 27.

72. U.S.—U. S. v. Wupperman, D.C. N.Y., 215 F. 135.

49 C.J. p 1214 note 34.

73. U.S.—Hartwell v. U. S., C.C.A. Ala., 107 F.2d 359.

49 C.J. p 1214 note 35.

74. U.S.—Tenenbaum v. U. S., C.C.A. Ga., 11 F.2d 927—U. S. v. Wupperman, D.C.N.Y., 215 F. 135.

75. U.S.—Moffitt v. U. S., C.C.A.Okl., 154 F.2d 402, certiorari denied 66 S. Ct. 1343, 328 U.S. 853, 90 L.Ed. 1825.

76. U.S.—U. S. v. Guest, C.C.A.N.Y., 74 F.2d 730, certiorari denied Guest v. U. S., 55 S.Ct. 654, 295 U. S. 742, 79 L.Ed. 1688.

77. U.S.—Hyney v. U. S., C.C.A. Mich., 44 F.2d 134, certiorari denied 51 S.Ct. 347, 288 U.S. 824, 75 L.Ed. 1438.

78. U.S.—Wolpa v. U. S., C.C.A.Neb., 86 F.2d 35, certiorari denied 57 S. Ct. 317, 299 U.S. 611, 81 L.Ed. 451.

79. U.S.—Wolpa v. U. S., supra.

*Allegation that letter was stamped when it was deposited in the mails is not necessary to the statement of an offense under the mail-fraud statutes.*—Hartwell v. U. S., C.C.A. Ala., 107 F.2d 359.

80. U.S.—Wolpa v. U. S., C.C.A.Neb., 86 F.2d 35, certiorari denied 57 S. Ct. 317, 299 U.S. 611, 81 L.Ed. 451.

—Hyney v. U. S., C.C.A.Mich., 44 F.2d 134, certiorari denied 51 S.Ct. 347, 288 U.S. 824, 75 L.Ed. 1438.

81. U.S.—Wolpa v. U. S., C.C.A.Neb., 86 F.2d 35, certiorari denied 57 S. Ct. 317, 299 U.S. 611, 81 L.Ed. 451.

82. U.S.—Wolpa v. U. S., supra.

*Term "postal card" could have conveyed no other meaning than that of official United States postal card with postage stamp printed thereon.*—Wolpa v. U. S., supra.

83. U.S.—U. S. v. Crummer, C.C.A. Kan., 151 F.2d 958, certiorari denied 66 S.Ct. 704, 327 U.S. 785, 90 L.Ed. 1012.

*Relation held sufficient*

U.S.—Baker v. U. S., C.C.A.Ark., 115 F.2d 533, certiorari denied 61 S.Ct. 711, 312 U.S. 692, 85 L.Ed. 1128, rehearing denied 61 S.Ct. 731, 312

U.S. 715, 85 L.Ed. 1145, motion denied, C.C.A., 139 F.2d 721, rehearing denied 65 S.Ct. 1399, 325 U.S. 894, 89 L.Ed. 2005.

84. U.S.—U. S. v. Crummer, C.C.A. Kan., 151 F.2d 958, certiorari denied 66 S.Ct. 704, 327 U.S. 785, 90 L.Ed. 1012.

85. U.S.—U. S. v. Crummer, supra—Muench v. U. S., C.C.A.Mo., 96 F. 2d 332—U. S. v. Main, D.C.Tex., 28 F.Supp. 550.

86. U.S.—Hartwell v. U. S., C.C.A. Ala., 107 F.2d 359.

87. U.S.—U. S. v. Crummer, C.C.A. Kan., 151 F.2d 958, certiorari denied 66 S.Ct. 704, 327 U.S. 785, 90 L.Ed. 1012—Stewart v. U. S., C.C. A.Mo., 300 F. 769.

88. U.S.—U. S. v. Crummer, C.C.A. Kan., 151 F.2d 958, certiorari denied 66 S.Ct. 704, 327 U.S. 785, 90 L.Ed. 1012—Stewart v. U. S., C.C. A.Mo., 300 F. 769.

89. U.S.—Byron v. U. S., C.C.A. Wash., 273 F. 769, certiorari denied 42 S.Ct. 94, 257 U.S. 635, 66 L.Ed. 418.

90. U.S.—Rosenbloom v. Hunter, C. C.A.Kan., 143 F.2d 673.

49 C.J. p 1215 note 39.

91. U.S.—Robinson v. U. S., C.C.A. Cal., 33 F.2d 238.

49 C.J. p 1215 note 40.

that the contents were false, that part of the indictment may be considered as surplusage.<sup>92</sup>

#### d. Issues, Proof, and Variance

While it is not necessary to prove every averment in the indictment in a prosecution for using the mails to defraud, all the material allegations must be proved.

While it is not necessary to prove every averment in the indictment in a prosecution for using the mails to defraud,<sup>93</sup> all the material allegations must be proved.<sup>94</sup> The existence of the scheme must be proved substantially as alleged in the indictment.<sup>95</sup> It is sufficient to prove, in accordance with allegations in the indictment, that there was a scheme to defraud, that the mails were used or caused to be used in furtherance of the scheme, and that the scheme was one which reasonably contemplated the use of the mails,<sup>96</sup> and, if this is shown, it is unnecessary to prove accused's connection with the mailing of the matter.<sup>97</sup> A specific intent to defraud need not be shown where

an intent to defraud is obvious from the nature of the scheme itself.<sup>98</sup> In the absence of an express allegation in the indictment that defendants intended to defraud every one who deposited money with them, the government is not bound to prove such an intent,<sup>99</sup> but it is otherwise where the indictment expressly alleges that defendants intended to defraud every one with whom they dealt, since, in these circumstances, the government is bound to prove the charge as made.<sup>1</sup> Trivial details or matters need not be proved.<sup>2</sup>

Where the scheme is made up of many elements, it is essential to prove a sufficient number of the elements of the scheme, so that the jury may be justified in finding the existence of the scheme;<sup>3</sup> but no particular element need be proved, if the other elements, when proved, are sufficient to establish the scheme.<sup>4</sup> It is not necessary to prove every misrepresentation charged in the indictment,<sup>5</sup> but it will be sufficient if enough of the

92. U.S.—Tenenbaum v. U. S., C.C. A.Ga., 11 F.2d 927.

93. U.S.—Holmes v. U. S., C.C.A. Neb., 134 F.2d 125, certiorari denied 63 S.Ct. 1434, 319 U.S. 776, 87 L.Ed. 1722—Butler v. U. S., C.C.A. Utah, 53 F.2d 800.

49 C.J. p 1214 note 20, p 1216 note 72.

#### Plan of escape

Failure to prove allegation respecting defendant's plan for escape from predicament in which fraud placed him will not upset a conviction.—Alford v. U. S., C.C.A.Cal., 41 F.2d 157, reversed on other grounds 51 S.Ct. 218, 282 U.S. 687, 75 L.Ed. 624.

#### Persons defrauded

Contention that evidence tending to show only some purchasers of securities were defrauded was insufficient under indictment for using mails to defraud charging intention to defraud all purchasers was held without merit.—Stephens v. U. S., C.C.A.Cal., 41 F.2d 440, certiorari denied Spicer v. U. S., 51 S.Ct. 83, 282 U.S. 880, 75 L.Ed. 777.

94. U.S.—Post v. U. S., Fla., 135 F. 1, 67 C.C.A. 569, 70 L.R.A. 989, rehearing denied 135 F. 1022, 67 C.C. A. 679, 70 L.R.A. 989.

#### Fraudulent character of scheme and falsity of representations

U.S.—Holmes v. U. S., C.C.A.Neb., 134 F.2d 125, certiorari denied 63 S.Ct. 1434, 319 U.S. 776, 87 L.Ed. 1722.

#### Mailing of letter

U.S.—U. S. v. Berg, C.C.A.N.J., 144 F.2d 173.

95. U.S.—Hass v. U. S., C.C.A.Iowa,

93 F.2d 427—U. S. v. Corlin, D.C. Cal., 44 F.Supp. 940.  
49 C.J. p 1216 note 74.

96. U.S.—Stainer v. U. S., C.C.A.La., 134 F.2d 931, certiorari denied 63 S.Ct. 1439, 319 U.S. 774, 87 L.Ed. 1721—Spivey v. U. S., C.C.A.Ala., 109 F.2d 181, certiorari denied 60 S.Ct. 1079, 310 U.S. 631, 84 L.Ed. 1401.

97. U.S.—Lamb v. U. S., C.C.A.Ga., 115 F.2d 157—Hart v. U. S., 112 F.2d 128, certiorari dismissed 61 S.Ct. 6, 311 U.S. 722, 85 L.Ed. 491, certiorari denied 61 S.Ct. 60, 311 U.S. 684, 85 L.Ed. 441, rehearing denied 61 S.Ct. 131, 311 U.S. 726, 85 L.Ed. 473—Spivey v. U. S., C.C.A.Ala., 109 F.2d 181, certiorari denied 60 S.Ct. 1079, 310 U.S. 631, 84 L.Ed. 1401.

98. U.S.—Walker v. U. S., Wash., 152 F. 111, 81 C.C.A. 329.  
49 C.J. p 1204 note 86.

99. U.S.—Stern v. U. S., N.Y., 223 F. 762, 139 C.C.A. 292.

1. U.S.—U. S. v. Staples, D.C.Mich., 45 F. 195.

2. U.S.—Johnson v. U. S., C.C.A.Ky., 82 F.2d 500, certiorari denied 56 S.Ct. 957, 298 U.S. 688, 80 L.Ed. 1407.

#### Place of hanging fictitious certificate

In prosecution for the use of the mails to defraud by issuance of fictitious medical and chiropractic diplomas and licenses to practice medicine, surgery, and chiropractic to be displayed on walls of offices of persons to whom they were issued, government was not required to show exact spot on wall on which such fictitious certificates and licenses were hung.—Alexander v. U.

S., C.C.A.Mo., 95 F.2d 873, certiorari denied 59 S.Ct. 99, 305 U.S. 637, 83 L.Ed. 409, Debeh v. U. S., 59 S.Ct. 99, 305 U.S. 637, 83 L.Ed. 409, Lindsay v. U. S., 59 S.Ct. 100, 305 U.S. 637, 83 L.Ed. 409, and 59 S.Ct. 100, 305 U.S. 637, 83 L.Ed. 410.

3. U.S.—Mathews v. U. S., C.C.A. Neb., 15 F.2d 139.

4. U.S.—Holmes v. U. S., C.C.A. Neb., 134 F.2d 125, certiorari denied 63 S.Ct. 1434, 319 U.S. 776, 87 L.Ed. 1722—Baker v. U. S., C.C.A.Ark., 115 F.2d 533, certiorari denied 61 S.Ct. 711, 312 U.S. 692, 85 L.Ed. 1128, rehearing denied 61 S.Ct. 731, 312 U.S. 715, 85 L.Ed. 1145, motion denied, C.C.A., 139 F. 2d 721, rehearing denied 65 S.Ct. 1399, 325 U.S. 894, 89 L.Ed. 2005—Cowl v. U. S., C.C.A.Neb., 35 F.2d 794.

49 C.J. p 1216 note 78.

5. U.S.—Ballard v. U. S., C.C.A.Cal., 138 F.2d 540, reversed on other grounds 64 S.Ct. 882, 322 U.S. 78, 88 L.Ed. 1148—Holmes v. U. S., C.C.A.Neb., 134 F.2d 125, certiorari denied 63 S.Ct. 1434, 319 U.S. 776, 87 L.Ed. 1722—Graham v. U. S., C.C.A.N.M., 120 F.2d 543—Baker v. U. S., C.C.A.Ark., 115 F.2d 533, certiorari denied 61 S.Ct. 711, 312 U.S. 692, 85 L.Ed. 1128, rehearing denied 61 S.Ct. 731, 312 U.S. 715, 85 L.Ed. 1145, motion denied 139 F. 2d 721, rehearing denied 65 S.Ct. 1399, 325 U.S. 894, 89 L.Ed. 2005—Weber v. U. S., C.C.A.Utah, 80 F. 2d 687—Levine v. U. S., C.C.A.Wash., 79 F.2d 364—Rude v. U. S., C.C.A.Colo., 74 F.2d 673—Belt v. U. S., C.C.A.Tex., 73 F.2d 888, certiorari denied 55 S.Ct. 513, 294 U.S. 713, 79 L.Ed. 1247—Goldstein

misrepresentations to prove the scheme are shown.<sup>6</sup>

**Evidence admissible under pleadings.** General rules relating to the admissibility of evidence under pleadings in criminal prosecutions, as discussed in Indictments and Informations § 253, apply in prosecutions for use of the mails to defraud.<sup>7</sup> Evidence of the mailing of letters other than those set out in the indictment, but of similar character, is admissible to show the character of the scheme<sup>8</sup> and its participants,<sup>9</sup> or to show intent to defraud.<sup>10</sup>

**Variance.** General rules, as discussed in Indictments and Informations §§ 254-270, govern as to what constitutes,<sup>11</sup> and what does not constitute,<sup>12</sup> a variance. Where the continuity of a scheme is relied on, the government is not limited strictly, in point of time, to the starting point it chooses to designate in the indictment,<sup>13</sup> although the government may circumscribe itself to the period it chooses through the evidence it offers.<sup>14</sup> Defendant cannot be convicted on evidence sufficient to sustain an offense not charged,<sup>15</sup> although such offense is equally within the statute.<sup>16</sup>

If the indictment charges a specific scheme for a specific purpose, then proof of the use of the mails after the purpose has been achieved will not authorize a conviction.<sup>17</sup>

## § 51. — Evidence

- a. Presumptions and burden of proof
- b. Admissibility
- c. Weight and sufficiency

### a. Presumptions and Burden of Proof

General rules in criminal prosecutions apply as to presumptions in prosecutions for using the mails to defraud. The burden is on the government to prove the essential elements of the offense.

General rules in criminal prosecutions, as discussed in Criminal Law §§ 579-599, apply as to presumptions in prosecutions for using the mails to defraud.<sup>18</sup> There is no presumption that a scheme to defraud, once established, continues to exist.<sup>19</sup> In a prosecution for using the mails to defraud, the burden is on the government to prove the essential elements of the offense.<sup>20</sup> The bur-

v. U. S., C.C.A.Mo., 63 F.2d 609—Havener v. U. S., C.C.A.Kan., 49 F.2d 196, certiorari denied 52 S.Ct. 24, 284 U.S. 644, 76 L.Ed. 547—Lewis v. U. S., C.C.A.Cal., 38 F.2d 406—Cowl v. U. S., C.C.A.Neb., 35 F.2d 794.

49 C.J. p 1216 note 79.

6. U.S.—Graham v. U. S., C.C.A.N.M., 120 F.2d 543—Weber v. U. S., C.C.A.Utah, 80 F.2d 687—Rude v. U. S., C.C.A.Colo., 74 F.2d 673—Goldstein v. U. S., C.C.A.Mo., 63 F.2d 609—Havener v. U. S., C.C.A.Kan., 49 F.2d 196, certiorari denied 52 S.Ct. 24, 284 U.S. 644, 76 L.Ed. 547.

49 C.J. p 1216 note 79.

7. U.S.—Troutman v. U. S., C.C.A.Colo., 100 F.2d 628.

49 C.J. p 1216 note 85.

8. U.S.—Morris v. U. S., C.C.A.La., 112 F.2d 522, certiorari denied 61 S.Ct. 41, 311 U.S. 653, 85 L.Ed. 418—Morgan v. U. S., C.C.A.Ark., 98 F.2d 473, certiorari denied 59 S.Ct. 229, 305 U.S. 648, 83 L.Ed. 419, rehearing denied 59 S.Ct. 248, 305 U.S. 674, 83 L.Ed. 437.

9. U.S.—Morgan v. U. S., supra.

10. U.S.—Davis v. U. S., C.C.A.Ark., 9 F.2d 826.

49 C.J. p 1219 note 23.

11. U.S.—Epstein v. U. S., C.A.Mich., 174 F.2d 754.

49 C.J. p 1216 note 87.

**Variance held fatal**

U.S.—Epstein v. U. S., supra.

12. U.S.—U. S. v. Epstein, C.C.A.N.Y., 154 F.2d 806, certiorari de-

nied 66 S.Ct. 1350, 328 U.S. 858, 90 L.Ed. 1629—Alexander v. U. S., C.C.A.Mo., 95 F.2d 873, certiorari denied 59 S.Ct. 99, 305 U.S. 637, 83 L.Ed. 409, Debeh v. U. S., 59 S.Ct. 99, 305 U.S. 637, 83 L.Ed. 409, Lindsay v. U. S., 59 S.Ct. 100, 305 U.S. 637, 83 L.Ed. 409 and 59 S.Ct. 100, 305 U.S. 637, 83 L.Ed. 410—Corbett v. U. S., C.C.A.Mo., 89 F.2d 124—Weber v. U. S., C.C.A.Utah, 80 F.2d 687—U. S. v. Weisman, C.C.A.N.Y., 83 F.2d 470, 107 A.L.R. 293. Certiorari denied Weisman v. U. S., 57 S.Ct. 22, 299 U.S. 560, 81 L.Ed. 412, rehearing denied 57 S.Ct. 118, 229 U.S. 621, 81 L.Ed. 457.

49 C.J. p 1216 note 88.

**Not fatal variance**

U.S.—Steiner v. U. S., C.C.A.La., 134 F.2d 931, certiorari denied 63 S.Ct. 1439, 319 U.S. 774, 87 L.Ed. 1721—U. S. v. Rosenfeld, C.C.A.N.Y., 57 F.2d 74, certiorari denied Nachman v. U. S., 52 S.Ct. 642, 286 U.S. 556, 76 L.Ed. 1290—Kercheval v. U. S., C.C.A.Tex., 36 F.2d 766, certiorari denied 50 S.Ct. 851, 281 U.S. 745, 74 L.Ed. 1157—Perry v. U. S., C.C.A.N.M., 136 F.2d 109, certiorari denied 64 S.Ct. 44, 320 U.S. 743, 88 L.Ed. 441—U. S. v. Wernes, C.C.A.M., 167 F.2d 797—Harris v. U. S., C.C.A.Md., 140 F.2d 567.

13. U.S.—U. S. v. Corlin, D.C.Cal., 44 F.Supp. 940.

14. U.S.—U. S. v. Corlin, supra.

15. U.S.—Gammon v. U. S., C.C.A.Iowa, 12 F.2d 226—Beck v. U. S., N.Y., 145 F. 625, 76 C.C.A. 417.

16. U.S.—Beck v. U. S., supra.

17. U.S.—Mitchell v. U. S., C.C.A.N.M., 118 F.2d 653.

**Lulling communication**

The indictment must charge a continuing scheme or a scheme which consists of several parts, and the proof must show that the communication was sent during the existence of the scheme, before proof of a lulling communication, sent after a person has parted with something of value, will authorize a conviction.—Mitchell v. U. S., supra.

18. U.S.—Hyney v. U. S., C.C.A.Mich., 44 F.2d 134, certiorari denied 51 S.Ct. 347, 283 U.S. 824, 75 L.Ed. 1438.

49 C.J. p 1217 note 90.

**Knowledge of falsity**

In prosecution for using mails to defraud in stock sale scheme, there is presumption that president, chief stockholder, and active head of corporation knew of falsity of financial statement.—Hyney v. U. S., C.C.A.Mich., 44 F.2d 134, certiorari denied 51 S.Ct. 347, 283 U.S. 824, 75 L.Ed. 1438.

**Participation in formation of scheme**

Defendant accused of using mails to defraud is conclusively presumed to have known that it was unnecessary that he should in first instance have participated in formation of scheme to defraud.—Cochran v. U. S., C.C.A.Minn., 41 F.2d 193.

19. U.S.—Merrill v. U. S., C.C.A.Mont., 95 F.2d 669.

20. U.S.—U. S. v. Carpenter, D.C.N.Y., 44 F.Supp. 654.

den is on the government to prove a scheme to defraud,<sup>21</sup> the essential elements of the scheme,<sup>22</sup> falsity of the statements and representations,<sup>23</sup> defendant's knowing participation in the crime,<sup>24</sup> an intent to defraud,<sup>25</sup> the use of the mails in furtherance of the fraudulent scheme,<sup>26</sup> and that the mailing was done within the jurisdiction of the court in which the prosecution is had.<sup>27</sup> The prosecution must prove that the transaction, in furtherance of which the mails were used, was part of a scheme in which defendant was implicated,<sup>28</sup> although it is not necessary to prove that defendant had any part in the immediate transaction<sup>29</sup> or knew of each individual and minute act in the execution of the scheme.<sup>30</sup> Where there is other evidence sufficient to connect accused with the scheme and its execution, the government need not prove that accused personally wrote the letters<sup>31</sup> or mailed them.<sup>32</sup>

The burden of proof is on the prosecution throughout the trial, and does not shift during the trial.<sup>33</sup> Once the existence of a scheme has

been established, defendant does not have the burden of showing its termination,<sup>34</sup> since the prosecution has the burden of proving that the scheme was still in existence when the mails were used.<sup>35</sup>

It is not necessary for the government to prove that there was an intent on the part of defendants to execute their fraudulent scheme by the use of the mails,<sup>36</sup> that the matter sent through the mails was calculated to be effective in carrying out the scheme,<sup>37</sup> that every step of the scheme was accomplished,<sup>38</sup> that the representations which the scheme contemplated would be made were actually made,<sup>39</sup> or that the scheme was successful.<sup>40</sup> The government need not prove either the existence or extent of damage to the victims.<sup>41</sup>

#### b. Admissibility

- (1) In general
- (2) Scheme to defraud and execution thereof
- (3) Intent

21. U.S.—Merrill v. U. S., C.C.A. Mont., 95 F.2d 669—U. S. v. Carpenter, D.C.N.Y., 44 F.Supp. 654.

22. U.S.—Alexander v. U. S., C.C.A. Mo., 95 F.2d 873, certiorari denied 59 S.Ct. 99, 305 U.S. 637, 83 L.Ed. 409, Debeh v. U. S., 59 S.Ct. 99, 305 U.S. 637, 83 L.Ed. 409, Lindsay v. U. S., 59 S.Ct. 100, 305 U.S. 637, 83 L.Ed. 409, and 59 S.Ct. 100, 315 U.S. 637, 83 L.Ed. 410.

23. U.S.—Holmes v. U. S., C.C.A. Neb., 134 F.2d 125, certiorari denied 63 S.Ct. 1434, 319 U.S. 776, 87 L.Ed. 1722—U. S. v. Brown, C.C.A.N.Y., 79 F.2d 321, certiorari denied McCarthy v. U. S., 56 S.Ct. 309, 296 U.S. 650, 80 L.Ed. 462—Little v. U. S., C.C.A.Colo., 73 F.2d 861, 96 A.L.R. 889.

24. U.S.—Mazurosky v. U. S., C.C.A. Or., 100 F.2d 958—U. S. v. Morley, C.C.A.Ind., 99 F.2d 683, certiorari denied Morley v. U. S., 59 S.Ct. 463, 306 U.S. 631, 83 L.Ed. 1033.

25. U.S.—Troutman v. U. S., C.C.A. Colo., 100 F.2d 628—Shaddy v. U. S., C.C.A.Colo., 30 F.2d 340.

26. U.S.—Wheaton v. U. S., C.C.A. N.J., 113 F.2d 710—U. S. v. Buckner, C.C.A.N.Y., 108 F.2d 921, certiorari denied Buckner v. U. S., 60 S.Ct. 613, 309 U.S. 669, 84 L.Ed. 1016—U. S. v. Morley, C.C.A. Ind., 99 F.2d 683, certiorari denied Morley v. U. S., 59 S.Ct. 463, 306 U.S. 631, 83 L.Ed. 1033—U. S. v. Baker, C.C.A.N.Y., 50 F.2d 122—Berliner v. U. S., C.C.A.N.J., 41 F.2d 221—U. S. v. Decker, D.C.Md., 51 F.Supp. 18, affirmed, C.C.A.,

Decker v. U. S., 140 F.2d 378, 151 A.L.R. 754—U. S. v. Carpenter, D.C.N.Y., 44 F.Supp. 654.  
49 C.J. p 1217 note 93.

27. U.S.—U. S. v. Cohen, C.C.A.N.Y., 145 F.2d 82, certiorari denied 65 S.Ct. 553, 323 U.S. 799, 89 L.Ed. 638, four cases, and 65 S.Ct. 554, 323 U.S. 800, 89 L.Ed. 638—U. S. v. Herzig, D.C.N.Y., 26 F.2d 487.

28. U.S.—U. S. v. Epstein, C.C.A. N.Y., 154 F.2d 806, certiorari denied 66 S.Ct. 1350, 328 U.S. 858, 90 L.Ed. 1629—U. S. v. Cohen, C.C.A.N.Y., 145 F.2d 82, certiorari denied 65 S.Ct. 553, 323 U.S. 799, 89 L.Ed. 637, four cases, and 65 S.Ct. 554, 323 U.S. 800, 89 L.Ed. 638.

29. U.S.—U. S. v. Epstein, C.C.A.N.Y., 154 F.2d 806, certiorari denied 66 S.Ct. 1350, 328 U.S. 858, 90 L.Ed. 1629—U. S. v. Cohen, C.C.A.N.Y., 145 F.2d 82, certiorari denied 65 S.Ct. 553, 323 U.S. 799, 89 L.Ed. 637, four cases, and 65 S.Ct. 554, 323 U.S. 800, 89 L.Ed. 638.

30. U.S.—Shreve v. U. S., C.C.A. Ariz., 103 F.2d 796, certiorari denied 60 S.Ct. 84, 308 U.S. 570, 84 L.Ed. 479.

31. U.S.—Shreve v. U. S., supra.

32. U.S.—Shreve v. U. S., C.C.A. Ariz., 103 F.2d 796, certiorari denied 60 S.Ct. 84, 308 U.S. 570, 84 L.Ed. 479.

33. U.S.—Post v. U. S., Fla., 135 F.1, 67 C.C.A. 569, 70 L.R.A. 989, rehearing denied 135 F. 1022, 67 C.C.A. 679—Melton v. U. S., Ala., 120 F. 504, 57 C.C.A. 134.

34. U.S.—Merrill v. U. S., C.C.A. Mont., 95 F.2d 669.

35. U.S.—Merrill v. U. S., supra.

36. U.S.—Morris v. U. S., C.C.A.La., 112 F.2d 522, certiorari denied 61 S.Ct. 41, 311 U.S. 653, 85 L.Ed. 418.

37. U.S.—Rosenbloom v. Hunter, C.C.A.Kan., 143 F.2d 673—Tincher v. U. S., C.C.A.W.Va., 11 F.2d 18, certiorari denied 46 S.Ct. 475, 271 U.S. 664, 70 L.Ed. 1139.

38. U.S.—Alexander v. U. S., C.C.A. Mo., 95 F.2d 873, certiorari denied 59 S.Ct. 99, 305 U.S. 637, 83 L.Ed. 409, Debeh v. U. S., 59 S.Ct. 99, 305 U.S. 637, 83 L.Ed. 409, Lindsay v. U. S., 59 S.Ct. 100, 305 U.S. 637, 83 L.Ed. 409, and 59 S.Ct. 100, 305 U.S. 637, 83 L.Ed. 410.

39. U.S.—Graham v. U. S., C.C.A. N.M., 120 F.2d 543.

40. U.S.—Gridley v. U. S., C.C.A. Mich., 44 F.2d 716, certiorari denied 51 S.Ct. 351, 283 U.S. 837, 75 L.Ed. 1441—Freeman v. U. S., C.C.A.N.J., 20 F.2d 748—Bettman v. U. S., Ohio, 224 F. 819, 140 C.C.A. 265, certiorari denied 36 S.Ct. 163, 239 U.S. 642, 60 L.Ed. 482.

Reliance on representations need not be proved.—Alexander v. U. S., C.C.A.Mo., 95 F.2d 873, certiorari denied 59 S.Ct. 99, 305 U.S. 637, 83 L.Ed. 409, Debeh v. U. S., 59 S.Ct. 99, 305 U.S. 637, 83 L.Ed. 409, Lindsay v. U. S., 59 S.Ct. 100, 305 U.S. 637, 83 L.Ed. 409 and 59 S.Ct. 100, 305 U.S. 637, 83 L.Ed. 410.

41. U.S.—Cowl v. U. S., C.C.A.Neb., 35 F.2d 794—Wilson v. U. S., N.Y., 190 F. 427, 111 C.C.A. 231.

## (1) In General

In prosecutions for use of the mails to defraud, great latitude is allowed in the introduction of evidence, and any evidence which is competent, material, and relevant on any issue or phase of the case is properly admitted.

In prosecutions for use of the mails to defraud, great latitude is allowed in the introduction of evidence,<sup>42</sup> and any evidence which is competent, material, and relevant on any issue or phase of the case is properly admitted.<sup>43</sup> The fact that such evidence might tend to establish defendant's guilt of another offense does not render it inadmissible.<sup>44</sup>

Under the general rules in criminal prosecutions, incompetent, immaterial, or irrelevant evidence is properly excluded.<sup>45</sup>

## (2) Scheme to Defraud and Execution Thereof

Any competent, relevant, and material evidence having a tendency to prove or disprove the scheme, or the methods of its execution, is admissible.

In proving a scheme to defraud, great latitude is allowed.<sup>46</sup> The scope of the evidence to establish the scheme is extensive<sup>47</sup> and rests largely

42. U.S.—Suetter v. U. S., C.C.A.Or., 140 F.2d 103—Hartzell v. U. S., C.C.A.Iowa, 72 F.2d 569, certiorari denied 55 S.Ct. 216, 293 U.S. 621, 79 L.Ed. 708.

43. U.S.—Richardson v. U. S., C.C.A.Tenn., 150 F.2d 58—Harper v. U. S., C.C.A.Mo., 143 F.2d 795—U. S. v. Feinberg, C.C.A.N.Y., 140 F.2d 593, 154 A.L.R. 272, certiorari denied 64 S.Ct. 943, 322 U.S. 726, 88 L.Ed. 1562—Ryan v. U. S., C.C.A.Ala., 129 F.2d 783—Sheridan v. U. S., C.C.A.Cal., 112 F.2d 503, reversed on other grounds 61 S.Ct. 619, 312 U.S. 654, 85 L.Ed. 1104, mandate conformed to, C.C.A., 118 F.2d 828, certiorari denied 61 S.Ct. 1115, 313 U.S. 586, 85 L.Ed. 1541—Sherwin v. U. S., C.C.A.Cal., 112 F.2d 503, reversed on other grounds 61 S.Ct. 618, 312 U.S. 654, 85 L.Ed. 1104, mandate conformed to, C.C.A., 118 F.2d 828, certiorari denied 61 S.Ct. 1115, 313 U.S. 586, 85 L.Ed. 1541—U. S. v. Sprengel, C.C.A.Pa., 103 F.2d 876—Morgan v. U. S., C.C.A.Ark., 98 F.2d 473, certiorari denied 59 S.Ct. 229, 305 U.S. 648, 83 L.Ed. 419, rehearing denied 59 S.Ct. 248, 305 U.S. 674, 83 L.Ed. 437—Lonergan v. U. S., C.C.A.Wash., 95 F.2d 642, certiorari denied 58 S.Ct. 1061, 304 U.S. 581, 82 L.Ed. 1543, rehearing denied 59 S.Ct. 60, 305 U.S. 670, 83 L.Ed. 434—Luke v. U. S., C.C.A.Ga., 84 F.2d 711, certiorari denied 57 S.Ct. 45, 299 U.S. 542, 81 L.Ed. 399—U. S. v. Brown, C.C.A.N.Y., 79 F.2d 321, certiorari denied McCarthy v. U. S., 56 S.Ct. 309, 296 U.S. 650, 80 L.Ed. 462—Hartzell v. U. S., C.C.A.Iowa, 72 F.2d 569, certiorari denied 55 S.Ct. 216, 293 U.S. 621, 79 L.Ed. 708—Brouse v. U. S., C.C.A.Mass., 68 F.2d 294—Norcott v. U. S., C.C.A.Ill., 65 F.2d 913, certiorari denied U. S. v. Norcott, 54 S.Ct. 130, 290 U.S. 694, 78 L.Ed. 597, U. S. v. Bennett, 54 S.Ct. 130, 290 U.S. 694, 78 L.Ed. 597, U. S. v. Packer, 54 S.Ct. 130, 290 U.S. 694, 78 L.Ed. 597, U. S. v. Needham, 54 S.Ct. 130, 290 U.S. 694, 78 L.Ed. 597—Goldstein v. U. S., C.C.A.Mo., 83 F.2d 609—Richards v. U. S., C.

C.A.Mass., 63 F.2d 338, certiorari denied 53 S.Ct. 790, 289 U.S. 757, 77 L.Ed. 1501—Butler v. U. S., C.C.A.Utah, 53 F.2d 800—Vause v. U. S., C.C.A.N.Y., 53 F.2d 346, certiorari denied 52 S.Ct. 37, 284 U.S. 661, 76 L.Ed. 560—Cohen v. U. S., C.C.A.N.J., 50 F.2d 819—Nichols v. U. S., C.C.A.Fla., 48 F.2d 46—Gridley v. U. S., C.C.A.Mich., 44 F.2d 716, certiorari denied 51 S.Ct. 351, 283 U.S. 827, 75 L.Ed. 1441—U. S. v. Shurtleff, C.C.A.N.Y., 43 F.2d 944—Stephens v. U. S., C.C.A.Cal., 41 F.2d 440, certiorari denied Spicer v. U. S., 51 S.Ct. 83, 282 U.S. 880, 75 L.Ed. 777—Alford v. U. S., C.C.A.Cal., 41 F.2d 157, reversed on other grounds 51 S.Ct. 218, 282 U.S. 687, 75 L.Ed. 624—Lewis v. U. S., C.C.A.Cal., 38 F.2d 406.  
49 C.J. p 1217 note 97.

44. U.S.—Tucker v. U. S., Ky., 224 F. 333, 140 C.C.A. 279, certiorari denied 36 S.Ct. 552, 241 U.S. 668, 60 L.Ed. 1229.

45. U.S.—Richardson v. U. S., C.C.A.Tenn., 150 F.2d 58—Harper v. U. S., C.C.A.Mo., 143 F.2d 795—Blue v. U. S., C.C.A.Ohio, 138 F.2d 351, certiorari denied 64 S.Ct. 1046, 322 U.S. 736, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Clark v. U. S., 64 S.Ct. 1046, 322 U.S. 736, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Pardee v. U. S., 64 S.Ct. 1046, 322 U.S. 737, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596—U. S. v. Levy, C.C.A.Ind., 138 F.2d 429, certiorari denied Levy v. U. S., 64 S.Ct. 528, 321 U.S. 770, 88 L.Ed. 1065, rehearing denied 64 S.Ct. 635, 321 U.S. 803, 88 L.Ed. 1089—Pandolfo v. U. S., C.C.A.N.M., 128 F.2d 917, certiorari denied 63 S.Ct. 47, 317 U.S. 651, 87 L.Ed. 524—Miller v. U. S., C.C.A.Kan., 120 F.2d 968—Grell v. U. S., C.C.A.Mo., 112 F.2d 861—Landay v. U. S., C.C.A.Mich., 108 F.2d 698, certiorari denied 60 S.Ct. 721, 309 U.S. 681, 84 L.Ed. 1024, Lane v. U. S., 60 S.Ct. 722, 309 U.S. 681, 84 L.Ed.

1025, Attix v. U. S., 60 S.Ct. 722, 309 U.S. 681, 84 L.Ed. 1025, and Brown v. U. S., 60 S.Ct. 722, 309 U.S. 681, 84 L.Ed. 1025—U. S. v. Sprengel, C.C.A.Pa., 103 F.2d 876—Morgan v. U. S., C.C.A.Ark., 98 F.2d 473, certiorari denied 59 S.Ct. 229, 305 U.S. 648, 83 L.Ed. 419, rehearing denied 59 S.Ct. 248, 305 U.S. 674, 83 L.Ed. 437—Norcott v. U. S., C.C.A.Ill., 65 F.2d 913, certiorari denied U. S. v. Norcott, 54 S.Ct. 130, 290 U.S. 694, 78 L.Ed. 597, U. S. v. Bennett, 54 S.Ct. 130, 290 U.S. 694, 78 L.Ed. 597, U. S. v. Packer, 54 S.Ct. 130, 290 U.S. 694, 78 L.Ed. 597, U. S. v. Carroll, 54 S.Ct. 130, 290 U.S. 694, 78 L.Ed. 597, and U. S. v. Needham, 54 S.Ct. 130, 290 U.S. 694, 78 L.Ed. 597—Goldstein v. U. S., C.C.A.Mo., 83 F.2d 609—Richards v. U. S., C.C.A.Mass., 63 F.2d 338, certiorari denied 53 S.Ct. 790, 289 U.S. 757, 77 L.Ed. 1501—Busch v. U. S., C.C.A.Mo., 52 F.2d 79, certiorari denied Greible v. U. S., 52 S.Ct. 209, 284 U.S. 687, 76 L.Ed. 580—Harris v. U. S., C.C.A.Wash., 48 F.2d 771—Gridley v. U. S., C.C.A.Mich., 44 F.2d 716, certiorari denied 51 S.Ct. 351, 283 U.S. 827, 75 L.Ed. 1441—Warfield v. U. S., C.C.A.La., 36 F.2d 903—Gold v. U. S., C.C.A.Minn., 36 F.2d 16.

## Consequence of losses

In prosecution for use of mails in scheme to manipulate stock without regard to its real value, admitting testimony of persons who had sustained losses through buying such stock to effect that in consequence of losses some buyers had lost homes and business and gone hopelessly into debt, that losses went into millions, and that one victim had committed suicide, was held error as exceeding permissible limits of such evidence.—U. S. v. Brown, C.C.A.N.Y., 79 F.2d 321, certiorari denied McCarthy v. U. S., 56 S.Ct. 309, 296 U.S. 650, 80 L.Ed. 462.

46. U.S.—Tenenbaum v. U. S., C.C.A.Ga., 11 F.2d 927.

47. U.S.—Hartzell v. U. S., C.C.A.Iowa, 72 F.2d 569, certiorari denied 55 S.Ct. 216, 293 U.S. 621, 79 L.Ed. 708—Corpus Juris cited in



in the discretion of the trial court.<sup>48</sup> Any competent, relevant, and material evidence having a tendency to prove<sup>49</sup> or disprove<sup>50</sup> the scheme, or the methods of its execution,<sup>51</sup> is admissible. Competent and relevant evidence may properly be admitted to show the representations made<sup>52</sup> and the falsity thereof,<sup>53</sup> good faith or knowledge of the falsity of the representations,<sup>54</sup> the success of the scheme,<sup>55</sup> and the age and status of the victims of the scheme.<sup>56</sup> Testimony as to events relating to the scheme, but occurring before the time allowed for commencing prosecutions, is ad-

missible where, within that time, mails had been used in furtherance of the scheme.<sup>57</sup>

### (3) Intent

Any competent, relevant, and material evidence tending to prove or disprove a fraudulent intent is admissible.

Any competent, relevant, and material evidence tending to prove or disprove an intent to defraud is admissible.<sup>58</sup> The evidence admissible for this purpose may be extensive in scope,<sup>59</sup> and rests

McCutchan v. U. S., C.C.A.Mo., 70 F.2d 658, 663, certiorari denied 55 S.Ct. 79, 293 U.S. 568, 79 L.Ed. 667. 49 C.J. p 1217 note 1.

48. U.S.—Hartzell v. U. S., C.C.A.Iowa, 72 F.2d 569, certiorari denied 55 S.Ct. 216, 293 U.S. 621, 79 L.Ed. 708.

49 C.J. p 1217 note 2.

49. U.S.—Reining v. U. S., C.C.A.Fla., 167 F.2d 362, certiorari denied 69 S.Ct. 49, 335 U.S. 830, 93 L.Ed. 383—Suetter v. U. S., C.C.A.Or., 140 F.2d 103—Ballard v. U. S., C.C.A.Cal., 138 F.2d 540, reversed on other grounds 64 S.Ct. 882, 322 U.S. 78, 88 L.Ed. 1148—Sheridan v. U. S., C.C.A.Cal., 112 F.2d 503, reversed on other grounds 61 S.Ct. 619, 312 U.S. 654, 85 L.Ed. 1104, mandate conformed to, C.C.A., 118 F.2d 828, certiorari denied 61 S.Ct. 1115, 313 U.S. 586, 85 L.Ed. 1541—Sherwin v. U. S., C.C.A.Cal., 112 F.2d 503, reversed on other grounds 61 S.Ct. 618, 312 U.S. 654, 85 L.Ed. 1104, mandate conformed to, C.C.A., 118 F.2d 828, certiorari denied 61 S.Ct. 1116, 313 U.S. 586, 85 L.Ed. 1541—Greenbaum v. U. S., C.C.A.Ariz., 80 F.2d 113—U. S. v. Hirsch, C.C.A.N.Y., 74 F.2d 215, certiorari denied Hirsch v. U. S., 55 S.Ct. 653, 295 U.S. 739, 79 L.Ed. 1686, rehearing denied 55 S.Ct. 825, 295 U.S. 768, 79 L.Ed. 1709—Little v. U. S., C.C.A.Colo., 73 F.2d 861, 96 A.L.R. 889—McCutchan v. U. S., C.C.A.Mo., 70 F.2d 658, certiorari denied 55 S.Ct. 79, 293 U.S. 568, 79 L.Ed. 667.

49 C.J. p 1217 note 3.

50. U.S.—Worthington v. U. S., C.C.A.Ill., 64 F.2d 936.

51. U.S.—U. S. v. Bramson, C.C.A.N.Y., 139 F.2d 598, certiorari denied 64 S.Ct. 636, 321 U.S. 783, 88 L.Ed. 1075—U. S. v. Dillard, C.C.A.N.Y., 101 F.2d 829, certiorari denied Dillard v. U. S., 59 S.Ct. 484, 306 U.S. 635, 83 L.Ed. 1036, Koven v. U. S., 59 S.Ct. 484, 306 U.S. 635, 83 L.Ed. 1036, and Donegan v. U. S., 59 S.Ct. 484, 306 U.S. 635, 83 L.Ed. 1036—Corpus Juris cited in McCutchan v. U. S., C.C.A.

Mo., 70 F.2d 658, 663, certiorari denied 55 S.Ct. 79, 293 U.S. 568, 79 L.Ed. 667.

49 C.J. p 1218 note 4.

52. U.S.—U. S. v. Dillard, C.C.A.N.Y., 101 F.2d 829, certiorari denied Dillard v. U. S., 59 S.Ct. 484, 306 U.S. 635, 83 L.Ed. 1036, Kovan v. U. S., 59 S.Ct. 484, 306 U.S. 635, 83 L.Ed. 1036, and Donegan v. U. S., 59 S.Ct. 484, 306 U.S. 635, 83 L.Ed. 1036—Lewis v. U. S., C.C.A.Cal., 38 F.2d 406.

53. U.S.—Perry v. U. S., C.C.A.N.M., 136 F.2d 109, certiorari denied 64 S.Ct. 44, 320 U.S. 743, 88 L.Ed. 441—Simons v. U. S., C.C.A.Wash., 119 F.2d 539, certiorari denied 62 S.Ct. 78, 314 U.S. 616, 86 L.Ed. 496—Walker v. U. S., C.C.A.Wash., 116 F.2d 458—U. S. v. Littlejohn, C.C.A.Ill., 96 F.2d 368, certiorari denied Littlejohn v. U. S., 58 S.Ct. 1058, 314 U.S. 583, 82 L.Ed. 1545—Czarlinsky v. U. S., C.C.A.N.M., 54 F.2d 889, certiorari denied 52 S.Ct. 406, 285 U.S. 549, 76 L.Ed. 940—Butler v. U. S., C.C.A.Utah, 53 F.2d 800—Lewis v. U. S., C.C.A.Cal., 38 F.2d 406.

54. U.S.—U. S. v. Cohen, C.C.A.N.Y., 145 F.2d 82, certiorari denied 65 S.Ct. 553, 323 U.S. 799, 89 L.Ed. 637, four cases, and 65 S.Ct. 554, 323 U.S. 800, 89 L.Ed. 638—U. S. v. Sprengel, C.C.A.Pa., 103 F.2d 876—Norcott v. U. S., C.C.A.Ill., 65 F.2d 913, certiorari denied U. S. v. Norcott, 54 S.Ct. 130, 290 U.S. 694, 78 L.Ed. 597, U. S. v. Bennett, 54 S.Ct. 130, 290 U.S. 694, 78 L.Ed. 597, U. S. v. Packer, 54 S.Ct. 130, 290 U.S. 694, 78 L.Ed. 597, U. S. v. Carroll, 54 S.Ct. 130, 290 U.S. 694, 78 L.Ed. 597, and U. S. v. Needham, 54 S.Ct. 130, 290 U.S. 694, 78 L.Ed. 597—Busch v. U. S., C.C.A.Mo., 52 F.2d 79, certiorari denied Greible v. U. S., 52 S.Ct. 209, 284 U.S. 687, 76 L.Ed. 580—Lewis v. U. S., C.C.A.Cal., 38 F.2d 406.

49 C.J. p 1218 note 8.

55. U.S.—Gridley v. U. S., C.C.A.Mich., 44 F.2d 716, certiorari denied 51 S.Ct. 351, 283 U.S. 827, 75 L.Ed. 1441.

56. U.S.—Bogy v. U. S., C.C.A.Tenn., 96 F.2d 734, certiorari denied Bogy v. U. S., 59 S.Ct. 68, 305 U.S. 608, 83 L.Ed. 387.

### Widows and orphans

In prosecution for using mails to sell building and loan association stock and to receive deposits therein on fraudulent representations that accounts were guaranteed by the government, reiteration during trial of fact that many depositors were widows and orphans was not error.—Norman v. U. S., C.C.A.Tenn., 100 F.2d 905, certiorari denied 59 S.Ct. 790, 306 U.S. 660, 83 L.Ed. 1057.

### Lack of guile as indicating fraud

A person victimizing by use of mails persons least able to guard themselves against fraudulent schemes cannot complain if their status is disclosed, and lack of guile of those solicited may persuasively indicate fraudulent character of the artifice.—Norman v. U. S., supra.

57. U.S.—Bowers v. U. S., 244 F.641, 157 C.C.A. 89.

58. U.S.—U. S. v. Bowcott, C.A.Ill., 170 F.2d 173, certiorari denied 69 S.Ct. 482, 335 U.S. 911, 93 L.Ed. 444—Little v. U. S., C.C.A.Colo., 73 F.2d 861, 96 A.L.R. 889—McCutchan v. U. S., C.C.A.Mo., 70 F.2d 658, certiorari denied 55 S.Ct. 79, 293 U.S. 568, 79 L.Ed. 667—Busch v. U. S., C.C.A.Mo., 52 F.2d 79, certiorari denied Greible v. U. S., 52 S.Ct. 209, 284 U.S. 687, 76 L.Ed. 580—Gold v. U. S., C.C.A.Minn., 36 F.2d 16.

49 C.J. p 1218 note 10.

Evidence of other transactions or offenses see Criminal Law § 691 v.

### Evidence held inadmissible

U.S.—U. S. v. Levy, C.C.A.Ind., 138 F.2d 429, certiorari denied Levy v. U. S., 64 S.Ct. 528, 321 U.S. 770, 88 L.Ed. 1065, rehearing denied 64 S.Ct. 635, 321 U.S. 803, 88 L.Ed. 1089.

49 C.J. p 1218 note 10 [c].

59. U.S.—U. S. v. Sprengel, C.C.A.Pa., 103 F.2d 876—Hartzell v. U. S., C.C.A.Iowa, 72 F.2d 569, certiorari denied 55 S.Ct. 216, 293 U.S. 621, 79 L.Ed. 708.

largely within the discretion of the trial judge.<sup>60</sup> A defendant should be permitted to offer any evidence which bears directly and not too remotely on his intention,<sup>61</sup> and the court should not exclude any evidence offered by defendant which tends to refute the fraudulent intent charged.<sup>62</sup> Circumstantial evidence which reasonably throws light on defendant's intention, either directly or indirectly, should be received on behalf of both the government and those charged with the crime.<sup>63</sup>

When not too remote or unconnected with the alleged scheme as to cast light on the question of intent, evidence tending to prove relevant acts or conduct which occurred before the date on which it is charged the scheme was devised, or before the time allowed for commencing prosecutions, may be admitted if, within the period of limitations, the mails were used in furtherance of such scheme.<sup>64</sup> Events occurring after letters have been mailed are admissible if they shed light on defendant's intent when the letters were mailed.<sup>65</sup> It is error to reject evidence of activities which occurred after the arrest, where such evidence would tend to prove that defendant did not have a fraudulent intent.<sup>66</sup>

*Letters, circulars, and telegrams.* Letters passing between several persons accused while carrying out their scheme,<sup>67</sup> or letters, telegrams, and circulars sent to various people to persuade them to buy shares of stock,<sup>68</sup> or letters containing mis-

leading financial statements for the purpose of obtaining credit,<sup>69</sup> are admissible to show intent to defraud. On the other hand, letters to accused from purchasers of goods which he had sold by use of the mails, stating the efficacy thereof for the purposes for which they were sold, are admissible in his behalf for the purpose of showing good faith and the absence of an intent to defraud.<sup>70</sup>

### c. Weight and Sufficiency

In order to justify a conviction for using the mails to defraud, all the essential elements or ingredients of the offense must be established beyond a reasonable doubt.

In order to justify a conviction for using the mails to defraud, all the essential elements or ingredients of the offense,<sup>71</sup> including misrepresentations when alleged,<sup>72</sup> guilty knowledge,<sup>73</sup> and use of the mails,<sup>74</sup> must be established beyond a reasonable doubt. Proof of the existence of a scheme to defraud, however strong, is not sufficient by itself to sustain a conviction.<sup>75</sup> It is not necessary for the government to prove its case by direct evidence, but it is sufficient if the essential facts and elements of the offense are proved by circumstantial evidence,<sup>76</sup> although, where the guilt depends entirely on circumstantial evidence, the government must prove its case to the exclusion of every reasonable hypothesis of innocence.<sup>77</sup> The formation or existence of a scheme to defraud,<sup>78</sup> and, likewise, the formation or exist-

60. U.S.—U. S. v. Sprengel, C.C.A. Pa., 103 F.2d 876—Hartzell v. U. S., C.C.A.Iowa, 72 F.2d 569, certiorari denied 55 S.Ct. 216, 293 U.S. 621, 79 L.Ed. 708.

61. U.S.—U. S. v. Freeman, C.C.A. Ill., 167 F.2d 786, certiorari denied 69 S.Ct. 37, 335 U.S. 817, 93 L.Ed. 372.

62. U.S.—Mansfield v. U. S., C.C.A. Mo., 76 F.2d 224, certiorari denied 56 S.Ct. 117, 296 U.S. 601, 80 L.Ed. 425.

#### Evidence admissible to negative intent

U.S.—Miller v. U. S., C.C.A.Kan., 120 F.2d 968—U. S. v. Corlin, D.C. Cal., 44 F.Supp. 940.  
49 C.J. p 1218 note 10 [d].

63. U.S.—Norcott v. U. S., C.C.A. Ill., 65 F.2d 913, certiorari denied U. S. v. Norcott, 54 S.Ct. 130, 290 U.S. 694, 78 L.Ed. 597, U. S. v. Bennett, 54 S.Ct. 130, 290 U.S. 694, 78 L.Ed. 597, U. S. v. Packer, 54 S.Ct. 130, 290 U.S. 694, 78 L.Ed. 597, U. S. v. Carroll, 54 S.Ct. 130, 290 U.S. 694, 78 L.Ed. 597, and U. S. v. Needham, 54 S.Ct. 130, 290 U.S. 694, 78 L.Ed. 597.

64. U.S.—Troutman v. U. S., C.C.A. Colo., 100 F.2d 628.

65. U.S.—Little v. U. S., C.C.A.Colo., 73 F.2d 861, 96 A.L.R. 889.

66. U.S.—Kleeden v. U. S., C.C.A. Tex., 45 F.2d 87.

67. U.S.—Farmer v. U. S., N.Y., 223 F. 903, 139 C.C.A. 341, certiorari denied 35 S.Ct. 940, 238 U.S. 638, 59 L.Ed. 1500.

68. U.S.—Kercheval v. U. S., C.C.A. Ark., 12 F.2d 904, reversed on other grounds 47 S.Ct. 582, 274 U.S. 220, 71 L.Ed. 1009.

69. U.S.—Kaufmann v. U. S., C.C.A. Pa., 282 F. 776, certiorari denied 43 S.Ct. 96, 260 U.S. 735, 67 L.Ed. 488.

70. U.S.—Hair v. U. S., Ill., 240 F. 333, 153 C.C.A. 259.

71. U.S.—Mackett v. U. S., C.C.A. Wis., 90 F.2d 462.  
49 C.J. p 1220 note 27.

72. U.S.—Levine v. U. S., C.C.A. Wash., 79 F.2d 364.

73. U.S.—Stone v. U. S., C.C.A. Tenn., 113 F.2d 70.

Mere suspicion that accused may have had guilty knowledge of scheme

to defraud is insufficient to warrant conviction for using the mails to defraud.—Mazurosky v. U. S., C. C.A.Or., 100 F.2d 958.

74. U.S.—Mackett v. U. S., C.C.A. Wis., 90 F.2d 462.

75. U.S.—U. S. v. Buckner, C.C.A. N.Y., 108 F.2d 921, certiorari denied Buckner v. U. S., 60 S.Ct. 613, 309 U.S. 669, 84 L.Ed. 1016—U. S. v. Morley, C.C.A.Ind., 99 F.2d 683, certiorari denied Morley v. U. S., 59 S.Ct. 463, 306 U.S. 631, 83 L.Ed. 1033.

76. U.S.—U. S. v. Pike, C.C.A.Ill., 158 F.2d 46—Mackett v. U. S., C. C.A.Wis., 90 F.2d 462.  
49 C.J. p 1220 note 30.

77. U.S.—Beckman v. U. S., C.C.A. La., 96 F.2d 15—U. S. v. Gasomiser, D.C.Del., 7 F.R.D. 712.

78. U.S.—Marshall v. U. S., C.C.A. Cal., 146 F.2d 618, 157 A.L.R. 241—Pietch v. U. S., C.C.A.Okl., 110 F.2d 817, 129 A.L.R. 563, certiorari denied 60 S.Ct. 1100, 210 U. S. 648, 84 L.Ed. 1414.

Persons acting individually  
The existence of a scheme may

ence of a criminal intent,<sup>79</sup> intent to use the mails,<sup>80</sup> the use of the mails in the execution of the scheme,<sup>81</sup> and guilty knowledge<sup>82</sup> may be established by circumstantial evidence or implied from established facts. Protestations of accused of his good intentions are entitled to weight in determining his guilt or innocence,<sup>83</sup> but his actions and his conduct may be weighed against his pro-

fessed innocence and good faith.<sup>84</sup> No more persuasive evidence is required to prove that the letters on which the prosecution is based were mailed within the district where the indictment was filed than on any other issue.<sup>85</sup>

In particular cases, the evidence has been held sufficient to sustain a conviction for using the mails to defraud,<sup>86</sup> or insufficient to warrant or sustain

not be inferred from the mere similarity of promises and representations of persons acting individually.—U. S. v. Corlin, D.C.Cal., 44 F.Supp. 940.

79. U.S.—Schauble v. U. S., C.C.A. Me., 40 F.2d 363.  
49 C.J. p 1220 note 29.

#### Representation as evidence of criminal intent

A representation may be so obviously without foundation as to afford cogent evidence of a criminal intent in him who makes it.—Nemec v. U. S., C.A.Wash., 178 F.2d 656, certiorari denied 70 S.Ct. 1006, 339 U.S. 985, 94 L.Ed. —, and Dawson v. U. S., 70 S.Ct. 1006, 339 U.S. 985, 94 L.Ed. — —Rudd v. U. S., Mo., 178 F. 912, 97 C.C.A. 462.

**Fraudulent nature of plan forming basis of prosecution may be inferred from series of isolated acts.**—Deaver v. U. S., 155 F.2d 740, 81 U.S.App.D.C. 148, certiorari denied 67 S.Ct. 121, 329 U.S. 766, 91 L.Ed. 659.

#### Exclusion of reasonable doubt

(1) The circumstances proved to establish criminal intent must directly support an inference of this fact so as to exclude all reasonable doubt.—U. S. v. Berg, C.C.A.N.J., 144 F.2d 173.

(2) The circumstances proved must exclude reasonable doubt to the extent of overcoming the presumption of innocence.—Wheaton v. U. S., C.C.A.N.J., 113 F.2d 710—U. S. v. Baker, C.C.A.N.Y., 50 F.2d 122.

80. U.S.—U. S. v. Bender, C.C.A.N.Y., 60 F.2d 56, certiorari denied Posner v. U. S., 53 S.Ct. 23, 287 U.S. 598, 77 L.Ed. 521.

#### Participation in scheme requiring use of mails

Where it appears that a scheme to defraud could not be carried out without use of mails, a jury is warranted, without further proof, in drawing inferences that those who participated in the fraud intended to use the mails.—Blue v. U. S., C.C.A. Ohio, 138 F.2d 351, certiorari denied 64 S.Ct. 1046, 322 U.S. 736, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Clark v. U. S., 64 S.Ct. 1046, 322 U.S. 736, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Pardee v. U. S., 64 S.Ct. 1046,

322 U.S. 737, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596.

81. U.S.—U. S. v. Berg, C.C.A.N.J., 144 F.2d 173—Rosenberg v. U. S., C.C.A.N.M., 120 F.2d 935—Wheaton v. U. S., C.C.A.N.J., 113 F.2d 710—Morgan v. U. S., C.C.A.Ark., 98 F.2d 473, certiorari denied 69 S.Ct. 229, 305 U.S. 648, 83 L.Ed. 419, rehearing denied 59 S.Ct. 248, 305 U.S. 674, 83 L.Ed. 437—Mackett v. U. S., C.C.A.Wis., 90 F.2d 462—Corbett v. U. S., C.C.A.Mo., 89 F.2d 124—McNear v. U. S., C.C.A.Kan., 60 F.2d 861—U. S. v. Bender, C.C.A.N.Y., 60 F.2d 56, certiorari denied Posner v. U. S., 53 S.Ct. 23, 287 U.S. 598, 77 L.Ed. 521—Butler v. U. S., C.C.A.Utah, 53 F.2d 800—Cohen v. U. S., C.C.A.N.J., 50 F.2d 819—U. S. v. Baker, C.C.A.N.Y., 50 F.2d 122—Havener v. U. S., C.C.A.Kan., 49 F.2d 196, certiorari denied 52 S.Ct. 24, 284 U.S. 644, 76 L.Ed. 547—Cochran v. U. S., C.C.A.Minn., 41 F.2d 193.

#### Custom

(1) Evidence of custom of mailing letters when clearly and definitely proved, and in the absence of substantial contradiction, establishes the fact of mailing.—U. S. v. Decker, D.C.Md., 51 F.Supp. 15, affirmed Decker v. U. S., 140 F.2d 378, 151 A.L.R. 754.

(2) Testimony that, in ordinary course of business, cash letters between New York and Illinois banks were sent and received by mail, was sufficient showing of use of mails to sustain conviction.—U. S. v. Leathers, C.C.A.N.Y., 135 F.2d 507.

(3) Uncontradicted evidence of usage and custom of intermediate bank, proved by its cashier, established mailing of checks by intermediate bank to drawee bank for collection, without calling mailing clerk of intermediate bank as a witness.—U. S. v. Decker, D.C.Md., 51 F.Supp. 15, affirmed, C.C.A., Decker v. U. S., 140 F.2d 378, 151 A.L.R. 754.

#### Delivery of letter

Under indictment alleging actual delivery of fraudulent letter, proof that letter, properly directed, has been placed in post office for transmission would make prima facie case for government.—Hagner v. U. S., App.D.C., 52 S.Ct. 417, 285 U.S. 427, 76 L.Ed. 861.

82. U.S.—Stone v. U. S., C.C.A.Tenn., 113 F.2d 70—Corbett v. U. S., C.C.A.Mo., 89 F.2d 124.

83. U.S.—U. S. v. Freeman, C.C.A.Ill., 167 F.2d 786, certiorari denied 69 S.Ct. 37, 335 U.S. 817, 93 L.Ed. 372.

84. U.S.—U. S. v. Freeman, supra.

85. U.S.—U. S. v. Cohen, C.C.A.N.Y., 145 F.2d 82, certiorari denied 65 S.Ct. 553, 323 U.S. 799, 89 L.Ed. 638, four cases, and 65 S.Ct. 554, 323 U.S. 800, 89 L.Ed. 638.

86. U.S.—Crosby v. U. S., C.A.Okl., 183 F.2d 373—U. S. v. Platt, C.A.N.Y., 182 F.2d 469—Bowers v. U. S., C.A.Fla., 177 F.2d 764, certiorari denied 70 S.Ct. 492, 338 U.S. 954, 94 L.Ed. — —U. S. v. Francis, C.A.Ind., 173 F.2d 619, certiorari denied 69 S.Ct. 1159, 337 U.S. 918, 93 L.Ed. 1727, rehearing denied 69 S.Ct. 1513, 337 U.S. 950, 93 L.Ed. 1752—U. S. v. Freeman, C.C.A.Ill., 167 F.2d 786, certiorari denied 69 S.Ct. 37, 335 U.S. 817, 93 L.Ed. 372—Reining v. U. S., C.C.A.Fla., 167 F.2d 362, certiorari denied 69 S.Ct. 49, 335 U.S. 830, 93 L.Ed. 383—U. S. v. Grayson, C.C.A.N.Y., 166 F.2d 863—U. S. v. Pike, C.C.A.Ill., 158 F.2d 46—Vickers v. U. S., C.C.A.Ark., 157 F.2d 285—U. S. v. Epstein, C.C.A.N.Y., 154 F.2d 806, certiorari denied 66 S.Ct. 1350—U. S. v. Monjar, C.C.A.Del., 147 F.2d 916, certiorari denied 65 S.Ct. 1191, two cases, 325 U.S. 859, 89 L.Ed. 1979, Cook v. U. S., 65 S.Ct. 1192, 325 U.S. 859, 89 L.Ed. 1979, Drew v. U. S., 65 S.Ct. 1192, 325 U.S. 859, 89 L.Ed. 1979, Jones v. U. S., 65 S.Ct. 1192, 325 U.S. 859, 89 L.Ed. 1979, Moore v. U. S., 65 S.Ct. 1192, 325 U.S. 859, 89 L.Ed. 1980, Condlin v. U. S., 65 S.Ct. 1193, 325 U.S. 859, 89 L.Ed. 1980, Fitzpatrick v. U. S., 65 S.Ct. 1193, 325 U.S. 859, 89 L.Ed. 1980, Lindh v. U. S., 65 S.Ct. 1193, 325 U.S. 859, 89 L.Ed. 1980, Willard v. U. S., 65 S.Ct. 859, 89 L.Ed. 1980, Crusser v. U. S., 65 S.Ct. 1194, 325 U.S. 859, 89 L.Ed. 1981, and Madams v. U. S., 65 S.Ct. 1194, 325 U.S. 859, 89 L.Ed. 1981—U. S. v. Berg, C.C.A.N.J., 144 F.2d 173—Ascher v. U. S., C.C.A.Ohio, 143 F.2d 592—Perry v. U. S., C.C.A.N.M., 136 F.2d 109, certiorari denied 64 S.Ct. 44, 320 U.S. 743, 88 L.Ed. 441—Clarke v. U. S., C.C.A.

Wash., 132 F.2d 538, certiorari denied 63 S.Ct. 992, 313 U.S. 789, 87 L.Ed. 1155—Hines v. U. S., C. C.A.N.M., 131 F.2d 971—Ryan v. U. S., C.C.A.Ala., 129 F.2d 783—Bradford v. U. S., C.C.A.La., 129 F.2d 274, reheard 130 F.2d 630, certiorari denied 63 S.Ct. 205, 317 U.S. 683, 87 L.Ed. 547—U. S. v. Riedel, C.C.A.Ill., 126 F.2d 81—Dunham v. U. S., C.C.A.Fla., 125 F.2d 895—Glover v. U. S., C.C.A.Ga., 125 F.2d 291, certiorari denied 62 S.Ct. 1280, 316 U.S. 690, 86 L.Ed. 1771, rehearing denied 65 S.Ct. 855, 324 U.S. 887, 89 L.Ed. 1436—Knight v. U. S., C.C.A.Tex., 123 F.2d 959—Weiss v. U. S., C.C.A.La., 122 F.2d 675, certiorari denied 62 S.Ct. 300, 314 U.S. 687, 86 L.Ed. 550, rehearing denied 62 S.Ct. 478, 314 U.S. 716, 86 L.Ed. 570—U. S. v. Goldstein, C.C.A.N.Y., 120 F.2d 486, affirmed 62 S.Ct. 1000, 316 U.S. 114, 86 L.Ed. 1312—Weiss v. U. S., C.C.A.La., 120 F.2d 472, rehearing denied 122 F.2d 675, certiorari denied 62 S.Ct. 300, 314 U.S. 687, 86 L.Ed. 550, rehearing denied 62 S.Ct. 478, 314 U.S. 716, 86 L.Ed. 570—Cortes v. U. S., C.C.A.Ariz., 119 F.2d 127—Sheridan v. U. S., C.C.A.Cal., 118 F.2d 828, certiorari denied 61 S.Ct. 1115, 313 U.S. 586, 85 L.Ed. 1541—Sherwin v. U. S., C.C.A.Cal., 118 F.2d 828, certiorari denied 61 S.Ct. 1115, 313 U.S. 586, 85 L.Ed. 1541—U. S. v. Mortimer, C.C.A.N.Y., 118 F.2d 266, certiorari denied Mortimer v. U. S., 62 S.Ct. 58, 314 U.S. 616, 86 L.Ed. 496—Shushan v. U. S., C.C.A.La., 117 F.2d 110, 133 A.L.R. 1040, certiorari denied 61 S.Ct. 1086, 313 U.S. 574, 85 L.Ed. 1531, rehearing denied 62 S.Ct. 53, 314 U.S. 706, 86 L.Ed. 564, certiorari denied Newman v. U. S., 61 S.Ct. 1086, 313 U.S. 574, 85 L.Ed. 1532, rehearing denied 62 S.Ct. 53, 314 U.S. 706, 86 L.Ed. 564, certiorari denied Miller v. U. S., 61 S.Ct. 1086, 313 U.S. 574, 85 L.Ed. 1532, rehearing denied 62 S.Ct. 53, 314 U.S. 706, 86 L.Ed. 564, certiorari denied Waguespack v. U. S., 61 S.Ct. 1086, 313 U.S. 574, 85 L.Ed. 1532, rehearing denied 62 S.Ct. 53, 314 U.S. 706, 86 L.Ed. 564—Waggoner v. U. S., C.C.A.Cal., 113 F.2d 867, certiorari denied 61 S.Ct. 140, 311 U.S. 695, 85 L.Ed. 450—Grell v. U. S., C.C.A.Mo., 112 F.2d 861—Hart v. U. S., C.C.A.La., 112 F.2d 128, certiorari denied 61 S.Ct. 6, 311 U.S. 722, 85 L.Ed. 471, certiorari denied 61 S.Ct. 60, 311 U.S. 684, 85 L.Ed. 441, rehearing denied 61 S.Ct. 131, 311 U.S. 726, 85 L.Ed. 473—U. S. v. Minnec, C.C.A.Ill., 104 F.2d 576, certiorari denied Minnec v. U. S., 60 S.Ct. 94, 308 U.S. 577, 84 L.Ed. 484—U. S. v. Dillard, C.C.A.N.Y., 101 F.2d 829, certiorari denied Dillard v. U. S., 59 S.Ct. 484, 306 U.S. 635,

83 L.Ed. 1036, Koven v. U. S., 59 S.Ct. 484, 306 U.S. 635, 83 L.Ed. 1036, and Donegan v. U. S., 59 S.Ct. 484, 306 U.S. 635, 83 L.Ed. 1036—Troutman v. U. S., C.C.A.Colo., 100 F.2d 628—Whitley v. U. S., C.C.A.Tex., 100 F.2d 504—U. S. v. Littlejohn, C.C.A.Ill., 96 F.2d 368, certiorari denied Littlejohn v. U. S., 58 S.Ct. 1058, 304 U.S. 583, 82 L.Ed. 1545—Stryker v. U. S., C.C.A.Colo., 95 F.2d 601—U. S. v. Weisman, C.C.A.N.Y., 83 F.2d 470, 107 A.L.R. 293, certiorari denied Weisman v. U. S., 57 S.Ct. 22, 299 U.S. 560, 81 L.Ed. 412, rehearing denied 57 S.Ct. 113, 299 U.S. 621, 81 L.Ed. 457—Johnson v. U. S., C.C.A.Ky., 82 F.2d 500, certiorari denied 56 S.Ct. 957, 298 U.S. 638, 80 L.Ed. 1407—McCutchan v. U. S., C.C.A.Mo., 70 F.2d 658, certiorari denied 55 S.Ct. 79, 293 U.S. 568, 79 L.Ed. 667—Butler v. U. S., C.C.A.Utah, 53 F.2d 800—Klose v. U. S., C.C.A.Minn., 49 F.2d 177, certiorari denied 52 S.Ct. 11, 284 U.S. 626, 76 L.Ed. 534—Alford v. U. S., C.C.A.Cal., 41 F.2d 157, reversed on other grounds 51 S.Ct. 218, 282 U.S. 687, 75 L.Ed. 624—Glymer v. U. S., C.C.A.Colo., 38 F.2d 581—Lewis v. U. S., C.C.A.Cal., 38 F.2d 406.

49 C.J. p 1220 note 32.

#### Fraudulent schemes forming basis for conviction

(1) Sale of stock or securities.—Danziger v. U. S., C.C.A.Cal., 161 F.2d 299, certiorari denied 68 S.Ct. 81, 332 U.S. 769, 92 L.Ed. 354—U. S. v. Bronson, C.C.A.N.Y., 145 F.2d 939—U. S. v. Kadison, C.C.A.Ind., 145 F.2d 525—Harper v. U. S., C.C.A.Mo., 143 F.2d 795—Estep v. U. S., C.C.A.Utah, 140 F.2d 40—U. S. v. Leathers, C.C.A.N.Y., 135 F.2d 507—Holmes v. U. S., C.C.A.Neb., 134 F.2d 125, certiorari denied 63 S.Ct. 1434, 319 U.S. 776, 87 L.Ed. 1722—Gantz v. U. S., C.C.A.Mo., 127 F.2d 498, certiorari denied 63 S.Ct. 47, 317 U.S. 625, 87 L.Ed. 505, rehearing denied 63 S.Ct. 154, 317 U.S. 709, 87 L.Ed. 565—Rosignol v. U. S., C.C.A.Ga., 112 F.2d 745, certiorari denied 61 S.Ct. 31, 311 U.S. 647, 85 L.Ed. 413—Pietch v. U. S., C.C.A.Okl., 110 F.2d 817, 129 A.L.R. 563, certiorari denied 60 S.Ct. 1100, 310 U.S. 648, 84 L.Ed. 1414—Landay v. U. S., C.C.A.Mich., 108 F.2d 698, certiorari denied 60 S.Ct. 721, 309 U.S. 681, 84 L.Ed. 1024, Lane v. U. S., 60 S.Ct. 722, 309 U.S. 681, 84 L.Ed. 1025, Attix v. U. S., 60 S.Ct. 722, 309 U.S. 681, 84 L.Ed. 1025, and Brown v. U. S., 60 S.Ct. 722, 309 U.S. 681, 84 L.Ed. 1025—Shreve v. U. S., C.C.A.Ariz., 103 F.2d 796, certiorari denied 60 S.Ct. 84, 308 U.S. 570, 84 L.Ed. 479—Kopald-Quinn & Co. v. U. S., C.C.A.Ga., 101 F.2d 628, certiorari denied Ricebaum v. U. S., 59 S.Ct. 835, 307 U.S. 628, 83 L.Ed. 1511, and Mendelson v. U. S., 59 S.

Ct. 835, 307 U.S. 628, 83 L.Ed. 1512—Levey v. U. S., C.C.A.Wash., 92 F.2d 688, certiorari denied 58 S.Ct. 609, 303 U.S. 639, 82 L.Ed. 1099—U. S. v. Rollnick, C.C.A.N.Y., 91 F.2d 911—U. S. v. Fradkin, C.C.A.N.Y., 81 F.2d 56, rehearing denied 81 F.2d 609, certiorari denied Fradkin v. U. S., 56 S.Ct. 598, 297 U.S. 720, 80 L.Ed. 1005—Levine v. U. S., C.C.A.Wash., 79 F.2d 364—Mansfield v. U. S., C.C.A.Mo., 76 F.2d 224, certiorari denied 56 S.Ct. 117, 296 U.S. 601, 80 L.Ed. 425—Baldwin v. U. S., C.C.A.Mont., 72 F.2d 810, certiorari denied Madison v. U. S., 55 S.Ct. 919, 295 U.S. 761, 79 L.Ed. 1702, Stohl v. U. S., 55 S.Ct. 919, 295 U.S. 761, 79 L.Ed. 1703, Faulkner v. U. S., 55 S.Ct. 920, 295 U.S. 761, 79 L.Ed. 1703, Baldwin v. U. S., 55 S.Ct. 920, 295 U.S. 761, 79 L.Ed. 1703, Keller v. U. S., 55 S.Ct. 920, 295 U.S. 761, 79 L.Ed. 1703, and Green v. U. S., 55 S.Ct. 927, 295 U.S. 761, 79 L.Ed. 1703—Fournier v. U. S., C.C.A.Ill., 58 F.2d 3, certiorari denied 52 S.Ct. 647, 286 U.S. 565, 76 L.Ed. 1297—U. S. v. Sprinkle, C.C.A.N.Y., 57 F.2d 968—U. S. v. Easterday, C.C.A.N.Y., 57 F.2d 185, certiorari denied Easterday v. U. S., 52 S.Ct. 646, 286 U.S. 564, 76 L.Ed. 1297—U. S. v. Rosenfeld, C.C.A.N.Y., 57 F.2d 74, certiorari denied Nachman v. U. S., 52 S.Ct. 642, 286 U.S. 556, 76 L.Ed. 1290—Busch v. U. S., C.C.A.Mo., 52 F.2d 79, certiorari denied Greible v. U. S., 52 S.Ct. 209, 284 U.S. 687, 76 L.Ed. 580—Harris v. U. S., C.C.A.Wash., 48 F.2d 771—U. S. v. Shurtlett, C.C.A.N.Y., 43 F.2d 944.

(2) Sale of real estate.—Deaver v. U. S., 155 F.2d 740, 81 U.S.App.D.C. 148, certiorari denied 67 S.Ct. 121, 329 U.S. 766, 91 L.Ed. 659—U. S. v. Beck, C.C.A.Ill., 118 F.2d 178, certiorari denied Beck v. U. S., 61 S.Ct. 1121, 313 U.S. 587, 85 L.Ed. 1542—Huteson v. U. S., C.C.A.Ind., 67 F.2d 731, certiorari denied 64 S.Ct. 631, 292 U.S. 627, 78 L.Ed. 1482—Armstrong v. U. S., C.C.A.N.M., 65 F.2d 853.

(3) Sale of gas and oil leases.—U. S. v. Leathers, C.C.A.N.Y., 135 F.2d 507—Atherton v. U. S., C.C.A.Cal., 128 F.2d 463.

(4) Issuance of fictitious medical certificates and licenses.—Alexander v. U. S. C.C.A.Mo., 95 F.2d 873, certiorari denied 59 S.Ct. 99, 305 U.S. 637, 83 L.Ed. 409, Debeh v. U. S., 59 S.Ct. 99, 305 U.S. 637, 83 L.Ed. 409, Lindsay v. U. S., 59 S.Ct. 100, 305 U.S. 637, 83 L.Ed. 409, and 59 S.Ct. 100, 305 U.S. 637, 83 L.Ed. 410.

(5) Sale of medical cures.—Baker v. U. S., C.C.A.Ark., 115 F.2d 535, certiorari denied 61 S.Ct. 711, 313 U.S. 692, 85 L.Ed. 1128, rehearing denied 61 S.Ct. 731, 312 U.S. 715, 85 L.Ed. 1145, motion denied, C.C.A., 139 F.2d 721, rehearing denied 65 S.Ct.

a conviction for using the mails to defraud;<sup>87</sup> or sufficient to sustain a conviction as to some defendants, and insufficient as to others;<sup>88</sup> or it has been held sufficient<sup>89</sup> or insufficient<sup>90</sup> to establish a scheme to defraud; sufficient<sup>91</sup> or insufficient<sup>92</sup> to show that accused participated in the scheme;

1399, 325 U.S. 894, 89 L.Ed. 2005—Barnhill v. U. S., C.C.A.Utah, 96 F. 2d 116.

(6) Check kiting.—U. S. v. Feldman, C.C.A.N.Y., 136 F.2d 394, affirmed 64 S.Ct. 1082, 323 U.S. 487, 88 L.Ed. 1408, 154 A.L.R. 982, rehearing denied 65 S.Ct. 26, 323 U.S. 811, 89 L.Ed. 646—Guardalibini v. U. S., C.C.A.Ala., 128 F.2d 984.

(7) False financial statements.—Zimmerman v. U. S., C.A.Tex., 171 F. 2d 790—U. S. v. Hartenfeld, C.C.A.Ind., 113 F.2d 359, certiorari denied Hartenfeld v. U. S., 61 S.Ct. 80, 311 U.S. 647, 85 L.Ed. 413—U. S. v. Bender, C.C.A.N.Y., 60 F.2d 56, certiorari denied Posner v. U. S., 53 S.Ct. 23, 287 U.S. 598, 77 L.Ed. 521—Berliner v. U. S., C.C.A.N.J., 41 F.2d 221.

(8) Prefabricated housing scheme.—U. S. v. Housing Foundation of America, C.A.Pa., 176 F.2d 665.

(9) Operation of pretended mechanical and engineering schools.—Hemphill v. U. S., C.C.A.Wash., 120 F.2d 115, certiorari denied 62 S.Ct. 111, 314 U.S. 627, 86 L.Ed. 503.

(10) Scheme to obtain money from unmarried woman by promising to marry her and repay all sums of money advanced.—Sovey v. U. S., C.C.A.Ga., 76 F.2d 972.

(11) Scheme to defraud insurers of amount of fire policy.—Frischia v. U. S., C.C.A.Fla., 63 F.2d 977, certiorari denied 53 S.Ct. 797, 289 U.S. 762, 77 L.Ed. 1505—U. S. v. Rosso, C.C.A.N.Y., 58 F.2d 197.

87. U.S.—Epstein v. U. S., C.A. Mich., 174 F.2d 754—Reining v. U. S., C.C.A.Fla., 167 F.2d 362, certiorari denied 69 S.Ct. 49, 335 U.S. 830, 93 L.Ed. 383—Ilseng v. U. S., C.C.A.Cal., 120 F.2d 823, certiorari denied 62 S.Ct. 125, 314 U.S. 665, 86 L.Ed. 532, 62 S.Ct. 126, 314 U.S. 665, 86 L.Ed. 532, and McKercher v. U. S., 62 S.Ct. 126, 314 U.S. 665, 86 L.Ed. 532—Wheaton v. U. S., C.C.A.N.J., 113 F.2d 710—Mazurosky v. U. S., C.C.A.Or., 100 F.2d 958—Hass v. U. S., C.C.A.Iowa, 93 F.2d 427—Vann v. U. S., C.C.A.Ala., 76 F.2d 808—Davis v. U. S., C.C.A.Del., 63 F.2d 545—McNear v. U. S., C.C.A.Kan., 60 F.2d 861—McClintock v. U. S., C.C.A.Kan., 60 F.2d 839—U. S. v. Quimby, C.C.A.N.Y., 51 F.2d 167—Cohen v. U. S., C.C.A.N.J., 50 F.2d 819—U. S. v. Baker, C.C.A.N.Y., 50 F. 2d 122—Gold v. U. S., C.C.A.Minn., 36 F.2d 18—U. S. v. Corlin, D.C. Cal., 44 F.Supp. 940.

49 C.J. p 1220 note 33.

88. U.S.—U. S. v. Cohen, C.C.A.N.Y., 145 F.2d 82, certiorari denied 65

S.Ct. 553, 323 U.S. 799, 89 L.Ed. 637, four cases, and 65 S.Ct. 554, 323 U.S. 800, 89 L.Ed. 638—Blue v. U. S., C.C.A.Ohio, 138 F.2d 351, certiorari denied 64 S.Ct. 1046, 322 U.S. 736, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Clark v. U. S., 64 S.Ct. 1046, 322 U.S. 736, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Pardee v. U. S., 64 S.Ct. 1046, 322 U.S. 737, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596—U. S. v. Wise, C.C.A.Ind., 108 F.2d 379—U. S. v. Dubrin, C.C.A.N.Y., 93 F.2d 499, certiorari denied Dubrin v. U. S., 58 S.Ct. 644, 303 U.S. 646, 82 L.Ed. 1107, and Weinstein v. U. S., 58 S.Ct. 644, 303 U.S. 646, 82 L.Ed. 1107—Patrick v. U. S., C.C.A.Wash., 77 F.2d 442, followed in 77 F.2d 446—Cochran v. U. S., C.C.A.Minn., 41 F.2d 193—Scheib v. U. S., C.C.A.Ind., 14 F.2d 75, certiorari denied 47 S.Ct. 95, 273 U.S. 701, 71 L.Ed. 848.

89. U.S.—Crooks v. U. S., C.A.N.C., 179 F.2d 304—Marshall v. U. S., C.C.A.Cal., 146 F.2d 618, 157 A.L.R. 241—Kann v. U. S., C.C.A.Md., 140 F.2d 380, reversed on other grounds 65 S.Ct. 148, 323 U.S. 88, 89 L.Ed. 88, 157 A.L.R. 406—Blue v. U. S., C.C.A.Ohio, 138 F.2d 351, certiorari denied 64 S.Ct. 1046, 322 U.S. 736, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Pardee v. U. S., 64 S.Ct. 1046, 322 U.S. 737, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596—Nassan v. U. S., C.C.A.Md., 126 F.2d 613—Dunham v. U. S., C.C.A.Fla., 125 F.2d 895—Knight v. U. S., C.C.A.Tex., 123 F. 2d 959—Hart v. U. S., C.C.A.La., 112 F.2d 128, certiorari dismissed 61 S.Ct. 6, 311 U.S. 722, 85 L.Ed. 471, certiorari denied 61 S.Ct. 60, 311 U.S. 684, 85 L.Ed. 441, rehearing denied 61 S.Ct. 131, 311 U.S. 726, 85 L.Ed. 473—U. S. v. Tamuel, C.C.A.Ill., 101 F.2d 339—U. S. v. Rosenfeld, C.C.A.N.Y., 57 F.2d 74, certiorari denied Nachman v. U. S., 52 S.Ct. 642, 286 U.S. 556, 76 L.Ed. 1290—Bennett v. U. S., C.C.A.Fla., 50 F.2d 1—Havener v. U. S., C.C.A.Kan., 49 F.2d 196, certiorari denied 52 S.Ct. 24, 284 U.S. 644, 76 L.Ed. 547—U. S. v. Green, D.C.Pa., 79 F.Supp. 702.

49 C.J. p 1220 note 35.

90. U.S.—U. S. v. Corlin, D.C.Cal., 44 F.Supp. 940.

91. U.S.—U. S. v. Epstein, C.C.A. N.Y., 154 F.2d 806, certiorari denied 66 S.Ct. 1350, 328 U.S. 858, 90 L.Ed. 1629—Kann v. U. S., C.C.A. Md., 140 F.2d 380, reversed on other grounds 65 S.Ct. 148, 323 U.S. 88, 89 L.Ed. 88, 157 A.L.R. 406—U. S. v. Bramson, C.C.A.N.Y., 139 F.2d 598, certiorari denied 64 S.Ct. 636, 321 U.S. 783, 88 L.Ed. 1075—Blue v. U. S., C.C.A.Ohio, 138 F.2d 351, certiorari denied 64 S.Ct. 1046, 322 U.S. 736, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Clark v. U. S., 64 S.Ct. 1046, 322 U.S. 736, 88 L. Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Pardee v. U. S., 64 S.Ct. 1046, 322 U.S. 737, 88 L. Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596—U. S. v. Oldenburg, C.C.A.Ill., 135 F.2d 616—U. S. v. Leathers, C.C. A.N.Y., 135 F.2d 507—Gates v. U. S., C.C.A.Colo., 122 F.2d 571, certiorari denied 62 S.Ct. 478, 314 U. S. 698, 86 L.Ed. 558, and 62 S.Ct. 483, 314 U.S. 698, 86 L.Ed. 558—U. S. v. Mortimer, C.C.A.N.Y., 118 F.2d 266, certiorari denied Mortimer v. U. S., 62 S.Ct. 58, 314 U.S. 616, 86 L.Ed. 496—U. S. v. Bob, C.C.A.N.Y., 106 F.2d 37, 125 A.L.R. 502, certiorari denied Bob v. U. S., 60 S.Ct. 115, 308 U.S. 589, 84 L.Ed. 493—U. S. v. Graham, C.C.A.N.Y., 102 F.2d 436, certiorari denied Graham v. U. S., 59 S.Ct. 1041, 307 U.S. 643, 83 L.Ed. 1524, rehearing denied 60 S.Ct. 68, 308 U.S. 632, 84 L.Ed. 526, certiorari denied Heed v. U. S., 59 S.Ct. 1041, 307 U.S. 643, 83 L.Ed. 1524—U. S. v. Berman, C.C.A.N.Y., 98 F.2d 733—Goodman v. U. S., C.C.A.Pa., 97 F.2d 197, certiorari granted 59 S. Ct. 100, 305 U.S. 587, 83 L.Ed. 371, certiorari dismissed 59 S.Ct. 363, 305 U.S. 578, 83 L.Ed. 364—Alexander v. U. S., C.C.A.Mo., 95 F.2d 873, certiorari denied 59 S.Ct. 99, 305 U.S. 637, 83 L.Ed. 409—Debeh v. U. S., 59 S.Ct. 99, 305 U.S. 637, 83 L.Ed. 409, and Lindsay v. U. S., 59 S.Ct. 100, 305 U.S. 637, 83 L.Ed. 410—Lee v. U. S., C.C.A.Ga., 91 F.2d 326, certiorari denied 58 S.Ct. 263, 302 U. S. 745, 82 L.Ed. 576—U. S. v. Citrin, D.C.N.Y., 58 F.Supp. 766.

92. U.S.—U. S. v. Dubrin, C.C.A. N.Y., 93 F.2d 499, certiorari denied Dubrin v. U. S., 58 S.Ct. 644, 303 U.S. 646, 82 L.Ed. 1107, and Wein-

sufficient<sup>93</sup> or insufficient<sup>94</sup> to show false representations; sufficient<sup>95</sup> or insufficient<sup>96</sup> to establish criminal intent; sufficient<sup>97</sup> or insufficient<sup>98</sup> to show an intent to use the mails in furtherance of the scheme to defraud; sufficient<sup>99</sup> or insufficient<sup>1</sup> to show that accused mailed, or caused matter to be mailed, or used the mails, in execution of the scheme; sufficient<sup>2</sup> or insufficient<sup>3</sup> to show that the scheme existed at the time the mails were used; or sufficient<sup>4</sup> or insufficient<sup>5</sup> to establish other particular facts.

## § 52. — Trial

General rules governing criminal trials and proceedings preliminary thereto apply in a prosecution for using the mails to defraud.

General rules governing criminal trials and proceedings preliminary thereto apply in a prosecution for using the mails to defraud.<sup>6</sup> It is the province of the jury to determine the guilt or innocence of accused,<sup>7</sup> and other questions of fact

stein v. U. S., 58 S.Ct. 644, 303 U.S. 646, 82 L.Ed. 1107.

93. U.S.—U. S. v. Wernes, C.C.A. Ill., 187 F.2d 797—U. S. v. Epstein, C.C.A.N.Y., 154 F.2d 806, certiorari denied 66 S.Ct. 1350, 328 U.S. 858, 90 L.Ed. 1629—Knight v. U. S., C. C.A.Tex., 123 F.2d 959—Foshay v. U. S., C.C.A.Minn., 68 F.2d 205, certiorari denied 54 S.Ct. 531, 291 U.S. 674, 78 L.Ed. 1063.

94. U.S.—Greenbaum v. U. S., C.C. A.Ariz., 80 F.2d 113.

95. U.S.—Marshall v. U. S., C.C.A. Cal., 146 F.2d 618, 157 A.L.R. 241—Gates v. U. S., C.C.A.Colo., 122 F.2d 571, certiorari denied 62 S.Ct. 478, 314 U.S. 698, 86 L.Ed. 558, and 62 S.Ct. 483, 314 U.S. 698, 86 L.Ed. 558.

96. U.S.—Epstein v. U. S., C.A. Mich., 174 F.2d 754.

**Knowledge of falsity of representations not established**

U.S.—Estep v. U. S., C.C.A.Utah, 140 F.2d 40—Greenbaum v. U. S., C.C.A.Ariz., 80 F.2d 113.

97. U.S.—U. S. v. Berg, C.C.A.N.J., 144 F.2d 173—Hines v. U. S., C.C. A.N.M., 131 F.2d 971—U. S. v. Bender, C.C.A.N.Y., 60 F.2d 56, certiorari denied Posner v. U. S., 53 S.Ct. 23, 287 U.S. 598, 77 L.Ed. 521, 49 C.J. p 1220 note 36.

98. U.S.—Spillers v. U. S., C.C.A. Tex., 47 F.2d 893—Kritcher v. U. S., C.C.A.N.Y., 17 F.2d 704.

99. U.S.—Marshall v. U. S., C.C.A. Cal., 146 F.2d 618, 157 A.L.R. 241—U. S. v. Berg, C.C.A.N.J., 144 F.2d 173—Harris v. U. S., C.C.A.Md., 140 F.2d 567—Decker v. U. S., C.C. A.Md., 140 F.2d 378, 151 A.L.R. 754—Blue v. U. S., C.C.A.Ohio, 138 F.2d 351, certiorari denied 64 S.Ct. 1046, 322 U.S. 736, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Clark v. U. S., 64 S.Ct. 1046, 322 U.S. 736, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596, certiorari denied Pardee v. U. S., 64 S.Ct. 1046, 322 U.S. 737, 88 L.Ed. 1570, rehearing denied 64 S.Ct. 1259, 322 U.S. 771, 88 L.Ed. 1596—Clarke v. U. S., C.C.A.Wash., 132 F.2d 538,

certiorari denied 63 S.Ct. 992, 318 U.S. 789, 87 L.Ed. 1155—U. S. v. Reiburn, C.C.A.N.Y., 127 F.2d 525—U. S. v. Riedel, C.C.A.Ill., 126 F.2d 81—Graham v. U. S., C.C.A. N.M., 120 F.2d 543—Corbett v. U. S., C.C.A.Mo., 89 F.2d 124—McNear v. U. S., C.C.A.Kan., 60 F.2d 861—U. S. v. Bender, C.C.A.N.Y., 60 F.2d 56, certiorari denied Posner v. U. S., 53 S.Ct. 23, 287 U.S. 598, 77 L.Ed. 521—Havener v. U. S., C.C. A.Kan., 49 F.2d 196, certiorari denied 52 S.Ct. 24, 284 U.S. 644, 76 L.Ed. 547—Cochran v. U. S., C.C.A. Minn., 41 F.2d 193—Alford v. U. S., C.C.A.Cal., 41 F.2d 157, reversed on other grounds 51 S.Ct. 213, 282 U.S. 687, 75 L.Ed. 624—Lewis v. U. S., C.C.A.Cal., 38 F.2d 406—Federman v. U. S., C.C.A.Ind., 36 F.2d 441, certiorari denied 50 S.Ct. 246, 281 U.S. 729, 74 L.Ed. 1146—U. S. v. Green, D.C.Pa., 79 F.Supp. 702.

49 C.J. p 1220 note 38.

1. U.S.—Wheaton v. U. S., C.C.A. N.J., 113 F.2d 710—Merrill v. U. S., C.C.A.Mont., 95 F.2d 669—Freeman v. U. S., C.C.A.N.J., 20 F.2d 748.

### Receipt of letter

(1) Evidence that matter was received through the mails is insufficient by itself, to show that accused mailed the matter or caused it to be mailed.—Davis v. U. S., C.C. A.Del., 63 F.2d 545—Cohen v. U. S., C.C.A.N.J., 50 F.2d 819—Berliner v. U. S., C.C.A.N.J., 41 F.2d 221—Freeman v. U. S., C.C.A.N.J., 20 F.2d 748.

(2) Proof that a letter was written in one city and received in another is insufficient to show use of the mails required for a conviction.—Mackett v. U. S., C.C.A.Wis., 90 F.2d 462—U. S. v. Baker, C.C.A.N.Y., 50 F.2d 122.

2. U.S.—U. S. v. Carruthers, C.C.A. Ill., 152 F.2d 512, certiorari denied 66 S.Ct. 805, 327 U.S. 787, 90 L.Ed. 1014, rehearing denied 66 S.Ct. 816, 327 U.S. 817, 90 L.Ed. 1040, rehearing denied 66 S.Ct. 897, 327 U.S. 819, 90 L.Ed. 1014—Mitchell v. U. S., C.C.A.N.M., 126 F.2d 550, certiorari denied 62 S.Ct. 1307, 316 U.S. 702, 86 L.Ed. 1771—U. S. v.

Buckner, C.C.A.N.Y., 108 F.2d 921, certiorari denied Buckner v. U. S., 60 S.Ct. 613, 309 U.S. 669, 84 L.Ed. 1016.

3. U.S.—U. S. v. Buckner, 108 F.2d 921, certiorari denied Buckner v. U. S., 60 S.Ct. 613, 309 U.S. 669, 84 L.Ed. 1016—Merrill v. U. S., C.C.A.Mont., 95 F.2d 669—Hass v. U. S., C.C.A.Iowa, 93 F.2d 427.

4. U.S.—U. S. v. Groves, C.C.A.N.Y., 122 F.2d 87, certiorari denied Groves v. U. S., 62 S.Ct. 135, 314 U.S. 670, 86 L.Ed. 536—U. S. v. Rosso, C.C.A.N.Y., 58 F.2d 197, 49 C.J. p 1220 note 31.

### Relationship of letters to scheme

U.S.—U. S. v. Berg, C.C.A.N.J., 144 F.2d 173.

### Letters mailed within district where indictment filed

U.S.—U. S. v. Cohen, C.C.A.N.Y., 145 F.2d 82, certiorari denied 65 S.Ct. 553, 323 U.S. 799, 89 L.Ed. 638, four cases, and 65 S.Ct. 554, 323 U.S. 800, 89 L.Ed. 638—Steiner v. U. S., C.C.A.La., 134 F.2d 931, certiorari denied 63 S.Ct. 1439, 319 U.S. 774, 87 L.Ed. 1721—McIntyre v. U. S., C.C.A.Ohio, 49 F.2d 769.

5. U.S.—Epstein v. U. S., C.A.Mich., 174 F.2d 754.

### Abandonment of scheme by participant

U.S.—U. S. v. Cohen, C.C.A.N.Y., 145 F.2d 82, certiorari denied 65 S.Ct. 553, 323 U.S. 799, 89 L.Ed. 637, four cases, and 65 S.Ct. 554, 323 U.S. 800, 89 L.Ed. 638.

### 6. Remarks of court

A misstatement of the charge in the indictment, made by the court preliminary to examination of jurors, the effect of which was to prejudice the jury from the start, was held erroneous.—Sunderland v. U. S., C.C.A.Neb., 19 F.2d 202.

7. U.S.—Weiss v. U. S., C.C.A.La., 122 F.2d 675, certiorari denied 62 S.Ct. 300, 314 U.S. 687, 86 L.Ed. 550, rehearing denied 62 S.Ct. 478, 314 U.S. 716, 86 L.Ed. 570—Grell v. U. S., C.C.A.Mo., 112 F.2d 861—U. S. v. Weiss, C.C.A.N.Y., 103 F.2d 348, certiorari granted Weiss v. U. S., 59 S.Ct. 1043, 307 U.S. 621, 83 L.Ed. 1500, reversed on other

which arise,<sup>8</sup> such as the existence of a scheme to defraud,<sup>9</sup> connection of accused with the fraudulent scheme,<sup>10</sup> the question of fraud,<sup>11</sup> the question of intent to defraud<sup>12</sup> or of good faith,<sup>13</sup> whether representations were false<sup>14</sup> or fraudulently made as part of the scheme alleged,<sup>15</sup> whether letters were mailed or caused to be mailed in furtherance of the scheme<sup>16</sup> and with the intent of

assisting in the furtherance of the scheme,<sup>17</sup> whether the scheme to defraud was apparently adapted to accomplish the crime intended,<sup>18</sup> and whether the scheme was put into operation.<sup>19</sup> These matters are for the determination of the jury only where there is sufficient evidence in the particular case to justify a submission to the jury,<sup>20</sup> and, if there is no evidence on which a conviction

grounds 60 S.Ct. 269, 308 U.S. 321, 84 L.Ed. 298—Goldstein v. U. S., C.C.A.Mo., 63 F.2d 609—Belden v. U. S., Wash., 223 F. 726, 139 C.C.A. 256.

#### Application of statute to particular facts

Guilt under the mail-fraud statute depends on answers to questions of law raised by application of the statute to the particular facts.—*Adams v. U. S. ex rel. McCann*, N. Y., 63 S.Ct. 236, 317 U.S. 269, 87 L. Ed. 268, 143 A.L.R. 435.

#### Directed verdict of acquittal held properly refused

U.S.—*Richardson v. U. S.*, C.C.A. Tenn., 150 F.2d 58—*Walker v. U. S.*, C.C.A.Wash., 116 F.2d 458—*Roubay v. U. S.*, C.C.A.Cal., 115 F.2d 49—*Hart v. U. S.*, C.C.A.La., 112 F.2d 128, certiorari dismissed 61 S.Ct. 6, 311 U.S. 722, 85 L.Ed. 471, certiorari denied 61 S.Ct. 60, 311 U.S. 684, 85 L.Ed. 441, rehearing denied 61 S.Ct. 131, 311 U.S. 726, 85 L.Ed. 473—*Landay v. U. S.*, C.C.A.Mich., 108 F.2d 698, certiorari denied 60 S.Ct. 721, 309 U.S. 681, 84 L.Ed. 1024, Lane v. U. S., 60 S.Ct. 722, 309 U.S. 681, 84 L.Ed. 1026, *Attix v. U. S.*, 60 S.Ct. 722, 309 U.S. 681, 84 L.Ed. 1025, and *Brown v. U. S.*, 60 S.Ct. 722, 309 U.S. 681, 84 L.Ed. 1025—*Gridley v. U. S.*, C.C.A.Mich., 44 F.2d 716, certiorari denied 51 S.Ct. 351, 283 U.S. 827, 75 L.Ed. 1441.

8. U.S.—*Weiss v. U. S.*, C.C.A.La., 122 F.2d 675, certiorari denied 62 S.Ct. 300, 314 U.S. 687, 86 L.Ed. 550, rehearing denied 62 S.Ct. 478, 314 U.S. 716, 86 L.Ed. 570—*Miller v. U. S.*, C.C.A.Kan., 120 F.2d 968—*Simons v. U. S.*, C.C.A.Wash., 119 F.2d 539, certiorari denied 62 S.Ct. 78, 314 U.S. 616, 86 L.Ed. 496—*U. S. v. Berman*, C.C.A.N.Y., 98 F.2d 733—*Pfaff v. U. S.*, C.C.A.Ind., 85 F.2d 309.

9. U.S.—*Holmes v. U. S.*, C.C.A. Neb., 134 F.2d 125, certiorari denied 63 S.Ct. 1434, 319 U.S. 776, 87 L.Ed. 1722.

10. U.S.—*U. S. v. Morley*, C.C.A. Ind., 99 F.2d 683, certiorari denied *Morley v. U. S.*, 59 S.Ct. 463, 306 U.S. 631, 83 L.Ed. 1033.  
49 C.J. p 1221 note 46.

11. U.S.—*St. Clair v. U. S.*, C.C.A. Wash., 23 F.2d 76.

12. U.S.—*Coleman v. U. S.*, C.C.A. Tex., 167 F.2d 837—*Hawley v. U. S.*, C.C.A.Colo., 133 F.2d 966—*Weiss v. U. S.*, C.C.A.La., 122 F.2d 675, certiorari denied 62 S.Ct. 300, 314 U.S. 687, 86 L.Ed. 550, rehearing denied 62 S.Ct. 478, 314 U.S. 716, 86 L.Ed. 570.  
49 C.J. p 1221 note 43.

13. U.S.—*Coleman v. U. S.*, C.C.A. Tex., 167 F.2d 837—*Hawley v. U. S.*, C.C.A.Colo., 133 F.2d 966—*U. S. v. Sprengel*, C.C.A.Pa., 103 F.2d 876.  
49 C.J. p 1221 note 49.

14. U.S.—*Ballard v. U. S.*, C.C.A. Cal., 138 F.2d 450, certiorari denied *U. S. v. Ballard*, 64 S.Ct. 427, 320 U.S. 733, 88 L.Ed. 434—*Simons v. U. S.*, C.C.A.Wash., 119 F.2d 539, certiorari denied 62 S.Ct. 78, 314 U.S. 616, 86 L.Ed. 496.

15. U.S.—*Perry v. U. S.*, C.C.A.N.M., 136 F.2d 109, certiorari denied 64 S.Ct. 44, 320 U.S. 743, 88 L.Ed. 441.

16. U.S.—*Muench v. U. S.*, C.C.A. Mo., 96 F.2d 332—*Smith v. U. S.*, C.C.A.Ga., 61 F.2d 681. Certiorari denied 53 S.Ct. 401, 288 U.S. 608, 77 L.Ed. 983, and *Ellis v. U. S.*, 53 S.Ct. 402, 288 U.S. 607, 77 L.Ed. 982. Followed in, *C.C.A.*, *Fowler v. Aderhold*, 73 F.2d 998—*Davis v. U. S.*, C.C.A.Tex., 55 F.2d 550, certiorari denied 52 S.Ct. 646, 286 U.S. 564, 76 L.Ed. 1296.

17. U.S.—*U. S. v. Crummer*, C.C.A. Kan., 151 F.2d 958, certiorari denied 66 S.Ct. 704, 327 U.S. 785, 90 L.Ed. 1012.

18. U.S.—*Whitehead v. U. S.*, Ala., 245 F. 385, 157 C.C.A. 547, certiorari denied 38 S.Ct. 191, 245 U.S. 670, 62 L.Ed. 540.

19. U.S.—*Stewart v. U. S.*, C.C.A. Mo., 300 F. 769.  
49 C.J. p 1221 note 51.

20. U.S.—*U. S. v. Feinberg*, C.C.A. N.Y., 140 F.2d 592, 154 A.L.R. 272, certiorari denied 64 S.Ct. 943, 322 U.S. 726, 88 L.Ed. 1562—*Rosenberg v. U. S.*, C.C.A.N.M., 120 F.2d 935—*Rude v. U. S.*, C.C.A.Colo., 74 F.2d 673—*West v. U. S.*, C.C.A. Colo., 68 F.2d 96—*Davis v. U. S.*, C.C.A.Del., 63 F.2d 545—*Salinger v. U. S.*, C.C.A.S.D., 23 F.2d 48.  
49 C.J. p 1221 note 52.

#### Uncontradicted evidence

Submitting to jury issue established by uncontradicted evidence is

erroneous.—*Gold v. U. S.*, C.C.A. Minn., 36 F.2d 16.

Proof of settled custom is sufficient to take question of use of mails to defraud to jury.—*Harris v. U. S.*, C.C.A.Md., 140 F.2d 567.

#### Evidence held sufficient for jury

(1) In general.—*U. S. v. Bowcott*, C.A.Ill., 170 F.2d 173, certiorari denied 69 S.Ct. 482, 335 U.S. 911, 93 L. Ed. 444—*U. S. v. Feinberg*, C.C.A.N.Y., 140 F.2d 592, 154 A.L.R. 272, certiorari denied 64 S.Ct. 943, 322 U.S. 726, 88 L.Ed. 1562—*U. S. v. Levy*, C. C.A.Ind., 138 F.2d 429, certiorari denied *Levy v. U. S.*, 64 S.Ct. 528, 321 U.S. 770, 88 L.Ed. 1065, rehearing denied 64 S.Ct. 635, 321 U.S. 803, 88 L. Ed. 1089—*Steiner v. U. S.*, C.C.A.La., 134 F.2d 931, certiorari denied 63 S. Ct. 1439, 319 U.S. 774, 87 L.Ed. 1721—*U. S. v. McDermott*, C.C.A.Ind., 131 F.2d 313, certiorari denied *McDermott v. U. S.*, 63 S.Ct. 664, 318 U.S. 765, 87 L.Ed. 1137, rehearing denied 63 S.Ct. 827, 318 U.S. 801, 87 L.Ed. 1164—*Bradford v. U. S.*, C.C.A.La., 129 F.2d 274, reheard 130 F.2d 630, certiorari denied 63 S.Ct. 205, 317 U.S. 683, 87 L.Ed. 547—*Dunham v. U. S.*, C.C.A.Fla., 125 F.2d 895—*U. S. v. White*, C.C.A.N.Y., 124 F.2d 181—*Knight v. U. S.*, C.C.A.Tex., 123 F.2d 959—*Bogy v. U. S.*, C.C.A.Tenn., 96 F.2d 734, certiorari denied *Bogy v. U. S.*, 59 S.Ct. 68, 305 U.S. 608, 83 L. Ed. 387—*Alexander v. U. S.*, C.C.A. Mo., 95 F.2d 873, certiorari denied 59 S.Ct. 99, 305 U.S. 637, 83 L.Ed. 409, *Debeh v. U. S.*, 59 S.Ct. 99, 305 U.S. 637, 83 L.Ed. 409, *Lindsay v. U. S.*, 59 S.Ct. 100, 305 U.S. 637, 83 L. Ed. 409, and 59 S.Ct. 100, 305 U.S. 637, 83 L.Ed. 410—*Green v. U. S.*, C. C.A.Utah, 93 F.2d 537—*Levey v. U. S.*, C.C.A.Wash., 92 F.2d 688, certiorari denied 58 S.Ct. 609, 303 U.S. 639, 82 L.Ed. 1099—*Simmons v. U. S.*, C.C.A.Tex., 89 F.2d 591, certiorari denied 58 S.Ct. 19, 302 U.S. 700, 82 L. Ed. 540—*Loneragan v. U. S.*, C.C.A. Wash., 88 F.2d 591, certiorari granted 58 S.Ct. 18, 302 U.S. 683, 82 L.Ed. 512, reversed 58 S.Ct. 430, 303 U.S. 33, 82 L.Ed. 630—*Reuben v. U. S.*, C. C.A.Ill., 86 F.2d 464, certiorari denied 57 S.Ct. 513, 300 U.S. 671, 81 L. Ed. 877, rehearing denied 57 S.Ct. 782, 301 U.S. 712, 81 L.Ed. 1364, *Rollnick v. U. S.*, 86 F.2d 464, certiorari denied 57 S.Ct. 511, 300 U.S. 671, 81 L.Ed. 877, rehearing denied 57 S.Ct. 782, 301 U.S. 712, 81 L.Ed.



could be based, it is the duty of the court to direct a verdict of acquittal.<sup>21</sup>

**Instructions.** In accordance with the rules governing criminal trials generally, the court should clearly and correctly instruct the jury as to the offense charged, the defense asserted, and the law applicable to the case.<sup>22</sup>

**Findings and verdict.** A finding by the jury that defendants devised a scheme to defraud necessari-

ly includes a finding of bad faith and guilty knowledge on their part.<sup>23</sup> Where, although an indictment charges both the offense of using the mails to execute a scheme to defraud and the offense of conspiring to commit the substantive offense, the judge submits the case to the jury only on the conspiracy count, a general verdict of guilty does not include the offense of using the mails to defraud.<sup>24</sup> Where the jury return a verdict of guilty which is based on circumstantial evidence but the evidence

1364—Laven v. U. S., 86 F.2d 464, certiorari denied 57 S.Ct. 513, 300 U.S. 671, 81 L.Ed. 877—Luke v. U. S., C.C.A.Ga., 84 F.2d 711, certiorari denied 57 S.Ct. 45, 299 U.S. 542, 81 L.Ed. 399—Lloyd v. U. S., C.C.A.Tex., 76 F.2d 385—Mansfield v. U. S., C.C.A.Mo., 76 F.2d 224, certiorari denied 56 S.Ct. 117, 296 U.S. 601, 80 L.Ed. 425—U. S. v. Hirsch, C.C.A.N.Y., 74 F.2d 215, certiorari denied Hirsch v. U. S., 55 S.Ct. 653, 295 U.S. 739, 79 L.Ed. 1686, rehearing denied 55 S.Ct. 825, 295 U.S. 768, 79 L.Ed. 1709—Baldwin v. U. S., C.C.A.Mont., 72 F.2d 810, certiorari denied Madison v. U. S., 55 S.Ct. 919, 295 U.S. 761, 79 L.Ed. 1702, Stohl v. U. S., 55 S.Ct. 919, 295 U.S. 761, 79 L.Ed. 1703, Faulkner v. U. S., 55 S.Ct. 920, 295 U.S. 761, 79 L.Ed. 1703, Baldwin v. U. S., 55 S.Ct. 920, 295 U.S. 761, 79 L.Ed. 1703, and Green v. U. S., 55 S.Ct. 927, 295 U.S. 761, 79 L.Ed. 1703—Taggart v. U. S., C.C.A.Colo., 63 F.2d 285—Roper v. U. S., C.C.A.Colo., 54 F.2d 845—Nichols v. U. S., C.C.A.Fla., 48 F.2d 46—Hynney v. U. S., C.C.A.Mich., 44 F.2d 134, certiorari denied 51 S.Ct. 347, 283 U.S. 824, 75 L.Ed. 1438.

(2) Fraudulent scheme.—Lelles v. U. S., C.C.A.Wash., 120 F.2d 447, certiorari denied 62 S.Ct. 108, 314 U.S. 626, 86 L.Ed. 503—Alken v. U. S., C.C.A.S.C., 108 F.2d 182—Foshay v. U. S., C.C.A.Minn., 68 F.2d 205, certiorari denied 54 S.Ct. 531, 291 U.S. 674, 78 L.Ed. 1063.

(3) Participation in scheme by defendant.

U.S.—U. S. v. Hartenfeld, C.C.A.Ind., 113 F.2d 359, certiorari denied Hartenfeld v. U. S., 61 S.Ct. 30, 311 U.S. 647, 85 L.Ed. 413—Paden v. U. S., C.C.A.Mo., 85 F.2d 366.

D.C.—Curley v. U. S., 160 F.2d 229, 81 U.S.App.D.C. 389, certiorari denied 67 S.Ct. 1511, 331 U.S. 837, 91 L.Ed. 1850, rehearing denied 67 S.Ct. 1729, 331 U.S. 869, 91 L.Ed. 1872, certiorari denied Smith v. U. S., 67 S.Ct. 1512, 331 U.S. 837, 91 L.Ed. 1850, rehearing denied 67 S.Ct. 1750, 331 U.S. 870, 91 L.Ed. 1873.

(4) Falsity of representations.—Mansfield v. U. S., C.C.A.Mo., 76 F.2d

224, certiorari denied 56 S.Ct. 117, 296 U.S. 601, 80 L.Ed. 425.

(5) Knowledge of falsity of representations.—Holt v. U. S., C.C.A.Okl., 94 F.2d 90.

(6) Intent to defraud or lack of good faith.—Stone v. U. S., C.C.A.Tenn., 113 F.2d 70.

(7) Use of mails.—Steiner v. U. S., C.C.A.La., 134 F.2d 931, certiorari denied 63 S.Ct. 1439, 319 U.S. 774, 87 L.Ed. 1721—Roubay v. U. S., C.C.A.Cal., 115 F.2d 49—U. S. v. Wise, C.C.A.Ind., 108 F.2d 379—U. S. v. Porter, C.C.A.Ill., 96 F.2d 773, certiorari denied Porter v. U. S., 59 S.Ct. 71, 305 U.S. 612, 83 L.Ed. 389—Corbett v. U. S., C.C.A.Mo., 89 F.2d 124.

21. U.S.—Tucker v. U. S., C.C.A.Okl., 5 F.2d 818.

49 C.J. p 1221 note 53.

22. U.S.—Coleman v. U. S., C.C.A.Tex., 167 F.2d 887—Richardson v. U. S., C.C.A.Tenn., 150 F.2d 58.

49 C.J. p 1220 note 44.

**Instructions held proper or adequate**

U.S.—Bridgman v. U. S., C.C.A.Cal., 183 F.2d 750—U. S. v. Platt, C.C.A.N.Y., 182 F.2d 469—Bowers v. U. S., C.A.Fla., 177 F.2d 764, certiorari denied 70 S.Ct. 492, 338 U.S. 954, 94 L.Ed. —Hawley v. U. S., C.C.A.Colo., 133 F.2d 966—Simons v. U. S., C.C.A.Wash., 119 F.2d 539, certiorari denied 62 S.Ct. 78, 314 U.S. 616, 86 L.Ed. 496—Leche v. U. S., C.C.A.La., 118 F.2d 246, certiorari denied 62 S.Ct. 73, 314 U.S. 617, 86 L.Ed. 496, rehearing denied 62 S.Ct. 295, 314 U.S. 712, 86 L.Ed. 567—U. S. v. Dillard, C.C.A.N.Y., 101 F.2d 829, certiorari denied Dillard v. U. S., 59 S.Ct. 484, 306 U.S. 635, 83 L.Ed. 1036, Koven v. U. S., 59 S.Ct. 484, 306 U.S. 635, 83 L.Ed. 1036, and Donegan v. U. S., 59 S.Ct. 484, 306 U.S. 635, 83 L.Ed. 1036—Jarvis v. U. S., C.C.A.Mass., 90 F.2d 243, certiorari denied 58 S.Ct. 25, 302 U.S. 705, 82 L.Ed. 544—U. S. v. Weisman, C.C.A.N.Y., 83 F.2d 470, 107 A.L.R. 293, certiorari denied Weisman v. U. S., 57 S.Ct. 22, 299 U.S. 560, 81 L.Ed. 412, rehearing denied 57 S.Ct. 113, 299 U.S. 621, 81 L.Ed. 457—Levine v. U. S., C.C.A.Wash., 79 F.2d 364—U. S. v. Brown, C.C.A.N.Y., 79 F.2d 321,

certiorari denied McCarthy v. U. S., 56 S.Ct. 309, 296 U.S. 650, 80 L.Ed. 462—U. S. v. Rowe, C.C.A.N.Y., 56 F.2d 747, certiorari denied Rowe v. U. S., 52 S.Ct. 579, 286 U.S. 554, 76 L.Ed. 1289—Harris v. U. S., C.C.A.Wash., 48 F.2d 771—Hyney v. U. S., C.C.A.Mich., 44 F.2d 134, certiorari denied 51 S.Ct. 347, 283 U.S. 824, 75 L.Ed. 1438—Cowl v. U. S., C.C.A.Neb., 35 F.2d 794.

D.C.—Deaver v. U. S., 155 F.2d 740, 81 U.S.App.D.C. 148, certiorari denied 67 S.Ct. 121, 329 U.S. 766, 91 L.Ed. 659.

**Instructions held erroneous or inadequate**

U.S.—Richardson v. U. S., C.C.A.Tenn., 150 F.2d 58—Clarke v. U. S., C.C.A.Wash., 132 F.2d 538, certiorari denied 63 S.Ct. 992, 318 U.S. 789, 87 L.Ed. 1155.

**Instructions held properly refused**

U.S.—Kaufman v. U. S., C.C.A.Mich., 163 F.2d 404, certiorari denied 68 S.Ct. 726, 333 U.S. 857, 92 L.Ed. 1137, rehearing denied 68 S.Ct. 396, 333 U.S. 878, 92 L.Ed. 1154—Guardalibini v. U. S., C.C.A.Ala., 128 F.2d 984—Glover v. U. S., C.C.A.Ga., 125 F.2d 291, certiorari denied 62 S.Ct. 1280, 316 U.S. 690, 86 L.Ed. 1761—U. S. v. Littlejohn, C.C.A.Ill., 96 F.2d 368, certiorari denied Littlejohn v. U. S., 58 S.Ct. 1058, 304 U.S. 583, 82 L.Ed. 1545—Stryker v. U. S., C.C.A.Colo., 95 F.2d 601—Weber v. U. S., C.C.A.Utah, 80 F.2d 687—Smith v. U. S., C.C.A.Ga., 61 F.2d 681. Certiorari denied 53 S.Ct. 401, 288 U.S. 608, 77 L.Ed. 983, and Ellis v. U. S., 53 S.Ct. 402, 288 U.S. 607, 77 L.Ed. 982. Followed in, C.C.A., Fowler v. Aderhold, 73 F.2d 998—Harris v. U. S., C.C.A.Wash., 48 F.2d 771—Gridley v. U. S., C.C.A.Mich., 44 F.2d 716, certiorari denied 51 S.Ct. 351, 283 U.S. 827, 75 L.Ed. 1441—Lewis v. U. S., C.C.A.Cal., 38 F.2d 406.

23. U.S.—Baker v. U. S., C.C.A.Ark., 115 F.2d 533, certiorari denied 61 S.Ct. 711, 312 U.S. 692, 85 L.Ed. 1128, rehearing denied 61 S.Ct. 731, 312 U.S. 715, 85 L.Ed. 1145, motion denied, C.C.A., 139 F.2d 721, rehearing denied 65 S.Ct. 1399, 325 U.S. 894, 89 L.Ed. 2005.

24. U.S.—Lefco v. U. S., C.C.A.Pa., 74 F.2d 66.



does not exclude every reasonable hypothesis except that of guilt, the court will grant a motion for judgment of acquittal.<sup>25</sup>

**Sentence and punishment.** Each violation of the mail-fraud statute may be separately punished.<sup>26</sup> The sentence prescribed by statute for using the mails to defraud cannot lawfully be imposed on a person who has been convicted only of a conspiracy to use the mails to defraud.<sup>27</sup>

### § 53. Matter Concerning Lotteries or Similar Schemes

In accordance with the provisions of the statute, the mailing of matter concerning a lottery, gift enterprise, or similar scheme offering prizes dependent on lot or chance is an offense.

In accordance with the provisions of the statute, 18 U.S.C.A. § 1302, the validity of which has been upheld,<sup>28</sup> the mailing of matter concerning a lottery, gift enterprise, or similar scheme offering prizes dependent on lot or chance is an offense.<sup>29</sup> The object of the statute is to punish those who use the mails for the promotion of lotteries and similar schemes,<sup>30</sup> but, since it is highly penal in its nature, it is to be strictly construed.<sup>31</sup> While it has been broadly stated that the effect of the statute is to make any matter concerning lotteries unmailable, and to subject the sender of any such matter by mail to the penalty therein provided,<sup>32</sup> it has been held that the statute was aimed at lottery dealers only and not individual buyers of lottery tickets.<sup>33</sup>

The statute cannot, of course, be violated unless the matter deposited in the mail is of the kind excluded from the mail by the statute.<sup>34</sup> In order to constitute a lottery or similar scheme within the meaning of the statute, the winning or losing must depend on lot or chance and be beyond the will or influence of the wagerer,<sup>35</sup> and the mere fact that an element of chance is present,<sup>36</sup> or there is an expectation of a prize,<sup>37</sup> is not sufficient to bring a scheme or plan within the statute. Knowledge of accused as to the nature of the matter is essential,<sup>38</sup> and, if shown, the absence of an intent to evade the law is immaterial.<sup>39</sup> Prepayment of postage is not made an element of the offense by the statute.<sup>40</sup>

It is not a defense that the lottery involved was valid under the laws of the state<sup>41</sup> or country<sup>42</sup> where it originated, or that the letter involved was innocent on its face<sup>43</sup> or sent in reply to letters written by a detective, under a fictitious name, for no other purpose than to obtain evidence.<sup>44</sup>

Prior to the revision of 1948, the statute by express terms made it an offense knowingly to deposit, or cause to be deposited, or knowingly to send, or cause to be sent, anything to be conveyed or delivered by mail in violation of the statute, or knowingly to deliver, or cause to be delivered, anything forbidden by the statute to be carried by mail. It has been said that three distinct offenses are created by the statute: Knowingly depositing, or causing to be deposited, such forbidden

25. U.S.—U. S. v. Gasomiser Corp., D.C.Del., 7 F.R.D. 712.

26. U.S.—U. S. ex rel. Bernstein v. Hill, C.C.A.Pa., 71 F.2d 159.

27. U.S.—Lefco v. U. S., C.C.A.Pa., 74 F.2d 66.

Conspiracy to use mails for fraudulent purpose see Conspiracy § 53.

28. U.S.—Horner v. U. S., N.Y., 12 S.Ct. 407, 143 U.S. 207, 36 L.Ed. 126.

49 C.J. p 1221 note 57.

As not abridging freedom of speech see Constitutional Law § 213 a.

29. U.S.—U. S. v. Rich, D.C.Ill., 90 F.Supp. 624.

**Schemes or plans held within statute**

(1) Scheme to run "keno" games.—Boasberg v. U. S., C.C.A.La., 60 F.2d 185, certiorari denied 53 S.Ct. 22, 287 U.S. 664, 77 L.Ed. 573.

(2) Plan, whereby money to be paid beneficiaries without insurable interest, depends on merits of designated person.—U. S. v. Hughes, D.C.Tex., 53 F.2d 387.

(3) Other schemes or plans.—U. S. v. Ridgway, D.C.Wash., 199 F. 286—49 C.J. p 1221 note 56 [a].

30. U.S.—U. S. v. Sauer, D.C.Mich., 88 F. 249.

49 C.J. p 1221 note 56.

31. U.S.—U. S. v. Rich, D.C.Ill., 90 F.Supp. 624—U. S. v. Hughes, D.C.Tex., 53 F.2d 387.

32. U.S.—U. S. v. Zeisler, C.C.Ill., 80 F. 499.

33. U.S.—U. S. v. Mason, C.C.Va., 22 F. 707.

34. U.S.—Peek v. U. S., C.C.A.Tex., 61 F.2d 973.

49 C.J. p 1222 note 65.

**Schemes or plans held not within statute**

(1) Bookmakers' schemes on horse races.—U. S. v. Rich, D.C.Ill., 90 F. Supp. 624.

(2) Scheme to create association and raise money by assessment for each member's benefit on marriage.—Peek v. U. S., C.C.A.Tex., 61 F.2d 973—U. S. v. Hughes, D.C.Tex., 56 F.2d 286.

(3) Other plans or schemes.—U. S. v. Stever, Ky., 32 S.Ct. 51, 222 U.S. 167, 56 L.Ed. 145—U. S. v. Rosenblum, C.C.N.Y., 121 F. 180.

35. U.S.—Peek v. U. S., C.C.A.Tex., 61 F.2d 973.

36. U.S.—U. S. v. Rich, D.C.Ill., 90 F.Supp. 624.

The word "chance," as used in the statute, must be construed as colored, if not controlled, by meaning of associated words.—U. S. v. Rich, supra.

37. U.S.—U. S. v. Rich, supra.

38. U.S.—U. S. v. Politzer, D.C.Cal., 59 F. 273.

39. U.S.—U. S. v. Politzer, supra.

40. U.S.—U. S. v. Lynch, D.C.Cal., 49 F. 851.

41. U.S.—U. S. v. Politzer, D.C.Cal., 59 F. 273.

42. U.S.—Horner v. U. S., N.Y., 13 S.Ct. 409, 147 U.S. 449, 37 L.Ed. 237—U. S. v. Zeisler, C.C.Ill., 80 F. 499.

43. U.S.—U. S. v. MacDonald, D.C.Mo., 65 F. 486.

44. U.S.—U. S. v. Moore, D.C.Ill., 19 F. 39—U. S. v. Duff, C.C.N.Y., 6 F. 45, 19 Blatchf. 9.

matter in the mail; sending such matter or causing it to be sent by mail; and knowingly causing such matter to be delivered by mail.<sup>45</sup> It is an essential element of the first offense that defendant knowingly deposited, or caused to be deposited, in the mail for conveyance or delivery thereby the matter forbidden by the statute;<sup>46</sup> but neither the first nor second offense requires for its completion that the matter deposited in the mail for transmission should be, in fact, transmitted or delivered.<sup>47</sup> On the other hand, the last offense is one which is not, and cannot be, completed without the delivery of the matter by mail to the person to whom it is addressed.<sup>48</sup> In order to constitute the second offense, the prohibited matter must have been deposited in the mail; it is not sufficient merely to send it to the post office.<sup>49</sup>

### § 54. — Indictment

The indictment in a prosecution for mailing matter concerning a lottery or a similar scheme must state the essential elements of the offense.

The indictment in a prosecution for mailing matter concerning a lottery or a similar scheme must state the essential elements of the offense,<sup>50</sup> should set forth such letter or circular complained of in *hæc verba*,<sup>51</sup> and should allege that accused knew that the matter deposited concerned a lottery.<sup>52</sup> The indictment must clearly describe the character of the scheme,<sup>53</sup> but, where the letter as set forth clearly shows the character of the scheme, an indictment need not allege specifically facts showing the enterprise to be a lottery, and a general averment to that effect is sufficient.<sup>54</sup> Where one count sets out a lottery scheme, subsequent counts charging the mailing of matter in furtherance of the scheme may refer thereto.<sup>55</sup> The indictment

need not show how the letter or circular concerns a lottery,<sup>56</sup> but, where the letter or circular does not show on its face that it relates to a lottery, the indictment should aver the existence of a lottery, or an intention to hold a lottery, to which the letter or circular refers.<sup>57</sup>

### § 55. — Evidence and Trial

The general rules of evidence and trial in criminal cases apply in prosecutions for mailing matter concerning lotteries or similar schemes.

The general rules of evidence<sup>58</sup> and trial<sup>59</sup> in criminal cases apply in prosecutions for mailing matter concerning lotteries or similar schemes, and, in order to justify a conviction, all the elements of the offense must be proved beyond a reasonable doubt.<sup>60</sup> The jury must be satisfied beyond a reasonable doubt that the letter was mailed,<sup>61</sup> that it concerned a lottery,<sup>62</sup> and that defendant deposited it, or caused it to be deposited, in the mail.<sup>63</sup>

### § 56. Embezzlement or Stealing Mail Matter

- a. By postal employees
- b. By any person

#### a. By Postal Employees

- (1) In general
- (2) Persons liable
- (3) Use of decoy letters or packages
- (4) Indictment
- (5) Evidence and trial

#### (1) In General

In accordance with statutory provisions, secreting, embezzling, destroying, or stealing mail matter by any postmaster or postal service employee is an offense.

45. U.S.—U. S. v. Horner, D.C.N.Y., 44 F. 677, affirmed 12 S.Ct. 407, 143 U.S. 207, 36 L.Ed. 266.

46. U.S.—U. S. v. Politzer, D.C.Cal., 59 F. 273.

47. U.S.—U. S. v. Horner, D.C.N.Y., 44 F. 677, affirmed 12 S.Ct. 407, 143 U.S. 207, 36 L.Ed. 266.

48. U.S.—U. S. v. Horner, *supra*.

49. U.S.—U. S. v. Dauphin, C.C.La., 20 F. 625.

50. U.S.—U. S. v. MacDonald, D.C. Mo., 65 F. 486.

49 C.J. p 1222 note 74.

#### Sufficient allegations

(1) Of consideration.—U. S. v. Hughes, D.C.Tex., 53 F.2d 387.

(2) Of lot or chance.—U. S. v. Hughes, *supra*.

51. U.S.—U. S. v. Noelke, C.C.N.Y., 1 F. 426, 17 Blatchf. 554.

49 C.J. p 1222 note 75.

52. U.S.—U. S. v. Fulkerson, D.C. Cal., 74 F. 619.

49 C.J. p 1222 note 76.

53. U.S.—U. S. v. MacDonald, D.C. Mo., 65 F. 486.

49 C.J. p 1222 note 77.

#### Description of scheme held sufficient

U.S.—Boasberg v. U. S., C.C.A.La., 60 F.2d 185, certiorari denied 53 S. Ct. 22, 287 U.S. 664, 77 L.Ed. 573—U. S. v. Hughes, D.C.Tex., 53 F.2d 387—Glass v. U. S., Wash., 222 F. 773, 138 C.C.A. 321—U. S. v. Ridgway, D.C.Wash., 199 F. 286.

54. U.S.—U. S. v. Fulkerson, D.C. Cal., 74 F. 631.

49 C.J. p 1222 note 79.

55. U.S.—Glass v. U. S., Wash., 222 F. 773, 138 C.C.A. 321—U. S. v. Ridgway, D.C.Wash., 199 F. 286.

56. U.S.—U. S. v. Fulkerson, D.C. Cal., 74 F. 631.

49 C.J. p 1222 note 81.

57. U.S.—U. S. v. Bailey, C.C.N.Y., 47 F. 117.

49 C.J. p 1222 note 82.

#### Evidence held admissible

U.S.—Boasberg v. U. S., C.C.A.La., 60 F.2d 185, certiorari denied 53 S.Ct. 22, 287 U.S. 664, 77 L.Ed. 573. 49 C.J. p 1223 note 89 [a-d].

59. U.S.—U. S. v. Noelke, C.C.N.Y., 1 F. 426, 17 Blatchf. 554.

60. U.S.—U. S. v. Noelke, C.C.N.Y., 1 F. 426, 17 Blatchf. 554.

#### Evidence held insufficient to justify conviction

U.S.—U. S. v. Hughes, D.C.Tex., 56 F.2d 286.

61. U.S.—U. S. v. Noelke, C.C.N.Y., 1 F. 426, 17 Blatchf. 554.

62. U.S.—U. S. v. Noelke, *supra*. 49 C.J. p 1223 note 91.

63. U.S.—U. S. v. Noelke, *supra*. 49 C.J. p 1223 note 92.

In accordance with statutory provisions, 18 U.S.C.A. §§ 1703, 1709, secreting, embezzling, destroying, or stealing mail matter by any postmaster or postal service employee is an offense.<sup>64</sup> A letter or package need not be removed from the post office building for the consummation of an offense under the statute,<sup>65</sup> and the crime is completed where a postal employee takes the mail matter into his possession and unlawfully removes or conceals it.<sup>66</sup> Two distinct classes of offenses are included within the statute, one relating to the embezzlement of letters or packages, and the other relating to the stealing of their contents.<sup>67</sup> In order to constitute the offense of embezzlement the matter must have come into the possession of the employee in his official character,<sup>68</sup> and must have been at the time a proper subject for deposit in the mail.<sup>69</sup> In order to constitute either of the offenses the matter alleged to have been embezzled or stolen must not have been delivered to the person to whom it was addressed.<sup>70</sup>

A postal employee who takes the contents of a letter or package is guilty of a violation of the statute, although he expects to return the matter taken after a temporary use thereof.<sup>71</sup>

### (2) Persons Liable

In order to come within the intent of the statutes, the accused must have been employed in the post office department.

In order to come within the intent of the statutes,

accused must have been employed in the post office department.<sup>72</sup> One who has discontinued his employment,<sup>73</sup> or one who, without compensation, assists in distributing or making up the mail<sup>74</sup> is not within the statute.

### (3) Use of Decoy Letters or Packages

A decoy letter addressed to a fictitious person and intended to be removed from the mail without being carried to the place of address may nevertheless be such as is intended to be conveyed by mail or carried by an employee of the postal service, within the meaning of the statute.

A decoy letter or package addressed to a fictitious person and intended to be removed from the mail without being carried to the place of address may nevertheless be such as is intended to be conveyed by mail or carried by an employee of the postal service, within the meaning of the statute.<sup>75</sup> It is not a defense to an indictment for embezzlement that the letter or package embezzled was a decoy<sup>76</sup> addressed to a fictitious person or place,<sup>77</sup> and was never intended to be delivered,<sup>78</sup> provided it was intended to be conveyed by mail,<sup>79</sup> or carried, or delivered by a mail carrier, messenger, agent, or letter carrier;<sup>80</sup> or that it was made up so as to attract attention, and indicate that it contained money;<sup>81</sup> but no conviction for embezzlement of a decoy letter may be sustained unless the letter was intended to be conveyed by mail, or carried, or delivered by a mail carrier or other employee of the

64. U.S.—Kelley v. U. S., C.C.A.Cal., 166 F.2d 343.

Under an early statute the offense of secreting, embezzling, or destroying letters, etc., was limited to those intended to be conveyed by mail, while the offense of stealing from letters or mail was not so limited.—Roth v. U. S., C.C.Ohio, 294 F. 475—49 C.J. p 1223 notes 94-96.

65. U.S.—Kelley v. U. S., C.C.A.Cal., 166 F.2d 343—U. S. v. Nott, C.C.Ohio, 27 F.Cas.No.15,900, 1 McLean 499.

66. U.S.—Kelley v. U. S., C.C.A.Cal., 166 F.2d 343.

67. U.S.—Bromberger v. U. S., N.Y., 128 F. 346, 63 C.C.A. 76. 49 C.J. p 1223 note 97.

68. U.S.—Shaw v. U. S., Ky., 165 F. 174, 91 C.C.A. 208.

N.M.—U. S. v. Aurandt, 107 P. 1064, 15 N.M. 292, 27 L.R.A.N.S., 1181.

69. U.S.—U. S. v. Taylor, D.C.Mich., 37 F. 200. 49 C.J. p 1223 note 99.

70. U.S.—U. S. v. Baugh, C.C.Va., 1 F. 784, 4 Hughes 501—U. S. v. Taylor, C.C.Va., 28 F.Cas.No.16,438, 1 Hughes 514.

71. U.S.—U. S. v. Thompson, D.C.S.C., 29 F. 706.

49 C.J. p 1224 note 6.

72. U.S.—U. S. v. Nott, C.C.Ohio, 27 F.Cas.No.15,900, 1 McLean 499.

49 C.J. p 1224 note 2.

Under an early statute pertaining to "any person employed in any department of the postal service," it has been held immaterial whether accused was employed directly by the United States or indirectly by a contractor.—U. S. v. Hanna, 17 P. 79, 4 N.M. 216—49 C.J. p 1224 note 3.

73. U.S.—U. S. v. Nott, C.C.Ohio, 27 F.Cas.No.15,900, 1 McLean 499.

74. U.S.—U. S. v. Nott, supra.

49 C.J. p 1224 notes 4, 5.

75. U.S.—McShann v. U. S., Okl., 231 F. 923, 146 C.C.A. 119.

49 C.J. p 1224 note 8.

76. U.S.—Kelley v. U. S., C.C.A.Cal., 166 F.2d 343.

49 C.J. p 1224 note 13.

77. U.S.—Scott v. U. S., N.Y., 19 S. Ct. 209, 172 U.S. 343, 43 L.Ed. 471.

49 C.J. p 1224 note 14.

Bona fide addresses

A fortiori, where addresses on

packages prepared by postal inspectors were bona fide, and there was no evidence of plan to withdraw packages from mail, packages were "intended to be conveyed by mail" within statute.—Kelley v. U. S., C.C.A.Cal., 166 F.2d 343.

78. U.S.—Goode v. U. S., Mass., 16 S.Ct. 136, 159 U.S. 663, 40 L.Ed. 297.

49 C.J. p 1224 note 15.

79. U.S.—U. S. v. Bethea, D.C.S.C., 44 F. 802.

49 C.J. p 1224 note 16.

Canceled stamps on package

Fact that canceled stamps were placed on decoy packages prepared by postal employees did not compel inference that packages were not "intended to be conveyed by mail" within statute making it an offense for postal employee to embezzle matter intended to be conveyed by mail.—Kelley v. U. S., C.C.A.Cal., 166 F.2d 343.

80. U.S.—Hall v. U. S., N.Y., 18 S.Ct. 237, 168 U.S. 632, 42 L.Ed. 607.

81. U.S.—U. S. v. Wight, D.C.S.C., 38 F. 106, affirmed 10 S.Ct. 487, 134 U.S. 136, 33 L.Ed. 865.

postal service.<sup>82</sup> With respect to the offense of stealing mail matter it is not a defense that the matter stolen was a decoy.<sup>83</sup>

#### (4) Indictment

An indictment against a postal employee for embezzling, destroying, or stealing mail matter must state with certainty and particularity the essential elements of the offense.

In accordance with rules in criminal prosecutions generally, an indictment against a postal employee for embezzling, destroying, or stealing mail matter must state with certainty and particularity the essential elements of the offense.<sup>84</sup> An indictment which is sufficiently clear in its allegations to enable accused to prepare his defense and to plead the indictment in bar of a subsequent prosecution for the same offense fulfills the requirements of definiteness and certainty.<sup>85</sup> An indictment which follows the language of the statute is sufficient.<sup>86</sup> The indictment must allege the employment of accused in the post office,<sup>87</sup> although it is sufficient to charge "that defendant was a person employed in one of the departments of the Post Office Establishment of the United States,"<sup>88</sup> and the particular office held by accused need not be stated.<sup>89</sup> An indictment for embezzlement of mail matter should allege that

the matter involved came into the possession of accused by reason or because of his employment in the postal service.<sup>90</sup> It is not essential that an indictment for stealing or abstraction from the mails contain the allegations necessary to charge a technical larceny.<sup>91</sup>

The indictment should allege that the matter was intended to be conveyed by mail, etc.<sup>92</sup> It is not necessary to allege that it was stamped,<sup>93</sup> or where it was mailed,<sup>94</sup> or the route on which it was to be conveyed,<sup>95</sup> or the particular place to which it was to be conveyed.<sup>96</sup>

**Description of property.** The indictment must contain a description of the subject matter sufficient to inform accused of the charge, and to protect him against being again placed in jeopardy.<sup>97</sup> It is not necessary to describe the property embezzled or stolen with the same precision as would be necessary in a case of forgery,<sup>98</sup> or larceny,<sup>99</sup> or some other crime directed against an instrument alleged to be contained in the letter.<sup>1</sup>

**Ownership.** An averment as to ownership of the mail matter embezzled or stolen by the postal employee is unnecessary.<sup>2</sup> An indictment for the embezzlement of a letter containing bank or treasury

82. U.S.—Hall v. U. S., N.Y., 18 S. Ct. 237, 168 U.S. 632, 42 L.Ed. 607, 49 C.J. p 1225 note 19.

83. U.S.—Roth v. U. S., C.C.A. Ohio, 294 F. 475, 49 C.J. p 1224 note 11.

Under an early statute in which there was a distinction between the offenses of embezzling and of stealing from letters or mail as to the necessity that the matter be intended to be conveyed by mail, it was held that it was immaterial that the decoy letter or package was not intended to be conveyed by mail or delivered by a letter carrier.—Hall v. U. S., N.Y., 18 S.Ct. 237, 168 U.S. 632, 42 L.Ed. 607.

84. U.S.—Shaw v. U. S., Ky., 165 F. 174, 91 C.C.A. 208. N.M.—U. S. v. Aurandt, 107 P. 1064, 15 N.M. 292, 27 L.R.A., N.S., 1181.

85. U.S.—Holley v. U. S., C.C.A. Fla., 12 F.2d 778, 49 C.J. p 1225 note 21.

#### Indictment held sufficient

U.S.—Cavanaugh v. U. S., C.C.A.N. J., 61 F.2d 127.

86. U.S.—Kelley v. U. S., C.C.A.Cal., 166 F.2d 343, 31 C.J. p 720 note 55 [a] (19).

87. U.S.—U. S. v. Nott, C.C. Ohio, 27 F.Cas.No.15,900, 1 McLean 499.

88. U.S.—U. S. v. Patterson, C.C. Mich., 27 F.Cas.No.16,011, 6 McLean 466.

89. U.S.—U. S. v. Clark, D.C.Pa., 25 F.Cas.No.14,801, Crabbe 584.

90. U.S.—Shaw v. U. S., Ky., 165 F. 174, 91 C.C.A. 208, 49 C.J. p 1225 note 25.

91. U.S.—U. S. v. Trosper, D.C.Cal., 127 F. 476, 49 C.J. p 1225 note 26.

92. U.S.—U. S. v. Hall, D.C.N.Y., 76 F. 566, affirmed 18 S.Ct. 237, 168 U. S. 632, 42 L.Ed. 607, 49 C.J. p 1225 note 28.

#### Language of statute

(1) An allegation in the language of the statute that the package "was intended to be conveyed by mail" to the named addressee was sufficient, without alleging sender of package or that he intended it to be conveyed by mail.—Kelley v. U. S., C.C.A.Cal., 166 F.2d 343.

(2) Under an early statute an averment that the letter or other matter embezzled was intended to be conveyed by post, in the language of that statute, was held sufficient.—U. S. v. Martin, C.C.Ind., 26 F.Cas. No.15,731, 2 McLean 256—49 C.J. p 1225 note 31.

#### Stealing from mail prior to statutory change

Prior to the statutory change doing away with the distinction by which the offense of secreting, embezzling, or destroying mail matter was limited to that intended to be

conveyed by mail, while the offense of stealing from letters or mail was not so limited, an indictment for stealing was not required to contain an allegation that the matter was intended to be conveyed by mail, or intended to be delivered by a postal employee, and, if such an allegation was unnecessarily inserted, it constituted surplusage.—Hall v. U. S., N.Y., 18 S.Ct. 237, 168 U.S. 632, 42 L. Ed. 607—49 C.J. p 1225 notes 29, 30.

93. U.S.—Alexis v. U. S., La., 129 F. 60, 63 C.C.A. 502, 49 C.J. p 1225 note 31 [a].

94. U.S.—U. S. v. Lancaster, C.C. Ill., 26 F.Cas.No.15,556, 2 McLean 431.

95. U.S.—U. S. v. Lancaster, supra.

96. U.S.—U. S. v. Laws, D.C.Mass., 26 F.Cas.No.15,579, 2 Lowell 115.

97. U.S.—Shaw v. U. S., Ky., 180 F. 348, 103 C.C.A. 494, 49 C.J. p 1225 note 35.

98. U.S.—Rosecrans v. U. S., Mont., 17 S.Ct. 302, 165 U.S. 257, 41 L.Ed. 708—Shaw v. U. S., Ky., 180 F. 348, 103 C.C.A. 494.

99. U.S.—Shaw v. U. S., supra.

1. U.S.—Rosecrans v. U. S., Mont., 17 S.Ct. 302, 165 U.S. 257, 41 L.Ed. 708—U. S. v. Golding, D.C., 25 F. Cas.No.15,224, 2 Cranch C.C. 212.

2. U.S.—Kelley v. U. S., C.C.A.Cal., 166 F.2d 343.

notes need not allege whose property it was,<sup>3</sup> and it is sufficient to describe the letter containing the notes according to its direction, which is to some one other than defendant.<sup>4</sup>

**Nondelivery.** An indictment charging embezzlement of a letter need not allege that the letter had not been delivered to the person to whom it was directed,<sup>5</sup> since this is matter of defense peculiarly within the knowledge of accused.<sup>6</sup>

**Intent.** An allegation that accused feloniously did "steal" is a sufficient charge of a wrongful intent.<sup>7</sup> The indictment need not charge that the acts set forth were done feloniously.<sup>8</sup>

**Date.** A clerical error in the date of the offense which is otherwise sufficiently identified is not material.<sup>9</sup>

### (5) Evidence and Trial

General rules of evidence and trial in criminal cases apply in a prosecution against a postal employee for embezzling, destroying, or stealing mail matter.

General rules of evidence in criminal cases apply in a prosecution against a postal employee for embezzling, destroying, or stealing mail matter.<sup>10</sup> The guilt of accused must be established beyond a reasonable doubt,<sup>11</sup> but circumstantial evidence may be sufficient.<sup>12</sup> In order to justify a conviction for larceny from the mails the evidence must establish beyond a reasonable doubt not only that the mail had been violated,<sup>13</sup> but that the letter or package, with the stealing of which defendant is charged, had been in, and was taken from, the mail.<sup>14</sup> The most satisfactory evidence that it had been in the mail is that of the person who deposited it in the post office, and, of its loss, that of the person to whom it

was addressed, to the effect that it was never received by him.<sup>15</sup> Mere suspicion against defendant is overcome by the proof of his good character by reliable witnesses.<sup>16</sup>

In accordance with the general rules of trial in criminal cases, where there is sufficient evidence to support the charge, the question of the guilt of accused is for the jury.<sup>17</sup> Where a postmaster is charged with stealing a letter from the mail, the other employees through whose hands the letter would pass should be examined,<sup>18</sup> especially if accused proves an exemplary character.<sup>19</sup>

### b. By Any Person

- (1) Nature and elements of offense
- (2) Prosecution and punishment

#### (1) Nature and Elements of Offense

Under statutory provisions, whoever steals, embezzles, or obtains by fraud or deception mail matter from or out of any authorized depository for mail matter, or mail matter which has been left for collection on, or adjacent to, a collection box or other authorized depository of mail matter, is guilty of an offense.

Under provisions of the statute, 18 U.S.C.A. § 1708, whoever steals, takes, or abstracts, or by fraud or deception obtains, or attempts so to obtain, from or out of any mail, post office or station thereof, letter box, mail receptacle, or any mail route, or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag, or mail, or abstracts or removes from any such letter, package, bag, or mail any article or thing contained therein, or secretes, embezzles, or destroys any such letter, postal card, package, bag, or mail, or any article or thing contained therein; or

3. U.S.—U. S. v. Baugh, C.C.Va., 1 F. 784, 4 Hughes 501.

49 C.J. p 1226 note 41.

4. U.S.—U. S. v. Laws, D.C.Mass., 26 F.Cas.No.15,579, 2 Lowell 115.

5. U.S.—Wight v. Nicholson, Mich., 10 S.Ct. 487, 134 U.S. 136, 33 L.Ed. 865.

49 C.J. p 1226 note 45.

6. U.S.—Wight v. Nicholson, supra —U. S. v. Jenther, C.C.N.Y., 26 F. Cas.No.15,476, 13 Blatchf. 335.

7. U.S.—U. S. v. Trosper, D.C.Cal., 127 F. 476.

8. U.S.—Kelley v. U. S., C.C.A.Cal., 166 F.2d 343.

49 C.J. p 1226 note 48.

9. U.S.—Adams v. U. S., Ala., 246 F. 830, 159 C.C.A. 132.

#### 10. Presumptions

U.S.—U. S. v. Jones, C.C.Ga., 31 F. 718.

49 C.J. p 1226 note 56 [a].

#### Admissibility of evidence

U.S.—Roth v. U. S., C.C.A.Ohio, 294 F. 475.

49 C.J. p 1227 note 58.

11. U.S.—U. S. v. McKenzie, D.C. Cal., 35 F. 826, 13 Sawy. 337—U. S. v. Crow, C.C.Ohio, 25 F.Cas.No. 14,895, 1 Bond 51.

#### Evidence held sufficient

U.S.—U. S. v. Gilmartin, C.C.A.N.Y., 120 F.2d 206—Cotten v. U. S., C.C. A.Tex., 92 F.2d 809.

49 C.J. p 1227 note 57 [a].

#### Evidence held insufficient

In absence of any competent evidence that article defendant was alleged to have secreted from mails was ever placed into the mails, government failed to sustain burden of proving its charge that defendant secreted and embezzled mail while serving as United States postal employee, and a judgment of acquittal would be entered.—U. S. v. Buckner, D.C.Pa., 78 F.Supp. 844.

12. U.S.—U. S. v. McKenzie, D.C. Cal., 35 F. 826, 13 Sawy. 337.

49 C.J. p 1227 note 59.

13. U.S.—U. S. v. McKenzie, supra —U. S. v. Crow, C.C.Ohio, 25 F.Cas. No.14,895, 1 Bond 51.

14. U.S.—U. S. v. Crow, supra.

15. U.S.—U. S. v. Crow, supra.

16. U.S.—U. S. v. Poage, C.C.Ohio, 27 F.Cas.No.16,059, 6 McLean 89.

17. U.S.—Cotten v. U. S., C.C.A.Tex., 92 F.2d 809.

#### Evidence held sufficient for jury

U.S.—Cavanaugh v. U. S., C.C.A.N.J., 61 F.2d 127.

49 C.J. p 1227 note 57 [b].

18. U.S.—U. S. v. Whitaker, C.C. Ohio, 28 F.Cas.No.16,672, 6 McLean 342.

49 C.J. p 1227 note 64.

19. U.S.—U. S. v. Whitaker, supra.

whoever steals, takes, or abstracts, or by fraud or deception obtains any letter, postal card, package, bag, or mail, or any article or thing contained therein which has been left for collection on or adjacent to a collection box or other authorized depository of mail matter, is guilty of an offense.<sup>20</sup> The statute applies, not only to postal employees,<sup>21</sup> but to every person, irrespective of his employment in the post office.<sup>22</sup> The offense is distinct from that described by the statute, 18 U.S.C.A. § 2114, which relates to assault on a custodian of mail matter with intent to rob or steal such mail matter,<sup>23</sup> from that described by the statute, 18 U.S.C.A. § 2115, which makes it an offense to break into a post office with intent to commit larceny,<sup>24</sup> and from that described by the statute, 18 U.S.C.A. § 1707, which makes it an offense to steal post office property.<sup>25</sup> While the statute includes larceny as understood at common law, it is not restricted to that offense, but makes criminal any unauthorized abstraction from the mails of postal matter,<sup>26</sup> and it is not necessary that the matter stolen should have possessed any value whatever.<sup>27</sup> The matter taken need not have been intended to be conveyed by mail,<sup>28</sup> and a conviction may be sustained where letters taken were decoy letters.<sup>29</sup> Whether the matter stolen from the mails was or was not mailable matter is not material.<sup>30</sup>

The term "mail" may mean either the whole body

of matter transported by the postal agents or any letter or packet forming a component part of it.<sup>31</sup> A post office need not be a building or room set apart for that use.<sup>32</sup> An authorized depository for mail matter may be a privately owned box,<sup>33</sup> a mail pouch,<sup>34</sup> or a mail truck;<sup>35</sup> it need not be a receptacle established or provided by the postmasters general for the safe deposit of matter for the mail or for delivery.<sup>36</sup> A former statute which made it an offense to extract "from or out of" a letter box or authorized depository mail matter which has been deposited therein was held not to apply to the act of taking mail matter which had been placed on or outside of a letter box.<sup>37</sup>

**Intent.** The taking must be with criminal intent;<sup>38</sup> it must not be a taking by the authority of the person to whom the letter was addressed,<sup>39</sup> or a taking by mistake,<sup>40</sup> or with an innocent intent;<sup>41</sup> and the criminal intent must exist at the time the letter or mail was taken.<sup>42</sup> If the taking is with the consent of the addressee,<sup>43</sup> or the taker innocently obtains possession thereof by mistake,<sup>44</sup> no offense has been committed under the statute, although there is a subsequent embezzlement by the taker, which may be punishable under state laws.<sup>45</sup>

## (2) Prosecution and Punishment

An indictment for stealing or embezzling mail mat-

20. U.S.—McKee v. Johnston, C.C.A. Cal., 109 F.2d 273, certiorari denied 60 S.Ct. 592, 309 U.S. 664, 84 L.Ed. 1011.—Touhy v. U. S., C.C.A. Minn., 88 F.2d 930.—Niemeyer v. U. S., C. C.A. Ill., 84 F.2d 919.—U. S. v. Sehon Chinn, D.C.W. Va., 85 F.Supp. 558. D.C.—Burton v. U. S., 169 F.2d 969, 83 U.S.App.D.C. 369.

### State law

Pilfering from a mailbox is not a criminal offense under the laws of New York state.—People v. Huber, 87 N.Y.S.2d 239, 194 Misc. 586.

21. U.S.—Roth v. U. S., C.C.A. Ohio, 294 F. 475. 49 C.J. p 1227 note 68.

22. U.S.—Goode v. U. S., Mass., 16 S.Ct. 136, 159 U.S. 663, 40 L.Ed. 297. 49 C.J. p 1227 note 69.

23. U.S.—Touhy v. Cox, C.C.A. Mo., 145 F.2d 107. Robbery of custodian of mail as offense see infra § 62.

24. U.S.—O'Brien v. Squier, C.C.A. Wash., 133 F.2d 123.

Breaking and entering post office as offense see infra § 63.

25. U.S.—O'Brien v. Squier, supra. Stealing of post office property as offense see infra § 64.

26. U.S.—Bowers v. U. S., Ark., 148 F. 379, 78 C.C.A. 193. 49 C.J. p 1227 note 72.

27. U.S.—Collins v. U. S., C.C.A. Iowa, 20 F.2d 574.—Bowers v. U. S., Ark., 148 F. 379, 78 C.C.A. 193.

28. U.S.—Roth v. U. S. C.C.A. Ohio, 294 F. 475.

29. U.S.—Roth v. U. S., supra.—Smith v. U. S., C.C.A. Tex., 288 F. 44.

30. Colo.—Beery v. U. S., 2 Colo. 186.

31. U.S.—U. S. v. Inabnet, D.C.S.C., 41 F. 130.

32. U.S.—U. S. v. Marselis, C.C.N. Y., 26 F.Cas.No.15,724, 2 Blatchf. 108. 49 C.J. p 1228 note 28.

33. U.S.—Rosen v. U. S., N.Y., 38 S. Ct. 148, 245 U.S. 467, 62 L.Ed. 406.

**House letter box**  
U.S.—U. S. v. Sehon Chinn, D.C.W. Va., 85 F.Supp. 558.

**Mailbox in apartment building**  
U.S.—Niemeyer v. U. S., C.C.A. Ill., 84 F.2d 919.

- 49 C.J. p 1228 note 85 [a].

34. U.S.—McKee v. Johnston, C.C.A. Cal., 109 F.2d 273, certiorari denied 60 S.Ct. 592, 309 U.S. 664, 84 L.Ed. 1011.

35. D.C.—Burton v. U. S., 169 F.2d 969, 83 U.S.App.D.C. 369.

36. U.S.—Foster v. Biddle, C.C.A. Kan., 14 F.2d 280. 49 C.J. p 1228 notes 86, 87.

37. U.S.—U. S. v. Lophansky, D.C. Pa., 232 F. 297.

38. U.S.—U. S. v. Meyers, D.C. Wis., 142 F. 907. 49 C.J. p 1227 note 74.

39. U.S.—In re Burkhardt, D.C. Wis., 33 F. 25.

40. U.S.—U. S. v. Meyers, D.C. Wis., 142 F. 907. 49 C.J. p 1227 note 76.

41. U.S.—In re Burkhardt, D.C. Wis., 33 F. 25.—U. S. v. Pearce, C.C. Mich., 27 F.Cas.No.16,020, 2 McLean 14.

42. U.S.—U. S. v. Inabnet, D.C.S.C., 41 F. 130.

U.S.—U. S. v. Smith, 40 P. 708, 11 Utah 433.

43. U.S.—In re Burkhardt, D.C. Wis., 33 F. 25.

44. U.S.—U. S. v. Meyers, D.C. Wis., 142 F. 907.

45. U.S.—U. S. v. Meyers, supra.—In re Burkhardt, D.C. Wis., 33 F. 25.

ter must state with certainty and particularity the essential elements of the offense.

An indictment for stealing or embezzling mail matter must state with certainty and particularity the essential elements of the offense.<sup>46</sup> The indictment need not conform to the essentials for an indictment for larceny,<sup>47</sup> and it need not allege that the property taken was of any value.<sup>48</sup> Surplusage will not vitiate the indictment.<sup>49</sup>

**Ownership.** The indictment need not allege ownership of the property stolen,<sup>50</sup> but it will be sufficient if it charges that accused stole, took, or abstracted a letter, package, etc., from the mail or from a post office, which letter or package, etc., is sufficiently described for identification.<sup>51</sup> Ownership of a check sent through the mails by a debtor to a creditor with instructions to credit the amount on his debt may properly be laid in the latter,<sup>52</sup> and an indictment for the larceny of a check may properly allege the ownership to be in the addressee.<sup>53</sup>

**Evidence, trial, and sentence.** In a prosecution for stealing or embezzling mail matter, general rules

of evidence<sup>54</sup> and trial<sup>55</sup> in criminal cases apply. The court may impose sentence within the limits prescribed by the statute.<sup>56</sup>

## § 57. Buying, Receiving, or Concealing, or Having in Possession Property Stolen from Mails

Under statutory provisions, it is an offense knowingly to buy, receive, or conceal, or unlawfully to have in possession, matter which has been stolen or embezzled from the mails.

Under provisions of the statute, 18 U.S.C.A. § 1708, it is an offense to buy, receive, or conceal, or unlawfully to have in possession any letter, postal card, package, bag, or mail or any article contained therein which has been stolen, taken, embezzled, or abstracted out of any mail, post office, or any other authorized depository for mail matter, knowing it to have been so stolen or embezzled.<sup>57</sup> In order to constitute this offense the property must have been stolen or embezzled from the mail.<sup>58</sup> It must also appear that accused knew that it had been so stolen or embezzled,<sup>59</sup> and that he bought it from the per-

46. U.S.—U. S. v. Meyers, D.C.Wis., 142 F. 907.

**Unlawful or fraudulent taking** must be alleged.—U. S. v. Meyers, supra—49 C.J. p 1228 note 91.

### Indictments held sufficient

U.S.—Sehon Chinn v. U. S., C.C.A. W.Va., 157 F.2d 1013—Poffenberger v. U. S., C.C.A.Iowa, 20 F.2d 42—Chapman v. Sanborn, C.C.A. Minn., 18 F.2d 254, followed in U. S. ex rel. Geiger v. Kennamer, 21 F.2d 1021—U. S. v. Sehon Chinn, D.C.W.Va., 85 F.Supp. 553.

Colo.—Beery v. U. S., 2 Colo. 186.

### Bill of particulars

Where counts 1 and 2 of indictment alleged that letters were stolen from United States mails on named day at designated railroad station in designated city, county, and state, and remaining counts did not designate precise place in such city where crimes were committed, defendant desiring clearer and more certain and definite particulars as to exact place should have asked for such particulars in motion for bill of particulars.—Touhy v. U. S., C.C.A. Minn., 88 F.2d 930.

47. U.S.—Bowers v. U. S., Ark., 148 F. 379, 78 C.C.A. 193.  
49 C.J. p 1228 note 89.

48. U.S.—Collins v. U. S., C.C.A. Iowa, 20 F.2d 574.

49. U.S.—Collins v. U. S., C.C.A. Iowa, 20 F.2d 574.  
49 C.J. p 1228 note 93.

50. U.S.—Collins v. U. S., C.C.A. Iowa, 20 F.2d 574.  
49 C.J. p 1226 note 39.

51. U.S.—Bowers v. U. S., Ark., 148 F. 379, 78 C.C.A. 193.

49 C.J. p 1226 note 40.

52. U.S.—U. S. v. Jones, C.C.Ga., 31 F. 718.

53. U.S.—U. S. v. Jones, C.C.Ga., 31 F. 725—U. S. v. Jackson, C.C.Ga., 29 F. 503.

### 54. Evidence held sufficient to justify conviction

U.S.—Green v. U. S., C.A.Mass., 176 F.2d 541—Niemeier v. U. S., C.C.A. Ill., 84 F.2d 919—Waldon v. U. S., D.C.Ill., 84 F.Supp. 449.  
D.C.—Burton v. U. S., 169 F.2d 969, 83 U.S.App.D.C. 369.

### Evidence held insufficient

U.S.—Brunner v. U. S., C.C.A.Ky., 168 F.2d 281.

### 55. Question for jury

The question of the intent with which letters are abstracted from the mail is for the jury.—U. S. v. Wilson, D.C.D.C., 44 F. 593.

**Instructions held proper or sufficient**  
U.S.—Touhy v. U. S., C.C.A.Minn., 88 F.2d 930.

56. U.S.—U. S. ex rel. Quinn v. Hunter, C.C.A.Ill., 162 F.2d 644.

### General sentence

Where maximum imprisonment sentence for stealing mail matter was five years, and maximum for conspiracy to commit such offense was two years and, where nine counts charged the stealing of nine letters from six different pouches, even if only six offenses of stealing mail matter were charged, a single general sentence to seventeen-year

term of imprisonment was valid and was not objectionable for uncertainty.—McKee v. Johnston, C.C.A.Cal., 109 F.2d 273, certiorari denied 60 S. Ct. 592, 309 U.S. 664, 84 L.Ed. 1011.

### Statute relating to another offense

Under an indictment, which stated an offense under the statute for stealing mail from an authorized receptacle of mail matter, authorizing imposition of four-year sentence, another statute relating primarily to malicious mischief respecting letter boxes was inapplicable to restrict sentence to three-year maximum allowed thereunder.—U. S. v. Sehon Chinn, D.C.W.Va., 85 F.Supp. 553.

57. U.S.—U. S. v. Kirby, C.A.N.Y., 176 F.2d 101—Colbeck v. U. S., C. C.A.Mo., 14 F.2d 801.

**Purpose of statute** "is to protect the mails against plundering, pilfering, or other interference or meddling with their contents."—Thompson v. U. S., Cal., 202 F. 401, 405, 120 C.C.A. 575, 47 L.R.A., N.S., 206.

### Treasury notes

In a prosecution under an early statute which made it an offense to receive certain enumerated articles, including promissory notes, which had been stolen from the mails, treasury notes were held to be promissory notes within the statute.—U. S. v. Hardyman, Va., 13 Pet. 176, 10 L.Ed. 113.

58. U.S.—U. S. v. Keene, C.C.Ill., 26 F.Cas.No.15,512, 5 McLean 509.

59. U.S.—Brandenburg v. U. S., C. C.A.N.J., 78 F.2d 811.  
49 C.J. p 1228 note 96.

son stealing or embezzling it,<sup>60</sup> or that he received it,<sup>61</sup> or had it in his possession,<sup>62</sup> or concealed it,<sup>63</sup> or aided the thief or some one else in concealing it.<sup>64</sup> It is not necessary that all the essential ingredients of the crime of larceny be present.<sup>65</sup> Unlawful intent is essential to conviction,<sup>66</sup> but it is not essential that accused should have received the property stolen or embezzled with intent to make any gain or profit thereby to himself.<sup>67</sup> Privately owned and controlled boxes placed in buildings or on mail routes may be authorized depositories within the statute, and a person may be convicted for receiving checks stolen from private boxes attached to residences and apartment houses.<sup>68</sup>

**Indictment.** An indictment sufficiently describes the offense if it sets forth the facts which constitute the offense distinctly enough to give accused full knowledge of the charge he is called on to meet,<sup>69</sup> and to enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same crime.<sup>70</sup> The indictment need not allege all the essential ingredients of larceny,<sup>71</sup> and it need not show the exact mail car or the particular package from which the articles have been stolen;<sup>72</sup> but it has been held that it must describe the property with the same particularity as is required in

an indictment for larceny.<sup>73</sup> It is sufficient for the indictment to allege facts which clearly import unlawful intent.<sup>74</sup> Where an indictment alleges that two persons received property stolen from the mail, without alleging whether it was done jointly or severally, one of two accused may be found guilty when the other has been discharged on a plea of autrefois convict.<sup>75</sup>

Rules relating to issues, proof, and variance in criminal prosecutions generally apply in prosecutions under this statute.<sup>76</sup>

**Evidence and trial.** General rules of evidence<sup>77</sup> and trial<sup>78</sup> apply in prosecutions under this statute.

**Sentence.** The sentence imposed must be in conformity with that authorized by the statute.<sup>79</sup>

## § 58. Embezzlement of Postal Funds

Under the statute punishing the embezzlement of postal funds, the diversion of postal funds by a postal employee in any way prohibited by the statute constitutes embezzlement, without the concurrent action of anyone else.

Under the statute punishing the embezzlement of postal funds, 18 U.S.C.A. § 1711, the diversion of postal funds by a postal employee in any way prohibited by the statute,<sup>80</sup> or for any time, however

60. U.S.—U. S. v. Keene, C.C.III., 26 F.Cas.No.15,512, 5 McLean 509.

61. U.S.—U. S. v. Montgomery, D.C. Or., 26 F.Cas.No.15,800, 3 Sawy. 544.

49 C.J. p 1228 note 98.

62. U.S.—Colbeck v. U. S., C.C.A. Mo., 14 F.2d 801.

49 C.J. p 1228 note 99.

63. U.S.—U. S. v. Montgomery, D.C. Or., 26 F.Cas.No.15,800, 3 Sawy. 544.

49 C.J. p 1228 note 1.

64. U.S.—U. S. v. Montgomery, supra.

49 C.J. p 1228 note 2.

65. U.S.—Thompson v. U. S., Cal., 202 F. 401, 120 C.C.A. 575, 47 L.R. A.N.S., 206—U. S. v. Montgomery, D.C.Or., 26 F.Cas.No.15,800, 3 Sawy. 544.

66. U.S.—Thompson v. U. S., Cal., 202 F. 401, 120 C.C.A. 575, 47 L.R. A.N.S., 206.

67. U.S.—U. S. v. Montgomery, D.C. Or., 26 F.Cas.No.15,800, 2 Sawy. 544.

68. U.S.—Pakas v. U. S., N.Y., 240 F. 350, 153 C.C.A. 276, affirmed 38 S.Ct. 148, 245 U.S. 467, 62 L.Ed. 406.

69. U.S.—Murdick v. U. S., C.C.A. Minn., 15 F.2d 965, certiorari denied Clarey v. U. S., 47 S.Ct. 765, 274 U.S. 752, 71 L.Ed. 1332.

70. U.S.—Murdick v. U. S., C.C.A.

Minn., 15 F.2d 965, certiorari denied Clarey v. U. S., 47 S.Ct. 765, 274 U.S. 752, 71 L.Ed. 1332.

71. U.S.—Thompson v. U. S., Cal., 202 F. 401, 120 C.C.A. 575, 47 L.R. A.N.S., 206.

49 C.J. p 1229 note 9.

72. U.S.—Murdick v. U. S., Minn., 15 F.2d 965, certiorari denied Clarey v. U. S., 47 S.Ct. 765, 274 U.S. 752, 71 L.Ed. 1332.

73. U.S.—U. S. v. Johnston, D.C. Wash., 292 F. 491.

49 C.J. p 1229 note 11.

74. U.S.—Thompson v. U. S., Cal., 202 F. 401, 120 C.C.A. 575, 47 L.R. A.N.S., 206.

49 C.J. p 1229 note 12.

75. U.S.—U. S. v. Montgomery, D.C. Or., 26 F.Cas.No.15,800, 3 Sawy. 544.

76. U.S.—Colbeck v. U. S., C.C.A. Mo., 14 F.2d 801.

49 C.J. p 1229 note 15.

77. Evidence held sufficient to sustain conviction

U.S.—U. S. v. Kirby, C.A.N.Y., 176 F.2d 101.

49 C.J. p 1229 note 16 [b].

Evidence held insufficient to sustain conviction

U.S.—Brandenburg v. U. S., C.C.A.N. J., 78 F.2d 811.

78. Evidence held sufficient to go to jury

U.S.—Johnston v. U. S., C.C.A.Idaho,

22 F.2d 1, certiorari denied 48 S. Ct. 421, 276 U.S. 637, 72 L.Ed. 745.

49 C.J. p 1229 note 16 [a].

Instructions held proper and sufficient

U.S.—U. S. v. Kirby, C.A.N.Y., 176 F.2d 101.

79. U.S.—Platak v. Aderhold, C.C.A. Ga., 73 F.2d 173.

Accessory after fact

Statute making accessory after the fact punishable by imprisonment not exceeding one half of the maximum term prescribed for a principal offender is inapplicable to one convicted of possessing bonds stolen from mail, since punishment for unlawful and knowing possessor of stolen mail matter is specifically provided by different statute.—Platak v. Aderhold, supra.

80. U.S.—U. S. v. Stein, C.C.A.N.Y., 50 F.2d 1025, certiorari denied Stein v. U. S., 52 S.Ct. 126, 284 U.S. 671, 76 L.Ed. 563.

49 C.J. p 1229 note 18—20 C.J. p 451 note 1 [c], p 453 note 13 [e], [f].

Purpose of statute

"The law intends that funds of this character should be kept absolutely separate and sacred as the best method not only of keeping the funds themselves secure, but of guarding the officers themselves from temptation and delinquency."



short,<sup>81</sup> constitutes embezzlement, without the concurrent action of anyone else.<sup>82</sup> In order to constitute an offense under the statute it must be committed knowingly and willfully;<sup>83</sup> but, on the other hand, it is sufficient that the prohibited acts were committed knowingly and willfully regardless of any specific intent,<sup>84</sup> and, therefore, it is not a defense that accused intended to restore the money appropriated at a later date<sup>85</sup> or that he did in fact do so,<sup>86</sup> although this action on his part might perhaps be considered as mitigating the offense.<sup>87</sup> It is not necessary, in order that a post office employee may be guilty of the offense, that in getting control of the money which he converted he should have been executing his employment or service, or complying with a duty thereof, if in so doing while acting as such employee he believed or pretended that he was performing a duty or function of his employment or service, or seemed to be doing so.<sup>88</sup>

**Prosecution for offense.** An indictment for embezzlement of postal funds by a postmaster or other employee, coming into his hands in his official capacity, should allege that the funds were in defendant's official possession when embezzled;<sup>89</sup> but the indictment will not be fatally defective for lack of a specific allegation of this kind where it alleges that, while accused was postmaster, he unlawfully and feloniously converted to his own use money of the United States, which came into his hands by virtue of his office, since this would be held to mean money in his official possession at the time of its conversion.<sup>90</sup> So, an indictment which charges in effect that the total sum alleged to have been em-

bezzled came into the possession of defendant in his official capacity is not demurrable for failure to give a particular description of the money,<sup>91</sup> or to allege possession of it by defendant by virtue of his employment, or ownership by the post office department.<sup>92</sup>

It is unnecessary to allege specifically in the language of the statute that the money referred to came into defendant's hands "in the execution or under color of his office, employment, or service," where the facts alleged show this to be so.<sup>93</sup> While scienter is a necessary element of the offense denounced by the statute and must be alleged and proved,<sup>94</sup> no specific intent is involved, and it will be sufficient for the indictment to aver that accused acted "willfully," the term implying knowledge and purpose to do wrong.<sup>95</sup> Where the embezzlement charged is the unlawful deposit of money-order funds by an assistant postmaster to the credit of the postal account, an allegation that the deposit was made for the purpose of concealing a shortage in the postal account was proper, as showing the purpose and intent with which the deposit was made;<sup>96</sup> but it is unnecessary to show by what means the shortage arose or how it existed, or to state the law or postal regulation which accused was charged with violating in making the deposit in the manner he did.<sup>97</sup>

General rules of evidence<sup>98</sup> and trial<sup>99</sup> in criminal cases apply. By statute, 18 U.S.C.A. § 3497, the transcript of the account books of the general accounting office is made prima facie evidence, and

U.S.—U. S. v. Gilbert, C.C.Ohio, 25 F. Cas.No.15,205.

Tex.—Griffin v. Zuber, 113 S.W. 961, 52 Tex.Civ.App. 288, 294.

**"Except as authorized by law"**

Within the statute, making it embezzlement for an employee of the postal service to convert postal funds to his own use, or to deposit them in any bank, or exchange them for other funds, except as authorized by law, the phrase "except as authorized by law" does not create an exception, in the sense that the term is usually applied to statutes creating offenses.—Petersen v. U. S., C.C.A.Hawaii, 287 F. 17.

81. U.S.—U. S. v. Gilbert, C.C.Ohio, 25 F.Cas.No.15,205.

Tex.—Griffin v. Zuber, 113 S.W. 961, 52 Tex.Civ.App. 288.

82. U.S.—U. S. v. Stein, C.C.A.N.Y., 50 F.2d 1025, certiorari denied Stein v. U. S., 52 S.Ct. 126, 284 U.S. 671, 76 L.Ed. 568.

**Knowledge by person receiving funds**

Knowledge of the character of the funds by another person receiving them from the postal employee does not change or alter the nature of the offense if the postal employee does the forbidden things enumerated in the statute.—U. S. v. Stein, C.C.A.N.Y., 50 F.2d 1025, certiorari denied Stein v. U. S., 52 S.Ct. 126, 284 U.S. 671, 76 L.Ed. 568.

83. U.S.—Mackey v. U. S., C.C.A. Tenn., 290 F. 18.

84. U.S.—Hughes v. U. S., C.C.A. Okl., 4 F.2d 686, 49 C.J. p 1229 note 21.

85. U.S.—Hughes v. U. S., supra, 49 C.J. p 1229 note 22.

86. U.S.—U. S. v. Gilbert, C.C.Ohio, 25 F.Cas.No.15,205.

87. U.S.—U. S. v. Gilbert, supra.

88. U.S.—Neill v. U. S., C.C.A.Ala., 41 F.2d 173.

89. U.S.—Corbin v. U. S., Neb., 205 F. 278, 125 C.C.A. 114.

49 C.J. p 1229 note 25.

90. U.S.—Corbin v. U. S., supra.

91. U.S.—Downing v. U. S., C.C.A. Fla., 54 F.2d 65.

92. U.S.—Downing v. U. S., supra.

93. U.S.—Neill v. U. S., C.C.A.Ala., 41 F.2d 173.

94. U.S.—Mackey v. U. S., C.C.A. Tenn., 290 F. 18.

95. U.S.—Foster v. U. S., La., 256 F. 207, 167 C.C.A. 423.

96. U.S.—Petersen v. U. S., C.C.A. Hawaii, 287 F. 17.

97. U.S.—Petersen v. U. S., supra.

**98. Admissibility of evidence**

U.S.—Petersen v. U. S., supra, 49 C.J. p 1229 note 18 [d].

**99. Question for jury**

In embezzlement prosecution, question whether defendant satisfactorily explained shortage in funds of post office of which he was postmaster was held for jury.—Downing v. U. S., C.C.A.Fla., 54 F.2d 65.

this places on defendant the burden of explaining a shortage in his accounts.<sup>1</sup>

### § 59. Taking or Opening Mail Matter to Obstruct Correspondence, Etc.

By statute, it is an offense to take a letter or other mail matter before delivery to the addressee with an intent to obstruct correspondence or to pry into the business of another.

By statute, 18 U.S.C.A. § 1702, the taking of a letter or other mail matter before delivery to the addressee with an intent to obstruct correspondence or pry into the secrets or business of another, or the opening, secreting, embezzlement, or destruction of such mail matter is made an offense.<sup>2</sup> In order to constitute the offense, the taking must be wrongful or unlawful,<sup>3</sup> with criminal intent,<sup>4</sup> and this intent must exist at the time of the taking.<sup>5</sup> It is not an element of the offense that, at the time of the opening, the letter was in the custody of any postmaster, carrier, or other person having charge of it.<sup>6</sup> The offense intended to be defined, where the other circumstances exist, is complete whether or not the letter contained anything of value.<sup>7</sup>

It is not a defense that the letter related in part to the business of accused or the business in which he was interested,<sup>8</sup> that the letter was not sealed, and was written by accused himself,<sup>9</sup> that the addressee's name was not correctly given,<sup>10</sup> that the letter was of no value to the person to whom it was addressed,<sup>11</sup> that accused believed in good faith, at the time that he took it out of the post office, that it was of no value,<sup>12</sup> that the letter was voluntarily delivered to accused by the postmaster,<sup>13</sup> or that the motive of accused was to prevent a prisoner from having improper communication with another.<sup>14</sup> One cannot be convicted, however, if he

knew the contents of the letter before he received it.<sup>15</sup>

*Termination of custody of United States.* Where a letter has been delivered to the person to whom<sup>16</sup> or in whose care<sup>17</sup> it was addressed, or to an authorized agent of the addressee,<sup>18</sup> or to the writer himself, if called for before it has been placed in transit,<sup>19</sup> it is no longer in the custody of the United States, or subject to its jurisdiction and the opening, secreting, or destruction of such letter, or abstraction of its contents after it has been so delivered is not an offense under the statute. However, it has also been held that one who takes a letter from the person in whose care it has been addressed, and opens it without authority, is guilty of the offense.<sup>20</sup>

*At common law.* It is a misdemeanor at common law to break open a private letter and publish its contents.<sup>21</sup> It is not a public offense, however, to publish the contents of a letter which came innocently into the possession of the publisher after it had been opened.<sup>22</sup>

*Prosecution and punishment.* An indictment must set forth with reasonable certainty the post office from which the letter was taken.<sup>23</sup> It need not expressly allege that the opening was unlawful, if it alleges facts which amount to an unlawful opening,<sup>24</sup> or that the person to whom the letter was addressed was a real person, where other allegations necessarily import that he was a real person,<sup>25</sup> or that the letter was in the custody of any postmaster, carrier, or other person having lawful charge of the letter.<sup>26</sup> Where venue and time are laid to the act of opening, it is not necessary to lay them to the intent which it is averred accompanied the act of opening, and so must necessarily have had its ex-

1. U.S.—Downing v. U. S., supra.

2. Purpose of the statute is to deal with unauthorized meddling with the mails out of mere malice or curiosity.—U. S. v. Davis, D.C.Mich., 33 F. 865—49 C.J. p 1230 note 35 [a].

3. U.S.—U. S. v. Safford, D.C.Mo., 66 F. 942.

49 C.J. p 1230 note 36.

4. U.S.—In re Burkhardt, D.C.Wis., 33 F. 25.

49 C.J. p 1230 note 37.

5. U.S.—U. S. v. Nutt, D.C.Ohio, 27 F.Cas.No.15,904.

49 C.J. p 1230 note 38.

6. U.S.—U. S. v. Pond, C.C.Mass., 27 F.Cas.No.16,067, 2 Curt. 265.

49 C.J. p 1230 note 39.

7. U.S.—U. S. v. Davis, D.C.Mich., 33 F. 865.

8. U.S.—U. S. v. Nutt, D.C.Ohio, 27 F.Cas.No.15,904.

9. U.S.—U. S. v. Pond, C.C.Mass., 27 F.Cas.No.16,067, 2 Curt. 265.

10. U.S.—U. S. v. Pond, supra.

11. U.S.—U. S. v. Nutt, D.C.Ohio, 27 F.Cas.No.15,904.

12. U.S.—U. S. v. Nutt, supra.

13. U.S.—U. S. v. Nutt, supra.

14. U.S.—U. S. v. Eddy, D.C.Ill., 25 F.Cas.No.15,024, 1 Biss. 227.

49 C.J. p 1230 note 47.

15. U.S.—U. S. v. Nutt, D.C.Ohio, 27 F.Cas.No.15,904.

16. U.S.—U. S. v. Bullington, C.C. Ala., 170 F. 121.

49 C.J. p 1231 note 49.

17. U.S.—U. S. v. Huilsman, D.C. Mo., 94 F. 486.

49 C.J. p 1231 note 50.

18. U.S.—U. S. v. Bullington, C.C. Ala., 170 F. 121.

49 C.J. p 1231 note 51.

19. U.S.—U. S. v. Bullington, supra.

49 C.J. p 1231 note 52.

20. U.S.—U. S. v. Hilbury, D.C.S.C., 29 F. 705.

21. N.Y.—Gill's Case, 3 City Hall Rec. 61—Noah's Case, 3 City Hall Rec. 13.

22. N.Y.—Noah's Case, supra.

23. U.S.—U. S. v. Davis, D.C.Mich., 33 F. 865.

49 C.J. p 1231 note 53.

24. U.S.—U. S. v. Pond, C.C.Mass., 27 F.Cas.No.16,067, 2 Curt. 265.

49 C.J. p 1231 note 54.

25. U.S.—U. S. v. Pond, supra.

49 C.J. p 1231 note 55.

26. U.S.—U. S. v. Pond, supra.

istence when and where the act was done.<sup>27</sup> It is not necessary to allege that the letter alleged to have been taken did not contain anything of value, although the statute provides that the offense shall consist in taking a letter from the mail "although it does not contain any article of value, or evidence thereof."<sup>28</sup>

General rules relating to issues, proof, and variance in criminal prosecutions apply in prosecutions for the offense under consideration.<sup>29</sup>

## § 60. Detention, Delay, or Opening of Mail Matter by Postmaster or Postal Employee

Under statutory provisions, it is an offense for a postmaster or postal employee unlawfully to detain, delay, or open any letter or other mail.

Under statutory provisions, 18 U.S.C.A. § 1703, it is an offense for a postmaster or other employee of the postal service unlawfully to detain, delay, or open any letter or other mail.<sup>30</sup> This statute refers to a detention of the matter therein described before it reaches the place of destination.<sup>31</sup> The mere fact of detention is insufficient to constitute the offense;<sup>32</sup> accused must have acted unlawfully and with guilty intent.<sup>33</sup> A decoy letter or package is intended to be conveyed by mail, within the meaning of the statute,<sup>34</sup> even though it is addressed to a fictitious addressee.<sup>35</sup>

An indictment for detaining mail is sufficient where it alleges in the words of the statute that the letter in question was unlawfully detained with intent to prevent its arrival; it need not aver that the letter was knowingly and willfully detained.<sup>36</sup> An indictment against a postmaster for opening mail, which charges that "as such postmaster" he

opened a letter which was intended to be conveyed by mail, sufficiently charges that, when the letter was opened by accused, it was in his possession as postmaster.<sup>37</sup> The elements of the offense may be proved by circumstantial as well as direct evidence.<sup>38</sup>

## § 61. Illegal Sale or Other Disposition of Stamps

By statute, it is an offense for any postal employee intrusted with the sale or custody of postage stamps to dispose of them except for cash or otherwise than as provided by law and the regulations of the postal department.

By statute, 18 U.S.C.A. § 1721, it is made an offense for a postmaster or postal service employee intrusted with the sale or custody of postage stamps, stamped envelopes, or postal cards to use or dispose of them in payment of debts, or in the purchase of merchandise or other salable articles, or to pledge or hypothecate them, or to sell or dispose of them except for cash, or for any sum other than that indicated on their face, or otherwise than as provided by law and the regulations of the department.<sup>39</sup> The statute is violated where the postmaster sells stamps intrusted to him on credit.<sup>40</sup> A postmaster who uses stamps, intrusted to him in paying for merchandise and remitting money, for the purpose of making change, violates the statute, although, in every instance, he has put the money value for the stamps so used in the till, in fact thus purchasing the stamps from himself.<sup>41</sup> A conviction of a postmaster for paying for merchandise in stamps cannot be sustained unless it is shown that the stamps so used had been received by the postmaster from the post office department.<sup>42</sup> It is not illegal for a postmaster to accept a deposit to buy postage due stamps.<sup>43</sup>

27. U.S.—U. S. v. Pond, *supra*.

28. U.S.—U. S. v. Davis, D.C.Mich., 33 F. 865.

49 C.J. p 1231 note 58.

29. U.S.—U. S. v. Mulvaney, C.C.N.Y., 27 F.Cas.No.15,833, 4 Park.Cr. 164.

49 C.J. p 1231 note 60.

30. U.S.—Kelley v. U. S., C.C.A.Cal., 166 F.2d 343.

49 C.J. p 1231 note 61.

Postmaster's civil liability for detention of mail and refusal to deliver see *supra* § 7.

31. U.S.—U. S. v. Pearce, C.C.Mich., 27 F.Cas.No.16,020, 2 McLean 14.

32. U.S.—Flashnick v. U. S., N.Y., 223 F. 736, 139 C.C.A. 266.

33. U.S.—Flashnick v. U. S., *supra*.

34. U.S.—Kelley v. U. S., C.C.A.Cal., 166 F.2d 343.

### Canceled stamps on package

Fact that canceled stamps were placed on packages prepared by postal employees and addressed to living persons at actual addresses, for purpose of attempting to apprehend whoever was stealing mail by postal inspectors, did not compel inference that packages were not "intended to be conveyed by mail" within statute.—Kelley v. U. S., *supra*.

35. U.S.—Jarrett v. U. S., C.C.A.Cal., 92 F.2d 698.

36. U.S.—U. S. v. Holmes, D.C.Mo., 40 F. 750.

49 C.J. p 1231 note 65.

37. U.S.—Holley v. U. S., C.C.A.Fla., 12 F.2d 778.

49 C.J. p 1231 note 66.

38. U.S.—Flashnick v. U. S., N.Y., 223 F. 736, 139 C.C.A. 266.

49 C.J. p 1232 note 67.

39. U.S.—Palliser v. U. S., N.Y., 10 S.Ct. 1034, 136 U.S. 257, 34 L.Ed. 514—U. S. v. Douglass, D.C.S.C., 33 F. 381.

40. U.S.—Palliser v. U. S., N.Y., 10 S.Ct. 1034, 136 U.S. 257, 34 L.Ed. 514.

49 C.J. p 1232 note 69.

41. U.S.—U. S. v. Douglass, D.C.S.C., 33 F. 381.

49 C.J. p 1232 note 70.

42. U.S.—U. S. v. Williamson, D.C.Va., 26 F. 690.

49 C.J. p 1232 note 71.

43. U.S.—Neill v. U. S., C.C.A.Ala., 41 F.2d 173.

## § 62. Robbery of Custodian of Mail

By statute, an assault on a custodian of mail matter, money, or other property of the United States with intent to rob, or the robbery of any such person of mail matter, money, or other property of the United States, is an offense.

By statute, 18 U.S.C.A. § 2114, whoever assaults a custodian of mail matter, money, or other property of the United States with intent to rob, steal, or purloin such mail matter, money, or property, or robs any such person of mail matter, money, or other property of the United States, is guilty of an offense.<sup>44</sup> This offense is different from that of abstracting mail matter from an authorized depository, as discussed supra § 56, and it is also different from the offense of cutting or injuring mail bags.<sup>45</sup> The statute makes two species of robbery offenses: A robbery of the mail under such circumstances as amount to an offense by the principles of the common law;<sup>46</sup> and a robbery effected by putting in jeopardy the life of a person having the custody of the mail by the use of dangerous weapons.<sup>47</sup> The first species of offense is committed where it is shown that the mail or any part thereof was taken violently from the possession of the carrier against his will by violence or putting him in fear,<sup>48</sup> since the term "rob" as used in the statute is used in its common-law sense.<sup>49</sup> In order to constitute the second offense, three things must concur: The mail must be robbed;<sup>50</sup> the robbery must be effected

by putting in jeopardy the life of the person who has the mail in custody;<sup>51</sup> and this must be done with a dangerous weapon.<sup>52</sup> Also, the statute makes it an offense to assault a person having lawful charge, control, or custody of mail matter, etc., with an intent to rob, and, in order to constitute the offense, both an assault and an intent to rob or steal mail matter in the possession of the person assaulted are essential elements,<sup>53</sup> but it is not necessary that any robbery shall actually have been committed;<sup>54</sup> any attempt to rob mail matter by an accused who assaults a mail custodian is an attempt to effect a robbery within the statute.<sup>55</sup>

*Persons having charge, control, or custody of mail or property.* The exact office or status of the person who is robbed, or whose life is jeopardized by means of dangerous weapons in attempted mail robbery, is immaterial as long as he had lawful charge of the mail matter.<sup>56</sup> Within the meaning of the statute is a mail carrier, although he has not taken the oath prescribed by law,<sup>57</sup> a clerk in charge of a branch contract post office,<sup>58</sup> or an employee of the postmaster,<sup>59</sup> although never officially appointed or sworn.<sup>60</sup> A postmaster from whom accused took by force a package directed to another person, which was a part of the United States mail, is within the meaning of the statute, although the package was not in the post office and had been removed to some other place,<sup>61</sup> and although the post-

44. U.S.—Hood v. U. S., C.C.A.Mo., 152 F.2d 431—Touhy v. Cox, C.C.A. Mo., 145 F.2d 107—Bugg v. U. S., C.C.A.Mo., 140 F.2d 848, certiorari denied 65 S.Ct. 89, 323 U.S. 673, 89 L.Ed. 547—U. S. v. Spain, D.C.Ill., 32 F.Supp. 28.

### Purpose of statute

The primary purpose of federal statute making it an offense to assault mail custodian with intent to rob, steal, or purloin mail matter was not the protection of the mails, except incidentally, but the protection of the custodian—U. S. v. Bruce, D.C.Ky., 52 F.Supp. 150.

### Scope of statute before amendment

In order to come within terms of statute, as it appeared before amendment in 1935, providing penalty for robbery of mail matter, the personal property stolen must be mail matter or mail.—Kelly v. U. S., C.C.A. Cal., 138 F.2d 489, certiorari denied 65 S.Ct. 712, 324 U.S. 855, 89 L.Ed. 1414, rehearing denied 65 S.Ct. 864, 324 U.S. 888, 89 L.Ed. 1436—U. S. v. Sehon Chinn, D.C.W.Va., 74 F.Supp. 189, affirmed, C.C.A., Sehon Chinn v. U. S., 163 F.2d 876.

45. U.S.—Banghart v. U. S., C.C.A. N.C., 148 F.2d 521, certiorari denied 65 S.Ct. 1568, 325 U.S. 837, 89 L.

Ed. 2001, rehearing denied 66 S.Ct. 133, 326 U.S. 807, 90 L.Ed. 492. Cutting or injuring mail bags as offense see infra § 64.

46. U.S.—Harrison v. U. S., Ala., 16 S.Ct. 961, 163 U.S. 140, 41 L.Ed. 104.

49 C.J. p 1232 note 82.

47. U.S.—U. S. v. Reeves, C.C.Tex., 38 F. 404.

49 C.J. p 1232 note 83.

48. U.S.—U. S. v. Reeves, supra—U. S. v. Wilson, C.C.Pa., 28 F.Cas. No.16,730, Baldw. 78.

49. U.S.—Costner v. U. S., C.C.A.N. C., 139 F.2d 429.

49 C.J. p 1232 note 85.

50. U.S.—U. S. v. Reeves, C.C.Tex., 38 F. 404—U. S. v. Wilson, C.C.Pa., 28 F.Cas.No.16,730, Baldw. 78.

51. U.S.—Madigan v. U. S., C.C.A. Wyo., 23 F.2d 180.

49 C.J. p 1232 note 87.

52. U.S.—U. S. v. Reeves, C.C.Tex., 38 F. 404.

49 C.J. p 1232 note 88.

53. U.S.—Conway v. U. S., C.C.A.Ill., 1 F.2d 274.

49 C.J. p 1233 note 89.

54. U.S.—Hensley v. U. S., C.C.A.

Ark., 156 F.2d 675—Blackwood v. U. S., C.C.A.Mo., 138 F.2d 461.

55. U.S.—U. S. v. Spain, D.C.Ill., 32 F.Supp. 28.

56. U.S.—Jones v. U. S., C.C.A.Ill., 72 F.2d 873.

57. U.S.—U. S. v. Wilson, C.C.Pa., 28 F.Cas.No.16,730, Baldw. 78, affirmed 7 Pet. 150, 8 L.Ed. 640.

58. U.S.—Johnston v. U. S., C.C.A. Wash., 145 F.2d 137.

### Permission to use money to purchase supplies

The provision of postal regulation that money received from sale of stamps at branch contract post offices is to be used to purchase additional supplies does not necessarily mean a transfer of title to clerk in charge thereof of stamps supplied by government so as to prevent such property from belonging to United States, within the statute penalizing mail robbery.—Johnston v. U. S., supra.

59. U.S.—Jones v. U. S., C.C.A.Ill., 72 F.2d 873.

60. U.S.—Randazzo v. U. S., C.C.A. Mo., 300 F. 794.

49 C.J. p 1233 note 91.

61. N.M.—U. S. v. Bowman, 5 P. 333, 3 N.M. 201.

master may have intended to appropriate the package for a private debt due to himself.<sup>62</sup> The fact that one of two mail clerks in the mail car assists the robbers will not prevent a conviction of the offense, although he had immediate possession of the mail,<sup>63</sup> inasmuch as the second government employee is considered lawfully in charge, control, or custody of any mail matter.<sup>64</sup>

**Persons liable.** One who was present at the robbery and consented thereto, aiding, procuring, advising, or assisting in the commission of the crime, may be regarded as a principal and convicted as such;<sup>65</sup> and one who aids in the planning of the crime and harbors conspirators at his house before and after the robbery is properly indicted as a principal, although he was not actually present when the crime was committed.<sup>66</sup> Under the statute, 18 U.S.C.A. § 2, providing that those who aid, abet, counsel, command, induce, or procure the commission of an offense against the United States are principals, an accessory before the fact may be convicted as a principal.<sup>67</sup>

**Entrapment.** Where defendants, charged with conspiracy to steal registered mail, had entered into an agreement with a mail messenger under which they were ostensibly to rob him, but were betrayed by the messenger to the postal authorities, the defense of entrapment by agents of government was not available.<sup>68</sup>

**Indictment.** An indictment is sufficient as to the description of the offense where it fully apprises defendants of the nature of the crime with which they are charged, and where a judgment thereon would bar any other prosecution for the same offense.<sup>69</sup>

A specific description of the nature of the mail matter involved is not necessary.<sup>70</sup> Specific allegations that the mail was taken from the person of the custodian<sup>71</sup> or that money taken in the robbery of the mail was the property of the United States<sup>72</sup> are unnecessary, where facts equivalent to such specific allegations are averred. An indictment which merely charges an "attempt to rob" a custodian of the mail is insufficient to charge an "assault with intent to rob" a custodian of the mail, within the terms of the statute.<sup>73</sup>

An indictment for advising, etc., a mail carrier to rob the mail should set forth that the carrier did in fact commit the offense, not necessarily, however, by a distinct, substantive averment of that fact.<sup>74</sup>

**Issues, proof, and variance.** In order to sustain an indictment for robbing "the mail" in the custody of a carrier, it is not necessary to prove a robbery of all the mail in the possession of the carrier.<sup>75</sup> Under a statute making one who aids and abets the commission of a crime a principal, an indictment directly charging accused with robbery of the mails is supported by evidence that he aided and abetted such a robbery.<sup>76</sup>

**Evidence.** The general rules governing criminal cases apply in prosecutions for this offense with respect to the presumptions and burden of proof,<sup>77</sup> and the admissibility<sup>78</sup> and sufficiency<sup>79</sup> of the evidence.

**Trial.** The rules governing criminal prosecutions generally apply as to the submission of questions to the jury,<sup>80</sup> and instructions.<sup>81</sup>

62. N.M.—U. S. v. Bowman, supra.

63. U.S.—Madigan v. U. S., C.C.A. Wyo., 23 F.2d 180.

49 C.J. p 1233 note 94.

64. U.S.—Sullivan v. U. S., C.C.A. Cal., 32 F.2d 992.

65. U.S.—U. S. v. Reeves, C.C.Tex., 38 F. 404—U. S. v. Wilson, C.C. Pa., 28 F.Cas.No.16,730, Baldw. 78.

66. U.S.—Rettich v. U. S., C.C.A. Mass., 84 F.2d 118.

67. U.S.—Melling v. U. S., C.C.A.Ill., 25 F.2d 92.

49 C.J. p 1233 note 97.

68. U.S.—Conway v. U. S., C.C.A.Ill., 1 F.2d 274.

69. U.S.—U. S. v. Spain, D.C.Ill., 32 F.Supp. 28.

49 C.J. p 1233 note 99.

Aider by verdict of defect in statement of offense see Indictments and Informations § 319.

Indictment held sufficient

U.S.—Hood v. U. S., C.C.A.Mo., 152

F.2d 431—Bugg v. U. S., C.C.A.Mo., 140 F.2d 848, certiorari denied 65

S.Ct. 89, 323 U.S. 673, 89 L.Ed. 547

—Blackwood v. U. S., C.C.A.Mo., 138 F.2d 461—Sansone v. Zerbst,

C.C.A.Kan., 73 F.2d 670—Schultz v. Zerbst, C.C.A.Kan., 73 F.2d 668

—U. S. v. Sehon Chinn, D.C.W.Va., 87 F.Supp. 364—U. S. v. Sehon Chinn, D.C.W.Va., 74 F.Supp. 189,

affirmed, C.C.A., Sehon Chinn v. U. S., 163 F.2d 876.

70. U.S.—Blackwood v. U. S., C.C.A. Mo., 138 F.2d 461.

71. U.S.—Weisman v. U. S., C.C.A. Mo., 1 F.2d 696.

49 C.J. p 1233 note 1.

72. U.S.—Johnston v. U. S., C.C.A. Wash., 145 F.2d 137.

73. U.S.—Aderhold v. Schiltz, C.C.A. Ga., 73 F.2d 381.

74. U.S.—U. S. v. Mills, N.C., 7 Pet. 138, 8 L.Ed. 636.

75. U.S.—U. S. v. Wilson, C.C.Pa.,

28 F.Cas.No.16,730, Baldw. 78, affirmed 7 Pet. 150, 8 L.Ed. 640.

76. U.S.—Vane v. U. S., Idaho, 254 F. 28, 165 C.C.A. 438.

77. U.S.—Madigan v. U. S., C.C.A. Wyo., 23 F.2d 180.

49 C.J. p 1233 note 9.

78. U.S.—Dixon v. U. S., C.C.A.Okl., 7 F.2d 818.

49 C.J. p 1233 note 10.

79. Evidence held sufficient to sustain conviction

U.S.—Schwartz v. U. S., C.C.A.Cal., 160 F.2d 718.

49 C.J. p 1233 note 11.

80. U.S.—Jones v. U. S., C.C.A.Ill., 72 F.2d 873.

49 C.J. p 1233 note 12.

Evidence held sufficient to go to jury U.S.—Rettich v. U. S., C.C.A.Mass., 84 F.2d 118.

49 C.J. p 1233 note 12 [b].

81. U.S.—Weisman v. U. S., C.C.A. Mo., 1 F.2d 696.

Idaho.—U. S. v. Mays, 1 Idaho 763.

*Sentence and punishment.* A sentence in accordance with that prescribed by statute is proper.<sup>82</sup> If accused is convicted of the charge that, in effecting or attempting to effect the robbery, he wounded the custodian of the mail matter or property of the United States, or put his life in jeopardy by the use of a dangerous weapon, a sentence of twenty-five years is mandatory, and the court has no discretion as to the extent of the punishment.<sup>83</sup> Imposition of the twenty-five year penalty is authorized whether or not the robbery has been completed.<sup>84</sup> It has been held that only one sentence may be imposed under the statute,<sup>85</sup> so that an offender who has robbed the mails is not subject to a penalty for the completed offense and also to a penalty for an assault with intent to rob,<sup>86</sup> or, if the assault with intent to rob or the completed robbery is aggravated by wounding or putting the life of the custodian in jeopardy by the use of dangerous weapons, he cannot be sentenced for the aggravated offense and also the lesser offense;<sup>87</sup> but there is other authority which holds that an offender may be sentenced both for assault on the custodian of the mail with intent to rob the mail and for using a dangerous weapon in robbing or attempting to rob the custodian.<sup>88</sup>

### § 63. Breaking and Entering Post Office

By statute it is an offense to break or attempt to break forcibly into any post office with intent to commit any larceny or other depredation therein.

Under the statute, 18 U.S.C.A. § 2115, whoever shall forcibly break into or attempt to break into any post office, or any building used in whole or in part as a post office, with intent to commit in such post office, or building, or part thereof, so used, any

larceny or other depredation, shall be guilty of an offense.<sup>89</sup> The statute creates a purely statutory offense which is unknown to the common law, and which must be classed as a misdemeanor, and not a felony.<sup>90</sup> It is an offense distinct from that of stealing mail matter, as considered supra § 56 b, or that of stealing post office property.<sup>91</sup> The object of the statute is to protect the postal service of the United States, and secure the buildings used for such purpose from felonious entry with the criminal intent defined in the statute;<sup>92</sup> and its constitutionality has been upheld.<sup>93</sup> The offense is committed by breaking into any part of a building used in whole or in part as a post office with intent to commit larceny or other depredation in the part so used,<sup>94</sup> and, where a building is used only in part as a post office, it is not essential that the original illegal entry be into that part; it is sufficient if there is a breaking into such building with intent to commit larceny or other depredation in the part used therein as a post office.<sup>95</sup> The attempt to commit larceny or other depredation in the part of the building used as a post office is an essential element of the offense,<sup>96</sup> and breaking into a building with intent to commit larceny in a part of the building not used as a post office is not within the statute.<sup>97</sup> The offense is complete when the post office is forcibly broken into with intent to steal or commit other depredation,<sup>98</sup> and it is not necessary in order to constitute the offense that larceny<sup>99</sup> or other depredation<sup>1</sup> should have been committed. One who, after breaking into a post office with intent to commit larceny therein, steals postal funds, commits two separate offenses, one under the statute under consideration, and the other under another statute, 18 U.S.C.A. § 1707, making it a

82. U.S.—Hood v. U. S., C.C.A.Mo., 152 F.2d 431—Hunter v. U. S., C. C.A.Ohio, 149 F.2d 710, certiorari denied 66 S.Ct. 472, 326 U.S. 787, 90 L.Ed. 478, rehearing denied 66 S.Ct. 526, 327 U.S. 814, 90 L.Ed. 1038.

83. U.S.—Hunter v. U. S., supra—U. S. v. Spain, D.C.Ill., 32 F.Supp. 28.

84. U.S.—Montgomery v. Johnston, C.C.A.Cal., 111 F.2d 327.

85. U.S.—Hunter v. U. S., C.C.A. Ohio, 149 F.2d 710, certiorari denied 66 S.Ct. 472, 326 U.S. 787, 90 L.Ed. 478, rehearing denied 66 S.Ct. 526, 327 U.S. 814, 90 L.Ed. 1038.

86. U.S.—Costner v. U. S., C.C.A.N.C., 139 F.2d 429.

87. U.S.—Costner v. U. S., supra—U. S. v. Bruce, D.C.Ky., 52 F.Supp. 150.

88. U.S.—Sansone v. Zerbst, C.C.A. Kan., 73 F.2d 670—Schultz v. Zerbst, C.C.A.Kan., 73 F.2d 668.

89. U.S.—Schwyhart v. U. S., C.C.A.Ark., 82 F.2d 725—U. S. v. Clifton, D.C.Ark., 91 F.Supp. 940.

90. U.S.—Considine v. U. S., Ohio, 112 F. 342, 50 C.C.A. 272, certiorari denied 22 S.Ct. 938, 184 U.S. 699, 46 L.Ed. 765.

91. U.S.—O'Brien v. Squier, C.C.A. Wash., 133 F.2d 123.

Stealing post office property as offense see infra § 64.

92. U.S.—Considine v. U. S., Ohio, 112 F. 342, 50 C.C.A. 272, certiorari denied 22 S.Ct. 938, 184 U.S. 699, 46 L.Ed. 765.

93. U.S.—U. S. v. Saunders, D.C. Ind., 77 F. 170—U. S. v. Campbell, C.C.S.C., 16 F. 233, 9 Sawy. 20.

94. U.S.—Schwyhart v. U. S., C.C.A. Ark., 82 F.2d 725.  
49 C.J. p 1234 note 18.

95. U.S.—U. S. v. Clifton, D.C.Ark., 91 F.Supp. 940.

96. U.S.—Sorenson v. U. S., Iowa, 168 F. 785, 94 C.C.A. 181.  
49 C.J. p 1234 note 19.

97. U.S.—U. S. v. Martin, C.C.Ala., 140 F. 256.  
49 C.J. p 1234 note 20.

98. U.S.—Morgan v. Devine, Kan., 35 S.Ct. 712, 237 U.S. 632, 59 L.Ed. 1153—Anderson v. Moyer, D.C.Ga., 193 F. 499.

99. U.S.—Morgan v. Devine, Kan., 35 S.Ct. 712, 237 U.S. 632, 59 L.Ed. 1153—Anderson v. Moyer, D.C.Ga., 193 F. 499.

1. U.S.—Morgan v. Devine, Kan., 35 S.Ct. 712, 237 U.S. 632, 59 L.Ed. 1153.

criminal offense to steal property belonging to the post office department.<sup>2</sup>

**Indictment.** The acts and intent which constitute the crime must be set forth in an indictment with reasonable particularity of time, place, and circumstances.<sup>3</sup> If only a part of the building is used for a post office, the indictment must show that the breaking was done with intent to commit larceny or other depredation in the part of the building used as a post office,<sup>4</sup> and an indictment in effect alleging that the breaking was done with the intent to commit larceny anywhere in the building is insufficient;<sup>5</sup> but it need not allege that the defendant broke into the post office part of the building.<sup>6</sup> Where the whole building is used as a post office, the indictment is not defective for failure to charge whether the building is used in whole or in part as a post office.<sup>7</sup>

**Evidence and trial.** The general rules governing criminal cases apply with respect to evidence<sup>8</sup> and trial<sup>9</sup> in prosecutions for this offense.

**Sentence and punishment.** The sentence imposed must be in conformity with the punishment prescribed by statute.<sup>10</sup> Prior to the amendment of the statute in 1948, the imposition of both a fine and a sentence of imprisonment was mandatory,<sup>11</sup> but the failure of the court to impose a fine was held not to invalidate the original sentence of punishment, and the court could correct the sentence by imposing the required fine.<sup>12</sup>

## § 64. Other Offenses

The statutes punish numerous other crimes against the postal service including the stealing or forging of mail locks or keys, stealing post office property, injuring mail bags, mailing threatening communications, forging or altering money orders, etc.

In addition to the particular offenses specifically considered, supra §§ 34-63, the statutes punish numerous other crimes against the postal service,<sup>13</sup> including, under various sections of 18 U.S.C.A., such as under § 1704, the stealing or forging of mail locks or keys,<sup>14</sup> under § 1707, stealing post office property,<sup>15</sup> under § 1706, injuring mail bags,<sup>16</sup> un-

2. U.S.—Morgan v. Devine, supra.  
49 C.J. p 1234 note 25.  
Stealing post office property as offense see infra § 64.

3. U.S.—Considine v. U. S., Ohio, 112 F. 342, 50 C.C.A. 272, certiorari denied 22 S.Ct. 938, 184 U.S. 699, 46 L.Ed. 765.  
49 C.J. p 1234 note 26.

4. U.S.—McNealy v. Johnston, D.C. Cal., 30 F.Supp. 312, appeal dismissed, C.C.A., Johnston v. McNealy, 108 F.2d 1015—U. S. v. Clifton, D.C.Ark., 91 F.Supp. 940.  
49 C.J. p 1234 note 27.

5. U.S.—McNealy v. Johnston, D.C. Cal., 30 F.Supp. 312, appeal dismissed, C.C.A., Johnston v. McNealy, 108 F.2d 1015.  
49 C.J. p 1234 note 28.

6. Ark.—U. S. v. Clifton, D.C.Ark., 91 F.Supp. 940.

7. U.S.—Brewer v. U. S., C.C.A.Ariz., 150 F.2d 314.

8. U.S.—Sorenson v. U. S., Iowa, 168 F. 785, 94 C.C.A. 181.  
49 C.J. p 1234 notes 32-34.

**Evidence held sufficient to sustain conviction**

U.S.—Calhoun v. U. S., C.A.Tex., 172 F.2d 457, certiorari denied 69 S.Ct. 1513, 337 U.S. 938, 93 L.Ed. 1743—Taylor v. U. S., C.C.A.Tex., 62 F. 2d 980.  
49 C.J. p 1234 note 34 [a].

9. **Evidence held sufficient to go to jury**  
U.S.—Steffen v. U. S., C.C.A.Or., 293 F. 30.

**Evidence held insufficient to go to jury**  
U.S.—Schwyhart v. U. S., C.C.A.Ark., 82 F.2d 725.

10. U.S.—Sorenson v. U. S., Iowa, 168 F. 785, 94 C.C.A. 181.

11. U.S.—Bledsoe v. Johnston, D. C.Cal., 61 F.Supp. 707, affirmed, C. C.A., 154 F.2d 458, certiorari denied 66 S.Ct. 1367, 328 U.S. 872, 90 L.Ed. 1642.

12. U.S.—Cook v. U. S., C.A.Mass., 171 F.2d 567.

13. U.S.—Washer v. U. S., C.C.A. Fla., 12 F.2d 925, certiorari denied 47 S.Ct. 98, 273 U.S. 705, 71 L.Ed. 849.

49 C.J. p 1235 note 36.  
Use of mails for unregistered securities see Licenses §§ 72-78.

**Mailing intoxicating liquors**  
U.S.—Washer v. U. S., supra.  
49 C.J. p 1235 note 36 [b].

**Receiving prize fight films from mails**

Under a statute now repealed, which prohibited the interstate transportation of any film or pictorial representation of any prize fight, in order to constitute the offense of receiving such matter from the mails, a transportation through the mails was held necessary.—Atlanta Enterprises v. Crawford, D.C. Ga., 22 F.2d 834.

14. U.S.—Van Gorder v. U. S., C.C. A.Mo., 21 F.2d 939.  
49 C.J. p 1235 note 37.

15. U.S.—Collins v. U. S., C.C.A. Iowa, 20 F.2d 574.  
49 C.J. p 1235 note 38.

As distinct from offense:

Of breaking and entering post office see supra § 63.  
Of stealing mail matter see supra § 56.

**Asportation of property**

To "steal or purloin" under the statute means unlawfully to take and carry away the personal property of another, and asportation is an essential element of the offense.—Warner v. U. S., C.C.A.Miss., 168 F. 2d 765.

**Theft of several bags held separate offenses**

U.S.—Warner v. U. S., supra.  
49 C.J. p 1235 note 33 [a].

**Question for jury**

Whether accused intended to steal property owned by the post office department.—U. S. v. Teixeira, C.C.A. N.Y., 162 F.2d 169.

**Sentence**

U.S.—Robinson v. U. S., C.C.A.N.D., 142 F.2d 431—Sorenson v. U. S., Iowa, 168 F. 785, 94 C.C.A. 181.

16. U.S.—Banghart v. U. S., C.C.A. N.C., 148 F.2d 521, certiorari denied 65 S.Ct. 1568, 325 U.S. 887, 89 L.Ed. 2001, rehearing denied 66 S. Ct. 133, 324 U.S. 807, 90 L.Ed. 492.

**Cutting of several mail bags**

Each successive cutting into a different mail bag with intent to rob or steal the mail therefrom by persons who, in the same transaction, tear or cut successively a number of such bags with intent to rob or steal any of the mail, is a distinct offense.—Ebeling v. Morgan, Kan., 35 S.Ct. 710, 237 U.S. 625, 59 L.Ed. 1151—Banghart v. U. S., C.C.A.N.C.

der § 1700, deserting the mail,<sup>17</sup> under § 1698, failure to deliver letters by master of vessel,<sup>18</sup> under § 1712, the falsification of postal returns to increase compensation,<sup>19</sup> under § 1342, the use of a fictitious address for the purpose of conducting a scheme to defraud or any other unlawful business,<sup>20</sup> and, under § 876, the mailing of threatening communications.<sup>21</sup> Under the statute, 18 U.S.C.A. § 2073, pertaining to false entries and reports by government employees, a postal employee may be prosecuted for making a false entry in a record which his duties required him to keep.<sup>22</sup>

**Forgery or alteration of money order.** Under the statute, 18 U.S.C.A. § 500, whoever falsely makes or forges, any order, in imitation of, or purporting to be, a money order issued by the post office department, or by any postmaster or agent thereof, or alters a money order, is guilty of an offense.<sup>23</sup> The crime defined by this statute is the common-law

crime of forgery with respect to a postal money order.<sup>24</sup> While an intent to defraud is an essential element of the offense,<sup>25</sup> it is not essential that there should be an intent to defraud the United States, but it will be sufficient if the intent is to defraud some other person.<sup>26</sup> Issuance by a postmaster of a money order on the application of a fictitious person without consideration therefor, and with intent to defraud, is a false making and forgery of the order.<sup>27</sup> Where several money orders were forged by accused on the same date and as a part of the same general transaction, the forgery of each constitutes a separate offense.<sup>28</sup> One who knowingly aids or assists another in altering a money order by raising its value may be convicted as a principal.<sup>29</sup> By further express provision of the same statute, one who, knowing the signature on a post office money order to be a forgery, presents it for payment, and collects it, is punishable under the statute.<sup>30</sup>

## V. PENALTIES AND FORFEITURES, AND SEARCHES AND SEIZURES

### § 65. Penalties and Forfeitures

A suit to recover a penalty imposed by statute for a violation of postal laws is maintainable only by, and in the name of, the United States.

A suit to recover a penalty imposed by statute for a violation of postal laws cannot be brought

by a private prosecutor but is maintainable only by, and in the name of, the United States.<sup>31</sup>

### § 66. Searches and Seizures

Searches and seizures are authorized in order to protect the monopoly of the post office department over

148 F.2d 521, certiorari denied 65 S.Ct. 1568, 325 U.S. 887, 89 L.Ed. 2001, rehearing denied 66 S.Ct. 133, 326 U.S. 807, 90 L.Ed. 492—*Johnston v. Lagomarsino*, C.C.A.Cal., 88 F.2d 86.

**Evidence held sufficient to justify conviction**  
U.S.—*Cotten v. U. S.*, C.C.A.Tex., 92 F.2d 809.

17. F.2d Opinion Attorney General 70. 49 C.J. p 1235 note 40.

18. U.S.—*U. S. v. Beaty*, C.C.Ark., 24 F.Cas.No.14,555, Hempst. 487. 49 C.J. p 1235 note 41.

19. U.S.—*U. S. v. Foster*, Mass., 34 S.Ct. 666, 233 U.S. 515, 58 L.Ed. 1034. 49 C.J. p 1235 note 42.

20. U.S.—*McDaniel v. U. S.*, Md., 87 F. 324, 30 C.C.A. 670, certiorari denied 19 S.Ct. 885, 171 U.S. 689, 43 L.Ed. 1179. 49 C.J. p 1235 note 43.

21. U.S.—*U. S. v. Pignatelli*, C.C.A.N.Y., 125 F.2d 643, certiorari denied *Pignatelli v. U. S.*, 62 S.Ct. 1269, 316 U.S. 680, 86 L.Ed. 1436.

**Indictment held sufficient**  
U.S.—*Whiting v. U. S.*, C.A.Ohio, 181 F.2d 643.

#### Admissibility of evidence

U.S.—*U. S. v. Pignatelli*, C.C.A.N.Y., 125 F.2d 643, certiorari denied *Pignatelli v. U. S.*, 62 S.Ct. 1269, 316 U.S. 680, 86 L.Ed. 1436.

#### Evidence held sufficient

U.S.—*Gilbert v. U. S.*, C.A.Miss., 182 F.2d 316—*U. S. v. Pignatelli*, C.C.A.N.Y., 125 F.2d 643, certiorari denied *Pignatelli v. U. S.*, 62 S.Ct. 1269, 316 U.S. 680, 86 L.Ed. 1436.

22. U.S.—*Harris v. U. S.*, C.C.A.Mo., 104 F.2d 41.

#### Indictment

(1) An indictment charging an assistant postmaster with making a false "statement of mailing" but not stating that he made false entry in any record which he was required to keep in connection with his official duties, and not stating that he forged or made a false entry in any record of post office in which he worked, was fatally defective.—*Harris v. U. S.*, supra.

(2) Proper identification of forged paper or of record as a record of post office establishment was an essential element required to be stated in an indictment against assistant postmaster for having made a false entry in a record which his duties required him to keep.—*Harris v. U. S.*, supra.

23. U.S.—*Isgate v. U. S.*, C.A.Tex., 174 F.2d 437.

**Evidence held to sustain conviction**  
U.S.—*U. S. v. Gutterman*, C.C.A.N.Y., 147 F.2d 540, 157 A.L.R. 1221.

**Evidence held sufficient to go to jury**  
U.S.—*Dean v. U. S.*, Ga., 246 F. 568, 158 C.C.A. 538.

**Instructions held sufficient**  
U.S.—*Isgate v. U. S.*, C.A.Tex., 174 F.2d 437.

24. U.S.—*Ex parte Hibbs*, D.C.Or., 26 F. 421.

25. U.S.—*U. S. v. Morris*, C.C.N.Y., 26 F.Cas.No.15,813, 16 Blatchf. 133.

26. U.S.—*U. S. v. Morris*, supra. 49 C.J. p 1232 note 75.

27. U.S.—*Ex parte Hibbs*, D.C.Or., 26 F. 421.

28. U.S.—*U. S. v. Carpenter*, Wash., 161 F. 214, 81 C.C.A. 194, 9 L.R.A., N.S., 1043, 10 Ann.Cas. 509. 49 C.J. p 1232 note 77.

29. U.S.—*Dean v. U. S.*, Ga., 246 F. 568, 158 C.C.A. 538.

30. Puerto Rico.—*U. S. v. Reyes*, 4 Puerto Rico Fed. 69.

31. U.S.—*Williams v. Wells Fargo & Co.*, Ark., 177 F. 352, 101 C.C.A. 328, 35 L.R.A.N.S., 1034, 21 Ann. Cas. 699.



the carrying of the mails. A summary proceeding for the return of seized mail matter may be brought in the federal district court which has jurisdiction.

In order to protect and enforce the monopoly, reserved to the post office department, of carrying the mail, in addition to prohibiting any one other than the government from engaging therein, and making it an offense to do so, provision has been made by statute, 39 U.S.C.A. §§ 498, 700, for searches and seizures with respect to mail matter being transported in violation of law; and the constitutionality of the statutes has been upheld.<sup>32</sup> The seized matter may be held only for the period of time prescribed by statute,<sup>33</sup> and, if the seizure is illegal, the matter cannot legally be held for any length of time.<sup>34</sup> A person aggrieved by the seizure has the right to have the legality of the seizure determined as soon as possible.<sup>35</sup>

Inasmuch as congress has specifically authorized United States commissioners to issue search warrants in cases enumerated by the statutes conferring the power, and has conferred no authority to issue warrants to search and seize letters, writings, etc., used or intended to be used in the execution of a scheme to defraud in the execution of which

the mails are used, the United States commissioners have no authority to issue a search warrant for this purpose;<sup>36</sup> and no authority has been conferred on a district judge to issue a search warrant in such a case.<sup>37</sup>

*Return of seized matter.* An aggrieved person may commence a summary proceeding for the return of the seized matter<sup>38</sup> in the federal district court which has jurisdiction,<sup>39</sup> and he need not apply to the postmaster general for a hearing prior to commencing the proceeding<sup>40</sup> or make the postmaster general a party to the proceeding.<sup>41</sup> The summary proceeding is properly commenced by an order to show cause and petition,<sup>42</sup> but the fact that the proceeding is initiated by a notice of motion and affidavit is not necessarily fatal to the application.<sup>43</sup> The summary proceeding for return of the seized matter is not the proper action to determine the legality of the seizure,<sup>44</sup> but the court may direct that the property be returned, unless the government brings proceedings to determine the legality of the seizure within a reasonable time.<sup>45</sup> Orders issued by the court in the proceeding are binding, provided they are not an abuse of judicial discretion.<sup>46</sup>

32. U.S.—Blackham v. Gresham, C. C.N.Y., 16 F. 609, 21 Blatchf. 354. Conveyance of mail matter out of mail as offense see supra § 36.

### 33. Detention after determination of suits

The statute authorizing postmaster general to direct that letters seized on ground that they are being carried contrary to law be detained until two months after final determination of all suits which might within six months be commenced against any person for sending or carrying such matter applies to actions against individuals and not to forfeiture proceedings which are brought against the seized property.—American Dealers Service v. Goldman, D.C.N.Y., 49 F.Supp. 933, affirmed, C.C.A., Goldman v. American Dealers Service, 135 F.2d 398.

34. U.S.—American Dealers Service v. Goldman, D.C.N.Y., 49 F.Supp. 933, affirmed, C.C.A., Goldman v. American Dealers Service, 135 F.2d 398.

35. U.S.—American Dealers Service v. Goldman, D.C.N.Y., 49 F.Supp. 933, affirmed, C.C.A., Goldman v.

American Dealers Service, 135 F.2d 398.

36. U.S.—U. S. v. Jones, D.C.Or., 230 F. 262.

37. U.S.—U. S. v. Jones, supra.

38. U.S.—Goldman v. American Dealers Service, C.C.A.N.Y., 135 F.2d 398.

39. U.S.—Goldman v. American Dealers Service, supra.

**Property taken under revenue laws**  
(1) The statute relating to recovery of property taken under revenue laws is applicable to property seized for violation of postal laws.—Goldman v. American Dealers Service, supra.

(2) Statutes under which checks in possession of corporation which engaged in business of delivering checks to creditors were seized on ground that corporation was violating law prohibiting establishment of private express for conveyance of letters are "revenue laws" within statute providing that property taken under authority of revenue law shall be deemed in custody of the law and subject only to orders of

federal courts having jurisdiction thereof.—American Dealers Service v. Goldman, D.C.N.Y., 49 F.Supp. 933, affirmed, C.C.A., Goldman v. American Dealers Service, 135 F.2d 398.

40. U.S.—Goldman v. American Dealers Service, C.C.A.N.Y., 135 F.2d 398.

41. U.S.—Goldman v. American Dealers Service, supra.

42. U.S.—American Dealers Service v. Goldman, D.C.N.Y., 49 F.Supp. 933, affirmed, C.C.A., Goldman v. American Dealers Service, 135 F.2d 398.

43. U.S.—American Dealers Service v. Goldman, D.C.N.Y., 49 F.Supp. 933, affirmed, C.C.A., Goldman v. American Dealers Service, 135 F.2d 398.

44. U.S.—Goldman v. American Dealers Service, C.C.A.N.Y., 135 F.2d 398.

45. U.S.—Goldman v. American Dealers Service, supra.

46. U.S.—Goldman v. American Dealers Service, supra.

## VI. CIVIL LIABILITY FOR OBSTRUCTING MAIL

## § 67. Liability to Addressee of Obstructed Mail

A person who obstructs mail received by him but addressed to another may be liable for the damages resulting therefrom.

A person receiving a letter addressed to another owes him the duty not to obstruct his mail,<sup>47</sup> and a breach of this duty renders him liable for the damages proximately resulting therefrom.<sup>48</sup>

## VII. POSTAL SAVINGS DEPOSITORIES

## § 68. In General

- a. Establishment and administration in general
- b. Deposit of postal savings funds with bank

## a. Establishment and Administration in General

The postal savings system, which is established by statute, is within the constitutional powers of the government. Officers of the postal department are held to the same accountability for postal savings funds as for public moneys.

The Postal Savings Act, 39 U.S.C.A. §§ 751-769, provides for the establishment and administration of a postal savings system, and makes the necessary provisions therefor,<sup>49</sup> and the creation and operation of the postal savings system are within the constitutional powers of the government.<sup>50</sup> By the provisions of the Postal Savings Act, the postmaster general may require postmasters and other postal officers and employees to perform postal savings depository business;<sup>51</sup> and he may, subject to the approval of the board of trustees, issue rules and regulations to carry the provisions of the act into effect.<sup>52</sup> Under the statute, 39 U.S.C.A. § 762, postal savings depository funds must be kept separate from other funds by postmasters or other officers or employees of the postal service.<sup>53</sup> Inasmuch as the statutes, 31 U.S.C.A. §§ 496, 498, 510, 514, require an administrative audit by the several executive departments and government establishments of all public accounts preliminary to their audit by the general accounting office, a regulation of the comptroller general directing the discontinuance of accounting in the division of postal savings is void.<sup>54</sup>

*Accountability for postal savings funds.* A post-

master individually, and a postmaster and the sureties on his bond, are liable as insurers for public moneys coming into their hands, as discussed supra §§ 7, 8, and by the provisions of the Postal Act and regulations of the post office department, promulgated in pursuance thereof, postal officers and other officers of the department and their bondsmen are held to the same accountability for postal savings funds as for public moneys.<sup>55</sup> The board of trustees has no authority to relieve from accountability those responsible for the safe-keeping and proper disposition of postal funds.<sup>56</sup> The postmaster general may relieve postmasters having custody of postal savings funds for the loss thereof when due to burglary, fire, or other unavoidable casualty resulting from no fault or negligence on their part;<sup>57</sup> but not otherwise.<sup>58</sup>

## b. Deposit of Postal Savings Funds with Bank

The statute provides for the deposit of postal savings funds in solvent banks, and the sufficiency of the security which is offered by a bank in which postal savings are deposited rests entirely in the discretion of the board of trustees.

By statute, 39 U.S.C.A. § 759, provision is made for the deposit of postal savings funds in solvent banks, whether organized under national or state laws, and whether or not member banks of the federal reserve system, being subject to national or state supervision and examination.<sup>59</sup> In order to authorize a bank to receive deposits under this provision, it is necessary that it should be incorporated or clothed with the essential attributes of a corporation by virtue of legislative sanction.<sup>60</sup> The mere authority to transact a banking business, although granted in pursuance of state laws, carries with it no implication of organization under

47. Tex.—Cohen v. Cohen, 63 S.W. 544, 26 Tex.Civ.App. 315.

48. Tex.—Cohen v. Cohen, supra. 49 C.J. p 1236 note 52.

49. 34 Opinion Attorney General 83. 49 C.J. p 1236 note 53.

50. U.S.—In re Kentucky Fuel Gas Corp., C.C.A.Ky., 127 F.2d 667, appeal dismissed Reeves v. Williamson, 63 S.Ct. 71, 317 U.S. 593, 87 L.Ed. 485.

51. 34 Opinion Attorney General 83.

52. 34 Opinion Attorney General 83.

53. 34 Opinion Attorney General 83.

54. 34 Opinion Attorney General 83.

55. U.S.—U. S. for Use and Benefit of Midland Loan Finance Co. v. National Surety Corporation, Minn., 60 S.Ct. 458, 309 U.S. 165, 84 L.Ed. 677.

49 C.J. p 1237 note 1.

56. 33 Opinion Attorney General 526.

57. 33 Opinion Attorney General 526.

58. 33 Opinion Attorney General 526.

59. 34 Opinion Attorney General 83. 49 C.J. p 1236 notes 68-70.

60. 29 Opinion Attorney General 368.

the state laws, irrespective of whether authority is, or is not, granted subject to state supervision and examination.<sup>61</sup> However, a private bank on which some of the essential attributes of a corporation are conferred by legislative sanction is within the statute, and may become a depository of postal savings funds.<sup>62</sup>

The object of the provision of the statute that postal savings funds shall be deposited among qualified banks substantially in proportion to the capital and surplus of each bank, is to insure that the banks shall be treated fairly as between each other, without favoritism or injustice.<sup>63</sup> In a construction of this provision by the attorney general, it was said that it was subject to regulations by the board of trustees, provided the regulations were reasonable, nondiscriminative, and adapted to carry out the purposes of the act,<sup>64</sup> and that the practice of excluding the emergency credit from the proportionate share in postal savings deposits of the bank allowing it is not in conflict with this provision.<sup>65</sup> By a further provision of the act, it is provided that, if no qualified bank is available to receive the funds in the particular place in which a postal savings depository is located, the deposit shall be apportioned among the qualified banks equally convenient to such locality.<sup>66</sup>

*Security for funds.* It has been held that, under the statute, the sufficiency of any bonds offered as security, even if they fall within the class prescribed therein, rests entirely in the uncontrolled discretion of the board of trustees.<sup>67</sup> Improvement bonds of a municipality, which purport to bind it without any reservation or limitation, are public bonds supported by the taxing power within the meaning of the statute, and may be accepted as security,<sup>68</sup> but improvement bonds which are not payable out of the general taxes of a city, but merely out of a special fund,<sup>69</sup> or public building bonds issued by a state and payable out of a trust fund which the state is pledged merely to administer,<sup>70</sup> are not acceptable as security for postal savings deposits.

Since there is no limitation in the statute as to the ownership of the bonds required to be deposited by the bank as security, bonds owned by the bank may be given as security.<sup>71</sup> On the other hand, the securities taken by the board of trustees need not be the property of the bank.<sup>72</sup> A bank may be permitted to pledge with the board of trustees bonds lent to it for that purpose,<sup>73</sup> provided the board takes them in pledge on a valuable consideration with no other notice than that they are being used in the exact manner authorized by the owners thereof.<sup>74</sup> It has been said, however, that it would seem advisable that every deposit of security to the board of trustees should be made by the bank itself, accompanied by assurances from the owners of the securities admitting their consent to the pledge for the consideration running from the government to themselves, namely, the deposit to be made by the government at their request at the bank in which they are interested.<sup>75</sup>

When bonds are transferred to the board of trustees by the bank in consideration of the deposit with the bank for postal savings funds, the board acquires a good title thereto as pledgee, because the bonds are negotiable instruments, and the board is a purchaser for value without notice of any flaw in the title thereto.<sup>76</sup>

In an action to compel the treasurer of the United States to deliver to a receiver of a state bank, bonds which the bank had pledged to secure deposits of postal savings funds, the United States has been held to be an indispensable party.<sup>77</sup>

## § 69. Deposits

- a. In general
- b. Exchange of deposits for government bonds
- c. Payment or settlement of accounts

### a. In General

A deposit in a postal savings account is a trust fund which never passes into, or becomes the property of, the United States treasury. No person may have more than one deposit account with the postal savings system.

61. 29	Opinion	Attorney	General
363.			
62. 29	Opinion	Attorney	General
420.			
63. 30	Opinion	Attorney	General
162.			
64. 30	Opinion	Attorney	General
162.			
65. 30	Opinion	Attorney	General
162.			
68. 29	Opinion	Attorney	General
258.			

67. 29	Opinion	Attorney	General
425.			
68. 29	Opinion	Attorney	General
425.			
49 C.J. p	1237	note	81.
69. 29	Opinion	Attorney	General
546.			
70. 29	Opinion	Attorney	General
451.			
71. 31	Opinion	Attorney	General
41.			
72. 29	Opinion	Attorney	General
333			
—29	Opinion	Attorney	General
266.			

73. 29	Opinion	Attorney	General
333			
—29	Opinion	Attorney	General
266.			
74. 29	Opinion	Attorney	General
333.			
75. 29	Opinion	Attorney	General
266.			
76. 29	Opinion	Attorney	General
333.			
77. D.C.—	Farley v. Albers	112 F.2d	
401,	72 App.D.C.	136,	certiorari denied
Albers v. Farley,	61 S.Ct.	37,	
311 U.S.	653,	85 L.Ed.	418.

A deposit in a postal savings account is a trust fund which never passes into, or becomes the property of, the United States treasury;<sup>78</sup> it does not, in a strict sense, amount to a loan to the government.<sup>79</sup> By the express provision of a section of the Postal Savings Act, 39 U.S.C.A. § 754, no person may have more than one deposit account with the postal savings system.<sup>80</sup> By another section of the act, 39 U.S.C.A. § 758, depositors are authorized to withdraw their deposits at any time,<sup>81</sup> the withdrawals to be paid in the state or territory concerned.<sup>82</sup> It is further provided in 39 U.S.C.A. § 766 that the faith of the United States is pledged to the payment by the deposits made in postal savings depository offices,<sup>83</sup> but this statute applies only where there is a deficiency in the funds of the system,<sup>84</sup> and the United States may not be sued by one of the depositors where there are sufficient funds on deposit to meet the claim.<sup>85</sup>

*Interest or dividends.* The rate of interest on deposits is dependent on the statute.<sup>86</sup> Where the statute under which a bank holding funds as depository for postal savings funds is incorporated provides that the net profits of savings banks shall be distributed as dividends among the depositors, but does not authorize the payment of interest on deposits, such bank cannot give dividends in addition to the interest which it is required to pay on its deposits of postal savings funds under the federal statute.<sup>87</sup>

#### b. Exchange of Deposits for Government Bonds

Depositors may exchange their deposits for government bonds, provided the deposits are authorized by law.

A section of the Postal Savings Act, 39 U.S.C.A. § 760, authorizes depositors to exchange their deposits for government bonds.<sup>88</sup> The section, of course, refers only to deposits authorized by law,<sup>89</sup> and, in consequence, the opening of a second postal savings account, which is expressly forbidden by statute, cannot be treated as a proper basis for the exchange of deposits for bonds.<sup>90</sup>

#### c. Payment or Settlement of Accounts

The payment of money in accordance with a final

judgment of a court of competent jurisdiction adjudicating the right of any person to a sum deposited with a postal savings depository operates as a full discharge from the claim.

In accordance with provisions of the statute, 39 U.S.C.A. § 767, the payment of money in accordance with a final judgment of a court of competent jurisdiction adjudicating the right of any person to a sum deposited with a postal savings depository operates as a full discharge from the claim.<sup>91</sup> Under the provision that a final judgment adjudicating right or interest in the credit of any sums deposited should be accepted by the board of trustees of the postal savings depository system as conclusive, whether a judgment in a creditor's suit to reach the debtor's postal savings adjudicated the right or interest of the debtor in the postal savings depository is a question for the board of trustees.<sup>92</sup>

*Settlement of accounts of deceased depositors.* Under a provision of the Postal Savings Act, 39 U.S.C.A. § 768, authorizing the postmaster general to make rules and regulations with respect to the deposit in, and withdrawal of moneys from, postal savings depositories by the issue of pass books or such other devices as he may adopt as evidence of such deposits or withdrawals, the postmaster general is authorized to make regulations dispensing with administration proceedings in the settlement of accounts of deceased depositors in the postal savings system, provided such regulations be reasonable, adapted to the discovery of truth, and based on the general legal principles governing the distribution of decedents' estates.<sup>93</sup> It would probably be well, however, to have a regulation of this kind printed in the pass book or otherwise brought to the notice of the depositor, and have the regulation adopted by the board of trustees.<sup>94</sup>

Where a person, now deceased, had opened a postal savings deposit under an arrangement with the assistant postmaster that, in case of death, the money would be paid to defendant, and defendant was administratrix of the estate of deceased, the post office department was not entitled to return of the deposit paid to defendant to await deter-

78. U.S.—U. S. v. Stewart, D.C.Nev., 30 F.Supp. 200, affirmed, C.C.A., 119 F.2d 492—Leka v. U. S., 69 Ct.Cl. 79.

79. Ind.—Lutz v. Arnold, 193 N.E. 840, 208 Ind. 480, rehearing overruled 196 N.E. 702, 208 Ind. 480.

80. 29 Opinion Attorney General 316.

81. Ind.—Lutz v. Arnold, 193 N.E. 840, 208 Ind. 480, rehearing overruled 196 N.E. 702, 208 Ind. 480.

82. 34 Opinion Attorney General 83.

83. 34 Opinion Attorney General 83.

84. U.S.—Leka v. U. S., 69 Ct.Cl. 79.

85. U.S.—Leka v. U. S., supra.

86. 34 Opinion Attorney General 83.

87. 29 Opinion Attorney General 513.

88. 34 Opinion Attorney General 83.

—29 Opinion Attorney General 316.

89. 29 Opinion Attorney General 316.

90. 29 Opinion Attorney General 316.

91. 29 Opinion Attorney General 316.

92. Neb.—In re Vanicek's Estate, 17 N.W.2d 477, 145 Neb. 531.

93. Tenn.—Bell-Dowlen Mills v. Draper, 83 S.W.2d 247, 169 Tenn. 112, certiorari denied 56 S.Ct. 156, 296 U.S. 633, 80 L.Ed. 450.

94. 29 Opinion Attorney General 477.

95. 29 Opinion Attorney General 477.

mination by a state court as to its ownership on the ground that the assistant postmaster was not authorized to accept a deposit on the conditions specified.<sup>95</sup>

**Aliens.** Where a deceased depositor was a subject of a foreign country, payment of the postal savings account to the parties entitled thereto in accordance with the laws of the deceased's country

is proper, notwithstanding there had been no administration in accordance with the laws of the state where the alien died,<sup>96</sup> inasmuch as the postal regulation providing that the postal savings of a deceased alien may be delivered, on application, to the proper consular officer is independent of the provisions which require administration of an estate.<sup>97</sup>

**POST-OFFICE ADDRESS.** See 1 C.J.S. p 1460 note 65.1.

**POSTPONE.** The word "postpone" carries with it the idea of deferring the doing of something until, or the taking effect of something at, a future or later time,<sup>1</sup> and it signifies to put off or defer the coming into existence of a right, obligation, condition, or other thing.<sup>2</sup> It has a plain, simple, unambiguous, and universally accepted meaning,<sup>3</sup> and it is defined as meaning to adjourn;<sup>4</sup> to put off;<sup>5</sup> to defer;<sup>6</sup> to defer to a future or later time;<sup>7</sup> to delay.<sup>8</sup>

"Postpone" has been distinguished from,<sup>9</sup> and held not synonymous with,<sup>10</sup> "suspend." It has been compared with, or distinguished from, "extend" see 35 C.J.S. p 288 note 37.

**POSTPONEMENT.** The act of postponing, or the state of being postponed; a deferring; a subordination, as in place or regard.<sup>11</sup> "Postponement" has been compared with, or distinguished from, "discharge" see 26 C.J.S. p 1330 note 39, and in Criminal Law § 480 it is stated that, while the terms "continuance" and "postponement" have been distinguished, the courts use the words interchangeably. Postponements in civil actions are discussed in Continuances § 1 et seq.

**POSTSCRIPT.** When used as a noun, the word "postscript" means a note or series of notes appended to a completed letter, book, or the like, usually giving an afterthought or additional information.<sup>12</sup> When used as a verb the word "postscript" means to add to.<sup>13</sup>

**POST TRAUMATIC PSYCHOSIS.** See Insane Persons § 2 d.

**POSTULATE.** To affirm or assert without proof; to claim as existent or true; to assume; to posit; assume the possibility of.<sup>14</sup> "Postulate" has been held to be synonymous with "assume" see 7 C.J.S. p 105 note 25.

**POST, WRIT OF ENTRY IN.** In English law, a writ, now abolished, given by the statute of Marlbridge, 52 Henry III chapter 30, which provided that, when the number of alienations of descents exceeded the usual degrees, a new writ should be allowed, without any mention of degrees at all.<sup>15</sup>

**POT.** A round vessel, characteristically rather deep than broad, made of earthenware or metal, and used for culinary and other purposes, chiefly domestic.<sup>16</sup>

The word "pot," as a gambling term, is defined in Gaming § 1 c (2); and as a mining term it is defined in Mines and Minerals § 3 h.

95. U.S.—U. S. v. Stewart, C.C.A. Nev., 119 F.2d 492.

96. U.S.—Lanza v. U. S., D.C.Ohio, 22 F.Supp. 716.

97. U.S.—Lanza v. U. S., supra.

1. Cal.—Gartner v. Roth, 157 P.2d 361, 363, 26 Cal.2d 184.

2. Nev.—Reno Club v. Young Inv. Co., 182 P.2d 1011, 1016, 64 Nev. 312.

3. Mont.—State ex rel. DuFresne v. Leslie, 50 P.2d 959, 963, 100 Mont. 449, 101 A.L.R. 1329.

4. Ill.—People v. Nelson, 96 N.E. 1071, 1072, 252 Ill. 514, 49 C.J. p 1238 note 4.

5. Mont.—State ex rel. DuFresne v. Leslie, 50 P.2d 959, 963, 100 Mont. 449, 101 A.L.R. 1329.

Nev.—Reno Club v. Young Inv. Co., 182 P.2d 1011, 1016, 64 Nev. 312. N.J.—Bisham v. Tucker, 2 N.J.Law 253, 254.

6. Mont.—State ex rel. DuFresne v. Leslie, 50 P.2d 959, 963, 100 Mont. 449, 101 A.L.R. 1329.

7. Nev.—Reno Club v. Young Inv. Co., 182 P.2d 1011, 1016, 64 Nev. 312.

8. Mont.—State ex rel. DuFresne v. Leslie, 50 P.2d 959, 963, 100 Mont. 449, 101 A.L.R. 1329.

Nev.—Reno Club v. Young Inv. Co., 182 P.2d 1011, 1016, 64 Nev. 312, 49 C.J. p 1238 note 5.

9. Cal.—Gartner v. Roth, 157 P.2d 361, 363, 26 Cal.2d 184.

10. U.S.—Hull Coal & Coke Co. v. Empire Coal & Coke Co., W.Va., 113 F. 256, 259, 51 C.C.A. 213.

11. New Standard D.

12. Va.—Fenton v. Davis, 47 S.E.2d 372, 376, 187 Va. 463.

13. Va.—Fenton v. Davis, supra.

14. Webster New Int.D.

15. Black L.D. 49 C.J. p 1120 note 55.

16. New Standard D.

#### Phrases

(1) "Fish pots" see Fish § 1.

(2) "Pot hunting" see 41 C.J.S. p 373 note 72.

**POTABLE.** As a noun, a drink;<sup>17</sup> something drinkable.<sup>18</sup> As an adjective, drinkable;<sup>19</sup> suitable for drink<sup>20</sup> or drinking.<sup>21</sup>

The term "potable" is employed in criminal statutes dealing with intoxicating liquors see Intoxicating Liquors § 217.

**POTATO.** One of the edible farinaceous tubers of a plant of the family Solanaceæ, usually roundish or oblong, with a whitish interior and a darker-colored skin.<sup>22</sup>

**POTENTIA.** As the first word of maxims as to which there have been no recent applications see 49 C.J. p 1238 notes 22-24, p 1239 note 53.

**POTENTIAL.** As a noun, the word "potential" is defined as meaning anything that may be possible.<sup>23</sup>

As an electrical term the word "potential" is defined in Electricity § 1 as the pressure by which electricity is caused to pass along a conductor.

As an adjective the word "potential" is defined as meaning efficacious;<sup>24</sup> endowed with energy adequate to a result;<sup>25</sup> existing in possibility,<sup>26</sup> not in actuality;<sup>27</sup> having latent power;<sup>28</sup> latent;<sup>29</sup> possible as opposed to actual.<sup>30</sup>

"Potential" has been distinguished from "actual" see 1 C.J.S. p 1433 note 51.

**POTENTIALLY.** In possibility; not in act; not positively; in efficacy; not in actuality.<sup>31</sup> "Poten-

tially" has been distinguished from "actually" see 1 C.J.S. p 1445 note 46.

**POTERIT; POTESE; POTESEAS.** As the first words of maxims as to which there have been no recent applications see 49 C.J. p 1239 notes 54-58, 61.

**POTESTATIVE CONDITION.** See 15 C.J.S. p 812 note 82.

**POTION.** Draught, used as a liquid, medicine, or dose.<sup>32</sup>

**POTIOR; POTIUS.** As the first words of maxims as to which there have been no recent applications see 49 C.J. p 1239 note 65-p 1240 note 67.

**POTT.** Percivall Pott, English surgeon, born in London January 6, 1714. A particular form of fracture of the ankle which he sustained through a fall from his horse in 1756 is still described as "Pott's fracture," and a spinal affection of which he gave an excellent clinical description is still known as "Pott's disease."<sup>33</sup>

**POTTERY.** A term applied to wares, of various designs and uses, composed of a base of plastic clay given form by the manipulation of the potter and fixed in that form and glazed by firing in a furnace.<sup>34</sup>

**POULTRY.** A generic word,<sup>35</sup> meaning domestic

17. U.S.—National Popsicle Corporation v. Brookfield Ice Cream Corporation, D.C.N.Y., 60 F.2d 1000. Mo.—State v. Mairs, App., 272 S.W. 992, 995.

18. U.S.—National Popsicle Corporation v. Brookfield Ice Cream Corporation, D.C.N.Y., 60 F.2d 1000, 1003.

Mo.—State v. Mairs, App., 272 S.W. 992, 995.

19. Tex.—Huddleston v. State, 280 S.W. 218, 103 Tex.Cr. 108. 49 C.J. p 1238 note 15.

Potable preparation is a drinkable preparation or a preparation usable as a beverage.—Huddleston v. State, supra.

Jamaica ginger as potable beverage Mo.—State v. Mairs, App., 272 S.W. 992, 995.

Tex.—Davis v. State, 292 S.W. 1109, 1111, 106 Tex.Cr. 425.

20. U.S.—National Popsicle Corporation v. Brookfield Ice Cream Corporation, D.C.N.Y., 60 F.2d 1000, 1003.

21. Mo.—State v. Mairs, App., 272 S.W. 992, 995.

22. New Standard D.

#### Phrases

(1) "Potato hole" see 40 C.J.S. p 409 note 95.

(2) "Potato starch" distinguished from "farina" see 35 C.J.S. p 746 note 45.

23. Tex.—Campbell v. J. E. Grant Co., 82 S.W. 794, 796, 36 Tex.Civ. App. 641.

24. Mich.—Dickey v. Waldo, 56 N.W. 608, 610, 97 Mich. 255, 23 L.R.A. 449.

#### Phrases

(1) "Potential existence" defined and distinguished from "actual existence" see 35 C.J.S. p 200 note 88. The doctrine of potential existence is discussed in 27 C.J.S. p 1310 notes 85, 86.

(2) "Potential jurisdiction" see Courts § 15 a.

25. Mich.—Dickey v. Waldo, 56 N.W. 608, 610, 97 Mich. 255, 23 L.R.A. 449.

26. Tex.—Campbell v. J. E. Grant Co., 82 S.W. 794, 796, 36 Tex.Civ. App. 641.

27. Okl.—Carter v. Rector, 210 P. 1035, 1037, 88 Okl. 12.

#### Similarly defined

"Existing in possibility, not in act."—Dickey v. Waldo, 56 N.W. 608, 610, 97 Mich. 255, 23 L.R.A. 449.

28. Mich.—Dickey v. Waldo, supra.

29. Okl.—Carter v. Rector, 210 P. 1035, 1037, 88 Okl. 12.

30. Okl.—Carter v. Rector, supra.

31. Neb.—New Lincoln Hotel Co. v. Shears, 78 N.W. 25, 28, 57 Neb. 478, 73 Am.S.R. 524, 43 L.R.A. 588. 49 C.J. p 1239 note 50.

32. Tex.—Runnels v. State, 77 S.W. 458, 460, 45 Tex.Cr. 446.

33. Encyclopaedia Britannica.

"Pott's disease" see 27 C.J.S. p 145 note 32.1.

"Pott's fracture" see 37 C.J.S. p 139 note 90.

34. N.J.—Trenton Potteries Co. v. Oliphant, 39 A. 923, 934, 56 N.J.Eq. 680. 49 C.J. p 1240 note 68.

35. Conn.—Wolcott v. Stickles, 82 A. 572, 573, 85 Conn. 322.

fowls reared for the table, or for their eggs or feathers, such as cocks and hens, capons, turkeys, ducks, and geese.<sup>36</sup> The term is sometimes applied to pigeons if reared for table consumption.<sup>37</sup>

"Poultry" has been distinguished from "chicken" see 14 C.J.S. p 1104 note 76.

Poultry as subject to tariff regulations is treated in Customs Duties § 38.

**POUND.** As a noun the word "pound" has various meanings, and in one sense it signifies a place of detention, and is defined as meaning an inclosed piece of land, secured by a firm structure of stone or of posts or timber placed in the ground.<sup>38</sup> In this sense the term is defined in Animals § 255.

The word "pound" also denotes a unit of weight and is defined in the C.J.S. title *Weights and Measures* § 1, also 49 C.J. p 1240 note 84; and the word is employed in this sense in the expression "pound pressure," the expression also being defined in *Weights and Measures* § 1, also 68 C.J. p 152 note 64 [d].

In a slightly different sense the word "pound" signifies a definite quantity of gold with a mark upon it to determine its weight and fineness;<sup>39</sup> and also a foreign gold coin, commonly denominated a "sovereign."<sup>40</sup> In this sense the word "pound" has been compared with "dollar" see 27 C.J.S. p 1316 note 91.

As a verb the word "pound" is defined as meaning to rise and fall heavily, as a ship in rough weather.<sup>41</sup>

**POUNDAGE.** Anciently, in English law, a duty im-

posed ad valorem at the rate of twelve pence per pound on all merchandise whatever, other than wine, imported and exported.<sup>42</sup>

In practice, the amount allowed to the sheriff or other officer for commissions on the money made by virtue of an execution.<sup>43</sup>

**POUND BREACH.** Defined see Animals § 268.

**POUNDKEEPER.** See Animals §§ 262-266.

**POUR APPUYER.** A French phrase meaning for the support of, or in support of.<sup>44</sup>

**POUR AUTRE VIE or PUR AUTRE VIE.** See Estates § 31.

**POURPRESTURE or PURPRESTURE.** The word "purpresture," or more properly speaking "pourpresture,"<sup>45</sup> is derived from the French word "pourpris"<sup>46</sup> or "pourprise."<sup>47</sup> It was defined by the common law and it has been recognized in American jurisdictions.<sup>48</sup>

A purpresture is an invasion of the right of property in the soil while the same remains in the king or sovereign.<sup>49</sup> It exists when anything is unjustly encroached upon against the king or the sovereign, as in the royal demesnes or in obstructing public ways or in turning public waters from their right course, or when anyone has built an edifice in the city on the king's street.<sup>50</sup> As stated by the common law writers a purpresture exists "when one encroacheth and makes that serviceable to himself which belongs to many," and "when there is a house builded or an inclosure made of any part of the

36. Neb.—Bartels v. State, 136 N. W. 717, 718, 91 Neb. 575.  
49 C.J. p 1240 note 76.

"Confinement" method of raising poultry see 15 C.J.S. p 824 note 32.1.

"Poultry raising" has been distinguished from "stock raising."—Krobitzsch v. Industrial Acc. Commn., 185 P. 396, 398, 181 Cal. 541.

37. Mo.—State v. Willers, App., 130 S.W.2d 256, 257.  
49 C.J. p 1240 note 76 [d].

38. Mass.—Wooley v. Groton, 2 Cush. 305, 308.  
49 C.J. p 1240 note 78.

39. Pa.—Borie v. Trott, 5 Phila. 366, 403, 404.  
49 C.J. p 1240 note 85.

40. N.Y.—Curtis v. Leavitt, 17 Barb. 309, 324.  
49 C.J. p 1240 note 86.

41. Or.—Shaver Forwarding Co. v. Eagle Star Ins. Co., 139 P.2d 709, 711, 172 Or. 91.

42. D.C.—Washington v. Barnes, 6 D.C. 230, 231.  
49 C.J. p 1240 note 87.

43. N.Y.—Bowe v. Campbell, 2 N.Y. Civ.Proc. 232, 234.

44. La.—Collins v. Collins, 193 So. 702, 703, 194 La. 446.

**Pour appuyer nouvelle demande**  
A French phrase which, when translated literally, means in support of his new action.—Collins v. Collins, supra.

45. Fla.—Williams v. Guthrie, 137 So. 682, 685, 102 Fla. 1047.  
Vt.—City of Montpelier v. McMahon, 81 A. 977, 979, 85 Vt. 275.

46. Ga.—Mayor and Council of the City of Columbus v. Jaques, 30 Ga. 506, 512.

47. N.H.—State v. Kean, 45 A. 256, 69 N.H. 122, 48 L.R.A. 102.

48. Ga.—Southeastern Pipe Line Co. v. Garrett ex rel. Le Sueur, 16 S. E.2d 753, 760, 192 Ga. 817.

**Early common-law writers**  
"In the definition of a 'purpres-

ture,' Glanville is substantially followed by both Coke and Blackstone, and neither of them is more clear, or more exact than is the author of our earliest treatise upon the common law."—City of Montpelier v. McMahon, 81 A. 977, 979, 85 Vt. 275.

49. Fla.—Williams v. Guthrie, 137 So. 682, 685, 102 Fla. 1047.

**An offense at common law**  
Wyo.—U. S. v. Douglas-Willan Sartoris Co., 22 P. 92, 94, 3 Wyo. 287.

50. Fla.—Williams v. Guthrie, 137 So. 682, 685, 102 Fla. 1047.  
Vt.—City of Montpelier v. McMahon, 81 A. 977, 979, 85 Vt. 275.

**Similarly stated**  
Where there is a house erected or an inclosure made upon any part of the king's demesnes or of a highway or common street or public water or such like public things it is properly called a purpresture.—State v. Kean, 45 A. 256, 69 N.H. 122, 48 L.R.A. 102.

King's demesne, or of a highway, or a common street, or public water, or such like things."<sup>51</sup>

A purpresture may be a nuisance, as stated in Nuisances § 66.

**POURPRIS or POURPRISE.** A French word<sup>52</sup> signifying a close<sup>53</sup> or inclosure.<sup>54</sup>

**POVERTY.** The quality or state of being poor or indigent; want or scarcity of means or sustenance; indigence; need.<sup>55</sup> "Poverty" is not synonymous with "immorality" see 42 C.J.S. p 396 note 75.1.

**POWDER.** A mass of fine particles of any substance;<sup>56</sup> fine, minute, loose, uncompact particles, such as result from pounding or grinding solid substance; dust.<sup>57</sup>

*Powdered.* Ornamented or marked with numerous spots or small figures; spangled; sprinkled or dressed with powder, as the hair; reduced to a powder; pulverized.<sup>58</sup> The word "powdered" would not properly be used to describe moist porous cylindrically formed apple chop products.<sup>59</sup>

**POWER.** Generally speaking, "power" means abil-

ity, whether physical, mental, or moral, to act;<sup>60</sup> the ability to act, regarded as latent or inherent;<sup>61</sup> an ability to do;<sup>62</sup> the faculty of doing or performing something;<sup>63</sup> the right, ability, or faculty of doing something;<sup>64</sup> capacity for action or performance<sup>65</sup> or for receiving external action or force;<sup>66</sup> the capacity to be acted on in some particular manner;<sup>67</sup> capability of producing or undergoing an effect, whether physical, mental or moral.<sup>68</sup>

The word "power" is further defined as meaning a right or authority by which one person is enabled and permitted to perform some act for another.<sup>69</sup> In this sense the word is defined in Powers § 1 as a liberty or authority reserved by, or limited to, a person to dispose of real or personal property for his own benefit, or for the benefit of others, and operating on an estate or interest, vested either in himself or some other person, the liberty or authority, however, not being derived out of such estate or interest, but overreaching or superseding it, either wholly or partially.

As generally understood, the word "power" implies responsibility,<sup>70</sup> and it has been said that it is idle to attempt to draw distinctions between pro-

51. Ga.—Southeastern Pipe Line Co. v. Garrett ex rel. Le Sueur, 16 S.E. 2d 753, 760, 192 Ga. 817—Mayor and Council of the City of Columbus v. Jaques, 30 Ga. 506, 512.

#### Similarly expressed

"Where one encroacheth, or maketh several to himself that which ought to be common to many."—State v. Kean, 45 A. 256, 69 N.H. 122, 48 L.R.A. 102.

52. Ga.—Mayor and Council of the City of Columbus, 30 Ga. 506, 512. N.H.—State v. Kean, 45 A. 256, 69 N.H. 122, 48 A.L.R. 102.

53. N.H.—State v. Kean, supra.

54. Ga.—Mayor and Council of the City of Columbus, 30 Ga. 506, 512. N.H.—State v. Kean, 45 A. 256, 69 N.H. 122, 48 L.R.A. 102.

55. Webster New Int.D.

49 C.J. p 1241 note 1.

"Poverty affidavit" see Costs § 151.

56. Ky.—Blankenship v. Commonwealth, 66 S.W. 994, 995, 23 Ky.L. 1995.

57. U.S.—Chas. H. Lilly Co. v. Louko, C.C.A.Wash., 119 F.2d 882, 883.

#### Powder puff

(1) The term "powder puff" has been applied to an article made by sewing a bunch of swan's down to a circular piece of silk or cotton cloth and affixing to that a small handle, and being like a brush in construction and use.—U. S. v. George Borgfeldt & Co., C.C.Md., 153 F. 480, 481, 482.

(2) The term has been applied to other articles, such as a small bit of down sewed to a cotton cloth, made into a puff shape by being stuffed with a little excelsior and covered with a small bit of satin; and also an article consisting of two discs of a woolen fabric having one fuzzy and one plain surface, and sewed together with the plain surfaces back to back so as to present the fuzzy surfaces on both the outsides of the discs.—U. S. v. George Borgfeldt & Co., supra.

#### Toilet powder

A fine powder, usually with soothing or antiseptic ingredients, used to sprinkle or rub over the skin of the body, as after bathing, usually distinguished from powder used as a cosmetic for the face.—U. S. v. Thomas & Pierson, 18 C.C.P.A. (Customs) 142, 145.

#### Washing powder

A compound in the form of a powder used for washing; and, also, any soap, suitable for washing, in the form of powder.—Falkinburg v. Lucy, 35 Cal. 52, 67, 95 Am.D. 76.

58. Webster New Int.D.

59. U.S.—Chas. H. Lilly Co. v. Louko, C.C.A.Wash., 119 F.2d 882, 883.

#### Powdered foil

Foil which has been reduced to a powder, rather than foil which has been powdered with any substance.—Grauert v. U. S., 15 Cust.App. 271, 274.

#### Powdered tin

Tin which has been reduced to a powder.—Grauert v. U. S., supra.

60. U.S.—Chrysler Corporation v. Trott, Cust. & Pat.App., 83 F.2d 302, 309.

61. Ga.—Bradley v. State, 36 S.E. 630, 631, 111 Ga. 168, 78 Am.S.R. 157, 50 L.R.A. 691.

62. R.I.—Remington v. Peckham, 10 R.I. 550, 553.

63. U.S.—Chrysler Corporation v. Trott, Cust. & Pat.App., 83 F.2d 302, 309.

Ga.—Bradley v. State, 36 S.E. 630, 631, 111 Ga. 168, 78 Am.S.R. 157, 50 L.R.A. 691.

64. U.S.—Clifford v. Helvering, C. C.A.3, 105 F.2d 586, 591.

65. U.S.—Chrysler Corporation v. Trott, Cust. & Pat.App., 83 F.2d 302, 309.

Ga.—Bradley v. State, 36 S.E. 630, 631, 111 Ga. 168, 78 Am.S.R. 157, 50 L.R.A. 691.

66. U.S.—Chrysler Corporation v. Trott, Cust. & Pat.App., 83 F.2d 302, 309.

67. N.Y.—Freligh v. Saugerties, 24 N.Y.S. 182, 185, 70 Hun 589.

68. U.S.—Chrysler Corporation v. Trott, Cust. & Pat.App., 83 F.2d 302, 309.

69. Mo.—McCune's Estate v. Daniel, 76 S.W.2d 403, 406.

70. Puerto Rico.—Rosaly v. People, 16 Puerto Rico 481, 486.



fessing to possess a power and pretending to exercise that power.<sup>71</sup> "Power" has been held to be synonymous with "authority" see 7 C.J.S. p 1291 note 10.1, "jurisdiction" see 50 C.J.S. p 1091 note 44, and "right,"<sup>72</sup> and has been compared with or distinguished from "authority" see 7 C.J.S. p 1291 note 10.1, "capacity" see 12 C.J.S. p 1116 note 48.1, and "privilege."<sup>73</sup> "Powers" has been held synonymous with, and also distinguished from, "cognizance," see 14 C.J.S. p 1310 note 3.

The word "power" and the plural form "powers" are treated in various connections throughout this work. The power of a municipality is discussed in Municipal Corporations § 106. For reference to county powers and the powers of county officials see the index to the title Counties. The powers of officers and boards generally are treated in Officers §§ 102-109. For reference to corporate powers and the powers of corporate officials see the index to the title Corporations. For other particular applications and specific references consult the Descriptive-Word Index.

*In mechanics.* The word "power" is used with a mechanical signification, and power in this sense is an intangible thing.<sup>74</sup> It is any form of energy available for doing any kind of work, as steam-power, water-power; specifically, mechanical energy, as distinguished from work done by hand, as a machine run by power;<sup>75</sup> energy developed by machinery;<sup>76</sup> capacity;<sup>77</sup> capacity for operating, as the power of an engine governor;<sup>78</sup> force;<sup>79</sup> applied force, as the power applied at one end of a lever to

overcome a "resistance" at the other end;<sup>80</sup> capability of performing mechanical work, as measured by the rate at which it is or can be done.<sup>81</sup> "Power" also is the rate at which mechanical energy is exerted or mechanical work performed, as by an engine or other machine, or an animal.<sup>82</sup> In this sense "power" has been compared with, or distinguished from, "engine" see 30 C.J.S. p 250 note 4.

*Implied powers.* An implied power is sired by,<sup>83</sup> or rests on,<sup>84</sup> necessity. It comes from,<sup>85</sup> and finds justification in,<sup>86</sup> an express power. It may not exist until an express power has been created from which it may spring.<sup>87</sup> An implied power functions as an essential aid in the fulfillment of the purpose to which its parent power is directed.<sup>88</sup> It must be not merely convenient, but necessary to the exercise of the power expressly conferred,<sup>89</sup> and the strength it gains from necessity must be sufficient to withstand all attacks of doubt, and, needless to say, it cannot operate in fields proscribed by organic law.<sup>90</sup>

The implied powers of an officer are treated generally in Officers § 102. The power to dispose of real or personal property may arise by implication, and when such is the case the power is denominated an "implied power" and such powers are treated in Powers § 10.

*Sovereign power.* Power without limitation.<sup>91</sup> The term has been applied to the people of the state in their sovereign capacity, acting through their representatives, the legislature.<sup>92</sup> In all govern-

71. Mich.—People v. Elmer, 67 N.W. 550, 551, 109 Mich. 493.

72. Wyo.—State v. Natrona County Eighth Judicial Dist. Ct., 238 P. 545, 548, 33 Wyo. 281. 49 C.J. p 1242 note 18.

73. Minn.—International Trust Co. v. American Loan & Trust Co., 65 N.W. 78, 79, 62 Minn. 501. 50 C.J. p 400 note 24 [a].

74. U.S.—Chrysler Corporation v. Trott, Cust. & Pat.App., 83 F.2d 302, 309.

75. U.S.—Chrysler Corporation v. Trott, supra.

76. Kan.—Fox v. Victory Ice Co., 284 P. 382, 383, 129 Kan. 778. 49 C.J. p 1242 note 20.

77. U.S.—Chrysler Corporation v. Trott, Cust. & Pat.App., 83 F.2d 302, 309, 311.

78. U.S.—Chrysler Corporation v. Trott, supra.

79. R.I.—Slatersville Finishing Co. v. Greene, 101 A. 226, 40 R.I. 410, 229 L.R.A.1917F 585.

80. U.S.—Chrysler Corporation v.

Trott, Cust. & Pat.App., 83 F.2d 302, 309, 311.

81. U.S.—Chrysler Corporation v. Trott, supra.

82. U.S.—Chrysler Corporation v. Trott, supra.

#### Measurement of power

The units most commonly used are the horse power and the watt. The power of a direct electric current is the product of the voltage and current. The true power of an alternating current is the product of voltage, current, and power factor. The apparent power (volt amperes) of an alternating current is the product of voltage and current.—Chrysler Corporation v. Trott, supra.

83. S.D.—South Dakota Employers Protective Ass'n v. Poage, 272 N.W. 806, 809, 65 S.D. 198.

84. S.D.—Chittenden v. Jarvis, 297 N.W. 787, 789, 68 S.D. 5.

85. S.D.—South Dakota Employers Protective Ass'n v. Poage, 272 N.W. 806, 809, 65 S.D. 198.

86. S.D.—Chittenden v. Jarvis, 297 N.W. 787, 789, 68 S.D. 5.

87. S.D.—South Dakota Employers Protective Ass'n v. Poage, 272 N.W. 806, 809, 65 S.D. 198.

88. S.D.—Chittenden v. Jarvis, 297 N.W. 787, 789, 68 S.D. 5.—South Dakota Employers Protective Ass'n v. Poage, 272 N.W. 806, 809, 65 S.D. 198.

89. N.Y.—Anderson v. Taconic State Park Commission, 25 N.Y.S. 2d 473, 175 Misc. 942.

#### Similarly expressed

An implied power must be necessary, not merely convenient.—People ex rel. City of Olean v. Western New York & Pennsylvania Traction Co., 108 N.E. 847, 848, 214 N.Y. 526.

90. S.D.—South Dakota Employers Protective Ass'n v. Poage, 272 N.W. 806, 809, 65 S.D. 198.

91. Ky.—Doe v. Buford, 1 Dana 481, 500.

92. Me.—Kennebec Water Dist. v. Waterville, 52 A. 774, 778, 96 Me. 234.

58 C.J. p 812 note 97.

ments of constitutional limitations, sovereign power manifests itself in but three ways: By exercising the right of taxation; the right of eminent domain; and through its police power.<sup>93</sup>

*Other phrases* employing the words "power" and "powers" are set out in the note,<sup>94</sup> and for addi-

tional phrases as to which more recent adjudications have not been found see 49 C.J. p 1242 note 22-p 1243 note 42.

**POWERBOAT.** A boat which is propelled by power other than man power.<sup>95</sup>

93. Wyo.—U. S. v. Douglas-Willan Sartoris Co., 22 P. 92, 96, 3 Wyo. 287.

#### 94. Phrases

(1) "Power coupled with interest" defined see Powers § 8; and for other references consult index to title Agency.

(2) "Power dam" see 25 C.J.S. p 441 note 86.1.

(3) "Power of attorney" defined see Agency § 27 a; and for other references consult index to that title.

(4) "Power of self-control" not synonymous with "malice" see 54 C.J.S. p 927 note 66.

(5) "Power to borrow" see 11 C.J.S. p 527 note 50.

(6) "Power to sell" distinguished from "investment" see 48 C.J.S. p 762 note 6.

(7) "Quasi private power."—Everly v. Adams, 147 P. 1134, 1135, 95 Kan. 305, L.R.A.1915E 448.

(8) "Resulting powers" see Constitutional Law § 68 b.

(9) "Usurpation of power" dis-

tinguished from "error in judgment" see 30 C.J.S. p 1138 note 25.

95. U.S.—U. S. v. Olson, D.C.Ky., 41 F.Supp. 433, 434.

#### Engine not operating

A gasoline engine launch or any large powerboat with engine permanently attached does not cease to be a powerboat when the engine is turned off. It would probably still be considered as a powerboat even if the engine had run out of gasoline and could not be operated without putting an additional supply obtained from a reserve container into the tank. U. S. v. Olson, *supra*.

## POWERS

This Title includes authority reserved by or limited to one or more persons to dispose of property or an estate therein vested in another or others; operation, execution, revocation, and extinguishment of the powers reserved or granted; rights and liabilities of donors or grantors, donees or grantees, and appointees or other beneficiaries of such powers in general; and remedies relating thereto.

*Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index*

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- III. MODIFICATION OR REVOCATION, AND SUSPENSION, §§ 13-15**
- IV. DURATION AND TERMINATION, §§ 16-19**
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**I. IN GENERAL**
**§ 1. Definition and Nature in General**

A power is an authority whereby a person is empowered to dispose of property for his own benefit or for the benefit of others, and operating on an estate or interest vested either in himself or another, such authority not being derived out of such estate or interest.

A "power", in the sense in which the term is used with respect to property, in contradistinction to its general or unrestricted meaning, is defined under

the common law, and under statutes substantially embodying the common-law definition, as a liberty or authority reserved by, or limited to, a person to dispose of real or personal property for his own benefit, or for the benefit of others,<sup>1</sup> and operating on an estate or interest, vested either in himself or some other person, the liberty or authority, however, not being derived out of such estate or interest, but overreaching or superseding it, either

1. U.S.—Henderson v. Rogan, C.C. A.Cal., 159 F.2d 855, 857, certio-

rari denied 67 S.Ct. 1534, 331 U.S. 843, 91 L.Ed. 1864.

wholly or partially.<sup>2</sup> A power is not property<sup>3</sup> or a property right<sup>4</sup> or interest;<sup>5</sup> nor is it an estate;<sup>6</sup> it is a personal privilege<sup>7</sup> or capacity,<sup>8</sup> a mere authority,<sup>9</sup> akin to an agency<sup>10</sup> of limited scope or power,<sup>11</sup> under which the donee acts for the donor.<sup>12</sup> It is not technically a form of ownership;<sup>13</sup> nor, as discussed *infra* § 31, does it of itself imply ownership; but it is clearly a right affecting ownership.<sup>14</sup>

*Distinguished from trust.* While a power is of the nature of a trust in that, if exercised, it must substantially carry out the donor's directions,<sup>15</sup> except where it is a power in trust, as discussed *infra*

§ 6, it is not imperative,<sup>16</sup> and therein differs from a trust which is always imperative.<sup>17</sup> A power may coexist with a trust, where they are not inconsistent.<sup>18</sup>

*Distinguished from "common-law authority."* A "power," strictly defined, is to be distinguished from a mere common-law authority, such as a power to sell, which is equivalent to the designation of a person to take the property;<sup>19</sup> but the courts have commonly used the term "power" to include such authorities, and it will be so used in this title.

*Distinguished from will.* The distinction between a will and a power of appointment has been said to

2. U.S.—*Corpus Juris* cited in *Mississippi Valley Trust Co. v. Commissioner of Internal Revenue*, C. C.A.8, 72 F.2d 197, 201.

Hawaii.—*Victoria Ward, Limited, v. Zion Securities Corporation*, 36 Hawaii 614, 630.

Ill.—*Boyle v. John M. Smyth Co.*, 248 Ill.App. 57, 84.

Md.—*Pope v. Safe Deposit & Trust Co.*, 161 A. 404, 406, 163 Md. 239.

Mo.—*Corpus Juris* cited in *Strauss v. J. C. Nichols Land Co.*, 37 S.W. 2d 505, 508, 327 Mo. 205.

N.J.—*Burlington County Trust Co. v. Di Castelcicala*, 66 A.2d 164, 168, 2 N.J. 214—*Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Kelly*, 34 A.2d 538, 134 N.J.Eq. 120.

Ohio.—*Bowerman v. Bowerman*, 35 N.E.2d 1012, 1014, 67 Ohio App. 425.

49 C.J. p 1248 notes 2, 3.

#### Other definitions

(1) An authority to do an act in relation to real property, or to the creation or revocation of an estate therein, or a charge thereon, which the owner, granting or reserving the power, might himself lawfully perform. In re *Clark*, 80 N.Y.S.2d 1, 5, 274 App.Div. 49—49 C.J. p 1248 note 3 [b] (1).

(2) An authority to do any act which the grantor might himself lawfully perform.—In re *Morrison's Estate*, 18 N.Y.S.2d 235, 241, 173 Misc. 503.

#### Power of appointment

(1) A delegation by the donor in the disposition of his property to the donee.—In re *Elston's Estate*, 90 P.2d 608, 613, 32 Cal.App.2d 652.

(2) An authority to do an act which the owner granting the power might himself lawfully perform. N.Y.—In re *Merseles' Will*, 292 N.Y. S. 276, 279, 161 Misc. 454.

Wash.—In re *Lidston's Estate*, 202 P.2d 259, 262, 265, 32 Wash. 2d 408.

(3) A power or authority given to

a person to dispose of property or an interest therein which is vested in a person other than donee of the power.—In re *Lidston's Estate*, *supra*.

(4) A power of disposition given a person over property not his own, by some one who directs the mode in which that power shall be exercised by a particular instrument.

N.Y.—In re *Burling's Estate*, 266 N.Y.S. 482, 148 Misc. 835.

Wash.—*Corpus Juris* cited in In re *Lidston's Estate*, 202 P.2d 259, 265, 32 Wash.2d 408.

49 C.J. p 1248 note 2 [b] (2).

"Power of revocation" is the reservation of a power in the grantor to put an end to the estate granted.—*Clifford v. Helvering*, C.C.A.8, 105 F.2d 586, reversed on other grounds *Helvering v. Clifford*, 60 S.Ct. 554, 309 U.S. 331, 84 L.Ed. 788, mandate conformed to, C.C.A., *Clifford v. Helvering*, 111 F.2d 896.

3. Ga.—*Keen v. Rodgers*, 47 S.E.2d 567, 203 Ga. 578—*Bienvenu v. First Nat. Bank of Atlanta*, 17 S. E.2d 257, 193 Ga. 101.

N.J.—In re *Winter's Estate*, 47 A.2d 548, 24 N.J.Misc. 172.

49 C.J. p 1248 note 4.

Interest of donee or grantee generally see *infra* § 31.

4. U.S.—*Clifford v. Helvering*, C.C. A.8, 105 F.2d 586, reversed on other grounds *Helvering v. Clifford*, 60 S.Ct. 554, 308 U.S. 331, 84 L.Ed. 788, mandate conformed to, C.C.A., *Clifford v. Helvering*, 111 F.2d 896.

Del.—*Equitable Trust Co. v. Union Nat. Bank*, 18 A.2d 228, 25 Del.Ch. 281.

Mass.—*Warren v. Sears*, 22 N.E.2d 406, 303 Mass. 578, 127 A.L.R. 595.

5. N.Y.—In re *Bradford's Will*, 288 N.Y.S. 153, 159 Misc. 482.

6. Cal.—*Corpus Juris* cited in *Riley v. Gordon*, 30 P.2d 617, 619, 137 Cal.App. 311.

Del.—*Corpus Juris* cited in *Equita-*

ble *Trust Co. v. Union Nat. Bank*, 18 A.2d 228, 230, 25 Del.Ch. 281.

Ky.—*Harlow v. Riley's Ex'r*, 138 S. W.2d 946, 282 Ky. 437.

Md.—*Pope v. Safe Deposit & Trust Co.*, 161 A. 404, 163 Md. 239.

49 C.J. p 1248 note 5.

7. Mass.—*Warren v. Sears*, 22 N.E. 2d 406, 303 Mass. 578, 127 A.L.R. 595.

8. Del.—*Equitable Trust Co. v. Union Nat. Bank*, 18 A.2d 228, 230, 25 Del.Ch. 281.

9. Ga.—*Keen v. Rodgers*, 47 S.E.2d 567, 203 Ga. 578—*Bienvenu v. First Nat. Bank of Atlanta*, 17 S. E.2d 257, 193 Ga. 101.

10. Ky.—*Roby v. Arterburn*, 108 S. W.2d 873, 269 Ky. 816.

11. N.Y.—In re *Bradford's Will*, 288 N.Y.S. 153, 159 Misc. 482.

N.C.—*American Trust Co. v. Williamson*, 46 S.E.2d 104, 228 N.C. 458.

12. Ill.—*Kane v. Schofield*, 76 N.E. 2d 216, 332 Ill.App. 505.

13. Cal.—In re *Elston's Estate*, 90 P.2d 608, 32 Cal.App.2d 652.

N.H.—*Lord v. Roberts*, 153 A. 1, 84 N.H. 517.

14. N.H.—*Lord v. Roberts*, 153 A. 1, 84 N.H. 517.

15. Ky.—*Chenoweth v. Bullitt*, 6 S. W.2d 1061, 224 Ky. 698.

16. U.S.—*Taylor v. Benham*, Ala., 5 How. 233, 12 L.Ed. 130.

Del.—*Corpus Juris* cited in *Equitable Trust Co. v. Union Nat. Bank*, 18 A.2d 228, 230, 25 Del.Ch. 281.

N.C.—*Henderson v. Western Carolina Power Co.*, 157 S.E. 425, 200 N.C. 443, 80 A.L.R. 497.

49 C.J. p 1248 note 8.

17. Tenn.—*Law Guarantee, etc., Co. v. Jones*, 58 S.W. 219, 103 Tenn. 245.

49 C.J. p 1249 note 10.

18. N.Y.—*Belmont v. O'Brien*, 12 N. Y. 394.

19. N.C.—*Rodgers v. Wallace*, 50 N. C. 181.

49 C.J. p 1249 note 12.

be that a will concerns the estate of the testator, while an appointment under a power concerns that of the donor of the power.<sup>20</sup>

**Legality under common law and statute.** Under the common law of England<sup>21</sup> and where such common law obtains in this country,<sup>22</sup> powers are legal; but their validity may be affected or limited by statute.<sup>23</sup> Where such is the intent of the legislature, statutes relating to powers may constitute a complete and exclusive code governing powers.<sup>24</sup>

## § 2. What Property May Be Subject of Powers

Generally speaking, both real and personal property may be the subject of powers.

Although, as discussed supra § 1, the term is sometimes defined with respect to real estate only, both real and personal property may be the subject of powers,<sup>25</sup> and in numerous cases powers over personalty have been considered without reference to the character of the property.<sup>26</sup> Moreover, statutes which in terms are applicable only to powers affecting real estate have been held to apply also to those concerning personalty.<sup>27</sup>

## § 3. Purposes for Which Powers May Be Created

In the absence of statute providing otherwise, powers may ordinarily be created to do anything which the donor himself might lawfully do.

Generally speaking, in the absence of any statute otherwise providing, powers or authorities may be created to do any act which the donor himself might lawfully perform;<sup>28</sup> and a power to do an unlawful act is void.<sup>29</sup> Power may be given to one of several grantees in a deed to annul the use therein named and create others,<sup>30</sup> and in such case the other grantees take title subject to the exercise of the power.<sup>31</sup>

Powers most commonly created are those to appoint, as discussed infra § 24, to sell or exchange, infra § 25, to mortgage, infra § 26, and to lease, manage, control, or the like, infra §§ 27-29.

## § 4. Who May Create Powers

A power can ordinarily be created only by a person competent to do the act which he assumes to authorize.

The grantor or donor of a power can only be a person competent to do the act which he assumes to authorize.<sup>32</sup>

## § 5. To Whom Powers May Be Granted

Unless otherwise provided by statute, a power may be granted to any person, including one who is not capable of contracting or conveying; it may be lawfully granted to one having an interest in the property.

Except when otherwise provided by statute,<sup>33</sup> it is a general rule that any person may be the donee or grantee of a power, whether or not he is capable of contracting or conveying;<sup>34</sup> and so a power may be granted to a married woman,<sup>35</sup> or an infant,<sup>36</sup>

20. Mass.—Thompson v. Pew, 102 N.E. 122, 214 Mass. 520. Operation and effect of execution of power of appointment generally see infra § 50.

21. Cal.—In re Sloan's Estate, 46 P. 2d 1007, 7 Cal.App.2d 319.

22. Cal.—In re Elston's Estate, 90 P.2d 608, 32 Cal.App.2d 652—In re Davis' Estate, 56 P.2d 584, 13 Cal. App.2d 64—In re Sloan's Estate, 46 P.2d 1007, 7 Cal.App.2d 319.

**Repeal of statute by which pre-existing common-law right to make power of appointment was declared had no effect other than to revive the common-law rule.**—In re Sloan's Estate, supra.

23. U.S.—Tilden v. Green, 28 N.E. 880, 130 N.Y. 29, 27 Am.S.R. 487, 14 L.R.A. 33.

49 C.J. p 1249 note 13.

24. N.Y.—In re Moshring, 48 N.E. 818, 154 N.Y. 423—Manton v. Peoples Bank of Johnstown, 38 N.Y.S. 2d 484, affirmed 44 N.Y.S.2d 593, 266 App.Div. 1043, reversed on other grounds 55 N.E.2d 46, 292 N.Y. 317.

49 C.J. p 1249 note 13 [a].

25. Wis.—Cawker v. Dreutzer, 221 N.W. 401, 197 Wis. 98.

49 C.J. p 1249 note 15.

26. Ky.—Ford v. Ford, 2 Duv. 418.

49 C.J. p 1249 note 16.

27. N.Y.—In re Clark, 80 N.Y.S.2d 1, 274 App.Div. 49—In re Brenner's Estate, 7 N.Y.S.2d 932, 169 Misc. 412, affirmed In re Brenner's Will, 12 N.Y.S.2d 352, 256 App.Div. 1064—Osborn v. Bankers Trust Co., 5 N.Y.S.2d 211, 168 Misc. 392—People, by Van Schaick, v. New York Title & Mortgage Co., 270 N.Y.S. 473, 150 Misc. 488.

49 C.J. p 1249 note 17.

28. N.Y.—In re Kellogg, 80 N.E. 207, 187 N.Y. 355, 13 L.R.A., N.S., 388.

49 C.J. p 1249 note 18.

**Purpose for which express trust cannot be created**

An express trust for a purpose not within the statute enumerating the purposes for which an express trust may be created may be given effect as a power in trust providing the power is one which may lawfully be exercised.—Downing v. Marshall, 23 N.Y. 366, 80 Am.D. 290

—Kondolf v. Britton, 145 N.Y.S. 791, 160 App.Div. 381—In re Suffolk County Trust Co., 65 N.Y.S.2d 243.

29. N.Y.—In re Morrison's Estate, 18 N.Y.S.2d 235, 173 Misc. 503.

49 C.J. p 1249 note 19.

30. Iowa.—Hamilton v. Hamilton, 128 N.W. 380, 149 Iowa 321.

Ky.—Dumesnil v. Dumesnil, 18 S.W. 229, 92 Ky. 526, 13 Ky.Law 770.

49 C.J. p 1249 note 20.

31. Ky.—Dumesnil v. Dumesnil, supra.

32. Dak.—Wambole v. Foote, 2 N.W. 239, 2 Dak. 1.

49 C.J. p 1250 note 26.

33. N.Y.—Matter of Mayo, 136 N.Y. S. 1066, 76 Misc. 416.

49 C.J. p 1250 note 28.

34. Ky.—Dumesnil v. Dumesnil, 18 S.W. 229, 92 Ky. 526, 13 Ky.L. 770.

49 C.J. p 1250 note 29.

35. Wyo.—Corpus Juris cited in In re Smith's Estate, 97 P.2d 677, 680, 55 Wyo. 181.

49 C.J. p 1250 note 30.

36. Ohio.—Sheldon v. Newton, 3 Ohio St. 494.

or an insane person.<sup>37</sup> A common-law authority may be lawfully granted to one who has no legal or equitable interest in the property which is the subject of the authority;<sup>38</sup> but a power which is simply collateral cannot be conferred so as to raise a use, except by a conveyance to a third person operating either by transmutation of possession or as a deed at common law.<sup>39</sup> A power may be given to one having an interest in the property subject to the power,<sup>40</sup> although an attempt to give a power to the owner of a fee simple or entire interest is surplusage and of no effect.<sup>41</sup>

The grantor of property may reserve an authority to himself,<sup>42</sup> and, if he retains a life interest, may

reserve a power.<sup>43</sup>

The question who may execute the power, as distinguished from the question who may properly be made a grantee of the power, is discussed *infra* §§ 35, 36.

## § 6. Classification

Powers may be broadly classified as general or special, as beneficial or in trust, and as being discretionary or imperative.

Apart from different or additional definitions or distinctions to be found in statutes,<sup>44</sup> a power is said to be general when it is exercisable in favor of any person whom the donee may select,<sup>45</sup> and

37. Ill.—*Miller v. Brinton*, 128 N.E. 370, 294 Ill. 177.

38. Ga.—*Gurr v. Gurr*, 32 S.E.2d 507, 198 Ga. 493.

49 C.J. p 1250 note 33.

39. N.C.—*Smith v. Smith*, 46 N.C. 135, 59 Am.D. 581.

49 C.J. p 1250 note 35.

40. Cal.—*In re Elston's Estate*, 90 P.2d 608, 32 Cal.App.2d 652.

Ky.—*Roby v. Arterburn*, 108 S.W.2d 373, 269 Ky. 816.

49 C.J. p 1250 note 36.

### Estate for life

(1) An absolute power of disposal is not inconsistent with an estate for life only.

Ga.—*Keen v. Rodgers*, 47 S.E.2d 567, 203 Ga. 578—*Bienvenu v. First Nat. Bank of Atlanta*, 17 S.E.2d 257, 193 Ga. 101.

Mo.—*St. Louis Union Trust Co. v. Clarke*, 178 S.W.2d 359, 352 Mo. 518.

(2) The gift of such power does not enlarge a life estate previously given, but confers an authority in addition thereto.—*Keen v. Rodgers*, 47 S.E.2d 567, 203 Ga. 578.

### Estate for years

A power of disposition may be coupled with an estate for years.—*St. Louis Union Trust Co. v. Clarke*, 178 S.W.2d 359, 352 Mo. 518.

41. Va.—*Browning v. Blue Grass Hardware Co., Inc.*, 149 S.E. 497, 153 Va. 20.

42. Ark.—*Griffith v. Maxfield*, 51 S.W. 822, 66 Ark. 513.

N.Y.—*Johnson v. Reeves*, 48 How. Pr. 505.

43. U.S.—*Equitable Trust Co. v. Paschall*, 115 A. 356, 13 Del.Ch. 87.

49 C.J. p 1250 note 39.

### 44. In New York

(1) It is provided by statute that a power is general where it authorizes the transfer or encumbrance of a fee by either a conveyance or a will of, or a charge on, the property

embraced in the power to any grantee whatever.—*West v. West*, 213 N.Y.S. 480, 215 App.Div. 285.

(2) Definitions and distinctions under earlier statutes see 49 C.J. p 1250 note 40 [a] (3).

45. U.S.—*Morgan v. Commissioner of Internal Revenue*, 60 S.Ct. 424, 309 U.S. 78, 84 L.Ed. 585—*Johnstone v. Commissioner of Internal Revenue*, C.C.A.9, 76 F.2d 55, certiorari denied 56 S.Ct. 89, 296 U.S. 578, 80 L.Ed. 408—*Leser v. Burnet*, C.C.A., 46 F.2d 756.

Del.—*McLaughlin v. Industrial Trust Co.*, 42 A.2d 12, 28 Del.Ch. 275.

D.C.—*Lee v. Commissioner of Internal Revenue*, 57 F.2d 399, 61 App.D.C. 33, certiorari denied *Lee v. Burnet*, 52 S.Ct. 645, 286 U.S. 563, 76 L.Ed. 1295.

Fla.—*Phipps v. Palm Beach Trust Co.*, 196 So. 299, 142 Fla. 782.

Ga.—*Corpus Juris* cited in *Jackson v. Franklin*, 177 S.E. 731, 734, 179 Ga. 840.

Ky.—*St. Matthews Bank v. De Charette*, 83 S.W.2d 471, 259 Ky. 802, 99 A.L.R. 1146, followed in *Godfroy v. De Charette*, 84 S.W.2d 66, 260 Ky. 147.

Me.—*Moore v. Emery*, 18 A.2d 781, 137 Me. 259.

Md.—*Lamkin v. Safe Deposit & Trust Co. of Baltimore*, 64 A.2d 704.

N.J.—*Marx v. Rice*, 65 A.2d 48, 1 N.J. 574—*Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Kelly*, 34 A.2d 538, 134 N.J.Eq. 120—*Brown v. Fidelity Union Trust Co.*, 9 A.2d 311, 321, 126 N.J.Eq. 406.

N.Y.—*Merrill v. Lynch*, 13 N.Y.S. 2d 514, 173 Misc. 39.

Ohio.—*Corpus Juris* quoted in *First-Central Trust Co. v. Clafin*, Com. Pl., 73 N.E.2d 388, 393.

Pa.—*Lyon v. Alexander*, 156 A. 84, 304 Pa. 288, 76 A.L.R. 1427.

Wash.—*Corpus Juris* cited in *In re Lidston's Estate*, 202 P.2d 259, 266, 32 Wash.2d 408.

49 C.J. p 1250 note 41.

### Other definitions

(1) A power of appointment is a "general power of appointment" when there is no limitation as to its exercise, except as to the manner, or any limitation as to the persons in whose favor it is to be exercised, or as to amounts to be given to such persons.—*Lamkin v. Safe Deposit & Trust Co. of Baltimore, Md.*, 64 A.2d 704, 707.

(2) A power of appointment is "general" if it is capable of being exercised by donee in favor of anyone including himself without restriction as to estate or interest appointed.

Md.—*O'Hara v. O'Hara*, 44 A.2d 813, 815, 185 Md. 321, 163 A.L.R. 1444.

Wash.—*In re Lidston's Estate*, 202 P.2d 259, 266, 32 Wash.2d 408.

### Necessity of power to vest fee simple

The right of a donee of a power of appointment to vest fee-simple estate in his appointee is not an essential attribute of a general power of appointment, but a general power of appointment exists if the donee has the right to appoint anyone he pleases.—*Fidelity-Philadelphia Trust Co. v. McCaughn*, C.C.A. Pa., 34 F.2d 600.

### Power to appoint to donee's own estate

A power of appointment is "general" only if donee of power may appoint to anyone, including his own estate or creditors, thus having as full dominion over property as if he owned it.—*Henderson v. Rogan*, C.C. A.Cal., 159 F.2d 855, certiorari denied 67 S.Ct. 1534, 331 U.S. 845, 91 L.Ed. 1864—*Vaughan v. Clauson*, D.C.Me., 54 F.Supp. 8, affirmed, C.C.A., 147 F.2d 84.

### Restricted method of exercise

(1) A power is regarded as "general" when it is not restricted by the donor to a particular object or beneficiary, although the method of exercising it may be restricted and limited to a testamentary paper. U.S.—*Leser v. Burnet*, C.C.A., 46 F.

special, limited, or particular when it is exercisable only in favor of persons or a class of persons designated or described in the instrument creating the power.<sup>46</sup>

In some jurisdictions, and in some instances under statutes so providing, a power, whether general or special, is classified as beneficial where no person other than the grantee has, by the terms of its creation, any interest in its execution;<sup>47</sup> and as in trust, where, being a general power, any person or class of persons other than the grantee is designated as entitled to the proceeds or any portion of them or any other benefits to result from its execution, or where, being a special power, either the authorized disposition or charge is limited to be made to a person or class of persons other than the grantee of the power, or any person or class of per-

sons other than such grantee is designated as entitled to any benefit from the disposition or charge authorized by the power.<sup>48</sup> Under such a classification, a power is not beneficial when by the terms of its creation other persons than the grantee have an interest in its execution,<sup>49</sup> or may in any contingency have such an interest.<sup>50</sup> Powers in trust are distinguishable from trusts, in that in the latter the trustee takes legal title to the property, which does not pass to a trustee of the power.<sup>51</sup>

*Discretionary or imperative powers.* A general power of appointment is never coupled with a duty to make the appointment,<sup>52</sup> but a special power may be either discretionary or it may be coupled with a duty.<sup>53</sup> A special power is discretionary where its exercise or nonexercise depends wholly on the volition of the grantee;<sup>54</sup> it is coupled with a trust

2d 756—*Blackburne v. Brown*, C.C. A.Pa., 43 F.2d 320—*Whitlock-Rose v. McCaughn*, D.C.Pa., 15 F.2d 591—*Lee v. Commissioner of Internal Revenue*, 57 F.2d 399, 61 App.D.C. 33, certiorari denied *Lee v. Burnet*, 52 S.Ct. 645, 286 U.S. 563, 76 L. Ed. 1295.

Md.—*Lamkin v. Safe Deposit Co. of Baltimore*, 64 A.2d 704.

(2) However, it has also been held that the power to appoint only by will is not a general power.—*Hooker v. Drayton*, 33 A.2d 206, 69 R.I. 290, 150 A.L.R. 723.

46. U.S.—*Morgan v. Commissioner of Internal Revenue*, 60 S.Ct. 424, 309 U.S. 78, 84 L.Ed. 585—*Johnstone v. Commissioner of Internal Revenue*, C.C.A.9, 76 F.2d 55.

Fla.—*Phipps v. Palm Beach Trust Co.*, 196 So. 299, 142 Fla. 782.

Ky.—*St. Matthews Bank v. De Charette*, 83 S.W.2d 471, 259 Ky. 802, 99 A.L.R. 1146, followed in *Godfrey v. De Charette*, 84 S.W. 2d 66, 260 Ky. 147.

N.H.—*Johnson v. Cushing*, 15 N.H. 298, 41 Am.D. 694.

N.J.—*Marx v. Rice*, 65 A.2d 48, 1 N.J. 574—*Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Kelly*, 34 A.2d 538, 134 N.J.Eq. 120—*Brown v. Fidelity Union Trust Co.*, 9 A.2d 311, 321, 126 N.J.Eq. 406.

N.Y.—In re *Davis*, 59 N.Y.S.2d 607, 186 Misc. 397—*Merrill v. Lynch*, 13 N.Y.S.2d 514, 173 Misc. 39.

Ohio.—*Corpus Juris* quoted in *First-Central Trust Co. v. Claffin*, Com. Pl., 73 N.E.2d 388, 393.

Pa.—*Lyon v. Alexander*, 156 A. 84, 304 Pa. 288, 76 A.L.R. 1427.

Wash.—*Corpus Juris* cited in *In re Lidston's Estate*, 202 P.2d 259, 266, 32 Wash.2d 408.

49 C.J. p 1250 note 42.

#### Other definitions

A power is "special" if its exer-

cise is restricted to particular persons or a particular class of persons, or if it can be exercised only for certain named purposes or under certain conditions.—In re *Lidston's Estate*, 202 P.2d 259, 266, 32 Wash. 2d 408.

#### "Exclusive" or "nonexclusive" special power

If a special power permits the donee to bar one or more members of the designated class from receiving a portion of the property it is "exclusive," but, if every member of the class is entitled to some portion, the power is "nonexclusive."—*Moore v. Emery*, 18 A.2d 781, 788, 137 Me. 259.

#### "Special" as signifying "express"

The terms "special power" or "specially empowered" are sometimes used, not in contradistinction to a general power, but as meaning a power specifically expressed or clearly and unequivocally manifested.

Ga.—*Corpus Juris* cited in *Regents of the University System v. Trust Company of Georgia*, 198 S.E. 345, 350, 186 Ga. 498.

Ky.—*Harrison v. Harbeson*, 9 Bush 397.

47. N.Y.—*Merrill v. Lynch*, 13 N.Y.S.2d 514, 173 Misc. 39.

49 C.J. p 1251 note 45.

Statutory provision incorporating rule stated in text is applicable to personalty as well as to realty.—In re *Brenner's Estate*, 7 N.Y.S.2d 932, 169 Misc. 412, affirmed in re *Brenner's Will*, 12 N.Y.S.2d 352, 256 App.Div. 1064.

A general beneficial power is analogous to ownership.

N.Y.—*Merrill v. Lynch*, 13 N.Y.S.2d 514, 173 Misc. 39.

Wis.—In re *Wadleigh's Estate*, 26 N.W.2d 667, 250 Wis. 284.

48. Ill.—*Wetmore v. Henry*, 102 N.E. 189, 259 Ill. 80, Ann.Cas.1914C 247.

49 C.J. p 1251 note 46.

49. N.Y.—*Coleman v. Beach*, 97 N.Y. 545.

50. N.Y.—*Wright v. Tallmadge*, 15 N.Y. 307.

51. N.Y.—*Train v. Davis*, 98 N.Y.S. 816, 49 Misc. 162—In re *Suffolk County Trust Co.*, 65 N.Y.S.2d 243.

49 C.J. p 1251 note 51.

52. N.Y.—*Merrill v. Lynch*, 13 N.Y.S.2d 514, 173 Misc. 39.

#### Reason for rule

A general power of appointment cannot be coupled with a trust, since it is inherent in the nature of a power coupled with a trust that the trust duty be enforceable by the potential appointees, and, if such potential appointees include the whole world, no one has a right to enforce the power, and the effective exercise or nonexercise of a general power depends solely on the will or caprice of the grantee.—*Merrill v. Lynch*, supra.

53. N.Y.—*Merrill v. Lynch*, supra.

#### Nature of "discretionary power"

A power is "discretionary" when it is not imperative or, if imperative, when the time, manner, or extent of execution is left to donee's discretion, a "discretionary power" being the power to do or to refrain from doing a certain thing.

Ala.—*Doe ex dem. Gosson v. Ladd*, 77 Ala. 223.

Tex.—*City of San Antonio v. Zogheib*, Civ.App., 70 S.W.2d 333, reversed on other grounds 101 S.W. 2d 539, 129 Tex. 141.

54. N.Y.—*Merrill v. Lynch*, 13 N.Y.S.2d 514, 173 Misc. 39.



duty where its exercise is obligatory on the grantee.<sup>55</sup> Powers in trust are imperative,<sup>56</sup> unless their execution or nonexecution is expressly made to depend on the will of the grantee.<sup>57</sup>

## § 7. — Powers Appendant or Appurtenant, in Gross, and Collateral

Powers appendant or appurtenant are those which depend strictly on an estate limited to the person to whom they are given; powers in gross are powers given to one to whom an interest in the property is limited or reserved by the instrument creating the power, which enable him to create such estates only as will not attach on his own interest, or will take effect only at the termination of his estate. A collateral power is a power given to one having no interest in the property, and to whom no interest therein is limited by the instrument creating the power.

Powers appendant or appurtenant are those which strictly depend on an estate limited to the person to whom they are given,<sup>58</sup> as where an estate for life is accompanied by a power to grant leases in possession,<sup>59</sup> or to convey or encumber the property;<sup>60</sup> or where an estate is limited to such uses as a designated person shall appoint, and in default of and until appointment, to him in fee;<sup>61</sup> or where property is mortgaged and a power of sale is given to the mortgagee.<sup>62</sup>

Powers in trust are discussed supra § 6.

*Powers in gross* are powers given to one whom an interest in the property subject to the power is limited or reserved by the instrument creating the power, which enable him to create such estates only as will not attach on his own interest, or will take

effect only at the termination of his estate,<sup>63</sup> as where land is granted or devised to a person for life with power to appoint the estate at his death.<sup>64</sup>

*Powers both appendant and in gross.* A power may, with respect to different estates in the property subject to it, have different aspects, so that, in respect of one estate, it is a power appendant, and in respect of another a power in gross.<sup>65</sup>

*Collateral or naked powers.* A power is simply collateral when given to one not having any interest in the property subject to the power, and to whom no interest therein is limited by the instrument creating the power.<sup>66</sup> Such a power is sometimes referred to as a "naked" power.<sup>67</sup>

## § 8. — Powers Coupled with Interest

A power coupled with an interest is a power accompanied by, or connected with, an interest in the property.

A power coupled with an interest, as distinguished from a collateral or naked power, as discussed supra § 7, is a power accompanied by, or connected with, an interest in the property subject to the power.<sup>68</sup> Accordingly, where a power is given in aid of the security for a debt, and the property which is the subject matter of the power is delivered or assigned with the power to the creditor as a part of the same transaction, the power is coupled with an interest.<sup>69</sup> The fact that the donee has an interest in that which is to be produced by the exercise of the power, however, does not render the power one coupled with an interest.<sup>70</sup>

55. N.Y.—Merrill v. Lynch, supra.

56. U.S.—Taylor v. Benham, Ala., 5 How. 233, 12 L.Ed. 130—Chew v. Hyman, C.C.M., 7 F. 7, 10 Biss. 240.

N.Y.—Tilden v. Green, 28 N.E. 880, 130 N.Y. 29, 27 Am.S.R. 487, 14 L.R.A. 33.

Va.—Daniel v. Brown, 159 S.E. 209, 156 Va. 563, 75 A.L.R. 1377.

A special power coupled with a trust belongs to the jurisdiction of equity and involves trust duties and obligations.—Merrill v. Lynch, 13 N.Y.S.2d 514, 173 Misc. 39.

57. N.Y.—Coleman v. Beach, 97 N. Y. 545.

58. N.Y.—Merrill v. Lynch, 13 N. Y.S.2d 514, 173 Misc. 39. 49 C.J. p 1251 note 52.

59. Mo.—Garland v. Smith, 64 S. W. 188, 164 Mo. 1. 49 C.J. p 1251 note 53.

60. Mo.—Garland v. Smith, 64 S.W. 188, 164 Mo. 1. 49 C.J. p 1251 note 54.

61. Md.—Brown v. Renshaw, 57 Md. 67.

49 C.J. p 1251 note 55.

62. N.C.—Well v. Davis, 84 S.E. 395, 168 N.C. 298.

49 C.J. p 1251 note 56.

63. Del.—Corpus Juris cited in McLaughlin v. Industrial Trust Co., 42 A.2d 12, 14, 28 Del.Ch. 275.

49 C.J. p 1251 note 57.

64. Del.—Corpus Juris cited in McLaughlin v. Industrial Trust Co., 42 A.2d 12, 14, 28 Del.Ch. 275.

49 C.J. p 1252 note 58.

65. Mo.—Garland v. Smith, 64 S.W. 188, 164 Mo. 1.

49 C.J. p 1252 note 61.

66. Ky.—Corpus Juris cited in Traugher v. King, 32 S.W.2d 8, 13, 235 Ky. 658.

N.Y.—Merrill v. Lynch, 13 N.Y.S.2d 514, 173 Misc. 39.

49 C.J. p 1252 note 62.

67. Ky.—Corpus Juris cited in

Traugher v. King, 32 S.W.2d 8, 13, 235 Ky. 658.

49 C.J. p 1252 note 63.

68. Md.—Literski v. Literski, 171 A. 874, 166 Md. 641.

N.J.—Corpus Juris cited in Hollingsworth v. Lederer, 4 A.2d 291, 296, 125 N.J.Eq. 193.

Ohio.—Corpus Juris quoted in Bowerman v. Bowerman, 35 N.E.2d 1012, 1014, 67 Ohio App. 425.

Or.—Marnon v. Vaughan Motor Co., 219 P.2d 163.

Tex.—Superior Oil Co. v. Stanolind Oil & Gas Co., Civ.App., 230 S.W. 2d 346.

49 C.J. p 1252 note 65.

69. N.Y.—Petrossi Bros. Contracting Corporation v. Town of Greece, 29 N.Y.S.2d 305.

70. Or.—Marnon v. Vaughan Motor Co., 219 P.2d 163.

Pa.—In re Corbin's Trust, Orph., 57 York Leg.Rec. 201.

Tex.—Superior Oil Co. v. Stanolind Oil & Gas Co., Civ.App., 230 S.W. 2d 346.

49 C.J. p 1253 note 66.

## II. CREATION AND VALIDITY

## § 9. Instruments Creating Powers

A power can be conferred only by an instrument executed with the same formalities as would be necessary for the disposition of the subject matter of the power.

A power to dispose of property can be conferred only by an instrument executed with the same formalities as would be necessary for the disposition of the subject matter of the power.<sup>71</sup> Accordingly, a deed<sup>72</sup> or will<sup>73</sup> is ordinarily requisite, or at least sufficient;<sup>74</sup> but a power may be created by an instrument not under seal if an unsealed instrument would be sufficient to do the act authorized.<sup>75</sup> It has been held that a provision in the charter of a benevolent society authorizing each member to dispose of certain funds creates a power.<sup>76</sup> The creation of a power of appointment amounts to a virtual offer to the donee of the estate or fund, which the donee may accept or reject at will.<sup>77</sup> If he declines or refuses to accept the power, it will be treated as absolutely null.<sup>78</sup>

71. N.Y.—Farmers' Loan & Trust Co. v. Winthrop, 144 N.E. 686, 238 N.Y. 477—Guokas v. Bishara, 57 N.Y.S.2d 588.  
49 C.J. p 1253 note 69.

72. Pa.—Equitable Gas Co. v. Smith, 13 Pa.Dist. & Co. 616.  
49 C.J. p 1253 note 70.

73. N.Y.—Cutting v. Cutting, 86 N.Y. 522.  
Ohio.—Boltz v. Riley, 18 Ohio Cir.Ct.N.S., 71, 34 Ohio Cir.Ct. 178.

74. Pa.—Equitable Gas Co. v. Smith, 13 Pa.Dist. & Co. 616.

75. Cal.—Dutton v. Warschauer, 21 Cal. 609, 82 Am.D. 765.  
49 C.J. p 1253 note 72.

76. Md.—Maryland Mut. Benev. Soc. I. O. R. M. v. Clendinen, 44 Md. 429, 22 Am.R. 52.

77. Ill.—Botzum v. Havana Nat. Bank, 12 N.E.2d 203, 367 Ill. 539.

78. Ala.—Hinson v. Williamson, 74 Ala. 180.

79. Ohio.—Corpus Juris quoted in Bowerman v. Bowerman, 35 N.E.2d 1012, 1014, 67 Ohio App. 425.  
Pa.—Equitable Gas Co. v. Smith, 13 Pa.Dist. & Co. 616.  
49 C.J. p 1253 note 76.

80. Ky.—England v. Davis, 116 S.W.2d 980, 273 Ky. 424.  
N.Y.—In re Clark, 80 N.Y.S.2d 1, 274 App.Div. 49.

Ohio.—Corpus Juris quoted in Bowerman v. Bowerman, 35 N.E.2d 1012, 1014, 67 Ohio App. 425.

Pa.—Equitable Gas Co. v. Smith, 13 Pa.Dist. & Co. 616.

Wash.—Corpus Juris cited in In re Lidston's Estate, 202 P.2d 259, 266, 32 Wash.2d 408.  
49 C.J. p 1253 note 77.

81. N.Y.—In re Brenner's Estate, 7 N.Y.S.2d 932, 169 Misc. 412, affirmed In re Brenner's Will, 12 N.Y.S.2d 352, 256 App.Div. 1064—In re Hilliard's Estate, 86 N.Y.S.2d 158—In re City Bank Farmers Trust Co., 69 N.Y.S.2d 235.

Ohio.—Corpus Juris quoted in Bowerman v. Bowerman, 35 N.E.2d 1012, 1014, 67 Ohio App. 425.

Pa.—In re McKallip's Estate, 188 A.343, 324 Pa. 438, 108 A.L.R. 1095—In re Selfert's Estate, Orph., 22 Leh.L.J. 425.

Wash.—Corpus Juris cited in In re Lidston's Estate, 202 P.2d 259, 266, 32 Wash.2d 408.  
49 C.J. p 1253 note 78.

82. Pa.—Beeson v. Breeding, 77 Pa. 156—Mewhinney v. Lowell, Com.Pl., 65 Montg.Co. 77.  
49 C.J. p 1254 note 79.

83. Tenn.—Law Guarantee, etc., Co. v. Jones, 58 S.W. 219, 103 Tenn. 245.  
49 C.J. p 1254 note 80.

Express power to revoke trust  
N.Y.—In re Goldowitz' Will, 259 N.Y.S. 900, 145 Misc. 300.

## § 10. Provisions Granting or Reserving Powers

No particular form of words is necessary to constitute a grant or reservation of a power; any words clearly indicating an intention to do so are sufficient.

Powers may be granted or reserved, whether by deed, will, or otherwise, either expressly<sup>79</sup> or by implication.<sup>80</sup> No particular form of words is necessary; any words, however informal, which clearly indicate an intention to give or reserve a power are sufficient for that purpose;<sup>81</sup> but a power is not created unless an intention to do so is expressed or clearly implied.<sup>82</sup> Accordingly, whether or not a power is expressly granted or reserved,<sup>83</sup> or is to be implied from the provisions of an instrument,<sup>84</sup> is a question of intention and construction, having in view the whole instrument.<sup>85</sup> It is indispensable, however, to the creation of a power that the property forming its subject matter be definitely identified,<sup>86</sup> and that its objects be specified in or clearly ascertainable from the instrument by which it is

Express power of sale to person having estate or interest

Md.—Takacs v. Doerfler, 48 A.2d 328, 187 Md. 62.  
49 C.J. p 1254 note 80 [d].

84. U.S.—Smith v. McIntyre, Ohio, 95 F. 585, 37 C.C.A. 177.  
49 C.J. p 1254 note 81.

85. Ga.—Beecher v. Newton, 120 S.E. 779, 157 Ga. 113.

Pa.—Mewhinney v. Lowell, Com.Pl., 65 Montg.Co. 77.  
49 C.J. p 1254 note 82.

Instruments held to create power of appointment

(1) Will creating trust for benefit of son, directing that on death of son trust be continued for benefit of another beneficiary, and requesting that the latter beneficiary will the remainder to charity, constituted only a grant to the latter of a power to appoint remainder by will.—In re Hilliard's Estate, 86 N.Y.S.2d 158.

(2) Where client supplied securities for creation of inter vivos trust by attorney solely for purpose of freeing client from annoyance by beneficiary, and trust agreement provided that on death of beneficiary principal was to be paid over to attorney if living or to such person as he might nominate, attorney's interest in trust was not a "reversion" but a power of appointment.—Guaranty Trust Co. of N.Y. v. New York Trust Co., 74 N.E.2d 232, 297 N.Y. 45.

86. Ohio.—Boltz v. Riley, 18 Ohio Cir.Ct.N.S., 71, 34 Ohio Cir.Ct. 178.

attempted to be created;<sup>87</sup> similarly, the person or persons by whom a power is to be exercised must in some manner be designated or pointed out by the instrument creating the power, and, if no person is designated, either expressly or by implication, to exercise it the power is ineffective.<sup>88</sup> An express trust for a purpose not within a statute enumerating the purposes for which an express trust may be created may be given effect as a power in trust if the purpose is one which may be lawfully exercised.<sup>89</sup>

*Dispositions or provisions inconsistent with power.* The mere fact that the donor of a power makes other disposition of, or provisions as to, the subject matter does not necessarily affect the power; but the instrument will be so construed, if possible, as to reconcile the inconsistency and give effect to all of its provisions.<sup>90</sup> In so far, however, as a power is repugnant to another disposition or provision made by the instrument containing it, the power is void.<sup>91</sup> A power of appointment may exist in conjunction with a transfer in trust or independent of such transfer.<sup>92</sup>

## § 11. Validity

The validity of a power depends on its nature and not on its execution. A power inseparably connected with other provisions affecting the subject matter which are invalid or impossible of accomplishment is itself inoperative.

The validity of a power depends on its nature and

not on its execution,<sup>93</sup> and consequently a power capable of being validly exercised is not void because under it the donee might attempt to create an illegal estate,<sup>94</sup> but is in legal effect a power to do what is lawful and not what is unlawful.<sup>95</sup> A power which is not presently exercisable or with certainty exercisable in the future is a nullity.<sup>96</sup>

*Invalidity or failure of other dispositions or provisions.* Where a power is inseparably connected with, or dependent on, other dispositions of or provisions as to the subject matter which are invalid or impossible of accomplishment, the power itself fails;<sup>97</sup> but such invalidity or impossibility of other provisions will not cause the failure of a power otherwise valid which is not so connected with or dependent on them.<sup>98</sup>

*Relief against invalidity.* Equity will not interfere in behalf of the grantee of a power or of one in whose favor it has been exercised to supply a defect in the creation of the power.<sup>99</sup>

## § 12. — Partial Invalidity

A power does not necessarily fail because it is invalid with respect to one of its purposes or beneficiaries.

A power for several purposes does not fail because among them is one which is void or has lapsed;<sup>1</sup> and a power void as to some of the persons for whose benefit it was to be exercised is not necessarily void as to others.<sup>2</sup>

87. N.Y.—Tilden v. Green, 28 N.E. 880, 130 N.Y. 29, 27 Am.S.R. 487, 14 L.R.A. 33.  
49 C.J. p 1254 note 84.

### Class of persons

The class of persons in whose favor a special power may be exercised must be designated by the donor of the power with sufficient certainty so that the court can ascertain who were the objects of the power; but the particular individuals for whom the power should be exercised need not be designated. N.Y.—Read v. Williams, 26 N.E. 730, 125 N.Y. 560, 21 Am.S.R. 748. Ohio—Central Trust Co. v. Watt, 38 N.E.2d 185, 139 Ohio St. 50.

88. Me.—Whittemore v. Russell, 14 A. 197, 80 Me. 297, 6 Am.S.R. 200.  
Md.—Baumeister v. Silver, 56 A. 825, 98 Md. 418.

89. N.Y.—Kondolf v. Britton, 145 N.Y.S. 791, 160 App.Div. 381—In

re Suffolk County Trust Co., 65 N.Y.S.2d 243.

90. Ky.—Stofer v. Stiltz, 200 S.W. 631, 179 Ky. 399.  
49 C.J. p 1255 note 89.

91. Ga.—Shewmake v. Robinson, 96 S.E. 564, 148 Ga. 287.  
Pa.—Mewhinney v. Lowell, Com.Pl., 65 Montg.Co. 77.

92. Cal.—In re Elston's Estate, 90 P.2d 608, 32 Cal.App.2d 652.

93. N.Y.—Read v. Williams, 26 N.E. 730, 125 N.Y. 560, 21 Am.S.R. 748.

### Powers held valid

Ill.—Rock Island Bank & Trust Co. v. Rhoads, 187 N.E. 139, 353 Ill. 131.  
Mo.—Keller v. Keller, 123 S.W.2d 113, 343 Mo. 815.

94. N.Y.—Hillen v. Iselin, 39 N.E. 368, 144 N.Y. 365.

95. N.Y.—Hillen v. Iselin, supra.

96. U.S.—Corning v. Commissioner of Internal Revenue, C.C.A.6, 104 F.2d 329.

97. Mich.—Petit v. Flint, etc., R. Co., 72 N.W. 238, 114 Mich. 362.  
49 C.J. p 1255 note 98.

98. Tex.—Pure Oil Co. v. Clark, Civ. App., 37 S.W.2d 1083, affirmed, Clark v. Pure Oil Co., Com.App., 56 S.W.2d 852.  
49 C.J. p 1255 note 99.

99. N.C.—Sanderlin v. Thompson, 17 N.C. 539.

1. N.Y.—Wilson v. Lynt, 30 Barb. 124, 16 How.Pr. 348.  
Tex.—Pure Oil Co. v. Clark, Civ.App., 37 S.W.2d 1083, affirmed Clark v. Pure Oil Co., Com.App., 56 S.W.2d 852.

2. N.Y.—Downing v. Marshall, 1 Abb.Dec. 525.

## III. MODIFICATION OR REVOCATION, AND SUSPENSION

## § 13. Revocability

A mere naked power may be revoked at will, but a power coupled with an interest or given for a valuable consideration or as security is irrevocable.

A mere naked power is revocable at the will of the donor or grantor;<sup>3</sup> but, where a power is coupled with an interest,<sup>4</sup> or is given for a valuable consideration<sup>5</sup> or as security,<sup>6</sup> it is irrevocable.

## § 14. Manner of Revocation or Modification

A duly created power can be revoked only in express terms or by necessary implication.

A duly created power cannot be revoked or modified except in express terms or by necessary implication.<sup>7</sup> Thus a power is not necessarily revoked by the grant of a similar power to another person,<sup>8</sup> or

by the donor's execution of a contract to sell the property forming the subject matter of the power,<sup>9</sup> or by codicils changing the legatees or devisees of property over which the power of sale was given by the will.<sup>10</sup>

## § 15. Suspension

A power may be suspended in the sense that its exercise may be made dependent on the happening of a future event.

Where the exercise of a power is made dependent on the happening of a future event, the effectual exercise of the power is suspended until that event happens.<sup>11</sup> Where a power coupled with an interest or a mere naked authority devolves on an insane person, it is suspended during the continuance of the disability.<sup>12</sup>

## IV. DURATION AND TERMINATION

## § 16. In General

The duration of a power depends on the intention of the grantor, the purposes in view, and the circumstances surrounding the transaction. Generally speaking, a power subsists until, but not after, its purpose ceases or is accomplished or the power is exhausted or becomes impossible of execution.

The duration of a power is dependent on the

intention of the grantor or donor, as shown by the terms of the instrument creating it, the purposes had in view, and the circumstances surrounding the transaction.<sup>13</sup> A power given to trustees ordinarily continues during the life of the trust and ceases on its termination.<sup>14</sup>

*Accomplishment or cesser of purpose, exhaustion,*

3. U.S.—*Corpus Juris* cited in *Security Realization Co. v. Henderson*, C.C.A.Nev., 120 F.2d 449, 455.
- Ala.—*Corpus Juris* cited in *Norris v. Commercial Nat. Bank of Anniston*, 163 So. 798, 801, 231 Ala. 204.
- Ohio.—*Corpus Juris* quoted in *Bowerman v. Bowerman*, 35 N.E.2d 1012, 1014, 67 Ohio App. 425.
- Pa.—*Equitable Gas Co. v. Smith*, 13 Pa.Dist. & Co. 616.
- 49 C.J. p 1255 note 3.
4. Ala.—*Corpus Juris* cited in *Norris v. Commercial Nat. Bank of Anniston*, 163 So. 798, 801, 231 Ala. 204.
- Ga.—*Finn v. Dobbs*, 4 S.E.2d 655, 188 Ga. 602.
- Ky.—*Chenault's Guardian v. Metropolitan Life Ins. Co.*, 53 S.W.2d 720, 245 Ky. 482.
- Mo.—*Corpus Juris* quoted in *Hadley Bros.-Uhl Co. v. Scott*, App., 93 S. W.2d 276, 278—*Corpus Juris* quoted in *Hadley Bros.-Uhl Co. v. Scott*, 53 S.W.2d 1070, 1074, 227 Mo.App. 354.
- N.J.—*Corpus Juris* cited in *Hollingsworth v. Lederer*, 4 A.2d 291, 296, 125 N.J.Eq. 193.
- N.Y.—*Petrosi Bros. Contracting Corporation v. Town of Greece*, 29 N.Y.S.2d 305.
- Ohio.—*Corpus Juris* quoted in *Bow-*

- erman v. Bowerman*, 35 N.E.2d 1012, 1014, 67 Ohio App. 425.
- Pa.—*Equitable Gas Co. v. Smith*, 13 Pa.Dist. & Co. 616.
- 49 C.J. p 1255 note 4.
- Neither by death nor by will can a power coupled with an interest be revoked.—*Gurr v. Gurr*, 22 S.E.2d 507, 198 Ga. 493.
5. Ala.—*Corpus Juris* cited in *Norris v. Commercial Nat. Bank of Anniston*, 163 So. 798, 801, 231 Ala. 204.
- Ga.—*Finn v. Dobbs*, 4 S.E.2d 655, 188 Ga. 602.
- Mo.—*Corpus Juris* quoted in *Hadley Bros.-Uhl Co. v. Scott*, App., 93 S. W.2d 276, 278—*Corpus Juris* quoted in *Hadley Bros.-Uhl Co. v. Scott*, 53 S.W.2d 1070, 1074, 227 Mo. App. 354.
- Ohio.—*Corpus Juris* quoted in *Bowerman v. Bowerman*, 35 N.E.2d 1012, 1014, 67 Ohio App. 425.
- 49 C.J. p 1256 note 5.
6. Ala.—*Corpus Juris* cited in *Norris v. Commercial Nat. Bank of Anniston*, 163 So. 798, 801, 231 Ala. 204.
- Mo.—*Corpus Juris* quoted in *Hadley Bros.-Uhl Co. v. Scott*, App., 93 S. W.2d 276, 278—*Corpus Juris* quoted in *Hadley Bros.-Uhl Co. v.*

- Scott*, 53 S.W.2d 1070, 1074, 227 Mo.App. 354.
- Ohio.—*Corpus Juris* quoted in *Bowerman v. Bowerman*, 35 N.E.2d 1012, 1014, 67 Ohio App. 425.
- 49 C.J. p 1256 note 6.
7. Ga.—*New v. Potts*, 55 Ga. 420.
- 49 C.J. p 1256 note 8.
8. U.S.—*Starr v. Stark*, C.C.Or., 22 F.Cas.No.13,317, 2 Sawy. 603, 642, affirmed 94 U.S. 477, 24 L.Ed. 276.
9. S.C.—*Douglass v. Dickson*, 45 S. C.L. 417.
10. N.Y.—*Conover v. Hoffman*, 1 Abb.Dec. 429, 15 Abb.Pr. 100.
- S.C.—*Anderson v. Butler*, 9 S.E. 797, 31 S.C. 183, 5 L.R.A. 166.
11. Del.—*Corpus Juris* cited in *McLaughlin v. Industrial Trust Co.*, 42 A.2d 12, 15, 28 Del.Ch. 275.
- Va.—*Raper v. Sanders*, 21 Gratt. 60, 62 Va. 60.
12. Del.—*Equitable Trust Co. v. Union Nat. Bank*, 18 A.2d 228, 25 Del. Ch. 281.
13. U.S.—*Milwee v. Waddleton*, Alaska, 233 F. 989, 147 C.C.A. 663.
- 49 C.J. p 1256 note 17.
14. Md.—*Johns Hopkins Univ. v. Middleton*, 24 A. 454, 76 Md. 186.
- 49 C.J. p 1256 note 18.

or impossibility of execution. In general a power duly created is valid and subsisting until its purpose, as determined from the whole intent of the instrument of creation, is spent;<sup>15</sup> and a mere change in circumstances will not cause the power to terminate if the purpose for which it was created still remains to be effectuated.<sup>16</sup> A power ceases, however, on the accomplishment or cesser of the purpose of its creation,<sup>17</sup> or on its exhaustion,<sup>18</sup> or where its execution becomes impossible or its purpose unattainable.<sup>19</sup>

### § 17. Death of Donor, Donee, or Beneficiary

A naked power is terminated by the death of the donor unless the power necessarily is such as can be exercised only after his death, but a donor's death does not terminate a power coupled with an interest; the donee's death terminates the power granted to him; the death of the beneficiary of a power does not terminate the power unless such death terminates the purpose of the power or renders its effectuation impossible.

A mere naked or collateral power is revoked by the death of the donor or grantor,<sup>20</sup> unless it is necessarily such as can be exercised only after his death;<sup>21</sup> but the donor's death does not revoke or terminate a power coupled with an interest.<sup>22</sup>

*Death of donee.* A power necessarily ceases on the death of the donee or grantee, where there is no one else authorized to execute it;<sup>23</sup> but, as discussed infra § 35, where so provided, expressly or by implication, by the instrument of creation, the

power may continue to exist in the assignee, representative, or successor of the donee after his death. Where the donee of a power given by the will of another dies before the testator, the power is a nullity.<sup>24</sup>

*Death of beneficiary.* While the death of one for whose benefit a power is created will not extinguish the power where it can still be exercised consistently with the purpose of its creation,<sup>25</sup> if the death of the beneficiary defeats or terminates the purpose of the power or renders its effectuation impossible, the power is thereby terminated.<sup>26</sup>

### § 18. Merger

Where the donee of a power is also given or becomes entitled to the fee or entire estate, the power is merged into the fee, and becomes inoperative.

Where the donee of a power is also given or becomes entitled to the fee or entire estate, the power is merged into the fee, and becomes inoperative.<sup>27</sup> A power, however, may subsist in one to whom the fee or entire estate is limited in default of execution of the power, without merging in the fee.<sup>28</sup>

### § 19. Release or Other Extinguishment by Donee

A power appendant, appurtenant, or in gross, as well as a general beneficial power, may ordinarily be released or extinguished by the donee or grantee, but, when a power is coupled with a trust, it cannot be released or

15. Ky.—Campbell v. Fowler, 11 S.W.2d 423, 226 Ky. 548.

49 C.J. p 1258 note 32.

16. Pa.—Swan v. Covert, 22 A. 28, 138 Pa. 306.

49 C.J. p 1258 note 33.

17. Ala.—Seeberg v. Norville, 85 So. 505, 204 Ala. 20.

49 C.J. p 1258 note 34.

18. S.C.—McNair v. Craig, 15 S.E. 135, 36 S.C. 100.

49 C.J. p 1258 note 35.

#### Single power of appointment

Generally, at least in absence of words indicating a contrary intent on part of donor, a single power of appointment is intended to be and can be exercised but once over the same property interest.—State Street Trust Co. v. Crocker, 28 N.E. 2d 5, 306 Mass. 257, 128 A.L.R. 1166.

19. N.Y.—Hetzl v. Barber, 69 N.Y. 1.

49 C.J. p 1258 note 36.

20. Ga.—Turman v. Winecoff, 75 S.E. 1131, 138 Ga. 726.

49 C.J. p 1256 note 20.

#### Reserved powers

Where unambiguous granting clause of mineral deed conveyed an undivided one-eighth interest in oil,

gas, and other minerals in, and that might be produced from, the land, but subsequent provisions retained in grantor certain powers and privileges relating to possible production of oil and gas, and reserved powers were not exercised by grantor during his life, they, being personal to the grantor, lapsed at his death and did not survive in his devisees or assignees.—Howard v. Dillard, 176 P.2d 500, 198 Okl. 116.

21. U.S.—Hunt v. Ennis, C.C.R.I., 12 F.Cas.No.6,889, 2 Mason 244.

22. Ohio.—Corpus Juris cited in Bowerman v. Bowerman, 35 N.E. 2d 1012, 1014, 67 Ohio App. 425.

49 C.J. p 1257 note 22.

23. Ky.—Roby v. Arterburn, 108 S.W.2d 873, 269 Ky. 816.—Corpus Juris cited in Slayden v. Hardin, 79 S.W.2d 11, 257 Ky. 685.

49 C.J. p 1257 note 24.

Effect of death of donee in case of merger see infra § 18.

A discretionary power of appointment may not be exercised after the death of the donee of the power.—In re Spruce's Will, 67 N.Y.S.2d 545, 188 Misc. 776.

24. Cal.—In re McCurdy's Estate, 240 P. 498, 197 Cal. 276.

Pa.—In re Cardon's Trust, 42 A.2d 56, 352 Pa. 23.

49 C.J. p 1257 note 26.

25. N.Y.—Cotton v. Burkelman, 36 N.E. 890, 142 N.Y. 160, 40 Am.S.R. 584.

49 C.J. p 1257 note 29.

26. Ohio.—Corpus Juris quoted in Bowerman v. Bowerman, 35 N.E. 2d 1012, 1014, 67 Ohio App. 425.

49 C.J. p 1257 note 30.

27. Pa.—Petition of McCawley, Com.Pl., 35 Luz.Leg.Reg. 180.

Wis.—Browning v. Blue Grass Hardware Co., 149 S.E. 497, 153 Va. 20.

49 C.J. p 1258 note 39.

#### Power to keep or dispose

Powers which give to donee the right to keep or to dispose of property are the same as powers which arise as an incident of ownership, and such powers do not terminate on donee's death, and donee has such an interest in property as to make him in substance the owner thereof.—In re Wadleigh's Estate, 26 N.W.2d 667, 250 Wis. 284.

28. N.Y.—Hicks v. Cochran, 4 Edw. 107.

49 C.J. p 1258 note 37.

extinguished without the consent of all the parties; a naked or collateral power cannot ordinarily be extinguished by any act of the donee.

A power appendant, appurtenant, or in gross may be released or extinguished by the donee or grantee,<sup>29</sup> unless it is coupled with a trust,<sup>30</sup> and even in the latter case the power may be extinguished by the consent of all the parties,<sup>31</sup> but not, it has been held, at least with respect to a special power in trust, by the joint act of the grantor and grantee, without the consent of the persons within the class of permissible appointees.<sup>32</sup> A general beneficial power may always be surrendered by the grantee or donee and thus extinguished,<sup>33</sup> provided

the donor's intention is not thereby frustrated;<sup>34</sup> thus, when a power is one which the donee may exercise for his own benefit, it may be extinguished by his act.<sup>35</sup> Even a special power, when not coupled with a trust, may be surrendered, renounced, or released and thereby extinguished.<sup>36</sup> Unless permitted by statute,<sup>37</sup> however, a mere naked or collateral power cannot be extinguished by any act of the donee.<sup>38</sup>

Any dealing by the donee of an extinguishable power with the property forming its subject matter which is inconsistent with the exercise of the power puts an end to it;<sup>39</sup> but such donee may ab-

29. Del.—*McLaughlin v. Industrial Trust Co.*, 42 A.2d 12, 28 Del.Ch. 275.

49 C.J. p 1259 note 43.

"It is conceded that at common law even an imperative power of appointment could be released or extinguished by the act of the donee, provided it was a so-called 'power in gross,' i.e., if the donee himself had an estate in the land."

—*Chase Nat. Bank of City of New York v. Chicago Title & Trust Co.*, 279 N.Y.S. 327, 335, 155 Misc. 61, affirmed 284 N.Y.S. 472, 246 App.Div. 201, affirmed 3 N.E.2d 405, 271 N.Y. 602, reargument denied 3 N.E.2d 472, 271 N.Y. 659.

#### Power exercisable by will

A general power in gross exercisable by will can be extinguished in donee's lifetime.—*McLaughlin v. Industrial Trust Co.*, 42 A.2d 12, 28 Del.Ch. 275.

30. N.Y.—*In re Matthews' Will*, 5 N.Y.S.2d 707, 255 App.Div. 80.

49 C.J. p 1259 note 44.

A special power coupled with a trust cannot be surrendered or extinguished by act or omission to act on the part of the donee.

N.J.—*Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Kelly*, 34 A.2d 538, 134 N.J.Eq. 120.

N.Y.—*Merrill v. Lynch*, 13 N.Y.S.2d 514, 173 Misc. 39.

An imperative power in trust which imposes on grantee a duty to others than himself, the performance of which may be compelled for their benefit, may not be released by grantee of power.—*Application of Schluskel*, 89 N.Y.S.2d 47, 195 Misc. 1008.

31. N.Y.—*Lewis v. Howe*, 66 N.E. 975, 1101, 174 N.Y. 340.

A reconveyance by the beneficiaries and the trustees to the original donor was sufficient to extinguish the power in trust.—*Lewis v. Howe*, supra.

32. N.Y.—*Chase Nat. Bank of City of New York v. Chicago Title &*

*Trust Co.*, 284 N.Y.S. 472, 246 App. Div. 201, affirmed 3 N.E.2d 205, 271 N.Y. 602, reargument denied 3 N.E.2d 472, 271 N.Y. 659.

33. D.C.—*District of Columbia v. Lloyd*, 160 F.2d 581, 82 U.S.App. D.C. 70.

Ill.—*Botzum v. Havana Nat. Bank*, 12 N.E.2d 203, 367 Ill. 539.

N.Y.—*Merrill v. Lynch*, 13 N.Y.S.2d 514, 173 Misc. 39.

Pa.—*In re Jackson's Trust*, 40 A.2d 393, 351 Pa. 89.—*In re Mogridge's Estate*, 20 A.2d 307, 342 Pa. 308.

"Where the power is a general one, under which the donee may appoint to any one, the testator has completely relinquished all dead hand dominion over the property, and has placed it for all practical purposes as completely within the control of the donee as though a fee had been created in him."—*Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Kelly*, 34 A.2d 538, 545, 134 N.J.Eq. 120.

#### Nonexercise of power

The nonexercise of general discretionary beneficial powers conferred by trust indentures could be manifested by inaction, or by instrument of surrender, since such formal instruments would be wholly consistent with nonexercise.—*Merrill v. Lynch*, 13 N.Y.S.2d 514, 173 Misc. 39.

#### By deed

Where an irrevocable deed of trust provided life estate for settlor's wife and reserved to settlor a general power of appointment of the corpus by will, settlor by subsequent inter vivos deed without the joinder of wife could extinguish such power of appointment and direct that after death of settlor and wife corpus should be distributed to a corporation for the benefit of settlor's creditors, since extinguishment of such power did not affect wife's interest in trust.—*In re Jackson's Trust*, 40 A.2d 393, 351 Pa. 89.

34. D.C.—*District of Columbia v. Lloyd*, 160 F.2d 581, 82 U.S.App. D.C. 70.

Md.—*O'Hara v. O'Hara*, 44 A.2d 818, 185 Md. 321, 163 A.L.R. 1444.

#### Agreement held not release

Agreement by donee of power of appointment by will as part of property settlement ratified by divorce decree, to execute irrevocable will bequeathing to daughter by first wife one third of his mother's estate in which he had power of appointment, was not a valid release of the power of appointment, since it violated mother's intention that disposition of her estate should remain under donee's control until his death.—*O'Hara v. O'Hara*, supra.

35. Del.—*McLaughlin v. Industrial Trust Co.*, 42 A.2d 12, 28 Del.Ch. 275.

Ill.—*Baker v. Wilmert*, 123 N.E. 627, 288 Ill. 434.

Pa.—*In re Mogridge's Estate*, 20 A. 2d 307, 342 Pa. 308.—*Lyon v. Alexander*, 156 A. 84, 304 Pa. 288, 76 A.L.R. 1427.

36. N.Y.—*Merrill v. Lynch*, 13 N.Y. S.2d 514, 173 Misc. 39.

37. N.J.—*Norris v. Thomson*, 19 N. J.Eq. 307, affirmed 20 N.J.Eq. 489. 49 C.J. p 1259 note 46.

38. N.Y.—*Chase Nat. Bank of City of New York v. Chicago Title & Trust Co.*, 279 N.Y.S. 327, 155 Misc. 61, affirmed 284 N.Y.S. 472, 246 App.Div. 201, affirmed 3 N.E.2d 205, 271 N.Y. 602, reargument denied 3 N.E.2d 472, 271 N.Y. 659.

49 C.J. p 1259 note 48.

39. Del.—*McLaughlin v. Industrial Trust Co.*, 42 A.2d 12, 28 Del.Ch. 275.

Ga.—*Rosier v. Nichols*, 50 S.E. 988, 123 Ga. 20.

Pa.—*In re Mogridge's Estate*, 20 A. 2d 307, 342 Pa. 308.

49 C.J. p 1259 note 50.

#### Covenant or agreement

(1) A covenant or agreement not to execute a power operates in equity either entirely or pro tanto, as a release of the power.—*McLaughlin v. Industrial Trust Co.*, 42 A.2d 12, 28 Del.Ch. 275—49 C.J. p 1259 note 50 [a] (1).

solutely alienate his estate in the property without extinguishing the power, if it can thereafter be exercised without derogation of the alienee's estate.<sup>40</sup> An instrument executed by the grantee of general discretionary powers expressly renouncing and relinquishing the power of appointment extinguishes the power, notwithstanding the grantee's prior execution of a will purporting to exercise the power.<sup>41</sup>

*Reviver after extinguishment.* If a power is extinguished by a conveyance of the estate to which it is appendant, it may be revived by a reconveyance for the same uses and purposes as under the original conveyance to the trustees.<sup>42</sup> The donee of a general power of appointment under a trust created by a will has no power to revoke a duly executed and delivered irrevocable renunciation and release of his right to appoint.<sup>43</sup>

## V. CONSTRUCTION

### § 20. General Considerations

Powers are construed according to the principles of the common law where the rule has not been changed by statutory provision.

Except as the rule may be changed by statutory provision, powers are construed according to the principles of the common law.<sup>44</sup> It has been said that perhaps on no other subject of the law have there been employed so many legal refinements, or such technical disquisition, as in the construction of powers.<sup>45</sup>

### § 21. — What Law Governs

Ordinarily the character and extent of a power are to be determined with respect to the law of the domicile of the donor or grantor, not the law of the situs of the property to which the power applies.

Although there is authority to the contrary,<sup>46</sup> it is ordinarily held that the character and extent of a power are to be determined with respect to the law of the domicile of the donor or grantor, not the law of the situs of the property to which the power applies.<sup>47</sup> A general power of appointment

is not subject to the principle of comity, either as to creation or interpretation.<sup>48</sup>

What law governs the execution of powers is considered *infra* § 44.

### § 22. — Rules of Construction

- a. In general
- b. Liberal or strict construction
- c. Limitations and restrictions

#### a. In General

Powers are to be construed in accordance with the intention of the donor or grantor, as determined under the rules relating to the construction of instruments generally, and such intention is to be gathered from the language used in the instrument of creation, and from the surrounding facts and circumstances, if an ambiguity is found in the instrument.

Powers are to be construed in accordance with the intention of the donor or grantor,<sup>49</sup> as determined under the rules relating to the construction of instruments generally.<sup>50</sup> The intention of the donor or grantor is to be gathered from the lan-

(2) This is true, even though the covenant is purely voluntary.—*McLaughlin v. Industrial Trust Co.*, *supra*.

#### Jointer in trust deed

Life tenant's power to convey estate for support of herself and children was not extinguished by joining in trust deed to secure note of adult son, not for life tenant's benefit.—*Citizens' Bank of Lancaster v. Foglesong*, 31 S.W.2d 778, 326 Mo. 581.

40. Ala.—*Proctor v. Scharpf*, 80 Ala. 227.

49 C.J. p 1259 note 51.

41. N.Y.—*Merrill v. Lynch*, 13 N.Y. S.2d 514, 173 Misc. 39.

42. Mass.—*Salisbury v. Bigelow*, 20 Pick. 174.

49 C.J. p 1259 note 52.

43. N.Y.—*Manville v. Dresselhuys*, 43 N.Y.S.2d 658, 181 Misc. 290.

44. Neb.—*Massey v. Guaranty*

Trust Co., 5 N.W.2d 279, 142 Neb. 237.

45. Ga.—*Grayson v. Germania Bank*, 79 S.E. 124, 40 Ga. 467.

46. N.Y.—*Newton v. Hunt*, 112 N.Y.S. 573, 59 Misc. 633, modified on other grounds 119 N.Y.S. 3, 184 App.Div. 325, affirmed 95 N.E. 1134, 201 N.Y. 599.

47. N.J.—*Fidelity Union Trust Co. v. Caldwell*, 44 A.2d 842, 137 N.J. Eq. 362.—*David v. Atlantic County Soc. for Prevention of Cruelty to Animals*, 19 A.2d 896, 129 N.J.Eq. 501.

49 C.J. p 1260 note 58.

48. N.J.—*In re Winter's Estate*, 47 A.2d 548, 24 N.J.Misc. 172.

49. Ga.—*Corpus Juris* quoted in *Regents of the University System v. Trust Co.*, 198 S.E. 345, 350, 186 Ga. 408.

Neb.—*Massey v. Guaranty Trust Co.*, 5 N.W.2d 279, 142 Neb. 237.

N.J.—*National State Bank of New-*

ark v. Morrison, 75 A.2d 916, 9 N.J.Super. 552.—*National State Bank of Newark v. Morrison*, 70 A.2d 888, 7 N.J.Super. 333.

N.Y.—*Application of Harris*, 96 N.Y. S.2d 88, 276 App.Div. 990.—*In re Hart's Estate*, 15 N.Y.S.2d 318, 172 Misc. 453, reversed on other grounds *In re Hart's Will*, 28 N.Y. S.2d 781, 262 App.Div. 190, appeal granted 44 N.E.2d 620, 289 N.Y. 646.

Tex.—*Corpus Juris* cited in *Lawrie v. Miller*, Com.App., 45 S.W.2d 172, 173.

49 C.J. p 1260 note 59.

50. Ga.—*Corpus Juris* quoted in *Regents of the University System v. Trust Co.*, 198 S.E. 345, 350, 186 Ga. 408.

Mo.—*Corpus Juris* cited in *Presbyterian Orphanage of Missouri v. Fitterling*, 114 S.W.2d 1004, 1008, 342 Mo. 299.

Neb.—*Massey v. Guaranty Trust Co.*, 5 N.W.2d 279, 142 Neb. 237.

49 C.J. p 1260 notes 59, 60.

guage used in the instrument of creation,<sup>51</sup> and the surrounding facts and circumstances may be considered in determining the donor's intent if an ambiguity is found in the instrument by which the power was created.<sup>52</sup> However, the donor's intention is not to be thwarted by refinements and distinctions resting on subtlety and ingenuity, lack of technical accuracy in the use of words, unduly stressing the literal meaning of a few words, or attaching to them a hard and fast meaning not in accordance with the setting in which they were employed.<sup>53</sup>

A power general in terms will not be cut down to a special or particular power, unless an intent to do so is apparent from the instrument conferring the power;<sup>54</sup> and, on the other hand, a power may not be extended beyond its express terms and the clear intention of the donor.<sup>55</sup> In furtherance of the object in view, the courts will vary the form of executing the power, and, as the case may require, either enlarge a limited to a general power, or cut down a general power to a particular purpose.<sup>56</sup> A particular intent will be made to yield to the general intent, where one is inconsistent with the other.<sup>57</sup>

#### b. Liberal or Strict Construction

Some authorities, but not others, hold that all powers are to be construed liberally in furtherance of the purpose for which they were created.

While it has been held broadly that instruments creating powers are to be strictly construed,<sup>58</sup> there is authority for the view that all powers are to be construed liberally in equity, in furtherance of the

purpose for which they were created.<sup>59</sup> A distinction has been drawn between naked powers and powers coupled with an interest by some authorities, which hold that the latter are to be construed more liberally than the former.<sup>60</sup> A further distinction is sometimes drawn between conveyances wherein it is the object of the grantor to convey his property and to retain a future power in himself of disposing of it, but to restrict himself in the exercise of that power to a particular mode, and conveyances wherein it is his object to place the property entirely beyond his own control, but to confer on a third person the power of changing the disposition of it, it being held that in the former case the restraining words or phrases ought to receive such a construction as is most favorable to the owner,<sup>61</sup> but in the latter case they should be taken in such sense as to operate most efficaciously in favor of the donee.<sup>62</sup>

#### c. Limitations and Restrictions

When no condition is actually annexed to a power, one need not be sought out, and everything which is legal and within the limits of the power should be supported; but, where there is a prohibition, limitation, or restriction in a power, such provision will control and the donee will not be permitted to disregard it.

When no condition is actually annexed to a power, one need not be sought out;<sup>63</sup> and everything which is legal and within the limits of the power should be supported.<sup>64</sup> Where a donor creates a power of appointment, it is inferable that he intends the donee to be unrestricted in its exercise except as restrictions are affirmatively imposed.<sup>65</sup> If an inconsistency exists in an instrument creating a power between the terms of an in-

51. Del.—*Highfield v. Delaware Trust Co.*, 152 A. 117, 4 W.W.Harr. 290, affirmed 152 A. 124, 4 W.W.Harr. 306.

Neb.—*Massey v. Guaranty Trust Co.*, 5 N.W.2d 279, 142 Neb. 237. 49 C.J. p 1260 note 60 [a].

52. Ky.—*Campbell v. Fowler*, 11 S.W.2d 423, 226 Ky. 548. 49 C.J. p 1260 note 60 [c].

53. N.J.—*National State Bank of Newark v. Morrison*, 75 A.2d 916, 9 N.J.Super. 552.

54. Ga.—*Corpus Juris* quoted in *Regents of the University System v. Trust Co.*, 198 S.E. 345, 350, 186 Ga. 408. 49 C.J. p 1260 note 61.

"General powers" and "special powers" defined and distinguished see *supra* § 6.

55. Ala.—*Marks v. Tarver*, 59 Ala. 335.

Ga.—*Corpus Juris* quoted in *Regents of the University System v. Trust Co.*, 198 S.E. 345, 350, 186 Ga. 408.

56. N.J.—*National State Bank of*

*Newark v. Morrison*, 70 A.2d 888, 7 N.J.Super. 333.

57. Ala.—*Capal v. McMillan*, 8 Port. 197.

Ga.—*Corpus Juris* quoted in *Regents of the University System v. Trust Co.*, 198 S.E. 345, 350, 186 Ga. 408.

58. U.S.—*Hannan v. Slush*, D.C. Mich., 5 F.2d 718.

Ga.—*Lewis v. King*, 141 S.E. 909, 165 Ga. 705.

Powers of sale are strictly construed and admit of no substitution, unless required by statute.—*Finlayson v. Roberts*, Tex.Civ.App., 82 S.W.2d 1020.

59. Md.—*Hutchinson v. Farmer*, 58 A.2d 638, 190 Md. 411.

Neb.—*Massey v. Guaranty Trust Co.*, 5 N.W.2d 279, 142 Neb. 237. 49 C.J. p 1261 note 70.

60. Tex.—*Superior Oil Co. v. Stanolind Oil & Gas Co.*, Civ.App., 230 S.W.2d 346.

49 C.J. p 1260 notes 68, 69.

61. Conn.—*Imlay v. Huntington*, 20 Conn. 146.

49 C.J. p 1261 note 71.

62. Conn.—*Imlay v. Huntington*, *supra*.

63. Neb.—*Massey v. Guaranty Trust Co.*, 5 N.W.2d 279, 142 Neb. 237. 49 C.J. p 1261 note 74.

#### Restrictions held not imposed

Under trust indenture providing that, after death of beneficiary, fund should be paid over to such persons or corporations in such proportions and on such terms as beneficiary should by last probated will direct and appoint, beneficiary was granted a power without limitation.—*Central Hanover Bank & Trust Co. v. Brown*, 73 N.Y.S.2d 282.

64. Neb.—*Massey v. Guaranty Trust Co.*, 5 N.W.2d 279, 142 Neb. 237.

65. N.J.—*National State Bank of Newark v. Morrison*, 70 A.2d 888, 7 N.J.Super. 333.

#### Wide discretion

Under inter vivos trust giving



strument to be executed under it and the consideration which it recites as moving to the grantor of the power, the recital will not operate as a limitation on the power.<sup>66</sup> Where, however, there is a prohibition, limitation, or restriction in a power, such provision will control and the donee will not be permitted to disregard it.<sup>67</sup>

### § 23. Nature and Extent of Power Granted

The nature and extent of the power granted generally depend on the terms of the instrument of creation.

The nature and extent of the power granted generally depend on the terms of the instrument of creation,<sup>68</sup> and ordinarily a court has no jurisdiction to enlarge such power.<sup>69</sup> A power cannot transcend the limits on it set by the donor.<sup>70</sup> A greater power includes a lesser power only when the lesser power is of the same character with the greater and essential to its execution.<sup>71</sup>

### § 24. — Power of Appointment, Revocation, or Disposition

- a. In general
- b. To whom appointment may be made
- c. Shares to be appointed, and selection, equality, and exclusion of appointees
- d. Estates or interests to be appointed
- e. Authority included in power of appointment
- f. Purposes of appointment; conditions

donee, who was settlor's daughter, the right to appoint property to such persons and in such shares, interests, and proportions as she should by her last will, duly executed in writing, designate, and providing that should settlor die before donee, trustee should invest trust funds only in such securities and property as should be approved in writing by donee, settlor intended to vest in donee a wide discretion over the disposition of the trust property. —*Geneva Trust Co. v. Sill*, 27 N.Y.S. 2d 289.

66. Cal.—*Beatty v. Clark*, 20 Cal. 11.

67. Neb.—*Massey v. Guaranty Trust Co.*, 5 N.W.2d 279, 142 Neb. 237.

68. Del.—*Highfield v. Delaware Trust Co.*, 152 A. 117, 4 W.W.Harr. 290, affirmed 152 A. 124, 4 W.W.Harr. 306.

69. Md.—*O'Hara v. O'Hara*, 44 A.2d 813, 185 Md. 321, 163 A.L.R. 1444.

70. Conn.—*Union & New Haven Trust Co. v. Taylor*, 50 A.2d 163, 133 Conn. 221.

71. N.Y.—*Manion v. Peoples Bank*

of Johnstown, 38 N.Y.S.2d 434, affirmed 44 N.Y.S.2d 593, 206 App. Div. 1043, reversed on other grounds 55 N.E.2d 46, 292 N.Y. 317.

72. N.Y.—*Kinnan v. Guernsey*, 64 How.Pr. 253, affirmed 19 N.Y. Wkly.Dig. 410.

49 C.J. p 1261 note 79.

73. Ky.—*Chenault's Guardian v. Metropolitan Life Ins. Co.*, 53 S.W.2d 720, 245 Ky. 482.

#### For whose benefit exercised

Generally, power of appointment must be exercised for benefit, not of appointee, but of persons for whose benefit power was granted.—*Chenault's Guardian v. Metropolitan Life Ins. Co.*, supra.

74. Md.—*O'Hara v. O'Hara*, 44 A.2d 813, 185 Md. 321, 163 A.L.R. 1444.

75. W.Va.—*Carney v. Kain*, 23 S.E. 650, 40 W.Va. 758.

49 C.J. p 1261 note 81.

76. Tex.—*Harrell v. Hickman*, 215 S.W.2d 876, 147 Tex. 396—*Randall v. Estes*, Civ.App., 218 S.W.2d 338, refused no reversible error.

77. N.Y.—*Low v. Bankers Trust*

#### a. In General

An absolute power to dispose of property embraces all powers necessary to effect the disposition; but the exercise of a power of appointment is limited to the exact performance of the duty imposed on the donee, and a court has no jurisdiction to enlarge the power granted, where such power is limited by the instrument creating it.

Generally speaking, an absolute power to dispose of property embraces all powers necessary to effect the disposition.<sup>72</sup> The exercise of a power of appointment is limited to the exact performance of the duty imposed on the donee or appointor,<sup>73</sup> and, where a power of appointment is limited by the instrument creating it, a court has no jurisdiction to enlarge such power.<sup>74</sup> If, by the terms of the instrument creating a power of appointment or revocation, its exercise is left to the discretion of the donee, the exercise of such discretion will not be interfered with, in the absence of bad faith.<sup>75</sup> Where a grant of a conditional fee or even a life estate is made to a survivor with full power of disposition, he may dispose of the property as he sees fit during his lifetime.<sup>76</sup> An appointment for an illegal purpose is void, although the form and method of appointment are legal.<sup>77</sup>

*General or special power.* In accordance with the general rules, discussed supra § 6, as to what constitutes a general power or a special power, and the general rules as to the construction of powers, considered supra § 22, particular instruments have been construed as conferring<sup>78</sup> or as not confer-

Co., 200 N.E. 674, 270 N.Y. 143, amendment of remittitur denied 3 N.E.2d 211, 271 N.Y. 615.

78. N.J.—*Hood v. Francis*, 44 A.2d 182, 137 N.J.Eq. 200—*Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Kelly*, 34 A.2d 538, 134 N.J.Eq. 120.

N.Y.—*Geneva Trust Co. v. Sill*, 27 N.Y.S.2d 289.

Pa.—*In re Jackson's Trust*, 40 A.2d 393, 351 Pa. 89—*In re Seifert's Estate*, Orph., 22 Lehigh 425.

*Power to appoint by last will* such persons as in donee's sole judgment and discretion might be worthy to receive residue of donor's estate and to fix the amount to be given to each was a "general" and not a "special" power.—*O'Hara v. O'Hara*, 44 A.2d 813, 185 Md. 321, 163 A.L.R. 1444.

#### Test

Fact that the donee of a power of appointment is free to select the beneficiary is not the sole test of the generality of the power but it must also be clear that the donee has an absolute disposing power over the estate.—*Hooker v. Drayton*, 33 A.2d 206, 69 R.I. 290, 150 A.L.R. 723.

ring<sup>79</sup> a general power of appointment or disposition. A "general power of appointment" is not converted into a "special power of appointment" by reason of spendthrift provisions protecting the income during the lifetime of the donee of the power.<sup>80</sup> The rights of a donee of a general power are not lessened by the donor's insertion of provisions to take effect only in default of appointment.<sup>81</sup> Accordingly, a gift over to persons who are to take in the event that a general power of appointment is not exercised by the donee does not of itself cut down or restrict the extent of the power, but there must, in addition, be a clear intent, expressed or implied, that the donor meant to give only a special or limited power.<sup>82</sup>

*What property, estates, or interests are included in a power of appointment is a matter of construc-*

*tion, and necessarily depends on the terms of the instrument creating the power.<sup>83</sup>*

#### b. To Whom Appointment May Be Made

- (1) In general
- (2) Under special or limited power

##### (1) In General

A general power of appointment may be exercised by the donee to or for the benefit of himself or any other person or persons, notwithstanding precatory expressions in the instrument by which the power was created.

A general power of appointment may be exercised by the donee to or for the benefit of himself<sup>84</sup> or any other person or persons,<sup>85</sup> notwithstanding precatory expressions in the instrument by which it was created;<sup>86</sup> and so he may exercise it in favor of his creditors,<sup>87</sup> or appoint to his estate,<sup>88</sup> or mingle

79. Cal.—*Dallapi v. Campbell*, 114 P.2d 646, 45 Cal.App.2d 541.

80. U.S.—*Legg's Estate v. Commissioner of Internal Revenue*, C.C.A. 4, 114 F.2d 760.

Pa.—*In re Miller's Trust*, 169 A. 362, 313 Pa. 18.

81. Mass.—*Fiduciary Trust Co. v. Mishou*, 75 N.E.2d 3, 321 Mass. 615.

82. N.J.—*Marx v. Rice*, 65 A.2d 48, 1 N.J. 574—*Hood v. Francis*, 44 A.2d 182, 137 N.J.Eq. 200.

83. N.Y.—*In re Reese's Estate*, 70 N.Y.S.2d 81, modified on other grounds *In re Reese's Will*, 87 N.Y.S.2d 607, 275 App.Div. 37—*Irving Trust Co. v. Hartmann*, 8 N.Y.S.2d 387.

49 C.J. p 1265 note 46.

**Intent to make complete disposition**  
Trust provision with respect to power of appointment given to settlor's daughters as beneficiaries, when construed in light of donor's intent to make a disposition which in any reasonable contingency would be complete, gave each daughter power to appoint with regard to all that portion of principal which her issue might otherwise receive at termination of trust.—*Wooster v. Union & New Haven Trust Co.*, 43 A. 2d 734, 132 Conn. 309.

84. U.S.—*Clauson v. Vaughan*, C.C. A.Me., 147 F.2d 84—*Commissioner of Internal Revenue v. Solomon*, C.C.A.3, 124 F.2d 86.

Ohio.—*Corpus Juris* cited in *In re Howald's Trust*, 29 N.E.2d 575, 582, 65 Ohio App. 191.

49 C.J. p 1261 note 83.  
What constitutes general power see supra § 6.

**Effect of surrounding circumstances**  
Explicit provision by donor of power for devolution of the property in event of nonexercise of the power, in connection with other circum-

stances, may indicate intent that donee shall not appropriate the appointive property to his own estate, but circumstances of postnuptial trust indenture giving wife power of testamentary appointment and husband power in event she did not exercise such power, did not manifest such intent.—*Fiduciary Trust Co. v. Mishou*, 75 N.E.2d 3, 321 Mass. 615.

85. U.S.—*Clauson v. Vaughan*, C.C. A.Me., 147 F.2d 84—*Commissioner of Internal Revenue v. Solomon*, C.C.A.3, 124 F.2d 86.  
Del.—*McLaughlin v. Industrial Trust Co.*, 42 A.2d 12, 28 Del.Ch. 275.

N.J.—*Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Kelly*, 34 A.2d 538, 134 N.J.Eq. 120—*Brown v. Fidelity Union Trust Co.*, 9 A.2d 311, 126 N.J.Eq. 406.

N.Y.—*U. S. Trust Co. of New York v. Wenzell*, 19 N.Y.S.2d 448, 173 Misc. 998, affirmed 18 N.Y.S.2d 1001, 258 App.Div. 1046, appeal denied 19 N.Y.S.2d 770, 259 App.Div. 713, affirmed 30 N.E.2d 727, 284 N.Y. 693—*Central Hanover Bank & Trust Co. v. Brown*, 73 N.Y.S. 2d 282—*Geneva Trust Co. v. Sill*, 27 N.Y.S.2d 289.

Pa.—*In re Scott's Estate*, 44 A.2d 323, 158 Pa.Super. 138, affirmed 46 A.2d 174, 353 Pa. 575.

Wash.—*In re Lidston's Estate*, 202 P.2d 259, 32 Wash.2d 408.  
49 C.J. p 1261 note 84.

#### Discretion

Donee of general power of appointment may turn stream of donor's munificence to any person or point within donee's discretion.—*De Charette v. De Charette*, 94 S.W.2d 1018, 264 Ky. 525, 104 A.L.R. 1455.

**Persons entitled under laws of succession**

A provision in will of resident of

another state exercising power of appointment which was created in the forum and subject to the law of the forum, that if any trusts provided for in will be held invalid, portions of estate included therein and other property not disposed of should pass according to laws of succession of such other state, was a valid exercise of the power.—*Chase Nat. Bank of City of New York v. Central Hanover Bank & Trust Co.*, 39 N.Y.S.2d 541, 265 App. Div. 434.

86. N.Y.—*Matter of McDonald*, 157 N.Y.S. 486, 92 Misc. 680, 15 Mills Surr. 376, affirmed 159 N.Y.S. 1126, 173 App.Div. 983.

**Word "request,"** as used in a power, with respect to persons to whom appointment may be made, may be used as a command or an intreaty depending on the context in which the word is asserted, and the circumstances attendant on its use, but the real test is whether or not the donor of the power intended by his language to control the disposition of his property.—*Marx v. Rice*, 65 A.2d 48, 1 N.J. 574.

87. U.S.—*Clauson v. Vaughan*, C.C. A.Me., 147 F.2d 84—*Commissioner of Internal Revenue v. Solomon*, C.C.A.3, 124 F.2d 86.

Del.—*McLaughlin v. Industrial Trust Co.*, 42 A.2d 12, 28 Del.Ch. 275.

Md.—*Wyeth v. Safe Deposit & Trust Co. of Baltimore*, 4 A.2d 753, 176 Md. 369.

N.J.—*Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Kelly*, 34 A.2d 538, 134 N.J.Eq. 120.

Ohio.—*Corpus Juris* cited in *In re Howald's Trust*, 29 N.E.2d 575, 582, 65 Ohio App. 191.

49 C.J. p 1262 note 86.

88. U.S.—*Clauson v. Vaughan*, C.C. A.Me., 147 F.2d 84—*Commissioner*

the subject matter therewith so as to subject the property to liability for his debts<sup>89</sup> or to the payment of legacies.<sup>90</sup> According to some decisions, however, unless expressly authorized, the donee has no power to appoint for the payment of his debts,<sup>91</sup> or to his own estate.<sup>92</sup>

**Deceased persons.** A power of appointment may not be exercised in favor of a deceased person.<sup>93</sup>

## (2) Under Special or Limited Power

- (a) In general
- (b) Children, issue, or descendants
- (c) Other relatives and relations

### (a) In General

Where a power of appointment is not general, but limited to certain beneficiaries or to a certain class of beneficiaries, it can be exercised only in favor of such beneficiaries or class, and any attempt to exercise it in favor of others is void.

Where a power of appointment is not general, but limited to certain beneficiaries or to a certain class of beneficiaries, it may and must be exercised in

favor of such beneficiaries or class, and any attempt to exercise it in favor of others is void,<sup>94</sup> at least in so far as the power is exceeded, as discussed infra § 47, whether the appointment is made directly or indirectly in favor of a stranger.<sup>95</sup> Thus, an attempt to exercise such a power wholly or partially in favor of the donee himself or of his estate is invalid, if he is not within the specified class of beneficiaries;<sup>96</sup> and so is an attempt to exercise it in favor of the parent<sup>97</sup> or the children or other descendants<sup>98</sup> of a beneficiary.

**Corporations.** An appointment may be made to a corporation under a power to appoint to any "person."<sup>99</sup> A power to appoint to a corporation authorizes an appointment to a municipal corporation,<sup>1</sup> or to a corporation to be formed under directions contained in the instrument executing the power.<sup>2</sup>

### (b) Children, Issue, or Descendants

A power to appoint property to or among the children generally, or particular children, of a donor, donee, or other designated person ordinarily does not authorize either a general or partial appointment to his grandchild

of Internal Revenue v. Solomon, C.C.A.3, 124 F.2d 86.

Del.—McLaughlin v. Industrial Trust Co., 42 A.2d 12, 28 Del.Ch. 275.

Mass.—Fiduciary Trust Co. v. Mishou, 75 N.E.2d 3, 321 Mass. 615—Garfield v. State St. Trust Co., 70 N.E.2d 705, 320 Mass. 646, 169 A.L.R. 719.

N.J.—Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Kelly, 34 A.2d 532, 134 N.J.Eq. 120.

N.Y.—In re Camp's Estate, 64 N.Y.S. 2d 755.

Ohio.—Corpus Juris cited in In re Howald's Trust, 29 N.E.2d 575, 582, 65 Ohio App. 191.

Pa.—In re Scott's Estate, 44 A.2d 323, 158 Pa.Super. 138, affirmed 46 A.2d 174, 353 Pa. 575—In re Hagen's Estate, 85 Pa.Super. 123, affirmed 132 A. 175, 285 Pa. 326—In re Weaver's Estate, Orph., 30 North Co. 125—In re Refowich's Estate, Orph., 43 Sch.Leg.Rec. 152.

89. Ohio.—Corpus Juris cited in In re Howald's Trust, 29 N.E.2d 575, 582, 65 Ohio App. 191.  
49 C.J. p 1262 note 87.

90. Pa.—In re Forney, 124 A. 424, 280 Pa. 282.  
49 C.J. p 1262 note 88.

91. U.S.—Leser v. Burnet, C.C.A., 46 F.2d 756.

Md.—Lamkin v. Safe Deposit & Trust Co. of Baltimore, 64 A.2d 704—Connor v. O'Hara, 53 A.2d 33, 188 Md. 527.

92. Md.—Lamkin v. Safe Deposit & Trust Co. of Baltimore, 64 A.2d 704.

93. U.S.—Corpus Juris cited in MacBryde v. Burnett, D.C.Md., 45 F.Supp. 451, 454, reversed on other grounds, C.C.A., Parker v. MacBryde, 132 F.2d 932, certiorari denied MacBryde v. Parker, 63 S.Ct. 859, 318 U.S. 779, 87 L.Ed. 1147 and MacBryde v. Davidge, 63 S.Ct. 859, 318 U.S. 779, 87 L.Ed. 1147.  
49 C.J. p 1265 note 44.

Death of beneficiary as terminating power see supra § 17.

94. U.S.—Clauson v. Vaughan, C. C.A.Me., 147 F.2d 84—Commissioner of Internal Revenue v. Solomon, C.C.A.3, 124 F.2d 86.

Mass.—Pitman v. Pitman, 50 N.E.2d 69, 314 Mass. 465, 150 A.L.R. 509.  
49 C.J. p 1262 note 90.

What constitutes special or limited power see supra § 6.

#### Appointment held valid

N.Y.—In re Eppig's Will, 54 N.Y.S. 2d 471.

#### Effect of statutory presumption

Where special power of appointment limits class in whose favor appointment may be made, and ineligible appointees designated in will of donee of power survive donee, not even statutory presumption that provision in will constitutes exercise of power of appointment will give validity to purported exercise of power.—In re Davis, 59 N.Y.S.2d 607, 186 Misc. 397.

#### Payment of labor performed

Where deed gave grantee life estate with power to dispose of property for her own needs, and recited understanding that after grantee's death all grantee's property should go to grantor's heirs, as grantee

"shall see fit," grantee's devise of property received under the deed to person who was not grantor's heir could not be sustained on theory that devise was in payment of labor performed for benefit of grantee during her lifetime.—Roberts v. Randleman, 180 S.W.2d 674, 352 Mo. 980.

#### Creditors

The donee of a special power is required to exercise the trust as stipulated and cannot appoint to donee's creditors.—Riggs v. Barrett, 32 N.E.2d 382, 308 Ill.App. 549—Riggs v. Barrett, 32 N.E.2d 392, 308 Ill.App. 671.

95. Tenn.—Herrick v. Fowler, 67 S. W. 861, 108 Tenn. 410.  
49 C.J. p 1262 note 92.

96. Ohio.—Shank v. Dewitt, 6 N.E. 255, 44 Ohio St. 237.  
49 C.J. p 1262 notes 94, 95.

97. Pa.—Salter v. Howell, 15 Serg. & R. 188.  
49 C.J. p 1262 note 96.

98. Ala.—Thorington v. Hall, 21 So. 385, 111 Ala. 323, 56 Am.S.R. 54.  
49 C.J. p 1263 note 97.

99. N.Y.—Farmers' L. & T. Co. v. Shaw, 107 N.Y.S. 337, 56 Misc. 201, affirmed 111 N.Y.S. 1118, 127 App.Div. 656.

1. N.J.—Guld v. Newark, 99 A. 120, 87 N.J.Eq. 38.

2. N.Y.—Maynard v. Farmers' L. & T. Co., 197 N.Y.S. 526, 119 Misc. 503, affirmed 203 N.Y.S. 83, 208 App.Div. 112, affirmed 144 N.E. 905, 238 N.Y. 592.

dren or remoter descendants, but a power to appoint to or among the issue or descendants of a designated person usually authorizes an appointment to any of his descendants, of any degree of remoteness.

Except when otherwise provided by statute,<sup>3</sup> a power to appoint property to or among the children generally, or particular children, of a donor, donee, or other designated person does not authorize either a general or partial appointment to his grandchildren or remoter descendants,<sup>4</sup> or to any other person,<sup>5</sup> even though there are no children living at the time the power is attempted to be executed,<sup>6</sup> unless an intention to include grandchildren or other descendants is manifest from the instrument creating the power.<sup>7</sup> Power to appoint to children does not include the spouse of a child.<sup>8</sup>

**Issue or descendants.** A power to appoint to or among the issue or descendants of a designated person authorizes an appointment to any of his descendants, of any degree of remoteness,<sup>9</sup> unless the context or other provisions of the instrument in which it is used, and such circumstances as may legitimately bear in that direction, show the term to have been used in the more restricted sense of "children."<sup>10</sup> Where a power of appointment is created in favor of a particular person "or" his issue or descendants, it has been held that the word "or" is to be taken in a discretionary, rather than a substitutional, sense, and that the power may be exercised in favor of the issue or descendants to the exclusion of the designated person.<sup>11</sup> A power to appoint to or among the issue of such children of a designated power as may die before him is improperly exercised by an appointment to the issue of living children.<sup>12</sup>

### (c) Other Relatives and Relations

Where a donee has an exclusive power to appoint to or among the relatives or relations of himself or another, the power extends to remote relatives, and is not confined to the next of kin.

Where a donee has an exclusive power to appoint to or among the relatives or relations of himself or another, the power extends to remote relatives, and is not confined to the next of kin.<sup>13</sup> Where, however, the donee has a nonexclusive or merely distributive power to appoint among relatives, and not among such of them as he thinks proper, he is confined in his appointment to the next of kin within the statute of descent and distribution.<sup>14</sup> Under a power given the donor's daughter to appoint to the donor's relations of the "full-blood," appointment is permissible only to the donor's brothers and sisters, and an attempted appointment of the children and grandchildren of a cousin of the donee is invalid.<sup>15</sup> A bequest of a life beneficiary to his nephews is within the donee's power of appointment to "kindred."<sup>16</sup>

**Family.** The term "family," as used in a power to give to any of the male descendants of the "family" of a testator bearing his surname, has been held to mean "children" of the testator.<sup>17</sup>

**Nephews and nieces.** A power to appoint to or among nephews and nieces does not extend to grandnephews and grandnieces.<sup>18</sup>

### c. Shares to Be Appointed, and Selection, Equality, and Exclusion of Appointees

Powers of appointment to a class are either exclusive or nonexclusive, and the shares to be appointed and the donee's right to select or exclude appointees depend

3. Ala.—Thorington v. Hall, 21 So. 335, 111 Ala. 323, 56 Am.S.R. 54. 49 C.J. p 1263 note 6.

4. Pa.—In re Miller's Trust, 48 Pa. Dist. & Co. 659. 49 C.J. p 1263 note 7.

5. Pa.—In re Lewis' Estate, 49 Pa. Dist. & Co. 173, modified on other grounds 37 A.2d 482, 349 Pa. 571.—In re Miller's Trust, 48 Pa. Dist. & Co. 659. 49 C.J. p 1263 note 8.

#### Children of second marriage

Pa.—In re Miller's Trust, supra. 49 C.J. p 1263 note 8 [a].

6. Mo.—Von Behrn v. Stoeppelmann, 226 S.W. 875, 286 Mo. 73. 49 C.J. p 1263 note 9.

7. Mo.—Von Behrn v. Stoeppelmann, 226 S.W. 875, 286 Mo. 73. 49 C.J. p 1263 note 10.

8. Va.—Knight v. Yarbrough, Gilm. 27, 21 Va. 27.

9. Mass.—Leverett v. Rivers, 94 N. E. 470, 208 Mass. 241. 49 C.J. p 1264 note 16.

#### Lineal descendants

Under a power to appoint among the lineal descendants of a certain person, the appointment need not be made to immediate lineal descendants.—In re Lewis' Estates, 112 A. 454, 269 Pa. 379, 13 A.L.R. 1053.

#### Appointment to husband

An appointment by paragraph of will creating trust for benefit of testatrix' husband during his lifetime, with remainder to her daughter, or, if daughter predeceased husband, to her issue in equal shares, was ineffective as exceeding power given testatrix by her father's will to dispose of principal of trust fund among her surviving issue by her will.—In re Slocum's Estate, 81 N.Y. S.2d 120, 192 Misc. 1026.

10. N.Y.—Drake v. Drake, 32 N.E. 114, 134 N.Y. 220, 17 L.R.A. 664.

11. N.Y.—Hillen v. Iselin, 39 N.E. 368, 144 N.Y. 365—Drake v. Drake, 32 N.E. 114, 134 N.Y. 220, 17 L.R.A. 664.

12. Pa.—In re Fottrell's Estate, 2 Pa. Dist. 146.

13. Ohio.—Williams v. Burrows, 1 Ohio Dec. (Reprint) 218, 4 West. L.J. 527.

R.I.—Huling v. Fenner, 9 R.I. 410.

14. N.H.—Varrell v. Wendell, 20 N.H. 431. 49 C.J. p 1265 note 38.

15. N.Y.—In re Skidmore's Estate, 266 N.Y.S. 312, 148 Misc. 569.

16. N.Y.—In re Carroll's Will, 8 N. E.2d 864, 274 N.Y. 288, reargument denied 11 N.E.2d 737, 275 N.Y. 536.

17. N.Y.—Dominick v. Sayre, 5 N.Y. Super. 555, 8 N.Y. Leg. Obs. 278.

18. Pa.—Salter v. Howell, 15 Serg. & R. 188.

on the character of the power as determined from the instrument creating it.

Powers of appointment to a class are either exclusive or nonexclusive,<sup>19</sup> and the shares to be appointed and the donee's right to select or exclude appointees depend on the character of the power as determined from the instrument creating it.<sup>20</sup>

**Under exclusive power.** A power is exclusive when there is granted to the donee the right to appoint to any of the designated objects to the exclusion of others;<sup>21</sup> and so such a power may be exercised by the donee by appointing to such of the objects, excluding others, and in such share, as he may see fit.<sup>22</sup>

**Under nonexclusive power.** A power of appointment is nonexclusive when no right of selection among the objects or of exclusion of any of them is given to the donee.<sup>23</sup> So, under a power containing no words of exclusion, the property must be so distributed, if the power is exercised, that all

the objects shall have some portion of it,<sup>24</sup> and the exclusion of any member of the designated class in making the appointments invalidates the attempted exercise of the power.<sup>25</sup> Unless an intention is shown in the instrument creating a nonexclusive power of appointment that the appointees shall take equally,<sup>26</sup> the donee may appoint such shares as he thinks fit,<sup>27</sup> subject to the rules relating to illusory appointments as discussed *infra* § 45.

#### d. Estates or Interests to Be Appointed

Generally, the donee of a power of appointment can appoint such an estate or interest only as is authorized by the instrument creating the power, and not a greater or lesser one; but, if there is no restriction as to the estate or interest to be raised by the execution of the power, or if the matter is expressly left to the discretion of the donee, he may appoint any estate or interest which the donor of the power could have created or transferred.

As a general rule, the donee of a power of appointment can appoint such an estate or interest

19. Ky.—Barrett v. Barrett, 179 S. W. 396, 166 Ky. 411, L.R.A.1916D 493.

Me.—Moore v. Emery, 18 A.2d 781, 137 Me. 259.

N.J.—National State Bank of Newark v. Morrison, 70 A.2d 888, 7 N.J.Super. 333.

20. N.J.—National State Bank of Newark v. Morrison, *supra*.

#### Express or implied power

Trustee's power to discriminate as to amount of benefit to be received by any person from exercise of power by trustee may be explicit or implicit.—In re Skidmore's Estate, 266 N.Y.S. 312, 148 Misc. 569.

21. Ky.—Barrett v. Barrett, 179 S. W. 396, 166 Ky. 411, L.R.A.1916D 493.

Me.—Moore v. Emery, 18 A.2d 781, 137 Me. 259.

N.J.—Corpus Juris quoted in Hopkins v. Dimock, 48 A.2d 204, 206, 134 N.J.Eq. 434, affirmed 52 A.2d 853, 140 N.J.Eq. 182—Corpus Juris quoted in National State Bank of Newark v. Morrison, 70 A.2d 888, 891, 7 N.J.Super. 333.

N.Y.—In re Skidmore's Estate, 266 N.Y.S. 312, 148 Misc. 569.  
49 C.J. p 1266 note 50.

22. Me.—Moore v. Emery, 18 A.2d 781, 137 Me. 259.

N.J.—Corpus Juris quoted in Hopkins v. Dimock, 48 A.2d 204, 206, 134 N.J.Eq. 434, affirmed 52 A.2d 853, 140 N.J.Eq. 182—Corpus Juris quoted in National State Bank of Newark v. Morrison, 70 A.2d 888, 891, 7 N.J.Super. 333.

49 C.J. p 1266 note 50.

#### Effect of statutes

(1) Statutes providing for equal-

ity among beneficiaries of power, where donor fails to specify share of each and permitting donor to empower trustee to discriminate, were held applicable only to nonexclusive powers.—In re Skidmore's Estate, 266 N.Y.S. 312, 148 Misc. 569.

(2) "Persons so designated," as used in statute providing that, where power provides for distribution of estate between "persons so designated" as trustee may think proper, trustee may give entire estate to one or more, refers only to persons designated by donor.—In re Skidmore's Estate, *supra*.

23. Cal.—Corpus Juris quoted in In re Sloan's Estate, 46 P.2d 1007, 1018, 7 Cal.App.2d 319.

Ky.—Barrett v. Barrett, 179 S.W. 396, 166 Ky. 411, L.R.A.1916D 493.

Me.—Moore v. Emery, 18 A.2d 781, 137 Me. 259.

N.J.—Corpus Juris quoted in Hopkins v. Dimock, 48 A.2d 204, 206, 134 N.J.Eq. 434, affirmed 52 A.2d 853, 140 N.J.Eq. 182—Corpus Juris quoted in National State Bank of Newark v. Morrison, 70 A.2d 888, 891, 7 N.J.Super. 333.

Pa.—Corpus Juris quoted in In re Sinnott's Estate, 165 A. 244, 246, 310 Pa. 463.

49 C.J. p 1266 note 52.

24. Cal.—Corpus Juris quoted in In re Sloan's Estate, 46 P.2d 1007, 1018, 7 Cal.App.2d 319.

N.J.—Corpus Juris quoted in Hopkins v. Dimock, 48 A.2d 204, 206, 134 N.J.Eq. 434, affirmed 52 A.2d 853, 140 N.J.Eq. 182—Corpus Juris quoted in National State Bank of Newark v. Morrison, 70 A.2d 888, 891, 7 N.J.Super. 333.

Pa.—Corpus Juris quoted in In re

Sinnott's Estate, 165 A. 244, 246, 310 Pa. 463.

49 C.J. p 1266 note 52.

25. U.S.—Parker v. MacBryde, C.C. A.Md., 132 F.2d 932, certiorari denied MacBryde v. Parker, 63 S.Ct. 859, 318 U.S. 779, 87 L.Ed. 1147 and MacBryde v. Dalvidge, 63 S.Ct. 859, 318 U.S. 779, 87 L.Ed. 1147.

Cal.—Corpus Juris quoted in In re Sloan's Estate, 46 P.2d 1007, 1018, 7 Cal.App.2d 319.

N.J.—Corpus Juris quoted in Hopkins v. Dimock, 48 A.2d 204, 206, 134 N.J.Eq. 434, affirmed 52 A.2d 853, 140 N.J.Eq. 182—Corpus Juris quoted in National State Bank of Newark v. Morrison, 70 A.2d 888, 891, 7 N.J.Super. 333.

Pa.—Corpus Juris quoted in In re Sinnott's Estate, 165 A. 244, 246, 310 Pa. 463.

49 C.J. p 1266 note 53.

26. N.J.—Corpus Juris quoted in Hopkins v. Dimock, 48 A.2d 204, 206, 134 N.J.Eq. 434, affirmed 52 A.2d 853, 140 N.J.Eq. 182—Corpus Juris quoted in National State Bank of Newark v. Morrison, 70 A.2d 888, 891, 7 N.J.Super. 333.

Pa.—Corpus Juris quoted in In re Sinnott's Estate, 165 A. 244, 246, 310 Pa. 463.

49 C.J. p 1266 note 54.

27. N.J.—Corpus Juris quoted in Hopkins v. Dimock, 48 A.2d 204, 206, 134 N.J.Eq. 434, affirmed 52 A.2d 853, 140 N.J.Eq. 182—Corpus Juris quoted in National State Bank of Newark v. Morrison, 70 A.2d 888, 891, 7 N.J.Super. 333.

Pa.—Corpus Juris quoted in In re Sinnott's Estate, 165 A. 244, 246, 310 Pa. 463.

49 C.J. p 1266 note 55.

only as is authorized by the instrument creating the power, and not a greater or lesser one.<sup>28</sup> If, however, there is no restriction as to the estate or interest to be raised by the execution of the power, or if the matter is expressly left to the discretion of the donee, he may appoint any estate or interest which the donor of the power could have created or transferred.<sup>29</sup> Accordingly, where the power is general, the donee of the power may appoint to various persons in varying amounts.<sup>30</sup>

*Estates in fee.* An unrestricted power to appoint or dispose of property authorizes the appointment of a fee or absolute interest, although no words of inheritance are contained in the power;<sup>31</sup> but a fee cannot be appointed where the power authorizes the appointment of a less estate only.<sup>32</sup>

*Limited estates.* Whether a donee having a power to appoint absolutely may carve out a lesser estate or interest depends on the application of the rule of reasonable construction.<sup>33</sup> Generally, where a power to dispose of property is a general one, inferior estates or interests may be legally conveyed.<sup>34</sup> Accordingly, under a general power to appoint, or a power to appoint limited merely as to the objects, the donee is not restricted to an appointment in fee simple, but may appoint lesser or

qualified estates in the subject matter;<sup>35</sup> but the rule may be otherwise where the appointment of a lesser estate is inconsistent with the terms and intent of the power,<sup>36</sup> and, if the power expressly or by clear implication requires that an estate in fee, and no other, shall be appointed, a less estate than a fee cannot be given by the donee,<sup>37</sup> and so it would seem that, where the class of objects of a special power contains but one member at the time the power is executed, the donee has no authority to appoint an estate less than a fee.<sup>38</sup> It has been held that the assertion that, in the absence of express prohibition, the power to appoint a fee includes the power to appoint a lesser estate is not a rule of universal application but at most a doctrine of equity limited to particular cases, which must be applied with consideration of its effect on the intent and purpose of the donor, the nature of the power, and the special circumstances.<sup>39</sup>

*Appointments in trust.* Under a power of appointment, either general or special, containing no restriction as to the nature of the estate to be raised, the donee is not limited to an appointment of the legal estate, but may execute the power by an appointment in trust for the objects of the power,<sup>40</sup> except where it appears, either expressly or im-

28. Conn.—Union & New Haven Trust Co. v. Taylor, 50 A.2d 168, 133 Conn. 221.

Del.—*Corpus Juris* cited in Equitable Trust Co. v. Foulke, 40 A.2d 713, 716, 28 Del.Ch. 238—*Corpus Juris* cited in Wilmington Trust Co. v. Wilmington Trust Co., 15 A.2d 153, 166, 25 Del.Ch. 121.

Ga.—Regents of the University System v. Trust Co., 198 S.E. 345, 349, 186 Ga. 498.

49 C.J. p 1266 note 58.

29. Ga.—Regents of the University System v. Trust Co., supra.

Neb.—Massey v. Guaranty Trust Co., 5 N.W.2d 279, 142 Neb. 237.

N.Y.—Geneva Trust Co. v. Sill, 27 N.Y.S.2d 289.

49 C.J. p 1266 note 59.

30. N.J.—Hood v. Francis, 44 A.2d 182, 137 N.J.Eq. 200—Brown v. Fidelity Union Trust Co., 9 A.2d 311, 126 N.J.Eq. 406.

31. Ga.—*Corpus Juris* quoted in Regents of the University System v. Trust Co., 198 S.E. 345, 349, 186 Ga. 498.

49 C.J. p 1267 note 60.

32. Ga.—*Corpus Juris* quoted in Regents of the University System v. Trust Co., 198 S.E. 345, 349, 186 Ga. 498.

Md.—Cooke v. Husbands, 11 Md. 492.

33. N.J.—National State Bank of Newark v. Morrison, 75 A.2d 916, 9 N.J.Super. 552.

34. Ky.—Sammons v. Warfield Natural Gas Co., 201 S.W.2d 719, 304 Ky. 548.

35. Del.—Wilmington Trust Co. v. Wilmington Trust Co., 15 A.2d 153, 25 Del.Ch. 121—*Corpus Juris* cited in Wilmington Trust Co. v. Wilmington Trust Co., 180 A. 597, 602, 21 Del.Ch. 102, modified on other grounds 186 A. 903, 21 Del.Ch. 188.

Ga.—*Corpus Juris* quoted in Regents of the University System v. Trust Co., 198 S.E. 345, 349, 186 Ga. 498.

Neb.—Massey v. Guaranty Trust Co., 5 N.W.2d 279, 142 Neb. 237.

N.J.—National State Bank of Newark v. Morrison, 75 A.2d 916, 9 N.J.Super. 552.

N.Y.—In re Hart's Will, 28 N.Y.S.2d 781, 262 App.Div. 190, appeal granted 44 N.E.2d 620, 289 N.Y. 646—*Corpus Juris* cited in In re Jackson's Estate, 25 N.Y.S.2d 102, 111, 175 Misc. 882, affirmed in re Jackson's Will, 30 N.Y.S.2d 840, 262 App.Div. 997, motion denied Jackson v. Jackson, 39 N.E.2d 309, 297 N.Y. 854.

Pa.—In re Lewis' Estate, 49 Pa.Dist. & Co. 173, modified on other grounds 37 A.2d 482, 349 Pa. 571—In re Adamson's Estate, 30 Pa. Dist. & Co. 476.

49 C.J. p 1267 note 62.

A partial exercise of a power is not invalid merely because it does

not exhaust the power.—Welch v. Morse, 81 N.E.2d 361, 323 Mass. 233, 4 A.L.R.2d 913.

36. N.J.—National State Bank of Newark v. Morrison, 75 A.2d 916, 9 N.J.Super. 552.

37. Conn.—Union & New Haven Trust Co. v. Taylor, 50 A.2d 168, 133 Conn. 221.

Ga.—*Corpus Juris* quoted in Regents of the University System v. Trust Co., 198 S.E. 345, 350, 186 Ga. 498.

Ky.—Barnes v. Graves, 82 S.W.2d 297, 259 Ky. 180.

49 C.J. p 1267 note 63.

38. Ga.—*Corpus Juris* quoted in Regents of the University System v. Trust Co., 198 S.E. 345, 350, 186 Ga. 498.

49 C.J. p 1267 note 64.

39. N.Y.—In re Kennedy's Will, 18 N.E.2d 146, 279 N.Y. 255.

#### Decision construed

It has been held that the court in Matter of Kennedy's Will, supra, did not intend to jettison the well-understood rule that the power to appoint a fee includes the power to appoint a lesser estate, but merely held the rule inapplicable to the particular state of facts then before it.—In re Hart's Will, 28 N.Y.S.2d 781, 262 App.Div. 190, appeal granted 44 N.E.2d 620, 289 N.Y. 646.

40. Fla.—*Corpus Juris* cited in

pliedly, from the instrument creating the power that the donor intended the appointees to take, not in trust, but absolutely.<sup>41</sup> On the other hand, where the instrument creating a power of appointment expressly or by clear implication provides that the appointment shall be made in trust for the objects of the power, the donee cannot appoint an absolute estate.<sup>42</sup> If the power is to appoint in a certain manner or to certain persons, or to declare certain trusts or uses, the donee can create such trusts only as are within the power.<sup>43</sup>

#### e. Authority Included in Power of Appointment

A power to appoint property may include the power to appoint with conditions and charges attached, or the donee may have power to sell the property and divide the proceeds, to convey or mortgage the property, or to make advancements to or among the objects of the power.

Unless the donor manifests a contrary intent, the donee of a general power of appointment may make appointments with conditions and charges attached provided they are lawful in themselves.<sup>44</sup> A power to appoint land authorizes in equity, a charge thereon for the benefit of an object of the power;<sup>45</sup> and so a power to appoint to or among the members of a designated class is properly executed by appointing the property in fee to one or more of the class and charging it with pecuniary legacies in favor of the others.<sup>46</sup>

*To sell and divide proceeds.* A power to appoint an estate authorizes an appointment to trustees to

sell the property and divide the proceeds among the objects of the power,<sup>47</sup> unless it appears from the instrument creating the power that it was intended that the objects of the power should take the property itself and not the proceeds thereof.<sup>48</sup>

*To convey.* Where the intention of the donor, as shown by the instrument creating a power of appointment, can be as effectually carried out by a conveyance as by an appointment, a conveyance by the donee is a valid execution of the power.<sup>49</sup>

*To mortgage.* A general or unrestricted power of appointment may validly be exercised by mortgage;<sup>50</sup> but, where the donee's right to alienate the property is restricted to a sale for reinvestment, a mortgage or encumbrance is not authorized.<sup>51</sup> Where such a mortgage duly executed under an unrestricted power provides that, in case of a sale thereunder, any overplus remaining after paying the debt secured thereby shall be paid to the mortgagor, his heirs, representatives, or assigns, or otherwise disposes of the surplus or equity of redemption, it is a total appointment under the power.<sup>52</sup> In the absence of such provision, however, the mortgage is only a pro tanto exercise of the power and the balance remains unexecuted.<sup>53</sup>

*To make advances.* A power of appointment may expressly or by implication include authority to make advancements to or among the objects of the power;<sup>54</sup> but, in the absence of any such provision, a nonexclusive power to appoint or divide does not authorize the donee to make advances to

*Phipps v. Palm Beach Trust Co.*, 196 So. 299, 301, 142 Fla. 782.

*Ga.—Corpus Juris quoted in Regents of the University System v. Trust Co.*, 198 S.E. 345, 350, 186 Ga. 498.

*Neb.—Massey v. Guaranty Trust Co.*, 5 N.W.2d 279, 142 Neb. 237.

*N.J.—Marx v. Rice*, 65 A.2d 48, 1 N.J. 574—*Corpus Juris* quoted in *National State Bank of Newark v. Morrison*, 75 A.2d 916, 919, 9 N.J.Super. 552.

*N.Y.—In re Hart's Will*, 28 N.Y.S.2d 781, 262 App.Div. 190, appeal granted 44 N.E.2d 620, 289 N.Y. 646—*In re Finucane's Will*, 82 N.Y.S.2d 471, 193 Misc. 439—*In re Lichtenstein's Estate*, 30 N.Y.S.2d 455, 177 Misc. 320—*In re Colt's Estate*, 278 N.Y.S. 895, 154 M.C. 843.

*Pa.—In re Lewis' Estate*, 49 Pa.Dist. & Co. 173, modified on other grounds 37 A.2d 482, 349 Pa. 571—*In re Adamson's Estate*, 30 Pa.Dist. & Co. 476—*In re Cunningham's Estate*, 95 Pittsb.Leg.J. 457, 96 Pittsb.Leg.J. 107, 61 York Leg. Rec. 157.

49 C.J. p 1267 note 66.

41. *Ga.—Corpus Juris* quoted in *Regents of the University System v. Trust Co.*, 198 S.E. 345, 350, 186 Ga. 498.

*N.J.—Corpus Juris* quoted in *National State Bank of Newark v. Morrison*, 75 A.2d 916, 919, 9 N.J.Super. 552.

*N.Y.—In re Finucane's Will*, 82 N.Y.S.2d 471, 193 Misc. 439—*In re Van Hoesen's Will*, 67 N.Y.S.2d 503.

49 C.J. p 1267 note 67.

42. *Va.—Morris v. Morris*, 33 Gratt. 51, 74 Va. 51.

49 C.J. p 1268 note 68.

43. *Pa.—In re Ingersoll*, 31 A. 858, 859, 167 Pa. 536.

49 C.J. p 1268 note 69.

44. *N.J.—Marx v. Rice*, 65 A.2d 48, 1 N.J. 574.

45. *N.Y.—Monjo v. Woodhouse*, 78 N.E. 71, 185 N.Y. 295, 6 L.R.A.N.S., 746, 7 Ann.Cas. 135.

49 C.J. p 1268 note 73.

46. *Md.—Allder v. Jones*, 56 A. 487, 98 Md. 101.

*Pa.—Darling v. Edson*, 4 Pa.Super. 498.

47. *N.J.—Hood v. Francis*, 44 A.2d 182, 137 N.J.Eq. 200.

49 C.J. p 1268 note 76.

48. *Del.—Doe v. Vincent*, 6 Del. 416.

49 C.J. p 1268 note 78.

49. *Md.—Benesch v. Clark*, 49 Md. 497.

49 C.J. p 1268 note 79.

Mode of execution generally see infra § 38.

50. *N.C.—Hicks v. Ward*, 12 S.E. 318, 107 N.C. 392, 10 L.R.A. 821.

49 C.J. p 1268 note 81.

51. *Va.—Norris v. Woods*, 17 S.E. 552, 89 Va. 873.

52. *N.C.—Hicks v. Ward*, 12 S.E. 318, 107 N.C. 392, 10 L.R.A. 821.

49 C.J. p 1269 note 84.

53. *N.C.—Hicks v. Ward*, supra.

49 C.J. p 1269 note 85.

54. *Md.—Franke v. Auerbach*, 20 A. 129, 72 Md. 580.

*Tenn.—Pate v. Pierce*, 4 Coldw. 104.

one or some of the objects without any division among the others.<sup>55</sup>

### f. Purposes of Appointment; Conditions

A power of appointment cannot be validly exercised otherwise than for the purposes intended by the donor, as shown by the instrument creating the power; and, where a power is given conditionally on the happening or nonhappening of a specified event, it arises only on the fulfillment of the condition.

A power of appointment cannot be validly exercised otherwise than for the purposes intended by the donor, as shown by the instrument creating the power.<sup>56</sup>

*Power dependent on condition.* Where a power of appointment or revocation is given conditionally on the happening or nonhappening of a specified event, it arises only on the fulfillment of the condition.<sup>57</sup> If, however, the condition is one to be determined by the exercise of judgment or discretion, the donee's decision, if made in good faith, is conclusive as to his right to the power.<sup>58</sup>

## § 25. — Power of Sale or Exchange

- a. In general
- b. Property, estates, or interests included
- c. Estates or interests to be conveyed
- d. Authority incidental to power
- e. Terms of sale

### a. In General

The scope and extent of a power of sale or exchange are to be determined from the instrument by which the

power was created, and such a power can be exercised only for the purpose, if any, pointed out in the instrument of creation, and on fulfillment of the condition or happening of the contingency on which the power may be made dependent.

The scope and extent of a power of sale or exchange are to be determined from the instrument by which the power was created.<sup>59</sup>

*Purpose of sale.* A power of sale can be exercised only for the purpose or purposes, if any, pointed out in the instrument of creation,<sup>60</sup> in determining which the intent of the donor, as shown by the terms of the instrument, governs,<sup>61</sup> although, if the purpose or its accomplishment involves the exercise of judgment or discretion, the donee, acting in good faith, is the sole judge thereof.<sup>62</sup> If the power is unrestricted or is given for any purpose the donee may deem advisable, it may be exercised in the discretion of the donee.<sup>63</sup>

*Power dependent on condition or contingency.* A power of sale dependent on a condition or contingency becomes operative on the fulfillment of the condition or happening of the contingency,<sup>64</sup> but not before such event.<sup>65</sup> Thus, a power to sell when necessary for the support and maintenance of the donee or another is contingent on such necessity;<sup>66</sup> but the donee is ordinarily the sole judge of whether or not a sale is necessary,<sup>67</sup> unless he acts in bad faith.<sup>68</sup>

### b. Property, Estates, or Interests Included

The property, estates, or interests to be included in, or subject to, a power of sale or exchange are to be

55. Ind.—Farmer v. Farmer, 93 Ind. 435.

56. Mo.—Corpus Juris cited in Citizens' Bank of Lancaster v. Foglesong, 31 S.W.2d 778, 781, 326 Mo. 581.

49 C.J. p 1269 note 88.

57. N.Y.—Austin v. Oakes, 23 N.E. 193, 117 N.Y. 577.

49 C.J. p 1269 note 90.

Conditions attached to execution see infra § 41.

Time of execution of power dependent on contingency see infra § 37.

#### "Issue"

Under will that empowered children of testatrix, where they would leave no surviving "issue," to dispose by will of one half of principal of their share in trust, daughter of testatrix validly exercised power, notwithstanding she had adopted children, since such adoption did not constitute leaving of "issue."—Morton v. American Security & Trust Co., 287 N.Y.S. 297, 159 Misc. 166, affirmed 295 N.Y.S. 556, 251 App.Div. 31, affirmed 12 N.E.2d 164, 276 N.Y. 475, motion denied 12 N.E.2d 596, 276 N.Y. 601.

58. Mass.—Krause v. Klucken, 135 Mass. 482.

59. Ky.—Pennebaker Home for Girls v. Board of Directors, Pennebaker Home for Girls, 61 S.W.2d 883, 250 Ky. 44.

49 C.J. p 1269 note 98.

Power given by:

Mortgage or trust deed see Mortgages §§ 544-603.

Will see the C.J.S. title Wills § 1067, also 69 C.J. p 833 note 2-p 840 note 29.

Power given to:

Agent or attorney see Agency § 114.

Executor see Executors and Administrators §§ 274-296.

Trustee see the C.J.S. title Trusts §§ 286-310, also 65 C.J. p 730 note 16-p 785 note 2.

Power to sell under power to:

Appoint see supra § 24.

Charge see infra § 28.

Lease see infra § 27.

60. Ill.—Fleming v. Mills, 55 N.E.

378, 182 Ill. 464.

49 C.J. p 1272 note 50.

61. N.Y.—Dyett v. Central Trust Co., 35 N.E. 341, 140 N.Y. 54.

49 C.J. p 1273 note 51.

62. Miss.—Yates v. Clark, 56 Miss. 212.

63. Ky.—Busch v. Rapp, 63 S.W. 479, 23 Ky.L. 605.

49 C.J. p 1273 note 53.

64. Ga.—Harp v. Wallin, 20 S.E. 966, 93 Ga. 811.

49 C.J. p 1273 note 61.

Conditions attached to execution see infra § 41.

Time of execution of power dependent on contingency see infra § 37.

65. Ill.—Rodisch v. Moore, 107 N.E. 108, 266 Ill. 106.

49 C.J. p 1273 note 62.

66. Ill.—Fleming v. Mills, 55 N.E. 373, 182 Ill. 464.

49 C.J. p 1273 note 63.

67. Pa.—In re Ramsey, 135 A. 119, 287 Pa. 448.

49 C.J. p 1273 note 64.

68. Mass.—Price v. Bassett, 47 N.E. 243, 168 Mass. 598.

Mo.—Scheidt v. Crecelius, 7 S.W. 412, 94 Mo. 322, 4 Am.S.R. 384.



determined, by the application of the ordinary rules of construction, from the terms of the instrument by which the power was conferred, viewed, if necessary, in the light of the circumstances surrounding the creation of the power.

The property, estates, or interests to be included in, or subject to, a power of sale or exchange are to be determined, by the application of the ordinary rules of construction, from the terms of the instrument by which the power was conferred, viewed, if necessary, in the light of the circumstances surrounding the creation of the power.<sup>69</sup> Property specially devised or bequeathed is not included in a power given in general terms, in the absence of any apparent intention to the contrary;<sup>70</sup> and it has been held that a cemetery lot is not included in such a power.<sup>71</sup> A power of sale is inapplicable to property sold by the donor by an executory contract before the power became effective.<sup>72</sup>

*After-acquired property or interests.* A power of sale does not extend to property or interests acquired by changing investments after the creation of the power,<sup>73</sup> unless an intent is apparent on the face of the instrument creating the power that such property or interests shall be included.<sup>74</sup>

#### c. Estates or Interests to Be Conveyed

The interest or estate which may be conveyed under a power of sale or exchange is to be determined from the terms of the instrument by which the power was created.

The interest or estate which may be conveyed under a power of sale or exchange is to be determined from the terms of the instrument by which the power was created.<sup>75</sup> Where the power is conferred on one to whom an estate for life or other particular interest or estate is conveyed or given

by the same instrument, the donee has power to convey only such particular estate,<sup>76</sup> except when an intention that a larger interest may be conveyed clearly appears, in which case it is ordinarily construed to authorize the disposal of a fee simple;<sup>77</sup> and a power to sell property in which another has a life estate cannot be exercised to deprive the life tenant of his estate without his consent.<sup>78</sup> A power to sell a fee ordinarily includes the power to sell a lesser estate or interest,<sup>79</sup> or to grant an easement.<sup>80</sup>

#### d. Authority Incidental to Power

- (1) In general
- (2) To transfer without sale
- (3) To mortgage, pledge, or hypothecate
- (4) To lease or partition

##### (1) In General

The donee of a power of sale generally has incidental authority to do such acts as will effectuate the intention of the donor, as shown by the instrument creating the power; but the donee is not authorized to deal with the property otherwise than in accordance with the donor's intention.

The donee of a power of sale has, generally speaking, incidental authority to do such acts as will effectuate the intention of the donor, as shown by the instrument creating the power;<sup>81</sup> and so a power to sell includes power to convey,<sup>82</sup> or to assign, in the case of a chose in action.<sup>83</sup> The donee is not, however, authorized to deal with the property otherwise than in accordance with the donor's intention.<sup>84</sup>

*To exchange under power of sale.* A power to sell ordinarily does not include the power to barter

69. Ga.—Vernoy v. Robinson, 66 S. E. 928, 133 Ga. 653.

49 C.J. p 1269 note 96.

70. Md.—Young v. Twigg, 27 Md. 620.

71. R.I.—Derby v. Derby, 4 R.I. 414.

72. N.Y.—Roome v. Philips, 27 N.Y. 357—Lewis v. Smith, 9 N.Y. 502, 61 Am.D. 706.

73. Ky.—Fritsch v. Klausung, 13 S. W. 241, 11 Ky.L. 788.

49 C.J. p 1270 note 2.

74. Ky.—Preuser v. Terry, 16 S.W. 133, 13 Ky.L. 25.

49 C.J. p 1270 note 3.

75. Ky.—Brown v. Harlow, 203 S. W.2d 60, 305 Ky. 285.

49 C.J. p 1270 note 4.

76. Ill.—Kaufman v. Breckinridge, 7 N.E. 666, 117 Ill. 305.

49 C.J. p 1270 note 6.

77. Ky.—Brown v. Harlow, 203 S.W. 2d 60, 305 Ky. 284.

49 C.J. p 1270 note 7.

78. Tenn.—Cross v. Buskirk-Rutledge Lumber Co., 201 S.W. 141, 139 Tenn. 79, Ann.Cas.1918D 983.

79. Pa.—Guss v. Windle, 15 Pa.Dist. 324.

80. Del.—Corpus Juris cited in Hackendorn v. Mahan, 8 A.2d 794, 797, 24 Del.Ch. 228.

49 C.J. p 1270 note 11.

81. Mo.—Corpus Juris cited in Presbyterian Orphanage of Missouri v. Fitterling, 114 S.W.2d 1004, 1008, 342 Mo. 299.

49 C.J. p 1271 note 14.

82. Tex.—Hunter v. Eastham, 69 S. W. 66, 95 Tex. 648.

#### Conveyance and reconveyance

Where grantor in fee reserved power of sale for own benefit, his subsequent conveyance to intermediary and reconveyance, for purpose of revesting land in grantor, were valid.—Harman v. Hurst, 153 A. 24, 160 Md. 96.

#### Rights of remainderman

(1) Where grantor conveyed property and on same day accepted a reconveyance of life estate in the property with power to sell, lease, mortgage, and encumber the property, the estate in remainder was divested by grantor's subsequent conveyance of both life estate and remainder to another after death of remainderman.—Borgman v. Lassahn, 2 A.2d 440, 175 Md. 695.

(2) Where owner of life estate with power of sale annexed sold realty before his death but received only a portion of the purchase price, life tenant's estate and not remainderman was entitled to the remainder of the purchase money.—Takacs v. Doerfer, 48 A.2d 328, 187 Md. 62.

83. Fla.—Allen v. Lamont, 128 So. 254, 99 Fla. 1041.

84. Mo.—Graham v. Stroh, 117 S.W. 2d 258, 342 Mo. 686.

49 C.J. p 1271 note 16.

or exchange,<sup>85</sup> although, where a power to sell land and invest the proceeds in other land is conferred, a direct exchange is a valid execution of the power.<sup>86</sup>

*To sell under power of exchanging.* A power to exchange does not authorize a sale or transfer of the subject matter partially or wholly for money.<sup>87</sup>

## (2) To Transfer without Sale

Where the purposes for which a power of sale was created can be fully accomplished by a transfer without sale, such a transfer will be upheld as a substantial execution of the power; but, where the power can only be executed according to the donor's intention by a sale, a transfer without sale is not authorized.

Where the purposes for which a power of sale was created can be fully accomplished by a transfer without sale, such a transfer will be upheld as a substantial execution of the power;<sup>88</sup> and so a donee having authority to receive the proceeds of sale and appropriate them to his own use may convey the property in payment of a debt.<sup>89</sup> Where, however, the power can only be executed according to the donor's intention by a sale, a transfer without sale is not authorized.<sup>90</sup> Where a conveyance gives the power to sell specifically, it has been held to exclude by implication any power to convey the property by will.<sup>91</sup>

*Gifts.* Power to sell does not include authority to make a gift of the subject matter, or convey it

without consideration, and such a transfer is void.<sup>92</sup>

*Election of beneficiaries to take property in lieu of proceeds.* Where all the beneficiaries who are distributees of the proceeds of the sale of property authorized to be sold under a power join in asking a transfer or conveyance of the property to themselves, according to their respective shares, and such a course does not substantially conflict with the purpose of the gift, a conveyance is proper,<sup>93</sup> provided all of such beneficiaries are sui juris,<sup>94</sup> and the rights of others will not be affected by such conveyance;<sup>95</sup> but, where any beneficiary fails to consent to such transfer, it cannot be made.<sup>96</sup>

## (3) To Mortgage, Pledge, or Hypothecate

Whether or not the donee of a power of sale may execute a mortgage of the property subject to the power, or pledge or hypothecate such property depends on the donor's intent as indicated by his language and his object in creating the power.

While there is authority to the contrary,<sup>97</sup> it is a general rule that a power of sale does not authorize a mortgage or deed of trust.<sup>98</sup> However, the general rule is subject to the qualification that whether the donee of a power of sale may execute a mortgage depends on the donor's intent as indicated by his language and his object in creating the power,<sup>99</sup> and, where the power was created for the accomplishment of a purpose which may be realized by mortgaging the property,<sup>1</sup> as where it

85. Minn.—*Corpus Juris* cited in Warner Hardware Co. v. Shimon, 242 N.W. 718, 720, 186 Minn. 229, 49 C.J. p 1271 note 25.

86. Ky.—*Corpus Juris* cited in Chenault's Guardian v. Metropolitan Life Ins. Co., 53 S.W.2d 720, 722, 245 Ky. 482.

49 C.J. p 1271 note 26.

87. Wis.—Long v. Fuller, 21 Wis. 131.

88. Ind.—Valentine v. Wysor, 23 N.E. 1076, 123 Ind. 47, 7 L.R.A. 788, 49 C.J. p 1271 note 17.

89. N.Y.—Brown v. Farmers' L. & T. Co., 22 N.E. 952, 117 N.Y. 266.

90. N.Y.—Harris v. Strodl, 30 N.E. 962, 132 N.Y. 392, 49 C.J. p 1271 note 19.

91. Mass.—Langlois v. Langlois, 93 N.E.2d 264—Kent v. Morrison, 26 N.E. 427, 153 Mass. 137, 25 Am.S.R. 616, 10 L.R.A. 756.

92. Ky.—*Corpus Juris* cited in Chenault's Guardian v. Metropolitan Life Ins. Co., 53 S.W.2d 720, 723, 245 Ky. 482.

Mo.—Graham v. Stroh, 117 S.W.2d 258, 342 Mo. 686.

Neb.—*Corpus Juris* cited in Graff v. Graff, 286 N.W. 788, 792, 136 Neb. 543.

N.Y.—Manion v. Peoples Bank of Johnstown, 38 N.Y.S.2d 484, affirmed 44 N.Y.S.2d 593, 266 App. Div. 1043, reversed on other grounds 55 N.E.2d 46, 292 N.Y. 317.

49 C.J. p 1271 note 20.

93. Colo.—Moore v. Barnard, 226 P. 134, 75 Colo. 395.

49 C.J. p 1271 note 21.

94. N.Y.—Prentice v. Janssen, 79 N.Y. 478.

95. N.Y.—Prentice v. Janssen, supra.

96. N.Y.—Mitchell v. Mitchell, 121 N.Y.S. 730, 137 App.Div. 15.

97. N.H.—McLane v. Silver Bros., 31 A.2d 305, 92 N.H. 368.

49 C.J. p 1271 note 34.

98. Ky.—Gaither v. Gaither, 155 S.W.2d 746, 288 Ky. 145—*Corpus Juris* cited in Morgan v. Meacham, 130 S.W.2d 992, 998, 279 Ky. 526—*Corpus Juris* cited in Pennebaker Home for Girls v. Board of Directors, Pennebaker Home for Girls, 61 S.W.2d 883, 884, 250 Ky. 44—Chenault's Guardian v. Metropolitan Life Ins. Co., 53 S.W.2d 720, 245 Ky. 482.

Minn.—*Corpus Juris* cited in Warner

Hardware Co. v. Shimon, 242 N.W. 718, 720, 186 Minn. 229.

Miss.—Guinn v. Gordon, 192 So. 25, 186 Miss. 771—Howard v. McMurchy, 166 So. 917, 175 Miss. 328.

Tex.—*Corpus Juris* cited in Jackson v. Templin, Com.App., 66 S.W.2d 666, 671, 92 A.L.R. 873.

49 C.J. p 1271 note 35.

### Participation by donor

Fact that donor of power with claim for annuity against life tenant, who had power to "sell" for reinvestment in land, qualifiedly joined in mortgage to pay life tenant's debts, did not make mortgage good against remaindermen—Chenault's Guardian v. Metropolitan Life Ins. Co., 53 S.W.2d 720, 245 Ky. 482.

99. Ky.—Gaither v. Gaither, 155 S.W.2d 746, 288 Ky. 145.

There must be some clear extrinsic indication of intention before a "power of disposition" will be held to authorize a mortgage—Manion v. Peoples Bank of Johnstown, 38 N.Y.S.2d 484, affirmed 44 N.Y.S.2d 593, 266 App.Div. 1043, reversed on other grounds 55 N.E.2d 46, 292 N.Y. 317.

1. Ky.—Gaither v. Gaither, 155 S.W.2d 746, 288 Ky. 145—*Corpus Juris* cited in Morgan v. Meacham,

was given for raising a particular charge, subject to which the property is settled or devised,<sup>2</sup> the court may under the circumstances support a mortgage as within the donor's intention, unless a contrary intent appears.<sup>3</sup> Where an absolute and unrestricted power to sell for the donee's own benefit is conferred, it may ordinarily be executed by a mortgage, in the absence of any circumstances indicating a contrary intention.<sup>4</sup>

A power to sell or otherwise "dispose" of the subject matter has been held to authorize a mortgage,<sup>5</sup> but in other cases the power to mortgage has been denied under such a power.<sup>6</sup> It has also been held that a power to "sell and convey" property does not carry with it the power to mortgage.<sup>7</sup>

*To pledge or hypothecate.* While it has been held without qualification that a power to sell includes a power to make a conditional sale of the subject matter by hypothecation,<sup>8</sup> it would seem that the existence of the right depends on the intention of the donor as expressed in the instrument creating the power, and so authority to pledge or hypothecate the subject matter of the power has variously been held to be included,<sup>9</sup> and not to be included,<sup>10</sup> in particular powers of sale.

#### (4) To Lease or Partition

A power to sell ordinarily does not authorize a lease; but a power to sell and exchange includes a power to make partition.

A power to sell ordinarily does not authorize a lease,<sup>11</sup> although the donee of a power to sell and

dispose of property has been held to have power to lease it where circumstances justified such action, in pursuance of the purpose for which the power was created.<sup>12</sup>

*To partition.* A power to sell and exchange includes a power to make partition;<sup>13</sup> and it has been held by some authorities that a power merely to sell will authorize a partition;<sup>14</sup> but there are also other decisions to the contrary.<sup>15</sup>

#### e. Terms of Sale

Where the instrument conferring a power to sell does not prescribe the terms on which sale is to be made, the donee is authorized to sell on such terms as will carry out the intention of the donor; but generally a power of sale gives authority to sell only for money, and only for cash and not on credit.

Where the instrument conferring a power to sell does not prescribe the terms on which sale is to be made, the donee is authorized to sell on such terms as will carry out the intention of the donor.<sup>16</sup> As a general rule, a power of sale gives authority to sell only for money,<sup>17</sup> and only for cash and not on credit,<sup>18</sup> although, where the donee has power to invest the proceeds, it may be proper to take a mortgage for a part of the sale price;<sup>19</sup> and, where a sale for cash is in terms required by the instrument creating the power, a sale on credit is unauthorized.<sup>20</sup> In the absence of any apparent intention to the contrary, the donee has power to sell by executory contract as well as by deed of bargain and sale.<sup>21</sup>

130 S.W.2d 992, 998, 279 Ky. 526—*Corpus Juris* cited in *Pennebaker Home for Girls v. Board of Directors*, *Pennebaker Home for Girls*, 61 S.W.2d 883, 884, 250 Ky. 44, 49 C.J. p 1272 note 36.

2. N.J.—*Loebenthal v. Raleigh*, 36 N.J.Eq. 169.

3. Ky.—*Corpus Juris* cited in *Pennebaker Home for Girls v. Board of Directors*, *Pennebaker Home for Girls*, 61 S.W.2d 883, 884, 250 Ky. 44.

Mass.—*Hoyt v. Jaques*, 129 Mass. 286.

N.J.—*Loebenthal v. Raleigh*, 36 N.J.Eq. 169.

4. Ky.—*Gaither v. Gaither*, 155 S.W.2d 746, 288 Ky. 145, 49 C.J. p 1272 note 39.

#### Absolute ownership

One having power to sell and vested with absolute ownership of the property, as distinguished from having mere power coupled with an interest, may mortgage the property.—*Guinn v. Gordon*, 192 So. 25, 186 Miss. 771.

5. Tenn.—*Hamilton v. Mound City Mut. Life Ins. Co.*, 3 Tenn.Ch. 124. Tex.—*Faulk v. Dashiell*, 62 Tex. 642, 50 Am.R. 542.

6. N.Y.—*Manion v. Peoples Bank of Johnstown*, 38 N.Y.S.2d 484, affirmed 44 N.Y.S.2d 593, 266 App. Div. 1043, reversed on other grounds 55 N.E.2d 46, 292 N.Y. 317.

49 C.J. p 1272 note 41.

7. N.Y.—*Manion v. Peoples Bank of Johnstown*, *supra*.

8. Pa.—*In re Kaiser's Estate*, 2 Lanc.L.Rev. 362.

9. Mo.—*Harbison v. James*, 2 S.W. 292, 90 Mo. 411, 49 C.J. p 1272 note 44.

10. Cal.—*Hawxhurst v. Rathgeb*, 51 P. 846, 119 Cal. 531, 63 Am.S.R. 142.

N.Y.—*Shaw v. Saranac Horse Nail Co.*, 39 N.E. 73, 144 N.Y. 220.

11. Kan.—*Corpus Juris* quoted in *Heffelfinger v. Scott*, 47 P.2d 66, 69, 142 Kan. 395, 49 C.J. p 1272 note 47.

12. Kan.—*Corpus Juris* quoted in

*Heffelfinger v. Scott*, 47 P.2d 66, 69, 142 Kan. 395, 49 C.J. p 1272 note 48.

13. U.S.—*Phelps v. Harris*, Miss., 101 U.S. 370, 25 L.Ed. 855.

14. S.C.—*Anderson v. Butler*, 9 S.E. 797, 31 S.C. 183, 5 L.R.A. 166, 49 C.J. p 1271 note 31.

15. N.Y.—*Braunsdorf v. Braunsdorf*, 23 N.Y.S. 722, affirmed 29 N.Y.S. 1141, 76 Hun 609. R.I.—*In re Carr*, 19 A. 145, 16 R.I. 645, 27 Am.S.R. 773.

16. Tex.—*Rogers v. Jones*, 35 S.W. 812, 13 Tex.Civ.App. 453, 49 C.J. p 1273 note 54.

17. Wash.—*Hutchings v. Fanshier*, 231 P. 14, 132 Wash. 5, 49 C.J. p 1273 note 55.

18. Ga.—*Donalson v. Thomason*, 74 S.E. 762, 137 Ga. 848, 49 C.J. p 1273 note 56.

19. Wis.—*McLenegan v. Yeiser*, 91 N.W. 682, 115 Wis. 304.

20. Pa.—*Philadelphia, etc., R. Co. v. Lehigh Coal, etc., Co.*, 36 Pa. 204.

21. N.Y.—*Demarest v. Ray*, 29 Barb. 563, 19 How.Pr. 574.

## § 26. — Power to Mortgage

Whether or not a power to mortgage is reserved or conferred, and, if so, the scope and extent of the power, are questions which depend wholly on the construction of the instrument under which the power is claimed.

Whether or not a power to mortgage is reserved or conferred, and, if so, the scope and extent of the power, are questions which depend wholly on the construction of the instrument under which the power is claimed.<sup>22</sup> A mortgage given for an unauthorized purpose is void.<sup>23</sup> A power to mortgage to secure borrowed money gives no authority to mortgage for the payment of debts theretofore contracted by the donor;<sup>24</sup> but a power to encumber by mortgage has been held to include power to extend an outstanding mortgage on the property<sup>25</sup> and to authorize renewals.<sup>26</sup> A power is not exhausted by one mortgage, in the absence of any such restriction, and the donee may remortgage the property for a purpose for which the power was given.<sup>27</sup>

## § 27. — Power to Lease

Powers to lease are ordinarily to be construed liberally according to the apparent intention of the parties.

Powers to lease are ordinarily to be construed liberally according to the apparent intention of the parties.<sup>28</sup> A power to lease does not include power to sell<sup>29</sup> or to give away<sup>30</sup> the subject matter of the power. A power to lease real estate authorizes the leasing of minerals in a mine on the land.<sup>31</sup>

*Term.* A power to lease ordinarily will not support a lease in reversion or to begin in futuro;<sup>32</sup> but, if the power to lease does not extend merely to leases in possession, the donee may grant a lease to begin in futuro.<sup>33</sup> Ordinarily, a donee having a life estate or other limited interest has no power to lease for a term beyond the duration of his estate.<sup>34</sup> Subject to the rights of remaindermen and reversioners, however, the donee may lease for such term as he may see fit,<sup>35</sup> unless the term is restricted by the instrument creating the power, in which case he cannot exceed the period so prescribed.<sup>36</sup>

*Provisions of lease.* The terms, covenants, and conditions which may or must be included in a lease under a power of leasing depend on the instrument by which the power is created, as where it provides for a lease on specified terms.<sup>37</sup>

## § 28. — Power to Charge

Authority to charge property under a power of appointment is considered *supra* § 24 e.

Examine Pocket Parts for later cases.

## § 29. — Power to Manage, Control, Improve, or Invest

The scope and extent of powers to manage, control, improve, or invest in property depend on the intention of the donor or creator as manifested by the terms of the instrument by which they are given.

S.C.—Shannon v. Freeman, 109 S.E. 406, 117 S.C. 480.

22. U.S.—Warner v. Connecticut Mut. Life Ins. Co., Ill., 3 S.Ct. 221, 109 U.S. 357, 27 L.Ed. 962.  
49 C.J. p 1273 note 67.

Power given to:

Agent or attorney see Agency § 111.

Executor see Executors and Administrators § 298.

Trustee see the C.J.S. title Trusts §§ 311-318, also 65 C.J. p 785 note 3-p 791 note 4.

Mortgage under power of sale see *supra* § 25.

Testamentary power see the C.J.S. title Wills §§ 1062-1072, also 69 C.J. p 823 note 88-p 855 note 68.

### Custom

Whether power to mortgage authorizes insertion in mortgage of power of sale in case of default depends on whether such mortgage is customary where land is situated.—Ames Family School Ass'n v. Baker, 173 N.E. 497, 273 Mass. 119, 72 A.L.R. 156.

### Conveyance by will

A power to mortgage confers no

power to convey the property by will.—Langlois v. Langlois, Mass., 93 N.E.2d 264—Kent v. Morrison, 26 N.E. 427, 153 Mass. 137, 25 Am.S.R. 616, 10 L.R.A. 756.

23. N.Y.—Syracuse Sav. Bank v. Holden, 11 N.E. 950, 105 N.Y. 415.

24. N.J.—Mulford v. Mulford, 6 A. 609, 42 N.J.Eq. 68.

25. U.S.—Warner v. Connecticut Mut. Life Ins. Co., Ill., 3 S.Ct. 221, 109 U.S. 357, 27 L.Ed. 962.

26. U.S.—Ames v. Holderbaum, C.C. Iowa, 44 F. 224.

27. Iowa.—Iowa L. & T. Co. v. Holderbaum, 52 N.W. 550, 86 Iowa 1.

28. Mo.—Taussig v. Reel, 34 S.W. 1104, 134 Mo. 530.  
49 C.J. p 1274 note 74.

Power given to:

Agent or attorney see Agency § 109.

Executor see Executors and Administrators § 297.

Trustee see the C.J.S. title Trusts § 319, also 65 C.J. p 791 note 5-p 795 note 75.

Power of sale as including power to lease see *supra* § 25.

29. N.Y.—Roe v. Vingut, 1 N.Y.S. 914, affirmed 22 N.E. 933, 117 N.Y. 204.

49 C.J. p 1274 note 75.

30. Mo.—Rayl v. Golfinopoulos, 264 S.W. 911.

31. Pa.—Appeal of Wentz, 106 Pa. 301.

32. Mo.—Taussig v. Reel, 34 S.W. 1104, 134 Mo. 530.  
49 C.J. p 1274 note 87.

33. N.Y.—Sinclair v. Jackson, 8 Cow. 543.

34. N.C.—Cox v. Kinston Carolina R., etc., Co., 95 S.E. 628, 175 N.C. 299.

49 C.J. p 1275 note 91.

35. R.I.—Goddard v. Brown, 12 R.I. 31.

49 C.J. p 1275 note 92.

36. Md.—Collins v. Foley, 63 Md. 158, 52 Am.R. 505.

37. R.I.—Goddard v. Brown, 12 R.I. 31.

49 C.J. p 1275 note 98.

Without regard to whether powers or authorities to manage or control property,<sup>38</sup> or to improve it,<sup>39</sup> or invest or reinvest,<sup>40</sup> are properly to be treated as "powers" within the meaning of the term as used in this title, it is clear that their scope and extent depend on the intention of the donor or creator as manifested by the terms of the instrument by which they are given. A power to manage or superintend does not authorize a sale or conveyance.<sup>41</sup>

### § 30. Effect of Existence of Power on Other Rights and Interests in Property

A power is ineffective until it is executed, and other rights and interests in the subject matter of the power are unaffected by its mere existence. Objects of the power have, by virtue merely of the existence of the power, no contingent interest or estate in the subject matter pending its exercise.

A power is ineffective until it is executed.<sup>42</sup> Other rights and interests in the subject matter of a power are unaffected by its mere existence,<sup>43</sup> and they may vest or take effect subject to the power,<sup>44</sup> although liable to destruction or divestment on its execution, as discussed infra § 49. Where an estate is given over in default of appointment, the nature

of the estate of the remaindermen is not affected by the power of disposition until that power is exercised,<sup>45</sup> and the release of the power of appointment merely confirms the remainders vested by the original instrument of creation and does not create them.<sup>46</sup> Remainders given in default of exercise of a power of appointment to be executed by will cannot be destroyed during the life of the donee of the power, but only by his testamentary appointment.<sup>47</sup>

*Objects of power* have, by virtue merely of the existence of the power, no contingent interest or estate in the subject matter pending its exercise.<sup>48</sup>

### § 31. Interest of Donee or Grantee

A power does not of itself imply ownership or give the donee or grantee any interest or estate in the property, but, as an unrestricted power to transfer property, there inheres in a general power of appointment a measure of control proprietary in nature normally incident to ownership.

While a power may be coupled with an interest, as discussed supra § 8, or may be given to one having an interest or estate in the subject matter, supra § 5, a power does not of itself imply ownership,<sup>49</sup> but, on the contrary, excludes the idea of any ab-

38. Ala.—*Dickinson v. Conniff*, 65 Ala. 531.

49 C.J. p 1276 note 9.

39. N.Y.—*Brown v. Chesterman*, 9 N.Y.S. 187.

49 C.J. p 1276 note 10.

40. N.C.—*Crawford v. Wearn*, 20 S. E. 724, 115 N.C. 540.

49 C.J. p 1276 note 11.

41. Cal.—*Billings v. Marrow*, 7 Cal. 171, 68 Am.D. 235.

42. Md.—*Cook v. Councilman*, 72 A. 404, 109 Md. 622.

Mo.—*Corpus Juris cited in Citizens' Bank of Lancaster v. Foglesong*, 31 S.W.2d 778, 782, 326 Mo. 581.

43. Mo.—*Corpus Juris cited in Citizens' Bank of Lancaster v. Foglesong*, 31 S.W.2d 778, 782, 326 Mo. 581.

49 C.J. p 1277 note 33.

#### Rights distinct

Under deed of life estate with power of sale of remainder, life estate and power to convey remainder were entirely separate and distinct.—*Roby v. Arterburn*, 108 S.W.2d 873, 289 Ky. 816.

44. Mo.—*Corpus Juris cited in Citizens' Bank of Lancaster v. Foglesong*, 31 S.W.2d 778, 782, 326 Mo. 581.

49 C.J. p 1277 note 34.

#### Intent of instrument

Under instrument creating trust for benefit of settlors' son, conferring on son power of appointment

by will, and providing that on default of appointment or in so far as appointment should be ineffectual fund should be divided into as many shares as there should be lawful children of son at time of his death, with provision for each child to receive benefit of income from one share until child reached age of thirty, when share was to be transferred to him, and that the term "children" should include issue of deceased child per stirpes and not per capita, settlors intended that principal of trust should belong to children of their son.—*Merrill v. Lynch*, 13 N.Y.S.2d 514, 173 Misc. 39.

45. Mass.—*National Shawmut Bank of Boston v. Joy*, 53 N.E.2d 113, 315 Mass. 457.—*Crawford v. Langmaid*, 50 N.E. 606, 171 Mass. 309.

46. N.Y.—*Merrill v. Lynch*, 13 N.Y.S.2d 514, 173 Misc. 39.

47. Pa.—*McCreary's Estate v. Pitts*, 47 A.2d 235, 354 Pa. 347.

48. Ill.—*Botzum v. Havana Nat. Bank*, 12 N.E.2d 203, 367 Ill. 539. 49 C.J. p 1278 note 36.

#### Investments by trustee

Where the exercise of a general power of appointment by the donee of the power under will was optional, investments by the donee, who was also the trustee, could not be challenged by those whom the trustee appointed, since the donee

was under no obligation to prospective appointees and could commit no fraud against them.—*Brown v. Fidelity Union Trust Co.*, 9 A.2d 311, 126 N.J.Eq. 406.

49. Cal.—*Corpus Juris cited in In re Elston's Estate*, 90 P.2d 608, 613, 32 Cal.App.2d 652.

Ill.—*Oglesby v. Springfield Marine Bank*, 52 N.E.2d 1000, 385 Ill. 414.

Ky.—*Corpus Juris quoted in Traugher v. King*, 32 S.W.2d 8, 13, 235 Ky. 658.

Mass.—*Pitman v. Pitman*, 50 N.E.2d 69, 314 Mass. 465, 150 A.L.R. 509.—*Commissioner of Corporations and Taxation v. Baker*, 22 N.E.2d 441, 303 Mass. 606.—*Hogarth-Swann v. Weed*, 174 N.E. 314, 274 Mass. 125.

N.Y.—*In re Hart's Estate*, 30 N.Y.S. 2d 147, 177 Misc. 183.

49 C.J. p 1276 note 18.

Liability of subject matter to claims of creditors of donee see infra § 32.

#### Gift, devise, or bequest

(1) An appointment under a testamentary power of appointment is not a "gift" of the donee's property.—*Hooker v. Drayton*, 33 A.2d 206, 69 R.I. 290, 150 A.L.R. 723.

(2) An "appointment" is not a "devise," "gift," or a "bequest" of the testator exercising a power of appointment, but the appointment is sui generis.—*Hooker v. Drayton*, supra.

solute interest or fee simple in the person possessing the power;<sup>50</sup> nor does a power of itself give the donee or grantee any interest or estate in the property.<sup>51</sup> The donee of a power of appointment is considered to be a mere agent of the donor,<sup>52</sup> and ordinarily the property subject to appointment is not alienable by him in his proprietary capacity;<sup>53</sup> nor is it subject to transfer by him except by appointment according to the instrument creating the power.<sup>54</sup> In other words, a general power of appointment under a trust does not have the elements of a title, estate, or ownership in the property as understood in the technically restricted acceptance of the term.<sup>55</sup>

As an unrestricted power to transfer property, however, there inheres in a general power of appointment a measure of control proprietary in

nature normally incident to ownership,<sup>56</sup> and for many purposes, the donee of such a power is treated as the owner.<sup>57</sup> So it has been held that, where the donee exercises the power in conformity with the trust instrument, he has accepted the gift and it becomes his property to dispose of as he sees fit.<sup>58</sup> It has also been held that powers which give to the donee the right to keep or to dispose of property vest in the donee such an interest in the property as to make him in substance the owner thereof.<sup>59</sup> A power of sale with a provision that the proceeds belong to the donee vests beneficial title to the land in him.<sup>60</sup> A provision in a deed, reserving to the grantor power to sell and mortgage, has been held intended for the benefit of the grantor, entitling him to the proceeds on the exercise of the power.<sup>61</sup>

50. Ky.—*Corpus Juris* quoted in *Traugher v. King*, 32 S.W.2d 8, 13, 235 Ky. 658.  
49 C.J. p 1276 note 19.
51. U.S.—*O'Neil v. Dreier*, C.C.A. Hawaii, 61 F.2d 598—*Leser v. Burnett*, C.C.A.4, 46 F.2d 756.  
Conn.—*McMurtry v. State*, 151 A. 252, 111 Conn. 594.  
Del.—*Corpus Juris* cited in *Union Nat. Bank of Wilmington v. Wilson*, 25 A.2d 450, 452, 26 Del.Ch. 170—*Equitable Trust Co. v. Union Nat. Bank*, 18 A.2d 228, 25 Del. Ch. 281.  
Hawaii.—*Hakalau v. De La Nux*, 35 Hawaii 59—*In re Dreier*, 32 Hawaii 32, rehearing denied 32 Hawaii 71.
- Ill.—*Oglesby v. Springfield Marine Bank*, 52 N.E.2d 1000, 385 Ill. 414—*Botzum v. Havana Nat. Bank*, 12 N.E.2d 203, 367 Ill. 539.
- Iowa.—*In re Proestler's Will*, 5 N.W. 2d 922, 232 Iowa 640.
- Ky.—*Corpus Juris* quoted in *Traugher v. King*, 32 S.W.2d 8, 13, 235 Ky. 658.
- Me.—*Moore v. Emery*, 18 A.2d 781, 137 Me. 259.
- Md.—*Lamkin v. Safe Deposit & Trust Co. of Baltimore*, 64 A.2d 704—*Connor v. O'Hara*, 53 A.2d 33, 188 Md. 527—*O'Hara v. O'Hara*, 44 A.2d 813, 185 Md. 321, 163 A.L.R. 1444.
- N.Y.—*In re Hart's Estate*, 30 N.Y.S. 2d 147, 177 Misc. 183.  
49 C.J. p 1276 note 20.
- Power as property generally see supra § 1.
- Superadded power as converting limited estate into fee see *Deeds* § 112; *Estates* § 32; the C.J.S. title *Wills* §§ 817, 897–899, also 69 C.J. p 449 note 78–p 453 note 8, p 550 note 79–p 569 note 53.
- Naked power of sale vests no interest in subject matter in donee of power.—*Traugher v. King*, 32 S.W. 2d 8, 235 Ky. 658—49 C.J. p 1276 note 20 [a] (2).
- Title not vested  
Power, to husband of grantee, to cultivate, lease, and sell, not exclusive or giving proceeds to husband, was not sufficient to vest title in husband.—*Traugher v. King*, supra.
- Settlor as donee  
Power itself is not property, although donee of the power is also the settlor and the life beneficiary.—*National Shawmut Bank of Boston v. Joy*, 53 N.E.2d 113, 315 Mass. 457.
52. Mass.—*Pitman v. Pitman*, 50 N.E.2d 69, 314 Mass. 465, 150 A.L.R. 509.  
N.Y.—*In re Walbridge's Estate*, 33 N.Y.S.2d 47, 178 Misc. 32.
- Limited agency  
Act of donee of power of appointment is merely exercise of limited agency to name person or persons who are to receive part of trust estate of which ultimate disposition is not made in will of the donor of power.—*In re Leeds' Will*, 276 N.Y.S. 950, 154 Misc. 228.
53. Md.—*Mercantile Trust Co. of Baltimore v. Bergdorf & Goodman Co.*, 173 A. 31, 167 Md. 158, 93 A.L.R. 1205—*Pope v. Safe Deposit & Trust Co.*, 161 A. 404, 163 Md. 239.
54. Mass.—*Garfield v. State St. Trust Co.*, 70 N.E.2d 705, 320 Mass. 646, 169 A.L.R. 719.
55. N.J.—*Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Kelly*, 34 A.2d 538, 134 N.J.Eq. 120.
56. N.J.—*Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Kelly*, supra.
- Donee has as full dominion over the property as though he owned it.—*Clauson v. Vaughan*, C.C.A.Me., 147 F.2d 84—*Commissioner of Internal Revenue v. Solomon*, C.C.A.3, 124 F.2d 86.
- Approaching complete ownership  
Rights conferred on donee of a general power closely approach, although they do not reach, complete ownership.—*Fiduciary Trust Co. v. Mishou*, 75 N.E.2d 3, 321 Mass. 615.
- Equivalence  
A "general power of appointment" is equivalent to a grant of absolute ownership.—*Dallapi v. Campbell*, 114 P.2d 646, 45 Cal.App.2d 541.
- Life tenant  
If the donee of a power of appointment is given a life interest in the property and a general power of appointment which he may exercise for his own benefits, such donee's rights of enjoyment and control are closely analogous to rights of an owner.—*In re Vanderbilt's Estate*, 22 N.E.2d 379, 281 N.Y. 297, affirmed *Whitney v. Commission of New York*, 60 S.Ct. 635, 309 U.S. 530, 84 L.Ed. 909.
57. Mass.—*Garfield v. State Street Trust Co.*, 70 N.E.2d 705, 320 Mass. 646, 169 A.L.R. 719.
- Freedom of disposal  
Property over which testatrix enjoyed a general and unrestricted power of appointment was hers to dispose of as she wished, provided only that such disposal was legally effective.—*In re Williams' Trust*, 82 N.Y.S.2d 101.
58. Ohio.—*First-Central Trust Co. v. Claffin*, Com.Pl., 73 N.E.2d 383.
59. Wis.—*In re Wadleigh's Estate*, 26 N.W.2d 667, 250 Wis. 284.
60. Ky.—*Traugher v. King*, 32 S.W.2d 8, 235 Ky. 658.
61. Md.—*Harman v. Hurst*, 153 A. 24, 160 Md. 96.

## § 32. — Rights of Creditors of Donee or Grantee

It is generally the rule that the creditors of the donee may not subject the appointive property to their claims, at least prior to the donee's exercise of the power, or in case of nonexecution of the power; but in some jurisdictions, where a general power of appointment is exercised in favor of a volunteer, the subject matter of the power will be treated in equity as assets for the payment of the debts of the donee of the power, to the exclusion of the appointee, if the donee's own estate is insufficient to satisfy their demands.

Since a power does not of itself give the donee or grantee any interest or estate in the property, as discussed supra § 31, it is generally the rule that the creditors of the donee may not subject such property to their claims, at least prior to the

donee's exercise of the power,<sup>62</sup> except as otherwise provided by statute.<sup>63</sup> So, on the nonexecution of a power of appointment or disposition, equity will not treat the subject matter of the power as assets of the donee for the benefit of his creditors, as against the person or persons entitled to it in default of appointment;<sup>64</sup> and the donee's creditors have no redress in the case of his failure to execute the power.<sup>65</sup>

*On execution of power.* It is the rule in some jurisdictions that on the execution of a general power of appointment, the creditors of the donee or grantee have no claim to the property in performance to the appointee named by the donee,<sup>66</sup> although a qualification to this rule has been held

62. Pa.—In re Scott's Estate, 44 A. 2d 323, 158 Pa.Super. 138, affirmed 46 A.2d 174, 353 Pa. 575.

**Power retained by settlor in trust deeds to appoint by will payee of trust funds after settlor's death is not estate in subject matter of power, and property is not subject to his creditors' claims.**—Mercantile Trust Co. of Baltimore v. Bergdorf & Goodman Co., 173 A. 31, 167 Md. 158, 93 A.L.R. 1205.

**Attorney who had rendered services in protecting interests of client under will was not entitled to payment therefor from corpus of trust fund from which client was entitled to receive the interest for life, with a general beneficial power of appointment by will of the corpus.**—In re Welsh's Will, 18 N.Y.S.2d 157, 173 Misc. 23.

63. Minn.—Beliveau v. Beliveau, 14 N.W.2d 360, 217 Minn. 235.

### Life estate changed into fee

Under statute providing conditions under which life estate shall be changed into a fee where there is no express trust, a grant or devise of land for life with power of disposition with remainder over creates, as far as creditors, purchasers, and encumbrancers of life tenant are concerned, a fee simple; and, where judgment creditor of life tenant, having power of disposition, causes property to be sold under execution, purchaser at execution sale occurring during lifetime of life tenant acquires an absolute fee title if no redemption is made from the sale, which cuts off the rights of the remaindermen.—Beliveau v. Beliveau, 14 N.W.2d 360, 217 Minn. 235.

### Property to which applicable

The statute, whereby a general and beneficial power in a life tenant to be exercised by will creates a fee absolute as against the life tenant's creditors, applies to personal as well as real property.—City Bank Farm-

ers Trust Co. v. Miller, 297 N.Y.S. 88, 163 Misc. 459, affirmed 1 N.Y.S. 2d 640, 253 App.Div. 707, reversed on other grounds 15 N.E.2d 553, 278 N.Y. 134.

64. Ky.—Slayden v. Hardin, 79 S.W. 2d 11, 257 Ky. 685.  
49 C.J. p 1276 note 21.

65. U.S.—U. S. v. Field, Ct.Cl., 41 S. Ct. 256, 255 U.S. 257, 65 L.Ed. 611.  
49 C.J. p 1276 note 21.  
Effect of nonexecution generally see infra § 55.

66. Colo.—Johnson v. Shriver, 216 P.2d 653.  
Md.—Connor v. O'Hara, 53 A.2d 33, 183 Md. 527—Pope v. Safe Deposit & Trust Co., 161 A. 404, 163 Md. 239—Mercantile Trust Co. of Baltimore v. Bergdorf & Goodman Co., 173 A. 31, 167 Md. 158, 93 A.L.R. 1205.

Pa.—In re Stannert's Estate, 15 A.2d 360, 339 Pa. 439—In re Miller's Trust, 169 A. 362, 313 Pa. 18.  
49 C.J. p 1276 note 23.

### Reason for rule

The donor of a power of appointment has the right to condition his bounty as he sees fit, and the creditors of the donee of the power have no reason to complain that the donor did not give his bounty to them.—Johnson v. Shriver, Colo., 216 P.2d 653.

### Absence of fraud

Corpus of trust fund, created by deed directing payment of principal after settlor's death to her testamentary appointees, surviving issue or next of kin, cannot be attached after her death to satisfy her creditors, in absence of fraud in inception of trust or instrument creating it.—Mercantile Trust Co. of Baltimore v. Bergdorf & Goodman Co., 173 A. 31, 93 A.L.R. 1205.

**On death of donee of general power, right to exercise it in favor of creditors passes from donee.**—Leser v. Burnet, C.C.A., 46 F.2d 756.

### Appointees held not mere "volunteers"

Where children, in order to provide for support of their mother, appointed themselves trustees of certain realty, title of which they retained, and they appointed their mother as their agent to control and manage the realty, and gave her power to convey realty to such person or persons as she should by her last will direct, but not otherwise, and they provided that the realty should not be subjected to payment of debts of mother, and provision in mother's will gave certain portions of the realty to her grandsons, and residuary clause provided that residue of estate should go to mother's children, mother did not appoint mere "volunteers" by will so as to give rise to rights in her creditors.—Johnson v. Shriver, Colo., 216 P. 2d 653.

### When question determined

The question of blending of life tenant's estate with the appointed estate, and latter estate's liability for his debts, by execution of power of appointment in life tenant will not be determined on audit of account of his trustee filed on the falling in of the life estate; where the question arises, the practice is to award the fund to the donee's executor with instructions to segregate it and determine the question at the audit of his account.—In re Booth's Estate, 8 Pa.Dist. & Co. 116.

### In Kentucky

(1) An early decision apparently followed a rule contrary to that stated in the text.—Boyce v. Waller, 9 Dana 478, 482.

(2) This decision has been said to rest on an old statute since repealed, and it has been held to be the rule that the donee's execution of general power of testamentary appointment does not justify court in seizing property and subjecting it to payment of debts of donee if estate is insufficient to satisfy debts.—St.

to exist in that, as a matter of public policy, the settlor of a trust inter vivos may not deprive his creditors of their right to enforce payment of their debts out of the trust property where he has reserved to himself the income for life and a general power of appointment.<sup>67</sup> In other jurisdictions, however, it is the settled rule that, where a general power of appointment is exercised in favor of a volunteer, the subject matter of the power will be treated in equity as assets for the payment of the debts of the donee of the power, to the exclusion of the appointee,<sup>68</sup> or taker in default after a defective appointment;<sup>69</sup> but creditors can lay claim to the

appointed estate only to the extent that the donee's own estate is insufficient to satisfy their demands.<sup>70</sup> The rule permitting the donee's creditors to enforce their claims against the property appointed to a volunteer does not apply where the power is limited and not general,<sup>71</sup> or in favor of creditors who were such before the creation of the power,<sup>72</sup> or against a bona fide purchaser for value.<sup>73</sup>

The donee of a general, unrestricted power of appointment may subject the estate appointed to the payment of his debts by specifically providing in the appointing provisions for the payment of such debts,<sup>74</sup> or by otherwise manifesting an intention

**Matthews Bank v. De Charette**, 83 S.W.2d 471, 259 Ky. 802, 99 A.L.R. 1146, followed in **Godfrey v. De Charette**, 84 S.W.2d 66, 260 Ky. 147.

**67. Pa.**—In *re* **Mogridge's Estate**, 20 A.2d 307, 342 Pa. 308.

A provision in a separation agreement obligating a husband to pay his wife a specific monthly sum, to the effect that the husband will do nothing which will operate to prevent or delay the payments to the wife provided for in the agreement, subordinates the husband's right to alienate his property by exercise of power of appointment to the wife's remedy to collect therefrom the monthly payments, and prevents him from placing the res of a trust inter vivos beyond her reach by exercise of a reserved power of appointment.—In *re* **Welsh's Estate**, 61 Pa.Dist. & Co. 47.

**68. U.S.**—**Stratton v. U. S., C.C.A. Mass.**, 50 F.2d 48, certiorari denied 52 S.Ct. 31, 284 U.S. 651, 76 L. Ed. 552.

**Ga.**—**Corpus Juris** quoted in **Jackson v. Franklin**, 177 S.E. 731, 735, 179 Ga. 840, 97 A.L.R. 1064.

**Ill.**—**Northern Trust Co. v. Porter**, 13 N.E.2d 487, 368 Ill. 256.

**Mass.**—**Garfield v. State St. Trust Co.**, 70 N.E.2d 705, 320 Mass. 646, 169 A.L.R. 719—**Prescott v. Wordell**, 65 N.E.2d 19, 319 Mass. 118—**National Shawmut Bank of Boston v. Joy**, 53 N.E.2d 113, 315 Mass. 457—**Pitman v. Pitman**, 50 N.E.2d 69, 314 Mass. 465, 150 A.L.R. 509—**Commissioner of Corporations and Taxation v. Baker**, 22 N.E.2d 441, 303 Mass. 606—**Slayton v. Fitch Home**, 200 N.E. 357, 293 Mass. 574, 104 A.L.R. 669—**Hogarth-Swann v. Weed**, 174 N.E. 314, 274 Mass. 125. **N.J.**—**U. S. Trust Co. of Newark v. Montclair Trust Co.**, 33 A.2d 901, 133 N.J.Eq. 579—**Seward v. Kaufman**, 180 A. 857, 119 N.J.Eq. 44, 49 C.J. p 1277 note 24.

#### Basis of rule

(1) "The underlying thought seems to be that as it is true that when a

man dies the law in dealing with his own property puts the right of his creditors ahead of the rights of his devisees or heirs at law, so where he has a general power of appointment over property other than his own, equity prefers the rights of his own creditors as against those of his appointees if the latter are not creditors. The principle is that, having power to appoint the property to anybody he sees fit, it is his duty to appoint to creditors rather than volunteers."—**Jackson v. Franklin**, 177 S.E. 731, 735, 179 Ga. 840, 97 A.L.R. 1064.

(2) Other statements of basis of rule see 49 C.J. p 1277 note 24 [a].

#### Personal property

A general power of appointment may be considered as personal property as to creditor's rights.—In *re* **Winter's Estate**, 47 A.2d 548, 24 N.J. Misc. 172.

**69. Ill.**—**Northern Trust Co. v. Porter**, 13 N.E.2d 487, 368 Ill. 256.

**70. N.J.**—**U. S. Trust Co. of Newark v. Montclair Trust Co.**, 33 A.2d 901, 133 N.J.Eq. 579—**Seward v. Kaufman**, 180 A. 857, 119 N.J. Eq. 44.

49 C.J. p 1277 notes 24, 25.

Specifically devised realty of testatrix must be exhausted by payment of debts before property appointed by general residuary clause will be used for that purpose.—**Slayton v. Fitch Home**, 200 N.E. 357, 293 Mass. 574, 104 A.L.R. 669.

#### Expenses of administration

Where testatrix' power of appointment was exercised through residuary clause in will, expenses of administration of testatrix' estate were payable out of individual estate, and any expenses arising out of administration of property subject to power were payable from that property.—**Slayton v. Fitch Home**, supra.

**71. Mass.**—**Prescott v. Wordell**, 65 N.E.2d 19, 319 Mass. 118.

49 C.J. p 1277 note 27—23 C.J. p 1152 note 21 [a].

#### Claims or expenses of administration

Property covered by special power of appointment cannot be subjected to payment of deceased donee's creditors' claims or expenses of administration of donee's estate, except as required by rules relating to fraudulent conveyances.—**Prescott v. Wordell**, supra.

#### Power to appoint by will

Generally, the equity of a donee's creditors rests on the donee's power to appoint in his own favor, and, where a power to appoint by will is not considered to be general so as to permit appointment to the donee's estate or to his creditors, the creditors have no claim in case of appointment to others.—**Hooker v. Drayton**, 33 A.2d 206, 69 R.I. 290, 150 A.L.R. 723.

**72. U.S.**—**Ebersole v. McGrath, D.C. Ohio**, 271 F. 995, error dismissed, C.C.A., 272 F. 1022.

**Vt.**—**Wales v. Bowdish**, 17 A. 1000, 61 Vt. 23, 4 L.R.A. 819.

**73. U.S.**—**Ebersole v. McGrath, D.C. Ohio**, 271 F. 995, error dismissed, C.C.A., 272 F. 1022.  
49 C.J. p 1277 note 29.

**74. Ohio.**—In *re* **Howald's Trust**, 29 N.E.2d 575, 65 Ohio App. 191.

#### Discharge of obligation

Donee, in providing for payment of debts out of appointed property, was only discharging obligation equity would have enforced.—**McMurtry v. State**, 151 A. 252, 111 Conn. 594.

#### Power held exercised

(1) Beneficiary of trust, who was also donee of power to appoint trust property, was held to have exercised power of appointment in favor of his creditors where his will provided for distribution of trust property and authorized executor to pay his debts out of first money coming into executor's hands.—**Mayberry v. Redmond**, 83 S.W.2d 897, 169 Tenn. 190.

(2) Where a deed of trust directed the income of the property to be paid to a daughter for life, and that on her decease the principal be con-



to blend his own and the appointed estate for purposes of payment of debts;<sup>75</sup> but it has been held that the donee's personal estate is required to be exhausted first in the payment of his debts before seeking contribution out of the appointed property for payment of the remainder.<sup>76</sup> In determining whether a testator who exercised a power of appointment intended to blend his own separate estate with the appointive estate, for the payment of his debts, his intention in exercising his power of appointment is to be gathered from his will, and his intention as it there appears must prevail.<sup>77</sup> A direction in the will that the testator's debts be paid

out of his estate, without mention of the estate over which the testator had a power of appointment, is required to be construed to refer only to his individual estate and not the appointive estate, in the absence of a manifested intention to the contrary;<sup>78</sup> and the fact that the testator disposed of his own separate estate and the estate over which he had the power of appointment in the same manner and on the same trusts does not indicate an intention to blend the estates for all purposes so as to subject the appointive estate to the payment of the testator's individual debts.<sup>79</sup>

## VI. EXECUTION

### § 33. Duty to Execute

A power may be coupled with a mandatory duty to exercise it, but ordinarily the donee of a power may or may not exercise it as he sees fit.

A power may be coupled with a mandatory duty to exercise it,<sup>80</sup> as in the case of a power in trust, as discussed in the C.J.S. title Trusts § 247, also 65 C.J. p 652 notes 52-54, or where the duty is imposed by the instrument conferring the power,<sup>81</sup> and in such case the donee of the power is under a duty to exercise it, even though he is given discretion as to the manner of its exercise.<sup>82</sup> Ordinarily,

however, as discussed supra § 1, a power is not imperative and the donee may or may not exercise it as he sees fit.<sup>83</sup>

### § 34. Compelling or Restraining Execution

As a rule the courts will not interfere to compel or restrain the exercise of a discretionary or nonimperative power.

As a rule the courts will not interfere to compel or control the execution of a discretionary or nonimperative power,<sup>84</sup> except as they may compel specific

veyed to such persons and estates as she should by will appoint, her will, directing payment of her debts and giving residue to her husband absolutely, and on his death to any children or issue of children, operated to appoint the trust property to pay her debts, as she might do under the general power.—In re Pennsylvania Co. for Insurances on Lives and Granting Annuities, 107 A. 840, 264 Pa. 433.

75. Pa.—In re Scott's Estate, 44 A. 2d 323, 158 Pa.Super. 138, affirmed 46 A.2d 174, 353 Pa. 575.

**Intention to blend estates held not shown**

Pa.—In re Stannert's Estate, 15 A.2d 360, 339 Pa. 439.

76. Ohio.—In re Howald's Trust, 29 N.E.2d 575, 65 Ohio App. 191.

77. Pa.—In re Stannert's Estate, 15 A.2d 360, 339 Pa. 439.

#### **Extrinsic evidence**

Where manifest intention of testator not to blend estate over which he had power of appointment with his own separate estate, and hence not to subject appointive estate to payment of his individual debts, was clear from language of will itself, extrinsic evidence of intention was properly excluded by trial court.—In re Stannert's Estate, supra.

78. Pa.—In re Stannert's Estate, 15 A.2d 360, 339 Pa. 439.

#### **Realty not subject to payment of debts**

Where children, in order to provide for support of their mother, appointed themselves trustees of certain realty, title of which they retained, and they appointed their mother as their agent to control and manage the realty, and gave her power to convey realty to such person or persons as she should by her last will direct, but not otherwise, and they provided that the realty should not be subjected to payment of debts of mother, provision in will of mother directing payment of all just debts except those that were secured by liens on realty was not an exercise of the power of appointment in favor of the mother's creditors, since the only relief mother was warranted in extending to her creditors was by making a specific bequest to creditors.—Johnson v. Shriver, Colo., 216 P.2d 653.

79. Pa.—In re Stannert's Estate, 15 A.2d 360, 339 Pa. 439.

80. U.S.—Mississippi Valley Trust Co. v. Commissioner of Internal Revenue, C.C.A., 72 F.2d 197, certiorari denied 55 S.Ct. 119, 293 U.S. 604, 79 L.Ed. 695, rehearing denied

55 S.Ct. 147, 293 U.S. 631, 79 L.Ed. 717.

Execution of powers created by will generally see the C.J.S. title Wills § 1070, also 69 C.J. p 845 note 12 et seq.

81. Va.—Daniel v. Brown, 159 S.E. 209, 156 Va. 563, 75 A.L.R. 1377.

82. N.Y.—Graham v. Livingston, 7 Hun 11.

65 C.J. p 652 note 53.

83. Del.—McLaughlin v. Industrial Trust Co., 42 A.2d 12, 28 Del.Ch. 276—Equitable Trust Co. v. Union Nat. Bank, 18 A.2d 228, 25 Del.Ch. 281.

N.Y.—Merrill v. Lynch, 13 N.Y.S.2d 514, 173 Misc. 39.

49 C.J. p 1278 note 38.

Relief against failure to execute power see infra § 55.

#### **Disposition on failure to exercise**

(1) Where grantor provides for disposition of property on failure of donee of a power of appointment to exercise it, the power is ordinarily regarded as a "discretionary power" and not "an imperative power."—Application of Schluskel, 89 N.Y.S. 2d 47, 195 Misc. 1008.

(2) Disposition on failure to exercise power generally see infra § 55.

84. U.S.—Mississippi Valley Trust Co. v. Commissioner of Internal

performance of a contract to execute the power.<sup>85</sup> However, where the instrument creating the power makes its execution an imperative duty, its execution may be compelled by the court.<sup>86</sup>

**Restraining execution.** The courts will not ordinarily interpose to restrain the execution of a power,<sup>87</sup> except where abuse of discretion, bad faith, or fraud is shown,<sup>88</sup> or where the power is attempted to be exercised in a manner different from that authorized by the donor.<sup>89</sup> Where the validity of a power is in question, its exercise may be restrained pending the determination of the controversy.<sup>90</sup>

### § 35. By Whom Power May Be Executed

A power may be exercised only by the person or persons authorized by the instrument creating the power.

A power may be exercised only by the person or persons authorized by the instrument creating the power.<sup>91</sup>

**Infants.** A collateral power or a power in gross may be exercised by an infant, whether the subject matter of the power is realty or personalty;<sup>92</sup> but an infant may not execute a power appendant or appurtenant,<sup>93</sup> unless, it has been indicated, the instrument giving such power shows the donor's intention that it should be exercised during the donee's infancy.<sup>94</sup>

**Insane persons.** An insane person may not exercise a power.<sup>95</sup> As considered supra § 15, where a power coupled with an interest or a mere naked power devolves on an insane person, it is suspended during the continuance of the disability, and it has been held that the power may not be exercised by the committee of the insane person,<sup>96</sup> but it has also been held that a court may authorize the guardian of an insane person to exercise a power of sale which is for the lunatic's benefit.<sup>97</sup>

**Married women.** Both at common law and under the modern statutes a married woman may, without

Revenue, C.C.A., 72 F.2d 197, certiorari denied 55 S.Ct. 119, 293 U.S. 604, 79 L.Ed. 695, rehearing denied 55 S.Ct. 147, 293 U.S. 631, 79 L.Ed. 717.

Ill.—Kelly v. Dyer, 194 N.E. 255, 355 Ill. 46—People v. Kaiser, 137 N.E. 826, 306 Ill. 313.

Tex.—City of San Antonio v. Zogheib, Civ.App., 70 S.W.2d 333, reversed on other grounds 101 S.W.2d 539, 129 Tex. 141—Corpus Juris cited in Davis v. Davis, Civ. App., 44 S.W.2d 447, 450.

Va.—Daniel v. Brown, 159 S.E. 209, 156 Va. 563, 75 A.L.R. 1377. 49 C.J. p 1278 note 41. Supervision of courts over execution of power see infra § 42.

85. Mo.—Tausig v. Reel, 34 S.W. 1104, 134 Mo. 530. 49 C.J. p 1278 note 42.

86. Cal.—O'Neil v. Ross, 277 P. 123, 98 Cal.App. 306.

Ill.—People v. Kaiser, 137 N.E. 826, 306 Ill. 313.

N.H.—Fowler v. Hancock, 197 A. 715, 89 N.H. 301.

Va.—Daniel v. Brown, 159 S.E. 209, 156 Va. 563, 75 A.L.R. 1377. 65 C.J. p 951 note 4.

Compelling execution of power in trust see the C.J.S. title Trusts § 422, also 65 C.J. p 951 note 4.

87. U.S.—Mississippi Valley Trust Co. v. Commissioner of Internal Revenue, C.C.A., 72 F.2d 197, certiorari denied 55 S.Ct. 119, 293 U.S. 604, 79 L.Ed. 695, rehearing denied 55 S.Ct. 147, 293 U.S. 631, 79 L.Ed. 717.

49 C.J. p 1278 note 43.

88. Pa.—Brüner v. Naglee, 7 Phila. 384.

49 C.J. p 1278 note 44.

Fraudulent exercise of power see infra § 45.

89. Ga.—Napier v. Napier, 14 S.E. 870, 89 Ga. 48. Mode of execution see infra § 38.

90. N.C.—Galbreath v. Everett, 84 N.C. 546.

91. Ky.—Koch v. Robinson, 83 S.W. 111, 26 Ky.L. 969. 49 C.J. p 1278 note 48.

Testamentary power see the C.J.S. title Wills § 1070, also 69 C.J. p 845 note 21 et seq.

To whom power may be granted see supra § 5.

Right of trustee in bankruptcy of donee of power to exercise power see Bankruptcy § 183.

**Grant to husband and wife and heirs of their bodies**

Where a deed to husband and wife and the heirs of their bodies provides that the grantees, or the survivor of them, might, with written consent of the grantors, sell the land conveyed and reinvest the proceeds, the children of the grantees need not join in a conveyance of the land.—Louisville, etc., R. Co. v. Horn, 82 S.W. 567, 26 Ky.L. 829.

92. Ky.—Owens v. Owens, 204 S.W.2d 580, 305 Ky. 460. 49 C.J. p 1278 note 54.

"Collateral power" defined see supra § 7.

"Power in gross" defined see supra § 7.

Capacity of infants to:

Alienate property see Infants § 36 et seq.

Make will see the C.J.S. title Wills § 8, also 68 C.J. p 419 note 17 et seq.

93. Ky.—Owens v. Owens, supra.

49 C.J. p 1278 note 55.

"Powers appendant" or "powers appurtenant" defined see supra § 7.

**Power exercisable by will**

A trust beneficiary's power under trust settlement, executed during his minority, to appoint by will distributees of trust estate on his death before completion of distribution to him, was "inchoate power," which could not be exercised until he reached majority, when he became competent to execute will.—In re Maxhimer's Estate, 40 N.E.2d 941, 139 Ohio St. 444.

94. Tenn.—Hill v. Clark, 4 Lea 405. 49 C.J. p 1278 note 56.

95. Del.—Equitable Trust Co. v. Union Nat. Bank, 18 A.2d 228, 25 Del. Ch. 281.

**Evidence held sufficient**

To sustain finding that donee of power was at the time mentally incompetent to exercise such power and warranted judgment setting aside the exercise thereof.—Swart v. Security-First Nat. Bank of Los Angeles, 120 P.2d 697, 48 Cal.App.2d 824.

96. Del.—Equitable Trust Co. v. Union Nat. Bank, 18 A.2d 228, 25 Del. Ch. 281.

**The statutory authority of trustee of an insane person to do whatever is necessary for the care, preservation, and increase of the insane person's estate does not give the trustee authority to exercise a power given to the insane person.—Equitable Trust Co. v. Union Nat. Bank, supra.**

97. Iowa.—Jones v. Clyman, 188 N.W. 954, 193 Iowa 1248.

the consent or concurrence of her husband, execute a power, whether appendant, in gross, or simply collateral, by will, deed, or otherwise, even in favor of her husband, and even though she may be under disability to dispose of her own estate, regardless of whether the power was granted or reserved before or after her marriage,<sup>98</sup> unless the concurrence of the husband is required by the instrument conferring the power,<sup>99</sup> or the terms of the instrument are inconsistent with the exercise of the power during coverture.<sup>1</sup>

*Personal, official, or fiduciary character of donee.* When a power is conferred on a person or persons by name, it is ordinarily personal, and may be exercised only by the donees named;<sup>2</sup> but when it is given to a class or to a designated person or persons merely *virtute officii*, it is not personal, and may be exercised by the person or persons for the time being members of the class or holding the office.<sup>3</sup>

*Joint or several authority.* As a general rule, where a power is conferred on two or more persons, and it is dependent on their judgment whether or not it shall be exercised, the power is a special confidence in their combined judgments, and the concurrence of both or all is necessary to a valid exercise of the power,<sup>4</sup> at least as far as acts involving

discretion are concerned.<sup>5</sup> A power may, however, be executed by one donee with the assent of the other or others where such others do not merely delegate the power to him;<sup>6</sup> and, where a power to sell is given to two or more persons, a sale by one, subsequently ratified by the other or others, is valid.<sup>7</sup> The general rule requiring concurrence of all does not apply where the power is in terms given to the donees jointly or severally,<sup>8</sup> or where a majority of the donees are expressly authorized to act;<sup>9</sup> but, where there are only two donees, one may not exercise the power under the latter provision,<sup>10</sup> Where there is a grant of a power in trust to two, and it is impossible for one of them to qualify, it has been held that the other may exercise the power.<sup>11</sup>

Except when otherwise provided by statute,<sup>12</sup> a mere naked or collateral power given to two or more persons in their personal capacity, as distinguished from a power given them *virtute officii*, is determined by the death of any one, and does not survive to the other or others,<sup>13</sup> but a power coupled with an interest may be executed by the survivor or survivors,<sup>14</sup> even though the power is discretionary,<sup>15</sup> unless a contrary intention appears from the instrument creating the power.<sup>16</sup> Where a power

98. Ky.—Hankins v. Columbia Trust Co., 134 S.W. 498, 142 Ky. 206.

Wyo.—Corpus Juris cited in In re Smith's Estate, 97 P.2d 677, 680, 55 Wyo. 181.

49 C.J. p 1279 note 64—30 C.J. p 694 note 18, p 755 note 6, p 759 note 11.

99. Wyo.—Corpus Juris cited in In re Smith's Estate, 97 P.2d 677, 680, 55 Wyo. 181.

49 C.J. p 1279 note 65.

1. Wyo.—Corpus Juris cited in In re Smith's Estate, 97 P.2d 677, 680, 55 Wyo. 181.

49 C.J. p 1279 note 66.

2. Ga.—Corpus Juris quoted in Bratton v. Trust Co. of Georgia, 11 S.E.2d 204, 208, 191 Ga. 49.

49 C.J. p 1279 note 68.

Delegation of power see *infra* § 36.

3. Ga.—Corpus Juris quoted in Bratton v. Trust Co. of Georgia, 11 S.E.2d 204, 208, 191 Ga. 49.

49 C.J. p 1280 note 69.

4. U.S.—Corpus Juris cited in Hoskins v. City of Orlando, C.C.A.Fla., 51 F.2d 901, 905.

Cal.—Talcott v. Talcott, 129 P.2d 946, 54 Cal.App.2d 743.

49 C.J. p 1280 note 71.

#### Tenants by entirety

Discretionary legal power, expressly given husband and wife as tenants by entirety for life by deed to them, may be jointly execut-

ed by them during their joint lives.—Litterski v. Litterski, 171 A. 874, 166 Md. 641.

5. U.S.—Corpus Juris cited in Hoskins v. City of Orlando, C.C.A.Fla., 51 F.2d 901, 905.

N.J.—Tarlton v. Gilsey, Ch., 37 A. 467.

6. Cal.—Panaud v. Jones, 1 Cal. 488. Tex.—Giddings v. Butler, 47 Tex. 535.

49 C.J. p 1280 note 73.

Delegation of power in general see *infra* § 36.

7. Ark.—Hill v. Peoples, 95 S.W. 990, 80 Ark. 15.

49 C.J. p 1280 note 74.

8. Iowa.—Taylor v. Dickinson, 15 Iowa 483.

Ky.—Hite v. Shrader, 3 Litt. 444.

9. N.Y.—Crane v. Decker, 22 Hun 452.

10. N.Y.—Crooked Lake Nav. Co. v. Keuka Nav. Co., 4 N.Y.St. 380, affirmed 22 N.E. 1126, 115 N.Y. 667.

11. N.Y.—In re Garfunkel's Estate, 71 N.Y.S.2d 693.

12. Pa.—Hunter v. Anderson, 25 A. 538, 152 Pa. 386.

49 C.J. p 1280 note 79.

#### Powers within scope of statute

Codal provision that, where "power" is vested in several persons, all must unite in its execution, but in case any one or more of them is

dead, the power may be executed by the survivor or survivors unless otherwise prescribed by the terms of the power, means any power including the power to consent as well as the power to alienate or transfer.—Talcott v. Talcott, 129 P.2d 946, 54 Cal.App.2d 743.

13. Pa.—In re Solomon's Estate, 2 A.2d 825, 332 Pa. 462.

49 C.J. p 1281 notes 81, 82.

14. Md.—Litterski v. Litterski, 171 A. 874, 166 Md. 641.

49 C.J. p 1281 note 83.

Death of person whose consent is condition attached to execution of power see *infra* § 41.

#### Tenants by entirety

Power granted to tenants by entirety of a life interest is one coupled with an interest, and whole interest or estate of both husband and wife in property conveyed to them as tenants by entirety for their lives survived on death of either to surviving spouse, so that power granted them by deed to dispose of entire estate during their lifetime was not extinguished by husband's death, but survived to widow.—Litterski v. Litterski, *supra*.

15. Md.—Litterski v. Litterski, *supra*. 49 C.J. p 1281 note 84.

16. Ky.—Steele v. Cassell, 191 S.W. 640, 173 Ky. 817.

49 C.J. p 1281 note 85.

is given to persons *virtute officii*, and not as individuals, it may, on the death of one or some of them, be exercised by the survivor or survivors.<sup>17</sup>

*Effect of renunciation or resignation of, or discharge from, office or trust.* The donee of a power who is also appointed executor or trustee by the instrument creating the power is not deprived of his right to exercise it by renouncing, resigning, or being discharged from his office or trust,<sup>18</sup> unless the power was given him simply *virtute officii*.<sup>19</sup>

*Heirs or representatives of deceased donee.* A power ordinarily may not be exercised by the heirs of the donee after his death;<sup>20</sup> nor may it be exercised by his executor or administrator,<sup>21</sup> unless it is coupled with an interest or trust,<sup>22</sup> or is expressly conferred on the donee and his executors or administrators<sup>23</sup> or legal representatives.<sup>24</sup>

### § 36. — Delegation or Assignment of Powers

The donee of a power which involves discretion ordinarily may not assign it or delegate its exercise to another unless he is authorized to do so.

A power the execution of which does not require the exercise of judgment or discretion may be delegated by the donee;<sup>25</sup> but the donee of a power which involves discretion ordinarily may not assign it or delegate its exercise to another,<sup>26</sup>

whether or not it is founded on the donor's personal confidence in the donee,<sup>27</sup> unless he is authorized so to do either expressly or by necessary implication,<sup>28</sup> except in some particular act merely ministerial and not requiring the exercise of judgment.<sup>29</sup> Similarly, where the consent of a third person is made a condition precedent to the execution of a power, such person may not authorize another as his attorney to consent.<sup>30</sup> It would seem, however, that a power which is absolute and does not involve any act personal to the donee may be delegated by him.<sup>31</sup>

Although the general statement has been made that the donee of a power of appointment is not entitled to delegate the exercise of the power unless there is something in the gift of the power to justify the delegation,<sup>32</sup> there is substantial authority that a power of appointment may be exercised by creating a new and further power of appointment.<sup>33</sup> Thus, it has been held that a special power of appointment may be effectively exercised by creating a general power in an object of the special power,<sup>34</sup> or by appointing an interest for life in an object of the power and a special power to appoint among persons, all of whom are objects of the original power,<sup>35</sup> but, if the power expressly or by clear implication requires that an estate in fee and no other be appointed, it may not be exer-

17. N.Y.—Loeb v. Hasslacher, 203 N.Y.S. 393, 209 App.Div. 58. Pa.—In re James' Estate, 9 Pa.Dist. & Co. 639.

49 C.J. p 1281 note 86.

18. Ga.—Corpus Juris quoted in Bratton v. Trust Co. of Georgia, 11 S.E.2d 204, 209, 191 Ga. 49.

49 C.J. p 1281 note 87.

19. Ga.—Corpus Juris quoted in Bratton v. Trust Co. of Georgia, 11 S.E.2d 204, 209, 191 Ga. 49.

49 C.J. p 1281 note 88.

20. Tenn.—Stamper v. Venable, 97 S.W. 812, 117 Tenn. 557.

49 C.J. p 1281 note 90.

21. N.J.—Chambers v. Tulane, 9 N. J.Eq. 146.

49 C.J. p 1281 note 91.

22. Pa.—Estate of Cunningham, 29 Pa.Dist. 544.

49 C.J. p 1281 note 92.

23. N.Y.—Doolittle v. Lewis, 7 Johns.Ch. 45, 11 Am.D. 389.

Pa.—Smith v. Folwell, 1 Binn. 546.

49 C.J. p 1282 note 93.

24. Ga.—Lewis v. King, 141 S.E. 909, 165 Ga. 705.

49 C.J. p 1282 note 94.

25. N.Y.—Crooke v. Kings County, 97 N.Y. 421, 453.

49 C.J. p 1282 note 96.

Delegation by donee of testamentary

power see the C.J.S. title Wills § 1070, also 69 C.J. p 845 note 22 et seq.

26. Ky.—Corpus Juris cited in De Charette v. De Charette, 94 S.W. 2d 1018, 1020, 264 Ky. 525, 104 A.L.R. 1455.

49 C.J. p 1282 note 97.

27. Tex.—Michael v. Crawford, 193 S.W. 1070, 108 Tex. 352.

28. Mass.—Boston Safe Deposit & Trust Co. v. Prindle, 195 N.E. 793, 290 Mass. 577.

49 C.J. p 1282 notes 99, 1, p 1283 notes 5, 6.

29. N.Y.—Gates v. Dudgeon, 66 N.E. 116, 173 N.Y. 426, 93 Am.S.R. 608.

49 C.J. p 1283 note 2.

30. N.Y.—People v. Smith, 45 N.Y. 772.

49 C.J. p 1283 note 3.

Consent of third person as condition precedent to exercise of power see *infra* § 41.

31. Ky.—Coats v. Louisville, etc., R. Co., 17 S.W. 564, 92 Ky. 263, 13 Ky. L. 557.

49 C.J. p 1283 note 4.

32. Mass.—Boston Safe Deposit & Trust Co. v. Prindle, 195 N.E. 793, 290 Mass. 577.

33. Md.—Lamkin v. Safe Deposit &

Trust Co. of Baltimore, 64 A.2d 704.

Mass.—Garfield v. State Street Trust Co., 70 N.E.2d 705, 320 Mass. 646, 169 A.L.R. 719.

N.Y.—In re Wildenburg's Estate, 21 N.Y.S.2d 331, 174 Misc. 503.

Pa.—In re McClellan's Estate, 70 A. 737, 221 Pa. 261.

49 C.J. p 1267 note 62 [a] (2).

Power to appoint as affected by rule against perpetuities see Perpetuities § 24.

**This is not a delegation of the power, but the grant of a new power.** Md.—Lamkin v. Safe Deposit & Trust Co. of Baltimore, 64 A.2d 704.

Mass.—Garfield v. State Street Trust Co., 70 N.E.2d 705, 320 Mass. 646, 169 A.L.R. 719.

N.J.—National State Bank of Newark v. Morrison, 75 A.2d 916, 9 N.J.Super. 552.

Tenn.—Mays v. Beech, 86 S.W. 713, 114 Tenn. 544, 4 Ann.Cas. 1189.

34. N.J.—National State Bank of Newark v. Morrison, 75 A.2d 916, 9 N.J.Super. 552.

N.Y.—In re Slocum's Estate, 81 N. Y.S.2d 120, 192 Misc. 1026.

35. N.J.—National State Bank of Newark v. Morrison, 75 A.2d 916, 9 N.J.Super. 552.

cised by creating a further power of appointment.<sup>36</sup> Moreover, it has been held that the exercise of a power of appointment by creating a further power of appointment is proper only where the donee may appoint to himself,<sup>37</sup> or where the appointment is limited to a class,<sup>38</sup> and that, where a general power of appointment may be exercised only by will and not by deed, it may not be exercised by creating a new and further power of appointment.<sup>39</sup>

**Ratification.** The donee of a discretionary power of sale may ratify a sale made by his attorney in fact and thereby validate it.<sup>40</sup>

**Effect of attempted delegation.** Where there is an attempt to delegate a power which may not be transferred, the delegation is void;<sup>41</sup> but an unauthorized delegation of power does not invalidate appointments or other dispositions which the donee had authority to make.<sup>42</sup>

### § 37. Time of Execution

As a general rule a power may be exercised at any time during the life of the donee or person authorized to execute it provided the purpose or object of the power continues that long, unless the instrument of creation provides for an earlier exercise of the power.

As a general rule a power may be exercised at any time during the life of the donee or other person authorized to execute it,<sup>43</sup> provided the purpose or object of the power continues that long,<sup>44</sup> unless

the instrument of creation provides either expressly or by implication for an earlier exercise or for a lesser period,<sup>45</sup> or the term is restricted by statute.<sup>46</sup> It has been held that a power should be exercised within a reasonable time,<sup>47</sup> and, if it remains unexercised for an unreasonable time, the power may terminate.<sup>48</sup> A power exercised by will is not exercised until the donee's death.<sup>49</sup>

**Execution at or within specified time.** A provision for the execution of a power at a specified future time or within a specified period has been construed as merely directory,<sup>50</sup> unless it appears that the donor intended that it should be of the essence of the power.<sup>51</sup> A power to be exercised "immediately" should be executed within a reasonable time, or as soon as practicable.<sup>52</sup>

**Will executed prior to creation of power.** There is authority that a will executed prior to the creation of a power may not be held an execution thereof,<sup>53</sup> but this rule is apparently a consequence of the early common-law rule that a will does not dispose of real property acquired after its execution,<sup>54</sup> and, under modern rules and statutes, under which a will disposes of property acquired after its execution, it is generally held that a power may be validly exercised by a will executed prior to the creation of the power, if the will is an otherwise effective exercise of the power,<sup>55</sup> as where it mani-

36. Ohio.—Jennert v. Houser, 4 Ohio Cir.Ct. 353, 2 Ohio Cir.Dec. 591.

Power to appoint limited estates generally see supra § 24.

37. Ky.—De Charette v. De Charette, 94 S.W.2d 1018, 264 Ky. 525, 104 A.L.R. 1455.

38. Ky.—De Charette v. De Charette, supra.

39. Ky.—De Charette v. De Charette, supra.

40. Ark.—Hill v. Peoples, 95 S.W. 990, 80 Ark. 15.

49 C.J. p 1283 note 7.

41. Ky.—De Charette v. De Charette, 94 S.W.2d 1018, 264 Ky. 525, 104 A.L.R. 1455.

49 C.J. p 1283 note 8.

42. Ky.—De Charette v. De Charette, supra.

49 C.J. p 1283 note 9.

43. Ala.—Corpus Juris cited in Rice v. Park, 135 So. 472, 474, 223 Ala. 317.

Ga.—Corpus Juris quoted in Wardlaw v. Woodruff, 165 S.E. 557, 560, 175 Ga. 515.

49 C.J. p 1283 note 12.

Time of execution of power given by will see the C.J.S. title Wills § 1070, also 69 C.J. p 847 note 41 et seq.

Duration and termination of powers in general see supra § 16 et seq.

44. Ga.—Wardlaw v. Woodruff, 165 S.E. 557, 175 Ga. 515.

Accomplishment or cesser of purpose see supra § 16.

45. Ky.—Muldrow v. Fox, 2 Dana 74.

49 C.J. p 1283 note 14, p 1279 note 67.

46. Puerto Rico.—Landron v. Nave-do, 12 Puerto Rico 253.

49 C.J. p 1283 note 15.

**Legislative discretion as to time**

In connection with a statute limiting the time within which a power to revoke a gift to persons not in being may be exercised, it has been said that generally speaking, unless arbitrarily exercised, there is a legislative discretion as to the reasonableness of the time allowed in a limitation on the right to exercise a power.—Pinkham v. Unborn Children of Jather Pinkham, 40 S.E.2d 690, 227 N.C. 72.

47. Ill.—Teater v. Salander, 136 N.E. 873, 305 Ill. 17.

49 C.J. p 1283 note 16.

48. N.J.—Ryan v. Daly, 134 A. 546, 99 N.J.Eq. 585, affirmed 137 A. 918, 101 N.J.Eq. 305, 306.

49 C.J. p 1283 note 17.

49. Cal.—In re Newton's Estate, 221 P.2d 952.

50. Tex.—Corpus Juris cited in Allred v. Beggs, 84 S.W.2d 223, 228, 125 Tex. 584.

49 C.J. p 1284 note 18.

51. Tex.—Corpus Juris cited in Allred v. Beggs, 84 S.W.2d 223, 228, 125 Tex. 584.

49 C.J. p 1284 note 19.

52. R.I.—Rhode Island Hospital Trust Co. v. Harris, 37 A. 701, 20 R.I. 160.

53. Tex.—Corpus Juris cited in Seguin State Bank & Trust Co. v. Locke, 73 S.W.2d 645, 647, affirmed 102 S.W.2d 1050, 129 Tex. 524.

49 C.J. p 1295 note 44.

54. Ky.—Hankins v. Columbia Trust Co., 134 S.W. 498, 142 Ky. 206.

After-acquired property passing by will see the C.J.S. title Wills § 70, also 68 C.J. p 492 note 28 et seq.

55. Cal.—California Trust Co. v. Ott, 140 P.2d 79, 59 Cal.App.2d 715.

Conn.—Hartford-Connecticut Trust Co. v. Thayer, 134 A. 155, 105 Conn. 57.

Fla.—Corpus Juris quoted in Hamilton v. Florida Nat. Bank of Jacksonville, 151 So. 409, 412, 112 Fla. 566, 91 A.L.R. 615.

feats an intention to execute the power.<sup>56</sup> Where a will is executed so nearly contemporaneously with the creation of a power as to be a part of the same transaction, it has been held an effectual exercise of the power, although in fact made prior to the power's creation.<sup>57</sup> A will executed prior to the creation of a power may be given effect as an execution of the power by a codicil executed after the power was created, ratifying and republishing the will.<sup>58</sup>

*Discretion of donee.* Where the execution of a power is left to the discretion of the donee, it may be exercised by him at such time as he sees fit,<sup>59</sup> even though the donor suggests a time for its exercise,<sup>60</sup> provided execution takes place within a reasonable time,<sup>61</sup> and the donee acts in good faith.<sup>62</sup>

*Execution dependent on contingency.* Where a power is authorized to be executed on a contingent event, it may, unless contrary to the intention of the donor, be executed before the event, although the execution will take effect only on the happening of the contingency,<sup>63</sup> especially where the happening

of the event cannot be ascertained until the moment of the donee's death.<sup>64</sup>

*Power subject to life estate.* A power which is subject to a life estate may not be effectually exercised during the continuance of such estate,<sup>65</sup> except with the consent of the life tenant.<sup>66</sup> Such consent need not be shown by deed,<sup>67</sup> but may be given orally,<sup>68</sup> or appear from the actions of the life tenant.<sup>69</sup>

*Exercise by survivor.* Where, a power given to the survivor of two is special,<sup>70</sup> or where it is limited to be executed after the death of one,<sup>71</sup> it may not be well exercised by a deed or will made during the lives of both by that individual who afterward proves to be the survivor.

### § 38. Mode of Execution

A power must be exercised in accordance with the terms of the grant of the power.

A power must be exercised in accordance with the terms of the grant of the power,<sup>72</sup> and so, when a

Ky.—*Hankins v. Columbia Trust Co.*, 134 S.W. 498, 142 Ky. 206.

N.Y.—*In re Davis*, 59 N.Y.S.2d 607, 186 Misc. 397—*City Bank Farmers Trust Co. v. Miller*, 297 N.Y.S. 88, 163 Misc. 459, affirmed 1 N.Y.S.2d 640, 253 App.Div. 707.

Pa.—*In re Morris' Account*, 148 A. 843, 298 Pa. 540.

49 C.J. p 1284 note 23, p 1295 notes 43, 46.

Special power may be exercised by a will made before power is created.—*In re Davis*, 59 N.Y.S.2d 607, 186 Misc. 397.

56. Fla.—*Hamilton v. Florida Nat. Bank of Jacksonville*, 151 So. 409, 112 Fla. 566, 91 A.L.R. 615.

49 C.J. p 1284 note 23, p 1295 note 45.

Intention to exercise power see *infra* § 40.

57. N.Y.—*U. S. Trust Co. v. Chauncey*, 66 N.Y.S. 563, 32 Misc. 358.

58. Mass.—*Willard v. Ware*, 10 Allen 263.

49 C.J. p 1296 note 48.

59. Wash.—*In re Lidston's Estate*, 202 P.2d 259, 32 Wash.2d 408.

49 C.J. p 1284 note 24.

60. Vt.—*Judevine v. Judevine*, 18 A. 778, 61 Vt. 587, 7 L.R.A. 517.

61. N.J.—*McCoury v. Leek*, 14 N.J. Eq. 70.

Pa.—*In re Githens' Estate*, 24 Pa.Co. 248.

62. Va.—*Wimbish v. Rawlins*, 76 Va. 48.

49 C.J. p 1284 note 27.

63. Mass.—*Bundy v. U. S. Trust Co.*, 153 N.E. 337, 257 Mass. 72.

49 C.J. p 1284 note 29.

Conditions attached to execution generally see *infra* § 41.

Suspension of power pending happening of contingency see *supra* § 15.

64. Md.—*Cowman v. Classen*, 144 A. 367, 156 Md. 428.

49 C.J. p 1284 note 30.

65. Va.—*Jackson v. Ligon*, 3 Leigh 161, 30 Va. 161.

49 C.J. p 1284 note 31.

66. Pa.—*Hupp v. Union Coal, etc. Co.*, 131 A. 364, 284 Pa. 529.

49 C.J. p 1284 note 32.

67. Pa.—*Knapp v. Nissley*, 98 A. 1051, 254 Pa. 379.

68. Pa.—*Knapp v. Nissley*, *supra*—*Hamlin v. Thomas*, 17 A. 506, 126 Pa. 20.

69. Pa.—*Hupp v. Union Coal, etc. Co.*, 131 A. 364, 284 Pa. 529.

49 C.J. p 1285 note 35.

70. N.Y.—*Re Moir*, 46 L.T.Rep.N.Y. 723.

49 C.J. p 1285 notes 37, 39.

71. N.Y.—*Garrett v. Duclos*, 112 N. Y.S. 811, 128 App.Div. 508.

49 C.J. p 1285 notes 38, 39.

72. Del.—*Security Trust Co. v. Spruance*, 174 A. 275, 20 Del.Ch. 195.

Ga.—*Metropolitan Life Ins. Co. v. Hall*, 12 S.E.2d 53, 191 Ga. 294.

Ky.—*De Charette v. De Charette*, 94 S.W.2d 1018, 264 Ky. 525, 104 A. L.R. 1455—*Pennebaker Home for*

*Girls v. Board of Directors, Pennebaker Home for Girls*, 61 S.W.2d 883, 250 Ky. 44.

Md.—*Lamkin v. Safe Deposit & Trust Co. of Baltimore*, 64 A.2d 704—*Hutchinson v. Farmer*, 58 A. 2d 638, 190 Md. 411.

Miss.—*Corpus Juris cited in Wirtz v. Gordon*, 184 So. 798, 804, 187 Miss. 866.

N.J.—*Fidelity Union Trust Co. v. Caldwell*, 44 A.2d 842, 137 N.J.Eq. 362.

49 C.J. p 1285 note 41.

Interests and estates which may be appointed or conveyed see *supra* §§ 24, 25.

Instrument of execution see *infra* § 39.

Mode of execution of testamentary power see the C.J.S. title Wills § 1070, also 69 C.J. p 847 note 55 et seq.

To whom appointments may be made see *supra* § 24.

#### Power of appointment

Ga.—*Metropolitan Life Ins. Co. v. Hall*, 12 S.E.2d 53, 191 Ga. 294.

Ky.—*De Charette v. De Charette*, 94 S.W.2d 1018, 264 Ky. 525, 104 A. L.R. 1455.

Md.—*Lamkin v. Safe Deposit & Trust Co. of Baltimore*, 64 A.2d 704.

Mass.—*Garfield v. State St. Trust Co.*, 70 N.E.2d 705, 320 Mass. 646.

N.J.—*Fidelity Union Trust Co. v. Caldwell*, 44 A.2d 842, 137 N.J.Eq. 362.

#### Power of revocation

Del.—*Security Trust Co. v. Spruance*, 174 A. 285, 20 Del.Ch. 195.

certain mode of executing it is prescribed by the donor, the donee has no authority to execute it in any other mode.<sup>73</sup> Strict compliance with the terms of the grant is generally required,<sup>74</sup> but it has been held that, where a power is coupled with an interest, the law is satisfied with a substantial compliance with the terms of the instrument by which it was created;<sup>75</sup> nor is the same strictness applied to the execution of a power coupled with a trust as to that of a naked power.<sup>76</sup>

The grant of a power without specific directions as to the mode of its exercise necessarily includes a grant of power to exercise the power,<sup>77</sup> and, where no mode is prescribed, or where the manner of execution is left to the discretion of the donee, he may execute it in any manner which will legally effectuate the intention of the donor.<sup>78</sup>

*In what name and capacity.* Ordinarily, a power

should be exercised by the donee in his own name,<sup>79</sup> unless the terms of its creation merely authorize him to execute it as the donor's agent or attorney.<sup>80</sup> A power may be executed only in the capacity in which it was conferred on the donee.<sup>81</sup>

*Parol sale.* A power to sell, without particular directions for its execution, may be executed by a parol sale,<sup>82</sup> unless such sale would be in contravention of the statute of frauds.<sup>83</sup>

### § 39. Instrument of Execution

Where the terms of the creation of a power require it to be executed by a particular instrument, the restriction must be observed, and the power cannot be effectually executed in any other way or by any other instrument.

Where the execution of a power is not otherwise restricted by the terms of its creation, it may be exercised by deed,<sup>84</sup> and, if not otherwise restricted,

#### Injury from irregular exercise of power

Grantor of power is not precluded from complaining of its irregular exercise because financial injury is not shown.—*Illinois Refining Co. v. Welch*, 173 N.E. 345, 341 Ill. 292.

#### General residuary clause

(1) The court must ascertain and render effective the intent and purpose sought to be accomplished by testator when he included in his will a provision that a general residuary clause in will of donee of power should not be deemed an exercise of power of appointment granted by testator; the intention of the testator in so providing was to provide against a thoughtless or inadequately considered final disposition of the portion of his estate to which the power of appointment applied.—*In re Kilpatrick's Estate*, 28 N.W.2d 286, 318 Mich. 445.

(2) Where donee of power executed will providing that remainder of trust property was devised and bequeathed in equal shares to such beneficiaries as survived donee, disposition of trust property was not made by a general residuary clause of will in violation of the power; where donee of power of appointment expressly stated that will constituted the exercise of such power and after specific bequests of parts of property subject to such power gave the residue of it to designated beneficiaries and also disposed of own property, donee complied with power providing that a general residuary clause should not be deemed an exercise thereof.—*In re Kilpatrick's Estate*, 28 N.W.2d 286, 318 Mich. 445.

73. Del.—*Security Trust Co. v. Spruance*, 174 A. 285, 20 Del.Ch. 195.

Ky.—*Pennebaker Home for Girls v. Board of Directors, Pennebaker Home for Girls*, 61 S.W.2d 883, 250 Ky. 44.

Md.—*Hutchinson v. Farmer*, 58 A.2d 638, 190 Md. 411—*O'Hara v. O'Hara*, 44 A.2d 813, 185 Md. 321, 163 A.L.R. 1444.

Neb.—*Massey v. Guaranty Trust Co.*, 5 N.W.2d 279, 142 Neb. 237—*Arlington State Bank v. Paulsen*, 78 N.W. 303, 57 Neb. 717, 49 C.J. p 1285 note 42.

#### Directions to trustee

Where donee was authorized only to give direction to trustees who were required to convey the property as directed, a deed executed by donee purporting to convey the property directly to a grantee without any action or conveyance by trustees was not a valid exercise of the power and conveyed nothing in virtue thereof.—*Metropolitan Life Ins. Co. v. Hall*, 12 S.E.2d 53, 191 Ga. 294.

74. Ill.—*Illinois Refining Co. v. Welch*, 173 N.E. 345, 341 Ill. 292. Neb.—*Massey v. Guaranty Trust Co.*, 5 N.W.2d 279, 142 Neb. 237—*Arlington State Bank v. Paulsen*, 78 N.W. 303, 57 Neb. 717, 49 C.J. p 1285 note 41.

75. Ind.—*Rowe v. Lewis*, 30 Ind. 163—*Rowe v. Beckel*, 30 Ind. 154, 95 Am.D. 676.

Powers coupled with interest generally see supra § 8.

76. W.Va.—*Irons v. Croft Hat, etc., Co.*, 104 S.E. 111, 86 W.Va. 685, 49 C.J. p 1285 note 44.

77. Ky.—*Pennebaker Home for Girls v. Board of Directors, Pennebaker Home for Girls*, 61 S.W.2d 883, 250 Ky. 44.

78. Kan.—*Corpus Juris* quoted in *Smith v. Judge*, 298 P. 651, 652, 133 Kan. 112.

Md.—*O'Hara v. O'Hara*, 44 A.2d 813, 185 Md. 321, 163 A.L.R. 1444. Wash.—*In re Ledston's Estate*, 202 P.2d 259, 32 Wash.2d 408, 49 C.J. p 1285 note 45.

79. Ala.—*Burton v. Jones*, 102 So. 807, 212 Ala. 353, 49 C.J. p 1285 note 46.

80. Mass.—*Cranston v. Crane*, 97 Mass. 459, 93 Am.D. 106.

81. Ga.—*Schley v. Brown*, 70 Ga. 64. N.Y.—*Brooks v. Terry*, 14 N.Y.S. 238, 60 Hun 577.

82. Pa.—*Silverthorn v. McKinster*, 12 Pa. 67.

83. N.C.—*Perkins v. Presnell*, 6 S.E. 801, 100 N.C. 220.

84. Del.—*Wilmington Trust Co. v. Wilmington Trust Co.*, 180 A. 597, 21 Del.Ch. 102, modified on other grounds on rehearing 186 A. 903, 21 Del.Ch. 188, 49 C.J. p 1285 note 57.

Conveyance or mortgage under power of appointment see supra § 24.

**Difference between appointment by will and one by deed or other instrument** is that latter is an act complete in itself, and the thing appointed vests from execution of instrument making appointment, whereas, in the former, the death of settlor is necessary to make act complete and make the subject of power pass.—*In re Eble's Trust*, 76 N.Y.S.2d 506, 191 Misc. 190.

**Power to appoint by will or otherwise** authorizes an appointment by deed.—*Wilmington Trust Co. v. Wilmington Trust Co.*, 15 A.2d 153, 25 Del.Ch. 121, affirmed 24 A.2d 309, 26 Del.Ch. 397, 139 A.L.R. 1117—

it may be exercised by will,<sup>85</sup> or simple note in writing;<sup>86</sup> and powers have been held to be effectually executed by gifts inter vivos<sup>87</sup> or causa mortis<sup>88</sup> of the subject matter, and by acts and instruments.<sup>89</sup> On the other hand, particular instruments have been held, under the circumstances, to be ineffectual as executions of powers.<sup>90</sup>

Where it is expressly provided<sup>91</sup> or clearly implied<sup>92</sup> by the terms of the creation of a power that it shall be executed by a particular instrument, as by deed or by will, or by either of two particular instruments, the restriction must be observed, and the power cannot be effectually executed in any other way or by any other instrument.<sup>93</sup>

*Instrument in nature of a will.* A power to be exercised by an instrument in the nature of, or purporting to be, a will is well exercised by an instrument of a testamentary character, although it is void as a will;<sup>94</sup> but such a power may not be executed by deed.<sup>95</sup>

*Instrument in writing.* A power required to be executed by a writing or instrument in writing is well executed by a will.<sup>96</sup>

*Contract.* The holder of a power may contract to limit or restrain himself in the exercise thereof.<sup>97</sup> A power to appoint by will may not be exercised by contract;<sup>98</sup> and, where a promise or contract to

Wilmington Trust Co. v. Wilmington Trust Co., 180 A. 597, 21 Del.Ch. 102, reheard 186 A. 903, 21 Del.Ch. 188.

85. Mass.—Stone v. Forbes, 75 N.E. 141, 189 Mass. 163.  
49 C.J. p 1285 note 58.

86. Va.—Goodloe v. Woods, 80 S.E. 108, 115 Va. 540.  
49 C.J. p 1286 note 59.

87. Ky.—Ewing v. Handley, 4 Litt. 346, 14 Am.D. 140.  
49 C.J. p 1286 note 60.

88. S.C.—Wilson v. Gaines, 30 S.C. Eq. 420.

89. N.H.—Weston v. Second Orthodox Cong. Soc., 110 A. 137, 79 N.H. 245.  
49 C.J. p 1286 note 63.

90. Conn.—Union, etc., Trust Co. v. Bartlett, 122 A. 105, 99 Conn. 245.  
49 C.J. p 1286 note 64.

91. Ga.—Newton v. Bullard, 182 S. E. 614, 181 Ga. 448.

Md.—Hutchinson v. Farmer, 58 A.2d 638, 190 Md. 411.

Mass.—National Shawmut Bank of Boston v. Joy, 53 N.E.2d 113, 315 Mass. 457.

N.Y.—Merrill v. Lynch, 13 N.Y.S.2d 514, 173 Misc. 39.  
49 C.J. p 1286 note 65.

92. N.H.—Belford v. Olson, 51 A.2d 635, 94 N.H. 278.  
49 C.J. p 1287 note 66.

**Power to be exercised during donee's lifetime**

(1) A power to dispose of property during one's lifetime has been held not a power to leave by will, since wills are ambulatory instruments and do not take effect until death of testator.—Belford v. Olson, supra—49 C.J. p 1287 note 66 [a].

(2) Accordingly, a power to sell and convey while living was held not to carry power to dispose of by will.—Gentle v. Frederick, 174 So. 606, 234 Ala. 184.

(3) On the other hand, it has been held that a power to be exercised during donee's lifetime may be as

validly exercised by will as by deed.—McGee v. Vandeventer, 158 N.E. 127, 326 Ill. 425.

(4) A power of disposition to be exercised by the donee at any time before his death could be exercised by the donee by his will.—Kiplinger v. Armstrong, 171 N.E. 245, 34 Ohio App. 348.

(5) Where property was conveyed by grantor to his attorney who immediately reconveyed property to grantor for life with power to grant, sell, lease, mortgage or "in any other manner" dispose of absolute estate therein with provision that in event power was not exercised property was to go to his niece, the quoted words did not authorize grantor to alter direction in which remainder of property should go, by giving it by his will to another.—Hutchinson v. Farmer, 58 A.2d 638, 190 Md. 411.

**Power to be exercised at donee's death**

The fact that by the terms of its creation a power is to be exercised at the donee's death does not restrict it to execution by will alone, and it may be exercised by deed.—Goodloe v. Woods, 80 S.E. 108, 115 Va. 540—49 C.J. p 1285 note 57 [a].

93. Ga.—Newton v. Bullard, 182 S. E. 614, 181 Ga. 448.

Ky.—Lexington Brick Co. v. Thornton, 132 S.W. 422, 141 Ky. 207.

Md.—Lamkin v. Safe Deposit & Trust Co. of Baltimore, 64 A.2d 74—Hutchinson v. Farmer, 58 A.2d 638, 190 Md. 411—O'Hara v. O'Hara, 44 A.2d 813, 185 Md. 321, 163 A.L.R. 1444—Pope v. Safe Deposit & Trust Co., 161 A. 404, 163 Md. 239.

Mass.—National Shawmut Bank of Boston v. Joy, 53 N.E.2d 113, 315 Mass. 457.

N.J.—Fidelity Union Trust Co. v. Parfner, 37 A.2d 675, 135 N.J.Eq. 133—U. S. Trust Co. of Newark v. Montclair Trust Co., 33 A.2d 901, 133 N.J.Eq. 579.

N.Y.—Merrill v. Lynch, 13 N.Y.S.2d 514, 173 Misc. 39—City Bank Farmers Trust Co. v. Neary, 27 N.Y.S.2d 979, appeal dismissed 27 N.Y.S.2d 1017, 261 App.Div. 1079, reargument denied 28 N.Y.S.2d 707, 262 App.Div. 758.

49 C.J. p 1286 note 65, p 1287 note 66.

**Incorporation by reference**

Power exercisable only by will could be exercised by an inter vivos trust agreement which was incorporated in the donee's will by reference.—First-Central Trust Co. v. Claffin, Ohio Com.Pl., 73 N.E.2d 388.

94. Cal.—Corpus Juris quoted in In re Sloan's Estate, 46 P.2d 1007, 1015, 7 Cal.App.2d 319.  
49 C.J. p 1287 note 68.

95. Pa.—In re Trust Under Deed of Levering, 9 Pa.Dist. & Co. 328.

96. W.Va.—Ruffner v. Brown, 98 S. E. 872, 83 W.Va. 689.  
49 C.J. p 1287 notes 70, 71.

97. Pa.—In re Welsh's Estate, 61 Pa.Dist. & Co. 47.  
Release or contract not to exercise limited power as fraudulent see infra § 45.

98. D.C.—Mondell v. Thom, 143 F. 2d 157, 79 U.S.App.D.C. 145.

Md.—O'Hara v. O'Hara, 44 A.2d 813, 185 Md. 321, 163 A.L.R. 1444.

Mass.—Pitman v. Pitman, 50 N.E.2d 69, 314 Mass. 465, 150 A.L.R. 509.  
N.J.—U. S. Trust Co. of Newark v. Montclair Trust Co., 33 A.2d 901, 133 N.J.Eq. 579.

N.Y.—Farmers' L. & T. Co. v. Mortimer, 114 N.E. 389, 219 N.Y. 290, Ann.Cas.1918E 1159.  
49 C.J. p 1286 note 65 [a] (3).

**Contract as fettering power**

The donee of a power to make appointment by will has no right to enter into any contract that fetters such power; whether a particular contract executed by donee of a power fetters such power so as to be unenforceable in equity must be determined from the language of instru-



make an appointment is not performed, the promisee may not obtain damages<sup>99</sup> or the specific property.<sup>1</sup>

**Formal requisites.** A deed, will, or other instrument in execution of a power must be executed with the formalities required by law in the execution of such instruments generally,<sup>2</sup> but as a rule, where a power may be executed by either of two instruments, formalities prescribed for one are not required for the other.<sup>3</sup> All formalities prescribed by the instrument creating the power must be observed,<sup>4</sup> such as a requirement that the instrument of execution be under seal,<sup>5</sup> be duly acknowledged,<sup>6</sup> or that it be witnessed or attested by a certain number of witnesses, or in a certain manner.<sup>7</sup> Where the instrument granting the power so pro-

vides, the instrument executing the power must be deposited with the trustees of the property.<sup>8</sup>

**By whom instrument executed.** The instrument by which a power is exercised must be executed by, or in behalf of, the donee or holder of the power.<sup>9</sup> The spouse of the donee need not join in the instrument,<sup>10</sup> unless his joinder is required by the instrument creating the power;<sup>11</sup> and, when the donee is a life tenant of the subject matter of the power, the remaindermen need not join.<sup>12</sup>

**Construction.** A writing allegedly exercising a power is to be read into and construed with the grant of the power.<sup>13</sup> The exercise of a power is to be construed in accordance with the donee's intention,<sup>14</sup> and in the light of the circumstances exist-

ment creating the power and intention of the donor as gathered from such instrument.—*O'Hara v. O'Hara*, 44 A.2d 813, 185 Md. 321, 163 A.L.R. 1444.

99. Ill.—*Northern Trust Co. v. Porter*, 13 N.E.2d 487, 368 Ill.App. 256. Mass.—*Pitman v. Pitman*, 50 N.E.2d 69, 314 Mass. 465, 150 A.L.R. 509. N.J.—*U. S. Trust Co. of Newark v. Montclair Trust Co.*, 33 A.2d 901, 133 N.J.Eq. 579.

1. Ill.—*Northern Trust Co. v. Porter*, 13 N.E.2d 487, 368 Ill.App. 256. Md.—*O'Hara v. O'Hara*, 44 A.2d 813, 185 Md. 321, 163 A.L.R. 1444. Mass.—*Pitman v. Pitman*, 50 N.E.2d 69, 314 Mass. 465, 150 A.L.R. 509. N.J.—*U. S. Trust Co. of Newark v. Montclair Trust Co.*, 33 A.2d 901, 133 N.J.Eq. 579.

N.Y.—*Farmers' L. & T. Co. v. Mortimer*, 114 N.E. 389, 219 N.Y. 290, Ann.Cas.1918E 1159.

2. Cal.—*In re Sloan's Estate*, 46 P. 2d 1007, 7 Cal.App.2d 319.

Va.—*Daniel v. Brown*, 159 S.E. 209, 156 Va. 563, 75 A.L.R. 1377. 49 C.J. p 1287 note 73.

3. Md.—*Olivet v. Whitworth*, 33 A. 723, 82 Md. 258. 49 C.J. p 1287 note 75.

4. Mass.—*National Shawmut Bank of Boston v. Joy*, 53 N.E.2d 113, 315 Mass. 457. 49 C.J. p 1287 note 74.

5. Mass.—*National Shawmut Bank of Boston v. Joy*, supra. 49 C.J. p 1288 note 86.

6. Mass.—*National Shawmut Bank of Boston v. Joy*, supra.

7. N.Y.—*Wainwright v. Low*, 30 N. E. 747, 132 N.Y. 313. 49 C.J. p 1288 note 87.

#### Attestation of signature

Where a marriage settlement gave the woman the power of appointment to the use of such persons as she might from time to time appoint

during the coverture, by any writing or writings under her hand and seal attested by three credible witnesses, and she executed a deed which recited that the parties had thereunto set their hands and seals, and which the witnesses attested as having been "sealed and delivered," this was held a sufficient execution of the power, although the witnesses did not attest the fact of her "signing" it.

U.S.—*Ladd v. Ladd*, Dist.Col., 8 How. 10, 12 L.Ed. 967.

8. Mass.—*National Shawmut Bank of Boston v. Joy*, 53 N.E.2d 113, 315 Mass. 457.

N.Y.—*In re Sullivan's Will*, 36 N.Y. S.2d 443.

#### Authority to file with trustee

Provision of trust deed that the remainder should be paid to a specified nominator or his nominee by written instrument filed with the trustee within six months after the death of the nominator meant that filing must be made by someone authorized to do so by nominator, and, hence, where power of appointment to a designated nominee was not filed at the direction of the nominator, the power of appointment was not exercised in favor of the nominee so designated.—*In re Sullivan's Will*, supra.

9. N.Y.—*Marsh v. Consumers' Park Brewing Co.*, 143 N.Y.S. 359, 82 Misc. 186, reversed on other grounds 147 N.Y.S. 695, 162 App. Div. 256, reversed on other grounds 115 N.E. 513, 220 N.Y. 205.

49 C.J. p 1287 note 78. Person authorized to execute power see supra § 35.

10. N.C.—*Dillon v. Monroe Cotton Mills Co.*, 123 S.E. 89, 187 N.C. 812.

49 C.J. p 1288 note 81.

11. N.C.—*Dillon v. Monroe Cotton Mills Co.*, supra.

12. Ill.—*Riemenschneider v. Tortoriello*, 122 N.E. 799, 287 Ill. 482. 49 C.J. p 1288 note 83.

13. Ky.—*Dant v. Fidelity & Columbia Trust Co.*, 193 S.W.2d 399, 302 Ky. 54.—*Goodloe's Trustee and Adm'r v. Goodloe*, 166 S.W.2d 836, 292 Ky. 494.

N.Y.—*In re Berwind's Estate*, 42 N. Y.S.2d 58, 181 Misc. 559.—*In re Walbridge's Estate*, 33 N.Y.S.2d 47, 178 Misc. 32.—*In re Merseles' Will*, 292 N.Y.S. 276, 161 Misc. 454.—*In re Baiter's Estate*, 273 N.Y.S. 962, 152 Misc. 177.—*In re Burling's Estate*, 266 N.Y.S. 482, 148 Misc. 835.—*In re Kraetzer's Will*, 264 N.Y.S. 443, 147 Misc. 609.—*In re Harbeck's Estate*, 254 N.Y.S. 312, 142 Misc. 57.—*In re Wickham's Will*, 249 N. Y.S. 148, 139 Misc. 729.—*In re Gaffney's Trust*, 75 N.Y.S.2d 675.

14. N.Y.—*In re O'Connor*, 82 N.Y.S. 2d 310.

Pa.—*In re Horsey's Estate*, 58 Pa. Dist. & Co. 112.

R.I.—*Bancroft v. Bancroft*, 27 A.2d 836, 68 R.I. 406.

#### Mistake of law

Where, under foreign law, life beneficiary's two sons were his "forced heirs," and as such entitled to two thirds of his estate, and life beneficiary, in exercising his power of appointment under a trust, under mistaken belief that foreign law applied, directed that the "freely disposable share" of his estate be given to a designated donee, other than the sons, exercise of power of appointment was a disposal of only one third of the trust fund.—*In re O'Connor*, 82 N.Y.S.2d 310.

#### "Trust"

Where will drafted and executed in foreign country provided for disposition of trust fund over which testatrix had power of appointment by will as part of residuary trust, incorporation in residuary clause of statutory will form providing that

ing at the time the power is exercised.<sup>15</sup> Where a power is exercised, it has been held that the intention of the donee is to be ascertained in precisely the same manner as a testator's intent is discovered in a will,<sup>16</sup> and that an appointment by will is to be construed as are other testamentary provisions.<sup>17</sup> It has been held that the law leans against a construction which would render ineffectual an attempted execution of a power.<sup>18</sup>

## § 40. Intent to Execute

- a. In general
- b. Particular matters indicating intention
- c. Will disposing of all donee's property; general bequest or devise
- d. Burden of proof; admissibility of evidence

trustees should hold property on "trust" to sell and pay expenses, debts, and legacies did not invalidate exercise of power of appointment under rule against perpetuities, since such use of quoted word merely indicated fiduciary obligations of trustees as to gross estate and did not create a trust as such.—In re Zerega's Estate, 72 N.Y.S.2d 617.

15. Mass.—Minot v. Paine, 120 N.E. 167, 230 Mass. 514, 1 A.L.R. 365.

16. Pa.—In re Lewis' Estate, 37 A. 2d 482, 349 Pa. 571.

17. Va.—Murchison v. Wallace, 159 S.E. 106, 156 Va. 728.

18. Ala.—Rice v. Park, 135 So. 472, 223 Ala. 317—Campbell v. Woodstock Iron Co., 3 So. 369, 83 Ala. 351.

19. U.S.—Johnstone v. Commissioner of Internal Revenue, C.C.A., 76 F.2d 55, certiorari denied 56 S.Ct. 89, 296 U.S. 578, 80 L.Ed. 408.

Cal.—Childs v. Gross, 107 P.2d 424, 41 Cal.App.2d 680.

Colo.—Johnson v. Shriver, 216 P.2d 653.

Del.—Equitable Trust Co. v. Causey, 9 A.2d 714, 24 Del.Ch. 259—Wilmington Trust Co. v. Grier, 161 A. 921, 19 Del.Ch. 34.

Fla.—DePass v. Kansas Masonic Home, 181 So. 410, 132 Fla. 455.

Ga.—Cannon v. Laing, 111 S.E. 565, 153 Ga. 88.

Ill.—Boyle v. John M. Smyth Co., 248 Ill.App. 57.

Iowa.—In re Stork's Estate, 9 N.W. 2d 273, 233 Iowa 413.

Md.—Reeside v. Annex Bldg. Ass'n of Baltimore City, 167 A. 72, 165 Md. 200, 91 A.L.R. 426.

Mass.—Gorey v. Guarente, 22 N.E.2d 99, 303 Mass. 569—Slayton v. Fitch Home, 200 N.E. 357, 293 Mass. 574, 104 A.L.R. 669.

N.J.—Brown v. Fidelity Union Trust

Co., 9 A.2d 311, 126 N.J.Eq. 406—Board of Home Missions of Presbyterian Church in U. S. of America v. Saltmer, 4 A.2d 69, 125 N.J. Eq. 33—Camden Safe Deposit & Trust Co. v. Fittler, 197 A. 249, 123 N.J.Eq. 245, affirmed Camden Safe Deposit & Trust Co. v. Frishmuth, 4 A.2d 379, 125 N.J.Eq. 169—Methodist Episcopal Home for the Aged of New Jersey v. Tuthill, 167 A. 9, 113 N.J.Eq. 460—Paul v. Paul, 133 A. 868, 99 N.J.Eq. 498—National State Bank of Newark v. Morrison, 70 A.2d 888, 7 N.J.Super. 333.

N.C.—Tocci v. Nowfall, 18 S.E.2d 225, 220 N.C. 550.

Ohio.—Kiplinger v. Armstrong, 171 N.E. 245, 34 Ohio App. 348.

### Donor and donee same person

The same rules apply where the donee and donor of the power are the same person as where the donee and donor of the power are different persons.—Equitable Trust Co. v. Paschall, 115 A. 356, 13 Del.Ch. 87.

### Leading case

U.S.—Blagge v. Miles, C.C.Mass., 3 Fed.Cases 559, No. 1479, 1 Story 426.

20. U.S.—Johnstone v. Commissioner of Internal Revenue, C.C.A., 76 F.2d 55, certiorari denied 56 S.Ct. 89, 296 U.S. 578, 80 L.Ed. 408.

Colo.—Johnson v. Shriver, 216 P.2d 653.

Del.—Hurlock v. Bader, 28 A.2d 465, 26 Del.Ch. 328—Equitable Trust Co. v. Causey, 9 A.2d 714, 24 Del.Ch. 259—Wilmington Trust Co. v. Grier, 161 A. 921, 19 Del.Ch. 34.

Ga.—Butler v. Prudden, 185 S.E. 102, 182 Ga. 189.

Hawaii.—Hakalau v. De La Nux, 35 Hawaii 59.

Ill.—Emery v. Emery, 156 N.E. 364, 325 Ill. 212—Merchants' L. & T. Co. v. Patterson, 139 N.E. 912, 308 Ill. 519.

## a. In General

Whether or not an instrument, suitable to the execution of a power, operates as an exercise thereof depends on the intention of the donee of the power; except where supplied by statute, an intention to execute the power must appear, and, where such intention properly appears, the power is effectually exercised.

The question whether or not an instrument, suitable to the execution of a power, operates as an exercise thereof depends on the intention of the donee of the power.<sup>19</sup> Except when supplied by statute, the intention to execute a power must always appear in its execution, either by express terms or recitals, or by necessary implication;<sup>20</sup> but, where such intention does appear, either expressly or by implication, and however it is manifested, in an instrument suitable to the execution of the power, the power is effectually exercised.<sup>21</sup>

Iowa.—Bussing v. Hough, 21 N.W.2d 587, 237 Iowa 194—In re Stork's Estate, 9 N.W.2d 273, 233 Iowa 413—In re Proestler's Will, 5 N.W. 2d 922, 232 Iowa 640.

Ky.—Corpus Juris cited in Greenway v. Irvine, 31 S.W.2d 606, 607, 235 Ky. 263.

Md.—Reeside v. Annex Bldg. Ass'n of Baltimore City, 167 A. 72, 165 Md. 200, 91 A.L.R. 426.

Mo.—Corpus Juris cited in Standley v. Allen, 163 S.W.2d 1012, 1014, 349 Mo. 1115.

N.H.—Faulkner v. Faulkner, 44 A.2d 429, 93 N.H. 451.

N.J.—Camden Safe Deposit & Trust Co. v. Fittler, 197 A. 249, 123 N.J. Eq. 245, affirmed Camden Safe Deposit & Trust Co. v. Frishmuth, 4 A.2d 379, 125 N.J.Eq. 169—Methodist Episcopal Home for the Aged of New Jersey, 167 A. 9, 113 N.J. Eq. 460.

N.Y.—In re Kelly's Will, 291 N.Y.S. 860, 161 Misc. 255, applying Florida law.

Ohio.—Kiplinger v. Armstrong, 171 N.E. 245, 34 Ohio App. 348.

Tex.—Corpus Juris cited in Seguin State Bank & Trust Co. v. Locke, Civ.App., 73 S.W.2d 645, 647, affirmed 102 S.W.2d 1050, 129 Tex. 524.

49 C.J. p 1288 note 95, p 1291 note 17.

Statute creating presumption of intention to exercise power see infra subdivision c (2) of this section.

### Intention not presumed

Intention to exercise power will not be presumed.—Kiplinger v. Armstrong, 171 N.E. 245, 34 Ohio App. 348.

21. U.S.—Johnstone v. Commissioner of Internal Revenue, C.C.A., 76 F.2d 55, certiorari denied 56 S.Ct. 89, 296 U.S. 578, 80 L.Ed. 408—

It has been held that an intention to exercise the power must clearly appear<sup>22</sup> so that the transaction is not fairly susceptible of any other construction;<sup>23</sup> and that, where it is uncertain whether or not an act done by the donee of a power is intended to be in execution thereof,<sup>24</sup> or where an intention not to exercise it is shown,<sup>25</sup> the power will not be treated as executed.

The donee's intention to exercise a power, however, need not be manifested in any given way.<sup>26</sup> Technical language is not necessary to the exercise of a power;<sup>27</sup> nor is it necessary that the intention to execute the power appear by express terms or recitals.<sup>28</sup> Such intention may be sufficiently manifested by words, acts, or deeds demonstrating the intention,<sup>29</sup> and an intention to exercise a power by

Guaranty Trust Co. of N. Y. v. Johnson, D.C.N.Y., 76 F.Supp. 566.  
Cal.—Childs v. Gross, 107 P.2d 424, 41 Cal.App.2d 680.  
Colo.—Johnson v. Shriver, 216 P.2d 653.  
Fla.—DePass v. Kansas Masonic Home, 181 So. 410, 132 Fla. 455.  
Hawaii.—Hakalau v. De La Nux, 35 Hawaii 59.  
Ill.—Emery v. Emery, 156 N.E. 364, 325 Ill. 212—Merchants' L. & T. Co. v. Patterson, 139 N.E. 912, 308 Ill. 519—Northern Trust Co. v. Cudahy, 91 N.E.2d 607, 339 Ill.App. 603.  
Iowa.—In re Stork's Estate, 9 N.W. 2d 273, 233 Iowa 413.  
Md.—Wyeth v. Safe Deposit & Trust Co. of Baltimore, 4 A.2d 753, 176 Md. 369—Reeside v. Annex Bldg. Ass'n of Baltimore City, 167 A. 72, 165 Md. 200, 91 A.L.R. 426.  
N.J.—Hood v. Francis, 44 A.2d 182, 137 N.J.Eq. 200—Camden Safe Deposit & Trust Co. v. Fidler, 197 A. 249, 123 N.J.Eq. 245, affirmed Camden Safe Deposit & Trust Co. v. Frishmuth, 4 A.2d 379, 125 N.J.Eq. 169—White v. Graves, Ch. 104 A. 205—Guild v. City of Newark, 99 A. 120, 87 N.J.Eq. 38—National State Bank of Newark v. Morrison, 70 A.2d 888, 7 N.J.Super. 333.  
N.Y.—In re Jackson's Estate, 25 N.Y.S.2d 102, 175 Misc. 882, affirmed In re Jackson's Will, 30 N.Y.S.2d 840, 262 App.Div. 997, appeal denied 31 N.Y.S.2d 664, 263 App.Div. 707—In re Stewart's Estate, 64 N.Y.S.2d 293, applying New Jersey law.  
N.C.—Walsh v. Friedman, 13 S.E.2d 250, 219 N.C. 151—Johnston v. Knight, 23 S.E. 92, 117 N.C. 122.  
S.C.—Adger v. Kirk, 108 S.E. 97, 116 S.C. 298—Price v. Oujia Realty Co., 101 S.E. 819, 113 S.C. 556.  
49 C.J. p 1289 note 98, p 1291 note 18.  
Instrument of execution see supra § 39.  
22. Cal.—Morffew v. San Francisco & S. R. R. Co., 40 P. 810, 107 Cal. 587—Childs v. Gross, 107 P.2d 424, 41 Cal.App.2d 680.  
Conn.—Heise v. City of Hartford, 17 A.2d 8, 127 Conn. 359.  
Del.—Equitable Trust Co. v. Causey, 9 A.2d 714, 24 Del.Ch. 259.  
Fla.—Patillo v. Glenn, 7 So.2d 328, 150 Fla. 73—DePass v. Kansas Ma-

sonic Home, 181 So. 410, 132 Fla. 455.  
Ill.—Emery v. Emery, 156 N.E. 364, 325 Ill. 212.  
N.J.—Brown v. Fidelity Union Trust Co., 9 A.2d 311, 126 N.J.Eq. 406—Board of Home Missions of Presbyterian Church in U. S. of America v. Saltmer, 4 A.2d 69, 125 N.J.Eq. 33.  
**The modern tendency is to relax the rule requiring the intention to execute the power to be clearly established.**  
N.C.—Tocci v. Nowfall, 18 S.E.2d 225, 220 N.C. 550—Matthews v. Griffin, 122 S.E. 465, 187 N.C. 599.  
Ohio.—Kiplinger v. Armstrong, 171 N.E. 245, 34 Ohio App. 348.

#### Conflicting evidence

Intent to execute power to convey or devise property need not be proved without conflicting evidence or so clearly that only one inference may be drawn from evidence.—Childs v. Gross, 107 P.2d 424, 41 Cal.App.2d 680.

#### Intention to exercise power held not clearly shown

N.J.—Brown v. Fidelity Union Trust Co., 9 A.2d 311, 126 N.J.Eq. 406.  
23. U.S.—Johnstone v. Commissioner of Internal Revenue, C.C.A., 76 F.2d 55, certiorari denied 56 S.Ct. 89, 296 U.S. 578, 80 L.Ed. 408.  
Cal.—Morffew v. San Francisco & S. R. R. Co., 40 P. 810, 107 Cal. 587—Childs v. Gross, 107 P.2d 424, 41 Cal.App.2d 680.  
Colo.—Johnson v. Shriver, 216 P.2d 653.  
Del.—Equitable Trust Co. v. Causey, 9 A.2d 714, 24 Del.Ch. 259.  
Fla.—Patillo v. Glenn, 7 So.2d 328, 150 Fla. 73—DePass v. Kansas Masonic Home, 181 So. 410, 132 Fla. 455.  
Hawaii.—Hakalau v. De La Nux, 35 Hawaii 59.  
Ill.—Emery v. Emery, 156 N.E. 364, 325 Ill. 212—Merchants' L. & T. Co. v. Patterson, 139 N.E. 912, 308 Ill. 519.  
Ohio.—Kiplinger v. Armstrong, 171 N.E. 245, 34 Ohio App. 348.  
49 C.J. p 1289 note 96.  
24. U.S.—Johnstone v. Commissioner of Internal Revenue, C.C.A., 76 F.2d 55, certiorari denied 56 S.Ct. 89, 296 U.S. 578, 80 L.Ed. 408.  
Del.—Equitable Trust Co. v. Causey, 9 A.2d 714, 24 Del.Ch. 259.

Fla.—Patillo v. Glenn, 7 So.2d 328, 150 Fla. 73—DePass v. Kansas Masonic Home, 181 So. 410, 132 Fla. 455.  
Ga.—Butler v. Prudden, 185 S.E. 102, 182 Ga. 189.  
Hawaii.—Hakalau v. De La Nux, 35 Hawaii 59.  
Ill.—Merchants' L. & T. Co. v. Patterson, 139 N.E. 912, 308 Ill. 519.  
Iowa.—In re Stork's Estate, 9 N.W. 2d 273, 233 Iowa 413.  
N.J.—Board of Home Missions of Presbyterian Church in U. S. of America v. Saltmer, 4 A.2d 69, 125 N.J.Eq. 33.  
Ohio.—Kiplinger v. Armstrong, 171 N.E. 245, 34 Ohio App. 348.  
49 C.J. p 1289 note 99.

25. Ala.—Rice v. Park, 135 So. 472, 223 Ala. 317.  
N.J.—Methodist Episcopal Home for the Aged of New Jersey v. Tuthill, 167 A. 9, 113 N.J.Eq. 460.

26. Del.—Hurlock v. Bader, 28 A.2d 465, 26 Del.Ch. 328—Wilmington Trust Co. v. Grier, 161 A. 921, 19 Del.Ch. 34.

Ind.—Crawfordsville Trust Co. v. Elston Bank & Trust Co., 25 N.E. 2d 626, 216 Ind. 596.

27. U.S.—Johnstone v. Commissioner of Internal Revenue, C.C.A., 76 F.2d 55, certiorari denied 56 S.Ct. 89, 296 U.S. 578, 80 L.Ed. 408.

Ill.—Merchants' L. & T. Co. v. Patterson, 139 N.E. 912, 308 Ill. 519—Boyle v. John M. Smyth Co., 248 Ill.App. 57.

28. Iowa.—In re Stork's Estate, 9 N.W.2d 273, 233 Iowa 413.

Tenn.—King v. Richardson, 7 Tenn. App. 535.

**Formal declaration of intention to exercise power is not required.**—Security Trust Co. v. Spruance, 174 A. 285, 20 Del.Ch. 195.

29. Iowa.—In re Stork's Estate, 9 N.W.2d 273, 233 Iowa 413.

Tenn.—King v. Richardson, 7 Tenn. App. 535.

#### Considered together

Intent to execute power is sufficiently shown if it appears by act, words, deed, conveyance, or testamentary instrument or by acts, instruments, and declarations considered together.—Rice v. Park, 135 So. 472, 223 Ala. 317.

an instrument may be sufficiently manifested by the circumstances surrounding the transaction.<sup>30</sup>

In determining whether or not the donee intended by his will to exercise the power, the entire will in all its parts may be looked to.<sup>31</sup> It has been held that the intent must, if possible, be ascertained from the terms of the will itself,<sup>32</sup> and if, considering the terms of the will, a doubt exists, resort may be had to recognized rules of construction.<sup>33</sup> In determining whether or not a power is exercised by the donee's will, the will is to be considered in the light of the circumstances<sup>34</sup> at the time of the execution of the will<sup>35</sup> and at the time of the donee's death.<sup>36</sup>

*Question of law or fact.* Where the determination of the issue depends solely on the terms of a written instrument, whether or not there was an intention to exercise a power is a question of law.<sup>37</sup>

*Power exercised by whole will or by particular clause.* Where a power is exercised by will, whether it is exercised by the will as a whole or by a particular clause or the residuary clause depends

on the testator's intention.<sup>38</sup> A power has been held to be exercised by the will as a whole and not by any particular clause thereof where the will contains an introductory declaration that the testator intends by the will to dispose of all property over which he has a power of appointment.<sup>39</sup> Where a will is regarded as an exercise of a power held by the testator, because it would otherwise be nugatory, the power must be treated as exercised by the whole will, and not merely by the residuary clause.<sup>40</sup>

#### b. Particular Matters Indicating Intention

- (1) In general
- (2) Reference to power
- (3) Reference to subject matter or instrument creating power
- (4) Instrument inoperative except as execution of power
- (5) Grant or conveyance by donee having estate or interest

##### (1) In General

Where pecuniary gifts, a residuary gift, or both, in the donee's will, read with reference to the property

30. Iowa.—In re Stork's Estate, 9 N.W.2d 273, 233 Iowa 413.

N.J.—Hood v. Francis, 44 A.2d 182, 137 N.J.Eq. 200.

N.C.—Tooci v. Nowfall, 18 S.E.2d 225, 220 N.C. 550.

**Circumstances held to indicate intention to exercise power**

Cal.—Childs v. Gross, 107 P.2d 424, 41 Cal.App.2d 680.

Del.—Wilmington Trust Co. v. Grier, 161 A. 921, 19 Del.Ch. 34.

Ga.—Cannon v. Laing, 111 S.E. 565, 153 Ga. 88.

Ill.—Rettig v. Zander, 4 N.E.2d 30, 364 Ill. 112—Northern Trust Co. v. Cudahy, 91 N.E.2d 607, 339 Ill.App. 603—Boyle v. John M. Smyth Co., 248 Ill.App. 57.

Iowa.—In re Stork's Estate, 9 N.W. 2d 273, 233 Iowa 413.

Md.—Reeside v. Annex Bldg. Ass'n of Baltimore City, 167 A. 72, 165 Md. 200, 91 A.L.R. 426.

Tex.—Cragin v. Frost Nat. Bank, Civ.App., 164 S.W.2d 24, error refused.

Wis.—First Wisconsin Trust Co. v. Helmholz, 225 N.W. 181, 198 Wis. 573.

31. Del.—Equitable Trust Co. v. Causey, 9 A.2d 714, 34 Del.Ch. 259—Wilmington Trust Co. v. Grier, 161 A. 921, 19 Del.Ch. 34.

Md.—Reeside v. Annex Bldg. Ass'n of Baltimore City, 167 A. 72, 165 Md. 200, 91 A.L.R. 426.

N.J.—Hood v. Francis, 44 A.2d 182, 137 N.J.Eq. 200.

**Nugatory provision**

In determining whether donee in-

tended to exercise power, language in donee's will, although legally nugatory, may be legitimately considered.—Wilmington Trust Co. v. Grier, 161 A. 921, 19 Del.Ch. 34.

32. Colo.—Johnson v. Shriver, 216 P.2d 653.

33. Colo.—Johnson v. Shriver, supra.

34. Ala.—Rice v. Park, 135 So. 472, 223 Ala. 317—Matthews v. McDade, 72 Ala. 377.

Cal.—Childs v. Gross, 107 P.2d 424, 41 Cal.App.2d 680.

Del.—Wilmington Trust Co. v. Grier, 161 A. 921, 19 Del.Ch. 34.

Ind.—Crawfordsville Trust Co. v. Elston Bank & Trust Co., 25 N.E. 2d 626, 216 Ind. 596.

N.J.—Methodist Episcopal Home for the Aged of New Jersey, 167 A. 9, 113 N.J.Eq. 460.

Ohio.—Kiplinger v. Armstrong, 171 N.E. 245, 34 Ohio App. 348.

**Among the circumstances to be considered are the source of the power, the terms of the instrument creating it, and the extent of the donee's present or past interest in the property.**—Worcester Bank & Trust Co. v. Sibley, 192 N.E. 31, 287 Mass. 594—Talbot v. Riggs, 191 N. E. 360, 287 Mass. 144—Sewall v. Wilmer, 132 Mass. 131.

35. Ill.—Northern Trust Co. v. Cudahy, 91 N.E.2d 607, 339 Ill.App. 603.

Iowa.—In re Stork's Estate, 9 N.W. 2d 273, 233 Iowa 413.

Md.—Wyeth v. Safe Deposit & Trust

Co. of Baltimore, 4 A.2d 753, 176 Md. 369—Reeside v. Annex Bldg. Ass'n of Baltimore City, 167 A. 72, 165 Md. 200, 91 A.L.R. 426.

Mass.—Worcester Bank & Trust Co. v. Sibley, 192 N.E. 31, 287 Mass. 594.

N.J.—Hood v. Francis, 44 A.2d 182, 137 N.J.Eq. 200—Paul v. Paul, 133 A. 868, 99 N.J.Eq. 498.

36. Md.—Wyeth v. Safe Deposit & Trust Co. of Baltimore, 4 A.2d 753, 176 Md. 369.

37. Conn.—Heise v. City of Hartford, 17 A.2d 8, 127 Conn. 359—Union & New Haven Trust Co. v. Bartlett, 122 A. 105, 99 Conn. 245.

**Where a will is unambiguous, it is for the court to determine whether or not it manifests an intent to exercise a power.**

Ga.—Butler v. Prudden, 185 S.E. 102, 182 Ga. 189.

Iowa.—In re Proestler's Will, 5 N.W. 2d 922, 232 Iowa 640.

38. R.I.—Barret v. Berea College, 137 A. 145, 48 R.I. 258.

**Exercise by will as whole or by particular clause where will is deemed to exercise power by reason of statute see infra subdivision c (2) of this section.**

39. R.I.—Barret v. Berea College, supra.

40. R.I.—Moran v. Cornell, 142 A. 605, 49 R.I. 308.

**Instrument inoperative except as execution of power generally see infra subdivision b (4) of this section.**

which he owned and other circumstances existing at the time of the execution of the will, indicate that the donee of a power understood that he was disposing of the property covered by the power, the power will be considered exercised.

Where pecuniary gifts, a residuary gift, or both, in the donee's will, read with reference to the property which he owned and other circumstances existing at the time of the execution of the will, indicate that the donee understood that he was disposing of the property covered by the power, the power will be considered exercised.<sup>41</sup> A will bequeathing exactly the sum the testator had a right to dispose of under a power is ordinarily treated as an execution of the power, although no reference to it is made in the will.<sup>42</sup> The purpose of a conveyance is strong evidence of intention to execute a power when such execution is necessary to effect the purpose.<sup>43</sup> A mere direction by a testator for the payment of his debts is not an exercise of his power of appointment.<sup>44</sup> The fact that the testator made what he believed to be an effective disposition of the property during his life indicates that he did not intend to exercise the power by his will.<sup>45</sup> It has been held that, where the donee believes that

he owns the appointive property, a will disposing of the property as his own does not operate as an exercise of his power to appoint it,<sup>46</sup> but it has also been held that a donee's intent to execute a power, otherwise disclosed, is not negated by the mere fact that he refers to the subject of the power as his own individual property.<sup>47</sup>

## (2) Reference to Power

As a general rule, an intention to exercise a power is sufficiently demonstrated by an express reference to the power, but such reference is not necessary where an intention to exercise the power is otherwise manifested.

An intention to exercise a power is sufficiently manifested by an express exercise of the power,<sup>48</sup> and it is generally held that an intention to execute a power is sufficiently demonstrated by an express reference to the power.<sup>49</sup> Where the donee of a power professes in general terms to act in pursuance of all or every power enabling him to dispose of property, this is ordinarily a sufficient reference to a particular power to operate as an execution thereof, unless a contrary intention appears.<sup>50</sup> While the instrument executing a power should ordinarily

41. Ill.—Rettig v. Zander, 4 N.E.2d 30, 364 Ill. 112.

Iowa.—In re Stork's Estate, 9 N.W. 2d 273, 233 Iowa 413.

N.J.—White v. Graves, Ch., 104 A. 205.

42. N.J.—Munson v. Berdan, 35 N. J.Eq. 376.

49 C.J. p 1289 note 9.

43. Colo.—Moore v. Barnard, 226 P. 134, 75 Colo. 395.

44. Colo.—Johnson v. Shriver, 216 P.2d 653.

45. N.J.—Methodist Episcopal Home for the Aged of New Jersey v. Tuthill, 167 A. 9, 113 N.J.Eq. 460.

46. Ala.—Rice v. Park, 135 So. 472, 223 Ala. 317.

47. Del.—Hurlock v. Bader, 28 A.2d 465, 26 Del.Ch. 328.

48. U.S.—Guaranty Trust Co. of N. Y. v. Johnson, D.C.N.Y., 76 F.Supp. 566.

N.J.—National State Bank of Newark v. Morrison, 70 A.2d 888, 7 N. J.Super. 333.

N.Y.—In re Jackson's Estate, 25 N. Y.S.2d 102, 175 Misc. 882, affirmed in re Jackson's Will, 30 N.Y.S.2d 840, 262 App.Div. 997, appeal denied 31 N.Y.S.2d 664, 263 App.Div. 707.

S.C.—Adger v. Kirk, 108 S.E. 97, 116 S.C. 298.

### Full exercise of power

Where will disposes of property of which testatrix is given power of appointment, will is construed to be

full exercise of power and to have completely disposed of whole of that property unless contrary intention clearly appears.—Jones v. Fidelity-Philadelphia Trust Co., 4 A.2d 204, 134 Pa.Super. 178.

49. Del.—Equitable Trust Co. v. Causey, 9 A.2d 714, 24 Del.Ch. 259.—Security Trust Co. v. Crumlish, 187 A. 20, 21 Del.Ch. 208.—Wilmington Trust Co. v. Grier, 161 A. 921, 19 Del.Ch. 34.—Grant v. Mulen, 138 A. 613, 15 Del.Ch. 174. Ga.—Butler v. Prudden, 185 S.E. 102, 182 Ga. 189. Hawaii.—Hakalau v. De La Nux, 35 Hawaii 59.

Iowa.—Bussing v. Hough, 21 N.W. 2d 587, 237 Iowa 194.—In re Stork's Estate, 9 N.W.2d 273, 233 Iowa 413.—In re Proestler's Will, 5 N. W.2d 922, 233 Iowa 640.

Md.—Reeside v. Annex Bldg. Ass'n of Baltimore City, 167 A. 72, 165 Md. 200, 91 A.L.R. 426.

N.J.—Hood v. Francis, 44 A.2d 182, 137 N.J.Eq. 200.

N.Y.—In re Flewellin's Will, 202 N.Y.S. 496, 122 Misc. 256.

N.C.—Tocci v. Nowfall, 18 S.E.2d 225, 320 N.C. 550.

Ohio.—Kiplinger v. Armstrong, 171 N.E. 245, 34 Ohio App. 348.

Pa.—In re Lippincott's Estate, 52 Pa.Dist. & Co. 273.

49 C.J. p 1289 note 12.

### Devise of fee; express exercise of powers

Where testatrix had been given power of appointment over one half of a trust and, in belief that she had

a fee therein, attempted to devise the fee to her trustees and in later portion of her will by specific reference to power of appointment exercised it, the latter provision was a valid exercise of the power and the former was without effect.—Bancroft v. Bancroft, 27 A.2d 836, 68 R.I. 406.

50. Mass.—Pitman v. Pitman, 50 N. E.2d 69, 314 Mass. 465, 150 A.L.R. 509.

N.Y.—In re Stewart's Estate, 64 N. Y.S.2d 293, applying New Jersey law.

Pa.—In re Lippincott's Estate, 52 Pa.Dist. & Co. 273.—In re Lewis' Estate, 49 Pa.Dist. & Co. 173, modified on other grounds 37 A.2d 482, 349 Pa. 571.

49 C.J. p 1293 note 28.

### Special powers

(1) The text rule applies as to a special power.—In re Lewis' Estate, supra.

(2) Where donee made no specific mention in his will of any special power of appointment, but will contained residuary clause devising and bequeathing donee's own property and that over which he had a power of appointment, there was a valid exercise of the special power of appointment in view of fact that the only property subject to a power to which the residuary clause could relate was the special power.—Pitman v. Pitman, 50 N.E.2d 69, 314 Mass. 465, 150 A.L.R. 509.

(3) "Special powers" defined see supra § 6.

refer to it,<sup>51</sup> such reference is unnecessary if it clearly appears that the donee had in view the subject of the power at the time and intended to execute it.<sup>52</sup>

### (3) Reference to Subject Matter or Instrument Creating Power

An intention to execute a power may be sufficiently shown by a reference to the subject matter of the power or to the instrument by which it was created.

An intention to execute a power may be sufficiently shown by a reference in the instrument of execution to the subject matter of the power, or to the instrument by which it was created, without any direct reference to the power itself.<sup>53</sup>

### (4) Instrument Inoperative Except as Execution of Power

Where a deed or will cannot operate except as an execution of a power, it will be presumed to be so intended, although the power is not referred to.

Where a deed or will cannot operate except as an execution of a power, it will be presumed to be so intended, although the power is not referred to;<sup>54</sup> but, if there is any other way in which the instrument can have effect, it will be deemed to operate in that way, and not as an execution of the power, in the absence of any apparent intention to execute the power.<sup>55</sup> Where the donee of a power owned no property at the time of the execution of his will

#### Power incident to ownership

Provision of will that it should include any property the testator had the power to dispose of was held to refer to power of disposition incident to ownership of property and not to power of appointment.

Fla.—Patillo v. Glenn, 7 So.2d 328, 150 Fla. 73.

R.I.—Matteson v. Goddard, 21 A. 914, 17 R.I. 299.

51. N.C.—Carraway v. Moseley, 87 S.E. 765, 152 N.C. 351—Johnson v. Johnson, 13 S.E. 183, 108 N.C. 619.

52. Ala.—Rice v. Park, 135 So. 472, 223 Ala. 317.

Ark.—Moore v. Avery, 225 S.W. 599, 146 Ark. 193.

Cal.—Childs v. Gross, 107 P.2d 424, 41 Cal.App.2d 680.

Ga.—Butler v. Prudden, 185 S.E. 102, 182 Ga. 189.

Ill.—Emery v. Emery, 156 N.E. 364, 325 Ill. 212.

Ind.—Crawfordville Trust Co. v. Elston Bank & Trust Co., 25 N.E. 2d 626, 216 Ind. 596.

Iowa.—In re Stork's Estate, 9 N.W. 2d 273, 233 Iowa 413.

Md.—Reeside v. Annex Bldg. Ass'n of Baltimore City, 167 A. 72, 165 Md. 200, 91 A.L.R. 426.

N.H.—Corpus Juris cited in Lord v. Roberts, 153 A. 1, 4, 84 N.H. 517.

N.J.—Fidelity Union Trust Co. v. Caldwell, 44 A.2d 842, 137 N.J.Eq. 362—Hood v. Francis, 44 A.2d 182, 137 N.J.Eq. 200—Board of Home Missions of Presbyterian Church in U. S. of America v. Saltner, 4 A.2d 69, 125 N.J.Eq. 33—Methodist Episcopal Home for the Aged of New Jersey v. Tuthill, 167 A. 9, 113 N.J.Eq. 460.

N.Y.—Morgan v. Keyes, 99 N.Y.S.2d 820.

Tenn.—King v. Richardson, 7 Tenn. App. 535.

49 C.J. p 1390 note 14.

53. Del.—Hurlock v. Bader, 28 A.2d 465, 26 Del.Ch. 328—Equitable Trust Co. v. Causey, 9 A.2d 714, 24 Del.Ch. 259—Cathell v. Burris, 187 A. 9, 21 Del.Ch. 233—Security

Trust Co. v. Spruance, 174 A. 285, 20 Del.Ch. 195—Wilmington Trust Co. v. Grier, 161 A. 921, 19 Del.Ch. 34—Grant v. Mullen, 138 A. 613, 15 Del.Ch. 174.

Ga.—Butler v. Prudden, 185 S.E. 102, 182 Ga. 189.

Hawaii.—Hakalau v. De La Nux, 35 Hawaii 59.

Iowa.—Bussing v. Hough, 21 N.W.2d 587, 237 Iowa 194—In re Stork's Estate, 9 N.W.2d 273, 233 Iowa 413

—In re Proestler's Will, 5 N.W.2d 922, 233 Iowa 640.

Md.—Reeside v. Annex Bldg. Ass'n of Baltimore City, 167 A. 72, 165 Md. 200, 91 A.L.R. 426.

N.J.—Hood v. Francis, 44 A.2d 182, 137 N.J.Eq. 200—White v. Graves, Ch., 104 A. 205—In re Flewellin's Will, 202 N.Y.S. 496, 122 Misc. 256.

N.C.—Tocci v. Nowfall, 18 S.E.2d 225, 320 N.C. 550.

Ohio.—Kiplinger v. Armstrong, 171 N.E. 245, 34 Ohio App. 348.

Tex.—Corpus Juris cited in Seguin State Bank & Trust Co. v. Locke, Civ.App., 73 S.W.2d 645, 647, affirmed 102 S.W.2d 250, 129 Tex. 524.

49 C.J. p 1293 note 29.

54. Cal.—Childs v. Gross, 107 P.2d 424, 41 Cal.App.2d 680.

Conn.—Strattman v. Strattman, 99 A. 571, 91 Conn. 240.

Del.—Equitable Trust Co. v. Causey, 9 A.2d 714, 24 Del.Ch. 259—Security Trust Co. v. Spruance, 174 A. 285, 20 Del.Ch. 195—Wilmington Trust Co. v. Grier, 161 A. 921, 19 Del.Ch. 34—Grant v. Mullen, 138 A. 613, 15 Del.Ch. 174.

Fla.—DePass v. Kansas Masonic Home, 181 So. 410, 132 Fla. 455.

Ga.—Butler v. Prudden, 185 S.E. 102, 182 Ga. 189.

Hawaii.—Hakalau v. De La Nux, 35 Hawaii 59.

Iowa.—Bussing v. Hough, 21 N.W.2d 587, 237 Iowa 194—In re Stork's Estate, 9 N.W.2d 273, 233 Iowa 413—In re Proestler's Will, 5 N.W. 2d 922, 233 Iowa 640.

Md.—Reeside v. Annex Bldg. Ass'n of Baltimore City, 167 A. 72, 165 Md. 200, 91 A.L.R. 426.

Mass.—Pitman v. Pitman, 50 N.E.2d 69, 314 Mass. 465, 150 A.L.R. 509.

N.J.—Hood v. Francis, 44 A.2d 182, 137 N.J.Eq. 200.

N.Y.—In re Flewellin's Will, 202 N.Y.S. 496, 122 Misc. 256.

N.C.—Tocci v. Nowfall, 18 S.E.2d 225, 320 N.C. 550.

Ohio.—Kiplinger v. Armstrong, 171 N.E. 245, 34 Ohio App. 348.

Tex.—Corpus Juris cited in Seguin State Bank & Trust Co. v. Locke, Civ.App., 73 S.W.2d 645, 647, affirmed 102 S.W.2d 250, 129 Tex. 524.

Md.—Reeside v. Annex Bldg. Ass'n of Baltimore City, 167 A. 72, 165 Md. 200, 91 A.L.R. 426.

Mass.—Pitman v. Pitman, 50 N.E.2d 69, 314 Mass. 465, 150 A.L.R. 509.

N.J.—Hood v. Francis, 44 A.2d 182, 137 N.J.Eq. 200.

N.Y.—In re Flewellin's Will, 202 N.Y.S. 496, 122 Misc. 256.

N.C.—Tocci v. Nowfall, 18 S.E.2d 225, 320 N.C. 550.

Ohio.—Kiplinger v. Armstrong, 171 N.E. 245, 34 Ohio App. 348.

Tex.—Corpus Juris cited in Seguin State Bank & Trust Co. v. Locke, Civ.App., 73 S.W.2d 645, 647, affirmed 102 S.W.2d 250, 129 Tex. 524.

49 C.J. p 1295 note 39.

Registration of deed

Where owners of realty conveyed realty to realty company as trustee, with power in company's own name to dispose of all or part of the realty and to execute and deliver a good and sufficient deed, and company executed a deed, which was filed for record, to purchasers without any mention that company was trustee, deed would be deemed to have been made in execution of the power and was good, not only between the parties, but also as against purchasers for value to whom the company subsequently conveyed by registered deed the same realty by deed in which company was named as trustee, as against objection that because of the mode of its execution, original deed was not capable of being registered so that index might show that it was executed as the act of a trustee.—Tocci v. Nowfall, 18 S.E.2d 225, 320 N.C. 550.

55. Del.—Equitable Trust Co. v. Causey, 9 A.2d 714, 24 Del.Ch. 259.

Fla.—DePass v. Kansas Masonic Home, 181 So. 410, 132 Fla. 455.

N.J.—Methodist Episcopal Home for the Aged of New Jersey v. Tuthill, 167 A. 9, 113 N.J.Eq. 460.

N.Y.—In re Kelly's Will, 20 N.Y.S.2d 6, 174 Misc. 80.

or at the time of his death, his will has been deemed to be an exercise of the power,<sup>56</sup> and a general devise has been held a sufficient exercise of a power of appointment over real estate where the donee owned no real property.<sup>57</sup> In this connection, a distinction has been made between realty and personalty, so that a devise in general terms is an exercise of the testator's power over real estate where the testator owned no realty at the time of the execution of the will,<sup>58</sup> but a bequest in general terms is not an execution of his power over personal property, even though the testator owned no personal property at the time of the execution of the will;<sup>59</sup> but it has also been held that this distinction has been invalidated by the enactment of statutes abrogating the common-law rule that a will does not transmit after-acquired realty,<sup>60</sup> and that the fact that the testator was without real or personal property at the time of the execution of the will does not make a general devise or bequest in such will operate as an exercise of his power,<sup>61</sup> although it may be some evidence that such was the testator's intention.<sup>62</sup> The fact that his will makes dispositions substantially in excess of his own property indicates that the testator intended to exercise the power,<sup>63</sup> but such fact is not conclusive,<sup>64</sup> and it has been held that the execution of

a power may not be presumed from the fact that the bequests in a will exceed the testator's estate where his estate is substantial.<sup>65</sup> An intent to exercise the power has been held to be sufficiently evidenced by a will making dispositions approximately equal to the value of the appointive estate where the testator at the time of the execution of the will had virtually no assets,<sup>66</sup> even though, thereafter and before his death, he acquired substantial property.<sup>67</sup>

#### (5) Grant or Conveyance by Donee Having Estate or Interest

Where the donee of a power has also an estate or interest in the subject matter of the power, a deed or other instrument executed by him will pass only his own interest or estate and will not be treated as an execution of the power unless an intention to execute the power appears.

Where the donee of a power has also an estate or interest in the subject matter of the power, it is the general rule that a deed, will, or other instrument executed by him will pass only his own interest or estate, and will not be treated as an execution of the power, in the absence of any reference to the power or other evidence of intention to execute it;<sup>68</sup> but it is otherwise where an

Ohio.—Kiplinger v. Armstrong, 171 N.E. 245, 34 Ohio App. 348. 49 C.J. p 1295 note 40.

56. Hawaii.—Hakalau v. De La Nux, 35 Hawaii 59.

57. Del.—Grant v. Mullen, 138 A. 613, 15 Del.Ch. 174.

Pa.—Thomson v. Fidelity Trust Co., 110 A. 770, 268 Pa. 203.

A will directing the sale of the testator's real estate was held to be an exercise of a power over real estate where the testator had no realty at the time of the execution of the will.—Hood v. Francis, 44 A.2d 182, 137 N.J.Eq. 200.

58. Del.—Equitable Trust Co. v. Causey, 9 A.2d 714, 24 Del.Ch. 259. Time of execution of power see supra § 37.

#### Reason for rule

(1) Under the English common law at the time this rule was adopted, a will was ineffective to transmit after-acquired real property, so that, if the testator had no realty other than that which was subject to the power, the conclusion was that he intended to exercise the power by a general devise since there was nothing else to which the words could refer.

Del.—Equitable Trust Co. v. Causey, supra.

Fla.—DePass v. Kansas Masonic Home, 181 So. 410, 132 Fla. 455.

(2) After-acquired property passing by will see the C.J.S. title Wills § 70, also 68 C.J. p 492 note 28 et seq.

59. Del.—Equitable Trust Co. v. Causey, 9 A.2d 714, 24 Del.Ch. 259.

60. Fla.—DePass v. Kansas Masonic Home, 181 So. 410, 132 Fla. 455.

61. Fla.—DePass v. Kansas Masonic Home, supra.

62. Fla.—DePass v. Kansas Masonic Home, supra.

63. Ill.—Northern Trust Co. v. Cudahy, 91 N.E.2d 607, 339 Ill.App. 603.

Mass.—Safe Deposit & Trust Co. v. Prindle, 195 N.E. 793, 290 Mass. 577.

N.J.—Camden Safe Deposit & Trust Co. v. Fittler, 197 A. 249, 123 N.J. Eq. 245, affirmed Camden Safe Deposit & Trust Co. v. Frishmuth, 4 A.2d 379, 125 N.J.Eq. 169.

Pa.—In re Noble's Estate, 23 A.2d 410, 344 Pa. 81.—In re Wilson's Estate, 57 Pa.Dist. & Co. 612.

64. Mass.—Safe Deposit & Trust Co. v. Prindle, 195 N.E. 793, 290 Mass. 577.

65. Pa.—Appeal of Bingham, 64 Pa. 345.

66. Cal.—Reed v. Hollister, 186 P. 819, 44 Cal.App. 533.

N.J.—Paul v. Paul, 133 A. 868, 99 N.J.Eq. 498.

67. N.J.—Paul v. Paul, supra.

68. Ind.—Crawfordsville Trust Co. v. Elston Bank & Trust Co., 25 N.E.2d 626, 216 Ind. 596.

Miss.—Corpus Juris cited in Wirtz v. Gordon, 184 So. 798, 804, 187 Miss. 866.

N.J.—Corpus Juris cited in Board of Home Missions of Presbyterian Church in U. S. of America v. Saltmer, 4 A.2d 69, 72, 125 N.J. Eq. 33.

Tex.—Corpus Juris quoted in Davis v. Magnolia Petroleum Co., Civ. App., 105 S.W.2d 695, 697.

Wis.—Corpus Juris cited in Meister v. Francisco, 289 N.W. 643, 647, 233 Wis. 319, 127 A.L.R. 242.

49 C.J. p 1293 note 33.

"Power coupled with interest" defined see supra § 8.

#### Equivocal acts

Where one has estate in, and power over, property, his equivocal acts will be presumed to be made as owner.—Rice v. Park, 135 So. 472, 223 Ala. 317.

#### Quitclaim deed

Ordinary quitclaim deed contains no apt words indicating intent to exercise power, but language thereof naturally and properly relates only to grantor's interest in land conveyed, and, where he actually owns interest on which deed can take effect, it will be held a conveyance only of such interest, not a conveyance in execution of power.—

intention to execute the power appears,<sup>69</sup> as where his acts must be referred to the power to give them full effect.<sup>70</sup> Thus, where one having power to appoint or convey the fee-simple estate, and also having a life estate or other interest, executes a conveyance of the fee, the conveyance will be regarded as an execution of the power.<sup>71</sup> Where the instrument purports merely to pass the grantor's own estate or interest, it will be so construed, and will not constitute an exercise of the power;<sup>72</sup> and, on the other hand, a disposition of the subject matter of a power by the donee in express execution of the power will be restricted, in the absence of anything in the context showing a contrary intention, to an execution of the power so as not to affect the donee's individual estate.<sup>73</sup> A bequest by the life tenant of a trust, with power to appoint the remainder, of all his interest in the trust has been held to be an exercise of the power where the accrued and unpaid income at the time of death was

small.<sup>74</sup>

### c. Will Disposing of All Donee's Property; General Bequest or Devise

- (1) Common-law rule
- (2) Judicial and statutory modification of rule

#### (1) Common-law Rule

The common-law rule is that the will of a donee of a power disposing of all of his property or making general devises or bequests is not an exercise of his power unless an intention to exercise the power is manifested.

The common-law rule is that the mere fact that the donee of a power to appoint or dispose of property leaves a will disposing of all of his property or containing a general devise or bequest does not sufficiently evidence an intent to exercise the power and such will does not operate as an exercise of the power,<sup>75</sup> unless, in accordance with the rules here-

Meister v. Francisco, 289 N.W. 643, 233 Wis. 319, 127 A.L.R. 242—Lardner v. Williams, 74 N.W. 346, 98 Wis. 514—Towle v. Ewing, 23 Wis. 336, 99 Am.D. 179.

69. Ind.—Crawfordsville Trust Co. v. Elston Bank & Trust Co., 25 N.E.2d 626, 216 Ind. 596.

N.H.—Lord v. Roberts, 153 A. 1, 84 N.H. 517.

Tex.—Corpus Juris quoted in Davis v. Magnolia Petroleum Co., Civ. App., 105 S.W.2d 695, 697, 49 C.J. p 1294 note 34.

70. Ala.—Rice v. Park, 135 So. 472, 223 Ala. 317.

Del.—Corpus Juris cited in Hurlock v. Bader, 28 A.2d 465, 467, 25 Del. Ch. 328.

Md.—Corpus Juris cited in Reeside v. Annex Bldg. Ass'n of Baltimore City, 167 A. 72, 76, 165 Md. 200, 91 A.L.R. 426.

Miss.—Corpus Juris cited in Wirtz v. Gordon, 184 So. 798, 804, 187 Miss. 866.

N.J.—Corpus Juris cited in Board of Home Missions of Presbyterian Church in U. S. of America v. Saltmer, 4 A.2d 69, 72, 125 N.J. Eq. 33.

Tex.—Corpus Juris quoted in Davis v. Magnolia Petroleum Co., Civ. App., 105 S.W.2d 695, 697, 49 C.J. p 1294 note 36.

Instrument inoperative except as execution of power generally see supra subdivision b (4) of this section.

71. Del.—Corpus Juris cited in Hurlock v. Bader, 28 A.2d 465, 467, 25 Del.Ch. 328.

Ky.—Roby v. Arterburn, 108 S.W.2d 873, 269 Ky. 816.

Md.—Corpus Juris cited in Reeside v. Annex Bldg. Ass'n of Baltimore

City, 167 A. 72, 76, 165 Md. 200, 91 A.L.R. 426.

N.J.—Corpus Juris cited in Board of Home Missions of Presbyterian Church in U. S. of America v. Saltmer, 4 A.2d 69, 72, 125 N.J. Eq. 33.

N.C.—Hood ex rel. North Carolina Bank & Trust Co. v. North Carolina Theatres, 186 S.E. 345, 210 N.C. 346.

R.I.—Pyne v. O'Donnell, 75 A.2d 21.

Tex.—Corpus Juris quoted in Davis v. Magnolia Petroleum Co., Civ. App., 105 S.W.2d 695, 697, 49 C.J. p 1294 note 35.

72. N.Y.—Weinstein v. Weber, 81 N.Y.S. 62, 78 App.Div. 645, affirmed 70 N.E. 115, 178 N.Y. 94, 49 C.J. p 1294 note 37.

73. R.I.—Heinemann v. De Wolf, 55 A. 707, 25 R.I. 243.

74. Ohio.—In re Howald's Trust, 29 N.E.2d 575, 65 Ohio App. 191.

75. Colo.—Johnson v. Shriver, 216 P.2d 658.

Del.—Lane v. Lane, 55 A. 184, 4 Pennw. 368, 103 Am.S.R. 122, 64 L.R.A. 849—Equitable Trust Co. v. Causey, 9 A.2d 714, 24 Del.Ch. 259—Wilmington Trust Co. v. Wilmington Trust Co., 180 A. 597, 21 Del.Ch. 102, modified on other grounds 186 A. 903, 21 Del.Ch. 188—Wilmington Trust Co. v. Grier, 161 A. 921, 19 Del.Ch. 34—Grant v. Mullen, 138 A. 613, 15 Del.Ch. 174—Equitable Trust Co. v. Paschall, 115 A. 356, 13 Del.Ch. 87—Security Trust & Safe Deposit Co. v. Ward, 93 A. 385, 10 Del.Ch. 408.

Fla.—Patillo v. Glenn, 7 So.2d 328, 150 Fla. 73—DePass v. Kansas Masonic Home, 181 So. 410, 132 Fla. 455.

Ga.—Butler v. Prudden, 185 S.E. 102, 182 Ga. 189.

Ill.—Rock Island Bank & Trust Co. v. Rhoads, 187 N.E. 139, 353 Ill. 131—Emery v. Emery, 156 N.E. 364, 335 Ill. 212.

Iowa.—Bussing v. Hough, 21 N.W.2d 587, 237 Iowa 194—In re Stork's Estate, 9 N.W.2d 273, 233 Iowa 413—In re Proestler's Will, 5 N.W. 2d 922, 232 Iowa 640.

Mo.—Standley v. Allen, 163 S.W.2d 1012, 349 Mo. 1115—Weiss v. St. Louis Union Trust Co., App., 142 S.W.2d 1103.

N.J.—Methodist Episcopal Home for the Aged of New Jersey v. Tut-hill, 167 A. 9, 113 N.J. Eq. 460—Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Morrell, 154 A. 416, 108 N.J. Eq. 188—Woodbridge v. Jarrard, 138 A. 536, 101 N.J. Eq. 439—Farnum v. Pennsylvania Co. for Insurance on Lives and Granting Annuities, 99 A. 145, 87 N.J. Eq. 108, affirmed 101 A. 1053, 87 N.J. Eq. 652.

N.Y.—In re Kelly's Will, 20 N.Y.S. 2d 6, 174 Misc. 80, applying Florida law—In re Kelly's Will, 291 N.Y.S. 860, 161 Misc. 255, applying Florida law—In re Campbell's Estate, 248 N.Y.S. 344, 138 Misc. 800, applying Illinois law.

Ohio.—Kiplinger v. Armstrong, 171 N.E. 245, 34 Ohio App. 348, 49 C.J. p 1291 note 17.

Continued adherence to rule defended

Ohio.—Kiplinger v. Armstrong, supra.

#### In New Hampshire

(1) In an early case, the court, after expressing its dissatisfaction with the text rule, reluctantly concluded that it was too well es-



tofore discussed in subdivisions a and b of this section, an intention to exercise the power is otherwise manifested.<sup>76</sup>

## (2) Judicial and Statutory Modification of Rule

- (a) In general
- (b) Intention not to exercise power

### (a) In General

In some jurisdictions, the rule has been established by judicial decision or by statute that, where the will of a donee of a power disposes of all of his property or estate or contains a general devise or bequest, such will

operates as an exercise of the donee's power of appointment or disposition unless an intention to the contrary appears.

In at least one jurisdiction, the common-law rule has been repudiated, and it is held that where the will of the donee of a power disposes of all of his property or estate or contains a general devise or bequest, such will operates as an exercise of the donee's power of appointment or disposition, even though the power is not mentioned in the will,<sup>77</sup> unless an intention to the contrary appears;<sup>78</sup> and this rule has been incorporated into a number of statutes.<sup>79</sup>

established to be disregarded.—*Burleigh v. Clough*, 52 N.E. 267, 13 Am. R. 23.

(2) It was subsequently held that a will making a gift of the residue of "my estate" was an exercise of a power of disposition, it being held that it was more probable than otherwise that the testator intended by such phrase to exercise the power.—*Kimball v. New Hampshire Bible Society*, 23 A. 83, 65 N.H. 139.

(3) In a later decision, it was held that the common-law rule is no longer in force in the state and that the will of a donee of a power disposing of all of his estate would constitute an exercise of the power in the absence of a contrary intention.—*Emery v. Haven*, 85 A. 940, 67 N.H. 503.

(4) However, in its latest expression, the court has criticized *Emery v. Haven*, supra, and reaffirmed the common-law rule stated in the text.—*Faulkner v. Faulkner*, 44 A.2d 429, 93 N.H. 451.

76. Colo.—*Johnson v. Shriver*, 216 P.2d 653.

Del.—*Equitable Trust Co. v. Causey*, 9 A.2d 714, 24 Del.Ch. 259—*Wilmington Trust Co. v. Grier*, 161 A. 921, 19 Del.Ch. 34—*Equitable Trust Co. v. Paschall*, 115 A. 356, 13 Del.Ch. 87.

Ga.—*Butler v. Prudden*, 185 S.E. 102, 182 Ga. 189.

Ill.—*Rettig v. Zander*, 4 N.E.2d 30, 364 Ill. 112—*Northern Trust Co. v. Cudahy*, 91 N.E.2d 607, 339 Ill. App. 603—*Boyle v. John M. Smyth Co.*, 248 Ill.App. 57.

Iowa.—*Bussing v. Hough*, 21 N.W. 2d 587, 237 Iowa 194—*In re Stork's Estate*, 9 N.W.2d 273, 233 Iowa 413—*In re Proestler's Will*, 5 N.W.2d 922, 232 Iowa 640.

Mo.—*Standley v. Allen*, 163 S.W.2d 1012, 349 Mo. 1115.

N.J.—*White v. Graves, Ch.*, 104 A. 205—*Farnum v. Pennsylvania Company for Insurance*, 99 A. 145, 87 N.J.Eq. 108, affirmed 101 A. 1053, 87 N.J.Eq. 652.

Ohio.—*Kiplinger v. Armstrong*, 171 N.E. 245, 34 Ohio App. 348, 49 C.J. p 1291 note 18.

77. U.S.—*Old Colony Trust Co. of Boston v. Commissioner of Internal Revenue*, C.C.A., 73 F.2d 970.

Mass.—*New England Trust Co. v. Wood*, 93 N.E.2d 547—*Boston Safe Deposit & Trust Co. v. Painter*, 77 N.E.2d 409, 322 Mass. 362—*Pitman v. Pitman*, 50 N.E.2d 69, 314 Mass. 465, 150 A.L.R. 509—*Old Colony Trust Co. v. Allen*, 29 N.E.2d 310, 307 Mass. 40—*Gorey v. Guarente*, 22 N.E.2d 99, 303 Mass. 569—*Slayton v. Fitch Home*, 200 N.E. 357, 293 Mass. 574, 104 A.L.R. 669—*Boston Safe Deposit & Trust Co. v. Prindle*, 195 N.E. 793, 290 Mass. 577—*Worcester Bank & Trust Co. v. Sibley*, 192 N.E. 31, 287 Mass. 594—*Butler v. New England Trust Co.*, 155 N.E. 788, 259 Mass. 39—*Harvard Trust Co. v. Frost*, 154 N.E. 863, 258 Mass. 319—*Bundy v. U. S. Trust Co. of New York*, 153 N.E. 337, 257 Mass. 72—*King v. Walsh*, 146 N.E. 33, 250 Mass. 462, 49 C.J. p 1291 note 20.

Even though the testator does not know he owns the power or does not have it in mind at the time of the execution of the will, the text rule applies.—*Boston Safe Deposit & Trust Co. v. Painter*, 77 N.E.2d 409, 322 Mass. 362.

78. U.S.—*Old Colony Trust Co. of Boston v. Commissioner of Internal Revenue*, C.C.A., 73 F.2d 970. Mass.—*Boston Safe Deposit & Trust Co. v. Painter*, 77 N.E.2d 409, 322 Mass. 362—*Pitman v. Pitman*, 50 N.E.2d 69, 314 Mass. 465, 150 A.L.R. 509—*Old Colony Trust Co. v. Allen*, 29 N.E.2d 310, 307 Mass. 40—*Gorey v. Guarente*, 22 N.E.2d 99, 303 Mass. 569—*Slayton v. Fitch Home*, 200 N.E. 357, 293 Mass. 574, 104 A.L.R. 669—*Boston Safe Deposit & Trust Co. v. Prindle*, 195 N.E. 793, 290 Mass. 577—*Worcester Bank & Trust Co. v. Sibley*, 192 N.E. 31, 287 Mass. 594—*Harvard Trust Co. v. Frost*, 154 N.E. 863,

258 Mass. 319—*Bundy v. U. S. Trust Co. of New York*, 153 N.E. 337, 257 Mass. 72—*King v. Walsh*, 146 N.E. 33, 250 Mass. 462—*Ames v. Ames*, 138 N.E. 845, 244 Mass. 381.

79. U.S.—*Barclay v. U. S.*, D.C.Pa., 73 F.Supp. 816, motion refused 74 F.Supp. 938.

Cal.—*California Trust Co. v. Ott*, 140 P.2d 79, 59 Cal.App.2d 715—*Childs v. Gross*, 107 P.2d 424, 41 Cal.App.2d 680.

Del.—*Wilmington Trust Co. v. Wilmington Trust Co.*, 186 A. 903, 21 Del.Ch. 188, applying New York law.

Ky.—*U. S. Trust Co. v. Winchester*, 126 S.W.2d 814, 277 Ky. 434—*Greenway v. Irvine*, 31 S.W.2d 606, 235 Ky. 263—*McCormick v. Security Trust Co. of Lexington*, 211 S.W. 196, 184 Ky. 25.

Md.—*Reeside v. Annex Bldg. Ass'n of Baltimore City*, 167 A. 72, 165 Md. 200, 91 A.L.R. 426—*Galard v. Winans*, 74 A. 626, 111 Md. 434.

N.Y.—*Low v. Bankers' Trust Co.*, 200 N.E. 674, 270 N.Y. 143, amendment of remittitur denied 3 N.E.2d 211, 271 N.Y. 615—*Chase Nat. Bank of City of New York v. Chicago Title & Trust Co.*, 284 N.Y.S. 472, 246 App.Div. 201, affirmed 3 N.E.2d 205, 271 N.Y. 602, reargument denied 3 N.E.2d 472, 271 N.Y. 659—*McLean v. McLean*, 160 N.Y.S. 949, 174 App.Div. 152—*Hirsch v. Buckl*, 148 N.Y.S. 214, 162 App. Div. 659—*In re Slocum's Estate*, 81 N.Y.S.2d 120, 192 Misc. 1026—*In re Davis*, 59 N.Y.S.2d 607, 186 Misc. 397—*In re Grinnell's Estate*, 49 N.Y.S.2d 781, 183 Misc. 109—*In re Trotter's Estate*, 23 N.Y.S.2d 1007, 175 Misc. 356—*In re Woodward's Estate*, 22 N.Y.S.2d 231, 174 Misc. 919—*In re Wildenburg's Estate*, 21 N.Y.S.2d 331, 174 Misc. 503—*In re Lynn's Estate*, 20 N.Y.S.2d 925, 174 Misc. 361, application denied 23 N.Y.S.2d 995, 175 Misc. 441, affirmed 26 N.Y.S.2d 96, 261 App. Div. 513, modified on other grounds 26 N.Y.S.2d 96, 261 App.Div. 513, affirmed *In re Lynn's Will*, 39 N.

The rule applies where the donee's will contains a gift of all of "my property,"<sup>80</sup> "my assets,"<sup>81</sup> "my estate,"<sup>82</sup> property of which the donee is possessed, or to which he is entitled, or in which he has an interest,<sup>83</sup> or property of which the donee is possessed or seized.<sup>84</sup> It has been held that the rule does not apply to a mere pecuniary legacy,<sup>85</sup> wheth-

er or not the will contains a general residuary clause,<sup>86</sup> and even though the donee's own estate is insufficient to discharge the pecuniary gifts,<sup>87</sup> so that a legacy of a sum of money is not an exercise of a power unless an intent that it be an exercise of the power is manifested;<sup>88</sup> but it has also been held that the statute applies where the donee's will

El.2d 266, 287 N.Y. 637—In re Kelly's Will, 20 N.Y.S.2d 6, 174 Misc. 80, applying Pennsylvania law—In re Brown's Will, 6 N.Y.S.2d 836, 169 Misc. 43—In re Brown's Will, 6 N.Y.S.2d 836, 169 Misc. 43—City Bank Farmers Trust Co. v. Miller, 297 N.Y.S. 88, 163 Misc. 459, affirmed 1 N.Y.S.2d 640, 253 App. Div. 707, reversed on other grounds 15 N.E.2d 553, 278 N.Y. 134—In re Palmer's Estate, 277 N.Y.S. 816, 154 Misc. 705—In re Spears' Will, 271 N.Y.S. 110, 151 Misc. 181—In re Burling's Estate, 266 N.Y.S. 482, 143 Misc. 835—In re Marsland's Estate, 254 N.Y.S. 293, 142 Misc. 230—Syracuse Trust Co. v. Fuller, 252 N.Y.S. 90, 140 Misc. 918—In re Wickham's Will, 249 N.Y.S. 148, 139 Misc. 729—In re Mann's Will, 244 N.Y.S. 673, 138 Misc. 42—In re Dodge's Estate, 222 N.Y.S. 247, 129 Misc. 390—In re Flewellin's Will, 202 N.Y.S. 496, 122 Misc. 256—In re Williams' Trust, 82 N.Y.S.2d 101—In re Gaffney's Trust, 75 N.Y.S.2d 675—In re Fuller's Will, 72 N.Y.S.2d 498—In re Reese's Estate, 70 N.Y.S.2d 81, modified on other grounds in re Reese's Will, 87 N.Y.S.2d 607, 275 App. Div. 37—In re Van Hoesen's Will, 67 N.Y.S. 2d 503—Pross v. Anson, 58 N.Y.S. 2d 26, affirmed 76 N.Y.S.2d 646, 273 App. Div. 860—Van Wagenen v. Fox, 22 N.Y.S.2d 803—Irving Trust Co. v. Hartmann, 8 N.Y.S.2d 387.

N.C.—Schaeffer v. Haseltine, 46 S. E.2d 463, 228 N.C. 484—Walsh v. Friedman, 13 S.E.2d 250, 219 N.C. 151.

Or.—Hollister v. Hollister, 166 P. 940, 85 Or. 316, applying New York law.

Pa.—In re Barton (Pendleton), 35 A. 2d 266, 348 Pa. 279—In re Noble's Estate, 23 A.2d 410, 344 Pa. 81—Provident Trust Co. of Philadelphia v. Scott, 6 A.2d 814, 335 Pa. 231—In re Wilbur's Estate, 5 A.2d 325, 334 Pa. 45—In re Miller's Trust, 169 A. 362, 313 Pa. 18—Thomson v. Fidelity Trust Co., 110 A. 770, 268 Pa. 203—In re Huddy's Estate, 84 A. 909, 326 Pa. 276—Jones v. Mackie, 49 Pa. Dist. & Co. 459—In re Morgan, Com. Pl., 39 Luz. Leg. Reg. 147.

R.I.—Commercial Trust Co. of N. J. v. Clinton, 72 A.2d 836—Adams v. D'Hauteville, 51 A.2d 92, 72 R.I. 325.

Wis.—Horlick v. Sidley, 3 N.W.2d 710, 241 Wis. 81.  
49 C.J. p 1291 note 22.

**Rule applied where donee and donor were same person**

N.Y.—City Bank Farmers Trust Co. v. Miller, 297 N.Y.S. 88, 163 Misc. 459, affirmed 1 N.Y.S.2d 640, 253 App. Div. 707, reversed on other grounds 15 N.E.2d 553, 278 N.Y. 134—In re Gaffney's Trust, 75 N.Y.S.2d 675.

Pa.—In re Barton (Pendleton), 35 A. 2d 266, 348 Pa. 279.

**Statute held to apply to both realty and personalty**

Cal.—Childs v. Gross, 107 P.2d 424, 41 Cal. App. 2d 680.

Wis.—Horlick v. Sidley, 3 N.W.2d 710, 241 Wis. 81.

**Statute held to create presumption of intention to execute power**

Md.—Lederer v. Safe Deposit & Trust Co. of Baltimore, 35 A.2d 166, 182 Md. 422.

N.Y.—Chase Nat. Bank v. Chicago Title & Trust Co., 299 N.Y.S. 926, 164 Misc. 508.

Pa.—Provident Trust Co. of Philadelphia v. Scott, 6 A.2d 814, 335 Pa. 231—Thomson v. Fidelity Trust Co., 110 A. 770, 268 Pa. 203.

**Knowledge of power**

Knowledge of the existence of the power of appointment is imputed to donee under statute, and it is immaterial that donee's will is silent in respect of the exercise of the power.—In re Grinnell's Estate, 49 N.Y.S.2d 781, 183 Misc. 109.

**Construction of English statute**

Since the statute is a literal copy of the English Wills Act, which had received a definite construction before its adoption by the statute, the statute should be construed consistently with that construction.—Adams v. D'Rauteville, 51 A.2d 92, 72 R.I. 325—Rhode Island Hospital Trust Co. v. Dunnell, 83 A. 853, 34 R.I. 394, Ann. Cas. 1914D 580.

**Donee domiciled outside state**

(1) The Wills Act applies to all wills governed by Pennsylvania law, including nonresident's will executing power of appointment created in trust deed executed by him while residing in Pennsylvania, although such act provides that it shall not be construed to apply to disposition of personalty by testator domiciled outside commonwealth at time of

his death.—In re Barton (Pendleton), 35 A.2d 266, 348 Pa. 279.

(2) What law governs exercise of power see *infra* § 44.

**Prior to the statute, the common-law rule was applied.**

R.I.—Church v. Providence, 125 A. 215—Cotting v. De Sartiges, 24 A. 530, 17 R.I. 668, 16 L.R.A. 367.

S.C.—First Carolinas Joint Stock Land Bank v. Deschamps, 172 S.E. 622, 171 S.C. 466.

**Common-law rule stated but not followed**

N.Y.—Speir v. Benvenuti, 189 N.Y. S. 885, 197 App. Div. 209.

80. Md.—Galard v. Winans, 74 A. 626, 111 Md. 434.

81. Pa.—In re Noble's Estate, 23 A. 2d 410, 344 Pa. 81.

**Power to sell all assets**

Provision in will drawn by layman giving full power to executor to sell all assets, real or personal, and proceeds to go to executor after all bequests had been settled, would be construed as a general "residuary clause," and would operate as an exercise of power of appointment.—In re Noble's Estate, *supra*.

82. N.Y.—Chase Nat. Bank of City of New York v. Central Hanover Bank & Trust Co., 39 N.Y.S.2d 541, 265 App. Div. 434—McLean v. McLean, 160 N.Y.S. 949, 174 App. Div. 142, affirmed 119 N.E. 1056, 223 N.Y. 695—In re Gaffney's Trust, 75 N.Y.S.2d 675.

Pa.—In re Finn's Estate, 18 Pa. Dist. 408.

83. N.Y.—Hirsch v. Bucki, 148 N.Y. S. 214, 162 App. Div. 659.

84. Pa.—Thomson v. Fidelity Trust Co., 110 A. 770, 268 Pa. 203.

85. Mass.—Old Colony Trust Co. v. Allen, 29 N.E.2d 310, 307 Mass. 40—Slayton v. Fitch Home, 200 N.E. 357, 293 Mass. 574, 104 A.L.R. 669—Boston Safe Deposit & Trust Co. v. Prindle, 195 N.E. 793, 290 Mass. 577.

86. Mass.—Boston Safe Deposit & Trust Co. v. Prindle, *supra*.

87. Mass.—Boston Safe Deposit & Trust Co. v. Prindle, *supra*.

88. Mass.—Old Colony Trust Co. v. Allen, 29 N.E.2d 310, 307 Mass. 40—Slayton v. Fitch Home, 200 N.E. 357, 293 Mass. 574, 104 A.L.R. 669.

contains pecuniary legacies in excess of his personal estate<sup>89</sup> and there is no residuary clause.<sup>90</sup>

**Rule not restricted to general powers.** The rule that the will of a donee disposing of all of his property or making general devises or bequests is an exercise of his powers, even though they are not mentioned, has been held to apply to special and limited powers as well as to general powers.<sup>91</sup>

**Rule restricted to wills.** The rule that an instrument disposing of all of the donee's property is an exercise of his powers, even though they are not mentioned, applies only to wills and does not apply to deeds.<sup>92</sup>

**Will executed before grant of power.** The rule that a will disposing of all the donee's property or making general devises or bequests is an exercise

of his powers, unless an intention to the contrary appears, applies even where the will is executed before the creation of the power,<sup>93</sup> particularly where the will has been republished by a codicil executed after the creation of the power.<sup>94</sup>

**Power exercised by will as whole or by particular clause.** Under the rule that a will of the donee of a power disposing of all of his property operates as an exercise of his power, unless an intent to the contrary is manifested, the intent of the donee governs as to whether the power is exercised by the will as a whole, by a particular clause thereof, or by the residuary clause of the will.<sup>95</sup> Ordinarily, where the will is silent as to the power, the appointive property is exercised by, and passes under, the residuary clause of the will,<sup>96</sup> but the power may be held to be exercised by and to pass by the entire

89. Pa.—In re Wilson's Estate, 57 Pa.Dist. & Co. 612.

90. Pa.—In re South's Estate, 93 A. 954, 248 Pa. 165.

91. N.Y.—In re Slocum's Estate, 81 N.Y.S.2d 120, 192 Misc. 1026—In re Davis, 59 N.Y.S.2d 607, 186 Misc. 397, disapproving Stewart v. Keating, 36 N.Y.S. 913, 15 Misc. 44—In re Hilliard's Estate, 86 N.Y.S.2d 158.

General and limited or special powers distinguished see supra § 6.

#### In Pennsylvania

(1) A limited power of appointment may be exercised, without direct reference to the creating power, by a clause which names all of the members of the permitted class as beneficiaries.—In re Biddle's Estate, 5 A.2d 158, 159, 333 Pa. 316—In re Lafferty's Estate, 167 A. 44, 311 Pa. 455.

(2) "We can see no sound reason why the rule applicable to general powers, that a gift of the residue is an exercise of the power without reference to it, should not apply to limited powers, where the residue is given to all the members of the designated class among whom the power could be exercised."—In re Biddle's Estate, supra.

(3) There are number of lower court decisions, however, to the effect that the statutory rule is limited to general powers and does not apply to special or limited powers.—In re Rudman's Estate, 22 Pa.Dist. 503—In re Lafferty's Estate, 19 Pa. Dist. 504.

92. Md.—Reeside v. Annex Bldg. Ass'n of Baltimore City, 167 A. 72, 165 Md. 200, 91 A.L.R. 426.

N.C.—Schaeffer v. Haseltine, 46 S.E. 2d 463, 228 N.C. 484.  
49 C.J. p 1292 note 25.

93. Cal.—California Trust Co. v. Ott, 140 P.2d 79, 59 Cal.App.2d 715.  
Ky.—Hankins v. Columbia Trust Co., 134 S.W. 498, 142 Ky. 208.

N.Y.—In re Slocum's Estate, 81 N.Y.S.2d 120, 192 Misc. 1026—In re Davis, 59 N.Y.S.2d 607, 186 Misc. 397—County Trust Co. v. Quencer, 54 N.Y.S.2d 29, 183 Misc. 922—City Bank Farmers Trust Co. v. Miller, 297 N.Y.S. 88, 163 Misc. 459, affirmed 1 N.Y.S.2d 640, 253 App.Div. 707, reversed on other grounds 15 N.E.2d 553, 278 N.Y. 134.  
49 C.J. p 1295 note 46.

Intention that will shall not operate as execution of power see infra subdivision c (2) (b) of this section.

Power exercised by will executed before creation of power generally see supra § 37.

#### Donor and donee of power same person

Cal.—California Trust Co. v. Ott, 140 P.2d 79, 59 Cal.App.2d 715.

N.Y.—County Trust Co. v. Quencer, 54 N.Y.S.2d 29, 183 Misc. 922—City Bank Farmers Trust Co. v. Miller, 297 N.Y.S. 88, 163 Misc. 459, affirmed 1 N.Y.S.2d 640, 253 App.Div. 707, reversed on other grounds 15 N.E.2d 553, 278 N.Y. 134.

94. Md.—Lederer v. Safe Deposit & Trust Co. of Baltimore, 35 A.2d 166, 182 Md. 422.

Wis.—Horlick v. Sidley, 3 N.W.2d 710, 241 Wis. 81.

95. Mass.—Butler v. New England Trust Co., 155 N.E. 788, 259 Mass. 39—Ames v. Ames, 130 N.E. 681, 238 Mass. 270.

Power exercised by whole will or by particular clause generally see supra subdivision a of this section.

All the circumstances are to be considered in determining the ques-

tion.—In re Lynn's Estate, 26 N.Y.S.2d 96, 261 App.Div. 513, affirmed In re Lynn's Will, 39 N.E.2d 266, 287 N.Y. 627.

96. Ky.—Greenway v. Irvine, 31 S.W.2d 606, 235 Ky. 363.

Mass.—Boston Safe Deposit & Trust Co. v. Painter, 77 N.E.2d 409, 322 Mass. 362—Pitman v. Pitman, 50 N.E.2d 69, 314 Mass. 465, 150 A.L.R. 509—Slayton v. Fitch Home, 200 N.E. 357, 293 Mass. 574, 104 A.L.R. 669—Butler v. New England Trust Co., 155 N.E. 788, 259 Mass. 39—Bundy v. U. S. Trust Co. of New York, 153 N.E. 337, 257 Mass. 72.

N.Y.—Lockwood v. Mildeberger, 53 N.E. 803, 159 N.Y. 181—Matter of Wainwright's Estate, 289 N.Y.S. 510, 248 App.Div. 336—McLean v. McLean, 160 N.Y.S. 949, 174 App. Div. 152—In re Mann's Will, 244 N.Y.S. 678, 138 Misc. 42—In re Dodge's Estate, 222 N.Y.S. 247, 129 Misc. 390—In re Flewellin's Will, 202 N.Y.S. 496, 122 Misc. 256—In re Gaffney's Trust, 75 N.Y.S.2d 675—In re Fuller's Will, 72 N.Y.S.2d 498—In re Reese's Estate, 70 N.Y.S.2d 81, modified on other grounds In re Reese's Will, 87 N.Y.S.2d 607, 275 App.Div. 37—Irving Trust Co. v. Hartmann, 8 N.Y.S.2d 387.

N.C.—Walsh v. Friedman, 13 S.E.2d 250, 219 N.C. 151.

Or.—Hollister v. Hollister, 166 P. 940, 85 Or. 316, applying New York law.

Pa.—In re Noble's Estate, 23 A.2d 410, 344 Pa. 81.

#### Possessed or entitled

Appointive property held to pass by residuary clause and not by clause making gift of all money and securities "of or to which I shall at my decease be possessed of or entitled."—Butler v. New England Trust Co., 155 N.E. 788, 259 Mass. 39.

will and not merely by the residuary clause;<sup>97</sup> and it has been held that when a power is deemed exercised through the application of the statute, the testator must be taken as exercising his power to the extent to which the fund subject to it is required to make all of the lawful provisions of the will effective.<sup>98</sup> A statute providing that a devise or bequest purporting to be of all the property belonging to the testator includes property over which he has a power of appointment, unless an intention to the contrary appears, is not limited to wills where a particular devise or bequest purports to be of all the property but also applies to a will which disposes of all the testator's property as the combined result of distinct provisions.<sup>99</sup>

### (b) Intention Not to Exercise Power

The statute does not change the rule that the execution of a power depends on the intention of the donee of the power and, if the will shows an intention not to exercise the power, such intention controls.

The statute does not change the rule that the execution of a power depends on the intention of the donee,<sup>1</sup> and, if the will shows an intention not to exercise the power, such intention controls.<sup>2</sup> It has been held that, where the donee's will disposes of all his property or contains a general devise or bequest, an intention that it shall not operate as an exercise of the donee's power must be disclosed by the will itself<sup>3</sup> expressly, or by necessary implication,<sup>4</sup> by language indicating such intention, or by

#### Individual property sufficient to pay legacies

Where individual property of testatrix was sufficient to fulfill legacies at time will was executed, intent of testatrix who had power of appointment was assumed to be that the power of appointment should be exercised by the residuary clause only.—*Slayton v. Fitch Home*, 200 N. E. 357, 293 Mass. 574, 104 A.L.R. 669.

97. N.Y.—In re Lynn's Estate, 26 N.Y.S.2d 96, 261 App.Div. 513, affirmed in re Lynn's Will, 39 N.E.2d 266, 287 N.Y. 627—In re Williams' Trust, 82 N.Y.S.2d 101—Application of Bankers Trust Co., 48 N.Y.S.2d 849.

Pa.—In re Blackburne's Estate, 138 A. 538, 290 Pa. 55—In re Nolan's Trust Estate, 96 A. 714, 251 Pa. 309.

R.I.—*Moran v. Cornell*, 142 A. 605, 49 R.I. 308.

#### Individual property insufficient to pay legacies

(1) The fact that testator's personal estate was wholly insufficient to pay even his two preferred legacies, not to speak of an additional legacy, warranted inference that testator intended to make available for his preferred and general legacies the property over which he had power of appointment to the extent to which his own property was insufficient to carry out the express Estate, 26 N.Y.S.2d 96, 261 App.Div. 513, affirmed in re Lynn's Will, 39 N.E.2d 266, 287 N.Y. 627.

(2) Will including pecuniary and residuary bequests evidenced intention to dispose of all testator's property, and where estate exclusive of property over which testator had power of appointment under trust was insufficient to pay pecuniary bequests, trust property would be included in estate passing by will, under statute, and pecuniary legatees were entitled to payment from trust property in addition to testator's own property, as against claim of

residuary legatees.—*Merwin v. Safe Deposit & Trust Co. of Baltimore*, 188 A. 803, 171 Md. 346.

98. N.Y.—In re Lynn's Estate, 26 N.Y.S.2d 96, 261 App.Div. 513, affirmed in re Lynn's Will, 39 N.E.2d 266, 287 N.Y. 627.

99. Md.—*Merwin v. Safe Deposit & Trust Co. of Baltimore*, 188 A. 803, 171 Md. 346.

1. N.Y.—*Chase Nat. Bank v. Chicago Title & Trust Co.*, 299 N.Y.S. 926, 164 Misc. 508.

#### Intent as to other matters

Statutory provision that personality embraced in a power to bequeath passes by will purporting to pass testator's entire personality in absence of intent to contrary did not prevent search in will for testator's intention concerning other matters in view of the situation and condition of testator's property.—*Low v. Bankers Trust Co.*, 200 N.E. 674, 270 N.Y. 143, motion denied 192 N.E. 406, 265 N.Y. 264, amendment of remittitur denied 3 N.E.2d 211, 271 N.Y. 615.

2. U.S.—*Barclay v. U. S.*, D.C.Pa., 73 F.Supp. 816, motion refused 74 F.Supp. 738, affirmed, C.C.A., 175 F.2d 48.

Ky.—*U. S. Trust Co. v. Winchester*, 126 S.W.2d 814, 277 Ky. 434.

Md.—*Lederer v. Safe Deposit & Trust Co. of Baltimore*, 35 A.2d 166, 182 Md. 422—*Childs' Estate v. Hoagland*, 30 A.2d 766, 181 Md. 550.

N.Y.—*Chase Nat. Bank of City of New York v. Chicago Title & Trust Co.*, 284 N.Y.S. 472, 246 App.Div. 201, affirmed 3 N.E.2d 205, 271 N.Y. 602, reargument denied 3 N.E.2d 472, 271 N.Y. 659—In re Langdon's Will, 50 N.Y.S.2d 100, 182 Misc. 84—In re Woodward's Estate, 22 N.Y.S.2d 231, 174 Misc. 919—In re Brown's Will, 6 N.Y.S.2d 836, 169 Misc. 43—*Van Wagenem v. Fox*, 22 N.Y.S.2d 803—*Irving Trust Co. v. Hartmann*, 8 N.Y.S. 2d 387.

Pa.—In re Noble's Estate, 23 A.2d 410, 344 Pa. 81.

R.I.—*Commercial Trust Co. of N. J. v. Clinton*, 72 A.2d 836.

Wis.—*Horlick v. Sidley*, 3 N.W.2d 710, 241 Wis. 81.

**Presumption created by statute is rebuttable.**—*Chase Nat. Bank of City of New York v. Chicago Title & Trust Co.*, 284 N.Y.S. 472, 246 App.Div. 201, affirmed 3 N.E.2d 205, 271 N.Y. 602, reargument denied 3 N.E.2d 472, 271 N.Y. 659.

3. Del.—*Wilmington Trust Co. v. Wilmington Trust Co.*, 186 A. 903, 21 Del.Ch. 188, applying New York law.

Ky.—*U. S. v. Winchester*, 126 S.W.2d 814, 277 Ky. 434.

N.Y.—*Speir v. Benvenuti*, 189 N.Y.S. 885, 197 App.Div. 209—In re Fuller's Will, 72 N.Y.S.2d 498.

Pa.—*Provident Trust Co. of Philadelphia v. Scott*, 6 A.2d 814, 335 Pa. 231—*Thomson v. Fidelity Trust Co.*, 110 A. 770, 268 Pa. 203, 49 C.J. p 1292 note 26.

#### General power accompanied by beneficial use of property

One who in any instance denies that a general devise executes a general power of appointment must prove by what appears on the face of the will that it was testator's clearly expressed intention the devise in question should not do so, the rule being particularly applicable where general power was accompanied by beneficial use of property, which was the subject of power, and where the power was created by testator.—*Thomson v. Fidelity Trust Co.*, supra.

4. N.Y.—*Lockwood v. Mildeberger*, 53 N.E. 803, 159 N.Y. 181, reargument denied 54 N.E. 1093, 159 N.Y. 562—*Chase Nat. Bank of City of New York v. Central Hanover Bank & Trust Co.*, 39 N.Y.S.2d 541, 265 App.Div. 434—In re Slocum's Estate, 81 N.Y.S.2d 120, 192 Misc. 1026—In re Davis, 59 N.Y.S.2d 607, 186 Misc. 397.

dispositions inconsistent with the exercise of the power.<sup>5</sup>

The testator's intention is to be ascertained by construing the words used in the will,<sup>6</sup> and it has been held that an intention not to exercise the power may not be inferred from extraneous circumstances,<sup>7</sup> but it has also been held that all of the circumstances surrounding the execution of the will<sup>8</sup> and known by the testator<sup>9</sup> may be considered in ascertaining whether or not there was an intention not to exercise the power. A provision of the will relied on to overcome the presumption of intention to exercise the power is to be construed consistently with the presumption if possible.<sup>10</sup>

The testator's knowledge of the power and of his right to exercise it need not be established in order to show that the testator did not intend to exercise the power;<sup>11</sup> but such knowledge, or the lack of it, is a factor to be considered in determining whether or not the testator intended not to exercise the power.<sup>12</sup>

#### Necessary implication

"Necessary implication" results only where the will permits of no other interpretation, and "necessary" means such as must be; impossible to be otherwise; not to be avoided; inevitable.—*Lockwood v. Mildeberger*, 53 N.E. 803, 159 N.Y. 181, reargument denied 54 N.E. 1093, 159 N.Y. 562—*Chase Nat. Bank of City of New York v. Central Hanover Bank & Trust Co.*, 39 N.Y.S.2d 541, 265 App.Div. 434—*In re Flewellin's Will*, 202 N.Y.S. 496, 122 Misc. 256.

5. Pa.—*Provident Trust Co. of Philadelphia v. Scott*, 6 A.2d 814, 335 Pa. 231.

#### Provisions disposing of own property

Intent of grantee of power of appointment to personal property not to exercise power by will may be implied from provisions by which grantee's own property is disposed of.—*Chase Nat. Bank of City of New York v. Chicago Title & Trust Co.*, 279 N.Y.S. 327, 155 Misc. 61, affirmed 284 N.Y.S. 472, 246 App.Div. 201, affirmed 3 N.E.2d 205, 271 N.Y. 602, reargument denied 3 N.E.2d 472, 271 N.Y. 659.

6. Mass.—*Gorey v. Guarente*, 22 N.E.2d 99, 303 Mass. 569.

7. Pa.—*Provident Trust Co. of Philadelphia v. Scott*, 6 A.2d 814, 335 Pa. 231.

Resort cannot be had to extraneous instruments to determine the question.—*Speir v. Benvenuti*, 189 N.Y.S. 885, 197 App.Div. 209.

Unless the will is ambiguous, evidence outside the will may not be

considered.—*Adams v. D'Rauteville*, 51 A.2d 92, 72 R.I. 325.

8. N.Y.—*Chase Nat. Bank of City of New York v. Chicago Title & Trust Co.*, 284 N.Y.S. 472, 246 App.Div. 201, affirmed 3 N.E.2d 205, 271 N.Y. 602, reargument denied 3 N.E.2d 472, 271 N.Y. 659—*In re Davis*, 59 N.Y.S.2d 607, 186 Misc. 397—*Chase Nat. Bank v. Chicago Title & Trust Co.*, 299 N.Y.S. 926, 164 Misc. 508.

9. Mass.—*Harvard Trust Co. v. Frost*, 154 N.E. 863, 258 Mass. 319.

10. Pa.—*Thomson v. Fidelity Trust Co.*, 110 A. 770, 268 Pa. 203.

11. N.Y.—*Chase Nat. Bank of City of New York v. Chicago Title & Trust Co.*, 279 N.Y.S. 327, 155 Misc. 61, affirmed 284 N.Y.S. 472, 246 App.Div. 201, affirmed 3 N.E.2d 205, 271 N.Y. 602, reargument denied 3 N.E.2d 472, 271 N.Y. 659.

12. N.Y.—*Lockwood v. Meidelberger*, 38 N.Y.S. 1107, 5 App.Div. 459, reversed on other grounds 53 N.E. 803, 159 N.Y. 181—*Chase Nat. Bank of City of New York v. Chicago Title & Trust Co.*, 279 N.Y.S. 327, 155 Misc. 61, affirmed 284 N.Y.S. 472, 246 App.Div. 201, affirmed 3 N.E.2d 205, 271 N.Y. 602, reargument denied 3 N.E.2d 472, 271 N.Y. 659.

13. Ky.—*U. S. Trust Co. v. Winchester*, 126 S.W.2d 814, 277 Ky. 434.

Mass.—*Boston Safe Deposit & Trust Co. v. Prindle*, 195 N.E. 793, 290 Mass. 577—*Worcester Bank & Trust Co. v. Sibley*, 192 N.E. 31, 287 Mass. 594.

An intention not to exercise the power has been held in particular cases to be sufficiently manifested,<sup>13</sup> as where the will contains an express statement that the power is not exercised,<sup>14</sup> where the testator makes dispositions which by their very nature are inapplicable to the subject of the power,<sup>15</sup> or where, the residuary estate is given in part to persons not eligible as appointees under the power.<sup>16</sup> It has been held that the statute does not apply to a will which expressly exercises the power,<sup>17</sup> and that an intention not to exercise the power except to the extent indicated is manifested by an express exercise of the power as to part of the appointive property<sup>18</sup> or by an express exercise of the power on a contingency which has not occurred.<sup>19</sup> The fact that the testator in various clauses of his will carefully distinguished his property from that over which he had a power of appointment has been held to indicate that he did not intend to exercise the power by a general residuary clause which made no reference to the power.<sup>20</sup>

14. Wis.—*In re Solveson's Will*, 34 N.W.2d 150, 253 Wis. 262.

49 C.J. p 1292 note 26 [a] (5).

15. N.Y.—*Chase Nat. Bank of City of New York v. Chicago Title & Trust Co.*, 279 N.Y.S. 327, 155 Misc. 61, affirmed 284 N.Y.S. 472, 246 App.Div. 201, affirmed 3 N.E.2d 205, 271 N.Y. 602, reargument denied 3 N.E.2d 472, 271 N.Y. 659.

49 C.J. p 1292 note 26 [a] (4).

16. N.Y.—*Chase Nat. Bank of City of New York v. Chicago Title & Trust Co.*, 279 N.Y.S. 327, 155 Misc. 61, affirmed 284 N.Y.S. 472, 246 App.Div. 201, affirmed 3 N.E. 205, 271 N.Y. 602, reargument denied 3 N.E.2d 472, 271 N.Y. 659—*Stewart v. Keating*, 36 N.Y.S. 913, 15 Misc. 44.

#### Appointee ineligible as to part of property

Where donee's power was restricted as to part of property and general as to balance, the fact that the person to whom residuary estate was given was not eligible as appointee of restricted part did not sufficiently manifest an intention not to exercise the power insofar as it was general.—*Wilmington Trust Co. v. Wilmington Trust Co.*, 186 A. 903, 21 Del.Ch. 188, applying New York law.

17. R.I.—*Bancroft v. Bancroft*, 27 A.2d 836, 68 R.I. 406.

18. N.Y.—*In re Elliott's Estate*, 76 N.Y.S.2d 755.

19. N.Y.—*In re Wainwright's Estate*, 82 N.Y.S.2d 345.

20. Mass.—*Boston Safe Deposit & Trust Co. v. Prindle*, 195 N.E. 793, 290 Mass. 577.

On the other hand, in various cases an intention not to exercise the power has been held not to be sufficiently manifested;<sup>21</sup> this intention has been held not to be sufficiently manifested by the absence of an express reference to the power in the will;<sup>22</sup> a gift of the residue of the donee's estate to persons ineligible as appointees, where the testator at the time of the execution of the will did not know that he had the power;<sup>23</sup> a gift of the residue to the donee's child, where the existence of the power is conditioned on the donee's death without issue;<sup>24</sup> a gift to the person who has a life estate in trust in the appointive property, where the power to appoint is limited to the remainder interest after such life estate;<sup>25</sup> a gift of the residue in trust to a child for life, where the property subject to the power to appoint consists of the remainder interest after a life estate in that child;<sup>26</sup> the fact that the dispositions made in the will would, where applied to the appointive property, in part violate the rule against perpetuities;<sup>27</sup> an express, but wholly or partially ineffective exercise of the power in a prior clause of the will;<sup>28</sup> or by the express exercise of other powers of appointment owned by the testator.<sup>29</sup>

*Will executed before grant of power.* The circumstances may be such as to evince an intent that a will executed prior to the creation of the power shall not operate as an execution of the power,<sup>30</sup> but the fact that the will does not anticipate the subsequent creation of a power does not show an intention that the will shall not operate as an execution of the power.<sup>31</sup>

#### d. Burden of Proof; Admissibility of Evidence

As a general rule, in the absence of a statute to the contrary, the burden of proving an intention to execute a power is on one claiming under its execution. Evidence as to the circumstances surrounding the execution of an instrument is admissible, at least where the instrument is ambiguous, to show that the donee intended thereby to exercise a power.

The burden of proving an intention to execute a power is on one claiming under its execution;<sup>32</sup> but where, as discussed supra c (2) of this section, a will of a donee of a power disposing of all his property or estate and containing a general devise or bequest operates as an exercise of the donee's power of appointment or disposition unless an intention to the contrary appears, the burden of proving an intention not to exercise the power is on one so claiming.<sup>33</sup>

21. Md.—*Lederer v. Safe Deposit & Trust Co. of Baltimore*, 35 A.2d 166, 182 Md. 422.

22. N.Y.—*Low v. Bankers Trust Co.*, 200 N.E. 674, 270 N.Y. 143—*Lockwood v. Mildeberger*, 53 N.E. 803, 159 N.Y. 181—*County Trust Co. v. Quencer*, 54 N.Y.S.2d 29, 183 Misc. 922—*In re Brown's Will*, 6 N.Y.S.2d 836, 169 Misc. 843—*Fross v. Anson*, 58 N.Y.S.2d 26, affirmed 76 N.Y.S.2d 646, 273 App.Div. 860—*Irving Trust Co. v. Hartmann*, 8 N.Y.S.2d 387.

23. N.Y.—*In re Slocum's Estate*, 81 N.Y.S.2d 120, 192 Misc. 1026—*In re Davis*, 59 N.Y.S.2d 607, 186 Misc. 397.

#### Execution of codicil after knowledge of power

The fact that donee of testamentary power to dispose of principal of trust fund by will made recent codicil to his will was insufficient to support implication of intent that will should not operate on appointive property, where codicil made no dispositive provision except to shorten duration of one of trusts and furnished no basis for implication of intent to let power lapse.—*In re Slocum's Estate*, 81 N.Y.S.2d 120, 192 Misc. 1026.

24. N.Y.—*Lockwood v. Mildeberger*, 53 N.E. 803, 159 N.Y. 181, reargument denied 54 N.E. 1093, 159 N.Y. 562.

25. Cal.—*California Trust Co. v. Ott*, 140 P.2d 79, 59 Cal.App.2d 715.

26. N.Y.—*Speir v. Benvenuti*, 189 N.Y.S. 885, 197 App.Div. 209.

27. N.Y.—*In re Grinnell's Estate*, 49 N.Y.S.2d 781, 183 Misc. 109.

28. Del.—*Wilmington Trust Co. v. Wilmington Trust Co.*, 186 A. 903, 21 Del.Ch. 188, applying New York law.

N.Y.—*Chase Nat. Bank of City of New York v. Central Hanover Bank & Trust Co.*, 39 N.Y.S.2d 541, 265 App.Div. 434—*In re Reese's Estate*, 70 N.Y.S.2d 81, modified on other grounds *In re Reese's Will*, 87 N.Y.S.2d 607, 275 App.Div. 37—*Van Wagenen v. Fox*, 22 N.Y.S.2d 803—*McLean v. McLean*, 158 N.Y.S. 59, affirmed 160 N.Y.S. 949, 174 App.Div. 152, affirmed 119 N.E. 1056, 223 N.Y. 695.

#### Residuary clause limited to property "owned by me"

The fact that the residuary clause under which the appointive property passes in lieu of the defective appointive refers only to property "owned by me" or "my estate" does not prevent the application of the text rule.—*Chase Nat. Bank of City of New York v. Central Hanover Bank & Trust Co.*, 39 N.Y.S.2d 541, 265 App.Div. 434—*Van Wagenen v. Fox*, 22 N.Y.S.2d 803.

29. Mass.—*Boston Safe Deposit & Trust Co. v. Painter*, 77 N.E.2d 409, 322 Mass. 362—*Cumston v.*

*Bartlett*, 21 N.E. 373, 149 Mass. 243.

Pa.—*In re Barton (Pendleton)*, 35 A. 2d 266, 348 Pa. 279—*Provident Trust Co. of Philadelphia v. Scott*, 6 A.2d 814, 335 Pa. 231.

#### Special power

The fact that testator specifically exercised a power to appoint "one of the issue of my said father's grandfather as should be living at my death" did not establish absence of intention to exercise a general power of appointment by residuary clause of will, in view of difference in nature of the two powers.—*Adams v. D'Hauteville*, 51 A.2d 92, 72 R.I. 325.

30. Md.—*Gassinger v. Thillman*, 153 A. 19, 160 Md. 194.

Application of statute to will executed before power generally see supra subdivision c (2) (a) of this section.

31. N.Y.—*County Trust Co. v. Quencer*, 54 N.Y.S.2d 29, 183 Misc. 922.

32. U.S.—*Virginia, etc., Coal Co. v. Charles, Va.*, 254 F. 379, 165 C.C.A. 599, error dismissed 40 S.Ct. 345, 252 U.S. 569, 64 L.Ed. 720.

Ill.—*Emery v. Emery*, 156 N.E. 864, 325 Ill. 212.

33. Pa.—*Thomson v. Fidelity Trust Co.*, 110 A. 770, 268 Pa. 203.

R.I.—*Adams v. D'Hauteville*, 51 A.2d 92, 72 R.I. 325.

In determining the existence of an intention to exercise a power of appointment, the admission and consideration of evidence of surrounding facts and circumstances are governed by the general rules applicable to the admissibility of such evidence in the construction of wills and other written instruments.<sup>34</sup> Accordingly, in determining whether or not the donee intended to exercise a power by his will, all the circumstances surrounding the execution of the will should be considered,<sup>35</sup> particularly where the will is ambiguous,<sup>36</sup> although such evidence has been held inadmissible where the will is not ambiguous.<sup>37</sup> Since such evidence is admitted merely to aid in ascertaining the donee's intent,<sup>38</sup> it ordinarily must relate to the facts existing at the time of the execution of the will.<sup>39</sup> Thus, evidence of the testator's circumstances at the time of his death ordinarily is not admissible to determine whether or not he intended by his will to execute his power,<sup>40</sup> except, possibly, evidence that he owned no real estate at the time of his death, where he has made a general devise.<sup>41</sup> However, it has also been held that evidence of the condition of the testator's estate and the appointive property is admissible.<sup>42</sup> Evidence has been held admissible as to the nature and amount of the donee's property,<sup>43</sup> the relative intimacy involved in his relations with

the beneficiaries of his will and the takers in default of appointment,<sup>44</sup> and to show that he had knowledge of the power of appointment at the time he made his will.<sup>45</sup> While parol evidence is not admissible to show what the testator intended to write,<sup>46</sup> such evidence may be admitted to explain or make certain what the testator has written.<sup>47</sup> Evidence as to statements or declarations of intention made by the testator ordinarily are inadmissible,<sup>48</sup> but evidence as to acts and declarations of the testator may be admissible when offered, not as direct evidence of his intention, but to show facts relevant to his knowledge and the state of his feelings.<sup>49</sup>

### § 41. Conditions Attached to Execution

The occurrence of any contingency or compliance with any conditions required by the terms of the creation of a power to precede or accompany its exercise is requisite to a valid execution of the power.

The occurrence of any contingency or compliance with any condition required by the terms of the creation of a power to precede or accompany its exercise is requisite to a valid execution of the power.<sup>50</sup> It has been held that, where the condition is such that its determination depends on the exercise of judgment and discretion, the decision

34. Ark.—Moore v. Avery, 225 S.W. 599, 146 Ark. 193.

Del.—Equitable Trust Co. v. Causey, 9 A.2d 714, 24 Del.Ch. 259.

In determining whether deed was exercise of power of sale, evidence of the circumstances of the transaction, including the understanding of the parties, is competent to show an intent to exercise the power.—Moore v. Barnard, 226 P. 134, 75 Colo. 395.

35. Cal.—Morfiew v. San Francisco & S. R. Co., 40 P. 810, 107 Cal. 587—Childs v. Gross, 107 P.2d 424, 41 Cal.App.2d 680.

N.J.—Hood v. Francis, 44 A.2d 182, 137 N.J.Eq. 200—Camden Safe Deposit & Trust Co. v. Fittler, 197 A. 249, 123 N.J.Eq. 245, affirmed Camden Safe Deposit & Trust Co. v. Frishmuth, 4 A.2d 379, 125 N.J.Eq. 169.

#### Facts known to testator

All circumstances existing and known to the testator, and the fact of his knowledge of them, may be shown.—Boston Safe Deposit & Trust Co. v. Prindle, 195 N.E. 793, 290 Mass. 577.

36. Ark.—Moore v. Avery, 225 S.W. 599, 146 Ark. 193.

Del.—Equitable Trust Co. v. Causey, 9 A.2d 714, 24 Del.Ch. 259.

37. Ark.—Moore v. Avery, 225 S.W. 599, 146 Ark. 193.

Ga.—Butler v. Pruden, 185 S.E. 102, 182 Ga. 189.

Iowa.—In re Proestler's Will, 5 N.W.2d 922, 232 Iowa 640.

38. Del.—Equitable Trust Co. v. Causey, 9 A.2d 714, 24 Del.Ch. 259.

39. Ark.—Moore v. Avery, 225 S.W. 599, 146 Ark. 193.

Del.—Equitable Trust Co. v. Causey, 9 A.2d 714, 24 Del.Ch. 259.

40. Del.—Equitable Trust Co. v. Causey, supra.

41. Del.—Equitable Trust Co. v. Causey, supra.

Instrument inoperative except as exercise of power see supra subdivision b (4) of this section.

42. N.J.—Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Morrell, 154 A. 416, 108 N.J.Eq. 188.

43. Iowa.—In re Stork's Estate, 9 N.W.2d 273, 232 Iowa 413.

Mass.—Boston Safe Deposit & Trust Co. v. Prindle, 195 N.E. 793, 290 Mass. 577.

49 C.J. p 1289 note 5.

44. Mass.—Boston Safe Deposit & Trust Co. v. Prindle, supra.

45. Mass.—Boston Safe Deposit & Trust Co. v. Prindle, supra.

46. Ill.—Northern Trust Co. v. Cudahy, 91 N.E.2d 607, 339 Ill.App. 603.

47. Ill.—Northern Trust Co. v. Cudahy, supra.

48. Del.—Equitable Trust Co. v. Causey, 9 A.2d 714, 24 Del.Ch. 259.

Mass.—Boston Safe Deposit & Trust Co. v. Prindle, 195 N.E. 793, 290 Mass. 577—Harvard Trust Co. v. Frost, 154 N.E. 863, 258 Mass. 319.

Ohio.—Kiplinger v. Armstrong, 171 N.E. 245, 34 Ohio App. 348.

Even where admitted without objection, such evidence may not be considered.—Equitable Trust Co. v. Causey, 9 A.2d 714, 24 Del.Ch. 259.

#### Conversations between testator and person who drew will

The expression "my estate" is not regarded as in itself creating a latent ambiguity so as to render competent conversations between the testator and the person who prepared his will as to his intention to exercise his power of appointment.—Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Morrell, 154 A. 416, 108 N.J.Eq. 416.

49. Mass.—Boston Safe Deposit & Trust Co. v. Prindle, 195 N.E. 793, 290 Mass. 577.

50. N.Y.—Harris v. Strodl, 30 N.E. 962, 132 N.Y. 392.

49 C.J. p 1296 note 50.

Power granted on contingency see supra § 23 et seq.

Time of execution of power dependent on contingency see supra § 37.

of the donee, made in good faith, is conclusive.<sup>51</sup> If the contingency happens, the power may be exercised according to its terms;<sup>52</sup> and, if the contingency has not happened and is no longer liable to happen, the power ceases to have existence, and may not be executed.<sup>53</sup> Where a power to dispose of property is granted provided a certain proportion is given to a designated person, the proviso has been construed as a limitation of the power and not as a condition precedent to its exercise.<sup>54</sup>

**Evidence of compliance.** One taking under a power the execution of which is dependent on a contingency has the burden of showing that the contingency has happened or the condition has been performed,<sup>55</sup> and a declaration or recital in the instrument executing the power is not sufficient;<sup>56</sup> but it has been held, under a power of sale on condition that the conveyance be bona fide and for a valuable and adequate consideration, that a deed reciting a valuable consideration imports that the conditions have been met.<sup>57</sup> Evidence of a compliance with the conditions is admissible,<sup>58</sup> unless such proof is excluded by the nature of the conditions imposed or by the terms of the power.<sup>59</sup>

**Consent of third person.** Whether or not the consent of a third person is required to the execution of a power depends on the intention of the donor, as determined from the whole instrument creating the power.<sup>60</sup> Where the execution of a power is conditioned on the consent or approval of a third

person, the power cannot be validly exercised without such consent or approval,<sup>61</sup> which must be given in the mode, if any, prescribed by the instrument creating the power<sup>62</sup> or by statute.<sup>63</sup> The spouse of one whose consent is required need not join in the consent in order to render the execution of the power effectual.<sup>64</sup>

Although an instrument executing a power does not show that a required consent to such execution was given, it may be presumed after the lapse of a considerable time, where the instrument creating the power did not require it to be given in any particular manner and there is no evidence that it was not given.<sup>65</sup>

**Death of person whose consent is required.** The death of the person, or of one of several persons, whose consent is required to the execution of a power, before giving his consent, will prevent its execution,<sup>66</sup> unless an intent to the contrary appears in the instrument creating the power,<sup>67</sup> or it is otherwise provided by statute.<sup>68</sup>

## § 42. Supervision of Court

In the absence of fraud, collusion, or abuse of discretion, the court will not interfere with the execution of a discretionary power by the donee.

The donee of a power ordinarily may execute it as conferred and in the manner designated in the instrument creating the power without the inter-

51. Ky.—Roby v. Arterburn, 108 S. W.2d 873, 269 Ky. 816.

49 C.J. p 1296 note 51.

### Good faith determined as of date of execution of power

Where life tenant exercised power to dispose of realty for his own comfort by executing deed creating joint tenancy, question of good faith on part of life tenant in thus disposing of remainder was to be determined as of date of exercise of power of disposition rather than date many years later when he severed joint tenancy by quitclaim deed to his niece.—Pyne v. O'Donnell, R.L., 75 A.2d 21.

52. Ky.—White v. Gott, 284 S.W. 78, 214 Ky. 810.

53. N.J.—Moore v. Moore, 41 N.J. Law 440.

49 C.J. p 1296 note 54.

54. Mass.—Old Colony Trust Co. v. Richardson, 7 N.E.2d 432, 297 Mass. 147, 121 A.L.R. 1218.

55. Mass.—Stevens v. Winship, 1 Pick. 318, 11 Am.D. 178.

49 C.J. p 1296 note 55.

56. Me.—Haines v. Brown, 96 A. 228, 114 Me. 320.

57. Ky.—Roby v. Arterburn, 108 S. W.2d 873, 269 Ky. 816.

58. N.Y.—Mowry v. Sanborn, 68 N. Y. 153.

59. N.Y.—Mowry v. Sanborn, supra.

60. Ky.—Williams v. Williams, 1 Duv. 221.

49 C.J. p 1297 note 64.

Delegation of authority to consent to execution of power see supra § 36.

Joinder of donee's spouse in instrument of execution see supra § 39.

61. Ala.—Seeberg v. Norville, 85 So. 505, 204 Ala. 20.

49 C.J. p 1296 note 60.

62. U.S.—Waldron v. Chastaney, C. C.N.Y., 28 F.Cas.No.17,058, 2 Blatchf. 62.

49 C.J. p 1297 note 61.

63. Ala.—Seeberg v. Norville, 85 So. 505, 204 Ala. 20.

49 C.J. p 1297 note 62.

64. Ky.—Combs v. McDowell, 200 S. W. 632, 179 Ky. 425.

65. S.C.—Bredenburg v. Bardin, 15 S.E. 372, 36 S.C. 197.

49 C.J. p 1297 note 66.

66. Ky.—Whisman v. McMullan's Ex'r, 227 S.W.2d 926, 312 Ky. 402.

49 C.J. p 1297 note 67.

Survivorship of joint or several authority in general see supra § 35.

Common-law rule stated but not applied

Cal.—Talcott v. Talcott, 129 P.2d 946, 54 Cal.App.2d 743.

67. Ky.—Whisman v. McMullan's Ex'r, 227 S.W.2d 926, 312 Ky. 402.

49 C.J. p 1297 note 68.

68. Cal.—Talcott v. Talcott, 129 P. 2d 946, 54 Cal.App.2d 743.

49 C.J. p 1297 note 69.

### General statute as to exercise of power by survivor

The codal provision that where a power is vested in several persons and any one or more of them is dead the power may be executed by the survivor or survivors unless otherwise prescribed by the terms of the power, applies where a power may be exercised only with the consent of third persons, so that where one or more of the third persons is dead, the survivor or survivors of them may consent to the exercise of the power.—Talcott v. Talcott, supra.



position of a court of equity,<sup>69</sup> and, in the absence of evidence of fraud, collusion, or abuse of discretion, the court will not interfere with the execution of a discretionary power by the donee.<sup>70</sup>

### § 43. Validity and Sufficiency of Execution

#### a. In general

#### b. Death of appointee before appointing instrument becomes operative

#### a. In General

The exercise of a power, in order to be valid, must be within the scope of the authority conferred.

The exercise of a power, in order to be valid, must be within the scope of the authority conferred.<sup>71</sup> A conveyance under a power is good to

the extent that it is embraced by the power.<sup>72</sup> In determining the validity of an exercise of a power of appointment, the instrument exercising the power is to be read into and as part of the instrument creating the power,<sup>73</sup> and, as discussed in Perpetuities §§ 24, 46, the validity of an appointment with respect to the rule against perpetuities is to be determined as of the effective date of the instrument creating the power, but it has been held that for other purposes, the validity of an appointment by will is to be determined as of the date the will becomes operative rather than as of the date of its execution.<sup>74</sup>

*Partial and successive executions.* A power may be exercised from time to time by partial and suc-

69. Ky.—Gullett v. Bailey, 35 S.W.

2d 17, 237 Ky. 151.

49 C.J. p 1297 note 72.

Judicial supervision of execution of power:

By executor see Executors and Administrators § 277.

By trustee see the C.J.S. title Trusts § 261, also 65 C.J. p 676 note 64 et seq.

70. Ala.—Rice v. Park, 135 So. 472, 223 Ala. 317.

Tex.—Corpus Juris cited in Nations v. Ulmer, Civ.App., 122 S.W.2d 700, 103—City of San Antonio v. Zoghbi, Civ.App., 70 S.W.2d 333, reversed on other grounds 101 S.W.2d 539, 129 Tex. 141—Corpus Juris cited in Davis v. Davis, Civ.App., 44 S.W.2d 447, 450.

Va.—Daniel v. Brown, 159 S.E. 209, 156 Va. 563, 75 A.L.R. 1377.

49 C.J. p 1297 note 73.

71. Ky.—Dant v. Fidelity & Columbia Trust Co., 193 S.W.2d 399, 302 Ky. 54—Chenault's Guardian v. Metropolitan Life Ins. Co., 53 S.W.2d 720, 245 Ky. 482.

Mass.—Gorey v. Guarente, 22 N.E.2d 99, 303 Mass. 569—Old Colony Trust Co. v. Richardson, 7 N.E.2d 432, 297 Mass. 147, 121 A.L.R. 1218.

Mo.—Citizens' Bank of Lancaster v. Foglesong, 31 S.W.2d 778, 326 Mo. 581.

N.Y.—In re Slocum's Estate, 81 N.Y.S.2d 120, 192 Misc. 1026—In re Van Hoesen's Will, 67 N.Y.S.2d 503.

Pa.—In re Wilson's Estate, 57 Pa. Dist. & Co. 612.

#### Intention of donor

In determining whether a power was validly exercised, the intention of donor governs and such intention is not to be thwarted by refinements and distinctions resting on subtlety and ingenuity, lack of technical accuracy in the use of words, unduly stressing the literal meaning of a few words, or by attaching to them a hard and fast meaning not in ac-

cordance with the setting in which they were employed.—National State Bank of Newark v. Morrison, 75 A.2d 916, 9 N.J.Super. 552.

#### Power held validly exercised

Mass.—North Adams Nat. Bank v. Curtiss, 187 N.E. 546, 284 Mass. 330—Old Colony Trust Co. v. Sargent, 126 N.E. 526, 235 Mass. 298.

N.Y.—In re Neill's Estate, 89 N.Y.S.2d 394, 194 Misc. 690—In re Adler's Estate, 83 N.Y.S.2d 153, 193 Misc. 19—In re Slocum's Estate, 81 N.Y.S.2d 120, 192 Misc. 1026—In re Reese's Estate, 70 N.Y.S.2d 81, modified on other grounds In re Reese's Will, 87 N.Y.S.2d 607, 275 App.Div. 37—In re Culver's Estate, 57 N.Y.S.2d 598, affirmed In re Culver's Will, 52 N.Y.S.2d 577, 268 App.Div. 972, reversed on other grounds 62 N.E.2d 213, 294 N.Y. 321.

N.C.—Schaeffer v. Haseltine, 46 S.E.2d 463, 228 N.C. 484.

Pa.—In re Lippincott's Estate, 52 Pa. Dist. & Co. 273.

#### Terms and conditions of payment

Where testator left residuary estate to six children "or their heirs per stirpes" and wife was made donee of power of appointment with right to prescribe "terms and conditions" on which any appointed share was to be paid, donee in attempting to dispose of remainders of shares of certain children to their issue exceeded the power, since under the will, an interest in succession was not given to the issue of any child.—In re Fiske's Estate, 88 N.Y.S.2d 446, 195 Misc. 1017.

#### Precatory provision

In will of donee of power, provisions that "It is my wish" that plates be affixed over door of hospital wards endowed in exercise of the power, reciting that wards were endowed by daughter in memory of her father and mother, and of her husband, respectively, were merely "precatory" and not obligatory, and

did not affect the property rights granted and did not render exercise of the power invalid.—In re Jackson's Estate, 25 N.Y.S.2d 102, 175 Misc. 882, affirmed In re Jackson's Will, 30 N.Y.S.2d 840, 262 App.Div. 997, appeal denied 31 N.Y.S.2d 664, 263 App.Div. 707.

#### Good faith

In determining whether property over which testatrix enjoyed a power of appointment had been validly disposed of, it would be presumed that testatrix drew her will in good faith and expected that legacies bequeathed would be met in realization, not frustration.—In re Williams' Trust, 82 N.Y.S.2d 101—In re Lathers' Will, 64 N.Y.S.2d 757.

72. Ala.—Rice v. Park, 135 So. 472, 223 Ala. 317.

73. N.Y.—In re Berwind's Estate, 42 N.Y.S.2d 58, 181 Misc. 559—In re Walbridge's Estate, 33 N.Y.S.2d 47, 178 Misc. 32—In re Trotter's Estate, 23 N.Y.S.2d 1007, 175 Misc. 356—In re Kelly's Will, 20 N.Y.S.2d 6, 174 Misc. 80—City Bank Farmers Trust Co. v. Miller, 297 N.Y.S. 88, 163 Misc. 459, affirmed 1 N.Y.S.2d 640, 253 App.Div. 707, reversed on other grounds 15 N.E.2d 553, 278 N.Y. 134—In re Kelly's Will, 291 N.Y.S. 860, 161 Misc. 255—In re Palmer's Estate, 277 N.Y.S. 816, 154 Misc. 705—In re Mann's Will, 244 N.Y.S. 673, 138 Misc. 42—In re Crosby's Estate, 242 N.Y.S. 207, 136 Misc. 688—In re Van Isenburg's Estate, 85 N.Y.S.2d 557—In re Hellinger's Estate, 83 N.Y.S.2d 10—In re Williams' Trust, 82 N.Y.S.2d 101—In re Fuller's Will, 72 N.Y.S.2d 498—In re Van Hoesen's Will, 67 N.Y.S.2d 503—In re Lathers' Will, 64 N.Y.S.2d 757—Pross v. Anson, 58 N.Y.S.2d 26, affirmed 76 N.Y.S.2d 646, 278 App.Div. 860.

74. N.Y.—In re Davis, 59 N.Y.S.2d 607, 186 Misc. 397.

cessive executions to suit convenience and promote advantage, as exigencies arise, or as expediency may suggest,<sup>75</sup> and a partial exercise of a power is not invalid because it does not exhaust the power.<sup>76</sup> So, a power over a fee may be executed at one time to pass a life estate or other partial interest and at another to pass the remainder,<sup>77</sup> or to pass at one time a part of the property in fee and afterward the balance.<sup>78</sup>

A power once fully exercised is exhausted and may not thereafter be again exercised.<sup>79</sup> Thus, a power to appoint fully and irrevocably executed by deed may not be exercised by a will which, although previously executed, does not become operative until after the deed.<sup>80</sup> However, an attempted exercise of a power, which is invalid because of fraud or excess, does not prevent a valid reexecution of the power in conformity with its terms.<sup>81</sup>

**Confirmation by legislative act.** An invalid execution of a power may be confirmed by a general<sup>82</sup> or special<sup>83</sup> legislative act.

**Burden of proof.** The burden of proving a valid exercise of a power rests on the person claiming the execution.<sup>84</sup>

#### b. Death of Appointee before Appointing Instrument Becomes Operative

Where the appointee dies before the appointing in-

strument takes effect, the appointment lapses, but statutes designed to prevent the failure of testamentary gifts by lapse are generally held to apply to and to save appointments by will where the appointee predeceases the donee.

Unless otherwise provided by statute, where one to whom an interest or estate is appointed by the donee of a power dies before the appointing instrument takes effect, the appointment lapses,<sup>85</sup> except where the appointment is made, not out of mere bounty, but in satisfaction of an obligation, whether or not legally enforceable, existing at the time the appointment takes effect, in which case the gift inures to the estate of the appointee.<sup>86</sup> Statutes designed to prevent the failure of testamentary gifts where the person to whom the gift is made dies before the testator, as discussed in the C.J.S. title Wills § 1217 et seq, also 69 C.J. p 1060 note 51 et seq, are generally held to apply to and to save appointments by will where the appointee predeceases the donee.<sup>87</sup> Such statutes have been held not to apply to appointments under a limited power,<sup>88</sup> and, in any event, they do not enlarge a limited power of appointment, so that where the persons substituted by the statute for the deceased appointee is not within the authorized group of appointees, the appointment is ineffective.<sup>89</sup> The person who takes the appointive property under such a statute takes as a substitute appointee and not as heir of the deceased appointee.<sup>90</sup>

75. U.S.—*Corpus Juris* quoted in *Omaha Nat. Bank v. O'Malley*, D. C.Neb., 69 F.Supp. 354, 364.

49 C.J. p 1302 note 21.

Power to appoint limited estates see *supra* § 24.

76. U.S.—*Corpus Juris* quoted in *Omaha Nat. Bank v. O'Malley*, D. C.Neb., 69 F.Supp. 354, 364.

N.Y.—*In re O'Connor*, 82 N.Y.S.2d 310.

49 C.J. p 1302 note 22.

77. U.S.—*Corpus Juris* quoted in *Omaha Nat. Bank v. O'Malley*, D. C.Neb., 69 F.Supp. 354, 364.

49 C.J. p 1302 note 23.

78. U.S.—*Corpus Juris* quoted in *Omaha Nat. Bank v. O'Malley*, D. C.Neb., 69 F.Supp. 354, 364.

79. U.S.—*Omaha Nat. Bank v. O'Malley*, D.C.Neb., 69 F.Supp. 354.

Del.—*Wilmington Trust Co. v. Wilmington Trust Co.*, 180 A. 597, 21 Del.Ch. 102, modified on other grounds 186 A. 903, 21 Del.Ch. 188.

Okl.—*Central Trust Co. v. Watt*, 38 N.E.2d 185, 139 Okl. 50.

Termination of power on exhaustion see *supra* § 16.

80. Del.—*Wilmington Trust Co. v. Wilmington Trust Co.*, 180 A. 597, 21 Del.Ch. 102, modified on other grounds 186 A. 903, 21 Del.Ch. 188.

81. Mass.—*Coffin v. Atty. Gen.*, 121 N.E. 397, 231 Mass. 579.

N.Y.—*Farrar v. McCue*, 89 N.Y. 139.

49 C.J. p 1301 note 18.

82. Ind.—*Price v. Huey*, 22 Ind. 18.

83. N.J.—*Thomson v. Norris*, 20 N. J.Eq. 489.

84. Mass.—*Lord v. Smith*, 200 N.E. 547, 293 Mass. 555.

85. U.S.—*Corpus Juris* cited in *MacBryde v. Burnett*, D.C.Md., 45 F.Supp. 451, 454, reversed on other grounds, C.C.A., *Parker v. MacBryde*, 132 F.2d 932, certiorari denied 63 S.Ct. 859, 318 U.S. 779, 87 L.Ed. 1147, and *MacBryde v. Davidge*, 63 S.Ct. 859, 318 U.S. 779, 87 L.Ed. 1147.

Mass.—*Old Colony Trust Co. v. Allen*, 29 N.E.2d 310, 307 Mass. 40.

N.J.—*Corpus Juris* quoted in *Brown v. Fidelity Union Trust Co.*, 9 A. 2d 311, 324, 126 N.J.Eq. 406.

Pa.—*In re Warner's Estate*, 153 A. 688, 302 Pa. 386—*In re Evans' Estate*, 10 Pa. Dist. 261.

49 C.J. p 1302 note 34.

Devolution of property where appointment is ineffective see *infra* § 55.

86. N.J.—*Corpus Juris* quoted in *Brown v. Fidelity Union Trust Co.*, 9 A. 2d 311, 324, 126 N.J.Eq. 406.

49 C.J. p 1303 note 35.

87. Ga.—*Newton v. Bullard*, 182 S. E. 614, 181 Ga. 448.

Mass.—*Old Colony Trust Co. v. Allen*, 29 N.E.2d 310, 307 Mass. 40—*Thompson v. Pew*, 102 N.E. 122, 214 Mass. 520.

Va.—*Daniel v. Brown*, 159 S.E. 209, 156 Va. 563, 75 A.L.R. 1377.

49 C.J. p 1302 note 33 [a].

**Relationship of appointee to testator**

The statute against lapsed gifts did not prevent the lapsing of appointment to testatrix' first cousin of a portion of the property over which testatrix was given power of appointment under testatrix' sister's will, since the statute does not apply to cousins.—*Brown v. Fidelity Union Trust Co.*, 9 A. 2d 311, 126 N. J.Eq. 406.

88. U.S.—*MacBryde v. Burnett*, D. C.Md., 45 F.Supp. 451, reversed on other grounds, C.C.A., *Parker v. MacBryde*, 132 F.2d 932, certiorari denied 63 S.Ct. 859, 318 U.S. 779, 87 L.Ed. 1147, and *MacBryde v. Davidge*, 63 S.Ct. 859, 318 U.S. 779, 87 L.Ed. 1147.

89. Va.—*Daniel v. Brown*, 159 S.E. 209, 156 Va. 563, 75 A.L.R. 1377.

200. Ga.—*Newton v. Bullard*, 182 S. E. 614, 181 Ga. 448.

90. Ga.—*Newton v. Bullard*, 182 S. E. 614, 181 Ga. 448.

Where the subject matter of a power fails before the appointment takes effect, the appointment lapses.<sup>91</sup>

#### § 44. — What Law Governs

It is generally held that questions as to the validity, sufficiency, construction, and operation of the execution of a power are governed by the law of the donor's domicile, and, in the case of a power as to real property, by the law of the place where the property is situated.

Although there is some authority holding that the

execution of a power is governed by the law of the domicile of the donee of the power,<sup>92</sup> it is generally held that an instrument executing a power is governed by the law of the jurisdiction which controls the effect of the instrument creating the power,<sup>93</sup> and that questions as to the validity, sufficiency, construction, and operation of the execution of a power are to be determined by the law of the domicile of the donor of the power,<sup>94</sup> unless the power was created in contemplation of the law of

91. N.J.—*Corpus Juris* quoted in *Brown v. Fidelity Union Trust Co.*, 9 A.2d 311, 324, 126 N.J.Eq. 406.

49 C.J. p 1303 note 36.

92. S.C.—*Adger v. Kirk*, 108 S.E. 97, 116 S.C. 298.

"If a power is a purely beneficial power or assets of the donee of the power, the *lex loci domicilii* of the donee of the power may govern the construction of testamentary execution and distribution under the will."—In re *New York Life Ins., etc., Co.*, 139 N.Y.S. 695, 704, affirmed 142 N.Y.S. 1132, 157 App.Div. 916, affirmed 103 N.E. 315, 209 N.Y. 585.

93. N.Y.—*Central Hanover Bank & Trust Co. v. Brown*, 73 N.Y.S.2d 282.

94. U.S.—*Graves v. Schmidlapp*, N.Y., 62 S.Ct. 870, 315 U.S. 657, 86 L.Ed. 1097, 141 A.L.R. 948—*Corpus Juris* cited in *Legg's Estate v. Commissioner of Internal Revenue*, C.C.A., 114 F.2d 760, 763.

Del.—*Wilmington Trust Co. v. Wilmington Trust Co.*, 186 A. 903, 21 Del.Ch. 188.

Iowa.—*Bussing v. Hough*, 21 N.W.2d 587, 237 Iowa 194.

Ky.—*Corpus Juris* quoted in *Liggett v. Fidelity & Columbia Trust Co.*, 118 S.W.2d 720, 722, 274 Ky. 387.

Mass.—*New England Trust Co. v. Wood*, 93 N.E.2d 547—*Boston Safe Deposit & Trust Co. v. Painter*, 77 N.E.2d 409, 322 Mass. 362—*Pitman v. Pitman*, 50 N.E.2d 69, 314 Mass. 465, 150 A.L.R. 509—*Boston Safe Deposit & Trust Co. v. Prindle*, 195 N.E. 793, 290 Mass. 577.

N.J.—*Fidelity Union Trust Co. v. Caldwell*, 44 A.2d 842, 137 N.J.Eq. 362—*David v. Atlantic County Soc. for Prevention of Cruelty to Animals*, 19 A.2d 896, 129 N.J.Eq. 501—In re *Winter's Estate*, 47 A.2d 548, 24 N.J.Misc. 172.

N.Y.—In re *Warren's Will*, 81 N.Y.S.2d 400, 192 Misc. 881—In re *Berwind's Estate*, 42 N.Y.S.2d 58, 181 Misc. 559—In re *Walbridge's Estate*, 33 N.Y.S.2d 47, 178 Misc. 32—In re *Kelly's Will*, 20 N.Y.S.2d 6, 174 Misc. 80—In re *Kelly's Will*, 291 N.Y.S. 860, 161 Misc. 255—*Chase Nat. Bank of City of New*

*York v. Chicago Title & Trust Co.*, 279 N.Y.S. 327, 155 Misc. 61, affirmed 284 N.Y.S. 472, 246 App.Div. 201, affirmed 3 N.E. 205, 271 N.Y. 602, reargument denied 3 N.E.2d 472, 271 N.Y. 659—In re *Burling's Estate*, 266 N.Y.S. 482, 148 Misc. 835—In re *Barnhart's Will*, 244 N.Y.S. 130, 137 Misc. 518—In re *Fuller's Will*, 72 N.Y.S.2d 498—In re *Smith's Will*, 57 N.Y.S.2d 189—In re *Bearns' Estate*, 23 N.Y.S.2d 1006, affirmed In re *Bearns' Will*, 17 N.Y.S.2d 996, 258 App.Div. 954, affirmed 30 N.E.2d 604, 284 N.Y. 658—*Van Wagenen v. Fox*, 22 N.Y.S.2d 803.

Pa.—In re *Barton* (Pendleton), 35 A.2d 266, 348 Pa. 279—In re *Shaffer's Estate*, 67 Pa.Dist. & Co. 495. R.I.—*Commercial Trust Co. of N. J. v. Clinton*, 72 A.2d 836—*Adams v. D'Hauteville*, 51 A.2d 92, 72 R.I. 325—*Bancroft v. Bancroft*, 27 A.2d 836, 68 R.I. 406.

49 C.J. p 1298 note 76—12 C.J. p 477 note 80.

#### Form and substance

Ordinarily, in case of personalty, questions as to both form and substance relating to validity and effect of an instrument exercising a power of appointment created by will are determined by the law of the domicile of the donor of the power.—*Amerige v. Attorney General*, 88 N.E.2d 126, 324 Mass. 648.

#### Intention to exercise power

(1) Whether will disposing of all donee's property is an exercise of his power is governed by the law of the donor's domicile.

U.S.—*Old Colony Trust Co. of Boston v. Commissioner of Internal Revenue*, C.C.A., 73 F.2d 970.

Iowa.—*Bussing v. Hough*, 21 N.W.2d 587, 237 Iowa 194.

N.Y.—*Chase Nat. Bank of City of New York v. Chicago Title & Trust Co.*, 279 N.Y.S. 327, 155 Misc. 61, affirmed 284 N.Y.S. 472, 246 App.Div. 201, affirmed 3 N.E.2d 205, 271 N.Y. 602, reargument denied 3 N.E.2d 472, 271 N.Y. 659—In re *Burling's Estate*, 266 N.Y.S. 482, 148 Misc. 835—In re *Marsland's Estate*, 254 N.Y.S. 293, 142 Misc. 230—In re *Campbell's Estate*, 248 N.Y.S. 344, 138 Misc. 800.

Pa.—In re *Barton*, 35 A.2d 266, 348 Pa. 279.

(2) Will disposing of all donee's property as exercise of power see supra § 40 c.

#### Validity of will

(1) Power of appointment by will was not effectively executed by will not validly executed according to law of state of donor's domicile, even though will was valid and probated in state of donee's domicile.—*Fidelity Union Trust Co. v. Caldwell*, 44 A.2d 842, 137 N.J.Eq. 362.

(2) Will of donee, invalid as such under laws of his domicile, is nevertheless valid as exercising power of appointment where will would be valid under laws of donor's domicile.—In re *Sloan's Estate*, 46 P.2d 1007, 7 Cal.App.2d 319.

#### Probate

Will exercising power need not be probated in donor's state.—In re *Smith's Will*, 57 N.Y.S.2d 189.

#### Jurisdiction and control by courts

Until property vests absolutely in beneficiary, it remains subject to jurisdiction and control of court of the donor's domicile.—In re *Walbridge's Estate*, 33 N.Y.S.2d 47, 178 Misc. 32.

#### Trust created by exercise of power

(1) Trust created by exercise of power of appointment must be administered in jurisdiction of donor's domicile.—In re *Walbridge's Estate*, 33 N.Y.S.2d 47, 178 Misc. 32—In re *Burnham's Estate*, 82 N.Y.S.2d 844—*Matter of Walker*, 53 N.Y.S.2d 102—In re *Phelps' Estate*, 45 N.Y.S.2d 621.

(2) The trustees of such trust must qualify in that jurisdiction.—In re *Warren's Will*, 81 N.Y.S.2d 400, 192 Misc. 881—In re *Walbridge's Estate*, 33 N.Y.S.2d 47, 178 Misc. 32—In re *Burnham's Estate*, 82 N.Y.S.2d 844—*Matter of Walker*, 53 N.Y.S.2d 102—In re *Phelps' Estate*, 45 N.Y.S.2d 621.

(3) The foregoing rules have been held to apply, even though some of the property appointed in trust is realty located in the donee's state, since it is held that the realty is to be deemed personally as far as the trust administration is concerned.—*Matter of Bradford's Estate*, 1 N.Y.

some other jurisdiction applying to its exercise.<sup>95</sup> There is authority that the law of the situs of a trust governs as to the validity and sufficiency of the execution of a power with respect to such trust property<sup>96</sup> so that where, as discussed in the C.J.S. title Trusts § 80, also 65 C.J. p 334 note 63 et seq, the situs of a trust of personal property is the domicile of the settlor of the trust at the time of its creation, the law of that jurisdiction has been held to govern as the validity and sufficiency of an exercise of a power with respect to the trust property, even though the settlor of the trust or donor of the power is domiciled in another jurisdiction at the time of his death or at the time of the execution of the power,<sup>97</sup> and this rule has been applied where the same person is the settlor of the trust and donee of the power.<sup>98</sup> On the other hand, it has been held, in the case of an inter vivos trust reserving a power in the settlor, that the

validity and sufficiency of the execution of the power in the settlor's will are to be determined by the law of the jurisdiction where he was domiciled at his death.<sup>99</sup>

It has been held that an orphans' court having general jurisdiction may enforce a power of appointment as to personal property in a trust the funds of which are located in the state, even though the donor and donee of the power were not residents, where the power was exercised in a will probated in the state.<sup>1</sup>

The exercise of a power as to real property is governed by the law of the place where it is situated.<sup>2</sup>

The law in force at the time of the execution of a power, rather than the law in force at the time of its creation, has been held to govern as to the validity and sufficiency of the exercise of a power.<sup>3</sup>

S.2d 539, 165 Misc. 736, affirmed 6 N.Y.S.2d 156, 254 App.Div. 828.

95. Mass.—*Amerige v. Attorney General*, 88 N.E.2d 126, 324 Mass. 648—*Pitman v. Pitman*, 50 N.E.2d 69, 314 Mass. 465, 150 A.L.R. 509—*Russell v. Joys*, 116 N.E. 549, 227 Mass. 263.

N.Y.—*Chase Nat. Bank of City of New York v. Central Hanover Bank & Trust Co.*, 39 N.Y.S.2d 541, 265 App.Div. 434—*City Bank Farmers Trust Co. v. Meyn*, 34 N.Y.S.2d 373, 263 App.Div. 671—*Central Hanover Bank & Trust Co. v. Brown*, 73 N.Y.S.2d 282—*In re City Bank Farmers Trust Co.*, 70 N.Y.S.2d 465—*Application of Bankers Trust Co.*, 48 N.Y.S.2d 849, 49 C.J. p 1298 note 79.

#### Testamentary and inter vivos powers distinguished

"Cases dealing with powers having a testamentary origin are . . . to be differentiated from cases which involve powers originating in agreements inter vivos, when a question involving conflict of laws is presented. . . . In an agreement inter vivos the element of domicile lacks the importance which practical considerations have accorded it in the law of wills. There is more room for the play of intent. I can see no reason why the intent of a donor should not be allowed full play in the matter of selecting the jurisdiction under which the validity of a trust inter vivos is in all respects to be determined, providing of course the property composing the corpus of the trust be delivered to a trustee in the selected jurisdiction and there administered. Indeed, even in a trust of testamentary creation, it has been held that intent is to be indulged to that extent."—*Wilmington*

*Trust Co. v. Wilmington Trust Co.*, 186 A. 903, 907, 21 Del.Ch. 188.

#### Power as to trust property to be administered in another jurisdiction

Where testator, although a resident of New York, appointed trustees who were residents of Massachusetts, and one of them was the donee of the power of appointment by will, and a substantial portion of the property of testator consisted of realty situated in Massachusetts, and will provided that appointment of successor trustees was to be subject to approval of judge of probate in certain county in Massachusetts, testator would be deemed to have intended that trust should be administered in Massachusetts, and law of Massachusetts governed power of appointment with respect to personality, rather than New York law.—*Amerige v. Attorney General*, 88 N.E.2d 126, 324 Mass. 648.

96. Del.—*Wilmington Trust Co. v. Sloane*, Ch., 54 A.2d 544.

Mass.—*Amerige v. Attorney General*, 88 N.E.2d 126, 324 Mass. 648—*Tudor v. Vail*, 80 N.E. 590, 195 Mass. 18.

N.J.—*David v. Atlantic County Soc. for Prevention of Cruelty to Animals*, 19 A.2d 896, 129 N.J.Eq. 501—*Swetland v. Swetland*, 149 A. 50, 105 N.J.Eq. 608.

N.Y.—*Chase Nat. Bank of City of New York v. Central Hanover Bank & Trust Co.*, 39 N.Y.S.2d 541, 265 App.Div. 434—*In re Barnhart's Will*, 244 N.Y.S. 130, 137 Misc. 518—*In re O'Connor*, 82 N.Y.S.2d 310—*Central Hanover Bank & Trust Co. v. Brown*, 73 N.Y.S.2d 282—*In re City Bank Farmers Trust Co.*, 70 N.Y.S.2d 465—*Application of Bankers Trust Co.*, 48 N.Y.S.2d 849.

Pa.—*In re Barton (Pendleton)*, 35 A.2d 266, 348 Pa. 279.

R.I.—*Harlow v. Duryea*, 107 A. 98, 42 R.I. 234.

97. Mass.—*Tudor v. Vail*, 80 N.E. 590, 195 Mass. 18.

N.J.—*David v. Atlantic County Soc. for Prevention of Cruelty to Animals*, 19 A.2d 896, 129 N.J.Eq. 501—*Swetland v. Swetland*, 149 A. 50, 105 N.J.Eq. 608.

N.Y.—*Central Hanover Bank & Trust Co. v. Brown*, 73 N.Y.S.2d 282.

Pa.—*In re Barton (Pendleton)*, 35 A.2d 266, 348 Pa. 279.

R.I.—*Harlow v. Duryea*, 107 A. 98, 42 R.I. 234.

98. N.J.—*David v. Atlantic County Soc. for Prevention of Cruelty to Animals*, 19 A.2d 896, 129 N.J.Eq. 501.

N.Y.—*Central Hanover Bank & Trust Co. v. Brown*, 73 N.Y.S.2d 282.

99. Ky.—*Radford v. Fidelity & Columbia Trust Co.*, 215 S.W. 285, 185 Ky. 453.

1. N.J.—*In re Winter's Estate*, 47 A.2d 458, 24 N.J.Misc. 172.

2. U.S.—*Corpus Juris cited in Legg's Estate v. Commissioner of Internal Revenue*, C.C.A., 114 F.2d 760, 763.

Iowa.—*Bussing v. Hough*, 21 N.W.2d 587, 237 Iowa 194.

Ky.—*Corpus Juris quoted in Liggett v. Fidelity & Columbia Trust Co.*, 118 S.W.2d 720, 722, 274 Ky. 387. Mass.—*Amerige v. Attorney General*, 88 N.E.2d 126, 324 Mass. 648.

N.Y.—*In re Kelly's Will*, 20 N.Y.S.2d 6, 174 Misc. 80, 49 C.J. p 1298 note 77—12 C.J. p 486 note 17.

3. R.I.—*Rhode Island Hospital*

## § 45. — Fraud; Illusory Appointments

## a. Fraud

## b. Illusory appointments

## a. Fraud

An exercise of a limited power is fraudulent where the exercise is for a corrupt purpose, or for purposes foreign to the power, or where the power is exercised because of a benefit conferred on, or promised to be conferred on, a person who is not an object of the power.

While the power or motive of the donee of a general or absolute power in the exercise of the power ordinarily is immaterial as far as the validity of his action is concerned,<sup>4</sup> the donee of a limited power must act in entire good faith and with a view to the accomplishment of the real purpose for which it was created,<sup>5</sup> and may not do indirectly that which it is unlawful for him to do directly.<sup>6</sup> An exercise of a limited power will be deemed fraudulent where the exercise is for a corrupt purpose,<sup>7</sup> where it is exercised for the benefit of the donee or a third person, where the donee or third person is not an object of the power,<sup>8</sup> where it is made because of a benefit conferred on, or promised to be conferred on, a person who is not an object of the power,<sup>9</sup> or where the exercise is for purposes foreign to the power.<sup>10</sup> An appointment made to an object of a limited power under an agreement by him to settle or dispose of the subject matter in a manner desired by the donee for his own benefit or that of a stranger, or on condition, or with the purpose that it shall be so settled or disposed of, or any other benefit obtained by the donee, is void.<sup>11</sup>

However, it has been held that, where no act on the part of the donee tending toward fraud and no intention to commit a fraud on the power appear, the mere fact that the appointee applies the property or agrees with a third person to apply it for the benefit of one in whose favor the donee could not legally have exercised the power does not constitute a fraud or make the appointment void.<sup>12</sup> Moreover, the donee may so exercise a limited power as incidentally to benefit himself<sup>13</sup> or a stranger,<sup>14</sup> where the purpose for which the power was created is nevertheless carried out and the power would have been so exercised without regard to such incidental benefit.

*A release or agreement not to execute* a limited power made by the donee in consideration of a benefit to himself has been held to be as much a fraud on the power as an execution for his own benefit.<sup>15</sup>

*Evidence of fraud.* The burden of proving a fraud on a power is on one attacking the donee's acts.<sup>16</sup> Where the proof leaves it doubtful whether a power of appointment has been legally or illegally exercised, the presumption in favor of meritorious claimants is in favor of its legality.<sup>17</sup> Inadequacy of the price brought at a sale under a power, without evidence of fraud or collusion, is not sufficient to impeach the sale.<sup>18</sup>

## b. Illusory Appointments

In some jurisdictions, the appointment of a merely nominal share under a nonexclusive power is illusory and void, but in other jurisdictions this doctrine is not followed.

Trust Co. v. Dunnell, 83 A. 858, 34 R.I. 394, Ann.Cas.1914D 580.  
49 C.J. p 1298 note 80.

4. Mass.—Krause v. Klucken, 185 Mass. 482.

R.I.—Metcalf v. Gladding, 87 A. 195, 35 R.I. 395.

"General powers" defined see supra § 6.

5. Ky.—Chenault's Guardian v. Metropolitan Life Ins. Co., 53 S.W.2d 720, 245 Ky. 482.

N.Y.—In re Carroll's Will, 8 N.E.2d 864, 274 N.Y. 288, 115 A.L.R. 923, reargument denied 11 N.E.2d 737, 275 N.Y. 536.

49 C.J. p 1298 note 82.

"Limited powers" defined see supra § 6.

## Barter or bargain

The exercise of a power of appointment is not a thing of barter or bargain.—Pitman v. Pitman, 50 N.E.2d 69, 314 Mass. 465, 150 A.L.R. 509.

General power exercisable only by will

The text rule has been held to ap-

ply to a general power exercisable only by will.—De Charette v. De Charette, 94 S.W.2d 1018, 264 Ky. 525, 104 A.L.R. 1455.

6. N.Y.—In re Carroll's Will, 8 N.E.2d 864, 274 N.Y. 288, 115 A.L.R. 923, reargument denied 11 N.E.2d 737, 275 N.Y. 536.

49 C.J. p 1298 note 82.

7. Mass.—Pitman v. Pitman, 50 N.E.2d 69, 314 Mass. 465, 150 A.L.R. 509.

8. Mass.—Pitman v. Pitman, supra.

9. U.S.—Horne v. Title Ins. & Trust Co., D.C.Cal., 79 F.Supp. 91.

N.Y.—In re Carroll's Will, 8 N.E.2d 864, 274 N.Y. 288, 115 A.L.R. 923, reargument denied 11 N.E.2d 737, 275 N.Y. 536.

10. N.Y.—In re Carroll's Will, supra.

11. Mass.—Pitman v. Pitman, 50 N.E.2d 69, 314 Mass. 465, 150 A.L.R. 509.

N.Y.—Corpus Juris cited in In re Carroll's Will, 8 N.E.2d 864, 868, 274 N.Y. 288, 115 A.L.R. 923, rear-

gument denied 11 N.E.2d 737, 275 N.Y. 536.—In re Stebbins-Vallols' Estate, 99 N.Y.S.2d 402.

49 C.J. p 1299 note 83.

12. U.S.—Ingraham v. Meade, C.C. Pa., 18 F.Cas.No.7,045, 3 Wall.Jr. 32.

49 C.J. p 1299 note 85.

13. N.Y.—Matter of Southworth, 150 N.Y.S. 509, 164 App.Div. 825, 13 Mills Surr. 442, affirmed 109 N.E. 1092, 215 N.Y. 719.

49 C.J. p 1299 note 87.

14. N.Y.—Matter of Tinker, 209 N.Y.S. 589, 124 Misc. 723.

15. N.J.—Thomson v. Norris, 20 N.J.Eq. 489.

49 C.J. p 1299 note 89.

Release or extinguishment of power generally see supra § 19.

16. Conn.—Budington v. Munson, 33 Conn. 481.

17. Tenn.—Marshall v. Stephens, 8 Humphr. 159, 47 Am.D. 601.

18. W.Va.—Maynard v. Stein, 125 S.E. 585, 97 W.Va. 597.

49 C.J. p 1300 note 98.

In furtherance of the rule, as discussed supra § 24, that a nonexclusive power of appointment among two or more persons must be so exercised, if at all, as to give each object a share or portion of the subject matter, it has been held in some jurisdictions that such a power may not legally be exercised except by giving to each object a beneficial interest or share in the property fairly proportioned to the whole, although not necessarily equal to the shares of the others, and that the appointment of a merely nominal share is illusory and void in equity,<sup>19</sup> although good at law,<sup>20</sup> unless the appointee thereof has been otherwise provided for by the donee.<sup>21</sup> In other jurisdictions, however, the doctrine of illusory appointments has been repudiated or has never been recognized, and a nominal or unsubstantial appointment is valid.<sup>22</sup> In any event, the doctrine of illusory appointments has no application where the power is not a nonexclusive power.<sup>23</sup>

### § 46. — Partial Invalidity in General

Where the execution of a power is partly invalid, it will nevertheless be given effect as far as it is valid,

unless the valid and invalid parts are not severable or the donee's scheme of distribution is more closely approximated by treating the exercise of the power as wholly ineffective.

The fact that the execution of a power is partly invalid does not invalidate it in toto, where the valid and invalid parts are severable, but it is given effect as far as it is valid,<sup>24</sup> but the exercise of a power is invalid in toto where the valid and invalid parts are so intermingled that it is not possible to fix a line of division between them,<sup>25</sup> or where the donee's scheme of distribution is more closely approximated by treating the exercise of the power as wholly ineffective than by treating it as partly valid and partly invalid.<sup>26</sup>

### § 47. — Execution in Excess of Power

An attempt to exercise a power in excess of its terms is good within the limits of the power, unless the authorized and unauthorized parts are inseparably connected.

An attempt to execute a power in excess of its terms is void as to the excess, but good within the limits of the power,<sup>27</sup> unless the authorized and un-

19. U.S.—*Parker v. MacBryde*, C.C. A.Md., 132 F.2d 932, certiorari denied *MacBryde v. Parker*, 63 S.Ct. 859, 318 U.S. 779, 87 L.Ed. 1147, and *MacBryde v. Davidge*, 63 S.Ct. 859, 318 U.S. 779, 87 L.Ed. 1147. 49 C.J. p 1300 note 8.

#### Estoppel

Where an appointment is manifestly illusory, the acceptance by the appointee of the property or sum appointed to him does not estop him to question the validity of the appointment.—*Barret's Ex'r v. Barret*, 179 S.W. 396, 166 Ky. 411, L.R.A. 1916D 493.

20. Ala.—*Hatchett v. Hatchett*, 16 So. 550, 103 Ala. 556.

21. Ala.—*Hatchett v. Hatchett*, supra. 49 C.J. p 1300 note 5.

22. N.J.—*Corpus Juris* quoted in *Brown v. Fidelity Union Trust Co.*, 9 A.2d 311, 126 N.J.Eq. 406.

Pa.—*In re Sinnott's Estate*, 165 A. 244, 310 Pa. 463.

Tenn.—*Hodges v. Stegall*, 83 S.W. 2d 901, 169 Tenn. 202, 100 A.L.R. 339.

34 C.J. p 1300 note 6.

23. N.J.—*Brown v. Fidelity Union Trust Co.*, 9 A.2d 311, 126 N.J.Eq. 406.

24. U.S.—*Parker v. MacBryde*, C.C. A.Md., 132 F.2d 932, certiorari denied *MacBryde v. Parker*, 63 S.Ct. 859, 318 U.S. 779, 87 L.Ed. 1147 and *MacBryde v. Davidge*, 63 S.Ct. 859, 318 U.S. 779, 87 L.Ed. 1147.

Del.—*Corpus Juris* cited in *Equitable Trust Co. v. Foulke*, 40 A.2d 713, 717, 28 Del.Ch. 238.

Ky.—*De Charette v. De Charette*, 94 S.W.2d 1018, 264 Ky. 525, 104 A.L.R. 1455.

Mass.—*Welch v. Morse*, 81 N.E.2d 361, 323 Mass. 233, 4 A.L.R.2d 913 —*Old Colony Trust Co. v. Richardson*, 7 N.E.2d 432, 297 Mass. 147, 121 A.L.R. 1218.

N.Y.—*In re Trotter's Estate*, 23 N.Y.S.2d 1007, 175 Misc. 356—*In re Burnham's Estate*, 82 N.Y.S.2d 844.

N.C.—*Corpus Juris* cited in *American Trust Co. v. Williamson*, 46 S.E.2d 104, 108, 228 N.C. 458.

Pa.—*In re Lewis' Estate*, 37 A.2d 482, 349 Pa. 571—*In re Van Syckel's Estate*, 44 Pa.Dist. & Co. 257.

Tenn.—*Corpus Juris* cited in *Hodges v. Stegall*, 83 S.W.2d 901, 903, 169 Tenn. 202, 100 A.L.R. 339. 49 C.J. p 1300 note 10.

#### Donee's intention

(1) Donee's intention, insofar as it is legal, should prevail.—*De Charette v. De Charette*, 94 S.W.2d 1018, 264 Ky. 525, 104 A.L.R. 1455.

(2) Under will providing that trust principal should pass according to donee's will but that named beneficiary should receive at least one half of principal, and donee's will creating trust for payment of income to named beneficiary and another for life and providing for disposition of principal on death of either, named beneficiary could not set up invalidity of trust created by donee as to half of principal and claim half absolutely and also claim half of income from remaining half of principal, but donee's other beneficiary was entitled to entire income

from remaining half of principal.—*Old Colony Trust Co. v. Richardson*, 7 N.E.2d 432, 297 Mass. 147, 121 A.L.R. 1218.

25. U.S.—*Parker v. MacBryde*, C.C. A.Md., 132 F.2d 932, certiorari denied *MacBryde v. Parker*, 63 S.Ct. 859, 318 U.S. 779, 87 L.Ed. 1147 and *MacBryde v. Davidge*, 63 S.Ct. 859, 318 U.S. 779, 87 L.Ed. 1147.

Del.—*Corpus Juris* cited in *Equitable Trust Co. v. Foulke*, 40 A.2d 713, 718, 28 Del.Ch. 238.

Mass.—*Old Colony Trust Co. v. Richardson*, 7 N.E.2d 432, 297 Mass. 147, 121 A.L.R. 1218. 49 C.J. p 1301 note 12.

26. U.S.—*Parker v. MacBryde*, C.C. A.Md., 132 F.2d 932, certiorari denied *MacBryde v. Parker*, 63 S.Ct. 859, 318 U.S. 779, 87 L.Ed. 1147 and *MacBryde v. Davidge*, 63 S.Ct. 859, 318 U.S. 779, 87 L.Ed. 1147.

Del.—*Equitable Trust Co. v. Foulke*, 40 A.2d 713, 28 Del.Ch. 238.

Mass.—*Old Colony Trust Co. v. Richardson*, 7 N.E.2d 432, 297 Mass. 147, 121 A.L.R. 1218.

27. Del.—*Equitable Trust Co. v. Foulke*, 40 A.2d 713, 28 Del.Ch. 238.

Mass.—*Old Colony Trust Co. v. Richardson*, 7 N.E.2d 432, 297 Mass. 147, 121 A.L.R. 1218.

N.J.—*Ogden v. McLane*, 67 A. 695, 73 N.J.Eq. 159.

N.Y.—*Corpus Juris* cited in *In re Carroll's Estate*, 286 N.Y.S. 307, 312, 247 App.Div. 11, motion denied *In re Carroll's Will*, 3 N.E.2d 460, 271 N.Y. 636, modified on other grounds 8 N.E.2d 864, 274 N.Y.

authorized parts are inseparably connected.<sup>28</sup>

## § 48. Aiding Defective Execution

Equity will aid the defective execution of a power where the defect is one of form and not of substance and where the party seeking relief shows some equity superior to that of the one against whom relief is sought.

Where the execution of a power created or reserved by the act of a donor is defective in form, it may be aided or corrected by a court of equity,<sup>29</sup> provided an intention on the part of the donee to execute the power,<sup>30</sup> and an attempt to effectuate that intent, partial in its nature and falling short of accomplishment,<sup>31</sup> appear, but even where the intention to execute is shown, equity cannot relieve against the defective execution of a power created by law, or dispense with any of the formalities required thereby for its due execution.<sup>32</sup>

*What defects may be aided.* Equity will correct only matters of form in the execution of a power, and not matters of substance or essence.<sup>33</sup> Equity cannot make valid the attempted execution of a power which is void for want of authority in the person who attempts its execution,<sup>34</sup> as where the

condition on which it was to be exercised has never happened,<sup>35</sup> or where the execution conflicts with the rule or a statute against perpetuities.<sup>36</sup>

*In whose favor equity interferes.* Before a court of equity will aid a defective execution of a power the party who seeks relief must show in himself some equity superior to that of him against whom relief is asked.<sup>37</sup> In accordance with the rule, equity will ordinarily aid a defective execution of a power in favor of a charity,<sup>38</sup> creditors,<sup>39</sup> purchasers for value,<sup>40</sup> or a wife or legitimate child of the donee;<sup>41</sup> but it will not interpose in favor of volunteers,<sup>42</sup> or the husband of the donee,<sup>43</sup> or grandchildren, at least as against children.<sup>44</sup>

## § 49. Operation and Effect of Execution

One in whose favor a power is duly exercised takes the interest or estate over which the power was created.

One in whose favor a power is duly exercised takes the interest or estate over which the power was created,<sup>45</sup> except such portion or interest as may be expressly excepted.<sup>46</sup> The exercise of a power defeats interests limited in default of or subject to its execution.<sup>47</sup> Where, however, the

288, 115 A.L.R. 923, reargument denied 11 N.E.2d 737, 275 N.Y. 536.  
Pa.—In re Carter's Estate, 24 Pa. Dist. 311, 43 Pa.Co. 130, affirmed 99 A. 79, 254 Pa. 565.  
49 C.J. p 1301 note 13.  
28. Mass.—Old Colony Trust Co. v. Richardson, 7 N.E.2d 432, 297 Mass. 147, 121 A.L.R. 1218.  
N.Y.—Corpus Juris cited in In re Carroll's Estate, 286 N.Y.S. 307, 312, 247 App.Div. 11, motion denied in re Carroll's Will, 3 N.E.2d 460, 271 N.Y. 636, modified on other grounds 8 N.E.2d 864, 274 N.Y. 288, 115 A.L.R. 923, reargument denied 11 N.E.2d 737, 275 N.Y. 536.  
49 C.J. p 1301 note 14.  
29. Ala.—Rice v. Park, 135 So. 472, 223 Ala. 317.  
Ga.—Corpus Juris cited in Cocke v. Bank of Dawson, 180 S.E. 711, 714, 180 Ga. 714.  
N.J.—Methodist Episcopal Home for the Aged of New Jersey v. Tuthill, 167 A. 9, 113 N.J.Eq. 460.  
N.Y.—In re Hart's Estate, 30 N.Y.S. 2d 147, 177 Misc. 183.  
Tenn.—Williams v. Hollis, 14 Tenn. App. 374.  
49 C.J. p 1303 note 48.  
30. Tenn.—Williams v. Hollis, supra.  
49 C.J. p 1304 note 49.  
Intention to execute power generally see supra § 40.  
31. Tenn.—Williams v. Hollis, supra.  
49 C.J. p 1304 note 50.

32. Ala.—McBryde v. Wilkinson, 29 Ala. 662.  
Md.—Smith v. Bowes, 38 Md. 463.  
49 C.J. p 1304 note 51.  
33. U.S.—American Freehold Land-Mortg. Co. v. Walker, C.C.Ga., 31 F. 103.  
49 C.J. p 1304 note 52—21 C.J. p 86 note 22.  
Absence of donee's signature is a defect that may be supplied.—Williams v. Hollis, 14 Tenn.App. 374.  
34. Tex.—Cheverel v. McCormick, 58 Tex. 440.  
49 C.J. p 1304 note 54.  
35. Ga.—Satterfield v. Tate, 64 S.E. 60, 132 Ga. 256.  
Conditions attached to execution generally see supra § 41.  
36. N.Y.—In re Hayman, 237 N.Y.S. 215, 134 Misc. 803.  
37. Tenn.—Corpus Juris cited in Williams v. Hollis, 14 Tenn.App. 374, 380.  
33 C.J. p 1304 note 58.  
38. Pa.—Pepper's Will, 1 Pars.Eq. Cas. 436.  
49 C.J. p 1304 note 59.  
39. Ga.—Corpus Juris cited in Cocke v. Bank of Dawson, 180 S.E. 711, 714, 180 Ga. 714.  
49 C.J. p 1304 note 60.  
40. U.S.—American Freehold Land-Mortg. Co. v. Walker, C.C.Ga., 31 F. 103.  
49 C.J. p 1304 note 61.  
41. Pa.—Dennison v. Goehring, 7 Pa. 175, 47 Am.D. 505—In re Rog-

ers' Estates, 31 Pa.Super. 620, affirmed 67 A. 762, 218 Pa. 431.  
49 C.J. p 1304 note 62.  
42. N.J.—Wooster v. Cooper, 45 A. 381, 59 N.J.Eq. 204.  
Pa.—In re Rogers, 67 A. 762, 218 Pa. 431.  
49 C.J. p 1305 note 63.  
43. Ill.—Breit v. Yeaton, 101 Ill. 242.  
49 C.J. p 1305 note 69.  
44. Ill.—Lynn v. Lynn, 33 Ill.App. 299.  
Va.—Morriss v. Morriss, 33 Gratt. 51, 74 Va. 51.  
49 C.J. p 1305 note 70.  
45. N.J.—Wright v. Wright, 148 A. 578, 105 N.J.Eq. 465.  
N.Y.—In re Reese's Estate, 70 N.Y. S.2d 81, modified on other grounds 87 N.Y.S.2d 607, 275 App.Div. 37.  
N.C.—Buncombe County v. Wood, 4 S.E.2d 505, 216 N.C. 224.  
R.I.—Bancroft v. Bancroft, 27 A.2d 836, 68 R.I. 406.  
49 C.J. p 1305 note 73.  
46. Pa.—Hupp v. Union Coal, etc., Co., 131 A. 364, 284 Pa. 529.  
47. Ky.—Brown v. Harlow, 203 S.W. 2d 60, 305 Ky. 284.  
Md.—Takacs v. Doerfler, 48 A.2d 328, 187 Md. 62.  
Mo.—St. Louis Union Trust Co. v. Clarke, 178 S.W.2d 359, 352 Mo. 518—Keller v. Keller, 123 S.W.2d 113, 343 Mo. 815.  
N.C.—Buncombe County v. Wood, 4 S.E.2d 505, 216 N.C. 224.  
49 C.J. p 1305 note 75.

donee of the power has also an estate in the subject matter, equity will not allow his execution of the power to defeat any estate he may voluntarily have created out of his own estate.<sup>48</sup>

## § 50. — Of Power of Appointment

Broadly speaking, the interests or estates created by the exercise of a power of appointment take effect as if created by the instrument creating the power and the appointee takes title under the donor of the power and not under the donee.

Broadly speaking, the interests or estates created by the exercise of a power of appointment take effect as if created by the instrument conferring the power, and the appointee or beneficiary takes title under the donor and not under the donee;<sup>49</sup> the operation and effect of an appointment are to be determined as if contained in the instrument creating the power.<sup>50</sup> While the exercise of a power of appointment relates back to the time of the creation of the power,<sup>51</sup> the appointed interests or estates vest only from the time of appointment.<sup>52</sup> An appointment

48. N.J.—*Baldwin v. Vreeland*, 11 A. 341, 43 N.J.Eq. 446—*Leggett v. Doremus*, 25 N.J.Eq. 122.

49. Conn.—*McMurtry v. State*, 151 A. 252, 111 Conn. 594.

Del.—*Wilmington Trust Co. v. Wilmington Trust Co.*, 180 A. 597, 21 Del.Ch. 102, modified on other grounds on rehearing 186 A. 903, 21 Del.Ch. 188.

Ga.—*Newton v. Bullard*, 182 S.E. 614, 181 Ga. 448—*Jackson v. Franklin*, 177 S.E. 731, 179 Ga. 840, 97 A.L.R. 1064.

Hawaii.—*Hakalau v. De La Nux*, 35 Hawaii 59.

Ill.—*Oglesby v. Springfield Marine Bank*, 52 N.E.2d 1000, 385 Ill. 414—*Kane v. Schofield*, 76 N.E.2d 216, 332 Ill.App. 505.

Iowa.—*Bussing v. Hough*, 21 N.W. 2d 587, 237 Iowa 194.

Ky.—*Corpus Juris* cited in *Goodloe's Trustee and Adm'r v. Goodloe*, 166 S.W.2d 836, 841, 292 Ky. 494.

Me.—*Moore v. Emery*, 18 A.2d 781, 137 Me. 259.

Md.—*Nicols v. Nicols' Estate*, 31 A. 2d 326, 181 Md. 582—*Wyeth v. Safe Deposit & Trust Co. of Baltimore*, 4 A.2d 753, 176 Md. 369—*Pope v. Safe Deposit & Trust Co.*, 161 A. 404, 163 Md. 239—*Galarud v. Winans*, 74 A. 626, 111 Md. 434.

Mass.—*Commissioner of Corporations and Taxation v. Baker*, 22 N.E.2d 441, 303 Mass. 606—*Slayton v. Fitch Home*, 200 N.E. 357, 293 Mass. 574, 104 A.L.R. 669.

Mo.—*Krause v. Jeannette Inv. Co.*, 62 S.W.2d 890, 333 Mo. 509.

N.Y.—*Matter of Harbeck*, 55 N.E. 850, 161 N.Y. 211—*Matter of Stewart*, 30 N.E. 184, 131 N.Y. 274, 14 L.R.A. 836—*Application of Harris*, 96 N.Y.S.2d 88, 276 App.Div. 990—*In re Eble's Estate*, 76 N.Y.S. 2d 506, 191 Misc. 190—*In re Walbridge's Estate*, 33 N.Y.S.2d 47, 178 Misc. 32—*In re Kelly's Will*, 20 N.Y.S.2d 6, 174 Misc. 80—*In re Comey's Will*, 17 N.Y.S.2d 949, 173 Misc. 377—*City Bank Farmers Trust Co. v. Green*, 289 N.Y.S. 473, 160 Misc. 370—*In re Bradford's Will*, 288 N.Y.S. 153, 159 Misc. 482—*In re Burling's Estate*, 266 N.Y. S. 482, 148 Misc. 835—*In re Kraetzer's Will*, 264 N.Y.S. 443, 147 Misc.

609—*In re Crosby's Estate*, 242 N.Y.S. 207, 136 Misc. 688—*In re Kalbfleisch's Estate*, 84 N.Y.S.2d 146—*In re Walker's Estate*, 53 N.Y.S.2d 102—*Central Hanover Bank & Trust Co. v. Wolff*, 35 N.Y.S.2d 148.

N.C.—*Corpus Juris* cited in *American Trust Co. v. Williamson*, 46 S.E.2d 104, 107, 228 N.C. 458.

Ohio.—*Corpus Juris* cited in *Central Trust Co. v. Watt*, 38 N.E.2d 185, 191—*In re Howald's Trust*, 29 N.E. 2d 575, 65 Ohio App. 191.

Pa.—*Commonwealth v. Davis' Estate*, 26 A.2d 915, 345 Pa. 284—*In re Potter's Estate*, 13 Pa.Dist. & Co. 687.

R.I.—*Hooker v. Drayton*, 33 A.2d 206, 69 R.I. 290, 150 A.L.R. 273.

Wis.—*In re Morgan's Will*, 277 N.W. 650, 227 Wis. 283, rehearing denied 278 N.W. 859, 227 Wis. 288.

49 C.J. p 1305 note 77.

Whether power be general or special, appointee takes under donor.—*Leser v. Burnet*, C.C.A.4, 46 F.2d 756.

Same person donor and donee

The text rule applies where the same person is both donor and donee of the power, and the appointee takes under the instrument creating the power rather than under the instrument exercising it.

Md.—*Nicols v. Nicols' Estate*, 31 A. 2d 326, 181 Md. 582.

N.Y.—*Herzog v. Title Guarantee & Trust Co.*, 103 N.E. 885, 310 N.Y. 531—*Genet v. Hunt*, 21 N.E. 91, 113 N.Y. 158—*Matter of Rogers' Will*, 291 N.Y.S. 815, 249 App.Div. 238—*City Bank Farmers Trust Co. v. Green*, 289 N.Y.S. 473, 160 Misc. 370—*Syracuse Trust Co. v. Fuller*, 252 N.Y.S. 90, 140 Misc. 913—*Central Hanover Bank & Trust Co. v. Wolff*, 35 N.Y.S.2d 148.

Exercise of power held disposition of donor's property

Ky.—*Commonwealth v. Fidelity & Columbia Trust Co.*, 146 S.W.2d 3, 285 Ky. 1—*De Charette v. De Charette*, 94 S.W.2d 1018, 264 Ky. 525, 104 A.L.R. 1455.

Md.—*Connor v. O'Hara*, 53 A.2d 33, 188 Md. 527.

Pa.—*In re Scott's Estate*, 44 A.2d 323, 158 Pa.Super. 138, affirmed 46 A. 2d 174, 353 Pa. 575—*In re Hagen's*

*Estate*, 85 Pa.Super. 123, affirmed 132 A. 175, 285 Pa. 326.

R.I.—*Hooker v. Drayton*, 33 A.2d 206, 69 R.I. 290, 150 A.L.R. 723.

Payment to donee's executor directed by donor

Where instrument creating power of appointment required appointive estate to be paid to donee's executor but intention was manifest that donee have unlimited power to name appointees, and executors were merely intended as conduits for passing appointed property, sums payable to appointees under will exercising the power should be paid to executors solely for transmission to appointees.—*Chase Nat. Bank of City of New York v. Central Hanover Bank & Trust Co.*, 39 N.Y.S.2d 541, 265 App.Div. 434.

50. Md.—*Lederer v. Safe Deposit & Trust Co. of Baltimore*, 35 A.2d 166, 182 Md. 422—*Wyeth v. Safe Deposit & Trust Co. of Baltimore*, 4 A.2d 753, 176 Md. 369—*Merwin v. Safe Deposit & Trust Co. of Baltimore*, 188 A. 803, 171 Md. 346—*Galarud v. Winans*, 74 A. 626, 111 Md. 434.

N.Y.—*In re Warren's Will*, 81 N.Y.S. 2d 400, 192 Misc. 881—*In re Eble's Trust*, 76 N.Y.S.2d 506, 191 Misc. 190—*In re Comey's Will*, 17 N.Y. S.2d 949, 173 Misc. 377—*In re Marsland's Estate*, 254 N.Y.S. 293, 142 Misc. 230—*In re Wickham's Will*, 249 N.Y.S. 148, 139 Misc. 729—*In re Von Isenburg's Estate*, 85 N.Y.S.2d 557—*Central Hanover Bank & Trust Co. v. Brown*, 73 N.Y.S.2d 282—*Manufacturers Trust Co. v. Searles*, 68 N.Y.S.2d 633.

Va.—*Daniel v. Brown*, 159 S.E. 209, 156 Va. 563, 75 A.L.R. 1377.

Liability for inheritance taxes on exercise of power see *Internal Revenue* § 487; the C.J.S. title *Taxation* § 1148, also 61 C.J. p 1666 note 76-p 1669 note 16.

51. U.S.—*Brown v. Commissioner of Internal Revenue*, C.C.A., 50 F.2d 842.

Ill.—*Kane v. Schofield*, 76 N.E.2d 216, 332 Ill.App. 505.

N.Y.—*Application of Harris*, 96 N.Y. S.2d 88, 276 App.Div. 990.

52. N.Y.—*Matter of Stewart*, 30 N.



by a person having the right to the income from a trust for life with power to appoint by will as to the remainder does not carry with it income accrued but not paid over during such person's life.<sup>53</sup>

*Allocation of appointive property where power exercised by donee's will.* Where a general power of appointment is exercised by the donee's will as a whole, or where his will disposes of the owned and appointive property as a single fund, the appointed property is allocated to the various dispositions in such manner as to give the maximum effect to such dispositions.<sup>54</sup> Thus, where the dispositions made do not violate the rule against perpetuities as to the property owned by the donee, but some of the dispositions violate that rule as to the appointive property, the appointive property will be allocated as far

as possible to those dispositions which do not involve a violation of the rule;<sup>55</sup> but this rule will not be applied where the possible violation of the rule against perpetuities arises, not from the donee's dispositions, but from appointments made by a subsequent donee on whom the original donee has conferred a further power of appointment.<sup>56</sup> Moreover, the rule is not one of law to be applied indiscriminately to save the exercise of a power which would otherwise fail; rather, it is an indication that the courts try to determine the intent of the testator and to do equity.<sup>57</sup> Where the residuary clause of a will is construed as exercising a power of appointment, the appointed property goes in full to the residuary legatees even though the testator's own property is insufficient to pay his general legatees.<sup>58</sup>

E. 184, 131 N.Y. 274, 14 L.R.A. 836—In re Walker's Estate, 53 N.Y. S.2d 102.

Ohio.—First-Central Trust Co. v. Clafin, Com.Pl., 73 N.E.2d 388. 49 C.J. p 1305 note 78.

53. N.Y.—In re Culver's Estate, 57 N.Y.S.2d 598, affirmed in re Culver's Will, 52 N.Y.S.2d 577, 268 App.Div. 972, reversed on other grounds 62 N.E.2d 213, 294 N.Y. 321.

54. Mass.—Amerige v. Attorney General, 88 N.E.2d 126, 324 Mass. 648—Minot v. Paine, 120 N.E. 167, 230 Mass. 514, 1 A.L.R. 365—Stone v. Forbes, 75 N.E. 141, 189 Mass. 163.

N.Y.—In re Wainwright's Will, 289 N.Y.S. 510, 248 App.Div. 336, motion granted 291 N.Y.S. 180, 248 App.Div. 891—In re Bearns' Estate, 65 N.Y.S.2d 199, 186 Misc. 742.

Power exercised by particular clause or by will as a whole see *supra* § 40.

**Will held to merge owned and appointive property**

(1) In general.—In re Spears' Will, 271 N.Y.S. 110, 151 Misc. 181.

(2) Fact that the testator intended to merge the appointive estate with his own is clearly implied from the express exercise of the power of appointment, coupled with the direction that the appointive property be paid to his executor.—In re Lathers' Will, 64 N.Y.S.2d 757.

(3) Where testator at outset of will expressed intention to dispose of all property of which he might have right or power to dispose at death, estate over which testator had power of appointment was merged with testator's individual estate.—In re Wainwright's Will, 289 N.Y.S. 510, 248 App.Div. 336, motion granted 291 N.Y.S. 180, 248 App.Div. 891—In re Bearns' Estate, 65 N.Y.S. 2d 199, 186 Misc. 742.

(4) Where power of appointment was expressly exercised by donee's will giving stated sums with proviso that each legacy should not exceed a stated percentage of "my net residuary estate available for distribution," and will provided that quoted phrase should include the net amount distributable as result of exercise of power of appointment, donee intended to blend the appointive property with her own personal net residuary estate.—In re Morse's Estate, 80 N.Y.S.2d 541.

#### **Specific legacy of stock**

Where a testatrix exercises a power of appointment, directing that the appointed estate be added to her own and that the combined fund or estate be disposed of as thereafter provided, and by a later clause in her will gives her holdings of stock in a certain corporation to specific legatees, the bequest will be construed to include such stock in the appointed estate as well as in testatrix's own estate.—In re White's Estate, 63 Pa.Dist. & Co. 408.

#### **Renunciation by legatees**

In determining whether property over which testatrix enjoyed a power of appointment was validly disposed of, effective intent of testatrix was to be weighed as of time she made her disposition, unaffected by fact that general legatees by compromise agreement had renounced general legacies under which such property was validly disposed of; attempted disposition did not fail because general legatees under compromise had renounced, in view of fact that renunciation was on stipulated terms that such property should be applied as therein directed, one of which purposes would constitute a valid disposition of the appointed property, although another was invalid, since doctrine of "marshaling" could be invoked and the valid purpose up-

held.—In re Williams' Trust, 82 N.Y. S.2d 101.

55. Mass.—Amerige v. Attorney General, 88 N.E.2d 126, 324 Mass. 648—Minot v. Paine, 120 N.E. 167, 230 Mass. 514, 1 A.L.R. 365—Stone v. Forbes, 75 N.E. 141, 189 Mass. 163.

N.Y.—Fargo v. Squiers, 48 N.E. 509, 154 N.Y. 250—In re Palmer's Estate, 277 N.Y.S. 816, 154 Misc. 705—In re Williams' Trust, 82 N.Y.S. 2d 101—In re Lathers' Will, 64 N.Y.S.2d 757.

Measuring period for application of rule against perpetuities in case of estates and interests created by exercise of power of appointment see *Perpetuities* § 24.

**Intent of testator with respect to disposition of property over which he enjoys a power of appointment must be ascertained and given effect if possible; intent may be gleaned not only from language of will itself but from other factors such as financial means and the conditions confronting him when will was drawn and which may be regarded, reasonably, as having affected his design.**—In re Williams' Trust, 82 N.Y.S.2d 101—In re Lathers' Will, 64 N.Y.S. 2d 757.

#### **Debts and administration expenses**

Appointive property may be applied to payment of donee's debts and administration expenses to avoid its passing as part of the residuary estate, in which case there would be a violation of the rule against perpetuities.—In re Williams' Trust, 82 N.Y.S.2d 101—In re Lathers' Will, 64 N.Y.S.2d 757.

56. Mass.—Amerige v. Attorney General, 88 N.E.2d 126, 324 Mass. 648.

57. N.Y.—Low v. Bankers Trust Co., 200 N.E. 674, 270 N.Y. 143—In re Lathers' Will, 64 N.Y.S.2d 757.

58. Mass.—Slayton v. Fitch Home,

**Conditional appointment.** When an appointment is conditioned on the performance or nonperformance of a particular act by the appointee, he takes the property subject to the condition.<sup>59</sup>

**Repudiation of appointment.** An appointee may repudiate the appointment or refuse to receive it, in which case the exercise of the power is nugatory,<sup>60</sup> although it would seem that it does not necessarily constitute a failure to appoint such as to allow the property to pass to those to whom it is limited in default of appointment;<sup>61</sup> and an appointee so repudiating an appointment may take or hold title under another provision of the instrument creating the power.<sup>62</sup>

**Illegal appointment.** An illegal appointment, such as one which violates the rule against perpetuities, is no appointment.<sup>63</sup>

## § 51. — Of Power of Sale

A purchaser at a sale under a power can take no greater interest or estate than the donor of the power had; while every presumption is indulged in favor of a bona fide purchaser at such a sale, he must satisfy him-

self of the existence of the power at the time of the purchase.

A purchaser at a sale under a power can take no greater estate or interest than the donor had;<sup>64</sup> and, where a sale by a donee is made avowedly under the provisions of the power, the purchaser can demand only such title as was in contemplation of the parties when the sale was made.<sup>65</sup> Every reasonable presumption is indulged in favor of a bona fide purchaser at such a sale;<sup>66</sup> and while he must satisfy himself as to the existence of the power at the time of his purchase,<sup>67</sup> and that any condition or contingency attached to its execution has been fulfilled,<sup>68</sup> or any restriction on its exercise observed,<sup>69</sup> in order for him to be affected by a fraudulent or illegal execution of the power on the part of the donee, either participation in the fraud or notice of it must be brought home to him.<sup>70</sup> Where a power of sale is exercised by the life tenant in fraud of the rights of the remaindermen and without consideration, the deed conveys only the estate of the life tenant and not that of the remaindermen.<sup>71</sup> The infant grantee of an estate subject

200 N.E. 357, 293 Mass. 574, 104 A.L.R. 669.

59. Ill.—*Merchants' L. & T. Co. v. Patterson*, 139 N.E. 912, 308 Ill. 519.

49 C.J. p 1306 note 80.

60. U.S.—*Corpus Juris* quoted in *Commissioner of Internal Revenue v. Cardeza's Estate*, C.A., 173 F.2d 19, 25—*Grinnell v. Commissioner of Internal Revenue*, C.C.A.2, 70 F.2d 705, affirmed 55 S.Ct. 354, 294 U.S. 153, 79 L.Ed. 825.

Mass.—*Garfield v. White*, 92 N.E.2d 575, 326 Mass. 20.

49 C.J. p 1306 note 81.

### Clear and unequivocal renunciation required

A renunciation or disclaimer of a gift by appointee under a power, must be clear and unequivocal; where grandson executed a document stating that he elected to take under trust directly from his grandfather instead of taking under his father who by will exercised power of appointment given by trust instrument, and executed a document stating that by such election grandson did not desire to waive his rights to take income by virtue of appointment to him by will of his father, and that it was not his intention to disclaim, renounce, or decline any gift under the will of the father, there was no renunciation or disclaimer by grandson of right to take under will and codicil in which his father exercised power of appointment.—*Garfield v. White*, 92 N.E.2d 575, 326 Mass. 20.

31. U.S.—*Corpus Juris* quoted in *Commissioner of Internal Revenue v. Cardeza's Estate*, C.A., 173 F.2d 19, 25.

49 C.J. p 1306 note 82.

62. N.Y.—*Matter of Haggerty*, 112 N.Y.S. 1017, 128 App.Div. 479, affirmed 87 N.E. 1120, 194 N.Y. 550. 49 C.J. p 1306 note 83.

### Election by appointee

Where will gave life beneficiary of trust estate power of appointment, in default of which and in absence of issue of life beneficiary, the life beneficiary's next of kin would take, and life beneficiary, without ever having had issue, attempted to appoint her surviving sisters, who were her sole next of kin, such sisters could accept title as appointees or as remaindermen under will that created trust estate.—*Grinnell v. Commissioner of Internal Revenue*, C.C.A.2, 70 F.2d 705, affirmed 55 S.Ct. 354, 294 U.S. 153, 79 L.Ed. 826.

63. N.Y.—*Low v. Bankers Trust Co.*, 200 N.E. 674, 270 N.Y. 143—*In re Kelly's Will*, 20 N.Y.S.2d 6, 174 Misc. 30—*In re Williams' Trust*, 82 N.Y.S.2d 101—*In re Lathers' Will*, 64 N.Y.S.2d 757.

64. Ala.—*Hairston v. Dobbs*, 2 So. 147, 80 Ala. 589.

65. Va.—*Goddin v. Vaughn*, 14 Gratt. 102, 55 Va. 102.

66. U.S.—*Smith v. McIntire*, C.C. Ohio, 83 F. 456.

67. Mo.—*Citizens' Bank of Lancas-*

*ter v. Foglesong*, 31 S.W.2d 778, 326 Mo. 581.

49 C.J. p 1306 note 88.

### Power of sale for support

Life tenant, having power of sale for support, executing trust deed securing individual debt of son, conveyed only life estate and did not extinguish power of sale for her support.—*Citizens' Bank of Lancaster v. Foglesong*, supra.

68. Mo.—*Citizens' Bank of Lancaster v. Foglesong*, supra.

49 C.J. p 1306 note 89.

### Priority on sale

Where life tenant with power of disposal contracted to convey to defendant in violation of condition giving others prior right to purchase, purchaser in possession had rights similar to tenant at will, and contract was personal obligation conveying no interest in land and was not enforceable against purchasers with knowledge of the contract.—*Bennett v. Casavant*, 150 A. 319, 129 Me. 123.

69. Mo.—*Citizens' Bank of Lancaster v. Foglesong*, 31 S.W.2d 778, 326 Mo. 581.

49 C.J. p 1306 note 90.

70. Ala.—*Corpus Juris* cited in *Winn v. Winn*, 6 So.2d 401, 404, 242 Ala. 324.

Mo.—*Citizens' Bank of Lancaster v. Foglesong*, 31 S.W.2d 778, 326 Mo. 581.

49 C.J. p 1306 note 91.

71. Ala.—*Moseley v. Monteabaro*, 17 So.2d 657, 245 Ala. 475.

to a power of sale is bound by a proper exercise of the power.<sup>72</sup>

*Rights of successive purchaser from donee.* One who purchases from the donee of a power, with knowledge that the power to sell has theretofore been conditionally exhausted by the making of an executory contract of sale to another, takes the property subject to the chance of his conveyance becoming inoperative by the final fulfillment of the executory contract.<sup>73</sup>

*Purchase money.* On the sale of property under a power the donee, and not the beneficial owners, is entitled to receive the purchase money,<sup>74</sup> and ordinarily he alone can bring an action for it,<sup>75</sup> although gifts of the proceeds may constitute an equitable charge on the property which can be enforced by the persons entitled thereto.<sup>76</sup>

*Duty of purchaser to see to application.* In the absence of bad faith, a purchaser at a sale under a power is not bound to see that the purchase money is properly applied by the donee.<sup>77</sup> It has been held, however, that a purchaser who pays the donee in depreciated currency so far participates in a fraud that he may be required to pay for the property at its actual value or the sale will be held void.<sup>78</sup>

## § 52. — Rights of Subsequent Purchasers

Subsequent purchasers of property sold or appointed under a power must take notice of the extent of the power.

Subsequent purchasers of property appointed or sold under a power granted by an instrument of record must take notice of the extent of the pow-

er.<sup>79</sup> An appointee or a purchaser at a sale under a power cannot convey to another, not an innocent purchaser, a better title than he himself possesses;<sup>80</sup> but an innocent purchaser in good faith is protected against fraud or illegality in the exercise of the power whereby his grantor acquired title.<sup>81</sup>

## § 53. — Rights of Creditors

An appointee or purchaser under a power takes a good title against creditors of the persons to whom the subject matter would pass in default of execution of the power.

An appointee or a purchaser at a bona fide sale, under a power, takes a good title against creditors or lienors of the persons to whom the subject matter would pass in default of execution of the power;<sup>82</sup> but a purchaser's title is subject to the rights of the donor's creditors, where the person to whom the proceeds of the sale are limited is a mere volunteer.<sup>83</sup>

The rights of the donee's creditors are discussed supra § 32.

## § 54. Revocation of Execution

A power once effectually exercised may not be revoked unless the right to revoke has been expressly reserved.

A power once effectually exercised cannot be revoked unless the right to revoke has been expressly reserved.<sup>84</sup> The question whether or not the execution of a power is revoked by a particular act or instrument depends on the intention of the donee,<sup>85</sup> and no technical form of revocation is essential.<sup>86</sup> An appointment by will is revoked by the revocation of the will,<sup>87</sup> or where the power is surrendered,<sup>88</sup>

72. Ky.—Gullett v. Bailey, 35 S.W. 2d 17, 237 Ky. 151.

73. N.Y.—Demarest v. Ray, 29 Barb. 563, 19 How.Pr. 574.

74. Pa.—Shippen v. Clapp, 29 Pa. 265.

49 C.J. p 1306 note 93.

75. Pa.—Shippen v. Clapp, supra.

76. Ohio.—Eltner v. Fife, 32 Ohio St. 358.

77. Ala.—Corpus Juris cited in Holum v. Quick, 21 So.2d 839, 840, 246 Ala. 659.

Ky.—Gullett v. Bailey, 35 S.W.2d 17, 237 Ky. 151.

N.C.—Buncombe County v. Wood, 4 S.E.2d 505, 216 N.C. 224.

49 C.J. p 1306 note 96.

78. Va.—Tosh v. Robertson, 27 Gratt. 270, 68 Va. 270.

79. Mo.—Rayl v. Golfinopulos, 264 S.W. 911.

**Power of sale for reinvestment**

Where provision of deed authorizing life tenants to sell land for

reinvestment stated that reinvestment was incumbent on them, but that purchasers were not required to see that reinvestment was made, failure to make reinvestment did not render deed executed by life tenant void ab initio so as to deny protection to a subsequent innocent purchaser of land.—Metropolitan Life Ins. Co. v. Chenault, 138 S.W.2d 319, 282 Ky. 252.

80. Ill.—Bevans v. Murray, 96 N.E. 546, 251 Ill. 603.

49 C.J. p 1307 note 99.

81. W.Va.—Maynard v. Shein, 125 S. E. 585, 97 W.Va. 597.

49 C.J. p 1307 note 1.

82. N.J.—Morse v. Hackensack Sav. Bank, 20 A. 961, 47 N.J.Eq. 279, 12 L.R.A. 62.

49 C.J. p 1307 note 3.

83. N.C.—Ingram v. Sloan, 27 N.C. 565.

84. Ala.—Rice v. Park, 135 So. 472, 223 Ala. 317.

Del.—Wilmington Trust Co. v. Wilmington Trust Co., 180 A. 597, 21 Del.Ch. 102, modified on other grounds on rehearing 186 A. 903, 21 Del.Ch. 188.

Ohio.—Corpus Juris cited in Central Trust Co. v. Watt, 38 N.E.2d 185, 193, 139 Ohio St. 50.

49 C.J. p 1307 note 6.

Revocation of power see supra § 13.

Exhaustion of power see supra § 16.

85. Pa.—Taylor v. Smiley, 14 Phila. 76.

49 C.J. p 1307 note 11.

86. Pa.—Taylor v. Smiley, supra.

49 C.J. p 1307 notes 11-13.

87. Ill.—McGee v. Vandeventer, 158 N.E. 127, 326 Ill. 425.

S.C.—Adger v. Kirk, 108 S.E. 97, 116 S.C. 298.

88. N.Y.—Merrill v. Lynch, 13 N.Y. S.2d 514, 173 Misc. 39.

Surrender and extinguishment of power generally see supra § 19.

or extinguished, or exercised by deed,<sup>89</sup> before the will becomes operative. It has been held under statute that the rule that a will executed by an unmarried person is deemed revoked by his subsequent marriage does not apply as to the exercise of a power by a will executed before marriage,<sup>90</sup> unless the property would pass in default of appointment to those who would have been entitled to it had it been the donee's property and he had died intestate.<sup>91</sup>

*Where an act of revocation is itself rescinded, the original execution of the power remains in full force and effect.*<sup>92</sup>

### § 55. Failure to Execute

Equity will not relieve against the nonexecution of a power except a power in trust, or in some cases, a power to appoint among a class, and where a power is not exercised, the property ordinarily passes to those to whom it was limited in default of execution, and in the absence of such limitation, to the donor or those entitled by descent from him.

While equity may in a proper case aid or correct a defective execution of a power, as discussed supra § 48, ordinarily it will not relieve against the non-

execution of a power.<sup>93</sup> So, when a power terminates without having been executed, the subject matter passes to those to whom it may have been limited in default of execution,<sup>94</sup> and, in the absence of any such limitation, ordinarily remains in the donor or those entitled thereto by descent from him;<sup>95</sup> and, similarly, where a power is partially unexecuted at its termination, the portion of the subject matter or the interest therein as to which it has not been exercised usually remains in the donor or passes as in default of execution.<sup>96</sup> The failure to exercise a power ordinarily does not vest any estate in the donee or those entitled by descent from him.<sup>97</sup>

*Power in trust.* Equity will execute a power coupled with a trust duty where the donee fails to do so.<sup>98</sup>

*Power to appoint among class.* Where a power to appoint among certain persons or a class remains unexecuted, and there is no limitation over in default of execution, equity will divide the subject matter equally among the members of the designated class;<sup>99</sup> and where the class in such case consists

89. Ala.—Rice v. Park, 135 So. 472, 223 Ala. 317.

90. Mass.—Pitman v. Pitman, 50 N. E.2d 69, 314 Mass. 465, 150 A.L.R. 509—Old Colony Trust Co. v. Allen, 29 N.E.2d 310, 307 Mass. 40—Yerxa v. Youngman, 135 N.E. 117, 241 Mass. 251—Paine v. Price, 68 N.E. 832, 184 Mass. 350—Osgood v. Bliss, 6 N.E. 527, 141 Mass. 474, 55 Am.R. 488.

91. Mass.—Pitman v. Pitman, 50 N. E.2d 69, 314 Mass. 465, 150 A.L.R. 509—Yerxa v. Youngman, 135 N. E. 117, 241 Mass. 251—Paine v. Price, 68 N.E. 832, 184 Mass. 350.

92. S.C.—Burkett v. Whittemore, 15 S.E. 616, 36 S.C. 428. 49 C.J. p.1308 note 17.

93. Ala.—Rice v. Park, 135 So. 472, 223 Ala. 317.

N.Y.—In re Hart's Estate, 30 N.Y.S. 2d 147, 177 Misc. 183.

N.C.—Henderson v. Western Carolina Power Co., 157 S.E. 425, 200 N.C. 443, 80 A.L.R. 497. 49 C.J. p. 1308 note 22—21 C.J. p. 86 note 19.

Duty to exercise power see supra § 33.

#### Manifestation of non-exercise

The non-exercise of general discretionary beneficial powers conferred by trust indentures could be manifested by inaction, or by instrument of surrender, since such formal instruments would be wholly consistent with non-exercise.—Merrill v. Lynch, 13 N.Y.S.2d 514, 173 Misc. 39.

94. Ky.—Vaughn v. Metcalf, 118 S. W.2d 727, 274 Ky. 379.

Mass.—Boston Safe Deposit & Trust Co. v. Prindle, 195 N.E. 793, 290 Mass. 577.

Mo.—St. Louis Union Trust Co. v. Clarke, 178 S.W.2d 359, 352 Mo. 518—Keller v. Keller, 123 S.W.2d 113, 343 Mo. 815.

N.J.—National State Bank of Newark v. Morrison, 75 A.2d 916, 9 N. J.Super. 552.

N.Y.—Low v. Bankers Trust Co., 200 N.E. 674, 270 N.Y. 143, amendment of remittitur denied 3 N.E.2d 211, 270 N.Y. 615—In re O'Connor, 82 N.Y.S.2d 310—Geneva Trust Co. v. Still, 27 N.Y.S.2d 289.

Okl.—Howard v. Dillard, 176 P.2d 500, 198 Okl. 116.

49 C.J. p. 1308 note 25.

#### In default of will

Where power of appointment contained in trust instrument recited that principal should be paid on death of life beneficiary to such person as he should by will appoint and "in default of such last will and testament" to his children, the quoted phrase meant default of appointment by will rather than default of any will.—In re O'Connor, 82 N.Y.S. 2d 310.

#### Succession through donee

Where beneficiary, given power to appoint by will distributees of trust estate on his death, died before reaching majority, he did not fail to exercise such power "within the time provided therefor", so that pro-

vision of tax statute that succession through donee of power of appointment shall be deemed to have taken place, where person possessing power fails to exercise it within such time, is inapplicable.—In re Maxhimer's Estate, 40 N.E.2d 941, 139 Ohio St. 444.

95. N.Y.—In re Reese's Estate, 70 N.Y.S.2d 81, modified on other grounds In re Reese's Will, 87 N. Y.S.2d 607, 275 App.Div. 37—Fross v. Anson, 58 N.Y.S.2d 26, affirmed 76 N.Y.S.2d 646, 273 App.Div. 860. Ohio.—First-Central Trust Co. v. Claffin, 73 N.E.2d 338.

Pa.—Irish v. Irish, 65 A.2d 345, 361 Pa. 410.

49 C.J. p. 1308 note 27.

96. Ky.—Continental Nat. Bank v. McCampbell, 213 S.W. 193, 184 Ky. 658.

49 C.J. p. 1308 note 28.

97. Ky.—Roby v. Arterburn, 108 S. W.2d 873, 269 Ky. 816.

98. N.Y.—Merrill v. Lynch, 13 N.Y. S.2d 514, 173 Misc. 39.

Ohio.—National City Bank of Cleveland v. Schmoltz, 31 N.E.2d 444. 21 C.J. p. 86 note 20.

99. U.S.—Markham v. Tibbetts, D.C. N.Y., 79 F.Supp. 47, modified on other grounds 79 F.Supp. 60.

Ill.—Oglesby v. Springfield Marine Bank, 52 N.E.2d 1000, 385 Ill. 414.

N.J.—First-Mechanics Nat. Bank of Trenton v. First-Mechanics Nat. Bank of Trenton, 43 A.2d 674, 137 N.J.Eq. 106.

of only one member at the time the power terminates, the whole of the subject matter passes to him.<sup>1</sup> Where such a power has been partially executed by the appointment of a share to one of the objects thereof, and remains unexecuted as to the other objects and the balance of the property, it has been held that the one to whom an appointment has been made can receive a share of the residue only by bringing into hotchpot the portion appointed to him.<sup>2</sup> Where the donee's power is limited to appointing to one member of a class, it has been held that the property is not to be divided among the members of the class on a failure to exercise the power.<sup>3</sup>

**Ineffective appointment.** Ordinarily, where an appointment is ineffective, it is the same as though there were a failure to appoint and the property

passes as in default of appointment;<sup>4</sup> and, where the appointment contains a direction for the devolution of the property in the event the appointment is ineffective in whole or in part, such direction will govern as to the devolution of the property.<sup>5</sup> However, where the donee of a general power makes an ineffective appointment, the property passes to the donee or his estate where the donee manifests an intent to assume control of the property for all purposes and not only for the limited purpose of giving effect to the expressed appointment,<sup>6</sup> and the application of this rule is not limited to instances where the donor has made no provision for the devolution of the property in default of appointment.<sup>7</sup> Where a donee of a general power appoints to a trustee on a trust which fails, there is a resulting trust in favor of the donee or his estate unless the donee manifests an inconsistent intent.<sup>8</sup>

Va.—*Daniel v. Brown*, 159 S.E. 209, 156 Va. 563, 75 A.L.R. 1377.  
49 C.J. p 1309 note 30.

#### Tenants in common

Where a power is left unexecuted, the court will execute it as a trust by dividing the fund equally among the objects or persons in favor of whom it was given or from whom the selection might have been made on the ground that equality is equity, and, where there is no rule in the gift which can apply to determine the proportions, the court will make the distribution per capita, and everybody within the rule will take equally as tenants in common.—*Oglesby v. Springfield Marine Bank*, 52 N.E.2d 1000, 385 Ill. 414.

1. Mass.—*Hooper v. Hooper*, 89 N.E. 161, 203 Mass. 50.

2. Va.—*Knight v. Yarbrough*, Gilm. 27, 21 Va. 27.  
49 C.J. p 1309 note 32.

3. U.S.—*Markham v. Tibbetts*, D.C. N.Y., 79 F.Supp. 47, modified on other grounds 79 F.Supp. 60.  
N.Y.—*Waterman v. New York Life Insurance & Trust Co.*, 142 N.E. 668, 237 N.Y. 293.

#### Reason for rule

Where the donee's power is limited to appointing to one of a class, he is not authorized to distribute the property to more than one or to all; equal distribution among the members of the class would frustrate the donor's purpose where effected by the donee, and it would equally frustrate his purpose where effected by the law.

U.S.—*Markham v. Tibbetts*, D.C.N.Y., 79 F.Supp. 47, modified on other grounds 79 F.Supp. 60.

N.Y.—*Waterman v. New York Life Insurance & Trust Co.*, 142 N.E. 668, 237 N.Y. 293.

4. U.S.—*Parker v. MacBryde*, C.C.A.

Md., 132 F.2d 932, certiorari denied *MacBryde v. Parker*, 63 S.Ct. 859, 318 U.S. 779, 87 L.Ed. 1147, and *MacBryde v. Davidge*, 63 S.Ct. 859, 318 U.S. 779, 87 L.Ed. 1147.  
Ky.—*Dant v. Fidelity & Columbia Trust Co.*, 193 S.W.2d 399, 302 Ky. 54.

N.Y.—*Low v. Bankers Trust Co.*, 200 N.E. 674, 270 N.Y. 143, amendment of remittitur denied 3 N.E.2d 211, 270 N.Y. 615.—*City Bank Farmers Trust Co. v. Meyn*, 34 N.Y.S.2d 373, 263 App.Div. 671.—*In re Slocum's Estate*, 81 N.Y.S.2d 120, 192 Misc. 1026.—*In re Reese's Estate*, 70 N.Y.S.2d 81, modified on other grounds *In re Reese's Will*, 87 N.Y.S.2d 607, 275 App.Div. 37.—*In re Van Hoesen's Will*, 67 N.Y.S.2d 503.—*Fross v. Anson*, 58 N.Y.S.2d 26, affirmed 76 N.Y.S.2d 646, 273 App. Div. 860.—*Geneva Trust Co. v. Sill*, 27 N.Y.S.2d 289.

Pa.—*In re Van Syckel's Estate*, 44 Pa.Dist. & Co. 257.

49 C.J. p 1301 note 11, p 1303 note 42.

#### Special power

Where an appointment under a special power is ineffective, the property passes as in default of appointment.

Del.—*Harker v. Reilly*, 4 Del.Ch. 72.  
Pa.—*Lyndall's Estate*, 2 Pa.Dist. 476.

#### Gift subject to power

Where a valid gift is made subject to a power of appointment, and the power is exercised in favor of the same person, but the appointment is ineffective because of the death of the appointee before the appointment takes effect, the gift is not divested.—*In re Evans' Estate*, 10 Pa.Dist. 261, 25 Pa.Co. 266.

5. N.Y.—*In re Lanier's Estate*, 88 N.Y.S.2d 517, 196 Misc. 96.

6. Mass.—*Amerige v. Attorney General*, 88 N.E.2d 126, 324 Mass. 648.—*Fiduciary Trust Co. v. Mishou*,

75 N.E.2d 3, 321 Mass. 615.—*Old Colony Trust Co. v. Allen*, 29 N.E. 2d 310, 307 Mass. 40.

**Ineffective appointment need not be in trust** in order that text rule may apply.—*Old Colony Trust Co. v. Allen*, supra—49 C.J. p 1303 note 41 [a].

#### Blending of appointive and individual estates

(1) The intent of the donee of the power to assume control of the property for all purposes is manifested by provisions in the instrument of appointment which blend the appointive property with the property owned by the donee.—*Fiduciary Trust Co. v. Mishou*, 75 N.E.2d 3, 321 Mass. 615.—*Old Colony Trust Co. v. Allen*, 29 N.E.2d 310, 307 Mass. 40.

(2) Such blending occurs where the residuary clause of a will is construed to be an exercise of the power.—*Old Colony Trust Co. v. Allen*, supra.

#### Ineffective appointment by residuary clause

Where the power to appoint is exercised by the residuary clause of a will, but the provisions thereof, while valid as to the testator's estate, violate the rule against perpetuities as to the appointive property, the appointive estate passes as intestate property of the donee.—*Fiduciary Trust Co. v. Mishou*, 75 N.E. 2d 3, 321 Mass. 615.

7. Mass.—*Fiduciary Trust Co. v. Mishou*, supra.

8. Mass.—*Amerige v. Attorney General*, 88 N.E.2d 126, 324 Mass. 648.—*Fiduciary Trust Co. v. Mishou*, 75 N.E.2d 3, 321 Mass. 615.—*Talbot v. Riggs*, 191 N.E. 360, 287 Mass. 144, 93 A.L.R. 164.—*Dunbar v. Hammond*, 125 N.E. 686, 234 Mass. 554.

49 C.J. p 1303 note 40.

**POX.** In its common acceptation, without any prefix, the term means "syphilis."<sup>1</sup>

**P. P. A.** See Abbreviations 1 C.J.S. p 276 note 5.

**P. P. I.** See Abbreviations 1 C.J.S. p 276 note 5.

**PRACTIC.** The term "practic" is derived from the Greek word "*Πρακτική*," meaning practical science.<sup>2</sup>

**PRACTICA.** In Spanish law, procedure.<sup>3</sup>

**PRACTICABLE.** The word "practicable," as defined by lexicographers, has a number of significations,<sup>4</sup> and is variously defined as meaning capable of being put into practice, done, or accomplished;<sup>5</sup> capable of being done or accomplished<sup>6</sup> with available means or resources;<sup>7</sup> capable of being performed or effected;<sup>8</sup> feasible;<sup>9</sup> feasible, fair, and convenient;<sup>10</sup> possible of execution or performance.<sup>11</sup>

The word is also defined as meaning that which may be done, practiced, or accomplished;<sup>12</sup> that which may be practiced or performed;<sup>13</sup> that which can be put into practice;<sup>14</sup> that which is performable, feasible, possible.<sup>15</sup>

It is further defined as meaning passable;<sup>16</sup> usable;<sup>17</sup> being of practical value or advantage; desirable.<sup>18</sup>

Whether a thing is practicable depends on the actualities, the very facts and circumstances of the case,<sup>19</sup> and an act is practicable if conditions and circumstances are such as to permit its performance or to render it feasible;<sup>20</sup> but a thing is not practicable if some element essential to its accomplishment is lacking.<sup>21</sup>

"Practicable" has been held equivalent to, or synonymous with, "feasible" see 35 C.J.S. p 758 note 58, "necessary" see 65 C.J.S. p 270 note 60, and "prac-

1. W.Va.—Swindell v. Harper, 41 S. E. 117, 118, 51 W.Va. 381.

2. Miss.—Joyner v. State, 179 So. 573, 575, 181 Miss. 245, 115 A.L.R. 954.

3. Escriche Diccionario.

4. Tex.—Corpus Juris quoted in Holyfield v. State, 63 S.W.2d 386, 388, 124 Tex.Cr. 422.

Wash.—State v. Stevens County Superior Court, 228 P. 842, 844, 131 Wash. 20.

5. Pa.—Unverzagt v. Prestera, 13 A. 2d 46, 48, 339 Pa. 141.

S.C.—Corpus Juris cited in Fort Sumter Hotel v. South Carolina Tax Commission, 21 S.E.2d 393, 396, 201 S.C. 50.

Tex.—Holyfield v. State, 63 S.W.2d 386, 388, 124 Tex.Cr. 422.

W.Va.—Beech Fork Coal Co. v. Pocahontas Corporation, 152 S.E. 785, 788, 109 W.Va. 39. 49 C.J. p 1310 note 14.

6. Mo.—Corpus Juris cited in Klohr v. Edwards, App., 94 S.W.2d 99, 104.

S.C.—Corpus Juris cited in Fort Sumter Hotel v. South Carolina Tax Commission, 21 S.E.2d 393, 396, 201 S.C. 50.

#### Similarly expressed

Capable of being performed or accomplished.—Corpus Juris cited in Marsh v. People, 146 P.2d 218, 220, 112 Colo. 81.

7. Colo.—Corpus Juris cited in Marsh v. People, 146 P.2d 218, 220, 112 Colo. 81.

Mo.—Benjamin v. Metropolitan St. R. Co., 151 S.W. 91, 96, 245 Mo. 598.

8. N.Y.—Walbridge v. Brooklyn Trust Co., 128 N.Y.S. 686, 690, 143 App.Div. 502.

S.C.—Corpus Juris cited in Fort

Sumter Hotel v. South Carolina Tax Commission, 21 S.E.2d 393, 396, 201 S.C. 50.

9. Mo.—Corpus Juris cited in Klohr v. Edwards, App., 94 S.W.2d 99, 104.

Pa.—Unverzagt v. Prestera, 13 A.2d 46, 48, 339 Pa. 141.

Tex.—Trustees of Independent School Dist. of Cleburne v. Johnson County Democratic Executive Committee, Civ.App., 52 S.W.2d 68, 69.

W.Va.—Beech Fork Coal Co. v. Pocahontas Corporation, 152 S.E. 785, 788, 109 W.Va. 39. 49 C.J. p 1310 note 15.

10. U.S.—In re Kenilworth Bldg. Corporation, C.C.A.111, 105 F.2d 673, 676—In re Philadelphia & Reading Coal & Iron Co., C.C.A. Pa., 105 F.2d 354, 356—In re Philadelphia & Reading Coal & Iron Co., C.C.A.Pa., 104 F.2d 126, 127—In re Northern Redwood Lumber Co., D.C.Cal., 43 F.Supp. 15, 17.

11. Ill.—People v. Errant, 82 N.E. 271, 274, 229 Ill. 56—Staley v. Enfield Tp. Highway Comrs., 214 Ill. App. 403, 410.

#### Similarly defined

(1) Possible of reasonable performance.—Pittsburgh, etc., R. Co. v. Indianapolis, etc., Tract Co., 81 N. E. 487, 488, 169 Ind. 634—49 C.J. p 1310 note 19.

(2) Possible of accomplishment.—Wheeling, etc., R. Co. v. Toledo R., etc., Co., 14 Ohio Cir.Ct., N.S., 321, 323, 33 Ohio Cir.Ct. 303.

12. Ill.—People v. Errant, 82 N.E. 271, 274, 229 Ill. 56. 49 C.J. p 1310 note 23.

#### Similarly defined

Able to be done.—Fort Sumter Ho-

tel v. South Carolina Tax Commission, 21 S.E.2d 393, 396, 201 S.C. 50.

13. Tex.—Holyfield v. State, 63 S.W. 2d 386, 388, 124 Tex.Cr. 422.

W.Va.—Beech Fork Coal Co. v. Pocahontas Corporation, 152 S.E. 785, 788, 109 W.Va. 39.

33 C.J. p 1310 note 24.

14. Ill.—People v. Errant, 82 N.E. 271, 274, 229 Ill. 56—Staley v. Enfield Tp. Highway Comrs., 214 Ill. App. 403, 410.

15. Ill.—People v. Errant, 82 N.E. 271, 274, 229 Ill. 56.

49 C.J. p 1310 note 21.

16. N.C.—Mayo v. Thigpen, 11 S.E. 1052, 107 N.C. 63.

Tex.—Morgan v. State, 120 S.W.2d 1063, 1064, 135 Tex.Cr. 402—Ex parte Williams, 79 S.W.2d 325, 326, 128 Tex.Cr. 148.

17. Tex.—Morgan v. State, 120 S.W. 2d 1063, 1064, 135 Tex.Cr. 402—Ex parte Williams, 79 S.W.2d 325, 326, 128 Tex.Cr. 148.

#### Similarly defined

Admitting of use.—Mayo v. Thigpen, 11 S.E. 1052, 107 N.C. 63.

18. U.S.—The Zeller No. 12, 68 F. Supp. 795, 798.

19. Cal.—Reedy v. Smith, 42 Cal. 245, 251.

Iowa.—Gifford v. New Amsterdam Casualty Co., 248 N.W. 235, 236, 216 Iowa 23.

N.Y.—Walbridge v. Brooklyn Trust Co., 128 N.Y.S. 686, 690, 143 App. Div. 502.

20. Conn.—Gilmartin v. D. & N. Transp. Co., 193 A. 726, 728, 729, 123 Conn. 127, 113 A.L.R. 1322.

21. Iowa.—Gifford v. New Amsterdam Casualty Co., 248 N.W. 235, 236, 216 Iowa 23.

tical;"<sup>22</sup> and it may or may not be synonymous with "possible" see ante p 245 note 17.

It has been compared with, or distinguished from, "convenient" see 18 C.J.S. p 38 note 10, "reasonable,"<sup>23</sup> and "requisite."<sup>24</sup>

The word "practicable" is frequently used in statutes, but not always with the same meaning as discussed in the C.J.S. title Statutes § 338, also 49 C.J. p 1309 note 10.

As employed in the bankruptcy act, the term is defined in Bankruptcy § 822 a, and as used in statutes regulating the carriage of certain dangerous substances on vessels transporting passengers see the C.J.S. title Shipping § 179, also 58 C.J. p 531 note 26.

**Practicable precaution.** A phrase commonly defined as meaning that the act or responsibility is capable of being done or accomplished with available means or resources, or that the act is capable of being performed, put into practice, or possible of being accomplished, executed, or performed, and that, by the exercise of ordinary, reasonable care and caution, it is possible to avoid the commission of a wrongdoing,<sup>25</sup> such as by the use of reasonable precaution a person's life has been saved or an ac-

cident has been avoided.<sup>26</sup>

*Other phrases* employing the word "practicable" are set out in the note.<sup>27</sup>

**PRACTICABLY.** An adverb meaning in a practicable manner.<sup>28</sup> It has been distinguished from "immediately" see 42 C.J.S. p 392 note 10.

**PRACTICAL.** It has been said that the word is not a technical legal term,<sup>29</sup> and that it does not necessarily mean that which is physically possible or mechanically practicable.<sup>30</sup> "Practical" is defined as meaning feasible;<sup>31</sup> practicable;<sup>32</sup> capable of being done or accomplished;<sup>33</sup> fit for doing;<sup>34</sup> that which is possible of reasonable performance, including the element of reasonable safety under the existing circumstances.<sup>35</sup>

It is further defined as meaning efficient;<sup>36</sup> reasonable;<sup>37</sup> valuable for use;<sup>38</sup> trained by, or derived from, experience or practice; hence, skilled in the application of means in attaining particular ends, experienced.<sup>39</sup>

"Practical" has been held synonymous with "practicable" see ante note 22.

*Phrases* employing the word are set out in the note.<sup>40</sup>

22. Mo.—Klohr v. Edwards, App., 94 S.W.2d 99, 104.

S.C.—Woody v. South Carolina Power Co., 24 S.E.2d 121, 202 S.C. 73, 49 C.J. p 1310 note 25.

23. Ohio.—Wheeling, etc., R. Co. v. Toledo R., etc., Co., 14 Ohio Cir.Ct., N.S., 321, 324, 33 Ohio Cir.Ct. 303.

24. Cal.—Intagliata v. Shipowners & Merchants Towboat Co., 159 P. 2d 1, 11, 26 Cal.2d 365.

25. U.S.—Connor v. Wheeler, D.C. Pa., 77 F.Supp. 875, 879—Bowles v. Weitz, D.C.Pa., 64 F.Supp. 829, 833, 834—Bowles v. Pechersky, D.C. Pa., 64 F.Supp. 641, 645—Bowles v. Hageal, D.C.Pa., 64 F.Supp. 294, 297.

#### Similarly defined

"Practicable precaution" means that the act is capable of being done or that performance is possible and that by the exercise of ordinary, reasonable care and caution, it is possible to avoid the commission of a wrongdoing.—Woods v. Cobleigh, D. C.N.H., 75 F.Supp. 125, 130.

#### Feasible, fair, convenient

The term "practicable precaution" does not mean possible, but means feasible, fair, and convenient; that it is capable of being done with the exercise of reasonable care, inquiry or caution.—Bowles v. Ward, D.C. Pa., 65 F.Supp. 880, 890.

26. U.S.—Bowles v. Weitz, D.C.Pa.,

64 F.Supp. 829, 833, 834—Bowles v. Pechersky, D.C.Pa., 64 F.Supp. 641, 645—Bowles v. Hageal, D.C. Pa., 64 F.Supp. 294, 297.

#### 27. Phrases

(1) "As soon as practicable" see 6 C.J.S. p 784 notes 50–55.

(2) "Reasonably practicable" synonymous with "possible" see ante p 245 note 19.

(3) Additional phrases as to which more recent adjudications have not been found see 49 C.J. p 1310 notes 27–41.

28. Ill.—Streeter v. Streeter, 43 Ill. 155, 165.

29. Tex.—Bell Pub. Co. v. Garrett Engineering Co., 170 S.W.2d 197, 204, 141 Tex. 51.

30. S.C.—Woody v. South Carolina Power Co., 24 S.E.2d 121, 124, 202 S.C. 73—Locklear v. Southeastern Stages, 8 S.E.2d 321, 324, 193 S.C. 309.

31. Mo.—Corpus Juris cited in Klohr v. Edwards, App., 94 S.W. 2d 99, 104.

S.C.—Ingram v. Hughes, 169 S.E. 425, 429, 170 S.C. 1, 87 A.L.R. 1325.

Vt.—Moore v. Wilder, 28 A. 320, 321, 66 Vt. 33.

32. S.C.—Ingram v. Hughes, 169 S.E. 425, 429, 170 S.C. 1, 87 A.L.R. 1325.

33. Mo.—Klohr v. Edwards, App., 94 S.W.2d 99, 104.

34. N.C.—Hanes v. Southern Public Utilities Co., 131 S.E. 402, 406, 191 N.C. 13.

35. S.C.—Woody v. South Carolina Power Co., 24 S.E.2d 121, 124, 202 S.C. 73—Locklear v. Southeastern Stages, 8 S.E.2d 321, 324, 193 S.C. 309.

36. N.C.—Smith v. Charlotte Electric Ry. Co., 92 S.E. 382, 384, 173 N.C. 489.

37. Vt.—Moore v. Wilder, 28 A. 320, 321, 66 Vt. 33.

38. N.C.—Smith v. Charlotte Electric Ry. Co., 92 S.E. 382, 384, 173 N.C. 489.

39. Tex.—Bell Pub. Co. v. Garrett Engineering Co., 170 S.W.2d 197, 203, 141 Tex. 51.

#### 40. Phrases

(1) "Practical agriculture" defined see Agriculture § 1.

(2) "Practical fender" see the C.J. S. title Street Railroads § 196, also 49 C.J. p 1310 notes 49, 50, and 60 C.J. p 381 notes 8–16.

(3) "Practical mechanic" see 57 C.J.S. p 480 note 13.

(4) "Practical suspensoid" defined see Mines and Minerals § 3 h.

(5) "Practical use" is any use, whether by way of experiment or

**PRACTICALLY.** Reasonably;<sup>41</sup> very nearly.<sup>42</sup>

**PRACTICANTE.** In Spanish law, one exercising the profession of a minor surgeon.<sup>43</sup>

## PRACTICE.

As a noun. In its ordinary and popular sense,<sup>44</sup> "practice" is not a technical legal word,<sup>45</sup> and its meaning varies widely and depends very much on the connection in which it is used.<sup>46</sup> Standing alone the word is vague, and its outline becomes definite only when associated with other definite ideas,<sup>47</sup> and considered generally, without regard to context, the term is not capable of useful construction,<sup>48</sup> and anything may be asserted of it.<sup>49</sup> However, it has been said that in its ordinary and popular

sense it has a readily comprehensible and comprehensive meaning.<sup>50</sup>

"Practice" ordinarily implies uniformity and continuity,<sup>51</sup> and does not denote a few isolated acts,<sup>52</sup> and uniformity and universality, general notoriety and acquiescence, must characterize the actions on which a practice is predicated.<sup>53</sup> In a broad sense "practice" may include inaction or failure to act, as well as affirmative action.<sup>54</sup>

The word "practice" is variously defined as meaning custom;<sup>55</sup> usage;<sup>56</sup> habit;<sup>57</sup> deed;<sup>58</sup> action;<sup>59</sup> habitual action; habitual way or mode of action;<sup>60</sup> performance;<sup>61</sup> habitual performance;<sup>62</sup> a continued and habitual performance of acts.<sup>63</sup>

otherwise.—*Rice v. Garnhart*, 34 Wis. 453, 467, 17 Am.R. 448.

(6) Additional phrases as to which more recent adjudications have not been found see 49 C.J. p 1310 notes 51-57.

41. Colo.—*Beeler v. People*, 146 P. 762, 765, 58 Colo. 451.

### Phrases

(1) "Practically worthless" means actually, not theoretically, worthless.—*Thompson v. American State Bank of Detroit*, 239 N.W. 373, 374, 256 Mich. 245.

(2) Other phrases as to which more recent adjudications have not been found see 49 C.J. p 1311 notes 63-70.

42. Sask.—*Melvre v. Steine*, 5 Sask. L. 335, 337, 2 Dom.L.R. 106, 21 West.L.R. 687.

43. Puerto Rico.—*People v. Fajardo*, 16 Puerto Rico 760, 762.

44. U.S.—*McComb v. C. A. Swanson & Sons*, D.C.Neb., 77 F.Supp. 716, 734.

45. Tex.—*Missouri-Kansas-Texas R. Co. of Texas v. Ashlock*, Civ.App., 136 S.W.2d 943, 944.

Legal signification see *infra* p 472 note 2.

46. U.S.—*Baltimore & O. R. Co. v. U. S.*, Ill., 48 S.Ct. 520, 522, 277 U. S. 291, 72 L.Ed. 885.

S.C.—*State v. Blackwell*, 13 S.E.2d 433, 434, 196 S.C. 313.

47. U.S.—*Missouri Pac. R. Co. v. Norwood*, D.C.Ark., 42 F.2d 765, 769.

48. U.S.—*Baltimore & O. R. Co. v. U. S.*, Ill., 48 S.Ct. 520, 522, 277 U. S. 291, 72 L.Ed. 885.—*Missouri Pac. R. Co. v. Norwood*, D.C.Ark., 42 F.2d 765, 769.

49. U.S.—*U. S. v. Pennsylvania R. Co.*, Pa., 37 S.Ct. 95, 101, 242 U.S. 208, 228, 41 L.Ed. 251.—*Missouri Pac. R. Co. v. Norwood*, D.C.Ark., 42 F.2d 765, 769.

50. U.S.—*McComb v. C. A. Swanson*

& Sons, D.C.Neb., 77 F.Supp. 716, 734.

51. U.S.—*Wells Lamont Corp. v. Bowles*, Em.App., 149 F.2d 364, 366. Vt.—*Sanborn v. Weir*, 113 A. 228, 231, 95 Vt. 1.

52. Vt.—*Sanborn v. Weir*, supra. 49 C.J. p 1311 note 96.

53. U.S.—*McComb v. C. A. Swanson & Sons*, D.C.Neb., 77 F.Supp. 716, 734.

54. Wash.—*State ex rel. Public Utility Dist. No. 1 of Okanogan County v. Department of Public Service*, 150 P.2d 709, 715, 21 Wash. 2d 201.

55. Del.—*Keatley v. Grand Fraternity*, 78 A. 874, 875, 25 Del. 267. Md.—*West v. Sun Cab Co.*, 154 A. 100, 103, 160 Md. 476.

Tex.—*Missouri-Kansas-Texas R. Co. of Texas v. Ashlock*, Civ.App., 136 S.W.2d 943, 944.

Wash.—*State ex rel. Public Utility Dist. No. 1 of Okanogan County v. Department of Public Service*, 150 P.2d 709, 715, 21 Wash.2d 201. 49 C.J. p 1311 note 81.

56. Ky.—*Columbia L. Ins. Co. v. Tousey*, 153 S.W. 767, 769, 152 Ky. 447.

49 C.J. p 1311 note 94.

### Similarly expressed

Custom or usage; a customary usage.—*Wells Lamont Corp. v. Bowles*, Em.App., 149 F.2d 364, 366.

57. Del.—*Keatley v. Grand Fraternity*, 78 A. 874, 875, 25 Del. 267. Md.—*West v. Sun Cab Co.*, 154 A. 100, 103, 160 Md. 476.

Wash.—*State ex rel. Public Utility Dist. No. 1 of Okanogan County v. Department of Public Service*, 150 P.2d 709, 715, 21 Wash.2d 201. 49 C.J. p 1311 note 85.

58. Ky.—*Columbia L. Ins. Co. v. Tousey*, 153 S.W. 767, 769, 152 Ky. 447.

59. Hawaii.—*U. S. v. A Lot of Silk*, 4 Hawaii Fed. 113, 125.

Ky.—*Columbia L. Ins. Co. v. Tousey*, 153 S.W. 767, 769, 152 Ky. 447.

60. Md.—*West v. Sun Cab Co.*, 154 A. 100, 103, 160 Md. 476.

### Similarly defined

(1) Frequent, repeated, or customary action.

Ill.—*Kaesberg v. Ricker*, 177 Ill. App. 527, 529.

Mo.—*Marker v. Cleveland*, 252 S.W. 95, 96, 212 Mo.App. 467.

(2) Often repeated or customary action.—*Columbia Life Ins. Co. v. Tousey*, 153 S.W. 767, 769, 152 Ky. 447.

(3) Method of action; the action of doing something; something done constantly or usually.—*West v. Sun Cab Co.*, 154 A. 100, 103, 160 Md. 476.

61. Md.—*West v. Sun Cab Co.*, supra. 49 C.J. p 1311 note 88.

62. Mo.—*Marker v. Cleveland*, 252 S.W. 95, 96, 212 Mo.App. 467.

63. N.Y.—*People v. Devinny*, 125 N. E. 543, 545, 227 N.Y. 397.

S.C.—*State v. Blackwell*, 13 S.E.2d 433, 434, 196 S.C. 313.

### Similarly defined

(1) A succession of acts of a similar kind.—*Marker v. Cleveland*, 252 S.W. 95, 96, 212 Mo.App. 467—49 C. J. p 1311 note 93.

(2) Something habitually and uniformly performed.—*Wells Lamont Corp. v. Bowles*, Em.App., 149 F.2d 364, 366.

(3) An actual performance habitually or customarily engaged in.—*McComb v. C. A. Swanson & Sons*, D.C.Neb., 77 F.Supp. 716, 734.

(4) Regular conduct.—*Keatley v. Grand Fraternity*, 78 A. 874, 875, 25 Del. 267.

(5) Something done or left undone, with a degree of regularity, not occasionally or sporadically.—*State ex rel. Public Utility Dist. No. 1 of Okanogan County v. Department*



The term is also defined as meaning exercise;<sup>64</sup> operation;<sup>65</sup> proceeding;<sup>66</sup> execution; working;<sup>67</sup>

The word "practice" is further defined as meaning the application of science or knowledge to the wants of men in the recurring incidents of life, as, in the practice of law or medicine;<sup>68</sup> the exercise of any profession;<sup>69</sup> as the practice of medicine or law;<sup>70</sup> professional business.<sup>71</sup>

In an entirely different sense the word "practice" means artifice, treachery, a plot, a stratagem.<sup>72</sup>

The plural, "practices," means a succession of acts of a similar kind or in a like employment.<sup>73</sup>

As a verb, the word "practice" is defined as meaning to do, to perform;<sup>74</sup> to act or exercise;<sup>75</sup> to carry on;<sup>76</sup> to make a practice of;<sup>77</sup> and, in a

somewhat different sense, to apply, as a theory, to real life.<sup>78</sup>

*Practicing.* The habitual doing of certain things, the doing of an act more than once.<sup>79</sup>

*Comparisons and distinctions.* The word "practice," as a noun, has been held equivalent to or synonymous with, "course of action" see 20 C.J.S. p 1304 note 16, "custom" see Customs and Usages § 1, "mode" see 58 C.J.S. p 839 note 35, and "usage."<sup>80</sup> It has been distinguished from "art" see 6 C.J.S. p 772 note 17.

As a verb, the word "practice" has been held synonymous with "engage" see 30 C.J.S. p 247 note 66.

*Phrases* employing the word "practice" are set out in the note.<sup>81</sup>

of Public Service, 150 P.2d 709, 715, 21 Wash.2d 201.

64. Hawaii.—U. S. v. A Lot of Silk, 4 Hawaii Fed. 113, 125.

#### Similarly defined

Frequent and repeated exercise in any matter.—Missouri Pac. R. Co. v. Norwood, D.C.Ark., 42 F.2d 765, 769.

65. Ky.—Columbia L. Ins. Co. v. Tousey, 153 S.W. 767, 769, 152 Ky. 447.

Md.—West v. Sun Cab Co., 154 A. 100, 103, 160 Md. 476.

66. Ky.—Columbia L. Ins. Co. v. Tousey, 153 S.W. 767, 769, 152 Ky. 447.

#### Similarly defined

Process of accomplishing or carrying out.—U. S. v. A Lot of Silk, 4 Hawaii Fed. 113, 125.

67. Md.—West v. Sun Cab Co., 154 A. 100, 103, 160 Md. 476.

68. Ill.—People v. Blue Mountain Joe, 21 N.E. 923, 925, 129 Ill. 370. 49 C.J. p 1311 note 75.

#### Similarly expressed

Actual performance or application of knowledge, distinguished from theory, profession, etc., especially such actual performance habitually engaged in.—Columbia L. Ins. Co. v. Tousey, 153 S.W. 767, 769, 152 Ky. 447.

Performance or execution as opposed to speculation or theory.—U. S. v. A Lot of Silk, 4 Hawaii Fed. 113, 125.

69. Mo.—Marker v. Cleveland, 252 S.W. 95, 96, 212 Mo.App. 467. 49 C.J. p 1311 note 76.

70. Mo.—Marker v. Cleveland, supra.

71. Mo.—Marker v. Cleveland, supra.

72. U.S.—U. S. v. A Lot of Silk, 4 Hawaii Fed. 113, 125.

73. Md.—West v. Sun Cab Co., 154 A. 100, 103, 160 Md. 476. 49 C.J. p 1312 note 10.

74. N.J.—Blumberg v. State Bd. of Medical Examiners, 115 A. 439, 440, 96 N.J.Law 331.

S.C.—State v. Blackwell, 13 S.E.2d 433, 434, 196 S.C. 313.

Wash.—State ex rel. Laughlin v. Washington State Bar Ass'n, 176 P.2d 301, 309, 26 Wash.2d 914.

#### Similarly defined

(1) To do or perform often, customarily, or habitually.—State ex rel. Laughlin v. Washington State Bar Ass'n, supra.

(2) To do or perform frequently, customarily, or habitually.—State v. Bryan, 4 S.E. 522, 523, 98 N.C. 644.

(3) To do frequently, habitually, customarily.—Gaul v. Hoffman, 5 Pa. Co. 355.

(4) To perform by a succession of acts, as to practice gaming.—State v. Bryan, supra.

(5) "Customarily performing acts."—State v. Blackwell, 13 S.E.2d 433, 434, 196 S.C. 313.

75. S.C.—State v. Blackwell, 13 S.E. 2d 433, 434, 196 S.C. 313.

Wash.—State ex rel. Laughlin v. Washington State Bar Ass'n, 176 P.2d 301, 309, 26 Wash.2d 914.

#### Similarly defined

(1) To exercise a calling or profession.—People v. Blue Mountain Joe, 21 N.E. 923, 925, 129 Ill. 370.

(2) To exercise, as a profession, trade, art, etc.—State v. Bryan, 4 S.E. 522, 523, 98 N.C. 644.

(3) To exercise or follow a profession or calling, as one's usual business to gain a livelihood.—Jackson v. Hough, 18 S.E. 575, 577, 38 W. Va. 236.

(4) To exercise, follow, or work at, as a profession, trade, art, etc.; as, to practice law or medicine.—State

ex rel. Laughlin v. Washington State Bar Ass'n, 176 P.2d 301, 309, 26 Wash.2d 914.

76. S.C.—State v. Blackwell, 13 S.E. 2d 433, 434, 196 S.C. 313.

Wash.—State ex rel. Laughlin v. Washington State Bar Ass'n, 176 P.2d 301, 309, 26 Wash.2d 914.

#### Similarly defined

To carry on in practice, or repeated action.—State v. Bryan, 4 S.E. 522, 523, 98 N.C. 644.

77. Wash.—State ex rel. Laughlin v. Washington State Bar Ass'n, 176 P.2d 301, 309, 26 Wash.2d 914.

78. N.C.—State v. Bryan, 4 S.E. 522, 523, 98 N.C. 644.

79. N.Y.—People v. Lee, 272 N.Y.S. 817, 820, 151 Misc. 431.

80. D.C.—U. S. Shipping Board Emergency Fleet Corporation v. Levensaler, 290 F. 297, 300, 53 App. D.C. 322.

#### 81. Phrases

(1) "Practice a calling" see 12 C. J.S. p 837 note 69.

(2) "Practice a profession;" to hold oneself out as following that profession as a calling, as one's usual business.—Beaver Brook Resort Co. v. Stevens, 230 P. 121, 122, 76 Colo. 131.

By corporation within prohibitory statute see Corporations § 956.

(3) "Practice dentistry" see Physicians and Surgeons § 1.

(4) "Practice of architecture" see Architects § 5.

(5) "Practice of law" discussed generally see Attorney and Client § 3 g; and specifically within a statute prohibiting corporations from practicing law see Corporations § 956 b.

(6) "Practice of medicine" see Physicians and Surgeons § 1.

(7) "Practice of pharmacy" see Druggists § 1 d.

## Practice and Procedure in Law

The word "practice," as used in the law, is sometimes referred to as being a technical term,<sup>82</sup> but the word "procedure," as a legal term, is so broad in its signification that it is seldom employed as a term of art,<sup>83</sup> and it is not well understood,<sup>84</sup> and is difficult to describe or define.<sup>85</sup>

Together, the words "practice" and "procedure," in a larger sense, and as used in law,<sup>86</sup> mean or include the mode of proceeding by which a legal right is enforced,<sup>87</sup> as distinguished from the substantive law which gives or declares the right.<sup>88</sup> The words "practice" and "procedure," separately, have this same signification. "Practice" is defined as meaning the mode of proceeding by which a legal right is enforced,<sup>89</sup> as distinguished from the law which gives or defines the right;<sup>90</sup> and "procedure" is

likewise defined as meaning the modes of conduct of litigation and judicial business, as distinguished from the branch of the law which gives or defines rights.<sup>91</sup>

It is difficult to determine from the adjudicated cases whether the term "practice" covers matters which are included in the meaning of the word "procedure," or whether the term "procedure" includes such matters as are within the scope of the word "practice." It has been said that "practice" is broad enough to cover all matters of judicial procedure,<sup>92</sup> but it also has been said that the word "procedure," as generally defined,<sup>93</sup> includes in its meaning whatever is embraced by the three technical words "pleading," "evidence," and "practice,"<sup>94</sup> and "practice" in this sense means those legal rules which direct the course of proceeding to bring

(8) "Practice of surgery" see *Physicians and Surgeons* § 1.

(9) Other phrases employing the word "practice" as a noun and as to which more recent adjudications have not been found see 49 C.J. p 1311 notes 98-9, and phrases employing the word "practice" as a verb and as to which more recent adjudications have not been found see 49 C.J. p 1315 notes 69-80.

82. U.S.—Kellman v. Stoltz, D.C. Iowa, 1 F.R.D. 726, 728.

Cal.—People v. Aguinaldo, 39 P.2d 505, 506, 3 Cal.App.2d 254.

La.—Geddes & Moss Undertaking & Embalming Co. v. First Nat. Life Ins. Co., App., 177 So. 818, 821. 50 C.J. p 425 note 68.

83. U.S.—Kellman v. Stoltz, D.C. Iowa, 1 F.R.D. 726, 728.

La.—Washington Nat. Ins. Co. v. McLemore, App., 163 So. 773, 775. 50 C.J. p 425 note 66.

"Procedure" defined generally see post.

84. U.S.—Kellman v. Stoltz, D.C. Iowa, 1 F.R.D. 726, 728.

50 C.J. p 425 note 65.

85. Cal.—People v. Weatherford, App., 160 P.2d 210, 218.

86. Cal.—Woodward v. Southern Pac. Co., 94 P.2d 1028, 1032, 35 Cal.App.2d 130—King v. Schumacher, 89 P.2d 466, 472, 32 Cal.App.2d 172.

87. Cal.—Woodward v. Southern Pac. Co., 94 P.2d 1028, 1032, 35 Cal.App.2d 130—King v. Schumacher, 89 P.2d 466, 472, 32 Cal.App.2d 172.

Ohio.—Mahoning Valley Ry. Co. v. Santoro, 112 N.E. 190, 191, 93 Ohio St. 53—Snow v. Cincinnati St. Ry. Co., 75 N.E.2d 220, 222, 80 Ohio App. 369.

Wash.—State v. Pavelich, 279 P. 1102, 1103, 153 Wash. 379.

## Similarly expressed

(1) The mode of proceeding and the formal steps by which a legal right is enforced.

Iowa.—Bascom v. District Court of Cerro Gordo County, 1 N.W.2d 220, 222, 231 Iowa 360.

Mass.—Duggan v. Ogden, 180 N.E. 301, 302, 278 Mass. 432, 82 A.L.R. 765.

(2) The forms for enforcing rights as distinguished from the law which creates, defines, and protects rights.

Iowa.—Bascom v. District Court of Cerro Gordo County, supra.

Mass.—Duggan v. Ogden, supra.

88. Cal.—Woodward v. Southern Pac. Co., 94 P.2d 1028, 1032, 35 Cal.App.2d 130—King v. Schumacher, 89 P.2d 466, 472, 32 Cal.App.2d 172.

89. Utah.—Corpus Juris quoted in Lyte v. District Court of Salt Lake County, 61 P.2d 1259, 1261, 90 Utah 369.

49 C.J. p 1312 note 17.

## Similarly defined

(1) The mode and order of procedure in obtaining compensation for an injury by action or suit in the legally established courts, from the inception of such suit until it ends in the final determination of the court of last resort.—Fielschman v. Walker, 91 Ill. 318, 320—Universal Credit Co. v. Antonsen, 22 N.E.2d 790, 793, 301 Ill.App. 334.

(2) The method of conducting litigation involving rights and corresponding defenses.—Cates v. Heffernan, 18 So.2d 11, 15, 154 Fla. 422—Skinner v. City of Eustis, 2 So.2d 116, 147 Fla. 22, 135 A.L.R. 359.

90. Utah.—Corpus Juris quoted in Lyte v. District Court of Salt Lake County, 61 P.2d 1259, 1261, 90 Utah 369.

19 C.J. p 1312 note 18.

91. Cal.—Corpus Juris cited in

Intagliata v. Shipowners & Merchants Towboat Co., App., 151 P.2d 133, 139.

50 C.J. p 426 notes 71, 72.

## Similarly expressed

(1) The method or manner of going ahead in conducting a suit to enforce a right as distinguished from definition of a right.—Corpus Juris cited in Intagliata v. Shipowners & Merchants Towboat Co., Cal. App., 151 P.2d 133, 139—50 C.J. p 425 note 68.

(2) The methods of conducting litigation and judicial proceedings.—People v. Weatherford, Cal.App., 160 P.2d 210, 218—50 C.J. p 426 note 71 [a].

92. Vt.—Johnson v. Smith, 62 A. 9, 10, 78 Vt. 145, 2 L.R.A., N.S., 1000.

93. Cal.—People v. Aguinaldo, 39 P.2d 505, 506, 3 Cal.App.2d 254. 50 C.J. p 425 note 67.

94. U.S.—Kellman v. Stoltz, D.C. Iowa, 1 F.R.D. 726, 728.

Cal.—People v. Aguinaldo, 39 P.2d 505, 506, 3 Cal.App.2d 254.

Ill.—Hunt v. Rosenbaum Grain Corporation, 189 N.E. 907, 911, 355 Ill. 504.

La.—Geddes & Moss Undertaking & Embalming Co. v. First Nat. Life Ins. Co., App., 177 So. 818, 821—Washington Nat. Ins. Co. v. McLemore, App., 163 So. 773, 775.

50 C.J. p 425 note 68.

## Similarly expressed

(1) "It includes whatever is meant by the three technical words, 'pleading, evidence, and practice,' and perhaps nothing more."—Kansas City v. O'Connor, 36 Mo.App. 594, 598.

(2) If the word "procedure" is to be given its widest significance, it would include the whole of the case, including pleading, evidence, and practice.—Commonwealth v. Hamilton, 74 Pa.Super. 419, 423.

parties into the court and the course of the court after they are brought in.<sup>95</sup>

"Practice and procedure" is that which regulates the formal steps in an action or other judicial proceeding;<sup>96</sup> the course of procedure in courts; the form, manner, and order in which proceedings have been and are accustomed to be had; the form, manner, and order of conducting and carrying on suits or prosecutions in the courts through their various stages, according to the principles of law, and the rules laid down by the respective courts.<sup>97</sup> It has reference to the manner in which the power to adjudicate or determine is exercised,<sup>98</sup> and deals with writs, summonses, pleadings, affidavits, notices, motions, petitions, orders, trials, judgments, appeals, costs, and executions.<sup>99</sup>

The word "practice," as a legal word, has been given various definitions, some in broader terms than others,<sup>1</sup> and it is defined as meaning the form, manner, and order of conducting and carrying on suits or prosecutions in the courts through their various stages, according to the principles of law, and the rules laid down by the respective courts;<sup>2</sup> the form, manner, and order in which proceedings have been and are accustomed to be had;<sup>3</sup> the law which regulates the formal steps in an action or other proceeding;<sup>4</sup> the course of procedure in the courts,<sup>5</sup> which, in a general sense, includes pleadings.<sup>6</sup> "Practice" refers to the rules adopted by every court to facilitate the transactions of the business before it in a proper and orderly manner,<sup>7</sup> and includes the formula by which jurisdiction is first asserted and afterward exercised in respect of any litigation in all

95. U.S.—Kellman v. Stoltz, D.C. Iowa, 1 F.R.D. 726, 728.

Ill.—Hunt v. Rosenbaum Grain Corporation, 189 N.E. 907, 911, 355 Ill. 504.

La.—Washington Nat. Ins. Co. v. Mc-Lemore, App., 163 So. 773, 775.

Utah.—Lyte v. District of Salt Lake County, 61 P.2d 1259, 1261, 90 Utah 369.

Va.—Commonwealth v. Huntington, 138 S.E. 650, 653, 148 Va. 97.

Wis.—In re Delmady's Estate, 27 N.W.2d 497, 498, 250 Wis. 389.  
49 C.J. p 1312 note 19 [a].

96. Cal.—People v. Central Pac. R. Co., 23 P. 303, 307, 83 Cal. 393.

Ohio.—Mahoning Valley Ry. Co. v. Santoro, 112 N.E. 190, 191, 93 Ohio St. 53—Snow v. Cincinnati St. Ry. Co., 75 N.E.2d 220, 222, 80 Ohio App. 369.

Wash.—State v. Pavelich, 279 P. 1102, 1103, 153 Wash. 379.

97. Ohio.—Mahoning Valley Ry. Co. v. Santoro, 112 N.E. 190, 191, 93 Ohio St. 53—Snow v. Cincinnati St. Ry. Co., 75 N.E.2d 220, 222, 80 Ohio App. 369.

Wash.—State v. Pavelich, 279 P. 1102, 1103, 153 Wash. 379.

98. Fla.—Sheldon v. Powell, 128 So. 258, 263, 99 Fla. 782.

99. Cal.—People v. Central Pac. R. Co., 23 P. 303, 307, 83 Cal. 393.

Iowa.—Bascom v. District Court of Cerro Gordo County, 1 N.W.2d 220, 222, 231 Iowa 360.

Mass.—Duggan v. Ogden, 180 N.E. 301, 302, 278 Mass. 432, 82 A.L.R. 765.

1. Fla.—Skinner v. City of Eustis, 2 So.2d 116, 147 Fla. 22, 135 A.L.R. 359.

Phrases employing the word "practice" in a legal sense and as to which more recent adjudications have not

been found see 49 C.J. p 1313 notes 21-25.

2. D.C.—Hilvering v. Continental Oil Co., 68 F.2d 750, 753, 63 App.D.C. 5.

Ill.—Hunt v. Rosenbaum Grain Corporation, 189 N.E. 907, 911, 355 Ill. 504—Therens v. Therens, 108 N.E. 712, 715, 267 Ill. 592.

Neb.—Corpus Juris quoted in Ralston v. Turner, 4 N.W.2d 302, 311, 141 Neb. 556.

Utah.—Corpus Juris quoted in Lyte v. District Court of Salt Lake County, 61 P.2d 1259, 1261, 90 Utah 369.

49 C.J. p 1312 note 15.

Similarly defined

(1) The form, manner, or order of instituting or conducting a suit or other judicial proceeding through its successive stages to the end in accordance with the rules and principles laid down by law or by the regulations and precedents of the courts.—Woodward v. Southern Pac. Co., 94 P.2d 1028, 1032, 35 Cal.App.2d 130—King v. Schumacher, 89 P.2d 466, 472, 32 Cal.App.2d 172.

(2) The manner in which a case shall be conducted and tried from inception to conclusion.—Hilvering v. Continental Oil Co., 68 F.2d 750, 753, 63 App.D.C. 5.

(3) All that relates to the manner and time in which a case shall be conducted and tried, from its inception to final judgment and execution.—Mack v. Carter, 183 So. 478, 479, 133 Fla. 313—49 C.J. p 1312 note 15 [b].

3. Neb.—Corpus Juris quoted in Ralston v. Turner, 4 N.W.2d 302, 311, 141 Neb. 556.

Utah.—Corpus Juris quoted in Lyte v. District Court of Salt Lake County, 61 P.2d 1259, 1261, 90 Utah 369.

49 C.J. p 1312 note 14.

4. Or.—State v. Farnham, 234 P. 806, 810, 114 Or. 32—In re McCormick's Estate, 144 P. 425, 427, 72 Or. 608.

Utah.—Corpus Juris quoted in Lyte v. District Court of Salt Lake County, 61 P.2d 1259, 1261, 90 Utah 369.

Similarly defined

(1) That which regulates the formal steps in an action or other judicial proceeding.

Alaska.—Currier v. Mihalick, 5 Alaska 251, 258.

Cal.—In re Morrison's Estate, 14 P. 2d 102, 104, 125 Cal.App. 504.

Ill.—Hunt v. Rosenbaum Grain Corporation, 189 N.E. 907, 911, 355 Ill. 504—Hoffman v. Paradis, 102 N.E. 253, 254, 259 Ill. 111.

(2) That which regulates the formal steps in a judicial proceeding.—Lyte v. District of Salt Lake County, 61 P.2d 1259, 1261, 90 Utah 369.

(3) Additional definitions of similar import see 49 C.J. p 1312 note 16 [a].

5. Neb.—Corpus Juris quoted in Ralston v. Turner, 4 N.W.2d 302, 311, 141 Neb. 556.

Utah.—Corpus Juris quoted in Lyte v. District Court of Salt Lake County, 61 P.2d 1259, 1261, 90 Utah 369.

49 C.J. p 1312 note 12.

6. Neb.—Corpus Juris quoted in Ralston v. Turner, 4 N.W.2d 302, 311, 141 Neb. 556.

Utah.—Corpus Juris quoted in Lyte v. District Court of Salt Lake County, 61 P.2d 1259, 1261, 90 Utah 369.

48 C.J. p 1312 note 13.

7. Utah.—Corpus Juris quoted in Lyte v. District Court of Salt Lake County, 61 P.2d 1259, 1261, 90 Utah 369.

49 C.J. p 1312 note 19.

its phases, until it is finally completed.<sup>8</sup> It has been said that practice deals with writs, summonses, pleadings, affidavits, notices, motions, petitions, orders, trials, judgments, appeals, costs, and executions.<sup>9</sup>

Procedure is the machinery for carrying on the suit,<sup>10</sup> and it includes pleading, process, evidence, and practice,<sup>11</sup> whether in the trial court or the appellate court, or in the processes by which causes are carried to appellate courts for review, or in laying the foundation for such review;<sup>12</sup> in fact, procedure includes every step which may be taken from the beginning to the end of a case.<sup>13</sup> Procedure is the means whereby the court reaches out to restore rights and remedy wrongs,<sup>14</sup> and it has been said that it must never become more important than the purpose which it seeks to accomplish.<sup>15</sup>

Under some circumstances "practice" and "procedure" are synonymous,<sup>16</sup> but under other circumstances the terms are distinguishable,<sup>17</sup> "procedure"

being the broader term<sup>18</sup> since it includes rules of evidence,<sup>19</sup> and evidence is generally regarded as a part of procedure, as stated in Evidence § 1 and Criminal Law § 530.

"Practice" has also been compared with, or distinguished from, "pleading" see Pleading § 1.

"Procedure" has been held equivalent to, or synonymous with, "process" see the C.J.S. title Process § 1, also 50 C.J. p 441 note 7, and has been compared with, or distinguished from, "form" see 37 C.J.S. p 113 note 48, "jurisdiction" see Courts § 15 c, "substantive law" see 52 C.J.S. p 1026 note 64, and "trial" see the C.J.S. title Trial § 1, also 50 C.J. p 425 note 68 [d].

**PRACTICO.** In Spanish law, an experienced man; an expert.<sup>20</sup>

**PRACTITIONER.** One who practices; especially, one who exercises an art, science, or profession, as law, medicine, or engineering.<sup>21</sup>

2. Neb.—*Corpus Juris* quoted in *Ralston v. Turner*, 4 N.W.2d 302, 311, 141 Neb. 556.

Utah.—*Corpus Juris* quoted in *Lyte v. District Court of Salt Lake County*, 61 P.2d 1259, 1261, 90 Utah 369.

49 C.J. p 1313 note 20.

9. Cal.—In *re Morrison's Estate*, 14 P.2d 102, 104, 125 Cal.App. 504.

49 C.J. p 1312 note 16 [b].

#### Matters included

The relative jurisdictions of the several courts; the modes by which and the extent to which controversies may be transferred, for trial or for review, from one tribunal to another; and, where several transfers are allowed, the order of sequence in such transfers, are all included in what is called the practice of the courts.—*Fleischman v. Walker*, 91 Ill. 318, 320.

10. Cal.—*Woodward v. Southern Pac. Co.*, 94 P.2d 1028, 1032, 35 Cal. App.2d 130—*King v. Schumacher*, 89 P.2d 466, 472, 32 Cal.App.2d 172.

Ohio.—*Jones v. Erie R. Co.*, 140 N.E. 366, 368, 106 Ohio 408.

Phrases employing the word "procedure" in a legal sense and as to which more recent adjudications have not been found see 50 C.J. p 426 notes 75, 76.

11. Cal.—*Woodward v. Southern Pac. Co.*, 94 P.2d 1028, 1032, 35 Cal. App.2d 130—*King v. Schumacher*, 89 P.2d 466, 472, 32 Cal.App.2d 172.

Ohio.—*Jones v. Erie R. Co.*, 140 N.E. 366, 368, 106 Ohio 408.

50 C.J. p 426 note 70.

12. Cal.—*Woodward v. Southern Pac. Co.*, 94 P.2d 1028, 1032, 35 Cal.App.2d 130—*King v. Schu-*

*macher*, 89 P.2d 466, 472, 32 Cal. App.2d 172.

Ohio.—*Jones v. Erie R. Co.*, 140 N.E. 366, 106 Ohio 408.

#### Similarly expressed

"As to the term 'procedure' I conceive it to include those rules and forms applicable in the administration of the remedies available in cases of invasions of primary rights of individuals in courts or other lawfully constituted tribunals and agencies. Such rules include both pleading and practice, including all rules and forms which govern the parties, their counsel and the court throughout the progress of the case from the time of its initiation until final judgment and its execution. It includes the subject of the burden of proof and its allocation, and in appropriate cases its shifting from party to party during the trial."—*Kellman v. Stoltz*, D.C.Iowa, 1 F.R.D. 726, 728.

13. Mo.—*Kirkville v. Munyon*, 91 S.W. 57, 58, 114 Mo.App. 567.

50 C.J. p 426 note 70.

#### Similarly expressed

The steps taken in an action or other legal proceeding.—*First Nat. Bank v. Sanford*, 83 Ill.App. 58, 59.

14. N.Y.—*Clark v. Kirby*, 153 N.E. 79, 82, 243 N.Y. 295—In *re Verly Bldg. Corporation*, 35 N.Y.S.2d 891, 892, 264 App.Div. 885—*Tioga County General Hospital v. Tidd*, 298 N.Y.S. 460, 474, 164 Misc. 273.

Or.—*Sheppard v. Blitz*, 163 P.2d 519, 523, 177 Or. 501.

#### Similarly expressed

(1) "Procedure" is the judicial process for enforcing rights and duties recognized by substantive law

and for justly administering redress for infraction of them.—*Sibbach v. Wilson & Co., Ill.*, 81 S.Ct. 422, 426, 312 U.S. 1, 85 L.Ed. 479—*Sims v. United Pacific Ins. Co., D.C.Idaho*, 51 F.Supp. 433, 435—*Union Cent. Life Ins. Co. v. Sobelson*, D.C.N.Y., 46 F. Supp. 931, 932.

(2) The word is commonly opposed to the sum of legal principles constituting the substance of the law, and denotes the body of rules, whether of practice or pleading, whereby rights are effectuated through the successful application of the proper remedies.—*People v. Weatherford*, Cal.App., 160 P.2d 210, 218.

15. N.Y.—*Clark v. Kirby*, 153 N.E. 79, 82, 243 N.Y. 295—In *re Verly Bldg. Corporation*, 35 N.Y.S.2d 891, 892, 264 App.Div. 885—*Tioga County General Hospital v. Tidd*, 298 N.Y.S. 460, 474, 164 Misc. 273.

Or.—*Sheppard v. Blitz*, 163 P.2d 519, 523, 177 Or. 501.

16. N.J.—*Morris v. Newark*, 62 A. 1005, 1006, 73 N.J.Law 268.

50 C.J. p 425 note 68 [b].

17. Cal.—*Woodward v. Southern Pac. Co.*, 94 P.2d 1028, 1032, 35 Cal.App.2d 130—*King v. Schumacher*, 89 P.2d 466, 472, 32 Cal. App.2d 172.

18. Ill.—*City of Chicago v. Williams*, 98 N.E. 666, 669, 254 Ill. 360.

50 C.J. p 425 note 68 [a].

19. Ill.—*City of Chicago v. Williams*, supra.

20. *Escrache Diccionario*.

21. *Webster New Int.D.*

"Practitioner" with respect to prac-

**PRADOS.** In Spanish law, fields.<sup>22</sup>

**PRÆ.** In Latin, before.<sup>23</sup>

**PRÆCIPE.** In practice, an original writ, drawn up in the alternative, commanding defendant to do the thing required or show the reason why he has not done it.<sup>24</sup> Also, a paper addressed to the prothonotary, entitled in the court out of which the writ is to issue, dated the day of its filing, containing with particularity the names of the parties, showing the form of the action, commanding, as its name denotes, the issuance of a writ of the kind and in the manner directed, and signed by the attorney or by the party, if he conducts his suit alone. Mere form is not a determining factor, but the paper, whatever its form, must contain a positive order to put the judicial machinery in motion.<sup>25</sup>

The commencement of an action by *præcipe* is discussed in Actions § 129 b (7), and the filing of a *præcipe* as the commencement of an action to stop the running of the statute of limitations is treated in Limitations of Actions § 265. The requirement of a *præcipe* for a transcript on appeal is treated in Appeal and Error § 1028 b. As a direction to the clerk of court to issue process see Process § 9.

**PRÆDIUM.** Latin, in the civil law, land; an estate; a tenement; a piece of landed property.<sup>26</sup>

*Prædium dominans.* In the civil law, the estate to which the service is due; the ruling estate.<sup>27</sup>

*Prædium serviens.* In the civil law, an estate subject to a privilege or service;<sup>28</sup> an estate which suffers a servitude or easement to another estate; the servient tenement.<sup>29</sup>

**PRÆFERRE PATRIAM LIBERIS REGEM DE-  
CET.** See 49 C.J. p 1316 note 9.

**PRÆMUNIRE.** In English law, the name of an offense against the king and his government, although not subject to capital punishment.<sup>30</sup>

**PRÆPROPERA CONSILIA BARO SUNT PROS-  
PERA.** See 49 C.J. p 1316 note 11.

**PRÆSCRIPTIO.** In the Roman law, limitation.<sup>31</sup>

*Maxims.* "Præscriptio" as the first word of maxims as to which there have been no recent applications see 49 C.J. p 1316 notes 14-16.

**PRÆSENTARE; PRÆSENTIA; PRÆSTAT;  
PRÆSUMATUR; PRÆSUMITUR; PRÆTEXTU.** As the first words of maxims as to which there have been no recent applications see 49 C.J. p 1316 notes 17-22, 28, 29.

**PRÆSUMERE.** A Latin word consisting of "præ" and "sumere."<sup>32</sup> It signifies to take or assume a matter beforehand, without proof; to take for granted.<sup>33</sup>

**PRÆSUMPTIO.** A Latin word meaning presumption. Also, intrusion, or the unlawful taking of anything.<sup>34</sup>

*Præsumptio juris et de jure.* A presumption of law and of right; a presumption which the law will not suffer to be contradicted; a conclusive or irrebuttable presumption.<sup>35</sup> It is sometimes written "presumptio juris et de jure."<sup>36</sup>

*Maxims.* "Præsumptio" and "præsumptiones" as the first words of maxims as to which there have been no recent applications see 49 C.J. p 1316 notes 23, 25-27.

**PRÆVENIRE.** A Latin term meaning to come before; to precede.<sup>37</sup>

tice of medicine see Physicians and Surgeons § 1.

A practitioner of a trade or profession, within the contemplation of a grandfather clause, is one who habitually holds himself out to the public as such, and, although the extent of his practice is not controlling, it must be sufficiently regular, according to the circumstances of the particular case.—State ex rel. Krausmann v. Streeter, 33 N.W.2d 56, 60, 61, 226 Minn. 458.

22. Cal.—Vernon Irr. Co. v. Los Angeles, 39 P. 762, 765, 106 Cal. 237.

23. Conn.—Morford v. Peck, 46 Conn. 380, 385.

24. Black L.D.

25. Del.—Casey v. Southern Corporation, 29 A.2d 174, 177.

26. Black L.D.  
See Easements § 1 d.

27. Ala.—Patterson v. Atlantic Coast Line R. Co., 81 So. 85, 90, 202 Ala. 583.

Ohio.—Morgan v. Mason, 20 Ohio 401, 409, 55 Am.D. 464.

28. Ala.—Patterson v. Atlantic Coast Line R. Co., 81 So. 85, 90, 202 Ala. 583.

Ohio.—Morgan v. Mason, 20 Ohio 401, 409, 55 Am.D. 464.

29. Ala.—Patterson v. Atlantic Coast Line R. Co., 81 So. 85, 90, 202 Ala. 583.

30. Black L.D.

31. U.S.—Campbell v. Holt, Tex., 6 S.Ct. 209, 210, 115 U.S. 620, 622, 29 L.Ed. 483.

S.C.—Brock v. Kirkpatrick, 48 S.E. 72, 79, 69 S.C. 231.

32. Conn.—Morford v. Peck, 46 Conn. 380, 385.

"Præ" defined see ante note 23.

"Sumere" defined see the C.J.S. definition Sumere, also 49 C.J. p 1340 note 51.

33. Conn.—Morford v. Peck, 46 Conn. 380, 385.

34. Black L.D.

35. Black L.D.

Applied in  
U.S.—Central Coal & Coke Co. v. Penny, Ark., 173 F. 340, 348, 97 C.C.A. 600.

36. U.S.—U. S. v. Chaves, N.M., 16 S.Ct. 57, 62, 159 U.S. 452, 40 L.Ed. 215—U. S. v. 2,184.81 Acres of Land in Sebastian, Crawford, and Franklin Counties, Ark., D.C.Ark., 45 F.Supp. 681, 683.

37. N.C.—Luton v. Badham, 37 S.E.

*Prævenio.* To go before.<sup>38</sup>

**PRAGMATICA.** That portion of the Spanish law which is apart from the royal decrees and ordinances.<sup>39</sup>

**PRAGMATICO.** In Spanish law, a commentator or glossator of the laws.<sup>40</sup>

**PRAIRIE.** An extensive tract of level or rolling land, destitute of trees, covered with coarse grass, and usually characterized by a deep fertile soil;<sup>41</sup> a meadow<sup>42</sup> or tract of grass land, especially a so-called natural meadow.<sup>43</sup> While "prairie" has been defined as meaning level grassy land,<sup>44</sup> it has also been said that prairie land may be far from level.<sup>45</sup> The definitions of the word as given by lexicographers are in accord with its popular use.<sup>46</sup>

**PRAISE.** The expression of love and gratitude for benefits received;<sup>47</sup> especially the joyful tribute of gratitude or homage rendered to the Divine Being; the act of glorifying or extolling the Creator; worship, often in song, in distinction from petition or confession.<sup>48</sup>

**PRAXIS JUDICUM EST INTERPRES LEGUM.** See 49 C.J. p 1317 note 53.

**PRAY.** Ask earnestly; beg; entreat; supplicate.<sup>49</sup>

**PRAYER.** A reverent petition to some divinity or object of worship.<sup>50</sup> Prayer is always worship, and is said to be a chief part of worship.<sup>51</sup>

In law a prayer is the request contained in a bill in equity that the court will grant the process,

aid, or relief which complainant desires, as stated in Equity § 215. The prayer for relief in actions at law is treated in Pleading § 95; in admiralty actions see Admiralty § 119 d. In the District of Columbia the word "prayer" is colloquially used to denote an instruction offered by one of the parties, as stated in Federal Courts § 325. For other references see Federal Courts §§ 128, 144, the index to the title Appeal and Error, and consult the Descriptive-Word Index.

**PRE.** A prefix commonly used and understood as denoting a priority of time or place,<sup>52</sup> and defined as meaning before, in front, in advance.<sup>53</sup>

**PREAMBLE.** A declaration of purpose;<sup>54</sup> an introduction or preface, as to a book, document, or the like; an introductory portion;<sup>55</sup> an introductory or explanatory statement.<sup>56</sup>

Preambles are frequently employed in ordinances, and as an aid to the construction of ordinances are discussed in Municipal Corporations § 442 h. Preambles are also employed in statutes and, in this connection, are defined in the C.J.S. title Statutes § 1, also 59 C.J. p 1004 notes 89 [a], [b]. The use of preambles is discussed in Statutes § 65, also 59 C.J. p 1004 note 89 [c]. The construction of a statute by reference to the preamble is treated in Statutes § 349, also 59 C.J. p 1004 note 88—p 1005 note 93. See also Constitutional Law §§ 68 a, 71 a.

**PRECARIO.** In Spanish law, that which is revocable, as a loan, at the will of him who makes it.<sup>57</sup>

**PRECARIOUS.** Uncertain; insecure.<sup>58</sup>

143, 146, 127 N.C. 96, 80 Am.S.R. 783, 53 L.R.A. 337.

38. N.Y.—*Peverelly v. People*, 3 Park.Cr. 59, 69.

39. *Escrache Diccionario*.

40. *Escrache Diccionario*.

41. Ind.—*Gardner v. Mann*, 76 N.E. 417, 418, 36 Ind.App. 694.

Kan.—*Interstate Galloway Cattle Co. v. Kline*, 32 P. 628, 629, 51 Kan. 23.

#### Similarly defined

A level or rolling tract of treeless land covered with coarse grass, and generally of rich soil, especially as in parts of the western United States.—*Gardner v. Mann*, 76 N.E. 417, 418, 36 Ind.App. 694.

42. Ind.—*Gardner v. Mann*, supra.

#### Phrases

(1) "Prairie grass" see 38 C.J.S. p 1072 note 87.

(2) "Prairie hay" see 39 C.J.S. p 803 note 13.

(3) "Prairie land" see Property § 7, also 49 C.J. p 1317 notes 45–48.

43. Kan.—*Interstate Galloway Cattle Co. v. Kline*, 32 P. 628, 629, 51 Kan. 23.

#### Similarly defined

Any natural grass land, as the so-called natural meadows.—*Gardner v. Mann*, 76 N.E. 417, 418, 36 Ind.App. 694.

44. Ind.—*Gardner v. Mann*, supra.

45. Minn.—*Jeffries v. Stromme*, 204 N.W. 541, 542, 164 Minn. 45.

46. Iowa.—*Brunell v. Hopkins*, 42 Iowa 429, 431.

49 C.J. p 1316 note 40.

47. Century D.

48. Ill.—*People v. District No. 24, etc., Bd. of Education*, 92 N.E. 251, 252, 245 Ill. 334, 29 L.R.A.N.S., 442, 19 Ann.Cas. 220.

49. Century D.

"Ask and pray" as expression of wish or desire see 6 C.J.S. p 790 note 73.L.

50. Cal.—*Ex parte Bohannon*, 111 P. 1039, 14 Cal.App. 321.

"Common prayer" defined see 15 C.J. S. p 591 note 77.

51. Ill.—*People v. Board of Education of District No. 24*, 92 N.E. 251, 252, 245 Ill. 334, 29 L.R.A.N.S., 442, 19 Ann.Cas. 220.

52. U.S.—*Standard Patent Process Corp. v. Endicott Johnson Corp.*, D.C.N.Y., 76 F.Supp. 703, 706.

53. Cal.—*Union Oil Co. of California v. Hane*, 80 P.2d 516, 518, 27 Cal.App.2d 106.

54. Wash.—*State v. Thurston County Super. Ct.*, 159 P. 92, 95, 96, 92 Wash. 16.

55. Ariz.—*Graves v. Alsap*, 25 P. 836, 842, 1 Ariz. 274.

56. N.J.—*Noice v. Schnell*, 137 A. 582, 586, 101 N.J.Eq. 252, 52 A.L.R. 965.

57. *Escrache Diccionario*.

58. Century D.  
49 C.J. p 1317 notes 70, 71.

**PRECATORY.** Derived from the Latin word "precor," to pray, and the suffix "ory," containing;<sup>59</sup> thus, literally, meaning prayerful.<sup>60</sup> According to its ordinary use it means beseeching;<sup>61</sup> prayerful;<sup>62</sup> entreating;<sup>63</sup> prayerful or entreating;<sup>64</sup> suppliant.<sup>65</sup> In this sense it does not embrace the idea of a command<sup>66</sup> or peremptory direction.<sup>67</sup> In its primal sense, as descriptive of an act relative to a right, it conveys the idea that the right is equivocal or uncertain, because it impliedly depends on the will of another who is besought to exercise his power over it.<sup>68</sup>

*Precatory words.* Words of recommendation, entreaty, or the like, accompanying a gift and implying a desire or wish on the part of the donor that the property given should be used for the benefit of some designated person or be applied to some designated purpose.<sup>69</sup> They are not imperative in form, since that would result in a contradiction in terms,<sup>70</sup> and they generally imply discretion unless a different sense is irresistibly forced by the context.<sup>71</sup> Precatory words are more often deemed mandatory when directed to an executor, but generally when directed to devisees are not made imperative unless it appears that they were intended to create a legal obligation.<sup>72</sup>

Precatory words are frequently employed in tes-

tamentary instruments, and are variously treated and discussed in the C.J.S. title Wills §§ 602, 831, 845, 1011, also 69 C.J. p 78 note 74-p 79 note 93, p 445 note 35-p 447 note 46, p 471 note 43-p 472 note 49, and p 716 note 56-p 727 note 62.

**PRECAUTION.** In its primary sense, caution previously employed; previous caution or care;<sup>73</sup> previous action.<sup>74</sup> In its secondary sense, a measure taken beforehand<sup>75</sup> to ward off danger<sup>76</sup> or secure certain advantages;<sup>77</sup> an active foresight designed to ward off possible evil or secure good results;<sup>78</sup> a precautionary act; as, to take precautions against accident.<sup>79</sup>

Precautions against injury required to be exercised within the law of negligence generally are treated in Negligence §§ 84-89; and as required of a municipal corporation with respect to obstructions or defects in its streets see Municipal Corporations §§ 835-838.

**PRECEDE.** To come first in order of time; to go before in place or order of time.<sup>80</sup>

"Precede" has been contrasted with "ensue" see 30 C.J.S. p 257 note 31.

*Preceding.* A word generally meaning "next before,"<sup>81</sup> although a different signification will be

59. Ky.—Bohon v. Barrett, 79 Ky. 378, 2 Ky.L. 371, 373.

60. Tex.—Paton v. Baugh, Civ.App., 265 S.W. 250, 254.

61. Ky.—Bohon v. Barrett, 79 Ky. 378, 2 Ky.L. 371, 373.

62. Tex.—Paton v. Baugh, Civ.App., 265 S.W. 250, 254.

63. "Precatory trust" defined see the C. J.S. title Trusts § 21, also 65 C.J. p 230 note 44.

64. Ky.—Bohon v. Barrett, 79 Ky. 378, 2 Ky.L. 371, 373.

65. Tex.—Paton v. Baugh, Civ.App., 265 S.W. 250, 254.

66. U.S.—U. S. v. 15,883.55 Acres of Land in Spartanburg County, S. C., D.C.S.C., 45 F.Supp. 558, 561.

67. Ky.—Bohon v. Barrett, 79 Ky. 378, 2 Ky.L. 371, 373.

68. Ky.—Bohon v. Barrett, supra.

69. Tex.—Paton v. Baugh, Civ.App., 265 S.W. 250, 254.

70. Tex.—Paton v. Baugh, supra.

71. Ky.—Bohon v. Barrett, 79 Ky. 378, 2 Ky.L. 371, 373.

72. Or.—Wemme v. Portland First Church of Christ Scientist, 219 P. 618, 627, 110 Or. 179.

73. 49 C.J. p 1317 note 83.

**Similarly defined**

Precatory words are words ex-

pressing direction, recommendation, desire, wish, request, and the like.—Bosworth v. Kilbourn, 201 S.W.2d 904, 906, 304 Ky. 628.

70. Or.—Wemme v. Portland First Church of Christ Scientist, 219 P. 618, 627, 110 Or. 179.

71. Ky.—Bosworth v. Kilbourn, 201 S.W.2d 904, 906, 304 Ky. 628.

72. Ky.—Bosworth v. Kilbourn, supra.

73. Ark.—Harris v. Hicks, 221 S.W. 472, 473, 143 Ark. 613.

Ky.—McKinney's Adm'x v. Cincinnati, N. O. & T. P. R. Co., 45 S.W. 2d 1031, 1034, 242 Ky. 167.

**Similarly defined**

Care previously employed to prevent mischief or to secure good result.—Fegan v. Lykes Bros. S. S. Co., 3 So.2d 632, 635, 198 La. 312.

As, his life was saved by precaution Ark.—Harris v. Hicks, 221 S.W. 472, 473, 143 Ark. 613.

**Phrases**

(1) "To use reasonable precaution" held equivalent to "in a careful and prudent manner" see 12 C.J. S. p 1146 note 69.

(2) Other phrases as to which more recent adjudications have not been found see 49 C.J. p 1318 notes 92-96.

74. La.—Fegan v. Lykes Bros. S. S. Co., 2 So.2d 632, 635, 198 La. 312.

75. La.—Fegan v. Lykes Bros. S. S. Co., supra.

76. Ky.—McKinney's Adm'x v. Cincinnati, N. O. & T. P. R. Co., 45 S.W.2d 1031, 1034, 242 Ky. 167.

77. Tex.—Rincon v. Berg Co., Civ. App., 60 S.W.2d 811, 813.

**Similarly defined**

A measure taken beforehand to ward off evil or secure good or success.—Harris v. Hicks, 221 S.W. 472, 473, 143 Ark. 613.

78. La.—Fegan v. Lykes Bros. S. S. Co., 3 So.2d 632, 635, 198 La. 312.

**Similarly defined**

Proven foresight.—Fegan v. Lykes Bros. S. S. Co., supra.

79. Ark.—Harris v. Hicks, 221 S.W. 472, 473, 143 Ark. 613.

80. Miss.—Planters' Mercantile Co. v. Braxton, 82 So. 323, 324, 120 Miss. 470.

81. Miss.—Planters' Mercantile Co. v. Braxton, supra.

49 C.J. p 1318 note 99.

**Phrases** employing the word as to which more recent adjudications have not been found see 49 C.J. p 1318 notes 2-8.

given to it if required by the instrument and the facts of the case.<sup>82</sup>

**PRECEDENT.** A draught of a conveyance, settlement, will, pleading, bill, or other legal instrument, which is considered worthy to serve as a pattern for future instruments of the same nature.<sup>83</sup>

A "precedent," within the rule requiring an established precedent to be followed in similar cases, is defined in Courts § 186.

**PRECEPT.** In law, a command or mandate in writing.<sup>84</sup> It is of equally extensive import with a writ<sup>85</sup> or process,<sup>86</sup> and includes warrants and processes in criminal cases as well as in civil.<sup>87</sup>

**PRECEPTOS.** In Spanish law, principles; doctrines; maxims.<sup>88</sup>

**PRECINCT.** A district within certain boundaries;<sup>89</sup> any district marked out and defined;<sup>90</sup> a minor territorial or jurisdictional division or jurisdiction.<sup>91</sup> Formerly, in England, it related to the district for which a high or petty constable was appointed.<sup>92</sup>

"Precinct" has been held synonymous with "beat" see 10 C.J.S. p 220 note 93, and has been distinguished from "county" see Counties § 1 b.

The term "precinct" or "precincts" is treated in various connections throughout this work, particular reference being made to the C.J.S. titles Counties

§ 40, Municipal Corporations § 81, and Religious Societies § 1, also 49 C.J. p 1319 notes 36-38. See also the index to the title Elections.

**PRECIO.** In Spanish law, price; valuation.<sup>93</sup>

**PRECIOUS.** Of great price or value; costly.<sup>94</sup>

**PRECIPICE.** A very steep perpendicular or overhanging place; an abrupt declivity; a cliff.<sup>95</sup>

**PRECIPITATE.** To throw down from a height; hurl headlong; to urge onward rashly; force forward prematurely; hasten.<sup>96</sup> It has been held synonymous with "prompt."<sup>97</sup>

**PRECIPITATION.** A term of well-known significance,<sup>98</sup> meaning the act of precipitating; the causing to happen or come to a crisis suddenly, unexpectedly, or too soon;<sup>99</sup> to hasten the occurrence of an event.<sup>1</sup>

**PRECIPITOUS.** The word "precipitous" has a meaning which denotes something steep, like, or of the nature of, a precipice, such as a precipitous cliff or a precipitous descent, associated with which is a suggestion of violence and danger.<sup>2</sup>

**PRÉCIS.** See *Fait Précis* 35 C.J.S. p 487 note 60.

**PRECISE.** A word of clear and well-defined meaning.<sup>3</sup> It means definite; exact; not vague or equiv-

82. Ga.—Simpson v. Robert, 35 Ga. 180.

Miss.—Planters' Mercantile Co. v. Braxton, 82 So. 323, 324, 120 Miss. 470.

83. Black L.D.

#### Phrases

(1) "Doctrine of precedents" see 27 C.J.S. p 1310 note 87.

(2) "Precedent condition" see "Condition Precedent" 15 C.J.S. p 811 note 72-p 812 note 78.

(3) "Precedents sub silentio," defined as meaning silent uniform course of practice, uninterrupted, although not supported by legal decisions.—Black L.D.—49 C.J. p 1318 note 12.

84. Mass.—Adams v. Voce, 1 Gray 51, 58.

N.Y.—Ackermann v. Berriman, 114 N.Y.S. 937, 938, 939, 61 Misc. 165.

85. N.Y.—Ackermann v. Berriman, supra.

49 C.J. p 1319 note 17.

86. Mass.—Adams v. Vose, 1 Gray 51, 58.

N.Y.—Ackermann v. Berriman, 114 N.Y.S. 937, 939, 61 Misc. 165.

49 C.J. p 1319 note 18.

87. Mass.—Adams v. Vose, 1 Gray 51, 58.

88. Escriche Diccionario.

89. Wyo.—Union Pac. R. Co. v. Ryan, 2 Wyo. 408, 418.

#### Phrases

(1) "Precinct bonds" see Counties § 41.

(2) Other phrases as to which more recent adjudications have not been found see 49 C.J. p 1319 note 89-p 1320 note 45.

90. U.S.—Union Pac. R. Co. v. Ryan, Wyo., 5 S.Ct. 601, 604, 113 U.S. 516, 28 L.Ed. 1098.

91. Ala.—Jarman v. Bennett, 93 So. 650, 651, 207 Ala. 654.

49 C.J. p 1319 note 24.

92. Wyo.—Union Pac. R. Co. v. Ryan, 2 Wyo. 408, 418.

93. Escriche Diccionario.

49 C.J. p 1320 note 47.

94. Webster New Int.D.

#### Phrases

(1) "Precious metals" defined as a term applied to gold and silver see 57 C.J.S. p 1074 note 48.

(2) "Precious stones" see Customs Duties § 45 d.

95. Tex.—Black v. State, 128 S.W.2d 406, 412, 137 Tex.Cr. 173.

96. New Standard D.

Used with reference to a casualty, it means to accelerate a casualty.—In re Cain, 133 P.2d 723, 726, 64 Idaho 389.

97. N.Y.—Tobias v. Lissberger, 12 N.E. 13, 15, 105 N.Y. 404, 59 Am.R. 509.

98. Cal.—Knock v. Industrial Acc. Commn., 253 P. 712, 714, 200 Cal. 456.

Idaho.—In re Cain, 133 P.2d 723, 726, 64 Idaho 389.

99. Cal.—Knock v. Industrial Acc. Commn., 253 P. 712, 714, 200 Cal. 456.

Idaho.—In re Cain, 133 P.2d 723, 726, 64 Idaho 389.

1. Cal.—Knock v. Industrial Acc. Commn., 253 P. 712, 714, 200 Cal. 456.

Idaho.—In re Cain, 133 P.2d 723, 726, 64 Idaho 389.

2. Mo.—Bornhoft v. City of Jefferson, App., 118 S.W.2d 93, 97.

3. Ind.—Barnard v. Graham, 22 N. E. 112, 113, 120 Ind. 135.



ocal;<sup>4</sup> having determinate limitations.<sup>5</sup> It has been held to be synonymous with "particular" see 67 C. J.S. p 881 note 5.

**Precisely.** Accurately; exactly; in conformity to a model.<sup>6</sup> It has been said that the word has a more restricted meaning than "substantially."<sup>7</sup>

**PRECLUDE.** To prevent or hinder by necessary consequence or implication.<sup>8</sup>

**PRECONCEIVE.** To think of beforehand, that is, before the execution of the act thought of.<sup>9</sup>

**PRECOR.** A Latin word meaning "to pray."<sup>10</sup>

**PREDECESSOR.** In common acceptation, one who goes before or precedes another in a given state, position, or office.<sup>11</sup> It does not necessarily express any relation of legal privity.<sup>12</sup>

"Predecessor" has been distinguished from "ancestor" see 3 C.J.S. p 1063 note 63.

**PREDESTINATION.** The purpose or decree of God from eternity respecting all events; especially, the preordination of men to everlasting happiness or misery; more especially, preordination to eternal life; election.<sup>13</sup>

**PREDIAL SERVITUDE.** See Easements § 1 d.

**PREDICATE.** As a noun, in grammatical analysis, the word or words of a sentence which assert something concerning the subject of the sentence.<sup>14</sup> As a verb, to found; to base.<sup>15</sup>

**PREDIO.** In Spanish law, an estate or interest in real property.<sup>16</sup>

**PREDISPOSE.** To give a tendency to; to make liable; as, to predispose the mind to friendship; debility predisposes the body to disease.<sup>17</sup>

**PREDOMINANT.** In its natural and ordinary signification, something greater or superior in power and influence to others, with which it is connected or compared.<sup>18</sup>

**PREDOMINATE.** The term is defined as meaning to have superior strength, power, or authority;<sup>19</sup> and it has been said that it signifies nothing more than a controlling influence over.<sup>20</sup>

**PREEMPTION.** A word derived from "præ" and "emptio," and defined as the act of buying before another; the act or right of purchasing before others.<sup>21</sup>

At common law, a term used to express the right of the king through his purveyors to buy provisions and other necessities for the use of his household at an appraised value in preference to all others, and even without the consent of the owner.<sup>22</sup>

In international and commercial law, the term is used as expressive of the right of a nation or country to detain the goods of strangers passing through its territories and seas in order to afford to its own subjects or citizens a preference of purchase.<sup>23</sup>

Preemption of public lands is discussed and treated in the C.J.S. title Public Lands § 44, also 50 C.J. p 931 note 2—p 933 note 5.

**PREEMPTOR.** See the C.J.S. title Public Lands § 44, also 49 C.J. p 1321 note 12.

**PREEXIST.** To exist before.<sup>24</sup>

#### 4. Webster New Int.D.

Phrases employing the word as to which more recent adjudications have not been found see 49 C.J. p 1320 notes 69—72.

5. Kan.—Wall v. Pierpont, 240 P. 251, 258, 119 Kan. 420.

6. Vt.—Ambrosini v. Pelaggi, 108 A. 916, 917, 94 Vt. 119.

7. Vt.—Ambrosini v. Pelaggi, supra.

8. Minn.—Strader v. Haley, 12 N. W.2d 608, 611, 216 Minn. 315, 150 A.L.R. 970.

"Precluded" synonymous with "estopped" within Negotiable Instruments Act see Bills and Notes § 485 d.

9. Mont.—State v. Spotted Hawk, 55 P. 1036, 1036, 22 Mont. 33.

"Preconceived malice" or "malice aforethought" see Homicide § 15.

10. Ky.—Bohon v. Barrett, 79 Ky. 378, 2 Ky.L. 371, 373.

11. U.S.—Lorillard Co. v. Peper, C. C.Mo., 65 F. 597, 598.

49 C.J. p 1321 note 86.

12. U.S.—Lorillard Co. v. Peper, supra.

13. Webster New Int.D.

#### Phrases

(1) "Absolute predestination" see 1 C.J.S. p 375 note 88.

(2) "Limited predestination" see 53 C.J.S. p 887 note 39.

14. Cal.—Bourland v. Hildreth, 26 Cal. 161, 232.

15. Webster New Int.D.

49 C.J. p 1321 note 93.

16. Escriche Diccionario. 49 C.J. p 1321 note 94.

17. Md.—Rosenburg v. State, 99 A. 680, 683, 129 Md. 418.

#### Similarly defined

To make liable or susceptible.—Rosenburg v. State, supra.

18. Mass.—Matthews v. Bliss, 22 Pick. 48, 53.

"Predominant motive" defined see 60 C.J.S. p 87 note 24.

19. Standard D.

20. Tex.—National Life & Accident Ins. Co. v. Patterson, Civ.App., 94 S.W.2d 189, 191.

21. N.Y.—Garcia v. Callender, 5 N. Y.S. 934, 53 Hun 12.

#### Similarly defined

The right of purchase before another.—U. S. v. Yankee Fuel Co., D.C. N.M., 195 F. 850, 852.

22. N.Y.—Garcia v. Callender, 26 N. E. 283, 125 N.Y. 307. 49 C.J. p 1321 note 7.

23. U.S.—U. S. v. Yankee Fuel Co., D.C.N.M., 195 F. 850, 852.

N.Y.—Garcia v. Callender, 26 N.E. 283, 284, 125 N.Y. 307.

24. Webster New Int.D.

"Preexisting debt" defined see 26 C. J.S. p 12 note 47.

**PREFECT.** A governor, commander, chief magistrate, or superintendent.<sup>25</sup>

**PREFER.** Bring in or offer; also, carry on.<sup>26</sup>

*Preferred.* A relative word, referring to something else, and meaning that the thing to which it is attached, whatever that may be, has some advantage over another thing of the same character, which but for this advantage would be like the other.<sup>27</sup>

**PREFERENCE.** In a general sense, the act of preferring one thing above another;<sup>28</sup> choice of one thing rather than another; estimation of one thing more than another;<sup>29</sup> the state of being preferred or chosen before others.<sup>30</sup>

As used with reference to debtor and creditor, the word "preference" contemplates the relation of existing creditors, having equal or similar rights and equities, at the time of the conveyance or transfer, whereby the rights of one are advanced over those of another in the competition for assets.<sup>31</sup> In this connection the term is defined as meaning the right which a creditor has over others to be paid first out of the assets of his debtor;<sup>32</sup> an advantage in the payment of a debt due him, acquired by one creditor over other creditors;<sup>33</sup> any advantage given by previous payment to one creditor, to which advantage all the other creditors were not parties;<sup>34</sup> the expression of a motive or desire to favor some creditors over others;<sup>35</sup> the paying or

securing to one or more of his creditors by an insolvent debtor the whole or a part of their claim, to the exclusion of the rest;<sup>36</sup> a payment to one creditor which will give or may possibly give him an advantage over others;<sup>37</sup> some advantage over another.<sup>38</sup> It can only arise by reason of some statutory provision or some fixed principle of common law which creates a special, superior right in certain creditors over others.<sup>39</sup>

"Preference" has been distinguished from "preferred claim" see 14 C.J.S. p 1189 note 9.1.

Preferences where the debtor-creditor relationship exists are treated in various titles throughout this work, particular reference being made to the indexes to the titles Assignments for the Benefit of Creditors, Bankruptcy, Banks and Banking, Corporations, Fraudulent Conveyances, and Insolvency. For other references to the use of the term in this connection see the Descriptive-Word Index.

Under constitutional and statutory provisions preference in appointment to public offices, positions, and employments is frequently given to honorably discharged members of the armed forces, and such provisions are treated generally in Officers § 35, and more specifically in Municipal Corporations, see the index to this title sub verbo "Veterans." Provisions against discharge of veterans from public service are treated in the C.J.S. titles States § 78, also 59 C.J. p 140 notes 4-7, and United States § 63, also 65 C.J. p 1298 notes 10-15.

## 25. Century D.

### In the United States

The title has been carried into several states where the legislation was framed on the model of the Code Napoleon.—Crespin v. U. S., N.M., 18 S.Ct. 53, 55, 168 U.S. 208, 42 L.Ed. 438—49 C.J. p 1321 note 15.

26. U.S.—Reg. v. Hamilton, 30 N.S. 322, 2 Can.Cr.Cas. 178, 183. 49 C.J. p 1322 notes 17, 19.

27. Wis.—Corpus Juris cited in In re Sletto's Estate, 272 N.W. 42, 45, 224 Wis. 178. 49 C.J. p 1322 note 21.

### Phrases

(1) "Preferred dividend" defined see Corporations § 458.

(2) "Preferred right" see Corporations § 219.

(3) "Preferred stock and stockholders" see Corporations §§ 220-235.

(4) Other phrases as to which more recent adjudications have not been found see 49 C.J. p 1322 notes 24-28.

28. Ga.—Keller v. State, 31 S.E. 92, 95, 102 Ga. 506.

Iowa.—Corpus Juris quoted in Andrew v. Farmers' & Merchants' State Bank of Cascade, 247 N.W. 797, 799, 215 Iowa 1150.

Md.—MacNabb v. Sheridan, 29 A.2d 271, 272, 181 Md. 245.

29. Ga.—Keller v. State, 31 S.E. 92, 95, 102 Ga. 506.

Iowa.—Corpus Juris quoted in Andrew v. Farmers' & Merchants' State Bank of Cascade, 247 N.W. 797, 799, 215 Iowa 1150.

### Similarly defined

Choice of one rather than another. —MacNabb v. Sheridan, 29 A.2d 271, 272, 181 Md. 245.

30. Iowa.—Corpus Juris quoted in Andrew v. Farmers' & Merchants' State Bank of Cascade, 247 N.W. 797, 799, 215 Iowa 1150.

Md.—MacNabb v. Sheridan, 29 A.2d 271, 272, 181 Md. 245. 49 C.J. p 1322 note 33.

31. U.S.—Adams v. City Bank & Trust Co. of Macon, Ga., C.C.A.Ga., 115 F.2d 453, 454.

Ga.—Booth v. Atlanta Clearing

House Ass'n, 63 S.E. 907, 908, 132 Ga. 100.

32. Ky.—Jackson v. Coons, 147 S. W.2d 45, 47, 285 Ky. 154, 132 A.L.R. 1403.

33. Miss.—Chism v. Citizens' Bank, 27 So. 637, 77 Miss. 599, 602. 49 C.J. p 1323 note 35.

34. Eng.—Sharp v. Jackson, [1899] A.C. 419, 423.

35. N.J.—Savage v. Miller, 39 A. 665, 666, 56 N.J.Eq. 432.

36. Ky.—Jackson v. Coons, 147 S.W. 2d 45, 47, 285 Ky. 154, 132 A.L.R. 1403.

49 C.J. p 1323 note 38.

37. U.S.—In re Hapgood, D.C.Mass., 11 F.Cas.No.6,044, 2 Lowell 200, 202.

Minn.—In re Stevens, 38 N.W. 111, 112, 38 Minn. 432.

38. B.C.—Edison Gen. Electric Co. v. Van Couver, etc., Tramway Co., 4 B.C. 460, 482.

39. Iowa.—Poweshiek County v. Merchants' Nat. Bank, 220 N.W. 63, 64.

*Phrases* employing the word are set out in the note.<sup>40</sup>

**PREFERENTIAL.** Giving, indicating, or having a preference or precedence.<sup>41</sup>

**PREFERMENT.** The act of preferring or esteeming more highly, or the state of being preferred.<sup>42</sup>

**PREFIX.** That which is prefixed; specifically, a significant syllable or particle used as the first element of a word, whether it is added before a complete word to modify or extend the meaning, or merely united with other particles.<sup>43</sup>

**PREGNANCY.** The existence of the condition beginning at the moment of conception, and terminating with the delivery of the child.<sup>44</sup> Being in a state of pregnancy is not necessarily inconsistent with being in sound health,<sup>45</sup> since "pregnancy" is neither a disease nor an injury, but is a natural condition for a married woman.<sup>46</sup>

**PREGNANT.** As an adjective, being with young, as a female, great with child.<sup>47</sup> As a noun, one who is with child.<sup>48</sup>

"Pregnant" has been held synonymous with "with child" see 14 C.J.S. p 1110 note 10.1; and has been compared with, or distinguished from, "delicate condition" see 26 C.J.S. p 692 note 36, and "quick with child" see 14 C.J.S. p 1110 note 10.1.

**PREGNANT NEGATIVE.** See the C.J.S. title Pleading § 151, also 49 C.J. p 269 note 22-p 274 note 59.

**PREJUDGMENT.** A term defined as meaning decision or condemnation in advance.<sup>49</sup> It has been held synonymous with "prejudice."<sup>50</sup>

**PREJUDICE.** Prejudice is a condition, or state of mind,<sup>51</sup> a mental attitude,<sup>52</sup> and ordinarily it is not capable of being proved by direct and positive evidence, but generally can be proved only by the circumstances, environment, association, relationship, and conduct of the person who entertains it.<sup>53</sup> It is a sinister quality,<sup>54</sup> and the very persons whom it actuates may be unconscious of its existence.<sup>55</sup>

It has been said that the word has no narrow, technical meaning in a legal sense, but is commonly used in the everyday affairs of life, and as so used

#### 40. Phrases

(1) "Preference right" to purchase public lands see the C.J.S. title Public Lands § 43, also 50 C.J. p 930 notes 68-71.

(2) "Preference shareholder" defined see Corporations § 220.

(3) "Preference stock" see Corporations § 220.

(4) Other phrases as to which more recent adjudications have not been found see 49 C.J. p 1323 notes 42-49.

#### 41. Webster New Int.D.

##### Preferential right

(1) A prior right.

U.S.—Denver City Tramway Co. v. Norton, Colo., 141 F. 599, 604, 73 C.C.A. 1, 6.

Colo.—Denver City Tramway Co. v. Gustafson, 121 P. 1015, 1019, 21 Colo.App. 478.

(2) A superior right.—Denver City Tramway Co. v. Gustafson, supra.

(3) As applied to corporate stock see Corporations § 220.

##### Other phrases

(1) "Preferential dividend" defined see Corporations § 453.

(2) "Preferential voting;" power of the legislature to restrict or extend, see Elections § 12; for other specific references see the title index to Elections.

(3) Additional phrases as to which more recent adjudications have not been found see 49 C.J. p 1323 notes 62-65.

42. Ind.—Duvall v. State, 166 N.E. 603, 604, 92 Ind.App. 134.

43. New Standard D.

Prefixes appearing before means of persons see Names § 5.

44. N.J.—State v. Loomis, 100 A. 160, 161, 90 N.J.Law 216.

S.C.—Lee v. Metropolitan Life Ins. Co., 186 S.E. 376, 382, 180 S.C. 475. "Commencement of life" see 53 C.J. S. p 881 notes 9-12.

45. Idaho.—Rasicot v. Royal Neighbors of America, 108 P. 1048, 1053, 18 Idaho 85, 138 Am.S.R. 180, 29 L.R.A., N.S., 433.

46. Or.—Carter v. Howard, 86 P.2d 451, 455, 160 Or. 507.

47. N.Y.—Eckhardt v. People, 22 Hun 525, 527.

"Pregnant with child" see 14 C.J.S. p 1110 note 10.1.

48. N.Y.—Eckhardt v. People, supra.

49. Century D.

50. Tex.—Sims v. State, 121 S.W.2d 350, 351, 135 Tex.Cr. 577.

49 C.J. p 1324 note 85 [a].

51. Okl.—Castleberry v. Jones, 99 P.2d 174, 179, 68 Okl.Cr. 414—Lee v. State, 92 P.2d 591, 593, 66 Okl.Cr. 351.

49 C.J. p 1324 note 89.

52. Ohio.—Cleveland Ry. Co. v. Myers, 197 N.E. 803, 804, 805, 50 Ohio App. 224.

53. Okl.—Castleberry v. Jones, 99 P.2d 174, 179, 68 Okl.Cr. 414—Lee v. State, 92 P.2d 591, 593, 66 Okl.Cr. 351.

351—State v. Parks, 239 P. 941, 942, 32 Okl.Cr. 61.

##### Similarly expressed

Prejudice can be determined only from acts or expressions of the individual.—Cleveland Ry. Co. v. Myers, 197 N.E. 803, 804, 805, 50 Ohio App. 224.

54. Tex.—Cortez v. State, 65 S.W. 536, 538, 44 Tex.Cr. 169.

55. Ohio.—Montalto v. State, 199 N.E. 198, 199, 51 Ohio App. 6.

Tex.—Cortez v. State, 69 S.W. 536, 538, 44 Tex.Cr. 169.

##### Unknowingly entertained

"It is often not known to be held by the person entertaining such prejudice; that is to say, one may have a prejudiced state of mind upon a subject against an idea, cause or person, and be wholly unconscious that he had any prejudice. In fact, upon casual thought, we are aware that many persons are prejudiced upon public questions, in matters of politics or religion, or on many other subjects, and by reason of such prejudice incapable of giving a dispassionate consideration to such question, and at the same time be totally unconscious that he is prejudiced, and would be quick to repudiate a suggestion that his state of mind is other than fair and open."—Castleberry v. Jones, 99 P.2d 174, 179, 68 Okl.Cr. 414—Lee v. State, 92 P.2d 591, 593, 66 Okl.Cr. 351—State v. Parks, 239 P. 941, 942, 32 Okl.Cr. 61.

is well understood by all persons of ordinary intelligence.<sup>56</sup> While the popular meaning of the word involves some grudge or ill will, as well as a preconceived opinion,<sup>57</sup> the term does not necessarily signify an enmity or ill will against a person.<sup>58</sup>

As a noun, "prejudice" is defined as meaning a bias<sup>59</sup> or leaning toward one side or the other of a question from considerations other than those belonging to it;<sup>60</sup> an unreasonable predilection or prepossession for or against anything, especially an opinion or leaning adverse to anything, formed without proper grounds or before suitable knowledge;<sup>61</sup> an opinion or judgment formed beforehand, or without due examination;<sup>62</sup> an opinion or decision of mind formed without due examination;<sup>63</sup> a prejudgment;<sup>64</sup> prepossession.<sup>65</sup> "Prejudice" also means to the injury or detriment of another;<sup>66</sup> but it is only detriment resulting from unfair judgment which constitutes legal prejudice.<sup>67</sup>

As a verb, the word "prejudice" is defined as meaning to injure or damage by some judgment or action; to cause injury to; hence, generally, to hurt; damage; injure; impair;<sup>68</sup> to cause any harm or damage or loss to;<sup>69</sup> to bias the mind by hasty and incorrect notions, and give it an unreasonable bent to one side or other of a cause; to

prepossess with unexamined opinions, or opinions formed without due knowledge of the facts and circumstances attending the question.<sup>70</sup>

"Prejudice" as a noun has been held synonymous with "prejudgment" see ante note 50, and has been distinguished from "bias" see 10 C.J.S. p 354 note 72; and as a verb has been held substantially similar to "defraud" see 26 C.J.S. p 683 note 12.1.

In law, prejudice is a bias on the part of judge, jury, or witness, which interferes with fairness of judgment.<sup>71</sup>

"Prejudice" is discussed and treated in various connections throughout this work, particular reference being made to the indexes to the titles Arbitration and Award, Criminal Law, Equity, Judges, and Juries. For other particular applications and specific uses of the term consult the Descriptive-Word Index.

**PREJUDICIAL.** The word "prejudicial" in its broad sense signifies tending to injure or impair, and in its restricted sense signifies being blinded by bias.<sup>72</sup> It may mean merely derogatory, or it may mean actually or naturally and probably bringing about a wrong result.<sup>73</sup> "Prejudicial" is defined as meaning disadvantageous;<sup>74</sup> harmful;<sup>75</sup> hurt-

56. *Okl.—Tegeler v. State*, 130 P. 1164, 1167, 9 *Okl.Cr.* 138.

57. *Ga.—Willis v. State*, 12 *Ga.* 444, 448.

58. *Ohio.—Montalto v. State*, 199 N. E. 198, 199, 51 *Ohio App.* 6.

59. *U.S.—Adelbert College of Western Reserve University v. Toledo, W. & W. R. Co.*, 47 F. 836, 843, 49 C.J. p 1324 note 81.

Phrases employing the word as to which more recent adjudications have not been found see 49 C.J. p 1325 notes 94-98.

60. *Fla.—Keen v. Brown*, 35 *So.* 401, 402, 46 *Fla.* 487.

*Ohio.—Keller v. Monarch Rubber Co.*, App., 41 N.E.2d 148, 149.

49 C.J. p 1324 note 81.

#### Similarly defined

A leaning toward one side of a cause for some reason other than its justice.—*Taylor v. F. W. Woolworth Co.*, 73 P.2d 1102, 1103, 146 *Kan.* 841.

61. *U.S.—Adelbert College of Western Reserve University v. Toledo, W. & W. R. Co.*, 47 F. 836, 843, 844, 49 C.J. p 1324 note 88.

62. *Okl.—Tegeler v. State*, 130 P. 1164, 1167, 9 *Okl.Cr.* 138.

*Wis.—Hungerford v. Cushing*, 2 *Wis.* 397, 405.

#### Similarly defined

(1) Judgment formed beforehand

without examination.—*Hudgins v. State*, 2 *Ga.* 173, 176.

(2) Judgment beforehand.—*State v. Anderson*, 37 P. 1, 14 *Mont.* 541.

(3) An opinion formed beforehand.—*Montalto v. State*, 199 N.E. 198, 199, 51 *Ohio App.* 6.

(4) The forming of an opinion without due knowledge or examination.—*Alabama Gas Co. v. Jones*, 13 *So.2d* 873, 876, 244 *Ala.* 413—*Yarbrough v. Mallory*, 144 *So.* 447, 448, 225 *Ala.* 579.

63. *U.S.—Adelbert College of Western Reserve University v. Toledo, W. & W. R. Co.*, 47 F. 836, 843, 49 C.J. p 1324 note 84.

64. *Ohio.—Montalto v. State*, 199 N. E. 198, 199, 51 *Ohio App.* 6, 49 C.J. p 1324 note 85.

65. *Okl.—Tegeler v. State*, 130 P. 1164, 1167, 9 *Okl.Cr.* 138, 49 C.J. p 1324 note 86.

66. *Pa.—Commonwealth v. Powers*, 168 A. 328, 331, 110 *Pa.Super.* 319.

67. *D.C.—U. S. v. McWilliams*, D.C., 54 F.Supp. 791, 793.

68. *U.S.—Cole v. Loew's, Inc.*, D.C. Cal., 8 F.R.D. 508, 514.

69. *N.J.—State v. Caporale*, 89 A. 1034, 1035, 85 *N.J.Law* 495, 49 C.J. p 1325 note 2.

"A person is prejudiced or ag-

grieved, in the legal sense, when a legal right is invaded by the act complained of or his pecuniary interest is directly affected by the decree or judgment."—*American Surety Co. v. Jones*, 51 N.E.2d 122, 125, 384 *Ill.* 222—*Gloss v. People*, 102 N.E. 763, 766, 259 *Ill.* 332, *Ann.Cas.* 1914C 119.

70. *Mo.—State v. Barton*, 71 *Mo.* 288, 296.

71. *Fla.—Keen v. Brown*, 35 *So.* 401, 402, 46 *Fla.* 487.

72. *Ga.—Ludwig v. J. J. Newberry Co.*, 52 S.E.2d 485, 488, 78 *Ga.App.* 871.

73. *Kan.—State v. Farrar*, 176 P. 987, 988, 103 *Kan.* 724.

*Tex.—Corpus Juris cited in Fidelity Union Casualty Co. v. Koonce*, Civ. App., 51 S.W.2d 777, 780.

74. *Kan.—Prunty v. Consolidated Fuel, etc., Co.*, 103 P. 802, 803, 82 *Kan.* 541.

*Tex.—Corpus Juris cited in Fidelity Union Casualty Co. v. Koonce*, Civ. App., 51 S.W.2d 777, 780.

75. *Tex.—Corpus Juris cited in Fidelity Union Casualty Co. v. Koonce*, Civ.App., 51 S.W.2d 777, 780—*Coman v. Baker*, Civ.App., 179 S.W. 937, 939.

#### Phrases

(1) "Prejudicial evidence" see Evidence § 159.

ful;<sup>76</sup> injurious.<sup>77</sup>

It has been held synonymous with "hurtful" see 41 C.J.S. p 374 note 96.

**PRELIMINARY.** Preceding the main business, preparatory, preparatory.<sup>78</sup>

"Preliminary" has been held to be the antonym of "postliminary" see ante p 248 note 63.

*Phrases* employing the word are set out in the note.<sup>79</sup>

**PREMATURE.** Happening, arriving, existing, or performed before the proper or usual time.<sup>80</sup>

The word "premature" is treated in various connections throughout this work, particular reference being made to Actions § 127, Insurance § 1262, and Judgments § 113 b. For other particular applica-

tions and specific uses of the term consult the indexes to the various titles and the Descriptive-Word Index.

**PREMEDITATE.** To deliberate;<sup>81</sup> to think on, and revolve in the mind, beforehand;<sup>82</sup> to contrive and design previously;<sup>83</sup> to determine upon beforehand;<sup>84</sup> to meditate or deliberate before concluding to do the deed;<sup>85</sup> to intend;<sup>86</sup> to consider and examine the reasons for and against; to consider maturely.<sup>87</sup> It has been said that to premeditate implies an act or state of mind going before meditation or deliberation.<sup>88</sup>

"Premeditate" and "deliberate" have been held to be synonymous, and the terms have also been distinguished, see 26 C.J.S. p 689 notes 66, 67. "Premeditate" has been distinguished from "design" see 26 C.J.S. p 1238 note 91.

(2) "Prejudicial interference" in mining phraseology see Mines and Minerals § 3 h.

76. Kan.—Prunty v. Consolidated Fuel, etc., Co., 108 P. 802, 803, 82 Kan. 541.

Tex.—Corpus Juris cited in Fidelity Union Casualty Co. v. Koonce, Civ. App., 51 S.W.2d 777, 780.

77. Tex.—Corpus Juris cited in Fidelity Union Casualty Co. v. Koonce, Civ. App., 51 S.W.2d 777, 780.

49 C.J. p 1325 note 8.

78. U.S.—McComb v. C. A. Swanson & Sons, D.C.Neb., 77 F.Supp. 716, 732.

#### Similarly defined

That which precedes the main business.—Hostetter v. Muskingum Watershed Conservancy Dist., 16 N.E.2d 428, 431, 58 Ohio App. 161.

#### 79. Phrases

(1) "Preliminary activities" as used in Portal-to-Portal Act of 1947, 29 U.S.C.A. §§ 251-262, see Master and Servant § 151 (28).

(2) "Preliminary hearing" in criminal prosecutions defined see Criminal Law § 331 and other references in the title index.

(3) "Preliminary injunction" defined see Injunctions § 2 and other references in the title index.

(4) "Preliminary questions" see the C.J.S. title Witnesses § 344, also 70 C.J. p 554 note 82—p 556 note 2.

(5) "Preliminary requisition" see Extradition § 35.

(6) "Preliminary warrant" or other process in criminal prosecutions defined see Criminal Law § 316 and other references in the title index.

(7) Other phrases as to which more recent adjudications have not

been found see 49 C.J. p 1325 notes 18-21.

80. Webster New Int.D.

#### Phrases

(1) "Premature birth of a child" defined see 11 C.J.S. p 349 note 63.1.

(2) "Premature labor" defined see 51 C.J.S. p 474 note 57.

81. Fla.—Cook v. State, 35 So. 665, 673, 46 Fla. 20.

49 C.J. p 1326 note 30.

#### Similarly defined

(1) To deliberate upon or contrive in advance.—Walcher v. Territory, 90 P. 887, 888, 18 Okl. 528.

(2) To deliberate upon the doing of an act beforehand.—State v. Strothers, 8 Ohio S. & C. P. 357, 359. 7 Ohio N.P. 228.

(3) To weigh in the mind.—Milton v. State, 6 Neb. 136, 143.

(4) To reflect upon.—Milton v. State, supra.

82. Cal.—People v. Honeycutt, 172 P.2d 698, 703, 29 Cal.2d 52—People v. Bender, 163 P.2d 8, 19, 27 Cal. 2d 164—People v. Thomas, 156 P. 2d 7, 17, 25 Cal.2d 880—People v. Nichols, 198 P.2d 538, 542, 88 Cal. App.2d 221.

#### Similarly defined

(1) To think, consider, or revolve in the mind beforehand.—Cook v. State, 35 So. 665, 673, 46 Fla. 20—40 C.J. p 1326 note 41.

(2) To think about beforehand.—Walcher v. Territory, 90 P. 887, 888, 18 Okl. 528—49 C.J. p 1326 note 40.

(3) To think of in advance. Neb.—Carleton v. State, 61 N.W. 699, 712, 43 Neb. 373.

Wis.—Perugi v. State, 80 N.W. 593, 597, 104 Wis. 230, 76 Am.S.R. 865.

(4) To think of a matter before it

is executed.—State v. Dodds, 46 S.E. 228, 231, 54 W.Va. 289.

83. Cal.—People v. Honeycutt, 172 P.2d 698, 703, 29 Cal.2d 52—People v. Bender, 163 P.2d 8, 19, 27 Cal.2d 164—People v. Thomas, 156 P.2d 7, 17, 25 Cal.2d 880—People v. Nichols, 198 P.2d 538, 542, 88 Cal. App.2d 221.

#### Similarly defined

(1) To contrive by previous meditation.—Stanley v. State, 199 S.W.2d 518, 150 Tex.Cr. 173.

(2) To plan, contrive, or scheme beforehand.—Craft v. State, 3 Kan. 450, 483.

(3) To design.—Perugi v. State, 80 N.W. 593, 597, 104 Wis. 230, 76 Am.S.R. 865.

84. Neb.—Carleton v. State, 61 N.W. 699, 712, 43 Neb. 373.

Wis.—Perugi v. State, 80 N.W. 593, 597, 104 Wis. 230, 76 Am.S.R. 865.

#### Similarly defined

To conceive of a thing before it is executed.—Commonwealth v. Smith, 2 Wheel.Cr., N.Y., 79, 86.

85. Tex.—Stanley v. State, 199 S.W. 2d 518, 150 Tex.Cr. 173.

#### Similarly defined

To meditate upon previously.—Walcher v. Territory, 90 P. 887, 888, 18 Okl. 528.

86. Wis.—Perugi v. State, 80 N.W. 593, 597, 104 Wis. 230, 76 Am.S.R. 865.

#### Similarly defined

To intend beforehand.—Commonwealth v. Tucker, 76 N.E. 127, 140, 189 Mass. 457, 7 L.R.A., N.S., 1056.

87. Neb.—Milton v. State, 6 Neb. 136, 143.

88. Tex.—Stanley v. State, 199 S.W. 2d 518, 150 Tex.Cr. 173.

**Premeditated.** Thought of beforehand, for any length of time, no matter how short;<sup>89</sup> previously contrived, designed, or intended;<sup>90</sup> to have formed in the mind by previous thought or meditation;<sup>91</sup> deliberate;<sup>92</sup> willful.<sup>93</sup> It has been said that "premeditated" includes within its meaning "meditation" and "deliberation."<sup>94</sup>

"Premeditated" has been held equivalent to, or synonymous with, "aforethought" see 2 C.J.S. p 1007 note 32, "deliberate" see 26 C.J.S. p 690 note 80, and "prepenne."<sup>95</sup>

It has been compared with, or distinguished from, "deliberate" see 26 C.J.S. p 690 note 82, and "willful."<sup>96</sup>

**PREMEDITATEDLY.** The word "premeditatedly" is defined as meaning planned, contrived, or schemed

beforehand;<sup>97</sup> thought of beforehand for any length of time, however short;<sup>98</sup> with fixed and preconceived intention formed before the act.<sup>99</sup> It has been said that "premeditatedly" does not mean "thought of" in the sense of "thought over."<sup>1</sup>

"Premeditatedly" has been held synonymous with "deliberately," and the terms have also been distinguished, see 26 C.J.S. p 691 notes 10, 11.

**PREMEDITATION.** The word "premeditation" is composed of "pre" and "meditation,"<sup>2</sup> and means meditation beforehand;<sup>3</sup> the act of meditating beforehand;<sup>4</sup> the act of premeditating.<sup>5</sup> Premeditation is the mental operation of thinking upon an act before doing it, or upon an inclination before carrying it out;<sup>6</sup> intent before the act;<sup>7</sup> a prior intention,<sup>8</sup> determination,<sup>9</sup> or purpose<sup>10</sup> to do the

89. Tex.—Stanley v. State, supra.  
Utah.—State v. Roedl, 155 P.2d 741,  
749, 107 Utah 538.  
49 C.J. p 1326 note 55.

#### Similarly defined

Thought over beforehand, for any length of time, however short.—  
State v. Blaine, 116 P. 660, 662, 64  
Wash. 122.

90. Fla.—Cook v. State, 35 So. 665,  
673, 46 Fla. 20.  
Utah.—Brannigan v. People, 24 P.  
767, 769, 3 Utah 488.

#### Similarly defined

(1) Contrived or designed previously.—Hawes v. State, 7 So. 302,  
304, 88 Ala. 37—Mitchell v. State, 60  
Ala. 26.

(2) Contrived beforehand, or designed previously.—Martin v. State,  
25 So. 265, 257, 119 Ala. 1.

91. Fla.—Cook v. State, 35 So. 665,  
673, 46 Fla. 20.  
Utah.—Brannigan v. People, 24 P.  
767, 769, 3 Utah 488.

#### Similarly defined

(1) Meditated or thought upon beforehand.—Keigans v. State, 41 So.  
886, 888, 52 Fla. 57.

(2) Previously considered or meditated.—Atkinson v. State, 20 Tex.  
523, 531.

(3) Conceived beforehand.—Pembrook v. State, 222 N.W. 956, 957, 117  
Neb. 759.

92. Fla.—Cook v. State, 35 So. 665,  
673, 46 Fla. 20.  
Utah.—Brannigan v. People, 24 P.  
767, 769, 3 Utah 488.

#### Phrases

(1) "Premeditated design" see  
Homicide § 33.

(2) "Premeditated malice" see  
Homicide § 33 b.

93. Utah.—Brannigan v. People, 24  
P. 767, 769, 3 Utah 488.

94. Utah.—Brannigan v. People, supra.

95. Dak.—Territory v. Bannigan, 46  
N.W. 597, 598, 1 Dak. 451.  
Fla.—Cook v. State, 35 So. 665, 671,  
46 Fla. 20.

N.Y.—People v. Clark, 7 N.Y. 385,  
393, 2 Edm.Sel.Cas. 280.  
Wis.—Sullivan v. State, 75 N.W. 956,  
960, 100 Wis. 283.

96. Ind.—Landreth v. State, 171 N.  
E. 192, 196, 201 Ind. 691, 72 A.L.R.  
891.

97. Kan.—State v. Johnson, 140 P.  
839, 840, 92 Kan. 441.  
Okl.—Easley v. State, 143 P.2d 166,  
170, 78 Okl.Cr. 1—Basham v. State,  
287 P. 761, 763, 47 Okl.Cr. 204.

98. Mo.—State v. Stogsdill, 23 S.W.  
2d 22, 26, 324 Mo. 105.  
49 C.J. p 1326 note 62 [b] (2).

99. Kan.—State v. Yarborough, 18  
P. 474, 478, 39 Kan. 581.

1. Okl.—Easley v. State, 143 P.2d  
166, 170, 78 Okl.Cr. 1—Basham v.  
State, 287 P. 761, 763, 47 Okl.Cr.  
204.

2. Fla.—Keigans v. State, 41 So.  
886, 888, 52 Fla. 57—Cook v. State,  
35 So. 665, 677, 46 Fla. 20.

3. N.Y.—People v. Kiernan, 3 N.Y.  
Cr. 247, 250.

#### Phrases

(1) "With premeditation" means  
with previous design formed.—State  
v. Fiske, 28 A. 572, 573, 63 Conn. 388.

(2) "With malice and premeditation" held equivalent to "with malice  
aforethought" see 2 C.J.S. p 1008  
note 37.

4. Neb.—Simmerman v. State, 17 N.  
W. 115, 14 Neb. 568.

5. Fla.—Keigans v. State, 41 So.  
886, 888, 52 Fla. 57—Cook v. State,  
35 So. 665, 677, 46 Fla. 20.

6. Wash.—State v. Moody, 51 P.  
356, 359, 13 Wash. 165.  
49 C.J. p 1327 note 73.

#### Similarly defined

(1) Thinking out beforehand.—  
State v. Spivey, 43 S.E. 475, 476, 132  
N.C. 989.

(2) Thinking over, deliberating  
upon, weighing in the mind beforehand.—Parker v. State, 161 P. 652,  
555, 24 Wyo. 491.

(3) Thinking about and forming a  
design or purpose before the commission of an act.—Commonwealth  
v. Webb, 97 A. 189, 191, 252 Pa. 187.

7. Okl.—Easley v. State, 143 P.2d  
166, 170, 78 Okl.Cr. 1—Basham v.  
State, 287 P. 761, 763, 47 Okl.Cr.  
204.

49 C.J. p 1327 note 70 [a] (1).

#### Similarly defined

(1) Design or intent before the  
act.—State v. McGaffin, 13 P. 560,  
562, 36 Kan. 315.

(2) A design formed to commit a  
crime, or to do some other thing before  
it is done.—Brannigan v. People,  
24 P. 767, 769, 3 Utah 488.

(3) Previous contrivance or design  
formed.—Simmerman v. State,  
17 N.W. 115, 14 Neb. 568.

8. Fla.—Matthews v. State, 177 So.  
321, 324, 130 Fla. 53—Buchanan v.  
State, 116 So. 275, 277, 95 Fla. 301  
—Lowe v. State, 105 So. 829, 831,  
90 Fla. 255.

Or.—State v. Ah Lee, 8 Or. 214, 221.

9. N.C.—State v. Cameron, 81 S.E.  
748, 749, 166 N.C. 379.  
49 C.J. p 1327 note 76.

#### Similarly defined

To form a prior determination to  
do the act.—State v. Wise, 36 S.E.  
2d 230, 232, 225 N.C. 746.

10. Ark.—Blevins v. State, 107 S.W.  
393, 394, 85 Ark. 195.

act in question; forethought;<sup>11</sup> previous deliberation;<sup>12</sup> prior consideration.<sup>13</sup>

"Premeditation" is also defined as meaning to think beforehand;<sup>14</sup> thought of beforehand<sup>15</sup> for any,<sup>16</sup> or some,<sup>17</sup> length of time, however short.

Premeditation is nothing more or less than a mental process, a series of mental attitudes,<sup>18</sup> and does not involve a constant purpose for a definite length of time.<sup>19</sup> No particular time is required for the mental process of premeditation,<sup>20</sup> and the intention to do the act need not have existed for any particular length of time before the act,<sup>21</sup> and it is as much premeditation if the intent entered into the mind of the guilty agent a moment before the act as though it entered the mind a considerable period of time before.<sup>22</sup>

Premeditation is where the intention to do the act has been formed before the attempt to execute it.<sup>23</sup>

"Premeditation" has been held equivalent to, or synonymous with, "aforethought" see 2 C.J.S. p 1007 note 32. "Premeditation" and "deliberation" have been held synonymous, and the terms have also been distinguished, see 26 C.J.S. p 692 notes 24, 25.

"Premeditation" as an element of murder in the first degree is defined and discussed in Homicide § 33. For other specific references consult the Descriptive-Word Index.

**PREMISES.** The word "premises" has various meanings depending on the subject matter in connection with which it is used.<sup>24</sup> It has no fixed legal significance,<sup>25</sup> and no definition applicable to every situation.<sup>26</sup>

The word has two entirely different meanings, and in popular usage signifies lands and tenements, and in this sense is defined in the C.J.S. title Property

11. Fla.—Cook v. State, 35 So. 665, 677, 46 Fla. 20.  
49 C.J. p 1327 note 71.

12. Fla.—Cook v. State, supra.  
49 C.J. p 1327 note 75.

**Similarly defined**

A deliberation and a continual persistence which indicates more perversity than will.—Brannigan v. People, 24 P. 767, 796, 3 Utah 488.

13. N.C.—State v. French, 34 S.E.2d 157, 162, 225 N.C. 276.

14. N.C.—State v. Wise, 36 S.E.2d 230, 232, 225 N.C. 746—State v. French, 34 S.E.2d 157, 161, 225 N.C. 276.

Pa.—Commonwealth v. Perrier, 3 Phila. 229, 232.

**Similarly defined**

(1) To think over a matter beforehand.—State v. French, 34 S.E.2d 157, 161, 225 N.C. 276.

(2) To think out, plan, or design beforehand.—State v. Russell, 145 P. 2d 1003, 1009, 106 Utah 110.

15. Mo.—State v. Cade, 34 S.W.2d 82, 83, 326 Mo. 1132.

N.M.—State v. Hall, 55 P.2d 740, 742, 40 N.M. 128—Torres v. State, 43 P. 2d 929, 931, 39 N.M. 191.

N.C.—State v. French, 34 S.E.2d 157, 162, 225 N.C. 276.

16. Minn.—State v. Prolow, 108 N. W. 873, 874, 98 Minn. 459.

Mo.—State v. Malone, 62 S.W.2d 909, 333 Mo. 594—State v. Ashcraft, 70 S.W. 898, 900, 170 Mo. 409—State v. Kotovsky, 74 Mo. 247, 249—State v. Klugore, 70 Mo. 546, 555.

N.C.—State v. Lewis, 183 S.E. 357, 359, 209 N.C. 191.

Okl.—Easley v. State, 143 P.2d 166, 169, 78 Okl.Cr. 1—Basham v. State, 287 P. 761, 763, 47 Okl.Cr. 204.  
49 C.J. p 1327 note 80.

17. N.C.—State v. Brown, 11 S.E.2d 321, 324, 218 N.C. 415—State v. Hawkins, 199 S.E. 284, 289, 214 N. C. 326—State v. Bowser, 199 S.E. 31, 33, 214 N.C. 249—State v. Payne, 197 S.E. 573, 579, 213 N.C. 719—State v. Buffkin, 183 S.E. 543, 548, 209 N.C. 117—State v. Evans, 150 S.E. 678, 679, 198 N.C. 82—State v. Steele, 130 S.E. 308, 312, 190 N.C. 506—State v. Benson, 111 S.E. 869, 871, 123 N.C. 795.

18. Philippine.—U. S. v. Beecham, 15 Philippine 272, 293.

19. W.Va.—State v. Farley, 23 S.E. 2d 616, 620, 125 W.Va. 266.

20. N.C.—State v. Buffkin, 183 S.E. 543, 548, 209 N.C. 117—State v. Evans, 150 S.E. 678, 679, 198 N.C. 82.

21. Fla.—Matthews v. State, 177 So. 321, 324, 130 Fla. 53—Buchanan v. State, 116 So. 275, 277, 95 Fla. 301—Powell v. State, 112 So. 608, 610, 93 Fla. 756—Lowe v. State, 105 So. 829, 831, 90 Fla. 255.

Okl.—Easley v. State, 143 P.2d 166, 170, 78 Okl.Cr. 1—Basham v. State, 287 P. 761, 763, 47 Okl.Cr. 204.

Wis.—Perugi v. State, 80 N.W. 593, 597, 104 Wis. 230, 76 Am.S.R. 865.

22. Fla.—Matthews v. State, 177 So. 321, 324, 130 Fla. 53—Buchanan v. State, 116 So. 275, 277, 95 Fla. 301—Lowe v. State, 105 So. 829, 831, 90 Fla. 255.

23. Or.—State v. Ah Lee, 8 Or. 214, 220.

24. U.S.—Corpus Juris quoted in O'Connor v. Great Lakes Pipe Line Co., C.C.A.Mo., 63 F.2d 523, 525, 526—Porter v. Tureen, D.C.Mo., 68 F. Supp. 214, 215.

Ga.—Deich v. Reeves, 48 S.E.2d 373, 375, 203 Ga. 596.

Md.—Jackson v. Birgfeld, 56 A.2d 793, 795, 189 Md. 552.

Mass.—Attorney General v. J. P. Cox Advertising Agency, 10 N.E.2d 255, 258, 298 Mass. 383—DePrizio v. F. W. Woolworth Co., 196 N.E. 910, 912, 291 Mass. 143—Wadman v. Boudreau, 170 N.E. 44, 46, 270 Mass. 198.

Mo.—State v. Myers, 147 S.W.2d 444, 447—Fulkerson v. Great Lakes Pipe Line Co., 75 S.W.2d 844, 846, 335 Mo. 1058.

Pa.—Corpus Juris cited in Littlejohn v. Rincoe, 49 A.2d 533, 534, 159 Pa. Super. 588.

Tex.—Lee v. State, 143 S.W.2d 389, 390, 140 Tex.Cr. 155—Comeaux v. State, 42 S.W.2d 255, 258, 118 Tex. Cr. 223.  
49 C.J. p 1327 note 85.

**Similarly expressed**

The word "premises" does not have one fixed and definite meaning but its meaning is to be determined by its context and is dependent on circumstances in which it is used.—Gibbons v. Brandt, C.C.A.Mo., 170 F. 2d 385, 387.

25. U.S.—Corpus Juris quoted in O'Connor v. Great Lakes Pipe Line Co., C.C.A.Mo., 63 F.2d 523, 525, 526.

Pa.—Corpus Juris cited in Littlejohn v. Rincoe, 49 A.2d 533, 534, 159 Pa. Super. 588.

Tex.—Lee v. State, 143 S.W.2d 389, 390, 140 Tex.Cr. 155.  
49 C.J. p 1327 note 86.

**No definite legal meaning**

Kan.—Merrill v. Farmers' Alliance Ins. Co., 122 P.2d 776, 782, 155 Kan. 31.

26. U.S.—O'Connor v. Great Lakes Pipe Line Co., C.C.A.Mo., 63 F.2d 523, 525.

§ 7, also 49 C.J. p 1328 note 9—p 1329 note 21. The term is also treated in its popular sense, as denoting lands and tenements, in Deeds § 22 b and in the C.J.S. title Workmen's Compensation Acts § 231, also 49 C.J. p 1329 notes 23, 24. See also the index to the title Landlord and Tenant and the Descriptive-Word Index.

In what has been said to be its primary sense,<sup>27</sup> the word "premises" is defined as meaning that which has been before mentioned;<sup>28</sup> matters previously stated or set forth;<sup>29</sup> statements previously made;<sup>30</sup> the foregoing statements;<sup>31</sup> that which has gone before;<sup>32</sup> that which is before;<sup>33</sup> that which precedes;<sup>34</sup> that which is put before;<sup>35</sup> that which is placed first; that which is sent before;<sup>36</sup> introduction.<sup>37</sup>

When used in its primary sense in a document or written instrument, ordinarily there can be no uncertainty with respect to the meaning of the word "premises,"<sup>38</sup> for in this sense the term implies a reference to previous matter contained therein<sup>39</sup> and concerning which something is proposed.<sup>40</sup>

When used in various other connections in written instruments, however, its exact meaning must be determined according to the intention of the parties as ascertained from the instrument, and the facts and circumstances attending its making.<sup>41</sup>

The stating part of a bill in equity is sometimes called the "premises," and is an essential part of the bill, as stated in Equity § 210.

In logic, "premises" is defined as meaning the two introductory propositions of a syllogism from which the conclusion is deduced.<sup>42</sup>

**PREMIUM.** A word of art with a well-defined meaning.<sup>43</sup> It signifies a reward or recompense for some act done;<sup>44</sup> a bonus;<sup>45</sup> compensation for the use of money;<sup>46</sup> a price for a loan; a sum in addition to interest.<sup>47</sup>

"Premium" has been held equivalent to, or synonymous with, "commission" see 15 C.J.S. p 582 note 16; and has been compared with or distinguished from "gross income" see 38 C.J.S. p 1082 note 63. "Premium" and "assessment" have been held synony-

27. Cal.—Alaska Imp. Co. v. Hirsch, 47 P. 124, 126, 119 Cal. 249.

Wyo.—Snow v. Duxstad, 147 P. 174, 183, 23 Wyo. 82.

28. S.C.—Berry v. Marion County Lumber Co., 93 S.E. 328, 329, 108 S.C. 108, Ann.Cas.1918E 877. 49 C.J. p 1327 note 93.

**Similarly defined**

What has been previously mentioned, without regard to the nature of the thing.—Sanford v. Irby, 4 L. J.Ch. 28, 28.

29. Wyo.—Snow v. Duxstad, 147 P. 174, 183, 23 Wyo. 82.

**Similarly defined**

(1) The aforesaid.—Snow v. Duxstad, supra.

(2) Facts previously stated.—Snow v. Duxstad, supra.

(3) What has been previously stated.—Boon v. Boon, 180 N.E. 792, 794, 348 Ill. 120.

(4) What has been stated before or above.—Snow, v. Duxstad, supra.

(5) The subject or thing previously expressed.—Beacon L., etc., Assur. Co. v. Gibb, 5 Can.App.Cas. 20, 37.

30. Mo.—Fulkerson v. Great Lakes Pipe Line Co., 60 S.W.2d 71, 73, 227 Mo.App. 882.

N.Y.—Gardner v. Bentley, 47 N.Y.S. 2d 746, 748, 183 Misc. 406.

49 C.J. p 1327 note 92.

"In the premises" defined see 42 C. J.S. p 483 note 82.

31. Wyo.—Snow v. Duxstad, 147 P. 174, 183, 23 Wyo. 82.

**Similarly defined**

The foregoing matter.—Littlejohn v. Rincoe, 49 A.2d 533, 535, 159 Pa. Super. 588.

32. U.S.—Old Dominion SS. Co. v. City of New York, D.C.N.Y., 286 F. 155, 156.

**Similarly defined**

What has gone before.—Boon v. Boon, 180 N.E. 792, 794, 348 Ill. 120.

33. Mo.—Fulkerson v. Great Lakes Pipe Line Co., 60 S.W.2d 71, 73, 227 Mo.App. 882.

49 C.J. p 1327 note 95.

34. Wyo.—Snow v. Duxstad, 147 P. 174, 183, 23 Wyo. 82.

35. N.Y.—Gardner v. Bentley, 47 N. Y.S.2d 746, 748, 183 Misc. 406.

Wyo.—Snow v. Duxstad, 147 P. 174, 183, 23 Wyo. 82.

36. Mass.—Doherty's Case, 2 N.E.2d 186, 187, 294 Mass. 363, 105 A.L.R. 576.

37. Mo.—Fulkerson v. Great Lakes Pipe Line Co., 60 S.W.2d 71, 73, 227 Mo.App. 882.

N.Y.—Gardner v. Bentley, 47 N.Y.S. 2d 746, 748, 183 Misc. 406.

49 C.J. p 1327 note 98.

38. Wyo.—Snow v. Duxstad, 147 P. 174, 183, 23 Wyo. 82.

39. Pa.—Littlejohn v. Rincoe, 49 A. 2d 533, 535, 159 Pa.Super. 588.

In its etymological sense, the term applies to that which has been before mentioned, and includes facts recited in the instrument in which it is used.—Berry v. Marion County Lumber Co., 93 S.E. 328, 329, 108 S.C. 108, Ann.Cas.1918E 877.

40. La.—Reynaud v. Bullock, 196 So. 29, 31, 195 La. 86.

Mo.—Fulkerson v. Great Lakes Pipe Line Co., 60 S.W.2d 71, 73, 227 Mo. App. 882.

49 C.J. p 1328 note 99 [a].

41. Ill.—Merchants' Bldg. Imp. Co. v. Chicago Exch. Bldg. Co., 71 N. E. 2d, 27, 210 Ill. 26, 102 Am.S.R. 145.

N.Y.—F. F. Proctor Troy Properties Co., Inc. v. Dugan Store, Inc., 181 N.Y.S. 786, 788, 191 App.Div. 685—Gardner v. Bentley, 47 N.Y.S.2d 746, 749, 183 Misc. 406.

42. Wyo.—Snow v. Duxstad, 147 P. 174, 183, 23 Wyo. 82.

43. Eng.—King v. Cadogan, 3 K.B. 485.

44. Cal.—Brown v. Board of Police Com'rs of City of Los Angeles, 136 P.2d 617, 619, 58 Cal.App.2d 473, 27 C.J. p 976 note 65.

**Similarly defined**

(1) A reward or recompense.—Farmers' and Bankers' Life Ins. Co. v. Whitney, 210 P. 646, 647, 112 Kan. 145.

(2) An award or recompense for some act done.—People v. Cohen, 289 N.Y.S. 397, 400, 160 Misc. 10.

45. Mont.—State v. Lutey, 179 P. 457, 458, 55 Mont. 545.

46. Ga.—Reynolds v. Bickers-Goodwin Co., 131 S.E. 55, 56, 161 Ga. 378.

47. Mont.—State v. Lutey, 179 P. 457, 458, 55 Mont. 545.



mous, and the terms have also been distinguished, see 6 C.J.S. p 1025 notes 36, 45.

The term "premium" is defined and discussed in Building and Loan Associations § 73. In connection with laws relating to gaming see Gaming §§ 1, 5, 88 b (4). "Premium," within the law of insurance, is defined in Insurance § 340; and for other references see the index to that title.

*Phrases* employing the word are set out in the note.<sup>48</sup>

**PRENSAJE.** In the Philippine Islands, the designation among merchants of the operation of baling hemp.<sup>49</sup> Also, according to the custom prevailing among hemp merchants and dealers in the Philippine Islands, the denomination of a charge, the amount of which depends on the then prevailing rate, made against the buyer.<sup>50</sup>

**PREPARATION.** In one sense the word means that which is prepared; something made; equipped or compounded for a particular purpose.<sup>51</sup> In a slightly different sense it means the act of preparing or fitting for some use or purpose; the operation of making ready for a specific end; disposition; adaptation.<sup>52</sup>

It has been compared with, or distinguished from, "attempt" see 7 C.J.S. p 689 note 48, "manufacture" see Manufactures § 1 a (4), and "preservation."<sup>53</sup>

"Preparation" as an element of an attempt to commit a crime is discussed in Criminal Law § 75

b; see also the index to that title. For other particular applications and specific uses of the term consult the Descriptive-Word Index.

**PREPARE.** To make ready; to provide with necessary means; to provide with what is appropriate or necessary.<sup>54</sup>

"*Prepared*" is defined as meaning put into a state for use.<sup>55</sup>

"Prepared" has been held equivalent to, or synonymous with, "fit" see 36 C.J.S. p 884 note 32.

**PREPAREDNESS.** State of being prepared; readiness; specifically, a state of military and naval preparation for adequate defense in case of possible hostilities;<sup>56</sup> and the word is generally understood to mean the possession on the part of this country of a larger and better army and navy.<sup>57</sup>

**PREPAY.** To pay beforehand; to pay the charge on in advance.<sup>58</sup>

**PREPAYMENT.** Payment beforehand, or in advance.<sup>59</sup> It has been said that the term is not necessarily the opposite of "final payment" see 36 C.J.S. p 763 note 8.

**PREPENSE.** Aforethought;<sup>60</sup> premeditated; thought of beforehand.<sup>61</sup>

The term has been held equivalent to, or synonymous with, "aforethought" see 2 C.J.S. p 1007 note 32, and "premeditated" see ante p 483 note 95.

#### 48. Phrases

(1) "At a premium" means above par.—Boston & M. R. Co. v. U. S., C.C.A. Mass., 265 F. 578, 579.

(2) "Premium system," a system whereby an individual is employed at an agreed basic rate, established by determining the time in which an ordinary workman can do the work, and in addition is paid a certain premium for performing such work in less than the determined time.—Johnson v. Fuller, etc., Mfg. Co., 197 N.W. 241, 242, 245, 133 Wis. 68.

(3) Other phrases as to which more recent adjudications have not been found see 49 C.J. p 1330 notes 72-74.

49. Philippine.—Inchausti v. Cromwell, 20 Philippine 345, 346.

50. Philippine.—Inchausti v. Cromwell, supra.

51. U.S.—U. S. v. Brunett, D.C.Mo., 53 F.2d 219, 229.

#### Phrases

(1) "Proprietary preparation," a medicinal preparation may be pro-

prietary where it is recommended by the manufacturer to the public as a proprietary medicine or as a remedy for disease, without being made by a private formula, or under an exclusive right claimed to the making or preparing it, or under a patent.—Ferguson v. Arthur, N.Y., 6 S.Ct. 861, 864, 117 U.S. 482, 29 L.Ed. 979—50 C.J. p 790 note 12.

(2) Other phrases as to which more recent adjudications have not been found see 49 C.J. p 1330 note 84—p 1331 note 90.

52. New Standard D.

53. U.S.—Habicht, Braun & Co. v. U. S., C.C.N.Y., 176 F. 1009, 1012.

54. Mont.—Brennan v. Northern Electric Co., 231 P. 388, 389, 72 Mont. 35.

55. N.Y.—People v. Wolen, 291 N.Y. S. 665, 666, 667, 161 Misc. 286.

#### Phrases

(1) "Prepared coal" defined see Mines and Minerals § 2 b (1).

(2) "Prepared prunes" are prunes which are first dried and then stewed in sugar syrup and finally sealed in

cans.—National Grocery Co. v. Pratt-Low Preserving Co., 17 P.2d 51, 170 Wash. 575.

(3) "Prepared vegetables" as subject to customs duties see Customs Duties § 38.

(4) Other phrases as to which more recent adjudications have not been found see 49 C.J. p 1330 note 84—p 1331 note 90.

56. Webster New Int.D.

57. U.S.—Army and Navy Club of America v. U. S., Ct.Cl., 53 F.2d 277, 281.

58. Century D.

#### Phrases

(1) "Prepay station," in the law of carriers, is defined in Carriers § 313.

(2) "Prepaid stock" defined see Corporations § 215.

59. Ind.—App v. Class, App., 72 N. E.2d 40, 41.

60. Pa.—Keenan v. Commonwealth, 44 Pa. 55, 57, 84 Am.D. 414.

61. Mo.—State v. Curtis, 70 Mo. 594, 598.

**PREPONDERANCE.** Superiority of weight; outweighing;<sup>62</sup> superiority in weight,<sup>63</sup> influence, or force.<sup>64</sup>

**PREPONDERATE.** To outweigh; to overbalance.<sup>65</sup>

**PREPOSÉ.** A French term meaning one who is intrusted with some matter; who takes care of, has charge of, it.<sup>66</sup>

**PRÉPOSER.** A French term meaning to intrust some one with, to set some one to, seeing to the performance of some matter, or taking charge of it.<sup>67</sup>

**PREPOSITION.** A word generally with some meaning of position, direction, time or other abstract relation, and connecting a noun or a pronoun, in an adjectival or adverbial sense, with some other word.<sup>68</sup>

**PREROGATIVE.** An exclusive or peculiar privilege, a fundamental and essential possession, a prior and indefeasible right; used generally of an official and hereditary right which may be asserted without question and for the exercise of which there is no responsibility or accountability as to the fact and the manner of its exercise.<sup>69</sup>

As used with respect to the powers of a sovereign,

it has a definite meaning gained through the great conflicts between the crown and parliaments of England,<sup>70</sup> and in this sense it is all the rights and privileges which, by law, the king has, as head and chief of the commonwealth, and as intrusted with the execution of the laws;<sup>71</sup> that power, preëminence, or privilege which the king has and claims over and beyond other persons, and above the ordinary course of the common law, in right of his crown;<sup>72</sup> that special preëminence which a sovereign has over all other persons, and out of the course of the common law, by right of regal dignity.<sup>73</sup> Where it exists it appertains to sovereignty,<sup>74</sup> and is synonymous with the term "sovereign right."<sup>75</sup>

The royal prerogatives of the British crown were of two classes, direct and incidental,<sup>76</sup> but none of the direct prerogatives, that is, those prerogatives which appertained to the royal character and authority of the king, and sprang from his political person, have been found suitable for the needs or conditions of American jurisdictions, and hence the common-law rules by which those prerogatives were established and maintained are not generally in force in the United States.<sup>77</sup> However, those incidental prerogatives which had no relation to the king's person and constituted exceptions in favor of the crown to general rules applicable to everyone

62. Ark.—Shinn v. Tucker, 37 Ark. 580, 588.

Mo.—Hill v. Scott, 38 Mo.App. 370, 376.

49 C.J. p 1331 note 23.

#### Phrases

(1) "Preponderance of evidence" in civil actions generally is discussed in Evidence §§ 1018-1022. Proof of elements not of the essence of an offense by a preponderance of evidence is treated in Criminal Law § 918; see also other references to the phrase in the title index. Instructions to the jury that the burden is on the party having the affirmative of an issue to prove his case by a preponderance of the evidence are discussed in the C.J.S. title Trial § 309, also 64 C.J. p 605 note 75-p 606 note 89.

(2) "Preponderance of proof" compared with "balance of probabilities" see 8 C.J.S. p 379 note 65.

63. Miss.—Corpus Juris cited in St. Louis-San Francisco Ry. Co. v. Dyson, 43 So.2d 95, 97, 207 Miss. 639.

49 C.J. p 1331 note 24.

64. Iowa.—Ball v. Marquis, 92 N.W. 691, 692.

Tex.—Martin v. St. Louis, etc., R. Co., Civ.App., 56 S.W. 1011, 1012.

65. N.Y.—In re Stege's Estate, 298 N.Y.S. 115, 119, 164 Misc. 95.

66. Eng.—Serandat v. Saisse, L.R. 1 P.C. 152, 165.

49 C.J. p 1331 note 28.

67. Eng.—Serandat v. Saisse, supra. 49 C.J. p 1332 note 30.

68. Mont.—State ex rel. Palagi v. Regan, 126 P.2d 818, 822, 113 Mont. 343.

69. Hawaii.—Everett v. Baker, 7 Hawaii 229, 248.

#### Phrases

(1) "Prerogative court" see Courts § 11.

(2) "Prerogative remedial legislation" see 52 C.J.S. p 1048 note 57.

70. Hawaii.—Everett v. Baker, 7 Hawaii 229, 248.

71. Mont.—Bignell v. Cummins, 222 P. 797, 799, 69 Mont. 294, 36 A.L.R. 634, 637.

49 C.J. p 1332 note 40.

72. Wis.—Attorney General v. Eau Claire, 37 Wis. 400, 443.

73. U.S.—Ætna Casualty & Surety Co. v. Bramwell, D.C.Or., 12 F.2d 307, 309.

74. U.S.—Ætna Casualty & Surety Co. v. Bramwell, supra.

#### Attribute of sovereignty

U.S.—American Bonding Co. of Baltimore v. Reynolds, D.C.Mont., 203 F. 356, 357.

75. Mont.—Bignell v. Cummins, 222

P. 797, 799, 69 Mont. 294, 36 A.L.R. 634.

49 C.J. p 1332 note 45.

76. U.S.—American Bonding Co. of Baltimore v. Reynolds, D.C.Mont., 203 F. 356, 357.

Or.—U. S. Fidelity and Guaranty Co. v. Bramwell, 217 P. 332, 335, 108 Or. 261.

77. Or.—U. S. Fidelity & Guaranty Co. v. Bramwell, supra.

#### Prerogatives direct or incidental

"Prerogatives are either direct or incidental. The direct are such positive substantial parts of the royal character and authority as are rooted in and spring from the king's political person, considered merely by itself, without reference to any other extrinsic circumstance; as, the right of sending ambassadors, of creating peers, and of making war or peace. But such prerogatives as are incidental bear always a relation to something else, distinct from the king's person; and are indeed only exceptions, in favour of the crown, to those general rules that are established for the rest of the community; such as, that no costs shall be recovered against the king; that the king can never be a joint tenant; and that his debts shall be preferred before a debt to any of his subjects."—U. S. Fidelity & Guaranty Co. v. Bramwell, supra.

else, and which, from their very nature, are essential to the welfare of the people of the state, have been adopted, and the common-law rules by which these rights were established have become the law in the United States.<sup>78</sup>

The word "prerogative" signifies a reservation or exception to the general course of law in favor of the public or for the public good, for the protection of the public revenue, and essential to the sustenance of the public burdens and the discharge of the public debts.<sup>79</sup> It is an arbitrary power vested in the executive, a power or will which is discretionary and uncontrolled;<sup>80</sup> and with respect to the governmental problems of a free people the expression is apt only when it is used to mean the inherent and paramount power of the people.<sup>81</sup>

**PREROGATIVE WRITS.** Writs which do not issue as of right, but in the sound discretion of the court or judge;<sup>82</sup> writs which issue on some extraordinary occasion, and for which it is necessary to apply by motion to the court.<sup>83</sup> Such writs are remedies of an extraordinary kind, granted by courts in certain cases, but never as a matter of right, they being a direct intervention of the government with the liberty or property of the subject.<sup>84</sup> At a remote date in England these writs were issued by the exercise of the royal prerogative,<sup>85</sup> and they are sometimes called "high prerogative

writs."<sup>86</sup> Such writs as certiorari, habeas corpus, injunction, mandamus, ne exeat, procedendo, prohibition, and quo warranto are generally,<sup>87</sup> although not always,<sup>88</sup> considered to be prerogative writs. In some jurisdictions, by reason of statutory or constitutional provisions, the prerogative writs are abolished.<sup>89</sup>

**PRES.** As an abbreviation for "president" see 1 C.J.S. p 276 note 5.

**PRESBYOPIA.** Long-sightedness and impairment of vision due to loss of accommodation of the eye in advancing years.<sup>90</sup>

**PRESBYTERIAN.** See the C.J.S. title Religious Societies § 1, also 49 C.J. p 1333 notes 67-75.

**PRESBYTERY.** See the C.J.S. title Religious Societies § 85, also 49 C.J. p 1333 notes 76, 77.

**PRESCRIBE.** A strong word,<sup>91</sup> having a very definite and a very limited meaning.<sup>92</sup> The term is not so narrow as to be confined to a positive order, since it also carries the meaning of limitation or restriction.<sup>93</sup>

"Prescribe" is variously defined as meaning to lay down authoritatively, as a guide, direction, or rule of action.<sup>94</sup> "Prescribe" is further defined as

78. Or.—U. S. Fidelity & Guaranty Co. v. Bramwell, *supra*.

79. Ala.—Green v. City of Homewood, 131 So. 897, 898, 899, 222 Ala. 225.

80. Mich.—Banking Commissioner v. Chelsea Sav. Bank, 127 N.W. 351, 352, 161 Mich. 691.

81. Mont.—Bignell v. Cummins, 222 P. 797, 799, 69 Mont. 294, 36 A.L.R. 634.

49 C.J. p 1332 note 43.

82. N.J.—Ex parte Thompson, 96 A. 102, 114, 85 N.J.Eq. 221.

W.Va.—Click v. Click, 127 S.E. 194, 195, 98 W.Va. 419.

83. N.M.—Territory v. Ashenfelter, 12 P. 879, 885, 886, 4 N.M. 85.

84. N.M.—Territory v. Ashenfelter, *supra*.

85. W.Va.—Click v. Click, 127 S.E. 194, 195, 98 W.Va. 419.

86. Iowa.—Wood Bros. Thresher Co. v. Elcher, 1 N.W.2d 655, 659, 231 Iowa 550.

N.J.—Ex parte Thompson, 96 A. 102, 114, 85 N.J.Eq. 221.

W.Va.—Click v. Click, 127 S.E. 194, 195, 98 W.Va. 419.

87. Cal.—Seaside M. Hospital v. California Employment Commission, App., 143 P.2d 503, 504.

Iowa.—Wood Bros. Thresher Co. v. Elcher, 1 N.W.2d 655, 659, 231 Iowa 550.

N.J.—Ex parte Thompson, 96 A. 102, 104, 85 N.J.Eq. 221.

N.M.—Territory v. Ashenfelter, 12 P. 879, 886, 887, 4 N.M. 85.

As prerogative writ:

Certiorari see Certiorari § 1.

Habeas corpus see Habeas Corpus § 1.

Injunction see Injunctions § 1.

Mandamus see Mandamus § 2 c.

Ne exeat see Ne Exeat § 1 b.

Procedendo see the C.J.S. definition

Procedendo, also 50 C.J. p 424

note 56 et seq.

Prohibition see the C.J.S. title Prohibition § 2, also 50 C.J. p 656

notes 42-45.

Quo warranto see the C.J.S. title Quo Warranto § 1, also 51 C.J. p

309 note 9 [a] (3), (4).

88. N.J.—Minochian v. City of Paterson, 143 A. 825, 830, 105 N.J. Law 73.

89. N.J.—Ward v. Keenan, 70 A.2d 77, 79, 3 N.J. 298.

90. Cal.—Guarantee Ins. Co. v. Industrial Acc. Commission of State, 199 P.2d 12, 14, 88 Cal.App.2d 410.

91. N.Y.—People v. New York Bd. of Estimate, etc., 131 N.Y.S. 604, 605, 146 App.Div. 515.

92. Ind.—State v. Indianapolis Home Brewing Co., 105 N.E. 909, 915, 182 Ind. 75.

49 C.J. p 1333 note 80.

93. Ky.—Johnson v. Commonwealth ex rel. Meredith, 165 S.W.2d 820, 828, 291 Ky. 829.

94. Colo.—Smith-Brooks Printing Co. v. Young, 85 P.2d 39, 41, 103 Colo. 199.

Fla.—Alsop v. Pierce, 19 So.2d 799, 803, 155 Fla. 184.

Minn.—State v. Holm, 238 N.W. 494, 498, 184 Minn. 228.

Mo.—Corpus Juris cited in State ex rel. Carroll v. Becker, 45 S.W.2d 533, 536, 329 Mo. 501.

Pa.—Commonwealth ex rel. Blattenberger v. Asha, 3 A.2d 287, 288, 133 Pa.Super. 509.

Va.—Commonwealth ex rel. Town of Appalachia v. Old Dominion Power Co., 34 S.E.2d 364, 368, 184 Va. 6.

49 C.J. p 1334 note 94.

**Similarly defined**

(1) To lay down authoritatively as a guide, direction, or rule.—McMahon v. Devlin, 173 N.E. 560, 561, 254 N.Y. 397—49 C.J. p 1334 note 94 [a] (1).

(2) To lay down authoritatively for direction.—New York v. Hexamer, 69 N.Y.S. 198, 203, 59 App.Div. 4.

meaning to set down authoritatively;<sup>95</sup> to give as a guide, direction, or rule of action;<sup>96</sup> to impose, as a peremptory order.<sup>97</sup>

"Prescribe" is also defined as meaning to appoint,<sup>98</sup> and in a number of cases it is defined as meaning to point.<sup>99</sup> "Prescribe" also means to ordain;<sup>1</sup> to direct;<sup>2</sup> to dictate;<sup>3</sup> to order;<sup>4</sup> to command positively;<sup>5</sup> to enjoin;<sup>6</sup> to fix definitely;<sup>7</sup> but etymologically it means to write before.<sup>8</sup>

"Prescribe" has been held equivalent to, or synonymous with, "control" see 18 C.J.S. p 33 note 68.2, "establish" see 30 C.J.S. p 1231 note 36.4, "guide" see 39 C.J.S. p 416 note 32, "limit" see 53 C.J.S. p 887 note 35.1, and "require."<sup>99</sup>

It has been compared with, or distinguished from, "dispense" see 27 C.J.S. p 344 note 35, "furnish" see 37 C.J.S. p 1411 note 51, and "regulate;"<sup>10</sup> but

its distinction from "determine" has been said to be far from clear, see 26 C.J.S. p 1259 note 90.

The term "prescribe," when used in a medical sense, is treated in the C.J.S. title Physicians and Surgeons § 1.

"Prescribed" has been said to have a well-defined legal meaning,<sup>11</sup> and is defined by application of the meanings of the present sense, as to lay down authoritatively as a guide, direction, or rule; to impose as a peremptory order; to dictate; to point; to direct;<sup>12</sup> to give as a guide, direction, or rule of action; to give law.<sup>13</sup>

It has been held synonymous with "established" see 30 C.J.S. p 1233 note 61.

**PRESCRIPCIÓN.** In Spanish law, a mode of terminating a claim or liability.<sup>14</sup>

(3) To lay down as a rule or direction to be followed.—Commonwealth ex rel. Blattenberger v. Ashe, 3 A.2d 287, 288, 133 Pa.Super. 509.

(4) To lay down beforehand as a rule of action.—Sevier v. Riley, 244 P. 323, 324, 198 Cal. 170.

(5) To set or lay down authoritatively for direction or control.—Holcomb v. Williams, Tex.Civ.App., 194 S.W. 631, 632.

(6) To set down authority.—State v. Indianapolis Home Brewing Co., 105 N.E. 909, 915, 182 Ind. 75.

(7) To define authoritatively.—Sevier v. Riley, supra.

95. Va.—Field v. Auditor, 3 S.E. 707, 710, 83 Va. 882.

Phrases employing the word as to which more recent adjudications have not been found see 49 C.J. p 1334 notes 17–24.

96. N.Y.—McMahon v. Devlin, 173 N.E. 560, 561, 254 N.Y. 397, 49 C.J. p 1334 note 91.

#### Similarly defined

(1) To give law.—McMahon v. Devlin, 173 N.E. 560, 561, 254 N.Y. 397—49 C.J. p 1334 note 92 [a].

(2) To give, as a law or direction.—Holcomb v. Williams, Tex.Civ.App., 194 S.W. 631, 632.

97. Colo.—Smith-Brooks Printing Co. v. Young, 85 P.2d 39, 41, 103 Colo. 199.

Minn.—State v. Holm, 238 N.W. 494, 498, 184 Minn. 228.

N.Y.—McMahon v. Devlin, 173 N.E. 560, 561, 254 N.Y. 397.

Pa.—Commonwealth ex rel. Blattenberger v. Ashe, 3 A.2d 287, 288, 133 Pa.Super. 509, 49 C.J. p 1334 note 93.

98. Colo.—Smith-Brooks Printing Co. v. Young, 85 P.2d 39, 41, 103 Colo. 199.

Minn.—State v. Holm, 238 N.W. 494, 498, 184 Minn. 228, 49 C.J. p 1333 note 82.

99. Ill.—Mansfield v. People, 45 N.E. 976, 977, 164 Ill. 611. N.Y.—McMahon v. Devlin, 173 N.E. 560, 561, 254 N.Y. 397—People v. New York Bd. of Estimate, etc., 131 N.Y.S. 604, 605, 146 App.Div. 515.

L. Cal.—Sevier v. Riley, 244 P. 323, 324, 198 Cal. 170.

Colo.—Smith-Brooks Printing Co. v. Young, 85 P.2d 39, 41, 103 Colo. 199.

Ky.—Johnson v. Commonwealth ex rel. Meredith, 165 S.W.2d 820, 828, 291 Ky. 829.

Pa.—Commonwealth ex rel. Blattenberger v. Ashe, 3 A.2d 287, 288, 133 Pa.Super. 509.

2. Colo.—Smith-Brooks Printing Co. v. Young, 85 P.2d 39, 41, 103 Colo. 199.

Ky.—Johnson v. Commonwealth ex rel. Meredith, 165 S.W.2d 820, 828, 291 Ky. 829.

Minn.—State v. Holm, 238 N.W. 494, 498, 184 Minn. 228.

N.Y.—McMahon v. Devlin, 173 N.E. 560, 561, 254 N.Y. 397.

Pa.—Commonwealth ex rel. Blattenberger v. Ashe, 3 A.2d 287, 288, 133 Pa.Super. 509, 49 C.J. p 1334 note 87.

3. Colo.—Smith-Brooks Printing Co. v. Young, 85 P.2d 39, 41, 103 Colo. 199.

Minn.—State v. Holm, 238 N.W. 494, 498, 184 Minn. 228.

N.Y.—McMahon v. Devlin, 173 N.E. 560, 561, 254 N.Y. 397.

Pa.—Commonwealth ex rel. Blattenberger v. Ashe, 3 A.2d 287, 288, 133 Pa.Super. 509, 49 C.J. p 1334 note 86.

4. Md.—Baltimore v. State, 15 Md. 376, 478, 74 Am.D. 572.

Va.—Field v. Marye, 3 S.E. 707, 710, 83 Va. 882.

5. Colo.—Travelers' Ins. Co. v. Industrial Commn., 208 P. 465, 466, 71 Colo. 495.

6. Pa.—Commonwealth ex rel. Blattenberger v. Ashe, 3 A.2d 287, 288, 133 Pa.Super. 509.

7. Del.—Cutrona v. Wilmington, 127 A. 421, 425, 14 Del.Ch. 434.

Ill.—Shannon v. Hinsdale, 54 N.E. 181, 183, 180 Ill. 202.

8. Ind.—State v. Indianapolis Home Brewing Co., 105 N.E. 909, 915, 182 Ind. 75.

9. U.S.—U. S. v. Dimmick, D.C.Cal., 112 F. 350, 351.

Okl.—American Ins. Co. v. Rodenhous, 128 P. 503, 504, 36 Okl. 211.

10. Del.—Cutrona v. Wilmington, 127 A. 421, 425, 14 Del.Ch. 434.

11. N.Y.—Heiferman v. Scholder, 119 N.Y.S. 520, 523, 134 App.Div. 579—Loewy v. Gordon, 114 N.Y.S. 211, 212, 129 App.Div. 459.

Wash.—State v. Truax, 226 P. 259, 261, 130 Wash. 69.

12. N.Y.—Heiferman v. Scholder, 119 N.Y.S. 520, 523, 134 App.Div. 579—Loewy v. Gordon, 114 N.Y.S. 211, 212, 129 App.Div. 459.

Wash.—State v. Truax, 226 P. 259, 261, 130 Wash. 69.

#### Similarly defined

To lay down authoritatively a rule of action.—Koenig v. Flynn, 179 N.E. 705, 258 N.Y. 292.

13. N.Y.—Loewy v. Gordon, 114 N.Y.S. 211, 212, 129 App.Div. 459.

Wash.—State v. Truax, 226 P. 259, 261, 130 Wash. 69.

14. Escribo Diccionario, 49 C.J. p 1334 note 25.

**PREScription.** In law prescription is of two kinds; it is either an instrument for the acquisition of property or an instrument of an exemption only from the servitude of judicial process.<sup>15</sup> In the first sense, as relating to the acquisition of property, prescription is treated in Adverse Possession § 2. In the second sense, as relating to exemption from the servitude of judicial process, prescription is treated in Limitations of Actions § 1 b (2) (a).

Prescription, in medical terminology, is discussed in Physicians and Surgeons § 1.

**PREscriptio NON DATUR IN BONA FELO-RUM, NISI PER RECORDUM.** See 49 C.J. p 1336 note 61.

**PREsence.** A term derived from "præ" and "ens."<sup>16</sup> It is not a technical term or a scientific word,<sup>17</sup> but, standing alone without qualifier or adjective,<sup>18</sup> is rather indefinite in its signification,<sup>19</sup> although it may be somewhat explained by contrasting it with its opposite, "absence."<sup>20</sup> Its meaning depends on the circumstances of each particular case.<sup>21</sup> The term implies an area which has no metes and bounds,<sup>22</sup> although it indicates that some person or thing is within view;<sup>23</sup> and thus proximity and consciousness may create "presence."<sup>24</sup>

The word "presence" is defined as meaning the

act, fact, or state of being present, or of being in a certain place and not elsewhere, or being within sight or call, at hand, or in some place which is being thought of;<sup>25</sup> immediate nearness or vicinity of one; proximity.<sup>26</sup> "Presence" is further defined as meaning in view;<sup>27</sup> in company with, in the same room with;<sup>28</sup> in a situation face to face with some person or persons;<sup>29</sup> before; in front of;<sup>30</sup> attendance.<sup>31</sup>

It is also defined as meaning the part of space within one's ken, call, influence, etc.<sup>32</sup>

"Presence" has been distinguished from "absence" see 1 C.J.S. p 350 note 52.1, "absent" see 1 C.J.S. p 351 note 88.1, and "view."<sup>33</sup>

Authority to arrest without a warrant for a crime committed in the presence of an officer see Arrest § 5 b; and presence of accused at the trial of a criminal action see Criminal Law §§ 973-976. The necessity for the presence of a foreign corporation within a state as a prerequisite to a suit in personam against it is discussed in Corporations § 1919. For more specific references to the term "presence" consult the Descriptive-Word Index and see the indexes to the various titles.

Phrases employing the word are set out in the note.<sup>34</sup>

**PREsencial.** In Spanish, actually present.<sup>35</sup>

15. U.S.—Campbell v. Holt, Tex., 6 S.Ct. 209, 210, 115 U.S. 620, 623, 29 L.Ed. 483.

49 C.J. p 1336 note 51.

Phrases as to which more recent adjudications have not been found see 49 C.J. p 1336 notes 57-60.

16. S.C.—Ray v. Hill, 34 S.C.L. 297, 303, 49 Am.D. 647.

"Præ" defined see ante p 474 note 23.

17. Mich.—In re Lane's Estate, 251 N.W. 590, 592, 265 Mich. 539—Bradford v. Vinton, 26 N.W. 401, 405, 59 Mich. 139, 60 Am.R. 276.

18. Minn.—London v. Maryland Casualty Co., 299 N.W. 193, 194, 10 Minn. 581.

19. Cal.—People v. Lavender, 31 P. 2d 439, 440, 137 Cal.App. 582. Va.—Moore v. Moore, 8 Gratt. 307, 326, 49 Va. 307, 326.

20. Va.—Moore v. Moore, supra.

21. Cal.—People v. Lavender, 31 P. 2d 439, 440, 137 Cal.App. 582. Va.—Nock v. Nock's Ex'rs, 10 Gratt. 106, 117, 118, 51 Va. 106, 117, 118.

22. Cal.—People v. Lavender, 31 P. 2d 439, 440, 137 Cal.App. 582. Va.—Nock v. Nock's Ex'rs, 10 Gratt. 106, 118, 51 Va. 106, 118.

23. N.C.—Graham v. Graham, 32 N. C. 219, 220.

24. Cal.—People v. Lavender, 31 P. 2d 439, 440, 137 Cal.App. 582.

Va.—Nock v. Nock's Ex'rs, 10 Gratt. 106, 119, 51 Va. 106, 119.

25. Mich.—In re Lane's Estate, 251 N.W. 590, 591, 265 Mich. 539.

Minn.—London v. Maryland Casualty Co., 299 N.W. 193, 194, 10 Minn. 581.

26. Cal.—In re Tracy's Estate, 182 P.2d 336, 337, 80 Cal.App.2d 782.

Mich.—In re Lane's Estate, 251 N. W. 590, 591, 265 Mich. 539.

27. Cal.—Brown v. City Council of City of Hawthorne, 284 P. 254, 255, 103 Cal.App. 113.

**Similarly defined**

(1) Within the view of.—Baldwin v. Baldwin, 81 Va. 405, 411, 59 Am. R. 669—Neil v. Neil, 1 Leigh 6, 11, 12, 28 Va. 6, 11, 12.

(2) In the view of; in the sight of.—Ray v. Hill, 34 S.C.L. 297, 303, 49 Am.D. 647.

28. Va.—Baldwin v. Baldwin, 81 Va. 405, 411, 59 Am.R. 669—Neil v. Neil, 1 Leigh, 6, 11, 12, 28 Va. 6, 11 12.

29. Cal.—Brown v. City Council of City of Hawthorne, 284 P. 254, 255, 103 Cal.App. 113.

30. S.C.—Ray v. Hill, 34 S.C.L. 297, 303, 49 Am.D. 647.

31. Mich.—In re Lane's Estate, 251 N.W. 590, 592, 265 Mich. 539.

32. Cal.—In re Tracy's Estate, 182 P.2d 336, 337, 80 Cal.App.2d 782. Mich.—In re Lane's Estate, 251 N. W. 590, 591, 265 Mich. 539.

33. N.Y.—People v. Esposito, 194 N. Y.S. 326, 332, 118 Misc. 867.

**24. Phrases**

(1) "Presence of court;" acts constituting contempt in, see Contempt § 26, and other references in the title index.

(2) "In the presence of" see 42 C.J.S. p 481 notes 59-63.

(3) "Personal presence" see 70 C.J.S. p 691 note 24.

(4) "Presence of testator" in statutes requiring wills to be subscribed by witnesses in the presence of the testator is defined in the C.J.S. title Wills § 189, also 68 C.J. p 701 notes 14-20.

(5) Other phrases as to which more recent adjudications have not been found see 49 C.J. p 1337 notes 72-75.

35. Philippine.—U. S. v. Gaoiran, 17 Philippine 404, 407.

**PRESENT.** As a noun, the word "present" has several meanings, and in one sense it literally means a gift;<sup>36</sup> an act of kindness courtesy, or respect, contributing to the pleasure of the receiver.<sup>37</sup> In this sense it has been compared with, or distinguished from, "donation" see 28 C.J.S. p 54 note 90, and "gift" see Gifts § 5.

In a different sense it means time now passing.<sup>38</sup>

As a verb, "present" is defined as meaning to lay before, or submit to, a person or body for consideration or action;<sup>39</sup> as to present a memorial, petition, or indictment;<sup>40</sup> to submit, as a petition, remonstrance, etc., for a decision or settlement to the proper authorities;<sup>41</sup> to offer for judicial action or inquiry;<sup>42</sup> to hand to and leave with;<sup>43</sup> to deliver up; to give official notice of;<sup>44</sup> to file;<sup>45</sup> to represent; to show.<sup>46</sup>

The verb "to present" has been held synonymous with "file" see 36 C.J.S. p 752 note 71, and "indicate" see 42 C.J.S. p 823 note 8.

As an adjective, "present" is defined as meaning being in view or immediately at hand;<sup>47</sup> being within reach, sight or call;<sup>48</sup> being in a certain place and not elsewhere;<sup>49</sup> ready at need.<sup>50</sup>

"Present," it has been said, in none of its applications, is synonymous, under any circumstances, with "resident."<sup>51</sup>

*Phrases* employing the word are set out in the note.<sup>52</sup>

**PRESENTATION.** A word having many different significations, as the context or the circumstances in which it is used may require.<sup>53</sup> It indicates something more than a mere delivery, or placing in the legal possession of the presentee the thing presented, and in order to constitute a presentation there must be not only a delivery, but also a formal exhibition of the thing presented, so that with full knowledge it may be accepted or rejected.<sup>54</sup>

"Presentation" is defined as meaning the act of presenting, or state of being presented; that which is presented;<sup>55</sup> a disclosure for approval or rejection;<sup>56</sup> delivering up; showing.<sup>57</sup>

It has been held synonymous with "teach,"<sup>58</sup> and has been distinguished from "filing" see 36 C.J.S. p 757 note 23.

Presentation of claims is treated in various connections throughout this work, particular reference

36. Ill.—Thomas v. People, 59 Ill. 160, 163.

49 C.J. p 1337 note 78.

37. Ind.—State v. Clinton County, 76 N.E. 986, 994, 166 Ind. 162.

38. Century D.

39. U.S.—National Labor Relations Board v. North American Aviation, C.C.A.9, 136 F.2d 898, 899.

Cal.—Gage v. Jordan, Retirement Life Payments Ass'n, Interveners, 147 P.2d 387, 393, 23 Cal.2d 794.

49 C.J. p 1337 note 88.

**Similarly defined**

(1) To lay before.—Jermyn's Election Expenses, 57 Pa.Super. 109, 116.

(2) To lay before a judge, magistrate, or governing body for action or consideration.—Noble v. State, 17 S.W.2d 1063, 1064, 112 Tex.Cr. 541—49 C.J. p 1337 note 87.

(3) To lay before a public body for consideration, as before a legislature, a court of judicature, a corporation, etc.—State v. Hinckley, 4 Minn. 345—49 C.J. p 1337 note 86.

40. Cal.—Gage v. Jordan, Retirement Life Payments Ass'n, 147 P. 2d 387, 393, 23 Cal.2d 794.

Tex.—Ross v. Abrams, Civ.App., 239 S.W. 705, 707.

41. Tex.—Noble v. State, 17 S.W.2d 1063, 1064, 112 Tex.Cr. 541.

49 C.J. p 1337 note 92.

42. U.S.—National Labor Relations Board v. North American Aviation, C.C.A.9, 136 F.2d 898, 899.

43. Wash.—Titus v. Montesano, 181 P. 43, 46, 106 Wash. 608.

**Similarly defined**

To hand over, proffer, so that a subject may be surrendered and taken possession of.—Jermyn's Election Expenses, 57 Pa.Super. 109, 116.

44. Pa.—Jermyn's Election Expenses, supra.

45. Ark.—Olcott v. Salt Bayou Drain. Dist., 223 S.W. 353, 354, 145 Ark. 101.

46. Mass.—Commonwealth v. Keefe, 9 Gray 290, 292.

47. Tex.—Seals v. State, 73 S.W.2d 528, 530, 126 Tex.Cr. 609.

49 C.J. p 1337 note 5.

**Similarly defined**

"Present" means being before, in view or at hand.—Knight v. State, 1 So.2d 668, 669, 30 Ala.App. 97.

48. Ala.—Knight v. State, supra.

49. Neb.—Cunningham v. Ilg, 226 N.W. 333, 334, 118 Neb. 682.

50. Tex.—Johnson v. Bussey, Civ. App., 95 S.W.2d 990, 992.

51. N.J.—Evans v. Perrine, 35 N. J.Law 221, 223.

**52. Phrases**

(1) "Present conveyance" defined see 18 C.J.S. p 95 note 37.1.

(2) "Present for probate" synonymous with "file for probate" see 36 C.J.S. p 752 note 74. The proposition that a will is "presented for

probate" when it is filed in the proper court, together with a sufficient application for its probate as required by law, is treated in the C.J. S. title Wills § 316, also 68 C.J. p 890 notes 83—85.

(3) "Present value" distinguished from "original cost" see 20 C.J.S. p 242 note 71. For specific treatment of the phrase "present value" consult the indexes to the titles Damages and Death.

(4) Other phrases as to which more recent adjudications have not been found see 49 C.J. p 1337 notes 72—75, 93—4, 10—p 1338 note 52.

53. Eng.—Bartlett v. Holmes, 13 C.B. 630, 637, 76 E.C.L. 630, 138 Reprint 1347, 20 Eng.L. & Eq. 277.

54. Ala.—Cameron v. North Birmingham Trust, etc., Bank, 84 So. 569, 17 Ala.App. 210.

Wyo.—Spalding v. McKnight, Wyo., 154 P.2d 312, 315, 61 Wyo. 22.

55. Webster New Int.D.

**Phrases** employing the word as to which more recent adjudications have not been found see 49 C.J. p 1338 notes 58, 59.

56. Del.—Snively v. Booth, 176 A. 649, 653, 6 W.W.Harr. 378.

57. Eng.—Bartlett v. Holmes, 13 C.B. 630, 637, 76 E.C.L. 630, 138 Reprint 1347, 20 Eng.L. & Eq. 277.

58. Del.—Snively v. Booth, 176 A. 649, 653, 6 W.W.Harr. 378.

being made to the C.J.S. titles Assignments for Benefit of Creditors §§ 308-351; Bankruptcy § 434; Banks and Banking § 1037; Counties §§ 297-301; Executors and Administrators §§ 394-435; Exemptions § 133; Guardian and Ward § 103; Insane Persons § 91; Insolvency § 14 d; Municipal Corporations §§ 922, 2199; Receivers § 271, also 53 C.J. p 236 note 48-p 238 note 84; States §§ 198-210, also 59 C.J. p 282 note 9-p 296 note 68; and Towns § 189, also 63 C.J. p 218 notes 31-42. For other particular applications and specific uses of the term consult the Descriptive-Word Index and the Indexes to the various titles.

**PRESENTI PERICULO SUCCURRENDUM, NEQUA ORIRI POSSIT INJURIA.** See 49 C.J. p 1338 note 62.

**PRESENTLY.** At once;<sup>59</sup> immediately;<sup>60</sup> now,<sup>61</sup> without delay;<sup>62</sup> at the time spoken of.<sup>63</sup> In a less definite sense "presently" means by and by; in a little time.<sup>64</sup>

"Presently" has been held synonymous with "immediately" see 42 C.J.S. p 393 note 7.L.

**PRESENTMENT.** The presentment of negotiable instruments for acceptance is treated in Bills and Notes §§ 165-169, and for payment in §§ 343-366; and presentment of paper by collecting banks for acceptance and payment is discussed in Banks and Banking § 235.

A presentment as a notice taken by a grand jury of an offense from its own knowledge or observation, or of its own motion on information from

others, without any bill of indictment having been submitted to it by the public prosecutor, is discussed in Indictments and Informations § 7 b; see also other references in the title index. The power of grand juries to make such a presentment is treated in Grand Juries § 34 d (2) (3).

**PRESENTS.** The term, in law, is defined as present letters or instrument, as a deed of conveyance, a lease, power of attorney, or other writing; as in "Know all men by these presents," that is, by the writing itself.<sup>65</sup>

**PRESERVATION.** The act of preserving, or keeping safe or sound; the act of keeping from injury or decay.<sup>66</sup> It has been distinguished from "preparation" see ante p 486 note 53.

**PRESERVATIVE.** That which preserves or has the power of preserving; that which tends to secure from injury, destruction, decay, or corruption; a preventive of injury or decay.<sup>67</sup>

**PRESERVE.** To maintain; to guard; to keep in existence or intact;<sup>68</sup> to secure; to uphold;<sup>69</sup> to keep from physical or chemical change;<sup>70</sup> to prepare (fruit, meat, etc.) by boiling with sugar, salting, or pickling, so as to prevent its decomposition or fermentation;<sup>71</sup> to prepare in such a manner as to resist decomposition or fermentation;<sup>72</sup> to prevent from spoiling by the use of preservative substances, with or without the use of the agency of heat.<sup>73</sup> It has been said that in none of its uses does "preserve" connote creating something, or extending an existing thing or status.<sup>74</sup>

59. Ga.—Hawkins v. Studdard, 71 S.E. 1112, 1113, 136 Ga. 727.

60. Ark.—Leo N. Levi Memorial Hospital Ass'n v. Caruth, 208 S.W. 2d 983, 986.

Ga.—Hawkins v. Studdard, 71 S.E. 1112, 1113, 136 Ga. 727.

61. Ga.—Hawkins v. Studdard, supra. 49 C.J. p 1339 note 67.

62. Ga.—Hawkins v. Studdard, supra.

63. Ark.—Leo N. Levi Memorial Hospital Ass'n v. Caruth, 208 S.W. 2d 983, 986.

64. Similarly expressed After a little while; before long; by and by; shortly; soon.—Hawkins v. Studdard, 71 S.E. 1112, 1113, 136 Ga. 727.

65. S.D.—Hickok v. Diocese of Sioux Falls, 259 N.W. 671, 673, 63 S.D. 418.

66. Century D. Phrases as to which more recent

adjudications have not been found see 49 C.J. p 1339 notes 77-79.

67. N.Y.—People v. Biesecker, 68 N.Y.S. 1067, 1069, 53 App.Div. 391.

Similarly defined

(1) That which preserves anything; which tends to keep safe and sound, or free from injury, corruption, or decay; a preventive of damage, decomposition, or waste.—People v. Biesecker, supra.

(2) That which keeps safe or tends to preserve; that which has power to keep safe or sound; a safeguard.—People v. Biesecker, supra.

(3) A preservative agent.—People v. Biesecker, supra.

68. Ohio.—City of Cincinnati v. Wright, 67 N.E.2d 353, 361, 362, 77 Ohio App. 261.

69. N.Y.—Neuendorff v. Duryea, 6 Daly 276, 281, 52 How.Pr. 267.

70. U.S.—Moscahlades v. U. S., 13 Cust.App. 633, 635.

Similarly defined.

(1) To keep.—Neuendorff v. Duryea, 6 Daly, N.Y., 276, 281, 52 How.Pr. 267.

(2) To keep from physical or chemical change or decay.—U. S. v. Conkey & Co., 12 Ct.Cust.App. 552, 554.

(3) To keep from decay.—U. S. v. Conkey & Co., supra.

71. U.S.—Moscahlades v. U. S., 13 Cust.App. 633, 635.

Similarly defined.

To prepare by boiling, salting, or pickling, so as to prevent decomposition or fermentation.—U. S. v. Conkey & Co., 12 Ct.Cust.App. 552, 554.

72. U.S.—U. S. v. Dodson, D.C.Cal., 268 F. 397, 403.

73. U.S.—U. S. v. Dodson, supra.

74. Ohio.—City of Cincinnati v. Wright, 67 N.E.2d 353, 361, 362, 77 Ohio App. 261.

"Preserve" has been distinguished from "file" see 36 C.J.S. p 752 note 72.

*Phrases* employing the words "preserve" and "preserved" are out in the note.<sup>75</sup>

**PRESIDE.** To occupy the place of authority, or of president, chairman, moderator, etc.;<sup>76</sup> to direct, control, and govern, as the chief officer;<sup>77</sup> to direct, control, or regulate proceedings as chief officer, as to preside at public meetings, to preside over the senate.<sup>78</sup>

"Preside" has been held synonymous with "sit."<sup>79</sup>

*Presiding.* The present participle of the verb "preside."<sup>80</sup>

**PRESIDENT.** One who presides; a ruler; governor; sovereign; head; now, one who is elected or appointed to preside, or control the proceedings of others.<sup>81</sup>

The manner of election of the president of the

United States, his powers and duties, and the issuance of proclamations and orders by him are discussed in the C.J.S. title United States §§ 27-30, also 65 C.J. p 1269 note 36-p 1271 note 73; his authority to grant pardons for offenses against the United States is discussed in Pardons § 3 a. The term "president" is treated in various other connections throughout this work, particular reference being made to the indexes to the titles Army and Navy, Banks and Banking, Clubs, Colleges and Universities, and Corporations.

**PRESIDIO.** See Army and Navy § 104 a.

**PRESS.** As a noun, an apparatus or machine by which pressure, especially strong and continuous pressure, is applied to any article; also a machine for printing.<sup>82</sup> There are various kinds of presses, such as arming presses,<sup>83</sup> blocking presses,<sup>84</sup> embossing presses,<sup>85</sup> gilding presses,<sup>86</sup> printing presses,<sup>87</sup> stamping presses,<sup>88</sup> and web presses.<sup>89</sup>

In a different sense "press" has been defined as meaning the newspapers and periodicals, collective-

#### 75. Phrases

(1) "Preserved sweet cider" see 14 C.J.S. p 1119 notes 80, 81.

(2) "Preserved vegetables" as subject to customs duties see Customs Duties § 38.

(3) "Preserve order" defined see 67 C.J.S. p 521 note 73.

(4) Other phrases as to which more recent adjudications have not been found see 49 C.J. p 1339 notes 2-11.

76. Ga.—Drake v. Drake, 1 S.E.2d 573, 575, 187 Ga. 423.

Applied to a person, the word "preside" means "one who controls or governs, one who exercises authority or superintendence over a business."—Gilmore v. State, Tex. Cr., 29 S.W. 477.

77. N.Y.—Smith v. People, 47 N.Y. 330, 334.

78. Ga.—Drake v. Drake, 1 S.E.2d 573, 575, 187 Ga. 423.

79. Ga.—Allen v. State, 29 S.E. 470, 471, 102 Ga. 622—Faulkner v. Walker, 137 S.E. 909, 910, 36 Ga. App. 636.

80. Webster New Int.D.

#### Phrases

(1) "Presiding judge" defined see Judges § 2 a (1), and other references in the title index.

(2) "Presiding magistrate" see Judges § 2 c.

(3) "Presiding officer;" one who occupies the place of authority, as of president, chairman, moderator, etc., to direct, control, or regulate proceedings as chief officer.—Fitz-

Simmons v. International Ass'n of Machinists, 7 A.2d 448, 451, 125 Conn. 490. See also Parliamentary Law § 5 b (1).

81. Webster New Int.D.

Phrases employing the word as to which more recent adjudications have not been found see 49 C.J. p 1340 notes 21-26.

82. New Standard D.

83. Arming press

A small hand-power stamping press used by bookbinders. Its earliest employment was in stamping heraldic arms on the sides of books, whence its name. In the United States this form of press is known as a stamping press or embossing press.—Petry & Co. v. U. S., 3 Ct.Cust.App. 348, 350.

84. Blocking press

A press for applying heated blocks or dies in ornamenting book covers; a press used for stamping designs on book covers; known in the United States as a stamping press.—Petry & Co. v. U. S., supra.

85. Embossing press

A device for stamping raised designs on paper, leather, etc.; an apparatus for stamping and embossing paper, cardboard, book covers, leather, etc.—Petry & Co. v. U. S., supra.

86. Gilding press

A stamping press for effecting sunken decoration with gold leaf.—Petry & Co. v. U. S., supra.

87. Printing press

(1) The expressions "printing press" and "printing machine" are

used interchangeably.—Petry & Co. v. U. S., supra.

(2) While every printing press may correctly be referred to as a printing machine, not every printing machine may properly be called a printing press. As commonly and generally understood, printing presses are those printing machines which are chiefly used by the art or trade of letter-press printing on paper and like substances and which are designed and intended to produce such printed matter as books, newspapers, magazines, periodicals, circulars, handbills, etc.—Petry & Co. v. U. S., supra.

"Press feeder" defined see 36 C.J.S. p 631 note 52.

88. Stamping press

Same as blocking press; a blocking press.—Petry & Co. v. U. S., supra.

89. Web press

A printing press which receives and prints upon a continuous web or roll of paper as it is unwound, and not upon cut sheets.—Duplex Printing-Press Co. v. Campbell Printing-Press & Mfg. Co., Ky., 69 F. 250, 253, 16 C.C.A. 220.

Web-perfecting press

A press which feeds itself with a long, continuous roll of paper, perfects or prints such paper on both sides by passing it between two sets of form and impression cylinders, and, by transverse cuts, severs the web into sheets.—Goss Printing-Press Co. v. Scott, N.J., 108 F. 253, 254, 47 C.C.A. 302—68 C.J. p 82 note 36.



ly, of a city or country.<sup>90</sup>

As a verb, to reduce to a particular shape or form by pressure.<sup>91</sup>

"Pressed" has been held synonymous with "molded" see 58 C.J.S. p 843 note 63.

**PRESSURE.** Compulsion, force, or influence.<sup>92</sup> It is not a certain, definite, well-understood thing which can be recognized and given effect to as soon as mentioned.<sup>93</sup>

As a technical term employed with reference to a telephone transmitter the word is treated in the C. J.S. title Telegraphs and Telephones § 4, also 49 C. J. p 1340 note 44.

**PRESTACIÓN.** In Spanish law, the act of giving or doing something, as the payment of what is due; the presentation of an oath.<sup>94</sup>

**PRESTAMO.** In Spanish law, a contract of loan; it includes the two Roman real contracts of commodatum and mutuum.<sup>95</sup>

**PRESUMABLY.** A comparative adverb.<sup>96</sup> It is defined as meaning fit to be assumed as true in advance of conclusive evidence;<sup>97</sup> credibly deduced;<sup>98</sup> fair to suppose<sup>99</sup> by reasonable supposition or inference;<sup>1</sup> what appears to be entitled to belief without direct evidence.<sup>2</sup>

"Presumably" has been held to be equivalent to "prima facie."<sup>3</sup>

**PRESUME.** A plain and simple word,<sup>4</sup> derived from the Latin "præsumere."<sup>5</sup> It has many different meanings, and is flexible and often partakes of the context in which it appears.<sup>6</sup> It has existed for ages in the language of all English-speaking peoples, with a meaning clearly indicated by its etymology and preserved in the dictionaries.<sup>7</sup>

The word "presume" is defined as meaning to take or suppose to be true, or entitled to belief without examination or proof, or on the strength of probability;<sup>8</sup> to take for granted,<sup>9</sup> or to assume a fact beforehand, and without evidence;<sup>10</sup> to suppose;<sup>11</sup>

90. Webster New Int.D.

Constitutional guaranty of freedom of the press see Constitutional Law § 213.

91. Century D.  
"Pressed glass" defined see 38 C. J.S. p 930 note 12.

92. Man.—Re Bell, 32 Man. 9, 13, 67 Dom.L.R. 66, 73, 1 West.Wkly. 1015.

93. Ont.—Munro v. Standard Bank, 30 Ont.L. 12, 16, 5 Ont.W.N. 508, 16 Dom.L.R. 293.

94. Escriche Diccionario.

95. Escriche Diccionario.  
49 C.J. p 1340 note 47.

**Prestamo mutuo**

In Spanish, a simple loan.—Sunico v. Ramirez, 14 Philippine 500, 503—49 C.J. p 1340 note 48.

96. Iowa.—Kurth v. Continental Life Ins. Co., 234 N.W. 201, 202, 211 Iowa 736.

Minn.—Maze v. Equitable Life Ins. Co. of Iowa, 246 N.W. 737, 740, 188 Minn. 139.

N.C.—Mitchell v. Equitable Life Assur. Soc. of U. S., 172 S.E. 495, 496, 205 N.C. 726.

97. Iowa.—Kurth v. Continental Life Ins. Co., 234 N.W. 201, 202, 211 Iowa 736.

Minn.—Maze v. Equitable Life Ins. Co. of Iowa, 246 N.W. 737, 740, 188 Minn. 139.

N.C.—Mitchell v. Equitable Life Assur. Soc. of U. S., 172 S.E. 495, 496, 205 N.C. 726.

98. Iowa.—Kurth v. Continental Life Ins. Co., 234 N.W. 201, 202, 211 Iowa 736.

Minn.—Maze v. Equitable Life Ins.

Co. of Iowa, 246 N.W. 737, 740, 188 Minn. 139.

N.C.—Mitchell v. Equitable Life Assur. Soc. of U. S., 172 S.E. 495, 496, 205 N.C. 726.

99. Iowa.—Kurth v. Continental Life Ins. Co., 234 N.W. 201, 202, 211 Iowa 736.

Minn.—Maze v. Equitable Life Ins. Co. of Iowa, 246 N.W. 737, 740, 188 Minn. 139.

N.C.—Mitchell v. Equitable Life Assur. Soc. of U. S., 172 S.E. 495, 496, 205 N.C. 726.

1. Iowa.—Kurth v. Continental Life Ins. Co., 234 N.W. 201, 202, 211 Iowa 736.

Minn.—Maze v. Equitable Life Ins. Co. of Iowa, 246 N.W. 737, 740, 188 Minn. 139.

N.C.—Mitchell v. Equitable Life Assur. Soc. of U. S., 172 S.E. 495, 496, 205 N.C. 726.

2. Iowa.—Kurth v. Continental Life Ins. Co., 234 N.W. 201, 202, 211 Iowa 736.

Minn.—Maze v. Equitable Life Ins. Co. of Iowa, 246 N.W. 737, 740, 188 Minn. 139.

N.C.—Mitchell v. Equitable Life Assur. Soc. of U. S., 172 S.E. 495, 496, 205 N.C. 726.

3. Ind.—Landreth v. State, 171 N.E. 192, 196, 201 Ind. 691, 72 A.L.R. 891.

4. Mo.—Hickman v. Union Electric Light, etc., Co., 226 S.W. 570, 576.

5. Conn.—Morford v. Peck, 46 Conn. 380, 385.

"Præsumere" defined see ante p 474 notes 32, 33.

6. Tex.—Cloud v. State, 202 S.W. 2d 846, 848, 150 Tex.Cr. 458.

7. Mo.—Hickman v. Union Electric Light, etc., Co., 226 S.W. 570, 576.

8. Cal.—Dietlin v. Missouri State Life Ins. Co., 14 P.2d 331, 335, 126 Cal.App. 15.

**Similarly defined**

(1) To assume to be true, or entitled to belief without examination or proof.—Ferrari v. Interurban St. R. Co., 103 N.Y.S. 134, 136, 118 App. Div. 155.

(2) To believe without examination.—Hammock v. McBride, 6 Ga. 178, 184.

9. Cal.—Dietlin v. Missouri State Life Ins. Co., 14 P.2d 331, 335, 126 Cal.App. 15.

Conn.—Morford v. Peck, 46 Conn. 380, 385.

Ind.—Pittsburgh, C. & St. L. Ry. Co. v. Bennett, 35 N.E. 1033, 1035, 9 Ind.App. 92.

Phrases employing the word and as to which more recent adjudications have not been found see 49 C.J. p 1341 notes 64—69.

10. Ind.—Pittsburgh, etc., R. Co. v. Bennett, 35 N.E. 1033, 1039, 9 Ind. App. 92.

**Similarly defined**

(1) To assume to be true beforehand.—Hickman v. Union Electric Light, etc., Co., Mo., 226 S.W. 576, 576.

(2) To assume a matter beforehand without proof.—State v. Schuck, 201 N.W. 342, 345, 51 N.D. 875.

(3) To take or assume a matter beforehand.—Morford v. Peck, 46 Conn. 380, 385.

11. Cal.—Dietlin v. Missouri State

to affirm a thing to be true, without proof;<sup>12</sup> to infer;<sup>13</sup> to venture, go, or act by an assumption of leave or authority not granted.<sup>14</sup> Also, to go beyond what is warranted by the circumstances of the case.<sup>15</sup>

*Presumed* means taken for granted without proof.<sup>16</sup> It has been held equivalent to, or synonymous with, "deemed" see 26 C.J.S. p 660 note 42, and distinguished from "inferred" see 43 C.J.S. p 373 note 31.

**PRESUMPTIO JURIS ET DE JURE.** See ante p 474 note 36.

**PRESUMPTION.** The term is defined in Criminal Law § 579 and in Evidence § 114. For other references consult the indexes to these titles and the Descriptive-Word Index.

**PRESUMPTIVE.** Based on presumption or probability; probable.<sup>17</sup>

**PRESUMPTIVELY.** By previous supposition.<sup>18</sup>

**PRESUNCIÓN.** In Spanish law, presumption which may be either of law (*presunción de derecho*) or of fact (*presunción de hombre*) which may be violent (*violente* or *vehemente*), probable or medium, or light.<sup>19</sup>

**PRESUPPOSE.** To imply or involve as a necessary condition; require as antecedently true; cause to be taken for granted.<sup>20</sup> It has been said that the word "presupposes" is as often used in the cases

as is the word "implies,"<sup>21</sup> and the two terms are considered as synonymous see 42 C.J.S. p 406 note 34.1.

**PRETEND.** In earlier times the word "pretend" had a broader meaning than it has at present, and signified, among other things, to profess to have; to make profession of (some quality or skill); and it also was used in the sense of to claim, to profess, to undertake; but this meaning has been greatly narrowed in the course of time, and there now is involved in the word an element of intentional falsity.<sup>22</sup> It is now defined as meaning to hold as true that which is false; to feign; to simulate.<sup>23</sup>

"Pretend" has been held synonymous with "assume" see 7 C.J.S. p 105 note 25.

*Pretended.* False;<sup>24</sup> feigned;<sup>25</sup> not real;<sup>26</sup> simulated;<sup>27</sup> something claimed contrary to the truth of the matter, or something falsely assumed;<sup>28</sup> unreal.<sup>29</sup>

"Pretended" has been distinguished from "actual" see 1 C.J.S. p 1433 note 64.

**PRÊTE-NOM.** A French term meaning one who lends his name.<sup>30</sup>

**PRETENSE or PRETENCE.** A holding out, or offering to others something false and feigned;<sup>31</sup> a ruse or wile masking ulterior design;<sup>32</sup> a show, or a holding forth in form, of something which does not, in fact, exist;<sup>33</sup> that which is advanced or displayed for the purpose of concealing the reality.<sup>34</sup>

Life Ins. Co., 14 P.2d 331, 335, 126 Cal.App. 15.

12. Ga.—Hammock v. McBride, 6 Ga. 178, 184.  
49 C.J. p 1341 note 53.

13. Cal.—Dietlin v. Missouri State Life Ins. Co., 14 P.2d 331, 335, 126 Cal.App. 15.

49 C.J. p 1341 note 59.

14. Ark.—Pearce v. State, 132 S.W. 986, 987, 97 Ark. 5.

15. Ark.—Pearce v. State, supra.

16. Del.—Green v. Maloney, 30 A. 672, 674, 12 Del. 22.

17. Century D.

#### Phrases

(1) "Heir presumptive" see Decent and Distribution § 61.

(2) "Presumptive evidence" see Evidence § 2 note 24.

(3) "Presumptive trusts" see the C.J.S. title Trusts § 14, also 65 C.J. p 223 note 62.

18. N.Y.—Isaacs v. Isaacs, 61 How. Pr. 369, 371.

19. Escriba Diccionario, 49 C.J. p 1341 note 78.

20. New Standard D.

21. Cal.—Everts v. Rosenberg, 41 P.2d 166, 4 Cal.App.2d 500.

22. Ont.—Rex v. Pollock, 47 Ont.L. 616, 625, 28 Dom.L.R. 545, 26 Can. Cr.Cas. 24.

23. Tex.—Brown v. Perez, Civ.App., 25 S.W. 980, 983.

24. Ark.—State v. Kansas City, etc., R., etc., Co., 153 S.W. 614, 616, 106 Ark. 248.

#### Phrases

(1) "Any pretended right or title." —Tomb v. Sherwood, 13 Johns, N.Y., 289, 291.

(2) "Pretended assessment" see 6 C.J.S. p 1031 note 82.1.

(3) "Pretended decree" see 26 C.J. S. p 44 note 5.1.

(4) "Pretended deed" see Deeds § 1.

25. Ark.—State v. Kansas City, etc., R., etc., Co., 153 S.W. 614, 616, 106 Ark. 248.

Tex.—Astugueville v. Loustannau, 61 Tex. 233, 239.

26. Tex.—Astugueville v. Loustannau, supra.

27. Ark.—State v. Kansas City, etc., R., etc., Co., 153 S.W. 614, 616, 106 Ark. 248.

28. Neb.—Powell v. Yeazel, 64 N.W. 695, 697, 46 Neb. 225.

29. Ark.—State v. Kansas City, etc., R., etc., Co., 153 S.W. 614, 616, 106 Ark. 248.

30. La.—Peterson v. Moresi, 186 So. 737, 739, 191 La. 932.

31. Iowa.—State v. Grant, 53 N.W. 120, 121, 86 Iowa 216—State v. Joaquin, 43 Iowa 131, 132.

Phrases employing the word and as to which more recent adjudications have not been found see 49 C.J. p 1342 notes 14, 15.

32. Ga.—Sheppard v. State, 105 S.E. 601, 602, 151 Ga. 27.

33. Vt.—Sprague v. Fletcher, 30 A. 693, 694, 67 Vt. 46.

34. Ga.—Sheppard v. State, 105 S.E. 601, 602, 152 Ga. 27.

It sometimes may be used to imply sham, falsity, and groundlessness.<sup>35</sup>

The word "pretense" is treated in False Pretenses § 1 et seq.

**PRETENSION.** A claim assumed or advanced, whether false or well founded, as to a possession, right, dignity, or title.<sup>36</sup> "Pretension" and "claim" have been held synonymous and the terms have also been distinguished see 14 C.J.S. p 1185 notes 70, 86.

**PRETERICIÓN.** In Spanish law, the testamentary omission of an heir by force of law.<sup>37</sup>

**PRETERMIT.** To pass by, to omit, to disregard.<sup>38</sup>

**PRETEXT.** False appearance; ostensible reason or motive assigned or assumed as a color or cover for the real reason or motive; pretense.<sup>39</sup>

**PRETIUM.** A Latin term meaning price; cost; value; the price of an article sold.<sup>40</sup>

*Pretium affectionis.* An imaginary value put on a thing by the fancy of the owner growing out of his or her attachment for the specific article, its associations, and so forth, and perhaps not ineptly called its sentimental value.<sup>41</sup>

*Maxim.* As the first word of a maxim as to which there have been no recent applications see 49 C.J. p 1342 note 30.

**PRETTY.** The adverb "pretty" means in some de-

gree; moderately; considerably; rather;<sup>42</sup> and it is less emphatic than "very."<sup>43</sup>

**PREVAIL.** The primary sense of the word "prevail" is to gain the victory; have the mastery; triumph;<sup>44</sup> to be or become effective or effectual; to be in force; to obtain;<sup>45</sup> to be in general use or practice; to be commonly accepted or adopted; to exist.<sup>46</sup> In law the term means to obtain a decision on the merits in one's favor.<sup>47</sup>

In a secondary or figurative sense "prevail" means to bring persuasion, inducement, or urgency to bear (on, upon, or with) successfully.<sup>48</sup>

*Prevailing.* A word having no technical legal import.<sup>49</sup> It means common;<sup>50</sup> current; general;<sup>51</sup> in operation;<sup>52</sup> prevalent.<sup>53</sup>

**PREVARICATION.** In the civil law, deceitful, crafty, or unfaithful conduct, particularly such as is manifested in concealing a crime.<sup>54</sup>

**PREVARICATO.** In Spanish law, infidelity on the part of a lawyer to his client.<sup>55</sup> Prevaricate is also applied to abuses or corruption on the part of public officials, especially judges.<sup>56</sup>

**PREVENCIÓN.** In Spanish law, the act of taking cognizance of a cause by one of several judges who have concurrent jurisdiction.<sup>57</sup>

**PREVENT.** A word of common understanding;<sup>58</sup> It is derived from the Latin word "prævenire,"<sup>59</sup>

35. Va.—Hash v. Commonwealth, 13 S.E. 398, 404, 88 Va. 172.

36. New Standard D.

37. Escriche Diccionario.

38. Ohio.—Provident Sav. Bank & Trust Co. v. Nash, 62 N.E.2d 736, 739, 75 Ohio App. 493.

49 C.J. p 1342 note 18.

#### Phrases

(1) "Pretermitted child" see Descent and Distribution § 45.

(2) "Pretermitted defense" see 26 C.J.S. p 675 note 13.

39. Okl.—Weston v. Territory, 98 P. 360, 362, 1 Okl.Cr. 407.

49 C.J. p 1342 note 24.

Phrases employing the word and as to which more recent adjudications have not been found see 49 C.J. p 1342 notes 26-28.

40. Black L.D.

41. N.C.—Thomason v. Hackney & Moale Co., 74 S.E. 1022, 1024, 159 N.C. 299.

49 C.J. p 1342 note 29.

42. Ga.—Nelms v. State, 51 S.E. 588, 123 Ga. 575.

"Pretty fast" see 35 C.J.S. p 753 note 61.

43. Ga.—Nelms v. State, supra.

44. Cal.—People v. Chase, 1 P.2d 60, 61, 117 Cal.App. 775.

45. Fla.—Atlantic Coast Line R. Co. v. Gamble, 21 So.2d 348, 350, 155 Fla. 678.

46. Fla.—Atlantic Coast Line R. Co. v. Gamble, supra.

47. Kan.—Steele v. Dye, 105 P. 700, 702, 81 Kan. 286.

49 C.J. p 1342 note 38.

48. Cal.—People v. Chase, 1 P.2d 60, 61, 117 Cal.App. 775.

49. Mich.—Detroit v. Detroit United R. Co., 139 N.W. 56, 59, 173 Mich. 314.

50. Mich.—Detroit v. Detroit United R. Co., supra.

N.Y.—People v. Coler, 59 N.E. 716, 730, 166 N.Y. 1, 82 Am.S.R. 605, 52 L.R.A. 814.

#### Phrases

(1) "Prevailing party" see Parties § 1.

(2) "Prevailing rate of wages" is the fair market rate of wages.—

Morse v. Delaney, 218 N.Y.S. 571, 576, 128 Misc. 317—49 C.J. p 1343 note 52.

(3) Other phrases as to which more recent adjudications have not been found see 49 C.J. p 1343 notes 53, 54.

51. N.Y.—People v. Coler, 59 N.E. 716, 730, 166 N.Y. 1, 82 Am.S.R. 605, 52 L.R.A. 814.

52. Mich.—Detroit v. Detroit United R. Co., 139 N.W. 56, 59, 173 Mich. 314.

53. Mich.—Detroit v. Detroit United R. Co., supra.

N.Y.—People v. Coler, 59 N.E. 716, 730, 166 N.Y. 1, 42, 82 Am.S.R. 605, 52 L.R.A. 814.

54. Black L.D.

49 C.J. p 1343 note 57.

55. Escriche Diccionario.

49 C.J. p 1343 note 58.

56. Escriche Diccionario.

49 C.J. p 1343 note 60.

57. Escriche Diccionario.

58. U.S.—International Parts Corporation v. Federal Trade Commission, C.C.A.7, 133 F.2d 883, 886.

59. N.C.—Luton v. Badham, 37 S.E.

signifying to come before, to precede;<sup>60</sup> and it has been said that this was the original meaning of the word in English.<sup>61</sup> The term is defined as meaning to go before;<sup>62</sup> to precede; to be beforehand with; to get the start of; to anticipate; to forestall;<sup>63</sup> but it has been said that these meanings are obsolete.<sup>64</sup>

In more modern usage the word "prevent" is defined as meaning to stop;<sup>65</sup> to keep from happening by taking the necessary measures;<sup>66</sup> to hinder;<sup>67</sup> to thwart;<sup>68</sup> to retard;<sup>69</sup> to preclude;<sup>70</sup> to obstruct;<sup>71</sup> to check;<sup>72</sup> to frustrate;<sup>73</sup> to prohibit;<sup>74</sup> to intercept;<sup>75</sup> to ward off;<sup>76</sup> and generally the word means hindering, checking, or stopping.<sup>77</sup>

While it has been said that all the meanings of the term "prevent" are anticipative,<sup>78</sup> it has also been stated that, when used in its original sense of anticipation, to "prevent" nearly always suggests

that someone is the object of prevention; but, when used in the usual modern sense of hindrance or preclusion, the word always means that some other entity is preventing action by the one prevented.<sup>79</sup> The word "prevent" does not necessarily imply physical force,<sup>80</sup> and the common acceptance of the term carries no connotation of permanency.<sup>81</sup>

"Prevent" has been held to be equivalent to, or synonymous with, "hinder" see 40 C.J.S. p 400 note 32. The words "prevent" and "prohibit" are sometimes used indiscriminately and as synonyms to avoid too frequent repetition.<sup>82</sup>

"Prevent" has been compared with, or distinguished from, "dissuade" see 27 C.J.S. p 357 note 71, "hinder" see 40 C.J.S. p 400 note 34, "obstruct" see 67 C.J.S. p 44 note 95, "regulate,"<sup>83</sup> and "resist."<sup>84</sup>

*Phrases* employing the word "prevent," or cognate terms, are set out in the note.<sup>85</sup>

143, 146, 127 N.C. 96, 80 Am.S.R. 783, 53 L.R.A. 337.  
49 C.J. p 1343 note 62.

60. N.C.—Luton v. Badham, *supra*.  
**Similarly defined**

To come before the usual time.—Smith v. Whitbeck, 13 Ohio St. 471, 478.

61. N.C.—Luton v. Badham, 37 S.E. 143, 146, 127 N.C. 96, 80 Am.S.R. 783, 53 L.R.A. 337.

62. Cal.—Brady v. Bartlett, 56 Cal. 350, 364.  
N.Y.—Peverelly v. People, 3 Park. Cr. 59, 69.

63. Cal.—Brady v. Bartlett, 56 Cal. 350, 364.  
49 C.J. p 1343 note 70.

64. Cal.—Brady v. Bartlett, *supra*.

65. Ky.—Corpus Juris cited in Mid-Continent Petroleum Corp. v. Barrett, 181 S.W.2d 60, 63, 297 Ky. 709.

Minn.—Corpus Juris cited in Orme v. Atlas Gas & Oil Co., 13 N.W.2d 757, 761, 217 Minn. 27.  
49 C.J. p 1343 note 87.

**Similarly defined**

(1) To stop in advance, from some act or operation.—Green v. State, 35 S.E. 97, 99, 109 Ga. 536.

(2) To come before and thereby stop.—Rowe v. Atlas Oil Co., 84 So. 485, 488, 147 La. 37—49 C.J. p 1343 note 74.

(3) To keep from occurring or being brought about as an event or result.—Green v. State, *supra*.

66. Tex.—Edgar v. Schmidt, Civ. App., 221 S.W.2d 867, 869.

67. Tex.—Fidelity, etc., Co. v. Joiner, Civ. App., 178 S.W. 806, 809.  
49 C.J. p 1343 note 76.

**Similarly expressed**

To hinder from happening by previous measures.—Green v. State, 35 S.E. 97, 99, 109 Ga. 536.

68. N.C.—Luton v. Badham, 37 S.E. 143, 146, 127 N.C. 96, 80 Am.S.R. 783, 53 L.R.A. 337.  
49 C.J. p 1343 note 89.

69. Ind.—Lake Erie, etc., R. Co. v. McFall, 76 N.E. 400, 402, 165 Ind. 574.

**Similarly defined**

(1) To restrain.—Green v. State, 35 S.E. 97, 99, 109 Ga. 536.

(2) To impede.—Brady v. Bartlett, 56 Cal. 350, 365.

70. Ga.—Green v. State, 35 S.E. 97, 99, 109 Ga. 536.

Ky.—Corpus Juris cited in Mid-Continent Petroleum Corp. v. Barrett, 181 S.W.2d 60, 63, 297 Ky. 709.

Minn.—Corpus Juris cited in Orme v. Atlas Gas & Oil Co., 13 N.W.2d 757, 761, 217 Minn. 27.

71. Ark.—Burr v. Williams, 20 Ark. 171, 175.

Cal.—Brady v. Bartlett, 56 Cal. 350, 365.

72. Ga.—Green v. State, 35 S.E. 97, 99, 109 Ga. 536.

Ind.—Lake Erie, etc., R. Co. v. McFall, 76 N.E. 400, 402, 165 Ind. 574.

73. Ky.—Corpus Juris cited in Mid-Continent Petroleum Corp. v. Barrett, 181 S.W.2d 60, 63, 297 Ky. 709.

Minn.—Corpus Juris cited in Orme v. Atlas Gas & Oil Co., 13 N.W.2d 757, 761, 217 Minn. 27.  
49 C.J. p 1343 note 75.

74. Ky.—Mid-Continent Petroleum Corp. v. Barrett, 181 S.W.2d 60, 63, 297 Ky. 709.

Minn.—Orme v. Atlas Gas & Oil Co., 13 N.W.2d 757, 761, 217 Minn. 27.

75. N.C.—Luton v. Badham, 37 S.E. 143, 146, 127 N.C. 96, 80 Am.S.R. 783, 53 L.R.A. 337.

49 C.J. p 1343 note 79.

**Similarly defined**

(1) To intercept and stop.—Brady v. Bartlett, 56 Cal. 350, 365.

(2) To intercept or bar the action of.—Green v. State, 35 S.E. 97, 99, 109 Ga. 536.

76. Ga.—Green v. State, *supra*.

77. Tex.—Edgar v. Schmidt, Civ. App., 221 S.W.2d 867, 869.

78. N.C.—Luton v. Badham, 37 S.E. 143, 146, 127 N.C. 96, 80 Am.S.R. 783, 53 L.R.A. 337.

79. U.S.—In re MacLauchlan, C.C. A.N.Y., 9 F.2d 534, 535.

80. Eng.—Cort v. Ambergate, etc., R. Co., 17 Q.B. 127, 145, 79 E.C.L. 127, 117 Reprint 1229.

49 C.J. p 1344 note 92.

81. U.S.—International Parts Corporation v. Federal Trade Commission, C.O.A. 7, 133 F.2d 883, 886.

82. Ala.—Ex parte Mayor & Aldermen of Florence, 78 Ala. 419, 424.  
50 C.J. p 650 note 95 [a].

83. La.—Shreveport v. Price, 77 So. 883, 885, 143 La. 986.

**Not synonymous**

Ind.—Duckwall v. New Albany, 25 Ind. 283, 285.

84. Mo.—Hax v. Quincy, O. & K. C. R. Co., 100 S.W. 693, 695, 123 Mo. App. 173.

54 C.J. p 719 note 57 [b].

**85. Phrases**

(1) "Prevent or attempt to prevent" means to anticipate, forestall, to intercept, hinder, frustrate,

**PREVENTIVE INJUNCTION.** See Injunctions § 4.

**PREVIOUS.** Being or taking place before something else; antecedent; prior.<sup>86</sup> The word "previous," indicating the concept of time, has been held synonymous with the terms "next preceding" and "next prior to," as discussed in the C.J.S. title Time § 8, also 49 C.J. p 1344 notes 7, 8.

**PREVIOUSLY.** An adverb of time, used in comparing an act or state named, to another act or state, subsequent in order of time, for the purpose of asserting the priority of the first.<sup>87</sup>

**PRICE.** The word "price" is variously defined as meaning the amount of money given, or set as the amount that will be given or received, in exchange for anything;<sup>88</sup> the amount at which a commodity is valued or sold in the market;<sup>89</sup> a consideration in current money given for the purchase of the thing sold;<sup>90</sup> the consideration demanded or received in connection with the sale of a commodity;<sup>91</sup> the consideration in money given for the purchase of a thing;<sup>92</sup> the sum stipulated as the equivalent of the

thing sold, and also every incident taken into consideration for the fixing of the price put to the debit of the vendee, and agreed to by him;<sup>93</sup> something which one ordinarily accepts voluntarily in exchange for something else;<sup>94</sup> the sum in money or other equivalent set on an article by the seller, which he demands for it;<sup>95</sup> the sum or amount of money, or its equivalent, which a seller asks or obtains for his goods in market;<sup>96</sup> the sum for which a thing is bought or sold, or offered for sale;<sup>97</sup> the sum of money which an article is sold for.<sup>98</sup>

While it has been said that "price" does not simply mean value or cost,<sup>99</sup> the word "price" has been defined as meaning the market value;<sup>1</sup> the value which the seller places on his goods for sale;<sup>2</sup> the cost to the buyer;<sup>3</sup> the amount paid by the purchaser.<sup>4</sup> It is further defined as meaning the market price;<sup>5</sup> the sum actually given for an article;<sup>6</sup> the sum which a seller will receive in exchange;<sup>7</sup> an exchangeable value of a commodity;<sup>8</sup> a recompense.<sup>9</sup>

"Price" implies value, usually in money,<sup>10</sup> and in common usage "price" is understood to mean money,<sup>11</sup> although this is not always so,<sup>12</sup> and it

thwart, to keep from happening.—*Ex parte Frye*, 156 S.W.2d 531, 535, 143 Tex.Cr. 9.

(2) "Prevents or dissuades" see 27 C.J.S. p 357 note 72.

(3) Other phrases as to which more recent adjudications have not been found see 49 C.J. p 1344 notes 93-2.

88. New Standard D.

#### Phrases

(1) "Previous chaste character" discussed in connection with criminal liability for seduction see the C.J.S. title Seduction § 37, also 57 C.J. p 53 note 71-p 54 note 84.

(2) "Previous demand" see 26 C.J.S. p 703 note 65.

(3) Other phrases as to which more recent adjudications have not been found see 49 C.J. p 1344 notes 11-23.

87. Iowa.—*Lebrecht v. Wilcoxon*, 40 Iowa 93, 94.

Phrases employing the word and as to which more recent adjudications have not been found see 49 C.J. p 1344 notes 26-32.

88. Pa.—*In re Williamson's Estate*, 153 A. 765, 767, 302 Pa. 462.

89. Wis.—*Wing v. Wadhams Oil & Grease Co.*, 74 N.W. 819, 820, 99 Wis. 248.

90. Mo.—*Good v. Erker*, 153 S.W. 556, 559, 170 Mo.App. 681, 49 C.J. p 1345 note 54.

91. Cal.—*Garcia v. Ebeling Motor Co.*, 201 P.2d 854, 857, 89 Cal.App. 2d 688.

92. Mass.—*Corpus Juris cited in Cousbellis v. Alexander*, 54 N.E.2d 47, 49, 315 Mass. 729.

49 C.J. p 1344 note 35-p 1345 note 56.

93. La.—*De L'Isle v. Moste*, 84 La. Ann. 164, 167.

Philippine.—*Inchausti v. Cromwell*, 20 Philippine 345, 350.

94. Pa.—*Herb v. Hallowell*, 154 A. 582, 584, 304 Pa. 128.

95. Pa.—*Kountz v. Kirkpatrick*, 72 Pa. 376, 386, 13 Am.R. 687.

96. Wis.—*Wing v. Wadhams Oil & Grease Co.*, 74 N.W. 819, 820, 99 Wis. 248, 250.

97. S.C.—*Guy v. McDaniel*, 29 S.E. 196, 197, 51 S.Ct. 436.

#### Similarly defined

The sum for which anything may be bought, or at which its value is rated; an equivalent in money asked for anything.—*Attorney General v. Toronto*, 20 Ont. 19, 25.

98. N.Y.—*Hudson Iron Co. v. Alger*, 54 N.Y. 173, 177.

99. S.C.—*Guy v. McDaniel*, 29 S.E. 196, 197, 51 S.C. 436.

#### Defined as meaning "cost"

Ont.—*Attorney General v. Toronto*, 20 Ont. 19, 25.

1. Tex.—*Ara v. Rutland*, Civ.App., 172 S.W. 993, 994.

2. N.Y.—*Scott v. People*, 62 Barb. 62, 72.

49 C.J. p 1345 note 49.

3. Mo.—*Williams v. Hybskmann*, 278 S.W. 377, 379, 311 Mo. 332.

4. U.S.—*Boyles v. Stapleton*, D.C. Colo., 53 F.Supp. 336, 340.

5. Wis.—*Wing v. Wadhams Oil & Grease Co.*, 74 N.W. 819, 820, 99 Wis. 248.

6. Mo.—*Williams v. Hybskmann*, 278 S.W. 377, 379, 311 Mo. 332.

7. U.S.—*Computing Scale Co. v. Standard Computing Scale Co.*, Mich., 118 F. 965, 968, 55 C.C.A. 459.

8. Wis.—*Wing v. Wadhams Oil & Grease Co.*, 74 N.W. 819, 820, 99 Wis. 248, 250.

9. Pa.—*Herb v. Hallowell*, 154 A. 582, 584, 304 Pa. 128.

10. Ark.—*Lonoke v. Bransford*, 216 S.W. 38, 40, 141 Ark. 18.

#### Sale for money

The word "price" generally implies a sale for money, although this is not always so.—*Halsted v. Globe Indemnity Co.*, 179 N.E. 376, 377, 258 N.Y. 168.

11. N.D.—*Embsden State Bank v. Boyle*, 196 N.W. 820, 821, 50 N.D. 573.

49 C.J. p 1345 note 52.

12. N.D.—*Embsden State Bank v. Boyle*, supra.

49 C.J. p 1345 note 53.

does not necessarily mean value in money; it may mean money or some other equivalent.<sup>13</sup>

"Price" has been held equivalent to, or synonymous with, "compensation" see 15 C.J.S. p 655 note 44, and "sum,"<sup>14</sup> and has been compared with, or distinguished from, "consideration" see 15 C.J.S. p 986 note 63.1, and "value."<sup>15</sup>

The regulation, fixing, or control of prices is treated in various places throughout this work, and particularly in the title Monopolies, reference being made to the index to that title. The subject is also treated in Constitutional Law §§ 169, 209, and in the C.J.S. title War § 20, also 67 C.J. p 367 note 8-p 372 note 27.

Phrases employing the word "price" are set out in the note,<sup>16</sup> and for additional phrases as to which more recent adjudications have not been found see 49 C.J. p 1346 notes 64-85.

**PRICKERS.** The term applied to the frayed and

broken wire strands of a metal cable.<sup>17</sup>

**PRIDE.** Undue self esteem; conceit; haughtiness or disdain for others.<sup>18</sup>

**PRIEST.** Distinguished from "pastor" see the C.J. S. title Religious Societies § 39, also 49 C.J. p 1346 note 90 [a].

**PRIMA.** In Spanish law, insurance premium.<sup>19</sup>

**PRIMA FACIE.** Latin words which have, by long usage, become a part of the English language, and the meaning of which is readily understood by a person of common understanding.<sup>20</sup> They are words of very common use in the courts and in newspaper reports of judicial decisions, and they import that the evidence produces for the time being a certain result, but that the result may be repelled.<sup>21</sup> They have been defined as meaning apparent.<sup>22</sup> They have further been defined as meaning as it first appears;<sup>23</sup>

13. Cal.—Kinard v. Jordan, 101 P. 696, 698, 10 Cal.App. 219. 49 C.J. p 1345 note 50.

14. Pa.—Paul v. Grimm, 30 A. 721, 165 Pa. 139, 143, 44 Am.S.R. 648.

15. Pa.—Theiss v. Wiess, 31 A. 63, 66, 166 Pa. 9, 45 Am.S.R. 638. 49 C.J. p 1345 note 58.

#### Not necessarily synonymous

"Price and value are not necessarily synonymous. Price is determined by short term factors and by the caprices of the market. Value on the other hand is dependent upon long term factors and is directly related to the intrinsic worth of the property that resists the impact of temporary and abnormal conditions. Neither price nor value can be determined by mathematical calculations, and value, even more than price, is a matter of judgment reached after a full consideration of all the relevant elements that may conceivably affect it."—State ex rel. Buck v. Rapp, 36 N.Y.S.2d 790, 796.

#### 16. Purchase price

(1) The consideration paid or agreed to be paid on the passing of the title to property in its entirety. —South Texas Lumber Co. v. Epps, 150 P. 164, 165, 48 Okl. 372.

(2) The price agreed on by the parties as a consideration for which the property is sold and purchased. —Byrd v. Babin, 200 So. 294, 300, 196 La. 902.

(3) It is commonly understood to mean money, although this is not always so.—Embsden State Bank v. Boyle, 196 N.W. 320, 321, 50 N.D. 573.

#### Wholesale price

(1) The term "wholesale price"

has a fixed, certain, and well-defined meaning in the mercantile world, and means the price fixed on merchandise by one who buys in large quantities of the same producer or manufacturer, and who sells the same to jobbers or to retail dealers. —Fawcner v. Lew Smith Wall Paper Co., 55 N.W. 200, 201, 88 Iowa 169, 45 Am.S.R. 230.

(2) There is a difference between the terms "wholesale price" and "wholesale cost," although the two terms are often used interchangeably.—J. W. Finn & Co. v. Culberhouse, 150 S.W. 698, 700, 105 Ark. 197.

#### Other phrases

(1) "Current price" see 25 C.J.S. p 37 notes 44-46.

(2) "Fair market price" see 35 C. J.S. p 483 note 5-p 484 note 9.

(3) "F. o. b. price" see 36 C.J.S. p 1035 note 19.

(4) "Invoice price" see 48 C.J.S. p 765 note 67-p 766 note 69.

(5) "List price" see 54 C.J.S. p 632 note 9.

(6) "Price expectancy" as interchangeable with "exhibition value" see 35 C.J.S. p 197 note 54.

(7) "Price list" see 54 C.J.S. p 632 note 9.

(8) "Reasonable price" is a question of fact dependent on the circumstances of each case.—A. M. Webb & Co. v. Robert P. Miller Co., C.C.A.Pa., 157 F.2d 865, 867—52 C.J. p 1187 note 34. As price purchaser is required to pay where contract of sale mentions no price see the C.J.S. title Sales § 75, also 55 C.J. p 224 notes 63-77.

(9) "Stipulated price;" in ordinary meaning, an agreed or fixed amount of money for a commodity. —Lonoke v. Bransford, 216 S.W. 38, 40, 141 Ark. 18—49 C.J. p 1346 note 63.

17. N.Y.—Henry v. Norton, 66 N.Y. S.2d 317, 320.

18. S.C.—Nelson v. Atlantic Coast Line R. Co., 4 S.E.2d 273, 279, 191 S.C. 345.

19. Escriche Diccionario.

20. Cal.—People v. Carmona, 251 P. 315, 318, 80 Cal.App. 159.

La.—Corpus Juris quoted in Martin v. Breaux, App., 165 So. 743, 745.

21. La.—Corpus Juris quoted in Martin v. Breaux, App., 165 So. 743, 745.

W.Va.—State v. Stover, 63 S.E. 315, 64 W.Va. 668.

As used in legal phraseology, the words "prima facie" mean a fact presumed to be true unless disproved by some evidence to the contrary.

Ariz.—Powell v. Gleason, 74 P.2d 47, 51, 50 Ariz. 542, 114 A.L.R. 838. Ohio.—State ex rel. Herbert v. Whims, 38 N.E.2d 596, 599, 68 Ohio App. 39.

22. La.—Corpus Juris quoted in Martin v. Breaux, App., 165 So. 743, 745.

Wis.—State v. Hastings, 15 Wis. 75, 84.

23. Cal.—Corpus Juris quoted in Ex parte Moseley, 45 P.2d 241, 243, 6 Cal.App.2d 654.

Ga.—Criswell Baking Co. v. Milligan, 50 S.E.2d 136, 143, 77 Ga.App. 861.

Ill.—Morrison v. Flowers, 139 N.E. 10, 12, 308 Ill. 189.

at first sight;<sup>24</sup> at first view;<sup>25</sup> on its face;<sup>26</sup> on the face of it;<sup>27</sup> on the first appearance;<sup>28</sup> presumably;<sup>29</sup> so far as can be judged by the first disclosure.<sup>30</sup>

The term has no narrow or restricted meaning synonymous with "inference" or "presumption,"<sup>31</sup> but it has been held to be equivalent to "presumably" see ante p 494 note 3.

Phrases employing the words are set out in the note.<sup>32</sup>

**PRIMAGE.** As an allowance by shippers to the master of a vessel for his care and trouble relative to the cargo see the C.J.S. title Shipping § 68, also 49 C.J. p 1347 notes 30, 31, and 58 C.J. p 283 notes 22-28.

**PRIMA PARS ÆQUITATIS ÆQUALITAS.** See 49 C.J. p 1347 note 32.

**PRIMARILY.** The adverb "primarily" has shades

of meaning similar to those of the adjective "primary."<sup>33</sup> It is defined as meaning in the first or most important place; originally; in the first intention;<sup>34</sup> basically or in such manner as to be of first importance<sup>35</sup> or of principal concern;<sup>36</sup> in the primary or first instance; at first; in the first place; chiefly; principally.<sup>37</sup> When the word "primarily" is applied to a single activity it always means the first, or chief, or principal, activity.<sup>38</sup> Other accepted and common meanings of "primarily" are essentially or fundamentally.<sup>39</sup>

**PRIMARY.** The adjective "primary"<sup>40</sup> has many meanings<sup>41</sup> and different shades of meaning,<sup>42</sup> varying in accordance with the subject word to which it is applied;<sup>43</sup> but always its basic idea is "first,"<sup>44</sup> and it is defined generally as meaning first.<sup>45</sup> It may refer to the first in order of time, and thus mean original or initial; or in order of importance, and thus mean chief or principal; or in order of derivation, and thus mean fundamental.<sup>46</sup>

La.—Corpus Juris quoted in Martin v. Breaux, App., 165 So. 743, 745.

24. Cal.—Corpus Juris quoted in Ex parte Moseley, 45 P.2d 241, 243, 6 Cal.App.2d 654.

La.—Corpus Juris quoted in Martin v. Breaux, App., 165 So. 743, 745. 49 C.J. p 1346 note 98.

25. Cal.—Corpus Juris quoted in Ex parte Moseley, 45 P.2d 241, 243, 6 Cal.App.2d 654—Frank Meline Co. v. Kleinberger, 290 P. 1042, 1043, 108 Cal.App. 60.

Ga.—Spivey v. Spivey, 44 S.E.2d 224, 227, 202 Ga. 644—Criswell Baking Co. v. Milligan, 50 S.E.2d 136, 143, 77 Ga.App. 861.

La.—Corpus Juris quoted in Martin v. Breaux, App., 165 So. 743, 745. 49 C.J. p 1346 note 99.

26. Cal.—Corpus Juris quoted in Ex parte Moseley, 45 P.2d 241, 243, 6 Cal.App.2d 654.

La.—Corpus Juris quoted in Martin v. Breaux, App., 165 So. 743, 745. W.Va.—State v. Tinch, 94 S.E. 503, 505, 81 W.Va. 441.

27. Cal.—Corpus Juris quoted in Ex parte Moseley, 45 P.2d 241, 243, 6 Cal.App.2d 654.

La.—Corpus Juris quoted in Martin v. Breaux, App., 165 So. 743, 745. N.C.—State v. Wilkerson, 79 S.E. 888, 890, 164 N.C. 431.

28. Cal.—Corpus Juris quoted in Ex parte Moseley, 45 P.2d 241, 243, 6 Cal.App.2d 654.

La.—Corpus Juris quoted in Martin v. Breaux, App., 165 So. 743, 745. N.C.—State v. Wilkerson, 79 S.E. 888, 890, 164 N.C. 431.

29. La.—Corpus Juris quoted in Martin v. Breaux, App., 165 So. 743, 745.

N.C.—State v. Wilkerson, 79 S.E. 888, 890, 164 N.C. 431.

30. La.—Corpus Juris quoted in Martin v. Breaux, App., 165 So. 743, 745.

N.C.—State v. Wilkerson, 79 S.E. 888, 890, 164 N.C. 431.

31. Cal.—Frank Meline Co. v. Kleinberger, 290 P. 1042, 1043, 108 Cal. App. 60.

#### 32. Phrases

(1) "Prima facie carrying capacity" see 12 C.J.S. p 1118 note 95.

(2) "Prima facie case;" defined in Evidence § 1016. For reference to other applications of the term see indexes to the titles Criminal Law, Evidence, and Negligence.

(3) "Prima facie evidence;" defined in Criminal Law § 900 and Evidence § 1016. For other applications of the phrase see the indexes to these titles.

(4) Other phrases as to which more recent adjudications have not been found see 49 C.J. p 1347 notes 20-26.

33. D.C.—Agnew v. Board of Governors of Federal Reserve System, 153 F.2d 785, 790, 80 U.S.App.D.C. 377.

34. Fla.—Corpus Juris quoted in Zee v. Gary, 189 So. 34, 36, 137 Fla. 741. 49 C.J. p 1347 note 34.

35. U.S.—Benitez v. Bank of Nova Scotia, C.C.A. Puerto Rico, 125 F.2d 523, 531—In re Day, D.C.Ill., 10 F. Supp. 229, 231.

36. U.S.—Benitez v. Bank of Nova Scotia, C.C.A. Puerto Rico, 125 F.2d 523, 531.

37. Fla.—Zee v. Gary, 189 So. 34, 36, 137 Fla. 741.

38. D.C.—Agnew v. Board of Governors of Federal Reserve System, 153 F.2d 785, 791, 80 U.S.App.D.C. 377.

#### Similarly expressed

"One would never say that a person is 'primarily concerned' or 'primarily interested' or 'primarily engaged' in a specified single activity, if the idea sought to be conveyed was that the named activity was a lesser among several important activities. To say that such an expression conveys that idea is, we think, clearly erroneous."—Agnew v. Board of Governors of Federal Reserve System, supra.

39. U.S.—Board of Governors of Federal Reserve System v. Agnew, App.D.C., 67 S.Ct. 411, 414, 329 U.S. 441, 91 L.Ed. 408.

40. D.C.—Agnew v. Board of Governors of Federal Reserve System, 153 F.2d 785, 790, 80 U.S.App.D.C. 377.

41. S.D.—State v. Erickson, 182 N. W. 315, 316, 44 S.D. 63, 13 A.L.R. 1189.

42. D.C.—Agnew v. Board of Governors of Federal Reserve System, 153 F.2d 785, 790, 80 U.S.App.D.C. 377.

S.D.—State v. Erickson, 182 N.W. 315, 316, 44 S.D. 63, 13 A.L.R. 1189.

43. S.D.—State v. Erickson, supra.

44. D.C.—Agnew v. Board of Governors of Federal Reserve System, 153 F.2d 785, 790, 80 U.S.App.D.C. 377.

45. Ind.—State v. Hirsch, 24 N.E. 1062, 1063, 125 Ind. 207, 9 L.R.A. 170.

46. D.C.—Agnew v. Board of Governors of Federal Reserve System,

The word "primary" is variously defined as meaning first in time;<sup>47</sup> in the first order of time;<sup>48</sup> first in order of time or development;<sup>49</sup> or in intention;<sup>50</sup> original;<sup>51</sup> first in origin, time, thought, or intention;<sup>52</sup> first in order.<sup>53</sup>

"Primary" is further defined as meaning first in rank, dignity, or importance;<sup>54</sup> principal;<sup>55</sup> chief;<sup>56</sup> first in order of advancement;<sup>57</sup> first in the order of development;<sup>58</sup> fundamental;<sup>59</sup> primitive.<sup>60</sup>

"Primary," when applied to a single subject often means first, chief, or principal,<sup>61</sup> but that is not always the case, and an activity or function may be

primary if it is substantial.<sup>62</sup> "Primary" is not restricted to the singular; it may refer to the plural.<sup>63</sup>

It also means preparatory<sup>64</sup> or preliminary to something higher.<sup>65</sup>

The synonyms of "primary" are "prime" and "primeval,"<sup>66</sup> and the antonyms are "lesser" see 52 C.J.S. p 1052 note 36, and "secondary."<sup>67</sup>

Phrases employing the word are set out in the note,<sup>68</sup> and for additional phrases as to which more recent adjudications have not been found see 49 C.J. p 1348 notes 62-70.

153 F.2d 785, 790, 80 U.S.App.D.C. 377.

47. Ind.—State v. Hirsch, 24 N.E. 1062, 1063, 125 Ind. 207, 9 L.R.A. 170.

48. U.S.—McCaughn v. Electric Storage Battery Co., C.C.A.Pa., 63 F.2d 715, 717.

49. Ind.—State v. Hirsch, 24 N.E. 1062, 1063, 125 Ind. 207, 9 L.R.A. 170.

50. S.D.—State v. Erickson, 182 N.W. 315, 317, 44 S.D. 63, 13 A.L.R. 1189.

51. U.S.—McCaughn v. Electric Storage Battery Co., C.C.A.Pa., 63 F.2d 715, 717.

49 C.J. p 1347 note 45.

52. U.S.—Bowles v. Nelson-Ricks Creamery Co., D.C.Idaho, 66 F. Supp. 885, 888.

53. Ind.—State v. Hirsch, 24 N.E. 1062, 1063, 125 Ind. 207, 9 L.R.A. 170.

54. U.S.—McCaughn v. Electric Storage Battery Co., C.C.A.Pa., 63 F.2d 715, 717.

#### Similarly defined

(1) That which is first in rank, dignity, or importance.—Bowles v. Nelson-Ricks Creamery Co., D.C.Idaho, 66 F.Supp. 885, 888.

(2) Of first importance.—Carlson v. Carpenter Contractors' Assoc., 224 Ill.App. 430, 447.

55. U.S.—McCaughn v. Electric Storage Battery Co., C.C.A.Pa., 63 F.2d 715, 717.

Ill.—Carlson v. Carpenter Contractors' Assoc., 224 Ill.App. 430, 447.

56. U.S.—McCaughn v. Electric Storage Battery Co., C.C.A.Pa., 63 F.2d 715, 717.

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57. U.S.—Bowles v. Nelson-Ricks Creamery Co., D.C.Idaho, 66 F. Supp. 885, 888.

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59. S.D.—State v. Erickson, 182 N.W. 315, 317, 44 S.D. 63, 13 A.L.R. 1189.

#### Distinction noted

"It is true, as the Board says in its brief, that some dictionaries give 'fundamental' as a meaning of 'primary,' and some also give 'essential,' which, however, the Board does not mention. But these words are not synonyms of 'primary,' and they overlap in meaning only when the implication of 'fundamental' or 'essential' is 'first' or 'principal.' Other meanings of 'fundamental' and 'essential' cannot be ascribed to 'primary' merely because the words are in part analogous. Certainly those words, in meanings other than 'principal,' are not apt as descriptive of business activity."—Agnew v. Board of Governors of Federal Reserve System, 153 F.2d 785, 791, 80 U.S. App.D.C. 377.

60. Ind.—State v. Hirsch, 24 N.E. 1062, 1063, 125 Ind. 207, 9 L.R.A. 170.

S.D.—State v. Erickson, 182 N.W. 315, 317, 44 S.D. 63, 13 A.L.R. 1189.

61. U.S.—Board of Governors of Federal Reserve System v. Agnew, App.D.C., 67 S.Ct. 411, 414, 329 U.S. 441, 91 L.Ed. 408.

D.C.—Agnew v. Board of Governors of Federal Reserve System, 153 F.2d 785, 790, 80 U.S.App.D.C. 377.

62. U.S.—Board of Governors of Federal Reserve System v. Agnew, App.D.C., 67 S.Ct. 411, 414, 329 U.S. 441, 91 L.Ed. 408.

63. D.C.—Agnew v. Board of Governors of Federal Reserve System, 153 F.2d 785, 790, 80 U.S.App.D.C. 377.

"Thus, the primary colors are not one but several; and so with the planets and the causes of war. An activity may be either a primary activity or the primary activity of a given person."—Agnew v. Board of Governors of Federal Reserve System, supra.

64. Ind.—State v. Hirsch, 24 N.E.

1062, 1063, 125 Ind. 207, 9 L.R.A. 170.

65. Pa.—Commonwealth v. Young, 16 Pa.Super. 317, 322.

66. D.C.—Agnew v. Board of Governors of Federal Reserve System, 153 F.2d 785, 790, 80 U.S.App.D.C. 377.

67. D.C.—Agnew v. Board of Governors of Federal Reserve System, supra.

#### 68. Primary purpose

(1) That which is first intention, which is fundamental.—State v. Erickson, 182 N.W. 315, 317, 44 S.D. 63, 13 A.L.R. 1189.

(2) The principal or fixed intention with which an act or course of conduct is undertaken.—Carlson v. Carpenter Contractors' Assoc., 224 Ill.App. 430, 448.

#### Other phrases

(1) "Primary boycott" as a conspiracy see Conspiracy § 12.

(2) "Primary cause" see 14 C.J.S. p 51 note 37.1.

(3) "Primary coil" see Electricity § 1.

(4) "Primary coverage" see Insurance § 49.

(5) "Primary disposal" of lands of the United States see the C.J.S. title Public Lands § 24, also 49 C.J. p 1347 note 53-p 1348 note 54.

(6) "Primary elections" see index to title Elections.

(7) "Primary evidence," otherwise known as "best evidence," defined see Evidence § 776.

(8) "Primary franchise" see Corporations § 69.

(9) "Primary invention" see Patents § 210.

(10) "Primary meeting" see Elections § 97.

(11) "Primary pleurisy" see ante p 155 note 12.

(12) "Primary rights" are the correlative of "primary duties."—Parker v. Brown, 10 S.E.2d 625, 630, 195 S.C. 35.



**PRIME.** The word "prime" has a variety of significations and is defined as meaning first in order of time; original; primary; first in rank, degree, dignity, authority, or importance.<sup>69</sup> It has been held to be a synonym of "primary" see ante p 501 note 66.

**PRIMEVAL.** Belonging to the first ages; primitive in time; primal; pristine.<sup>70</sup> It has been held to be a synonym of "primary" see ante p 501 note 66.

**PRIMO; PRIMUS.** As the first words of maxims as to which there have been no recent applications see 49 C.J. p 1348 notes 91, 95.

**PRIMOGENITURA.** In Spanish law, the right or prerogative of the first-born son.<sup>71</sup>

**PRIMOGENITURE.** The state of being the first born among several children of the same parents; seniority by birth in the same family; the superior or exclusive right possessed by the eldest son, and particularly his right to succeed to the estate of his ancestor, in right of his seniority by birth, to the exclusion of younger sons.<sup>72</sup>

**PRINCE.** In the general acceptance of the term according to authorities, "prince," when applied in the law of nations, signifies a sovereign, a king, emperor, or ruler; one to whom power is delegated or vested.<sup>73</sup>

**PRINCEPS.** As the first word of maxims as to which there have been no recent applications see 49 C.J. p 1348 notes 97, 98.

**PRINCIPAL.** As a noun the word "principal" has two different meanings. In one sense, and in what has been said to be its original signification, it means

a sum or fund which is producing interest;<sup>74</sup> a sum of money placed at interest, or employed as a fund as distinguished from its income or profits.<sup>75</sup> In this sense the word has no strict legal meaning, but it involves the loose general idea of a source of income.<sup>76</sup> Ordinarily the term conveys no idea of land or any right therein,<sup>77</sup> and it does not include real property.<sup>78</sup> The word "principal" is frequently employed in this sense in testamentary dispositions of property, and the construction that is placed on the term when so used is discussed in the C.J.S. title Wills § 759, also 69 C.J. p 376 note 64, and 49 C.J. p 1349 note 2 [a]. In this sense, "principal" has been held equivalent to, or synonymous with, "capital" see 12 C.J.S. p 1124 note 95, "corpus" see 20 C.J.S. p 235 note 18, and "face" see 35 C.J.S. p 382 note 70, and it has been compared with, or distinguished from, "income" see 42 C.J.S. p 535 note 41, and "interest" see Interest § 1.

In an entirely different sense the noun "principal" is employed to denote a person, and in this sense the term is treated in many places throughout this work. On the civil side of the law the word "principal" is applied to the person whom the agent represents and from whom he derives his authority as stated in Agency § 1 b. The word "principal" is defined in Principal and Surety § 3 as the person on whom the primary obligation rests, and in the C.J.S. title Schools and School Districts § 154, the word "principal" is defined as meaning a teacher intrusted with special duties of direction and management. On the criminal side of the law the term "principal" is applied to one who actually perpetrates the crime or who, being actually or constructively present, aids and abets its commission as stated in Criminal Law § 81 a.

As an adjective the word "principal" is defined as meaning chief;<sup>79</sup> highest in rank, authority,

69. Mo.—Cox Real Estate Co. v. French, 142 S.W. 449, 450, 160 Mo. App. 678.

#### Prime mover

(1) An initial source of motive power, as an engine or machine, the object of which is to receive and modify force and motion as supplied by some natural source, and apply them to drive other machinery, as a water-wheel, a water-pressure engine, a windmill, a turbine, a tidal motor, a steam engine, or other heat engine. The internal combustion gas engine is a prime mover which converts heat energy, contained in the natural gas as fuel, into mechanical energy, then supplied to and used by the compressor unit.—Coverdale v. Arkansas-Louisiana Pipe Line Co., La., 58 S.Ct. 736, 738, 303 U.S. 604,

82 L.Ed. 1043—Bowles v. Ammon, D. C.Neb., 61 F.Supp. 106, 109.

(2) All internal combustion engines are classified as prime movers.—Bowles v. Ammon, supra.

#### Other phrases

(1) "Prime contractor" within the meaning of internal revenue acts see Internal Revenue § 468.

(2) "Prime cost" see 20 C.J.S. p 242 notes 72-75.

(3) Additional phrases as to which more recent adjudications have not been found see 49 C.J. p 1348 notes 62-70.

70. New Standard D.

71. Escribier Diccionario.

72. Black L.D.

49 C.J. p 1348 note 94.

As abolished in American jurisdictions see Descent and Distribution § 22.

73. U.S.—The Lucy H., D.C.Fla., 235 F. 610, 614.

49 C.J. p 1348 note 96.

74. N.J.—Murray v. Donahue, 154 A. 315, 316, 108 N.J.Eq. 146.

75. Pa.—Sheets' Appeal, 52 Pa. 257, 267.

49 C.J. p 1349 note 2.

76. Pa.—Sheets' Appeal, supra.

77. N.J.—Murray v. Donahue, 154 A. 315, 316, 108 N.J.Eq. 146.

78. N.Y.—Chisolm v. Hamersley, 100 N.Y.S. 38, 41, 114 App.Div. 565.

79. U.S.—In re Day, D.C.Ill., 10 F. Supp. 229, 231.

49 C.J. p 1349 note 11.

character, importance, or degree;<sup>80</sup> of first importance;<sup>81</sup> leading;<sup>82</sup> main;<sup>83</sup> most considerable or important.<sup>84</sup> It is not synonymous with "proximate."<sup>85</sup>

*Phrases* employing the word are set out in the note,<sup>86</sup> and for other phrases as to which more recent adjudications have not been found see 49 C.J. p 1349 notes 7-10, 25-p 1350 note 52.

80. Cal.—Bland v. Galt Joint Union High School Dist. Trustees, 228 P. 395, 397, 67 Cal.App. 784.  
49 C.J. p 1349 note 12.

**Similarly defined**

(1) Highest in value, character, or importance.—Kelty v. Burgess, 115 P. 583, 584, 84 Kan. 678.

(2) The main or chief element, and, where there are several elements, the principal one must be the higher or highest in value, character or importance.—Covert v. State Bd. of Equalization, Cal.App., 162 P.2d 717, 722.

81. U.S.—In re Day, D.C.Ill., 10 F. Supp. 229, 231.

82. Kan.—Kelty v. Burgess, 115 P. 583, 584, 84 Kan. 678.

83. U.S.—In re Day, D.C.Ill., 10 F. Supp. 229, 231.  
49 C.J. p 1349 note 14.

84. Ky.—Standard Oil Co. v. Commonwealth, 62 S.W. 897, 898, 110 Ky. 821, 23 Ky.L. 302.  
49 C.J. p 1349 note 15.

85. N.Y.—Woolsey v. Brooklyn Heights R. Co., 108 N.Y.S. 16, 18, 123 App.Div. 631.

**86. Phrases**

(1) "Principal clerk" see 14 C.J.S. p 1208 note 96.

(2) "Principal contractor" defined

generally see 17 C.J.S. p 291 note 30.1.

(3) "Principal defendant" see Parties § 1.

(4) "Principal place of business" within jurisdictional clause of bankruptcy laws see Bankruptcy § 24.

(5) "Principal soutien;" a French term meaning principal support.—Laroche v. Wayagamack Pulp, etc., Co., [1923] Can.S.C. 476, [1923] 2 Dom.L.R. 927, 929—49 C.J. p 1349 note 22.

(6) "Responsible principal."—Gulf Refining Co. v. Huffman, 297 S.W. 199, 201, 155 Tenn. 580.

## PRINCIPAL AND SURETY

This Title includes promises to be bound, with and for another primarily liable, for the payment of a debt or performance of a duty or contract or other obligation by him; nature, requisites, validity, incidents, construction, operation, and effect of such promises in general; organization, franchises, powers, and dealings of surety companies; and rights, liabilities, and remedies of sureties, principals, and creditors.

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## I. IN GENERAL

### § 1. Nature of Relationship

The relationship of principal and surety, or suretyship, in its broadest sense, is the relationship occupied by a person liable for the payment of money or for the performance of an act by another, such liability being collateral as to such person, and who is liable to suffer loss in the event of the failure of such other person to pay or perform, but whose liability is terminated at once, fully and completely, if such other person does pay or perform.

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occupied by a person liable for the payment of money or for the performance of an act by another, such liability being collateral as to such person, and who is liable to suffer loss in the event of the failure of such other person to pay or perform, but whose liability is terminated at once, fully and completely, if such other person does pay or perform.<sup>1</sup> Suretyship is a lending of credit to aid a principal who has insufficient credit of his own,<sup>2</sup> and is a direct contract to pay the principal's debt or perform his obligation in case of his default,<sup>3</sup>

1. Tex.—Lubbock First Nat. Bank v. Alexander, Civ.App., 4 S.W.2d 298, 300.

#### Other statements of relationship

(1) "Suretyship" exists where one person has undertaken an obligation and another person is also under an obligation or other duty to obligee, who is entitled to but one performance, and as between two persons bound, one of them, rather than the other, should perform.

Pa.—National Surety Corp. v. Nulton, 55 Pa.Dist. & Co. 149.

Wis.—State Bank of Mt. Horeb v. Banking Commission, 2 N.W.2d 363, 366, 240 Wis. 189.

(2) The suretyship relation arises where two persons are under obligation to the same obligee who is entitled to but one performance as between the two who are bound, and the obligor ultimately responsible for the debt is the principal debtor

while the other is the surety.—Everts v. Matteson, 132 P.2d 476, 21 Cal.2d 437.

(3) Additional statement.—Scandinavian-American Bank of Fargo v. Westby, 172 N.W. 665, 670, 41 N.D. 276.

#### Surety of subcontractor

In contractor's action against surety of subcontractors who had undertaken to perform contractor's agreement with state, surety occupied same position toward contractor as contractor's surety occupied toward state.—Federal Surety Co. v. White, 295 P. 281, 88 Colo. 238.

#### Contract uberrimæ fides

Suretyship contract is contract uberrimæ fides, especially where it is purely voluntary.—First Citizens Bank & Trust Co. of Utica v. Sherman's Estate, 294 N.Y.S. 131, 250 App.Div. 339.

2. Ala.—Rollings v. Gunter, 101 So. 446, 211 A. 671.

Ga.—Etheridge v. W. T. Rawleigh Co., 116 S.E. 903, 29 Ga.App. 698.

3. U.S.—Chicago Title & Trust Co. v. Fox Theatres Corporation, C.C. A.N.Y., 91 F.2d 907.

N.C.—Rouse v. Wooten, 53 S.E. 430, 432, 140 N.C. 557, 111 Am.S.R. 875, 6 Ann.Cas. 280.

50 C.J. p 12 note 4.

#### Similar statements

(1) Suretyship is an accessory promise by which a person binds himself for another already bound, and agrees with the creditor to satisfy the obligation if the debtor does not.—Continental & Commercial Nat. Bank of Chicago v. Cobb, Mass., 200 F. 511, 516, 118 C.C.A. 615.

(2) Suretyship is obligation to pay if primary debtor fails to do so according to contract to which both

although the surety's obligation is accessorial to that of the principal debtor.<sup>4</sup>

*Contract of suretyship* in a broad sense is one whereby one person binds himself to answer for the debt, default, or miscarriage of another.<sup>5</sup> In a narrower legal sense, however, it is a contract whereby one person obligates himself, in consideration of credit or indulgence or other benefit given to his principal, to be answerable for the debt or obligation of such principal, who is primarily responsible therefor, in case of the latter's default, the principal also remaining liable therefor, and the surety becoming bound as the principal or original debtor is bound, and in some jurisdictions this definition, in effect, is given by statute.<sup>6</sup> Under a contract of suretyship the obligee or creditor is not under the necessity of seeing that the principal performs his conditions, since the surety must do so.<sup>7</sup>

*Classes.* A suretyship is designated as "voluntary" where the chief object of the contract is to become a surety,<sup>8</sup> or as "involuntary," or by operation of law, where the chief object of the contract is to accomplish some purpose other than security, but its effect is to make one of the par-

ties secondarily liable for a debt or for the performance of an act by another.<sup>9</sup> A suretyship may be designated as "personal" where the surety may be made to respond in damages generally for a breach of his contract,<sup>10</sup> or as "real" where certain specific property can be taken to enforce payment of another's debt, or the performance of some duty owing by another and the owner of such property, if he would save it, must pay or perform, but he is not personally liable in damages.<sup>11</sup>

*Imputed knowledge.* Broadly speaking, the knowledge of the surety is not imputable to the principal;<sup>12</sup> but it has been held that knowledge to the principal is knowledge to the surety.<sup>13</sup>

## § 2. "Surety" Defined

In a broad sense a surety is one who becomes responsible for the debt, default, or miscarriage of another, but in a narrower sense, a surety is a person who binds himself for the payment of a sum of money, or for the performance of something else, for another who is already bound for such payment or performance.

In a broad sense a surety is one who becomes responsible for the debt, default, or miscarriage of another.<sup>14</sup> In a narrower sense, however, a surety is a person who binds himself for the payment

principal and surety are parties.—Union Indemnity Co. v. Freeman, 133 So. 48, 49, 222 Ala. 479.

(3) Suretyship is an undertaking to answer for the debt, default, or miscarriage of another, by which the surety becomes bound as the original debtor is bound.

Del.—W. T. Rawleigh Co. v. Warrington, 199 A. 666, 668, 9 W.W. Harr. 366.

N.C.—Dry v. Reynolds, 172 S.E. 351, 352, 205 N.C. 571.

### Obligation to do act

In contracts of suretyship, surety obligates himself to do act if principal fails.—National Surety Co. v. George E. Breece Lumber Co., C.C.A. N.M., 60 F.2d 847.

*Terms "surety" and "security"* are not synonymous; while the latter term includes the former, the use of the latter is a limitation of the form of the security to that of personal and direct liability on the primary obligation, which is much more simple and preferable.—Cope v. Cope, 5 Tenn.App. 169.

4. Me.—Matthews v. Matthews, 148 A. 796, 128 Me. 495.  
50 C.J. p 12 note 5.

### Primary liability of principal

As between principal and surety, principal is primarily liable.—State Athletic Commission of California v. Massachusetts Bonding & Insurance Co., 117 P.2d 75, 46 Cal.App.2d 223.

5. Ind.—Meyer v. Building & Realty Service Co., 196 N.E. 250, 254, 209 Ind. 125, 100 A.L.R. 1442—Druckmiller v. Coy, 85 N.E. 1028, 1030, 42 Ind.App. 500.

Iowa.—Corpus Juris cited in Benson v. Alleman, 263 N.W. 305, 306, 220 Iowa 731.

50 C.J. p 12 note 6.

### Similar definition

A contract of suretyship is one under which, in consideration of the benefit extended to the principal debtor, one lends his credit by joining in the principal debtor's obligation, so as to render himself directly and primarily responsible with the principal on the same contract and without any reference to the solvency of the principal.—Durham v. Greenwald, 3 S.E.2d 585, 586, 188 Ga. 165—Arkansas Fuel Oil Co. v. Young, 16 S.E.2d 909, 911, 66 Ga. App. 33—Etheridge v. W. T. Rawleigh Co., 116 S.E. 903, 905, 29 Ga. App. 698.

### Between debtor and surety

A contract of suretyship is between the principal debtor and the surety.—First Nat. Bank & Trust Co. of Ford City v. Stolar, 197 A. 499, 130 Pa.Super. 480.

6. Ga.—Saxon v. National City Bank of Rome, 151 S.E. 501, 169 Ga. 784—Electric City Brick Co. v. Hagler, 149 S.E. 126, 128, 168 Ga. 836.

50 C.J. p 13 note 9.

7. Ala.—Maryland Casualty Co. v. Cunningham, 173 So. 506, 234 Ala. 80.

8. D.C.—Duncan v. North Wales, etc., Bank, 6 App.Cas. 1.

9. Mo.—Wayman v. Jones, 58 Mo. App. 313.  
50 C.J. p 13 note 11.

10. Pa.—Zusin v. Wharton Business Men's Building & Loan Ass'n, 163 A. 377, 107 Pa.Super. 181.

11. Iowa.—Corpus Juris quoted in First v. Byrne, 28 N.W.2d 509, 512, 238 Iowa 712, 172 A.L.R. 1072.

Pa.—Corpus Juris quoted in Zusin v. Wharton Business Men's Building & Loan Ass'n, 163 A. 377, 380, 107 Pa.Super. 181.

Mortgage or pledge as constituting implied contract of suretyship see infra § 41.

12. Tex.—Girard Fire & Marine Ins. Co. v. Koenigsberg, Civ.App., 65 S.W.2d 783.

13. U.S.—U. S. v. Bornn, D.C.N.Y., 20 F.Supp. 336, modified on other grounds, C.C.A., 104 F.2d 641, certiorari denied Royal Indemnity Co. v. U. S., 60 S.Ct. 143, 308 U.S. 606, 84 L.Ed. 506, and Bornn v. U. S., 60 S.Ct. 143, 308 U.S. 606, 84 L.Ed. 507.

14. U.S.—Hall v. Weaver, C.C.Or., 34 F. 104, 106, 13 Sawy. 188.

Tex.—Universal Automobile Ins. Co. v. Culbertson, Civ.App., 51 S.W.2d 1071, 1072.

of a sum of money, or for the performance of something else, for another who is already bound for such payment or performance;<sup>15</sup> and in some jurisdictions there are statutory definitions to this effect.<sup>16</sup> A surety has also been defined as a person who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to be indemnified by some other person, who ought himself to have made payment or performed before the surety was compelled to do so.<sup>17</sup> As between joint makers of a note, some may in fact be sureties for another joint maker.<sup>18</sup>

### § 3. "Principal" Defined

The "principal," as the term is used in the law of principal and surety, is the person on whom the primary obligation rests, and who ordinarily receives the benefit or obtains such benefit for another.

The "principal," as the term is used in the law of principal and surety, is the person on whom the primary obligation rests,<sup>19</sup> and who ordinarily receives the benefit<sup>20</sup> or obtains such benefit for another.<sup>21</sup> The mere fact that one may benefit indirectly by the transaction does not make him a principal.<sup>22</sup> For example, the fact that the principal uses the money to pay a debt owing by him

to the surety does not make the latter a principal instead of a surety.<sup>23</sup> On the other hand, although a person apparently undertakes to pay the debt of another, if the debt is in fact his own, he is none the less a principal, as distinguished from a surety.<sup>24</sup> So also, while the relation of suretyship may exist between the principal and surety, if the surety contracts as a principal with the creditor, he may be held as such.<sup>25</sup>

*Joint principals.* Where two or more jointly borrow money for the benefit of both or either, they may all be principal obligors.<sup>26</sup> In determining which of two signers of an obligation is the principal and which the surety, the reality of the transaction rather than the form of the instrument is controlling,<sup>27</sup> and it has been held that the question is to be determined not by the form of the contract, but by an inquiry as to who received the consideration.<sup>28</sup>

### § 4. "Creditor" or "Obligee" Defined

The "creditor" or "obligee," as the terms are used in the law of principal and surety, is the person who can enforce payment or performance by the principal or surety.

#### Other definitions

(1) A surety is one who becomes bound simply for the accommodation of his principal and receives no consideration for the favor he bestows.—*Trinkle v. Ladoga Bldg. Loan Fund & Savings Ass'n*, 117 N. E. 542, 544, 65 Ind.App. 415.

(2) A surety is one who undertakes to pay money or to do any other act in event his principal fails therein.—*In re Brock*, 166 A. 778, 781, 312 Pa. 7.

(3) Additional definitions. Ga.—*Massell v. Prudential Ins. Co. of America*, 196 S.E. 115, 57 Ga. App. 460.

Pa.—*Pittsburg Const. Co. v. West Side Belt R. Co.*, 75 A. 1029, 1030, 227 Pa. 90.

50 C.J. p 13 note 15 [a].

**Bonding company agreeing to indemnify for a consideration is a surety.**—*Foster v. Kerr & Houston, Inc.*, 179 A. 297, 133 Me. 389.

15. Del.—*Corpus Juris* cited in *W. T. Rawleigh Co. v. Warrington*, 199 A. 666, 667, 9 W.W.Harr. 366.

N.Y.—*Smith v. 167th Street & Walter Ave. Corporation*, 31 N.Y.S.2d 177, 179, 177 Misc. 507.

50 C.J. p 13 note 16.

#### Similar definitions

Cal.—*Everts v. Matteson*, 132 P.2d 476, 21 Cal.2d 437.

Fla.—*Anderson v. Trueman*, 130 So. 13, 13, 100 Fla. 727.

50 C.J. p 13 note 16 [a].

#### 16. Statutory definition

Some statutes define a surety as "one who at the request of another, and for the purpose of securing to him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person, or hypothecates property as security therefor."—*Kellogg v. Lopez*, 78 P. 1056, 1057, 145 Cal. 497—*Townsend v. Sullivan*, 84 P. 435, 436, 3 Cal.App. 115—50 C.J. p 13 note 17.

17. U.S.—*Mellette Farmers' Elevator Co. v. H. Poehler Co.*, D.C. Minn., 18 F.2d 430, 431.

50 C.J. p 13 note 18.

18. Tex.—*Guaranty State Bank of New Braunfels v. Kuehler*, Civ. App., 114 S.W.2d 622, error refused.

19. Iowa.—*Corpus Juris* quoted in *Benson v. Alleman*, 263 N.W. 305, 306, 220 Iowa 731.

50 C.J. p 13 note 20.

#### Agreement to be primarily liable

Where one person agrees with another to be primarily liable for a debt owing to a third person, as between parties to agreement, the first is the principal and the second becomes the surety.

U.S.—*Hutchinson Coal Co. v. Miller*, D.C.W.Va., 20 F.Supp. 718.

W.Va.—*Petty v. Warren*, 110 S.E. 826, 90 W.Va. 397.

20. Ala.—*Rollings v. Gunter*, 101 So. 446, 211 Ala. 671.

50 C.J. p 13 note 21.

21. Ala.—*Rollings v. Gunter*, supra. 50 C.J. p 14 note 22.

22. Tex.—*Lubbock First Nat. Bank v. Alexander*, Civ.App., 4 S.W.2d 298.

50 C.J. p 14 note 23.

23. Ind.—*Harvey v. Osborn*, 55 Ind. 535.

24. Ala.—*Wimberly v. Windham*, 16 So. 23, 104 Ala. 409, 53 Am.S.R. 70.

50 C.J. p 14 note 25.

25. Cal.—*In re Chamberlain's Estate*, 112 P.2d 53, 44 Cal.App.2d 193, rehearing denied 112 P.2d 934, 44 Cal.App.2d 193.

Ky.—*Brickley v. Standard Mortgage Co.*, 160 S.W.2d 633, 290 Ky. 125.

La.—*Collier v. Brown*, 141 So. 405, 11 La.App. 567—*Gast & Levy v. Loeb*, 8 La.App. 221.

50 C.J. p 14 note 26.

#### Liability on note

The word "surety," appended to the name of a maker of a note, cannot alter his liability as to the owner thereof, and only shows that, as between the promisors, one is a principal and the other a guarantor.—*Cellers v. Meachem*, 89 P. 426, 427, 49 Or. 186, 10 L.R.A., N.S., 133, 13 Ann.Cas. 997.

26. Ala.—*Rollings v. Gunter*, 101 So. 446, 211 Ala. 671.

27. Ky.—*Peoples Bank v. Bowling*, 123 S.W.2d 1052, 276 Ky. 228.

28. Ala.—*Bradley v. Bentley*, 163 So. 351, 231 Ala. 23.

The "creditor" or "obligee," as the terms are used in the law of principal and surety, is the person who can enforce payment or performance by the principal or surety.<sup>29</sup>

## § 5. Statutory Provisions in General

Statutory provisions concerning the rights and obligations of sureties ordinarily are inapplicable to rights acquired under a contract dated before the enactment of the statute.

A statute concerning the rights and obligations of sureties has been held not applicable to rights acquired under a contract dated before the enactment of such statute.<sup>30</sup> The relation of principal and surety as it existed at the common law may be applicable to negotiable instruments under the Negotiable Instruments Law,<sup>31</sup> although such law does not, in any place, refer to sureties.<sup>32</sup>

## II. WHAT LAW GOVERNS

### § 6. In General

Unless it is shown that the parties intended to contract with reference to the law of another jurisdiction, the law of the place where a contract of suretyship is made and to be performed, which is in force at the time of the making of the contract, ordinarily governs.

In accordance with the rules as to the law governing contracts, discussed in Contracts §§ 12-21, and more particularly bonds, discussed in Bonds §§ 5, 6, unless it is shown that the parties intended to contract with reference to the law of another jurisdiction,<sup>33</sup> the law of the place where a contract of suretyship is made and to be performed,<sup>34</sup> which is in force at the time of the making of the contract,<sup>35</sup> ordinarily governs. The law of the place of contract governs although it is signed by the surety<sup>36</sup> or obligee<sup>37</sup> in another jurisdiction, or the surety is a nonresident, temporarily within the jurisdiction when the contract is made,<sup>38</sup> and although the instrument is designed to obtain credit in another jurisdiction, the law of which differs on the subject of suretyship.<sup>39</sup>

### § 7. Creation and Existence of Relationship

The law of the place where a contract of suretyship is made and to be performed ordinarily governs in respect of the validity of the contract.

As a general rule, the law of the place where a contract of suretyship is made and to be performed governs in respect of the validity of the contract.<sup>40</sup>

### § 8. Nature and Extent of Surety's Liability

The law of the place where a contract of suretyship is made and to be performed ordinarily governs as to the rights and liabilities of the surety.

As a general rule, the law of the place where a contract of suretyship is made and to be performed governs as to the rights<sup>41</sup> and liabilities<sup>42</sup> of the surety. Where a surety pleads a discharge as a defense to an action to enforce the obligation, whether the surety has been discharged by any act of the creditor is to be determined by the laws of the state where the action is brought.<sup>43</sup>

29. Ala.—Maryland Casualty Co. v. Cunningham, 173 So. 506, 234 Ala. 89.

Cal.—Everts v. Matteson, 132 P.2d 476, 21 Cal.2d 437.

30. Cal.—Ingalls v. Bell, 110 P.2d 1068, 43 Cal.App.2d 356.

31. W.Va.—Koblegard Co. v. Maxwell, 34 S.E.2d 116, 127 W.Va. 630.

32. Or.—Hunter v. Harris, 127 P. 786, 63 Or. 505.

8 C.J. p 74 note 93.

33. D.C.—Fisk Rubber Co. v. Muller, 42 App.D.C. 49.

50 C.J. p 14 note 32.

34. U.S.—American Surety Co. of New York v. Independent School Dist. No 18 of Lake Park, C.C. A.Minn., 53 F.2d 178, 81 A.L.R. 1, certiorari denied Independent School Dist. No. 18 of Lake Park v. American Surety Co. of New York, 52 S.Ct. 200, 284 U.S. 683, 76 L.Ed. 577.

Pa.—Tenant v. Tenant, 1 A. 532, 110 Pa. 478.

35. N.C.—Pritchard v. Mitchell, 51 S.E. 783, 139 N.C. 54.

50 C.J. p 14 note 33.

36. W.Va.—Pugh v. Cameron, 11 W.Va. 523.

50 C.J. p 15 note 37.

37. D.C.—Fisk Rubber Co. v. Muller, 42 App.D.C. 49.

50 C.J. p 15 note 38.

38. Iowa.—Nichols, etc., Co. v. Marshall, 79 N.W. 282, 108 Iowa 513.

50 C.J. p 15 note 39.

39. La.—Lachman v. Block, 17 So. 153, 47 La. Ann. 505, 28 L.R.A. 265.

40. N.Y.—Union Nat. Bank v. Chapman, 62 N.E. 672, 169 N.Y. 538, 83 Am.S.R. 614, 57 L.R.A. 513.

50 C.J. p 14 note 34.

41. Pa.—Tenant v. Tenant, 1 A. 532, 110 Pa. 478.

50 C.J. p 14 note 35.

42. N.Y.—Keeler v. Templeton, 298 N.Y.S. 193, 164 Misc. 113, motion denied 300 N.Y.S. 863, 165 Misc. 392.

50 C.J. p 14 note 36.

#### Uniform Negotiable Instruments Law

Where note to be paid in California was given in California by and to resident of California and secured by mortgage on California realty, construction given Uniform Negotiable Instruments Law by California courts would be followed, in action on note in New York, as to liability of makers as sureties on indorsement by grantees of mortgaged property in consideration for extension of note.—Keeler v. Templeton, supra.

43. Ga.—Toomer v. Dickerson, 37 Ga. 423.

50 C.J. p 15 note 42.



### III. CREATION AND EXISTENCE OF RELATIONSHIP

#### A. IN GENERAL

#### § 9. In General

The relation of suretyship arises from an agreement between the parties, whereby one person becomes liable for another's debt or duty, in which such person has not a direct personal interest and from which he does not receive a benefit.

The relation of suretyship arises from an agreement between the parties,<sup>44</sup> either express or implied, discussed *infra* §§ 33-41, whereby one person becomes liable for another's debt or duty, in which such person has not a direct personal interest and from which he does not receive a benefit.<sup>45</sup> The relationship is fixed by the arrangement and equities between the debtors or obligors,<sup>46</sup> and may be known to the creditor or obligee, or be wholly unknown to him.<sup>47</sup> If it is unknown to him, his rights are in no manner affected by it;<sup>48</sup> but, if he knows that one party is surety merely, he must, in any subsequent action he may take regarding the debt or obligation, respect the surety's equities, as discussed *infra* § 32. The fact that a surety has security or that the source of his re-

imbursement or indemnification is disclosed by the contract does not prevent the existence of a suretyship relation.<sup>49</sup> There is no distinction between a suretyship created with consent of the creditor and that which arises by operation of law.<sup>50</sup>

Suretyship is a tripartite agreement to which there are three indispensable parties, an obligor, a surety, and an obligee; and there can be no true suretyship if any one is lacking.<sup>51</sup> The relationship of principal and surety as applied to individuals necessarily involves separate personalities so that a person cannot be surety for himself.<sup>52</sup>

#### § 10. Distinctions

Suretyship has been distinguished from various other relationships.

Suretyship has been distinguished from various other relationships,<sup>53</sup> such as guaranty, discussed in Guaranty § 6, indemnity, in Indemnity § 3, and indorsement of a bill or note, in Bills and Notes §§ 217g, 739. Where the terms of the contract are

44. Tex.—Jagoe Const. Co. v. U. S. Fidelity & Guaranty Co., Com. App., 58 S.W.2d 503.  
50 C.J. p 15 note 44.

#### Contract or dealing

The relationship of principal and surety must arise from some contract or dealing to which both are parties.—Fidelity Union Trust Co. v. Gottlieb, 4 A.2d 498, 125 N.J.Eq. 152.

**Surety's obligation is contractual,** agreement being that surety will make good, up to specified limiting sum, to person assured any damage which may accrue by reason of principal's failure to perform specified act or pursue defined course of conduct.—In re Penna's Estate, 290 N.Y.S. 200, 160 Misc. 525, reversed on other grounds 293 N.Y.S. 73, 250 App.Div. 719, affirmed in re National City Bank of New York, 10 N.E.2d 571, 274 N.Y. 600.

45. Cal.—Corpus Juris cited in De Nure Land & Investment Corporation v. Security First Nat. Bank, 22 P.2d 530, 532, 132 Cal.App. 256.  
Ga.—National Bank of Tifton v. Smith, 83 S.E. 526, 527, 142 Ga. 663, L.R.A.1915B 1116.  
N.Y.—DuPort v. First Nat. Bank of Glens Falls, 29 N.Y.S.2d 729, 262 App.Div. 267, reversed on other grounds 43 N.E.2d 34, 288 N.Y. 261.  
Pa.—Fidelity Mut. Life Ins. Co. v. Power, 166 A. 845, 311 Pa. 302, 50 C.J. p 15 note 47.

**Suretyship relation held established**  
Ala.—Lamkin v. Lovell, 58 So. 258, 176 Ala. 334.

Cal.—W. H. Marston Co. v. Kochritz, 298 P. 120, 109 Cal.App. 331.  
Ind.—Indianapolis Brewing Co. v. Behnke, 81 N.E. 119, 41 Ind.App. 288.

Wash.—Thompson v. Metropolitan Bldg. Co., 164 P. 222, 223, 95 Wash. 546.

50 C.J. p 15 note 47 [a].

#### Contracts not creating suretyship

(1) In general.

Or.—National Sales Co. v. Manciet, 162 P. 1055, 1056, 83 Or. 34, L.R.A. 1917D 485.

S.C.—Mack Mfg. Co. v. Massachusetts Bonding & Ins. Co., 87 S.E. 439, 103 S.C. 55.

50 C.J. p 15 note 47 [b].

(2) Letter from third person to holder of note for timber, advising that third person was financing maker, and agreeing to have him start cutting timber according to terms of contract between maker and holder, held not to create a suretyship.—Exchange Nat. Bank v. Waldron Lumber Co., 150 So. 3, 177 La. 1015.

(3) Landowners entering tripartite trust agreement whereby they conveyed to bank as trustees for benefit of purchaser were not sureties as to persons claiming out of improvement fund established by beneficiary with their consent.—De Nure Land & Investment Corporation v. Secur-

ity First Nat. Bank, 22 P.2d 530, 132 Cal.App. 256.

46. S.D.—Heinrich v. Magee, 217 N. W. 631, 52 S.D. 371.  
50 C.J. p 15 note 48.

**Suretyship depends, not on who signs the note, but on who lends his credit and for whose benefit the loan was made.**—Howell v. War Finance Corporation, C.C.A.Ariz., 71 F.2d 237.

47. N.Y.—DuPort v. First Nat. Bank of Glens Falls, 29 N.Y.S.2d 729, 262 App.Div. 267, motion denied 30 N.Y.S.2d 695, 262 App.Div. 978, reversed on other grounds 43 N.E.2d 34, 288 N.Y. 261.  
50 C.J. p 15 note 49.

48. Ala.—Bright v. Mack, 72 So. 433, 197 Ala. 214.

Mich.—Smith v. Sheldon, 35 Mich. 42, 24 Am.R. 529.

49. Wis.—State Bank of Mt. Horeb v. Banking Commission, 2 N.W.2d 363, 240 Wis. 189.

50. Ohio.—Gholson v. Savin, 31 N. E.2d 858, 137 Ohio St. 551, 139 A. L.R. 75.

51. Minn.—Stabs v. City of Tower, 40 N.W.2d 362, 229 Minn. 552.

52. Iowa.—Hudson v. Smith, 82 N. W. 943, 111 Iowa 411.

Tex.—Universal Automobile Ins. Co. v. Culbertson, Civ.App., 51 S.W.2d 1071.

53. N.C.—Dunlap v. Willett, 69 S.E. 222, 153 N.C. 317.

50 C.J. p 16 note 54.

ambiguous or the facts are such as to throw doubt on the nature of the relationship it becomes a matter of construction to determine from the intention of the parties as evinced by the contract or surrounding circumstances whether the contract is one of suretyship or of another character.<sup>54</sup>

### § 11. Duration and Termination of Relationship in General

A surety who desires to terminate the relationship may avail himself of such remedies as are provided by statute.

A surety who desires to terminate the relationship may avail himself of such remedies as are provided by statute.<sup>55</sup> In a proper case, the relationship of principal and surety may be terminated by death of the surety,<sup>56</sup> but the relationship is not terminated by reason of a judgment having been obtained against the principal and surety.<sup>57</sup> Termination and release or discharge of the surety's liability are considered *infra* §§ 116-244.

### § 12. Evidence of Existence of Relationship

- a. Presumptions
- b. Burden of proof
- c. Admissibility
- d. Weight and sufficiency

#### a. Presumptions

Where the names of two or more parties to an obligation appear, it will be presumed, unless a different relationship is shown by the language of the writing, that all are principals, and in the absence of evidence to the contrary there is no presumption that any of such parties are sureties; but the presumption that a party

is a principal and not a surety may be rebutted by proper evidence.

Where the names of two or more parties to an obligation appear, it will be presumed, unless a different relationship is shown by the language of the writing, that all are principals;<sup>58</sup> and in the absence of evidence to the contrary there generally is no presumption that any of such parties are sureties;<sup>59</sup> nor, if it be known that some are sureties, is there any presumption, from the order of the names, which are sureties.<sup>60</sup> Where, however, one of several signers is known to be the real principal, the others, as between themselves, are *prima facie* sureties of the principal, and cosureties of each other;<sup>61</sup> and the creditor may be presumed to know that one person is the principal, where such person has obtained all the benefit of the contract,<sup>62</sup> as by receiving all of the money,<sup>63</sup> or where the contract was entered into on account of a debt due from one person only.<sup>64</sup> So it has generally been held that the party who executes a bond is entitled to a presumption that the obligation is secondary, on showing that he became a party at the request of the other party to the obligation, that the consideration moved to the other party, and that such party was the prime mover in the negotiation.<sup>65</sup> It has also been held that the presumption is that one placing his name on the back of a note or other instrument, nonnegotiable, meant thereby to become a surety for the payor.<sup>66</sup>

*Rebuttal.* The presumption that a party is a principal and not a surety may be rebutted by proper evidence;<sup>67</sup> and, where the names of two or more persons appear to an obligation, any of them

54. Iowa.—*Fellows v. Errington*, 170 N.W. 545, 186 Iowa 332.

50 C.J. p 16 note 54.

#### Necessity of disclaimer

Under a statute so providing, a written agreement to answer for the default of another subjects such person to the liabilities of suretyship and confers on him the rights incident thereto in the absence of any express provision in the agreement that it is not intended to be a contract of suretyship.—*National Surety Corp. v. Nulton*, 55 Pa. Dist. & Co. 149.—*Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Barton*, Pa. Com. Pl., 59 Montg. Co. 219.—50 C.J. p 16 note 54 [c].

55. Ky.—*Farmers' Nat. Bank v. Jones*, 28 S.W.2d 787, 234 Ky. 591, 70 A.L.R. 335.

56. Mass.—*Killoren v. Hernan*, 20 N.E.2d 946, 303 Mass. 93.

57. Or.—*Walsh v. Young*, 180 P.2d 535, 181 Or. 185.

58. Iowa.—*Corpus Juris* quoted in *First v. Byrne*, 28 N.W.2d 509, 513, 238 Iowa 712, 172 A.L.R. 1072.

Ky.—*Green v. May*, 147 S.W. 428, 148 Ky. 783.  
As to bill or note see *Bills and Notes* § 658.

59. Iowa.—*Corpus Juris* quoted in *First v. Byrne*, 28 N.W.2d 509, 513, 238 Iowa 712, 172 A.L.R. 1072.  
50 C.J. p 64 note 38.

60. Ala.—*Summerhill v. Tapp*, 52 Ala. 227.  
Ky.—*Deering v. Veal*, 78 S.W. 886, 25 Ky. Law 1809.

61. Vt.—*Flanagan v. Post*, 45 Vt. 246.

62. N.J.—*Corpus Juris* quoted in *Oriental Building & Loan Ass'n v. Nutley & Avondale Realty Co.*, 19 A.2d 351, 352, 129 N.J.Eq. 292.  
N.Y.—*In re Sanders' Estate*, 24 N.Y.S. 317, 4 Misc. 343, affirmed 31 N.Y.S. 65, 82 Hun 62.

63. N.J.—*Corpus Juris* quoted in

*Oriental Building & Loan Ass'n v. Nutley & Avondale Realty Co.*, 19 A.2d 351, 352, 129 N.J.Eq. 292.  
50 C.J. p 64 note 42.

64. Ind.—*Brannon v. Irons*, 49 N.E. 469, 19 Ind. App. 305.

N.J.—*Corpus Juris* quoted in *Oriental Building & Loan Ass'n v. Nutley & Avondale Realty Co.*, 19 A.2d 351, 352, 129 N.J.Eq. 292.

65. Pa.—*McKean v. Enburg*, 188 A. 835, 325 Pa. 456.

#### Reason for presumption

Presumption arises because facts required as its foundation indicate who primarily ought to pay indebtedness.—*McKean v. Enburg*, *supra*.

66. La.—*Commercial Bank & Trust Co. of Alexandria v. Turregano*, 134 So. 383, 172 La. 429—*Cooley v. Lawrence*, 4 Mart. 639.

67. N.J.—*Corpus Juris* quoted in *Slatoff v. Theurich*, 5 A.2d 748, 750, 125 N.J.Eq. 555.  
50 C.J. p 64 note 44.

may, without alleging fraud or mistake, allege and show that his relationship thereto is only that of surety.<sup>68</sup>

*Affixing words "surety" or "security."* If the word "surety" or "security" is affixed to some of the names, the presumption is that those are sureties and the others principals,<sup>69</sup> although the use of the word "surety" does not indicate necessarily that the promise is collateral, or that there is another primarily liable.<sup>70</sup>

### b. Burden of Proof

The burden of proof ordinarily is on the party asserting it to prove the existence of a suretyship contract; but if the relationship is apparent on the face of the instrument the burden of proof is on one asserting its nonexistence.

In accordance with the general rules as to burden of proof, particularly those relating to the burden of proving the existence of contracts in general, the burden of proof ordinarily is on the party asserting it to prove the existence of a suretyship contract.<sup>71</sup> Thus, where the relationship is not apparent on the face of the instrument, the burden is on a person claiming to contract as surety to prove the fact of suretyship<sup>72</sup> and that the creditor not only knew of that fact but consented to deal with him as surety.<sup>73</sup> On the other hand, if the relationship is apparent on the face of the instrument, the burden of proof is on one asserting its nonexistence.<sup>74</sup> Where acceptance of the contract is presumed, the burden of proving that it was not accepted is on the surety.<sup>75</sup>

If the surety claims that his execution of the contract was induced by fraud, the burden is on him to prove that fact;<sup>76</sup> and, where an apparent surety claims that he signed only as attesting witness, it is incumbent on him to prove that he was induced to sign his name to the instrument as an apparent surety by mistake on his part<sup>77</sup> or by the fraud of the obligee.<sup>78</sup> It has been held that the burden is on the creditor to show his lack of knowledge of fraud of the principal in procuring the surety's signature,<sup>79</sup> but it has also been held that the surety has the burden of proving the obligee's knowledge of, and participation in, the principal's fraud which induced the surety to become such.<sup>80</sup> Where a bond purporting to be signed by the principal is delivered without his signature, the obligee has the burden of showing that the surety consented to such delivery.<sup>81</sup>

### c. Admissibility

General rules as to the admissibility of evidence apply to the admissibility of evidence to prove or disprove the existence of a suretyship contract.

The general rules as to the admissibility of evidence, particularly in respect of the existence of contracts in general, apply to the admissibility of evidence, including circumstantial evidence,<sup>82</sup> to prove or disprove the existence of a suretyship contract,<sup>83</sup> such as on the question of the surety's estoppel to deny his execution of the contract,<sup>84</sup> or of fraud as an inducement to the surety's signature,<sup>85</sup> or to show the true relationship of the parties to the contract.<sup>86</sup> It is competent for the

68. Ky.—Green v. May, 147 S.W. 428, 148 Ky. 788.

N.J.—Corpus Juris quoted in Slatoff v. Theurich, 5 A.2d 748, 750, 125 N.J.Eq. 555—Corpus Juris cited in Burack v. Mayers, 187 A. 767, 768, 121 N.J.Eq. 135, affirmed 191 A. 841, 122 N.J.Eq. 5.

69. Vt.—Lathrop v. Wilson, 30 Vt. 604.

Va.—Harper v. McVeigh, 1 S.E. 193, 82 Va. 751.

70. Pa.—Glittan v. Strong, 64 Pa. 242.

71. Cal.—Farmers', etc., Bank v. De Shorb, 70 P. 771, 137 Cal. 685.

72. Cal.—Farmers', etc., Bank v. De Shorb, supra.  
50 C.J. p 64 note 52.

73. Cal.—Osborn v. Hamilton, 117 P. 786, 16 Cal.App. 634.

Ge.—Duckett v. Martin, 99 S.E. 151, 23 Ga.App. 630.

Minn.—Bandler v. Bradley, 124 N.W. 644, 110 Minn. 66.

50 C.J. p 22 note 65, p 23 note 71 [a] (2).

74. Vt.—Flanagan v. Post, 45 Vt. 246.

75. U.S.—Evans v. Kister, Ky., 92 F. 828, 35 C.C.A. 28.

76. Ky.—Green v. May, 147 S.W. 428, 148 Ky. 788.

Tex.—National Union Fire Ins. Co. v. Peck, Civ.App., 296 S.W. 338.

77. Ky.—Green v. May, 147 S.W. 428, 148 Ky. 788.

78. Ky.—Green v. May, supra.

79. Iowa.—Monroe Bank v. Anderson Bros. Min., etc., Co., 22 N.W. 929, 65 Iowa 692.

80. U.S.—Anthony P. Miller, Inc., v. Needham, D.C.Pa., 35 F.Supp. 332.

81. Colo.—Watkins Medical Co. v. Johnson, 201 P. 47, 70 Colo. 320.

Mass.—Goodyear Dental Vulcanite Co. v. Bacon, 24 N.E. 404, 151 Mass. 460, 8 L.R.A. 486.

82. N.M.—O'Fallon Supply Co. v. Tagliaferro, 224 P. 394, 29 N.M. 240.

50 C.J. p 65 note 66.

83. Ga.—Wofford v. Waldrip, 56 S.E.2d 816, 80 Ga.App. 562.

Ill.—Sparta Building & Loan Ass'n v. Renfro's Estate, 4 N.E.2d 838, 287 Ill.App. 303.

N.J.—Slatoff v. Theurich, 5 A.2d 748, 125 N.J.Eq. 555.

N.C.—Flippen v. Lindsey, 18 S.E.2d 824, 221 N.C. 30.

50 C.J. p 65 note 67.

One who signs in ordinary form as maker, drawer, acceptor, or indorser may often be shown to be a surety for another party.—Daneri v. Gazzola, 73 P. 179, 139 Cal. 416—3 C.J. p 72 note 65.

84. Ga.—J. R. Watkins Co. v. Rivers, 140 S.E. 770, 37 Ga.App. 559.

50 C.J. p 65 note 69.

85. S.D.—Wakonda State Bank v. Fairfield, 220 N.W. 515, 53 S.D. 268.

50 C.J. p 65 note 70.

86. Pa.—In re Taussig, 70 A. 294, 221 Pa. 62.

50 C.J. p 65 note 71.

Court may look to defendant's conduct in procuring dismissal of

surety to testify that, in signing the instrument and leaving it with the principal, it was not his intention to deliver the bond without the principal's signature.<sup>87</sup>

#### d. Weight and Sufficiency

The general rules as to the weight and sufficiency of evidence apply in determining the weight and sufficiency of the evidence as to the existence of the relation of suretyship.

The general rules as to the weight and sufficiency of evidence, particularly in respect of the existence of contracts generally, apply in determin-

ing the weight and sufficiency of the evidence as to the existence of the relation of suretyship,<sup>88</sup> as with respect to proof of execution of the instrument,<sup>89</sup> such as whether or not the surety signed the contract,<sup>90</sup> or whether his signature was induced by fraud,<sup>91</sup> or was executed on condition,<sup>92</sup> or whether or not the contract was illegal<sup>93</sup> or was without consideration.<sup>94</sup>

On the question of duress, a subsequent letter written by the surety, admitting payments on the obligation after removal of duress and asking indulgence, demands an inference that the duress was waived and the contract ratified.<sup>95</sup>

action on note on ground that plaintiff should sue to foreclose mortgage securing it in determining whether he was surety or principal in foreclosure suit.—*Granger v. Harper*, 17 P.2d 135, 217 Cal. 16.

87. Minn.—*Morrison County School Dist. No. 80 v. Lapping*, 110 N.W. 849, 100 Minn. 139, 12 L.R.A., N.S., 1105.

88. Ga.—*Wofford v. Waldrip*, 56 S.E.2d 816, 80 Ga.App. 562. 50 C.J. p 65 note 76.

#### Evidence held sufficient

(1) To show existence of suretyship in general.

Ark.—*Taylor v. Joiner*, 24 S.W.2d 326, 180 Ark. 869.

Ky.—*Cloud v. Middleton*, 44 S.W.2d 559, 241 Ky. 595.

N.J.—*Burack v. Mayers*, 187 A. 767, 121 N.J.Eq. 135, affirmed 191 A. 841, 122 N.J.Eq. 5.

Tex.—*Winkler v. First Nat. Bank*, Civ.App., 134 S.W.2d 341. 50 C.J. p 65 note 76 [a] (1).

(2) To show that one seeking subrogation as surety was joint and several maker and principal on note which he paid.—*Bryn Mawr Trust Co. v. Cole*, 159 A. 445, 306 Pa. 274.

(3) To support finding of delivery of bond to obligee without notice of agreement between principal and surety that surety was not bound by bond until it was signed by two other sureties, and finding that such agreement did not in fact exist.—*Tariton v. Trezevant & Cochran*, Tex. Civ.App., 165 S.W.2d 514, error refused.

(4) To sustain determination that defendant was in fact a principal and not a surety.—*Wofford v. Waldrip*, 56 S.E.2d 816, 80 Ga.App. 562.

#### Evidence held insufficient

(1) To show suretyship in general.

Cal.—*Granger v. Harper*, 17 P.2d 135, 217 Cal. 16.

La.—*Pritchard & Thompson Advertising Agency v. Pereira*, App., 147 So. 507.

Okl.—*Morris' Estate v. Kirby's Estate*, 133 P.2d 896, 192 Okl. 69.

Tex.—*Lombardo v. Reed*, Civ.App., 145 S.W.2d 1113.

50 C.J. p 65 note 76 [b] (1).

(2) To show absence of suretyship relation.—*Union Fruit Producers v. Plumb*, 95 P.2d 1033, 1 Wash.2d 278 —50 C.J. p 65 note 76 [b] (2).

#### Knowledge of contention

Where owner of lot in which mortgagor had only a leasehold interest conveyed lot to mortgagor so that it could procure a loan, mortgagee's knowledge that mortgagor made payments of rentals to owner after trust deed was executed did not indicate that mortgagee knew or was charged with knowledge that owner contended that he was a surety for loan secured by trust deed with respect to that lot; and evidence as consistent with hypothesis that mortgagee did not have knowledge of arrangement as with hypothesis that it did have knowledge of arrangement was not proof that mortgagee knew that owner contended that he was a surety.—*A. & R. Realty Co. v. Northwestern Mut. Life Ins. Co.*, C.C.A.Mo., 95 F.2d 703.

Fact that note was written in first person singular was not controlling on question whether second signer was accepted by payee as surety.—*Granger v. Harper*, 17 P.2d 135, 217 Cal. 16.

Payee's letter to signer of note sued on, requesting that signer send payee copy of letter which payee had written to signer some time before with respect to notes returned to signer was held not evidence of alleged fact that signer was principal, rather than surety, on note sued on.—*Arnold v. Darby*, 176 S.E. 914, 49 Ga.App. 629.

89. Ga.—*Pilgrims' Home Lodge No. 105 v. Wilkinson*, 166 S.E. 681, 46 Ga.App. 103.

50 C.J. p 65 note 77.

#### Prima facie case

On pleading of due execution of surety's bond, introduction of bond executed by surety's agent made out prima facie case against surety of due execution and delivery.—*Amer-*

ican Surety Co. of New York v. Alamo Iron Works, Tex.Civ.App., 29 S.W.2d 493, reversed on other grounds, Com.App., 36 S.W.2d 714.

90. Miss.—*McCarty v. Love*, 110 So. 795, 145 Miss. 330.

50 C.J. p 65 note 78.

91. Iowa.—*Beal v. Milliron*, 267 N.W. 83.

50 C.J. p 66 note 79.

#### Evidence held sufficient

To show fraud as inducement.

Ga.—*W. T. Rawleigh Co. v. Kelly*, 50 S.E.2d 113, 78 Ga.App. 10.

Iowa.—*Beal v. Milliron*, 267 N.W. 83. 50 C.J. p 66 note 79 [a].

#### Evidence held insufficient

(1) To show fraud.

Iowa.—*New Amsterdam Casualty Co. v. Bookhart*, 235 N.W. 74, 212 Iowa 994, 76 A.L.R. 897.

Pa.—*Flocker v. Sirlin*, 156 A. 893, 102 Pa.Super. 476.

Tenn.—*Rawleigh Co. v. Boyd & Hill*, 4 Tenn.App. 392.

50 C.J. p 66 note 79 [b].

(2) To justify denial of recovery on ground that general contractor was connected with fraud inducing defendant to become surety or to establish that general contractor had knowledge of fraud.—*Anthony P. Miller, Inc. v. Needham*, D.C.Pa., 35 F.Supp. 332.

92. Iowa.—*Selma Sav. Bank v. Harlan*, 149 N.W. 882, 167 Iowa 673.

50 C.J. p 66 note 80.

93. Ga.—*Commercial Credit Co. v. Fry*, 122 S.E. 77, 31 Ga.App. 488.

50 C.J. p 66 note 81.

94. Iowa.—*Beal v. Milliron*, 267 N.W. 83.

95. Ga.—*Augusta Motor Sales Co. v. King*, 137 S.E. 102, 36 Ga.App. 541.

#### Threats of prosecution

Where the duress consisted of threats of prosecution against the surety's son, testimony by the surety that he discovered that his son was not guilty and that he and the son had an understanding, by which payment was made on the contract

B. NECESSITY, NATURE, AND VALIDITY OF PRINCIPAL'S OBLIGATION

§ 13. Necessity

It is essential to the relation of suretyship that there be a principal debtor or obligor and a valid and subsisting debt or obligation for which the principal is responsible.

It is essential to the relation of suretyship that there be a principal debtor or obligor<sup>96</sup> and a valid and subsisting debt or obligation for which the principal is responsible.<sup>97</sup>

§ 14. Nature and Validity in General

The obligation of the principal, for the payment or performance of which the surety undertakes to make himself collaterally liable, must be a valid and binding obligation as between the principal and the creditor or obligee; but under some circumstances the surety may be held liable on an obligation which is not enforceable against the principal.

The obligation of the principal, for the payment or performance of which the surety undertakes to make himself collaterally liable, must be a valid and binding obligation as between the principal and the creditor or obligee.<sup>98</sup> If it is invalid the surety, as a general rule, will not be bound,<sup>99</sup> especially where he had no knowledge of its invalidity at the time he became surety,<sup>1</sup> and even though he believed it to be valid.<sup>2</sup> Under some circumstances, however, the surety may be held liable on an obligation which is not enforceable against the principal.<sup>3</sup> Accordingly, sureties on a bond may be bound although the principal be not bound

because the principal named is fictitious.<sup>4</sup> A surety for the performance of a contract is not relieved from liability because the contract was incapable of performance when entered into, where the principal was bound to perform in so far as he was able to, and the obligee would be entitled to some damages for nonperformance.<sup>5</sup>

§ 15. Requirements of Statute

The fact that the bond or obligation of the principal is not in the form required by law will not affect the liability of the surety unless such failure to comply with the statutory requirements actually invalidates the obligation of the principal.

The fact that the bond or obligation of the principal is not in the form required by law will not affect the liability of the surety<sup>6</sup> or constitute a defense in an action against him for a breach thereof<sup>7</sup> unless such failure to comply with the statutory requirements actually invalidates the obligation of the principal.<sup>8</sup>

§ 16. Incapacity or Disqualification of Principal

In the absence of fraud a surety is bound, although the contract is not enforceable against the principal by reason of his lack of capacity or qualification to enter into it.

The general rule that a contract void as to the principal is also void as to the surety, discussed

for the son, demands an inference that at the time of such payment he knew of the son's innocence and the duress was removed.—*Augusta Motor Sales Co. v. King*, *supra*.

96. Del.—*Corpus Juris* cited in *W. T. Rawleigh Co. v. Warrington*, 199 A. 666, 668, 9 W.W.Harr. 366. Ga.—*Saxon v. National City Bank of Rome*, 151 S.E. 501, 169 Ga. 784. 50 C.J. p 16 note 55.

**Liability of two parties.**

The essence of a contract of suretyship is the existence of someone liable as principal, necessarily contemplating that there must be at least two parties liable for payment of obligation, the principal and the surety.—*Meeks v. Withers*, 184 S.E. 604, 181 Ga. 787.—*Saxon v. National City Bank*, 151 S.E. 501, 169 Ga. 784.—*Magid v. Beaver*, 192 S.E. 532, 56 Ga.App. 286, reversed on other grounds 196 S.E. 422, 185 Ga. 669, conformed to 197 S.E. 80, 57 Ga.App. 871.—*Jordan v. Douglas Grocery Co.*, 108 S.E. 139, 27 Ga.App. 296.

97. Del.—*Corpus Juris* cited in *W.*

*T. Rawleigh Co. v. Warrington*, 199 A. 666, 668, 9 W.W.Harr. 366. 50 C.J. p 16 notes 56, 59.

**Equitable title in another**

A bonding company's bond to secure the execution of a building contract was not vitiated by the fact that obligee had only the legal title to the premises, and the equitable title was in another.—*Texas Fidelity & Bonding Co. v. Elliott*, Tex. Civ.App., 195 S.W. 301.

98. Mich.—*Stratford Arms Hotel Co. v. General Casualty & Surety Co.*, 229 N.W. 506, 249 Mich. 518. 50 C.J. p 16 notes 58-60.

99. U.S.—*Cameron County Water Imp. Dist. No. 8 v. De La Vergne Engine Co.*, C.C.A.Tex., 93 F.2d 373. Tenn.—*Baird v. McDaniel Printing Co.*, 153 S.W.2d 135, 25 Tenn.App. 144. 50 C.J. p 16 note 59.

**Invalidity held not shown**

Ill.—*J. R. Watkins Co. v. Salyers*, 49 N.E.2d 288, 319 Ill.App. 369, affirmed 51 N.E.2d 574, 384 Ill. 369.

1. Conn.—*Doughty v. Savage*, 28 Conn. 146. 50 C.J. p 16 note 60.

2. S.C.—*Evans v. Huey*, 1 S.C.L. 13. 3. Fla.—*Florida School-Book Depository v. Liddon*, 153 So. 902, 114 Fla. 149.

**Payment of order**

Surety on bond conditioned on payment of order for money was not released from liability because no liability existed under order.—*Karsh v. Fidelity Union Casualty Co.*, 6 P.2d 980, 119 Cal.App. 543.

4. Fla.—*Florida School-Book Depository v. Liddon*, 153 So. 902, 114 Fla. 149.

5. U.S.—*National Surety Co. v. Russell*, C.C.A.Ind., 66 F.2d 104.

6. U.S.—*Chadwick v. U. S.*, C.C. Mass., 3 F. 750. 50 C.J. p 16 notes 64, 65.

7. N.C.—*Henderson v. Matlock*, 9 N.C. 366. 50 C.J. p 16 note 65.

8. La.—*Bradford v. Skillman*, 6 Mart.N.S., 123.

Pa.—*Cooney v. Biggerstaff*, 7 A. 156, 4 Pa.Cas. 200.

supra § 14, does not apply where a person sui generis becomes surety for a person incapable of contracting.<sup>9</sup> In such cases, in the absence of fraud, the surety is bound, although the contract is not enforceable against the principal by reason of his lack of capacity or qualification to enter into it.<sup>10</sup> In other words, the surety's contract is an implied admission of the principal's capacity; and this is true as to the capacity of an individual<sup>11</sup> and as to the authority of an officer of a corporation principal.<sup>12</sup> Accordingly a surety for an infant principal is bound<sup>13</sup> unless the infant principal disaffirms his contract on attaining majority;<sup>14</sup> but even in such a case the surety remains liable if the creditor is not placed in statu quo by a return of the consideration.<sup>15</sup> So, also, a surety is liable, although the contract is invalid as to the principal because the principal is a married woman<sup>16</sup> or an insane person.<sup>17</sup>

### § 17. Duress and Undue Influence

Duress exercised on the principal ordinarily will not avoid the obligation of a surety unless the surety at the time of executing the obligation was ignorant of such duress.

In accordance with the general rule, discussed in Contracts § 179, that duress affecting the validity of a contract can be taken advantage of as a defense only by the person on whom the duress was exercised, duress exercised on the principal will not avoid the obligation of a surety<sup>18</sup> unless the surety, at the time of executing the obligation, is ignorant of the duress which renders it voidable by the principal;<sup>19</sup> and knowledge of the fact of the principal's imprisonment does not necessarily involve knowledge of its want of legality for duress.<sup>20</sup> By way of exception to the general rule, a surety

may avoid the obligation on the ground of duress where it is extorted from the principal in violation of a statute,<sup>21</sup> or where the relationship between the principal and surety, such as father and son or husband and wife, is so intimate that the duress on the principal is supposed to operate with equal force on the surety.<sup>22</sup>

### § 18. Forgery

The forgery of the names of one or more of several obligors to an obligation does not release a surety thereon, if the obligee accepts the instrument without notice of the forgery.

The forgery of the names of one or more of several obligors to a bond or note does not release a surety thereon, if the obligee accepts the instrument without notice of the forgery.<sup>23</sup>

### § 19. Fraud

Generally, if the principal is not bound by the contract owing to fraud practiced on him by the creditor, the surety likewise is not bound; but unless the principal avails himself of the fraud in avoidance of the contract the surety cannot take advantage of it.

As a general rule, if the principal is not bound by the contract owing to fraud practiced on him by the creditor, the surety likewise is not bound;<sup>24</sup> and the fact that the principal brought an action in disaffirmance of, and legally rescinded, the contract in the state wherein the contract was to be performed is available to the surety, although the principal had not reduced the rescission of the contract to judgment.<sup>25</sup> Unless, however, the principal avails himself of the fraud in avoidance of the contract the surety cannot take advantage of it.<sup>26</sup> A misrepresentation made to the principal, which is insufficient to discharge him, will not avail the sure-

9. Tenn.—National Union Fire Ins. Co. v. Winn, 3 Tenn.App. 60. 50 C.J. p 16 notes 69-75.

10. Fla.—Florida School-Book Depository v. Liddon, 153 So. 902, 114 Fla. 149.

Tenn.—National Union Fire Ins. Co. v. Winn, 3 Tenn.App. 60. 50 C.J. p 17 note 70.

11. Tex.—Lee v. Yandell, 6 S.W. 665, 69 Tex. 34. 8 C.J. p 73 note 71.

12. Ark.—Maledon v. Leflore, 35 S. W. 1102, 62 Ark. 387.

13. Ga.—Browne v. Institute of Business and Accounting, 12 S.E. 2d 455, 63 Ga.App. 871.

Tenn.—National Union Fire Ins. Co. v. Winn, 3 Tenn.App. 60. 50 C.J. p 17 note 71.

14. Iowa.—Keokuk County State

Bank v. Hall, 76 N.W. 832, 106 Iowa 540.

50 C.J. p 17 note 72.

15. Va.—Kyger v. Sipe, 16 S.E. 627, 89 Va. 507.

50 C.J. p 17 note 73.

16. Fla.—Powell v. Beatty, 147 So. 845, 110 Fla. 3.

Pa.—Brodsky v. Frank, Com.Pl., 57 York Leg.Rec. 49.

Tenn.—National Union Fire Ins. Co. v. Winn, 3 Tenn.App. 60.

50 C.J. p 17 note 74.

17. Tex.—Lee v. Yandell, 6 S.W. 665, 69 Tex. 34.

18. Mont.—Spear v. Ryan, 208 P. 1069, 64 Mont. 145.

50 C.J. p 17 note 78.

19. Ga.—Patterson v. Gibson, 10 S. E. 9, 81 Ga. 302, 12 Am.S.R. 356.

50 C.J. p 17 note 79.

20. Ga.—Patterson v. Gibson, supra.

50 C.J. p 18 note 80.

21. N.J.—Schuster v. Arena, 84 A. 723, 83 N.J.Law 79.

50 C.J. p 18 note 81.

22. Tenn.—Owens v. Mynatt, 1 Heisk. 675.

50 C.J. p 18 note 82.

23. Fla.—Florida School-Book Depository v. Liddon, 153 So. 902, 114 Fla. 149.

50 C.J. p 18 note 84.

24. Mass.—Hazard v. Irwin, 18 Pick. 95.

Tex.—Mitchell v. Zurn, Com.App., 221 S.W. 954.

25. N.Y.—Taylor-Fichter Steel Const. Co. v. Fidelity & Casualty Co. of New York, 16 N.Y.S.2d 218, 258 App.Div. 235.

26. N.Y.—Taylor-Fichter Steel Const. Co. v. Fidelity & Casualty Co. of New York, supra.

50 C.J. p 18 notes 87, 88—8 C.J. p 716 note 87.

ty.<sup>27</sup> If a surety changes his position to that of creditor, by executing his own note to the payee and taking up the original note, he cannot defeat a recovery on the new note by setting up fraud on the principal in the original note.<sup>28</sup>

**Fraud of principal.** A surety is not released from liability by the fraud of his principal in securing the execution of a contract for the performance of which the surety renders himself liable, where the creditor has no notice of such fraud, actual or constructive.<sup>29</sup>

## § 20. Illegality

The obligation of a surety is not binding on him where the entire contract between the primary parties out of which it springs is affected by positive illegalities of which he is ignorant, or where it is based on an illegal consideration.

The obligation of a surety is not binding on him where the entire contract between the primary parties out of which it springs is affected by positive illegalities<sup>30</sup> of which he is ignorant,<sup>31</sup> or where it is based on an illegal consideration.<sup>32</sup> The surety may set up the illegality of the contract, although the principal may not be in a position to urge the same defense;<sup>33</sup> nor is he estopped to set up such defense by the fact that the creditor was induced to enter into the contract and part with his money by reason of the surety's becoming such.<sup>34</sup>

In accordance with the foregoing rules, a suretyship contract is void, and the surety not liable thereon, where it is given to defraud the creditors

of the principal,<sup>35</sup> or for the payment of rent of property leased for illegal purposes,<sup>36</sup> unless the lessor is without actual knowledge of such unlawful use.<sup>37</sup> So also, a surety is not bound by the principal's obligation given to compound a crime,<sup>38</sup> although he may be bound where the security is given merely for the repayment of money stolen or embezzled,<sup>39</sup> and there is no agreement committing the payee to concealment or to otherwise shirk the duty to punish the crime.<sup>40</sup>

## § 21. — Collateral Transaction

If the principal's obligation itself is not illegal, the surety's liability is not affected by collateral or incidental acts of illegality on the part of the principal or of the obligee.

Where the principal's obligation itself is not illegal, the surety's liability is not affected by collateral or incidental acts of illegality on the part of the principal<sup>41</sup> or of the obligee.<sup>42</sup> Thus sureties for a contractor cannot set up as a defense that he employed aliens in violation of the law.<sup>43</sup>

## § 22. Ultra Vires Contracts

A surety on a bond by or to a corporation is liable thereon, although the transaction is ultra vires as to the corporation, either as principal or as obligee.

A surety on a bond by or to a corporation is liable thereon, although the transaction is ultra vires as to the corporation, either as principal<sup>44</sup> or as obligee.<sup>45</sup> This rule applies to the sureties on the bond of a bank officer,<sup>46</sup> or municipal officer or

27. Me.—Bryant v. Crosby, 36 Me. 562, 58 Am.D. 767.

28. Ala.—Fluker v. Henry, 27 Ala. 403.

29. La.—Union Bank v. Beatty, 10 La. Ann. 378.

30. La.—J. R. Watkins Co. v. Brown, 126 So. 587, 13 La. App. 244. Tenn.—Baird v. McDaniel Printing Co., 153 S.W.2d 135, 25 Tenn. App. 144.

50 C.J. p 18 note 92.

### Agent's performance

Surety who guarantees payment of loss because of failure of agent faithfully to perform a contract is not a party to, participant in, or surety for, illegal contract.—Beaver County v. Home Indemnity Co., 52 P.2d 435, 88 Utah 1.

### Illegality held not shown

U.S.—Maryland Casualty Co. v. Dunlap, C.C.A. Mass., 68 F.2d 239.

Ill.—J. R. Watkins Co. v. Salyers, 49 N.E.2d 288, 319 Ill. App. 369, affirmed 51 N.E.2d 574, 384 Ill. 369.

31. Colo.—Phillipsburg First Nat. Bank v. Clark, 149 P. 612, 59 Colo. 455.

32. Ga.—Commercial Credit Co. v. Fry, 122 S.E. 77, 31 Ga. App. 488. 50 C.J. p 18 note 94.

33. Mich.—Denison v. Gibson, 24 Mich. 187. 50 C.J. p 19 note 95.

34. N.C.—Basnight v. American Mfg. Co., 93 S.E. 734, 174 N.C. 206. 50 C.J. p 19 note 96.

35. Pa.—Hook v. White, 59 A. 290, 201 Pa. 41.

36. Vt.—Mound v. Barker, 44 A. 346, 71 Vt. 253, 76 Am.S.R. 767.

37. Mass.—Way v. Reed, 6 Allen 364. 50 C.J. p 19 note 1.

38. Ga.—Commercial Credit Co. v. Fry, 122 S.E. 77, 31 Ga. App. 488. 50 C.J. p 19 note 2.

### Guilt or prosecution

Where sureties sued on a note pleaded that it was void as given to prevent the prosecution of the principal for a felony, it was not necessary to show that the party charged was actually guilty or that prosecution had already begun.—Commer-

cial Credit Co. v. Fry, 122 S.E. 77, 31 Ga. App. 488.

39. Kan.—Blair Milling Co. v. Fruit-ager, 215 P. 286, 113 Kan. 432, 32 A.L.R. 416. 50 C.J. p 19 note 3.

40. Ala.—Wilson v. Singer Sewing Mach. Co., 108 So. 358, 214 Ala. 536.

41. S.C.—State v. Scheper, 11 S.E. 623, 12 S.E. 564, 816, 33 S.C. 562. 50 C.J. p 19 note 4.

42. Minn.—Eagle Roller-Mill Co. v. Dillman, 69 N.W. 910, 67 Minn. 232. 50 C.J. p 19 note 5.

43. Pa.—Philadelphia v. McLinden, 11 Pa. Dist. 128, 26 Pa. Co. 387.

44. Tex.—Mitchell v. Zurn, Com. App., 221 S.W. 954. 50 C.J. p 19 note 8.

45. Miss.—Perkins v. State, 94 So. 460, 130 Miss. 512. 50 C.J. p 19 note 9.

46. Mo.—Lionberger v. Krieger, 88 Mo. 160. 50 C.J. p 19 note 10.

agent,<sup>47</sup> or 'a contractor with a municipality.<sup>48</sup> It has been held, however, that where no recovery could be had on an obligation given by a municipal corporation because the debt had been incurred contrary to constitutional and statutory restrictions requiring the voters' approval, no liability attaches to the surety of such obligation.<sup>49</sup>

### § 23. Incomplete or Irregular Instrument

Mere irregularities in, or incompleteness of, the instrument evidencing the obligation of the principal to the creditor or obligee do not affect the surety's liability unless the irregularity or incompleteness is such as to render the obligation void.

Mere irregularities in, or incompleteness of, the instrument evidencing the obligation of the principal to the creditor or obligee do not affect the surety's liability,<sup>50</sup> even though the principal may not be bound by the instrument,<sup>51</sup> unless the irregularity or incompleteness is such as to render the obligation void.<sup>52</sup> Thus the surety's liability is not relieved by an incomplete or uncertain statement in the instrument as to the place of performance,<sup>53</sup> or by a failure to insert the surety's name in the body of the instrument,<sup>54</sup> especially where he signs and seals the instrument.<sup>55</sup>

### § 24. Want of Authority to Make Contract

Want of authority of the person who executes an ob-

ligation as the agent or representative of the principal will not, as a general rule, affect the surety's liability thereon, especially in the absence of fraud, even though the obligation is not binding on the principal.

Want of authority of the person who executes an obligation as the agent or representative of the principal will not, as a general rule, affect the surety's liability thereon,<sup>56</sup> especially in the absence of fraud,<sup>57</sup> even though the obligation is not binding on the principal.<sup>58</sup> This rule is especially applicable where there is no positive illegality in the contract,<sup>59</sup> and where the surety was cognizant of the want of authority,<sup>60</sup> or where it affirmatively appears that the principal is in fact indebted or under obligation to the creditor or obligee.<sup>61</sup> A surety signing a partnership note has been held bound, although the note was signed by a member of the firm without authority.<sup>62</sup>

### § 25. Want or Failure of Consideration

Where the obligation is invalid as between the original parties by reason of a total lack or failure of consideration it will not bind the surety.

Where the obligation is invalid as between the original parties by reason of a total lack or failure of consideration it will not bind the surety.<sup>63</sup> Likewise a party cannot be bound as surety for a debt which is not due, by reason of a failure of consideration against the principal,<sup>64</sup> but in case of a

47. Ind.—Indianapolis v. Skeen, 17 Ind. 628.

50 C.J. p 20 note 11.

48. Wis.—Madison v. American Sanitary Engineering Co., 95 N.W. 1097, 118 Wis. 480.

50 C.J. p 20 note 12.

49. U.S.—Cameron County Water Imp. Dist. No. 8 v. De La Vergne Engine Co., C.C.A.Tex., 93 F.2d 373.

50. U.S.—Galveston Causeway Constr. Co. v. Galveston, etc., R. Co., D.C.Tex., 284 F. 137, affirmed, C.C.A., 287 F. 1021, certiorari denied 43 S.Ct. 503, 262 U.S. 747, 67 L.Ed. 1212.

50 C.J. p 20 note 14.

#### Land contract

In determining surety's liability on bond conditioned on vendor's laying sidewalks and planting shade trees, as required by land contract, preliminary arrangements between parties and whether agreement to purchase was in writing were immaterial.—Campbell v. Brower, 248 N.W. 581, 263 Mich. 160.

51. Fla.—Webster v. Wallis, 17 So. 571, 35 Fla. 267.

52. N.C.—Grier v. Hill, 51 N.C. 572. 50 C.J. p 20 note 16.

Blank note signed by maker and surety, which payee filled in for more than amount authorized by

surety, held not enforceable against surety even to extent of amount authorized.—Stout v. Eastern Rock Island Plow Co., 176 N.E. 844, 202 Ind. 517, 75 A.L.R. 1386.

53. U.S.—Mutual Life Ins. Co. v. Wilcox, C.C.Ill., 17 F.Cas.No.9,979, 8 Biss. 197.

50 C.J. p 20 note 17.

54. Neb.—Stewart v. Carter, 4 Neb. 564.

50 C.J. p 20 note 18.

55. Va.—Luster v. Middlecoff, 8 Gratt. 54, 49 Va. 54, 56 Am.D. 129. 50 C.J. p 20 note 19.

56. Mo.—Clark County Sav. Bank v. Farmers' Trust Co., App., 24 S. W.2d 1065.

50 C.J. p 20 note 21.

57. N.H.—Weare v. Sawyer, 44 N.H. 198.

58. Ga.—McKibben v. Macon Fourth Nat. Bank, 122 S.E. 891, 32 Ga.App. 222.

50 C.J. p 20 note 23.

59. Mo.—Farmers', etc., Bank v. Harrison, 12 S.W.2d 755, 321 Mo. 815.

60. Ark.—Klein v. German Nat. Bank, 61 S.W. 572, 69 Ark. 140, 86 Am.S.R. 183.

Neb.—Luce v. Foster, 60 N.W. 1027, 42 Neb. 818.

61. Ga.—McKibben v. Macon

Fourth Nat. Bank, 122 S.E. 891, 32 Ga.App. 222.

50 C.J. p 20 note 26.

62. Pa.—Stewart v. Behm, 2 Watts 356.

50 C.J. p 20 note 27.

63. Okl.—Brown v. American Surety Co., 287 P. 594, 110 Okl. 253.

50 C.J. p 21 note 29.

Failure of consideration for surety's obligation see *infra* § 70.

#### Note

A surety, when sued by the payee of a note, may defend on the ground of want or failure of consideration for the note.—Menzel v. Primm, 91 P. 754, 6 Cal.App. 204.

#### Failure of consideration not shown

Where contract for road construction provided that payment should be made by cancellation on completion of work, of note executed by road contractor to plaintiff, road contractor's failure to construct road and plaintiff's failure to surrender note did not work a failure of consideration for contract, so as to discharge bond securing performance of such contract.—Edmund D. Cook, Inc. v. Commercial Casualty Ins. Co., 190 A. 99, 15 N.J.Misc. 256, affirmed 190 A. 102, 117 N.J.Law 440.

64. La.—Adams v. Cuny, 15 La. Ann. 485.



partial failure of consideration it is for the principal and not the surety to elect whether to avoid the principal contract on the ground or only to claim a pro rata deduction.<sup>65</sup> Nevertheless as the

obligation of a surety arises from the consideration received by his principal, he cannot avail himself of a want of consideration where the principal cannot do so.<sup>66</sup>

### C. REQUISITES AND VALIDITY OF SURETYSHIP CONTRACT

#### § 26. General Rules

In order to enter into a valid contract creating the relationship of principal and surety, there must be competent parties, an offer and acceptance, and a valid consideration, as well as a sufficient compliance with the formalities, if any, required by law.

In order to enter into a valid contract creating the relationship of principal and surety, as in the case of other contracts, there must be competent parties, an offer and acceptance, and a valid consideration, as well as a sufficient compliance with the formalities, if any, required by law.<sup>67</sup>

#### § 27. Assent in General

Suretyship, like other contracts, requires that assent to the contract be manifested by the parties, so that each may know that the other is bound.

Suretyship, like other contracts, requires that assent to the contract be manifested by the parties, so that each may know that the other is bound.<sup>68</sup> Accordingly, a person may not involuntarily, and not as the result of any act on his part, be made surety for another,<sup>69</sup> however responsible that other may be,<sup>70</sup> or whatever security may be given to the surety for the ultimate reimbursement of the sum exacted from him.<sup>71</sup>

#### § 28. Consent or Acceptance by Principal

Consent to, or acceptance by, the principal of the suretyship relation is discussed *infra* §§ 29, 30.

Examine Pocket Parts for later cases.

#### § 29. — As between Principal and Surety

Generally, as between the principal and surety, it is essential to the existence of a suretyship relation that the surety become such at the request, or with the assent, of the principal, or that the principal have notice of, and accept, the surety's offer to assume the relationship.

Generally as between the principal and surety, it is essential to the existence of a suretyship relation that the surety become such at the request, or with the assent, of the principal,<sup>72</sup> or that the principal have notice of, and accept, the surety's offer to assume the relationship.<sup>73</sup> Accordingly, where a party becomes surety without the consent or acceptance of the principal, he is a mere volunteer,<sup>74</sup> and, although he assumes such relationship with the consent of the creditor, the principal debtor is not bound for a want of privity of contract.<sup>75</sup> The principal's assent to an assumption of suretyship is tantamount to a request,<sup>76</sup> and may be inferred from his subsequent acts and conduct in relation to it,<sup>77</sup> as by his appearing and defending an action on the obligation,<sup>78</sup> by his suffering a default in an action against both principal and surety on the obligation,<sup>79</sup> or by his acceptance of, or acquiescence in, the benefits of the contract.<sup>80</sup>

On the other hand, the relationship of principal and surety may be created without the consent or knowledge of the principal and without any consideration passing between them,<sup>81</sup> as where the

65. S.C.—Equity Commissioner v. Robinson, 17 S.C.L. 151.

66. Miss.—Dillingham v. Jenkins, 15 Miss. 479.  
50 C.J. p 21 note 32.

67. Or.—Corpus Juris quoted in Craswell v. Biggs, 86 P.2d 71, 76, 160 Or. 547.  
Acceptance generally see *infra* §§ 28-37, 57-59.

Consideration see *infra* §§ 63-70.  
Execution of written instruments see *infra* §§ 46-54.

Incapacity of surety as affecting validity of contract see *infra* § 80.

Necessity of writing see Frauds, Statute of §§ 12-31.

Statutory requirements in general see *infra* § 37.

68. La.—Siben v. Green, App., 8 So. 2d 706.

50 C.J. p 21 note 40.

69. N.Y.—People v. Trust Co. of America, 98 N.R. 207, 206 N.Y. 74.

70. N.Y.—People v. Trust Co. of America, *supra*.

71. N.Y.—People v. Trust Co. of America, *supra*.

72. U.S.—Alexander v. Young, C.C. A.Kan., 65 F.2d 752.  
50 C.J. p 21 notes 41, 47.

73. U.S.—Alexander v. Young, *supra*.  
50 C.J. p 21 notes 41, 48.

74. Ark.—McCabe v. Patterson, 199 S.W. 548, 131 Ark. 523.

Ohio.—Barger v. Gething, App., 52 N.E.2d 94.

**Surety held not volunteer**

Where one under subsisting liability for debt superseded prepared supersedeas bond and signed it as surety, and principal obtained T's

signature, T was not volunteer.—Taylor v. Joiner, 24 S.W.2d 326, 180 Ark. 869.

75. Vt.—Peake v. Dorwin, 25 Vt. 28.  
50 C.J. p 21 note 43.

76. Me.—Powers v. Nash, 37 Me. 322.

77. Me.—Powers v. Nash, *supra*.

78. Ill.—Snell v. Warner, 63 Ill. 176.

50 C.J. p 21 note 51.

79. Me.—Powers v. Nash, 37 Me. 322.

80. Me.—Powers v. Nash, *supra*.

Neb.—Fiala v. Ainsworth, 88 N.W. 135, 63 Neb. 1, 93 Am.S.R. 420.

81. Pa.—National Surety Corp. v. Nulton, 55 Pa.Dist. & Co. 149.

Consideration generally see *infra* §§ 63-70.

surety pays an obligation which is primarily due from the principal, whereby the principal becomes unjustly enriched,<sup>82</sup> and under such circumstances the surety is not a volunteer.<sup>83</sup>

*Surety as principal to another surety.* In order to make one surety a principal as to another surety it must be shown that the latter became surety at his request.<sup>84</sup>

### § 30. — As between Surety and Creditor

Where one binds himself as surety at the request or with the assent of the creditor alone, as between them, the relationship is that of suretyship, and is attendant with all the rights and liabilities flowing therefrom.

Where one binds himself as surety at the request or with the assent of the creditor alone, as between them, the relationship is that of suretyship,<sup>85</sup> and is attendant with all the rights and liabilities flowing therefrom,<sup>86</sup> although without any knowledge, assent, or request on the part of the principal;<sup>87</sup> and as between the surety and creditor the latter is bound by all the rules of law respecting sureties,<sup>88</sup> and the surety likewise is bound by such rules in respect of his rights and liabilities as against the creditor.<sup>89</sup>

### § 31. Notice to, and Acceptance by, Creditor

In order that the surety may occupy that position and avail himself of the rights, defenses, and remedies of a surety as against the creditor, the fact of the suretyship must be known to the creditor.

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remedies of a surety as against the creditor, the fact of the suretyship must be known to the creditor;<sup>90</sup> otherwise, the surety may be held liable as principal obligor.<sup>91</sup> If the fact of suretyship appears on the face of the contract, it is sufficient notice to the creditor.<sup>92</sup> However, if it does not so appear, notice or knowledge of it must be clearly and satisfactorily brought home to him by the surety, to enable the latter to avail himself of the protection which the law affords to sureties.<sup>93</sup>

*Exercise of power to affix name of surety.* Where authority is given the creditor to affix the name of an individual to an instrument as surety, the creditor can signify his acceptance of such individual as surety only by the execution of the power,<sup>94</sup> which must be done within a reasonable time.<sup>95</sup>

### § 32. — Effect of Knowledge by Creditor

As a general rule, where, as between themselves, parties stand in the relation of principal and surety, although such relationship does not appear on the face of the instrument which they have executed, the creditor must have regard to the equities of the surety in any subsequent action which he may take regarding the debt.

Where, as between themselves, parties stand in the relation of principal and surety, although such relationship does not appear on the face of the instrument which they have executed, the creditor must have regard to the equities of the surety in any subsequent action which he may take regarding the debt,<sup>96</sup> where he has knowledge of the relationship at the time he executes or receives the instrument,<sup>97</sup>

82. Pa.—National Surety Corp. v. Nulton, *supra*.

83. Pa.—National surety Corp. v. Nulton, *supra*.

84. N.H.—Whitehouse v. Hanson, 42 N.H. 9.

Change from surety to principal debtor generally see *infra* § 44.

85. U.S.—Alexander v. Young, C.C. A.Kan., 65 F.2d 752.

86. U.S.—Alexander v. Young, *supra*.

87. Pa.—National Surety Corp. v. Nulton, 55 Pa.Dist. & Co. 149. 50 C.J. p 22 note 57.

88. Vt.—Peake v. Dorwin, 25 Vt. 28.

89. Me.—Hughes v. Littlefield, 18 Me. 400.

90. U.S.—A. & R. Realty Co. v. Northwestern Mut. Life Ins. Co., C.C.A.Mo., 95 F.2d 703.

Pa.—First Nat. Bank & Trust Co. of Ford City v. Stolar, 197 A. 499, 130 Pa.Super. 480.

Wash.—Alaska Pac. Salmon Co. v.

Matthewson, 101 P.2d 606, 3 Wash. 2d 560.

50 C.J. p 22 note 61.

91. Tex.—Neyland v. Lanier, Civ. App., 273 S.W. 1022.

50 C.J. p 22 note 62.

92. Mass.—Duffee v. Kelly, 117 N. E. 907, 228 Mass. 571.

50 C.J. p 22 note 63.

93. Ga.—Lumpkin County Bank v. Justus, 103 S.E. 794, 150 Ga. 286.

50 C.J. p 22 notes 64, 68 [a].

Evidence of existence of relationship see *supra* § 12.

**Notice not shown**

Where owner of lot in which mortgagor had only a leasehold interest conveyed lot to mortgagor under arrangement for reconveyance subject to trust deed so that mortgagor could procure a loan, recording of reconveyance several months after mortgagee had recorded trust deed was not constructive notice to mortgagee of arrangement under which owner claimed to be surety, with respect to mortgagee's rights against owner.—A. & R. Realty Co. v. North-

western Mut. Life Ins. Co., C.C.A. Mo., 95 F.2d 703.

94. Tenn.—Gillman v. Kibler, 5 Humphr. 19.

95. Tenn.—Gillman v. Kibler, *supra*.

96. Mich.—Smith v. Shelden, 35 Mich. 42, 24 Am.R. 539.

50 C.J. p 22 note 68.

97. Mass.—Jennings v. Moore, 75 N. E. 214, 189 Mass. 197.

Pa.—Corpus Juris cited in First Nat. Bank & Trust Co. of Ford City v. Stolar, 197 A. 499, 502, 130 Pa. Super. 480.

Tex.—Guaranty State Bank of New Braunfels v. Kuehler, Civ.App., 114 S.W.2d 622, error refused.

50 C.J. p 22 note 69.

**In New Jersey**

(1) If a creditor knows that one joint debtor is primarily liable for the entire debt, in equity the relationship of principal and surety exists.—Taylor v. Shute, 39 A. 663, 61 N.J.Law 256—Reinfield v. Fidelity Union Trust Co., 198 A. 220, 123 N. J.Eq. 428, affirmed 5 A.2d 699, 125

or before the act occurs in respect of which the surety claims protection.<sup>98</sup> There are, however, some early cases to the contrary,<sup>99</sup> based in some instances on the rule against parol evidence to contradict a written instrument, as discussed in Evidence § 985, or on the estoppel arising from the execution of an instrument under seal.<sup>1</sup>

By way of exception to the general rule, it has been held that, where several persons sign an obligation in which they jointly and severally promise "as principals," each is estopped to prove that he signed only as surety and that the creditor had knowledge thereof.<sup>2</sup> However, on the other hand, it has been held that, where the fact that two debtors, as between themselves, are principal and surety is known to the creditor, he is bound to respect the relationship, even though, by the terms of the security held by him, the real surety occupies the position of principal.<sup>3</sup>

*Sufficiency of knowledge.* Where the creditor has knowledge of such facts as would put a reasonably prudent man on an inquiry which, if followed up, would presumably have resulted in knowledge of suretyship, he is chargeable with notice thereof,<sup>4</sup> although he did not act in bad faith in not making an inquiry.<sup>5</sup> However, knowledge that one person is the principal, and others who appear as such in the instrument are sureties, is not shown

by the mere fact that the former paid the interest on the debt.<sup>6</sup>

### § 33. Express Contract in General

No particular form or expression is necessary to create a contract of suretyship, provided the language used is definite and certain and shows an intention to create the relationship.

No particular form of contract is necessary to create a contract of suretyship.<sup>7</sup> The relationship may be created by written correspondence,<sup>8</sup> or in the form of a bond as collateral to the bond and mortgage of another.<sup>9</sup> Likewise, it is not necessary that any particular forms or expressions of language be used,<sup>10</sup> or that the instrument specify the relationship,<sup>11</sup> since, in determining whether the contract is one of suretyship, the courts will consider the substance rather than the form of the contract;<sup>12</sup> and provided the nature, character, and extent of the obligation are described in certain and definite language,<sup>13</sup> any language or expression is sufficient which, by general rules of construction, shows an intention of the parties to create the relationship.<sup>14</sup>

*Mere willingness.* A contract of suretyship does not arise from a writing in which the signer merely expresses his willingness to stand security for another person to whom credit is subsequently ex-

N.J.Eq. 347.—Slatoff v. Theurich, 199 A. 49, 123 N.J.Eq. 593.

(2) One contracting as principal, who is in fact a surety, cannot, in a law court, claim privileges belonging to a surety.—Rosenstein v. Rosenstein, 185 A. 368, 116 N.J.Law 517—Taylor v. Shute, supra—Anthony v. Fritts, 45 N.J.Law 1—Pentard v. Davis, 21 N.J.Law 632, 47 Am.D. 172—Klorman v. Westcliff Co., 170 A. 251, 12 N.J.Misc. 266—Hunt v. Gorenberg, 155 A. 881, 9 N.J.Misc. 463.  
98. Mich.—Smith v. Shelden, 35 Mich. 42, 24 Am.R. 529.  
50 C.J. p 23 note 70.  
99. Cal.—California Nat. Bank v. Ginty, 41 P. 38, 108 Cal. 148.  
50 C.J. p 23 note 71.

1. Miss.—Willis v. Ives, 9 Miss. 307.  
50 C.J. p 23 note 73.

2. Ill.—Chandler v. Chandler, 63 N. E.2d 272, 326 Ill.App. 670.  
50 C.J. p 23 note 74.

3. Ill.—Hull v. Peer, 27 Ill. 312.  
50 C.J. p 23 note 75.

4. Minn.—Fuller v. Quesnel, 65 N. W. 634, 63 Minn. 302.  
50 C.J. p 23 note 76.

5. Minn.—Fuller v. Quesnel, supra.

6. Tex.—Coffin v. Loomis, Civ.App., 41 S.W. 511.

7. Ga.—W. T. Rawleigh Co. v. Overstreet, 32 S.E.2d 574, 71 Ga.App. 873.

Wash.—Amalgamated Gold Mines Co. v. Ridgely, 170 P. 355, 100 Wash. 99.

8. Pa.—Allison v. Wood, 23 A. 559, 147 Pa. 197, 30 Am.S.R. 726.  
50 C.J. p 24 note 87.

9. N.Y.—New York Mut. Life Ins. Co. v. U. S. Hotel Co., 144 N.Y.S. 476, 82 Misc. 632.

10. Ga.—W. T. Rawleigh Co. v. Overstreet, 32 S.E.2d 574, 71 Ga.App. 873.

N.Y.—General Phoenix Corp. v. Cabot, 89 N.E.2d 238, 300 N.Y. 87.  
50 C.J. p 23 note 81.

11. Ind.T.—Taylor v. Acom, 45 S. W. 130, 1 Ind.T. 436.  
50 C.J. p 23 note 82.

12. Ga.—W. T. Rawleigh Co. v. Overstreet, 32 S.E.2d 574, 71 Ga.App. 873.  
50 C.J. p 23 note 83.

13. La.—Carruth v. Port Hudson Oil Dev. Co., 105 So. 302, 159 La. 236.  
50 C.J. p 23 note 84.

#### Immaterial errors

Surety on bond given for performance of contract for purchase of oil

burner was held liable on principal's default, although bond recited erroneous amount of purchase price, where error was immaterial and did not affect substantial rights of parties or meaning of contract as evidenced by bond.—J. J. Tyrrell Co. of Boston v. Allen, 194 N.E. 661, 289 Mass. 570.

#### Contract held not indefinite

Pa.—Thommen v. Aldine Trust Co., 153 A. 750, 302 Pa. 409.

14. Ga.—W. T. Rawleigh Co. v. Overstreet, 32 S.E.2d 574, 71 Ga.App. 873—Watkins Medical Co. v. Marbach, 93 S.E. 270, 20 Ga.App. 691.  
N.Y.—General Phoenix Corp. v. Cabot, 89 N.E.2d 238, 300 N.Y. 87.  
50 C.J. p 24 note 85.

#### Writing held contract of suretyship

Contract whereby principal and sureties agreed to pay for goods that should be furnished to principal by another was one of suretyship.—J. R. Watkins Co. v. Brewer, 36 S.E.2d 442, 73 Ga.App. 331.

Variance of two days in date of note and as stated in bond securing payment was not of sufficient importance to affect surety's obligation.—Grinnell Realty Co. v. General Casualty & Surety Co., 234 N.W. 125, 253 Mich. 16.

tended;<sup>15</sup> nor does it arise from an intention, and an unsuccessful attempt, to become a surety.<sup>16</sup>

**Necessity of writing.** In some jurisdictions a contract of suretyship is required to be in writing,<sup>17</sup> and a mere verbal assurance that the obligation of another will be paid does not render a party liable as a surety.<sup>18</sup>

**Bills and notes.** The relationship of principal and surety may be established by a bill or a note.<sup>19</sup> Generally the relationship is established by adding the word "surety"<sup>20</sup> or some equivalent expression<sup>21</sup> to the signature, either on the face or on the back of the bill or the note. The relationship may be created by the addition of words indicating that it was intended as collateral security.<sup>22</sup>

### § 34. — Different Instruments

While a surety is generally bound with his principal in the same instrument, there is nothing in law which prevents him from becoming bound as surety in a separate instrument.

While ordinarily there is an identity of obligation, as discussed *infra* § 92, this does not necessarily mean identity of instrument;<sup>23</sup> and, while a surety is usually bound with his principal by the same instrument,<sup>24</sup> there is nothing in law which prevents him from becoming bound as surety in a separate instrument,<sup>25</sup> subsequent in time,<sup>26</sup> or on a new consideration.<sup>27</sup>

### § 35. — Qualification of Liability

It is not necessary that the obligations of the principal and the surety be equal and ordinarily the surety may fix the precise terms and conditions on which he is willing to become a surety.

Although as a general rule the surety's liability is the same as that of the principal, and cannot be greater than that of the principal, either as to amount or as to the burdensome character of the conditions, it is not necessary that the obligations of the principal and surety be equal,<sup>28</sup> and a lack of coincidence between the obligation assumed by the principal and that assumed by the surety does not render the obligation of the latter invalid.<sup>29</sup> Ordinarily, the surety may fix the precise terms on which he is willing to become a surety,<sup>30</sup> and may qualify his liability by limiting the amount for which he can be held liable,<sup>31</sup> or he may be surety for the performance of a part only of what the principal is obligated to do.<sup>32</sup> However, the surety has no right to contract for the abridgement of any right to enforce such liability as may accrue under the contract.<sup>33</sup> Likewise, the affixing of a certain amount between the signature and seal of a surety will not limit his liability as expressed and fixed in the body of the bond;<sup>34</sup> and he cannot limit his liability on a written obligation by a parol agreement.<sup>35</sup>

15. Ga.—*Teasley v. Ray*, 72 S.E. 43, 9 Ga.App. 649.

16. Miss.—*Matthews v. Millsaps*, 58 Miss. 564.

17. La.—*Gulf Refining Co. v. Loeb*, App., 195 So. 848.

Necessity of writing generally see *Frauds*, Statute of §§ 12-31.

18. La.—*Gulf Refining Co. v. Loeb*, supra.

19. Cal.—*National Bank of Commerce v. Schirm*, 86 P. 981, 983, 3 Cal.App. 696.

20. Ind.—*Phillips v. Cox*, 61 Ind. 345.

3 C.J. p 72 note 63.

21. Ga.—*McIntyre v. Moore*, 31 S.E. 144, 105 Ga. 112.

3 C.J. p 72 note 64.

Particular words held to constitute contract of suretyship

An indorsement of a note, "I hereby guarantee the payment of the within note. Waiving notice of protest and demand of payment," is a contract of suretyship.—*Whitehouse's Estate*, 18 Pa.Dist. & Co. 558.

22. Cal.—*National Bank of Commerce v. Schirm*, 86 P. 981, 3 Cal.App. 696.

50 C.J. p 24 note 88.

23. Del.—*Corpus Juris* cited in *W. T. Rawleigh Co. v. Warrington*, 199 A. 666, 668, 9 W.W.Harr. 366. Ga.—*McKibben v. Macon Fourth Nat. Bank*, 122 S.E. 891, 32 Ga.App. 222.

24. Del.—*W. T. Rawleigh Co. v. Warrington*, 199 A. 666, 9 W.W.Harr. 366.

50 C.J. p 24 note 94.

25. Del.—*Corpus Juris* cited in *W. T. Rawleigh Co. v. Warrington*, 199 A. 666, 668, 9 W.W.Harr. 366. Ky.—*Dorman v. Carnes*, 96 S.W.2d 869, 265 Ky. 361.

Tex.—*Corpus Juris* cited in *Williams v. National Bank of Commerce*, Civ.App., 62 S.W.2d 1108, 1110, reversed on other grounds *National Bank of Commerce v. Williams*, 84 S.W.2d 691, 125 Tex. 619. 50 C.J. p 24 note 95.

Cosureties by different instruments see *infra* § 345.

26. Ga.—*McKibben v. Fourth Nat. Bank*, 122 S.E. 891, 32 Ga.App. 222. Pa.—*Westinghouse Electric, etc., Co. v. Wilson*, 63 Pa.Super. 294.

27. Del.—*Corpus Juris* cited in *W. T. Rawleigh Co. v. Warrington*, 199 A. 666, 668, 9 W.W.Harr. 366. Pa.—*Westinghouse Electric, etc., Co. v. Wilson*, 63 Pa.Super. 294.

28. U.S.—*New Amsterdam Casualty Co. v. W. T. Taylor Constr. Co.*, C.C.A.Ala., 12 F.2d 972. 50 C.J. p 24 note 1.

29. Philippine.—*Poblete v. Lo Singco*, 44 Philippine 369.

30. Okl.—*Fidelity & Deposit Co. of Maryland v. United States Fidelity & Guaranty Co.*, 64 P.2d 672, 179 Okl. 174.

50 C.J. p 24 note 3.

31. Mont.—*Butte v. Cohen*, 24 P. 206, 9 Mont. 435.

50 C.J. p 24 note 4.

32. U.S.—*New Amsterdam Casualty Co. v. W. T. Taylor Constr. Co.*, C.C.A.Ala., 12 F.2d 972.

33. Okl.—*Fidelity & Deposit Co. of Maryland v. United States Fidelity & Guaranty Co.*, 64 P.2d 672, 179 Okl. 174.

34. Idaho.—*Dangel v. Levy*, 1 Idaho. 722.

35. Pa.—*In re Weber's Estate*, 20 Pa.Dist. & Co. 647; affirmed, 177 A. 51, 317 Pa. 497.

50 C.J. p 24 note 7. Parol evidence to contradict written contract of suretyship generally see *Evidence* § 907.

## § 36. — Agreement to Become Surety

Although an agreement to become a surety does not make the promisor a surety, if he fails to become a surety as agreed, and the agreement has been relied on, he may be held liable for a breach of his contract, to the same extent as though he had become surety.

A contract to pay another to become surety or to lend one his credit is not unlawful,<sup>36</sup> and is based on a sufficient consideration.<sup>37</sup> Accordingly, a contract to become surety is binding on the promising surety, although the obligation between the principal and the creditor is not complete in minor details,<sup>38</sup> or does not absolutely conform to the agreement to become a surety.<sup>39</sup> If such an agreement is entered into by an unauthorized agent, the surety's subsequent signing of the instrument constitutes a ratification of the agreement.<sup>40</sup>

*Operation and effect.* Although an agreement to become a surety does not make the promisor a surety,<sup>41</sup> it is the duty of the promisor to become a surety in compliance with its terms,<sup>42</sup> and he is not released therefrom by the other party's failure to make a formal demand that he sign the obligation.<sup>43</sup> If he fails to become a surety as agreed and the agreement has been relied on, he cannot repudiate the contract,<sup>44</sup> and he may be held liable for a breach of his contract, to the same extent as though he had become surety;<sup>45</sup> and it has been held that such an agreement may be enforced by the creditor, even though he was ignorant of it at the time it was made.<sup>46</sup> However, a person who actually has not become a surety, although he has agreed to do so, cannot be made liable by the false and fraudulent representation of an agent, without authority, that he has become such surety.<sup>47</sup>

*Agreement to deliver new bond.* Where a surety agrees to deliver a new bond on the return of the old one, the surety would be liable following the obligee's surrender of the old bond, even though it has not issued a new one at the time of the principal's default,<sup>48</sup> since the execution of the new bond would be merely putting in written form that which has already been agreed on.<sup>49</sup>

*Covenant to relieve one who is surety* by becoming a surety in his stead may be sued on, in an action of covenant, in the name of such surety.<sup>50</sup>

## § 37. — Statutory Requirements in General

A surety's obligation is not rendered invalid by reason of the fact that a bond given by him does not conform to the statute under which it is given, or that the statute may be unconstitutional, since it may be good as against him, as a common-law bond, if voluntarily given.

A surety's obligation is not rendered invalid by reason of the fact that a bond given by him does not conform to the statute under which it is given,<sup>51</sup> or that the statute may be unconstitutional,<sup>52</sup> since it may be good as against him, as a common-law bond, if voluntarily given.<sup>53</sup> A surety may be held liable on his obligation, although the statute is violated, by the naming of a wrong obligee,<sup>54</sup> or by making the bond joint only, and not joint and several,<sup>55</sup> or by providing for a larger<sup>56</sup> or smaller<sup>57</sup> penalty than the statute provides; or by adding a condition not specifically named in the statute;<sup>58</sup> or by not taking security in addition to the sureties.<sup>59</sup> Where it is required that a certain number of sureties shall sign the bond, if fewer than that number voluntarily and knowingly sign,

36. Ky.—Givens v. Gridley, 106 S.W. 1192, 32 Ky.L. 825.

37. Ky.—Givens v. Gridley, *supra*.

38. Iowa.—Kladivo v. Melberg, 227 N.W. 833, 210 Iowa 306.

**Details implied**

Where defendant agreed to sign his son's note if plaintiff would sign such note, agreement that reasonable time and reasonable rate of interest were to be settled on by son was implied.—Kladivo v. Melberg, *supra*.

39. Ind.—Webster v. Smith, 30 N.E. 139, 4 Ind.App. 44.

Pa.—Mann v. McDowell, 3 Pa. 357, 45 Am.D. 649.

40. Ind.—Ailes v. Miller, 100 N.E. 475, 52 Ind.App. 280.

41. Del.—Rice v. Moore, 1 Del. 453, 50 C.J. p 25 note 13.

42. Ind.—Webster v. Smith, 30 N.E. 139, 4 Ind.App. 44.

Pa.—Donaldson v. Hartford Acc. etc., Co., 112 A. 562, 269 Pa. 456.

43. Ind.—Webster v. Smith, 30 N.E. 139, 4 Ind.App. 44.

44. Iowa.—Kladivo v. Melberg, 227 N.W. 833, 210 Iowa 306.

45. Iowa.—Kladivo v. Melberg, *supra*.  
50 C.J. p 25 note 16.

46. La.—McKerall v. McMillan, 9 Rob. 19.

47. Ind.—Hayes v. Burkam, 94 Ind. 311.

48. Pa.—Donaldson v. Hartford Accident, etc., Co., 112 A. 562, 269 Pa. 456.

49. Pa.—Donaldson v. Hartford Accident, etc., Co., *supra*.

50. Pa.—Flinn v. McGonigle, 9 Watts. & S. 75.

51. Neb.—Riggs v. Miller, 52 N.W. 567, 34 Neb. 666.  
50 C.J. p 25 note 23.

52. La.—Bradford v. Skillman, 6 Mart.N.S., 123.

53. Ga.—Stephens v. Crawford, 3 Ga. 493.

50 C.J. p 25 note 25.

54. Wash.—Pacific Bridge Co. v. U. S. Fidelity, etc., Co., 73 P. 772, 33 Wash. 47.

50 C.J. p 25 note 27.

55. Fla.—Baars v. Gordon, 21 Fla. 25.

56. N.C.—Henderson v. Matlock, 9 N.C. 366.

57. Ind.—Carver v. Carver, 77 Ind. 498.

58. U.S.—Chadwick v. U. S., C.C. Mass., 3 F. 750.

59. U.S.—Joyce v. Auten, Ohio, 21 S.Ct. 227, 179 U.S. 591, 45 L.Ed. 332.

Iowa.—State v. Wiley, 15 Iowa 155.

they will be bound,<sup>60</sup> unless, in the absence of waiver, the statutory requirement is mandatory,<sup>61</sup> or unless they sign on condition that the required number shall sign.<sup>62</sup>

### § 38. Implied or Quasi Contract in General

While an obligation in suretyship will not be implied, a form of suretyship, known as "involuntary suretyship," may arise, without any contract being expressed in positive terms of suretyship, or any actual intent to form that relationship.

While an obligation in suretyship will not be implied and never arises by act of the parties except by express contract,<sup>63</sup> a form of suretyship, known as "involuntary suretyship," may arise, without any contract being expressed in positive terms of suretyship, or any actual intent to form that relationship, out of a contract whose chief object is to accomplish some purpose other than that of becoming liable for the debt, default, or miscarriage of another, but which, by implication of law incidentally, has that effect, by reason of the position which the parties have assumed toward each other or toward the property out of which the debt or obligation due to the obligee is paid;<sup>64</sup> and, where the relationship so results, it is immaterial that it does not appear on the face of the transaction.<sup>65</sup> This form of suretyship may arise out of an implied parol agreement between the parties,<sup>66</sup> or it may arise between obligors on different instruments or obligations,<sup>67</sup>

unless the undertakings are entirely separate and independent.<sup>68</sup> However, a person who promises as principal to pay to a creditor a definite sum does not become a surety as to an indebtedness of a third person included in that sum.<sup>69</sup>

An indorser of a negotiable instrument, except an indorser "without recourse," may be liable as a surety.<sup>70</sup>

*Surety of agent*, acting within the scope of his authority, may be considered the surety of the principal.<sup>71</sup>

### § 39. — By Execution of Joint Obligation

When two or more persons enter into a joint obligation, as between themselves, each is a principal for his proportionate share of the debt or obligation, and a surety as to the shares or acts of the others, but as far as the creditor is concerned, each obligor is a principal as to the whole of the debt or obligation.

Where two or more persons enter into a joint obligation, as between themselves, each is a principal for his proportionate share of the debt or obligation, or so far as his own acts are concerned, and a surety as to the shares or acts of the others.<sup>72</sup> In this class of cases, however, as far as the creditor or obligee is concerned, each obligor is a principal as to the whole of the debt or obligation,<sup>73</sup> and the suretyship cannot be imposed on the creditor or obligee, without his consent, so as to affect his rights.<sup>74</sup>

60. Neb.—Gray v. Norfolk School Dist., 53 N.W. 377, 35 Neb. 438. 50 C.J. p 25 note 33.

61. Neb.—Cutler v. Roberts, 7 Neb. 4, 29 Am.R. 371.

62. Tex.—Reynolds v. Dechaums, 24 Tex. 174, 76 Am.D. 101.

63. Ohio.—Gholson v. Savin, 31 N.E. 2d 858, 137 Ohio St. 551, 139 A.L.R. 75.

Tex.—Chickasaw Lumber Co. v. Blanke, Civ.App., 185 S.W.2d 140, refused for want of merit.

64. Ga.—Holton v. Smith, 163 S.E. 516, 44 Ga.App. 832.

N.Y.—DuPort v. First Nat. Bank of Glens Falls, 29 N.Y.S.2d 729, 262 App.Div. 267, motion denied 30 N.Y.S.2d 695, 262 App.Div. 978, reversed on other grounds 43 N.E. 2d 34, 288 N.Y. 261.

Ohio.—Gholson v. Savin, 31 N.E.2d 858, 137 Ohio St. 551, 139 A.L.R. 75.

50 C.J. p 25 note 38.

65. Ala.—Tennessee-Hermitage Nat. Bank v. Hagan, 119 So. 4, 218 Ala. 390.

50 C.J. p 26 note 39.

66. Wash.—A mal gam a t e d Gold Mines Co. v. Ridgely, 170 P. 355, 100 Wash. 99.

As not within statute of frauds see Frauds, Statute of §§ 15, 229.

67. Del.—Corpus Juris cited in W. T. Rawleigh Co. v. Warrington, 199 A. 666, 668, 9 W.W.Harr. 366.

50 C.J. p 26 note 41.

68. Pa.—Tracy v. Pomeroy, 13 A. 514, 120 Pa. 14.

50 C.J. p 26 note 42.

69. Ohio.—Brown v. Ginn, 21 Ohio Cir.Ct., N.S., 85.

50 C.J. p 26 note 43.

70. Ind.—Ohio Thresher, etc., Co. v. Hensel, 36 N.E. 716, 9 Ind.App. 328.

La.—Drew v. Robertson, 2 La. Ann. 592.

Tenn.—Bryant v. Rudisell, 4 Helsk. 656.

Tex.—Early v. Chamberlain, 1 Tex. App.Civ.Cas. § 920.

**Indorser held not surety** under statute authorizing a surety to maintain an action against his principal to obtain indemnity against the debt or liability for which he is bound, before it is due, whenever any grounds for attachment exist.—Rice v. Dorrian, 22 S.W. 213, 57 Ark. 541.

71. Ala.—Eckford v. Wood, 5 Ala. 136.

50 C.J. p 26 note 44.

Execution of suretyship contract by agent see infra § 51.

72. U.S.—Sauder v. Dittmar, C.C.A. Kan., 118 F.2d 524.

Ga.—Holton v. Smith, 163 S.E. 516, 44 Ga.App. 832.

Mo.—Reissaus v. White, 106 S.W. 603, 128 Mo.App. 135.

50 C.J. p 26 note 46.

73. U.S.—Sauder v. Dittmar, C.C.A. Kan., 118 F.2d 524.

Ga.—Holton v. Smith, 163 S.E. 516, 44 Ga.App. 832.

Ill.—Chandler v. Chandler, 63 N.E. 2d 272, 326 Ill.App. 670.

Iowa.—Fitzgerald v. Nolan, 71 N.W. 224, 102 Iowa 283.

**The only contract implied from unqualified signatures** is the ordinary contract and relation of parties as shown by the position of the signature.

Ga.—Rich v. Warren, 69 S.E. 573, 135 Ga. 394.

Mo.—Hardester v. Tate, 85 Mo.App. 624.

74. U.S.—Sauder v. Dittmar, C.C.A. Kan., 118 F.2d 524.

Ga.—Wilson v. Kurfees, 166 S.E. 30, 45 Ga.App. 824.

50 C.J. p 26 note 48.

## § 40. — By Assumption of Indebtedness

A common instance of involuntary suretyship, at least as between the principal and surety themselves, occurs where one party to a contract, as a part of the agreement, assumes an indebtedness owing by the other to a third person, the one assuming the indebtedness becoming the principal, and the former debtor a surety.

A common instance of involuntary suretyship, at least as between the principal and surety themselves, occurs where one party to a contract, as a part of the agreement, assumes an indebtedness owing by the other to a third person, the one assuming the indebtedness becoming the principal, and the former debtor a surety.<sup>75</sup> Accordingly, as discussed in Mortgages § 416, where a purchaser of mortgaged land assumes and agrees to pay the mortgage debt, he becomes the principal debtor, and the mortgagor or grantor occupies the position of a surety; and, as discussed in Partnership § 264, where, on the dissolution of a firm or a change in the membership, the continuing partners or new firm assumes the firm debts, those who assume the debts are, as among themselves, the principal debtor and the retiring partners are regarded as sureties.

*As to creditor.* Even though the creditor is not a party to the agreement,<sup>76</sup> it is made for his benefit and he is impliedly included as within the privity thereof,<sup>77</sup> and, if he accepts such agreement, he is bound to observe and respect the relationship of principal and surety arising therefrom,<sup>78</sup> unless it is otherwise specially contracted by the parties.<sup>79</sup>

## § 41. — By Mortgage or Pledge

A common instance of real suretyship, under which property mortgaged or pledged is said to stand as surety, and the surety held liable as such only to the extent of the property mortgaged or pledged, arises where property is mortgaged, without personal liability, to secure the debt or obligation of another, or where it is pledged for the same purpose.

A common instance of real suretyship, under which property mortgaged or pledged is said to stand as surety,<sup>80</sup> and the surety held liable as such only to the extent of the property mortgaged or pledged,<sup>81</sup> arises where property is mortgaged, without personal liability, to secure the debt or obligation of another,<sup>82</sup> or where it is pledged for the same purpose.<sup>83</sup> The extent of the interest of the surety

75. U.S.—Sauder v. Dittmar, C.C.A. Kan., 118 F.2d 524.

Cal.—Everts v. Matteson, 132 P.2d 476, 21 Cal.2d 437.

Ind.—Williams v. Boyd, 75 Ind. 286.

Iowa.—Corpus Juris quoted in McKee-Fansher Co. v. Rowen, 5 N.W.2d 911, 232 Iowa 660.

Kan.—Corpus Juris cited in Federal Land Bank of Wichita v. Butz, 135 P.2d 883, 886, 156 Kan. 662.

Ohio.—Gholson v. Savin, 31 N.E.2d 858, 137 Ohio St. 551, 139 A.L.R. 75.

N.Y.—Colgrove v. Tallman, 67 N.Y. 95, 23 Am.R. 90.

Okl.—Corpus Juris quoted in American Liberty Life Ins. Co. v. Baird, 57 P.2d 829, 831, 176 Okl. 132.

Or.—Corpus Juris cited in Walin v. Young, 180 P.2d 535, 539, 181 Or. 185—Hurst v. Merrifield, 23 P.2d 124, 144 Or. 78.

Pa.—Campbell v. Floyd, 25 A. 1033, 153 Pa. 84.

R.I.—Industrial Trust Co. v. Goldman, 193 A. 852, 59 R.I. 11, 112 A. L.R. 1813.

Tex.—Wilson v. J. W. Crowds Drug Co., Com.App., 222 S.W. 223—Meier v. Service Corporation of National Ass'n of Credit Men, Civ. App., 129 S.W.2d 690, error dismissed, judgment correct—Trimble v. Whitson, Civ.App., 77 S.W.2d 899—Corpus Juris cited in Loveless v. Temple Trust Co., Civ.App., 59 S.W.2d 883.

Utah.—Kennedy v. Griffith, 95 P. 2d 752, 98 Utah 183.

Wis.—Gates v. Hughes, 44 Wis. 332, 50 C.J. p 27 note 50.

76. Mo.—Citizens' Bank v. Douglass, 161 S.W. 601, 178 Mo.App. 664.

Wis.—Fanning v. Murphy, 105 N.W. 1056, 126 Wis. 538, 110 Am.S.R. 946, 4 L.R.A., N.S., 666, 5 Ann.Cas. 435.

77. Iowa.—Malanaphy v. Fuller, etc., Mfg. Co., 101 N.W. 640, 125 Iowa 719, 106 Am.S.R. 332, 50 C.J. p 27 note 54.

78. Kan.—Federal Land Bank of Wichita v. Butz, 135 P.2d 883, 156 Kan. 662.

Mich.—Walter A. Wood Mowing, etc., Mach. Co. v. Oliver, 61 N.W. 507, 103 Mich. 326—Smith v. Shelden, 35 Mich. 42, 24 Am.R. 529.

N.Y.—Colgrove v. Tallman, 67 N.Y. 95, 23 Am.R. 90.

Ohio.—Gholson v. Savin, 31 N.E.2d 858, 137 Ohio St. 551, 139 A.L.R. 75.

Or.—Hurst v. Merrifield, 23 P.2d 124, 144 Or. 78.

Wis.—Gates v. Hughes, 44 Wis. 332, 50 C.J. p 27 note 55.

79. Tex.—Wilson v. J. W. Crowds Drug Co., Com.App., 222 S.W. 223.

80. Iowa.—Corpus Juris quoted in First v. Byrne, 28 N.W.2d 509, 512, 238 Iowa 712, 50 C.J. p 27 note 60.

81. Iowa.—Corpus Juris quoted in First v. Byrne, 28 N.W.2d 509, 512, 238 Iowa 712, 50 C.J. p 27 notes 62, 63.

82. Iowa.—Corpus Juris quoted in First v. Byrne, 28 N.W.2d 509, 512, 513, 238 Iowa 712, 172 A.L.R. 1072.

Okl.—Foster v. First Nat. Bank & Trust Co. of Tulsa, 66 P.2d 79, 179 Okl. 496.

50 C.J. p 27 note 62.

## Joint mortgage

(1) Joint mortgage to secure the separate debts of the mortgagors makes each a principal as to his debt, and a surety as to the debts of the others.—Van Rensselaer v. Akin, 22 Wend., N.Y., 549.

(2) Where two joint owners convey property to secure debt of one, the other becomes surety for debt to extent of value of his interest in property.—American Trust Co. v. Waddle, 36 S.W.2d 894, 162 Tenn. 412.

83. U.S.—Howard Johnson, Inc., of Fla. v. Tucker, C.C.A.Fla., 157 F. 2d 959—Epstein v. Goldstein, C. C.A.N.Y., 118 F.2d 73.

Ind.—Owen County State Bank v. Guard, 26 N.E.2d 395, 217 Ind. 75. N.Y.—Rutherford Nat. Bank v. Manniello, 271 N.Y.S. 69, 240 App.Div. 506, affirmed 195 N.E. 203, 266 N. Y. 568.

50 C.J. p 27 note 63.

## Pledgor held not volunteer

Where plaintiff placed stocks and money in the hands of a broker at the request of defendants, who were dealing with broker in purchase of stocks on margin, to aid defendants in meeting broker's demands for more margin, plaintiff was not a mere "volunteer," so as to prevent recovery from defendants for loss of the stocks and money.—Damler v. Baine, 51 N.E.2d 885, 114 Ind.App. 534.

in the property is immaterial.<sup>84</sup>

Where a prior mortgagee of land agrees to subordinate his lien to that of a subsequent mortgage, he occupies the position of a real surety as to the indebtedness secured by such subsequent mortgage.<sup>85</sup> However, where a mortgage is given by a third party, and accepted by a grantor, as part of the initial payment of the grantee toward the purchase price of property, the relationship of principal and surety does not arise between the mortgagor and the grantee.<sup>86</sup> Likewise, an assignee of an equitable mortgage given to secure an indorsement on a note executed in part payment of the purchase price of lands on which a prior mortgage was given, who also holds a conveyance of the equity of redemption, does not stand in the position of surety for the mortgage debt.<sup>87</sup>

**Partnership.** A partner who mortgages his separate property to secure a firm debt has been held to be a surety,<sup>88</sup> although there is authority to the contrary.<sup>89</sup> However, where a firm executes a mortgage on property belonging to the firm and on the individual property of one of the partners, to secure a debt owing by the firm, the partner owning the individual property is not a surety as to the other partners, but a joint principal,<sup>90</sup> although the firm gives the individual owner a certificate showing that the debt secured is a firm debt, and that the individual property is merely used as collateral, and that the firm will protect him from loss.<sup>91</sup>

#### Contract held not impossible of performance

A contract by which defendants agreed to return stock deposited by plaintiff with a broker at defendants' request, to aid defendants in meeting broker's demand for more margin, or to reimburse plaintiff, was not rendered impossible of performance because plaintiff thereby empowered broker to sell the stock, since defendants were then liable for reimbursement.—*Damler v. Baine*, supra.

**One who furnishes collateral as accommodation** to secure a loan of another stands in the relation of a surety to the one accommodated. *Ind.—Eberhart v. Eyre-Shoemaker, Inc.*, 134 N.E. 227, 78 Ind.App. 658. *Me.—Matthews v. Matthews*, 148 A. 796, 128 Me. 495.

#### Joint pledgors

Maker's wife and father, each furnishing one half of collaterals to secure loan to husband, were cosureties of husband's note.—*Matthews v. Matthews*, supra.

#### Transaction held not suretyship

Seller of furniture to lessee of hotel who vested title to furniture in lessee and took as security for pay-

ment thereof an assignment of lease on the hotel was held not a surety so as to be discharged by change in amount due under lease on ground that such alteration was without seller's knowledge and consent.—*Smith v. Thomsen*, 48 P.2d 102, 8 Cal.App.2d 603.

#### Contract held not bailment

*Ind.—Damler v. Baine*, 51 N.E.2d 885, 114 Ind.App. 534.

*84. Mass.—McBride v. Potter-Lovell Co.*, 47 N.E. 242, 169 Mass. 7, 61 Am.S.R. 265.  
50 C.J. p 27 note 64.

#### Property wrongfully pledged

The relation between a bank and a trust became one of suretyship when bank learned that certain bonds held by it as collateral security for the payment of a trustee's individual indebtedness were claimed to be the property of the trust estate.—*DuPort v. First Nat. Bank of Glens Falls*, 29 N.Y.S.2d 729, 262 App.Div. 267, reversed on other grounds 43 N.E.2d 34, 288 N.Y. 261.—*Duport v. First Nat. Bank*, 15 N.Y.S.2d 372, 257 App.Div. 693.

*85. Ala.—Moses v. Home Bldg., etc., Assoc.*, 14 So. 412, 100 Ala. 465.

**Pledge of customer's securities.** Where a broker pledges a customer's securities for his own debts, such securities stand as surety for such debts,<sup>92</sup> but the customer himself, although he has authorized the pledge, is not a surety, since, if the security is insufficient, no personal liability attaches to him.<sup>93</sup>

**Pledge of policy.** The pledge of an insurance policy, by insured, to secure a loan from insurer pursuant to the loan feature of the policy does not create a status of suretyship in favor of the beneficiary or assignee of the policy, where insurer deducts the value of the loan from the policy on the death of insured,<sup>94</sup> unless the contract of insurance requires insured to obtain the consent of the beneficiary or assignee before pledging the policy.<sup>95</sup>

## § 42. Changes in Relationship

The relationship of principal and surety may arise from a change in the relations of the parties to a contract.

The relationship of principal and surety may arise from a change in the relations of the parties to a contract;<sup>96</sup> and, even where there is already a contract of suretyship, a change in the relation of the parties may cause their respective liabilities, at least as between themselves, to be reversed.<sup>97</sup>

## § 43. — From Principal Debtor to Surety

Where there is a contract of suretyship, a change

*Conn.—Rowan v. Sharps Rifle Mfg. Co.*, 33 Conn. 1.

*86. Wis.—Kedinger v. Heisler*, 272 N.W. 372, 224 Wis. 388.

*87. N.Y.—Ellsworth v. Lockwood*, 42 N.Y. 89.

*88. N.Y.—Averill v. Loucks*, 6 Barb. 470.

*89. N.J.—Tiffany v. Crawford*, 14 N. J.Eq. 278.

*90. Ala.—Chandler v. Kyle*, 57 So. 475, 176 Ala. 184.

*91. Ala.—Chandler v. Kyle*, supra.

*92. U.S.—Robinson v. Roe*, N.Y., 233 F. 936, 14 C.C.A. 610, certiorari denied 37 S.Ct. 15, 242 U.S. 630, 61 L.Ed. 536.

*93. U.S.—Robinson v. Roe*, supra.

*94. Okl.—Stevens v. Muskogee First Nat. Bank*, 245 P. 567, 117 Okl. 148.

*95. Okl.—Stevens v. Muskogee First Nat. Bank*, supra.

*96. U.S.—Vary v. Norton*, C.C.Mich., 6 F. 808.  
50 C.J. p 28 note 78.

*97. S.D.—Heinrich v. Magee*, 217 N. W. 631, 52 S.D. 371.

50 C.J. p 28 note 79.



In the relationship of the parties may cause the principal to become the surety.

Where there is a contract of suretyship, a change in the relationship of the parties may cause the principal debtor to become the surety.<sup>98</sup> Accordingly, where the surety, for a valuable consideration, agrees with the principal to pay the indebtedness or perform the obligation, the principal becomes the surety.<sup>99</sup>

#### § 44. — From Surety to Principal

A surety may become a principal by some new arrangement between himself and the creditor, irrespective of the principal debtor; or he may become a principal, at least as between himself and the original principal, where he agrees, for a valuable consideration, with the original principal to pay the indebtedness or to perform the obligation.

A surety may become a principal by some new arrangement between himself and the creditor, irrespective of the principal debtor.<sup>1</sup> So, also, a surety becomes the principal, at least as between himself and the original principal, where he agrees, for a valuable consideration, with the original principal to pay the indebtedness or to perform the obligation,<sup>2</sup> or where he takes indemnity against loss.<sup>3</sup> However, a surety does not become a principal, by consenting to a change in the original contract, where he does not become a party to the contract or bind himself beyond the obligation of his bond;<sup>4</sup> or by giving a new obligation to the creditor in place of the old one;<sup>5</sup> or by reason of the maturity of the principal obligation;<sup>6</sup> or by reason of forbearance granted to him by the creditor;<sup>7</sup> or by making a payment and agreeing to an extension;<sup>8</sup> or by a gift from the principal of a part of the proceeds of the note on which he is surety;<sup>9</sup>

or by the application by the creditor of the proceeds of the note to some part of the obligation of the surety to the principal;<sup>10</sup> or by becoming a partner with his principal.<sup>11</sup>

*Joint debtors.* Where one of two or more joint debtors undertakes to pay the entire indebtedness, he becomes the principal, and the remainder the sureties;<sup>12</sup> or, if the surety receives part of the debt in money from the principal, they become joint debtors.<sup>13</sup>

*Limitation of agreement.* An agreement by a surety to be treated as a principal is not limited by another clause in which he consents to an extension of the time of payment in such a manner as to restrict the right of the creditor, as against the surety, to one extension.<sup>14</sup>

#### § 45. — Notice to, and Acceptance by, Creditor

Under some decisions the creditor is not bound to recognize the changed relationship unless he assents thereto, while under others he is obliged to respect the rights of the surety when the facts of the changed relationship are known to him.

Although the creditor is not bound to respect a changed relationship where he is without notice,<sup>15</sup> there is a lack of harmony in the decisions as to whether the creditor is compelled to recognize the changed relationship when informed of it.<sup>16</sup> Under some decisions, the creditor is not bound to recognize the changed relationship, but may ignore it unless he assents thereto.<sup>17</sup> Accordingly, where one is a principal obligor, he cannot, without the consent of the creditor, transform the principal obligation into an accessory one of suretyship.<sup>18</sup> Under

98. S.D.—Heinrich v. Magee, 217 N. W. 631, 52 S.D. 371.  
50 C.J. p 28 note 80.

##### In law court

One contracting as principal, who later becomes surety, cannot, in law court, claim privileges belonging to surety.—Klorman v. Westcliff Co., 170 A. 251, 12 N.J.Misc. 266—Hunt v. Gorenberg, 155 A. 881, 9 N.J.Misc. 463.

99. Cal.—Everts v. Matteson, 132 P. 2d 476, 21 Cal.2d 437.  
50 C.J. p 28 note 81.

1. Iowa.—Hayward v. Fullerton, 39 N.W. 651, 75 Iowa 371.  
50 C.J. p 28 note 88.

2. Cal.—Everts v. Matteson, 132 P. 2d 476, 21 Cal.2d 437.  
50 C.J. p 28 note 89.

3. Iowa.—Citizens' Bank v. Barnes, 30 N.W. 857, 70 Iowa 412.  
50 C.J. p 29 note 90.

4. Iowa.—Mason City Independent School Dist. v. Reichard, 39 Iowa 168.

5. Miss.—Donald v. First Nat. Bank, 54 So. 721, 100 Miss. 174.  
50 C.J. p 29 note 92.

6. Ky.—Reidlin Co. v. Haske, 290 S.W. 1050, 218 Ky. 47.

7. Mo.—Cox v. Jeffries, 73 Mo.App. 412.

8. Iowa.—Hayward v. Fullerton, 39 N.W. 651, 75 Iowa 371.

9. Ga.—Fraser v. McConnell, 23 Ga. 368.

10. Ala.—Tennessee-Hermitage Nat. Bank v. Hagan, 119 So. 4, 218 Ala. 390.

11. Ky.—Kender v. Taber, 1 Ky.Op. 412.

12. U.S.—Vary v. Norton, C.C.Mich., 6 F. 808.

50 C.J. p 29 note 1.

13. Tex.—Roberson v. Tonn, 13 S. W. 385, 76 Tex. 535.  
50 C.J. p 29 note 2.

14. Iowa.—Merchants' Nat. Bank v. Murphy, 101 N.W. 441, 125 Iowa 607.

15. Ga.—Wilson v. Kurfees, 166 S. E. 30, 45 Ga.App. 824.  
N.Y.—White v. Augello, 254 N.Y.S. 228, 142 Misc. 233.

16. Tex.—A. F. Shapleigh Hardware Co. v. Wells, 37 S.W. 411, 90 Tex. 110, 59 Am.S.R. 783.

17. Tex.—Vollmer v. Roscoe, Civ. App., 201 S.W.2d 71—Tenison v. Knapp, Civ.App., 64 S.W.2d 1071—Weaver v. Oliver, Civ.App., 3 S.W. 2d 892—Hawkins v. Western Nat. Bank, Civ.App., 145 S.W. 722.  
50 C.J. p 29 note 7.

18. Ga.—Corpus Juris cited in Wilson v. Kurfees, 166 S.E. 30, 45 Ga.App. 824.

other decisions the creditor is obliged to respect the rights of the surety, when the facts are known to him;<sup>19</sup> but the notice to the creditor must be definite and distinct, and so given as fully and fairly to apprise him of the new agreement and of the changed attitude of the debtor claiming the rights of a surety.<sup>20</sup>

*Reestablishment of original position.* It has been held that a surety who, by arrangement between himself and the principal debtor, takes the primary liability on himself may, by subsequent arrangements, reestablish himself in the position and with the rights of a surety, without the consent of the creditor.<sup>21</sup>

## § 46. Execution of Instrument

General rules apply in respect of the necessity of a seal on a contract of suretyship.

General rules apply in respect of the necessity for, and sufficiency of, a seal on a contract of suretyship.<sup>22</sup> Where the bond recites that it is "sealed with our seals," sureties after whose names seals are omitted are presumed to have adopted the seals after preceding names.<sup>23</sup> The absence of a seal against the signature of a surety does not affect the liability of the other signers.<sup>24</sup> Likewise, the failure to attach the seal of the principal does not relieve the surety from liability.<sup>25</sup>

## § 47. — Time of Execution

It is not necessary that a suretyship contract be executed at the same time as the contract which it secures.

A suretyship contract may become operative as against the surety, notwithstanding it is executed before the execution of the contract which it secures.<sup>26</sup> So, where a contract of suretyship is entered into to secure the performance of a particular contract which the surety knows has not yet

been executed, delay in the execution of such contract will not discharge the surety where it is not unreasonable,<sup>27</sup> and there is no showing that the surety has been injured thereby.<sup>28</sup>

## § 48. — Signing by Principal

- a. In general
- b. Statutory bond
- c. Joint or joint and several bonds

### a. In General

Where the nature of the bond or obligation is such that the failure of the principal to sign the instrument affects the surety injuriously, the surety is not bound, but, where the failure of the principal to sign the instrument in no way affects the rights or liabilities of the surety, the instrument is valid, and the surety is bound.

Whether the principal is required to sign the bond or instrument, evidencing the suretyship contract, in order that the sureties may be held liable thereon, is a subject on which there is an apparent conflict in the decisions.<sup>29</sup> As has been said, whether or not the principal obligor should sign generally depends on the nature of the bond;<sup>30</sup> the statutory requirements, if it is an official or judicial bond;<sup>31</sup> or the nature of the liability imposed.<sup>32</sup> Accordingly, where the nature of the bond or obligation is such that the failure of the principal to sign the instrument affects the surety injuriously, the better rule is that the surety is not bound,<sup>33</sup> as where no obligation attaches to the principal outside of the bond itself, and the surety, therefore, has no remedy over against the principal.<sup>34</sup>

On the other hand, unless the surety has signed on the express condition that the principal should also sign before delivery of the instrument to the obligee, where the failure of the principal to sign the instrument in no way affects the rights or liabilities of the surety, the instrument is valid, and the surety is bound,<sup>35</sup> especially where he waives

Tex.—Tenison v. Knapp, Civ.App., 64 S.W.2d 1071.  
50 C.J. p 30 note 8.

19. U.S.—Sauder v. Dittmar, C.C.A. Kan., 118 F.2d 524.  
50 C.J. p 29 note 5.

20. N.Y.—Palmer v. Purdy, 83 N.Y. 144.

21. N.Y.—Remsen v. Beekman, 25 N.Y. 552.

22. Pa.—Commonwealth v. Gutellus, 135 A. 214, 287 Pa. 441.  
50 C.J. p 30 note 18.

23. Pa.—Commonwealth v. Gutellus, supra.  
50 C.J. p 30 note 18.

24. Pa.—Templeton v. Commonwealth, 8 A. 167, 3 Pa.Cas. 550.

25. U.S.—Marotta v. American Surety Co. of New York, C.C.A. Mass., 64 F.2d 77.

26. Pa.—Butz v. U. S. Metal Products Co., 99 A. 169, 255 Pa. 53.

27. Pa.—Butz v. U. S. Metal Products Co., supra.

28. Pa.—Butz v. U. S. Metal Products Co., supra.

29. Iowa.—Brown v. Melloon, 153 N.W. 75, 170 Iowa 49, Ann.Cas.1917C 1070.

30. Iowa.—Brown v. Melloon, supra.

31. Iowa.—Brown v. Melloon, supra. Surety on bond of officer in general see Officers §§ 145-177.

32. Iowa.—Brown v. Melloon, supra.

33. Del.—Corpus Juris cited in W. T. Rawleigh Co. v. Warrington, 199 A. 666, 669, 9 W.W.Harr. 366.

Mich.—Corpus Juris quoted in Berlin Tp., Monroe County, v. Neidermeier, 275 N.W. 204, 205, 281 Mich. 450.

50 C.J. p 30 note 30.

34. Cal.—People v. Hartley, 21 Cal. 585, 82 Am.D. 758.

50 C.J. p 30 note 31.

35. Ga.—Corpus Juris cited in Nowell v. Mayor & Council of Monroe, 171 S.E. 136, 138, 177 Ga. 648. Mich.—Corpus Juris cited in Campbell v. Brower, 248 N.W. 581, 582, 263 Mich. 160.

Ohio.—Hill v. Buchanan, 6 Ohio Supp. 230.

the signing of the bond by the principal,<sup>36</sup> as where he executes and delivers the bond with the intention that it shall constitute a contract, notwithstanding the absence of the principal's signature.<sup>37</sup> Thus, a principal's failure to sign the bond does not affect the surety's liability thereon where the principal is liable independently of the bond,<sup>38</sup> as where, independently of the bond, the liability of the principal is fixed by contract,<sup>39</sup> or by operation of law,<sup>40</sup> or where the surety is equally bound by the contract to secure the performance of which the bond is given.<sup>41</sup> In such cases the failure of the principal to sign the bond renders it only technically, and not substantially, defective, and does not release the surety,<sup>42</sup> and imposes on the obligee no duty to inquire whether it was delivered by the sureties on condition that the principal should execute it.<sup>43</sup>

*Instrument invalid on face.* According to some decisions, however, a bond which purports on its face to be the obligation of one as principal and others as sureties, but which is executed only by the sureties, does not on its face show any contract obligation on the part of the sureties,<sup>44</sup> unless it appears that the sureties have waived the execution of the bond by the principal, and authorized its delivery to the obligee as a valid obligation,<sup>45</sup> which waiver must be shown by positive proof.<sup>46</sup> In such a case the obligee is chargeable with notice that the instrument is imperfect;<sup>47</sup> and the surety may show that he did not assent to its delivery before being signed by the principal.<sup>48</sup>

*Unauthorized signature.* Under some decisions it is held that, although a principal is not bound by a suretyship contract by reason of his name being signed thereto without his authority, the sureties who properly execute are nevertheless bound thereby.<sup>49</sup> By other decisions, however, the sureties are regarded as not bound in such a case,<sup>50</sup> unless they sign with knowledge of the fact that the principal's signature has been attached without authority,<sup>51</sup> or unless the principal is already bound independently of the bond.<sup>52</sup>

### b. Statutory Bond

A statutory bond generally is invalid as to the sureties if, without their knowledge and consent, it is accepted without being signed by the principal as required by statute, unless the statutory requirement is merely directory, and the principal is liable without signing.

A statutory bond generally is invalid as to the sureties if, without their knowledge and consent, it is accepted without being signed by the principal as required by statute,<sup>53</sup> unless the statutory requirement is merely directory, and the principal is liable without signing.<sup>54</sup>

### c. Joint or Joint and Several Bonds

As a general rule, the failure of the principal to execute a bond which purports to be a joint and several bond or several only does not invalidate it as to the surety.

As a general rule, the failure of the principal to execute a bond which purports to be a joint and several bond or several only does not invalidate it

Tex.—Corpus Juris cited in *Shade v. Anderson*, Civ.App., 36 S.W.2d 1041, 1042.  
50 C.J. p 31 note 33.

Variance between name of principal stated in bond and name of principal as signed was immaterial, since principal's signature was unnecessary, where bond was signed by sureties who sustained no injury therefrom.—*Wright v. Loring*, 184 N.E. 865, 351 Ill. 584.

36. Neb.—*Bollman v. Pasewalk*, 36 N.W. 134, 22 Neb. 761.

W.Va.—*La Belle Iron Works v. Quarter Sav. Bank*, 82 S.E. 614, 74 W.Va. 569.

Waiver of defects generally see *infra* § 83.

37. Ky.—*Dorman v. Carnes*, 96 S.W. 2d 869, 265 Ky. 361.

Tex.—*Shade v. Anderson*, Civ.App., 36 S.W.2d 1041.  
50 C.J. p 31 note 35.

38. Ohio.—*Hill v. Buchanan*, 6 Ohio Supp. 230.

Tex.—*Shade v. Anderson*, Civ.App., 36 S.W.2d 1041.  
50 C.J. p 31 note 36.

39. Tex.—*Wright v. Jones*, 120 S.W. 1139, 55 Tex.Civ.App. 616.  
50 C.J. p 31 note 37.

40. W.Va.—*Star Grocery Co. v. Bradford*, 74 S.E. 509, 70 W.Va. 496, 39 L.R.A., N.S., 184.  
50 C.J. p 31 note 38.

41. U.S.—*St. Louis Brewing Assoc. v. Hayes*, Tex., 97 F. 859, 38 C.C.A. 449.

42. Tenn.—*Cambria Coal Co. v. National Surety Co.*, 209 S.W. 641, 141 Tenn. 270.

W.Va.—*Star Grocery Co. v. Bradford*, 74 S.E. 509, 70 W.Va. 496, 39 L.R.A., N.S., 184.

43. W.Va.—*Star Grocery Co. v. Bradford*, *supra*.

44. S.D.—*Rapid City Bd. of Education v. Sweeney*, 48 N.W. 302, 1 S.D. 642, 36 Am.S.R. 767.  
50 C.J. p 31 note 42.

45. Ind.—*Wild Cat Branch v. Ball*, 45 Ind. 213.

50 C.J. p 31 note 43.  
Waiver of defects or objections generally see *infra* § 83.

46. Mich.—*Hall v. Parker*, 39 Mich. 287.

47. Ind.—*Wild Cat Branch v. Ball*, 45 Ind. 213.

48. Ind.—*Wild Cat Branch v. Ball*, *supra*.

49. N.Y.—*Millius v. Shafer*, 3 Den. 60.

50 C.J. p 32 note 63.  
Want of authority to make contract generally see *supra* § 24.

50. Mass.—*Dole v. Cosmopolitan Preserving Co.*, 46 N.E. 105, 167 Mass. 481, 57 Am.S.R. 477.  
50 C.J. p 32 note 64.

51. Neb.—*Luce v. Foster*, 60 N.W. 1027, 42 Neb. 818.

50 C.J. p 33 note 65.

52. Tex.—*Smith v. Basinger*, 12 Tex. 227.

53. Mich.—*Berlin Tp., Monroe County v. Neidermeier*, 275 N.W. 204, 281 Mich. 450.

50 C.J. p 32 note 48.

54. Iowa.—*Jaeger Mfg. Co. v. Massachusetts Bonding & Ins. Co.*, 294 N.W. 268, 229 Iowa 153.

50 C.J. p 32 note 49.

as to a surety,<sup>55</sup> unless there was an express agreement that the bond should not be valid until so executed.<sup>56</sup> This rule is especially applicable where the principal is primarily liable without reference to the bond,<sup>57</sup> and when the bond contains a clause of subrogation entitling the surety to be subrogated to the obligee's claim against the principal,<sup>58</sup> and where similar bonds for previous years, furnished by the same surety, were not signed by the principal.<sup>59</sup> The principal who gives such a bond is equally liable thereon although he has not signed it.<sup>60</sup> On the other hand, it is held that a joint and several bond so executed is not binding on the sureties<sup>61</sup> unless they sign with the intention of being bound, whether or not the bond is signed by the principal.<sup>62</sup>

**Joint bond.** A bond which in form is the joint obligation of a principal and his sureties, and not joint and several, requires the signature of the principal to render it valid and binding on the sureties,<sup>63</sup> unless the sureties sign with the intention of being bound without requiring the principal's signature,<sup>64</sup> and except in those jurisdictions in which such an obligation is, by statute, regarded as joint and several.<sup>65</sup>

#### § 49. — Signing by Surety in General

Ordinarily the proper place for the signature of a surety to a bond is at the foot of the instrument, but one may nevertheless become bound by signing the in-

strument in any part thereof where there is an apparent intention to become bound as surety.

General rules apply to the necessity for, and sufficiency of, a surety's signature to a contract of suretyship.<sup>66</sup> Accordingly, a surety bond to become a binding obligation must be executed by the obligor.<sup>67</sup> As in other cases his signature may be made by a mark,<sup>68</sup> or his signature may be cut from one instrument and attached to another where the liability intended to be assumed is not changed.<sup>69</sup>

**Place of signing.** Ordinarily the proper place for the signature of a surety to a bond is at the foot of the instrument;<sup>70</sup> and, where a person so subscribes his name, with the manifest intention of being bound by the conditions of the bond, he generally will be regarded as a surety, although his name is not mentioned in the body of the bond.<sup>71</sup> However, it is not essential to the validity of the bond as against the surety that his signature should be in the proper place.<sup>72</sup> In the absence of a statutory provision to the contrary, and where there is an apparent intention to become bound as surety, a party may become such by signing the instrument in any part thereof,<sup>73</sup> such as on the back of the instrument.<sup>74</sup> Where a signature is thus misplaced, it is a question of fact as to whether the signer intended to become a surety.<sup>75</sup>

**In place for witness.** A witness who inadvertently places his signature under that of the obligor is

55. Cal.—Hill v. New Amsterdam Casualty Co., 286 P. 1103, 105 Cal. App. 156.

La.—Corpus Juris quoted in Queen Ins. Co. of America v. Bloomenstiel, 168 So. 302, 304, 184 La. 1070.

Mich.—Corpus Juris cited in Campbell v. Brower, 248 N.W. 521, 522, 263 Mich. 160.

Pa.—Directors of Washington Tp. School Board v. Renstrom, 160 A. 861, 307 Pa. 197—New York Casualty Co. v. James, Com.Pl., 19 Lehigh Co.L.J. 106, 32 Mun.L.R. 154. 50 C.J. p 32 note 50.

56. La.—Corpus Juris quoted in Queen Ins. Co. of America v. Bloomenstiel, 168 So. 302, 304, 184 La. 1070.

Pa.—Directors of Washington Tp. School Board v. Renstrom, 160 A. 861, 307 Pa. 197—New York Casualty Co. v. James, Com.Pl., 19 Lehigh Co.L.J. 106, 32 Mun.L.R. 154. 50 C.J. p 32 note 51.

57. La.—Corpus Juris quoted in Queen Ins. Co. of America v. Bloomenstiel, 168 So. 302, 304, 184 La. 1070. 50 C.J. p 32 note 52.

58. Pa.—Donaldson v. Hartford Acc., etc., Co., 112 A. 562, 269 Pa. 456.

59. S.D.—Adams Co. v. Nesbit, 159 N.W. 869, 38 S.D. 6.

60. Idaho.—Pocatello v. Maryland Fidelity, etc., Co., 237 P. 1106, 41 Idaho 46.

61. Minn.—Martin v. Hornsby, 56 N.W. 751, 55 Minn. 187, 43 Am.S. R. 487.

50 C.J. p 32 note 56.

62. Mo.—Gay v. Murphy, 34 S.W. 1091, 184 Mo. 98, 56 Am.S.R. 496.

63. La.—Corpus Juris quoted in Queen Ins. Co. of America v. Bloomenstiel, 168 So. 302, 303, 184 La. 1070.

Mich.—Berlin Tp., Monroe County v. Neidermeier, 275 N.W. 204, 281 Mich. 450.

50 C.J. p 32 note 58.

64. La.—Corpus Juris quoted in Queen Ins. Co. of America v. Bloomenstiel, 168 So. 302, 303, 184 La. 1070.

50 C.J. p 32 note 59.

65. Iowa.—Brown v. Melloon, 152 N.W. 75, 170 Iowa 49, Ann.Cas. 1917C 1070.

La.—Corpus Juris quoted in Queen Ins. Co. of America v. Bloomenstiel, 168 So. 302, 303, 184 La. 1070. 50 C.J. p 32 note 50.

66. Ga.—J. R. Watkins Co. v. Rivers, 140 S.E. 770, 37 Ga.App. 559. Ky.—Maupin v. Berkley, 11 Ky.Op. 487.

67. Md.—John McShain, Inc., v. Eagle Indemnity Co., 23 A.2d 669, 180 Md. 202.

68. Ky.—Commonwealth v. Campbell, 45 S.W. 89, 20 Ky.L. 54. 50 C.J. p 32 note 72.

69. Iowa.—Lee County v. Welsing, 30 N.W. 481, 70 Iowa 198.

70. Wis.—Polacheck v. Moore, 90 N. W. 175, 114 Wis. 261.

71. Idaho.—Sanders v. Keller, 111 P. 250, 18 Idaho 590. 50 C.J. p 32 note 75.

72. Wis.—Polacheck v. Moore, 90 N. W. 175, 114 Wis. 261.

73. Neb.—Corpus Juris cited in State v. Smith, 281 N.W. 851, 854, 135 Neb. 423. 50 C.J. p 32 note 77.

74. Mich.—Preston v. Huntington, 34 N.W. 279, 67 Mich. 139.

75. Wis.—Polacheck v. Moore, 90 N. W. 175, 114 Wis. 261. 50 C.J. p 32 note 79.

not liable as a surety;<sup>76</sup> on the other hand, if the instrument indicates that a signer is a surety, he cannot escape liability because he signed in the place for witnesses,<sup>77</sup> although his name is not mentioned in the body of the instrument.<sup>78</sup>

*Two signatures by same person.* The same person may sign the instrument twice, in two different capacities,<sup>79</sup> or the second signature may be merely by way of explanation of the first signature.<sup>80</sup>

*Two instruments and one signature.* Where two contracts appear on one sheet, the latter only being signed by the surety, it becomes a question of intention whether he is liable on both;<sup>81</sup> and, where a surety promises to become liable according to specifications to be agreed on thereafter, it is not necessary that he be a party to and sign the subsequent agreement.<sup>82</sup>

## § 50. — Signing by Cosureties

Questions relating to the signing by a surety are discussed supra § 49, conditional signing by a co-surety, infra § 52, and the rights and liabilities between cosureties infra §§ 343-385.

Examine Pocket Parts for later cases.

## § 51. — Signing by Agent

Questions regarding the authority of an agent to bind his principal as surety are discussed in Agency §§ 27a, 106.

Examine Pocket Parts for later cases.

## § 52. — Conditional Signing

- a. In general
- b. Effect of conditions as to obligee in general
- c. Signing by principal
- d. Signing by other surety
- e. Performance of condition

- f. Waiver of condition
- g. Notice of condition

### a. In General

A surety, in agreeing to become such, may sign the instrument on condition that, before he becomes liable thereon, certain acts are to be performed by the principal or others.

A surety, in agreeing to become such, may sign the instrument on the condition that, before he becomes liable thereon, certain acts are to be performed by the principal or others.<sup>83</sup> Although a signing may be conditional without the use of express words,<sup>84</sup> generally, conditions will not be implied,<sup>85</sup> and the mere statement by the principal to the obligee of the necessity of performing a certain act before asking the surety to sign does not make such act a condition precedent to the delivery of the bond.<sup>86</sup> A surety for the payment of money may stipulate for the institution of proceedings against the principal before he shall become liable.<sup>87</sup> Likewise, a surety for the loan of money may require that the indebtedness be evidenced in a certain way, as by note<sup>88</sup> or draft,<sup>89</sup> or that it may be secured by collateral given by the creditor.<sup>90</sup> As a condition to signing a mortgage note, the surety may require the payee to agree to have the insurance on the mortgaged property continued in force until the note is paid.<sup>91</sup>

### b. Effect of Conditions as to Obligee in General

If the surety has agreed to be bound only on the performance of a particular condition, which fact is known to the obligee, it is well settled that the surety is not bound unless such condition is performed or its performance is waived. Where the condition is not known to the obligee, the better rule is that a breach thereof does not relieve the surety from liability.

Where a surety has agreed to be bound only on the performance of a particular condition, which fact is known to the obligee, it is well settled that the surety is not bound unless such condition is performed or its performance waived by him.<sup>92</sup>

76. Minn.—U. S. Fidelity, etc., Co. v. Siegmann, 91 N.W. 473, 87 Minn. 175.

77. La.—Holden v. Tanner, 6 La. Ann. 74.

Mass.—Richardson v. Boynton, 12 Allen 138, 90 Am.D. 141.

78. La.—Holden v. Tanner, 6 La. Ann. 74.

50 C.J. p 33 note 82.

79. Wash.—Pacific Nat. Bank v. Aetna Indemn. Co., 74 P. 590, 33 Wash. 428.

50 C.J. p 33 note 83.

80. Ill.—Capps v. Watts, 43 Ill. 60.

50 C.J. p 33 note 84.

81. Vt.—Bacon v. Dodge, 20 A. 197, 62 Vt. 460.

50 C.J. p 33 note 86.

Different instruments as constituting contract generally see supra § 34.

82. Pa.—Mann v. McDowell, 3 Pa. 357, 45 Am.D. 649.

83. N.Y.—Toles v. Adees, 91 N.Y. 562.

84. D.C.—Cummings v. United Clay Products Co., Mun.App., 32 A.2d 107.

85. N.Y.—Raymond v. Tallman, 91 N.Y.S. 670, 100 App.Div. 400.

50 C.J. p 34 note 5.

86. Neb.—Korty v. McGill, 62 N.W. 1075, 44 Neb. 516.

87. N.Y.—Toles v. Adees, 91 N.Y. 562.

88. N.Y.—Stone v. Bicket, 66 N.Y.S. 79, 31 Misc. 683, affirmed 71 N.Y.S. 1149, 62 App.Div. 617.

89. Ill.—Hood v. Paddock-Hawley Iron Co., 53 Ill.App. 229.

90. Ind.—McCoy v. Wilson, 58 Ind. 447.

91. Mich.—Clare County Sav. Bank v. Featherly, 139 N.W. 61, 173 Mich. 292.

92. Conn.—Doughty v. Savage, 28 Conn. 146.

50 C.J. p 34 note 16.

Waiver of condition see infra subdivision f of this section.

However, where the condition is not known to the obligee, there is some conflict in the decisions as to its effect on the surety's liability to the creditor or obligee. By what is known as the better rule, if the condition is not known to the obligee, a breach thereof does not relieve the surety from liability<sup>93</sup> on the ground that he is estopped to set up any condition not known to the obligee, on which his signature was obtained.<sup>94</sup> On the other hand, there are decisions to the effect that, even though the obligee has no knowledge of the condition, the surety is not bound if the instrument is delivered by the principal without the performance of the condition.<sup>95</sup>

**Notice of performance to surety.** Where the condition is the performance of some act by the principal, formal notice to the surety of such performance is not necessary.<sup>96</sup>

**Additional security.** Where the contract is made on a condition for additional security that does not become effective until after the exhaustion of the principal security, a failure to perform such condition does not discharge a surety on the principal bond or contract.<sup>97</sup>

### c. Signing by Principal

Where a surety signs a note or bond on condition that the principal will also sign it, which condition is known to the payee or obligee, as a general rule, the surety is not bound if the principal delivers the instrument without signing it, but, where the payee or obligee has no notice, actual or constructive, of the condition, the surety is bound.

Where a surety signs a note or bond on condition that the principal will also sign it, which condition is known to the payee or obligee, the surety is not bound where the principal delivers the instrument without signing it, unless he waives such condi-

tion.<sup>98</sup> However, where the obligee has no notice, actual or constructive, of the condition, the surety is bound,<sup>99</sup> especially where, on learning of the nonperformance of the condition, he does not raise any objection.<sup>1</sup> So, where a bond is good without the signature of the principal, and the sureties' recourse against him is in no way impaired by his failure to sign, the fact that the sureties signed the bond on the express condition that the principal should also sign is no defense to an action thereon.<sup>2</sup>

**Delivery to third person for completion.** Where a surety, after signing the bond, on condition that it be executed by a certain person as principal, delivers it to a third person to be completed, it constitutes a mere delivery in escrow;<sup>3</sup> and, where such person signs the principal's name to the bond, by himself as agent, without authority therefor, and delivers it to the obligee, the condition is not fulfilled,<sup>4</sup> and there is not a sufficient delivery of the bond to make it an enforceable obligation.<sup>5</sup>

### d. Signing by Other Surety

- (1) In general
- (2) When not made condition
- (3) Promise of obligee to procure other surety

#### (1) In General

As a general rule, where a surety signs an obligation and turns it over to the principal on the condition that others are also to sign it, he is bound, although the instrument, regular on its face, is delivered by the principal in violation of the condition, if the obligee accepts it without notice of the condition, either actual or constructive.

As a general rule, sometimes by virtue of express statute, where a surety signs an obligation

93. U.S.—Title Guaranty, etc., Co. v. Schmidt, Iowa, 213 F. 199, 129 C.C.A. 543.

Mo.—Lightner v. Gregg, 61 Mo.App. 650.

50 C.J. p 35 note 18.

94. Or.—Wollenberg v. Sykes, 89 P. 148, 49 Or. 163.

50 C.J. p 35 note 19.

95. Ala.—White Sewing Mach. Co. v. Saxon, 25 So. 784, 131 Ala. 399.

50 C.J. p 35 note 21.

96. Ark.—Newton v. More, 14 Ark. 166.

50 C.J. p 35 note 22.

97. Ga.—Amos v. Continental Trust Co., 95 S.E. 1025, 22 Ga.App. 348.

50 C.J. p 35 note 23.

98. Ala.—Birmingham News Co. v. Moseley, 141 So. 689, 225 Ala. 45.

50 C.J. p 35 note 26.

Waiver of condition see infra subdivision f of this section.

#### Failure of payee to procure signature

A maker who signed note as accommodation surety, on condition that note should be signed by principals, was not required to resort to principles governing fraud to avoid liability, since payee's failure to procure signatures of principals did not have effect simply to release surety, in that he had never been bound, contingency on which he was to become liable not having occurred.—Exchange Nat. Bank v. Parsons, Tex.Civ.App., 116 S.W.2d 817.

99. Cal.—Pacific Mill, etc., Co. v. Massachusetts Bonding, etc., Co., 219 P. 972, 192 Cal. 278.

N.Y.—Richardson v. Rogers, 50 How.Pr. 403.

1. Cal.—Pacific Mill, etc., Co. v. Massachusetts Bonding, etc., Co., 219 P. 972, 192 Cal. 278.

N.Y.—Richardson v. Rogers, 50 How.Pr. 403.

2. Cal.—Pacific Mill, etc., Co. v. Massachusetts Bonding, etc., Co., 219 P. 972, 192 Cal. 278.

Mont.—Woodman v. Calkins, 34 P. 187, 13 Mont. 363, 40 Am.S.R. 449.

3. R.I.—Horton v. Stone, 80 A. 1, 32 R.I. 499.

4. R.I.—Horton v. Stone, supra. Unauthorized signing of principal's name generally see supra § 48.

5. R.I.—Horton v. Stone, supra.

and turns it over to the principal on the condition that others are also to sign it, he is bound, although the instrument, regular on its face, is delivered by the principal in violation of the condition, if the obligee accepts it without notice of the condition, either actual or constructive.<sup>6</sup> Under this rule, the instrument, as so delivered to the principal, is not merely an escrow,<sup>7</sup> and the surety is bound on the principle of estoppel,<sup>8</sup> for the reason that, since the creditor is wholly innocent in the transaction, he is entitled to stand on the instrument as a complete and binding contract as between the principal and surety and himself,<sup>9</sup> and for the further reason that, where the surety intrusts the delivery of the instrument to his agent for the purpose of obtaining signatures before delivering the contract to the creditor or obligee, and the agent makes delivery in violation of his instructions, the surety must suffer for the misconduct of his agent,<sup>10</sup> even though his agent is the principal obligor.<sup>11</sup> Accordingly, one who signs or indorses a note as surety cannot, as against an innocent payee or any other bona fide holder for value, set up that the principal delivered it in violation of a condition that certain other person or persons should first sign or indorse it,<sup>12</sup> notwithstanding any fraud of the principal in procuring his

signature,<sup>13</sup> since no agreement of the sureties, among themselves or with the principal, that, if all of them are not bound, none of them shall be, will affect the rights of the payee, unless he has notice of the agreement, and that it has been violated prior to, or at the time that he takes the note and parts with, the consideration.<sup>14</sup>

On the other hand, in some jurisdictions, where a surety signs a bond on condition that others shall also sign it before delivery by the principal to the obligee, it has been held broadly that he is not bound on the bond where no other signatures are procured,<sup>15</sup> although the instrument provides that those who sign shall be liable notwithstanding such a condition.<sup>16</sup> However, this rule does not apply to commercial paper which comes into the hands of a bona fide purchaser before maturity, who is without notice of the condition.<sup>17</sup>

**Obligee with notice.** Where, however, the creditor or obligee has notice of the condition when he receives the instrument, he cannot hold the surety liable thereon, unless the latter waives such condition;<sup>18</sup> and this rule also applies as against the obligee's assignee.<sup>19</sup>

**Stipulation against condition.** Such a condition is not available as a defense where the bond pro-

6. Ark.—*W. T. Rawleigh Co. v. Disheroon*, 134 S.W.2d 4, 199 Ark. 479—*W. T. Rawleigh Co. v. Moore*, 55 S.W.2d 63, 186 Ark. 571—*Copeland v. Union Industrial Loan Corporation*, 48 S.W.2d 845, 185 Ark. 643.

Ky.—*Farmers' Nat. Bank of Somerset v. Campbell*, 39 S.W.2d 465, 239 Ky. 346.

Mo.—*State v. Modrel*, 69 Mo. 152—*State v. Baker*, 64 Mo. 167.

Pa.—*Commonwealth v. Olloman*, 23 Pa. Dist. & Co. 125, 15 Wash. Co. 101.

Tenn.—*State ex rel. v. Holston Trust Co.*, 79 S.W.2d 1012, 168 Tenn. 546—*Corpus Juris* cited in *Wagoner v. Dorris*, 68 S.W.2d 142, 144, 17 Tenn. App. 420.

Tex.—*Tarleton v. Trezevant & Cochran, Civ. App.*, 165 S.W.2d 514, error refused.

Wash.—*J. R. Watkins Co. v. Brund*, 294 P. 1024, 160 Wash. 183, 50 C.J. p 36 notes 38, 39.

7. Tenn.—*Dun v. Garrett*, 27 S.W. 1011, 93 Tenn. 650, 42 Am.S.R. 937. Delivery to coobligor in escrow generally see *Escrows* § 7.

8. Mich.—*Westveer v. Landwehr*, 267 N.W. 849, 276 Mich. 326.

Tex.—*Tarleton v. Trezevant & Cochran, Civ. App.*, 165 S.W.2d 514, error refused.

50 C.J. p 37 note 41.

Estoppel as to defects or objections generally see *infra* § 83.

9. Tex.—*Tarleton v. Trezevant & Cochran, Civ. App.*, 165 S.W.2d 514, error refused. 50 C.J. p 37 note 42.

10. Ky.—*Farmers' Nat. Bank of Somerset v. Campbell*, 39 S.W.2d 465, 239 Ky. 346.

Tex.—*Tarleton v. Trezevant & Cochran, Civ. App.*, 165 S.W.2d 514, error refused.

50 C.J. p 37 note 43.

11. Ky.—*Brown v. Wilson*, 1 S.W. 2d 767, 222 Ky. 454.

50 C.J. p 37 note 44.

12. Ark.—*W. T. Rawleigh Co. v. Disheroon*, 134 S.W.2d 4, 199 Ark. 479—*Copeland v. Union Industrial Loan Corporation*, 48 S.W.2d 845, 185 Ark. 643.

Ky.—*Farmers' Nat. Bank of Somerset v. Campbell*, 39 S.W.2d 465, 239 Ky. 346.

Tenn.—*Corpus Juris* cited in *Wagoner v. Dorris*, 68 S.W.2d 142, 144, 17 Tenn. App. 420.

50 C.J. p 37 note 45.

Conditional delivery of bill or note generally see *Bills and Notes* §§ 79, 487.

**In Missouri**

(1) The text rule has been followed.—*North Atchison Bank v. Gay*, 21 S.W. 479, 114 Mo. 203.

(2) In an early case the court

held that the rule did not apply to a nonnegotiable note.—*Ayres v. Milroy*, 53 Mo. 516, 14 Am.R. 465.

(3) In a subsequent case the court held that irrespective of the negotiability of a note, it is no defense that the principal agreed to procure additional surety, where the note was regular on its face and where the payee had no notice of such agreement.—*Taylor v. Keithley*, Mo. App., 266 S.W. 735.

13. Ky.—*Brown v. Wilson*, 1 S.W. 2d 767, 222 Ky. 454.

14. Tex.—*Hess v. Schaffner*, Civ. App., 139 S.W. 1024.

50 C.J. p 37 note 47.

15. Ala.—*O'Neal v. Turner*, 158 So. 801, 230 Ala. 24.

50 C.J. p 36 note 35.

16. Ala.—*White Sewing Mach. Co. v. Saxon*, 25 So. 784, 121 Ala. 399.

17. Ala.—*Ex parte Goldberg*, 67 So. 839, 191 Ala. 356, L.R.A.1915F 1157.

50 C.J. p 36 note 37.

18. Tex.—*Campbell Printing Press, etc., Co. v. Powell*, 14 S.W. 245, 78 Tex. 53.

50 C.J. p 37 notes 49, 50.

Waiver of condition generally see *infra* subdivision f of this section.

19. Ky.—*Smith v. Bales*, 99 S.W. 672, 30 Ky. Law 779.

50 C.J. p 37 note 51.

vides that no agreement that other persons are to sign shall be a defense thereto and that the person to whom the instrument is delivered has absolute authority to deliver it.<sup>20</sup>

*Release of some as release of all.* It has been held that, where some of the sureties are released for failure to comply with a condition to procure additional signers, all others who signed are also released,<sup>21</sup> even though such condition was imposed after the instrument was executed by some of the sureties unconditionally.<sup>22</sup>

## (2) When Not Made Condition

Where a surety does not make the execution of the instrument by other sureties a condition precedent to the legal existence of the instrument, he cannot rely on such execution as a condition to his being liable on the instrument.

Where a surety does not make the execution of the instrument by other sureties a condition precedent to the legal existence of the instrument, he cannot rely on such execution as a condition to his being liable on the instrument,<sup>23</sup> as where, without making his liability conditional on others signing, he merely tells the obligee that others are to join.<sup>24</sup> So, a mere representation<sup>25</sup> or promise,<sup>26</sup> contemporaneous with the delivery of the instrument, that certain other persons should also execute it, is not a condition the nonperformance of which will impair the validity of the obligation delivered in reliance thereon.

*Expectancy or belief.* In the absence of fraud or deceit, a surety's mere expectation or well founded belief or understanding that other parties will sign will not make delivery by him conditional on an execution by others.<sup>27</sup>

## (3) Promise of Obligee to Procure Other Surety

By some decisions, where the surety signs on the agreement of the creditor or obligee to procure additional signatures as sureties, a failure to procure such signatures relieves the surety from liability.

By some decisions, where the surety signs on the agreement of the creditor or obligee, or his agent, to procure additional signatures as sureties, a failure to procure such signatures relieves the surety from liability.<sup>28</sup> By other decisions, however, a failure to comply with such agreement does not impair the surety's obligation,<sup>29</sup> since, as discussed in Escrows § 7, the agreement is void because a note or bond cannot be delivered to the payee or obligee as an escrow. However, such failure entitles the surety to recover damages for a breach of the agreement,<sup>30</sup> or to set them up by way of counterclaim.<sup>31</sup>

## e. Performance of Condition

A surety who signs on condition may insist on a strict compliance therewith.

A surety who signs on condition may insist on a strict compliance therewith.<sup>32</sup> A condition that another sign as cosurety has been held sufficiently complied with where the signature of such person is made on the back of the instrument,<sup>33</sup> or as indorser,<sup>34</sup> or is affixed by an authorized agent;<sup>35</sup> and, if the surety signing on condition knows that the bond is to be executed by the other through an agent, he is bound to examine such agent's authority, and is not relieved if the other is not bound because of a defect in the agent's authority.<sup>36</sup> However, the condition is not sufficiently complied with if such signature is affixed by an unauthorized

20. Tex.—White Sewing Mach. Co. v. Wingo, Civ.App., 152 S.W. 187 —Page v. White Sewing Mach. Co., 34 S.W. 988, 12 Tex.Civ.App. 327.

21. Ala.—Corpus Juris quoted in O'Neal v. Turner, 158 So. 801, 805, 230 Ala. 24.  
50 C.J. p 38 note 53.

22. Ala.—Corpus Juris quoted in O'Neal v. Turner, 158 So. 801, 805, 230 Ala. 24.  
50 C.J. p 38 note 54.

23. Pa.—Fidelity Mut. Life Ins. Co. v. Power, 166 A. 345, 311 Pa. 302.  
50 C.J. p 38 note 55.

**Bond with fewer sureties than required by by-laws**

Where the by-laws of a lodge require three sureties on the bond of a trustee, and a bond signed by a principal and two sureties only is accepted by the lodge, the sureties cannot complain if they signed

without any understanding that a third surety was to sign.—Coombs v. Harford, 59 A. 529, 99 Me. 426.

24. Tenn.—Bramley v. Wilds, 9 Lea 674.

25. Minn.—Reed v. McGregor, 64 N. W. 88, 62 Minn. 94.  
50 C.J. p 38 note 57.

26. Okl.—Sellers v. Terr, 121 P. 228, 32 Okl. 147.  
50 C.J. p 38 note 58.

27. Ark.—W. T. Rawleigh Co. v. Disheroon, 134 S.W.2d 4, 199 Ark. 479.

D.C.—Cummings v. United Clay Products Co., Mun.App., 32 A.2d 107.  
50 C.J. p 38 note 59.

28. Pa.—Miller v. Stern, 12 Pa. 383.  
50 C.J. p 38 note 61.

29. Ky.—Tross v. Bills' Ex'x, 224 S.W. 660, 189 Ky. 115.  
50 C.J. p 38 note 62.

30. Ky.—Tross v. Bills' Ex'x, supra —Hudspeth v. Tyler, 56 S.W. 973, 108 Ky. 520, 22 Ky.L. 221.

31. Ky.—Rohrman v. Bonser, 163 S.W. 193, 157 Ky. 397.  
50 C.J. p 38 note 65.

32. Neb.—Middleboro Nat. Bank v. Richards, 76 N.W. 528, 55 Neb. 682.  
50 C.J. p 38 note 66.

33. Tex.—Erwin v. El. I. Du Pont de Nemours Powder Co., Civ.App., 156 S.W. 1097.

34. Tex.—Kugle v. Traders State Bank, Civ.App., 252 S.W. 208.

35. Ala.—McClure v. Colclough, 5 Ala. 65.

Va.—Blankenship v. Ely, 36 S.E. 484, 98 Va. 359.

36. Mich.—Bowen v. Mead, 1 Mich. 432.  
50 C.J. p 38 note 70.



person,<sup>37</sup> even though it is subsequently ratified.<sup>38</sup> So, also, a condition that others sign as cosureties is not complied with by such persons signing a long time after a default by the principal,<sup>39</sup> or where their signatures are obtained by fraud,<sup>40</sup> or are forged,<sup>41</sup> unless there is nothing on the face of the instrument to put the obligee on notice, in which case the surety is estopped to deny the genuineness of such signatures.<sup>42</sup>

#### f. Waiver of Condition

One who signs a bond as surety conditionally may waive such condition and thus estop himself to deny liability on the bond.

One who signs a bond as surety conditionally may waive such condition and thus estop himself to deny liability on the bond.<sup>43</sup> Accordingly, where a surety has knowledge, actual or constructive, that the condition has not been complied with, he may be held to have waived the condition and be estopped to set it up to avoid liability on the bond,<sup>44</sup> as, where, without objection, he suffers the bond to be unconditionally delivered to the obligee<sup>45</sup> or the principal to act under the bond.<sup>46</sup>

On the other hand, where a surety has no knowledge that the condition has not been complied with, he will not be held to have waived the condition;<sup>47</sup> and where, under such circumstances, he promises to pay the creditor the amount due under the bond, it has been held not to bar the defense of violation of condition that the principal also sign the bond.<sup>48</sup> Likewise, a condition requiring other sureties is not waived by the mere failure of one surety to answer the obligee's letter relative to such other sureties<sup>49</sup> or by the fact that a surety, who has signed on such condition, tries to borrow money to pay the bond or a part of it.<sup>50</sup>

#### g. Notice of Condition

- (1) In general
- (2) Where instrument complete on face
- (3) Where instrument incomplete on face

##### (1) In General

In order that nonperformance of a condition may constitute a defense to a surety, the creditor or obligee must have notice, either actual or constructive.

Constructive notice arises and is sufficient where the obligee has knowledge of facts which would cause a reasonably prudent person to make inquiry,<sup>51</sup> as where the conditional nature of the execution is apparent either on the face of the instrument itself, as discussed *infra* subdivision g (3) of this section, or in connection with the attending circumstances,<sup>52</sup> as where the obligee's contract with the principal stipulates for such condition.<sup>53</sup> Notice of nonperformance of a condition that another surety also sign involves incompleteness of the instrument, and notice thereof, either actual or constructive, to the obligee.<sup>54</sup>

*The absence of an acknowledgement* of a bond, when required, so detracts from its facial regularity as to call for inquiry by the obligee as to whether it was signed by the surety on condition,<sup>55</sup> and entitles a surety, if sued thereon, to prove an unfulfilled condition imposed by him.<sup>56</sup>

*Notice to agent.* Subject to the general rules relating to notice to an agent as notice to the principal, as discussed in Agency §§ 262-274, notice of the conditions on which a surety signs a bond or note, acquired by an authorized agent of the creditor or obligee while acting within the scope of his authority, is notice to the latter.<sup>57</sup>

37. Neb.—Middleboro Nat. Bank v. Richards, 76 N.W. 528, 55 Neb. 682.

38. Neb.—Middleboro Nat. Bank v. Richards, *supra*.

39. Vt.—Fletcher v. Austin, 11 Vt. 447, 34 Am.D. 698.

40. Me.—Franklin Bank v. Stevens, 39 Me. 532.

41. Ala.—Sharp v. Allgood, 14 So. 16, 100 Ala. 183.

50 C.J. p 39 note 75.  
Forgery of signature as affecting contract generally see *infra* §§ 73, 74.

42. Ga.—Mathis v. Morgan, 72 Ga. 17, 53 Am.R. 847.

S.C.—Sullivan v. Williams, 21 S.E. 643, 43 S.C. 489.

Estoppel as to defects and objections generally see *infra* § 83.

43. Minn.—Clarke v. Williams, 62 N.W. 1125, 61 Minn. 12.

50 C.J. p 37 note 50, p 39 note 80, p 114 note 92 [c], p 115 note 8 [d].

Estoppel or waiver as to defects or objections generally see *infra* § 83.

44. Ala.—Daughtry v. Stewart, 4 So. 867, 84 Ala. 69.  
50 C.J. p 39 note 81.

45. Ind.—American Surety Co. v. Pangburn, 105 N.E. 769, 182 Ind. 116, Ann.Cas.1916E 1126.  
50 C.J. p 39 note 82.

46. Ala.—Smith v. Kirkland, 1 So. 276, 81 Ala. 345.  
50 C.J. p 68 note 19.

47. Ala.—Birmingham News Co. v. Moseley, 141 So. 689, 225 Ala. 45.

48. Ala.—Birmingham News Co. v. Moseley, *supra*.

49. Iowa.—Andrew v. Hanson, 222 N.W. 10, 206 Iowa 258.

Okl.—Lemp Brewing Co. v. Secor, 96 P. 636, 21 Okl. 537.

50. Ky.—Slaughter v. Hampton, 90 S.W. 981, 28 Ky.L. 904.

51. Neb.—Watkins Medical Co. v. Hunt, 177 N.W. 462, 104 Neb. 266.  
50 C.J. p 39 note 88.

52. S.C.—Crawford v. Owens, 60 S. E. 236, 79 S.Ct. 59.  
50 C.J. p 39 note 90.

53. S.C.—Crawford v. Owens, *supra*.  
50 C.J. p 39 note 91.

54. Ga.—Bonner v. Nelson, 57 Ga. 433.

55. N.M.—Hendry v. Cartwright, 89 P. 809, 14 N.M. 72, 8 L.R.A., N.S., 1056.

56. N.M.—Hendry v. Cartwright, *supra*.

57. Ark.—W. T. Rawleigh Co. v. Moore, 55 S.W.2d 63, 186 Ark. 571.  
50 C.J. p 39 note 96.

*An infant obligee* is not affected by notice of conditions prejudicial to him.<sup>58</sup>

*Statutory notice.* Where the bond is a statutory one, a statutory requirement of two or more sureties to the obligation operates as notice to the obligee.<sup>59</sup>

*Delivery by stranger.* The creditor or obligee may be held to have constructive notice if he receives the instrument from a stranger,<sup>60</sup> as where delivery is wrongfully made by one holding it in escrow.<sup>61</sup> However, the surety cannot avoid liability on this ground where the delivery is made by his agent.<sup>62</sup>

### (2) Where Instrument Complete on Face

Where the instrument is complete and regular on its face, there is no duty on the obligee to inquire whether any condition has been imposed on its delivery.

Where the instrument is complete and regular on its face, there is no duty on the obligee to inquire whether any condition has been imposed on its delivery,<sup>63</sup> and the surety is not relieved from liability because of a breach of condition, unless the obligee, at the time of such delivery, has actual notice of the condition and of its violation,<sup>64</sup> or unless the attending circumstances are such as to charge him with notice thereof.<sup>65</sup> Thus, where the bond is regular on its face, and is good without the principal's signature, the obligee is not chargeable with notice that the surety's signature was made on condition that the principal should also sign before delivering the bond,<sup>66</sup> especially where the principal signs a contract imposing the same obligations.<sup>67</sup>

### (3) Where Instrument Incomplete on Face

Where the instrument is so incomplete on its face as to suggest nonperformance of some condition imposed by the surety, it imputes notice to the obligee of such condition and of its violation, in which case, actual notice is not required.

Where the instrument is so incomplete on its face as to suggest nonperformance of some condition imposed by the surety, it imputes notice to the obligee of such condition and of its violation,<sup>68</sup> in which case, actual notice is not required.<sup>69</sup> However, in order that a defect on the face of a bond may serve to impute notice to the obligee, it must be of such a nature as may reasonably lead to a discovery of the real defect complained of.<sup>70</sup> Thus, notice of any conditions on which the obligee may have signed is not imputed to the obligee by the mere fact that there are more seals than signatures to a bond,<sup>71</sup> that the instrument contains the word "sureties,"<sup>72</sup> or that there are unfilled blanks.<sup>73</sup>

*Failure of all persons to sign.* The fact that an instrument which purports on its face to be the bond of two or more obligors is delivered to the obligee without being executed by all the persons named in the body thereof as obligors imputes notice to the obligee that the surety signing it did so on the condition that it be executed by all the parties named, either as principal or cosureties, before delivery,<sup>74</sup> and puts him on inquiry as to whether those who signed consented to its delivery without the signature of the others.<sup>75</sup> Where the bond recites a principal and sureties but the principal fails to sign, it necessitates inquiry in respect thereof.<sup>76</sup>

58. N.Y.—Bangs v. Osborn, 2 N.Y. St. 685.

59. Neb.—Cutler v. Roberts, 7 Neb. 4, 29 Am.R. 371.  
50 C.J. p 40 note 98.

60. Va.—Ward v. Churn, 18 Graff. 801, 59 Va. 801, 98 Am.D. 749.

61. Va.—Ward v. Churn, supra.

62. Iowa.—Taylor County v. King, 34 N.W. 774, 73 Iowa 153, 5 Am. S.R. 666.

63. Tenn.—Corpus Juris quoted in Waggoner v. Dorris, 68 S.W.2d 142, 144, 17 Tenn.App. 420.  
50 C.J. p 40 note 3.

64. N.M.—Hendry v. Cartwright, 89 P. 309, 14 N.M. 72, 8 L.R.A., N.S., 1056.

Tenn.—Corpus Juris quoted in Waggoner v. Dorris, 68 S.W.2d 142, 144, 17 Tenn.App. 420.

Tex.—Tarlton v. Trezevant & Cochran, Civ.App., 165 S.W.2d 514, error refused.

Wash.—J. R. Watkins Co. v. Brund, 294 P. 1024, 160 Wash. 183.

65. Tenn.—Corpus Juris quoted in Waggoner v. Dorris, 68 S.W.2d 142, 144, 17 Tenn.App. 420.  
50 C.J. p 40 note 5.

**Circumstances held insufficient to put payee on inquiry**

Fact that three sureties signed original note and renewals, whereas only two signed final note for much smaller sum, was held insufficient to put payee on inquiry with respect to absence of third surety.—Farmers' Nat. Bank of Somerset v. Campbell, 39 S.W.2d 465, 239 Ky. 346.

66. Tenn.—Corpus Juris quoted in Waggoner v. Dorris, 68 S.W.2d 142, 144, 17 Tenn.App. 420.  
50 C.J. p 40 note 7.

67. Tenn.—Corpus Juris quoted in Waggoner v. Dorris, 68 S.W.2d 142, 144, 17 Tenn.App. 420.  
50 C.J. p 40 note 8.

68. N.M.—Hendry v. Cartwright, 89 P. 309, 14 N.M. 72, 8 L.R.A., N.S., 1056.  
50 C.J. p 40 note 9.

69. U.S.—Pawling v. U. S., 4 Cranch 219, 2 L.Ed. 601.  
S.C.—Crawford v. Owens, 60 S.E. 236, 79 S.C. 59.

70. Ill.—Chicago v. Gage, 95 Ill. 593, 35 Am.R. 182.

Or.—Baker County v. Huntington, 79 P. 187, 46 Or. 275.

71. Pa.—Winters v. Robison, 14 Pa. Co. 264.  
50 C.J. p 40 note 12.

72. Mich.—Crystal Lake Tp. v. Hill, 67 N.W. 121, 109 Mich. 246—Brown v. Probate Judge, 4 N.W. 195, 42 Mich. 501.

73. Conn.—Union Pac. Tea Co. v. Dick, 89 A. 204, 87 Conn. 711.  
50 C.J. p 40 note 14.

74. Ala.—Corpus Juris quoted in Birmingham News Co. v. Moseley, 141 So. 689, 692, 693, 225 Ala. 45.  
50 C.J. p 40 note 18.

75. Ala.—Corpus Juris quoted in Birmingham News Co. v. Moseley, 141 So. 689, 692, 225 Ala. 45.  
50 C.J. p 41 note 19.

76. Mass.—Goodyear Dental Vul-

**Erasures.** A material, noticeable erasure in an instrument may be sufficient to put an obligee on notice as to a conditional signing of a surety.<sup>77</sup> The erasure, before delivery, of a name originally in the body of the bond is sufficient to put the obligee on notice as to whether the surety's signing was conditional on the signing by such person.<sup>78</sup> However, where the erasure cannot be detected without a close inspection, it is not sufficient to put the obligee on notice.<sup>79</sup>

**Presumptions.** The authorities are not in harmony as to whether there is a presumption that an instrument is incomplete and unfinished until it is executed by all the parties whose names appear.<sup>80</sup> Generally, no presumption arises that a bond is not to be considered binding on a surety who signs until executed by all of the obligors named in the body thereof;<sup>81</sup> but its execution is deemed prima facie complete, and it is for those who executed it to show that they were not to be bound unless it was executed by the others,<sup>82</sup> especially where the bond is a joint and several one.<sup>83</sup> Some authorities, however, hold that the presumption is that such an instrument is not to be delivered until it is signed by the obligors named, and it is incumbent on the obligee to show affirmatively that the surety who signed it dispensed with the execution of it by the other obligors named.<sup>84</sup> Further, the distinction has been made that, where the bond purports to be a joint one, the presumption is that each of the obligors named in the bond signed on the understanding that the others would also sign.<sup>85</sup>

### § 53. — Signing by Creditor or Obligee

The failure of the creditor to execute the instrument does not relieve a surety thereon, where the principal has treated it as a valid obligation.

canite Co. v. Bacon, 24 N.E. 404, 151 Mass. 460, 8 L.R.A. 486.  
50 C.J. p 41 note 20.

Necessity of execution by principal generally see supra § 48.

77. N.M.—Hendry v. Cartwright, 89 P. 309, 14 N.M. 72, 8 L.R.A., N.S., 1056.

78. Ark.—State v. Churchill, 3 S.W. 352, 880, 48 Ark. 426.  
50 C.J. p 40 note 15.

79. Wash.—King County v. Ferry, 32 P. 538, 5 Wash. 536, 34 Am.S.R. 880, 19 L.R.A. 506.

80. Ala.—Corpus Juris quoted in Birmingham News Co. v. Moseley, 141 So. 689, 693, 225 Ala. 45.  
50 C.J. p 41 note 22.

Presumption as to existence of relation see supra § 12.

81. Ala.—Corpus Juris quoted in

Birmingham News Co. v. Moseley, 141 So. 689, 693, 225 Ala. 45.

50 C.J. p 41 note 23.

82. Ala.—Corpus Juris quoted in Birmingham News Co. v. Moseley, 141 So. 689, 693, 225 Ala. 45.

50 C.J. p 41 note 24.

83. Ala.—Corpus Juris quoted in Birmingham News Co. v. Moseley, 141 So. 689, 693, 225 Ala. 45.

50 C.J. p 41 note 25.

84. Iowa.—Novak v. Pitlick, 94 N.W. 916, 120 Iowa 286, 98 Am.S.R. 860.

50 C.J. p 41 note 26.

85. Cal.—Sacramento v. Dunlap, 14 Cal. 421.

86. Pa.—Duffee v. Mansfield, 21 A. 675, 141 Pa. 507.  
50 C.J. p 41 note 33.

87. La.—Equitable Real Estate Co. v. National Surety Co., 63 So. 104, 133 La. 448.

The failure of the creditor to execute the instrument does not relieve a surety thereon, where the principal has treated it as a valid obligation.<sup>86</sup> Where the obligee is required by statute to take a bond, and the statute is substantially complied with, a slight discrepancy between his name as signed to the principal contract and as appearing on the bond does not relieve the surety from liability.<sup>87</sup>

### § 54. — Justification of Surety

The justification of a surety is no part of his undertaking, and ordinarily his mere failure to justify will not release him from liability on a bond which is accepted without such justification.

The justification of a surety is no part of his undertaking,<sup>88</sup> and ordinarily his mere failure to justify will not release him from liability on a bond which is accepted without such justification.<sup>89</sup> However, the failure to justify by one of the sureties on a joint bond, which by order of court is not to be operative until the sureties have justified, releases his cosurety,<sup>90</sup> even though the cosurety afterward agrees orally to consider himself bound.<sup>91</sup>

### § 55. Delivery

Ordinarily the bond or obligation of a surety is not of any validity until it has been properly delivered. Delivery of the bond or obligation to the obligee may be made by the surety through an agent, and the principal obligor may act as the agent of the surety for the purpose of making delivery.

While it has been held not essential to the creation of a surety relationship that the promise to pay the debt or obligation of another be directed, addressed, or delivered by the maker of the promise to any particular creditor or prospective creditor,<sup>92</sup> ordinarily the bond or obligation of a surety is not

88. Idaho.—Wilson v. Eagleson, 71 P. 613, 9 Idaho 17, 108 Am.S.R. 110—Miller v. Pine Min. Co., 32 P. 207, 3 Idaho 603.

2 C.J. p 1191 note 65 (1).

"Justification of sureties" defined

In practice, the proceeding by which sureties establish their ability to perform the undertaking of the bond or recognizance.—Dickinson v. Smith, 120 N.W. 406, 407, 139 Wis. 1—35 C.J. p 896 note 20.

89. Idaho.—State v. McDonald, 40 P. 312, 4 Idaho 468, 95 Am.S.R. 137.

50 C.J. p 41 note 30.

90. N.Y.—Gross v. Bouton, 9 Daly 25.

91. N.Y.—Gross v. Bouton, supra.

92. U.S.—Joe Balestrieri & Co. v. C. I. R., C.A., 177 F.2d 867.

Reason for rule

A proposal to stand as surety may

of any validity until it has been properly delivered.<sup>93</sup> Thus, in the case of a surety on a note, since his obligation is to the payee or creditor,<sup>94</sup> it is of no validity until after the delivery of the note to the creditor or obligee.<sup>95</sup>

**Mailing.** A suretyship contract is delivered when it is deposited in the mail, directed to the obligee<sup>96</sup> or to someone, other than the surety's agent, for delivery to the obligee,<sup>97</sup> such as to the principal for his signature.<sup>98</sup>

**By or to agent.** Delivery of the bond or obligation to the obligee may be made by the surety through an agent,<sup>99</sup> and where the surety places a fully executed bond or obligation in the hands of an agent for use in a transaction to be consummated, without giving the agent any special instructions, he thereby authorizes its delivery to the obligee to secure any agreement coming within its terms.<sup>1</sup> The principal obligor may act as the agent of the surety for the purpose of making delivery,<sup>2</sup> and such authority may be inferred from the facts and circumstances of the case,<sup>3</sup> such as from the acts and conduct of the surety which fairly evince such an intention.<sup>4</sup> As far as the surety is concerned, his liability on the bond or obligation becomes fixed by his delivering it to the principal, with the intention that it shall become operative,<sup>5</sup> as where he places it in the office of the

principal for his signature,<sup>6</sup> since this is equivalent to delivery to the obligee.<sup>7</sup>

Where the principal has possession of a bond or obligation executed by a surety, it is presumed to be rightful,<sup>8</sup> and the delivery of it by him to the obligee is binding on the surety, even without his assent,<sup>9</sup> where there is no fact or circumstance which could preclude the acceptance of it.<sup>10</sup> However, the appointment of a receiver in the meantime to take charge of the principal's affairs, because of insolvency, terminates such implied authority;<sup>11</sup> and if the bond or obligation is delivered by him thereafter it is not effective against the surety.<sup>12</sup>

Delivery of the bond or obligation may be made to an authorized agent of the creditor or obligee.<sup>13</sup>

## § 56. — Conditional Delivery

Where the bond or obligation as delivered to the obligee is subject to certain conditions, there is not a technical delivery to him. A delivery may be conditional without the use of express words to that effect.

Where the bond or obligation as delivered to the obligee is subject to certain conditions, there is not a technical delivery to him.<sup>14</sup> While a delivery may be conditional without the use of express words to that effect,<sup>15</sup> in the absence of evidence to the contrary it will be presumed that the delivery of a bond or obligation was unconditional,<sup>16</sup>

be addressed to the general public, the surety in such a case becoming liable to anyone who accepts the proposal and advances money in reliance thereon.—*Joe Balestrieri & Co. v. C. I. R.* supra.

93. Idaho.—*Corpus Juris* cited in *J. B. Watkins Co. v. Clark*, 147 P. 2d 348, 351, 65 Idaho 504.  
Md.—*John McShain, Inc. v. Eagle Indemnity Co.*, 23 A.2d 669, 180 Md. 202.

50 C.J. p 42 note 38.

94. Mo.—*Chitwood v. Hatfield*, 118 S.W. 1192, 136 Mo.App. 688.

N.Y.—*Benjamin v. Ver Nooy*, 55 N.Y.S. 796, 36 App.Div. 581, modified on other grounds, 61 N.E. 971, 168 N.Y. 578.

95. Mo.—*Chitwood v. Hatfield*, 118 S.W. 1192, 136 Mo.App. 688.  
50 C.J. p 42 note 40.

96. Pa.—*Donaldson v. Hartford Accident, etc., Co.*, 112 A. 562, 269 Pa. 456.

97. Pa.—*Hanauer v. National Surety Co.*, 123 A. 863, 279 Pa. 345—*Donaldson v. Hartford Accident, etc., Co.*, 112 A. 562, 269 Pa. 456.

98. Pa.—*Donaldson v. Hartford Accident, etc., Co.*, supra.

99. N.J.—*Corpus Juris* quoted in

72 C.J.S.—35

*Burststein v. Union Indemnity Co.*, 166 A. 89, 90, 110 N.J.Law 442.  
50 C.J. p 42 note 45.

1. N.J.—*Corpus Juris* quoted in *Burststein v. Union Indemnity Co.*, 166 A. 89, 90, 110 N.J.Law 442.  
50 C.J. p 42 note 46.

2. Neb.—*Paxton v. State*, 81 N.W. 383, 69 Neb. 460, 80 Am.S.R. 689.  
50 C.J. p 42 note 47.

3. Minn.—*Larson v. National Surety Co.*, 214 N.W. 507, 171 Minn. 455, 53 A.L.R. 382.  
50 C.J. p 42 note 48.

4. Ky.—*Thompson v. Citizens' Bank, etc., Co.*, 1 S.W.2d 770, 222 Ky. 492.  
50 C.J. p 42 note 49.

### Leaving with principal

Sureties who sign a bond or obligation and leave it with the principal to be delivered to the obligee thereby constitute the principal their agent for that purpose.—*Hall v. Weaver*, C.C.Or., 34 F. 104, 13 Sawy. 188.

5. N.Y.—*Haywood v. Townsend*, 38 N.Y.S. 517, 4 App.Div. 246.

6. Pa.—*Hanauer v. National Surety Co.*, 123 A. 863, 279 Pa. 345—*Donaldson v. Hartford Acc., etc., Co.*, 112 A. 562, 269 Pa. 456.

7. Pa.—*Hanauer v. National Surety Co.*, 123 A. 863, 279 Pa. 345.

8. Mo.—*North St. Louis Planing Mill Co. v. Christophel*, 137 S.W. 295, 157 Mo.App. 18.

9. Mo.—*North St. Louis Planing Mill Co. v. Christophel*, supra.

10. Mo.—*North St. Louis Planing Mill Co. v. Christophel*, supra.

11. Minn.—*Larson v. National Surety Co.*, 214 N.W. 507, 171 Minn. 455, 53 A.L.R. 382.

12. Minn.—*Larson v. National Surety Co.*, supra.  
50 C.J. p 42 note 57.

13. Pa.—*State Camp P. O. S. A. v. Kelley*, 110 A. 339, 267 Pa. 49.  
50 C.J. p 42 note 58.

14. N.C.—*Dunlap v. Willett*, 69 S.E. 222, 153 N.C. 317.  
50 C.J. p 43 note 60.

15. D.C.—*Cummings v. United Clay Products Co.*, Mun.App., 32 A.2d 107.

16. Neb.—*Watkins Medical Co. v. Hunt*, 177 N.W. 462, 104 Neb. 266—*Gyger v. Courtney*, 81 N.W. 437, 59 Neb. 555.

**Payee's oral statement to sureties on note, prior to signing thereof, that their signatures were mere formalities and that they would not**

and a bond or obligation, complete on its face, may not be avoided in the hands of an obligee receiving it from one of two or more cosureties without notice of a condition annexed on delivery by one or more of the cosureties.<sup>17</sup>

## § 57. Acceptance and Approval

- a. Acceptance
- b. Approval

### a. Acceptance

In order that a surety may be bound, the suretyship bond or obligation must be duly accepted by the creditor or obligee within a reasonable time; but acceptance need not be made in a formal manner and may be implied from the circumstances.

In order that a surety may be bound, it is necessary that the suretyship bond or obligation be duly accepted by the creditor or obligee<sup>18</sup> within a reasonable time,<sup>19</sup> or, as discussed *infra* § 60, before the surety has signified an intention to withdraw. Acceptance, however, need not be made in a formal manner,<sup>20</sup> but may be implied from the circumstances,<sup>21</sup> as where the creditor has knowledge that one of the parties is in fact a surety<sup>22</sup> or where the principal contract stipulates for a bond and a bond is given.<sup>23</sup> Acceptance may also

be implied from the fact that the principal obligor enters on the duties of the contract secured and that the obligee retains the bond or obligation without objection,<sup>24</sup> or from the fact that the agreement is delivered to the creditor and credit extended to the principal on the strength thereof.<sup>25</sup>

### b. Approval

Acceptance and retention of the bond or obligation raise an implication of its approval; ordinarily the fact that a bond or obligation is not approved as required by law does not release the sureties from their liability thereon.

Acceptance and retention of the bond or obligation raise an implication of its approval,<sup>26</sup> but, since the approval of a statutory bond or obligation is not primarily for the benefit of the principal obligor or the sureties so much as for the protection of the obligee,<sup>27</sup> in the absence of a statutory provision to the contrary the fact that a bond or obligation is not approved as required by law does not release the sureties from their liability thereon,<sup>28</sup> nor is it necessary to such liability that the approval, when made, be indorsed on the bond.<sup>29</sup>

Where, under a statute providing that the undertaking may be in one instrument or several, an

be liable if notes were not paid did not relate to delivery on condition.—*Davlin v. Kowalk*, 6 N.E.2d 798, 54 Ohio App. 222.

17. Va.—*Webb v. Trent's Ex'r*, 174 S.E. 755, 162 Va. 500.

#### Conditional delivery to cosurety

Sureties on bond were liable to obligee who received it from cosurety and another without notice that it was intended to be only temporary, or that it had been conditionally delivered to cosurety other than the one delivering it or that delivery was without authority and in breach of condition.—*Webb v. Trent's Ex'r*, *supra*.

18. Md.—*John McShain, Inc. v. Eagle Indemnity Co.*, 23 A.2d 669, 180 Md. 202.

50 C.J. p 43 note 67.

Notice to, and acceptance by, creditor generally see *supra* § 31.

#### Rejection

Alleged offer of sureties on bond for distributor for retail company to become sureties on note for purpose of giving distributor additional time to bring his accounts to date was rejected by letter of company disavowing note which sureties signed with understanding that another party who failed to sign would also execute note, and making another offer to the sureties, which was not accepted by them, and hence sureties were not liable on note.—*W. T.*

*Rawleigh Co. v. Izard*, Tex.Civ.App., 113 S.W.2d 620.

#### Return to surety for insertion of clause

Where surety bond was returned to surety company with request that there be included in the bond a forbearance clause, which surety declined to add and principal named in the bond defaulted and bond was never returned to the obligee, surety could not be held liable on the bond, since it was never accepted by the obligee.—*John McShain, Inc. v. Eagle Indemnity Co.*, 23 A.2d 669, 180 Md. 202.

#### Unauthorized acceptance

An acceptance made by one without authority to do so does not bind the surety.—*Hill v. Calvert*, 18 S.C. Eq. 56—50 C.J. p 43 note 77.

#### Conclusive acceptance

The fact that a person's name is signed to a bond and that the approval of the proper official is indorsed thereon is conclusive of the acceptance of such person as surety.—*Wright v. Schmidt*, 47 Iowa 233.

19. La.—*Lachman v. Block*, 17 So. 153, 47 La. Ann. 505, 28 L.R.A. 255. 50 C.J. p 43 note 68.

20. Colo.—*Drescher v. Fulham*, 52 P. 685, 11 Colo.App. 62. 50 C.J. p 43 note 70.

21. Colo.—*Drescher v. Fulham*, *supra*.

#### Retention by obligee

An obligee's retention of a surety bond delivered to him is an implied acceptance of the terms of the bond.—*John McShain, Inc. v. Eagle Indemnity Co.*, 23 A.2d 669, 180 Md. 202.

22. Colo.—*Drescher v. Fulham*, 52 P. 685, 11 Colo.App. 62. 50 C.J. p 43 note 72.

23. La.—*Edward B. Bruce Co. v. Lambour*, 49 So. 659, 123 La. 969.

24. Colo.—*Boyd v. Agricultural Ins. Co.*, 76 P. 986, 20 Colo.App. 28. 50 C.J. p 43 note 74.

25. Ind.—*Swope v. Forney*, 17 Ind. 385.

Philippine.—*Philippine Nat. Bank v. Escueta*, 50 Philippine 991.

26. U.S.—*Postmaster-General v. Norvell*, D.C.Pa., 19 F.Cas.No.11-310, Gilp. p. 106. 50 C.J. p 44 note 92.

27. Cal.—*People v. Edwards*, 9 Cal. 286.

Colo.—*Irwin v. Crook*, 28 P. 549, 17 Colo. 16.

50 C.J. p 44 note 93.

28. Neb.—*Faxton v. State*, 81 N.W. 383, 59 Neb. 460, 80 Am.S.R. 689. 50 C.J. p 44 note 94.

Approval of official bond as affecting liability of surety thereon see *Officers* § 158.

29. N.Y.—*Gopsill v. Decker*, 4 Hun 625, 67 Barb. 211.

undertaking fails of approval because of the insufficiency of one of the sureties, and a separate undertaking is executed by another surety alone, he is bound, although the former undertaking has become void.<sup>30</sup> If the approval of a bond has become a matter of record, the evidence of the officer who made it is inadmissible to impeach it.<sup>31</sup> Moreover, the sureties may not question the legal qualifications of the officers who approve it.<sup>32</sup>

### § 58. — Notice of Acceptance

Even where notice to the surety is necessary in order that he may be bound, formal notice of acceptance of the bond or obligation by the creditor or obligee is considered unnecessary.

The rule that notice of acceptance must be communicated to the offeror has been held inapplicable to a surety,<sup>33</sup> and, even where it is held that notice to the surety is necessary in order that he may be bound, formal notice of acceptance of the bond or obligation by the creditor or obligee is considered unnecessary,<sup>34</sup> so that where the bond or obligation is absolute in terms and is executed contemporaneously with the contract it is intended to secure, and as a part of the same transaction, formal notice of acceptance has not been required.<sup>35</sup> Also, one who agrees to act as surety in place of a released surety may not escape liability on the ground that notice of acceptance has not been communicated to him where, after signing the agreement, he pays to the principal part of the amount secured.<sup>36</sup>

*Conditional offer.* Where a person offers his name as surety on certain conditions, mere performance of such conditions is not sufficient to fix the surety's liability,<sup>37</sup> but the creditor must notify him of the acceptance of the offer or of his intention to act on it,<sup>38</sup> and the proposed surety is not bound to inquire as to such acceptance.<sup>39</sup>

### § 59. — Effect of Prior Rejection

Prior rejection of the bond or obligation does not prevent a subsequent acceptance thereof, so as to bind the surety, unless the offer of suretyship is, in the meantime, revoked.

Prior rejection of the bond or obligation does not prevent a subsequent acceptance thereof, so as to bind the surety,<sup>40</sup> unless the offer of suretyship is, in the meantime, revoked;<sup>41</sup> and, where the bond is in fact accepted with his name thereon, the surety is not released from liability by the fact that he had been excepted to as being insufficient, and failed to justify,<sup>42</sup> or by the fact that additional signatures are required because of his insufficiency.<sup>43</sup> The substitution of a new surety, after exception to the original surety and his failure to justify, operates as an exoneration of the surety excepted to,<sup>44</sup> even though the exception is thereafter countermanded.<sup>45</sup>

*Estoppel of principal.* The principal obligor, after the bond has performed its full office, may not, as against the surety, avail himself of the fact that it had previously been rejected by the obligee.<sup>46</sup>

### § 60. Revocation before Delivery and Acceptance

A surety has the right to revoke the suretyship before the instrument is delivered and accepted.

A surety has the right to revoke the suretyship before the instrument is delivered and accepted.<sup>47</sup>

### § 61. Incomplete Instrument

A suretyship bond or obligation is void, and the surety is not liable thereon, where there is an omission of some word or words necessary to make it effective as a complete instrument.

A suretyship bond or obligation is void, and the surety is not liable thereon, where there is an omission of some word or words necessary to make it

30. N.Y.—Gottwald v. Tuttle, 7 Daly 105.

31. La.—Taylor v. Jones, 3 La. Ann. 619.

32. N.H.—Horn v. Whittier, 6 N.H. 88.

33. Ill.—Vermont Marble Co. v. Bayne, 190 N.E. 291, 356 Ill. 127.

34. La.—Edward B. Bruce Co. v. Lambour, 49 So. 659, 123 La. 969. 50 C.J. p 43 note 80.

35. Minn.—Leonard Co-op. Creamery Assoc. v. First State Bank, 209 N.W. 631, 168 Minn. 28. 50 C.J. p 43 note 81.

36. Ill.—Vermont Marble Co. v. Bayne, 190 N.E. 291, 356 Ill. 127.

37. Ky.—Steadman v. Guthrie, 4 Metc. 147.

38. Ky.—Gano v. Farmers' Bank, 45 S.W. 519, 103 Ky. 508, 20 Ky.L. 197, 82 Am.S.R. 596. 50 C.J. p 44 note 83.

39. Ky.—Gano v. Farmers' Bank, supra—Steadman v. Guthrie, 4 Metc., Ky., 147.

40. Tex.—Early v. Chamberlain, 1 Tex.A.Civ.Cas. § 920. 50 C.J. p 44 note 85.

41. Tex.—Early v. Chamberlain, supra.

42. N.Y.—Decker v. Anderson, 39 Barb. 346—Van Dune v. Coope, 1 Hill 557.

Failure to justify as not releasing from liability generally see supra § 54.

43. U.S.—Postmaster General v. Norvell, D.C.Pa., 19 F.Cas.No.11, 310, Gilp. p. 106. 50 C.J. p 44 note 88.

44. N.Y.—McIntyre v. Borst, 26 How.Pr. 411.

45. N.Y.—McIntyre v. Borst, supra.

46. Mich.—Hanley v. U. S. Fidelity, etc., Co., 92 N.W. 107, 131 Mich. 609.

50 C.J. p 44 note 91.

47. Neb.—Paxton v. State, 81 N.W. 383, 59 Neb. 460, 80 Am.S.R. 689. 50 C.J. p 44 note 1.

Rescission or revocation of contract of suretyship see infra § 129.

Surety's notice to terminate after principal's default see infra § 131.

effective as a complete instrument,<sup>48</sup> as where the name of the one who is to perform the condition of the bond is not written in the blank provided therefor,<sup>49</sup> or where a provision creating a specific liability leaves the amount or penalty blank,<sup>50</sup> or where it does not contain a general provision to answer for the default of the principal obligor.<sup>51</sup> However, the surety's liability has been held not affected by the failure of some of the persons named in the instrument to execute and sign it.<sup>52</sup> So also the surety's liability generally may not be affected by the omission of the names of localities.<sup>53</sup>

## § 62. — Filling Blanks

- a. In general
- b. By obligee

### a. In General

Ordinarily, where a surety signs a bond or undertaking containing blank spaces, and intrusts it to another for use, the instrument so delivered carries on its face the implied authority to fill blanks with reasonable matter or sums necessary to perfect the instrument in general conformity to its character and nature, so as to render the surety liable thereon, provided the circumstances are such as to permit such implication of authority.

Although there is some authority to the effect that a bond or obligation signed in blank by a surety is not valid as to him where it is afterward filled up without his knowledge and authority,<sup>54</sup> and while it may not be conclusively inferred from the presence of unfilled blanks in a bond or obligation at the time of delivery that the depository

thereof is authorized to fill such blanks,<sup>55</sup> ordinarily, where a surety signs a bond or undertaking containing blank spaces, and intrusts it to another for use, the instrument so delivered carries on its face the implied authority to fill blanks with reasonable matter or sums necessary to perfect the instrument in general conformity to its character and nature, so as to render the surety liable thereon, provided the circumstances are such as to permit such implication of authority.<sup>56</sup>

Where a surety intrusts a bond or obligation containing blank spaces to the principal obligor, the latter has been held to have the implied authority to fill the blanks therein<sup>57</sup> or to ratify them if filled by another;<sup>58</sup> and under this rule, where a note, with blanks therein, is signed by a surety and intrusted by him to the principal obligor, the latter has been held to have the implied authority to fill in such blanks,<sup>59</sup> such as to insert the true date of the execution of the note,<sup>60</sup> or to fill in the amount of the note,<sup>61</sup> the name of the payee,<sup>62</sup> or the place of payment.<sup>63</sup> In such cases the surety has been held to be estopped to deny his obligation, as against the obligee who receives the instrument in good faith, without knowledge that the blanks had been filled after the surety signed,<sup>64</sup> especially where the blanks are filled in accordance with his instructions.<sup>65</sup>

*Exceeding authority.* The surety may be bound even though the principal exceeds his authority in filling the blanks<sup>66</sup> unless the creditor has knowl-

48. Iowa.—Spring Garden Ins. Co. v. Lemmon, 86 N.W. 35, 117 Iowa 691.

N.C.—Grier v. Hill, 51 N.C. 572.

49. Fla.—Florida School-Book Depository v. Liddon, 153 So. 902, 114 Fla. 149.

50. Iowa.—Spring Garden Ins. Co. v. Lemmon, 86 N.W. 35, 117 Iowa 691.

50 C.J. p 44 note 5.

51. Iowa.—Spring Garden Ins. Co. v. Lemmon, *supra*.

52. Va.—Cox v. Thomas, 9 Gratt. 312, 50 Va. 312.

50 C.J. p 45 note 9.

Omission of name from body of obligation see *supra* § 49.

53. Ind.—Irwin v. Kilburn, 2 N.E. 650, 104 Ind. 113.

50 C.J. p 45 note 11.

54. Ark.—Smith v. Carder, 33 Ark. 709.

50 C.J. p 45 note 13.

55. Cal.—Pacific Automobile Exch. v. Stansfeld, 217 P. 566, 62 Cal. App. 577.

56. Cal.—Riverside Portland Ce-

ment Co. v. Maryland Casualty Co., 189 P. 808, 46 Cal.App. 87.

Va.—Webb v. Trent's Ex'r, 174 S.E. 755, 162 Va. 500.

50 C.J. p 45 note 14.

57. N.C.—Rollins v. Ebbs, 50 S.E. 577, 138 N.C. 140.

50 C.J. p 45 note 15.

58. Tex.—Bremner v. Fields, Civ. App., 34 S.W. 447.

50 C.J. p 45 note 16.

59. Iowa.—Marion Sav. Bank v. Leahy, 204 N.W. 456, 200 Iowa 220.

50 C.J. p 45 note 17.

60. Ind.—Emmons v. Meeker, 55 Ind. 321.

50 C.J. p 45 note 18.

61. Ky.—Dow-Hayden Grocery Co. v. Muncy, 73 S.W. 1030, 24 Ky.L. 2255.

50 C.J. p 45 note 19.

62. Ind.—Armstrong v. Harshman, 61 Ind. 52, 28 Am.R. 665.

63. Ind.—Gothrump v. Williamson, 61 Ind. 599.

64. Cal.—Dolbeer v. Livingston, 35 P. 328, 100 Cal. 617.

50 C.J. p 45 note 21.

Estoppel as to defects and objections generally see *infra* § 83.

65. Ga.—Brown v. Colquitt, 73 Ga. 59, 54 Am.R. 367.

66. Miss.—Times-Picayune Pub. Co. v. Frierson, 144 So. 235, 164 Miss. 105.

50 C.J. p 45 note 23.

### Amount

(1) In general.—Eichelberger v. Old Nat. Bank, 3 N.E. 127, 103 Ind. 401—50 C.J. p 45 note 23 [a] (2).

(2) A surety who signs a bond in blank and intrusts it to his principal to be filled in and delivered to the obligee is bound by the instrument as delivered, although the principal, before delivery, inserts in the bond a larger penal sum than that agreed on between him and the surety, if the obligee has no notice, from the face of the bond or otherwise, of the unauthorized act of the principal.

Mass.—White v. Duggan, 2 N.E. 118, 140 Mass. 18, 54 Am.R. 437.

Miss.—Corpus Juris cited in Times-Picayune Pub. Co. v. Frierson, 144 So. 235, 236, 164 Miss. 105.

edge thereof<sup>67</sup> or unless the excess of authority amounts to fraud as against the surety.<sup>68</sup> However, the fact that the maker to whom a surety delivers a note, signed in blank by him, fills in an amount exceeding that agreed on, is an available defense to the action thereon by the payee against the surety;<sup>69</sup> and where the principal alters the amount of the original obligation as recited in the bond, to a larger amount, and inserts a still larger amount in the blank space for the amount of the surety's undertaking, the bond is not invalid, but the surety is liable only to the extent of the original obligation.<sup>70</sup>

**Revocation of authority.** After a surety has authorized the principal to fill blanks, he may revoke such authority before the principal acts.<sup>71</sup>

### b. By Obligee

The surety is liable where the blanks in the bond or obligation are filled in by the obligee under instructions so to do; and where the instrument as delivered to the obligee contains blank spaces, the filling of which does not change the effect of the instrument, the obligee has been held to have implied authority to fill such blanks.

The surety is liable where the blanks in the bond or obligation are filled in by the obligee under instructions so to do;<sup>72</sup> and where the instrument as delivered to the obligee contains blank spaces, the filling of which does not change the effect of the instrument, the obligee has been held to have implied authority to fill such blanks<sup>73</sup> even though the surety failed to read or understand the instru-

ment.<sup>74</sup> The surety has been held liable on the obligation so filled unless the obligee, in filling the blanks, acts in bad faith,<sup>75</sup> or unless the instrument so signed in blank was procured from the surety by fraud.<sup>76</sup>

The delivery of a surety bond or obligation to the principal with the amount of indebtedness due the creditor from the principal in blank, on the other hand, does not impliedly authorize the creditor to fill such blank and thereby convert the instrument into an account stated, as between the creditor and surety,<sup>77</sup> notwithstanding the indebtedness is, in general terms, assumed and guaranteed by the surety.<sup>78</sup>

### § 63. Consideration

The necessity and sufficiency of consideration to support a contract of suretyship are discussed infra §§ 64-69; and failure of consideration infra § 70.

Examine Pocket Parts for later cases.

### § 64. — Necessity

Ordinarily it is essential to the validity of a contract of suretyship that it be supported by a sufficient legal consideration.

Ordinarily it is essential to the validity of a contract of suretyship that it be supported by a sufficient legal consideration,<sup>79</sup> and a renewal of the surety's obligation, after he has been discharged, also requires a consideration.<sup>80</sup> On the other hand,

67. Ind.—Emmons v. Meeker, 55 Ind. 321.

50 C.J. p 46 note 24.

68. Del.—Hastings v. Clendaniel, 2 Del.Ch. 165.

50 C.J. p 46 note 25.

Fraud as affecting validity of surety's assent generally see infra §§ 75-77.

69. Iowa.—Marion Sav. Bank v. Leahy, 204 N.W. 456, 200 Iowa 220.

50 C.J. p 46 note 26.

70. Cal.—Pacific Auto. Exch. v. Stansfield, 217 P. 566, 62 Cal.App. 577.

71. S.C.—Gourdin v. Reed, 42 S.C.L. 230.

72. N.Y.—Union Trust Co. v. McCrum, 129 N.Y.S. 1078, 145 App. Div. 409, affirmed 101 N.E. 1124, 207 N.Y. 721.

50 C.J. p 46 note 29.

73. Minn.—McConnon v. Hovland, 194 N.W. 394, 156 Minn. 222, 224.

50 C.J. p 46 note 30.

Stipulation authorizing writing in of amount due

Where a suretyship contract con-

tains a provision that, if the amount of indebtedness is not written in the agreement, express authority to write in the amount is given, such stipulation authorizes the obligee to write into the bond the amount due, and it is immaterial, with respect to the liability of the sureties, whether or not the amount is written into the contract at the time the sureties sign, since by signing the contract with this authorization therein for the amount to be written in, they undertook to pay the amount which might be due.—J. R. Watkins Co. v. Poag, 122 So. 473, 154 Miss. 222.

74. Tex.—National Union Fire Ins. Co. v. Peck, Civ.App., 296 S.W. 338.

75. La.—Robertson v. Glasscock, 6 La. Ann. 124.

50 C.J. p 46 note 33.

76. Iowa.—Spring Garden Ins. Co. v. Lemmon, 86 N.W. 25, 117 Iowa 691.

50 C.J. p 46 note 34.

77. N.D.—Watkins Co. v. Keeney, 201 N.W. 832, 52 N.D. 280, 37 A. L.R. 1389.

78. N.D.—Watkins Co. v. Keeney, supra.

79. Ark.—Johnston v. Missouri Pac. R. Co., 160 S.W.2d 39, 203 Ark. 1036.

Del.—Corpus Juris cited in W. T. Rawleigh Co. v. Warrington, 199 A. 666, 668, 9 W.W.Harr. 366.

N.Y.—Alley v. Turck, 40 N.Y.S. 432, 8 App.Div. 50.

Tex.—Green v. American Refining Properties, Civ.App., 22 S.W.2d 343.

50 C.J. p 46 note 41.

**Promise to pay subcontractor**

A promise by a surety to whom the builder has assigned the money to become due under the contract, to pay the claim of a subcontractor if the subcontractor would do certain work on the premises, is without consideration unless the work specified was something which the subcontractor was not required by his contract to do.—Alley v. Turck, 40 N.Y.S. 432, 8 App.Div. 50.

80. Mich.—Detroit First Nat. Bank v. Currie, 110 N.W. 499, 147 Mich.



in the absence of a statute to the contrary, a contract of suretyship under seal need not be shown to be supported by consideration,<sup>81</sup> especially where no consideration was contemplated by the parties.<sup>82</sup>

### § 65. — Sufficiency in General

Whatever would be sufficient as a consideration in the case of any other kind of contract ordinarily is sufficient to support a contract of suretyship.

Whatever would be sufficient as a consideration in the case of any other kind of contract ordinarily is sufficient to support a contract of suretyship.<sup>83</sup> There need not be the same consideration for the contract of the principal and the surety;<sup>84</sup> the consideration may consist of a direct payment to the surety<sup>85</sup> or of some benefit or advantage to him.<sup>86</sup> The surety's original liability as such may support his renewal thereof.<sup>87</sup> Also, a prior suretyship contract has been held sufficient consideration for a subsequent contract under which the liability sought to be imposed on the sureties is slightly less than the amount of the principal's in-

debtedness at the time of the substitution of the suretyship contract.<sup>88</sup>

### § 66. — Indirect Consideration in General

The consideration for a suretyship contract need not move directly to the surety; it is sufficient that a valuable consideration passes between the principal and the obligee.

The consideration for a suretyship contract need not move directly from the obligee to the surety,<sup>89</sup> no direct benefit to the surety being necessary to support the contract;<sup>90</sup> it is sufficient that a valuable consideration passes between the principal and the obligee.<sup>91</sup> For example, a consideration sufficient to validate the contract between a principal and the payee of a note is sufficient to bind also the principal's surety, who joins in the execution thereof.<sup>92</sup>

*This consideration may consist of some benefit or advantage to the principal obligor,<sup>93</sup> or it may*

72, 118 Am.S.R. 537, 9 L.R.A.,N.S., 698, 11 Ann.Cas. 241.  
50 C.J. p 46 note 42.

81. Pa.—Billings v. Roth, 40 A.2d 910, 156 Pa.Super. 390.  
50 C.J. p 46 note 40.

#### Seal imports consideration

Pa.—Central Penn Nat. Bank of Philadelphia v. Tinkler, 40 A.2d 389, 351 Pa. 123—Billings v. Roth, 4 A.2d 910, 156 Pa.Super. 390.

#### Agreement acknowledging payment of consideration

Want of consideration was not defense to action on written agreement of suretyship under seal which acknowledged payment of consideration and stated that signer intended to be legally bound by agreement.—Central Penn Nat. Bank of Philadelphia v. Tinkler, 40 A.2d 389, 351 Pa. 123.

82. Pa.—Meek v. Frantz, 33 A. 413, 171 Pa. 632—Billings v. Roth, 40 A.2d 910, 156 Pa.Super. 390.

83. La.—Succession of Scullin, 63 So. 858, 134 La. 153.  
50 C.J. p 47 note 44.

#### Legality of consideration

In order to be sufficient to support a contract of suretyship the consideration therefor must be legal.—Folmar v. Siler, 31 So. 719, 132 Ala. 297.

#### Surety on note

Consideration for surety's liability on note to payee thereof may rest on consideration flowing from principal maker to surety.—Tenny v. Porter, 33 S.W. 211, 61 Ark. 329.

84. Del.—W. T. Raleigh Co. v. Warrington, 199 A. 666, 9 W.W.Harr. 366.

85. Ky.—Givens v. Gridley, 106 S. W. 1192, 32 Ky.L. 825.  
50 C.J. p 47 note 45.

86. Tex.—Greenfield v. Anderson, Civ.App., 67 S.W.2d 658.  
50 C.J. p 47 note 46.

#### Release from former suretyship

Contract of suretyship was supported by sufficient consideration, shown by surety's release from a former suretyship on a bond of the principal.—Gulf Live Stock Ins. Co. v. Love, Tex.Civ.App., 181 S.W. 766.

87. Ind.—Lackey v. Boruff, 53 N.E. 413, 152 Ind. 371.  
50 C.J. p 47 note 49.

88. Colo.—W. T. Rawleigh Co. v. Dickneite, 61 P.2d 1028, 99 Colo. 276.

89. Ga.—Walls v. Muscogee Bank & Trust Co., 161 S.E. 663, 44 Ga. App. 361.

Iowa.—Hakes v. Franke, 231 N.W. 1, 210 Iowa 1169.

Kan.—Corpus Juris quoted in Security State Bank of Eskridge v. Mossman, 292 P. 935, 936, 131 Kan. 508.

Pa.—Millus v. Abrachinsky, Com.Pl., 42 Sch.Leg.Rec. 175.

Tex.—Greenfield v. Anderson, Civ. App., 67 S.W.2d 658.  
Wash.—J. R. Watkins Co. v. Brund, 294 P. 1024, 160 Wash. 183.  
50 C.J. p 47 note 53.

90. Ark.—Johnston v. Missouri Pac. R. Co., 160 S.W.2d 39, 203 Ark. 1036—Holman v. Armstrong, 63 S. W.2d 339, 187 Ark. 958.

Cal.—Parrino v. Rallis, 2 P.2d 515, 116 Cal.App. 364.

As between principal and surety, the relationship may be created

without any consideration passing directly between the two.—National Surety Corp. v. Nulton, 55 Pa.Dist. & Co. 149.

91. Ark.—Johnston v. Missouri Pac. R. Co., 160 S.W.2d 39, 203 Ark. 1036—Holman v. Armstrong, 63 S. W.2d 339, 187 Ark. 958.

Ga.—Smalley v. Bassford, 13 S.E.2d 662, 191 Ga. 642—Browne v. Institute of Business and Accounting, 12 S.E.2d 455, 63 Ga.App. 871.  
Iowa.—Beal v. Milliron, 267 N.W. 83.  
—Hakes v. Franke, 231 N.W. 1, 210 Iowa 1169.

Kan.—Corpus Juris quoted in Security State Bank of Eskridge v. Mossman, 292 P. 935, 936, 131 Kan. 508.

Ky.—Dorman v. Carnes, 96 S.W.2d 869, 265 Ky. 361—Hughett v. Shain, 69 S.W.2d 688, 253 Ky. 330.  
Tex.—Greenfield v. Anderson, Civ. App., 67 S.W.2d 658.

Wash.—J. R. Watkins Co. v. Brund, 294 P. 1024, 160 Wash. 183.  
50 C.J. p 47 note 54.

Although there may be additional consideration flowing to surety, one consideration flowing to the principal debtor is all that is required.—Durham v. Greenwold, 3 S.E.2d 585, 188 Ga. 165.

92. Kan.—Corpus Juris quoted in Security State Bank of Eskridge v. Mossman, 292 P. 935, 936, 131 Kan. 508.

Ky.—Hughett v. Shain, 69 S.W.2d 688, 253 Ky. 330.  
50 C.J. p 47 note 55.

93. Ark.—Holman v. Armstrong, 63 S.W.2d 339, 187 Ark. 958.

Iowa.—Hakes v. Franke, 231 N.W. 1, 210 Iowa 1169.

consist of some disadvantage or detriment to the creditor or obligee,<sup>94</sup> such as by his incurring liability,<sup>95</sup> or by his releasing a former surety,<sup>96</sup> or by his surrendering some security<sup>97</sup> or a right,<sup>98</sup> or by his giving the principal an office or employment, and trusting his affairs to him,<sup>99</sup> or by his continuing the principal in office or employment after he has entered on his duties.<sup>1</sup>

### § 67. — As Affected by Time of Making Suretyship Contract

- a. Before, or at same time as, principal contract
- b. Relating to past transaction

#### a. Before, or at Same Time as, Principal Contract

A suretyship contract made before or at the same time as the principal contract, or one executed after the principal contract but as part of the original transaction, may be supported by the consideration moving between the obligee and the principal obligor under the principal contract.

Where a contract of suretyship is made before or at the same time as the principal contract, and both contracts form parts of the same transaction, one consideration is sufficient for both the principal and collateral contract and there need not be any consideration other than that moving between the obligee and the principal obligor under the principal contract.<sup>2</sup> Moreover, even though a sure-

tyship contract is executed subsequently to the principal contract, it will be regarded as being made at the same time so as to constitute a part of the same transaction, and be supported by the same consideration, and not require a new consideration, where it is executed pursuant to a prior agreement and as an inducement to the execution of the principal contract,<sup>3</sup> especially where the transaction was entered into at the instance or request of the surety;<sup>4</sup> and this rule applies even though there is a delay for some time before the surety is requested to sign.<sup>5</sup>

#### b. Relating to Past Transaction

Ordinarily the consideration which binds a surety must be executory, and where a suretyship contract is entered into after the making of, and entirely apart from, the principal contract the consideration given to the principal alone for the principal contract and already executed is regarded as a past consideration with respect to the suretyship contract.

As a general rule, the consideration which binds a surety must be executory,<sup>6</sup> and where a suretyship contract is entered into after the making of, and entirely apart from, the principal contract, the consideration given to the principal alone for the principal contract and already executed is regarded as a past consideration with respect to the suretyship contract,<sup>7</sup> and there must be a new and independent consideration to support the suretyship,<sup>8</sup> which, according to one decision on the

Pa.—Bloomfield Trust Co. v. Trojanowski, 147 A. 847, 298 Pa. 61—Miners' State Bank v. Aukstokalnins, 128 A. 726, 283 Pa. 18.  
Tex.—Greenfield v. Anderson, Civ. App., 67 S.W.2d 658.  
50 C.J. p 47 note 56.  
**Advances made to principal**  
Ark.—McMorella v. Buckner State Bank, 85 S.W.2d 709, 191 Ark. 307.  
Wis.—J. R. Watkins Co. v. Beyer, 233 N.W. 442, 203 Wis. 397, 71 A.L.R. 1268.  
94. Ark.—Johnston v. Missouri Pac. R. Co., 160 S.W.2d 39, 203 Ark. 1036—McMorella v. Buckner State Bank, 85 S.W.2d 709, 191 Ark. 307.  
Cal.—Parrino v. Rallis, 2 P.2d 515, 116 Cal.App. 364.  
Iowa.—Hakes v. Franke, 231 N.W. 1, 210 Iowa 1169.  
Tex.—Greenfield v. Anderson, 67 S.W.2d 658.  
50 C.J. p 47 note 57.  
Forbearance to principal see *infra* § 69.  
95. Cal.—Farley v. Moran, 31 P. 158, 3 Cal.Unrep.Cas. 572.  
50 C.J. p 47 note 58.  
96. Ill.—Vermont Marble Co. v. Bayne, 190 N.E. 291, 356 Ill. 127.  
50 C.J. p 48 note 60.

97. Cal.—Davis v. National Surety Co., 72 P. 1001, 139 Cal. 223.  
50 C.J. p 48 note 61.  
98. Ill.—Harwood v. Johnson, 20 Ill. 367.  
50 C.J. p 48 note 62.  
99. Tex.—Corpus Juris quoted in Greenfield v. Anderson, Civ.App., 67 S.W.2d 658, 660.  
50 C.J. p 48 note 63.  
1. Tex.—Corpus Juris quoted in Greenfield v. Anderson, Civ.App., 67 S.W.2d 658, 660.  
50 C.J. p 48 note 64.  
2. Del.—Corpus Juris cited in W. T. Rawleigh Co. v. Warrington, 199 A. 666, 668, 9 W.W.Harr. 366.  
Okla.—Kelly v. Citizens-Farmers Nat. Bank of Chickasha, 77 P.2d 681, 182 Okl. 307.  
50 C.J. p 48 note 65.  
**Consideration running from payee to maker of note will support the liability of a contemporaneous surety.**  
Iowa.—Penn Mut. Life Ins. Co. v. Orr, 252 N.W. 745, 217 Iowa 1022—Nolte v. Nolte, 235 N.W. 483, 211 Iowa 1289.  
Pa.—Bloomfield Trust Co. v. Trojanowski, 147 A. 847, 298 Pa. 61.

8 C.J. p 211 note 84—50 C.J. p 48 note 65 [b].  
3. Tex.—Corpus Juris quoted in Greenfield v. Anderson, Civ.App., 67 S.W.2d 658, 660.  
50 C.J. p 48 note 66.  
4. Ill.—Laingor v. Lowenthal, 151 Ill.App. 599.  
Pa.—Paul v. Stackhouse, 38 Pa. 302.  
5. Ark.—Kissine v. Plunkett-Jarrell Grocer Co., 145 S.W. 567, 103 Ark. 473.  
50 C.J. p 48 note 68.  
6. Del.—Corpus Juris cited in W. T. Rawleigh Co. v. Warrington, 199 A. 666, 668, 9 W.W.Harr. 366.  
Ill.—Laingor v. Lowenthal, 151 Ill. App. 599.  
Ind.—Weidler v. Floran, 13 N.E.2d 330, 105 Ind.App. 564.  
Tex.—Green v. American Refining Properties, Civ.App., 22 S.W.2d 343.  
7. Tex.—Green v. American Refining Properties, *supra*.  
50 C.J. p 49 note 71.  
8. Ga.—Nalley Land & Investment Co. v. Merchants & Planters Bank, 199 S.E. 815, 187 Ga. 142.  
Ill.—Bassett v. Heifens, 30 N.E.2d 528, 307 Ill.App. 426.

question, consideration must be serious.<sup>9</sup>

Thus, unless there is a new consideration, of which the surety has knowledge, for his promise,<sup>10</sup> a surety is not bound where he executes a contract as surety after its delivery,<sup>11</sup> as where he signs a note as surety after its delivery to the payee.<sup>12</sup> It has been held not necessary that the consideration for the contract of a surety on a note under these circumstances shall be a new consideration paid to or by either of the parties for such signing,<sup>13</sup> but any benefit accruing to the principal or surety,<sup>14</sup> or any disadvantage to the payee,<sup>15</sup> may be sufficient.

*Contract covering future transactions.* Where a suretyship contract expressly covers past and future transactions, and is supported by a consideration arising out of the future transactions, it is good as to the whole.<sup>16</sup>

### § 68. — Extension of Credit to Principal

A creditor may alter his position for the worse so as to raise a sufficient consideration to support a suretyship contract by giving credit to the principal.

A creditor may alter his position for the worse so as to raise a sufficient consideration to support a suretyship contract by giving credit to the principal,<sup>17</sup> which may be done by advancing money to him.<sup>18</sup>

### § 69. — Forbearance to Principal

The performance of a promise by the creditor or obligee not to pursue or enforce a legal right which he has against the principal obligor is a sufficient consideration for a contract of suretyship, although a definite time is not agreed on; but mere forbearance is not of itself sufficient consideration.

The performance of a promise by the creditor or obligee not to pursue or enforce a legal right which he has against the principal obligor is a sufficient consideration for a contract of suretyship,<sup>19</sup> although a definite time is not agreed on.<sup>20</sup> On the other hand, mere forbearance alone is not of itself a sufficient consideration, but there must be an agreement to forbear, made by one party and accepted by the other,<sup>21</sup> which agreement may be implied from the conduct of the parties and the nature of the transaction.<sup>22</sup>

Thus a surety is bound where, in pursuance of an agreement with him, the creditor or obligee forbears to bring suit against the principal,<sup>23</sup> or grants the principal an extension of time in which to perform or pay the principal obligation,<sup>24</sup> such as by taking a note of the principal.<sup>25</sup> So the extension of an antecedent indebtedness of the principal is a sufficient consideration for the undertaking of a surety on a note renewing the indebtedness,<sup>26</sup> and the surrender of an old note is suffi-

Iowa.—Nolte v. Nolte, 285 N.W. 483, 211 Iowa 1289.

Ky.—Hughett v. Shain, 69 S.W.2d 688, 263 Ky. 330.

Okl.—Kelly v. Citizens-Farmers Nat. Bank of Chickasha, 77 P.2d 681, 182 Okl. 307.

Tex.—Williams v. National Bank of Commerce, Civ.App., 62 S.W.2d 1108, reversed on other grounds National Bank of Commerce v. Williams, 84 S.W.2d 691, 125 Tex. 619—Green v. American Refining Properties, Civ.App., 22 S.W.2d 343.

50 C.J. p 49 note 72.

9. La.—W. T. Rawleigh Co. v. Toms, App., 153 So. 595.

#### Consideration not serious

One dollar is no consideration for promise of sureties to pay past debts of principal.—W. T. Rawleigh Co. v. Toms, supra.

10. Mass.—Pratt v. Hedden, 121 Mass. 116.

50 C.J. p 49 note 73.

11. Tex.—Bluff Springs Mercantile Co. v. White, Civ.App., 90 S.W. 710.

50 C.J. p 49 note 74.

12. Iowa.—Nolte v. Nolte, 285 N.W. 483, 211 Iowa 1289.

Tex.—Green v. American Refining Properties, Civ.App., 22 S.W.2d 343.

8 C.J. p 212 note 93—50 C.J. p 49 note 75.

**Case of no consideration is not made out if note was not delivered and accepted prior to procuring surety's signature, so that surety signing note given as part payment for property is bound by consideration to principal, notwithstanding property was already delivered.**—Hughett v. Shain, 69 S.W.2d 688, 263 Ky. 330.

13. Ill.—Anderson v. Norvill, 10 Ill. App. 240.

14. Kan.—Peck State Bank v. Pickens, 237 P. 651, 117 Kan. 701, 119 Kan. 57.

50 C.J. p 49 note 77.

15. Kan.—Peck State Bank v. Pickens, supra.

50 C.J. p 49 note 78.

16. Okl.—W. T. Rawleigh Co. v. Riggs, 252 P. 428, 123 Okl. 42.

50 C.J. p 49 note 79.

17. Ala.—Corpus Juris cited in Underwood v. Singer Sewing Mach. Co., 145 So. 138, 139, 225 Ala. 680.

Ark.—Holman v. Armstrong, 63 S.W. 2d 339, 187 Ark. 958.

Cal.—Burrows Shoe Co. v. Brotherton, 288 P. 879, 106 Cal.App. 162.

Pa.—Millus v. Abrachinsky, Com.Pl., 42 Sch.Leg.Rec. 175.

50 C.J. p 49 note 82.

18. Cal.—Ray v. Borgfeldt, 146 P. 679, 169 Cal. 253.

50 C.J. p 50 note 83.

19. Ga.—Williams v. J. B. Riley Drug Co., 128 S.E. 215, 34 Ga.App. 68.

50 C.J. p 50 note 87.

20. Ga.—Williams v. J. B. Riley Drug Co., supra.

50 C.J. p 50 note 88.

21. Iowa.—Beal v. Milliron, 267 N. W. 83.

Tex.—Green v. American Refining Properties, Civ.App., 22 S.W.2d 343.

50 C.J. p 50 note 90.

22. Va.—Saunders v. Mecklenburg Bank, 71 S.E. 714, 112 Va. 443, Ann. Cas.1913B 982.

23. S.D.—Bower v. Jones, 128 N.W. 470, 26 S.D. 414.

50 C.J. p 50 note 92.

24. Ark.—Holman v. Armstrong, 63 S.W.2d 339, 187 Ark. 958.

Ga.—Nalley Land & Investment Co. v. Merchants & Planters Bank, 199 S.E. 815, 187 Ga. 142.

Iowa.—Beal v. Milliron, 267 N.W. 83.

50 C.J. p 50 note 94.

25. Okl.—Kelly v. Citizens-Farmers Nat. Bank of Chickasha, 77 P.2d 681, 182 Okl. 307—Menkemeller v. Citizens' Nat. Bank of Chickasha, 286 P. 907, 142 Okl. 230.

50 C.J. p 50 note 95.

26. Ga.—Williams v. J. B. Riley

cient consideration for the surety's signing a new one,<sup>27</sup> whether the former note was signed by the surety<sup>28</sup> or not;<sup>29</sup> and this rule applies where both parties have knowledge of the facts, although the surety had been released from the old note by the action of the insolvent principal,<sup>30</sup> and although the creditor might have proceeded against the principal on the old note before its maturity.<sup>31</sup>

## § 70. — Failure of Consideration

Where the consideration for the surety's obligation wholly fails, he is not liable thereon.

Where the consideration for the surety's obligation wholly fails, he is not liable thereon.<sup>32</sup> If there are two sureties by separate instruments, one alone may not avail himself of all the advantages of a partial failure of consideration.<sup>33</sup>

## § 71. Validity of Surety's Assent in General

Questions relating to the validity of assent to a contract of suretyship are controlled by general rules.

Questions relating to the validity of assent to a contract of suretyship are controlled by the rules which apply to the validity of assent in case of other contracts.<sup>34</sup>

Drug Co., 128 S.E. 215, 34 Ga.App. 68.  
50 C.J. p 50 note 96.

27. Ind.—Garrigue v. Kellar, 74 N.E. 523, 164 Ind. 676, 103 Am.S.R. 324, 69 L.R.A. 870.  
50 C.J. p 51 note 97.

28. Mich.—Hancock First Nat. Bank v. Johnson, 95 N.W. 975, 133 Mich. 700, 103 Am.S.R. 468.  
50 C.J. p 51 note 98.

29. Cal.—Stroud v. Thomas, 72 P. 1008, 139 Cal. 274, 96 Am.S.R. 111.  
50 C.J. p 51 note 99.

30. Vt.—Churchill v. Bradley, 5 A. 189, 58 Vt. 403, 56 Am.R. 563.

31. Tex.—Hannay v. Moody, 71 S.W. 325, 31 Tex.Civ.App. 88.  
50 C.J. p 51 note 2.

32. La.—W. T. Rawleigh Co. v. Toms, App., 153 So. 595.  
50 C.J. p 51 notes 4, 6.

Effect of want or failure of consideration of principal obligation generally see supra § 25.

What constitutes failure of consideration

(1) Generally.—Dunbar v. Fleisher, 20 A. 520, 137 Pa. 85—50 C.J. p 51 note 4 [a].

(2) Where consideration for sureties' agreement to pay principal's past indebtedness was that creditor would extend further credit to principal, but creditor did not extend

further credit, but expressly refused it, sureties were not liable for past indebtedness.—W. T. Rawleigh Co. v. Toms, La.App., 153 So. 595.

(3) Where consideration for becoming surety for past indebtedness of another is extension of time for payment of such debt, extension of time until termination of agreement between debtor and creditor, which was terminable at any time, was no consideration for surety contract, since, in fact, no extension of time was granted.—J. R. Watkins Co. v. Jones, 131 So. 301, 171 La. 467.

(4) Contract under which alleged surety's liability was contingent on request by maker of note for a second extension was a valid contract supported by sufficient consideration, but created no liability of surety where maker never requested extension.—American Fruit Growers v. Hawkinson, 106 S.W.2d 564, 21 Tenn. App. 127.

33. U.S.—Joyce v. Cockrill, Ohio, 92 F. 838, 35 C.C.A. 38, affirmed 21 S.Ct. 227, 179 U.S. 591, 45 L.Ed. 332.

34. Colo.—Federal Surety Co. v. White, 295 P. 281, 88 Colo. 238.  
Ky.—People's State Bank v. Hill, 275 S.W. 694, 210 Ky. 222.

Va.—Cobb v. Vaughan, 126 S.E. 77, 141 Va. 100, 43 A.L.R. 177.

Necessity of assent see supra § 27.

35. Ky.—People's State Bank v.

## § 72. Duress and Undue Influence

A surety is not bound by a contract which he has signed under duress unless he waives the duress and ratifies the contract after the duress has been removed.

A surety is not bound by a contract which he has signed under duress<sup>35</sup> unless he waives the duress and ratifies the contract after the duress has been removed.<sup>36</sup> Also, sureties executing a bond because of the impending publicity incident to a threat of prosecution have been held not estopped to question the validity of the bond.<sup>37</sup>

## § 73. Forgery of Surety's Signature

A contract of suretyship is void as to a person whose signature as surety has been forged.

A contract of suretyship is void as to a person whose signature as surety has been forged;<sup>38</sup> and such a person is not estopped to assert the forgery by merely withholding information with respect to it at a time when payment from the principal might have been enforced.<sup>39</sup>

## § 74. Forgery of Other Signatures

If the obligee accepts the instrument in good faith, without notice of the forgery, it is no defense to a surety that he was induced to sign an instrument on the supposition that a prior signature thereon was genuine, and

Hill, 275 S.W. 694, 210 Ky. 222, 228.

50 C.J. p 63 note 17.  
Effect of duress on principal see supra § 17.

36. Ga.—Augusta Motor Sales Co. v. King, 137 S.E. 102, 36 Ga.App. 541.

50 C.J. p 63 note 18.

37. Tenn.—Brown v. McCulloch, 144 S.W.2d 1, 24 Tenn.App. 324.

Sureties' knowledge of rights

Where sureties on bond executed on demand by representative of department of insurance and banking and under threat of criminal prosecution had knowledge that they could not legally be required to execute bond in order to be entitled to sell stock of savings and loan bank, but executed the bond because of impending publicity incident to the threat of prosecution, which would have destroyed the market for the stock, and none of the stockholders had knowledge of existence of the bond or acted on it, the sureties were not estopped to question validity of the bond.—Brown v. McCulloch, supra.

38. Ark.—Johnson v. T. M. Dover Mercantile Co., 261 S.W. 913, 164 Ark. 371.

50 C.J. p 62 note 1.

39. Ind.—Maxwell v. Wright, App., 64 N.E. 893, reversed on other grounds 67 N.E. 267, 160 Ind. 515.

he may be bound although the signature of the principal or of a cosurety is a forgery.

If the obligee accepts the instrument in good faith, without notice of the forgery, it is no defense to a surety that he was induced to sign an instrument on the supposition that a prior signature thereon was genuine;<sup>40</sup> he may be bound although the signature of the principal is a forgery.<sup>41</sup> Unless the creditor takes the instrument with notice of the facts,<sup>42</sup> the forgery of the signature of a cosurety will not affect the liability of a surety,<sup>43</sup> as where the forged signature is placed on the instrument after he has executed it.<sup>44</sup> So also, if the payee or obligee has accepted the instrument without notice of the forgery,<sup>45</sup> a surety will not be relieved from liability merely because he signs the instrument in the belief that the signature of a cosurety already appearing thereon is genuine, when as a matter of fact it is a forgery,<sup>46</sup> since in such a case he will be regarded as affirming the genuineness of the previous signature;<sup>47</sup> and this rule has been held to apply although the forged name is erased before delivery of the instrument.<sup>48</sup> Under some statutes, however, the liability of the remaining sureties will be proportionately diminished.<sup>49</sup>

## § 75. Fraud or Misrepresentation

- a. In general
- b. As affected by status of principal
- c. Knowledge or participation of creditor or obligee
- d. Fraud or concealment by agent of creditor or obligee

### a. In General

Where a surety is induced to enter into the suretyship contract by fraud of the creditor or obligee or with his knowledge or participation, such fraud may operate to release the surety from liability on his undertaking.

General rules as to the essentials and effect of fraud apply to contracts of suretyship.<sup>50</sup> A contract of suretyship imports entire good faith and confidence between the parties with respect to the whole transaction;<sup>51</sup> and therefore, where a surety is induced to enter into the suretyship contract by fraud or fraudulent representations or concealments on the part of the creditor or obligee, or of the principal obligor or a third person, with the obligee's knowledge or participation, as to some fact or circumstance materially affecting the surety's liability, such fraud operates to release the surety from liability on his undertaking.<sup>52</sup> Where

40. Kan.—Corpus Juris quoted in Great American Ins. Co. v. O'Neal, 27 P.2d 201, 203, 138 Kan. 617.

N.J.—Corpus Juris quoted in Newark Finance Corporation v. Accocella, 180 A. 862, 865, 115 N.J.Law 388.

50 C.J. p 62 note 4.

41. Ind.—Wayne Agricultural Co. v. Cardwell, 73 Ind. 555.

Kan.—Corpus Juris quoted in Great American Ins. Co. v. O'Neal, 27 P. 2d 201, 203, 138 Kan. 617.

N.J.—Corpus Juris quoted in Newark Finance Corporation v. Accocella, 180 A. 862, 865, 115 N.J.Law 388.

50 C.J. p 62 note 5.

Where execution of bond was not denied recovery could be had against surety on bond under circumstances, as against contention that genuineness of principal's signature was not established.—Indemnity Ins. Co. of North America v. City of Harrison, 54 S.W.2d 692, 186 Ark. 590.

42. Kan.—Corpus Juris quoted in Great American Ins. Co. v. O'Neal, 27 P.2d 201, 203, 138 Kan. 617.

50 C.J. p 62 note 7.

43. Kan.—Corpus Juris quoted in Great American Ins. Co. v. O'Neal, 27 P.2d 201, 203, 138 Kan. 617.

50 C.J. p 62 note 8.

44. Kan.—Corpus Juris quoted in Great American Ins. Co. v. O'Neal, 27 P.2d 201, 203, 138 Kan. 617.

50 C.J. p 62 note 9.

45. Ind.—Hunter v. Fitzmaurice, 2 N.E. 127, 104 Ind. 449.

Kan.—Corpus Juris quoted in Great American Ins. Co. v. O'Neal, 27 P.2d 201, 203, 138 Kan. 617.

50 C.J. p 62 note 10.

46. Kan.—Corpus Juris quoted in Great American Ins. Co. v. O'Neal, 27 P.2d 201, 203, 138 Kan. 617.

50 C.J. p 62 note 11.

47. Kan.—Corpus Juris quoted in Great American Ins. Co. v. O'Neal, 27 P.2d 201, 203, 138 Kan. 617.

50 C.J. p 63 note 12.

48. Kan.—Corpus Juris quoted in Great American Ins. Co. v. O'Neal, 27 P.2d 201, 203, 138 Kan. 617.

Me.—York County Mut. F. Ins. Co. v. Brooks, 51 Me. 506.

Erasure of name as alteration generally see infra § 82.

49. Ark.—Johnson v. T. M. Dover Mercantile Co., 261 S.W. 918, 164 Ark. 371.

50 C.J. p 63 note 14.

50. Okl.—Corpus Juris quoted in First Nat. Bank v. Godwin, 47 P. 2d 116, 119, 173 Okl. 169.

### Fraud on cosurety

A surety may not take advantage of fraud practiced on a cosurety.—Sulphur Deposit Bank v. Peak, 62 S.W. 268, 110 Ky. 579, 23 Ky.L. 19, 96 Am.S.R. 466—50 C.J. p 52 note 36.

### Fraud affecting one of several contracts

Sureties for payment of principal's indebtedness for merchandise purchased by him under first of two written contracts covering successive years are liable to creditor, even if second contract was procured by false and fraudulent representations to sureties, where only transaction between creditor and principal after expiration of first year was principal's return to creditor of some goods, for which credit was given.—W. T. Rawleigh Co. v. Graham, 103 P.2d 1076, 4 Wash.2d 407, 129 A.L.R. 596.

51. Okl.—Corpus Juris quoted in First Nat. Bank v. Godwin, 47 P. 2d 116, 119, 173 Okl. 169.

Wash.—Associated Indemnity Corporation v. Del Guzzo, 81 P.2d 516, 195 Wash. 486.

50 C.J. p 52 note 27.

At every step of the transaction, the law imposes on the creditor the duty of dealing with the surety with the utmost good faith.

Iowa.—Lingenfelter v. Bowman, 137 N.W. 946, 156 Iowa 649, 653—Monroe Bank v. Anderson Bros. Min., etc., Co., 22 N.W. 929, 65 Iowa 692.

N.Y.—First Citizens Bank & Trust Co. of Utica v. Sherman's Estate, 294 N.Y.S. 131, 250 App.Div. 339.

52. U.S.—Northwestern Jobbers Credit Bureau v. National Surety Corporation, D.C.Minn., 54 F.Supp. 716.

Ga.—W. T. Rawleigh Co. v. Kelly, 50 S.E.2d 113, 78 Ga.App. 10.

Okl.—Corpus Juris quoted in First

a surety is induced by fraud to enter into the suretyship contract, such fraud may entitle him to rescind the contract<sup>53</sup> and to have it canceled as far as he is concerned,<sup>54</sup> and to withdraw the security deposited with the creditor,<sup>55</sup> or, if it has been converted, to recover its value.<sup>56</sup>

*Failure to make inquiry.* While it has been held that negligence on the part of the surety in relying on the representations made to him and in failing to make inquiries may prevent him from asserting that he was fraudulently induced to enter into the contract,<sup>57</sup> it has also been held that a material misrepresentation of fact to a surety invalidates the suretyship contract although the surety had knowledge of facts which might have put him on inquiry.<sup>58</sup>

#### b. As Affected by Status of Principal

A surety, fraudulently induced to enter into a transaction, may take advantage of the fraud irrespective of its effect on the principal, and he may be released from the obligation although it may be binding on the principal; but he may not be discharged on the ground of fraudulent representations made to his principal unless the principal is entitled to be discharged therefor.

A surety who is induced to enter into a transaction by fraud may take advantage of the fraud irrespective of its effect on the principal,<sup>59</sup> and he may be released from the obligation although it may be binding on the principal.<sup>60</sup> Furthermore, he may rescind the contract although the principal may not elect to rescind his contract.<sup>61</sup>

On the other hand, a surety may not be dis-

charged on the ground of fraudulent representations made to his principal<sup>62</sup> unless the principal is entitled to be discharged therefor.<sup>63</sup>

#### c. Knowledge or Participation of Creditor or Obligor

In order to enable a surety to avoid his contract by reason of fraudulent concealment or false statements, the creditor or obligor must have knowledge of it or be connected therewith; and in the absence of knowledge on the part of the obligor a surety may not escape liability because of an erroneous impression which he has acquired by himself.

In order to enable a surety to avoid his contract by reason of fraudulent concealment or false statements, it is essential that the creditor or obligor have knowledge of it or be connected therewith.<sup>64</sup> The surety may not avoid his obligation for fraud or fraudulent concealment as to matters of which the creditor or obligor was ignorant.<sup>65</sup> In the absence of knowledge on the part of the obligor, a surety may not escape liability because of erroneous impressions which he has acquired by himself,<sup>66</sup> such as a belief that some other person was to be the principal,<sup>67</sup> that a corporate principal was a partnership,<sup>68</sup> that prior signers would be cosureties with him,<sup>69</sup> or that the principal was not largely indebted.<sup>70</sup> However, the surety may avoid the contract unless the obligor enlightens him, where the obligor knows that the surety is executing the contract under an erroneous impression as to the facts,<sup>71</sup> such as that a note is to secure future transactions only, and not past indebtedness,<sup>72</sup>

Nat. Bank v. Godwin, 47 P.2d 116, 119, 173 Okl. 169.

50 C.J. p 52 note 30.

#### Slightest fraud

N.Y.—First Citizens Bank & Trust Co. of Utica v. Sherman's Estate, 294 N.Y.S. 131, 250 App.Div. 339.

50 C.J. p 52 note 30 [a].

Whether surety is compensated or voluntary, his contract is vitiated by fraud of one seeking to hold him liable as such; hence fact that maker of note promised to pay one who indorsed it as surety does not preclude latter from denying liability for fraud of payee.—Young v. Goetting, C.C.A.Tex., 16 F.2d 248.

53. Okl.—Corpus Juris quoted in First Nat. Bank v. Godwin, 47 P. 2d 116, 119, 173 Okl. 169.

50 C.J. p 52 note 32.

54. Okl.—Corpus Juris quoted in First Nat. Bank v. Godwin, 47 P. 2d 116, 119, 173 Okl. 169.

50 C.J. p 52 note 33.

55. Iowa.—Wile v. Wright, 32 Iowa 451.

Okl.—Corpus Juris quoted in First

Nat. Bank v. Godwin, 47 P.2d 116, 119, 173 Okl. 169.

56. Iowa.—Wile v. Wright, 32 Iowa 451.

Okl.—Corpus Juris quoted in First Nat. Bank v. Godwin, 47 P.2d 116, 119, 173 Okl. 169.

57. Ga.—Rutland v. Parham, 124 S. E. 355, 32 Ga.App. 662.

50 C.J. p 52 note 31.

58. Mo.—Milan Bank v. Richmond, 139 S.W. 852, 235 Mo. 532.

50 C.J. p 53 note 49.

59. S.D.—Rathgaber v. Horton, 218 N.W. 148, 52 S.D. 436.

60. Iowa.—Sherman v. Smith, 169 N.W. 216, 185 Iowa 654.

50 C.J. p 53 note 39.

61. S.D.—Rathgaber v. Horton, 218 N.W. 148, 52 S.D. 436.

62. Me.—Bryant v. Crosby, 36 Me. 562, 58 Am.D. 767.

50 C.J. p 53 note 41.

Fraud affecting principal's obligation generally see supra § 19.

63. U.S.—Whitcomb v. Shultz, N.Y., 223 F. 268, 138 C.C.A. 510, certio-

rari denied 35 S.Ct. 937, 238 U.S. 632, 59 L.Ed. 1498.

50 C.J. p 53 note 42.

64. La.—Tooke v. Burke, 75 So. 668, 141 La. 746.

50 C.J. p 60 note 71.

65. Ohio.—Isaac Harter Co. v. Pearson, 5 Ohio Cir.Ct. N.S., 304, 26 Ohio Cir.Ct. 601.

66. Iowa.—Miller v. Gardner, 49 Iowa 234.

50 C.J. p 60 note 73.

67. Ark.—Williams v. Morris, 138 S.W. 464, 99 Ark. 319.

50 C.J. p 60 note 74.

68. Iowa.—Monroe Bank v. Gifford, 32 N.W. 669, 72 Iowa 750.

69. Neb.—Stoner v. Keith County, 67 N.W. 311, 48 Neb. 279.

70. Tenn.—Hubbard v. Fravell, 12 Lea 304.

71. Ind.—Fassnacht v. Emsing Gagen Co., 46 N.E. 45, 47 N.E. 480, 18 Ind.App. 80, 63 Am.S.R. 322.

Minn.—Powers Dry-Goods Co. v. Harlin, 71 N.W. 16, 68 Minn. 193, 64 Am.S.R. 469.

72. Ind.—Fassnacht v. Emsing Ga-

or that it is in renewal of a prior note instead of being for additional indebtedness,<sup>73</sup> or that it covers all of the indebtedness of the principal.<sup>74</sup>

*By principal or third person.* Fraud or misrepresentation practiced by the principal alone on the surety, without any knowledge or participation on the part of the creditor or obligee, in inducing the surety to enter into the suretyship contract will not affect the liability of the surety;<sup>75</sup> and this rule also applies as to fraud or misrepresentation of an unauthorized third person,<sup>76</sup> since no duty is imposed on the obligee to seek out the surety and ascertain whether he has been thus misled.<sup>77</sup> The surety, on the other hand, may avoid the contract where the obligee at the time of the execution of the contract by the surety has knowledge of such fraud or misrepresentation<sup>78</sup> or participates therein,<sup>79</sup> as where he stands by in silence and permits the principal, by fraud, to induce the surety to execute the contract,<sup>80</sup> or where he overhears enough of a conversation between the principal and surety to put him on inquiry,<sup>81</sup> or where the circumstances are such as would lead a reasonable man to believe that the principal must have used fraud, but the creditor willfully remains ignorant.<sup>82</sup>

#### d. Fraud or Concealment by Agent of Creditor or Oblige

A surety may avoid his contract where he has been induced to enter into it by false and fraudulent statements or representations of an agent of the obligee, within the scope of his authority, but not where such representations are not within the scope of his authority.

A surety may avoid his contract where he has been induced to enter into it by false and fraudulent statements or representations of an agent of the obligee, within the scope of his authority,<sup>83</sup> but not where such representations are not within the scope of his authority,<sup>84</sup> as where they are made by a public agent to a person about to become a surety on another officer's bond.<sup>85</sup> A surety is bound to take notice, when the principal is acting as agent for the creditor, that the authority is very limited, and the surety is liable although he relies on unauthorized fraudulent statements of the principal.<sup>86</sup>

### § 76. — Acts or Representations

#### a. In general

#### b. Particular acts or representations

gen. Co., 46 N.E. 45, 47 N.E. 480, 18 Ind.App. 80, 63 Am.S.R. 322.  
50 C.J. p 60 note 80.

73. Iowa.—Miller v. Gardner, 49 Iowa 234.

74. Minn.—Powers Dry-Goods Co. v. Harlin, 71 N.W. 16, 68 Minn. 193, 64 Am.S.R. 469.

75. U.S.—Standard Sur. & Cas. Co. of N. Y. v. Olson, C.C.A.Minn., 150 F.2d 385—National Surety Co. v. Russell, C.C.A.Ind., 66 F.2d 104.  
Cal.—Simon Newman Co. v. Tully, 88 P.2d 131, 13 Cal.2d 134.

Ga.—Corpus Juris quoted in W. T. Raleigh Co. v. Oliver, 21 S.E.2d 490, 492, 67 Ga.App. 748.

Ind.—Carey v. State ex rel. Department of Financial Institutions, 12 N.E.2d 131, 213 Ind. 181.

Ky.—Dorman v. Carnes, 96 S.W.2d 869, 265 Ky. 361.

Minn.—Neefus v. Neefus, 296 N.W. 579, 209 Minn. 495.

Miss.—Times-Picayune Pub. Co. v. Frierson, 144 So. 235, 164 Miss. 105.

Mo.—J. R. Watkins Co. v. Oldfield, 174 S.W.2d 142, 351 Mo. 894.

Tenn.—Rawleigh Co. v. Boyd & Hill, 4 Tenn.App. 392.

Tex.—Detroit Fidelity & Surety Co. v. First Nat. Bank, Civ.App., 66 S.W.2d 406—Riley v. Reifert, Civ. App., 32 S.W. 185.

Wis.—J. R. Watkins Co. v. Beyer, 233 N.W. 442, 203 Wis. 397, 71 A.L.R. 1268.

50 C.J. p 61 note 83—8 C.J. p 796 note 35.

#### Principal as agent of creditor

Where agent desiring to execute bond to principal as condition to entering into or continue relationship of principal and agent solicits third person to become surety on bond to principal and makes misrepresentations whereby third person becomes surety, principal is not bound by such misrepresentations, since agent was not acting within scope of his agency in procuring sureties on his bond.

Ark.—J. R. Watkins Medical Co. v. Montgomery, 215 S.W. 638, 140 Ark. 487.

Okl.—Briggs v. J. R. Watkins Co., 157 P.2d 462, 195 Okl. 254.

76. Miss.—Times-Picayune Pub. Co. v. Frierson, 144 So. 235, 164 Miss. 105.

50 C.J. p 61 note 84.

77. Ky.—Dorman v. Carnes, 96 S.W. 2d 869, 265 Ky. 361.

50 C.J. p 61 note 85.

78. Va.—Atlantic Trust, etc., Co. v. Union Trust, etc., Corp., 67 S.E. 182, 110 Va. 286, 292, 135 Am.S.R. 937.

50 C.J. p 61 note 86.

#### Statements to several sureties

Where the principal, with the creditor's knowledge, fabricates a story which will appeal to several separate sureties, the statements made to them individually as part of a scheme may inure to the benefit

of each.—State Sav., etc., Co. v. Grady, 153 N.E. 238, 20 Ohio App. 385.

79. Va.—Atlantic Trust, etc., Co. v. Union Trust, etc., Corp., 67 S.E. 182, 110 Va. 286, 135 Am.S.R. 937.  
50 C.J. p 61 note 87.

80. Mo.—Ward v. National Surety Co., 152 S.W. 397, 167 Mo.App. 579.

50 C.J. p 61 note 88.

81. Mich.—Beath v. Chapoton, 73 N.W. 806, 115 Mich. 506, 69 Am.S.R. 589.

82. Mich.—Lee v. Wisner, 38 Mich. 82.

50 C.J. p 62 note 90.

83. Ga.—Lynchburg Shoe Co. v. Daniel, 98 S.E. 107, 23 Ga.App. 186.  
50 C.J. p 62 note 94.

84. Del.—Lieberman v. Wilmington First Nat. Bank, 45 A. 901, 18 Del. 416, 8 Del.Ch. 519, 82 Am.S.R. 414, 48 L.R.A. 514.

50 C.J. p 62 note 95.

Where person fraudulently acts as agent for the principal and for the creditor, the latter may not be held responsible for such fraud practiced without his knowledge.—Jungk v. Reed, 42 P. 292, 12 Utah 196.

85. Ky.—U. S. Fidelity, etc., Co. v. Commonwealth, 104 S.W. 1029, 31 Ky.L. 1179.

50 C.J. p 62 note 96.

86. Ky.—Spalding v. Tucker, 51 S.W. 2, 21 Ky.L. 233.

### a. In General

Fraud sufficient to entitle a surety to avoid his obligation may consist of any false representation of a material fact, made with knowledge of its falsity and with intent that it shall be acted on by the surety, and except for which the relationship might not have been entered into; also a material misrepresentation of fact to the surety will avoid the contract although honestly made.

Fraud sufficient to entitle a surety to avoid his obligation may consist of any false representation of a material fact, made with knowledge of its falsity and with intent that it shall be acted on by the surety, and except for which the relationship might not have been entered into.<sup>87</sup> Moreover, if there is a material misrepresentation of fact to the surety, the suretyship contract is invalid even though the misrepresentation is made honestly or without intent to deceive,<sup>88</sup> and even though the creditor, at the time of making the representation, has no knowledge of its falsity.<sup>89</sup> A suretyship contract will not be avoided by reason of a representation which is immaterial,<sup>90</sup> or which is not justifiably relied on,<sup>91</sup> or which is a mere matter of opinion,<sup>92</sup> or which is a statement of the legal effect of his contract.<sup>93</sup>

*Statement substantially true.* If the statement of the obligee or creditor is substantially, although not strictly, correct, the surety is bound if there has not been any intent to mislead.<sup>94</sup>

*Signing without reading or noticing contents of instrument.* Where the surety is able to read and write, and no trick or artifice is used, he is liable,

where he signs the contract without reading it, although he is under a misapprehension as to its terms<sup>95</sup> or although a misrepresentation has been made as to the nature or scope of the instrument.<sup>96</sup> Also, the fact that a surety is illiterate and that the contract was not read to him does not raise a presumption against the validity of the contract; fraud must be alleged and proved.<sup>97</sup> However, under some circumstances, fraudulent representations as to the contents of the contract signed by a surety will constitute a defense to him.<sup>98</sup>

### b. Particular Acts or Representations

A mere statement or representation of a promissory nature by the creditor or obligee as to his intention, in order to induce a surety to sign, does not constitute such a representation as will affect the liability of the latter.

A mere statement or representation of a promissory nature by the creditor or obligee as to his intention, in order to induce a surety to sign, does not constitute such a representation as will affect the liability of the latter.<sup>99</sup> Thus a promise by the creditor to sell the principal more goods,<sup>1</sup> or to lend the principal more money,<sup>2</sup> or to take collateral security from the principal,<sup>3</sup> if broken, does not avoid the contract of suretyship on the ground of misrepresentation, since it gives the surety, at most, but a right of action for the breach.<sup>4</sup> Furthermore, if the promise be for the performance of an illegal act, the surety cannot be defrauded by it.<sup>5</sup>

*Other acts or representations.* It is regarded as a fraud on the surety falsely to tell him that the

87. U.S.—Northwestern Jobbers Credit Bureau v. National Surety Corporation, D.C.Minn., 54 F.Supp. 716.

Ga.—W. T. Rawleigh Co. v. Kelly, 50 S.E.2d 113, 78 Ga.App. 10.

Okl.—Corpus Juris quoted in First Nat. Bank v. Godwin, 47 P.2d 116, 119, 173 Okl. 169.

50 C.J. p 53 note 46.

88. Minn.—W. A. Thomas Co. v. National Surety Co., 172 N.W. 697, 142 Minn. 460.

50 C.J. p 53 note 47.

Regardless of intent, any misrepresentation which increases risk of loss avoids surety bond.—Northwestern Jobbers Credit Bureau v. National Surety Corporation, D.C. Minn., 54 F.Supp. 716.

89. Mo.—Milan Bank v. Richmond, 129 S.W. 352, 235 Mo. 532.

90. Or.—State v. Cornwall, 201 P. 1072, 102 Or. 230.

50 C.J. p 53 note 51.

#### Materiality of representation

(1) In general.—Rohrman v. Bonser, 163 S.W. 193, 157 Ky. 397—50 C.J. p 53 note 51 [a], [b].

(2) If surety on note is not deceived by representation of facts as to character of contract, amount for which he is to become responsible, and consideration for note, he may not escape liability.—Larmore v. People's State Bank, 188 N.E. 317, 206 Ind. 66.

91. Del.—Lieberman v. Wilmington First Nat. Bank, 45 A. 901, 18 Del. 416, 8 Del.Ch. 519, 82 Am.S.R. 414, 48 L.R.A. 514.

50 C.J. p 53 note 52.

92. Iowa.—Weitz v. U. S. Fidelity, etc., Co., 219 N.W. 411, 206 Iowa 1025.

50 C.J. p 54 note 53.

93. Tex.—Burk v. Galveston County, 13 S.W. 455, 76 Tex. 267.

50 C.J. p 54 note 54.

94. Ill.—City Trust, etc., Co. v. Lee, 68 N.E. 485, 204 Ill. 69.

50 C.J. p 55 note 81.

95. Cal.—Metropolitan Loan Assoc. v. Esche, 17 P. 675, 75 Cal. 513.

50 C.J. p 54 note 56.

96. Mo.—J. R. Watkins Co. v. Oldfield, 174 S.W.2d 143, 351 Mo. 894.

50 C.J. p 54 note 57.

97. N.Y.—Ellis v. McCormick, 1 Hilt. 313.

98. Ky.—Haldeman v. German Security Bank, 44 S.W. 383, 19 Ky. L. 1691.

50 C.J. p 54 note 69.

99. Ark.—Rose City Bottling Works v. Godchaux Sugars, 236 S.W. 825, 151 Ark. 269.

50 C.J. p 55 note 75.

1. Ky.—New York Store Mercantile Co. v. Gorham, 199 S.W. 64, 178 Ky. 535.

50 C.J. p 55 note 76.

2. Ky.—New York Store Mercantile Co. v. Gorham, supra—Stanford First Nat. Bank v. Mattingly, 18 S.W. 940, 92 Ky. 650, 14 Ky.L. 68.

3. Ky.—New York Store Mercantile Co. v. Gorham, 199 S.W. 64, 178 Ky. 535.

N.H.—Concord Bank v. Rogers, 16 N.H. 9.

4. Ky.—New York Store Mercantile Co. v. Gorham, 199 S.W. 64, 178 Ky. 535.

5. Ga.—Graham v. Marks, 25 S.E. 931, 98 Ga. 67.

50 C.J. p 55 note 80.



principal requested him to become such,<sup>6</sup> or to make a false representation as to the principal's indebtedness,<sup>7</sup> or falsely to state that the principal is not a defaulter<sup>8</sup> or that the creditor holds collateral of the principal,<sup>9</sup> or to make a false statement as to the time of the maturity of the liabilities of the principal<sup>10</sup> or as to the consideration to be paid for the principal contract.<sup>11</sup> If a misrepresentation is made as to the amount of the liabilities of the principal for which the surety is rendering himself liable, his contract is voidable,<sup>12</sup> at least as to the excess over the amount stated to him.<sup>13</sup> Also, a surety is not bound if he is deceived as to the application to be made of the proceeds of the instrument signed by him<sup>14</sup> or as to the value of security conveyed to him.<sup>15</sup> Furthermore, a surety is not liable where he signs the contract in reliance on false representations to the effect that another surety has signed the contract and that his signature is genuine.<sup>16</sup> If the surety signs a note for the purchase of property, any fraudulent misstatement with respect to such property frees him from liability.<sup>17</sup>

A surety, on the other hand, may not claim that he is not liable because he was told that his signature was required as a matter of form<sup>18</sup> and that he did not incur any risk,<sup>19</sup> or that his liability would be temporary only<sup>20</sup> or merely nominal.<sup>21</sup> Also, a surety may not avoid liability on the ground

that her signature was obtained by the false pretense that it was necessary to release certain dower rights.<sup>22</sup>

## § 77. — Concealment

- a. In general
- b. Duty to disclose
- c. Nature of concealment
- d. As to principal's credit or solvency
- e. As to principal's default or misconduct

### a. In General

Subject to the rules relating to concealment as fraud generally, if at the time a contract of suretyship is executed the obligee conceals or withholds from the surety material facts affecting the risk, which are within his knowledge and which it is his duty to disclose, whereby the surety is induced to execute the contract, it constitutes such fraud as will entitle the surety to avoid his contract.

Subject to the rules relating to concealment as fraud generally, particularly as a ground for avoiding a contract, it is a well-settled rule that, if, at the time a contract of suretyship is executed, the obligee conceals or withholds from the surety material facts affecting the risk, which are within his knowledge and which it is his duty to disclose, whereby the surety is induced to execute the contract, it constitutes such fraud as will enable the surety to avoid his contract,<sup>23</sup> especially where the

6. Neb.—Gist v. Feitz, 61 N.W. 621, 48 Neb. 238.  
50 C.J. p 54 note 59.

7. Iowa.—Barnes v. Century Sav. Bank, 128 N.W. 541, 149 Iowa 367.  
50 C.J. p 54 note 60.

#### Statement absolving obligee from responsibility

Where surety asks obligee whether it knows of any outstanding liabilities on part of principal and obligee replies in the negative although the principal owes money to the obligee at such time, the surety may avoid liability on his suretyship contract because of such misrepresentation by the obligee even though surety, on making inquiry of creditor or obligee, said that reply would be held strictly private and confidential, and would not make obligee in any way responsible.—U. S. v. American Bonding, etc., Co., C.C.Md., 89 F. 921, affirmed, C.C.A., 89 F. 925.

8. Ill.—Drabek v. Grand Lodge B. S. B. C., 24 Ill.App. 82.

9. Va.—U. S. Fidelity, etc., Co. v. Virginia Country Club, 105 S.E. 686, 129 Va. 306.

10. Okl.—First Nat Bank v. Godwin, 47 P.2d 116, 173 Okl. 169.  
50 C.J. p 54 note 62.

11. Ky.—Stanford First Nat. Bank v. Mattingly, 18 S.W. 940, 92 Ky. 650, 14 Ky.L. 68.

12. N.C.—Pittsburgh Plate Glass Co. v. Maryland Fidelity, etc., Co., 138 S.E. 143, 193 N.C. 769.  
50 C.J. p 54 note 64.

13. Ind.—Fishburn v. Jones, 37 Ind. 119.

14. Miss.—Clopton v. Elkin, 49 Miss. 95.

N.Y.—Weed v. Bentley, 6 Hill 56.

15. Ky.—People's State Bank v. Hill, 275 S.W. 694, 210 Ky. 222.  
50 C.J. p 54 note 67.

16. Iowa.—Riniker v. Newkirk, 179 N.W. 825.  
50 C.J. p 54 note 68.

17. Ga.—W. T. Rawleigh Co. v. Kelly, 50 S.E.2d 113, 78 Ga.App. 10.

#### Reason for rule

False misrepresentation of existing fact, to effect that person signed contract as surety, inducing another person to sign contract as surety, increased the risk and exposed such other person to greater liability, and such other person was not required to prove loss to avoid contract.—W. T. Rawleigh Co. v. Kelly, supra.

18. Ga.—Satterfield v. Spier, 39 S. E. 930, 114 Ga. 127.  
50 C.J. p 54 note 70.

19. Iowa.—Robinson v. Larson, 83 N.W. 900, 112 Iowa 173.  
50 C.J. p 55 note 71.

20. Mich.—Hancock First Nat. Bank v. Johnson, 95 N.W. 975, 133 Mich. 700, 103 Am.S.R. 463.  
50 C.J. p 55 note 72.

21. Ga.—Brown v. Davenport, 76 Ga. 799.

22. Wash.—Oregon Nat. Bank v. Gardner, 42 P. 545, 13 Wash. 154.

23. Ill.—Crofut v. Aldrich, 54 Ill. App. 541.

24. U.S.—Northwestern Jobbers Credit Bureau v. National Surety Corporation, D.C.Minn., 54 F.Supp. 716.

N.Y.—First Citizens Bank & Trust Co. of Utica v. Sherman's Estate, 294 N.Y.S. 131, 250 App.Div. 339.  
Tenn.—Corpus Juris quoted in Hutsell v. Citizens' Nat. Bank, 64 S. W.2d 188, 192, 166 Tenn. 598.

Wash.—Associated Indemnity Corporation v. Del Guzzo, 81 P.2d 516, 195 Wash. 486.  
50 C.J. p 55 note 87.

obligation of suretyship is entered into at the request of the person to whom the security is given.<sup>24</sup> A contract of suretyship may be avoided even though the undue concealment is not willful or intentional,<sup>25</sup> and even though it is not done with intent to deceive the surety,<sup>26</sup> or with a view to any advantage to the creditor or obligee,<sup>27</sup> provided it operates to the prejudice of the surety;<sup>28</sup> and this is true although the suretyship contract is made on a sufficient consideration.<sup>29</sup>

### b. Duty to Disclose

In order that a concealment may amount to such fraud as will release a surety, there must be a duty on the part of the obligee to disclose the facts to the surety, and it is essential that he have a suitable opportunity to disclose the facts to the surety before he enters into the contract.

In order that a concealment may amount to such fraud as will release a surety, there must be a duty on the part of the obligee to disclose the facts to the surety.<sup>30</sup> If the prospective surety applies to him, before entering into the contract, for information touching the undertaking, the obligee is bound, if he assumes to answer the inquiry at all, to give full information as to all material facts known to him and unknown to the surety, which might in any manner affect the risk to be assumed or influence him in becoming a surety;<sup>31</sup> and he

may do nothing to deceive or mislead the surety without vitiating the agreement.<sup>32</sup>

*In absence of inquiry.* In the absence of inquiry from the prospective surety, the obligee is not bound to make an entire disclosure to him of all the facts which may affect his undertaking,<sup>33</sup> and whether, in a particular case, the obligee is bound, before accepting the undertaking of the surety, and without being applied to by him for information on the subject, to inform him of facts within his knowledge which increase the risks of the undertaking depends on the circumstances of the case.<sup>34</sup> If there is nothing in the circumstances to indicate that the prospective surety is being misled or deceived, or that he is entering into the contract in ignorance of facts materially affecting its risks, the obligee is not bound to seek him out or, without being applied to, communicate to him information as to the facts within his knowledge pertaining to the risk;<sup>35</sup> but in such case the obligee may assume that the surety has obtained information for his guidance from other sources, or that he has chosen to assume the risks of the undertaking, whatever they may be.<sup>36</sup>

In the absence of inquiry, the surety is not entitled to information which, by reasonable diligence, is as accessible to him as to the creditor or obligee,<sup>37</sup> and his ignorance will not excuse him,<sup>38</sup>

24. Tenn.—*Corpus Juris* quoted in *Hutsell v. Citizens' Nat. Bank*, 64 S.W.2d 188, 192, 166 Tenn. 598.

Wis.—*Remington Sewing Mach. Co. v. Kezertee*, 5 N.W. 809, 49 Wis. 409.

50 C.J. p 56 note 88.

25. Tenn.—*Corpus Juris* quoted in *Hutsell v. Citizens' Nat. Bank*, 64 S.W.2d 188, 192, 166 Tenn. 598.

50 C.J. p 56 note 89.

26. U.S.—*Northwestern Jobbers Credit Bureau v. National Surety Corporation*, D.C.Minn., 54 F.Supp. 716.

27. Tenn.—*Corpus Juris* quoted in *Hutsell v. Citizens' Nat. Bank*, 64 S.W.2d 188, 192, 166 Tenn. 598.

50 C.J. p 56 note 90.

28. N.Y.—*Damon v. Empire State Surety Co.*, 146 N.Y.S. 996, 161 App.Div. 875.

Tenn.—*Corpus Juris* quoted in *Hutsell v. Citizens' Nat. Bank*, 64 S.W.2d 188, 192, 166 Tenn. 598.

#### Surety not deceived

If surety on note is not deceived by withholding of facts as to character of contract, amount for which he is to become responsible, and consideration for note, he cannot escape liability.—*Larmore v. People's State Bank*, 188 N.E. 317, 206 Ind. 66.

29. Iowa.—*Barnes v. Century Sav. Bank*, 128 N.W. 541, 149 Iowa 367.

Tenn.—*Corpus Juris* quoted in *Hutsell v. Citizens' Nat. Bank*, 64 S.W.2d 188, 192, 166 Tenn. 598.

30. U.S.—*National Surety Co. v. Russell*, C.C.A.Ind., 66 F.2d 104—*New York Fidelity, etc., Co. v. Glenn*, C.C.A.W.Va., 3 F.2d 913.

Ind.—*Larmore v. People's State Bank*, 188 N.E. 317, 206 Ind. 66.

N.Y.—*Seglin Const. Co. v. Columbia Casualty Co.*, 264 N.Y.S. 144, 239 App.Div. 803.

31. U.S.—*Copper Process Co. v. Chicago Bonding, etc., Co.*, C.C.A.Pa., 262 F. 66, 8 A.L.R. 1477.

50 C.J. p 56 note 94.

32. Iowa.—*Lingenfelter v. Bowman*, 137 N.W. 946, 156 Iowa 649—*Monroe Bank v. Anderson Bros. Min., etc., Co.*, 22 N.W. 929, 65 Iowa 692.

33. Iowa.—*In re Tabasinsky's Estate*, 293 N.W. 578, 228 Iowa 1102.

N.Y.—*Seglin Const. Co. v. Columbia Casualty Co.*, 264 N.Y.S. 144, 239 App.Div. 803.

50 C.J. p 56 note 96.

34. Ind.—*Larmore v. People's State Bank*, 188 N.E. 317, 206 Ind. 66.

Iowa.—*Monroe Bank v. Anderson Bros. Min., etc., Co.*, 22 N.W. 929, 65 Iowa 692.

35. Ark.—*Couch v. Stout*, 107 S.W.2d 351, 194 Ark. 385.

Ind.—*Larmore v. People's State Bank*, 188 N.E. 317, 206 Ind. 66.

Okl.—*National Casualty Co. v. Sipes*, 71 P.2d 459, 180 Okl. 548.

50 C.J. p 56 note 98.

36. Iowa.—*Sherman v. Harbin*, 100 N.W. 629, 125 Iowa 174.

50 C.J. p 56 note 99.

37. Ark.—*Couch v. Stout*, 107 S.W.2d 351, 194 Ark. 385.

Ill.—*Swisher v. Fidelity, etc., Co.*, 164 Ill.App. 243.

50 C.J. p 56 note 1.

#### Reasons for rule

(1) A surety must protect himself and ascertain risks he is incurring and cannot, by his neglect, throw burden on creditor or obligee to inform him concerning matters which surety could easily ascertain for himself.—*Couch v. Stout*, 107 S.W.2d 351, 194 Ark. 385.

(3) One asked to become a surety should exercise reasonable diligence to know the circumstances of the transaction and, if put on guard by the circumstances, should make inquiry.—*Larmore v. People's State Bank*, 188 N.E. 317, 206 Ind. 66.

38. Ky.—*Sebald v. Citizens' Deposit*

even though the facts are not known generally,<sup>39</sup> unless the obligee uses some deceit or trick to throw the surety off his guard and thereby prevent an investigation.<sup>40</sup> The fact that security is called for after the time for the performance of the principal contract should make the surety alert.<sup>41</sup> Where the surety delivers a fully executed bond to the principal with authority to deliver it on certain general conditions, which are met, he may not thereafter complain that the terms of the actual agreement between the principal and obligee were not more fully disclosed.<sup>42</sup>

Where the obligee knows, or has good grounds for believing, that the surety is being deceived or misled, or that he is being induced to enter into the contract in ignorance of facts materially increasing the risks, of which the obligee has knowledge, and he has a reasonable opportunity, before accepting his undertaking, to inform him of such facts, good faith and fair dealing demand that he should make such disclosure to the surety,<sup>43</sup> as where material facts exist, and are known to the obligee, of a character which the surety may reasonably assume do not exist.<sup>44</sup>

*Opportunity to disclose.* In order to charge an obligee with fraudulent concealment, it is essential that he have a suitable opportunity to disclose the facts to the surety before he enters into the contract;<sup>45</sup> and hence a surety is not released because of the obligee's failure to disclose facts of which he acquires knowledge after the contract is executed,<sup>46</sup> although before the execution of a substitute contract.<sup>47</sup> If the surety is absent, so that no direct communication can be had with him, the obligee has been held to be under no duty to search him out and inform him of the risks of the

contract.<sup>48</sup>

### c. Nature of Concealment

A concealment or nondisclosure sufficient to avoid a contract of suretyship and operate as a release of a surety must be a material and inducing concealment; but the doctrine that fraudulent concealments as to material matters are equivalent to the affirmation of a fact which does not exist applies strictly in favor of sureties.

A concealment or nondisclosure sufficient to avoid a contract of suretyship and operate as a release of a surety must be a material or inducing concealment.<sup>49</sup> It must be, and it is sufficient when it is, a concealment of some fact known to the obligee and unknown to the surety, which bears on the particular transaction to which the suretyship attaches, and materially affects or increases the surety's risk or liability to his prejudice,<sup>50</sup> and which, if known, would influence the surety with respect to entering into the contract.<sup>51</sup> It has been regarded as improper concealment not to disclose the fact that the principal refused to allow application to be made for the signature of the surety<sup>52</sup> or that an agent of the creditor was also a partner in the firm which was the principal,<sup>53</sup> or not to disclose a separate agreement modifying the contract.<sup>54</sup>

*As fraudulent representation.* The doctrine that fraudulent concealments as to material matters are equivalent to the affirming of a fact which does not exist applies strictly in favor of sureties.<sup>55</sup> It has been held that, in order to release a surety, the concealment must be such as to amount to an implied fraudulent representation.<sup>56</sup>

*Immaterial concealment.* A surety is not released from liability by a failure to disclose to him immaterial matters which would not prejudicially affect

Bank, 105 S.W. 130, 31 Ky.L. 1244, 14 L.R.A.N.S., 376.

50 C.J. p 56 note 2.

39. Iowa.—Monroe Bank v. Gifford, 32 N.W. 669, 72 Iowa 750.

40. U.S.—New York Fidelity, etc., Co. v. Glenn, C.C.A.W.Va., 3 F.2d 913.

41. Tex.—U. S. Fidelity, etc., Co. v. Means, etc., Iron Works, 132 S.W. 536, 63 Tex.Civ.App. 56.

50 C.J. p 57 note 6.

42. Conn.—New York Plumbing, etc., Supplies Co. v. Aetna Casualty, etc., Co., 133 A. 588, 104 Conn. 551.

43. Iowa.—Sherman v. Harbin, 100 N.W. 629, 125 Iowa 174.

50 C.J. p 57 note 9.

44. Mass.—Province Securities Corp. v. Maryland Casualty Co., 168 N. E. 252, 269 Mass. 75.

Utah.—Jungk v. Holbrook, 49 P. 305, 15 Utah 198, 62 Am.S.R. 921.

45. Iowa.—In re Tabasinsky's Estate, 293 N.W. 578, 228 Iowa 1102.

50 C.J. p 57 note 12.

46. N.Y.—Phillips v. National Surety Co., 193 N.Y.S. 490, 200 App. Div. 338.

50 C.J. p 57 note 14.

47. Pa.—Donaldson v. Hartford Accident, etc., Co., 112 A. 562, 269 Pa. 456.

50 C.J. p 57 note 15.

48. Iowa.—Sherman v. Harbin, 100 N.W. 629, 125 Iowa 174.

50 C.J. p 57 note 16.

49. Iowa.—Sherman v. Smith, 169 N.W. 216, 185 Iowa 654.

50. U.S.—Northwestern Jobbers Credit Bureau v. National Surety Corporation, D.C.Minn., 54 F.Supp. 716.

Ind.—Larmore v. People's State Bank, 188 N.E. 317, 206 Ind. 66.

50 C.J. p 57 note 19.

51. Utah.—Jungk v. Holbrook, 49 P. 305, 15 Utah 198, 62 Am.S.R. 921.

50 C.J. p 57 note 20.

52. Iowa.—Conger v. Bean, 12 N.W. 284, 58 Iowa 321.

53. Utah.—Jungk v. Holbrook, 49 P. 305, 15 Utah 198, 62 Am.S.R. 921.

54. Cal.—Union Oil Co. v. Pacific Surety Co., 187 P. 14, 182 Cal. 69.

50 C.J. p 58 note 23.

55. Iowa.—Sherman v. Smith, 169 N.W. 216, 185 Iowa 654.

56. Ala.—Maryland Casualty Co. v. State, 87 So. 521, 205 Ala. 324.

50 C.J. p 58 note 26.

him or increase his responsibility.<sup>57</sup> For example, the surety may not avoid his contract because of the obligee's failure to disclose information as to the personal habits of the principal,<sup>58</sup> or as to all of his dealings with the principal,<sup>59</sup> or the manner in which he will proceed to enforce the contract,<sup>60</sup> or as to facts which would prevent the principal from performing illegal acts.<sup>61</sup> Arrangements for the payment of interest to or by the principal,<sup>62</sup> or the time of its payment,<sup>63</sup> need not be disclosed.

*Distinct transaction.* Unless inquired of by the surety,<sup>64</sup> the obligee need not disclose facts not directly connected with the transaction to which the suretyship attaches,<sup>65</sup> or matters not connected with the subject of the contract,<sup>66</sup> although they might have a decided influence on the surety in determining whether he would enter into the contract.<sup>67</sup> Where one stands surety for an employee, the employer-obligee is not obliged to mention the fact that the predecessor of the employee was a defaulter, since it in no way increases or relates to the obligations assumed by the surety.<sup>68</sup>

#### d. As to Principal's Credit or Solvency

An obligee usually need not, in the absence of a request therefor, give information to the surety concerning the general credit or solvency of the principal.

Under the general rules already considered, an obligee usually is under no duty, in the absence of a request therefor, to give information to the surety concerning the general credit or solvency of the principal,<sup>69</sup> or to disclose to him the indebtedness of the principal,<sup>70</sup> or that a judgment has been obtained against him,<sup>71</sup> or that his property is about to be sold under attachment,<sup>72</sup> or that he is insolvent.<sup>73</sup>

unless the obligee knows that the surety is prompted to execute the contract under a misapprehension as to the principal's indebtedness.<sup>74</sup>

On the other hand, where an obligee or creditor undertakes to give a proposed surety information as to the principal's credit or financial condition, he is bound to disclose all the circumstances affecting the surety's risk.<sup>75</sup>

#### e. As to Principal's Default or Misconduct

##### (1) In general

##### (2) Knowledge by creditor or surety

##### (1) In General

Ordinarily where an obligee takes a bond as security for an agent or employee, who, to the knowledge of the obligee, has previously been guilty of defaults or misconduct involving a want of integrity, and the obligee does not disclose such facts to the surety, he is guilty of a fraudulent concealment of material facts.

Ordinarily, where an obligee takes a bond as security for an agent or employee, who, to the knowledge of the obligee, has previously been guilty of defaults or misconduct involving a want of integrity, and the obligee does not disclose such facts to the surety, he is guilty of a fraudulent concealment of material facts, the disclosure of which good faith requires, and he may not recover of the surety,<sup>76</sup> even though such default may have occurred in the service of another than the obligee.<sup>77</sup> However, in the absence of inquiry by the surety, it has been held that an obligee is under no duty to disclose prior defaults or irregularities of the principal,<sup>78</sup> especially where the bond is not executed on the solicitation of the obligee.<sup>79</sup>

57. Ind.—Larmore v. People's State Bank, 188 N.E. 317, 206 Ind. 66. 50 C.J. p 58 note 27.

58. N.D.—Aetna Indemn. Co. v. Schroeder, 95 N.W. 436, 12 N.D. 110.

59. Mass.—Province Security Corp. v. Maryland Casualty Co., 168 N.E. 252, 269 Mass. 75. 50 C.J. p 58 note 29.

60. Ill.—Doane v. Fuller, 88 Ill.App. 515.

61. Iowa.—Sherman v. Smith, 169 N.W. 216, 185 Iowa 654. 50 C.J. p 58 note 31.

62. Mass.—Province Security Corp. v. Maryland Casualty Co., 168 N.E. 252, 269 Mass. 75. 50 C.J. p 58 note 32.

63. N.H.—New Hampshire Sav. Bank v. Colcord, 15 N.H. 119, 41 Am.D. 685.

64. W.Va.—Warren v. Branch, 15 W.Va. 21.

65. Ind.—Larmore v. People's State Bank, 188 N.E. 317, 206 Ind. 66.

66. U.S.—Magee v. Manhattan Life Ins. Co., Ala., 92 U.S. 93, 23 L.Ed. 699.

50 C.J. p 58 note 35.

67. W.Va.—Warren v. Branch, 15 W.Va. 21.

68. N.Y.—Bostwick v. Van Voorhis, 91 N.Y. 353.

69. Ind.—Larmore v. People's State Bank, 188 N.E. 317, 206 Ind. 66. 50 C.J. p 58 note 38.

70. Tenn.—W. T. Rawleigh Co. v. Boyd & Hill, 4 Tenn.App. 392. 50 C.J. p 58 note 39.

71. Wash.—Oregon Nat. Bank v. Gardner, 42 P. 545, 13 Wash. 154.

72. Ky.—Smith v. London First Nat. Bank, 53 S.W. 648, 107 Ky. 257, 21 Ky.L. 953.

73. Mich.—Hancock First Nat. Bank v. Johnson, 95 N.W. 975, 133 Mich. 780, 103 Am.S.R. 468. 50 C.J. p 58 note 42.

74. Iowa.—Selma Sav. Bank v. Harlan, 149 N.W. 882, 167 Iowa 678. 50 C.J. p 59 note 44.

75. N.M.—Putney v. Schmidt, 120 P. 720, 16 N.M. 400.

76. Mo.—St. Charles Sav. Bank v. Denker, 205 S.W. 208, 275 Mo. 607. 50 C.J. p 59 note 49.

#### Payee of note

With respect to the duty to disclose past misconduct to a prospective surety, the relationship as between a payee and surety on a note ordinarily is not considered to be the same as that existing between a surety and beneficiary of a bond.—Larmore v. People's State Bank, 188 N.E. 317, 206 Ind. 66.

77. Minn.—Capital Fire Ins. Co. v. Watson, 79 N.W. 601, 76 Minn. 387, 77 Am.S.R. 657. 50 C.J. p 59 note 50.

78. Md.—Lake v. Thomas, 36 A. 437, 84 Md. 608. 50 C.J. p 59 note 47.

79. Wis.—Aetna Life Ins. Co. v. Mabbett, 18 Wis. 667.

Unless the bond covers loss by negligence or errors,<sup>80</sup> the rule does not apply where the undisclosed acts or defaults consist of mere irregularities or omissions of duty which are consistent with honesty,<sup>81</sup> such as that the principal had failed to account<sup>82</sup> or to remit promptly,<sup>83</sup> or that he had intermingled his funds with those of his employer.<sup>84</sup> In accordance with the general rules, however, where a prospective surety for an employee applies to the employer obligee for information as to the employee's previous conduct, it is the duty of the obligee to make a full disclosure of all material facts within his knowledge bearing on the risk.<sup>85</sup>

## (2) Knowledge by Creditor or Surety

Nondisclosure of prior defaults or misconduct on the part of the principal does not constitute fraudulent concealment where the obligee is ignorant or has merely constructive notice thereof, even though a failure by the obligee to discover its defaults was the result of negligence in not examining the accounts of the principal, unless such negligence was gross.

Nondisclosure of prior defaults or misconduct on the part of the principal does not constitute fraudulent concealment where the obligee is ignorant<sup>86</sup> or has merely constructive notice<sup>87</sup> thereof, even though a failure by the obligee to discover its defaults was the result of negligence in not examining the accounts of the principal,<sup>88</sup> unless such negligence was gross<sup>89</sup> or the obligee willfully abstained from an investigation after having a belief, founded on reasonable and reliable information, that the principal was a defaulter.<sup>90</sup> So also, nondisclosure of such defaults is no defense where the surety has knowledge thereof<sup>91</sup> or where the surety

had no knowledge of the previous employment and hence could not have relied on an implied representation of the principal's worthiness.<sup>92</sup>

**Knowledge by agent.** Knowledge of a prior default of the principal, to agents of the obligee, at the time a surety executes a bond making himself liable therefor, generally will prevent an action being maintained thereon;<sup>93</sup> but knowledge by a public agent of prior defaults of a public officer at the time of the execution or approval of such officer's bond will not affect the liability of sureties thereon.<sup>94</sup>

## § 78. Mistake

A surety is not bound where there is a mutual mistake as to a material fact, without any fault or negligence on his part.

A surety is not bound where there is a mutual mistake as to a material fact, without any fault or negligence on his part.<sup>95</sup> However, in the absence of fraud or duress, a surety may not be relieved from liability merely because he executed by mistake an instrument different from the one intended,<sup>96</sup> or because of a clerical error which could not have misled him<sup>97</sup> or affected his liability;<sup>98</sup> nor may he avoid liability on a bond executed by him under a misapprehension as to the necessity for the bond, where his misapprehension is caused by his own carelessness.<sup>99</sup> If he is able to read, he is bound, although he signs the instrument as surety without reading it or knowing the contents thereof,<sup>1</sup> since it is not necessary that a person signing as surety shall know the terms of the principal agreement.<sup>2</sup>

80. Ohio.—Commonwealth Bldg., etc., Co. v. Fromlet, 6 Ohio S. & C. P. 184, 7 Ohio N.P. 194.  
50 C.J. p 60 note 57.

81. Okl.—National Casualty Co. v. Sipes, 71 P.2d 459, 180 Okl. 548.  
50 C.J. p 59 note 51.

82. N.Y.—Howe Mach. Co. v. Farrington, 82 N.Y. 121.  
S.C.—Wilmington, etc., R. Co. v. Ling, 18 S.C. 116.

83. Kan.—Star Ins. Co. v. Carey, 267 P. 990, 126 Kan. 205, 60 A.L.R. 153.  
Okl.—National Casualty Co. v. Sipes, 71 P.2d 459, 180 Okl. 548.  
50 C.J. p 59 note 53.

84. Tex.—Screwman's Ben. Assoc. v. Smith, 7 S.W. 793, 70 Tex. 168.

85. Iowa.—Sherman v. Harbin, 100 N.W. 629, 125 Iowa 174.  
Wis.—Brillion Lumber Co. v. Barnard, 111 N.W. 483, 131 Wis. 284.

86. Mass.—New York L. Ins. Co. v.

Macomber, 48 N.E. 776, 169 Mass. 580.  
50 C.J. p 60 note 60.

87. W.Va.—Wait v. Homestead Bldg. Assoc., 85 S.E. 637, 76 W.Va. 431.

50 C.J. p 60 note 61.

88. Kan.—McMullen v. Winfield Bldg., etc., Assoc., 67 P. 892, 64 Kan. 298, 91 Am.S.R. 236, 56 L.R.A. 924.

50 C.J. p 60 note 62.

89. Ky.—Graves v. Lebanon Nat. Bank, 10 Bush 23, 19 Am.R. 50.

90. Ohio.—Dinsmore v. Tidball, 34 Ohio St. 411.

91. Me.—Franklin Bank v. Cooper, 39 Me. 542.

Pa.—Park Pav. Co. v. Kraft, 105 A. 39, 262 Pa. 178.

92. N.H.—Peerless Casualty Co. v. Howard, 92 A. 165, 77 N.H. 355.  
50 C.J. p 60 note 66.

93. Me.—Franklin Bank v. Cooper, 39 Me. 542.

94. Conn.—Watertown Sav. Bank v. Mattoon, 62 A. 622, 78 Conn. 388.

50 C.J. p 60 note 69.  
Liabilities on official bonds generally see Officers §§ 155-177.

95. Mass.—Blaney v. Rogers, 54 N. E. 561, 174 Mass. 277.

50 C.J. p 51 note 13.

96. S.D.—Bower v. Jones, 128 N.W. 470, 26 S.D. 414.

50 C.J. p 51 note 15.

97. Ark.—Stiewel v. American Surety Co., 68 S.W. 1021, 70 Ark. 512.  
50 C.J. p 51 note 16.

98. Ky.—Bassett v. O'Neil Coal, etc., Co., 131 S.W. 25, 140 Ky. 346.  
50 C.J. p 51 note 17.

99. Mass.—Brooks v. Whitmore, 8 N.E. 117, 142 Mass. 399.  
50 C.J. p 51 note 18.

1. Iowa.—Winterset First Nat. Bank v. Phillips, 212 N.W. 678, 203 Iowa 372.

50 C.J. p 51 note 19.

2. Iowa.—Winterset First Nat. Bank v. Phillips, supra.

*Equitable relief.* If the contract cannot be enforced against a surety according to its obvious intent, a court of equity may reform it.<sup>3</sup>

### § 79. Illegality

An illegal suretyship contract is not enforceable against the surety, except that, where the contract is only partially illegal, the surety's liability may continue as to the residue.

As in the case of contracts in general, an illegal suretyship contract is not enforceable against the surety,<sup>4</sup> except that, where the contract is only partially illegal, the surety's liability may continue as to the residue.<sup>5</sup>

### § 80. Capacity or Qualifications of Surety

A surety is not bound by his obligation, where at the time of entering into it he is incompetent to contract, even though the obligee had no knowledge of the surety's incapacity or incompetency, and acted in good faith.

Subject to the rules relating to capacity to contract in general, a surety is not bound by his obligation, where at the time of entering into it he is not of sufficient mental capacity to make the contract,<sup>6</sup> or where he is incompetent so to contract by reason of his personal interest in the subject of the contract;<sup>7</sup> and these rules apply even though the obligee had no knowledge of the surety's incapacity or incompetency,<sup>8</sup> and acted in good faith.<sup>9</sup> In the absence of fraud or misrepresentation, a surety, however, is not released by the incapacity of a co-surety;<sup>10</sup> nor, in case of a note to a corporation, is the surety on such note released by the fact that he was a director of such corporation.<sup>11</sup> Weakness of capacity on the part of the surety, and the fact that

it is a contract of suretyship, may be considered on the question of fraud in procuring the contract.<sup>12</sup>

A partner may not become a surety on an obligation executed by his firm as principal, since he would be acting as both principal and surety at one and the same time, in the same obligation, and for the same liability.<sup>13</sup>

An unmarried woman has been held capable of becoming a personal surety for another.<sup>14</sup>

*Statutory qualification.* A statutory provision as to the qualifications of a surety must be substantially complied with;<sup>15</sup> but a person who has become a surety may not plead his lack of legal qualification as a defense.<sup>16</sup> A provision making it unlawful for a certain person to become indorser for any other person does not prohibit him from acting as surety.<sup>17</sup>

### § 81. Alteration of Contract before Execution or Delivery

A surety may be entitled to avoid the suretyship contract because of a material alteration of the contract by the principal before its delivery to the obligee.

A surety by handing the suretyship contract to the principal to deliver to the obligee does not confer actual or apparent authority on the principal to alter the instrument;<sup>18</sup> and therefore a material alteration of the suretyship contract by or with the consent of the principal, before its delivery to the obligee, renders the contract void as against a surety who has signed it before such alteration<sup>19</sup> unless the subsequent alteration is made by his authority or with his consent;<sup>20</sup> and this rule has been held to apply whether or not the obligee had notice of such

3. Mich.—Stevens v. Pendleton, 63 N.W. 655, 105 Mich. 519. 50 C.J. p 52 note 22.

4. Iowa.—Denecke v. West, 169 N.W. 97, 184 Iowa 600. 50 C.J. p 64 note 34. Illegality of principal's obligation see supra §§ 20, 21.

Contracts held not illegal  
Ill.—Illinois Nat. Casualty Co. v. Lemmon, 282 Ill.App. 469. 50 C.J. p 64 note 34 [a].

5. Mo.—Citizens' Trust Co. v. Tindle, 199 S.W. 1025, 272 Mo. 681.

6. Mo.—Doty v. Mumma, 264 S.W. 656, 305 Mo. 188. 50 C.J. p 63 note 21.

Capacity of husband to be surety for wife see Husband and Wife § 46.

7. N.Y.—Assets Realization Co. v. Roth, 166 N.Y.S. 388, 179 App.Div. 324, reversed on other grounds 123 N.E. 743, 226 N.Y. 370. 50 C.J. p 63 note 22.

8. U.S.—Edwards v. Davenport, C.C. Iowa, 20 F. 756, 4 McCrary 34. 50 C.J. p 63 note 23.

9. U.S.—Edwards v. Davenport, supra.

10. Ky.—Wills v. Evans, 38 S.W. 1090, 18 Ky.L. 1067. 50 C.J. p 63 note 25.

11. Ky.—Commonwealth Bank v. Triplett, 6 J.J.Marsh. 549. 50 C.J. p 63 note 26.

12. Ga.—Causey v. Wiley, 27 Ga. 444.

13. Ky.—Crook v. Cochran, 197 S.W.2d 92, 303 Ky. 127.

La.—Bayne v. Cusimano, 23 So. 361, 50 La. Ann. 361.

14. Ky.—State Nat. Bank of Frankfort v. Thompson, 126 S.W.2d 412, 277 Ky. 527.

A mother who is a widow and unmarried may become personal surety for her son.—State Nat. Bank of Frankfort v. Thompson, supra.

15. Conn.—Lovejoy v. Isbell, 40 A. 531, 70 Conn. 557. 50 C.J. p 64 note 29.

16. Neb.—Heater v. Pearce, 81 N.W. 615, 59 Neb. 583.

17. Ala.—Decatur Branch Bank v. Douglass, 90 Ala. 853. 50 C.J. p 64 note 31.

18. Neb.—Hagler v. State, 47 N.W. 692, 31 Neb. 144, 28 Am.S.R. 514. 50 C.J. p 69 note 41.

Modification, change, or alteration of contract or obligation after execution or delivery see infra §§ 124-127.

19. Cal.—Pelton v. San Jacinto Lumber Co., 45 P. 12, 113 Cal. 21. 50 C.J. p 69 note 42.

Alterations not releasing sureties  
Pa.—Beary v. Haines, 4 Whart. 17. 50 C.J. p 69 note 42 [b].

20. Ind.—Fry v. P. Bannon Sewer Pipe Co., 101 N.E. 10, 179 Ind. 309. 50 C.J. p 69 note 43.

alteration.<sup>21</sup> A surety is also released where a material alteration is made by the obligee after the delivery of the instrument to him but before the terms of the contract are agreed on.<sup>22</sup> A surety, however, is not released where the alteration is made by the surety himself without the obligee's knowledge or consent<sup>23</sup> or where the surety, by his negligence in leaving spaces in the instrument, has enabled the alteration to be made.<sup>24</sup>

*Alteration before execution.* A material alteration of the contract by or with the consent of the principal does not render it void as to a surety who thereafter signs it,<sup>25</sup> except that, where the contract is void as to sureties who signed before the alteration, it is also void as to a surety who signs thereafter on the faith of the previous signers being cosureties, and without notice of the alteration, which renders the contract void as to them.<sup>26</sup>

*A material change in the principal contract,* after the surety has executed the bond, and before the creditor has executed the principal contract, releases the surety,<sup>27</sup> but not where such change is made before the bond is signed, of which fact the surety has notice.<sup>28</sup>

## § 82. — Erasure of Names

A bond or note is void as to a surety who signs on condition or in reliance on other signers being bound thereby as principal or cosureties, where the names of one or more of such other signers are erased without his knowledge or consent.

A bond or note is void as to a surety who signs on condition or in reliance on other signers being bound thereby as principal or cosureties, where, after he has signed, the names of one or more of such other signers are erased without his knowledge or consent,<sup>29</sup> notwithstanding the one whose name

is so erased afterward resigns the instrument;<sup>30</sup> and such a bond or note is also void as against a surety who, without knowledge thereof, signs after the erasure.<sup>31</sup> If such erasure is made after the instrument has been signed by all the sureties but before its delivery or approval, as a general rule all of the sureties who did not know of or consent thereto, or ratify it, are released,<sup>32</sup> notwithstanding the different sureties are charged with separate and limited liabilities,<sup>33</sup> although the instrument is still binding on the principal.<sup>34</sup> Such erasure, however, will not release a surety who had previously signed the instrument without reference to the signature by the surety whose name was erased<sup>35</sup> or who knows of, and consents to, the erasure;<sup>36</sup> nor will such an erasure release a surety who signs after the erasure with knowledge thereof.<sup>37</sup> It has also been held that the erasure of the name of a surety from a note does not release the other sureties from liability thereon as against an innocent payee,<sup>38</sup> since, in the absence of knowledge or notice to the contrary, the payee may presume that such erasure was made with the consent of the other sureties.<sup>39</sup>

*Erasure from power of attorney.* Where the sureties all sign a power of attorney, authorizing a public official to sign their names to a bond, but, before delivery to such official, one or more of their signatures are erased, all of the cosureties who did not know of, or consent to, such erasure are released.<sup>40</sup>

## § 83. Estoppel or Waiver as to Defects or Objections

- a. In general
- b. By silence or acquiescence
- c. By contracting as principal

21. Tex.—Stephenson v. Nelson, Com.App., 243 S.W. 1069. 50 C.J. p 69 note 44.

22. Ky.—Mullins v. Blaine Bank, 290 S.W. 682, 217 Ky. 822. 50 C.J. p 69 note 45.

23. Cal.—Union Oil Co. v. Mercantile Refining Co., 97 P. 919, 8 Cal. App. 768. 50 C.J. p 69 note 46.

24. Ky.—Blakey v. Johnson, 13 Bush 197, 26 Am.R. 254.

25. Cal.—People v. Kneeland, 31 Cal. 288.

Tex.—Security State Bank v. Dawson, Civ.App., 261 S.W. 821.

26. Mo.—State v. McGonigle, 13 S.W. 758, 101 Mo. 353, 20 Am.S.R. 609, 8 L.R.A. 735. 50 C.J. p 69 note 50.

27. N.Y.—French v. Graves, 64 N.Y. S. 74, 50 App.Div. 522. 50 C.J. p 70 note 51.

28. S.C.—State Agricultural, etc., Soc. v. Taylor, 88 S.E. 372, 104 S.C. 167. 50 C.J. p 70 note 52.

29. Miss.—State v. Allen, 10 So. 473, 69 Miss. 508, 30 Am.S.R. 563. 50 C.J. p 70 note 55.

30. Tex.—Connor v. Thornton, Civ. App., 51 S.W. 354.

31. Mo.—State v. Findley, 14 S.W. 111, 101 Mo. 368—State v. McGonigle, 13 S.W. 758, 101 Mo. 353, 20 Am.S.R. 609, 8 L.R.A. 735.

32. Iowa.—State v. Craig, 12 N.W. 301, 58 Iowa 238. 50 C.J. p 70 note 58.

33. Wash.—Fairhaven v. Cowgill, 36 P. 1093, 8 Wash. 686.

34. R.I.—Shepard Land Co. v. Bani-gan, 87 A. 531, 36 R.I. 1.

35. N.D.—Cass County v. American Exch. State Bank, 91 N.W. 59, 11 N.D. 238.

36. R.I.—Shepard Land Co. v. Bani-gan, 87 A. 531, 36 R.I. 1.

37. N.D.—Cass County v. American Exch. State Bank, 91 N.W. 59, 11 N.D. 238.

38. Minn.—Healy-Owen-Hartzell Co. v. Montevideo Farmers', etc., El. Co., 206 N.W. 646, 165 Minn. 330, 44 L.R.A. 1238. 50 C.J. p 70 note 64.

39. Tex.—Hess v. Schaffner, Civ. App., 139 S.W. 1024. 50 C.J. p 70 note 65.

40. Ky.—Bracken County Sinking Fund Comrs. v. Daum, 80 Ky. 388.

### a. In General

Although there are defects or objections affecting the validity or enforceability of the contract of suretyship, a surety may waive, or be estopped to assert, such defects or objections in avoidance of liability on the suretyship contract.

Although there are defects or objections affecting the validity or enforceability of the contract of suretyship, a surety may waive his right to take advantage of such objections or defects,<sup>41</sup> or he may, by his acts or conduct, be estopped to assert such defects or objections in avoidance of liability on the suretyship contract.<sup>42</sup> In accordance with the rule that a surety is estopped by the material recitals in his bond or obligation, a surety in a written undertaking may be estopped to assert a defect, irregularity, or objection in denial of any material recital in his obligation,<sup>43</sup> unless such recital was inserted under a mistake of fact,<sup>44</sup> particularly where the obligation has been acted on and has accomplished the purpose for which it was given.<sup>45</sup> A surety may be estopped to assert a different date from that recited in the bond or obligation,<sup>46</sup> that the bond or obligation was given without consideration,<sup>47</sup> that the proceedings in which it was given were irregular,<sup>48</sup> that the necessary preliminary steps were not taken,<sup>49</sup> or that it was intended that he should be under no liability.<sup>50</sup>

On the other hand, a surety may not be estopped by the recitals of the bond or obligation to question the legality of its execution,<sup>51</sup> or to deny that he

had executed the instrument,<sup>52</sup> even though he is otherwise estopped by statute to deny its validity.<sup>53</sup> Also, an equitable estoppel in favor of surety does not arise from a misstatement of facts as to his liability unless he is injured or prejudiced thereby.<sup>54</sup>

*Ignorance of legal effect.* If the surety has full knowledge of the facts at the time he executes the undertaking, he is estopped to assert that he did so under a misapprehension or in ignorance of the legal effect<sup>55</sup> or as to the legal effect of the undertaking.<sup>56</sup>

*Obtaining benefit or protecting self.* Where a surety treats the contract as valid for the purpose of obtaining a personal benefit for himself, he afterward may not be permitted to deny his liability to the creditor or obligee;<sup>57</sup> but he may not be estopped to deny his obligation simply because he has taken steps to protect himself in event of a failure of his defense.<sup>58</sup>

*Compliance with, and validity of, statute.* A surety who voluntarily signs a bond or obligation is estopped to set up, as a defense, that certain statutory provisions as to its execution were not complied with,<sup>59</sup> such as by his failure to justify;<sup>60</sup> nor may he question the validity of the statute under which the bond or obligation was given.<sup>61</sup>

*Official bond.* A surety on an official bond has been held to be estopped to deny that his principal is a particular officer, as recited in the bond,<sup>62</sup> or

41. Colo.—Howard v. Fisher, 283 P. 1042, 86 Colo. 493.

50 C.J. p 66 note 86.

Waiver or estoppel as to:

Condition to signature see supra § 52.

Duress in execution see supra § 72.

Forgery of surety's signature see supra § 73.

Matters relating to discharge of surety see infra § 160.

Validity of instrument with blanks filled see supra § 62.

42. Mo.—Burge v. Duden, 78 S.W. 653, 105 Mo.App. 8.

50 C.J. p 66 note 88.

Assignee for benefit of creditors estopped

Colo.—In re Stockham, 11 P.2d 945, 91 Colo. 64.

43. Kan.—Allen v. Hopkins, 61 P. 750, 62 Kan. 175.

50 C.J. p 66 note 90.

44. Conn.—McNerney v. Downs, 101 A. 494, 92 Conn. 139.

50 C.J. p 66 note 91.

45. Mont.—Clark v. National Surety Co., 261 P. 618, 81 Mont. 113.

50 C.J. p 66 note 92.

46. Minn.—Red Wing Sewer Pipe

Co. v. Donnelly, 113 N.W. 1, 102 Minn. 192, 120 Am.S.R. 619.

50 C.J. p 66 note 93.

47. Conn.—McNerney v. Downs, 101 A. 494, 92 Conn. 139.

50 C.J. p 67 note 94.

48. Conn.—McNerney v. Downs, supra.

50 C.J. p 67 note 95.

49. Conn.—McNerney v. Downs, supra.

N.J.—Hauser v. Ryan, 63 A. 4, 73 N. J.Law 274.

50. Va.—Chapman v. Persinger, 13 S.E. 549, 87 Va. 581.

50 C.J. p 67 note 97.

51. Conn.—McNerney v. Downs, 101 A. 494, 92 Conn. 139.

50 C.J. p 67 note 98.

52. Tenn.—Byrd v. Shelley, 2 Tenn. Cas. 33.

53. Tenn.—Byrd v. Shelley, supra.

54. Ill.—Chicago, etc., R. Co. v. Slick, 220 Ill.App. 61.

55. N.D.—Cass County v. American Exch. State Bank, 91 N.W. 59, 11 N.D. 238.

50 C.J. p 67 note 2.

56. Neb.—Stoner v. Keith County, 67 N.W. 311, 48 Neb. 279.

50 C.J. p 67 note 3.

57. Mich.—Grosse Ile Tp. v. New York Indemnity Co., 245 N.W. 791, 260 Mich. 643, 86 A.L.R. 776.

N.Y.—McClare v. Massachusetts Bonding & Insurance Co., 195 N.E. 15, 266 N.Y. 371, motion denied 195 N.E. 129, 266 N.Y. 408.

50 C.J. p 68 note 33.

58. Wash.—De Mattos v. Jordan, 55 P. 118, 20 Wash. 315.

50 C.J. p 69 note 39.

59. N.J.—Emanuel v. McNeil, 94 A. 616, 87 N.J.Law 499.

50 C.J. p 67 note 5.

60. Gal.—Carpenter v. Furrey, 61 P. 369, 128 Cal. 665.

50 C.J. p 67 note 6.

61. Idaho.—Pocatello v. Fargo, 242 P. 297, 41 Idaho 432.

50 C.J. p 67 note 7.

62. Neb.—U. S. Fidelity, etc., Co. v. McLaughlin, 107 N.W. 577, 109 N. W. 390, 76 Neb. 307.

50 C.J. p 67 note 9.

Liabilities on official bonds generally see Officers §§ 155-177.



that the bond is an official bond;<sup>63</sup> and he may not be permitted to dispute the official's appointment or election, as being irregular or illegal,<sup>64</sup> that he was ineligible,<sup>65</sup> that he never took the oath of office,<sup>66</sup> that his bond was not approved by the proper authority,<sup>67</sup> or that his appointment was annulled.<sup>68</sup>

### b. By Silence or Acquiescence

Where a surety, with knowledge of the facts, remains silent while the contract is being acted on by the principal and obligee, he may be estopped afterward to set up various defenses relating to the validity and enforceability of the contract.

Where a surety, with knowledge of the facts, fails to object at the proper time and remains silent while the contract is being acted on by the principal and obligee, he may be estopped afterward to set up the defense of failure of consideration,<sup>69</sup> uncertainty of contract,<sup>70</sup> that he did not execute the contract,<sup>71</sup> or fraud.<sup>72</sup> Thus, where a surety acquires knowledge or notice of the fraud by which he was induced to execute the obligation,<sup>73</sup> he may be estopped to set up such fraud as a defense, where he fails, within a reasonable time after such knowledge is acquired, to avail himself thereof as a ground for avoiding liability;<sup>74</sup> and where he thereafter gives a collateral note it operates as a waiver of the fraud,<sup>75</sup> but this does not bind him to a new contract not within the terms of the first agreement.<sup>76</sup>

*As to validity of principal obligation.* Where the surety's undertaking recognizes the existence and binding effect of the principal contract or obliga-

tion, a surety who, without objection, obligates himself to secure performance of such contract or obligation is estopped to assert its invalidity,<sup>77</sup> or to deny that it was entered into<sup>78</sup> or became operative;<sup>79</sup> and, where faith and credit have been given to the surety's obligation, he may not invoke immaterial variances and departures from the principal contract,<sup>80</sup> particularly where he has expressly waived the mistake in the contract and corrected it in the bond.<sup>81</sup>

### c. By Contracting as Principal

Where one who in fact is a surety by express terms obligates himself as a principal, he thus waives the rights accruing to him as a surety.

Where one who in fact is a surety by express terms obligates himself as a principal, he thus waives the rights accruing to him as a surety,<sup>82</sup> and ordinarily is estopped to set up a defense that he signed merely as surety.<sup>83</sup> Thus, where he contracts in terms as "principal," he is estopped to assert that he is merely a surety, and he may be held as a principal,<sup>84</sup> unless he has added the word "surety" to his signature.<sup>85</sup> However, a waiver of the rights of sureties may not be effected by several persons merely signing a bond or obligation by which they agree to become jointly and severally bound without designating which are principals and which are sureties;<sup>86</sup> and if they are described in the contract as sureties it must appear from other parts thereof that they agreed to be bound as principals before it may be said that they waived any of their rights as sureties.<sup>87</sup>

63. Neb.—U. S. Fidelity, etc., Co. v. McLaughlin, 107 N.W. 577, 109 N.W. 390, 76 Neb. 307.

Wis.—Vincent v. Starks, 45 Wis. 458.

64. U.S.—U. S. v. Morse, App.D.C., 31 S.Ct. 37, 218 U.S. 493, 54 L.Ed. 1123, 21 Ann.Cas. 782.  
50 C.J. p 67 note 11.

65. N.Y.—People v. McCumber, 27 Barb. 632, affirmed 18 N.Y. 315, 72 Am.D. 515.

66. Vt.—Lyndon v. Miller, 36 Vt. 329.

67. Neb.—U. S. Fidelity, etc., Co. v. McLaughlin, 107 N.W. 577, 109 N.W. 390, 76 Neb. 307.

68. La.—Macready v. Schenck, 6 So. 517, 41 La. Ann. 456.

69. Ky.—Hunter v. Liberty Nat. Bank & Trust Co., 126 S.W.2d 807, 277 Ky. 538.  
50 C.J. p 67 note 16.

70. Ga.—J. R. Watkins Co. v. Harrison, 120 S.E. 434, 31 Ga.App. 270.  
50 C.J. p 68 note 17.

71. Ga.—J. R. Watkins Co. v. Rivers, 140 S.E. 770, 37 Ga.App. 559.

72. Mo.—Ward v. National Surety Co., 152 S.W. 397, 167 Mo.App. 579.  
50 C.J. p 68 note 20.

73. S.D.—Guaranty State Bank v. Potter, 208 N.W. 170, 49 S.D. 619.  
50 C.J. p 68 note 21.

74. Iowa.—Barnes v. Century Sav. Bank, 144 N.W. 367, 165 Iowa 141.  
50 C.J. p 68 note 23.

75. S.D.—Guaranty State Bank v. Potter, 208 N.W. 170, 49 S.D. 619.

76. S.D.—Guaranty State Bank v. Potter, supra.

77. U.S.—National Surety Corporation v. Peoples Milling Co., D.C. Ky., 57 F.Supp. 281.  
50 C.J. p 68 note 27.

78. Utah.—Gottsegan Cigar Co. v. Levy, 130 P. 780, 42 Utah 366, Ann. Cas.1916A 1189.  
50 C.J. p 68 note 28.

79. Md.—McIver Constr. Co. v. Hurwitz, 125 A. 153, 144 Md. 451.  
50 C.J. p 68 note 29.

80. Idaho.—Pocatello v. Fargo, 242 P. 297, 41 Idaho 432.

81. Ill.—Weiss v. U. S. Fidelity, etc., Co., 132 N.E. 749, 300 Ill. 11.  
50 C.J. p 68 note 31.

82. Ill.—Chandler v. Chandler, 63 N.E.2d 272, 326 Ill.App. 670.  
Me.—Matthews v. Matthews, 148 A. 796, 128 Me. 495.  
50 C.J. p 68 note 33.  
Changing relationship from surety to principal generally see supra § 44.

83. Vt.—Lamoille County Nat. Bank v. Hunt, 47 A. 1078, 72 Vt. 357.  
50 C.J. p 68 note 34.

84. Vt.—Claremont Bank v. Wood, 10 Vt. 582.  
50 C.J. p 68 note 36.

85. Vt.—Peoples Bank v. Pearsons, 30 Vt. 711.

86. Mo.—Reissaus v. White, 106 S.W. 603, 128 Mo.App. 135.

87. Mo.—Beers v. Wolf, 22 S.W. 620, 116 Mo. 179.

## § 84. Ratification

The ratification of a contract of suretyship after duress has been removed is discussed *supra* § 72.

Examine Pocket Parts for later cases.

## § 85. Effect of Invalidity

The effect of invalidity of a contract of suretyship is discussed in connection with the essential requisites of such a contract considered *supra* §§ 26-83.

Examine Pocket Parts for later cases.

## § 86. Cancellation for Invalidity

A complaint for the cancellation of a suretyship contract must be sufficient to warrant the relief sought.

A complaint for the cancellation of a contract of suretyship must be sufficient to warrant the relief sought,<sup>88</sup> and this rule has been applied to a complaint based on the invalidity of the principal contract.<sup>89</sup>

## IV. NATURE OF LIABILITY OF SURETY

## § 87. In General

The surety's obligation is primary, original, and direct, and is generally the same as that of the principal.

The surety's obligation is primary,<sup>90</sup> original,<sup>91</sup> and direct.<sup>92</sup> It has been said to be contractual,<sup>93</sup> and legal, as distinguished from moral.<sup>94</sup> The liability of a surety<sup>95</sup> or of a supplemental surety<sup>96</sup>

to the creditor or obligee is absolute or generally the same as that of the principal, even though the relationship be known to the creditor.<sup>97</sup> The contract of the surety, being to pay or perform if the principal does not, is executory until the surety has actually paid or performed.<sup>98</sup>

*Bills and notes.* In general the surety's liability

88. Tex.—*W. T. Rawleigh Co. v. Cook*, Civ.App., 107 S.W.2d 625, error dismissed.

Right of surety to have contract canceled for fraud see *supra* § 75 a.

89. Tex.—*W. T. Rawleigh Co. v. Cook*, *supra*.

**As against general demurrer**

(1) Complaint for cancellation of contract of suretyship on ground that principal contract violated certain anti-trust laws, alleging voluntary execution of principal contract and that efforts of parties to comply therewith violated anti-trust laws, sufficiently alleged intent of parties to violate anti-trust laws as against a general demurrer.—*W. T. Rawleigh Co. v. Cook*, *supra*.

(2) Such complaint was not subject to general demurrer on ground that such anti-trust statutes were repugnant to organic law of land where the validity of the statutes had been frequently upheld.—*W. T. Rawleigh Co. v. Cook*, *supra*.

90. Del.—*W. T. Rawleigh Co. v. Warrington*, 199 A. 666, 9 W.W.Harr. 366.

Fla.—*Scott v. National City Bank of Tampa*, 139 So. 367, 107 Fla. 810.

Ga.—*Arkansas Fuel Oil Co. v. Young*, 16 S.E.2d 909, 66 Ga.App. 33.

Iowa.—*Corpus Juris* quoted in *Benson v. Alleman*, 263 N.W. 305, 306, 220 Iowa 731.

N.C.—*Corpus Juris* cited in *Tar Heel Bond Co. v. Krider*, 11 S.E.2d 291, 293, 218 N.C. 361.

Tex.—*Corpus Juris* cited in *Turner*

*v. Montgomery*, Civ.App., 67 S.W.2d 637, 639.

50 C.J. p 70 note 68.

In suit primarily on an open account for merchandise sold to debtor, obligation of sureties was only secondary and that of the debtor was primary.—*J. R. Watkins Co. v. Calhoun*, La.App., 44 So.2d 726.

91. Iowa.—*Corpus Juris* quoted in *Benson v. Alleman*, 263 N.W. 305, 306, 220 Iowa 731.

N.C.—*Corpus Juris* cited in *Tar Heel Bond Co. v. Krider*, 11 S.E.2d 291, 293, 218 N.C. 361.

Pa.—*Pittsburg Const. Co. v. West Side Belt R. Co.*, 75 A. 1029, 227 Pa. 90.

50 C.J. p 70 note 69.

92. U.S.—*Peterson v. Miller Rubber Co.*, C.C.A.Minn., 24 F.2d 59.

Del.—*W. T. Rawleigh Co. v. Warrington*, 199 A. 666, 9 W.W.Harr. 366.

Ga.—*Arkansas Fuel Oil Co. v. Young*, 16 S.E.2d 909, 66 Ga.App. 33.

Iowa.—*Corpus Juris* quoted in *Benson v. Alleman*, 263 N.W. 305, 306, 220 Iowa 731.

N.C.—*Corpus Juris* cited in *Tar Heel Bond Co. v. Krider*, 11 S.E.2d 291, 293, 218 N.C. 361.

Pa.—In re *Brock*, 166 A. 778, 312 Pa. 7—*Pittsburg Const. Co. v. West Side Belt R. Co.*, 75 A. 1029, 227 Pa. 90.

93. Md.—*Hartford Acc. etc., Co. v. W. & J. Knox Net, etc., Co.*, 132 A. 261, 150 Md. 40.

50 C.J. p 71 note 71.

94. Ky.—*Emmons v. Overton*, 18 B. Mon. 643.

95. U.S.—*Smith Engineering Co. v. Rice*, C.C.A.Mont., 102 F.2d 492, certiorari denied *Rice v. Smith Engineering Co.*, 59 S.Ct. 1034, two cases, 307 U.S. 637, 83 L.Ed. 1519, rehearing denied 60 S.Ct. 68, two cases, 308 U.S. 632, 84 L.Ed. 527—*Pinckney v. Wylie*, C.C.A. Tex., 86 F.2d 541.

Ala.—*Alabama Bank & Trust Co. v. Garner*, 142 So. 568, 225 Ala. 269.

Cal.—*Austin v. American Surety Co. of New York*, 4 P.2d 577, 118 Cal. App. 68.

Del.—*W. T. Rawleigh Co. v. Warrington*, 199 A. 666, 9 W.W.Harr. 366.

Ga.—*Arkansas Fuel Oil Co. v. Young*, 16 S.E.2d 909, 66 Ga.App. 33.

N.C.—*Rouse v. Wooten*, 53 S.E. 430, 140 N.C. 557, 111 Am.S.R. 875, 6 Ann.Cas. 280.

Pa.—*Pittsburg Const. Co. v. West Side Belt R. Co.*, 75 A. 1029, 227 Pa. 90.

50 C.J. p 71 note 73.

**Insurer**

Surety is insurer of debt or obligation.

Fla.—*Scott v. National City Bank of Tampa*, 139 So. 367, 107 Fla. 810.

N.D.—*Northern State Bank of Grand Forks v. Bellamy*, 125 N.W. 888, 19 N.D. 509.

96. Conn.—*Monson v. Drakeley*, 40 Conn. 552, 16 Am.R. 74.

97. Cal.—*California Nat. Bank v. Ginty*, 41 P. 38, 108 Cal. 148.

50 C.J. p 71 note 76.

98. Ga.—*Savannah Ice Co. v. Canal-Louisiana Bank, etc., Co.*, 79 S.E. 45, 12 Ga.App. 818.

as a party to the paper corresponds to that of his principal toward holders of the paper;<sup>99</sup> and the fact that a signer is a surety does not diminish his liability to the holder of the instrument.<sup>1</sup> Thus a surety for the drawer is liable as drawer,<sup>2</sup> and a surety for the maker is liable as maker.<sup>3</sup> As far as the holder of the bill or note is concerned, the liability of a surety is a "primary" liability as distinguished from a "secondary" liability, and this is so within the meaning of those terms as used in the Negotiable Instruments Law.<sup>4</sup> Accommodation parties are liable in the capacity assumed by them.<sup>5</sup> As between the principal debtor and the surety on a note, the obligation of surety is collateral to that of the principal debtor, and his liability is secondary.<sup>6</sup> Where there are several sureties on a note, they are equally bound to pay a judgment thereon.<sup>7</sup> The surety is not, however, a fiduciary to the payee,<sup>8</sup> and is not liable to the party accommodated.<sup>9</sup> Where the makers sign a note as collateral for another's obligation to collect the original notes, their liabilities are controlled by the law of suretyship and not the Negotiable Instruments Law.<sup>10</sup> Where a surety on a note knows that another was to sign it, he is liable, although without actual knowledge that such other had signed.<sup>11</sup>

## § 88. Parties Liable in General

Parties who may be liable on the contract include

99. U.S.—*Corpus Juris* quoted in *Hardesty v. Young*, D.C.Minn., 34 F.2d 310, 311.

N.C.—*Taft v. Covington*, 153 S.E. 597, 199 N.C. 51—*Roberson-Ruffin Co. v. Spain*, 91 S.E. 361, 173 N.C. 23.

Pa.—*Bloomfield Trust Co. v. Trojanowski*, 147 A. 847, 298 Pa. 61. 8 C.J. p 73 note 76.

Words in note by which parties guaranteed its payment did not affect parties' liability as principal and sureties or make sureties guarantors.—*Furr v. Trull*, 171 S.E. 641, 205 N.C. 417.

1. U.S.—*Corpus Juris* quoted in *Hardesty v. Young*, D.C.Minn., 34 F.2d 310, 311. 8 C.J. p 73 note 77.

2. U.S.—*Corpus Juris* quoted in *Hardesty v. Young*, D.C.Minn., 34 F.2d 310, 311. N.Y.—*Suydam v. Westfall*, 2 Den. 205.

3. U.S.—*Corpus Juris* quoted in *Hardesty v. Young*, D.C.Minn., 34 F.2d 310, 311.

Cal.—*Southern California Nat. Bank v. Wyatt*, 25 P. 918, 87 Cal. 616.

4. Colo.—*Winton v. Sullivan*, 91 P. 2d 996, 104 Colo. 450.

Ky.—*Fritts v. Kirchdorfer*, 124 S.W. 882, 136 Ky. 643. 8 C.J. p 74 note 90.

5. Iowa.—*Benson v. Alleman*, 263 N.W. 305, 220 Iowa 781. 50 C.J. p 71 note 77.

6. Pa.—*First Nat. Bank v. Kendrick*, 160 A. 227, 105 Pa.Super. 142.

7. U.S.—*Apple v. Owens*, C.C.A. Tex., 48 F.2d 807.

8. Wash.—*Opie v. Pacific Inv. Co.*, 67 P. 231, 26 Wash. 505, 56 L.R.A. 778.

9. Neb.—*Mills v. Mills*, 252 N.W. 471, 126 Neb. 74.

10. Mont.—*First Nat. Bank v. Holding*, 4 P.2d 709, 90 Mont. 529.

11. Ill.—*Bowers v. Hefebower*, 243 Ill.App. 129.

12. N.Y.—*Rochester Sav. Bank v. Stoeltzen & Tapper*, 26 N.Y.S.2d 718, 176 Misc. 140. 50 C.J. p 71 note 80.

13. U.S.—*Pavlanos v. Garoufalas*, C.C.A.N.M., 89 F.2d 203.

Ala.—*Alabama Bank & Trust Co. v. Garner*, 142 So. 568, 225 Ala. 269.

sureties, whose liability is discussed infra §§ 90-244, 249-285; the principal, whose liabilities to the creditor are considered infra §§ 245-248, and whose liabilities to the surety infra §§ 300-338; the creditor, whose liabilities to the surety are discussed infra §§ 286-299; third persons, whose liabilities to the surety are considered infra §§ 339-342; and cosureties, whose liabilities are discussed infra §§ 343-385.

Examine Pocket Parts for later cases.

## § 89. Joint, Several, and Joint and Several Liability

The principal and sureties may be bound jointly or jointly and severally.

The principal and sureties may be bound jointly<sup>12</sup> or jointly and severally.<sup>13</sup> If sureties have bound themselves for specific sums, each is liable individually until that amount is exhausted.<sup>14</sup> A joint and several liability is indicated where the language of the instrument is singular.<sup>15</sup> Each signer is liable for the entire indebtedness<sup>16</sup> where the liability is joint and several,<sup>17</sup> and an agreement by the creditor not to exact more than a proportionate share from each is not binding.<sup>18</sup>

Ga.—*J. R. Watkins Co. v. Brewer*, 36 S.E.2d 442, 73 Ga.App. 331.

La.—*Elmer Candy Co. v. Baumann*, App., 150 So. 427—*McCoy v. Marsh*, 6 La.App. 606. 50 C.J. p 71 note 81.

### Bills and notes

(1) Principal and surety on note are jointly and severally liable.—*Griffin v. H. C. Whitmer Co.*, 194 S.E. 895, 57 Ga.App. 203.

(2) Surety on note was jointly and severally liable for payment thereof, notwithstanding signature was made on back of note.—*Martin v. Coogan*, 55 P.2d 1037, 176 Okl. 385.

14. La.—*Dougherty v. Peters*, 2 Rob. 537.

15. Ind.—*McCormick v. Mitchell*, 57 Ind. 248. 50 C.J. p 71 note 83.

16. N.Y.—*Morgan v. Smith*, 70 N.Y. 537.

17. Mo.—*Schneider v. Maney*, 145 S.W. 823, 242 Mo. 36. 50 C.J. p 71 note 85.

18. Iowa.—*Small v. Older*, 10 N.W. 734, 57 Iowa 326.

## V. SCOPE AND EXTENT OF LIABILITY OF SURETY AS TO CREDITOR OR OBLIGEE

## A. IN GENERAL

## § 90. In General

Where a person agrees to exonerate another from a basic obligation, he may become merely a surety in respect thereof. Where the surety on a building and construction contract assumes performance of it on the builder's default, he becomes subject to the liabilities of the builder on the contract.

Where a person agrees to exonerate another from a basic obligation, he may become merely a surety in respect thereof.<sup>19</sup> If the surety of a treasurer of a beneficial or fraternal society joins in an additional bond because the amount in the treasurer's hands exceeds the amount allowed to remain there by the by-laws, he cannot defeat his liability because the by-laws require the treasurer to have in his possession a sum not exceeding a certain amount, and a bond for that amount has been given.<sup>20</sup>

*Building and construction contracts.* Where the surety on a building and construction contract assumes performance of it on the builder's default, he becomes subject to the liabilities of the builder

on the contract<sup>21</sup> without reference to the amount he signed for as surety,<sup>22</sup> and may thereby become liable for any indebtedness created prior to such undertaking.<sup>23</sup> In so doing, it is the surety's duty to complete the work as reasonably as possible, and without profit to himself.<sup>24</sup> Where the surety completes the contract and the owner suffers no loss thereby, there is no further liability to the owner by the surety.<sup>25</sup> Where the surety authorizes another to complete the contract, he will be liable for the work done thereafter,<sup>26</sup> but it must be shown that such party acted as the agent of the surety.<sup>27</sup>

## § 91. Limitation by Terms of Contract in General

The liability of a surety is measured by the terms of his contract, and, while he is liable to the full extent thereof, such liability is strictly limited to that assumed by its terms.

The liability of a surety is measured by his contract,<sup>28</sup> and, whether he is a gratuitous or com-

19. N.Y.—In re Wickings' Estate, 294 N.Y.S. 598, 162 Misc. 357.

**Liability for rent**

Although member of family which occupied house agreed to assume liability for rent, such member will be only a surety, and head of family will remain primarily liable for rent unless landlord expressly agrees to look only to the other member for payment.—In re Wickings' Estate, *supra*.

20. Pa.—Vesper Court No. 69 F. A. v. Fries, 22 Pa.Super. 250.

21. U.S.—Corpus Juris cited in Federal Surety Co. v. Lalonde, C. C.A.Mont., 31 F.2d 673, 675.

Colo.—Howard v. Fisher, 283 P.1042, 86 Colo. 493.

La.—Klein v. Collins, 106 So. 120, 159 La. 704.

S.C.—National Loan & Exchange Bank of Greenwood v. Gustafson, 154 S.E. 167, 157 S.C. 221.

Tex.—Southern Surety Co. v. Weaver Bros., Com.App., 56 S.W.2d 634—W. H. Putegnat Co. v. Fidelity & Deposit Co. of Maryland, Com. App., 29 S.W.2d 1004.

9 C.J. p 857 note 92.

Amount recoverable by owner or contractor on completion of contract or subcontract see *infra* § 112.

Rights and remedies of surety after completion of contract by surety see *infra* § 286.

Duty to complete contract  
N.C.—Crouse v. Stanley, 154 S.E. 40, 199 N.C. 186.

**Assignee of contractor**

Surety completing state improvement contract on default of contractor is not liable to, nor does he take subject to claims of, contractor's assignee for amounts due on contract.—Laski v. State, 217 N. Y.S. 48, 217 App.Div. 420.

The only possible effect of a tender to complete the contract after expiration of the time to complete the contract would be in mitigation of damages.—Zipkin v. Investors Syndicate, 152 F.2d 678, 80 U.S.App.D.C. 302.

**No estoppel to assert defenses**

Sureties on a building contractor's bond are not estopped to deny liability where the contractor abandoned the work because they appropriated material he left, selling it and appropriating the proceeds, or because they requested the owner not to sue on the bond until they could see "what could be done about getting things in shape to go on with the building," or because they acquired property of the contractor's wife, under an agreement to apply it to the completion of the work, even though the sureties' acts may have been tortious toward the contractor.—School Dist. of Village of Barfield v. Green, 114 S.W. 578, 134 Mo.App. 421.

22. La.—Klein v. Collins, 106 So. 120, 159 La. 704.

Payments made by surety on contractor's bond in completing work in accordance with contract did not affect liability created by bond.—U. S. Fidelity & Guaranty Co. v. Zidell-Steinberg Co., 50 P.2d 584, 151 Or. 538, modified on other grounds 51 P. 2d 687, 151 Or. 538.

23. La.—Klein v. Collins, 106 So. 120, 159 La. 704.

24. U.S.—U. S. Fidelity & Guaranty Co. v. Worthington & Co., C.C.A. Ala., 6 F.2d 502, certiorari denied 46 S.Ct. 119, 269 U.S. 583, 70 L.Ed. 424.

25. Tex.—W. H. Putegnat Co. v. Fidelity & Deposit Co. of Maryland, Com.App., 29 S.W.2d 1004.

26. Ky.—Title Guaranty & Surety Co. v. Hay, 194 S.W. 922, 175 Ky. 671.

**Completion held not authorized**

Correspondence between contractor's surety and indemnitors was held not to authorize the indemnitors to complete the work for the surety.—Title Guaranty & Surety Co. v. Hay, 176 S.W. 957, 165 Ky. 76.

27. S.C.—Crum v. Jenkins, 143 S.E. 21, 145 S.C. 177.

28. Ark.—American Bonding Co. v. Board of Improvement of Street Improvement Dist. No. 82 of Hot Springs, 59 S.W.2d 605, 187 Ark. 300.

pensated surety, while he is liable to the full extent | assumed by its terms,<sup>30</sup> or, as the rule is otherwise thereof,<sup>29</sup> such liability is strictly limited to that

Ky.—Standard Oil Co. of New Jersey v. National Surety Co., 29 S.W.2d 29, 234 Ky. 764.

Md.—Lange v. Board of Education of Cecil County, to Use and Benefit of International Business Machines Corporation, 37 A.2d 317, 183 Md. 255—Hospital for Women of Maryland, for Use of Robert S. Green, Inc. v. U. S. Fidelity & Guaranty Co., 11 A.2d 457, 177 Md. 615, 128 A.L.R. 931.

Mo.—Corpus Juris quoted in State v. National Surety Co., 82 S.W.2d 616, 619, 233 Mo.App. 77.

Neb.—W. T. Rawleigh Co. v. Smith, 9 N.W.2d 286, 142 Neb. 527.

N.J.—Corpus Juris quoted in Boorstein v. Miller, 3 A.2d 87, 91, 124 N.J.Eq. 526.

N.Y.—Central Hanover Bank & Trust Co. v. National Surety Corporation, 296 N.Y.S. 276, 163 Misc. 651, affirmed 295 N.Y.S. 756, 250 App.Div. 752, affirmed 10 N.E.2d 560, 274 N.Y. 579.

Okl.—Corpus Juris cited in Allen v. Hartford Accident & Indemnity Co., 123 P.2d 252, 253, 190 Okl. 313.

Or.—Hall v. Cutler Bindery Co., 26 P.2d 1109, 145 Or. 565.

Pa.—Double Dollar Building & Loan Ass'n v. Kushin, 159 A. 39, 306 Pa. 121—New Holland Dairies v. Regent Dairy Products Corporation, 174 A. 664, 115 Pa.Super. 87—Fleck Brothers Co. v. Pietretti, 14 Pa.Dist. & Co. 771—Hause v. Smith, Com.Pl., 56 Dauph.Co. 392—Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Barton, Com.Pl., 59 Montg.Co. 219.

S.C.—McKenzie v. Standard Accident Ins. Co., 1 S.E.2d 502, 189 S.C. 475.

Tex.—American Surety Co. of New York v. Axtell Co., 36 S.W.2d 715, 120 Tex. 166, answers conformed to, Civ.App., 38 S.W.2d 1110—Corpus Juris quoted in Draper v. Robinson, Civ.App., 106 S.W.2d 825, 829, modified on other grounds Robinson v. Draper, 127 S.W.2d 181, 133 Tex. 280.

Vt.—Vermont People's Nat. Bank v. Robbins' Estate, 166 A. 6, 105 Vt. 283.

Wash.—Lockit Cap Co. v. Globe Mfg. Co., 290 P. 813, 158 Wash. 183.

W.Va.—Lawhead v. Doddridge County Bank, 194 S.E. 79, 119 W.Va. 467.

Wis.—Gumz v. U. S. Fidelity & Guaranty Co., 245 N.W. 82, 209 Wis. 408.

50 C.J. p 72 note 90.

#### Similar statements of rule

(1) A surety's liability is always measured by the express terms of

his covenant, the obligations of his principal as defined by the state statutes, and the conditions of the bond.—Tucker v. Brown, 150 P.2d 604, 20 Wash.2d 740.

(2) Liability of bondsman is measured by his covenant, condition, and statutes relating to bond and to duties of principal.—Swanberg v. National Surety Co., 283 P. 761, 86 Mont. 340.

Invalid supplemental contract between parties did not change liability of surety on original contract.—American Fruit Growers v. Hawkinson, 106 S.W.2d 564, 21 Tenn.App. 127.

#### Statutory bond

(1) Scope of surety's obligation under statutory bond is prescribed by statute in compliance with which bond is given and by language employed in bond defining obligation.—Home Indemnity Co. v. State of Missouri, C.C.A.Mo., 78 F.2d 391.

(2) Scope of surety's undertaking is measured by bond and statutes applicable when it is executed, and there can be no expansion of scope of undertaking by subsequent statutory changes.—Hochevar v. Maryland Casualty Co., C.C.A.Ohio, 114 F.2d 948.

#### Consideration

The liability of a surety is not affected by the fact that the consideration for the contract may take one of several forms, or that it may or may not be recited in the instrument.—J. R. Watkins Co. v. Beyer, 233 N.W. 442, 203 Wis. 397, 71 A.L.R. 1268.

#### Waiver by creditor

(1) With respect to liability of surety, owner may waive contract requiring changes to be authorized in writing.—Massachusetts Bonding & Insurance Co. v. Lentz, 9 P.2d 408, 40 Ariz. 46.

(2) Oblige of bond for completion of building was entitled to rely on provision that only written waiver or release of any default or omission of principal should be binding.—Prudence Co. v. Fidelity & Deposit Co. of Maryland, C.C.A.N.Y., 77 F.2d 834, modified on other grounds 56 S.Ct. 387, 297 U.S. 198, 80 L.Ed. 581, motion denied 56 S.Ct. 679, amended 56 S.Ct. 935, 298 U.S. 642, 80 L.Ed. 1374.

(3) Provision in bond for completion of building that only written waiver or release of any default or omission of principal should be binding on obligee could be waived by parol agreement of officer having authority to bind obligee.—Prudence Co. v. Fidelity & Deposit Co. of Maryland, supra.

29. Mo.—Corpus Juris quoted in State v. National Surety Co., 82 S.W.2d 616, 619, 233 Mo.App. 77.

Tex.—Corpus Juris quoted in Draper v. Robinson, Civ.App., 106 S.W.2d 825, 829, modified on other grounds Robinson v. Draper, 127 S.W.2d 181, 133 Tex. 280.

50 C.J. p 72 note 92.

#### Statutory bond

(1) Where bond is by its terms more comprehensive than required by statute, surety is liable to full extent of bond.—Zelev. Industrial Commission of Utah, 128 P.2d 751, 102 Utah 164.

(2) On the other hand, surety's liability under statutory bond has been held to be measured by statute requiring bond, and additions to bond not required by statute are void and may be treated as surplusage.—State ex rel. Dyer v. Francis, 54 P.2d 297, 152 Or. 448.

#### Surety on lease

Surety bond conditioned on lessee's taking possession and establishing regular business as provided in lease covered not only failure to take possession, but also failure to pay rent, taxes and insurance.—American Surety Co. of New York v. Hutchinson, C.C.A.Tex., 63 F.2d 536.

30. U.S.—U. S. Fidelity & Guaranty Co. v. City of Cleveland, C.C.A. Ohio, 88 F.2d 915—Massachusetts Bonding & Insurance Co. v. U. S., C.C.A.Wis., 54 F.2d 1039.

Ark.—New Amsterdam Casualty Co. v. Detroit Fidelity & Surety Co., 58 S.W.2d 418, 187 Ark. 97.

Cal.—Brock v. Fidelity & Deposit Co. of Maryland, 75 P.2d 605, 10 Cal.2d 512—Sparks v. Buckner, 57 P.2d 1395, 14 Cal.App.2d 213—Goatman v. Pacific Ready-Cut Homes, 297 P. 68, 112 Cal.App. 397.

Ind.—Sparta State Bank v. Myers, 177 N.E. 258, 202 Ind. 553—Ohio Oil Co. v. Fidelity & Deposit Co. of Maryland, 42 N.E.2d 406, 112 Ind.App. 452—Peters v. Bechdolt, 192 N.E. 116, 100 Ind.App. 395.

Kan.—Stull v. Allen, 193 P.2d 207, 165 Kan. 202.

Md.—Art Plate Glass & Mirror Corp. v. Fidelity Const. Corp., 69 A.2d 808—Mayor and Council of City of Baltimore, for Use of Lehigh Structural Steel Co., v. Maryland Casualty Co., 190 A. 250, 171 Md. 667, 111 A.L.R. 305.

Mass.—Eastern Tire Co. v. Witter, 183 N.E. 894, 281 Mass. 523.

Miss.—National Union Fire Ins. Co. v. Currie, 178 So. 104, 180 Miss. 711.

Mo.—City of St. Louis v. Maryland Casualty Co., App., 122 S.W.2d 20

—Corpus Juris quoted in State v.

stated, a surety is not held beyond the terms,<sup>31</sup> or the strict,<sup>32</sup> or the precise,<sup>33</sup> or the clear,<sup>34</sup> or the express<sup>35</sup> terms of his contract; and the sure-

ty has the right to stand on the strict,<sup>36</sup> or precise,<sup>37</sup> or the very<sup>38</sup> terms of his contract, and

National Surety Co., 82 S.W.2d 616, 619, 233 Mo.App. 77—City of St. Joseph ex rel. Consolidated Stone Co. v. Pfeiffer Stone Co., 26 S.W.2d 1018, 224 Mo.App. 895.  
Neh.—W. T. Rawleigh Co. v. Smith, 9 N.W.2d 286, 142 Neb. 527.  
N.H.—Lavigne v. Lavigne, 176 A. 282, 87 N.H. 223.  
N.J.—**Corpus Juris** quoted in Boorstein v. Miller, 3 A.2d 87, 91, 124 N.J.Eq. 526.  
Ohio.—State ex rel. Herbert v. Inland Bonding Co., App., 46 N.E.2d 623, reversed on other grounds 51 N.E.2d 710, 142 Ohio St. 189.  
Okl.—Whale v. Rice, 49 P.2d 737, 173 Okl. 530—Upsher v. Hooker, 300 P. 799, 150 Okl. 76.  
Pa.—Mechanics' Trust Co. v. Fidelity & Casualty Co. of New York, 156 A. 146, 304 Pa. 526—Allen Fuel Co. v. Rice Coal Co., Com.Pl., 43 Lack.Jur. 231.  
S.C.—Yongue v. National Surety Corporation, 3 S.E.2d 198, 190 S.C. 421—McKenzie v. Standard Accident Ins. Co., 1 S.E.2d 502, 189 S.C. 475—National Loan & Exchange Bank of Greenwood v. Gustafson, 154 S.E. 167, 157 S.C. 221.  
Tenn.—State ex rel. McCormack v. National Bond & Mortgage Co., 168 S.W.2d 488, 26 Tenn.App. 125.  
Tex.—**Corpus Juris** quoted in Draper v. Robinson, Civ.App., 106 S.W.2d 825, 829, modified on other grounds Robinson v. Draper, 127 S.W.2d 181, 133 Tex. 280.  
Wis.—O'Neill v. Maryland Casualty Co. of Baltimore, Md., 300 N.W. 167, 238 Wis. 529.  
50 C.J. p 72 note 93.  
**Acts of principal**  
(1) A surety's liability is strictissimi juris and is not to be enlarged by acts of its principal without its assent.—Indemnity Ins. Co. of North America v. Farkas, 76 N.Y.S.2d 426, 191 Misc. 424, reversed on other grounds 89 N.Y.S.2d 741, 195 Misc. 554.  
(2) Additional liability not shown by contract of surety on bond to have been within reasonable contemplation of parties when it was made cannot be imposed on him by subsequent action of obligee or principal in bond.—In re Revocation of Retail Malt Liquor License, 200 A. 313, 131 Pa.Super. 330.  
31. U.S.—Thompson v. U. S. Fidelity & Guaranty Co., D.C.Idaho, 3 F.Supp. 756.  
Fla.—Fidelity & Deposit Co. of Maryland v. Sholtz for Use of Duval County, 168 So. 25, 123 Fla. 837.  
Ga.—W. T. Rawleigh Co. v. Over-

street, 32 S.E.2d 574, 71 Ga.App. 873.  
Mo.—State ex rel. Southern Surety Co. of New York v. Haid, 49 S.W. 2d 41, 329 Mo. 1220—**Corpus Juris** quoted in State v. National Surety Co., 82 S.W.2d 616, 619, 233 Mo. App. 77.  
N.J.—**Corpus Juris** quoted in Boorstein v. Miller, 3 A.2d 87, 91, 124 N.J.Eq. 526.  
Ohio.—State ex rel. Herbert v. Inland Bonding Co., App., 46 N.E.2d 623, reversed on other grounds 51 N.E.2d 710, 142 Ohio St. 189.  
Okl.—Eckles v. Busey, 132 P.2d 344, 191 Okl. 644—**Corpus Juris** cited in Allen v. Hartford Accident & Indemnity Co., 123 P.2d 252, 253, 190 Okl. 313.  
Pa.—Spring Garden Building & Loan Ass'n v. Rhodes, 190 A. 530, 126 Pa.Super. 102.  
Tex.—**Corpus Juris** quoted in Draper v. Robinson, Civ.App., 106 S.W.2d 825, 829, modified on other grounds Robinson v. Draper, 127 S.W.2d 181, 133 Tex. 280.  
50 C.J. p 72 note 94.  
32. Mo.—**Corpus Juris** quoted in State v. National Surety Co., 82 S.W.2d 616, 619, 233 Mo.App. 77.  
N.J.—**Corpus Juris** quoted in Boorstein v. Miller, 3 A.2d 87, 91, 124 N.J.Eq. 526.  
W.Va.—Lawhead v. Doddridge County Bank, 194 S.E. 79, 119 W.Va. 467.  
50 C.J. p 72 note 95.  
33. Cal.—Sparks v. Buckner, 57 P. 2d 1395, 14 Cal.App.2d 213.  
Mo.—**Corpus Juris** quoted in State v. National Surety Co., 82 S.W.2d 616, 619, 233 Mo.App. 77.  
Neb.—W. T. Rawleigh Co. v. Smith, 9 N.W.2d 286, 142 Neb. 527.  
N.J.—**Corpus Juris** quoted in Boorstein v. Miller, 3 A.2d 87, 91, 124 N.J.Eq. 526.  
N.Y.—Gutner v. Success Magazine Corporation, 242 N.Y.S. 682, 136 Misc. 253.  
Tex.—Mingus v. Employers' Liability Assur. Co., Com.App., 65 S.W. 2d 292.  
50 C.J. p 73 note 96.  
34. Iowa.—Conley v. Jamison, 219 N.W. 485, 205 Iowa 1326, 59 A.L.R. 835.  
Mo.—**Corpus Juris** quoted in State v. National Surety Co., 82 S.W.2d 616, 619, 233 Mo.App. 77.  
N.J.—**Corpus Juris** quoted in Boorstein v. Miller, 3 A.2d 87, 91, 124 N.J.Eq. 526.  
35. U.S.—Union Indemnity Co. v. Lang, C.C.A.Cal., 71 F.2d 901.  
Cal.—State Athletic Commission of California v. Massachusetts Bonding & Insurance Co., 117 P.2d 80,

46 Cal.App.2d 839—City of Los Angeles v. Hoppenyan's, Inc., 47 P.2d 293, 8 Cal.App.2d 138—Murphy v. Hellman Commercial Trust & Savings Bank, 185 P. 485, 43 Cal.App. 579.  
Ill.—Wright v. Loring, 184 N.E. 865, 351 Ill. 584—Corn Belt Bank v. Maryland Casualty Co., 281 Ill. App. 387—Buttas v. Juddson Hotel Co., 256 Ill.App. 305.  
Miss.—National Union Fire Ins. Co. v. Currie, 178 So. 104, 180 Miss. 711.  
Mo.—**Corpus Juris** quoted in State v. National Surety Co., 82 S.W.2d 616, 619, 233 Mo.App. 77.  
N.J.—**Corpus Juris** quoted in Boorstein v. Miller, 3 A.2d 87, 91, 124 N.J.Eq. 526.  
N.D.—Rosedal v. Harding, 252 N.W. 884, 64 N.D. 431.  
50 C.J. p 73 note 98.  
36. Mo.—**Corpus Juris** quoted in State v. National Surety Co., 82 S.W.2d 616, 619, 233 Mo.App. 77.  
N.J.—**Corpus Juris** quoted in Boorstein v. Miller, 3 A.2d 87, 91, 124 N.J.Eq. 526.  
N.D.—State v. Padgett, 209 N.W. 388, 54 N.D. 211.  
Wash.—Grand Lodge of Scandinavian Fraternity of America, Dist. No. 7, v. U. S. Fidelity & Guaranty Co., 98 P.2d 971, 2 Wash. 2d 561.  
Wis.—Donkle v. Milem, 59 N.W. 586, 88 Wis. 33.  
50 C.J. p 73 note 99.  
37. Ala.—Mackay v. Dodge, 5 Ala. 388.  
Mo.—**Corpus Juris** quoted in State v. National Surety Co., 82 S.W.2d 616, 619, 233 Mo.App. 77.  
Mont.—Swanberg v. National Surety Co., 283 P. 761, 86 Mont. 340.  
N.J.—**Corpus Juris** quoted in Boorstein v. Miller, 3 A.2d 87, 91, 124 N.J.Eq. 526.  
38. Ala.—Anderson v. Bellinger, 6 So. 82, 87 Ala. 334, 13 Am.S.R. 46, 4 L.R.A. 680.  
Cal.—People's Nat. Bank v. Southern Surety Co., 288 P. 827, 105 Cal. App. 731.  
Ind.—Ohio Oil Co. v. Fidelity & Deposit Co. of Maryland, 42 N.E.2d 406, 112 Ind.App. 452.  
Iowa.—Independent Dist. of Mason City of Reichard, 50 Iowa 98.  
La.—Basso v. Export Warrant Co., 193 So. 654, 194 La. 303—Shreveport Laundries v. Sherman, App. 7 So.2d 433.  
Md.—Art Plate Glass & Mirror Corp. v. Fidelity Const. Corp., 69 A.2d 808.  
Miss.—National Union Fire Ins. Co. v. Currie, 178 So. 104, 180 Miss. 711.

to rely on the strict letter thereof.<sup>39</sup> He will, however, be chargeable with notice of the terms of the instrument which he undertakes to secure.<sup>40</sup>

Sureties for one person are not liable for an association of several persons of which such individual is a member,<sup>41</sup> or a firm including such person;<sup>42</sup> and, conversely, sureties for several are not liable for an individual.<sup>43</sup> The liability of a surety for one or more principals does not extend to acts performed by such principals jointly with others.<sup>44</sup> Where a statute provides that a bond or undertaking in actions or special proceedings shall continue in force after a change or addition of parties, its effect is merely to preserve unimpaired the liability in favor of the party for whom the undertaking was originally given, and not to in-

clude the party substituted or added.<sup>45</sup>

The surety on a building or construction contract is bound only in the manner and to the extent provided in the obligation,<sup>46</sup> and the principal cannot by his acts bind the surety beyond the obligations assumed.<sup>47</sup>

## § 92. Liability of Principal as Measure of Surety's Liability

In the absence of limitations or restrictions contained in the contract, the liability of the surety is coextensive with that of the principal.

In the absence of limitations or restrictions contained in the contract, the liability of the surety is coextensive with that of the principal.<sup>48</sup> While it has been said that the liability of the surety can

Mo.—*Corpus Juris* quoted in *State v. National Surety Co.*, 82 S.W.2d 616, 619, 233 Mo.App. 77.

N.J.—*Corpus Juris* quoted in *Boorstein v. Miller*, 3 A.2d 87, 91, 124 N.J.Eq. 526.

N.M.—*Monte Rico Mill & Min. Co. v. U. S. Fidelity & Guaranty Co.*, 5 P.2d 195, 35 N.M. 616, certiorari denied 52 S.Ct. 496, 286 U.S. 544, 76 L.Ed. 1281.

Ohio.—*Sturges v. Williams*, 9 Ohio St. 443, 75 Am.D. 473.

Okl.—*Whale v. Rice*, 49 P.2d 737, 173 Okl. 530.

Pa.—*Spring Garden Building & Loan Ass'n v. Rhodes*, 190 A. 530, 126 Pa.Super. 102.

50 C.J. p 73 note 2.

### Liability for fraud of principal

In fixing surety's liability for principal's fraud, as long as surety keeps aloof from conduct of trust, faithful administration of which surety guarantees, and seeks no personal profit, he may stand on terms of his bond and, if he participates in fraud, he may become equally liable with the principal.—*Cone v. Benjamin*, 8 So.2d 476, 150 Fla. 419.

39. Ala.—*Carroll v. Hanahan*, 130 So. 197, 221 Ala. 553.

Mo.—*Globe American Corporation v. Miller*, 131 S.W.2d 340, 234 Mo. App. 253—*Corpus Juris* quoted in *State v. National Surety Co.*, 82 S.W.2d 616, 619, 233 Mo.App. 77.

N.J.—*Corpus Juris* quoted in *Boorstein v. Miller*, 3 A.2d 87, 91, 124 N.J.Eq. 526.

Tex.—*First State Bank of Temple v. Metropolitan Casualty Ins. Co. of New York*, 79 S.W.2d 835, 125 Tex. 113, 98 A.L.R. 1256.

50 C.J. p 73 note 3.

40. U.S.—*American Surety Co. of New York v. Hutchinson*, C.C.A. Tex., 63 F.2d 536.

41. Tex.—*Corpus Juris* quoted in *Draper v. Robinson*, Civ.App., 106 S.W.2d 825, 829, modified on other

grounds *Robinson v. Draper*, 127 S.W.2d 181, 133 Tex. 280.

50 C.J. p 73 note 4.

42. Tex.—*Corpus Juris* quoted in *Draper v. Robinson*, Civ.App., 106 S.W.2d 825, 829, modified on other grounds *Robinson v. Draper*, 127 S.W.2d 181, 133 Tex. 280.

50 C.J. p 73 note 5.

43. Mo.—*State v. Boon*, 44 Mo. 254.

50 C.J. p 73 note 6.

44. Minn.—*Trovatten v. Minea*, 7 N.W.2d 390, 213 Minn. 544, 144 A. L.R. 1263.

45. N.Y.—*Pontiac First Commercial Bank v. Valentine*, 139 N.Y.S. 1037, 155 App.Div. 91, affirmed 102 N.E. 544, 209 N.Y. 145, Ann.Cas. 1913D 1104.

Tex.—*Corpus Juris* quoted in *Draper v. Robinson*, Civ.App., 106 S.W.2d 825, 829, modified on other grounds *Robinson v. Draper*, 127 S.W.2d 181, 133 Tex. 280.

46. U.S.—*Equitable Trust Co. v. Aetna Indemnity Co.*, C.C.Pa., 168 F. 433.

Ill.—*Philippe v. Curran*, 218 Ill.App. 517.

Iowa.—*Lamson v. Maryland Casualty Co.*, 194 N.W. 70, 196 Iowa 1185.

N.J.—*Meyer v. Standard Accident Ins. Co.*, 177 A. 255, 114 N.J.Law 483.

N.Y.—*Kinney v. Massachusetts Bonding & Ins. Co.*, 175 N.Y.S. 398, modified on other grounds 206 N.Y.S. 163, 210 App.Div. 285.

Tex.—*General Bonding & Casualty Ins. Co. v. McCurdy*, Civ.App., 183 S.W. 796—*Bell v. Campbell*, Civ. App., 143 S.W. 953.

Utah.—*Corporation of President of Church of Jesus Christ of Latter-Day Saints v. Hartford Accident & Indemnity Co.*, 95 P.2d 736, 98 Utah 297.

9 C.J. p 856 note 69.

Amount recoverable by owner from surety in completing contract see *infra* § 112.

Liability to laborers and materialmen see *Mechanics' Liens* § 259.

### Special guaranty

Where a building contractor's bond contained no words of limitation indicating that the surety depended on the faithfulness of the obligee or reposed any trust in him, but expressly recited that the principal and the obligee had entered into a written contract by which the former agreed to construct the building in question for plaintiff, the bond did not import a special guaranty.—*Wing & Bostwick Co. v. U. S. Fidelity & Guaranty Co.*, C.C. N.Y., 150 F. 672.

### Repair and construction bonds distinguished

Liability under bond conditioned on performance of contract is foreclosed by good-faith conclusion and agreement that work has been done as per specifications, while under guarantee of completed work for given period liability attaches for mistakes, oversights, and fraud in original acceptance, and for hidden and future developing defects.—*Sioux City v. Western Asphalt Corporation*, 268 N.W. 595, reheard 271 N.W. 624, 223 Iowa 279, 109 A.L.R. 608.

### Bonds of subcontractors

Colo.—*Gardner Bros. & Glenn Const. Co. v. American Surety Co. of New York*, 37 P.2d 384, 95 Colo. 456.

Md.—*Trimeunt Dredging Co., for Use of Brown & Hooft, v. U. S. Fidelity & Guaranty Co.*, 171 A. 700, 166 Md. 556.

Pa.—*W. H. Hoffman Co. v. Title Guaranty & Surety Co.*, 99 A. 414, 255 Pa. 112.

Tex.—*McGregor & Henger v. Escajeda*, Civ.App., 216 S.W. 398.

47. Mo.—*Inman v. Nolan*, App., 288 S.W. 1007.

48. U.S.—*American Surety Co. v. Wheeling Structural Steel Co.*, C. C.A.W.Va., 114 F.2d 237—*National Surety Co. of New York v. Ulmen*,

in no event exceed the liability of the principal,<sup>49</sup> under some circumstances the principal and sureties may be answerable for different amounts.<sup>50</sup> A surety may limit the amount of his liability<sup>51</sup> where the intention to do so is apparent on the face of the contract,<sup>52</sup> and, where his agreement is to be responsible for a certain amount, he cannot be

held for amounts in excess of it.<sup>53</sup>

### § 93. Limitation by Penalty of Bond

Ordinarily a surety on a bond is not liable beyond the penalty named therein.

Ordinarily a surety on a bond is not liable beyond the penalty named therein.<sup>54</sup> The applica-

C.C.A.Mont., 68 F.2d 330, certiorari denied *Ulmen v. National Surety Co. of New York*, 54 S.Ct. 629, 292 U.S. 624, 78 L.Ed. 1479—*City of East Cleveland v. Fidelity & Deposit Co. of Maryland*, D.C.Ohio, 5 F.Supp. 212.

Cal.—*State Athletic Commission of California v. Massachusetts Bonding & Insurance Co.*, 117 P.2d 75, 46 Cal.App.2d 823.

Del.—*Corpus Juris cited in W. T. Rawleigh Co. v. Warrington*, 199 A. 666, 668, 9 W.W.Harr. 366.

Fla.—*Cone v. Benjamin*, 8 So.2d 476, 150 Fla. 419.

Ga.—*J. R. Watkins Co. v. Brewer*, 36 S.E.2d 442, 73 Ga.App. 331.

Hawaii.—*Territory v. Pacific Coast Casualty Co.*, 22 Hawaii 446.

Ill.—*Turk v. U. S. Fidelity & Guaranty Co.*, 197 N.E. 765, 361 Ill. 206.

Iowa.—*Benson v. Alleman*, 263 N.W. 305, 220 Iowa 731.

La.—*Anders v. J. L. Evans & Co.*, App., 187 So. 109.

Mo.—*State ex rel. and to Use of Scarborough v. Earley*, App., 219 S.W.2d 879.

Mont.—*Meinecke v. McFarland*, 206 P.2d 1012—*Annala v. McLeod*, 206 P.2d 811—*Federal Surety Co. v. Basin Const. Co.*, 5 P.2d 775, 91 Mont. 114.

N.H.—*Lavigne v. Lavigne*, 176 A. 282, 87 N.H. 223.

N.Y.—*In re Century Indemnity Co.*, 7 N.Y.S.2d 7, 169 Misc. 61, reversed without opinion Application of U. S., 11 N.Y.S.2d 253, 256 App.Div. 974, affirmed 25 N.E.2d 383, 282 N.Y. 95.

N.C.—*Chozon Confections v. Johnson*, 11 S.E.2d 472, 218 N.C. 500—*State v. U. S. Guarantee Co.*, 178 S.E. 550, 207 N.C. 725.

Ohio.—*Myles v. Meineke*, 78 N.E.2d 917, 82 Ohio App. 126.

Okl.—*Corpus Juris cited in Allen v. Hartford Accident & Indemnity Co.*, 123 P.2d 252, 253, 190 Okl. 313—*U. S. Fidelity & Guaranty Co. v. Kern*, 62 P.2d 1173, 178 Okl. 370.

Pa.—*McShain v. Indemnity Ins. Co. of North America*, 12 A.2d 59, 338 Pa. 113—*Stewart v. National Surety Co.*, 17 Pa.Dist. & Co. 463—*Commonwealth v. Fidelity & Casualty Co. of New York*, 17 Pa.Dist. & Co. 102.

Tex.—*Girard Fire & Marine Ins. Co. v. Koenigsberg*, Civ.App., 65 S.W. 2d 783.

Va.—*C. S. Luck & Sons v. Boatwright*, 162 S.E. 53, 157 Va. 490.

Wash.—*Tucker v. Brown*, 150 P.2d 604, 20 Wash.2d 740.

W.Va.—*Town of Clendenin ex rel. Fields v. Ledsome*, 40 S.E.2d 849, 129 W.Va. 388.

Wis.—*Klatte v. Franklin State Bank*, 248 N.W. 158, 211 Wis. 613, rehearing denied and modified on other grounds 249 N.W. 72, 211 Wis. 613.

50 C.J. p 74 note 11.

**Surety bond held not to amend original contract**

Provision in performance bond that any amendment of contract, including failure of buyer to exercise any rights thereunder, should not release principal and surety from liability, meant that if buyer and seller by agreement amended contract, or if seller led buyer to believe that seller had waived his rights under section of contract defining buyer's remedy for defective materials, surety should be liable under bond, and surety's liability on the bond was still measured by the principal's rights and obligations under the contract as originally executed.—*De Witt v. Itasca-Mantrap Co-op. Electrical Ass'n*, 10 N.W. 2d 715, 215 Minn. 551.

**Sureties on bond given to guarantee execution of contract according to its terms become parties to that contract the same as though they had actually made and executed the contract itself.**—*W. P. Fuller & Co. v. Alturas School Dist.*, 153 P. 743, 28 Cal.App. 609.

**Building and construction contracts**

(1) Liability of contractor is measure of surety's liability.

U.S.—*Smith Engineering Co. v. Rice*, C.C.A.Mont., 102 F.2d 492, certiorari denied *Rice v. Smith Engineering Co.*, 59 S.Ct. 1034, two cases, 307 U.S. 637, 83 L.Ed. 1519, rehearing denied 60 S.Ct. 68, two cases, 308 U.S. 632, 84 L.Ed. 527—*Modern Brokerage Corporation v. Massachusetts Bonding & Insurance Co.*, D.C.N.Y., 54 F.Supp. 939, opinion adhered to 56 F.Supp. 696.

Ala.—*Huntsville Elks' Club v. Garity-Hahn Bldg. Co.*, 57 So. 750, 176 Ala. 128.

Cal.—*Atowich v. Zimmer*, 25 P.2d 6, 218 Cal. 763.

Del.—*Board of Public Education in Wilmington v. Aetna Casualty & Surety Co.*, 152 A. 600, 4 W.W. Harr. 355.

(2) Liability of subcontractor is

measure of his surety's liability.—*Thomas Havery Co. v. Pacific Indemnity Co.*, 11 P.2d 864, 215 Cal. 555.

**Comaker of negotiable note, who signed as surety, was entitled to benefit of extension of time in which to pay indebtedness obtained by maker under bankruptcy act, since obligations of a surety are coextensive with those of a principal, notwithstanding discharge in bankruptcy of a principal would not relieve the surety.**—*Benson v. Alleman*, 263 N.W. 305, 220 Iowa 731.

49. Iowa.—*Watkins Medical Co. v. Moss*, 141 N.W. 497, 160 Iowa 244.

50 C.J. p 74 note 12.

50. Mo.—*Butler County School Dist. No. 37 v. Aetna Accident & Liability Co.*, App., 234 S.W. 1017.

50 C.J. p 74 note 13.

**Joint and several bond**

Ill.—*People v. Wirkus' Estate*, 265 Ill.App. 248.

51. Mass.—*Town of Belmont v. Trenholm*, 19 N.E.2d 9, 302 Mass. 215.

Pa.—*City of Philadelphia v. Toner*, 68 Pa.Dist. & Co. 280.

50 C.J. p 74 note 14.

52. Mich.—*Maryland Casualty Co. v. Moon*, 203 N.W. 885, 231 Mich. 56.

50 C.J. p 74 note 15.

53. N.Y.—*Agawam Bank v. Strever*, 16 Barb. 82.

50 C.J. p 74 note 16.

54. U.S.—*Maryland Casualty Co. v. Alford*, C.C.A.Okla., 111 F.2d 388, certiorari denied *Maryland Casualty Co. v. Alford*, 61 S.Ct. 27, two cases, 311 U.S. 668, 85 L.Ed. 429—*Massachusetts Bonding & Insurance Co. v. U. S.*, C.C.A.Cal., 97 F.2d 879—*Chicago Bonding, etc., Co. v. Augusta-Savannah Nav. Co.*, Ill., 250 F. 616, 162 C.C.A. 632, certiorari denied 38 S.Ct. 428, 247 U. S. 509, 62 L.Ed. 1241.

Cal.—*Kane v. Mendenhall*, 56 P.2d 498, 5 Cal.2d 749.

Fla.—*Fidelity & Deposit Co. of Maryland v. Sholtz for Use of Duval County*, 168 So. 25, 123 Fla. 837.

La.—*Klein v. J. D. & J. M. Collins*, 106 So. 120, 153 La. 704—*McCoy v. Marsh*, 6 La.App. 606.

Md.—*Aetna Indemnity Co. v. Baltimore, S. P. & C. Ry. Co.*, 84 A. 166, 117 Md. 623.

Neb.—*O'Shea v. North American Ho-*



tion of this doctrine to the matter of interest, costs, and attorney's fees is discussed *infra* §§ 113-115. If the amount of the penalty is insufficient to satisfy all claims, it should be apportioned.<sup>55</sup> The rule applies to sureties who have bound themselves severally for certain amounts.<sup>56</sup> Sureties, although not liable beyond the penalty as to some persons, may be liable beyond it as to others, if the bond so provides.<sup>57</sup>

Where a bond is furnished under a statute providing that any person who may be damaged by the wrongful act of the principal shall have a right of recovery on the bond for all damages not exceeding a designated sum, or under a statute containing similar provisions, it has been held that the aggregate recovery of several claimants cannot exceed the penalty thereof.<sup>58</sup> In at least one jurisdiction, however, where a bond has been furnished under such a statute, and there are several claimants against the surety, it has been held that each claimant may recover to the full extent of the bond, although the combined recovery may exceed the penalty named in the bond,<sup>59</sup> and notwithstanding a provision in the bond that the total liability

of the surety should not exceed the statutory amount.<sup>60</sup>

## § 94. Conditions of Liability in General

Since a surety's liability is measured by the terms of his contract, his liability will be measured by the conditions stated in the bond.

Since a surety's liability is measured by the terms of his contract, his liability will be measured by the conditions stated in the bond.<sup>61</sup> The surety is not liable for the breach of conditions the performance of which he has not secured,<sup>62</sup> even though thereby the obligation secured is released.<sup>63</sup> If the surety has indicated the manner in which the indebtedness for which he has undertaken to become liable shall be incurred, he is not liable for indebtedness incurred in another way.<sup>64</sup>

## § 95. Breach by Principal

On breach by the principal of the contract or condition secured, the surety is liable.

On breach by the principal of the contract or condition secured, the surety is liable,<sup>65</sup> and a

tel Co., 191 N.W. 321, 109 Neb. 317.

N.C.—State v. U. S. Guaranty Co., 178 S.E. 550, 207 N.C. 725.

N.D.—Rosedal v. Harding, 252 N.W. 884, 64 N.D. 431.

Or.—*Corpus Juris* cited in U. S. Fidelity & Guaranty Co. v. Zidell-Steinberg Co., 50 P.2d 584, 591, 151 Or. 538, motion to modify decision and order granted on other grounds 51 P.2d 687, 151 Or. 538—New Amsterdam Casualty Co. v. Hyde, 34 P.2d 930, 148 Or. 229, rehearing denied 35 P.2d 980, 148 Or. 229.

S.C.—*Corpus Juris* quoted in Brown v. National Surety Corp. of N. Y., 36 S.E.2d 588, 590, 207 S.C. 462.

Tenn.—National Union Fire Ins. Co. v. Winn, 3 Tenn.App. 60, 50 C.J. p 74 note 22.

55. Or.—New Amsterdam Casualty Co. v. Hyde, 34 P.2d 930, 148 Or. 229, rehearing denied 35 P.2d 980, 148 Or. 229.

S.C.—*Corpus Juris* quoted in Brown v. National Surety Corp. of N. Y., 36 S.E.2d 588, 590, 207 S.C. 462, 50 C.J. p 75 note 26.

56. La.—Marcy v. Praeger, 34 La. Ann. 54—Dougherty v. Peters, 2 Rob. 537.

57. U.S.—U. S. v. Rundle, Wash., 100 F. 400, 40 C.C.A. 450.

Wash.—Griffith v. Rundle, 63 P. 199, 23 Wash. 453, 55 L.R.A. 381.

58. Cal.—Coast Surety Corp. v. White, 57 P.2d 951, 14 Cal.App.2d

35—Wiggins v. Pacific Indemnity Co., 25 P.2d 898, 134 Cal.App. 328.

Iowa.—Witter v. Massachusetts Bonding & Insurance Co., 247 N.W. 831, 215 Iowa 1322, 89 A.L.R. 1065.

59. Wash.—Paulsell v. Peters, 115 P.2d 708, 9 Wash.2d 599—Commercial State Bank v. Palmerton-Moore Grain Co., 277 P. 389, 152 Wash. 89—Nelson v. Pacific Coast Casualty Co., 164 P. 594, 96 Wash. 43—Salo v. Pacific Coast Casualty Co., 163 P. 384, 95 Wash. 109, L. R.A.1917D 613.

60. Wash.—Paulsell v. Peters, 115 P.2d 708, 9 Wash.2d 599.

61. U.S.—First Nat. Bank v. American Surety Co. of New York, C.C. A.Ala., 53 F.2d 746—Baltimore Trust Co. v. Metropolitan Casualty Ins. Co. of New York, D.C.Md., 3 F.Supp. 404, affirmed, C.C.A., 68 F. 2d 121.

N.J.—Klivan v. Margolis, 8 A.2d 697, 123 N.J.Law 359.

Ohio.—State ex rel. Herbert v. Inland Bonding Co., App., 46 N.E.2d 623, reversed on other grounds 51 N.E.2d 710, 142 Ohio St. 189.

S.C.—McKenzie v. Standard Accident Ins. Co., 1 S.E.2d 502, 189 S.C. 475. Wash.—Tucker v. Brown, 150 P.2d 604, 20 Wash.2d 740.

50 C.J. p 72 notes 90 [a] (1), 92 [a]. Conditions precedent in action by creditor against surety see *infra* §§ 251-253.

A privilege for the protection of the surety will not be turned into a burden to his detriment.—Naragan-

sett Pier R. Co. v. Palmer, 38 A.2d 761, 70 R.I. 298, 153 A.L.R. 1143.

62. Wis.—Mohawk Co. v. Bankers' Surety Co., 156 N.W. 154, 162 Wis. 272.

50 C.J. p 74 note 19.

### Exempt losses

The bond may exempt the surety from liability for losses resulting from designated causes, such as losses resulting from strikes or labor difficulties.

N.Y.—Riviera Realty Co. v. Illinois Surety Co., 150 N.Y.S. 616, 165 App. Div. 114.

Wash.—Uden v. Schaefer, 188 P. 395, 110 Wash. 391.

63. U.S.—National Surety Co. v. Jackson County Bank, C.C.A.N.C., 20 F.2d 644.

Utah.—Paxton v. Spencer, 265 P. 751, 71 Utah 313.

64. Tex.—Reeves v. Jowell, Civ. App., 140 S.W. 364, 50 C.J. p 73 note 3½.

65. U.S.—Pinckney v. Wylie, C.C.A. Tex., 86 F.2d 541—Maryland Casualty Co. v. Jones, C.C.A.Cal., 35 F. 2d 791.

Ala.—Bradley v. Bentley, 163 So. 349, 26 Ala.App. 299, certiorari denied 163 So. 351, 231 Ala. 28.

Fla.—*Corpus Juris* cited in Scott v. National City Bank of Tampa, 139 So. 367, 369, 107 Fla. 810.

Ga.—Arkansas Fuel Oil Co. v. Young, 16 S.E.2d 909, 66 Ga.App. 33.

N.Y.—Goelet v. National Surety Co., 164 N.E. 101, 249 N.Y. 287, 62 A. L.R. 425.

breach of any one of several conditions in a bond will impose liability on the surety.<sup>66</sup> Thus, where the condition is that the principal will pay over money,<sup>67</sup> the failure of the principal to do so constitutes a breach of the surety's contract so as to render the latter liable, but the surety may not be held liable before the money is due.<sup>68</sup> The conditions may be alternative so that the failure by the principal to comply with either imposes liability.<sup>69</sup>

*Building and construction contracts.* A surety

on a building or construction contract is liable if the principal does not perform his contract<sup>70</sup> in time<sup>71</sup> or if he does not furnish<sup>72</sup> or pay for<sup>73</sup> labor and materials, if improper material<sup>74</sup> and poor workmanship<sup>75</sup> are used, and if adjoining property is damaged.<sup>76</sup> Persons who have become security for the performance of duties by the principal must see that he performs them.<sup>77</sup> Where a contractor fails to perform work in accordance with the plans and specifications, neither the contractor nor his surety can escape liability by se-

N.C.—Rouse v. Wooten, 53 S.E. 430, 140 N.C. 557, 111 Am.S.R. 875, 6 Ann.Cas. 280.

Pa.—Plummer v. Wilson, 185 A. 311, 322 Pa. 118—Pittsburg Const. Co. v. West Side Belt R. Co., 75 A. 1029, 227 Pa. 90.

50 C.J. p 75 note 29—8 C.J. p 73 note 75.

#### Proof of breach

Until liability of principal on a bond has been established judicially and finally, there is no competent proof of the occurrence of a breach in the conditions of the bond as a prerequisite to enforcement of surety's liability.—Posey v. Hamner, 27 So.2d 158, 210 La. 382.

#### Bond to pay judgment

Generally, agreement of surety to pay any judgment which may be rendered in a particular proceeding, to which surety is not a party, is broken by recovery of judgment to which covenant relates, in absence of fraud.—Brescia Const. Co. v. Wal-art Const. Co., 281 N.Y.S. 43, 245 App. Div. 105.

#### Necessity of breach

Recovery from surety is dependent on demonstration of default in performance by principal obligor of obligation primarily resting on him.—Endurance Holding Corporation v. Kramer Surgical Stores, 238 N.Y.S. 377, 227 App.Div. 582—In re Stern's Estate, 291 N.Y.S. 732, 161 Misc. 272.

68. Pa.—Pennsylvania Supply Co. v. National Casualty Co., 31 A.2d 453, 152 Pa.Super. 217.

67. Fla.—Corpus Juris cited in Scott v. National City Bank of Tampa, 139 So. 367, 369, 107 Fla. 810.

50 C.J. p 75 note 31.

68. La.—State Nat. Bank v. New Orleans Brewing Assoc., 22 So. 48, 49 La.Ann. 934.

Mo.—Sauer v. Griffin, 67 Mo. 654.

69. Pa.—Nazareth Fdy., etc., Co. v. Marshall Mach., etc., Co., 102 A. 268, 258 Pa. 558, followed in 102 A. 272, 258 Pa. 569.

70. U.S.—Provident Trust Co. of Philadelphia v. Metropolitan Cas. Ins. Co. of N. Y., C.C.A.Pa., 152 F. 2d 875, certiorari denied 66 S.Ct.

810, 327 U.S. 789, 90 L.Ed. 1015—Downer v. U. S. Fidelity & Guaranty Co. of Maryland, C.C.A.Pa., 46 F.2d 733.

Ala.—Everglades Const. Co. v. American Surety Co., 156 So. 829, 229 Ala. 290.

Cal.—Bierlich v. Unger, 36 P.2d 374, 1 Cal.2d 587—Fruit Growers' Supply Co. v. Goss, 41 P.2d 357, 4 Cal. App.2d 651.

Ga.—U. S. Fidelity & Guaranty Co. v. Koehler, 137 S.E. 85, 36 Ga.App. 396.

Ky.—Mayes v. Lane, 76 S.W. 399, 116 Ky. 566, 25 Ky.L. 824.

Md.—Etna Indemnity Co. of Hartford, Conn., v. George A. Fuller Co., 73 A. 738, 111 Md. 321, reargument denied 74 A. 369, 111 Md. 321.

Minn.—Allen v. Eneroth, 137 N.W. 16, 118 Minn. 476.

Miss.—First Baptist Church of Oxford v. Hendricks, 65 So. 244, 107 Miss. 267.

N.Y.—Elmohar Co. v. People's Surety Co. of New York, 111 N.E. 821, 217 N.Y. 289.

Ohio.—Village of Bay v. U. S. Fidelity & Guaranty Co., 156 N.E. 227, 24 Ohio App. 73.

Pa.—Lender v. Kline, 31 A. 550, 167 Pa. 183.

Utah.—Corporation of President of Church of Jesus Christ of Latter-Day Saints v. Hartford Accident & Indemnity Co., 95 P.2d 736, 98 Utah 297.

71. U.S.—Federal Surety Co. v. A. Bentley & Sons Co., C.C.A. Ohio, 51 F.2d 24, 78 A.L.R. 1041.

Ga.—Adams v. Haigler, 51 S.E. 638, 123 Ga. 659.

Iowa.—Getchell, etc., Lumber, etc., Co. v. Peterson, 100 N.W. 550, 124 Iowa 599.

Md.—Leppert v. Flags, 60 A. 450, 101 Md. 71.

Minn.—Schutt Realty Co. v. Mallowney, 10 N.W.2d 273, 215 Minn. 340.

Ohio.—Rock v. Monarch Bldg. Co., 100 N.E. 887, 87 Ohio St. 244.

Tex.—Texas Fidelity & Bonding Co. v. Elliott, Civ.App., 195 S.W. 301.

#### Effect of payment

Where bond protecting lender unequivocally requires completion of project within a specified period, mere payment after expiration of

such period by lender to contractor, with nothing more, does not constitute a waiver of breach of the bond.—Zipkin v. Investors Syndicate, 152 F.2d 678, 80 U.S.App.D.C. 302.

72. Ga.—Adams v. Haigler, 51 S.E. 638, 123 Ga. 659.

Tex.—Dallas Homestead, etc., Assoc. v. Thomas, 81 S.W. 1041, 36 Tex. Civ.App. 268.

73. Cal.—Fruit Growers' Supply Co. v. Goss, 41 P.2d 357, 4 Cal.App.2d 651.

Colo.—A. S. Ripley Bldg. Co. v. Coors, 84 P. 817, 37 Colo. 78.

Iowa.—Van Buren County v. American Surety Co., 115 N.W. 24, 137 Iowa 490, 26 Am.S.R. 290.

Ky.—U. S. Fidelity & Guaranty Co. v. Probst, 97 S.W. 405, 30 Ky.L. 63—Mayes v. Lane, 76 S.W. 399, 116 Ky. 566, 25 Ky.L. 824.

Mass.—Ruggles v. Bernstein, 74 N. E. 366, 188 Mass. 232.

Minn.—Church of the Immaculate Conception v. Curtis, 153 N.W. 259, 130 Minn. 111.

Mo.—Oberbeck v. Mayer, 59 Mo.App. 289—McFall v. Dempsey, 43 Mo. App. 369—Casey v. Gunn, 29 Mo. App. 14.

Pa.—McKenzie Co. v. Fidelity & Deposit Co. of Maryland, Com.Pl., 52 Dauph.Co. 210.

Tex.—Indemnity Ins. Co. of North America v. Bassett, Civ.App., 299 S.W. 714.

74. Md.—Leppert v. Flags, 60 A. 450, 101 Md. 71.

75. La.—Vernon Parish Police Jury v. Johnson, 35 So. 550, 111 La. 279. Pa.—In re Byers, 54 A. 492, 205 Pa. 66.

76. Md.—Leppert v. Flags, 60 A. 450, 101 Md. 71.

77. U.S.—Knutson v. Metallic Slab Form Co., C.C.A.Tex., 130 F.2d 200. 50 C.J. p 75 note 30.

#### Notice of ability to perform

Surety on subcontractor's bond, rather than contractor, was chargeable with notice of the integrity of subcontractor and its ability to perform.—Glens Falls Indem. Co. v. Basich Bros. Const. Co., C.C.A.Cal., 165 F.2d 649, certiorari denied 68 S. Ct. 1347, 334 U.S. 833, 92 L.Ed. 1760.

curing possession of a mortgage on the property and selling the property at a foreclosure sale.<sup>78</sup> Where the contract makes the final certificate of the architect conclusive evidence of performance, and he gives such certificate without fraud or gross negligence, no action can be maintained on the contractor's bond for using inferior materials.<sup>79</sup> Where the contractor agrees to complete work by a certain day or to pay a certain sum as liquidated damages, and the surety on his bond agrees to protect the obligee from all loss arising from the non-fulfillment of the covenants of the contractor, and there is delay in completing the work, the surety as well as the contractor is bound to pay the amount fixed as liquidated damages without any proof of actual loss.<sup>80</sup> Where the surety consents to compromise an agreement between the owner and the contractor and subsequently approves its repudiation by the contractor, the surety can be held for the breach of the original contract.<sup>81</sup>

## § 96. Performance of Contract or Conditions by Creditor

As a general rule a creditor can hold a surety to his contract only by strictly complying with the contract.

As a general rule a creditor can hold a surety to his contract only by strictly complying with the contract.<sup>82</sup> A surety will not be held liable on a bond where there is an obligation, untendered and unperformed on the part of the creditor, which is precedent to, or at least concurrent with, the surety's obligation.<sup>83</sup> The creditor is under no duty, however, to perform a condition in the bond which he is under no obligation to do,<sup>84</sup> as where the performance of a condition in the bond is optional with the creditor.<sup>85</sup> A creditor is under no obligation to perform a condition which does not appear in the contract between him and the principal, although it may appear in the bond.<sup>86</sup>

78. D.C.—*Mercantile Trust Co. v. Hensey*, 27 App.D.C. 210, affirmed 27 S.Ct. 535, 205 U.S. 298, 51 L.Ed. 811, 10 Ann.Cas. 572.

79. Tex.—*Carnegie Public Library Assoc. v. Harris*, 97 S.W. 520, 43 Tex.Civ.App. 165.

80. D.C.—*Mercantile Trust Co. v. Hensey*, 27 App.D.C. 210, affirmed 27 S.Ct. 535, 205 U.S. 298, 51 L.Ed. 811, 10 Ann.Cas. 572.

81. Utah.—*Christensen v. Hamilton Realty Co.*, 129 P. 412, 42 Utah 70.

82. Ga.—*Holmes v. Redwine*, 29 S. E. 923, 103 Ga. 252.

Ky.—*Illinois Surety Co. v. Mitchell*, 197 S.W. 844, 177 Ky. 367.

N.C.—*Edgerton v. Taylor*, 115 S.E. 156, 184 N.C. 571.

Or.—*Astoria Southern Ry. Co. v. Pacific Surety Co.*, 137 P. 857, 68 Or. 569.

Va.—*American Surety Co. v. Plank & Whitsett*, 165 S.E. 660, 159 Va. 1. Conditions precedent in action by creditor against surety see *infra* §§ 251-253.

Nonperformance of conditions or prevention of performance as releasing or discharging surety see *infra* § 152.

### Certificate of architect

(1) Where, before completion of a building, the contractor abandoned the work, the certificate of the architect with respect to certain work, required by the contract, and necessary to be done before the building could be used, was not essential to a recovery on the contractor's bond.—*Jenkins v. American Surety Co. of New York*, 88 P. 1112, 45 Wash. 573.

(2) Where a building contract, authorizing the owner to complete the work on the contractor's default,

further provided that the expense incurred by the owner should be audited and certified by the architect, whose certificate should be conclusive, but the contractor's bond provided that the surety should not be liable to any action instituted later than a specified date, and the building had not been completed on that date, and a certificate covering all of the items could not therefore be produced, and the specific objection that no certificate was presented was not made, the failure to produce the certificate did not bar recovery against the surety.—*Cowles v. J. C. Mardis Co.*, 181 N.W. 872, 192 Iowa 890.

(3) A contract between a contractor, for the erection of a building, and a subcontractor giving the contractor the right to complete the work in case of the subcontractor's failure to do so, and containing a provision that the contractor might take charge of and complete the work if the architect should certify that the default of the subcontractor was sufficient ground for such completion, did not cover a situation where the subcontractor abandoned the work, and in such case the contractor without any certificate of the architect was entitled to complete the work, and recover his loss from the surety on the bond of the subcontractor.—*U. S. Fidelity & Guaranty Co. v. Probst*, 97 S.W. 405, 30 Ky.L. 63.

(4) Under a building contract providing that the architect should certify any expense or damage incurred by the owner because of the contractor's failure to perform, where the contractor abandoned the work before completion, and immediately thereafter the architects were dis-

charged and another architect was immediately employed and superintended the completion of the building, a certificate of damages signed by the new architect and by the only available member of the firm whose services had been dispensed with, the whereabouts of the other being unknown, was a sufficient compliance with the contract to entitle the owner to recover on the contractor's bond.—*Tally v. Ganahl*, 90 P. 1049, 151 Cal. 418.

Sureties may rely on strict performance of contract between principal and creditor.

Ill.—*Wright v. Loring*, 184 N.E. 865, 351 Ill. 584.

Pa.—*Germantown Trust Co. v. Emhardt*, 184 A. 457, 321 Pa. 561, followed in 184 A. 460, 321 Pa. 567.

A surety may insist on the compliance with requirements, clearly expressed, which are made the condition to liability.

Iowa.—*Hileman & Gindt v. Faus*, 158 N.W. 597, 178 Iowa 644.

Mich.—*Doyle v. Faust*, 153 N.W. 725, 187 Mich. 108.

83. Wash.—*Kanters v. Kotick*, 173 P. 329, 102 Wash. 523.

84. Mo.—*Noonan v. Independence Indemnity Co.*, 41 S.W.2d 162, 328 Mo. 706, 76 A.L.R. 931.

### Repeated renewals of notes

Wis.—*Haney School Furniture Co. v. Medary*, 101 N.W. 929, 123 Wis. 364.

85. Mo.—*Noonan v. Independence Indemnity Co.*, 41 S.W.2d 162, 328 Mo. 706, 76 A.L.R. 931.

86. Ark.—*Federal Union Surety Co. v. McGuire*, 163 S.W. 1171, 111 Ark. 373.

## § 97. Necessity of Damage to Creditor or Obligee

Unless the condition is to save the obligee harmless, it is not essential that the breach by the principal injure the obligee.

Unless the condition is to save the obligee harmless, it is not essential that the breach by the principal injure the obligee.<sup>87</sup> Where the obligation secures the creditor or obligee against loss by reason of claims of others, it is not requisite to the surety's liability that the former have paid such claims<sup>88</sup> or been forced to pay them.<sup>89</sup>

## § 98. Acts Requisite to Fix Liability in General

Except where required by provisions of the contract, a demand or notice of default is not required to fix the surety's liability.

Except where required by provisions of the contract,<sup>90</sup> a demand or notice of default is not required to fix the surety's liability.<sup>91</sup> After notice of acceptance of the bond, it is not necessary to give the surety notice of the transaction between the obligee and the principal to secure which the bond was given.<sup>92</sup> Where the suretyship contract

secures the accounting of deposits and payment thereof on legal demand, a mere letter by the depositor is not a sufficient legal demand so as to render the surety liable.<sup>93</sup>

## § 99. Commencement and Duration of Liability in General

In the absence of a statutory or contractual provision to the contrary, the liability of a surety accrues on the breach of the contract and continues until it is discharged.

In the absence of a statutory<sup>94</sup> or contractual<sup>95</sup> provision to the contrary, the surety or surety company's liability accrues on the breach of the contract,<sup>96</sup> as when the obligation matures and remains unpaid.<sup>97</sup> The liability of a surety for the acts of the principal continues during the period fixed by the contract,<sup>98</sup> in the absence of circumstances terminating or discharging the surety's liability, as discussed *infra* §§ 116-244, and the obligation of the surety, once it has arisen, continues until it is discharged.<sup>99</sup> Once the liability of the surety has arisen, subsequent negotiations between the parties to the original contract without the consent of the surety have been held not to operate to change or extend the liability of the surety.<sup>1</sup>

## B. CONSTRUCTION OF CONTRACT

### § 100. In General

Subject to the doctrine of strict construction, the general rules as to the construction of contracts apply to the contracts of a gratuitous surety, and, with some

distinctions, to the contract by a compensated surety or surety company.

Subject to the doctrine of strict construction, the general rules as to the construction of contracts

87. Mass.—*Leshefsky v. American Employers' Ins. Co.*, 199 N.E. 395, 293 Mass. 164, 103 A.L.R. 1388. 50 C.J. p 75 note 37.

88. Wash.—*Finne v. Maryland Casualty Co.*, 173 P. 501, 102 Wash. 651.

Necessity of payment under indemnity contract see *Indemnity* § 14.

89. Ark.—*Federal Union Surety Co. v. McGuire*, 163 S.W. 1171, 111 Ark. 373.

90. Pa.—*In re Brock*, 166 A. 778, 313 Pa. 7. 50 C.J. p 89 note 74.

#### Contract construed

In contract securing one advancing money to another, provision that no demand or notice from obligee should be "prerequisite to liability of obligors hereunder" meant liability actually to make payment of debt avowed in opening paragraph of contract.—*In re Brock*, *supra*.

91. U.S.—*Providence, Fall River & Newport Steamboat Co. v. Massachusetts Bay S. S. Corporation*, D. C. Mass., 38 F.2d 674. 50 C.J. p 89 note 76.

Failure to give notice of default to surety as ground for discharge see *infra* § 150.

92. Ind.—*Jenkins v. Phillips*, 48 N.E. 651, 18 Ind.App. 562. 50 C.J. p 89 note 78.

93. U.S.—*Montana Life Ins. Co. v. American Surety Co.*, C.C.A. Mont., 8 F.2d 801.

94. La.—*National Park Bank v. Concordia Land, etc., Co.*, 105 So. 234, 159 La. 86. 50 C.J. p 89 note 80 [a].

95. Wash.—*Pacific Tel., etc., Co. v. Robinson*, 263 P. 790, 142 Wash. 537.

50 C.J. p 89 note 81.

96. Wash.—*Zagar v. Columbia Casualty Co.*, 43 P.2d 949, 181 Wash. 487.

50 C.J. p 89 note 82.

#### "Legal demand"

Where bank rule provided that savings accounts could be withdrawn only after a designated number of days' notice, with respect to liability of bank's surety which gave notice of termination of its liability on bonds, for nonpayment by bank on

legal demand, default in payment on such demand occurred, not when notice was given, but when, later, demand was made.—*Pennsylvania Slovak Roman and Greek Catholic Union v. American Surety Co. of New York*, C.C.A. Pa., 71 F.2d 537, certiorari denied 55 S.Ct. 86, 293 U.S. 575, 79 L.Ed. 672.

97. Iowa.—*Hilleman v. Faus*, 158 N.W. 597, 178 Iowa 644. 50 C.J. p 89 note 83.

#### 98. Default in payment of rent

Bond to secure payment of rent providing that it should remain in force between certain dates if no default in payments of lease had occurred meant default in actual payments, not default on day payment was due.—*Shaw v. New Amsterdam Casualty Co.*, 164 A. 916, 310 Pa. 213.

99. Neb.—*O'Shea v. North American Hotel Co.*, 191 N.W. 321, 109 Neb. 317.

Pa.—*Central Penn Nat. Bank of Philadelphia v. Tinkler*, 40 A.2d 389, 351 Pa. 123.

1. Neb.—*O'Shea v. North American Hotel Co.*, 191 N.W. 321, 109 Neb. 317.

apply to the contracts of a gratuitous surety,<sup>2</sup> and, with some distinctions, to a contract by a compensated surety or surety company,<sup>3</sup> and this rule has been incorporated into some statutes.<sup>4</sup> In accordance with this rule, words in the contract must, in the absence of anything to show a different use,

be given their generally accepted meaning.<sup>5</sup> The suretyship contract of either a gratuitous or a paid surety must receive a fair, just, and reasonable interpretation,<sup>6</sup> and the intent or object of the parties,<sup>7</sup> as gathered from the language of the instrument in the light of surrounding facts and circum-

2. Ark.—Home Ins. Co. v. Boyce, 65 S.W.2d 910, 188 Ark. 488.

N.Y.—General Phoenix Corp. v. Cabot, 89 N.E.2d 238, 300 N.Y. 87—Niagara County Nat. Bank & Trust Co. v. La Port, 253 N.Y.S. 433, 233 App.Div. 501—In re Lilienthal's Estate, 240 N.Y.S. 849, 136 Misc. 762.

Okl.—McClure v. Weigand Tea & Coffee Co., 12 P.2d 877, 158 Okl. 115.

Wis.—Corpus Juris cited in Gumz v. United States Fidelity & Guaranty Co., 245 N.W. 82, 84, 209 Wis. 408. 50 C.J. p 75 note 46.

Strict construction as to a gratuitous surety see *infra* § 101.

3. U.S.—National Surety Co. of New York v. Ulmen, C.C.A.Mont., 68 F. 2d 330, certiorari denied Ulmen v. National Surety Co. of New York, 54 S.Ct. 629, 292 U.S. 624, 78 L.Ed. 1479—Kentucky Rock Asphalt Co. v. Fidelity & Casualty Co. of New York, C.C.A.Ky., 37 F.2d 279, 77 A.L.R. 4—Commissioners of Sinking Fund of Louisville v. Anderson, D.C.Ky., 20 F.Supp. 217, affirmed, C.C.A., 110 F.2d 961, certiorari denied 61 S.Ct. 28, 311 U.S. 669, 85 L.Ed. 429—American Bonding Co. v. Anderson, D.C.Ky., 20 F.Supp. 217, reversed on other grounds, C.C.A., 110 F.2d 961—Ulmen v. National Surety Co. of New York, D.C.Mont., 3 F.Supp. 348.

Cal.—City of Los Angeles v. Hoppenyan's, Inc., 47 P.2d 293, 8 Cal. App.2d 138.

Ill.—Galesburg Sanitary Dist., for Use of Anderson v. American Surety Co. of New York, 32 N.E. 2d 407, 308 Ill.App. 457.

Ind.—U. S. Fidelity & Guaranty Co. v. Stark, 200 N.E. 489, 102 Ind. App. 222.

Md.—John McShain, Inc., v. Eagle Indemnity Co., 23 A.2d 669, 180 Md. 202.

Miss.—Hartford Accident & Indemnity Co. v. Hewes, 199 So. 93, 190 Miss. 225, modified on other grounds 199 So. 772, 190 Miss. 225.

Mont.—Swanberg v. National Surety Co., 283 P. 761, 86 Mont. 340.

N.Y.—Gillmore v. Equitable Surety Co., 239 N.Y.S. 530, 228 App.Div. 188.

Ohio.—State ex rel. Herbert v. Inland Bonding Co., App., 46 N.E.2d 623, reversed on other grounds 51 N.E.2d 710, 142 Ohio St. 189.

Okl.—Enid Concrete Pipe & Stone Co. v. Mann, 50 P.2d 307, 174 Okl. 282—W. S. Dickey Clay Mfg. Co. v.

New York Casualty Co. of New York, 50 P.2d 325, 174 Okl. 281—New York Casualty Co. of New York v. Wallace & Tiernan, 50 P. 2d 176, 174 Okl. 278.

Wis.—Gumz v. U. S. Fidelity & Guaranty Co., 245 N.W. 82, 209 Wis. 408.

50 C.J. p 76 note 48.

Strict construction as to a compensated surety see *infra* § 102.

4. U.S.—Union Indemnity Co. v. Lang, C.C.A.Cal., 71 F.2d 901.

50 C.J. p 76 note 49.

5. U.S.—Ethna Casualty & Surety Co. v. Commercial State Bank of Rantoul, D.C.Ill., 13 F.2d 474.

Ill.—Harris, for Use of Otis Elevator Co. v. American Surety Co. of New York, 17 N.E.2d 250, 297 Ill.App. 1, reversed on other grounds Harris v. American Surety Co. of New York, 24 N.E.2d 42, 372 Ill. 361.

Ind.—Sparta State Bank v. Myers, 177 N.E. 258, 202 Ind. 553.

N.M.—Monte Rico Mill. & Min. Co. v. U. S. Fidelity & Guaranty Co., 5 P.2d 195, 35 N.M. 616, certiorari denied 52 S.Ct. 496, 286 U.S. 544, 76 L.Ed. 1281.

N.Y.—Atwater v. Lober, 239 N.Y.S. 340, 135 Misc. 560.

R.I.—Narragansett Pier R. Co. v. Palmer, 38 A.2d 761, 70 R.I. 298, 153 A.L.R. 1143.

50 C.J. p 77 note 59.

6. U.S.—Union Indemnity Co. v. Lang, C.C.A.Cal., 71 F.2d 901—Corpus Juris quoted in Baltimore Trust Co. v. Metropolitan Casualty Ins. Co., D.C.Md., 3 F.Supp. 404, 407.

Cal.—Municipal Bond Co. v. Balboa Const. Co., 34 P.2d 1032, 140 Cal. App. 57.

Ill.—Galesburg Sanitary Dist., for Use of Anderson v. American Surety Co. of New York, 32 N.E.2d 407, 308 Ill.App. 457.

Ind.—Sparta State Bank v. Myers, 177 N.E. 258, 202 Ind. 553.

Ky.—Dorman v. Carnes, 96 S.W.2d 869, 265 Ky. 361—Union Indemnity Co. v. Pennsylvania Boiler Works, 55 S.W.2d 367, 246 Ky. 473.

Okl.—McClure v. Weigand Tea & Coffee Co., 12 P.2d 877, 158 Okl. 115.

Pa.—Appeal of St. Paul Mercury Indemnity Co. of St. Paul, 191 A. 9, 325 Pa. 535.

Vt.—Town of Windsor, to Use and Benefit of Samson Plaster Board Co. v. Standard Accident Ins. Co., 26 A.2d 83, 112 Vt. 426.

Wis.—Gumz v. U. S. Fidelity & Guaranty Co., 245 N.W. 82, 209 Wis. 408.

50 C.J. p 76 note 50.

Rule of strictissimi juris applies to suretyship contract only to extent that no implication shall be indulged in to impose burden not clearly inferable from language of contract, but does not apply so as to hold that contract shall not be reasonably interpreted as other contracts are.—City of Los Angeles v. Hoppenyan's, Inc., 47 P.2d 293, 8 Cal.App.2d 138—50 C.J. p 76 note 48 [b].

7. U.S.—Union Indemnity Co. v. Lang, C.C.A.Cal., 71 F.2d 901—National Surety Co. of New York v. Ulmen, C.C.A.Mont., 68 F.2d 330, certiorari denied Ulmen v. National Surety Co. of New York, 54 S. Ct. 629, 292 U.S. 624, 78 L.Ed. 1479—American Surety Co. of New York v. Hutchinson, C.C.A.Tex., 63 F.2d 536—Corpus Juris quoted in Baltimore Trust Co. v. Metropolitan Casualty Ins. Co., D.C.Md., 3 F.Supp. 404, 407.

Cal.—City of Los Angeles v. Hoppenyan's, Inc., 47 P.2d 293, 8 Cal.App. 2d 138—Municipal Bond Co. v. Balboa Const. Co., 34 P.2d 1032, 140 Cal.App. 57.

Ill.—Galesburg Sanitary Dist., for Use of Anderson v. American Surety Co. of New York, 32 N.E.2d 407, 308 Ill.App. 457.

Ky.—Dorman v. Carnes, 96 S.W.2d 869, 265 Ky. 361—Union Indemnity Co. v. Pennsylvania Boiler Works, 55 S.W.2d 367, 246 Ky. 473.

Md.—Fidelity & Deposit Co. of Maryland v. Mattingly Lumber Co., 4 A.2d 447, 176 Md. 217.

Mont.—Swanberg v. National Surety Co., 283 P. 761, 86 Mont. 340.

N.Y.—In re Lilienthal's Estate, 240 N.Y.S. 849, 136 Misc. 762.

N.C.—Overman & Co. v. Great American Indemnity Co., 155 S.E. 730, 199 N.C. 736.

Okl.—McClure v. Weigand Tea & Coffee Co., 12 P.2d 877, 158 Okl. 115.

Pa.—Monongahela St. Ry. Co. v. Philadelphia Co., 39 A.2d 909, 350 Pa. 603—Corpus Juris quoted in In re Brock, 166 A. 778, 312 Pa. 7—Commonwealth v. National Surety Co., 164 A. 788, 310 Pa. 108, 89 A.L.R. 564—Thommen v. Aldine Trust Co., 153 A. 750, 302 Pa. 409—Pure Oil Co. v. Shiffer, 175 A. 895, 115 Pa.Super. 319—New Holland Dairies v. Regent Dairy Prod-

stances,<sup>8</sup> is controlling. When such intention is once ascertained it will prevail over all other considerations in determining the nature of the agreement.<sup>9</sup> The contract of either a gratuitous or a compensated surety must be construed from the expressions as therein contained<sup>10</sup> unless there is such ambiguity as renders it uncertain or doubtful.<sup>11</sup> If there is no ambiguity, there is no room for construction.<sup>12</sup>

Reference must be had to the entire instrument,<sup>13</sup> and, where the suretyship contract makes another

instrument a part thereof, the contract and instrument must be construed together.<sup>14</sup> Where the contract is entered into pursuant to a charter or statute, such charter or statute forms a part of the contract so as to be construed in connection therewith,<sup>15</sup> but, although there is some authority to the contrary,<sup>16</sup> the statute under which the contract is made will not be construed so as to enlarge the surety's liability beyond the terms of his contract.<sup>17</sup>

A construction resulting in a condition is not fa-

ucts Corporation, 174 A. 664, 115 Pa.Super. 87—Elliott-Lewis Electrical Co. v. Hausman, 158 A. 626, 104 Pa.Super. 322.

S.C.—National Loan & Exchange Bank of Greenwood v. Gustafson, 154 S.E. 167, 157 S.C. 221.

Tenn.—Holmes v. Elder, 94 S.W.2d 390, 170 Tenn. 257, 104 A.L.R. 1282.

Vt.—Town of Windsor, to Use and Benefit of Samson Plaster Board Co. v. Standard Accident Ins. Co., 26 A.2d 83, 112 Vt. 426.

Va.—C. S. Luck & Sons v. Boatwright, 162 S.E. 53, 157 Va. 490.

Wash.—Grand Lodge of Scandinavian Fraternity of America, Dist. No. 7, v. U. S. Fidelity & Guaranty Co., 98 P.2d 971, 2 Wash.2d 661.

Wis.—Gumz v. U. S. Fidelity & Guaranty Co., 245 N.W. 82, 209 Wis. 408.

50 C.J. p 76 note 51.

2. U.S.—Feutz v. Massachusetts Bonding & Ins. Co., D.C.Mo., 85 F.Supp. 418—Corpus Juris quoted in Baltimore Trust Co. v. Metropolitan Casualty Ins. Co., D.C.Md., 3 F.Supp. 404, 407.

Cal.—City of Los Angeles v. Hoppenyan's, Inc., 47 P.2d 293, 8 Cal. App.2d 133—Municipal Bond Co. v. Balboa Const. Co., 34 P.2d 1032, 140 Cal.App. 57.

Ill.—Galesburg Sanitary Dist., for Use of Anderson v. American Surety Co. of New York, 33 N.E.2d 407, 308 Ill.App. 457—Harris, for Use of Otis Elevator Co., v. American Surety Co. of New York, 17 N.E.2d 250, 297 Ill.App. 1, reversed on other grounds Harris v. American Surety Co. of New York, 24 N.E.2d 42, 372 Ill. 361.

Ky.—Dorman v. Carnes, 96 S.W.2d 869, 265 Ky. 361—Union Indemnity Co. v. Pennsylvania Boiler Works, 55 S.W.2d 367, 246 Ky. 473.

Md.—Fidelity & Deposit Co. of Maryland v. Mattingly Lumber Co., 4 A.2d 447, 176 Md. 217.

N.Y.—Gillmore v. Equitable Surety Co., 239 N.Y.S. 530, 228 App.Div. 188—In re Lillienthal's Estate, 240 N.Y.S. 849, 136 Misc. 762.

Okl.—Boyle v. Montague, 48 P.2d 1037, 173 Okl. 402—McClure v. Weigand Tea & Coffee Co., 12 P.2d 877, 158 Okl. 115.

Pa.—Corpus Juris quoted in In re Brock, 166 A. 778, 781, 312 Pa. 7—Thommen v. Aldine Trust Co., 153 A. 750, 302 Pa. 409—Pure Oil Co. v. Shlifer, 175 A. 895, 115 Pa.Super. 319.

W.Va.—Lawhead v. Doddridge County Bank, 194 S.E. 79, 119 W.Va. 467.

Wis.—Gumz v. U. S. Fidelity & Guaranty Co., 245 N.W. 82, 209 Wis. 408.

50 C.J. p 77 note 52.

9. U.S.—Corpus Juris quoted in Baltimore Trust Co. v. Metropolitan Casualty Ins. Co., D.C.Md., 3 F. Supp. 404, 408.

Ga.—McKibben v. Macon Fourth Nat. Bank, 122 S.E. 891, 32 Ga.App. 222.

10. Ark.—Home Ins. Co. v. Boyce, 65 S.W.2d 910, 188 Ark. 488.

Pa.—Koch v. Moyer, 158 A. 198, 103 Pa.Super. 270.

R.I.—Narragansett Pier R. Co. v. Palmer, 38 A.2d 761, 70 R.I. 298, 153 A.L.R. 1143.

50 C.J. p 77 note 56.

Secret understandings between the principals and sureties cannot alter the legal effect of a bond.—Lloyds Casualty Insurer v. Farrar, 174 S.W.2d 302, 141 Tex. 497.

11. U.S.—Feutz v. Massachusetts Bonding & Ins. Co., D.C.Mo., 85 F. Supp. 418.

Ark.—Home Ins. Co. v. Boyce, 65 S.W.2d 910, 188 Ark. 488.

50 C.J. p 77 note 57.

12. Ill.—Leshar v. U. S. Fidelity & Guaranty Co., 88 N.E. 208, 239 Ill. 502—People, for Use of National Cast Iron Pipe Co. v. Merkle, 269 Ill.App. 449.

13. La.—Ault & Burden v. Shepherd, 8 La.App. 595.

Tenn.—Holmes v. Elder, 94 S.W.2d 390, 170 Tenn. 257, 104 A.L.R. 1282.

50 C.J. p 77 note 54.

14. U.S.—Massachusetts Bonding & Ins. Co. v. Feutz, C.A.Mo., 182 F.2d 752—Feutz v. Massachusetts Bonding & Ins. Co., D.C.Mo., 85 F. Supp. 418—Moore v. Maryland Casualty Co., D.C.Mass., 12 F.Supp. 90, affirmed, C.C.A., Maryland Casualty Co. v. Moore, 82 F.2d 189, cer-

tiorari denied 56 S.Ct. 749, 286 U.S. 666, 80 L.Ed. 1390.

Cal.—Municipal Bond Co. v. Balboa Const. Co., 34 P.2d 1032, 140 Cal. App. 57.

Mont.—Federal Surety Co. v. Basin Const. Co., 5 P.2d 775, 91 Mont. 114.

N.H.—Kenney v. Barry, 162 A. 774, 86 N.H. 35.

Okl.—Corpus Juris cited in Wright v. Fidelity & Deposit Co. of Maryland, 54 P.2d 1084, 1086, 176 Okl. 274.

Pa.—New Holland Dairies v. Regent Dairy Products Corporation, 174 A. 664, 115 Pa.Super. 87.

Tex.—Corpus Juris cited in Eubanks v. Schwalbe, Civ.App., 55 S.W.2d 906, 909.

50 C.J. p 77 note 60.

#### Two bonds

Where person agreeing to extinguish fire on vessel to be burned in connection with Independence Day celebration and to remove the hulk of the vessel from tidewater, executed bond to indemnify members of amusement division of chamber of commerce arranging the burning against loss by reason of execution of a bond having the same surety by the members to the commonwealth conditioned on the removal from tidewater of the hulk of the vessel, the two bonds must be read together in determining surety's liability on the first mentioned bond, the sole purpose of which was to shift the ultimate responsibility under the second-mentioned bond from the members to such person and, consequently, to such person's surety; but in determining liability on the second-mentioned bond the first-mentioned bond may not be considered.—Hartford Accident & Indemnity Co. v. Casassa, 16 N.E.2d 860, 301 Mass. 246.

15. Okl.—Boyle v. Montague, 48 P.2d 1037, 173 Okl. 402.

50 C.J. p 78 note 61.

16. Wash.—Paulsell v. Peters, 115 P.2d 708, 9 Wash.2d 599.

17. U.S.—Corpus Juris cited in State of Arkansas v. Pufahl, C.C. A.Ark., 52 F.2d 116, 119.

50 C.J. p 78 note 62.

vored, and, when the provision is expressly designated a covenant, this construction will be adopted.<sup>18</sup> The recitals in a bond may be read to interpret and limit the condition thereof.<sup>19</sup> Where, by mistake, the condition is so drawn as to be insensible and invalid, it may be read and construed in the light of the evident intention of the parties, where such intention accords with justice and the rights of the case.<sup>20</sup>

**Construction against surety.** Ambiguous language ordinarily will be construed against the surety if it is employed by him<sup>21</sup> and in favor of the

obligee,<sup>22</sup> although there is also authority to the contrary.<sup>23</sup>

**Construction by court or parties.** The construction of the contract is a matter of law for the court,<sup>24</sup> but, where the parties have themselves construed the contract, such construction will be adopted.<sup>25</sup>

**Building and construction contracts.** The contract of a surety on a building or construction contract is to be construed together with other instruments to which it refers,<sup>26</sup> together with instru-

18. U.S.—Prudence Co. v. Fidelity & Deposit Co. of Maryland, D.C.N.Y., 2 F.Supp. 454.

Condition will not be read out of bond if agreement will be materially altered and burden inflicted on surety not contemplated by plain terms of bond.—City of St. Joseph ex rel. Consolidated Stone Co. v. Pfeiffer Stone Co., 26 S.W.2d 1018, 224 Mo. App. 895.

19. U.S.—U. S. v. Morrisdale Coal Co., D.C.Pa., 50 F.Supp. 138, affirmed, C.C.A., 135 F.2d 921, certiorari denied Morrisdale Coal Co. v. U. S., 64 S.Ct. 64, 320 U.S. 756, 83 L.Ed. 451.

20. Okl.—McClure v. Weigand Tea & Coffee Co., 12 P.2d 877, 158 Okl. 115.

21. U.S.—Phillips Co. v. Constitution Indemnity Co. of Philadelphia, C.C.A.Wis., 68 F.2d 304—Ætna Casualty & Surety Co. v. Independent Bridge Co., for Use of Alpha Portland Cement Co., C.C.A.Pa., 55 F.2d 79, certiorari denied 52 S.Ct. 500, 286 U.S. 548, 76 L.Ed. 1284—Clarkeburg Trust Co. v. Commercial Casualty Ins. Co., C.C.A.W.Va., 40 F.2d 626—Ætna Casualty & Surety Co. v. Commercial State Bank of Rantoul, D.C.Ill., 13 F.2d 474—Feutz v. Massachusetts Bonding & Ins. Co., D.C.Mo., 85 F.Supp. 418.

Ala.—Corpus Juris quoted in Maryland Casualty Co. v. Cunningham, 173 So. 506, 508, 234 Ala. 80.

Ga.—Polk v. Slaton, 187 S.E. 846, 54 Ga.App. 328.

Ill.—Corn Belt Bank v. Maryland Casualty Co., 281 Ill.App. 387—People, for Use of National Cast Iron Pipe Co. v. Markle, 269 Ill. App. 449.

Ind.—Meyer v. Building & Realty Service Co., 196 N.E. 250, 209 Ind. 125, 100 A.L.R. 1442.

Mich.—City of Detroit v. Blue Ribbon Auto Drivers' Ass'n, 237 N.W. 61, 254 Mich. 263, 74 A.L.R. 1306—Grinnell Realty Co. v. General Casualty & Surety Co., 234 N.W. 125, 253 Mich. 16.

Mo.—State ex rel. and to Use of

Winebrenner v. Detroit Fidelity & Surety Co., 32 S.W.2d 572, 326 Mo. 684, 71 A.L.R. 1131—City of St. Joseph ex rel. Consolidated Stone Co. v. Pfeiffer Stone Co., 26 S.W. 2d 1018, 224 Mo.App. 895.

Pa.—Corpus Juris quoted in In re Brock, 166 A. 778, 781, 312 Pa. 7. Tenn.—Villines v. Parham-Lindsey Grocery Co., 6 Tenn.App. 254. 50 C.J. p 78 notes 64, 65.

22. U.S.—Standard Accident Ins. Co. v. Simpson, C.C.A.S.C., 64 F.2d 583, certiorari denied Carolina Contracting Co. v. Standard Acc. Ins. Co., 54 S.Ct. 123, 280 U.S. 688, 78 L.Ed. 593.

Ala.—Corpus Juris quoted in Maryland Casualty Co. v. Cunningham, 173 So. 506, 508, 234 Ala. 80—National Surety Co. v. First Nat. Bank, 140 So. 544, 224 Ala. 423.

Mo.—Union State Bank v. American Surety Co., 23 S.W.2d 1038, 324 Mo. 438.

N.Y.—American Surety Co. of New York v. Wells Water Dist., 1 N.Y. S.2d 614, 253 App.Div. 19, 254 App. Div. 717, affirmed American Surety Co. of New York v. Wells Water Dist., Town of Wells, 19 N.E. 2d 926, 280 N.Y. 528, motion denied 20 N.E.2d 1023, 280 N.Y. 673—People's Bank of Hamburg v. C. L. Gates, Inc., 250 N.Y.S. 452, 232 App.Div. 328.

Pa.—Corpus Juris quoted in In re Brock, 166 A. 778, 781, 312 Pa. 7. 50 C.J. p 78 note 66.

23. Kan.—Guess v. Letson, 57 P. 1053, 9 Kan.App. 106. 50 C.J. p 78 note 67.

24. U.S.—American Surety Co. of New York v. Hutchinson, C.C.A. Tex., 63 F.2d 536.

Kan.—Corpus Juris quoted in Scovill v. Scovill, 62 P.2d 852, 854, 144 Kan. 759.

Pa.—Thommen v. Aldine Trust Co., 153 A. 750, 302 Pa. 409.

Tenn.—Villines v. Parham-Lindsey Grocery Co., 6 Tenn.App. 254. 50 C.J. p 78 note 68.

25. Mo.—Naylor Special Road Dist. of Ripley County v. Fidelity & Deposit Co., App., 75 S.W.2d 436,

record quashed State ex rel. Fidelity & Deposit Co. of Maryland v. Allen, Sup., 85 S.W.2d 455.

Tenn.—Fidelity-Phoenix Fire Ins. Co. of New York v. Jackson, 181 S.W. 2d 625, 181 Tenn. 453—Villines v. Parham-Lindsey Grocery Co., 6 Tenn.App. 254. 50 C.J. p 78 note 69.

26. U.S.—American Surety Co. of N. Y. v. Brummel, C.A.Kan., 184 F.2d 935.

Ala.—Maryland Casualty Co. v. Cunningham, 173 So. 506, 234 Ala. 80. Cal.—Roberts v. Security Trust & Savings Bank, 238 P. 673, 196 Cal. 557, 575—City of Los Angeles v. Hoppenyan's Inc., 47 P.2d 293, 3 Cal.App.2d 138.

Ind.—National Surety Co. v. Rochester Bridge Co., 146 N.E. 415, 83 Ind.App. 195—Hoosier Brick Co. v. Floyd County Bank, 116 N.E. 87, 64 Ind.App. 445.

Mo.—Noonan v. Independence Indemnity Co., 41 S.W.2d 162, 328 Mo. 706, 76 A.L.R. 931—Harris v. Taylor, 129 S.W. 995, 150 Mo.App. 291.

N.J.—Meyer v. Standard Accident Ins. Co., 177 A. 255, 114 N.J.Law 483.

N.C.—Overman & Co. v. Great American Indemnity Co., 155 S.E. 730, 199 N.C. 736—Robinson Mfg. Co. v. Blaylock, 135 S.E. 136, 193 N.C. 407—Standard Electric Time Co. v. Fidelity & Deposit Co. of Maryland, 132 S.E. 808, 191 N.C. 653—Ideal Brick Co. v. Gentry, 132 S.E. 800, 191 N.C. 636—Ideal Brick Co. v. Gentry, 132 S.E. 800, 191 N.C. 636—Morganton Mfg. & Trading Co. v. Anderson, 81 S.E. 418, 165 N.C. 285, Ann.Cas.1916A 763.

Okl.—Ætna Casualty & Surety Co. v. Tucker, 50 P.2d 339, 174 Okl. 343.

Utah.—De Luxe Glass Co. v. Martin, 208 P.2d 1127.

Wis.—Fidelity & Deposit Co. of Maryland v. Metropolitan Sewerage Commission of Milwaukee County, 210 N.W. 713, 191 Wis. 499—Building Contractors' Limited Mut. Liability Ins. Co. v.

ments to which the contract may refer,<sup>27</sup> and even another contract executed contemporaneously.<sup>28</sup> Where the language of the bond is that selected by the surety, it must be given the strongest interpretation which it will reasonably bear in favor of the obligee.<sup>29</sup> The interpretation given the building contract by the surety at the time the bond was given may be accepted by the court,<sup>30</sup> and, in the absence of fraud between the contractor and the owner, the surety may be bound by the construction placed on the contract by his principal.<sup>31</sup> The words used will be given their usual meaning.<sup>32</sup>

Similarly, in determining the liability of a surety on a subcontractor's contract, the bond and con-

tract are to be construed reasonably<sup>33</sup> and as a whole.<sup>34</sup> Where the subcontract and bond are unambiguous, resort need not be had to the surrounding circumstances in order to ascertain the intent of the parties.<sup>35</sup>

### § 101. Strict Construction as to Gratuitous Surety

A gratuitous surety is a favorite of the law, and the contract must be strictly construed so as to impose on the surety only the burdens clearly within its terms, and it cannot be extended by implication, presumption, or construction.

A gratuitous surety is a favorite of the law,<sup>36</sup> and the contract must be strictly construed<sup>37</sup> so

Southern Surety Co., 200 N.W. 770, 185 Wis. 83.  
9 C.J. p 856 note 70.

#### Inconsistency

(1) Where a bond securing the performance of a building contract is executed subsequently thereto, as between the owner and the surety, a stipulation in the bond modifies, with the consent of the contractor, a stipulation in the building contract as far as inconsistent, and the stipulation in the bond controls as far as the surety is concerned.—*Hax-Smith Furniture Co. v. Toll*, 113 S.W. 650, 133 Mo.App. 404.

(2) Where the terms of a bond for the performance of a building contract conflict with the terms of the contract, the bond will control in determining the liability of the sureties.—*Morgan v. Salmon*, 135 P. 553, 18 N.M. 72, L.R.A.1915B, 1407.

Contract held part of bond although not referred to

U.S.—*Modern Brokerage Corporation v. Massachusetts Bonding & Insurance Co.*, D.C.N.Y., 54 F.Supp. 939, opinion adhered to 56 F.Supp. 696.

27. Ind.—*National Surety Co. v. Rochester Bridge Co.*, 146 N.E. 415, 83 Ind.App. 195.

28. Tex.—*Jones v. Gambill*, Civ. App., 241 S.W. 1067.

29. Ark.—*Federal Union Surety Co. v. McGuire*, 163 S.W. 1171, 111 Ark. 373.

30. Mo.—*Noonan v. Independence Indemnity Co.*, 41 S.W.2d 162, 328 Mo. 706, 76 A.L.R. 931.

31. Idaho.—*Sanders v. Keller*, 111 P. 350, 18 Idaho 590.

32. U.S.—*Wood v. U. S. Fidelity & Guaranty Co.*, D.C.Mass., 143 F. 424.

33. U.S.—*Glens Falls Indemnity Co. v. Basich Bros. Const. Co.*, C.C.A. Cal., 165 F.2d 649, certiorari denied 68 S.Ct. 1347, 334 U.S. 833, 92 L. Ed. 1760.

34. U.S.—*Glens Falls Indemnity Co. v. Basich Bros. Const. Co.*, supra. Cal.—*Storm & Butts v. Lipscomb*, 3 P.2d 567, 117 Cal.App. 6.

Principal contract held not made part of subcontract

Colo.—*Gardner Bros. & Glenn Const. Co. v. American Surety Co. of New York*, 37 P.2d 384, 95 Colo. 456.

35. Wis.—*Theodore J. Molzahn & Sons v. K. W. Construction Co.*, 254 N.W. 101, 214 Wis. 603.

36. U.S.—*Massachusetts Bonding & Ins. Co. v. Feutz*, C.A.Mo., 182 F.2d 752.

Ind.—*Peters v. Bechdolt*, 192 N.E. 116, 100 Ind.App. 395.

Kan.—*Corpus Juris quoted in Scovill v. Scovill*, 62 P.2d 852, 854, 144 Kan. 759.

Ky.—*Corpus Juris quoted in Vogt v. City of Louisville*, 79 S.W.2d 359, 362, 258 Ky. 36.

Me.—*Foster v. Kerr & Houston, Inc.*, 179 A. 297, 133 Me. 389.

Miss.—*Hederman v. Cox*, 193 So. 19, 188 Miss. 21.—*Corpus Juris cited in National Union Fire Ins. Co. v. Currie*, 178 So. 104, 105, 180 Miss. 711.—*Corpus Juris cited in W. T. Raleigh Co. v. Rotenberry*, 164 So. 5, 6, 174 Miss. 319.

Mo.—*School Dist. of St. Joseph v. Security Bank of St. Joseph*, 26 S.W.2d 785, 325 Mo. 1.—*Prudential Ins. Co. of America v. Goldsmith*, 192 S.W.2d 1, 239 Mo.App. 188.

N.Y.—*First Citizens Bank & Trust Co. of Utica v. Sherman's Estate*, 294 N.Y.S. 131, 250 App.Div. 339.—*Bank of U. S. v. Andron*, 277 N.Y.S. 594, 155 Misc. 21.

N.D.—*State v. Padgett*, 209 N.W. 388, 54 N.D. 211.

Or.—*Hagey v. Massachusetts Bonding & Insurance Co.*, 126 P.2d 836, 169 Or. 132.—*Title & Trust Co. v. U. S. Fidelity & Guaranty Co.*, 1 P.2d 1100, 138 Or. 467, affirmed 7 P.2d 805, 138 Or. 467.

Pa.—*Thommen v. Aldine Trust Co.*, 153 A. 750, 302 Pa. 409.—*Commonwealth v. Przekon*, 25 A.2d 776, 148

Pa.Super. 385.—*Elliott-Lewis Electrical Co. v. Hausman*, 158 A. 626, 104 Pa.Super. 322.—*Cohen v. Bank of Philadelphia & Trust Co.*, 156 A. 742, 102 Pa.Super. 279.—*Allen Fuel Co. v. Rice Coal Co.*, Com.Pl., 43 Lack.Jur. 231.

50 C.J. p 78 note 70.

37. U.S.—*Massachusetts Bonding & Ins. Co. v. Feutz*, C.A.Mo., 182 F. 2d 752.

Ark.—*Furst & Thomas v. Rowland*, 68 S.W.2d 451, 188 Ark. 804.

Colo.—*Bell v. People, for Use of Garfield County*, 22 P.2d 857, 92 Colo. 585.

Ga.—*Barry Finance Co. v. Lanier*, 53 S.E.2d 694, 79 Ga.App. 344.—*W. T. Rawleigh Co. v. Overstreet*, 32 S. E.2d 574, 71 Ga.App. 873.

Ill.—*Commonwealth Trust & Savings Bank v. Hart*, 268 Ill.App. 322.

Iowa.—*Kies v. Brown*, 268 N.W. 910, 222 Iowa 54.—*Andrew v. Austin*, 232 N.W. 79, 213 Iowa 963.

Kan.—*Stull v. Allen*, 193 P.2d 207, 165 Kan. 202.—*Corpus Juris quoted in Scovill v. Scovill*, 62 P.2d 852, 854, 144 Kan. 759.

Ky.—*Corpus Juris quoted in Vogt v. City of Louisville*, 79 S.W.2d 359, 362, 258 Ky. 36.—*American Surety Co. of New York v. Noe*, 53 S.W.2d 178, 245 Ky. 42.

La.—*Basso v. Export Warrant Co.*, 193 So. 654, 194 La. 303.—*Texas & Pac. Ry. Co. v. U. S. Fidelity & Guaranty Co.*, App., 16 So.2d 671.—*Shreveport Laundries v. Sherman, App.*, 7 So.2d 433.—*Knox Glass Bottle Co. v. Golden Gate Liquor Co.*, App., 174 So. 684.—*Home Ins. Co. v. Voorhies Co.*, App., 168 So. 724.—*Texas Co. v. Crais*, App., 155 So. 405.—*Continental Ins. Co. v. Prevost*, App., 154 So. 671.—*First Nat. Bank v. White*, 127 So. 433, 18 La. App. 156.

Me.—*Foster v. Kerr & Houston, Inc.*, 179 A. 297, 133 Me. 389.

Mich.—*Gunn v. Geary*, 7 N.W. 235, 44 Mich. 615.

Miss.—*Hederman v. Cox*, 193 So. 19,



as to impose on the surety only the burdens clearly within the terms of such contract,<sup>38</sup> and it cannot be extended by implication, presumption, or construction.<sup>39</sup> All doubts will be resolved in his favor.<sup>40</sup> Construction in favor of the surety should

not, however, be carried to the length of giving the contract a forced and unreasonable construction with the view of relieving him.<sup>41</sup> This rule of strictissimi juris<sup>42</sup> is followed both in law and in equity;<sup>43</sup> but it has been said not to apply to a case

188 Miss. 21—*Corpus Juris* cited in *W. T. Raleigh Co. v. Rotenberry*, 164 So. 5, 6, 174 Miss. 319.  
 Mo.—School Dist. of St. Joseph v. Security Bank of St. Joseph, 26 S. W.2d 785, 325 Mo. 1—Prudential Ins. Co. of America v. Goldsmith, 192 S.W.2d 1, 239 Mo.App. 188.  
 N.J.—Boorstein v. Miller, 3 A.2d 87, 124 N.J.Eq. 526.  
 N.Y.—Rutherford Nat. Bank v. Manniello, 271 N.Y.S. 69, 240 App.Div. 506, affirmed 195 N.E. 203, 266 N.Y. 568—Atwater v. Lober, 239 N.Y.S. 340, 135 Misc. 560—Yonkers-Cameo, Inc., v. Shusterman, 16 N. Y.S.2d 260.  
 Ohio.—Rohr v. Beamer, 189 N.E. 125, 46 Ohio App. 452.  
 Okl.—McClure v. Weigand Tea & Coffee Co., 12 P.2d 877, 158 Okl. 115.  
 Or.—Title & Trust Co. v. U. S. Fidelity & Guaranty Co., 1 P.2d 1100, 138 Or. 467, affirmed 7 P.2d 805, 138 Or. 467.  
 Pa.—Manufacturers & Merchants Building & Loan Ass'n v. Willey, 183 A. 789, 321 Pa. 340—City of Philadelphia v. National Surety Co., 173 A. 181, 315 Pa. 356—In re Brock, 166 A. 778, 312 Pa. 7—*Corpus Juris* cited in In re Cancellmo's Estate, 162 A. 454, 455, 308 Pa. 178—Thommen v. Aldine Trust Co., 153 A. 750, 302 Pa. 409—Barratt v. Greenfield, 9 A.2d 188, 137 Pa.Super. 310—In re Revocation of Retail Malt Liquor License, 200 A. 313, 131 Pa.Super. 330—Cohen v. Bank of Philadelphia & Trust Co., 156 A. 742, 102 Pa.Super. 279—Thommen v. Wolfe, 13 Pa.Dist. & Co. 491.  
 R.I.—Narragansett Pier R. Co. v. Palmer, 38 A.2d 761, 70 R.I. 298, 153 A.L.R. 1143.  
 Tenn.—Holmes v. Elder, 94 S.W.2d 390, 170 Tenn. 257, 104 A.L.R. 1282.  
 Tex.—Cooley v. Cash, Civ.App., 207 S.W.2d 436—*Corpus Juris* cited in *Texas & P. Ry. Co. v. Citizens Nat. Bank in Abilene*, Civ.App., 126 S. W.2d 765, 768.  
 Va.—American Surety Co. of New York v. Commonwealth, 21 S.E.2d 748, 180 Va. 97.  
 Wis.—Klatte v. Franklin State Bank, 248 N.W. 158, 211 Wis. 613, rehearing denied and modified on other grounds 249 N.W. 72, 211 Wis. 613—In re Oeffin's Estate, 245 N.W. 109, 209 Wis. 386—Gumz v. U. S. Fidelity & Guaranty Co., 245 N.W. 82, 209 Wis. 408—Donkle v. Milem, 59 N.W. 586, 68 Wis. 33.  
 50 C.J. p 78 note 71.

#### Undertaking not wholly gratuitous

A contract of suretyship entered into by one not regularly engaged in such business is to be strictly construed in favor of the obligor, whether or not his undertaking is wholly gratuitous, especially where it is contended that the agreement is one to indemnify against liability for the acts of the obligee or its agents.—*City of Philadelphia v. Philadelphia Gas Works Co.*, 49 Pa. Dist. & Co. 314.

#### Statutes strictly construed

A gratuitous surety is entitled to have statutes and rules of law designated for the protection of such a surety strictly construed in his favor.—*Ryan v. Scovill*, 78 P.2d 877, 147 Kan. 748.

38. Kan.—*Corpus Juris* quoted in *Scovill v. Scovill*, 62 P.2d 852, 854, 144 Kan. 759.

Ky.—*Dorman v. Carnes*, 96 S.W.2d 869, 265 Ky. 361—*Corpus Juris* quoted in *Vogt v. City of Louisville*, 79 S.W.2d 359, 362, 258 Ky. 36.

Miss.—*Hederman v. Cox*, 193 So. 19, 138 Miss. 21—*Wingo-Ellett & Crump Shoe Co. v. Naaman*, 167 So. 634, 175 Miss. 468—*Corpus Juris* cited in *W. T. Raleigh Co. v. Rotenberry*, 164 So. 5, 6, 174 Miss. 319.

Mo.—School Dist. of St. Joseph v. Security Bank of St. Joseph, 26 S. W.2d 785, 325 Mo. 1.

Pa.—Thommen v. Aldine Trust Co., 153 A. 750, 302 Pa. 409—Cohen v. Bank of Philadelphia & Trust Co., 156 A. 742, 102 Pa.Super. 279.

Tex.—Cooley v. Cash, Civ.App., 207 S.W.2d 436.

50 C.J. p 79 note 72.

39. Cal.—*Ryan v. Shannahan*, 285 P. 1045, 209 Cal. 98.

Ill.—*Wright v. Loring*, 184 N.E. 865, 351 Ill. 584—Commonwealth Trust & Savings Bank v. Hart, 268 Ill. App. 322.

Iowa.—*Kies v. Brown*, 268 N.W. 910, 222 Iowa 54—*Andrew v. Austin*, 232 N.W. 79, 213 Iowa 963.

Kan.—*Stull v. Allen*, 193 P.2d 207, 165 Kan. 202—*Corpus Juris* quoted in *Scovill v. Scovill*, 62 P.2d 852, 854, 144 Kan. 759.

Ky.—*Corpus Juris* quoted in *Vogt v. City of Louisville*, 79 S.W.2d 359, 362, 258 Ky. 36.

La.—*Shreveport Laundries v. Sherman*, App., 7 So.2d 433—*Texas Co. v. Crais*, App., 155 So. 405—*Texas Co. v. Couvillon*, App., 148 So. 295.

Miss.—*Hederman v. Cox*, 193 So. 19,

188 Miss. 21—*Corpus Juris* cited in *National Union Fire Ins. Co. v. Currie*, 178 So. 104, 105, 180 Miss. 711—*Wingo-Ellett & Crump Shoe Co. v. Naaman*, 167 So. 634, 175 Miss. 468—*Corpus Juris* cited in *W. T. Raleigh Co. v. Rotenberry*, 164 So. 5, 6, 174 Miss. 319.

Mo.—School Dist. of St. Joseph v. Security Bank of St. Joseph, 26 S.W.2d 785, 325 Mo. 1—Prudential Ins. Co. of America v. Goldsmith, 192 S.W.2d 1, 239 Mo.App. 188.

Okl.—*Whale v. Rice*, 49 P.2d 737, 173 Okl. 530.

Pa.—Manufacturers & Merchants Building & Loan Ass'n v. Willey, 183 A. 789, 321 Pa. 340—Commonwealth v. Cohen, 14 A.2d 362, 140 Pa.Super. 361—*Barratt v. Greenfield*, 9 A.2d 188, 137 Pa.Super. 310—In re Revocation of Retail Malt Liquor License, 200 A. 313, 131 Pa.Super. 330—*Pure Oil Co. v. Shlifer*, 175 A. 895, 115 Pa.Super. 319—*Fleck Brothers Co. v. Pieratti*, 14 Pa.Dist. & Co. 771—*Thommen v. Wolfe*, 13 Pa.Dist. & Co. 491.

R.I.—*Narragansett Pier R. Co. v. Palmer*, 38 A.2d 761, 70 R.I. 298, 153 A.L.R. 1143.

Tenn.—*Holmes v. Elder*, 94 S.W.2d 390, 170 Tenn. 257, 104 A.L.R. 1282—*State ex rel. McCormack v. National Bond & Mortgage Co.*, 168 S.W.2d 488, 26 Tenn.App. 125.

Tex.—Cooley v. Cash, Civ.App., 207 S.W.2d 436.

W.Va.—*Lawhead v. Doddridge County Bank*, 194 S.E. 79, 119 W.Va. 467.

50 C.J. p 79 note 73.

40. U.S.—*Massachusetts Bonding & Ins. Co. v. Feutz*, C.A.Mo., 182 F.2d 752.

Or.—Title & Trust Co. v. U. S. Fidelity & Guaranty Co., 1 P.2d 1100, 138 Or. 467, affirmed 7 P.2d 805, 138 Or. 467.

41. Colo.—*Bell v. People*, for Use of Garfield County, 22 P.2d 857, 92 Colo. 585.

Ill.—*Wright v. Loring*, 184 N.E. 865, 351 Ill. 584.

Pa.—*Corpus Juris* cited in *Thommen v. Aldine Trust Co.*, 153 A. 750, 302 Pa. 409—*Corpus Juris* cited in *Cohen v. Bank of Philadelphia & Trust Co.*, 156 A. 742, 102 Pa.Super. 279.

50 C.J. p 80 note 75.

42. Utah.—*Walker Realty Co. v. American Surety Co.*, 211 P. 998, 60 Utah 435.

43. Or.—*Woodle v. Settlemeyer*, 141

where a clear intention that the sureties should come under a more enlarged obligation is shown,<sup>44</sup> and it has, by some authorities, been explained to be a rule, not of construction, but one of application of the contract after its meaning has been ascertained from an interpretation of the contract under the rules applicable to other contracts.<sup>45</sup>

## § 102. Strict Construction as to Compensated Surety

Generally, the rule that the surety is a favorite of the law and that his contract must be strictly construed does not apply to surety companies organized to make

bonds or undertakings for a profit, or to a compensated surety.

While by some authorities no distinction with regard to its construction is made between the contract of a gratuitous surety and that of a compensated surety,<sup>46</sup> they are not ordinarily regarded as on the same footing.<sup>47</sup> At common law, and under statutes declaratory thereof, the rule that the surety is a favorite of the law and that his contract must be strictly construed does not apply to surety companies organized to make bonds or undertakings for a profit, or to a compensated surety.<sup>48</sup> This rule is without application where the con-

P. 205, 71 Or. 25, L.R.A.1915A 839, Ann.Cas.1916C 1222.  
50 C.J. p 80 note 77.

44. N.Y.—McElroy v. Mumford, 28 N.E. 502, 128 N.Y. 303—De Camp v. Bullard, 50 N.Y.S. 807, 22 Misc. 441, affirmed 53 N.Y.S. 1102, 33 App.Div. 627, affirmed 54 N.E. 26, 159 N.Y. 450.

45. Cal.—Bridges v. Price, 273 P. 72, 95 Cal.App. 394.  
50 C.J. p 80 note 79.

What is meant by the maxim is that, when the meaning of a contract of indemnity or guaranty has once been judicially determined under the rule of reasonable construction applicable to all written contracts, then the liability of the surety, under his contract, as thus interpreted and construed, is not to be extended beyond its strict meaning.—Covey v. Schiesswohl, 114 P. 292, 50 Colo. 68.

46. N.J.—Meyer v. Standard Accident Ins. Co., 177 A. 255, 114 N.J. Law 483.

50 C.J. p 81 notes 83 [g]—[i].

Contracts required by statute  
U.S.—McGrath v. Nolan, C.C.A.Or., 83 F.2d 746.

### In Texas

(1) A suretyship contract will be strictly construed.—Standard Acc. Ins. Co. v. Knox, 184 S.W.2d 612, 144 Tex. 296—First State Bank of Temple v. Metropolitan Casualty Ins. Co. of New York, 79 S.W.2d 835, 125 Tex. 113, 98 A.L.R. 1256—Aetna Casualty & Surety Co. v. Russell, Com.App., 24 S.W.2d 385, rehearing denied, Com.App., 33 S.W.2d 189—Texas & P. Ry. Co. v. Citizens Nat. Bank in Abilene, Civ.App., 126 S.W.2d 765—U. S. Fidelity & Guaranty Co. v. Daniels, Civ.App., 107 S.W.2d 400—Draper v. Robinson, Civ.App., 106 S.W.2d 825, modified on other grounds Robinson v. Draper, 127 S.W.2d 181, 133 Tex. 280—N. O. Nelson Mfg. Co. v. Wallace, Civ.App., 66 S.W.2d 505, error refused—Citizens' State Bank of Wheeler v. American Surety Co., Civ.App., 65 S.W.2d 778, error refused—Miller v. Board County, Civ.

App., 59 S.W.2d 277—American Indemnity Co. v. Robstown Ind. School Dist. Bd. of Trustees, Civ.App., 200 S.W. 592, reversed on other grounds, Com.App., 228 S.W. 105, conformed to, Civ.App., 233 S.W. 878—50 C.J. p 81 note 83 [j].

(2) On the other hand, it has been held that the rule of strictissimi juris should not be extended to a bond underwritten by a compensated corporation.—Aetna Casualty & Surety Co. v. Hawn Lumber Co., Civ.App., 62 S.W.2d 329, modified on other grounds 97 S.W.2d 460, 128 Tex. 296, rehearing denied 98 S.W.2d 167, 128 Tex. 296.

47. Cal.—Ramish v. Astor, 42 P.2d 334, 5 Cal.App.2d 225.

Fla.—American Surety Co. of New York v. Smith, 130 So. 440, 100 Fla. 1012.

Mich.—City of Detroit v. Blue Ribbon Auto Drivers' Ass'n, 287 N.W. 61, 254 Mich. 263, 74 A.L.R. 1306.

Mo.—State ex rel. and to Use of Kaercher v. Roth, 49 S.W.2d 109, 330 Mo. 105.

N.Y.—Van Schaick v. Bank of Yorktown, 277 N.Y.S. 311, 154 Misc. 400.

N.C.—Maxwell v. Southern Fidelity Mut. Ins. Co., 9 S.E.2d 428, 217 N.C. 762.

S.C.—Bessinger v. National Sur. Corp., 35 S.E.2d 658, 207 S.C. 365.  
50 C.J. p 81 note 81.

48. U.S.—Corpus Juris quoted in United States Guarantee Co. v. Colonial Oil Co., C.C.A.Ga., 145 F. 2d 496, 500—U. S. v. Hartford Accident & Indemnity Co., C.C.A. Conn., 117 F.2d 503—Maryland Casualty Co. v. Moore, C.C.A. Mass., 82 F.2d 189, certiorari denied Maryland Casualty Co. v. Moore, 56 S.Ct. 749, 298 U.S. 666, 80 L.Ed. 1390—Feutz v. Massachusetts Bonding & Ins. Co., D.C.Mo., 85 F.Supp. 418—Colonial Oil Co. v. U. S. Guarantee Co., D.C.Ga., 56 F.Supp. 545, affirmed, C.C.A., 145 F.2d 496—Massachusetts Bonding & Insurance Co. v. Harrisburg Trust Co., D.C.Pa., 54 F.Supp. 401, reversed on other grounds, C.C.A.,

148 F.2d 784—Commissioners of Sinking Fund of Louisville v. Anderson, D.C.Ky., 20 F.Supp. 217, affirmed, C.C.A., 110 F.2d 961, certiorari denied 61 S.Ct. 28, 311 U.S. 669, 85 L.Ed. 429—American Bonding Co. v. Anderson, D.C.Ky., 20 F. Supp. 217, reversed on other grounds, C.C.A., 110 F.2d 961—Moore v. Maryland Casualty Co., D.C.Mass., 12 F.Supp. 90, affirmed, C.C.A., Maryland Casualty Co. v. Moore, 82 F.2d 189, certiorari denied 56 S.Ct. 749, 298 U.S. 666, 80 L.Ed. 1390—Dairymen's Co-operative Sales Co. v. Maryland Casualty Co., D.C.Pa., 11 F.Supp. 423, affirmed, C.C.A., 78 F.2d 1014—Baltimore Trust Co. v. Metropolitan Casualty Ins. Co. of New York, D.C.Md., 3 F.Supp. 404, affirmed, C.C.A., 68 F.2d 121.

Del.—Wilmington Housing Authority, for Use of Simeone, v. Fidelity & Deposit Co. of Maryland, 47 A.2d 524, 4 Terry 381, 170 A.L.R. 1288.  
Fla.—Sessions v. Willard, 172 So. 242, 126 Fla. 848—Tapping v. McIntosh, 140 So. 773, 104 Fla. 715.

Ill.—Turk v. U. S. Fidelity & Guaranty Co., 197 N.E. 765, 361 Ill. 206.

Ind.—General Asbestos & Supply Co. v. Aetna Casualty & Surety Co., 198 N.E. 813, 101 Ind.App. 207.

Kan.—Ortmeyer Lumber Co. v. Central Surety & Insurance Corporation, 98 P.2d 97, 151 Kan. 226.

Ky.—American Surety Co. of New York v. Noe, 53 S.W.2d 178, 245 Ky. 42.

Me.—McFarland v. Rogers, 184 A. 391, 134 Me. 228—Foster v. Kerr & Houston, Inc., 179 A. 297, 138 Me. 389.

Md.—Lange v. Board of Education of Cecil County, to Use and Benefit of International Business Machines Corporation, 37 A.2d 317, 183 Md. 255—Hospital for Women of Maryland, for Use of Robert S. Green, Inc., v. U. S. Fidelity & Guaranty Co., 11 A.2d 457, 177 Md. 615, 128 A.L.R. 931.

Miss.—Hartford Accident & Indemnity Co. v. Hewes, 199 So. 93, 190 Miss. 225, modified on other

tract has plainly but one meaning,<sup>49</sup> and no intentment or presumptions other than those necessarily arising upon the contract of bond can be raised against a surety.<sup>50</sup> So, the liability of the surety or company cannot be extended by implication or construction beyond the terms of the contract.<sup>51</sup>

- grounds on suggestion of error 199 So. 772, 190 Miss. 225.
- Mo.—Noonan v. Independence Indemnity Co., 41 S.W.2d 162, 328 Mo. 706, 76 A.L.R. 931—State ex rel. and to Use of Winebrenner v. Detroit Fidelity & Surety Co., 32 S.W.2d 572, 326 Mo. 684, 71 A.L.R. 1131—State ex rel. Hardy v. Farris, 47 S.W.2d 198, 226 Mo.App. 1007.
- Neb.—Luikart v. Massachusetts Bonding & Insurance Co., 263 N.W. 124, 129 Neb. 771.
- N.Y.—Ocean Operating Corporation v. Capital City Surety Co., 238 N.Y.S. 209, 135 Misc. 359.
- N.C.—Maxwell v. Southern Fidelity Mut. Ins. Co., 9 S.E.2d 428, 217 N.C. 762.
- Or.—State, for Use and Benefit of Stater Motor Co. v. Metropolitan Casualty Ins. Co. of New York, 26 P.2d 1094, 145 Or. 367.
- Pa.—Flumara v. American Surety Co. of New York, 31 A.2d 283, 346 Pa. 584, 149 A.L.R. 545—City of Philadelphia v. National Surety Co., 173 A. 181, 315 Pa. 356—In re Brock, 166 A. 778, 312 Pa. 7—Shaw v. New Amsterdam Casualty Co., 164 A. 916, 310 Pa. 213—**Corpus Juris** cited in In re Cancellmo's Estate, 162 A. 454, 455, 308 Pa. 178—Pennsylvania Supply Co. v. National Casualty Co., 31 A.2d 453, 152 Pa.Super. 217—**Corpus Juris** quoted in Thomas Holme Building & Loan Ass'n v. New Amsterdam Casualty Co., 188 A. 374, 377, 124 Pa.Super. 187—Commonwealth ex rel. Reno v. Daugherty, Com.Pl., 54 Dauph.Co. 405.
- Tenn.—Holmes v. Elder, 94 S.W.2d 390, 170 Tenn. 257, 104 A.L.R. 1282—Fidelity Bond & Mortgage Co. v. American Surety Co., 14 Tenn.App. 211—Rambo v. Naylor Engineering Co., 10 Tenn.App. 203.
- Va.—American Surety Co. of New York v. Commonwealth, 21 S.E.2d 748, 180 Va. 97—C. S. Luck & Sons v. Boatwright, 162 S.E. 53, 157 Va. 490.
- W.Va.—**Corpus Juris** cited in State ex rel. City of Beckley v. Roberts, 40 S.E.2d 841, 847, 129 W.Va. 539.
- Wis.—Gumz v. U. S. Fidelity & Guaranty Co., 245 N.W. 82, 209 Wis. 408.
- 50 C.J. p 81 note 83.
- In Oklahoma**
- (1) The text rule has been followed.—**Corpus Juris** cited in Wright v. Fidelity & Deposit Co. of Maryland, 54 P.2d 1084, 1087, 176 Okl. 274—Employers' Liability Assur. Corporation, Limited, of London, England, v. Cannon, 49 P.2d 103, 173 Okl. 493, 102 A.L.R. 131—N. O. Nelson Mfg. Co. v. McDougal, 43 P.2d 399, 171 Okl. 477—Metropolitan Casualty Ins. Co. of New York v. United Brick & Tile Co., 29 P.2d 771, 167 Okl. 402, followed in United Brick & Tile Co. v. Southwestern Const. Co., 29 P.2d 777, 167 Okl. 407.
- (2) However, it has also been held that a contract of suretyship should be interpreted and the intelligible meaning of its language ascertained, and that it will then be construed and applied strictly in favor of the surety.—W. S. Dickey Clay Mfg. Co. v. New York Casualty Co. of New York, 50 P.2d 325, 174 Okl. 281—Enid Concrete Pipe & Stone Co. v. Mann, 50 P.2d 307, 174 Okl. 282—New York Casualty Co. of New York v. Wallace & Tiernan, 50 P.2d 176, 174 Okl. 278.
49. Ill.—Corn Belt Bank v. Maryland Casualty Co., 281 Ill.App. 387—People, for Use of National Cast Iron Pipe Co. v. Markle, 269 Ill. App. 449.
- N.Y.—Shiya v. Erickson, 282 N.Y.S. 812, 156 Misc. 738.
- Tenn.—Kings, Inc. v. Maryland Casualty Co., 33 S.W.2d 57, 161 Tenn. 531.
- 50 C.J. p 82 note 84.
50. Mo.—Eau Claire-St. Louis Lumber Co. v. Banks, 117 S.W. 611, 136 Mo.App. 44.
51. U.S.—Commissioners of Sinking Fund of Louisville v. Anderson, D.C.Ky., 20 F.Supp. 217, affirmed, C.C.A., 110 F.2d 961, certiorari denied 61 S.Ct. 28, 311 U.S. 669, 85 L.Ed. 429—American Bonding Co. v. Anderson, D.C.Ky., 20 F.Supp. 217, reversed on other grounds, C.C.A., 110 F.2d 961—Thompson v. U. S. Fidelity & Guaranty Co., D. C.Idaho, 3 F.Supp. 756.
- Ark.—American Bonding Co. v. Board of Improvement of Street Improvement Dist. No. 83 of Hot Springs, 59 S.W.2d 605, 187 Ark. 300—New Amsterdam Casualty Co. v. Detroit Fidelity & Surety Co., 58 S.W.2d 418, 187 Ark. 97.
- Colo.—Gardner Bros. & Glenn Const. Co. v. American Surety Co. of New York, 37 P.2d 384, 95 Colo. 456.
- Fla.—Standard Accident Ins. Co. v. Bear, 184 So. 97, 134 Fla. 523, 127 A.L.R. 1.
- Ga.—Tate v. National Surety Corporation, 200 S.E. 314, 58 Ga.App. 874.
- Ill.—Corn Belt Bank v. Maryland Casualty Co., 281 Ill.App. 387.
- Ind.—State ex rel. Lawson v. Warren Bros. Roads Co., 59 N.E.2d 912, 115 Ind.App. 452—Ohio Oil Co. v. Fidelity & Deposit Co. of Maryland, 42 N.E.2d 406, 112 Ind.App. 452.
- Me.—McFarland v. Rogers, 184 A. 391, 134 Me. 228.
- Miss.—Hartford Accident & Indemnity Co. v. Hewes, 199 So. 93, 190 Miss. 225, modified on other grounds 199 So. 772, 190 Miss. 225.
- Mo.—City of St. Louis v. Maryland Casualty Co., App. 122 S.W.2d 20—City of St. Joseph ex rel. Consolidated Stone Co. v. Pfeiffer Stone Co., 26 S.W.2d 1018, 224 Mo.App. 895.
- N.C.—Town of Clayton v. Wall, 8 S.E.2d 223, 217 N.C. 365, 127 A.L.R. 854.
- Ohio.—State ex rel. Herbert v. Inland Bonding Co., App. 46 N.E.2d 623, reversed on other grounds 51 N.E.2d 710, 142 Ohio St. 189.
- Okl.—W. S. Dickey Clay Mfg. Co. v. New York Casualty Co. of New York, 50 P.2d 325, 174 Okl. 281—Enid Concrete Pipe & Stone Co. v. Mann, 50 P.2d 307, 174 Okl. 282—New York Casualty Co. of New York v. Wallace & Tiernan, 50 P.2d 176, 174 Okl. 278—Employers' Liability Assur. Corporation, Limited, of London, England, v. Cannon, 49 P.2d 103, 173 Okl. 493, 102 A.L.R. 131.
- Pa.—Commonwealth v. Cohen, 14 A.2d 362, 140 Pa.Super. 361—Commonwealth, to Use of Howard W. Read Corporation, v. A. Stryker, Inc., 167 A. 459, 109 Pa.Super. 137.
- S.C.—Yongue v. National Surety Corporation, 3 S.E.2d 198, 190 S.C. 421.
- Tenn.—Fidelity Bond & Mortgage Co. v. American Surety Co., 14 Tenn.App. 211.
- Tex.—Standard Accident Ins. Co. v. Knox, 184 S.W.2d 612, 144 Tex. 296—U. S. Fidelity & Guaranty Co. v. Daniels, Civ.App., 107 S.W.2d 400—Draper v. Robinson, Civ.App., 106 S.W.2d 825, modified on other grounds Robinson v. Draper, 127 S.W.2d 181, 133 Tex. 280—Citizens' State Bank of Wheeler v. American Surety Co., Civ.App., 65 S.W.2d 778, error refused—American Indemnity Co. v. Robstown Ind. School Dist. Bd. of Trustees, Civ. App., 200 S.W. 592, reversed on other grounds, Com.App., 228 S.W. 105, conformed to, Civ.App., 233 S.W. 878.
- Vt.—Town of Windsor, to Use and Benefit of Samson Plaster Board Co. v. Standard Accident Ins. Co., 26 A.2d 83, 112 Vt. 426.
- Wash.—Tucker v. Brown, 150 P.2d 604, 20 Wash.2d 740.
- Wis.—Gumz v. U. S. Fidelity & Guaranty Co., 245 N.W. 82, 209 Wis. 408.
- 50 C.J. p 82 note 86.

While such corporations may call themselves "surety companies," their business is in all essential particulars that of insurers.<sup>52</sup> The obligation is to be liberally construed,<sup>53</sup> and, particularly where a statute so provides, in accordance with the rules applicable to insurance policies.<sup>54</sup> The contract should be most strongly construed in favor of the insured or obligee<sup>55</sup> and against the compensated

52. U.S.—Maryland Casualty Co. v. Dunlap, C.C.A.Mass., 68 F.2d 289.
- Colo.—Federal Surety Co. v. White, 295 P. 281, 88 Colo. 238.
- Ind.—London & Lancashire Indemnity Co. of America v. Community Savings & Loan Ass'n, 4 N.E.2d 688, 102 Ind.App. 665—General Asbestos & Supply Co. v. Aetna Casualty & Surety Co., 198 N.E. 813, 101 Ind.App. 207.
- Md.—Hospital for Women of Maryland, for Use of Robert S. Green, Inc., v. U. S. Fidelity & Guaranty Co., 11 A.2d 457, 177 Md. 615, 128 A.L.R. 931.
- Mich.—City of Detroit v. Blue Ribbon Auto Drivers' Ass'n, 237 N.W. 61, 254 Mich. 263, 74 A.L.R. 1306.
- Minn.—Farmers State Bank of Madelia v. Burns, New York Casualty Co. of New York, Intervener, 4 N.W.2d 330, 212 Minn. 455, dissenting opinion Farmers State Bank of Madelia v. Burns, New York Casualty Co. of New York, Intervener, 5 N.W.2d 589, 212 Minn. 455.
- Neb.—Luikart v. Massachusetts Bonding & Insurance Co., 263 N.W. 124, 129 Neb. 771.
- N.C.—Maxwell v. Southern Fidelity Mut. Ins. Co., 9 S.E.2d 428, 217 N.C. 762.
- Or.—Hagey v. Massachusetts Bonding & Insurance Co., 126 P.2d 836, 169 Or. 132.
- Pa.—Flumara v. American Surety Co. of New York, 31 A.2d 283, 346 Pa. 584, 149 A.L.R. 545—Commonwealth v. Przekon, 25 A.2d 776, 148 Pa.Super. 385.
- Va.—American Surety Co. of New York v. Commonwealth, 21 S.E.2d 748, 180 Va. 97.
- W.Va.—State ex rel. City of Beckley v. Roberts, 40 S.E.2d 841, 129 W.Va. 539.
- 28 C.J. p 1042 note 9—50 C.J. p 83 note 87.
- Bond in nature of insurance contract**
- U.S.—Massachusetts Bonding & Ins. Co. v. Feutz, C.A.Mo., 182 F.2d 752—Massachusetts Bonding & Insurance Co. v. John R. Thompson Co., C.C.A.Mo., 88 F.2d 825, certiorari denied 57 S.Ct. 941, 301 U.S. 707, 81 L.Ed. 1361—U. S. v. Continental Casualty Co., D.C.Md., 49 F.Supp. 717—Baltimore Trust Co. v. Metropolitan Casualty Ins. Co. of New York, D.C.Md., 3 F.Supp. 404, affirmed, C.C.A., 68 F.2d 121.
- Ala.—National Surety Co. v. First Nat. Bank, 140 So. 544, 224 Ala. 423.
- Conn.—State ex rel. Beardsley v. London & Lancashire Indemnity Co. of America, 200 A. 567, 124 Conn. 416.
- Ill.—Town of City of Peoria v. Rauschkolb, 78 N.E.2d 123, 333 Ill. App. 411—Omaha Nat. Bank v. U. S. Fidelity & Guaranty Co., 244 Ill.App. 204.
- Ky.—Young Men's Christian Association's Assignee of Paducah v. Indemnity Ins. Co. of America, 51 S.W.2d 463, 244 Ky. 473.
- Neb.—Luikart v. Massachusetts Bonding & Insurance Co., 263 N.W. 124, 129 Neb. 771.
- Tenn.—Fidelity Bond & Mortgage Co. v. American Surety Co., 14 Tenn.App. 211—National Acceptance Co. v. Royal Indemnity Co., 9 Tenn.App. 515.
- Vt.—Town of Windsor, to Use and Benefit of Samson Plaster Board Co. v. Standard Accident Ins. Co., 26 A.2d 83, 112 Vt. 426.
- Va.—American Surety Co. v. Plank & Whitsett, 165 S.E. 660, 159 Va. 1.
- Wis.—Citizens' State Bank of Sheboygan v. City of Sheboygan, 224 N.W. 720, 198 Wis. 416.
53. Neb.—Luikart v. Massachusetts Bonding & Insurance Co., 263 N.W. 124, 129 Neb. 771.
- Pa.—Shaw v. New Amsterdam Casualty Co., 164 A. 916, 310 Pa. 213. 50 C.J. p 83 note 88.
- The force of doctrine of ejusdem generis invoked to restrict scope of bond of a compensated surety is lessened by its impact with rule of liberal construction not applicable to penal statutes.**—U. S. Fidelity & Guaranty Co. v. Thomlinson-Arkwright Co., 141 P.2d 817, 172 Or. 307.
54. U.S.—Massachusetts Bonding & Ins. Co. v. Feutz, C.A.Mo., 182 F.2d 752—Jack v. Craighead Rice Mill Co., C.C.A.Ark., 167 F.2d 96, certiorari denied, New Amsterdam Cas. Co. v. Craighead Rice Mill., 68 S.Ct. 1340, 334 U.S. 829, 92 L.Ed. 1756—Massachusetts Bonding & Insurance Co. v. John R. Thompson Co., C.C.A.Mo., 88 F.2d 825, certiorari denied 57 S.Ct. 941, 301 U.S. 707, 81 L.Ed. 1361—Northwestern Jobbers Credit Bureau v. National Surety Corporation, D.C. Minn., 54 F.Supp. 716—In re Parker-Young Co., D.C.N.H., 12 F.Supp. 987.
- Conn.—State ex rel. Beardsley v. London & Lancashire Indemnity Co. of America, 200 A. 567, 124 Conn. 416.
- Ill.—Town of City of Peoria v. Rauschkolb, 78 N.E.2d 123, 333 Ill. App. 411—Omaha Nat. Bank v. U. S. Fidelity & Guaranty Co., 244 Ill.App. 204.
- Mich.—City of Detroit v. Blue Ribbon Auto Drivers' Ass'n, 237 N.W. 61, 254 Mich. 263, 74 A.L.R. 1306.
- N.Y.—First Nat. Bank v. National Surety Co., 169 N.Y.S. 774, 182 App.Div. 262, reversed on other grounds 127 N.E. 479, 228 N.Y. 469.
- N.C.—Maxwell v. Southern Fidelity Mut. Ins. Co., 9 S.E.2d 428, 217 N.C. 762.
- Or.—Title & Trust Co. v. U. S. Fidelity & Guaranty Co., 1 P.2d 1100, 138 Or. 467, affirmed 7 P.2d 805, 138 Or. 467.
- S.C.—Massachusetts Bonding & Ins. Co. v. Law, 147 S.E. 444, 149 S.C. 402.
- Tenn.—Rambo v. Naylor Engineering Co., 10 Tenn.App. 203.
- Vt.—Town of Windsor, to Use and Benefit of Samson Plaster Board Co. v. Standard Accident Ins. Co., 26 A.2d 83, 112 Vt. 426.
- Va.—American Surety Co. of New York v. Commonwealth, 21 S.E.2d 748, 180 Va. 97—American Surety Co. v. Plank & Whitsett, 165 S.E. 660, 159 Va. 1.
- 50 C.J. p 83 note 89.
55. U.S.—Massachusetts Bonding & Ins. Co. v. Feutz, C.A.Mo., 182 F.2d 752—Southern Surety Co. v. Slayton, C.C.A.Ohio, 41 F.2d 698—State of Montana v. Fidelity & Deposit Co. of Maryland, D.C.Mont., 16 F.Supp. 489, affirmed, C.C.A., Fidelity & Deposit Co. of Maryland v. State of Montana, 92 F.2d 693—Baltimore Trust Co. v. Metropolitan Casualty Ins. Co. of New York, D.C.Md., 3 F.Supp. 404, affirmed, C.C.A., 68 F.2d 121—Prudence Co. v. Fidelity & Deposit Co. of Maryland, D.C.N.Y., 2 F.Supp. 454.
- Ariz.—New York Indemnity Co. v. May, 295 P. 814, 37 Ariz. 462.
- Ark.—State ex rel. Bailey v. Taylor, 71 S.W.2d 470, 189 Ark. 313.
- Colo.—Federal Surety Co. v. White, 295 P. 281, 88 Colo. 238.
- Ind.—London & Lancashire Indemnity Co. of America v. Community Savings & Loan Ass'n, 4 N.E.2d 688, 102 Ind.App. 665—U. S. Fidelity & Guaranty Co. v. Stark, 200 N.E. 489, 102 Ind.App. 222—General Asbestos & Supply Co. v. Aetna Casualty & Surety Co., 198 N.E. 813, 101 Ind.App. 207.
- La.—Texas & Pac. Ry. Co. v. U. S. Fidelity & Guaranty Co., App. 16 So.2d 671.
- Mo.—Noonan v. Independence Indemnity Co., 41 S.W.2d 162, 328 Mo. 706, 76 A.L.R. 931.
- Nev.—Gill v. Paysee, 226 P. 302, 48 Nev. 12.

surety.<sup>56</sup>

## § 103. Subject Matter in General

Construction of suretyship contracts as to the debts or claims included is discussed *infra* § 104, and as to the property or funds covered, *infra* § 105.

Examine Pocket Parts for later cases.

## § 104. Debts or Claims Included

The rules of construction which apply to the contracts of sureties apply in determining to what debts or liabilities the obligation of the surety extends.

The rules hereinbefore stated apply in determining to what debts or liabilities the obligation of the surety extends.<sup>57</sup> So, where the contract is to secure the payment of notes of a particular de-

Okl.—Employers' Liability Assur. Corporation, Limited, of London, England, v. Cannon, 49 P.2d 103, 173 Okl. 493, 102 A.L.R. 131.

Or.—Hagey v. Massachusetts Bonding & Insurance Co., 126 P.2d 836, 169 Or. 132—Grandy v. Williams, 34 P.2d 622, 147 Or. 409—Title & Trust Co. v. U. S. Fidelity & Guaranty Co., 1 P.2d 1100, 138 Or. 467, affirmed 7 P.2d 805, 138 Or. 467.

Pa.—Pennsylvania Turnpike Commission, to Use of Weiss, v. Andrews & Andrews, 47 A.2d 220, 354 Pa. 138—Romano, for Use of Romano, v. Loeb, 192 A. 100, 326 Pa. 272—Hess v. Merion Title & Trust Co., 177 A. 53, 317 Pa. 501—Furdy v. Massey, 159 A. 545, 306 Pa. 288—Real Estate—Land Title & Trust Co. v. Lloyd Bldg. Corporation, 159 A. 168, 306 Pa. 189—Mechanics' Trust Co. v. Fidelity & Casualty Co. of New York, 156 A. 146, 304 Pa. 530—Pennsylvania Supply Co. v. National Casualty Co., 31 A.2d 453, 172 Pa.Super. 217—Narberth Building & Loan Ass'n v. Bryn Mawr Trust Co., 190 A. 149, 126 Pa.Super. 74—*Corpus Juris* quoted in Thomas Holme Building & Loan Ass'n v. New Amsterdam Casualty Co., 188 A. 374, 124 Pa.Super. 187—National Cas. Co. v. Ferry, Com. Pl., 56 Dauph.Co. 369—Commonwealth, to Use of Santini by Scarry, v. American Employers' Ins. Co. of Boston, Mass., Com.Pl., 20 Erie Co. 384.

Tenn.—Kings, Inc. v. Maryland Casualty Co., 33 S.W.2d 57, 161 Tenn. 531.

Vt.—Springfield Co-op. Freeze Locker Plant v. Wiggins, 63 A.2d 182, 115 Vt. 445—Town of Windsor, to Use and Benefit of Samson Plaster Board Co. v. Standard Accident Ins. Co., 26 A.2d 83, 112 Vt. 426.

W.Va.—State ex rel. City of Beckley v. Roberts, 40 S.E.2d 841, 129 W. Va. 539—Mills v. Indemnity Ins. Co. of North America, 171 S.E. 532, 114 W.Va. 263.

50 C.J. p 83 note 90.

56. U.S.—Massachusetts Bonding & Ins. Co. v. Feutz, C.A.Mo., 182 F.2d 752—American Surety Co. of New York v. Hutchinson, C.C.A.Tex., 63 F.2d 536—Southern Surety Co. v. Slayton, C.C.A.Ohio, 41 F.2d 693—Clarksburg Trust Co. v. Commercial Casualty Ins. Co., C.C.A.W.Va.,

40 F.2d 626—Commissioners of Sinking Fund of Louisville v. Anderson, D.C.Ky., 20 F.Supp. 217, affirmed, C.C.A., 110 F.2d 961, certiorari denied 61 S.Ct. 28, 311 U.S. 669, 85 L.Ed. 429—American Bonding Co. v. Anderson, D.C.Ky., 20 F.Supp. 217, reversed on other grounds, C.C.A., 110 F.2d 961—State of Montana v. Fidelity & Deposit Co. of Maryland, D.C.Mont., 16 F.Supp. 489, affirmed, C.C.A., Fidelity & Deposit Co. of Maryland v. State of Montana, 92 F.2d 693.

Ala.—Craft v. Standard Accident Ins. Co., 123 So. 265, 23 Ala.App. 246, certiorari granted 123 So. 271, 220 Ala. 6.

Ariz.—Massachusetts Bonding & Insurance Co. v. Lentz, 9 P.2d 408, 40 Ariz. 46.

Ark.—State ex rel. Bailey v. Taylor, 71 S.W.2d 470, 189 Ark. 313—American Bonding Co. v. Board of Improvement of Street Improvement Dist. No. 82 of Hot Springs, 59 S.W.2d 605, 187 Ark. 300—Consolidated Indemnity & Insurance Co. v. State, 43 S.W.2d 240.

Fla.—Carlton, for Use and Benefit of Okeechobee County, v. Detroit Fidelity & Surety Co., 151 So. 328, 112 Fla. 644, followed 151 So. 332, 112 Fla. 644.

Ill.—Omaha Nat. Bank v. U. S. Fidelity & Guaranty Co., 244 Ill.App. 204.

Ind.—U. S. Fidelity & Guaranty Co. v. Stark, 200 N.E. 489, 102 Ind.App. 222—Evansville Ice & Storage Co. v. Fidelity & Casualty Co. of New York, 111 N.E. 812, 61 Ind.App. 194.

Iowa.—Iowa Trust & Savings Bank v. Soppe, 247 N.W. 632, 215 Iowa 1242.

Me.—McFarland v. Rogers, 184 A. 391, 134 Me. 228.

Mont.—Montana Auto Finance Corporation v. Federal Surety Co., 278 P. 116, 85 Mont. 149.

Mo.—Noonan v. Independence Indemnity Co., 41 S.W.2d 162, 328 Mo. 706, 76 A.L.R. 931—Union State Bank v. American Surety Co., 23 S.W.2d 1038, 324 Mo. 438.

Neb.—Luikart v. Massachusetts Bonding & Insurance Co., 263 N.W. 124, 129 Neb. 771.

N.Y.—First Nat. Bank v. National Surety Co., 169 N.Y.S. 774, 182 App.Div. 262, reversed on other

grounds 127 N.E. 479, 228 N.Y. 469—Lavine v. Indemnity Ins. Co. of North America, 254 N.Y.S. 804, 142 Misc. 422, affirmed 254 N.Y.S. 1000, 234 App.Div. 906, reversed on other grounds 183 N.E. 897, 260 N.Y. 399.

Or.—Title & Trust Co. v. U. S. Fidelity & Guaranty Co., 1 P.2d 1100, 138 Or. 467, affirmed 7 P.2d 805, 138 Or. 467.

Pa.—Hempfield Tp. School Dist. v. Cavalier, 164 A. 602, 309 Pa. 460—*Corpus Juris* quoted in Thomas Holme Building & Loan Ass'n v. New Amsterdam Casualty Co., 188 A. 374, 377, 124 Pa.Super. 187—New Holland Dairies v. Regent Dairy Products Corporation, 174 A. 664, 115 Pa.Super. 87—Pennsylvania Turnpike Commission, to Use of v. Girard Const. Co., 38 Pa. Dist. & Co. 1.

Tenn.—Kings, Inc. v. Maryland Casualty Co., 33 S.W.2d 57, 161 Tenn. 531—Fidelity Bond & Mortgage Co. v. American Surety Co., 14 Tenn.App. 211.

Utah.—J. F. Tolton Inv. Co. v. Maryland Casualty Co., 293 P. 611, 77 Utah 226.

Vt.—Springfield Co-op. Freeze Locker Plant v. Wiggins, 63 A.2d 182, 115 Vt. 445—Town of Windsor, to Use and Benefit of Samson Plaster Board Co. v. Standard Accident Ins. Co., 26 A.2d 83, 112 Vt. 426.

Wash.—Tucker v. Brown, 150 P.2d 604, 20 Wash.2d 740—Glaspey v. Drolet, 108 P.2d 375, 6 Wash.2d 610.

Wis.—In re Oeffeln's Estate, 245 N. W. 109, 209 Wis. 386.

50 C.J. p 84 note 91.

57. U.S.—Providence, Fall River & Newport Steamboat Co. v. Massachusetts Bay S. S. Corporation, D.C.Mass., 38 F.2d 674.

Ga.—Cartwright v. Farmers Bank of Tifton, 41 S.E.2d 818, 74 Ga.App. 847—J. R. Watkins Co. v. Ellington, 29 S.E.2d 300, 70 Ga.App. 722.

Mich.—Campbell v. Brower, 748 N. W. 581, 263 Mich. 160.

Pa.—Cohen v. Bank of Philadelphia & Trust Co., 156 A. 742, 102 Pa.Super. 279—New Holland Dairies v. Regent Dairy Products Corporation, 174 A. 664, 115 Pa.Super. 87.

Tex.—W. T. Rawleigh Co. v. Sherley, Civ.App., 165 S.W.2d 465, error dismissed.

Wash.—W. T. Rawleigh Co. v. Gra-

scription, the surety is not liable for the payment of other notes.<sup>58</sup> A surety may become responsible for disputed as well as for valid claims if this was the intention.<sup>59</sup> If a surety becomes responsible for a judgment to be obtained, he can show that the judgment for which he is sought to be held is not the one for which he became liable,<sup>60</sup> or that the judgment obtained is void.<sup>61</sup> If payment by the principal was to be made out of certain funds, the surety is not in default if such funds were not received by the principal,<sup>62</sup> unless the undertaking also included the collection of such funds.<sup>63</sup> If the contract of the surety was to reimburse the obligee for money which the latter might be called on to pay by reason of acts of the principal, the surety is liable on payment by the obligee, although without compulsion, if there was legal liability on his part.<sup>64</sup>

### § 105. Property or Funds Covered

The question of what property or funds are intended to be covered by the suretyship contract must depend on the terms of the contract.

The question of what property or funds are intended to be covered by the suretyship contract must depend on the terms of the contract.<sup>65</sup>

### § 106. Duties of Office or Employment

The liability of a surety on a contract conditioned on the performance by the principal of the duties of his office or employment depends on the construction of the terms of the contract.

The liability of a surety on a contract conditioned on the performance by the principal of the duties of his office or employment depends on the construction of the terms of the contract.<sup>66</sup> Where the bond is conditioned that the principal account

ham, 103 P.2d 1076, 4 Wash.2d 407, 129 A.L.R. 596.

50 C.J. p 84 note 93.

#### Building and construction contracts

D.C.—Zipkin v. Investors Syndicate, 152 F.2d 678, 80 U.S.App.D.C. 302.

Mo.—Sylvester Watts Smyth Realty Co. v. American Surety Co. of New York, 238 S.W. 494, 292 Mo. 423.

Pa.—Pennsylvania Turnpike Commission, to Use of, v. U. S. Fidelity & Guaranty Co., 44 Pa.Dist. & Co. 187.

Tex.—American Surety Co. of New York v. Stuart, Civ.App., 151 S.W. 2d 886.

Wash.—Jenkins v. American Surety Co. of New York, 88 P. 1112, 45 Wash. 573.

Wis.—Warren Webster & Co. v. Beaumont Hotel Co., 138 N.W. 102, 151 Wis. 1.

58. N.Y.—Adrianne v. Kelley, 156 N.Y.S. 1013, 171 App.Div. 213.

59. Wis.—St. Paul Title, etc., Co. v. Sabin, 87 N.W. 1109, 112 Wis. 105.

60. N.Y.—Caponigri v. Cooper, 70 N.Y.S. 587, 34 Misc. 649.

61. La.—McCloskey v. Wingfield, 29 La.Ann. 141.

62. Utah.—Utah State Bldg., etc., Assoc. v. Perkins, 173 P. 950, 53 Utah 474.

50 C.J. p 84 note 98.

63. Ky.—Thompson v. Coppage, 3 Bush 318.

64. U.S.—Northwestern Jobbers Credit Bureau v. National Surety Corporation, D.C.Minn., 54 F.Supp. 716.

50 C.J. p 85 note 2.

65. U.S.—Corpus Juris cited in State of Arkansas v. Pufahl, C.C. A.Ark., 52 F.2d 116, 118.

66. Colo.—Federal Surety Co. v. White, 295 P. 281, 88 Colo. 238.

50 C.J. p 85 note 3.

#### Property or funds held covered

(1) Advancements.

U.S.—Feutz v. Massachusetts Bonding & Ins. Co., D.C.Mo., 85 F.Supp. 418.

Cal.—Municipal Bond Co. v. Balboa Const. Co., 34 P.2d 1032, 140 Cal. App. 57.

La.—Ault & Burden v. Shepherd, 8 La.App. 595.

Tex.—Constitution Indemnity Co. of Philadelphia v. Morgan, Civ.App., 49 S.W.2d 497, error refused.

Utah.—Corporation of President of Church of Jesus Christ of Latter-Day Saints v. Hartford Accident & Indemnity Co., 95 P.2d 736, 98 Utah 297.

50 C.J. p 85 note 3 [a] (1).

(2) Building not referred to in bond.—Molin v. New Amsterdam Casualty Co., 203 P. 2, 118 Wash. 208.

(3) Financial aid extended by creditor.

U.S.—Pennsylvania R. Co. v. Fidelity & Deposit Co. of Maryland, D.C.Pa., 16 F.Supp. 902.

Mass.—Museum of Fine Arts v. American Bonding Co. of Baltimore, Md., 97 N.E. 633, 211 Mass. 124.

(4) Payment of funds to principal.—Island Gun Club v. National Surety Co., 172 P. 209, 101 Wash. 185.

(5) Payment to agent of creditor.—Brod v. Cincinnati Time Recorder Co., 77 N.E.2d 293, 82 Ohio App. 26.

(6) Sums paid to discharge liens.—Alfred E. Joy Co. v. New Amsterdam Casualty Co., 120 A. 684, 98 Conn. 794.

#### Property or funds held not covered

(1) Advancements by creditor.

D.C.—Zipkin v. Investors Syndicate, 152 F.2d 678, 80 U.S.App.D.C. 302.

Tenn.—National Union Fire Ins. Co. v. Winn, 3 Tenn.App. 60.

(2) Building not referred to in contract.—Miller v. Friedheim, 102 S.W. 372, 82 Ark. 592.

(3) Building provided for in independent contract.—Miller v. Friedheim, supra.

(4) Loans made before execution of contract.—Corporation of President of Church of Jesus Christ of Latter-Day Saints v. Hartford Accident & Indemnity Co., 95 P.2d 736, 98 Utah 297.

(5) Property not referred to in bond.—Reilly v. McCray, 62 Pa. Super. 308.

68. R.I.—Narragansett Pier R. Co. v. Palmer, 38 A.2d 761, 70 R.I. 298, 153 A.L.R. 1143.

50 C.J. p 85 note 5.

#### Bond held a fidelity and performance bond

Bond of principal and surety company binding them to pay third person for loss sustained by third person because of any act of fraud, dishonesty, forgery, theft, larceny, or embezzlement on part of principal while in performance of a joint adventurer agreement with third person was both a fidelity and performance bond, at least to extent that it guaranteed that principal would undertake performance of agreement with honesty and fidelity.—Massachusetts Bonding & Ins. Co. v. Feutz, C.A.Mo., 182 F.2d 752.

#### Surety held liable

Ind.—Peters v. Bechdolt, 192 N.E. 116, 100 Ind.App. 395.

#### Surety held not liable

(1) For loss to company through dishonesty or culpable negligence while employed by company.—Narragansett Pier R. Co. v. Palmer, 38 A.2d 761, 70 R.I. 298, 153 A.L.R. 1143.

(2) For payment of uncollectable claims.—Fidelity-Phenix Fire Ins.

for assets coming into his hands, the principal can only perform the condition by payment into court or according to the order of the court.<sup>67</sup> Where the particular employment or office is not expressly stated but is clearly indicated by the terms of the contract, the surety's obligation is confined to such employment or office,<sup>68</sup> unless the surety consents that it be extended to cover another employment,<sup>69</sup> in which case the employment to which it extends limits the surety's obligation.<sup>70</sup> The surety is not liable for the acts of the principal in discharge of duties to one other than the obligee.<sup>71</sup> Recovery on the bond of one officer does not prevent recovery on the bond of another for the same default.<sup>72</sup> Where the trustees of a beneficial association give several bonds, the sureties on the several bond of one of them may be held for the personal default of their principal.<sup>73</sup> Instruction by a superior to the principal as to matters not within the scope of the latter's duties does not affect the surety's liability.<sup>74</sup> Where the principal carried on his office through employees, and a loss occurs as to the office, in the absence of proof that it was by the employees the surety of the principal is liable.<sup>75</sup> Sureties who have undertaken to be responsible for the principal within certain

territory are not responsible for his acts elsewhere.<sup>76</sup>

### § 107. Period as to Which Liability Attaches

Unless sooner discharged, and except as it may be limited by the contract, the obligation of the surety continues for the same period as that of the principal.

Unless sooner discharged, or except as it may be limited by the contract, the obligation of the surety continues for the same period as that of the principal.<sup>77</sup> Where the facts indicate that the surety intended the obligation to be a continuing security for future credit to be extended to the principal, the surety's liability will run for such period, and the amount named in the contract limits the liability at the end of such time.<sup>78</sup>

### § 108. — Preexisting Liabilities

A contract of suretyship is not retrospective in its operation and no liability attaches to the surety for defaults occurring before it is entered into, unless an intent to be so liable is indicated.

A contract of suretyship is not retrospective in its operation<sup>79</sup> and no liability attaches to the surety for defaults occurring before it is entered into,<sup>80</sup> unless an intent to be so liable is indicated.<sup>81</sup> A

Co. of New York v. Jackson, 181 S. W.2d 625.

67. Mo.—State v. Chicago Bonding, etc., Co., 215 S.W. 20, 279 Mo. 535 —State v. Williams, 77 Mo. 463.

68. Iowa.—Jewel Tea Co. v. Shepard, 154 N.W. 755, 172 Iowa 480.

69. Iowa.—Jewel Tea Co. v. Shepard, supra.

70. Iowa.—Jewel Tea Co. v. Shepard, supra.

71. Mo.—Farmers' L. & T. Co. v. Southern Surety Co., 226 S.W. 926, 285 Mo. 621.

50 C.J. p 86 note 11.

72. Colo.—Corpus Juris quoted in National Surety Corporation v. Hall, 109 P.2d 905, 907, 107 Colo. 150.

Tex.—National Surety Co. v. Tomball First State Bank, Civ.App., 244 S.W. 217.

73. Me.—Coombs v. Harford, 59 A. 529, 99 Me. 426.

74. U.S.—U. S. Fidelity, etc., Co. v. Walker, Ala., 248 F. 42, 160 C.C.A. 182.

50 C.J. p 86 note 13.

75. Va.—U. S. Fidelity, etc., Co. v. Virginia Country Club, 105 S.E. 686, 129 Va. 306.

76. Kan.—Singer Mfg. Co. v. Armstrong, 54 P. 571, 7 Kan.App. 314. 50 C.J. p 86 note 15.

77. D.C.—Starrett Bros. & Eken v.

Asher Fireproofing Co., 59 F.2d 358, 61 App.D.C. 182.

Ind.—Peters v. Bechdolt, 192 N.E. 116, 100 Ind.App. 395.

Mo.—J. R. Watkins Co. v. Oldfield, 174 S.W.2d 142, 351 Mo. 894.

Pa.—Challenge Yearly Beneficial Ass'n v. Weis, 52 Pa.Super. 262.

Tex.—American Surety Co. v. Camp, Civ.App., 202 S.W. 798.

50 C.J. p 86 note 18.

#### Indefinite period

The contracts of paid sureties should not be construed to cover an indefinite period of time unless language is found therein to support such a conclusion.—Commissioners of Sinking Fund of Louisville v. Anderson, D.C.Ky., 20 F.Supp. 217, affirmed C.C.A., 110 F.2d 961, certiorari denied 61 S.Ct. 28, 311 U.S. 669, 85 L.Ed. 429.—America Bonding Co. v. Anderson, D.C.Ky., 20 F.Supp. 217, reversed on other grounds C.C.A., 110 F.2d 961.

78. La.—Bush Wine, etc., Co. v. Wolff, 19 So. 765, 48 La.Ann. 918. 50 C.J. p 86 note 21.

79. U.S.—Corpus Juris cited in Home Indemnity Co. v. State of Missouri, C.C.A.Mo., 78 F.2d 391, 394.—Corpus Juris quoted in W. J. Jones & Son v. Columbia Casualty Co., C.C.A.Or., 73 F.2d 449, 452.

Mo.—State ex rel. Prudential Ins. Co. of America v. Bland, 185 S.W. 2d 654, 353 Mo. 956.

Pa.—Commonwealth v. Standard Accident Ins. Co. of Detroit, Mich., 161 A. 895, 105 Pa.Super. 358. 50 C.J. p 86 note 22.

80. U.S.—Town of Hamden v. American Surety Co., C.C.A.Conn., 93 F. 2d 482, certiorari denied American Surety Co. v. Town of Hamden, 58 S.Ct. 647, 303 U.S. 648, 82 L.Ed. 1109.—Home Indemnity Co. v. State of Missouri, C.C.A.Mo., 78 F.2d 391.—Corpus Juris quoted in W. J. Jones & Son v. Columbia Casualty Co., C.C.A.Or., 73 F.2d 449, 452.—American Surety Co. of New York v. Scott, C.C.A.Colo., 63 F.2d 961.

Ind.—Employers' Liability Assur. Corporation v. State ex rel. Union Trust Co. of Franklin, 34 N.E.2d 936, 110 Ind.App. 86.

Mo.—Prudential Ins. Co. of America v. Goldsmith, App., 181 S.W.2d 201.

Pa.—Commonwealth v. Standard Accident Ins. Co. of Detroit, Mich., 161 A. 895, 105 Pa.Super. 358.

Tenn.—Stevenson v. Union Indemnity Co., 28 S.W.2d 346, 160 Tenn. 603.

Tex.—Scruggs v. Rowe, Civ.App., 147 S.W.2d 946, error dismissed, judgment correct.—Means v. Floyd West & Co., Civ.App., 74 S.W.2d 518.

50 C.J. p 86 note 23.

81. U.S.—Corpus Juris quoted in W. J. Jones & Son v. Columbia



fortiori the surety is not liable for antecedent acts or defaults of his principal where he has expressly stipulated against such liability.<sup>82</sup> In some cases sureties have been held liable for the defaults of the officer of a beneficial association occurring before the execution of the bond.<sup>83</sup>

### § 109. — Time of Employment or Office

Where an employee or officer is chosen for an uncertain period, the sureties on his bond generally will be liable for the duration of such period, and, if chosen for a definite period, his sureties will not be liable for defaults occurring after the period for which the bond was given.

Where an employee or officer is appointed, elected, or hired for an uncertain period, the sureties on his bond generally will be liable for the duration of such period.<sup>84</sup> The liability of the sureties of an employee as to anything that may occur thereafter is terminated by the removal<sup>85</sup> or resignation<sup>86</sup> of the employee, although his employment by the person secured may be continued thereafter;<sup>87</sup> but their liability for matters which occurred prior to such removal or resignation is not affected thereby.<sup>88</sup>

If the principal is appointed, elected, or employed annually or for a definite period, his sureties will not be liable for defaults occurring after the expiration of the year or period for which the bond was given,<sup>89</sup> although he is reappointed or reelected,<sup>90</sup> and although the bond is conditioned for the performance of duties by the principal during his continuance in office.<sup>91</sup> So, if the principal has been employed to accomplish certain work, his sureties are not liable after that work has been accomplished.<sup>92</sup> Where the bond fails to state the term, it may be coextensive with the term of the original appointment.<sup>93</sup> The fact that the office of the principal is an annual one need not appear in the bond.<sup>94</sup> Sureties will be liable for subsequent terms if the language of their contract indicates such an intention,<sup>95</sup> although it is requisite, even in such cases, that the service of the principal be continuous,<sup>96</sup> unless there is a contract provision otherwise.<sup>97</sup> An office does not become an annual one merely because the officers appointing the principal are chosen annually.<sup>98</sup>

In the absence of a provision in the contract, where it is clear that the principal is to be elected

Casualty Co., C.C.A.Or., 73 F.2d 449, 452—American Surety Co. of New York v. Scott, C.C.A.Colo., 63 F.2d 961.

Colo.—W. T. Rawleigh Co. v. Dickneite, 61 P.2d 1028, 99 Colo. 276.

Miss.—W. T. Rawleigh Co. v. Wing, 4 So.2d 222.

Mo.—State ex rel. Prudential Ins. Co. of America v. Bland, 185 S.W.2d 654, 353 Mo. 956—Prudential Ins. Co. of America v. Goldsmith, App., 181 S.W.2d 201.

Tenn.—Stevenson v. Union Indemnity Co., 28 S.W.2d 346, 160 Tenn. 603.

Wash.—Molin v. New Amsterdam Casualty Co., 203 P. 2, 118 Wash. 208.

50 C.J. p 86 note 24.

**Prior indebtedness as shown by books**

(1) Contract whereby sureties assumed buyer's prior indebtedness as shown by seller's books contemplated that liability be shown solely by seller's books, and books themselves must furnish information required with reasonable certainty without aid of parol evidence or loose-leaf memoranda kept otherwise than in, and as part of, books.—W. T. Raleigh Co. v. Rotenberry, 164 So. 5, 174 Miss. 319.

(2) Contract whereby sureties assumed buyer's prior indebtedness as shown by seller's books referred to 'account books,' meaning volumes bound or sewed together in which accounts are regularly kept, and excluding collections of loose and in-

determinate memoranda.—W. T. Raleigh Co. v. Rotenberry, supra.

(3) Seller was not entitled to recover against sureties contracting to assume buyer's prior indebtedness as shown by seller's books, where books carried alleged account in form of entries consisting only of dates and figures and letter "M," especially in absence of invoice numbers and of testimony that letter "M" was well understood as meaning merchandise.—W. T. Raleigh Co. v. Rotenberry, supra.

82. Miss.—Maryland Casualty Co. v. Hall, 88 So. 407, 125 Miss. 792. 50 C.J. p 87 note 25.

83. Ill.—Swisher v. Fidelity, etc., Co., 164 Ill.App. 243. 7 C.J. p 1095 note 61.

84. Iowa.—Wapello State Sav. Bank v. Colton, 110 N.W. 450, 133 Iowa 147, 11 L.R.A.N.S., 493. 50 C.J. p 87 note 27.

Period of liability on official bonds generally see Officers §§ 162, 163.

85. Ohio.—City Ins. Co. v. Roberts, 6 Ohio Dec., Reprint, 1213, 12 Am. L.Rec. 744, 11 Cinc.L.Bul. 219. 50 C.J. p 87 note 28.

86. Mass.—Amicable Mut. L. Ins. Co. v. Sedgwick, 110 Mass. 163. N.Y.—Fidelity Mut. Life Ins. Co. v. Richland, 138 N.Y.S. 763, 154 App. Div. 95.

87. N.Y.—Grand Union Tea Co. v. Potter, 166 N.Y.S. 469, 101 Misc. 52.

50 C.J. p 87 note 30.

88. U.S.—McGill v. U. S. Bank, Conn., 12 Wheat. 511, 6 L.Ed. 711. 50 C.J. p 87 note 31.

89. Ind.—Peters v. Bechdolt, 192 N.E. 116, 100 Ind.App. 395. 50 C.J. p 87 note 33.

90. Cal.—Fresno Enterprise Co. v. Allen, 8 P. 59, 67 Cal. 505. 50 C.J. p 87 note 34.

91. Mass.—O'Brien v. Murphy, 56 N.E. 283, 175 Mass. 253, 78 Am. S.R. 487. 50 C.J. p 87 note 35.

92. Ga.—Southern Surety Co. v. Williams, 137 S.E. 861, 36 Ga.App. 692. 50 C.J. p 87 note 36.

93. Ind.—Peters v. Bechdolt, 192 N.E. 116, 100 Ind.App. 395.

94. Neb.—Humboldt First Nat. Bank v. Samuelson, 118 N.W. 81, 82 Neb. 532, 119 N.W. 250, 82 Neb. 535. 50 C.J. p 87 note 37.

95. Ind.—Peters v. Bechdolt, 192 N.E. 116, 100 Ind.App. 395. 50 C.J. p 87 note 41.

96. Me.—Coombs v. Harford, 59 A. 529, 99 Me. 426. 50 C.J. p 88 note 42.

97. Pa.—Shackamaxon Bank v. Yard, 22 A. 908, 143 Pa. 129, 24 Am.S.R. 521.

98. Cal.—Humboldt Sav., etc., Soc. v. Wennerhold, 22 P. 920, 81 Cal. 528.

Kan.—Ellis Merchants' Bank v. Honey, 50 P. 371, 58 Kan. 603.



annually or at fixed periods, the surety is not liable after the expiration of such period and a reasonable time thereafter for the choice and qualification of a successor.<sup>99</sup> If a successor is not chosen, and the principal continues in office without any re-appointment or reelection, the sureties cannot be held for any default occurring after his term has expired.<sup>1</sup> The contract may, however, contain a provision that the liability shall continue until a successor is named and qualified.<sup>2</sup>

### § 110. — Successive Contracts or Periods

In the absence of the surety's assent, a surety on one contract is not liable on a subsequent contract; nor is a surety on the subsequent contract liable on the prior contract.

In the absence of the surety's assent,<sup>3</sup> as for example, by provision in his contract therefor,<sup>4</sup> a surety on one contract is not liable on a subsequent contract;<sup>5</sup> nor is a surety on the subsequent contract liable on the prior contract.<sup>6</sup> So, a surety for the performance of a contract is not, in the absence of a specific agreement, a surety for the performance of a renewal of the contract.<sup>7</sup> Where there are successive bonds, with different sets of sureties on each, it is the time of an actual defalcation and not the technical breach which determines which set is liable.<sup>8</sup> Although there is authority to the contrary,<sup>9</sup> if the principal uses money collected during one term to make good the defaults of a prior term, the sureties on the last bond given are liable.<sup>10</sup> The termination of an employee's contract by a second appointment will release his

surety from liability under the later appointment.<sup>11</sup> The sureties on the bond of the officer of a beneficial association are not relieved from liability for a defalcation because the association accepted the officer's resignation, where a new officer was immediately elected and installed, and the demand was made on the former one for the funds.<sup>12</sup>

### § 111. — Term of Lease

A surety of a lessee for a fixed term is not liable after its expiration, although the lessee holds over, and the lessee has an option for a renewal, unless the language of the contract indicates the contrary.

A surety of a lessee for a fixed term is not liable after its expiration, although the lessee holds over,<sup>13</sup> and the lessee has an option for a renewal,<sup>14</sup> unless the language of the contract indicates the contrary.<sup>15</sup> The rescission of a lease by the lessor will terminate the liability of the surety for rent to accrue thereafter.<sup>16</sup> So, where the tenant's surrender of the premises is accepted by the landlord, the tenant's surety is not liable for rent to accrue,<sup>17</sup> although he remains liable for the rent already due.<sup>18</sup> A reletting of the premises by the lessor by the direction of the surety does not operate as a surrender.<sup>19</sup> The removal from the premises of a tenant by summary proceedings likewise terminates the liability of the tenant's surety as to the rent thereafter accruing,<sup>20</sup> but the surety is not released by the issuance of the warrant in such proceedings where the surety assented to a stay to permit the tenant to pay the rent, which payment

99. Mich.—Webster v. Jossman, 165 N.W. 802, 199 Mich. 98. 50 C.J. p 88 note 47.

1. Mass.—Chelmsford Co. v. Demarest, 7 Gray 1. 50 C.J. p 88 note 48.

2. Minn.—Nelson, etc., Creamery, etc., Co. v. Armstrong, 101 N.W. 968, 102 N.W. 207, 731, 93 Minn. 449. 50 C.J. p 88 note 49.

3. Md.—Maryland Fidelity, etc., Co. v. Poe, 114 A. 713, 138 Md. 520. 50 C.J. p 88 note 51.

4. N.Y.—Ulster County Sav. Inst. v. Young, 55 N.E. 453, 161 N.Y. 23. 50 C.J. p 88 note 52.

#### Practically identical contracts

Surety of contractor with practically identical contracts with individuals and their corporate successor was liable on bond naming corporate obligee, but referring to date of contract with individuals.—Columbia Lumber & Mfg. Co. v. Globe Indemnity Co., 164 S.E. 916, 166 S.C. 408.

5. Ark.—American Indemnity Co. v. Reed, 87 S.W.2d 1, 191 Ark. 556. 50 C.J. p 88 note 53.

6. Ind.—Employers' Liability Assur. Corporation v. State ex rel. Union Trust Co. of Franklin, 34 N.E.2d 936, 110 Ind.App. 86. 50 C.J. p 88 note 54.

7. D.C.—U. S. v. Bayly, 39 App.D.C. 105, 41 L.R.A.,N.S., 422.

8. Ind.—Employers' Liability Assur. Corporation v. State ex rel. Union Trust Co. of Franklin, 34 N.E.2d 936, 110 Ind.App. 86.

Wash.—Corpus Juris cited in Zagar v. Columbia Casualty Co., 43 P.2d 949, 951, 181 Wash. 487.

7 C.J. p 1094 note 54 [a]—50 C.J. p 88 note 56.

9. N.Y.—Golden Seal Assur. Soc. v. Aetna Casualty, etc., Co., 203 N.Y. S. 674, 207 App.Div. 628.

10. Ill.—Citizens' Sav., etc., Assoc. v. Weaver, 127 Ill.App. 252. 50 C.J. p 88 note 58.

11. Ala.—Rapiet v. Louisiana Equitable Life Ins. Co., 57 Ala. 100. 50 C.J. p 88 note 59.

12. S.C.—Stemmermann v. Lillenthal, 32 S.E. 535, 54 S.C. 440. 7 C.J. p 1095 note 60.

13. Mass.—Brewer v. Knapp, 1 Pick. 332.

14. N.C.—Town of Tarboro v. West, 170 S.E. 634, 205 N.C. 200. 50 C.J. p 88 note 62.

15. Pa.—Platt v. Fisher, 59 Pa. Super. 114. 50 C.J. p 88 note 63.

16. Mo.—Hotel Milton Co. v. Powell, 128 S.W. 953, 146 Mo.App. 208.

17. U.S.—American Bonding Co. v. Pueblo Inv. Co., Colo., 150 F. 17, 80 C.C.A. 97, 9 L.R.A.,N.S., 557, 10 Ann.Cas. 357. 50 C.J. p 88 note 65.

18. Ark.—White River, etc., R. Co. v. Star Ranch, etc., Co., 91 S.W. 14, 77 Ark. 128. 50 C.J. p 88 note 66.

19. N.Y.—McKensie v. Farrell, 17 N.Y.Super. 192.

20. N.Y.—Wilkesbarre Realty Co. v. Powell, 149 N.Y.S. 209, 86 Misc. 321—Newcombe v. Bagleton, 38 N.Y.S. 424, 16 Misc. 285.

is made during the time of the stay.<sup>21</sup> The surety's liability is not terminated by the unjustified abandonment of the premises by the lessee,<sup>22</sup> even

though the premises are occupied by others who were not procured by the lessor,<sup>23</sup> or because the lessor does not relet when he can.<sup>24</sup>

### C. AMOUNT RECOVERABLE

#### § 112. In General

As a general rule, the liability of a surety in the absence of contractual limitation is measured by the loss or damage directly resulting from the default of the principal with respect to the act to secure the performance of which the suretyship contract is entered into.

As a general rule, the liability of the surety in the absence of contractual limitation<sup>25</sup> or provision for liquidated damages,<sup>26</sup> as distinguished from a penalty,<sup>27</sup> is measured by the loss or damage directly resulting from the default of the principal with respect to the act to secure the performance of which the suretyship contract is entered into.<sup>28</sup> In the case of a continuing security for future credit to be extended to the principal, the amount named by him in the obligation indicates the balance of the principal's account for which he may be held.<sup>29</sup> If the surety's liability is not continuing, he cannot be held for any credit extended to the principal after the amount designated by him has been

reached,<sup>30</sup> although future payments made by the principal have reduced the amount due.<sup>31</sup> Sureties for an amount owing by the principal are liable for what is actually due<sup>32</sup> and not for the amount recited in the instrument as being due,<sup>33</sup> or for amounts subsequently due.<sup>34</sup>

If sureties bind themselves severally for certain amounts, each is liable up to that amount.<sup>35</sup>

The surety is entitled to have sums received by the obligee properly going in reduction of the damages suffered by the obligee applied in mitigation thereof.<sup>36</sup>

*Building or construction contract.* Where the principal fails to discharge his obligations under a building or construction contract, the obligee can recover the actual damages sustained up to the penalty named in the bond,<sup>37</sup> and he is entitled to be placed in the position in which he would

21. N.Y.—*Newcombe v. Eagleton*, 44 N.Y.S. 401, 19 Misc. 603.

22. La.—*Ledoux v. Jones*, 20 La. Ann. 539.

23. La.—*Ledoux v. Jones*, *supra*. Pa.—*Supplee v. Herrman*, 16 Pa. Super. 45.

24. La.—*Ledoux v. Jones*, 20 La. Ann. 539.

25. Or.—*Title & Trust Co. v. U. S. Fidelity & Guaranty Co.*, 1 P.2d 1100, 138 Or. 467, reheard 7 P.2d 805, 138 Or. 467.

Philippine.—*Lemery v. Mendoza*, 48 Philippine 415.

26. U.S.—*Johnson v. Southwestern Surety Ins. Co.*, D.C.Or., 206 F. 486.

50 C.J. p 89 note 85.

27. Ind.—*Dill v. Lawrence*, 10 N.E. 573, 109 Ind. 564.

50 C.J. p 89 note 86.

28. Mass.—*Leshefsky v. American Employers' Ins. Co.*, 199 N.E. 395, 293 Mass. 164, 103 A.L.R. 1388.

S.D.—*Corpus Juris* cited in *Minnehaha County v. Willadsen*, 11 N. W.2d 55, 59, 69 S.D. 413.

50 C.J. p 89 note 87.

#### Nominal and substantial damages

For the breach of the bond the creditor is entitled to recover nominal damages and substantial damages if he has sustained any.—*Leshefsky v. American Employers' Ins. Co.*, 199 N.E. 395, 293 Mass. 164, 103 A.L.R. 1388.

*Expenses in moving boat, after*

*purchase at marshal's sale, were not recoverable from surety on bond indemnifying against liens.*—*Providence, Fall River & Newport Steamboat Co. v. Massachusetts Bay S. S. Corporation*, D.C.Mass., 38 F.2d 674.

#### Sureties on notes

(1) A surety on notes given for the price of property transferred in fraud of the seller's creditors is not liable for the value of the property in excess of the amount of the note. *Vance Shoe Co. v. Haught*, 28 S.E. 553, 41 W.Va. 275.

(2) The liability of sureties on a note given during the Civil War for land was for the value of Confederate money at that time; but they could show that it was given for land, and the amount recoverable would be the value of the land.—*Bryan v. Harrison*, 71 N.C. 478.

29. Tex.—*Lasater v. Purcell Mill, etc., Co.*, 54 S.W. 425, 22 Tex.Civ. App. 33.

50 C.J. p 90 note 88.

30. La.—*Stewart v. Lewis*, 6 So. 898, 42 La. Ann. 37.

50 C.J. p 90 note 89.

31. N.Y.—*Agawam Bank v. Strever*, 16 Barb. 82, affirmed 18 N.Y. 502.

32. N.Y.—*Cobb v. Titus*, 10 N.Y. 198.

50 C.J. p 90 note 91.

33. Philippine.—*Hong kong, etc., Banking Co. v. Aldanese*, 48 Philippine 990.

50 C.J. p 90 note 91.

34. S.C.—*De Camps v. Carpin*, 19 S.C. 121.

50 C.J. p 90 note 93.

35. Mass.—*Brighton Bank v. Smith*, 12 Allen 243, 90 Am.D. 144.

50 C.J. p 90 note 94.

36. N.Y.—*Goldberg v. Popular Pictures Corp.*, 165 N.Y.S. 106, 178 App.Div. 86.

50 C.J. p 90 note 95.

37. U.S.—*U. S. v. U. S. Fidelity, etc., Co.*, Cal., 35 S.Ct. 298, 236 U.S. 512, 59 L.Ed. 698—*Chicago Bonding, etc., Co. v. Augusta-Savannah Nav. Co.*, Ill., 250 F. 616, 162 C.C.A. 632, certiorari denied 38 S.Ct. 428, 247 U.S. 509, 62 L.Ed. 1241.

Colo.—*Routt v. Dills*, 90 P. 67, 40 Colo. 50.

Conn.—*Alfred E. Joy Co. v. New Amsterdam Casualty Co.*, 120 A. 684, 98 Conn. 794.

Fla.—*Parrish v. Board of Public Instruction of Polk County*, Fla., 89 So. 317.

Kan.—*Hensley v. School Dist. No. 87 of Anderson County*, 154 P. 253, 97 Kan. 56.

La.—*Costanza v. Cannata*, 36 So.2d 627, 214 La. 29—*Leinhard v. Meyer, App.*, 123 So. 130.

Minn.—*McLeod v. National Surety Co.*, 158 N.W. 619, 133 Minn. 351. Mo.—*Noonan v. Independence Indemnity Co.*, 41 S.W.2d 162, 328 Mo. 706, 76 A.L.R. 931.

Mont.—*Darby State Bank v. Pew*, 195 P. 852, 59 Mont. 351.

Neb.—*O'Shea v. North American*

have been had the contract been fulfilled.<sup>38</sup> A surety will not be entitled to credit for changes in the contract which have not been authorized, as required by contract,<sup>39</sup> and will not be entitled to credit for work called for in the original contract but omitted from the reletting contract.<sup>40</sup> Where the surety has the option to complete the contract, but fails to do so, he may not complain of an al-

lowance of damages for delay in completion,<sup>41</sup> and he may not complain because the creditor fails to complete the contract.<sup>42</sup>

Where the obligee completes the work himself or has it completed by another, he may recover the amount actually and reasonably expended in completing the contract, in excess of the original contract price.<sup>43</sup> An owner who makes expendi-

Hotel Co., 191 N.W. 321, 109 Neb. 317.

N.J.—Edmund D. Cook, Inc. v. Commercial Casualty Ins. Co., 190 A. 99, 15 N.J.Misc. 256, affirmed 190 A. 102, 117 N.J.Law 440.

N.Y.—Murray v. National Surety Co., 236 N.Y.S. 14, 226 App.Div. 450, reversed on other grounds 171 N.E. 776, 253 N.Y. 547.

Okl.—National Surety Co. v. Bd. of Education, 162 P. 1108, 62 Okl. 259.

Tex.—W. H. Putegnat Co. v. Fidelity & Deposit Co. of Maryland, Com.App., 29 S.W.2d 1004.

Wis.—Lloyd Inv. Co. v. Illinois Surety Co., 160 N.W. 58, 164 Wis. 282.

#### Damages held speculative

Surety on bond of contractor for part of work on building, which was to be completed at a certain time, was held not liable for damages for the contractor's abandonment of the work, since such damages were too speculative.—People v. Metropolitan Surety Co., 154 N.Y.S. 373, 168 App. Div. 615, appeal dismissed 111 N.E. 1094, 217 N.Y. 612.

#### Damages to mortgagees

(1) True measure of mortgagee's damages for breach of bond for completion of building is extent to which its security was impaired, and actual cost of completion may make damages more certain, or may be used as proof of damages, but is not controlling unless it represents the difference in value between building on date fixed for completion and building as it then should have been.—Prudence Co. v. Fidelity & Deposit Co. of Maryland, C.C.A.N.J., 77 F.2d 834, modified on other grounds 56 S.Ct. 387, 297 U.S. 198, 80 L.Ed. 581, motion denied 56 S.Ct. 679, amended 56 S.Ct. 935, 298 U.S. 642, 80 L.Ed. 1374.

(2) Mortgagees suing on bonds insuring erection of buildings on mortgaged premises were held entitled only to damages shown by deficiency judgment on foreclosure.—McCauslan v. Zoar Holding Co., 227 N.Y.S. 75, 131 Misc. 148.

#### Subcontractors' bonds

U.S.—Federal Surety Co. v. Lalonde, C.C.A.Mont., 31 F.2d 673.

N.D.—Long v. American Surety Co. of New York, 137 N.W. 41, 23 N.D. 492.

Tex.—Southern Surety Co. v. Amer-

ican Const. Co., Com.App., 36 S.W. 2d 212.

#### Items or expenses held recoverable

##### (1) In general.

U.S.—Asbury Park Board of Education v. Maryland Casualty Co., C.C.A.N.J., 27 F.2d 20—Prudence Co. v. Fidelity & Deposit Co. of Maryland, D.C.N.Y., 7 F.Supp. 392, reversed on other grounds, C.C.A., 77 F.2d 834, modified on other grounds 56 S.Ct. 387, 297 U.S. 198, 80 L.Ed. 581, motion denied 56 S.Ct. 679, amended 56 S.Ct. 935, 298 U.S. 642, 80 L.Ed. 1374.

Ill.—Fisher v. U. S. Fidelity & Guaranty Co., 39 N.E.2d 67, 313 Ill. App. 66.

##### (2) Loss by rentals.

Ala.—Maryland Casualty Co. v. Cunningham, 173 So. 506, 234 Ala. 80.

Cal.—Tally v. Ganahl, 90 P. 1049, 151 Cal. 418—Callan v. Empire State Surety Co., 129 P. 978, 20 Cal.App. 483.

(3) Carrying charges not to exceed rentals.—Prudence Co. v. Fidelity & Deposit Co. of Maryland, N.Y., 56 S.Ct. 387, 297 U.S. 198, 80 L.Ed. 581, motion denied 56 S.Ct. 679, amended 56 S.Ct. 935, 298 U.S. 642, 80 L.Ed. 1374.

(4) Premiums for liability insurance.—Museum of Fine Arts v. American Bonding Co. of Baltimore, Md., 97 N.E. 633, 211 Mass. 124.

#### Items or expenses held not recoverable

(1) Architect's fees.—Asbury Park Board of Education v. Maryland Casualty Co., C.C.A.N.J., 27 F.2d 20.

(2) Amount of liens on premises.—McCauslan v. Zoar Holding Co., 227 N.Y.S. 75, 131 Misc. 148.

(3) Payment by obligee to audit principal's account.—Museum of Fine Arts v. American Bonding Co. of Baltimore, Md., 97 N.E. 633, 211 Mass. 124.

(4) Renewal premiums paid to surety.—Museum of Fine Arts v. American Bonding Co. of Baltimore, Md., supra.

(5) Sum in possession of obligee which he is under no obligation to pay.—Woodruff v. Schultz, 118 N.W. 579, 155 Mich. 11, 16 Ann.Cas. 346.

##### (6) Voluntary payments.

U.S.—Union Indemnity Co. v. Vetter, C.C.A.Fla., 40 F.2d 606.

Wash.—Bon Marche Realty Co. v.

Southern Surety Co., 278 P. 679, 152 Wash. 604.

38. U.S.—Prudence Co. v. Fidelity & Deposit Co. of Maryland, N.Y., 56 S.Ct. 387, 297 U.S. 198, 80 L.Ed. 581, motion denied 56 S.Ct. 679, amended 56 S.Ct. 935, 298 U.S. 642, 80 L.Ed. 1374.

N.J.—Edmund D. Cook, Inc. v. Commercial Casualty Ins. Co., 190 A. 99, 15 N.J.Misc. 256, affirmed 190 A. 102, 117 N.J.Law 440.

39. Ariz.—Massachusetts Bonding & Insurance Co. v. Lentz, 9 P.2d 408, 40 Ariz. 46.

40. U.S.—Asbury Park Bd. of Education v. Maryland Casualty Co., C.C.A.N.J., 27 F.2d 20.

41. Wash.—Sheard v. United States Fidelity & Guaranty Co., 107 P. 1024, 58 Wash. 29, rehearing denied 109 P. 276, 58 Wash. 29.

42. U.S.—Chicago Bonding & Surety Co. v. Augusta-Savannah Nav. Co., Ill., 250 F. 616, 162 C.C.A. 632, certiorari denied 38 S.Ct. 428, 247 U.S. 509, 62 L.Ed. 1241.

43. U.S.—Prudence Co. v. Fidelity & Deposit Co. of Maryland, N.Y., 56 S.Ct. 387, 297 U.S. 198, 80 L.Ed. 581, motion denied 56 S.Ct. 679, amended 56 S.Ct. 935, 298 U.S. 642, 80 L.Ed. 1374—Union Indemnity Co. v. Vetter, C.C.A.Fla., 40 F.2d 606—Board of Education of City of Asbury Park v. Maryland Casualty Co. of Baltimore, Md., C.C.A.N.J., 27 F.2d 20.

Ark.—Eureka Stone Co. v. First Christian Church of Ft. Smith, 110 S.W. 1042, 86 Ark. 212.

Cal.—Callan v. Empire State Surety Co., 129 P. 978, 20 Cal.App. 483, rehearing denied 129 P. 981, 20 Cal.App. 483.

Mich.—Doherty v. Detroit Fidelity & Surety Co., 214 N.W. 833, 240 Mich. 36.

Mont.—State Bank of Darby v. Pew, 195 P. 852, 59 Mont. 144.

N.J.—Edmund D. Cook, Inc. v. Commercial Casualty Ins. Co., 190 A. 99, 15 N.J.Misc. 256, affirmed 190 A. 102, 117 N.J.Law 440.

N.Y.—Elmhurst Co. v. People's Surety Co. of New York, 111 N.E. 821, 217 N.Y. 289.

Pa.—Mechanics' Trust Co. v. Fidelity & Casualty Co. of New York, 156 A. 146, 804 Pa. 526.

Wash.—Simpson Logging Co. v. Northwest Bridge Co., 137 P. 127,

tures in good faith in completing the contract has been held to be entitled to recover on the bond without showing that the expenditures were reasonably, necessarily, prudently, or wisely made.<sup>44</sup> After the obligee has completed the contract, the surety has been held not to be entitled to have the balance of the contract price credited on the penalty named in the bond.<sup>45</sup>

Where the contract so provides, the owner must have the architect certify his expenses in completing the contract before he can hold the surety liable therefor,<sup>46</sup> and an architect's certificate given after the commencement of an action on the bond has been held to be too late.<sup>47</sup> A rough estimate

by the architect as to the cost of completion, when not accepted or relied on by the surety, is not conclusive on the obligee as to the extent of recovery.<sup>48</sup> The fact that the owner has made payments on estimates furnished does not estop him as against the contractor's surety from recovering expenses in overhauling and rebuilding part of the work improperly done,<sup>49</sup> particularly where the contract provides that the advances required to be made by the owner shall not be deemed an acceptance or waiver of any defective work, and does not require the owner to inspect the quality and character of the work, or that the architect shall do so before the owner shall make the advancements.<sup>50</sup>

76 Wash. 533—Jenkins v. American Surety Co. of New York, 88 P. 1112, 45 Wash. 573.  
9 C.J. p 856 note 78.

**The owner's duty toward surety on building contractor's bond after contractor's default** is to endeavor in good faith to complete job without unnecessary expenses, and owner cannot disregard expense or heedlessly spend in belief that he will be indemnified by surety.—Corporation of President of Church of Jesus Christ of Latter-Day Saints v. Hartford Accident & Indemnity Co., 95 P.2d 736, 98 Utah 297.

#### Expenditures less than unpaid portion

Creditor completing contract was not entitled to recover from surety for alleged expenditures in excess of unpaid portion of contract price, where all figures introduced showed total to be less than such unpaid portion, and plaintiffs' only exhibit containing additional items was not introduced in evidence and could not have been considered by jury in reaching verdict.—Standard Accident Ins. Co. of Detroit, Mich., v. Laird, Tex.Civ.App., 81 S.W.2d 271, error dismissed.

**Owner entitled to judgment on bond** Tex.—Garrett v. Dodson, Civ.App., 199 S.W. 675—General Bonding & Casualty Ins. Co. v. Hill, Civ.App., 195 S.W. 873.

#### Liquidated damages

(1) In an action on a building contractor's bond, plaintiff was entitled to the liquidated damages provided for in the contract, until completion of the work by him, if he completes the work within a reasonable time, but he could not enhance his damages by unreasonable delay.—School Dist. No. 3 of Ford County v. United States Fidelity & Guaranty Co. of Baltimore, Md., 152 P. 668, 96 Kan. 499.

(2) A provision in a contractor's bond that, if the obligee should complete or relet the contract, any for-

feiture provided therein against the principal should not be operative against the surety, excluded the liability of the surety for liquidated damages under the contract, where the obligee completed or relet the contract.—Village of Canton v. Globe Indemnity Co., 195 N.Y.S. 445. **Subcontractors' bonds**

#### (1) In general.

U.S.—Knutson v. Metallic Slab Form Co., C.C.A.Tex., 128 F.2d 408, rehearing denied 130 F.2d 200.  
Cal.—New England Equitable Ins. Co. v. Chicago Bonding & Surety Co., 172 P. 1122, 36 Cal.App. 584.  
Tex.—American Const. Co. v. Kleinnie, Civ.App., 177 S.W. 1176.

(2) Where subcontractor defaulted and original contractor was hired by surety to complete contract, contractor was not entitled to profit of ten per cent for labor in finishing contract where no agreement for such profit existed between contractors.—Everglades Const. Co. v. American Surety Co., 156 So. 829, 229 Ala. 290.

(3) In an action on the bond of a subcontractor, there could be no recovery for use of the owner for excess cost of finishing work, contractor having defaulted, without showing proportion of excess cost due to the subcontractor's default.—W. H. Hoffman Co. v. Title Guaranty, etc., Co., 99 A. 414, 255 Pa. 112.

#### Particular items of damages held recoverable

##### (1) Architect's fees.

N.Y.—Kinney v. Massachusetts Bonding & Insurance Co., 206 N. Y.S. 163, 210 App.Div. 285.  
Tex.—Welsh v. Warren, Civ.App., 159 S.W. 106.

(2) Cost of labor or materials.  
U.S.—Prudence Co. v. Fidelity & Deposit Co. of Maryland, D.C.N.Y., 7 F.Supp. 392, reversed on other grounds, C.C.A., 77 F.2d 834, modified on other grounds 56 S. Ct. 387, 297 U.S. 198, 80 L.Ed. 581, motion denied 56 S.Ct. 679, amend-

ed 56 S.Ct. 935, 298 U.S. 642, 80 L. Ed. 1374.

Cal.—Fruit Growers' Supply Co. v. Goss, 41 P.2d 357, 4 Cal.App.2d 651.

Utah.—Corporation of President of Church of Jesus Christ of Latter-Day Saints v. Hartford Accident & Indemnity Co., 95 P.2d 736, 98 Utah 297.

#### Particular items of damages held not recoverable

(1) Brokerage fees.—Kroeger v. Union Indemnity Co., 14 P.2d 258, 40 Ariz. 467.

(2) Expenses for inefficient use of creditor's own men.—Knutson v. Metallic Slab Form Co., C.C.A.Tex., 128 F.2d 408, rehearing denied 130 F.2d 200.

(3) Expense for photographs of work at time of default.—Massachusetts Bonding & Insurance Co. v. John R. Thompson Co., C.C.A.Mo., 88 F.2d 825, certiorari denied 57 S. Ct. 941, 301 U.S. 707, 81 L.Ed. 1361.

(4) Sums paid to procure bonds for faithful performance of new contract.—Kinney v. Massachusetts Bonding, etc., Co., 206 N.Y.S. 163, 210 App.Div. 285.

44. U.S.—Massachusetts Bonding & Insurance Co. v. John R. Thompson Co., C.C.A.Mo., 88 F.2d 825, certiorari denied 57 S.Ct. 941, 301 U.S. 707, 81 L.Ed. 1361.

45. Ohio.—Higgins v. Drucker, 22 Ohio Cir.Ct. 112, 12 Ohio Cir.Dec. 220.

46. Mo.—Joblin v. Illinois Surety Co., 182 S.W. 143, 193 Mo.App. 132.

47. Wash.—De Mattos v. Jordan, 55 P. 118, 20 Wash. 315.

48. Kan.—School Dist. No. 3 of Ford County v. U. S. Fidelity, etc., Co. of Baltimore, Md., 152 P. 668, 96 Kan. 499.

49. Tex.—Welsh v. Warren, Civ. App., 159 S.W. 106.

50. Tex.—Welsh v. Warren, supra.

A surety may not complain of the cost of completion without showing that it was excessive or in violation of the surety contract;<sup>51</sup> nor may he complain that the owner in completing the work used and paid for material which the contractor had ordered and left on the premises, where it is not claimed that the price is too high.<sup>52</sup>

If the surety authorizes the owner to settle all claims for labor or material, he authorizes the owner to adjust all just and legal claims against the property, whether or not they have ripened into actual liens;<sup>53</sup> and, where the authority is to settle all claims for labor or material approved by the representative of the surety, but the representative refuses to co-operate in the settlement of claims, the owner may adjust all claims and hold the surety liable therefor.<sup>54</sup> Where the amount due the builder under the contract is sufficient to pay for the completion of the work and to pay the legal liens, the surety is not liable to the owner who voluntarily pays claimants in excess of what he is legally liable for.<sup>55</sup> Where the builder ceases work before completion, and the owner gives the notice in writing, prescribed by the contract, of his intent to enter on the completion of the work on a specified day and to exclude the builder therefrom, the builder must be deemed to be in charge of the building and responsible for all materials

therein until the expiration of the time given, and, if during that time any materials are removed from the building, no deduction on account thereof can be made by the surety as against the owner, where he does not cause the removal.<sup>56</sup>

### § 113. Interest

Ordinarily sureties may be held liable for interest on the amount due from them as damages for its detention, even though by the addition of such interest the sum for which the sureties are held exceeds the sum named as penalty in their contract.

Ordinarily sureties may be held liable for interest on the amount due from them as damages for its detention,<sup>57</sup> even though by the addition of such interest the sum for which the sureties are held exceeds the sum named as penalty in their contract;<sup>58</sup> as to the latter proposition there is, however, more particularly in the earlier decisions, authority to the contrary,<sup>59</sup> and further a recovery of interest as a part of the sum secured as distinguished from damages for its detention has been refused, where in excess of a penalty named.<sup>60</sup> Under some statutes the recovery on a bond is limited to the amount of the penalty except where the condition is for the payment of money.<sup>61</sup>

Interest when allowable as damages may be allowed from the time the sureties became liable,<sup>62</sup>

51. Ind.—Illinois Surety Co. v. Huber, 107 N.E. 298, 57 Ind.App. 408.

52. N.Y.—Hastings Land Improvement Co. v. Empire State Surety Co., 141 N.Y.S. 417, 156 App.Div. 258, affirmed 109 N.E. 1078, 215 N.Y. 653, rehearing denied 109 N.E. 1078, 215 N.Y. 753.

53. Cal.—D. H. & M. A. Edwards Co. v. Barry, 149 P. 373, 27 Cal. App. 170.

54. Cal.—D. H. & M. A. Edwards Co. v. Barry, *supra*.

55. Cal.—Growall v. Pacific Surety Co., 131 P. 73, 21 Cal.App. 185.

56. Cal.—Dunne Inv. Co. v. Empire State Surety Co., 150 P. 405, 27 Cal.App. 208, rehearing denied 150 P.2d 411, 27 Cal.App. 208.

57. U.S.—Glens Falls Indem. Co. v. Basich Bros. Const. Co., C.C.A.Cal., 165 F.2d 649, certiorari denied 68 S.Ct. 1347, 334 U.S. 833, 92 L.Ed. 1760—Massachusetts Bonding & Insurance Co. v. U. S., C.C.A.Cal., 97 F.2d 879.

Fla.—American Surety Co. of New York v. Gedney, 185 So. 844, 136 Fla. 10.

50 C.J. p 90 note 96.

#### Determination of amount of loss

Surety on undertaking cannot be charged with interest on demand until amount of loss has been deter-

mined.—Title & Trust Co. v. U. S. Fidelity & Guaranty Co., 1 P.2d 1100, 138 Or. 467, reheard 7 P.2d 805, 138 Or. 467.

When penalty of bond is sufficient, surety is liable for such interest as might have been recovered against principal.—Union Indemnity Co. v. State, 127 So. 204, 221 Ala. 1.

58. U.S.—Massachusetts Bonding & Insurance Co. v. U. S., C.C.A.Cal., 97 F.2d 879—Corpus Juris cited in United States v. Mitty Bros. Const. Co., D.C.Idaho, 4 F.Supp. 216, 219, applying Illinois law.

Cal.—Burns v. Massachusetts Bonding & Insurance Co., 146 P.2d 29, 62 Cal.App.2d 972.

Colo.—Corpus Juris cited in Federal Surety Co. v. White, 295 P. 281, 290, 88 Colo. 238.

Fla.—American Surety Co. of New York v. Gedney, 185 So. 844, 136 Fla. 10.

Ill.—City of Aurora v. Lakin, 222 Ill.App. 480.

Ky.—Corpus Juris cited in Kaufman v. Kaufman's Adm'r, 166 S.W.2d 860, 867, 292 Ky. 351.

Mass.—Union Market Nat. Bank of Watertown v. Nonantum Inv. Co., 197 N.E. 57, 291 Mass. 439.

Pa.—Commonwealth, to Use of, v. Turner, 39 Pa.Dist. & Co. 252, reversed on other grounds Common-

wealth to Use of Ulshofer v. Turner, 17 A.2d 352, 340 Pa. 468—Commonwealth to Use v. Fidelity & Casualty Co. of New York, 17 Pa.Dist. & Co. 102.

Tex.—Corpus Juris cited in State v. Standard Accident Ins. Co., Civ. App., 203 S.W.2d 984, 985.

50 C.J. p 90 note 97.

#### Because of surety's default

Interest in excess of maximum penalty of the undertaking may become due from surety but only because of surety's own default.—Cunningham v. Cunningham, 157 F.2d 859, 81 U.S.App.D.C. 300.

59. Ala.—Ansley v. Mock, 8 Ala. 444.

50 C.J. p 91 note 98.

60. Kan.—Burchfield v. Haffey, 7 P. 548, 34 Kan. 42.

50 C.J. p 91 note 99.

61. N.Y.—Westcott v. Maryland Fidelity, etc., Co., 84 N.Y.S. 731, 87 App.Div. 497.

50 C.J. p 91 note 1.

62. U.S.—Massachusetts Bonding & Insurance Co. v. U. S., C.C.A.Cal., 97 F.2d 879.

Cal.—Burns v. Massachusetts Bonding & Insurance Co., 146 P.2d 29, 62 Cal.App.2d 972.

Fla.—American Surety Co. of New York v. Gedney, 185 So. 844, 136 Fla. 10.

which, although it may not be from the same time that the principal is liable for interest,<sup>63</sup> is generally, in the absence of statutory provision or stipulation in the contract to the contrary, such time.<sup>64</sup> Unless a provision of the contract provides otherwise, when demand or notice is necessary interest may be computed only from the time of the demand or notice.<sup>65</sup> The filing of a claim<sup>66</sup> or institution of a suit<sup>67</sup> may be a sufficient demand. In some jurisdictions interest is computed from the date of the breach.<sup>68</sup> The rate may be stipulated in the contract,<sup>69</sup> in which case the sureties may not be held for interest at a higher rate.<sup>70</sup>

### § 114. Costs

Sureties are not liable for costs and expenses incurred by the creditor or obligee in an endeavor to enforce the liability of the principal, unless a suit is necessary to disclose the principal's liability.

Sureties are not liable for costs and expenses incurred by the creditor or obligee in an endeavor to enforce the liability of the principal<sup>71</sup> unless

a suit is necessary to disclose the principal's liability.<sup>72</sup> The rule that a surety on a bond is not liable beyond the penalty named therein, as discussed supra § 93, does not prevent the recovery of costs where allowed, even though the addition of such amount makes the total amount exceed the penalty;<sup>73</sup> but it has been said that a surety's liability does not ordinarily extend beyond the penalty of the bond unless he has in some way resisted or obstructed the recovery of the claim against him.<sup>74</sup>

### § 115. Attorney's Fees

Sureties are not liable for the attorney's fees of the creditor or obligee unless there is an express provision in the contract to that effect, or the sureties have agreed to be liable for all expenses, or statutes so provide.

Sureties are not liable for the attorney's fees of the creditor or obligee<sup>75</sup> unless there is an express provision in the contract to that effect,<sup>76</sup> or the sureties have agreed to be answerable for all expenses,<sup>77</sup> or statutes so provide.<sup>78</sup> The sureties

Pa.—*Corpus Juris* quoted in *Commonwealth v. Great American Indemnity Co.*, 167 A. 793, 799, 312 Pa. 183.

Wis.—Banking Commission of Wisconsin v. National Surety Corporation, 11 N.W.2d 171, 243 Wis. 543.

50 C.J. p 91 note 2.

63. La.—*Dorsett v. Lambeth*, 6 La. Ann. 51.

Pa.—*Corpus Juris* quoted in *Commonwealth v. Great American Indemnity Co.*, 167 A. 793, 799, 312 Pa. 183.

64. Ala.—*Union Indemnity Co. v. State*, 127 So. 204, 221 Ala. 1.

Pa.—*Corpus Juris* quoted in *Commonwealth v. Great American Indemnity Co.*, 167 A. 793, 799, 312 Pa. 183.

50 C.J. p 91 note 4.

Interest in excess of face of bond distinguished

For interest which does not bring total liability beyond penalty of the bond, surety is liable for principal's debt, so that interest runs as against the principal, usually from the date when principal violates the obligation secured, but, for other interest in excess of face of the bond, surety can be held liable only for its own default.—*Burns v. Massachusetts Bonding & Insurance Co.*, 146 P.2d 29, 62 Cal.App.2d 972.

Defendant precluded from applying value of pledged bonds

The fact that surety on bonds given to secure road district's deposits with bank, and providing that no suit could be brought against surety by reason of any default of principal until after sixty days from de-

fault, was precluded from applying value of government bonds pledged to indemnify surety on its liability on depositary bonds through attitude of receiver of depositary bank toward pledge, did not suspend liability of surety for interest from date on which bank closed.—*Lloyds America v. El Paso-Hudspeth Counties Road Dist. of Texas*, Tex.Civ. App., 107 S.W.2d 1008, error refused.

65. U.S.—*Massachusetts Bonding & Insurance Co. v. U. S.*, C.C.A.Cal., 97 F.2d 879—In re Perelstine, D. C.Pa., 44 F.2d 62, affirmed, C.C.A., Royal Indemnity Co. v. Sproul, 46 F.2d 1019—*Chicago Bonding, etc., Co. v. Augusta-Savannah Nav. Co.*, Ill., 250 F. 616, 162 C.C.A. 632, certiorari denied 38 S.Ct. 428, 247 U.S. 509, 62 L.Ed. 1241.

S.D.—*Corpus Juris* cited in *Clark County v. Howard*, 237 N.W. 561, 562, 58 S.D. 457.

50 C.J. p 91 note 5.

66. Mass.—*Geo. H. Sampson Co. v. Commonwealth*, 94 N.E. 473, 208 Mass. 372.

67. Ill.—*City of Aurora v. Lakin*, 223 Ill.App. 480.

50 C.J. p 91 note 7.

68. Neb.—*O'Shea v. North American Hotel Co.*, 191 N.W. 321.

50 C.J. p 91 note 8.

69. N.Y.—*Schwartz v. Smith*, 128 N.Y.S. 1, 143 App.Div. 297, affirmed 101 N.E. 1121, 207 N.Y. 714.

50 C.J. p 91 note 10.

70. N.Y.—*Schwartz v. Smith*, supra.

71. Ark.—*Batesville Bank v. Maxey*, 88 S.W. 968, 76 Ark. 472.

50 C.J. p 91 note 12.

Costs in action by creditor against surety see infra § 281.

72. La.—*Scully v. Hawkins*, 14 La. Ann. 183.

50 C.J. p 92 note 14.

73. N.Y.—*Held v. Burke*, 82 N.Y.S. 426, 83 App.Div. 509.

S.C.—*State v. Wylie*, 33 S.C.L. 113.

74. U.S.—*Thomas Laughlin Co. v. American Surety Co., Me.*, 114 F. 627, 51 C.C.A. 247.

75. Mont.—*Federal Surety Co. v. Basin Const. Co.*, 5 P.2d 775, 91 Mont. 114.

50 C.J. p 92 note 21.

76. Ala.—*Maryland Casualty Co. v. Cunningham*, 173 So. 506, 234 Ala. 80.

La.—*Klein v. Collins*, 106 So. 120, 159 La. 704.

50 C.J. p 92 note 22.

Attorney's fees held not covered  
Mont.—*Federal Surety Co. v. Basin Const. Co.*, 5 P.2d 775, 91 Mont. 114.

50 C.J. p 92 note 22 [2].

Amount allowed held sufficient

La.—*Klein v. Collins*, 106 So. 120, 159 La. 704.

77. U.S.—*Northwestern Jobbers Credit Bureau v. National Surety Corporation*, D.C.Minn., 54 F.Supp. 716.

La.—*Labarthe v. Mazzei*, 2 La.App. Orleans, 367.

78. Mont.—*Federal Surety Co. v. Basin Const. Co.*, 5 P.2d 775, 91 Mont. 114.

50 C.J. p 92 note 24.

Bond held not within statute authorizing attorneys' fees

U.S.—*Union Indemnity Co. v. Vetter*, C.C.A.Fla., 40 F.2d 606.

will not be liable for attorney's fees, even though there is an express stipulation therefor, if their liability is sought to be enforced in some other way than on the contract in which such stipulation appears.<sup>79</sup> A surety has been held liable, however, for legal services necessitated by the principal's default.<sup>80</sup> Even where the bond stipulates that damages shall include attorney's fees, under the rule

that a surety on a bond is not liable beyond the penalty named therein, the surety is not liable for attorney's fees in excess of the penalty named.<sup>81</sup> It has been held, however, that, where the bond provides for a penal sum together with attorney's fees, the surety is liable for attorney's fees in addition to the full amount of the penalty.<sup>82</sup>

## VI. TERMINATION AND RELEASE OR DISCHARGE OF SURETY'S LIABILITY

### A. IN GENERAL

#### § 116. In General

Generally speaking, the liability of a surety ends with the extinguishment of the obligation of the principal; but there are exceptions to this rule, as where a married woman, minor, or other person under a personal disability is discharged by reason of such disability.

It is a well-established rule, both at common law and under statutes, that the liability of a surety ends with the extinguishment of the obligation of the principal.<sup>83</sup> Accordingly, as discussed *infra* §§ 223-226, a surety is generally discharged when his principal is released from liability, although there are exceptions to this rule, notably cases in which the principal is released through causes which originate with the law and not in the voluntary acts of the creditor, as discussed *infra* §§ 232-244. Another exception is to be found in the rule that a surety for a married woman, minor, or other

person incapable of contracting remains bound notwithstanding the principal may be discharged because of his incapacity,<sup>84</sup> unless the principal without capacity to contract disaffirms and restores to the creditor or obligee everything received by him under the contract.<sup>85</sup> The surety is not released because other parties with whom he is acting do not comply with their agreement with him through no fault of the obligee or creditor.<sup>86</sup> Generally speaking, a compensated surety can be relieved from liability only where the circumstances clearly justify relief.<sup>87</sup>

*Judgment in favor of principal.* A surety can set up, as a defense, that a judgment has been rendered in favor of the principal in an action for the same alleged default.<sup>88</sup> The rule has been held to apply even though the surety was not a party to

79. Ga.—Jones v. Findley, 10 S.E. 541, 84 Ga. 52.

N.Y.—McCauslan v. Zoar Holding Co., 227 N.Y.S. 75, 131 Misc. 148.

80. N.Y.—Kinney v. Massachusetts Bonding & Insurance Co., 206 N.Y.S. 163, 210 App.Div. 285.

81. Cal.—Corpus Juris quoted in Hartford Accident & Indemnity Co. v. Industrial Accident Com'n, 13 P.2d 699, 703, 216 Cal. 40.

Mo.—Hartford F. Ins. Co. v. Casey, 191 S.W. 1072, 196 Mo.App. 291.

82. Okl.—Truax v. Capitol Life Ins. Co., 26 P.2d 755, 166 Okl. 153.

83. U.S.—Haddad v. Western Contracting Corp., D.C.W.Va., 71 F. Supp. 212.

Cal.—Goatman v. Pacific Ready-Cut Homes, 297 P. 68, 112 Cal.App. 397.

Idaho.—Epperson v. Texas-Owyhee Mining & Development Co., 118 P. 2d 745, 63 Idaho 251.

Ind.—Corpus Juris cited in McKee v. Harwood Automotive Co., 183 N.E. 646, 647, 204 Ind. 233.

N.H.—Burque v. Brodeur, 158 A. 127, 85 N.H. 310.

N.J.—Slatoff v. Theurich, 199 A. 49, 123 N.J.Eq. 593.

Pa.—Lupowitz v. Double Share Bldg.

& Loan Ass'n, 14 Pa.Dist. & Co. 280.

Tex.—Scarborough v. Kerr, Civ.App., 70 S.W.2d 607.

50 C.J. p 93 note 29.

**Statute construed**

The statute providing that the obligation of a surety shall cease of course if the obligation of his principal from any cause becomes extinct requires that obligation of principal shall have been completely destroyed, before obligation of surety ceases.—Franklin v. Mobley, 42 S.E.2d 755, 202 Ga. 212.

84. Ga.—Browne v. Institute of Business and Accounting, 12 S.E. 2d 455, 63 Ga.App. 871.

Ind.—Corpus Juris cited in McKee v. Harwood Automotive Co., 183 N.E. 646, 647, 204 Ind. 233.

50 C.J. p 93 note 33.

85. Ind.—Corpus Juris cited in McKee v. Harwood Automotive Co., 183 N.E. 646, 647, 204 Ind. 233.

Iowa.—Perry Auto Co. v. Mainland, 294 N.W. 281, 229 Iowa 187.

50 C.J. p 93 note 34.

**Where principal has received nothing,** his surety is discharged on mere disaffirmance of the minor's contract.

—Gervis v. Knapp, 43 N.Y.S.2d 849, 182 Misc. 311.

**Sufficiency of restoration**

(1) Where infant rescinded contract to purchase automobile, not a necessity, and recovered payments made, tender of automobile after seven months' use did not place seller in statu quo so as to release sureties on purchase note.—McKee v. Harwood Automotive Co., 183 N.E. 646, 204 Ind. 233.

(2) Where consideration is returned only in part or where special damages exist, guarantor's defense is partial only.—Gervis v. Knapp, 43 N.Y.S.2d 849, 182 Misc. 311.

86. Neb.—Lipps v. Panko, 140 N.W. 761, 93 Neb. 469.

87. U.S.—Southern Surety Co. v. People's State Bank of South Carolina, 47 F.2d 93.

Strict construction as to compensated surety see *supra* § 102.

Effect of modification, change, or alteration of contract or obligation on liability of compensated surety see *infra* §§ 124-127.

88. U.S.—U. S. v. Coast Wineries, C.C.A. Wash., 131 F.2d 643—Corpus Juris cited in Central Trust Co. v.

the action in which judgment was rendered,<sup>89</sup> although there is also authority to the contrary.<sup>90</sup> Even though judgment has been obtained against the sureties, if judgment afterward is rendered in favor of the principal the sureties are released.<sup>91</sup> If the principal succeeds only in reducing the amount of the claim against him, the sureties are released to the same extent.<sup>92</sup> The surety is not released by a judgment of dismissal for want of prosecution in favor of the principal where due to the failure of the surety to see that the action was prosecuted in accordance with his agreement,<sup>93</sup> nor is the surety released where, on appeal, the judgment for the principal is reversed.<sup>94</sup>

**Merger of right and liability.** Whenever a note or bond on which the principal is primarily liable comes into the hands of the principal, with a right to enforce it, a surety thereon is discharged.<sup>95</sup> Similarly, if a mortgagee purchases the mortgaged land,<sup>96</sup> or if a purchaser of land takes an assignment of a judgment which is a lien on the land,<sup>97</sup> or a landlord takes an assignment of a lease on which the surety is secondarily liable for the rent,<sup>98</sup> a surety for the indebtedness is discharged by the merger of the right and liability in one person; but the liability of a surety for the accrued rent of personal property under a contract of letting, reserving to the owner the option of requiring the return of the property, is not released by a sale of the property and termination of the letting.<sup>99</sup> A surety on a judgment is not discharged by an as-

signment of the judgment to the wife of the principal debtor in the absence of any showing that the judgment has been paid by the principal or that the consideration for the assignment was money of the principal.<sup>1</sup>

**Failure to record contract.** A surety is not discharged from his obligation because a building contract,<sup>2</sup> plans and specifications,<sup>3</sup> or the bond itself<sup>4</sup> has not been filed or recorded as required by statute.

## § 117. Provisions of Contract of Suretyship

The termination of a surety's liability ordinarily is governed by the provisions of the contract of suretyship.

In conformity with the principle, discussed supra § 91, that the liability of a surety is measured by his contract, it may be said in general terms that, in the absence of earlier termination by release, mutual agreement, or operation of law ordinarily the termination of a surety's liability is governed by provisions of the contract, if any.<sup>5</sup> Thus, under statutory bonds so providing, sureties may be discharged when counter security is not given to them on their request and compliance with specified conditions.<sup>6</sup> So too, where the obligation of a surety on a building contractor's bond is, under the terms of the bond, to terminate a specified time after the time for completion of the building, his obligation cannot be enlarged by an unauthorized extension of the contractor's time for completion of the building.<sup>7</sup>

Manly, C.C.A.Fla., 100 F.2d 992, 994—Kramer v. Morgan, C.C.A.N.Y., 85 F.2d 96—U. S. v. American Surety Co. of New York, C.C.A.N.Y., 56 F.2d 734—Corpus Juris cited in Prichard v. Nelson, D.C.Va., 55 F.Supp. 506, 514, affirmed, C.C.A., 137 F.2d 312.

Pa.—McShain v. Indemnity Ins. Co. of North America, 12 A.2d 59, 338 Pa. 113.

Tex.—Stafford v. Lawyers' Lloyds of Texas, Civ.App., 175 S.W.2d 461—Scarborough v. Kerr, Civ.App., 70 S.W.2d 607.

50 C.J. p 93 note 36.

Judgment and execution against principal as discharging surety see infra § 242.

### Judgment on different claim

Where wife was injured by display of fireworks and husband incurred medical expenses and other kindred damages as result of wife's injuries, action by husband and wife against surety company on bond given by fireworks display licensee conditioned for payment of all damages caused by reason of the display was not barred under theory of res judicata because of judgment exon-

erating the licensee from liability in prior action based on licensee's negligence, and therefore exclusion of proceedings in action against licensee was not error.—McBride v. Maryland Casualty Co., 23 A.2d 596, 128 N.J.Law 64, 138 A.L.R. 932.

89. Ga.—Brown v. Bradford, 30 Ga. 927.  
50 C.J. p 93 note 37.

90. Ark.—State Bank v. Robinson, 13 Ark. 214.

91. Ind.—Michener v. Springfield Engine, etc., Co., 40 N.E. 679, 142 Ind. 130, 31 L.R.A. 59.  
50 C.J. p 93 note 39.

92. Cal.—Corpus Juris cited in State Athletic Commission v. Massachusetts Bonding & Ins. Co., 117 P.2d 75, 78, 46 Cal.App.2d 823.  
50 C.J. p 93 note 40.

93. Ga.—Hardin v. Johnston, 58 Ga. 522.

94. Ky.—Thomas v. Whittaker, 11 Ky.Op. 875.

95. Mich.—Ashoff v. Van Brunt, 48 N.W. 151, 84 Mich. 575.  
50 C.J. p 94 note 43.

96. Pa.—Building Assoc. v. Benson, 2 Wkly.N.Cas. 541.

97. Pa.—Wright v. Knepper, 1 Pa. 361.

W.Va.—Johnson v. Young, 20 W.Va. 614.

98. Mo.—Smith v. Thurston, 19 Mo. App. 48.

99. Pa.—Monsarratt v. Equitable Trust Co., 14 Pa.Super. 541.

1. Pa.—Hall v. Bardwell, 1 Pa.C. Pl. 22.

2. Cal.—Summerton v. Hanson, 49 P. 135, 117 Cal. 252.

9 C.J. p 863 note 67.

3. Cal.—Blyth v. Robinson, 37 P. 904, 104 Cal. 239.

4. Kan.—Evans v. Watson, 55 P. 17, 8 Kan.App. 144.

9 C.J. p 863 note 69.

5. Ohio.—Harrison Bldg. Co. v. Beckerman, 156 N.E. 919, 24 Ohio App. 202.

6. Tenn.—Kincaid v. Sharp, 3 Head 151.

50 C.J. p 109 note 44.

7. Pa.—Watters v. Fisher, 139 A. 842, 291 Pa. 311.

Alteration of, or departure from,



Provisions in the contract of suretyship for rescission, revocation, or termination generally of such contract are considered *infra* § 129.

## § 118. Acts or Conduct of Principal in General

As a general rule, no act of the principal which does not extinguish his own obligation is sufficient of itself to discharge his surety.

As a general rule the principal cannot by any act of his, except one which will extinguish the debt or obligation, discharge the surety.<sup>8</sup> Some act of the creditor or obligee is required in order to discharge him.<sup>9</sup> The fact that the principal uses a note signed by the surety to remove encumbrances on exempt property of the principal, thus decreasing the property available to creditors, does not discharge a surety in the absence of any misrepresentation.<sup>10</sup> In the absence of an express provision to the contrary, a surety is not discharged by reason of the fact that the principal has conducted his business through subordinates or agents.<sup>11</sup> Failure of the principal to pay the premium to the surety is not a ground for discharging the surety as against the creditor or obligee.<sup>12</sup>

Breach of his obligations by the principal as affecting the surety's liability is discussed *supra* § 95; and questions as to the termination or discharge of the surety's liability by acts or conduct of the creditor or obligee generally are discussed *infra* §§ 148-160.

## § 119. Amendments, Stipulations, and Other Matters in Judicial Proceedings Affecting Bonds Therein

Generally speaking, a surety on a bond given in a

Judicial proceeding in accordance with statutory requirements is not released by amendments to the pleadings unless their effect is to impose on the surety a liability greater than that originally assumed.

A bond which is authorized and required to be given in a judicial proceeding is subject to the provisions of law then existing with respect to the conduct of the action, as determining the scope and effect of the obligation thereby assumed.<sup>13</sup> Generally a surety is not released by amendments to the pleadings<sup>14</sup> unless their effect is to impose on him a liability greater than he had originally assumed, as by letting in a new cause of action<sup>15</sup> or causing a variation of the risk the surety assumed,<sup>16</sup> or the amendments are of such a character that the court does not have power to allow them except on the stipulations of the parties.<sup>17</sup> So amendments which change the form of action,<sup>18</sup> increase the damages claimed,<sup>19</sup> or substitute a real for a nominal party<sup>20</sup> do not release the surety. So amendment of the writ in the action in which the bond is given so as to increase the *ad damnum* does not release the surety, where such amendment does not let in a new demand or a new cause of action.<sup>21</sup>

Sureties will be released by a change which brings new parties into the proceedings,<sup>22</sup> and in several jurisdictions, although there is also authority to the contrary,<sup>23</sup> by the dismissal of the action as to one or more of the parties defendant.<sup>24</sup> If a bill is filed by a creditor in behalf of himself and others who might come in,<sup>25</sup> or the obligation of the sureties contemplates the payment of any judgment which may be rendered on the trial and judicial determination of the cause of action,<sup>26</sup> an intention is shown to allow such changes and the sureties are not discharged, and in the latter case, if the bond was given in consideration of a con-

terms of building and construction contract as discharging surety see *infra* § 126.

8. Ohio.—National Surety Co. v. Bohn, 182 N.E. 506, 125 Ohio St. 537.

50 C.J. p 109 note 41.

### Acts held not to release surety

Allowance against defunct bank of claim on certificate of deposit issued by bank did not increase risk of sureties on certificate and release them.—Council v. Freeman, 157 S.E. 263, 42 Ga.App. 632.

9. N.J.—Vanderbeek v. Tierney-Connelly Constr. Co., 73 A. 480, 77 N.J.Law 664.

10. Ky.—Smith v. London First Nat. Bank, 53 S.W. 648, 107 Ky. 257, 21 Ky.L. 953.

11. Minn.—Trovatten v. Minea, 7 N.W.2d 390, 213 Minn. 544, 144 A.L.R. 1263.

12. Ind.—Massachusetts Bonding, etc., Co. v. State, 127 N.E. 223, 76 Ind.App. 16.

13. R.I.—Bedard v. Mahoney, 76 A. 113, 30 R.I. 469, 136 Am.S.R. 965.

14. Mass.—Townsend Nat. Bank v. Jones, 24 N.E. 593, 151 Mass. 454. 50 C.J. p 99 note 70.

15. Mass.—Driscoll v. Holt, 49 N.E. 309, 170 Mass. 262. 50 C.J. p 99 note 71.

16. Hawaii.—William W. Bierce, Ltd. v. Waterhouse, 19 Hawaii 398.

17. Mich.—Evers v. Sager, 28 Mich. 47. 50 C.J. p 100 note 73.

18. Ill.—Block v. Blum, 33 Ill.App. 643. 50 C.J. p 100 note 74.

19. Md.—Warren Bros. Co. v. Ken-

drick, 77 A. 847, 113 Md. 603, 140 Am.S.R. 445.

50 C.J. p 100 note 75.

20. Tenn.—Elder v. Fielder, 9 Bart. 272.

21. Mass.—Eastern Tire Co. v. Witter, 183 N.E. 894, 281 Mass. 523—Townsend Nat. Bank v. Jones, 24 N.E. 593, 151 Mass. 454.

22. Mass.—Richards v. Storer, 114 Mass. 101. 50 C.J. p 100 note 77.

23. R.I.—Bedard v. Mahoney, 76 A. 113, 30 R.I. 469, 136 Am.S.R. 965. 59 C.J. p 100 note 78.

24. Miss.—Tyler v. Davis, 63 Miss. 345. 50 C.J. p 100 note 79.

25. Md.—Levy v. Taylor, 24 Md. 282.

26. Ill.—Salomon v. Buehler, 129 Ill.App. 176.

50 C.J. p 100 note 81.

tinuance of the action for a definite period, further continuances granted with the consent of the parties in the usual course of the proceedings will not release the sureties.<sup>27</sup> In admiralty, as long as the cause of action remains practically the same, sureties will not be discharged by a change as to the parties.<sup>28</sup>

Immaterial variations in the proceedings, not increasing the liability of the sureties, will not release them.<sup>29</sup> An agreement by several parties holding identical claims to try one of them and make the verdict rendered therein conclusive as to all will not discharge the sureties;<sup>30</sup> nor will stipulations of the parties, such as that no appeal be taken, the judgment of the trial court to be accepted as final,<sup>31</sup> or that a bill to enjoin the collection of a judgment be dismissed,<sup>32</sup> or that the right to a deficiency judgment in an action to foreclose a mortgage be waived.<sup>33</sup> The modification of a judgment at the instance of the person secured so as to increase the amount due will discharge a surety for the payment thereof,<sup>34</sup> but a reduction of the amount will not.<sup>35</sup> A change with respect to the return day will release the sureties on an undertaking given during judicial proceedings.<sup>36</sup>

## § 120. Discharge by Order of Court

Where a bond is given in judicial proceedings, the court may not, without the consent of the parties, discharge the bond or release the surety except in accordance with statutory provisions conferring such power.

A court does not have power to release sureties on the bond of a person acting in a fiduciary capacity except it be done in accordance with the provisions of a statute conferring such power.<sup>37</sup> Unless so released by the court, a bond once approved remains operative as a security until its conditions are performed, or its penalty exhausted, or until

it is barred by the statute of limitations.<sup>38</sup> In the case of statutory bonds in judicial proceedings, the court cannot, unless a statute provides otherwise, or unless with the consent of the parties interested, discharge the bond<sup>39</sup> or release the surety.<sup>40</sup> Where a statutory provision authorizes the release of a surety, such provision must be strictly complied with, in order that the release may be effective.<sup>41</sup> So, where the statute provides that the surety may apply for a release, or contemplates that the initial step for obtaining a release must be taken by the surety, the proceeding asking for his discharge generally must be on his petition.<sup>42</sup> It is within the power of the court to discharge the surety from liability on the bond where the action has abated.<sup>43</sup>

## § 121. Diversion of Contract or Use of Proceeds for Unauthorized Purpose

Diversion of an instrument or the proceeds thereof from the purpose to which the parties have limited it by their agreement will, in the absence of consent on his part, discharge the surety from liability to one having notice of the limitation and diversion.

If one becomes surety on an instrument, and the parties have agreed that such instrument or the proceeds thereof shall be used only for a specified purpose, the use of the instrument or the proceeds for a different purpose without the consent of the surety will discharge him from liability to anyone having notice or knowledge of such limitation and of the diversion of the instrument or proceeds.<sup>44</sup> An assignment by a contractor, of the proceeds of a public improvement contract, for value received, without the knowledge or consent of a compensated surety, does not constitute a material alteration of the contract sufficient, under the rules discussed infra § 124, to work a discharge of the surety from its obligation under the bond.<sup>45</sup>

27. Philippine.—Spreckels v. Ward, 12 Philippine 414.

50 C.J. p 100 note 82.

28. U.S.—The Beaconsfield, N.Y., 15 S.Ct. 860, 158 U.S. 303, 39 L.Ed. 993.

50 C.J. p 100 note 83.

29. Ala.—Triest v. Enslin, 17 So. 356, 106 Ala. 180.

50 C.J. p 100 note 84.

30. Ala.—Jaffray v. Smith, 17 So. 218, 106 Ala. 112.

Cal.—Meyer v. Jones, 163 P. 67, 32 Cal.App. 378.

31. Cal.—Meyer v. Jones, supra.

32. Ill.—Boynton v. Phelps, 52 Ill. 210.

50 C.J. p 100 note 87.

33. N.Y.—Mack v. Anderson, 33 N.Y.S. 208.

34. Wis.—Sage v. Strong, 40 Wis. 575.

50 C.J. p 100 note 89.

35. Pa.—Commonwealth v. Mendelsohn, 83 Pa.Super. 593.

50 C.J. p 100 note 90.

36. R.I.—Wilson v. Fisk, 46 A. 272, 22 R.I. 100.

37. Ky.—Corpus Juris cited in Fidelity & Deposit Co. of Maryland v. McComas' Adm'r, 175 S.W. 2d 1017, 1019, 295 Ky. 850.

50 C.J. p 190 note 69.

38. Ind.—American Bonding Co. v. Hall, 106 N.E. 534, 57 Ind.App. 523.

Pa.—Commonwealth v. Rogers, 53 Pa. 470.

39. Pa.—Commonwealth v. Ameri-

can Bonding Co., 91 A. 938, 245 Pa. 535.

50 C.J. p 190 note 73.

40. Ill.—Clark v. American Surety Co., 49 N.E. 481, 171 Ill. 235.

50 C.J. p 190 note 74.

41. Ill.—Clark v. American Surety Co., 49 N.E. 481, 171 Ill. 235.

50 C.J. p 190 note 75.

42. Iowa.—Bookhart v. Younglove, 218 N.W. 533, 207 Iowa 800.

43. N.Y.—Quinn v. Ershowsky, 245 N.Y.S. 398, 138 Misc. 15.

44. N.M.—Pacific Nat. Agr. Credit Corporation v. Hagerman, 51 P.2d 857, 39 N.M. 549, 101 A.L.R. 1301.

50 C.J. p 128 note 25.

45. Ohio.—Van Wert Nat. Bank v. Roos, 17 N.E.2d 651, 134 Ohio St. 359.

## § 122. — Negotiable Instruments

Diversion of a note or its proceeds without the surety's consent ordinarily will discharge the surety from liability to anyone with notice of the diversion.

In the absence of statutory provision to the contrary, if one becomes a surety on a note or other negotiable instrument for a specified purpose, according to the agreement of the parties, he is not liable, if it is used for a different purpose without his consent, to anyone having notice or knowledge of such purpose and the diversion of the instrument;<sup>46</sup> but one who takes the instrument without notice or knowledge of the diversion from the use for which the surety executed it may hold the surety,<sup>47</sup> and a surety cannot complain that a note was used for a purpose different from the one he supposed it would be,<sup>48</sup> or that the principal diverted the proceeds to a use other than that agreed on, where such agreement was in no way communicated to the party seeking to enforce the obligation.<sup>49</sup>

In some cases the rule is that, where a note is signed by a surety for the purpose of obtaining a discount, it is immaterial by whom the money is advanced, provided the purpose has been accomplished, and although the note may be sold to another than the payee,<sup>50</sup> or such is the result if the party who takes such note has no knowledge of any limitation on the purpose of the instrument imposed by the surety, the fact that it is made to a particular payee being considered insufficient to give such notice,<sup>51</sup> or where there is a general intention to become surety to raise money without regard to the person to whom the note should be passed.<sup>52</sup> However, if a note is made payable to a bank, or a cashier of a bank, so that it shows on its face that it was made for the purpose of being discounted at a particular bank, it has no validity as to the sureties unless it be so discounted.<sup>53</sup>

In other cases, however, it has been held that if a note is not delivered to the payee, but is sold to a third person without the consent of the sureties thereon, it cannot be enforced against them.<sup>54</sup> Discharge of an accommodation party as surety on a negotiable instrument is discussed generally in Bills and Notes § 752; and diversion of accommodation paper as affecting the liability of the accommodation party is considered in Bills and Notes § 753.

*Consent of surety.* A surety may consent to a diversion of the instrument or proceeds,<sup>55</sup> or waive a defense that he has been discharged thereby,<sup>56</sup> as by making a new promise to pay the debt.<sup>57</sup>

## § 123. Impossibility of Performance; Destruction of Subject Matter

Where the principal has unqualifiedly promised to perform an act, impossibility of performance will not release the surety, although a surety is discharged where the law prevents performance of his contract. Generally, the effect on the liability of the surety in the case of destruction of the subject matter of the contract is the same as the effect thereof on the liability of the principal.

Impossibility of performance by the principal of an act which he has unqualifiedly promised to do will not release the surety;<sup>58</sup> but a surety is discharged where the law prevents performance of his contract.<sup>59</sup> Generally, whether the liability of a surety ceases with the destruction of the subject matter of the contract depends on the liability of the principal. Thus the surety remains liable if the principal does,<sup>60</sup> and is relieved if the principal is relieved.<sup>61</sup> So, since at common law the lessee is not released from liability for rent by reason of the destruction of the premises, as discussed in Landlord and Tenant § 486, the destruction of a building which is the subject of a lease is not a

46. N.M.—Pacific Nat. Agr. Credit Corporation v. Hagerman, 51 P.2d 857, 39 N.M. 549, 101 A.L.R. 1301.

50 C.J. p 128 note 25.

47. Ky.—Lovelace v. Lovelace, 124 S.W. 400, 136 Ky. 452, 136 Am.S.R. 271.

50 C.J. p 129 note 26.

48. Vt.—Flanagan v. Post, 45 Vt. 246.

50 C.J. p 129 note 27.

49. Iowa.—Ft. Dodge Grocery Co. v. Brown, 152 N.W. 500.

50 C.J. p 129 note 28.

50. Vt.—Flanagan v. Post, 45 Vt. 246.

50 C.J. p 129 note 29.

51. N.Y.—Utica Bank v. Ganson, 10 Wend. 314.

50 C.J. p 129 note 30.

52. Tenn.—Perkins v. Ament, 2 Head 110.

50 C.J. p 129 note 31.

53. S.C.—Greenville v. Ormand, 28 S.E. 50, 51 S.C. 58, 64 Am.S.R. 663, 39 L.R.A. 847.

50 C.J. p 129 note 32.

54. Iowa.—Howe v. Selby, 6 N.W. 39, 53 Iowa 670.

50 C.J. p 129 note 33.

55. Tenn.—Hermitage Nat. Bank v. Carpenter, 174 S.W. 263, 131 Tenn. 136, Ann.Cas.1916D 730.

50 C.J. p 129 note 35.

56. Mo.—Mastin Bank v. Hammer-slough, 72 Mo. 274.

57. Mo.—Mastin Bank v. Hammer-slough, supra.

58. Vt.—Montpelier v. National

Surety Co., 122 A. 484, 97 Vt. 111, 33 A.L.R. 489.

59. N.C.—Bunting v. Wright, 61 N. C. 295.

50 C.J. p 100 note 94.

60. Ky.—Carney v. Walden, 16 B. Mon. 388.

*Performance prevented by obligor's act*

Where performance is rendered impossible by the obligor's own act or the act of some person or agency on his behalf, the obligor's surety cannot be allowed to show this as an excuse.—U. S. v. Dixey, Pa., 25 F. Cas.No.14,967, 3 Wash.C.C. 15—9 C. J. p 75 note 1.

61. Pa.—Building Assoc. v. Benson, Com.Pl., 2 Wkly.N.C. 541.

defense to a surety for the rent;<sup>62</sup> but under a statute the surety may be released<sup>63</sup> even though the lessee continues to occupy the premises.<sup>64</sup>

## § 124. Modification, Change, or Alteration

- a. In general
- b. Sufficiency of alteration
- c. Necessity of prejudice to surety
- d. Materiality of alteration
- e. Effect of consent of surety
- f. Waiver or estoppel
- g. Extent of discharge

### a. In General

Where the principal contract or the contract of suretyship is materially altered, changed, or departed from without the surety's knowledge or consent, ordinarily the surety is discharged from liability.

As discussed supra § 91, a surety has the right to stand on the letter of his contract, and if, without his knowledge or consent, any material alteration or change is made in the contract entered into by him, or in the contract or obligation, the performance of which is secured, he is discharged;<sup>65</sup> and it is to be noted that an alteration, within the foregoing rule, may be accomplished either by material changes in the language of the instrument or by material departures from its terms in its execution and enforcement.<sup>66</sup> It is immaterial that the alteration was made without fraudulent intent;<sup>67</sup> nor is it necessary that the alteration affect the validity of the contract since, despite the fact that the surety is discharged, the principal,<sup>68</sup> and cosureties, who have consented to the alteration,<sup>69</sup> will remain bound. Changes in order to

62. Miss.—Payne v. Devinal, 19 Miss. 400.

63. N.J.—Colonial Land Co. v. Asmus, 81 A. 367, 82 N.J.Law 28.

64. N.J.—Colonial Land Co. v. Asmus, supra.

65. U.S.—Sauder v. Dittmar, C.C.A. Kan., 118 F.2d 524—Providence, Fall River & Newport Steamboat Co. v. Massachusetts Bay S. S. Corporation, D.C.Mass., 38 F.2d 674—U. S. ex rel. Townshend v. Robson, D.C.W.Va., 9 F.Supp. 446. Ala.—Maryland Casualty Co. v. Cunningham, 173 So. 506, 234 Ala. 80—Jefferson Lumber Co. v. Powers, 134 So. 464, 233 Ala. 63—Carroll v. Hanahan, 130 So. 197, 221 Ala. 553.

Fla.—Anderson v. Trueman, 130 So. 12, 100 Fla. 727.

Ga.—Heard v. Tappan, 43 S.E. 375, 116 Ga. 930—Smith v. Georgia Battery Co., 169 S.E. 381, 46 Ga. App. 840.

Ind.—Detroit Fidelity & Surety Co. v. Bushong, 175 N.E. 683, 96 Ind. App. 352.

Ky.—Kelly v. King, 145 S.W.2d 78, 284 Ky. 429—Phillips v. Board of Education of Pineville, 140 S.W.2d 819, 283 Ky. 173.

Md.—Prodis v. Constantinides, 172 A. 286, 167 Md. 33, 93 A.L.R. 1200.

Mass.—Hartford Accident & Indemnity Co. v. Casassa, 16 N.E.2d 860, 301 Mass. 246.

Minn.—Corpus Juris cited in Schmidt v. McKenzie, 9 N.W.2d 1, 6, 215 Minn. 1.

Mo.—Highland Inv. Co. v. Kansas City Computing Scales Co., 209 S. W. 895, 277 Mo. 365.

N.J.—Bell v. Merchants Building & Loan Ass'n of West Hudson, 28 A.2d 295, 132 N.J.Eq. 356, affirmed 32 A.2d 364, 133 N.J.Eq. 345.

N.M.—Pacific Nat. Agr. Credit Cor-

poration v. Hagerman, 51 P.2d 857, 39 N.M. 549, 101 A.L.R. 1301.

N.Y.—Becker v. Faber, 19 N.E.2d 997, 280 N.Y. 146, 121 A.L.R. 1010, reargument denied Becker v. Intemann, 21 N.E.2d 216, 280 N.Y. 730

—Levy v. Jones, 55 N.Y.S.2d 607, 269 App.Div. 295, appeal granted 57 N.Y.S.2d 135, 269 App.Div. 901

—DuPort v. First Nat. Bank of Glens Falls, 29 N.Y.S.2d 729, 262 App.Div. 267, reversed on other grounds 43 N.E.2d 34, 288 N.Y. 261

—Duport v. First Nat. Bank, 15 N.Y.S.2d 372, 257 App.Div. 693—Rutherford Nat. Bank v. Manniello, 271 N.Y.S. 69, 240 App.Div. 506, affirmed 195 N.E. 203, 266 N.Y. 568

—Irving Trust Co. v. Hutchinson Holding Corporation, 270 N.Y.S. 684, 241 App.Div. 107—Greenwich Sav. Bank v. Cabin Holding Corporation, 26 N.Y.S.2d 791, 176 Misc. 89—White v. Augello, 254 N.Y.S. 228, 142 Misc. 233—Weingarten v. Kramer, 247 N.Y.S. 657, 139 Misc. 74—In re Lienthal's Estate, 240 N.Y.S. 849, 136 Misc. 762—Schneider v. Louis Friedman Realty Co., 47 N.Y.S.2d 22.

Ohio.—Van Wert Nat. Bank v. Roos, 17 N.E.2d 651, 134 Ohio St. 359.

Okl.—Eckles v. Busey, 132 P.2d 344, 191 Okl. 644—Whale v. Rice, 49 P.2d 737, 173 Okl. 530.

Pa.—Germantown Trust Co. v. Emhardt, 184 A. 457, 321 Pa. 561, followed 184 A. 460, 321 Pa. 567—Jacob Sall Building & Loan Ass'n v. Heller, 171 A. 464, 314 Pa. 237—First Nat. Bank & Trust Co. of Ford City v. Stolar, 197 A. 499, 130 Pa.Super. 480—Spring Garden Building & Loan Ass'n v. Rhodes, 190 A. 530, 128 Pa.Super. 102—Koch v. Moyer, 158 A. 198, 103 Pa. Super. 270—Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Barton, Com.Pl., 59 Montg.Co. 219—First Nat. Bank & Trust Co. of Dellastown v. In-

nerst, Com.Pl., 51 York Leg.Rec. 145.

Tenn.—Organ v. Allison, 9 Baxt. 459—Fidelity Bond & Mortgage Co. v. American Surety Co., 14 Tenn.App. 211.

Tex.—Straus-Frank Co. v. Hughes, 156 S.W.2d 519, 138 Tex. 50—Mingus v. Employers' Liability Assur. Co., Com.App., 65 S.W.2d 292—Park Presbyterian Church of Italy v. William Cameron & Co., Com. App., 58 S.W.2d 63—Porter v. Hope, Civ.App., 279 S.W. 535.

Vt.—Derby v. Thrall, 44 Vt. 413, 8 Am.R. 389.

W.Va.—Koblegard Co. v. Maxwell, 34 S.E.2d 116, 127 W.Va. 630.

50 C.J. p 116 note 37—2 C.J. p 1181 note 80.

### Reasons for rule

(1) Alteration of the principal's contractual obligation releases the surety, for the principal is no longer bound to perform the obligation guaranteed and the surety cannot be held responsible for failure to perform any other obligation.—Becker v. Faber, 19 N.E.2d 997, 280 N.Y. 146, 121 A.L.R. 1010, reargument denied Becker v. Intemann, 21 N.E.2d 216, 280 N.Y. 730—Greenwich Sav. Bank v. Eckford Realty Corporation, 48 N.Y.S.2d 664, 263 App.Div. 195.

(2) Similar reasons.—Reese v. U. S., Cal., 9 Wall. 13, 19 L.Ed. 541—50 C.J. p 116 note 37 [a].

66. Conn.—New Haven v. National Steam Economizer Co., 65 A. 959, 79 Conn. 482.

67. Minn.—Renville County v. Gray, 63 N.W. 635, 61 Minn. 242. 50 C.J. p 118 note 40.

68. Mass.—Howe v. Peabody, 2 Gray 556.

69. U.S.—Mundy v. Stevens, Pa., 61 F. 77, 9 C.C.A. 366.

make the instrument conform to the intention of all the parties will not release the surety, although they are made without his knowledge and consent.<sup>70</sup>

It is an alteration, and not the attempted performance<sup>71</sup> or enforcement,<sup>72</sup> of the terms of a contract which, unless the surety consents, discharges him. An action taken by the creditor pursuant to the terms of his contract cannot be regarded as an alteration thereof discharging the surety.<sup>73</sup> A surety will not be discharged because the obligee, after the principal failed fully to perform, completed the work in a manner different from that called for in the original contract.<sup>74</sup> Clearly a surety cannot be relieved from liability on the ground of alteration where in fact no alteration has occurred.<sup>75</sup> It has been held that the rule that a change or alteration in the obligation extinguishes the surety's obligation and discharges him generally applies only to contracts between private parties,<sup>76</sup> and does not apply so as to discharge one who is not a surety but is a comaker of the principal instrument.<sup>77</sup>

*Independent contracts or stipulations.* A surety is not discharged by an independent, collateral, or auxiliary agreement between the principal and the creditor or obligee which does not vary the terms of the first contract,<sup>78</sup> as where the principal

executes a mortgage to secure the note on which the surety is bound.<sup>79</sup> If the performance of two or more contracts is secured by the contract of the surety, a change as to one will not affect his liability as to the other;<sup>80</sup> and where the contract of a surety can be enforced by two or more parties although an alteration made by one of them may discharge the liability of the surety as to that one it will not discharge him as to the others.<sup>81</sup> The breach by the principal of a provision in the contract for which no penalty is provided as against the surety is not an alteration of the terms of the contract discharging the surety.<sup>82</sup>

*Changes before contract of suretyship or after accrual of liability.* If the surety's obligation is assumed with reference to a change already made in the principal's contract, such alteration will not discharge the surety.<sup>83</sup> A modification of the contract does not relieve the surety of liability for those debts of his principal which matured before any change was made in the contract.<sup>84</sup>

*Application of rule to negotiable instruments.* Under the rule that the purport of a commercial instrument on which a memorandum has been written is to be collected from its "eight corners," as discussed in Bills and Notes § 42 b, the unauthorized alteration of an indorsement of payment so

70. Cal.—Fruit Growers' Supply Co. v. Goss, 41 P.2d 357, 4 Cal.App.2d 651.

50 C.J. p 118 note 44.

**Filling in amount**

Where the contract of suretyship contains a dollar sign followed by a blank space for the amount of indebtedness covered, and the obligee fills the correct amount into such space after its execution, such filling in does not amount to a material alteration of the contract.—McConnon & Co. v. Hovland, 194 N.W. 394, 156 Minn. 222.

71. Tex.—Galveston, etc., R. Co. v. Walker, 219 S.W. 815, 110 Tex. 286. 50 C.J. p 118 note 45.

72. U.S.—American Bonding Co. v. Pueblo Ins. Co., Colo., 150 F. 17, 80 C.C.A. 97, 9 L.R.A., N.S., 557, 10 Ann.Cas. 357.

73. U.S.—Vance v. San Luis Valley Rural Elec. Co-op., C.A.Colo., 178 F.2d 145.

50 C.J. p 118 note 47.

74. La.—Shreveport v. U. S. Fidelity, etc., Co., 60 So. 621, 131 La. 933.

75. Ga.—J. R. Watkins Co. v. Brewer, 36 S.E.2d 442, 73 Ga.App. 331.

N.J.—Guaranty Trust Co. of New York v. Stamler, 158 A. 749, 10 N.J. Misc. 234.

**Additions or supplements which do**

not conflict with original agreement may be made without thereby releasing surety.—National Surety Co. v. Russell, C.C.A.Ind., 66 F.2d 104.

76. N.Y.—Weingarten v. Kramer, 247 N.Y.S. 657, 139 Misc. 74. Okl.—Eckles v. Busey, 132 P.2d 344, 191 Okl. 644.

77. Ala.—Jefferson Lumber Co. v. Powers, 134 So. 464, 223 Ala. 63.

78. U.S.—National Surety Co. v. Russell, C.C.A.Ind., 66 F.2d 104.

Kan.—Corpus Juris cited in Haynes Hardware Co. v. Western Casualty & Surety Co., 133 P.2d 574, 581, 156 Kan. 356.

Pa.—In re Waber's Estate, 20 Pa. Dist. & Co. 647, affirmed 177 A. 51, 317 Pa. 497.

S.C.—Waddell v. Cary, 152 S.E. 179, 155 S.C. 152.

Wis.—Strehlow v. Reingruber, 224 N. W. 742, 198 Wis. 525.

50 C.J. p 118 note 49.

**Paid surety** is not discharged by independent contract between principal parties not varying terms which bind surety.—American Surety Co. of New York v. Noe, 53 S.W.2d 178, 245 Ky. 42.

79. U.S.—Cross v. Allen, Or., 12 S. Ct. 67, 141 U.S. 528, 35 L.Ed. 843. 50 C.J. p 118 note 50.

80. Tenn.—Southern Const. Co. v.

Southern Surety Co., 10 Tenn.App. 506.

50 C.J. p 119 note 51.

81. U.S.—U. S. Fidelity, etc., Co. v. Omaha Bldg., etc., Co., Neb., 116 F. 145, 53 C.C.A. 465, certiorari denied 23 S.Ct. 843, 187 U.S. 642, 41 L.Ed. 346.

50 C.J. p 119 note 52.

82. U.S.—Pittsburg-Buffalo Co. v. American Fidelity Co., Pa., 219 F. 818, 135 C.C.A. 488.

50 C.J. p 119 note 53.

**Necessity and effect of breach by principal as bearing on liability of surety** see supra § 95.

83. U.S.—Illinois Surety Co. v. Standard Underground Cable Co. Pa., 238 F. 546, 151 C.C.A. 482, certiorari denied 37 S.Ct. 478, 243 U.S. 651, 61 L.Ed. 947.

84. Pa.—Land Title Bank & Trust Co. v. Freas, 5 A.2d 165, 334 Pa. 26.

**Waiver of interest**

Creditor may waive further collection of interest without disturbing status of its already matured claim against surety for payment of principal sum, as long as creditor preserves, for surety's benefit, its claim against debtor for entire principal sum.—Land Title Bank & Trust Co. v. Freas, supra.

alters the amount of the note as to discharge a surety not consenting.<sup>85</sup> A material alteration of a note given for an indebtedness which is not extinguished by, and exists independently of, the writing will, since the surety's liability exists solely by virtue of the writing, release him from all liability.<sup>86</sup> Immaterial changes or alterations in the terms of a note, however, will not discharge the surety.<sup>87</sup> Under the view that, as far as the holder of a bill or note is concerned, the liability of a surety is primary rather than secondary, it follows that, as far as the surety is concerned, the question as to when he is released by variation of the contract is governed by the provisions of the Negotiable Instruments Law applicable to the discharge of persons primarily liable;<sup>88</sup> and it has been held that such statute changes the former rule applicable to such a case.<sup>89</sup>

*Application of rule to leases.* In conformity with the general rule applicable to suretyship contracts, a surety for a lessee cannot be held for rent after a material change in the terms of the lease<sup>90</sup> or in the terms of the contract of suretyship,<sup>91</sup> and will be discharged by a material alteration of the lease contract or obligation without the surety's consent;<sup>92</sup> but, where an act or departure from the terms of the contract does not amount to a material alteration of the lease or the suretyship contract, the surety will not be released from liability.<sup>93</sup> The surety is not discharged by a mod-

ification or alteration of the principal contract or obligation made with his knowledge and consent<sup>94</sup> or where the tenant deposits money as security and the landlord has no knowledge of the third person's relationship as surety.<sup>95</sup> If, after a suretyship contract has been placed on the same paper on which it secures, the tenant erases his signature, signs again, and the covenant is attested, the surety is not discharged on the ground of a material alteration of the contract.<sup>96</sup>

### b. Sufficiency of Alteration

An alteration, in order to effect the discharge of the surety, must be binding on the parties, based on a sufficient consideration, and such as would constitute a valid defense by the principal to an action on the original contract.

In order that a surety on a contract may be discharged from liability thereon by an agreement altering its terms between the principal and the obligee, such agreement, except in a case where the agreement is by way of alteration of the original instrument,<sup>97</sup> must be binding on the parties,<sup>98</sup> based on a sufficient consideration,<sup>99</sup> and such as would be a valid defense by the principal debtor to an action on the original contract.<sup>1</sup> In general, it is necessary that both the principal and creditor or obligee consent to the agreement altering the contract or undertaking of the principal in order for it to discharge the surety.<sup>2</sup> So, alterations

85. Ind.—*Johnston v. May*, 76 Ind. 293.

86. Tex.—*Williams v. Midland Nat. Bank*, Civ.App., 191 S.W. 1181. 50 C.J. p 119 note 54.

87. Okl.—*Foster v. First Nat. Bank & Trust Co. of Tulsa*, 66 P.2d 79, 179 Okl. 496.

88. Ohio.—*Richards v. Market Exch. Bank Co.*, 90 N.E. 1000, 81 Ohio St. 343, 26 L.R.A., N.S., 99 and note.

89. Ohio.—*Richards v. Market Exch. Bank Co.*, supra.

90. N.Y.—*In re Tessier*, 183 N.Y.S. 371, 193 App.Div. 916, affirmed 130 N.E. 934, 230 N.Y. 660.

Pa.—*Green v. Boyd*, 13 Pa.Super. 651.

91. Mich.—*Stevens v. Pendleton*, 47 N.W. 1097, 83 Mich. 343, reheard 48 N.W. 478, 85 Mich. 137.

92. Ark.—*Coddington v. Brown*, 185 S.W. 809, 123 Ark. 486. 36 C.J. p 306 note 50.

**Act of tenant changing subtenant's obligation**

The termination of the principal tenancy by the tenant's fault in allowing summary proceedings for the nonpayment of rent to be begun re-

leases a surety for the subtenant from all liability since the subtenant's obligation is thereby changed from one for rent under the lease to one for use and occupation.—*Rainier v. Smith*, 120 N.Y.S. 993, 65 Misc. 560.

93. Ky.—*Mudd v. Shroader*, 154 S. W. 21, 152 Ky. 696.

Pa.—*Plummer v. Wilson*, 185 A. 311, 322 Pa. 118.

94. Cal.—*Smith v. Thomsen*, 48 P.2d 102, 8 Cal.App.2d 603.

95. Cal.—*Knight v. Marks*, 191 P. 531, 183 Cal. 354. 36 C.J. p 306 note 81.

96. N.Y.—*Dusenberry v. O'Shield*, 2 N.Y.Super. 410.

Effect of alteration of instrument prior to execution or delivery generally see *Alteration of Instruments* § 46.

Alteration of suretyship contract before execution or delivery generally see supra §§ 81, 82.

97. Cal.—*Nissen v. Ehrenpfort*, 183 P. 956, 43 Cal.App. 593.

Mo.—*Stillwell v. Aaron*, 69 Mo. 539, 33 Am.R. 517.

98. Ky.—*Furst & Thomas v. Lyon*, 102 S.W.2d 1016, 267 Ky. 495—W.

T. Raleigh Co. v. Thoroughman, Ky., 11 S.W.2d 1006, 227 Ky. 35.

La.—*Converse v. Dicks*, 151 So. 75, 178 La. 193.

N.Y.—*Greenwich Sav. Bank v. Cab-in Holding Corporation*, 26 N.Y.S. 2d 791, 176 Misc. 89.

W.Va.—*Koblegard Co. v. Maxwell*, 34 S.E.2d 116, 127 W.Va. 630.

50 C.J. p 119 note 59.

99. U.S.—*American Surety Co. of New York v. Wheeling Structural Steel Co.*, D.C.W.Va., 26 F.Supp. 395, reversed on other grounds, C. C.A., *American Surety Co. v. Wheeling Structural Steel Co.*, 114 F.2d 237.

N.Y.—*Greenwich Sav. Bank v. Cab-in Holding Corporation*, 26 N.Y.S. 2d 791, 176 Misc. 89—*Albany Exchange Sav. Bank v. Winne*, 6 N. Y.S.2d 699, 168 Misc. 853.

50 C.J. p 119 note 60.

1. Utah.—*South Omaha Stockyards Nat. Bank v. Bragg*, 245 P. 966, 67 Utah 60.

2. U.S.—*Equitable Surety Co. v. McMillan*, App.D.C., 34 S.Ct. 803, 234 U.S. 448, 58 L.Ed. 1394—*Pittsburg-Buffalo Co. v. American Fidelity Co.*, Pa., 219 F. 818, 135 C.C.A. 488.

made without the knowledge or consent of the creditor or obligee do not affect the liability of a surety<sup>3</sup> unless he subsequently ratifies them.<sup>4</sup>

An alteration by an authorized agent of the creditor or of which the agent has knowledge will discharge the surety,<sup>5</sup> although it is otherwise if the agent making the alteration does not have any authority to make it.<sup>6</sup> In the absence of fraud a contract by a corporation will not be held a modification of a contract between the principal and a partnership, the members of which own practically all the stock of the corporation, so as to discharge the sureties.<sup>7</sup>

**Necessity of writing.** Ordinarily it is not necessary that the agreement altering the contract be in writing,<sup>8</sup> but a surety will not be discharged by a parol agreement between the obligee and the principal changing the terms of a contract under seal<sup>9</sup> or of a written contract which is of such a character that under the statute of frauds it must be in writing.<sup>10</sup>

**Waiver of breach or acceptance of part performance.** A waiver by the creditor of a breach of the

contract by the principal<sup>11</sup> or an acceptance of part performance<sup>12</sup> has been held not such a modification as will discharge a surety from liability; but under some circumstances a contrary rule may be applied.<sup>13</sup>

### c. Necessity of Prejudice to Surety

Generally a surety will be discharged by any material alteration of the terms of the contract regardless of whether he is prejudiced thereby, unless he is a compensated surety.

As a general rule it is not necessary that the alteration or change add to the burden of the surety or be prejudicial or injurious to him in order that he be discharged;<sup>14</sup> the fact that it was not prejudicial to him,<sup>15</sup> or did not increase his liability<sup>16</sup> or actually injure him,<sup>17</sup> or even that it was for his benefit,<sup>18</sup> will not vary the rule, it being held that he will be discharged regardless of whether such alteration or change was beneficial or prejudicial to him.<sup>19</sup> In some jurisdictions the rule is stated to be that the surety is discharged by any alteration, and the court will not inquire into the question of whether there was in fact any prejudice, and, if so, the extent thereof,<sup>20</sup> provided there

3. Neb.—*Bingham v. Shadle*, 63 N. W. 143, 45 Neb. 82.  
50 C.J. p 119 note 63.

4. Okl.—*Evvatt v. Dulaney*, 151 P. 607, 51 Okl. 81.  
50 C.J. p 119 note 64.

5. Ind.—*Owens v. Tague*, 29 N.E. 784, 3 Ind.App. 245.  
50 C.J. p 119 note 65.

6. Ky.—*Allen County v. U. S. Fidelity, etc., Co.*, 93 S.W. 44, 122 Ky. 825, 29 Ky.L. 356.  
50 C.J. p 119 note 66.

7. Iowa.—*Charles Weitz's Sons v. U. S. Fidelity, etc., Co.*, 219 N.W. 411, 206 Iowa 1025.

8. Ind.—*Guthrie v. Carpenter*, 70 N. E. 486, 162 Ind. 417.  
50 C.J. p 119 note 68.

9. N.Y.—*Shufeldt v. Gustin*, 2 E.D. Smith 57.  
50 C.J. p 120 note 69.

10. Ga.—*Willis v. Fields*, 63 S.E. 828, 132 Ga. 242.

11. Cal.—*Sacramento v. Kirk*, 7 Cal. 419.

N.Y.—*Michigan SS. Co. v. American Bonding Co.*, 93 N.Y.S. 805, 104 App.Div. 347.

#### Acceptance of rent after due date

Acceptance of rent a few days after it is due ordinarily does not constitute an alteration or modification of the agreement between the landlord and tenant so as to discharge the surety.—*Fox v. Como*, 50 Pa.Dist. & Co. 386.

#### Provision as to effect of waiver

The surety for a tenant under a

written agreement of lease may not complain of a variation of the contract by acceptance of rent after it falls due, where the lease itself contains provisions recognizing that rent may be accepted after the due date and stipulating that such acceptance shall not excuse subsequent delay or be construed as a waiver of any right of the landlord.—*Fox v. Como*, supra.

12. N.Y.—*Becker v. Faber*, 19 N.E. 2d 997, 280 N.Y. 146, 121 A.L.R. 1010, reargument denied *Becker v. Intemann*, 21 N.E.2d 216, 280 N.Y. 730.—*In re Metz' Estate*, 18 N.Y.S. 2d 883, 173 Misc. 813, reversed on other grounds 30 N.Y.S.2d 502, 262 App.Div. 508.—*Revel Realty, etc., Co. v. Maxwell*, 119 N.Y.S. 257, 65 Misc. 54.

#### Acceptance of reduced rent

Cal.—*Callaghan v. Olsen*, 207 P. 1014, 58 Cal.App. 96.—*Dodge v. Chapman*, 183 P. 966, 42 Cal.App. 612.

13. U.S.—*Prudence Co. v. Fidelity & Deposit Co. of Maryland*, D.C.N. Y., 2 F.Supp. 454.

14. U.S.—*Chapman v. Hoage*, App. D.C., 56 S.Ct. 333, 296 U.S. 526, 80 L.Ed. 370.

Ohio.—*Sturges v. Williams*, 9 Ohio St. 443, 75 Am.D. 473.

Tex.—*Hughes v. Straus-Frank Co.*, Civ.App., 127 S.W.2d 582, affirmed *Straus-Frank Co. v. Hughes*, 156 S.W.2d 519, 138 Tex. 50.—*Mingus Employers' Liability Assur. Co.*, Civ.App., 65 S.W.2d 292.

15. Mont.—*U. S. Building & Loan*

*Ass'n v. Burns*, 4 P.2d 703, 90 Mont. 402.

50 C.J. p 120 note 74.

16. Ky.—*Kelly v. King*, 145 S.W.2d 78, 284 Ky. 429.—*Phillips v. Board of Education of Pineville*, 140 S. W.2d 819, 283 Ky. 173.

17. U.S.—*Prairie State Bank v. U. S., Ct.Cl.*, 17 S.Ct. 142, 164 U.S. 227, 41 L.Ed. 412.

Ky.—*Pond Creek Coal Co. v. Citizens' Trust & Guaranty Co.*, 186 S.W. 494, 170 Ky. 601.—*Calloway v. Snapp*, 78 Ky. 561.

18. U.S.—*Prairie State Bank v. U. S., Ct.Cl.*, 17 S.Ct. 142, 164 U.S. 227, 41 L.Ed. 412.

La.—*Shreveport Laundries v. Sherman, App.*, 7 So.2d 433.

Mo.—*Art Plate Glass & Mirror Corp. v. Fidelity Const. Corp.*, 69 A.2d 808.

Okl.—*Foster v. First Nat. Bank & Trust Co. of Tulsa*, 66 P.2d 79, 179 Okl. 496.

50 C.J. p 120 note 75.

19. Mo.—*Reissaus v. Whites*, 106 S.W. 603, 128 Mo.App. 135.

50 C.J. p 120 note 76.

20. N.Y.—*Commercial Casualty Ins. Co. v. Roman*, 279 N.Y.S. 170, 244 App.Div. 306, reversed on other grounds 199 N.E. 658, 269 N.Y. 451, remittitur amended 200 N.E. 319, 270 N.Y. 563.—*Yonkers-Cameo, Inc. v. Shusterman*, 16 N.Y.S.2d 260.

50 C.J. p 121 note 78.

#### "Rights" prejudiced

Surety whose "rights" have been materially prejudiced need not show

is a possibility of prejudice to the surety.<sup>21</sup> On the other hand, the rule in some jurisdictions is that a surety will not be discharged by an alteration or change in the contract<sup>22</sup> or a departure therefrom<sup>23</sup> unless he has been prejudiced thereby. In at least one jurisdiction, it has been held that a departure from the contract, as distinguished from an actual change in the terms thereof, will not release a surety thereon unless his position has been changed to his prejudice.<sup>24</sup>

**Compensated and corporate surety.** Although in a few jurisdictions the rule that a surety is discharged by an alteration regardless of whether he is prejudiced thereby is held to apply even in the case of a paid or corporate surety,<sup>25</sup> it is generally held that in order for a compensated or corporate

surety to be discharged by an alteration of, or departure from, the contract or obligation it must have been prejudiced thereby.<sup>26</sup> This rule has been held applicable even though the bond provides that it is to be strictly construed as a contract of suretyship.<sup>27</sup>

#### d. Materiality of Alteration

Although there is some authority to the contrary, it is generally held that, in order to discharge a surety, an alteration must be material, especially in the case of a compensated surety.

As a general rule an alteration or change in the contract or obligation must be material in order to discharge a surety thereon.<sup>28</sup> If the change or departure is immaterial,<sup>29</sup> such as one which does

that he has been injured to be discharged from liability.—*Passman v. Budnizky*, 1 N.E.2d 707, 284 Ill.App. 533.

21. Mass.—*Cambridge Sav. Bank v. Hyde*, 131 Mass. 77, 41 Am.R. 193. 50 C.J. p 120 note 77.

#### In New York

(1) It has been said many times that the surety will be discharged regardless of whether the alteration or change was beneficial or prejudicial to him.—*Reeves v. Pierson*, 23 Hun 185—50 C.J. p 120 note 77 [a] (1).

(2) It has also been said that the surety will be discharged by a material alteration regardless of whether the alteration could work any injury to the surety.—*Weingarten v. Kramer*, 247 N.Y.S. 657, 139 Misc. 74.

(3) However, the rule of the text has in some instances been clearly followed.—*Ullmann Realty Co. v. Hollander*, 123 N.Y.S. 772, 774, 66 Misc. 348—50 C.J. p 120 note 77 [a] (2, 3).

22. Mont.—*Dodd v. Vucovich*, 99 P. 296, 38 Mont. 188. 50 C.J. p 121 note 79.

23. Wis.—*Chandler Lumber Co. v. Radke*, 118 N.W. 185, 136 Wis. 495, 22 L.R.A., N.S., 713.

24. N.Y.—*Smith v. Molleson*, 42 N. E. 669, 148 N.Y. 241. 50 C.J. p 121 note 81.

25. Cal.—*Corona First Cong. Church of Christ v. Lowrey*, 165 P. 440, 175 Cal. 124.

Tex.—*Loneragan v. San Antonio Trust Co.*, 104 S.W. 1061, 106 S. W. 876, 101 Tex. 63, 130 Am.S.R. 803, 22 L.R.A., N.S., 364.

26. U.S.—*Chapman v. Hoage*, App. D.C., 56 S.Ct. 333, 296 U.S. 526, 80 L.Ed. 370.—*Maryland Casualty Co. v. Moore*, C.C.A.Mass., 82 F.2d 189, certiorari denied 56 S.Ct. 749, 298

U.S. 666, 80 L.Ed. 1390.—*Maryland Casualty Co. v. Dunlap*, C.C.A. Mass., 68 F.2d 289.—*Hartford Accident & Indemnity Co. v. Federal Bond & Mortgage Co.*, C.C.A.Minn., 59 F.2d 950.—*Haddad v. Western Contracting Corp.*, D.C.W.Va., 71 F.Supp. 212.—*U. S. v. Quaker Industrial Alcohol Corporation*, D.C. Pa., 2 F.Supp. 863, affirmed, C.C.A., New Amsterdam Casualty Co. v. U. S., 67 F.2d 488, certiorari denied 54 S.Ct. 438, 291 U.S. 662, 78 L.Ed. 1053, rehearing denied 54 S.Ct. 526, 291 U.S. 650, 78 L.Ed. 1053.

Colo.—*Federal Surety Co. v. White*, 295 P. 281, 88 Colo. 238.

Ill.—*Danville Hotel Co. v. Benson*, 262 Ill.App. 288.

Ky.—*American Surety Co. of New York v. Noe*, 53 S.W.2d 178, 245 Ky. 42.

Mass.—*Hartford Accident & Indemnity Co. v. Casassa*, 16 N.E.2d 860, 301 Mass. 246.

Mich.—*Becker-Boter Oil & Gas Co. v. Massachusetts Bonding & Insurance Co.*, 235 N.W. 869, 254 Mich. 94.—*Grinnell Realty Co. v. General Casualty & Surety Co.*, 234 N.W. 125, 253 Mich. 16.

Ohio.—*Van Wert Nat. Bank v. Roos*, 17 N.E.2d 651, 134 Ohio St. 359.—*London, etc., Indemnity Co. v. Columbia County*, 140 N.E. 672, 107 Ohio St. 51.

Pa.—*Plummer v. Wilson*, 185 A. 311, 322 Pa. 118.—*McClelland v. New Amsterdam Casualty Co.*, 185 A. 198, 322 Pa. 429.—*Phillips v. American Liability & Surety Co.*, 162 A. 435, 309 Pa. 1.—*National Casualty Co. v. Ferry*, Com.Pl., 56 Dauph.Co. 369.

Utah.—*Corpus Juris cited in Corporation of President of Church of Jesus Christ of Latter Day Saints v. Hartford Accident & Indemnity Co.*, 95 P.2d 736, 741, 98 Utah 297.

50 C.J. p 121 note 86.

There is no presumption that paid surety was harmed, nor is suggestion of mere contingencies or possibilities sufficient.—*Grinnell Realty Co. v. General Casualty & Surety Co.*, 234 N.W. 125, 253 Mich. 16.

#### In case of fraud

The general rule requiring a liberal construction of the contract against a surety for hire in determining whether there has been a departure does not extend to cases of fraud or unfair dealing as against a surety.—*Detroit Fidelity & Surety Co. v. Central Station Equipment Co.*, D.C.Fla., 1 F.Supp. 845, reversed on other grounds, C.C.A., *Third Nat. Bank v. Detroit Fidelity & Surety Co.*, 65 F.2d 548, certiorari denied *Detroit Fidelity & Surety Co. v. Third Nat. Bank*, 54 S.Ct. 88, 290 U. S. 667, 78 L.Ed. 577.

#### Early cases contra

Ky.—*Inland Nav. Co. v. American Surety Co.*, 227 S.W. 809, 190 Ky. 504.

Pa.—*Bauschard Co. v. New York Fidelity, etc., Co.*, 21 Pa.Super. 370.

27. Pa.—*Phillips v. American Liability & Surety Co.*, 162 A. 435, 309 Pa. 1.

28. Ala.—*Carroll v. Hanahan*, 130 So. 197, 221 Ala. 553.

Neb.—*State v. Smith*, 281 N.W. 851, 135 Neb. 423.

Vt.—*Derby v. Thrall*, 44 Vt. 413, 8 Am.R. 389.

50 C.J. p 121 note 87.

29. U.S.—*Bopst v. Columbia Casualty Co.*, D.C.Md., 37 F.Supp. 32.

Ala.—*Anderson v. Bellinger*, 6 So. 82, 87 Ala. 334, 13 Am.S.R. 46, 4 L.R.A. 680.

Tenn.—*Alston v. Farmers' & Merchants' Bank*, 8 Tenn.Civ.App. 420. Tex.—*Corpus Juris cited in Park Presbyterian Church of Italy v. William Cameron & Co.*, Com.App., 58 S.W.2d 63, 65.



not change the legal effect of the instrument<sup>30</sup> or place the surety in a different position,<sup>31</sup> he will not be discharged. However, in some jurisdictions, it has been held that, as a general rule, any variation or change in the contract or obligation, whether material or not, is sufficient,<sup>32</sup> this being sometimes referred to as the strict rule;<sup>33</sup> in others it has been held that deviations from the contract with respect to acts of omission and commission in matters of performance must be material in order to discharge a surety,<sup>34</sup> but that any variation in the terms of the contract itself, as by adding additional terms and stipulations, will discharge the surety.<sup>35</sup>

Apart from the question of whether the alteration must be material, if the change alters the le-

gal identity of the instrument<sup>36</sup> or substantially increases the chances of loss to the surety<sup>37</sup> it is material and will discharge the sureties. Permission by the obligee to the principal to perform in any way he chooses, provided the contract obligation is lived up to, is not a modification of the contract so as to release the surety;<sup>38</sup> and in general a waiver of some provision which is solely for the benefit of the principal or of the creditor is not such alteration as will discharge the surety.<sup>39</sup>

*Compensated or corporate surety.* An alteration or change in the contract or obligation must be material in order for a compensated or corporate surety to be discharged from liability thereby,<sup>40</sup> some jurisdictions holding this an exception to the

Vt.—Derby v. Thrall, 44 Vt. 413, 8 Am.R. 389.

Wis.—Strehlow v. Reingruber, 224 N.W. 742, 198 Wis. 525.  
50 C.J. p 121 note 91.

30. U.S.—Sauder v. Dittmar, C.C.A. Kan., 118 F.2d 524, stating Illinois law.

Ga.—H. C. Whitmer Co. v. Sheffield, 181 S.E. 119, 51 Ga.App. 623.

N.Y.—Ludekens v. Pscherhofer, 28 N.Y.S. 230, 76 Hun 548.

Tenn.—Alston v. Farmers' & Merchants' Bank, 8 Tenn.Civ.App. 420.

Tex.—Corpus Juris cited in Park Presbyterian Church of Italy v. William Cameron & Co., Com.App., 58 S.W.2d 63, 65—First Nat. Bank of Fort Worth v. Brown, Civ.App., 172 S.W.2d 151, error refused.

Wis.—Strehlow v. Reingruber, 224 N.W. 742, 198 Wis. 525.  
50 C.J. p 121 note 92.

31. U.S.—Sauder v. Dittmar, C.C.A. Kan., 118 F.2d 524, stating Illinois law.

Ill.—Ryan v. Springfield First Nat. Bank, 35 N.E. 1120, 148 Ill. 349.

Tenn.—Alston v. Farmers' & Merchants' Bank, 8 Tenn.Civ.App. 420.

Tex.—Corpus Juris cited in Park Presbyterian Church of Italy v. William Cameron & Co., Com.App., 58 S.W.2d 63, 65.

Wis.—Strehlow v. Reingruber, 224 N.W. 742, 198 Wis. 525.  
50 C.J. p 122 note 93.

#### Renunciation of principal contract

Mortgagor's renunciation of agreement with mortgagee to construct building on mortgaged premises within ten years and mortgagee's adoption of renunciation, without knowledge or consent of surety on mortgagor's bond conditioned on construction of building within time limited, did not increase surety's obligation.—Yaffe v. Glen Falls Indemnity Co., 161 A. 521, 115 Conn. 375.

32. Mich.—Grinnell Realty Co. v. General Casualty & Surety Co., 234 N.W. 125, 253 Mich. 16.

N.Y.—Becker v. Faber, 19 N.E.2d 997, 280 N.Y. 146, 121 A.L.R. 1010, reargument denied Becker v. Intemann, 21 N.E.2d 216, 280 N.Y. 730—Greenwich Sav. Bank v. Eckford Realty Corporation, 48 N.Y.S.2d 664, 268 App.Div. 195—Commercial Casualty Ins. Co. v. Roman, 279 N.Y.S. 170, 244 App.Div. 306, reversed on other grounds 199 N.E. 658, 269 N.Y. 451, remittitur amended 200 N.E. 319, 270 N.Y. 563—In re Metz' Estate, 18 N.Y.S.2d 883, 173 Misc. 813, reversed on other grounds 30 N.Y.S.2d 502, 262 App.Div. 508—Yonkers-Cameo, Inc. v. Shusterman, 16 N.Y.S.2d 260.  
Pa.—Plummer v. Wilson, 185 A. 311, 322 Pa. 118.  
50 C.J. p 122 note 94.

33. N.Y.—In re Metz' Estate, 18 N.Y.S.2d 883, 173 Misc. 813, reversed on other grounds 30 N.Y.S.2d 502, 262 App.Div. 508.

34. Mo.—Reissaus v. Whites, 106 S.W. 603, 128 Mo.App. 135—Martin v. Whites, 106 S.W. 608, 128 Mo.App. 117.

35. Mo.—Reissaus v. Whites, 106 S.W. 603, 128 Mo.App. 135.  
50 C.J. p 122 note 96.

36. Ohio.—Van Wert Nat. Bank v. Roos, 17 N.E.2d 651, 134 Ohio St. 359.

Tex.—Corpus Juris cited in Park Presbyterian Church of Italy v. William Cameron & Co., Com.App., 58 S.W.2d 63, 65.  
50 C.J. p 121 note 88.

#### Substitution of new obligation for old

By "alteration" in principal's obligation, such as will release the surety, principal is discharged from performance of the obligation in its original form, and in effect, a new obligation is substituted for the old.—Becker v. Faber, 19 N.E.2d 997, 280 N.Y. 146, 121 A.L.R. 1010, reargument denied Becker v. Intemann, 21 N.E.2d 216, 280 N.Y. 730—In re Metz' Estate, 18 N.Y.S.2d 883, 173 Misc.

813, reversed on other grounds 30 N.Y.S.2d 502, 262 App.Div. 508.

37. U.S.—Glens Falls Indemnity Co. v. Basich Bros. Const. Co., C.C.A. Cal., 165 F.2d 649, certiorari denied 68 S.Ct. 1347, 334 U.S. 833, 92 L.Ed. 1760.

N.M.—Pacific Nat. Agr. Credit Corporation v. Hagerman, 51 P.2d 857, 39 N.M. 549, 101 A.L.R. 1301.

Okl.—Whale v. Rice, 49 P.2d 737, 173 Okl. 530.

Pa.—Phillips v. American Liability & Surety Co., 162 A. 435, 309 Pa. 1—Young v. American Bonding Co., 77 A. 623, 228 Pa. 373.

Tenn.—Fidelity Bond & Mortgage Co. v. American Surety Co., 14 Tenn.App. 211.

Tex.—Corpus Juris cited in Park Presbyterian Church of Italy v. William Cameron & Co., Com.App., 58 S.W.2d 63, 65.

38. N.Y.—Matter of People, 226 N.Y.S. 175, 232 App.Div. 304, reversed on other grounds 165 N.E. 829, 250 N.Y. 410.

50 C.J. p 122 note 97.

39. Tex.—U. S. Fidelity, etc., Co. v. Henderson County, Civ.App., 253 S.W. 835.

50 C.J. p 122 note 98.  
Waiver of breach or acceptance of part performance by creditor see supra subdivision b of this section.

40. U.S.—Maryland Casualty Co. v. Moore, C.C.A. Mass., 82 F.2d 159, certiorari denied 56 S.Ct. 749, 298 U.S. 666, 80 L.Ed. 1390.

Mass.—Hartford Accident & Indemnity Co. v. Casassa, 16 N.E.2d 860, 301 Mass. 246.

Mich.—Becker-Boter Oil & Gas Co. v. Massachusetts Bonding & Insurance Co., 235 N.W. 869, 254 Mich. 94—Grinnell Realty Co. v. General Casualty & Surety Co., 234 N.W. 125, 253 Mich. 16.

Pa.—Plummer v. Wilson, 185 A. 311, 322 Pa. 118—McClelland v. New Amsterdam Casualty Co., 185 A.

general rule of the forum that any variation is sufficient.<sup>41</sup> This rule has been held applicable even though the bond provides that it is to be construed strictly as a contract of suretyship.<sup>42</sup> Where the alteration is material, it is sufficient to discharge even a paid surety,<sup>43</sup> provided there is also prejudice to the surety, where prejudice is required under the rules discussed supra subdivision c of this section.

### e. Effect of Consent of Surety

A surety is not discharged by an alteration to which he consents; and such consent may be given after the alteration as well as in advance.

The consent of the surety to any variation or change in the contract or obligation of the principal otherwise sufficient to discharge him is essential to the continuance of his liability.<sup>44</sup> If he consents to an alteration of the contract or obligation he is not discharged thereby.<sup>45</sup> This consent need not be express, but may be implied.<sup>46</sup> It may be given in advance,<sup>47</sup> as, for example, at the time the contract of suretyship is entered into,<sup>48</sup> or it may with equal effect be given at a time subsequent to the

alteration,<sup>49</sup> subsequent ratification being equivalent to original authority to make the alteration.<sup>50</sup> Where the contract contemplates or expressly authorizes alterations to be made, the surety will not be discharged by alterations within the limits intended, which were made without his express consent;<sup>51</sup> but, when the alterations are such that instead of a modification a new contract superseding the old one is in effect made, a surety who has not assented to the change will be discharged.<sup>52</sup> A new consideration is not essential to support the consent of the surety to the alteration, regardless of whether such consent is expressed before or after the alteration.<sup>53</sup> A notation of an alteration on the instrument by the creditor will not, even though made without his knowledge, discharge a surety who has agreed to the change in terms.<sup>54</sup>

### f. Waiver or Estoppel

A surety may by his contract waive his right, or be estopped to assert, his discharge by reason of an alteration of the contract or obligation.

A surety may waive his right to be discharged because of an alteration or change in the contract.<sup>55</sup>

198, 322 Pa. 429—Shaw v. New Amsterdam Casualty Co., 164 A. 916, 310 Pa. 213—Phillips v. American Liability & Surety Co., 162 A. 435, 309 Pa. 1—National Casualty Co. v. Ferry, Com.Pl., 56 Dauph.Co. 369.

50 C.J. p 122 note 99.

41. Ky.—Pond Creek Coal Co. v. Citizens' Trust Co., 186 S.W. 494, 170 Ky. 601.

50 C.J. p 122 note 1.

42. Pa.—Phillips v. American Liability & Surety Co., 162 A. 435, 309 Pa. 1.

43. Ky.—Inland Nav. Co. v. American Surety Co., 227 S.W. 809, 190 Ky. 504—Pond Creek Coal Co. v. Citizens' Trust, etc., Co., 186 S.W. 494, 170 Ky. 601.

44. Ala.—Alabama Fidelity, etc., Co. v. Alabama Fuel, etc., Co., 67 So. 318, 190 Ala. 397.

50 C.J. p 122 note 5.

Consent of surety to acts of creditor or obligee in general see infra §§ 158, 159.

45. Mass.—Brockton Sav. Bank v. Shapiro, 42 N.E.2d 826, 311 Mass. 695.

Va.—Corpus Juris cited in Norfolk Mattress Co. v. Royal Mfg. Co., 169 S.E. 586, 588, 160 Va. 623.

50 C.J. p 122 note 6.

**Consent by personal representative**  
Personal representative of surety who is also the principal may consent to alteration of contract so as not to release surety's estate.—Voiles v. Green, 43 Ind. 374.

46. U.S.—Mundy v. Stevens, Pa., 61 F. 77, 9 C.C.A. 366.

50 C.J. p 123 note 7.

#### Silence

(1) Mere silence or passive consent after knowledge of change of contract under which surety signed does not constitute acquiescence or consent to change by surety.—Pacific Nat. Agr. Credit Corporation v. Hagerman, 51 P.2d 857, 39 N.M. 549, 101 A.L.R. 1301—50 C.J. p 114 note 89 [a].

(2) On the other hand, it has been held that a surety will be estopped to show that he did not assent to alteration of the contract if he remains silent when the facts and circumstances make it his duty to speak and the obligee is misled thereby to his injury, as where, on learning of the alteration of the bond to secure the payment of public funds before any funds were deposited with the depository, he nevertheless remains silent and permits the deposit of funds to be made.—Renville County v. Gray, 63 N.W. 635, 61 Minn. 242.

#### Necessity of knowledge

Consent of a surety to extension of a note will not operate as a ratification of a material alteration unless he had knowledge of the alteration.—Johnson Farm Loan Co. v. McManigal, C.C.A.Neb., 288 F. 185.

47. U.S.—McMullen v. U. S., Cal., 167 F. 460, 93 C.C.A. 96, reversed on other grounds 32 S.Ct. 128, 222 U.S. 460, 56 L.Ed. 269.

48. U.S.—McMullen v. U. S., supra. 50 C.J. p 123 note 9.

49. Vt.—Gray v. Williams, 99 A. 735, 91 Vt. 111.

50 C.J. p 123 note 10.

50. Tex.—People's Finance Co. of Dallas v. Sabanovich, Com.App., 26 S.W.2d 187.

51. U.S.—Maryland Casualty Co. v. Moore, C.C.A.Mass., 82 F.2d 189, certiorari denied 56 S.Ct. 749, 298 U.S. 666, 80 L.Ed. 1390.

Pa.—Jacob Sall Building & Loan Ass'n v. Heller, 171 A. 464, 314 Pa. 237—Zusin v. Wharton Business Men's Building & Loan Ass'n, 163 A. 377, 107 Pa.Super. 181.

50 C.J. p 123 note 11.

52. Md.—U. S. v. Poe, 114 A. 705, 138 Md. 466.

N.Y.—Schuck v. Kings Realty Co., 23 N.Y.S.2d 764, 260 App.Div. 1021, affirmed 34 N.E.2d 907, 285 N.Y. 750—Irving Trust Co. v. Hutchinson Holding Corporation, 270 N.Y. S. 684, 241 App.Div. 107.

**Change not provided for in contract**  
Where a bond contains the words "sealed with our seals," the clause raises no implication of an intent to have a seal added after execution, and is mere surplusage.—Metropolitan L. Ins. Co. v. McCoy, 41 Hun, N.Y., 142.

53. Iowa.—Pelton v. Prescott, 13 Iowa 567.

54. Mo.—Martin v. Whites, 106 S. W. 608, 128 Mo.App. 117.

55. Ala.—Culwell v. Edmondson, 129 So. 276, 221 Ala. 424.

Knowledge by the surety of the alteration is necessary to a waiver.<sup>56</sup> The rule that assent to an alteration made in the contract or obligation amounts to a waiver of the right to rely thereon as a defense, discussed in *Alteration of Instruments* § 75, applies to a surety who gives his subsequent assent to the alteration of an instrument.<sup>57</sup> So, a surety's right to claim discharge by reason of an alteration is waived by an acknowledgment of liability or a new promise to pay the debt after the alteration,<sup>58</sup> or by bringing suit on the instrument as altered,<sup>59</sup> or by a request for an extension of time for payment.<sup>60</sup> A surety is estopped to show that he did not assent to an alteration of the contract if, after changes have been made in the contract, he takes it over and completes it, receiving payment thereon,<sup>61</sup> or if he signs a statement that the contract is binding<sup>62</sup> or has been satisfactorily performed in accordance with its terms.<sup>63</sup>

### g. Extent of Discharge

Although a contrary rule is sometimes followed in the case of a compensated surety, generally speaking a material alteration operates as a complete discharge of the surety and not merely as a pro tanto discharge.

Generally speaking a material variance, change, or alteration of the contract operates as a complete discharge of the surety and not merely as a pro

tanto discharge;<sup>64</sup> but, according to some authorities, a compensated surety is discharged only to the extent that it is prejudiced or injured thereby,<sup>65</sup> at least in certain cases.<sup>66</sup> Having been discharged by the change in the contract, the surety cannot be charged with liability for failing to use diligence to see that the original contract was carried out.<sup>67</sup>

*Revivor of liability.* The liability of the surety will not be revived by a restoration of the instrument to its original form<sup>68</sup> or by the fact that the principal attempts to perform the original agreement.<sup>69</sup>

## § 125. — Contracts or Obligations of Officers, Agents, or Employees

A surety for an officer, agent, or employee is discharged by a material alteration respecting the duties, place of employment, or compensation of the principal unless he consents to such alteration.

As a general rule a surety for an officer, agent, or employee is discharged by a material change or enlargement of the duties of his principal<sup>70</sup> unless he has consented to such changes.<sup>71</sup> It requires a material change in the duties and responsibilities of the principal to discharge the sureties on his bond.<sup>72</sup> Thus a mere change in the designation of the office of the principal, without a material change in his duties,<sup>73</sup> or the imposition of additional duties on

Neb.—Hagler v. State, 47 N.W. 692, 31 Neb. 144, 28 Am.S.R. 514.  
50 C.J. p 123 note 19.

### Signing instrument in blank

Where a surety signs a note in blank, with marginal figures indicating the amount for which it is to be filled out, and the principal alters the figures and fills out and negotiates the note for a larger amount, the alteration does not of itself discharge the surety.—Schryner v. Hawkes, 22 Ohio St. 308.

### Suing for receiver

Surety bringing suit for receiver to manage mortgaged property ratified alteration in note secured by mortgage, precluding setting up defense of alteration.—People's Finance Co. of Dallas v. Sabanovich, Tex.Com.App., 26 S.W.2d 187.

56. Pa.—Spring Garden Building & Loan Ass'n v. Rhodes, 190 A. 530, 126 Pa.Super. 102.  
50 C.J. p 123 note 20.

57. Mo.—Evans v. Foreman, 60 Mo. 449.

58. Ala.—Culwell v. Edmondson, 129 So. 276, 221 Ala. 424.  
50 C.J. p 123 note 23.

59. Okl.—Evatt v. Dulaney, 151 P. 607, 51 Okl. 81.

60. Iowa.—Bell v. Mahin, 29 N.W. 331, 69 Iowa 408.

61. Cal.—Watterson v. Owens River Canal Co., 143 P. 90, 25 Cal.App. 247.

62. Mich.—People v. Banhagel, 114 N.W. 669, 151 Mich. 40.

63. La.—Mandeville v. Paquette, 95 So. 391, 153 La. 33.

64. N.M.—Pacific Nat. Agr. Credit Corporation v. Hagerman, 51 P.2d 857, 39 N.M. 549, 101 A.L.R. 1301.  
Pa.—First Nat. Bank & Trust Co. of Ford City v. Stolar, 197 A. 499, 130 Pa.Super. 480.

65. Kan.—School Dist. No. 1 of Clark County v. Massachusetts Bonding & Ins. Co., 142 P. 1077, 93 Kan. 53.

Wis.—Maryland Casualty Co. v. Eagle River Union Free High School Dist. of Vilas County, 205 N.W. 926, 183 Wis. 520—Joint School Dist. No. 4 of Town and City of Platteville v. Bailey-Marsh Co., 194 N.W. 171, 181 Wis. 202.

Extent of discharge in case of surety under building or construction contract see *infra* § 126.

Necessity of prejudice to surety generally to effect discharge see *supra* subdivision c of this section.

66. N.Y.—New York Municipal R. Corp. v. Intercontinental Constr. Corp., 189 N.Y.S. 621, 115 Misc. 341, affirmed 197 N.Y.S. 933, 204 App.Div. 896, affirmed 143 N.E. 728, 237 N.Y. 536.  
50 C.J. p 121 note 81 [a].

67. Tex.—Bullard v. Norton, 182 S.W. 668, 107 Tex. 571.

68. Ky.—Locknane v. Emmerson, 11 Bush 69.  
50 C.J. p 119 note 56.

69. Ark.—O'Neal v. Kelley, 47 S.W. 409, 65 Ark. 550.  
N.Y.—American Casualty Ins. Co. v. Green, 75 N.Y.S. 407, 70 App.Div. 267, affirmed 70 N.E. 1094, 178 N. Y. 580.

70. U.S.—Centerville State Bank v. National Surety Co., 27 F.2d 552.  
50 C.J. p 124 note 40.

Discharge of surety on official bond by change in powers and duties of principal see *Officers* § 165 a.

71. Mass.—Singer Mfg. Co. v. Reynolds, 47 N.E. 438, 168 Mass. 588, 60 Am.S.R. 417.  
50 C.J. p 123 note 13.

72. Pa.—State Camp P. O. S. A. v. Kelley, 110 A. 339, 267 Pa. 49.

73. Ohio.—Walsh v. Miller, 38 N.E. 381, 51 Ohio St. 462.

the principal, not materially changing or incompatible with his former ones,<sup>74</sup> will not discharge the surety, the default not being connected with the added duties; but it is otherwise if the added duties have enlarged the responsibility of the principal enabling him to commit the default.<sup>75</sup> Thus a surety for an agent will be discharged by a change in the rules governing his conduct, allowing him to give credit instead of requiring payment in cash,<sup>76</sup> or by the creditor's release of a requirement that statements or reports be made by the principal at specified intervals,<sup>77</sup> or by a change in their requirements.<sup>78</sup>

Sureties are not discharged because the duties of the principal are increased by the natural growth of the business in which he is engaged;<sup>79</sup> nor does an increase in the capital of the obligee discharge the sureties of a cashier.<sup>80</sup> While the resignation of a treasurer necessarily makes him a custodian of money in an individual rather than in an official capacity, his surety will not be discharged.<sup>81</sup> Whether a change with respect to making remittances will discharge a surety depends on whether the making of remittances was a term in the contract for which the surety expressly or impliedly agreed to become liable; if not a term in the contract, a surety will not be discharged, in the absence of injury occasioned thereby,<sup>82</sup> but where it is an integral part of the contract a material change with respect thereto discharges the surety.<sup>83</sup>

A contention that the duties of an agent were increased by his appointment as general state agent, whereas the bond was executed as the bond of a special county agent only, is without merit, where

the contract appointing the agent as general agent was made before the date of the bond, and the default complained of was not with respect to his acts as general agent.<sup>84</sup> The sureties on a several continuing bond given by one of the trustees of a lodge whose by-laws provide that the bond of a trustee shall be joint or several are not liable after the lodge has changed its by-laws so as to require the trustees to give a joint and several bond.<sup>85</sup>

If the principal already holds another office at the time the surety enters into his contract, the surety cannot urge the other duties as a defense;<sup>86</sup> and, if the sureties have undertaken to become liable for all of the duties to which the principal may be assigned, a change therein will not affect their liability.<sup>87</sup> An employee's temporary or casual performance of other duties at the request of his employer will not release his sureties from liability.<sup>88</sup> With respect to the question whether they have been materially changed, if the nature of the duties of the office are not recited in the contract, they are those which plainly and commonly belong to the class of employment by which the principal is designated.<sup>89</sup>

*Place of employment or operation.* As a general rule a surety is discharged by a material change in the place of employment of his principal<sup>90</sup> unless he has consented thereto.<sup>91</sup> A change in the size of a salesman's territory ordinarily will release his surety from liability.<sup>92</sup> However, he will not be released from liability for defaults which occurred prior to the time such change was made.<sup>93</sup>

*Compensation.* A surety is not discharged by an alteration respecting the amount of compensation

74. Ind.—Wallace v. Exchange Bank, 26 N.E. 175, 126 Ind. 265. 50 C.J. p 124 note 43.

75. Mo.—State v. Holman, 68 S.W. 965, 96 Mo.App. 193. 50 C.J. p 124 note 44.

76. N.Y.—Grand Union Tea Co. v. Potter, 166 N.Y.S. 469, 101 Misc. 52. 50 C.J. p 124 note 45.

77. Ala.—Alabama Fidelity, etc., Co. v. Alabama Fuel, etc., Co., 67 So. 318, 190 Ala. 397.  
Ark.—Singer Mfg. Co. v. Boyette, 86 S.W. 673, 74 Ark. 600.  
Minn.—Fidelity Mut. Life Ass'n v. Dewey, 86 N.W. 423, 83 Minn. 389, 54 L.R.A. 945.

Tex.—New Jersey Ins. Co. v. Anderson, Civ.App., 90 S.W.2d 338, error dismissed.

78. Ark.—Furst & Thomas v. Rowland, 68 S.W.2d 451, 188 Ark. 804. 50 C.J. p 125 note 47.

79. Me.—Coombs v. Harford, 59 A. 529, 99 Me. 426. 50 C.J. p 125 note 48.

80. Neb.—McAuley v. Cooley, 66 N.W. 304, 47 Neb. 165. 50 C.J. p 125 note 49.

81. S.C.—Stemmermann v. Lilienthal, 32 S.E. 535, 54 S.C. 440.

82. Mo.—Hartford Fire Ins. Co. v. Casey, 191 S.W. 1072, 136 Mo.App. 291. 50 C.J. p 125 note 51.

83. Tex.—New Jersey Ins. Co. v. Anderson, Civ.App., 90 S.W.2d 338, error dismissed.

84. Colo.—Boyd v. Agricultural Ins. Co., 76 P. 986, 20 Colo.App. 28.

85. Me.—Coombs v. Harford, 59 A. 529, 99 Me. 426.

86. Colo.—Boyd v. Agricultural Ins. Co., 76 P. 986, 20 Colo.App. 28.

87. N.Y.—New York Fourth Nat.

Bank v. Spinney, 24 N.E. 316, 120 N.Y. 560. 50 C.J. p 125 note 55.

88. Pa.—American Tel. Co. v. Lanning, 21 A. 162, 139 Pa. 594.

89. Del.—Lieberman v. Wilmington First Nat. Bank, 40 A. 332, 8 Del. Ch. 229.

Ind.—Salem v. McClintock, 46 N.E. 39, 16 Ind.App. 656, 59 Am.S.R. 330.

90. Iowa.—Jewel Tea Co. v. Shepard, 154 N.W. 755, 172 Iowa 480. 50 C.J. p 125 note 57.

91. Ill.—Howe Sewing Mach. Co. v. Layman, 88 Ill. 39.

92. Ark.—W. T. Rawleigh Co. v. Wilkes, 121 S.W.2d 886, 197 Ark. 6. 50 C.J. p 125 note 58.

93. Ky.—W. T. Rawleigh Co. v. Thoroughman, 11 S.W.2d 1006, 227 Ky. 35.

his principal is to receive, as an employee, where he has consented to such alteration.<sup>94</sup>

## § 126. — Building and Construction Contracts

- a. In general
- b. Changes in plans or specifications
- c. Changes respecting time

### a. In General

Immaterial changes in a building or construction contract do not affect the liability of the contractor's surety, but material changes will discharge the surety, unless such changes are authorized by the contract or bond, or unless the surety consents to such changes or is barred from asserting his discharge by reason of waiver or estoppel.

In accordance with general rules discussed supra § 124, immaterial changes which do not alter the essential features of a building and construction contract, the general character of the work con-

templated by it, or the general character of the materials necessary for its execution do not affect the surety's liabilities on the bond.<sup>95</sup> However, the terms of the obligation cannot be materially changed without the surety's consent, even with a view to avoiding ultimate liability;<sup>96</sup> and, as a general rule, any material alteration or change in a building contract, without the surety's consent, discharges him from liability on the bond given to secure the performance of such contract;<sup>97</sup> and this rule is not affected by the fact that the contractor assures the owner that the liability of the surety will not be affected by the change.<sup>98</sup> Of course, the surety cannot be discharged on the ground of alteration or modification of the contract, where there is no alteration<sup>99</sup> or where the work done is in conformity with the terms of the contract;<sup>1</sup> nor can he claim to be discharged by reason of alterations which were made prior to his signing the bond with knowledge thereof.<sup>2</sup> A surety who unjustifiably repudi-

94. N.Y.—Travelers' Ins. Co. v. Stiles, 81 N.Y.S. 664, 82 App.Div. 441.

Alteration as to amount of obligation generally see infra § 127.  
Departure from provisions of contract respecting payment generally see infra § 133.

95. U.S.—Wald v. Eagle Indem. Co., C.A.Tex., 178 F.2d 91—U. S., for Use of Baltimore Cooperage Co., v. McCay, D.C.Md., 28 F.2d 777.

Ariz.—Prescott Nat. Bank v. Head, 90 P. 328, 11 Ariz. 213, 21 Ann. Cas. 990.

Colo.—Equitable Surety Co. v. Connors, 147 P. 438, 27 Colo.App. 213.

D.C.—Wilkinson v. McKimmie, 36 App.D.C. 336, affirmed 33 S.Ct. 879, 229 U.S. 590, 67 L.Ed. 1342—Granite Co. v. Granite Co., 23 App. D.C. 1.

Ky.—Cooke v. White Common School Dist. No. 7, 111 S.W. 686, 33 Ky. L. 926.

Md.—Etna Indemnity Co. v. Waters, 73 A. 712, 110 Md. 678.

Mo.—Dorr v. Bankers' Surety Co., App., 218 S.W. 398—Western Bldg., etc., Assoc. v. Fitzmaurice, 7 Mo.App. 283.

Okl.—Maryland Casualty Co. v. Town of Wellston, 148 P. 691, 47 Okl. 417.

Tenn.—Little & Dean v. Fidelity & Deposit Co., 3 Tenn.App. 157.  
9 C.J. p 858 note 10.

96. U.S.—U. S. v. Freel, N.Y., 22 S.Ct. 875, 186 U.S. 309, 46 L.Ed. 1177.

9 C.J. p 859 note 12.

97. U.S.—Pittsburgh Steel Co. v. Standard Accident Ins. Co., D.C. S.C., 55 F.Supp. 36—Bopst v. Columbia Casualty Co., D.C.Md., 37

F.Supp. 32—Fidelity & Deposit Co. v. Agnew, C.C.A.N.J., 152 F. 955, 82 C.C.A. 108.

Cal.—Roberts v. Security Trust & Savings Bank, 238 P. 673, 196 Cal. 557—Watterson v. Owens River Canal Co., 143 P. 90, 25 Cal.App. 247—Barrett-Hicks Co. v. Glas, 99 P. 856, 9 Cal.App. 491.

Ga.—Haigler v. Adams, 63 S.E. 715, 5 Ga.App. 637.

La.—Savings & Homestead Ass'n v. Frank, 83 So. 491, 146 La. 198.

Mich.—People v. Banhagel, 114 N. W. 669, 151 Mich. 40.

Minn.—Poe v. Cameron, 153 N.W. 129, 130 Minn. 15.

Mo.—Matthews v. Hill, App., 287 S. W. 789—Neuwirth v. Moydell, 174 S.W. 206, 188 Mo.App. 467—Utter- son v. Elmore, 136 S.W. 9, 154 Mo. App. 646—Reissaus v. Whites, 106 S.W. 603, 128 Mo.App. 135.

N.Y.—American Bonding Co. of Bal- timore v. Kelly, 158 N.Y.S. 812, 172 App.Div. 437.

Pa.—Sonhefeld v. Brennan, 17 Pa. Dist. 267.

Tenn.—Fidelity Bond & Mortgage Co. v. American Surety Co., 14 Tenn.App. 211—Southern Const. Co. v. Southern Surety Co., 10 Tenn.App. 506—Little & Dean v. Fidelity & Deposit Co., 3 Tenn. App. 157.

Tex.—Bullard v. Norton, 182 S.W. 668, 107 Tex. 571—Wright v. A. G. McAdams Lumber Co., Com. App., 234 S.W. 878—Porter v. Hope, Civ.App., 279 S.W. 535.

9 C.J. p 859 note 13.

**Validity of statute providing other- wise**

Statutory provision that no change or alterations of the plans, building construction, or method of payment shall affect the liability on

a construction bond, is invalid.—Wright v. A. G. McAdams Lumber Co., Tex.Com.App., 234 S.W. 878.

98. Ark.—O'Neal v. Kelly, 47 S.W. 409, 65 Ark. 550.

99. Cal.—Dunne Inv. Co. v. Empire State Surety Co., 150 P. 411, 27 Cal.App. 208.

Ind.—Hoosier Brick Co. v. Floyd County Bank, 116 N.E. 87, 64 Ind. App. 445.

Tex.—General Bonding, etc., Ins. Co. v. Beckville Independent School Dist., Civ.App., 156 S.W. 1161.

### Change from initial draft

Fact that the terms of the initial draft of a building contract were departed from did not affect the contractor's bond, although the change was made after the bond was signed and before delivery, where the bond applied only to the executed building contract and was delivered by one to whom it had been intrusted for that purpose, with full knowledge of the change.—Cortright Metal Roofing Co. v. Merten, 145 N.W. 261, 95 Neb. 164, followed in Farley & Loetscher Mfg. Co. v. Merten, 145 N.W. 263, 95 Neb. 171, Nebraska Material Co. v. Merten, 145 N.W. 264, 95 Neb. 172, and Johnson v. Merten, 145 N.W. 264, 95 Neb. 174.

1. Ky.—Cooke v. White Common School Dist. No. 7, 111 S.W. 686, 33 Ky.Law 926.

Mo.—Hiller v. Daman, 166 S.W. 869, 183 Mo.App. 315.

Tex.—General Bonding & Casualty Ins. Co. v. Beckville Independent School Dist., Civ.App., 156 S.W. 1161.

2. Wash.—Columbia Security Co. v. Etna Accident & Liability Co., 183 P. 137, 108 Wash. 116.

ates his obligations cannot complain of a subsequent alteration of the contract between the owner and the contractor so as to facilitate the completion of the construction.<sup>3</sup>

Alteration of a building and construction contract without the knowledge or consent of the owner, creditor, or obligee does not affect the liability of the surety;<sup>4</sup> neither is the surety discharged because the builder performs additional work not demanded by the owner.<sup>5</sup> Under a statute declaring that a contract in writing may be altered only by a written instrument or executed oral agreement, a surety on a written construction contract is not discharged by verbal changes in the contract, unless such changes are executed.<sup>6</sup> A failure to perform a contract on time does not release the surety from liability for a failure to pay claims for labor and material, as to the payment of which no time limit is provided in the bond.<sup>7</sup>

*Where changes authorized.* Where an alteration

or change in, or departure from, the terms of the contract, although a material one, is authorized by the contract,<sup>8</sup> as where it is made by the owner or the architect under a contract which permits him, at any time during the progress of the building operations, to make alterations, changes, or additions without invalidating the contract,<sup>9</sup> or where the bond itself contains a similar provision,<sup>10</sup> it does not discharge the surety. Such a provision, however, applies only in cases, and to the extent, contemplated by the contract<sup>11</sup> or bond;<sup>12</sup> the changes, although material, must be fairly within the scope of the original undertaking, reasonably within the contemplation of the parties, and not so extensive as to constitute a departure from the original contract,<sup>13</sup> and, if they do not meet these requirements but are instead radical and revolutionary, the surety will be released.<sup>14</sup> Where the contract specifies the manner in which the changes shall be made, some authorities hold that failure to comply with such provisions discharges the sure-

3. U.S.—Knutson v. Metallic Slab Form Co., C.C.A.Tex., 128 F.2d 408, rehearing denied 130 F.2d 200.

4. Iowa.—Van Buren County v. American Surety Co., 115 N.W. 24, 137 Iowa 490, 126 Am.S.R. 290. Mo.—Neuwirth v. Moydell, 174 S.W. 206, 188 Mo.App. 467.

Pa.—Koch v. Moyer, 158 A. 198, 103 Pa.Super. 270.

5. Cal.—Wolf v. Aetna Indemn. Co., 126 P. 470, 163 Cal. 597. 9 C.J. p 860 note 27.

6. Cal.—Watterson v. Owens River Canal Co., 143 P. 90, 25 Cal.App. 247.

7. N.Y.—U. S. v. Stratford, 65 N.Y. S. 1051, 53 App.Div. 410, appeal dismissed 59 N.E. 1131, 165 N.Y. 638.

Wash.—Henry v. Aetna Indemn. Co., 79 P. 42, 36 Wash. 553.

8. U.S.—Vance v. San Luis Valley Rural Elec. Co-op., C.A.Colo., 178 F.2d 145—American Fidelity Co. v. Velle, Mo., 196 F. 190, 116 C.C.A. 22, certiorari denied 33 S.Ct. 112, 226 U.S. 607, 57 L.Ed. 379.

Ky.—Roberts v. Edger, 43 S.W.2d 985, 241 Ky. 320.

Pa.—Koch v. Moyer, 158 A. 198, 103 Pa.Super. 270.

Tenn.—Little & Dean v. Fidelity & Deposit Co., 3 Tenn.App. 157. 9 C.J. p 859 note 17.

#### Subcontractor's surety

(1) The surety of a subcontractor is not discharged from liability because the principal contractor and subcontractor make such departures from the contract between them as are authorized by the contract under which the principal contractor

agreed to do the work.—Pacific Bridge Co. v. U. S. Fidelity, etc., Co., 73 P. 772, 33 Wash. 47.

(2) The suspension of work on an original building contract by the architect, under authority given by the contract, does not discharge the surety of a subcontractor for a portion of the work whose contract expressly made the provisions of the original contract a part of the subcontract.—Lester v. Dwyer Plumbing & Heating Co., 133 P. 1180, 66 Or. 474.

#### Extra work

Where the contract provides for the ordering of extra work, the requiring of such extras does not violate or change the contract so as to release the surety.

Iowa.—Cowles v. J. C. Mardis Co., 181 N.W. 872, 192 Iowa 890—Ft. Dodge, D. M. & S. R. Co. v. Burns, 158 N.W. 582, 177 Iowa 51.

Minn.—City of Fergus Falls v. Illinois Surety Co., 128 N.W. 820, 112 Minn. 462.

Pa.—Koch v. Moyer, 158 A. 198, 103 Pa.Super. 270.

Wash.—Houghton v. Hoy, 172 P. 1148, 102 Wash. 358.

9. W.Va.—State v. Hudson Pav., etc., Co., 113 S.E. 251, 91 W.Va. 387.

9 C.J. p 859 note 18.

Provisions authorizing changes in plans or specifications see *infra* subdivision b (2) of this section.

10. Mo.—Hiller v. Daman, 166 S.W. 869, 183 Mo.App. 315.

N.J.—Jersey City Water Supply Co. v. Metropolitan Const. Co., 69 A. 1088, 76 N.J.Law 419.

Tenn.—Little & Dean v. Fidelity & Deposit Co., 3 Tenn.App. 157.

Tex.—Employers' Casualty Co. v. Irene Independent School Dist., Civ.App., 286 S.W. 539. 9 C.J. p 859 note 19.

11. Iowa.—McConnell v. Poor, 84 N.W. 968, 113 Iowa 133, 52 L.R.A. 312.

Tenn.—Little & Dean v. Fidelity & Deposit Co., 3 Tenn.App. 157.

Tex.—Wright v. A. G. McAdams Lumber Co., Com.App., 234 S.W. 878.

9 C.J. p 859 note 20.

12. Mo.—Neuwirth v. Moydell, 174 S.W. 206, 188 Mo.App. 467. 9 C.J. p 859 note 21.

13. U.S.—Massachusetts Bonding & Insurance Co. v. John R. Thompson Co., C.C.A.Mo., 88 F.2d 825, certiorari denied 57 S.Ct. 941, 301 U.S. 707, 81 L.Ed. 1861.

#### Changes constituting abandonment of original contract

Under building contractor's bond providing that alterations which might be made in the terms of the contract or the work to be done under it should not release surety, no change in the contract or in the work done under it, not equivalent to abandonment of the original contract and substitution of a new one, would discharge surety, and it was held immaterial that changes were brought about by cancellation of original drawings and substitution of new ones.—Massachusetts Bonding & Insurance Co. v. John R. Thompson Co., *supra*.

14. U.S.—Massachusetts Bonding & Insurance Co. v. John R. Thompson Co., *supra*.

ty,<sup>15</sup> but others hold that noncompliance with such requirements, at least to the extent that they are merely procedural, does not discharge the surety.<sup>16</sup> A provision authorizing changes, alterations, and additions in the construction of a building does not authorize changes as to other contract provisions.<sup>17</sup>

**Collateral agreement.** The surety is not released by an independent collateral agreement between the owner and the principal<sup>18</sup> or by a change in a collateral contract between the contractor and a subcontractor which in no way prejudices the surety.<sup>19</sup>

**Changes necessitated by contractor's conduct.** Where the change or departure from the contract is, as between the contractor and the owner, due entirely to the acts or omissions of the contractor, the surety cannot successfully claim discharge on the ground of alteration of the contract.<sup>20</sup> Thus, the sureties are not discharged by a change in the work made necessary by the negligence or default of the builder,<sup>21</sup> as where changes in the work are

made because the architect does not consider it properly done.<sup>22</sup>

**Prejudice or injury to surety.** Generally speaking, it is the deviation from the terms of the contract that operates to release the surety, and not the injury or damage done by such departure, and the breach of the contract ipso facto nullifies it as to the surety,<sup>23</sup> regardless of whether or not the changes are shown to injure him,<sup>24</sup> and even though the changes may be of benefit to the surety.<sup>25</sup> However, it has been held that the rule discharging the surety from liability, even though the changes do not increase his risk or cause him injury, is not applicable where the surety is engaged in the business of suretyship for compensation; such a surety is not discharged by a change in the contract unless it is prejudiced or injured thereby.<sup>26</sup>

**Discharge as to third party beneficiaries.** Even though there has been a material alteration of the contract between the contractor and the owner, the

15. Mo.—Chapman v. Eneberg, 68 S.W. 974, 95 Mo.App. 127.  
9 C.J. p 859 note 22, p 858 note 3.

**Verbal order**

Under the rule stated in the text, where the contract provides that the changes must be evidenced by a written agreement, the making of such changes without a written agreement discharges the surety.—Chapman v. Eneberg, 68 S.W. 974, 95 Mo.App. 127.

16. Cal.—Roberts v. Security Trust, etc., Bank, 238 P. 678, 196 Cal. 557.  
9 C.J. p 860 note 22 [a] (1).

17. Tex.—Wright v. A. G. McAdams Lumber Co., Com.App., 234 S.W. 878—Tennessee Valley School, Common School Dist. No. 3, Cottle County, v. U. S. Fidelity & Guaranty Co., Civ.App., 247 S.W. 595.

18. Ark.—Aetna Indemnity Co. v. City of Little Rock, 115 S.W. 960, 89 Ark. 95.

Ga.—Massachusetts Bonding & Ins. Co. v. Realty Trust Co., 83 S.E. 210, 142 Ga. 499, error dismissed 36 S.Ct. 451, 241 U.S. 687, 60 L.Ed. 1237.

Ind.—U. S. Fidelity & Guaranty Co. v. American Blower Co., 84 N.E. 555, 41 Ind.App. 620, followed in U. S. Fidelity & Guaranty Co. v. American Radiator Co., 84 N.E. 558, 41 Ind.App. 712.

Pa.—Koch v. Moyer, 158 A. 198, 103 Pa.Super. 270.

Tex.—U. S. Fidelity & Guaranty Co. v. Henderson County, Com.App., 276 S.W. 203, rehearing overruled 276 S.W. 1119—Thompson v. Kleiman, Civ.App., 259 S.W. 593.  
9 C.J. p 860 note 26.

**A secret understanding between owners and a building contractor** that, when he completed the work, they might want him to take a second mortgage for what might be due, not being a contract, did not release his surety, especially where he was delinquent when the favor would have been required and the entire price was paid in cash.—Martin v. Empire State Surety Co., 101 P. 876, 53 Wash. 290.

**Extra work outside contract**

Agreement between principal parties to contract for additional work, not included in original contract, is independent contract not constituting material alteration of original, so as to release surety on contractor's bond.—U. S. Fidelity, etc., Co. v. Henderson County, Tex.Com.App., 276 S.W. 203, rehearing overruled 276 S.W. 1119.

19. Tex.—Hess & Skinner Engineering Co. v. Turney, Civ.App., 207 S.W. 171.

20. Cal.—Bowman v. Maryland Casualty Co., 263 P. 826, 88 Cal.App. 481.

Minn.—City of Fergus Falls v. Illinois Surety Co., 128 N.W. 820, 112 Minn. 462.

21. U.S.—American Fidelity Co. v. Velle, Mo., 196 F. 190, 116 C.C.A. 22, certiorari denied 33 S.Ct. 112, 226 U.S. 607, 57 L.Ed. 379.

Mo.—Killoren v. Meehan, 55 Mo.App. 427.

22. La.—People's Homestead Assoc. v. Staub, 3 La.App., Orleans, 93.

23. U.S.—Baldwin v. Becker, C.C.A. N.M., 277 F. 930.

Ky.—Inland Navigation Co. v. Amer-

ican Surety Co., 227 S.W. 809, 190 Ky. 504.

N.M.—Lyons v. Kitchell, 134 P. 213, 18 N.M. 82, Ann.Cas.1915C 671.

24. U.S.—Prairie State Bank v. United States, Ct.Cl., 17 S.Ct. 142, 164 U.S. 227, 41 L.Ed. 412—Justice v. Empire State Surety Co., D.C. Pa., 209 F. 105, affirmed 218 F. 802, 134 C.C.A. 490.

Mo.—Matthews v. Hill, App., 287 S.W. 789—Utterson v. Elmora, 136 S.W. 9, 154 Mo.App. 646.

N.Y.—American Bonding Co. of Baltimore v. Kelly, 158 N.Y.S. 812, 172 App.Div. 437.

Tex.—Fidelity & Deposit Co. of Maryland v. Kelsay Lumber Co., Com.App., 33 S.W.2d 731.

25. Ark.—Hinton v. Stanton, 165 S.W. 299, 112 Ark. 207.

Ky.—Inland Navigation Co. v. American Surety Co., 227 S.W. 809, 190 Ky. 504.

Tex.—Bullard v. Norton, 182 S.W. 668, 107 Tex. 571—Fidelity & Deposit Co. of Maryland v. Kelsay Lumber Co., Com.App., 33 S.W.2d 731.

26. U.S.—Haddad v. Western Contracting Corp., D.C.W.Va., 71 F. Supp. 212.

Mo.—Lackland v. Renshaw, 165 S.W. 314, 256 Mo. 133—Rule v. Anderson, 142 S.W. 358, 160 Mo.App. 347.

Utah.—M. H. Walker Realty Co. v. American Surety Co. of New York, 211 P. 998, 60 Utah 435.

Wash.—James Black Masonry & Contracting Co. v. National Surety Co., 112 P. 517, 61 Wash. 471—Monro v. National Surety Co., 92 P. 280, 47 Wash. 488.

surety is not discharged as to materialmen for whose benefit the bond is required to be given<sup>27</sup> and who furnished material after such alteration without actual or constructive notice thereof.<sup>28</sup>

**Waiver or estoppel.** Provisions in the contract for the benefit of the obligee alone may be waived without affecting the liability of the surety;<sup>29</sup> and it has been held that the principal can waive a provision intended solely for his own benefit which requires notices from the owner or to the surety to be in writing.<sup>30</sup> Accordingly, it has been held that the fact that changes are not ordered in writing, as stipulated by the contract, does not release the surety, since such provision is for the benefit of the contractor as well as the owner and may be waived by the contractor.<sup>31</sup> However, where a waiver by the contractor amounts to abandonment of the contract, it is not a modification so as to discharge the surety.<sup>32</sup>

Where an alteration of a building contract is consented to, or ratified by, the sureties, they cannot avail themselves of such alteration as a de-

fense;<sup>33</sup> but a surety will not be held estopped where he had no notice of the change and did not acquiesce therein.<sup>34</sup> Where a surety takes over the work which has been abandoned by the contractor after some changes in the contract have been made, and without objection completes the contract as changed, demanding and receiving payment as for the original contract, he is estopped to claim that the changes were outside the original contract or made without his consent.<sup>35</sup>

## b. Changes in Plans or Specifications

### (1) In general

#### (2) Provisions authorizing changes

### (1) In General

Material changes in the plans or specifications made without the surety's consent will discharge the surety; but the surety will not be discharged on the ground of alteration of plans or specifications where no changes, or only immaterial changes, have occurred.

Material or substantial changes in the plans or specifications,<sup>36</sup> as, for example, changes materially increasing the dimensions of the job,<sup>37</sup> or making a

27. U.S.—Equitable Surety Co. v. U. S., App.D.C., 34 S.Ct. 803, 234 U.S. 448, 58 L.Ed. 1394.

D.C.—Equitable Surety Co. v. U. S., 42 App.D.C. 374, followed in 42 App.D.C. 380 and Howeson v. U. S., 42 App.D.C. 379.

La.—Victoria Lumber Co. v. Wells, 71 So. 781, 139 La. 500.

28. Tex.—Southern Surety Co. v. Nalle & Co., Com.App., 242 S.W. 197.

29. Ill.—City of Chicago v. Agnew, 106 N.E. 252, 264 Ill. 288.

## Continuance of work after specified time

A continuance of the work on a building beyond the time specified in the contract does not constitute such a novation of the contract as would discharge the contractor's surety from liability.—Wing & Bostwick Co. v. United States Fidelity & Guaranty Co., C.C.N.Y., 150 F. 672.

## Employment of supervising architect

Where a building contract provides that the owners may employ a supervising architect and they do not exercise the right, the surety on the bond of the contractor cannot claim exemption by pleading change of the contract.—Meyer v. Bichow, 63 So. 487, 133 La. 975.

30. Or.—Enterprise Hotel Co. v. Book, 85 P. 333, 48 Or. 58.  
9 C.J. p 863 note 64.

31. Ark.—Kerby v. Saline Road Impr. Dist. No. 4, 251 S.W. 356, 159 Ark. 21—Hinton v. Stanton, 165 S.W. 299, 112 Ark. 207.

32. Colo.—McPhee v. U. S., 174 P. 808, 64 Colo. 421, followed in Owen v. U. S., 174 P. 816, 65 Colo. 159.

33. U.S.—U. S. v. D. L. Taylor Co., D.C.N.C., 268 F. 635.  
Mich.—People v. Banhagel, 114 N. W. 669, 151 Mich. 40.

Mo.—Kneisley Lumber Co. v. Edward B. Stoddard Co., 109 S.W. 840, 131 Mo.App. 15.

N.Y.—Village of Newark v. James F. Leary Const. Co., 194 N.Y.S. 212, 118 Misc. 622.

Wash.—Wiley v. Hart, 132 P. 1015, 74 Wash. 142—Keenan v. Empire State Surety Co., 113 P. 636, 62 Wash. 250.  
9 C.J. p 863 note 65.

34. U.S.—Bopst v. Columbia Casualty Co., D.C.Md., 37 F.Supp. 32.

35. Cal.—Watterson v. Owens River Canal Co., 143 P. 90, 25 Cal.App. 247.

36. U.S.—Bench Canal Drainage Dist. v. Maryland Casualty Co., C.C.A.Wyo., 278 F. 67.

Ark.—Southwestern Surety Ins. Co. v. Terry, 184 S.W. 54, 122 Ark. 522—Aetna Indem. Co. v. City of Little Rock, 115 S.W. 960, 89 Ark. 95.

Iowa.—Lamson v. Maryland Casualty Co., 194 N.W. 70, 196 Iowa 1185—Holland v. Story County, 192 N. W. 402, 195 Iowa 489—Bartlett & Kling v. Illinois Surety Co., 119 N.W. 729, 142 Iowa 538.

Ky.—Hammond v. Hurst, 277 S.W. 308, 211 Ky. 167—Harlan Fuel Co. v. Wiggington, 262 S.W. 957, 203 Ky. 546.

La.—Wells v. Fidelity & Deposit Co. of Maryland, 83 So. 448, 146 La. 169.

Mich.—Woodruff v. Schultz, 118 N. W. 579, 155 Mich. 11, 16 Ann.Cas. 346—Battle Creek Lumber Co. v. Poland, 114 N.W. 669, 151 Mich. 40.

Mo.—Utterson v. Elmore, 136 S.W. 9, 154 Mo.App. 646—School Dist. of Village of Barfield v. Green, 114 S. W. 578, 134 Mo.App. 421—Nowell v. Mode, 111 S.W. 641, 132 Mo.App. 232.

R.I.—State v. El J. Doyle & Co., 96 A. 605.

Tex.—Luling Oil & Mfg. Co. v. Gohmert, 110 S.W. 772, 50 Tex.Civ. App. 606.

Wash.—Fransoli v. Thompson, 104 P. 278, 55 Wash. 259.

9 C.J. p 860 note 31.

A "substantial variance" has been defined as any variance other than mere inconsequential departure from the plans and specifications.—Prudence Co. v. Fidelity & Deposit Co. of Maryland, D.C.N.Y., 7 F.Supp. 392, 397, reversed on other grounds, C.C.A., 77 F.2d 834, modified on other grounds 56 S.Ct. 387, 297 U.S. 198, 80 L.Ed. 581, motion denied 56 S.Ct. 679, amended 56 S.Ct. 935, 298 U.S. 642, 80 L.Ed. 1374.

37. Ky.—Hammond v. Hurst, 277 S.W. 308, 211 Ky. 167.  
9 C.J. p 860 note 32.

Addition of another story to the height of a building involves a material change so as to discharge sureties.—Barrett-Hicks Co. v. Glas, 111 P. 760, 14 Cal.App. 289—Barrett-



substantial alteration with respect to the materials used,<sup>38</sup> will discharge the sureties if such changes are made without their consent.<sup>39</sup> On the other hand, immaterial changes in the plans or specifications will not discharge the surety, even though they are not authorized by the contract and are made without the surety's consent,<sup>40</sup> or although made otherwise than in the manner provided in the contract for the making of alterations,<sup>41</sup> particularly where such changes are made at the contractor's request<sup>42</sup> or where the surety's agent is notified of the change and does not object.<sup>43</sup>

Accordingly, where changes merely require the contractor to perform some additional work without materially changing the original plans, the surety is not thereby relieved from liability under the contract;<sup>44</sup> and whether such a change involves a material change in the contract or is merely an addition thereto is usually a question for the jury.<sup>45</sup> An immaterial change in the location of the building will not discharge the sureties;<sup>46</sup> but a material change of location will discharge them.<sup>47</sup> The fact that the owner, in completing the work after abandonment by the contractor, made some changes from

the plan and specifications, due allowance being made for the difference in price, does not discharge the sureties.<sup>48</sup>

Where changes are agreed to on behalf of the obligee by one without authority to do so,<sup>49</sup> or are made at the request of a third party,<sup>50</sup> the surety is not discharged; nor is he discharged where a change or departure from the plans and specifications is, as between the contractor and the obligee, due entirely to the acts or omissions of the former.<sup>51</sup> The surety is not discharged on the ground of alteration of plans or specifications where there has been no change in the plans or specifications to which the contract refers,<sup>52</sup> although the initial plans or specifications have been changed.<sup>53</sup>

## (2) Provisions Authorizing Changes

A surety is not discharged by changes in the plans or specifications which are authorized by the contract or bond.

The surety is not discharged by changes or alterations in the plans or specifications where such changes or alterations are authorized by the contract or bond,<sup>54</sup> or where the contract or bond ex-

Hicks Co. v. Glas, 99 P. 856, 9 Cal. App. 491—9 C.J. p 860 note 32 [a].

38. Md.—Trustees of Seventh Baptist Church of Baltimore v. Andrew & Thomas, 81 A. 1, 115 Md. 535, reargument denied 82 A. 452, 115 Md. 535.

Mo.—Reissaus v. Whites, 106 S.W. 603, 128 Mo.App. 135.

39. Mo.—Beers v. Wolf, 22 S.W. 620, 116 Mo. 179.  
9 C.J. p 860 note 33.

### Departures agreed on

Departures amicably agreed on did not release building contractor's surety, where owner completed work after contractor's abandonment.—Doherty v. Detroit Fidelity & Surety Co., 214 N.W. 833, 240 Mich. 36.

40. U.S.—Wald v. Eagle Indem. Co., C.A.Tex., 178 F.2d 91—Glens Falls Indem. Co. v. Basich Bros. Const. Co., C.C.A.Cal., 165 F.2d 649, certiorari denied 68 S.Ct. 1347, 334 U.S. 833, 92 L.Ed. 1760.

Ark.—Altman v. Sproles, 255 S.W. 573, 1092, 161 Ark. 128—Hinton v. Stanton, 165 S.W. 299, 112 Ark. 207.

D.C.—Zipkin v. Investors Syndicate, 152 F.2d 678, 80 U.S.App.D.C. 303.

Ky.—Cooke v. White Common School Dist. No. 7, 111 S.W. 686, 33 Ky.L. 926.

Mo.—Rule v. Anderson, 142 S.W. 358, 160 Mo.App. 347—Boppert v. Illinois Surety Co., 126 S.W. 763, 140 Mo.App. 675—Nowell v. Mode, 111 S.W. 641, 132 Mo.App. 232.

N.Y.—City of Middletown v. Aetna

Indemnity Co. of Hartford, Conn., 106 N.Y.S. 374, 121 App.Div. 589.

Okl.—Crudup v. Oklahoma Portland Cement Co., 156 P. 899, 56 Okl. 786.

Tex.—Garrett v. Dodson, Civ.App., 199 S.W. 675—Da Moth v. Hillsboro Independent School Dist., Civ.App., 186 S.W. 437.

Wash.—Fransoli v. Thompson, 104 P. 278, 55 Wash. 259.

Provision expressly requiring consent is inapplicable to immaterial alteration.—Aetna Indemnity Co. v. Waters, 73 A. 712, 110 Md. 673.

41. Cal.—Wolf v. Aetna Indemnity Co. of Hartford, Conn., 126 P. 470, 163 Cal. 597.

42. La.—Natchitoches Sweet Potato Co. v. Perfection Curing Co., 96 So. 808, 153 La. 916.

43. Ohio.—Southern Surety Co. v. Masonic Temple Co. of Washington Courthouse, 4 Ohio App. 477.

44. U.S.—New Amsterdam Casualty Co. v. W. T. Taylor Const. Co., C. C.A.Ala., 12 F.2d 972—New Amsterdam Casualty Co. v. W. T. Taylor Const. Co., C.C.A.Ala., 12 F.2d 972.

9 C.J. p 861 note 39.

45. Ark.—Hinton v. Stanton, 165 S. W. 299, 112 Ark. 207.  
9 C.J. p 861 note 40.

46. U.S.—Equitable Surety Co. v. U. S., App.D.C., 34 S.Ct. 803, 234 U.S. 448, 58 L.Ed. 1394.

9 C.J. p 861 note 41.

47. U.S.—Tide Water Oil Co. v. Globe Indemnity Co., N.Y., 238 F. 157, 151 C.C.A. 233.

48. N.Y.—Stogop Realty Co. v. National Surety Co., 215 N.Y.S. 90, 216 App.Div. 198.

Tex.—Southern Surety Co. v. American Const. Co., Com.App., 36 S.W. 2d 212.

9 C.J. p 857 note 86.

49. Cal.—Watterson v. Owens River Canal Co., 143 P. 90, 25 Cal.App. 247.

### Change not binding on owner

Where an architect in charge of a building, in violation of the terms of a contract, makes changes in the contract without the owner's consent, he goes beyond his agency and in no way binds the owner of the building and does not discharge the surety.—Fullerton Lumber Co. v. Gates, 89 Mo.App. 201.

50. La.—People's Homestead Assoc. v. Staub, 3 La.App., Orleans, 93.

51. U.S.—Equitable Trust Co. v. Aetna Indemnity Co., C.C.Pa., 168 F. 433.

52. U.S.—Elkan v. Sebastian Bridge Dist., C.C.A.Ark., 291 F. 532.

53. Ky.—Cooke v. White Common School Dist. No. 7, 111 S.W. 686, 33 Ky.L. 926.

Tex.—Da Moth & Rose v. Hillsboro Independent School Dist., Civ. App., 186 S.W. 437.

54. U.S.—United States v. McMullen, Cal., 32 S.Ct. 128, 222 U.S.

pressly provides that the surety shall not be released from liability thereby;<sup>55</sup> and, where the contract authorizes changes from the plans and specifications without notice to the surety, reasonable changes not

imposing on the surety a burden clearly not contemplated by the terms of the undertaking may be made without discharging the surety.<sup>56</sup> So, changes in the plans for the walls, partitions, windows, and

460, 56 L.Ed. 269—U. S., for Use of Baltimore Cooperage Co., v. McCay, D.C.Md., 28 F.2d 777—Elkan v. Sebastian Bridge Dist., C. C.A.Ark., 291 F. 532.

D.C.—U. S. v. Maloney, 4 App.Cas., D.C., 505.

Ind.—State v. Lund, 139 N.E. 466, 80 Ind.App. 349.

Iowa.—Lamson v. Maryland Casualty Co., 194 N.W. 70, 196 Iowa 1185.

Ky.—Illinois Surety Co. v. Garrard Hotel Co., 118 S.W. 967.

Mich.—Doyle v. Faust, 153 N.W. 725, 187 Mich. 108.

Mo.—Orpheum Theater & Realty Co. v. Kansas City Casualty Co., 239 S.W. 841—Schnitzer v. Couch, App., 279 S.W. 165—Utterson v. Elmore, 136 S.W. 9, 154 Mo.App. 646—Nowell v. Mode, 111 S.W. 641, 132 Mo.App. 232—Fullerton Lumber Co. v. Gates, 89 Mo.App. 201.

N.Y.—Newark v. Leary Constr. Co., 194 N.Y.S. 212, 118 Misc. 622.

Okl.—Coyle v. United States Gypsum Co., 166 P. 394, 64 Okl. 153—American Surety Co. v. Scott & Co., 90 P. 7, 18 Okl. 264.

Pa.—Loughney v. Constr. Co., 97 A. 179, 252 Pa. 131.

Tex.—Garrett v. Dodson, Civ.App., 199 S.W. 675—American Surety Co. v. San Antonio Loan & Trust Co., Civ.App., 98 S.W. 387.

Wash.—Stocking v. Fouts, 169 P. 593, 99 Wash. 261.

9 C.J. p 559 note 17.

#### Reason for rule

The proposition rests on the theory that the surety has consented in advance to the changes thereafter made.

Mo.—Reissaus v. Whites, 106 S.W. 603, 128 Mo.App. 135.

Tex.—Jones v. Gambill, Civ.App., 241 S.W. 1067.

#### Validity of provision

A provision in a building contract that changes may be made, which shall not release the sureties on the bond given to guaranty the contract, is valid.—Bartlett & Kling v. Illinois Surety Co., 119 N.W. 729, 142 Iowa 538.

#### Surety's implied acceptance of provisions for alteration

Where building contract is referred to in bond, and it provides that contractor shall faithfully keep his covenants and agreements and turn over building free and clear of liens accruing by reason of work described in contract or any modification thereof, surety must be held to have agreed that he will be equally bound where changes authorized by building contract are made.—Rob-

erts v. Security Trust, etc., Bank, 238 P. 673, 196 Cal. 557.

Bond construed with respect to extent of variation authorized.—Trinity Universal Ins. Co. v. Willbanks, 144 S.W.2d 1092, 201 Ark. 386.

55. U.S.—Galveston Causeway Const. Co. v. Galveston, H. & S. A. Ry. Co., D.C.Tex., 284 F. 137.

La.—Jacob A. Zimmerman & Son v. U. S. Fidelity & Guaranty Co., 90 So. 647, 150 La. 277.

Mich.—People v. Morrison, 199 N.W. 689, 228 Mich. 216.

Mo.—Kline Cloak & Suit Co. v. Morris, 240 S.W. 96, 293 Mo. 478—City of Kennett v. Katz Const. Co., 202 S.W. 558, 273 Mo. 279.

Neb.—Burt County v. Lewis, 141 N. W. 1032, 93 Neb. 690.

Utah.—M. H. Walker Realty Co. v. American Surety Co. of New York, 211 P. 998, 60 Utah 435.

56. U.S.—Maryland Casualty Co. v. Moore, 82 F.2d 189, certiorari denied Maryland Casualty Co. v. Moore, 56 S.Ct. 749, 298 U.S. 666, 80 L.Ed. 1390—Bankers' Surety Co. v. Elkhorn River Drainage Dist., Neb., 214 F. 342, 130 C.C.A. 650, certiorari denied 35 S.Ct. 206, 235 U.S. 702, 59 L.Ed. 433.

Ark.—Eureka Stone Co. v. First Christian Church of Ft. Smith, 110 S.W. 1042, 86 Ark. 212.

Cal.—Roberts v. Security Trust & Savings Bank, 238 P. 673, 196 Cal. 557—W. P. Fuller & Co. v. Alturas School Dist., 153 P. 743, 28 Cal. App. 609—Dunne Inv. Co. v. Empire State Surety Co., 150 P. 405, 27 Cal.App. 208, rehearing denied 150 P. 411, 27 Cal.App. 208.

Iowa.—Lamson v. Maryland Casualty Co., 194 N.W. 70, 196 Iowa 1185.

Kan.—School Dist. No. 3 of Ford County v. United States Fidelity & Guaranty Co. of Baltimore, Md., 152 P. 668, 96 Kan. 499.

Mo.—City of Kennett v. Katz Const. Co., 202 S.W. 558, 273 Mo. 279—Lackland v. Renshaw, 165 S.W. 314, 256 Mo. 133—Mathews v. Hill, App., 287 S.W. 789.

N.Y.—Newark v. Leary Constr. Co., 194 N.Y.S. 212, 118 Misc. 622.

Tenn.—Little & Dean v. Fidelity & Deposit Co., 3 Tenn.App. 157.

Tex.—Tennessee Valley School, Common School Dist. No. 3, Cottle County v. U. S. Fidelity & Guaranty Co., Civ.App., 247 S.W. 595.

Wis.—Kretschmar v. Bruss, 84 N.W. 429, 108 Wis. 396.

#### Test

In determining whether changes in the plans or construction affect the liability under a contractor's bond

which referred to and made a part of its plans and specifications reserving to the owners the right to alter or modify the plans and specifications, the test is whether the changes "alter or modify the plans and specifications" of the building contracted to be erected, or do they amount to a contract for a different building.—Southern Surety Co. v. Nalle & Co., Tex.Civ.App., 231 S.W. 402.

#### Limitation to changes not substantially increasing price

(1) Where there is no provision in the contract for increasing the contract price to meet changes in the plans and specifications, a stipulation in the bond that any alteration in the plans between the owner and the contractor would not release the surety is applicable only to those changes which do not substantially increase the cost of the building beyond the amount that the owner by contract had agreed to pay.—Altman v. Sproles, 255 S.W. 573, 1092, 161 Ark. 128.

(2) A provision in a construction contract that there should be no changes or modifications in the plans unless agreed on and fixed in writing, signed by the owner and the contractor, could be waived as between the owner and the contractor, and such waiver as to a minor change would bind sureties under a provision in the bond that changes involving decreased expenditure or increased expenditure of less than one thousand dollars, or not involving any change in cost, could be made without the consent of the sureties.—Blackwood v. McCallum, 203 P. 758, 187 Cal. 655.

(3) In an action on a paid surety's building contract bond, the contract authorized aggregate changes not exceeding ten per cent of the penal sum of the bond without consent of the surety, "aggregate" meaning net increase in cost because of changes.—National Surety Co. v. Haley, 159 P. 292, 53 Okl. 263.

A slight departure from the plans of the work in a builder's contract, without the knowledge of the sureties on a bond, where alterations are authorized by the contract secured by the bond, will not release the surety from liability on the bond. Kan.—Risse v. Hopkins, 40 P. 904, 55 Kan. 518.

Okl.—American Surety Co. v. Scott & Co., 90 P. 7, 18 Okl. 264.

#### Changes not inconsistent with penalty for delay

Although the contract provides for a penalty for delay in complet-

the chimneys of a building, but making no change in the character or exterior dimensions of the building, although material alterations, do not discharge the contractor's surety where the contract permits the owner without restriction to make changes in the drawings and plans;<sup>57</sup> and any doubt as to whether changes made were such as were permitted by the contract must be resolved against the surety.<sup>58</sup> Generally speaking, provisions in the contract or specifications with respect to alterations are limited by conditions of the bond restricting the right of alteration.<sup>59</sup> Violation of a clause in the bond, to the effect that if the owner should make alteration in the plans increasing the cost by more than a specified amount he must notify the surety, does not release the surety.<sup>60</sup> It is a common practice for the parties to a building and construction contract, when stipulating for alterations, to provide that such changes shall be made only on the written agreement of the parties, or that the parties shall agree on the cost thereof before they shall be made; and, when a material alteration is made without the observance of such formalities, the question arises whether the surety is discharged.<sup>61</sup> The authorities are not agreed on the subject.<sup>62</sup> In some jurisdictions it is held that a failure to observe such formalities will discharge the surety,<sup>63</sup> except where the bond or contract expressly provides that no altera-

tions, or no alterations not exceeding certain limits, should release the surety of liability.<sup>64</sup> A doctrine to the contrary is adhered to in other jurisdictions, where it is held that such formalities are solely for the benefit of the owners and contractors, and may be waived by them without releasing the surety.<sup>65</sup> It has also been held that a change not made in accordance with the provisions of the contract governing the mode of making alterations is not an alteration within the meaning of a provision in the bond that the surety shall be discharged by an alteration made without his consent.<sup>66</sup>

### e. Changes Respecting Time

A contractor's surety will be discharged by a material change with respect to the time within which the work is to be completed.

Where a material change is made in the contract with respect to the time within which the work is to be completed, the surety is discharged.<sup>67</sup> The principal's failure to commence work on the date specified ordinarily does not constitute a substantial breach of his bond to the contractor.<sup>68</sup> Where, at the time a building contract is signed and the bond given, the contract is silent as to the time within which the building is to be completed, the insertion thereafter, without the surety's consent, of a provision limiting the time to a specified period dis-

ing the building, the making of material changes in the plans which are not shown to have required a longer time for construction does not discharge the surety.—Doyle v. Faust, 153 N.W. 725, 187 Mich. 108.

#### Alterations not within contemplation of parties

Iowa.—Lamson v. Maryland Casualty Co., 194 N.W. 70, 196 Iowa 1185.  
Tex.—Southern Surety Co. v. Nalle, Civ.App., 231 S.W. 402.

57. Mich.—Doyle v. Faust, 153 N.W. 725, 187 Mich. 108.

58. Mich.—Doyle v. Faust, supra.

59. Mo.—Neuwirth v. Moydell, 174 S.W. 206, 188 Mo.App. 467—Hax-Smith Furniture Co. v. Toll, 113 S.W. 650, 133 Mo.App. 404.

#### Release under bond by changes authorized by contract

Mo.—Utterson v. Elmore, 136 S.W. 9, 154 Mo.App. 646.

60. Mich.—Board of Education of City of Sault Ste. Marie v. Chaussee, 177 N.W. 975, 211 Mich. 61.

61. Cal.—Roberts v. Security Trust & Savings Bank, 238 P. 673, 196 Cal. 557.

62. Cal.—Roberts v. Security Trust & Savings Bank, supra.

Iowa.—Bartlett & Kling v. Illinois Surety Co., 119 N.W. 729, 142 Iowa 538.

63. U.S.—Edward G. Budd Mfg. Co. v. Aetna Casualty & Surety Co., D.C.Pa., 272 F. 775.

Mo.—Eldridge v. Fuhr, 59 Mo.App. 44.

Tex.—Loneragan v. San Antonio Loan & Trust Co., 104 S.W. 1061, 101 Tex. 63, 22 L.R.A., N.S., 364, 130 Am.S.R. 803, rehearing denied Thos. Loneragan & Co. v. San Antonio Loan & Trust Co., 106 S.W. 876, 101 Tex. 63, 22 L.R.A., N.S., 364, 130 Am.S.R. 803.

#### Oral instead of written alteration

A material change effected by oral agreement rather than in writing, as required by the contract, discharges the surety.—Burnes Estate v. Fidelity & Deposit Co. of Maryland, 70 S.W. 518, 96 Mo.App. 467—Eldridge v. Fuhr, 59 Mo.App. 44—Killoren v. Meehan, 55 Mo.App. 427.

64. Mo.—Kline Cloak & Coat Co. v. Morris, 240 S.W. 96, 293 Mo. 478.

65. Cal.—Roberts v. Security Trust & Savings Bank, 238 P. 673, 196 Cal. 557, explaining First Congregational Church of Christ in Corona v. Lowrey, 165 P. 440, 175 Cal. 124—Bowman v. Maryland Casualty Co., 263 P. 826, 88 Cal.App. 481. Dictum to contrary Wolf v. Aetna Indemnity Co. of Hartford, Conn., 126 P. 470, 163 Cal. 597.

Hawaii.—Hustace v. Davis, 28 Hawaii 606.

Ind.—State v. Lund, 139 N.E. 466, 80 Ind.App. 349.

Minn.—Milavetz v. Oberg, 164 N.W. 910, 138 Minn. 215—Hormel v. American Bonding Co., 128 N.W. 12, 112 Minn. 288, 33 L.R.A., N.S. 513—Brandrup v. Brazier, 127 N.W. 424, 111 Minn. 376.

N.Y.—Smith v. Molleson, 42 N.E. 669, 148 N.Y. 241—Village of Newark v. James F. Leary Const. Co., 194 N.Y.S. 212, 118 Misc. 622.

#### In Iowa

(1) The rule stated in the text has been followed.—Bartlett & Kling v. Illinois Surety Co., 119 N.W. 729, 142 Iowa 538.

(2) However, it has also been held that, where the owner materially changes the plans and has extra work done without a special agreement minuted on the original contract as therein required, the surety for the contractor is discharged.—Stillman v. Wickham, 76 N.W. 1008, 106 Iowa 597.

66. Md.—Aetna Indemnity Co. v. Waters, 73 A. 712, 110 Md. 673.

67. U.S.—Bopst v. Columbia Casualty Co., D.C.Md., 37 F.Supp. 32.

68. U.S.—American Surety Co. of New York v. Scott, C.C.A.Colo., 63 F.2d 961.

charges the surety.<sup>69</sup> However, where the bond provides that alterations of the contract by written agreement shall not release the surety, the surety is not released by an extension of time in writing.<sup>70</sup> Where the surety is jointly bound as principal for the performance of the contract of construction, he is not discharged by the fact that the obligee permits completion of the construction after the time specified in the contract.<sup>71</sup>

### § 127. — Particular Changes or Alterations

The question whether or not particular changes, such as changes affecting the compensation of the principal, amount of the obligation, interest, and other matters, will discharge the surety depends largely on whether the particular change is material or immaterial.

Applying the general rule as to the effect of material alterations, discussed supra § 124, to particular changes, alterations, or modifications other than those involved in contracts or obligations of officers, agents, or employees, discussed supra § 125, or in building and construction contracts, discussed supra § 126, it has been held that a surety is discharged by material alterations as to the place<sup>72</sup> or time of performance,<sup>73</sup> or date of the contract;<sup>74</sup> by alterations consisting of inserting or striking out

a material clause;<sup>75</sup> by inserting in a note a provision for payment of attorney's fees;<sup>76</sup> by making a joint note joint and several<sup>77</sup> or making a note negotiable;<sup>78</sup> by changing a note to a draft;<sup>79</sup> by affixing<sup>80</sup> or removing a seal;<sup>81</sup> by erasing the word "surety" after a signature;<sup>82</sup> by adding a name as witness to the signature of sureties;<sup>83</sup> by tearing from the bond a letter affixed thereto, which is a material part of the contract;<sup>84</sup> or by changing a loan from one of securities to one of money.<sup>85</sup> So, the release of the warranty of a chattel sold will discharge a surety for the purchase price,<sup>86</sup> as will the substitution of an article different in size or quality from that contracted for.<sup>87</sup>

On the other hand, various changes have been held not to constitute material alterations so as to discharge the surety,<sup>88</sup> as, for example, the addition of words more accurately describing matters mentioned in the contract,<sup>89</sup> an alteration in the affidavit of justification to the bond,<sup>90</sup> a change in the recital of the consideration for the obligation, where such change does not alter the legal effect of the instrument,<sup>91</sup> or the elimination from the principal's bond of void provisions.<sup>92</sup> The indorsement of an agreement extending the time of payment made on the back of a promissory note has

69. Okl.—*Evatt v. Dulaney*, 151 P. 607, 51 Okl. 81.

70. Neb.—*Burt County v. Lewis*, 141 N.W. 1032, 93 Neb. 690.

71. N.Y.—*U. S. v. Stratford*, 65 N.Y. S. 1051, 53 App.Div. 410.

Effect of extension of time as to principal debtors in relation of principal and surety inter se see infra § 166.

72. Ark.—*White River, etc., R. Co. v. Star Ranch, etc., Co.*, 91 S.W. 14, 77 Ark. 128.

50 C.J. p 127 note 92.

73. Tenn.—*Fidelity Bond & Mortgage Co. v. American Surety Co.*, 14 Tenn.App. 211.

50 C.J. p 127 note 93.

Alteration as to time of payment see infra § 133.

74. Ind.—*Brannum Lumber Co. v. Pickard*, 71 N.E. 676, 33 Ind.App. 484.

50 C.J. p 127 note 94.

75. Ind.—*Weir Plow Co. v. Walmsley*, 11 N.E. 232, 110 Ind. 242.

50 C.J. p 127 note 96.

76. Ohio.—*Kerr v. Iddings*, 6 Ohio Cir.Ct. 604, 3 Ohio Cir.Dec. 607.

77. Ind.—*Eckert v. Louis*, 84 Ind. 99.

78. N.H.—*Haines v. Dennett*, 11 N. H. 180.

79. Ga.—*Simons v. McDowell*, 53 S.E. 1031, 125 Ga. 203.

80. Mo.—*Fred Helm Brewing Co. v. Hazen*, 55 Mo.App. 277.

Affixing seal to tax collector's bond as releasing sureties see Taxation § 683.

81. Tenn.—*Organ v. Allison*, 9 Baxt. 459.

82. Iowa.—*Laub v. Paine*, 46 Iowa 550, 26 Am.R. 163.

2 C.J. p 1209 note 7 [b].

83. Ala.—*White Sewing Mach. Co. v. Saxon*, 25 So. 784, 121 Ala. 399.

50 C.J. p 127 note 5.

84. Pa.—*Allen Iron, etc., Co. v. Providence Iron, etc., Co.*, 63 Pa. Super. 459.

85. D.C.—*Baglin v. Southern Surety Co.*, 41 App.D.C. 530.

86. Ind.—*Crouch v. Parker*, 125 N. E. 453, 188 Ind. 680.

87. N.Y.—*Grant v. Smith*, 46 N.Y. 93.

50 C.J. p 127 note 9.

88. Change as to place

The insertion in a note, as the place of execution, of the place where the contract was actually made and in accordance with the laws of which the note is to be governed does not vary the terms of the contract as far as the surety is concerned, since it does not import to it any effect that it did not before possess.—*Houston v. Potts*, 64 N.C. 33.

Change of date

Where the time for performance

or payment is fixed, and it does not depend on the lapse of a particular period from the date of the instrument, the change of a day in the date is immaterial.—*Frather v. Zulauf*, 38 Ind. 155—2 C.J. p 1204 note 72.

89. Iowa.—*Starr v. Blatner*, 41 N. W. 41, 76 Iowa 356—*Rowley v. Jewett*, 9 N.W. 353, 56 Iowa 492.

Change of name

(1) Where a mistake in the designation of the payee in a promissory note is corrected by changing in the designation the Christian name, such correction is an immaterial alteration so as not to discharge a non-consenting surety.—*Derby v. Thrall*, 44 Vt. 413, 8 Am.R. 389.

(2) Where a note payable to a partnership was indorsed by a surety and afterward altered by the maker and payee, without the knowledge of the surety, by changing the name of the payee so as to make the note payable to the same partnership under a different name, the surety was not discharged as the change was immaterial.—*Arnold v. Jones*, 2 R.I. 345.

90. N.Y.—*Ludekens v. Pscherhofer*, 28 N.Y.S. 230, 76 Hun 548.

91. Ill.—*Gardiner v. Harback*, 21 Ill. 129.

92. Tex.—*Equitable Surety Co. v. Stemmons*, Civ.App., 239 S.W. 1037.

been held not to be an alteration of the note, but merely the making of a memorandum of the agreement to extend the time.<sup>93</sup>

**Compensation of principal.** A surety is not, as a general rule, discharged by a change in the compensation of his principal,<sup>94</sup> by a change in the rate of commissions allowed, which does not change the duties of the principal or vary the risk of the surety,<sup>95</sup> by a change from commissions to a salary,<sup>96</sup> by a change in the amount allowed him for expenses,<sup>97</sup> or because a guaranty of the payment of his commissions is withdrawn.<sup>98</sup> On the other hand, it has been held that a change from a salary to commissions will discharge a surety,<sup>99</sup> as will a reduction of the commissions to be received by the principal.<sup>1</sup> Where the compensation was an express term in the contract of the surety, so that a change therein amounts to a new agreement between the employer and the principal, a change in the amount of compensation<sup>2</sup> or a change from a salary to a commission<sup>3</sup> is held to be such a material alteration as will discharge the surety.

**Amount of obligation.** Where the amount of the principal's obligation is changed a surety is discharged,<sup>4</sup> but a mere reduction of the amount demanded of the debtor, where such reduction does

not alter the contractual obligation which is the subject of the suretyship, will not discharge a surety,<sup>5</sup> and it has been held that a reduction of the amount of a note by a bank to make it conform to the amount actually lent will not discharge the sureties thereon.<sup>6</sup> The creditor's unauthorized filling in of a blank in a surety bond with the amount of the existing indebtedness owing by the principal is a material alteration which discharges the surety.<sup>7</sup> A claim by the obligee in his pleading for a larger amount than is due him is not a change in the terms of the contract which will discharge the sureties from liability.<sup>8</sup> Where the bond of a principal is provided by different sureties executing separate bonds, each of which states the total amount of the principal's bond and designates the limits of the individual surety's liability, the fact that the aggregate sum for which all the sureties are bound exceeds the amount required is not a material alteration of the bond after its execution.<sup>9</sup>

**Interest.** A material alteration as to interest discharges the surety.<sup>10</sup> So, adding a clause to a note, calling for the payment of interest,<sup>11</sup> or changing the time when interest is to begin,<sup>12</sup> the time payable,<sup>13</sup> or the rate,<sup>14</sup> discharges the surety. On the other hand, an immaterial change as to interest will

93. Mo.—Moore v. Macon Sav. Bank, 22 Mo.App. 684.

94. Ind.—Wallace v. Spencer Exch. Bank, 26 N.E. 175, 126 Ind. 265. 50 C.J. p 124 note 29.

95. U.S.—Smith v. Addison, D.C., 22 F.Cas.No.12,998, 5 Cranch C.C. 623. 50 C.J. p 124 note 30.

96. N.Y.—Socialistic Co-op. Pub. Assoc. v. Hoffmann, 33 N.Y.S. 695, 12 Misc. 440.

97. Mo.—Hartford F. Ins. Co. v. Casey, 191 S.W. 1072, 196 Mo.App. 291. 50 C.J. p 124 note 32.

98. Mass.—Amicable Mut. L. Ins. Co. v. Sedgwick, 110 Mass. 163. N.Y.—Travelers' Ins. Co. v. Stiles, 81 N.Y.S. 664, 82 App.Div. 441.

99. Ill.—Despres v. Folz, 134 Ill. App. 111.

Mass.—Germania F. Ins. Co. v. Lange, 78 N.E. 746, 193 Mass. 67.

1. U.S.—Atlas Assur. Co. v. Lawrence, C.C.A.N.D., 34 F.2d 401.

2. N.Y.—American Casualty Co. v. Green, 70 N.E. 1094, 178 N.Y. 580—Bagley v. Clarke, 20 N.Y.Super. 94.

3. U.S.—Victor Sewing-Mach. Co. v. Langham, C.C.Wis., 28 F.Cas.No. 16,935, 9 Biss. 183.

Mass.—Germania F. Ins. Co. v. Lange, 78 N.E. 746, 193 Mass. 67.

4. U.S.—National Surety Co. v. Russell, C.C.A.Ind., 66 F.2d 104. Cal.—Shuey v. Bunney, 40 P.2d 859, 4 Cal.App.2d 408.

Idaho.—Mulkey v. Long, 47 P. 949, 5 Idaho 213.

50 C.J. p 125 note 60.

**Indorsement of fictitious credit** on a note pursuant to an arrangement between the maker and the payee, for the purpose of reducing the amount and perverting its use, is an alteration which will discharge the surety.—Johnson v. May, 76 Ind. 293.

5. N.J.—Vanderbeek v. Tierney-Connelly Constr. Co., 73 A. 480, 77 N.J.Law 664.

6. Ga.—Paulk v. Williams, 110 S.E. 632, 28 Ga.App. 183.

7. N.D.—J. R. Watkins Co. v. Keeney, 201 N.W. 833, 52 N.D. 280, 37 A.L.R. 1389.

8. Pa.—Nazareth Fdy., etc., Co. v. Marshall Mach., etc., Co., 102 A. 268, 258 Pa. 558.

9. Colo.—Owen v. U. S., 174 P. 816, 65 Colo. 159—McPhee v. U. S., 174 P. 808, 64 Colo. 421.

10. Wis.—Kilkelly v. Martin, 34 Wis. 525.

11. Ky.—Richards v. Cofer, 2 Ky. Op. 55.

50 C.J. p 126 note 67.

12. Ind.—Franklin L. Ins. Co. v. Courtney, 60 Ind. 134. 50 C.J. p 126 note 68.

13. N.Y.—Greenwich Sav. Bank v. Eckford Realty Corporation, 48 N.Y.S.2d 664, 268 App.Div. 195—Greenwich Sav. Bank v. Cabin Holding Corporation, 26 N.Y.S.2d 791, 176 Misc. 89—Dewey v. Reed, 40 Barb. 16.

50 C.J. p 126 note 69.

14. Minn.—Fillmore County v. Greenleaf, 83 N.W. 157, 80 Minn. 242.

50 C.J. p 126 note 70.

#### **Reduction of rate**

(1) An agreement between the creditor and principal permanently reducing the rate of interest discharges the surety.

Minn.—Fillmore County v. Greenleaf, 83 N.W. 157, 80 Minn. 242.

N.Y.—Greenwich Sav. Bank v. Eckford Realty Corporation, 48 N.Y.S.2d 664, 268 App.Div. 195—Greenwich Sav. Bank v. Cabin Holding Corporation, 26 N.Y.S.2d 791, 176 Misc. 89.

(2) However, where the creditor accepts a lower rate of interest as an act of leniency, the surety is not discharged.—Becker v. Faber, 19 N.E.2d 997, 280 N.Y. 146, 121 A.L.R. 1010, reargument denied Becker v. Intermann, 21 N.E.2d 216, 280 N.Y. 730.

not discharge the surety.<sup>15</sup> Thus, a collateral agreement for a changed rate,<sup>16</sup> or that the interest is to cease after a certain time,<sup>17</sup> has been held not to affect the liability of the surety, even though such independent agreement is indorsed on the note itself.<sup>18</sup> Also, an agreement which is not binding will not discharge a surety from liability,<sup>19</sup> so that sureties on a note will not be discharged by an increase in the rate of interest which was made on the fraudulent representations of the maker that the sureties had agreed to such an increase in consideration of an extension of time, unless the payee acts under the agreement after learning that the sureties refused to assent thereto.<sup>20</sup> It has been held that, where without fraudulent intent a clause calling for payment of interest was inserted in a note and subsequently erased, the sureties will not be discharged.<sup>21</sup> Sureties on a debt secured by a second mortgage will not be discharged by an increase in the rate of interest of the first mortgage.<sup>22</sup>

*Extension of credit.* Where the surety has stipulated that his liability shall not exceed a certain amount, an extension of credit to the principal for a larger amount is not an alteration which discharges the surety;<sup>23</sup> nor will a surety on a contract containing a continuing sale provision be released from liability because the creditor permitted the principal to become gradually more indebted without notice to the surety.<sup>24</sup> If the agreement between the creditor and the principal provided that the latter should not receive credit beyond that amount, an extension of credit beyond the amount specified discharges the surety;<sup>25</sup> and the increase of a credit opened by a bank in a current account in favor of a person, without the consent of the sure-

ty who guarantees such credit, completely releases the surety.<sup>26</sup>

*Acceleration of maturity.* As a general rule, sureties on notes due successively will be discharged by an agreement entered into between the payee and the principal, without their consent, that on non-payment at maturity of any of the notes all shall become due.<sup>27</sup> It has been held, however, that, where the maturity of notes due successively has been accelerated by a contract to which the surety who signed the notes is not a party, he is not discharged from liability inasmuch as the contract in no way affected his liability and he was only bound to pay on the dates specified in the notes.<sup>28</sup>

*Arbitration.* A surety for the performance of an award will be discharged by a substitution of arbitrators<sup>29</sup> or by the inclusion of matters in the award not embraced in the submission.<sup>30</sup> The submission of the question of damages in condemnation proceedings to arbitrators instead of to a jury will not discharge a surety of plaintiff,<sup>31</sup> provided the award is filed in court and judgment entered thereon;<sup>32</sup> but if the submission is treated as a common-law arbitration, to have effect irrespective of any action of the court, the surety will be discharged.<sup>33</sup>

*Particular changes with respect to leases.* A reduction in the rent to be paid under a lease is not alone sufficient to discharge the lessee's surety;<sup>34</sup> but reduction of the rent and shortening of the term of the lease have been held sufficient to discharge the surety,<sup>35</sup> as have changes which involve enlarging the premises and increasing the rent and burdens of the lessee,<sup>36</sup> diminishing or surrendering part of the premises,<sup>37</sup> or inserting provisions

15. Va.—Tremper v. Hemphill, 8 Leigh 623, 35 Va. 623, 31 Am.D. 673.

2 C.J. p 1210 note 20.

16. Mass.—Cambridge Sav. Bank v. Hyde, 131 Mass. 77, 41 Am.R. 193. 50 C.J. p 126 note 71.

17. Vt.—Wheeler v. Washburn, 24 Vt. 293.

18. N.Y.—Sanford v. Story, 38 N.Y. S. 104, 15 Misc. 536. 50 C.J. p 126 note 73.

19. Pa.—Schroyer v. Thompson, 105 A. 274, 262 Pa. 282, 2 A.L.R. 1567. 50 C.J. p 126 note 74.

20. Ark.—Waugh v. Cook, 167 S.W. 103, 118 Ark. 127.

21. Ohio.—McAlpin v. Clark, 11 Ohio Cir.Ct. 524, 5 Ohio Cir.Dec. 364.

22. N.Y.—Schwartz v. Smith, 128 N. Y.S. 1, 143 App.Div. 297, affirmed 101 N.E. 1121, 207 N.Y. 714.

23. U.S.—Fertig v. Bartles, C.C.N. J., 78 F. 866. 50 C.J. p 126 note 78.

24. Okl.—J. R. Watkins Co. v. Pruitt, 266 P. 770, 130 Okl. 231.

25. D.C.—Commercial Nat. Bank v. London, etc., Indemn. Co., 10 F.2d 641, 56 App.D.C. 76. 50 C.J. p 126 note 80.

26. Philippine.—Philippine Nat. Bank v. Veraguth, 50 Philippine 253.

27. Ala.—Bright v. Mack, 72 So. 433, 197 Ala. 214.

Kan.—Peru Plow, etc., Co. v. Ward, 41 P. 64, 1 Kan.App. 6.

28. Neb.—Hatfield v. Jakway, 170 N. W. 181, 102 Neb. 831.

29. Ala.—Mackay v. Dodge, 5 Ala. 388.

30. Mass.—Hubbell v. Bissell, 2 Allen 196.

31. Or.—Dowd v. American Surety Co., 139 P. 112, 69 Or. 413.

32. Or.—Dowd v. American Surety Co., 118 P. 198, 60 Or. 56.

33. Or.—Dowd v. American Surety Co., supra. 50 C.J. p 127 note 89.

34. N.Y.—Ullmann Realty Co. v. Hollander, 123 N.Y.S. 772, 66 Misc. 348, 67 Misc. 287.

*Reduction for part of term*

Reduction of the rent for the first part of the term will not release the surety from liability for rent accruing during the latter part of the term.—Ullmann Realty Co. v. Hollander, supra.

35. N.Y.—Revel Realty & Securities Co. v. Maxwell, 119 N.Y.S. 257, 65 Misc. 54.

36. N.Y.—New York v. Clark, 82 N. Y.S. 855, 84 App.Div. 388.

37. Ark.—Snodgrass v. Shader, 168 S.W. 567, 113 Ark. 429.

La.—Denouvion v. Hodgson, 23 La.

for surrender of the premises on the occurrence of certain contingencies.<sup>38</sup> The surrender of a lease by a sublessee will not release his surety from liability for the performance of the covenants of the sublease;<sup>39</sup> nor will the action of the sublessee in thereafter paying the rent to the parties who acquired the sublessor's interest in the premises.<sup>40</sup> Subletting will not of itself discharge the surety;<sup>41</sup> and the fact that the lessor occupied part of the premises for a portion of the term with the consent of the tenant, no change having been made in the contract, does not release the surety.<sup>42</sup>

### § 128. Rescission or Revocation of Principal Contract

Rescission or revocation of the principal contract ordinarily will release the surety from any further liability, but not from liability for obligations which have already become fixed thereunder.

The rescission or revocation of the principal contract by the parties thereto, will, as a general rule, discharge the surety from further liability,<sup>43</sup> but it will not release him from liability for obligations which have already become fixed thereunder.<sup>44</sup> A surety is not released by a notice of the obligee to the principal that he is going to cancel the principal contract where the latter, at his urgent request, is given further indulgence.<sup>45</sup> An intervention by the other party to the contract in aid of its execution,<sup>46</sup> or to protect his rights until its execution,<sup>47</sup> is not a rescission of the contract discharging the surety. A refusal of the other party to the contract to continue to be

bound by it after the principal's breach,<sup>48</sup> or a forfeiture of the contract based on the principal's breach of its terms,<sup>49</sup> does not operate to discharge the surety, especially where the contract provides for forfeiture on terms which assume the continuance of the principal's accrued indebtedness thereunder;<sup>50</sup> but the obligor cannot, after declaring a forfeiture, recover from the surety any damages predicated on affirmance rather than disaffirmance of the contract.<sup>51</sup> Even though the contract provides for termination at any time at the option of the obligee, if the obligee arbitrarily and illegally terminates the contract without any reason other than a desire to collect immediately from the surety, the surety is discharged.<sup>52</sup> Whether notice by the obligee to the principal constitutes rescission or an election to stand on the contract is a matter of intent.<sup>53</sup>

### § 129. Rescission or Revocation of Contract of Suretyship

Under certain circumstances, a surety may terminate the contract of suretyship, and thereby release himself from further liability.

A surety bound for an indefinite and contingent liability and not for a sum fixed and certain to become due may revoke and end his future liability where the guaranteed contract has no definite time to run; or where it has such definite time, but the principal has so violated it and is so in default that the creditor may safely and lawfully terminate it on account of the breach.<sup>54</sup> Where the surety-

Ann. 438—Penn v. Collins, 5 Rob. 213.

Mo.—Prior v. Kiso, 81 Mo. 241.

Tex.—Arnett v. Simpson, Civ.App., 235 S.W. 982, error dismissed.

Wis.—Nichols v. Palmer, 4 N.W. 137, 48 Wis. 110.

38. U.S.—Zeigler v. Hallahan, Pa., 131 F. 205, 66 C.C.A. 1.

39. Wash.—Brewster Cigar Co. v. Atwood, 182 P. 564, 107 Wash. 639.

40. Wash.—Brewster Cigar Co. v. Atwood, *supra*.

41. Iowa.—Johnson v. Bernstein, 155 N.W. 266, 178 Iowa 1052.

N.Y.—Conklin v. Cooper, 46 Hun 680, 12 N.Y.St. 632.

#### Principal obligation unchanged

An agreement by the lessor with the lessee to rent the premises for the latter and at his risk and give him the benefit of all the rent received, qualified by the stipulation that the agreement should not be construed as impairing or altering the lease, etc., makes no change in the terms of the lease or the obligations of the tenants.—Morgan v.

Smith, 7 Hun 244, affirmed 70 N.Y. 537.

42. Pa.—Medary v. Cathers, 28 A. 1012, 161 Pa. 87.

Tenn.—Sutherland v. Shelton, 12 Helsk. 374.

43. Cal.—Pacific Coast Engineering Co. v. Detroit Fidelity & Surety Co., 5 P.2d 888, 214 Cal. 384.

50 C.J. p 94 note 50.

Rescission or revocation of suretyship contract see *infra* § 129.

44. Ga.—J. R. Watkins Co. v. Brewer, 36 S.E.2d 442, 73 Ga.App. 331.

50 C.J. p 94 note 53.

45. Tex.—Southern Surety Co. v. American Const. Co., Com.App., 36 S.W.2d 212.

46. Md.—Ætna Indemn. Co. v. Baltimore, etc., R. Co., 84 A. 166, 114 Md. 523.

Wash.—Manhattan v. U. S. Fidelity, etc. Co., 137 P. 1003, 77 Wash. 405.

47. Ga.—Gay v. Carpenter, 134 S.E. 803, 35 Ga.App. 768.

48. N.Y.—Keene v. Newark Watch Case Material Co., 98 N.Y.S. 68, 112

App.Div. 7, affirmed 81 N.E. 1167, 188 N.Y. 598.

50 C.J. p 94 note 57.

49. Cal.—Metropolitan Casualty Ins. Co. of New York v. Stone, 12 P.2d 665, 124 Cal.App. 430.

50 C.J. p 94 note 58.

50. Pa.—Mulert v. Pittsburg Real Est. Trust Co., 76 A. 848, 226 Pa. 602.

Tex.—Southern Surety Co. v. American Const. Co., Com.App., 36 S.W. 2d 212.

51. Iowa.—Smith v. Tullis, 259 N.W. 202, 219 Iowa 712.

52. Mich.—J. R. Watkins Co. v. Rich, 235 N.W. 845, 254 Mich. 82.

Prevention of performance by obligee generally as discharging surety see *infra* § 152.

53. Cal.—Pacific Coast Engineering Co. v. Detroit Fidelity & Surety Co., 5 P.2d 888, 214 Cal. 384.

54. N.Y.—Emery v. Baltz, 94 N.Y. 408.

Okl.—Corpus Juris quoted in Central Surety & Insurance Corporation v. Richardson, 80 P.2d 663, 668, 183

Okl. 38, 118 A.L.R. 1252.

ship contract is for a prescribed period, the surety cannot terminate the relationship before the end of that period without the principal's consent,<sup>55</sup> unless the principal has been guilty of some default or dereliction of duty.<sup>56</sup>

The surety's right to terminate his liability by notice is discussed *infra* § 131.

### § 130. Spoliation of Principal Contract

Accidental mutilation or destruction of the original contract, or alteration thereof by a stranger, ordinarily will not discharge the surety.

A physical destruction of the original contract by a stranger,<sup>57</sup> or an accidental mutilation or destruction,<sup>58</sup> or a destruction or mutilation by the guardian of the creditor,<sup>59</sup> or an alteration by a stranger,<sup>60</sup> will not discharge the sureties. However, where the alteration so transforms the obligations as to increase the liability of the obligors, the obligee cannot recover according to the tenor of the instrument as so transformed, since the character of the instrument has been changed and is not the instrument executed by the obligor or surety.<sup>61</sup>

### § 131. Surety's Notice to Terminate

In a proper case, a surety may terminate the contract of suretyship by sufficient notice to such effect and thereby release himself from further liability; and such right sometimes exists by reason of statutory or contractual provisions.

Apart from contractual provisions to such effect,

if the surety's liability is to arise or is to be increased by future acts of the obligee or creditor, and no time has been prescribed in the contract, the surety can terminate his liability as to the future by notifying the creditor or obligee that he withdraws,<sup>62</sup> but he remains liable for any rights the creditor or obligee previously may have acquired,<sup>63</sup> and, if the creditor or obligee suffers further losses after the receipt of the notice in spite of his diligent efforts to protect himself, the sureties are not entitled to have their liability thus limited to the defaults before the notice was received.<sup>64</sup> On the other hand, if the consideration for the surety's contract has been executed fully, as in the case of a bond for the performance of services,<sup>65</sup> or in the case of an official bond, as discussed generally in Officers § 165, such as the bond of a tax collector,<sup>66</sup> the surety cannot terminate his liability by notice unless the creditor assents thereto.<sup>67</sup> Where a lease is from year to year or from month to month, a surety thereon may, by notice, terminate his liability as to rent accruing by reason of a hold-over clause,<sup>68</sup> but he cannot, by notice, terminate his contract during its continuance.<sup>69</sup>

*Statutory provisions.* Where the right to terminate his contract is given to a surety by statute, it is essential, in order that the surety be released, that he comply strictly with the law.<sup>70</sup> A right given to sureties by statute to terminate their contracts must be deemed to be intended to include surety companies, where the statute does not ex-

55. Okl.—*Corpus Juris* quoted in *Central Surety & Ins. Corporation v. Richardson*, 80 P.2d 663, 668, 183 Okl. 38, 118 A.L.R. 1252. 50 C.J. p 94 note 62.

56. N.Y.—*Lawyers' Surety Co. v. Ayraut*, 150 N.Y.S. 800, 165 App. Div. 254.

Okl.—*Corpus Juris* quoted in *Central Surety & Ins. Corporation v. Richardson*, 80 P.2d 663, 668, 183 Okl. 38, 118 A.L.R. 1252.

57. Kan.—*McLennan v. Wellington*, 30 P. 183, 48 Kan. 756.

58. Pa.—*Rhoads v. Frederick*, 8 Watts 448. 50 C.J. p 128 note 22.

#### Alteration of "duplicates"

With respect to release of surety because of alteration of so-called "duplicate notes" delivered to creditor by principal when original notes signed by surety were accidentally destroyed, such new notes were not duplicates in the sense of instruments having the same legal effect and validity as originals, but were in fact intended merely to be used as copies or evidence, as nearly as

possible, of the notes which had been destroyed.—*Nickle v. Lewis*, 272 N. W. 525.

59. Fla.—*Williams v. Moseley*, 2 Fla. 304. 50 C.J. p 128 note 23.

60. Ky.—*Corpus Juris* cited in *Phillips v. Board of Education of Pineville*, 140 S.W.2d 819, 822, 283 Ky. 173.

50 C.J. p 128 note 24.

Alteration by a county official having the custody of the instrument is an alteration by a stranger within the rule stated in the text.—*Medlin v. Platte County*, 8 Mo. 235, 40 Am. D. 135.

61. Ky.—*Phillips v. Board of Education of Pineville*, 140 S.W.2d 819, 283 Ky. 173—*Hall v. Cannoy*, 220 S.W. 737, 187 Ky. 718—*Lee v. Alexander*, 9 B.Mon. 25, 48 Am.D. 412.

62. U.S.—*Continental Casualty Co. v. U. S., for Use of Ainsworth*, C. C.A.111, 68 F.2d 577, certiorari denied 54 S.Ct. 774, 292 U.S. 641, 78 L.Ed. 1493, rehearing denied 54 S. Ct. 862, 292 U.S. 615, 78 L.Ed. 1474. Mich.—*Corpus Juris* cited in *Law-*

*rence v. American Surety Co. of New York*, 249 N.W. 3, 6, 263 Mich. 586, rehearing denied 250 N.W. 295, 264 Mich. 516, 88 A.L.R. 535. 50 C.J. p 94 note 64.

63. N.Y.—*Bostwick v. Van Voorhis*, 91 N.Y. 353.

50 C.J. p 94 note 65.

64. Vt.—*Ricketson v. Lizotte*, 98 A. 801, 90 Vt. 386.

65. Ala.—*Saint v. Wheeler, etc., Mfg. Co.*, 10 So. 539, 95 Ala. 362, 36 Am.S.R. 210.

50 C.J. p 94 note 68.

66. Me.—*Lewiston v. Gagne*, 36 A. 629, 89 Me. 395, 56 Am.S.R. 432.

67. Ala.—*Saint v. Wheeler, etc., Mfg. Co.*, 10 So. 539, 95 Ala. 362, 36 Am.S.R. 210.

68. Pa.—*Appeal of Pleasanton*, 75 Pa. 344—*Desilver's Est.*, 9 Phila. 302.

69. Pa.—*Coe v. Vogdes*, 71 Pa. 383 —*Traegar v. Hartnett*, 15 Wkly. N.C. 300.

70. S.C.—*Bolen v. National Surety Co.*, 94 S.E. 1049, 108 S.C. 403. 50 C.J. p 95 note 76.



pressly except them, and, at the time of its enactment, surety companies were expressly authorized to act as sureties.<sup>71</sup> The surety company, by accepting a contract of indemnity from the principal which expressly provides that such acceptance shall not limit or abridge any right or remedy which the surety may otherwise have, does not waive the statutory right to terminate the contract;<sup>72</sup> nor does the mere fact that the company has received compensation for a period beyond the date of a motion for discharge from further liability prevent the company from obtaining the statutory relief.<sup>73</sup>

**Contractual provisions.** A surety may expressly reserve in his contract the right to terminate it by notice,<sup>74</sup> and the same is true as to the right of the creditor or obligee to annul the suretyship contract by notice.<sup>75</sup> Where the contract gives the creditor or obligee the right to annul it by notice, and notice is given, the surety remains liable for all breaches prior to such notice,<sup>76</sup> but, where the bond also contains a provision for completing the transaction at the expense of the principal and surety, the surety is liable thereunder even after the notice.<sup>77</sup> Notice by the surety cannot operate instantly, but the right must be exercised reasonably.<sup>78</sup>

**Sufficiency of notice.** The notice requisite to terminate future liability must be definite and un-

equivocal,<sup>79</sup> and it must be received by the creditor or obligee,<sup>80</sup> although notice to an agent has been held sufficient.<sup>81</sup> Formal notice by the surety is not required unless stipulated for in the contract;<sup>82</sup> and even if it is so stipulated for, it may be waived.<sup>83</sup>

### § 132. Transfer of Subject Matter and Security in General

The transfer of property by the principal ordinarily does not of itself discharge the surety.

The transfer of property by the principal does not discharge the surety,<sup>84</sup> especially where the principal is not released.<sup>85</sup> Where a builder gives completion bonds providing that the buildings should be fully constructed and completed in accordance with specifications, but the obligee fails to advance the promised funds to the builder, the builder is excused from performance, with respect to the right of an assignee of the bonds to recover from the surety.<sup>86</sup>

### § 133. Departure from Provisions as to Payment

- a. In general
- b. Building and construction contracts

#### a. In General

A material alteration of, or departure from, the pro-

71. N.Y.—In re Thurber, 56 N.E. 631, 162 N.Y. 244.

72. N.Y.—In re Thurber, *supra*.

73. N.Y.—Matter of U. S. Fidelity, etc., Co., 98 N.Y.S. 217, 50 Misc. 147.

74. U.S.—Gass v. Stinson, C.C. Mass., 10 F.Cas.No.5,260, 2 Sumn. 453.

50 C.J. p 95 note 32.

#### Principal's right to terminate

Reservation by indemnity company in a contract and bond of the right to cancel the bond is valid and does not make the contract of suretyship terminable at the will of the principal.—Thomas v. Western Indemnity Co., 246 S.W. 345, 112 Tex. 132, conformed to 278 S.W. 265.

75. D.C.—U. S. v. Maloney, 4 App. D.C. 505.

76. Pa.—Central Penn Nat. Bank of Philadelphia v. Tinkler, 40 A.2d 389, 351 Pa. 123.  
50 C.J. p 95 note 84.

77. Mass.—Newton v. Devlin, 134 Mass. 490.

78. Vt.—Ricketson v. Lizotte, 98 A. 801, 90 Vt. 386.  
50 C.J. p 95 note 86.

79. Wis.—Bremer v. Rufener, 202 N. W. 206, 186 Wis. 195.  
50 C.J. p 95 note 87.

80. Colo.—American Surety Co. v. Morris, 242 P. 983, 78 Colo. 504.

81. Cal.—White Sewing Mach. Co. v. Courtney, 75 P. 296, 141 Cal. 674.

82. Mich.—Union Cent. L. Ins. Co. v. Smith, 63 N.W. 438, 105 Mich. 353.

83. U.S.—Gass v. Stinson, C.C. Mass., 10 F.Cas.No.5,260, 2 Sumn. 453.

84. U.S.—Gass v. Stinson, *supra*.

85. U.S.—Hartford Accident & Indemnity Co. v. Federal Bond & Mortgage Co., C.C.A.Minn., 59 F.2d 950.

#### Second assignment

In a materialman's action against a bonding company on a bond to secure a street paving contract, where it appeared that the contractors had assigned certain monthly payments to the paving company, the fact that the contractors subsequently assigned such payments to a third person did not release the bonding company, the mere act of assignment constituting no actionable wrong to the company in the absence of a showing of collection by the third

person.—Mack Mfg. Co. v. Massachusetts Bonding & Insurance Co., 102 S.E. 499, 114 S.C. 207.

86. U.S.—Hartford Accident & Indemnity Co. v. Federal Bond & Mortgage Co., C.C.A.Minn., 59 F. 2d 950.

87. U.S.—Provident Trust Co. of Philadelphia v. Metropolitan Cas. Ins. Co. of N. Y., C.C.A.Pa., 152 F.2d 875, certiorari denied 66 S.Ct. 810, two cases, 327 U.S. 789, 90 L.Ed. 1015.

#### Assignee or obligee

Fact that assignments of completion bonds and consents to assignments were executed before delivery of bonds did not amount to a technical flaw in the assignments, where the delivery of bonds preceded delivery of assignments to assignee, but even if assignments had become effective before bonds were delivered, the bonds would still have been assignable as future interest, and, where builder furnished completion bonds naming lender as obligee and builder and surety consented to assignments, the purported assignee was not a direct obligee but his rights were derived by assignment.—Provident Trust Co. of Philadelphia v. Metropolitan Cas. Ins. Co. of N. Y., *supra*.

visions governing payment under the original contract ordinarily will discharge the surety.

A payment under a contract made in violation of its terms,<sup>87</sup> as, for example, after the contract has been abandoned,<sup>88</sup> discharges the surety where it is made without his consent; the extent of the discharge is limited, in some cases, to the amount of the unauthorized payments.<sup>89</sup> The rule, however, has been held not to apply in the case of payments made under mistake of fact<sup>90</sup> or under circumstances not increasing the surety's risk or liability,<sup>91</sup> or where the surety has acquiesced therein,<sup>92</sup> or, as discussed *infra* § 136, has otherwise waived his rights. The surety is discharged by material alterations changing the medium or manner of payment<sup>93</sup> or the amount of particular payments.<sup>94</sup> A surety cannot successfully claim to be discharged by reason of alteration of, or departure from, the provisions of the contract respecting payment where there has in fact been no such alteration or departure.<sup>95</sup>

**Restrictions imposed by statute.** Where a statute places restrictions on payments under contracts of a specified kind, payments made in violation of the statute will discharge the surety;<sup>96</sup> but a sure-

ty will not be discharged by a payment to a person having a claim especially protected by statute.<sup>97</sup>

### b. Building and Construction Contracts

Material alterations of, or departures from, the terms of a building or construction contract respecting payment ordinarily will discharge the surety; according to some authorities, such discharge is only *pro tanto*, that is, only to the extent to which the surety is injured or prejudiced.

While immaterial changes or departures from the terms of the contract with respect to payment do not discharge the surety,<sup>98</sup> subject to the limitations and qualifications of the rule respecting the effects of alteration or modification of building contracts on the surety's liability generally, as discussed *supra* § 126, material changes or departures from the terms of the contract respecting payment will discharge the surety<sup>99</sup> if made without his consent;<sup>1</sup> and it is immaterial that one of the effects of the change is the elimination of a provision that would have rendered the contract unenforceable.<sup>2</sup> Thus, the surety will be discharged where there is a material alteration or departure consisting of payments made prematurely or in excess of the amount due at the time,<sup>3</sup> or in the ab-

87. Ind.—Detroit Fidelity & Surety Co. v. Bushong, 175 N.E. 683, 96 Ind.App. 352.

50 C.J. p 127 note 93, p 165 note 57.

88. Wis.—Platteville Joint School Dist. No. 4 v. Bailey-Marsh Co., 194 N.W. 171, 181 Wis. 202.

89. Tex.—Grant v. Alfalfa Lumber Co., Civ.App., 177 S.W. 536.

90. Cal.—Dunne Inv. Co. v. Empire State Surety Co., 150 P. 405, 411, 27 Cal.App. 208.

50 C.J. p 165 note 61.

91. N.Y.—New York Municipal R. Corp. v. Intercontinental Constr. Corp., 189 N.Y.S. 621, 115 Misc. 341, affirmed 197 N.Y.S. 933, 204 App.Div. 896, affirmed 143 N.E. 728, 237 N.Y. 526.

50 C.J. p 165 note 62.

92. Wash.—Williams v. Pacific Coast Casualty Co., 140 P. 74, 79 Wash. 164, Ann.Cas.1915C 678.

50 C.J. p 165 note 63.

93. Conn.—Phoenix Mut. L. Ins. Co. v. Holloway, 51 Conn. 310, 50 Am. R. 21.

50 C.J. p 124 note 33—p 127 note 95.

94. Conn.—Rowan v. Sharps' Rifle Mfg. Co., 33 Conn. 1.

50 C.J. p 125 note 61.

95. Ala.—Maryland Casualty Co. v. Cunningham, 173 So. 506, 234 Ala. 80.

96. Cal.—Silberstein v. Kitrick, 169 P. 250, 35 Cal.App. 91.

Tex.—Kelsay Lumber Co. v. Rotsky, Civ.App., 178 S.W. 837.

97. Cal.—Hubbard v. Jurian, 170 P. 1093, 35 Cal.App. 757.

98. U.S.—Maryland Casualty Co. v. Dunlap, C.C.A.Mass., 68 F.2d 289. Conn.—City of New Haven v. National Steam Economizer Co., 65 A. 959, 79 Conn. 482.

Minn.—McLeod v. National Surety Co., 158 N.W. 619, 133 Minn. 351.

Pa.—Haine v. Dambach, 4 Pa.Co. 633.

Tex.—Southern Surety Co. v. American Const. Co., Com.App., 36 S. W.2d 212.

99. U.S.—Anthony P. Miller, Inc., v. Needham, D.C.Pa., 35 F.Supp. 332, reversed on other grounds, C. C.A., 122 F.2d 710.

Ga.—Massachusetts Bonding, etc. Co. v. Realty Trust Co., 73 S.C. 1053, 137 Ga. 693—Mauney v. Hartford Accident & Indemnity Co., 23 S.E.2d 490, 68 Ga.App. 515—Hartford Accident & Indemnity Co. v. Mauney, 17 S.E.2d 885, 66 Ga.App. 403.

Ind.—Detroit Fidelity & Surety Co. v. Bushong, 175 N.E. 683, 96 Ind. App. 352—Hubbard v. Reilly, 98 N.E. 886, 51 Ind.App. 19.

N.Y.—American Metal Ceiling Co. v. New Hyde Park Fire Dist., 154 N. Y.S. 661, 91 Misc. 236, modified on other grounds 159 N.Y.S. 648, 172 App.Div. 774.

Tex.—Bullard v. Norton, 182 S.W. 668, 107 Tex. 571—Mingus v. Employers' Liability Assur. Co., Com. App., 65 S.W.2d 292—Wright v.

McAdams Lumber Co., Com.App., 234 S.W. 878—Porter v. Hope, Civ. App., 279 S.W. 535—Tennessee Valley School, Common School Dist. No. 3, Cottle County, v. U. S. Fidelity & Guaranty Co., Civ.App., 247 S.W. 595.

9 C.J. p 861 note 42.

1. Ga.—Blackburn v. Morel, 79 S.E. 492, 13 Ga.App. 516.

2. Tex.—Tennessee Valley School v. U. S. Fidelity, etc., Co., Civ.App., 247 S.W. 595.

3. U.S.—Anthony P. Miller, Inc., v. Needham, D.C.Pa., 35 F.Supp. 332, reversed on other grounds, C.C.A., 122 F.2d 710.

Ind.—Detroit Fidelity & Surety Co. v. Bushong, 175 N.E. 683, 96 Ind. App. 352.

N.Y.—St. John's College, Fordham v. Aetna Indemn. Co., 94 N.E. 994, 201 N.Y. 335.

Pa.—Fitzpatrick v. McAndrews, 2 Pa. Dist. 713, 12 Pa.Co. 353—Pennsylvania Supply Co. v. National Casualty Co., Com.Pl., 51 Dauph. Co. 390.

Tenn.—Town of Franklin v. Hermitage Engineering Co., 12 Tenn.App. 434.

Tex.—Mingus v. Employers' Liability Assur. Co., Com.App., 65 S.W.2d 292.

Va.—American Surety Co. v. Plank & Whitesett, 165 S.E. 660, 159 Va. C.J.

9 C.J. p 861 note 42—50 C.J. p 165 note 62.

sence of the receipts for materials and labor required by the contract,<sup>4</sup> or by a material change increasing the amount to be paid the contractor.<sup>5</sup>

It is generally held that payment to the principal without certificates or estimates of the architect or engineer as required by the contract<sup>6</sup> or in excess of the amounts due on the estimates<sup>7</sup> discharges the surety. It has been held, however, that a provision for payments on certificates of the superintending architect is only for the benefit of the owner, which benefit may be waived by him,<sup>8</sup> and that a payment without a certificate does not release the surety, if it is actually due at the time, or otherwise does not prejudice the surety,<sup>9</sup> as where the payments are actually used to pay for labor and materials in the building.<sup>10</sup> The surety is not discharged where the owner pays on certi-

icates of the architect in accordance with the terms of the contract, although it later develops that the certificates were for greater sums than were actually due.<sup>11</sup>

The payment to the builder, without the surety's consent, of a percentage that, under the bond or the building contract, should be reserved until the completion of the work for which the bond was given, discharges the sureties;<sup>12</sup> and this has also been held to be true where the owner does not comply with a statutory provision requiring him to retain a certain percentage of the contract price for the payment of artisans and mechanics,<sup>13</sup> but it has been held that such a requirement of the bond does not apply to payments made, after the contractor's default, in completing the building and in discharging liens.<sup>14</sup> Where the owner has

**Effect of premature payment on liability of surety generally see infra § 134.**

#### **Surety's consent to payment**

Premature payment will not release surety, where made with surety's knowledge and acquiescence, or at his request.—*Federal Surety Co. v. White*, 295 P. 281, 88 Colo. 238.

#### **Necessity of injury to surety**

(1) If the payment is one on which the obligee bases his right of recovery, so that making it prematurely constitutes it an alteration of the obligation, the surety is released without any showing of injury, but, if the payment is one on which the obligee is not relying for recovery, the obligee cannot recover unless the payment has injuriously affected his rights.—*Pacific Coast Engineering Co. v. Detroit Fidelity & Surety Co.*, 5 P.2d 888, 214 Cal. 384.

(2) So, the owner's alleged violation of the contract in making premature payments to the contractor did not release the surety from liability for damages resulting from the use of faulty workmanship and material where the contract provided that neither the final certificate nor payment should relieve the contractor of responsibility for faulty materials or workmanship.—*American Employers' Ins. Co. v. Huddleston*, Civ.App., 39 S.W.2d 952, affirmed 70 S.W.2d 696, 123 Tex. 285.

#### **Materiality of premature payment**

In order to release the surety, the overpayment, that is, the amount that is paid in excess of the amount due at the time, must be of such an amount relative to the whole contract, or to that part of it left undone, that it can be said that a material incentive to the completion of the contract has been done away with to the detriment of the surety.

—*Federal Surety Co. v. White*, 295 P. 281, 88 Colo. 238.

#### **Deduction of sums owing to obligee**

Obligee in bond must deduct from payments to principal any sum owing obligee, or surety will be discharged.—*City of Tacoma v. Peterson*, 25 P.2d 1034, 174 Wash. 621.

4. Tex.—*Aetna Casualty & Surety Co. v. Russell*, Com.App., 24 S.W.2d 385, rehearing denied 33 S.W.2d 189.

5. Cal.—*Alcatraz Masonic Hall Assoc. v. U. S. Fidelity, etc., Co.*, 85 P. 156, 3 Cal.App. 338.  
9 C.J. p 861 note 45.

6. Iowa.—*Getchell Lumber, etc., Co. v. National Surety Co.*, 100 N.W. 556, 124 Iowa 617.

Okl.—*Evvatt v. Dulaney*, 151 P. 607, 51 Okl. 81.

9 C.J. p 861 note 44.

**More informalities in the certificates or estimates on which payments are based will not release the surety, in the absence of actual prejudice.**—*Lackland v. Renshaw*, 165 S. W. 314, 256 Mo. 133—9 C.J. p 861 note 44 [d].

7. Minn.—*Fitger Brewing Co. v. American Bonding Co.*, 149 N.W. 539, 127 Minn. 330.  
9 C.J. p 861 note 49.

8. Cal.—*Dunne Inv. Co. v. Empire State Surety*, 150 P. 405, 27 Cal. App. 208.

9 C.J. p 862 note 50.

9. Tex.—*Park Presbyterian Church of Italy v. William Cameron & Co.*, Com.App., 58 S.W.2d 63.  
9 C.J. p 862 note 50.

10. Mo.—*Lackland v. Renshaw*, 165 S.W. 314, 256 Mo. 133.

N.Y.—*Hastings Land Impr. Co. v. Empire State Surety Co.*, 141 N.Y. S. 417, 156 App.Div. 258, affirmed 109 N.E. 1073, 215 N.Y. 653.

11. Conn.—*City of New Haven v.*

*Nat. Steam Economizer Co.*, 65 A. 959, 79 Conn. 482.

#### **Architect's certificate is conclusive**

on the surety in the absence of any claim of bad faith or fraud on the part of the architect.—*Texas Fidelity & Bonding Co. v. Rosenberg Independent School Dist.*, Tex.Civ.App., 195 S.W. 298.

12. U.S.—*Maryland Casualty Co. v. Portland Const. Co.*, C.C.A.Vt., 71 F.2d 658—*Fort Worth Independent School Dist. v. Aetna Casualty & Surety Co.*, C.C.A.Tex., 48 F.2d 1, 77 A.L.R. 222, certiorari denied 52 S.Ct. 24, 284 U.S. 645, 76 L.Ed. 548.

Ala.—*Montgomery First Nat. Bank v. Maryland Fidelity, etc., Co.*, 40 So. 415, 145 Ala. 335, 117 Am.S.R. 45, 5 L.R.A., N.S., 418, 8 Ann.Cas. 241, overruling *Fidelity & Deposit Co. of Maryland v. Robertson*, 34 So. 933, 136 Ala. 379.

Ill.—*Chicago v. Agnew*, 182 Ill.App. 499.

Ky.—*Inland Navigation Co. v. American Surety Co.*, 227 S.W. 809, 190 Ky. 504.

N.M.—*Lyons v. Kitchell*, 134 P. 213, 18 N.M. 82.

N.Y.—*St. John's College, Fordham v. Aetna Indemn. Co.*, 94 N.E. 994, 201 N.Y. 335.

Tenn.—*Little & Dean v. Fidelity & Deposit Co.*, 3 Tenn.App. 157.

Tex.—*Mingus v. Employers' Liability Assur. Co.*, Com.App., 65 S.W. 2d 292—*Aetna Casualty & Surety Co. v. Russell*, Com.App., 24 S.W.2d 385, rehearing denied 33 S.W.2d 189.

Va.—*American Surety Co. v. Plank & Whitsett*, 165 S.E. 660, 159 Va. 1.

9 C.J. p 862 note 52.

13. Tex.—*Kelsay Lumber Co. v. Rotsky*, Civ.App., 178 S.W. 827.

14. Ark.—*Federal Union Surety Co.*

an option rather than a duty to retain a percentage of the contract price he may waive such privilege without affecting the liability of the surety.<sup>15</sup>

The rule that an unauthorized or premature payment to the contractor discharges the surety has been held to apply, even though such payment is necessary to enable the contractor to complete the work;<sup>16</sup> but there is some authority to the contrary,<sup>17</sup> since the rule is sometimes laid down that a surety cannot complain of an advance made while the work is in progress which assists the contractor to perform and which is deducted at or before the time of the last payment.<sup>18</sup> In conformity with the view, as discussed supra § 126, that the surety will not be discharged by alterations of, or departures from, provisions of the contract unless the surety is injured thereby, it is held that the surety will not be discharged by premature payments to the contractor, where the money paid has been entirely applied to payment of claims for labor and materials for which the surety is liable under the bond.<sup>19</sup>

Where the contract guaranteed by the surety is silent as to the time of payment, a change respect-

ing the time for payment from the terms of a collateral agreement between the contractor and the creditor does not discharge the surety.<sup>20</sup> Retention, by the owner, of money owing to the contractor, to pay debts of the latter, does not discharge the sureties;<sup>21</sup> nor are the sureties discharged because payment was made by the owner to the principal while there were claims unpaid, in the absence of any term in the contract forbidding it,<sup>22</sup> or by other payments which do not prejudice the sureties' interests.<sup>23</sup>

The surety cannot successfully claim to be discharged on the ground of alteration of, or departure from, the provisions of the contract with respect to payment where there has been no such alteration or departure and the owner or other obligee has acted in conformity with the contract,<sup>24</sup> or where the bond expressly provides that such alteration or departure shall not release the surety.<sup>25</sup> However, the fact that the contract provides for changes in the structure does not authorize a change as to the method and amount of the payments without the consent of the sureties.<sup>26</sup> Premature pay-

v. McGuire, 163 S.W. 1171, 111 Ark. 373.

N.Y.—St. John's College, Fordham v. Aetna Indemn. Co., 94 N.E. 994, 201 N.Y. 335.

#### Reputation by surety

The provision of subcontract for retention of ten per cent of monthly architect's estimates was a security for performance, and, when subcontractor became unable to perform and his surety renounced his obligation, the owner was entitled to use security for his own and surety's benefit in completing contract, and such use of the reserved percentages did not discharge surety.—Knutson v. Metallic Slab Form Co., C.C.A.Tex., 130 F.2d 200.

15. Ark.—Marree v. Ingle, 61 S.W. 369, 69 Ark. 126.  
9 C.J. p 863 note 63.

16. Tex.—McKnight v. Lange Mfg. Co., Civ.App., 155 S.W. 977.

17. Pa.—Phillips v. American Liability & Surety Co., 162 A. 435, 309 Pa. 1.

18. Wash.—City of Tacoma v. Peterson, 25 P.2d 1034, 174 Wash. 621.

19. Ky.—American Surety Co. of New York v. Noe, 53 S.W.2d 178, 245 Ky. 42.

Tex.—Norton v. Bridge, Civ.App., 144 S.W.2d 959.

20. Tex.—Southern Surety Co. v. Klein, Civ.App., 278 S.W. 527.

21. Wash.—De Mattos v. Jordan, 46 P. 402, 15 Wash. 378.  
9 C.J. p 862 note 56.

#### Retention of more than contractual minimum

Where a surety bond provided for a retention of part of the contract price, not less than ten per cent, and the contract did not stipulate any amount to be retained, the retention by the obligee of five thousand dollars out of seventeen thousand seven hundred fifty dollars did not release the surety.—Maryland Casualty Co. v. Town of Wellston, 148 P. 691, 47 Okl. 417.

22. Fla.—Columbia Casualty Co. v. Barry, 149 So. 567, 111 Fla. 517.  
9 C.J. p 862 note 57.

#### Payment after cautionary notice

Owner of building, on subcontractor's service of cautionary notices, was not obligated to withhold moneys due contractor to cover payment of subcontractor's claims, where contract expressly provided that on failure of contractor to pay for materials and labor, owner would have recourse to the bond.—Columbia Casualty Co. v. Barry, supra.

23. Ill.—Chicago v. Agnew, 106 N. E. 252, 284 Ill. 288.  
9 C.J. p 862 note 58.

#### During period of default

Where mortgagor's construction bond to mortgagees required mortgagees to make certain "progress payments" as work progressed, that mortgagees made such payments while interest on first mortgage was in default did not preclude recovery against surety, default having subsequently been cured by payment

and acceptance of interest.—Maryland Casualty Co. v. Dunlap, C.C.A. Mass., 68 F.2d 289.

24. U.S.—Glens Falls Indem. Co. v. Basich Bros. Const. Co., C.C.A.Cal., 165 F.2d 649, certiorari denied 68 S.Ct. 1347, 334 U.S. 833, 92 L.Ed. 1760.—Bryce Plumbing & Heating Co. v. Maryland Casualty Co., D.C. S.C., 21 F.Supp. 854.

Ala.—Maryland Casualty Co. v. Cunningham, 173 So. 506, 234 Ala. 80.  
Ark.—Trinity Universal Ins. Co. v. Willbanks, 144 S.W.2d 1092, 201 Ark. 386.

D.C.—Zipkin v. Investors Syndicate, 152 F.2d 678, 80 U.S.App.D.C. 302.

Ill.—Turk v. U. S. Fidelity & Guaranty Co., 197 N.E. 765, 361 Ill. 206.

Iowa.—Wykoff v. Stewart, 164 N.W. 122, 180 Iowa 949.

Minn.—Milavetz v. Oberg, 164 N.W. 910, 138 Minn. 215.

Mo.—Noonan v. Independence Indemnity Co., 41 S.W.2d 162, 328 Mo. 706, 76 A.L.R. 931.

N.Y.—St. John's College, Fordham, v. Aetna Indemnity Co., 94 N.E. 994, 201 N.Y. 335.

Tenn.—Little & Dean v. Fidelity & Deposit Co., 3 Tenn.App. 157.

Tex.—Maryland Casualty Co. v. Fidelity & Casualty Co., Civ.App., 147 S.W.2d 1097, error dismissed, judgment correct.

25. Tenn.—Town of Franklin v. Hermitage Engineering Co., 12 Tenn.App. 434.

26. Ga.—Blackburn v. Morel, 79 S. E. 492, 13 Ga.App. 516.

ment does not release the surety as against third-party beneficiaries under the bond;<sup>27</sup> and where, as in the case of a public building, the surety's bond is required by statute, runs to the people of the state and is conditioned to pay, if the contractor does not, for the material and labor, the surety is not discharged by an alteration in the contract between the contractor and the owner, respecting the time or manner of paying the contractor.<sup>28</sup>

*Extent of discharge.* Authorities holding that a material variance with respect to payment to a contractor discharges the surety whether or not he is prejudiced or injured thereby naturally hold that such a variance discharges the surety entirely and not merely pro tanto.<sup>29</sup> Among authorities holding that the surety is not discharged by a variance with respect to payment unless he is prejudiced or injured, some hold, or at least do not appear to question, that the surety is entirely discharged in case of such a variance,<sup>30</sup> but others hold, at least in the case of a paid surety, that the discharge is only pro tanto,<sup>31</sup> at least where the payment does not constitute an inducement to abandon the work;<sup>32</sup> and under the latter view, even where the bond provides that alterations in the terms of the contract or in the work done thereunder should not release the surety from liability, such provision

does not prevent the surety from defending pro tanto for his actual injury or prejudice resulting from alterations with respect to payment.<sup>33</sup>

### § 134. — Payments before Due under Contract

As a general rule, a payment made to the principal before it is due under the contract will discharge the surety.

Conformably to the rules governing the effect of premature payment on the liability of a surety under a building and construction contract, as discussed supra § 133 b, a payment made before it is due under the principal contract in general without the surety's consent ordinarily will release the surety,<sup>34</sup> where the payment is one on which the obligee seeks recovery so as to constitute the premature payment an alteration of the obligation,<sup>35</sup> unless the bond in express terms provides that it shall not,<sup>36</sup> or the payment has been fraudulently induced under circumstances for which the surety is directly or indirectly responsible.<sup>37</sup> The surety will not be released where the payment, as made, does not violate the terms of the contract,<sup>38</sup> or where the rights of the surety are not prejudiced,<sup>39</sup> at least, according to some authorities, where the premature payment is one on which the obligee is

27. U.S.—*Hochevar v. Maryland Casualty Co.*, C.C.A.Ohio, 114 F.2d 948—*Maryland Casualty Co. v. Portland Const. Co.*, C.C.A.Vt., 71 F.2d 658.
- Pa.—*Pennsylvania Supply Co. v. National Casualty Co.*, 31 A.2d 453, 152 Pa.Super. 217—*National Cas. Co. v. Ferry*, Com.Pl., 56 Dauph. Co. 369.
28. Mich.—*People v. Banhagel*, 114 N.W. 669, 151 Mich. 40.
29. N.M.—*Morgan v. Salmon*, 135 P. 553, 18 N.M. 72, L.R.A.1915B, 407.
30. Wash.—*James Black Masonry & Contracting Co. v. Nat. Surety Co.*, 112 P. 517, 61 Wash. 471.
31. U.S.—*Hochevar v. Maryland Casualty Co.*, C.C.A.Ohio, 114 F.2d 948.
- Kan.—*Young Men's Christian Ass'n of Salina v. Ritter*, 140 P. 892, 92 Kan. 467, L.R.A.1915C, 177—*Young Men's Christian Ass'n of Salina, Kan. v. United States Fidelity & Guaranty Co.*, 133 P. 894, 90 Kan. 332.
- Minn.—*Fitzger Brewing Co. v. American Bonding Co. of Baltimore*, 149 N.W. 539, 127 Minn. 330—*City of Fergus Falls v. Illinois Surety Co.*, 128 N.W. 820, 112 Minn. 462.
- Mo.—*State ex rel. Union Indemnity Co. v. Shain*, 66 S.W.2d 102, 334 Mo. 153—*Southern Real Estate &*

- Financial Co. v. Bankers' Surety Co.*, 184 S.W. 1030.
- N.C.—*Crouse v. Stanley*, 154 S.E. 40, 199 N.C. 186.
- Okl.—*National Surety Co. v. Haley*, 159 P. 292, 58 Okl. 263.
- Utah.—*Corporation of President of Church of Jesus Christ of Latter-Day Saints v. Hartford Accident & Indemnity Co.*, 95 P.2d 736, 98 Utah 297.
- Wash.—*Monro v. National Surety Co.*, 92 P. 280, 47 Wash. 488.
- Wis.—*Joint School Dist. No. 4 of Town and City of Platteville v. Bailey-Marsh Co.*, 194 N.W. 171, 181 Wis. 202.
32. Tex.—*Park Presbyterian Church of Italy v. William Cameron & Co.*, Com.App., 58 S.W.2d 63.
33. Utah.—*Corporation of President of Church of Jesus Christ of Latter-Day Saints v. Hartford Accident & Indemnity Co.*, 95 P.2d 736, 98 Utah 297.

#### Reason for rule

The purpose of such a provision is to avoid the severity of the common-law rule that an alteration fully releases the surety regardless of injury or prejudice; it is a recognition of the trend of modern decisions to the effect that a departure from the terms of the contract releases a compensated surety only where and to the extent that the surety is injured.

—*Corporation of President of Church of Jesus Christ of Latter-Day Saints v. Hartford Accident & Indemnity Co.*, supra.

34. Conn.—*Chester v. Leonard*, 37 A. 397, 68 Conn. 495.  
50 C.J. p 165 note 69.

#### Surety's knowledge of payment

A premature payment will not discharge the surety where it is made with his knowledge and acquiescence, or by his request.—*Federal Surety Co. v. White*, 295 P. 281, 88 Colo. 238.

35. Cal.—*Pacific Coast Engineering Co. v. Detroit Fidelity & Surety Co.*, 5 P.2d 888, 214 Cal. 384.

36. N.J.—*Guttenberg v. Vassel*, 65 A. 994, 74 N.J.Law 553.

37. Iowa.—*Van Buren County v. American Surety Co.*, 115 N.W. 24, 137 Iowa 490, 126 Am.S.R. 290.  
50 C.J. p 166 note 71.

38. Ala.—*Maryland Casualty Co. v. Cunningham*, 173 So. 506, 234 Ala. 80.

- Tex.—*Maryland Casualty Co. v. Fidelity & Casualty Co.*, Civ.App. 147 S.W.2d 1097, error dismissed, judgment correct.  
50 C.J. p 166 note 72.

39. U.S.—*Pickens County v. National Surety Co.*, C.C.A.S.C., 13 F.2d 758.

50 C.J. p 166 note 73.

not relying for a recovery,<sup>40</sup> or where provisions as to the time of payment intended solely for the benefit of the obligee are waived by him.<sup>41</sup> The general rule discharging a surety for unauthorized payments does not apply to payments not covered by the contract,<sup>42</sup> or to payments made in discharging the particular obligations which the surety's bond is expressly made to cover,<sup>43</sup> or for which the surety would otherwise be held liable.<sup>44</sup>

### § 135. — Advances or Loans

A mere advancement or loan is not a payment which, if made contrary to the terms of the contract, will affect the surety's liability.

A mere advancement or loan is not a payment which, if made contrary to the contract, will affect the surety's liability,<sup>45</sup> even though it is stipulated that the loan shall be repaid out of the next payment under the contract.<sup>46</sup> Whether a transaction is a payment or loan depends on the circumstances as revealing the intent of the parties.<sup>47</sup>

*In the case of a building and construction contract* the same rule applies, namely, that a mere advancement or loan from the owner to the builder is not a payment so that, if unauthorized, it will discharge the surety.<sup>48</sup> So, the surety is not

discharged where money transferred by the owner to the builder is merely a loan independent of the contract price and is not paid on the amount due the contractor for his work;<sup>49</sup> and on the other hand, the surety cannot be held liable for the amount of such loan if it is not repaid by the builder.<sup>50</sup> Where a contract provides for advances by a loan company to a contractor for the purposes of erecting a building, the surety on a bond guaranteeing completion of the building is not released from liability to the obligee, the loan company, on the ground that the company made advances prematurely, where in fact the advances complained of were not made earlier than authorized by the contract;<sup>51</sup> moreover, even though some advances under such a contract were premature the surety is not released in the absence of prejudice.<sup>52</sup>

### § 136. — Waiver or Estoppel

A departure from the terms of the contract respecting payment will not discharge a surety who has waived such terms or his rights thereunder.

A surety is not discharged by a departure from the provisions of the contract or bond respecting payment, where he has waived such provisions or his rights thereunder.<sup>53</sup>

## B. PERFORMANCE OF PRINCIPAL CONTRACT

### § 137. In General

A surety can defend successfully by showing that the obligations for which he was bound have been performed.

A surety can defend successfully by showing that the obligations for which he was bound have been performed,<sup>54</sup> and where he has undertaken to

40. Cal.—Pacific Coast Engineering Co. v. Detroit Fidelity & Surety Co., 5 P.2d 888, 214 Cal. 384—Mazera v. Ramsey, 238 P. 101, 72 Cal. App. 601.

41. Ala.—Maryland Fidelity, etc., Co. v. Robertson, 34 So. 933, 136 Ala. 379.

50 C.J. p 166 note 74.

42. Tex.—Tarkington Prairie Lodge A. F. & A. M. No. 498 v. George W. Smyth Lumber Co., Civ.App., 214 S.W. 588.

43. Ky.—U. S. Fidelity, etc., Co. v. Columbus Baptist Church Trustees, 102 S.W. 325, 31 Ky.L. 520. 50 C.J. p 166 note 76.

44. Pa.—Franklin Borough M. E. Church v. Equitable Surety Co., 112 A. 551, 269 Pa. 411.

45. Colo.—Corpus Juris quoted in Federal Surety Co. v. White, 295 P. 281, 289, 88 Colo. 238. 50 C.J. p 166 note 78.

46. Colo.—Corpus Juris quoted in Federal Surety Co. v. White, 295 P. 281, 289, 88 Colo. 238. 50 C.J. p 166 note 79.

47. U.S.—Fidelity, etc., Co. v. Agnew, N.J., 152 F. 955, 82 C.C.A. 103.

48. Ohio.—Southern Surety Co. v. Masonic Temple Co. of Washington Courthouse, 4 Ohio App. 477. 9 C.J. p 862 note 59—50 C.J. p 166 note 78.

#### Advances requested by surety's agent

If any violation of a subcontractors' surety bond was involved in contractor's loans or advances to finance project, it did not release surety where such advances were requested by surety's general agent.—Federal Surety Co. v. White, 295 P. 281, 88 Colo. 238.

49. La.—Meyer v. Bichow, 63 So. 487, 133 La. 975.

50. Mass.—Museum of Fine Arts v. American Bonding Co., 97 N.E. 633, 211 Mass. 124.

51. U.S.—Prudence Co. v. Fidelity & Deposit Co. of Maryland, D.C.N.Y., 2 F.Supp. 454.

52. U.S.—Prudence Co. v. Fidelity & Deposit Co. of Maryland, supra.

53. Cal.—Municipal Bond Co. v. Balboa Const. Co., 34 P.2d 1032, 140 Cal.App. 57.

Wash.—Parsons v. Washington Const. & Bldg. Co., 125 P. 954, 69 Wash. 595. 50 C.J. p 165 note 64.

#### Facts held not to constitute waiver

Where construction contract and contractor's bond required contractor to attach paid bills and affidavits that materials and work had been fully paid for to drafts drawn by contractor against obligee on bank, and provided that provisions of bond could not be altered without written consent of surety, and drafts drawn by contractor against owner on bank, without attaching thereto such paid bills and affidavits, were paid, correspondence between surety and obligee, wherein surety reserved all rights and defenses, was not a "waiver" of surety's right to insist on owner's compliance with contract.—Mauney v. Hartford Accident & Indemnity Co., 23 S.E.2d 490, 68 Ga.App. 515.

54. N.Y.—Barnes v. Cushing, 59 N.Y.S. 345, 43 App.Div. 158, reversed

guarantee or perform one of two or more acts in the alternative, the performance of any one will discharge him.<sup>55</sup> The performance of his contract by the principal in an unlawful manner will not discharge a surety<sup>56</sup> unless the obligee knew of, and acquiesced in, such unlawful performance.<sup>57</sup> Acceptance of defective work performed by a contractor will not relieve his sureties, unless the obligee has knowledge of the defects therein,<sup>58</sup> or there has been unreasonable delay in their discovery.<sup>59</sup>

*Performance by a stranger* will not be compliance with the contract.<sup>60</sup>

### § 138. Building Contract

When a building and construction contract has been fully performed, there can be no liability on a surety bond given to secure its faithful performance.

When a building and construction contract has been fully performed, there can be no liability on a surety bond given to secure its faithful performance.<sup>61</sup> The sufficiency of performance of a contract is discussed in Contracts §§ 494-515, and the scope and extent of liability of a surety of a building contract are considered supra §§ 90-115.

### § 139. Payment of Debt Secured

#### a. In general

#### b. Sufficiency and medium of payment

##### a. In General

Payment and discharge of the principal debt, no matter by whom made, discharge the surety.

Payment and discharge of the principal debt, no matter by whom made, discharge the surety.<sup>62</sup>

However, in order to discharge the surety, payment of the principal debt or obligation must be valid and binding,<sup>63</sup> and, if the creditor is for any reason forced to refund the payment, the liability of the surety is restored.<sup>64</sup> Thus, a surety is not, as a general rule, released by payment which is illegal because it is a preference in violation of the Bankruptcy Act, and which the creditor is obliged to refund.<sup>65</sup> It has been held that, if the creditor is aware of the illegal preference at the time he receives payment, the surety is discharged,<sup>66</sup> although there is some authority to the contrary.<sup>67</sup>

#### b. Sufficiency and Medium of Payment

##### (1) In general

##### (2) Payment in commercial paper

##### (1) In General

It is not requisite that payment in order to discharge a surety should be in cash; any arrangement, in good faith, between the principal and obligee whereby the obligation is considered paid, is sufficient.

Under the general rules relating to payment, as discussed in Payment §§ 3-37, it is not requisite that payment, in order to discharge a surety, should be in cash; any arrangement, in good faith, between the principal and the obligee, whereby the obligation is considered paid, is sufficient.<sup>68</sup> Payment is sufficient where it is made to an unauthorized agent, if it is ratified by the creditor.<sup>69</sup> The surety is not required to pay at a particular place unless his contract so requires,<sup>70</sup> although the principal may have so bound himself by a separate contract.<sup>71</sup>

*Payment in property.* Payment made by the principal in property, personal<sup>72</sup> or real,<sup>73</sup> will discharge the surety if accepted in extinguishment

on other grounds 61 N.E. 902, 168 N.Y. 542.

50 C.J. p 101 note 6.

Breach of contract or condition by principal as affecting surety's liability see supra § 95.

55. U.S.—Dumont v. U. S., N.Y., 98 U.S. 142, 25 L.Ed. 65.

Ga.—English v. State Bank, 76 Ga. 537.

50 C.J. p 101 note 7.

56. U.S.—Lincoln County v. Coast Bridge Co., D.C.Mont., 231 F. 468, affirmed 338 F. 705, 151 C.C.A. 555.

57. U.S.—Lincoln County v. Coast Bridge Co., supra.

58. N.J.—Newark v. New Jersey Asphalt Co., 53 A. 294, 68 N.J.Law 458.

W.Va.—Leonard v. Jackson County Ct., 25 W.Va. 45.

59. Mo.—St. Louis Bd. of Education v. National Surety Co., 82 S.W. 70, 183 Mo. 166.

60. U.S.—U. S. v. South Branch Distilling Co., C.C.M., 27 F.Cas.No. 16,359, 8 Biss. 162.

50 C.J. p 101 note 12.

61. Cal.—Goatman v. Pacific Ready-Cut Homes, 297 P. 68, 112 Cal.App. 397.

Kan.—Road Supply & Metal Co. v. Bechtelheimer, 240 P. 847, 119 Kan. 560.

62. W.Va.—Corpus Juris cited in Hughes v. McElwee, 185 S.E. 688, 689, 117 W.Va. 410.

50 C.J. p 101 note 14.

63. Ill.—Baxter v. Continental Illinois Nat. Bank & Trust Co. of Chicago, 26 N.E.2d 179, 304 Ill. App. 117.

64. Ill.—Baxter v. Continental Illinois Nat. Bank & Trust Co. of Chicago, supra.

65. U.S.—Swarts v. St. Louis Fourth Nat. Bank, Mo., 117 F. 1, 54 C.C.A. 387.

50 C.J. p 101 note 15.

66. Ky.—Northern Bank v. Cooke, 13 Bush 340.

67. Ga.—Higdon v. Bell, 102 S.E. 546, 25 Ga.App. 54.

68. Mich.—Coots v. Farnsworth, 28 N.W. 534, 61 Mich. 497.

50 C.J. p 103 note 39.

69. Ill.—People v. Frost, 46 Ill.App. 197.

50 C.J. p 103 note 42.

70. Tex.—Chamberlain v. Fox, Civ. App., 54 S.W. 297.

71. Tex.—Chamberlain v. Fox, supra.

72. U.S.—U. S. v. Cushman, C.C.N. H., 25 F.Cas.No.14,908, 2 Sumn. 426.

50 C.J. p 103 note 48.

73. N.Y.—Loomer v. Wheelwright, 3 Sandf.Ch. 135.

Va.—Daniel v. Wharton, 19 S.E. 170, 90 Va. 584.

of the debt. Where the principal and obligee in good faith have placed a value on the property, such value will govern.<sup>74</sup> Where, however, the obligee is not authorized to receive anything but money, payment in property will not discharge the surety;<sup>75</sup> and, if property received in settlement is taken from the creditor owing to the superior rights of third persons, the sureties are not released.<sup>76</sup>

**Conditional payment.** A conditional payment does not discharge the surety on the original indebtedness.<sup>77</sup>

**Seizure or levy.** A seizure or levy on property of the principal, sufficient to pay the debt, is a satisfaction of it, and a surety is released.<sup>78</sup> However a sale, under execution, of property which was supposed by the creditor to belong to the principal, but which does not, will not discharge a surety who has not been misled to his prejudice.<sup>79</sup> An attachment against the property of the principal will not discharge a surety until applied in payment.<sup>80</sup>

## (2) Payment in Commercial Paper

Where a note, bond, or draft is accepted as payment, the surety is discharged.

In accordance with the general rules as to payment by bill or note, as discussed in Payment § 23, in the absence of agreement, a note given for the

debt by the principal<sup>81</sup> or by the surety<sup>82</sup> does not constitute payment of such debt. Where, however, the note is accepted as payment, the surety is discharged,<sup>83</sup> and, if the obligee accepts a note of the principal in payment of a loss, a surety is discharged, although the obligee was ignorant of his right to proceed against the surety.<sup>84</sup> A surety will be discharged if the creditor or obligee accepts a bond<sup>85</sup> or a draft<sup>86</sup> as payment; but it is otherwise if the draft is not considered payment unless it in turn is paid.<sup>87</sup> However, a nonnegotiable draft or note of the principal<sup>88</sup> or an unenforceable note<sup>89</sup> is not payment discharging the surety.

**Payment by the note of a third person** will discharge a surety,<sup>90</sup> but not if the obligee is induced by fraud to take one which is worthless, and he repudiates the transaction,<sup>91</sup> or the note is a forgery.<sup>92</sup>

**Check.** Where the creditor takes a check of the principal, which would have been paid if presented promptly, but which is retained by the creditor until there are not sufficient funds in the bank to meet it, a surety for the debt for which the check was given is discharged;<sup>93</sup> but by taking a worthless check the creditor does not release a surety if the latter is notified of its dishonor in time to protect himself.<sup>94</sup> A check subsequently paid constitutes payment discharging the surety.<sup>95</sup>

74. Kan.—Union Stove, etc., Works v. Breidenstein, 31 P. 703, 50 Kan. 53.

50 C.J. p 103 note 50.

75. Ky.—Martin v. U. S., 4 T.B. Mon. 487.

50 C.J. p 103 note 51.

76. Ill.—Bennesson v. Savage, 22 N. E. 838, 130 Ill. 352.

77. Pa.—In re De Roy's Estate, 157 A. 800, 305 Pa. 541.

78. U.S.—U. S. v. Sutton, N.C., 4 S.Ct. 291, 111 U.S. 42, 28 L.Ed. 346.

50 C.J. p 103 note 45.

### Mortgage foreclosure

(1) Surety on bond securing building of houses on lots trust deeded to obligee was held discharged, where, after default in building and on trust deed, obligee purchased lots at foreclosure sale for full trust deed indebtedness, notwithstanding value of premises did not equal indebtedness.—John P. Mills Organization v. Unger, 9 P.2d 833, 215 Cal. 308, 82 A.L.R. 758.

(2) Liability of junior lienholder's surety on bond given holder of intermediate mortgage, conditioned on payment of real estate taxes before specified date, was held not extinguished by foreclosure sale under

senior mortgage at which obligee purchased premises subject to unpaid taxes or by obligee's subsequent redemption of real estate from tax title, where proceeds of foreclosure sale were insufficient for payment of obligee's intermediate mortgage by more than amount of tax.—Leshefsky v. American Employers' Ins. Co., 199 N.E. 395, 293 Mass. 184, 103 A.L.R. 1388.

79. Iowa.—Chambers v. Cochran, 18 Iowa 159.

80. N.H.—Amoskeag Bank v. Robinson, 44 N.H. 503.

81. Pa.—Corpus Juris cited in In re Roy's Estate, 157 A. 800, 305 Pa. 541.—Corpus Juris cited in Easton School Dist. v. Continental Casualty Co., 155 A. 93, 94, 304 Pa. 67.

50 C.J. p 103 note 54.

82. N.Y.—American Surety Co. v. Crow, 49 N.Y.S. 946, 22 Misc. 573.

50 C.J. p 103 note 55.

83. Ind.—Price v. Barnes, 31 N.E. 809, 7 Ind.App. 1.

50 C.J. p 103 note 56.

84. U.S.—Bowers v. Cobb, C.C. Mass., 31 F. 678.

85. N.Y.—La Farge v. Herter, 11 Barb. 159, affirmed 9 N.Y. 241.

50 C.J. p 104 note 58.

86. N.Y.—A'bany City F. Ins. Co. v. Devendorf, 43 Barb. 444.

50 C.J. p 104 note 59.

87. Ky.—Ford v. Stewart, 4 B.Mon. 326.

50 C.J. p 104 note 60.

### Trade acceptance

N.C.—Standard Electric Time Co. v. Fidelity & Deposit Co. of Maryland, 132 S.E. 808, 191 N.C. 653.

88. Ind.—Lindeman v. Rosenfield, 67 Ind. 246, 33 Am.R. 79.

Wis.—Brill v. Holle, 11 N.W. 42, 53 Wis. 537.

89. Ill.—Kelley v. Post, 37 Ill.App. 396.

50 C.J. p 104 note 65.

90. W.Va.—Dryden v. Stephens, 1 W.Va. 1.

50 C.J. p 104 note 66.

91. N.Y.—Douglass v. Ferris, 33 N. E. 1041, 138 N.Y. 192, 34 Am.S.F. 435.

50 C.J. p 104 note 67.

92. Ky.—Offutt v. Bank of Kentucky, 1 Bush 186.

93. Pa.—Fegley v. McDonald, 8 Pa. 128.

94. Mo.—Hogan v. Kaiser, 88 S.V. 1128, 113 Mo.App. 711.

95. Ark.—Wilson v. Mississippi County, 206 S.W. 741, 137 Ar. 615.



# § 140. — Payment by Principal in General

Payment of the debt by the principal discharges the surety.

Payment of the debt by the principal discharges the surety,<sup>96</sup> and the indebtedness cannot be kept alive against the latter.<sup>97</sup> The rule applies, even though payment was made with money borrowed by the principal for the purpose of paying the debt and under an understanding with the lender that the debt should be kept alive against the surety.<sup>98</sup> In accordance with the rule that a mere deposit of money in a bank on which a negotiable instrument is drawn or at which it is payable does not constitute payment if the instrument has not been presented or left at such bank for collection, as discussed in Bills and Notes § 442 c (2), the mere deposit of money sufficient to pay a negotiable instrument, which was not presented for payment, by the maker in the bank at which the instrument was payable is not a payment which relieves the surety of liability.<sup>99</sup>

# § 141. — Payment by Surety in General

Payment by the surety is a complete defense to an action for the debt brought against him by the creditor or obligee.

Payment by the surety is a complete defense to an action for the debt brought against him by the creditor or obligee.<sup>1</sup> However, payment by a cosurety of his proportionate share does not release him as to the remainder.<sup>2</sup>

*Supplemental surety.* Since a surety occupies the relationship of principal to a supplemental surety, as discussed infra § 386, payment by the surety will discharge the supplemental surety.<sup>3</sup> The liability of the supplemental surety cannot be continued by the surety's taking an assignment of the debt.<sup>4</sup>

*Payment to one of several creditors* is a discharge of the surety as to all.<sup>5</sup>

# § 142. — Payment by Third Person

Payment of the principal obligation by a third person will release the surety from liability.

Payment of the principal obligation by a third person will release the surety from liability.<sup>6</sup> However, a third person's purchase of the debt, as distinguished from a payment, will not discharge the surety,<sup>7</sup> but in order to operate as a purchase, it is necessary that the creditor receive the money with knowledge that it is not payment.<sup>8</sup> Where the object is purchase and not payment, the person furnishing the money can allow the principal to act for him in procuring an assignment.<sup>9</sup>

# § 143. — Partial Payment

Partial payment does not discharge the surety completely, but it is a discharge of his liability to the extent of the payment made.

Partial payment does not discharge the surety completely.<sup>10</sup> It is, however, a discharge of his liability to the extent of the payment made,<sup>11</sup> as where the surety is discharged pro tanto by payment from

96. U.S.—Meeker v. Halsey, C.C.A. N.Y., 87 F.2d 299—Baltimore Trust Co. v. Metropolitan Casualty Ins. Co. of New York, D.C.Md., 3 F. Supp. 404, affirmed, C.C.A., 68 F.2d 121.

Ill.—Baxter v. Continental Illinois Nat. Bank & Trust Co. of Chicago, 26 N.E.2d 179, 304 Ill.App. 117.

N.C.—Raleigh Banking & Trust Co. v. York, 155 S.E. 263, 199 N.C. 624.

Pa.—In re Brock, 166 A. 778, 312 Pa. 7—Allen Fuel Co. v. Rice Coal Co., Com.Pl., 43 Lack.Jur. 231. 50 C.J. p 101 note 19—8 C.J. p 588 note 75.

## Payment not shown

Ark.—Bowie v. Temple Cotton Oil Co., 201 S.W.2d 32, 211 Ark. 535.

97. Wash.—Seattle First Nat. Bank v. Harris, 34 P. 466, 7 Wash. 139. 50 C.J. p 103 note 20.

## Repayment to principal

Surety is released if creditor, having accepted payment, lends or repays money to principal.—U. S. Fidelity & Guaranty Co. v. Allied Products Co., 187 N.E. 83, 45 Ohio App. 376.

98. N.H.—Eastman v. Plumer, 32 N.H. 238.

Tex.—Stroud v. Miller, Civ.App., 204 S.W. 1175.

50 C.J. p 102 note 21.

99. N.C.—Dry v. Reynolds, 172 S.E. 351, 205 N.C. 571.

1. Cal.—Merner Lumber Co. v. Brown, 21 P.2d 590, 218 Cal. 136—Johnson v. Mortgage Guarantee Co., 4 P.2d 208, 117 Cal.App. 416.

Ill.—Runyan v. Moon, 267 Ill.App. 312.

Va.—Grizzle v. Fletcher, 105 S.E. 457, 127 Va. 663.

50 C.J. p 102 note 22.

## Extinguishment by confusion

Payment of note by surety liable thereon as principal operated to extinguish debt by confusion as to cosurety.—Bazer v. Grimmer, 135 So. 54, 16 La.App. 613.

2. Pa.—Martin v. Frantz, 18 A. 20, 127 Pa. 389, 14 Am.S.R. 859.

50 C.J. p 102 note 23.

3. U.S.—American Surety Co. v. Ballman, Mo., 115 F. 292, 53 C.C.A. 153, certiorari denied 23 S.Ct. 846, 187 U.S. 646, 47 L.Ed. 347.

50 C.J. p 102 note 25.

4. N.Y.—Wronkow v. Oakley, 31 N. E. 521, 133 N.Y. 505, 28 Am.S.R. 661, 16 L.R.A. 209.

5. Colo.—McPhee v. U. S., 174 P. 808, 64 Colo. 421.

50 C.J. p 102 note 27.

6. W.Va.—Hughes v. McElwee, 185 S.E. 688, 117 W.Va. 410.

50 C.J. p 102 note 28.

7. Colo.—Chappell v. McKeough, 40 P. 769, 21 Colo. 275.

50 C.J. p 102 note 29.

8. Ga.—Cason v. Heath, 12 S.E. 678, 86 Ga. 438.

50 C.J. p 102 note 30.

Distinction between payment and purchase of debt generally see Payment § 2.

9. Ill.—Du Bois v. Stoner, 11 Ill. App. 403.

10. Cal.—Jarvis v. Frey, 189 P. 795, 46 Cal.App. 704.

50 C.J. p 102 note 32.

11. Ga.—Gartrell v. Johns, 84 S.E. 175, 15 Ga.App. 671.

Tenn.—Dies v. Wilson County Bank, 165 S.W. 248, 129 Tenn. 89, Ann. Cas.1915A 1090.

the principal to the creditor<sup>12</sup> or by payments of the proceeds from security received by the creditor.<sup>13</sup> An erroneous payment of less than the full amount has been held a complete discharge where the error was not that of the paying surety.<sup>14</sup>

*Partial payment of different debt* will not discharge the surety even pro tanto.<sup>15</sup>

## § 144. — Application of Payments

- a. Surety's right to control
- b. Application by court
- c. Effect of application

### a. Surety's Right to Control

- (1) In general
- (2) Where special equities exist
- (3) Effect of contract

#### (1) In General

In the absence of agreement or equities in favor of the surety, he cannot control the application of the pay-

ments to that portion of the indebtedness of the principal for which he is surety.

In the absence of agreement<sup>16</sup> or equities in favor of the surety,<sup>17</sup> he cannot compel the application of payments to that portion of the indebtedness of the principal for which he is surety.<sup>18</sup> Where the debtor designates the application of payments, his designation is controlling with respect to the surety.<sup>19</sup> Where the debtor does not designate the application of payments, the creditor may apply them to any portion of the indebtedness, as discussed in Payment § 57, and the surety has no right to insist on application to the debt for which he is liable.<sup>20</sup> It makes no difference that the surety was not aware of the existence of any other indebtedness of the principal than that for which the surety became liable.<sup>21</sup>

*Running accounts.* Where the indebtedness of the principal is a running account, for some of the items of which a surety is liable, the creditor is not under obligation to apply payments to the oldest items.<sup>22</sup>

12. La.—Mortgage Inv. Co. v. Natal, 139 So. 768, 174 La. 91.  
50 C.J. p 103 note 34.

13. Ark.—McConnell v. Beattie, 34 Ark. 113.

S.C.—Field v. Pelot, 16 S.C.Law 369.

14. Pa.—Lycoming County v. Straub, 33 Pa.Super. 441.

15. Cal.—Hammond Lumber Co. v. Richardson Building & Engineering Co., 285 P. 851, 209 Cal. 82, followed in 285 P. 855, 209 Cal. 781.

16. Iowa.—Cain v. Vogt, 116 N.W. 786, 138 Iowa 631, 128 Am.S.R. 216.  
50 C.J. p 104 note 70.

17. Ky.—Henderson v. Phoenix Ins. Co., 25 S.W.2d 359, 283 Ky. 217.

Okl.—Sipes v. John, 58 P.2d 854, 177 Okl. 299.  
50 C.J. p 104 note 71.

18. U.S.—Hartford Accident & Indemnity Co. v. City of Sulphur, C.C.A.Okl., 123 F.2d 566, certiorari denied 62 S.Ct. 633, 315 U.S. 805, 86 L.Ed. 1204, applying Oklahoma law.

Ariz.—Valley Nat. Bank of Phoenix v. Shumway, 163 P.2d 676, 63 Ariz. 490.

Ark.—National Surety Co. v. Southern Lumber & Supply Co., 24 S.W.2d 964, 181 Ark. 105.

Cal.—Giordano v. American Fidelity & Cas. Co., 217 P.2d 444.

Colo.—Corpus Juris cited in Ohio Casualty Ins. Co. v. Colorado Portland Cement Co., 51 P.2d 591, 593, 97 Colo. 541.

Ill.—Whiting Hotel Bldg. Corporation v. Sun Indemnity Co. of New York, 279 Ill.App. 551.

Miss.—J. R. Watkins Co. v. Guess, 24 So.2d 341.

Mont.—National Bank of Montana v. Bingham, 5 P.2d 554, 91 Mont. 62.

Okl.—Sipes v. John, 58 P.2d 854, 177 Okl. 299—Corpus Juris cited in Metropolitan Casualty Co. v. United Brick & Tile Co., 29 P.2d 771, 776, 167 Okl. 402.

Or.—Seattle Dock Co. v. Pacific Surety Co., 167 P. 510, 86 Or. 85.  
Tenn.—First Nat. Bank of Stuttgart, Ark. v. Bova, 13 Tenn.App. 689.  
50 C.J. p 104 note 72.

*Indorsing and delivering to plaintiff,* and his application of architect's certificate to payment of note signed by plaintiff as surety for contractor, could not be regarded as breach by him of contract, with respect to liability of contractor's surety.—American Surety Co. of New York v. Noe, 53 S.W.2d 178, 245 Ky. 42.

### Damages

(1) The owner of a building is not required to apply the contract price for the benefit of a surety of the contractor, but may withhold it for damages due him for delay in the erection of the building.—Getchell, etc., Lumber, etc., Co. v. Peterson, 100 N.W. 550, 124 Iowa 599, followed in Getchell, etc., Lumber, etc., Co. v. National Surety Co., 100 N.W. 1123.

(2) Damages for building contractor's delay and defective work were held properly deducted from balance of price in owner's hands before discharging liens.—Bowman v. Maryland Casualty Co., 263 P. 826, 88 Cal.App. 481.

19. U.S.—Corpus Juris quoted in U. S. v. Mitty Bros. Const. Co., D.C. Idaho, 4 F.Supp. 216, 220, affirmed in part, C.C.A., Mitty Bros. Const. Co. v. U. S., 75 F.2d 79.

Ariz.—Security Trust & Savings Bank v. June, 1 P.2d 970, 38 Ariz. 513.

50 C.J. p 105 note 74.

20. U.S.—Corpus Juris quoted in U. S. v. Mitty Bros. Const. Co., D.C. Idaho, 4 F.Supp. 216, 220, affirmed in part, C.C.A., Mitty Bros. Const. Co. v. U. S., 75 F.2d 79.

Ark.—National Surety Co. v. Southern Lumber & Supply Co., 24 S.W.2d 964, 181 Ark. 105.

Ill.—Whiting Hotel Bldg. Corporation v. Sun Indemnity Co. of New York, 279 Ill.App. 551.

Utah.—Utah State Building Commission, for Use and Benefit of Mountain States Supply Co. v. Great American Indemnity Co., 140 P.2d 763, 105 Utah 11.

50 C.J. p 105 note 76.

### Compensated surety

A debt guaranteed by compensated surety stands in same position as an ordinary secured debt with respect to creditor's right to apply payments as he sees fit in absence of direction from debtor.—Whiting Hotel Bldg. Corporation v. Sun Indemnity Co. of New York, 279 Ill. App. 551.

21. Ill.—Aetna Acc., etc., Co. v. Alexander Lumber Co., 215 Ill. App. 555, 570, reversed on other grounds 129 N.E. 871, 296 Ill. 500.  
Pa.—Arbuckles v. Chadwick, 23 A. 346, 146 Pa. 393.

22. Pa.—Bricker Baking Co. v.

## (2) Where Special Equities Exist

The surety can control the application of payments where circumstances exist giving him an equity superior to the usual rights of the debtor and creditor with respect to the application of payments.

The surety can control application of payments where circumstances exist giving him an equity superior to the usual legal rights of the debtor and creditor with respect to application of payments.<sup>23</sup> Thus, the surety can compel application of payments to the portion of the indebtedness for which he is liable where the payment, to the knowledge of the creditor,<sup>24</sup> is derived from a source from which it would be a fraud on the surety to permit diversion of the funds to a different purpose.<sup>25</sup> For example, the surety can control application of payments where the money is the surety's and is paid to the principal to pay to the creditor<sup>26</sup> or where the

surety has a lien on the property from which the funds for payment are derived.<sup>27</sup>

*Application of moneys secured.* Ordinarily, it is held that the surety has an equity entitling him to have payments applied to the secured debt where the specific moneys paid to the creditor are the very moneys for which the surety is bound,<sup>28</sup> as where a surety has become responsible for the payment of money by the principal, and the latter receives money under his contract, which he pays over, and it is held that the creditor or obligee has no right to apply such payments in any other way than to the relief of the surety.<sup>29</sup> This rule is generally qualified by a limitation to the effect that the creditor must have knowledge of the source of the money,<sup>30</sup> and, where the creditor is ignorant of the source of the money, he may apply the payment on an unsecured debt.<sup>31</sup> Other authorities deny the rule al-

Sweigart, 14 Pa.Dist. & Co. 413, 42 Lanc.L.Rev. 201.

50 C.J. p 105 note 80.

**Future purchases**

Creditor could not, as against surety, retain payment made on open and running account to apply on future purchases.—Southern Surety Co. v. Corbit, 285 P. 949, 142 Okl. 103.

23 N.J.—Grover v. Franklin Tp. Board of Education, 141 A. 81, 102 N.J.Eq. 415, affirmed 144 A. 918, 104 N.J.Eq. 197.

50 C.J. p 105 note 85.

24 La.—Grand Lodge B. K. A. v. Murphy Constr. Co., 92 So. 757, 152 La. 123.

25 La.—Grand Lodge B. K. A. v. Murphy Constr. Co., supra.

26 Mass.—Reed v. Boardman, 20 Pick. 441.

50 C.J. p 105 note 90.

27 Ark.—Herweigh v. Hall, 292 S. W. 97, 172 Ark. 1148.

50 C.J. p 105 note 91.

28 Ky.—Corpus Juris cited in National Surety Corp. v. City of Bowling Green, 95 S.W.2d 1080, 1082, 265 Ky. 36.

50 C.J. p 105 note 94.

Where there is no showing as to source of money, surety could not require payments to be applied to secured debt.—Utah State Building Commission, for Use and Benefit of Mountain States Supply Co. v. Great American Indemnity Co., 140 P.2d 763, 105 Utah 11—Board of Education v. Southern Surety Co., 287 P. 332, 76 Utah 63.

29 U.S.—R. P. Farnsworth & Co. v. Electrical Supply Co., C.C.A. La., 112 F.2d 150, 130 A.L.R. 192, rehearing denied 113 F.2d 111, 130 A.L.R. 197, certiorari denied 61 S. Ct. 139, 311 U.S. 700, 85 L.Ed. 454

—U. S., for Use and Benefit of Crane Co. v. Johnson, Smathers & Rollins, C.C.A.N.C., 67 F.2d 121.

Ala.—Corpus Juris cited in U. S. Fidelity & Guaranty Co. v. Butcher, 137 So. 446, 447, 223 Ala. 606—Corpus Juris cited in Maryland Casualty Co. v. Dupree, 136 So. 811, 814, 223 Ala. 430.

Tex.—Aetna Casualty & Surety Co. v. Hawn Lumber Co., 97 S.W.2d 460, 128 Tex. 296, rehearing denied and modified on other grounds 98 S.W.2d 167, 128 Tex. 296.

Wash.—Associated Indemnity Corporation v. Del Guzzo, 81 P.2d 516, 195 Wash. 486—Fidelity & Deposit Co. of Maryland v. Northwestern Nat. Bank of Bellingham, 155 P. 743, 90 Wash. 179.

50 C.J. p 105 note 95.

30 U.S.—R. P. Farnsworth & Co. v. Electrical Supply Co., C.C.A. La., 112 F.2d 150, 130 A.L.R. 192, rehearing denied 113 F.2d 111, 130 A.L.R. 197, certiorari denied 61 S. Ct. 139, 311 U.S. 700, 85 L.Ed. 454

—U. S., for Use and Benefit of Crane Co. v. Johnson, Smathers & Rollins, C.C.A.N.C., 67 F.2d 121.

Tex.—Aetna Casualty & Surety Co. v. Hawn Lumber Co., 97 S.W.2d 460, 128 Tex. 296, rehearing denied and modified on other grounds 98 S.W.2d 167, 128 Tex. 296.

50 C.J. p 105 note 96.

**Duty to apply**

There is no trust attaching to monthly payments made to contractor which prevents his using them generally as his own, but, when he pays them over to materialman who knows their source, there is a duty to apply money for payment of those materials furnished the job rather than to some other debt.—R. P. Farnsworth & Co. v. Electrical Supply Co., C.C.A. La., 112 F.2d 150, 130 A.L.R. 192, rehearing

denied 113 F.2d 111, 130 A.L.R. 197, certiorari denied 61 S.Ct. 139, 311 U.S. 700, 85 L.Ed. 454.

**Advances or loans**

(1) Materialman, although he knew money received from subcontractor to meet pay rolls and evidenced by notes and repaid with interest was borrowed from general contractor who knew it was to be paid to materialman, was not obligated to apply such money to discharge pro tanto contractor's liability for labor and material under statutory payment bond and subcontractor's authorization to set aside funds to guarantee payment to materialman, since transactions between materialman and subcontractor were "loans" and not "payments."—U. S., to Use of Par-Lock Applicators of New Jersey v. J. A. J. Const. Co., C.C.A.Pa., 187 F.2d 584.

(2) Bank which, after advancing money for material bill under agreement for reimbursement, applied installment of contract price on bill, with surety's knowledge, was held not chargeable with diverting contract funds.—Third Nat. Bank v. Detroit Fidelity & Surety Co., C.C.A. Fla., 65 F.2d 548, certiorari denied Detroit Fidelity & Surety Co. v. Third Nat. Bank, 54 S.Ct. 88, 290 U.S. 667, 78 L.Ed. 577.

(3) Fact that building loan company, as obligee in contractor's bond, applied to payment of debt deposit made by contractor in return for advance was held no defense to surety, where bond permitted application of advances to interest, since no question of application of payment is involved.—Prudence Co. v. Fidelity & Deposit Co. of Maryland, D.C.N.Y., 2 F.Supp. 454.

31 Ala.—U. S. Fidelity & Guaranty

together by holding, without regard to the creditor's knowledge, that he may apply the payment to an unsecured debt,<sup>32</sup> or that, even though it affirmatively appears that the creditor knew the source, he may nevertheless apply payments under the secured contract to an unsecured debt.<sup>33</sup>

### (3) Effect of Contract

A contract between the creditor and the surety will control the respective rights of the parties as to the application of payments, but will not deprive the debtor of his primary right to control application or affect payments not within the contemplation of the contract.

A contract between the creditor and the surety will control the respective rights of the parties as to application of payments,<sup>34</sup> but will not deprive the debtor of his primary right to control application<sup>35</sup> or affect payments not within the contemplation of the contract.<sup>36</sup> Where the creditor has made an agreement with the surety to apply certain future payments by the principal to the indebtedness for which the surety is liable, the creditor has no right to make any other application, even with the consent of the principal.<sup>37</sup> It has been held that a contract between the debtor and creditor for application of payments to the secured debt cannot be changed to the detriment of the surety.<sup>38</sup>

*An oral agreement as to application of payments cannot be shown where it would differ from a written agreement thereon.*<sup>39</sup>

### b. Application by Court

Where neither the debtor nor the creditor exercises his right to control the application of payment, in some jurisdictions the court will impute payment to a debt for which the surety is bound so as to discharge the surety, but in other jurisdictions the court is not required, in the absence of superior equities, to apply the payment so as to exonerate the surety.

Where neither the debtor nor the creditor exercises his right to control application of payment, in some jurisdictions the court will impute payment to a debt for which the surety is bound so as to discharge the surety,<sup>40</sup> but in other jurisdictions, the court is not required, in the absence of superior equities, to apply the payment so as to exonerate the surety.<sup>41</sup> The equities of the surety are, however, a proper matter for consideration by the court.<sup>42</sup> The court will apply the payment as equity seems to require, usually to the oldest item,<sup>43</sup> unless the conduct of the parties indicates that payments by the principal were to be credited to later items,<sup>44</sup> as where application of the rule would result in holding a surety for a loss during a time when he was not liable for defalcations.<sup>45</sup>

Co. v. Butcher, 137 So. 446, 223 Ala. 606.

Utah.—Utah State Building Commission, for Use and Benefit of Mountain States Supply Co. v. Great American Indemnity Co., 140 P.2d 763, 105 Utah 11.

Wash.—U. S. Fidelity & Guaranty Co. v. Feenaughty Machinery Co., 85 P.2d 1085, 197 Wash. 569. 50 C.J. p 106 note 96.

#### No duty of inquiry

Fact that materialman is secured by bond for material furnished to particular job does not require him to inquire source of money received on general account from contractor.—U. S. Fidelity & Guaranty Co. v. Butcher, 137 So. 446, 223 Ala. 606.

32. Mich.—People v. Powers, 66 N. W. 215, 103 Mich. 339.

33. U.S.—First Camden Nat. Bank & Trust Co. v. Aetna Casualty & Surety Co., C.C.A.N.J., 132 F.2d 114, certiorari denied Aetna Casualty & Surety Co. v. First Camden Nat. Bank & Trust Co., 63 S.Ct. 1157, 319 U.S. 749, 87 L.Ed. 1704—Fidelity & Deposit Co. of Maryland v. Union State Bank of Minneapolis, D.C.Minn., 21 F.2d 102.

N.J.—Grover v. Franklin Tp. Board of Education, 141 A. 81, 102 N.J. Eq. 415, affirmed 144 A. 918, 104 N.J.Eq. 197.

Okla.—Metropolitan Casualty Co. v.

United Brick & Tile Co., 29 P.2d 771, 167 Okl. 402.

50 C.J. p 106 note 98.

34. Miss.—Davidson v. Plant, 74 So. 328, 113 Miss. 482. 50 C.J. p 106 note 1.

35. Ind.—Trentman v. Fletcher, 100 Ind. 105. 50 C.J. p 107 note 2.

36. Ill.—Brookport Nat. Bank v. Smith, 183 Ill.App. 623. 50 C.J. p 107 note 3.

37. Ill.—Petefish v. Watkins, 16 N. E. 248, 124 Ill. 384. 50 C.J. p 107 note 4.

38. Vt.—Ballantine v. Fenn, 92 A. 3, 88 Vt. 166. 50 C.J. p 107 note 5.

39. N.H.—Hoyt v. French, 24 N.H. 198. 50 C.J. p 107 note 7.

40. U.S.—R. P. Farnsworth & Co. v. Electrical Supply Co., C.C.A.La., 112 F.2d 150, 130 A.L.R. 192, rehearing denied 113 F.2d 111, 130 A.L.R. 197, certiorari denied 61 S.Ct. 139, 311 U.S. 700, 85 L.Ed. 454.

La.—Vinton Grain Co. v. Rickerson, App., 148 So. 292.

41. Va.—Pope v. Transparent Ice Co., 20 S.E. 940, 91 Va. 79. 50 C.J. p 107 note 10.

Application of payment to unsecured

debt in preference to secured debt, see Payment § 73.

#### Compensated surety

Where neither debtor nor creditor applied payment, a debt guaranteed by a compensated surety stands in the same category as an ordinary secured debt; since, while the creditor does not hold property of the principal debtor as security, he does hold the promise of the third person for which the principal debtor has paid, and this third person has no equity superior to that of the creditor, and there is no reason for not following the ordinary rule of applying the payment in the interest of the creditor.—Maryland Casualty Co. v. City of South Norfolk, C.C.A. Va., 54 F.2d 1032.

42. N.Y.—Harding v. Tift, 75 N.Y. 461.

50 C.J. p 107 note 13.

43. Tenn.—Blackmore v. Granbery, 39 S.W. 229, 98 Tenn. 277. 50 C.J. p 107 note 14.

44. Ill.—Aetna Acc., etc., Co. v. Alexander Lumber Co., 215 Ill. App. 555, 570, reversed on other grounds 129 N.E. 871, 296 Ill. 500. 50 C.J. p 107 note 15.

45. U.S.—Nashville First Nat. Bank v. National Surety Co., Tenn., 130 F. 401, 64 C.C.A. 601, 66 L.R.A. 777.

50 C.J. p 107 note 16.

*Pro rata application.* In some cases application will be made ratably among different debts.<sup>46</sup>

*Proceeds of execution sale.* Proceeds derived by a creditor from a sale of the principal's property under a claim for which the surety is not liable should not be applied to a discharge of a demand against a surety on another obligation of the judgment debtor.<sup>47</sup>

### c. Effect of Application

An application once made by the creditor, or by the debtor, or by both, cannot be changed as against the surety, in the absence of fraud.

An application once made by the creditor,<sup>48</sup> or by the debtor,<sup>49</sup> or by both,<sup>50</sup> cannot be changed as against the surety, in the absence of fraud.<sup>51</sup> The rule controls, although both the principal and the creditor wish to change the application.<sup>52</sup> An application made by law is controlling on the surety.<sup>53</sup>

## § 145. — Unexecuted Agreement or Negotiations as to Payment

An uncompleted agreement to pay or unexecuted negotiations looking to a settlement will not discharge the surety.

An uncompleted agreement to pay<sup>54</sup> or unexecuted negotiations looking to a settlement<sup>55</sup> will not discharge the surety.

## § 146. — Recital of Payment

A mere recital of payment, without payment in fact, will not result in a discharge of the surety, unless it constitutes ground for an estoppel.

A mere recital of payment, without payment in fact, will not result in a discharge of the surety,<sup>56</sup> unless it constitutes ground for an estoppel.<sup>57</sup>

## § 147. Tender of Payment or Performance

An unaccepted valid tender of payment or performance by the principal, or by the surety, discharges the surety.

An unaccepted valid tender of payment or performance by the principal<sup>58</sup> or by the surety<sup>59</sup> discharges the surety. In order to discharge a surety the tender must be legally sufficient<sup>60</sup> with respect to amount,<sup>61</sup> manner,<sup>62</sup> medium,<sup>63</sup> and place<sup>64</sup> of payment, and must be made in good faith.<sup>65</sup>

*Keeping tender good.* Tender of payment is sufficient to discharge a surety from his obligation to pay the debt tendered and refused, even though such tender is not kept good.<sup>66</sup>

46. Ark.—State v. Churchill, 3 S.W. 352, 880, 48 Ark. 426.

50 C.J. p 107 note 17.

47. Ga.—First Nat. Bank of Commerce, Ga., v. Simmons, 173 S.E. 341, 48 Ga.App. 728.

Application of involuntary payments generally see Payment § 51.

48. Ala.—Royal Indemnity Co. v. Young & Vann Supply Co., 144 So. 532, 225 Ala. 591.

La.—Corpus Juris cited in Bickham v. Womack, 160 So. 431, 436, 181 La. 837.

Tex.—Atina Casualty & Surety Co. v. Hawn Lumber Co., 97 S.W.2d 460, 128 Tex. 296, rehearing denied and modified on other grounds 98 S.W.2d 167, 138 Tex. 296.

50 C.J. p 107 note 18.

49. La.—Corpus Juris cited in Bickham v. Womack, 160 So. 431, 436, 181 La. 837.

50 C.J. p 108 note 19.

50. La.—Corpus Juris cited in Bickham v. Womack, 160 So. 431, 436, 181 La. 837.

50 C.J. p 108 note 20.

51. Mo.—W. T. Rawleigh Medical Co. v. McKinney, App., 180 S.W. 440.

50 C.J. p 108 note 21.

52. U.S.—U. S. v. Brent, D.C.S.C., 236 F. 771.

50 C.J. p 108 note 22.

53. Kan.—Barber County v. Lake

State Bank, 252 P. 475, 123 Kan. 222.

54. Minn.—State Bank v. Pacific El. Co., 198 N.W. 304, 159 Minn. 94.

50 C.J. p 108 note 25.

55. Ill.—Stern v. People, 102 Ill. 540.

50 C.J. p 108 note 26.

56. Colo.—Equitable Surety Co. v. Conners, 147 P. 438, 27 Colo.App. 213.

50 C.J. p 108 note 27.

57. W.Va.—Citizens' Trust, etc., Co. v. Goff, 94 S.E. 756, 81 W.Va. 366.

50 C.J. p 108 note 28.

58. U.S.—Meeker v. Halsey, C.C.A. N.Y., 87 F.2d 299.

Mass.—Hamlen v. Rednalloh Co., 197 N.E. 149, 291 Mass. 119, 99 A.L.R. 1230.

Ohio.—U. S. Fidelity & Guaranty Co. v. Allied Products Co., 187 N.E. 83, 45 Ohio App. 270.

50 C.J. p 108 note 30.

### Bills and notes

Under the Negotiable Instruments Law, it has been held that surety on note, being primarily liable, is not released by tender of payment by prior party.—Dry v. Reynolds, 172 S.E. 351, 205 N.C. 571.

59. Utah.—Corpus Juris cited in Lilienquist v. Utah State Nat. Bank, 100 P.2d 185, 188, 99 Utah 163.

50 C.J. p 108 note 31.

60. Kan.—Corpus Juris cited in

Brown v. Schreckler, 100 P.2d 741, 745, 151 Kan. 724.

50 C.J. p 108 note 33.

### Time

Where bonds protected lender against loss because of failure to complete houses within four months, sureties' tender to complete, made more than four months after the permitted four months had expired, and after a receiver had been appointed, was not a legal defense to liability for loss caused by the delay.—Zipkin v. Investors Syndicate, 152 F.2d 678, 80 U.S.App.D.C. 302.

61. Kan.—Corpus Juris cited in Brown v. Schreckler, 100 P.2d 741, 151 Kan. 724.

50 C.J. p 108 note 34.

62. Tex.—Head v. Texas State Bank, Civ.App., 16 S.W.2d 298.

50 C.J. p 108 note 35.

63. La.—Williams v. Reynolds, 11 La. 230.

50 C.J. p 109 note 36.

64. Ga.—Bennett v. Simmons, 118 S.E. 493, 30 Ga.App. 529.

50 C.J. p 109 note 37.

65. Ala.—Lee v. Lee, 67 Ala. 406.

50 C.J. p 109 note 38.

66. Minn.—Dunn v. Hunt, 65 N.W. 948, 63 Minn. 434.

50 C.J. p 109 note 39.

General rule as to necessity of keeping tender good see the C.J.S. title Tender §§ 45, 46, also 62 C.J. p 681 notes 17-27.

## C. ACTS OR CONDUCT OF CREDITOR OR OBLIGEE IN GENERAL

## § 148. General Rule

Mere indulgence, forbearance, or passiveness on the part of the creditor, where there is no duty to act, will not release the surety, but he will not be bound if the person secured does any act which violates or injures his rights, whether such injury arises from some positive act or omitting to do something which it was the duty of the creditor to perform.

The surety must be dealt with by the creditor or obligee in fairness and good faith,<sup>67</sup> and the creditor or obligee must observe the express terms and obligations of the contract,<sup>68</sup> and refrain from doing anything which alters the position or liability of surety, or increases the surety's risk.<sup>69</sup> Thus, a

surety may be discharged by the fraud of the creditor or obligee;<sup>70</sup> but he is not discharged by acts of the creditor or obligee which are not inconsistent with his rights at law or in equity as a creditor, or with his relations to the surety as such,<sup>71</sup> or which the surety has advised or procured to be done by the creditor or obligee.<sup>72</sup> Mere indulgence, forbearance, or passiveness on the part of the creditor, where there is no duty to act, will not release the surety;<sup>73</sup> but he will not be bound if he is misled or deceived to his prejudice,<sup>74</sup> or if the person secured does any act which violates or injures his rights,<sup>75</sup> whether such injury arises from some

67. Mass.—Hamlen v. Rednalloh Co., 197 N.E. 149, 291 Mass. 119, 99 A.L.R. 1230.

Ohio.—U. S. Fidelity & Guaranty Co. v. Allied Products Co., 187 N.E. 33, 45 Ohio App. 270.

Pa.—First Nat. Bank & Trust Co. of Ford City v. Stolar, 197 A. 499, 130 Pa.Super. 480. 50 C.J. p 109 note 46.

68. Ky.—Dorman v. Carnes, 96 S.W. 2d 869, 265 Ky. 361—New York Indemnity Co. v. Hurst, 66 S.W. 2d 8, 252 Ky. 59, 94 A.L.R. 864—American Surety Co. of New York v. Noe, 53 S.W.2d 178, 245 Ky. 42—Young Men's Christian Association's Assignee of Paducah v. Indemnity Ins. Co. of America, 51 S.W.2d 463, 244 Ky. 473. 50 C.J. p 109 note 46.

69. Ky.—Dorman v. Carnes, 96 S.W. 2d 869, 265 Ky. 361—U. S. Fidelity & Guaranty Co. v. Mayo Arcade Corporation, 70 S.W.2d 531, 253 Ky. 763—New York Indemnity Co. v. Hurst, 66 S.W.2d 8, 252 Ky. 59, 94 A.L.R. 864—American Surety Co. of New York v. Noe, 53 S.W. 2d 178, 245 Ky. 42. 50 C.J. p 109 note 46.

Creditor must preserve all rights against debtor, where a creditor intends to look to surety for payment.—Basso v. Export Warrant Co., 193 So. 654, 194 La. 303.

70. Minn.—Powers Dry-Goods Co. v. Harlin, 71 N.W. 16, 68 Minn. 193, 64 Am.S.R. 460. 50 C.J. p 109 note 47.

71. U.S.—State-Planters' Bank & Trust Co. v. First Nat. Bank, C.C. A.Va., 76 F.2d 527, certiorari denied 55 S.Ct. 923, 295 U.S. 764, 79 L.Ed. 1706—Maryland Casualty Co. v. Dunlap, C.C.A.Mass., 68 F. 2d 289.

Ga.—J. R. Watkins Co. v. Brewer, 36 S.E.2d 442, 73 Ga.App. 331.

Wash.—Martin v. Empire State Surety Co., 101 P. 876, 53 Wash. 290.

50 C.J. p 109 note 48.

## Acts not discharging surety

(1) Where subcontractor's surety indicated no desire to operate plant notwithstanding warning of April 27, reiterated on June 1, that subcontractor was not meeting contract, surety could not defeat liability on bond on ground that contractor by taking over when subcontractor abandoned contract on June 8, deprived surety of his right to take over and operate, or secure some one to take over and operate, subcontractor's plant within thirty days after notice of subcontractor's default.—Glens Falls Indem. Co. v. Basich Bros. Const. Co., C.C.A.Cal., 165 F.2d 649, certiorari denied 68 S. Ct. 1347, 334 U.S. 833, 92 L.Ed. 1760.

(2) Bank was not required to notify surety of arrangement with contractor whereby bank paid wages and took assignment of labor claims.—Third Nat. Bank v. Detroit Fidelity & Surety Co., C.C.A.Fla., 65 F.2d 548, certiorari denied Detroit Fidelity & Surety Co. v. Third Nat. Bank, 54 S.Ct. 88, 290 U.S. 667, 78 L.Ed. 577.

(3) Risk of surety on unsecured claim is not increased by creditor's failure to apply toward payment of unsecured claim, proceeds derived from levy on, and sale of, principal debtor's property under another claim against debtor.—First Nat. Bank of Commerce, Ga., v. Simmons, 173 S.E. 241, 48 Ga.App. 728.

(4) Other acts see 50 C.J. p 109 note 48 [a].

72. Ga.—Jones v. Hawkins, 60 Ga. 52. 50 C.J. p 110 note 49.

73. Ark.—Travelers' Bldg. & Loan Ass'n v. Hawkins, 34 S.W.2d 474, 182 Ark. 1148.

Ga.—Scott v. Gaulding, 2 S.E.2d 69, 187 Ga. 751, 122 A.L.R. 200, answer to certified question conformed to 3 S.E.2d 766, 60 Ga.App. 306—Curan v. Colbert, 3 Ga. 239, 46 Am.D. 427—Stephens v. Stone, 167 S.E. 545, 46 Ga.App. 293.

Ky.—Henderson v. Phoenix Ins. Co., 25 S.W.2d 359, 233 Ky. 217.

N.Y.—Acme Investors Corp. v. Kahan, 64 N.Y.S.2d 6—Otto v. Lincoln Sav. Bank of Brooklyn, 49 N. Y.S.2d 407, reversed on other grounds 51 N.Y.S.2d 561, 268 App. Div. 400, affirmed 62 N.E.2d 236, 294 N.Y. 798.

Ohio.—Hartford Accident & Indemnity Co. v. Morgan, 32 N.E.2d 425. 50 C.J. p 110 note 50.

Release or discharge of sureties by subcontractors or materialmen see Mechanics' Liens § 259 b.

Extension of time of payment or performance see infra §§ 181-192. Effect of neglect to act or proceed against principal see infra §§ 208-222.

## Nondisclosure of matter of defense

After the contract guaranteed has been finished, and only question between obligee and surety is as to existence and extent of breach by obligor, there is no fiduciary relationship between surety and obligee making it latter's duty to disclose to former any matter of defense.—City of Richmond, Ky., v. Fidelity & Deposit Co. of Maryland, C.C.A.Ky., 53 F.2d 437.

74. Ky.—New York Store Mercantile Co. v. Gorham, 199 S.W. 64, 178 Ky. 535.

Pa.—Commonwealth ex rel. Reno v. Daugherty, Com.Pl., 54 Dauph. Co. 405.

50 C.J. p 110 note 51.

Concealment of facts by creditor as affecting validity of suretyship contract see supra § 77.

75. Ga.—Scott v. Gaulding, 2 S.E. 2d 69, 187 Ga. 751, 122 A.L.R. 200, answers to certified questions conformed to 3 S.E.2d 766, 60 Ga.App. 306—Lumsden v. Leonard, 55 Ga. 374—Corpus Juris cited in Bulloch Mortgage Loan Co. v. Jones, 10 S. E.2d 88, 92, 63 Ga.App. 55—Seaboard Loan Corporation v. McCall, 7 S.E.2d 318, 61 Ga.App. 752—Ste-

positive act or omitting to do something which it was the duty of the creditor to perform.<sup>76</sup> Matters which would discharge a surety before maturity of a debt will have a like effect if arising after maturity,<sup>77</sup> and, although there is some authority to the contrary,<sup>78</sup> generally whatever acts will discharge the surety before judgment will have a like effect thereafter.<sup>79</sup>

**Statutory obligation.** One who stands in the relationship of a surety on an obligation, who is required by statute to stand as security until certain claims are fully paid, is not released by a subsequent transaction between the principal debtor and the creditor, which does not result in the release of the debtor or the payment of the claim.<sup>80</sup>

**A surety for one of two agents** will not be discharged from liability to their common principal by the acts or negligence of the other.<sup>81</sup>

**Consent to acts of principal.** Where the creditor or obligee,<sup>82</sup> or his agent,<sup>83</sup> with some exceptions,<sup>84</sup> has consented to the acts of the principal relied on as causing the surety's liability, the creditor or obligee cannot hold the surety therefor.

**Mistake as to effect of act.** A mere expression of opinion by the creditor or obligee, under a mistaken conception of the law, that the surety has been discharged does not estop the creditor to hold the surety liable.<sup>85</sup>

## § 149. Failure to Examine Accounts

Where the bond requires that there be an audit of the books and accounts of the principal at stated times,

phens v. Stone, 167 S.E. 545, 46 Ga. App. 293.  
Ky.—Henderson v. Phoenix Ins. Co., 25 S.W.2d 359, 233 Ky. 217.  
N.Y.—Bank of U. S. v. Andron, 277 N.Y.S. 594, 155 Misc. 21.  
Pa.—Girard Trust Co. v. Aetna Casualty & Surety Co., 11 Pa. Dist. & Co. 247.  
S.D.—Zastrow v. Knight, 239 N.W. 925, 56 S.D. 554, 72 A.L.R. 379.  
Tex.—General Bonding & Casualty Ins. Co. v. Harlan, Civ.App., 196 S.W. 906.  
50 C.J. p 110 note 52—8 C.J. p 73 note 86.

**Under statute** surety is discharged by creditor's act injuring surety, or by creditor's act increasing risk to surety, or by creditor's act exposing surety to greater liability, and surety need not suffer a loss to be discharged.—W. T. Rawleigh Co. v. Kelly, 50 S.E.2d 113, 78 Ga.App. 10.

**Right of sureties to contribution** must not be impaired by any affirmative act of creditor.—Bullock Mortgage Loan Co. v. Jones, 10 S.E.

2d 88, 63 Ga.App. 55—50 C.J. p 110 note 52 [c].

76. Va.—Womack v. Paxton, 5 S.E. 550, 84 Va. 9, 22.  
50 C.J. p 111 note 53.

77. Me.—Stowell v. Goodenow, 31 Me. 538.

78. U.S.—Lenox v. Prout, D.C., 3 Wheat. 520, 4 L.Ed. 449.  
50 C.J. p 111 note 55.

79. Ga.—Scott v. Gaulding, 2 S.E.2d 69, 187 Ga. 751, 123 A.L.R. 200, answers to certified questions conformed to 3 S.E.2d 766, 60 Ga.App. 306—Lumsden v. Leonard, 55 Ga. 374—Bullock Mortgage Loan Co. v. Jones, 10 S.E.2d 88, 63 Ga.App. 55.  
50 C.J. p 111 note 56.

80. N.D.—Thompson Yards v. Kingsley, 208 N.W. 949, 54 N.D. 49.

81. N.Y.—Monroe County v. Otis, 62 N.Y. 88.  
50 C.J. p 111 note 53.

82. Del.—Pickering v. Day, 2 Del. Ch. 233.

50 C.J. p 111 note 59.

a nonperformance of the condition will discharge the surety.

Where the bond requires that there be an audit of the books and accounts of the principal at stated times, a nonperformance of the condition will discharge the surety.<sup>86</sup> However, in the absence of any stipulation in the bond requiring it, the fact that the default of the principal might have been prevented by an examination of his accounts by the obligee or by the obligee's agents will not relieve the sureties,<sup>87</sup> even though a by-law required an examination to be made,<sup>88</sup> and the surety was induced to sign the principal's bond by his knowledge of the by-laws, and his belief that they would be enforced.<sup>89</sup> Where, however, the obligee has reason to suspect the incompetency or negligence on the part of the principal so gross and habitual that, if true, his own good faith toward the sureties would call for notice from him to them, and if an examination of the accounts would verify his suspicions or show them to be groundless, he has then a duty toward his surety to examine the accounts.<sup>90</sup>

## § 150. Failure to Give Notice of Default to Surety

- a. In general
- b. Time for notice
- c. Sufficiency of notice
- d. Waiver and estoppel as to notice

### a. In General

Where the contract of suretyship stipulates that notice of the principal's default be given to the surety,

83. Conn.—Huntington v. Williams, 3 Conn. 427.

84. Mo.—Market St. Bank v. Stumpe, 2 Mo.App. 545.  
50 C.J. p 111 note 61.

85. Ala.—Royston v. Howie, 15 Ala. 309.

86. W.Va.—Piedmont Grocery Co. v. Hawkins, 104 S.E. 736, 87 W. Va. 38.

50 C.J. p 169 note 26.

87. Va.—Crawn v. Commonwealth, 4 S.E. 721, 84 Va. 282, 10 Am.S.R. 839.  
50 C.J. p 169 note 27.

88. Fla.—Mutual Loan, etc., Assoc. v. Price, 16 Fla. 204, 19 Fla. 127, 26 Am.R. 703.  
50 C.J. p 169 note 29.

89. Mo.—State v. Atherton, 40 Mo. 209.

Pa.—Pittsburg, etc., R. Co. v. Shaaffer, 59 Pa.St. 350.

90. Minn.—Manchester F. Assur. Co. v. Redfield, 71 N.W. 709, 69 Minn. 10.

50 C.J. p 170 note 33.

generally the failure to comply with the condition will prevent recovery from the surety.

Although it has been stated that, where the obligation of the surety is a continuing one, the creditor must give notice to the surety of conduct of the principal indicating bad faith, moral turpitude, or unfitness for trust,<sup>91</sup> and a failure to do so will release the surety from further liability,<sup>92</sup> a surety is not discharged from further liability, generally, on failure of the obligee to notify him of his principal's default, where the suretyship contract contains no stipulation that such notice shall be given.<sup>93</sup> How-

ever, if the contract of suretyship stipulates that such notice shall be given, the general rule is that failure to comply with the condition will prevent recovery from the surety;<sup>94</sup> although, even where the bond requires notice, the surety is not discharged by a failure to give notice of slight defaults,<sup>95</sup> which are waived by the obligee;<sup>96</sup> or on mere suspicion of possible default;<sup>97</sup> or where, under the terms of the contract, there is no default;<sup>98</sup> or where, if a default exists, there is excuse<sup>99</sup> or provision in the suretyship contract exempting the surety for liability therefor,<sup>1</sup> or where the surety already has

91. Okl.—Briggs v. J. R. Watkins Co., 157 P.2d 462, 195 Okl. 254—National Casualty Co. v. Sipes, 71 P.2d 459, 180 Okl. 548—J. R. Watkins Co. v. Jennings, 269 P. 265, 131 Okl. 295.

92. Okl.—J. R. Watkins Co. v. Jennings, supra.

93. U.S.—Corpus Juris cited in American Surety Co. of New York v. U. S., C.C.A.Okl., 112 F.2d 908, 906.

D.C.—Zipkin v. Investors Syndicate, 152 F.2d 678, 80 U.S.App.D.C. 302.

Ark.—Corpus Juris quoted in Gazette Pub. Co. v. Stephens, 135 S.W.2d 313, 314, 199 Ark. 641—U. S. Fidelity & Guaranty Co. v. Lyons & Carnahan, 70 S.W.2d 552, 188 Ark. 1078.

Ky.—Henderson v. Phoenix Ins. Co., 25 S.W.2d 359, 233 Ky. 217.

Pa.—School Dist. of Borough of Ed-dystone v. Lewis, 101 Pa.Super. 583.

Utah.—Corpus Juris cited in Corporation of President of Church of Jesus Christ of Latter-Day Saints v. Hartford Accident & Indemnity Co., 95 P.2d 736, 745, 98 Utah 297. 50 C.J. p 170 note 35.

#### Stipulation not implied

Ark.—Gazette Pub. Co. v. Stephens, 135 S.W.2d 313, 199 Ark. 641.

#### Bills and notes

(1) Under Negotiable Instruments Law, a surety is not entitled to notice of dishonor and protest.

Ark.—Colvin v. Glover, 220 S.W. 832, 143 Ark. 498.

Cal.—Burrows Shoe Co. v. Brotherton, 288 P. 879, 106 Cal.App. 162.

Ga.—Preston v. Dozier, 68 S.E. 793, 135 Ga. 25.

Ky.—First State Bank v. Williams, 175 S.W. 10, 164 Ky. 143—Fritts v. Kirchdorfer, 123 S.W. 882, 136 Ky. 643.

N.C.—Federal Land Bank of Columbia v. Whitehurst, 165 S.E. 793, 203 N.C. 302—Horton v. Wilson, 95 S.E. 904, 175 N.C. 533—Edwards v. Jefferson Standard L. Ins. Co., 92 S.E. 695, 173 N.C. 614—Rouse v. Wooten, 53 S.E. 430, 140 N.C.

557, 111 Am.S.R. 875, 6 Ann.Cas. 280.

Tex.—Wall v. Reimers, Civ.App., 79 S.W.2d 142—Georges v. Fricke, Civ.App., 233 S.W. 221.

(2) Statute dispensing with protest and notice if holder sues acceptor or maker at first term of court after right of action accrues was held inapplicable to sureties, even though suretyship is not expressed on face of note, and further that such statute was impliedly repealed by Negotiable Instruments Law.—Wall v. Reimers, Tex.Civ. App., 79 S.W.2d 142.

(3) Under Negotiable Instruments Law, a surety is not discharged by failure to notify him that principal failed to pay note.

Ill.—Albaugh-Dover Co. v. Napieralski, 205 Ill.App. 457.

Mich.—Buckeye Commercial Sav. Bank v. Protogere, 231 N.W. 65, 250 Mich. 652.

Tex.—Scott v. Tate, Civ.App., 28 S.W.2d 848—Georges v. Fricke, Civ. App., 233 S.W. 221.

(4) However, it has been held that notice to a surety of the non-payment of the original note must be given within a reasonable time, where the original note has been turned over to the principal after acceptance of check or renewal note by the creditor and a default results in the payment of the check or renewal note.

U.S.—Northeast Nat. Bank of Philadelphia v. Fireman's Fund Indemnity Co., C.C.A.Pa., 94 F.2d 32. Tenn.—First Nat. Bank of Huntsville, Tenn. v. Ashley, 10 Tenn. App. 44.

94. U.S.—Union Indemnity Co. v. Lang, C.C.A.Cal., 71 F.2d 901.

Pa.—Gentile v. American State Bank & Trust Co., 172 A. 303, 315 Pa. 123—Woodling v. U. S. Fidelity & Guaranty Co., Com.Pl., 15 Northumb.Leg.J. 354.

Vt.—Springfield Co-op. Freeze Locker Plant v. Wiggins, 63 A.2d 182, 115 Vt. 445.

50 C.J. p 170 note 37—9 C.J. p 858 note 99.

Necessity of notice of default in order to fix liability of surety see supra § 98.

**Bond and original contract must be construed together.**—Shaw v. New Amsterdam Casualty Co., 164 A. 316, 310 Pa. 213.

#### Compensated surety

Where bond of compensated surety is ambiguous with respect to what constitutes default, strict enforcement of forfeiture for failure to give notice of default should not be permitted.—Shaw v. New Amsterdam Casualty Co., supra.

**Where the contract forbids all interference by the owner with the work, except as he is furnished with a certificate from the architect that there has been default on the part of the builder, the surety of the builder cannot be relieved of his liability on his bond, of which the building contract is made a part, by reason of the failure of the owner to notify the surety of the builder's default, as required by the bond, where the owner never receives from the architect any certificate of default.**—McCreery v. National Surety Co., 75 A. 674, 226 Pa. 450.

95. U.S.—Maryland Casualty Co. v. Dunlap, C.C.A.Mass., 68 F.2d 289. 50 C.J. p 170 note 38—1 C.J. p 8 note 45 [a].

96. U.S.—Equitable Surety Co. v. Muddy Bottom Swamp Land Dist. No. 1, Miss., 256 F. 773, 168 C.C.A. 119.

Minn.—Johnson v. Laurence, 214 N.W. 24, 171 Minn. 202.

97. U.S.—Glens Falls Indem. Co. v. Basich Bros. Const. Co., C.C.A.Cal., 165 F.2d 649, certiorari denied 68 S.Ct. 1347, 334 U.S. 833, 92 L.Ed. 1760.

50 C.J. p 170 note 39.

98. Pa.—McClelland v. New Amsterdam Casualty Co., 185 A. 198, 322 Pa. 429.

50 C.J. p 170 note 40.

99. N.C.—Harris v. U. S. Fidelity, etc., Co., 83 S.E. 805, 167 N.C. 623.

1. Ark.—National Surety Co. v. Long, 96 S.W. 745, 79 Ark. 523.



knowledge or is chargeable with knowledge of the default.<sup>2</sup>

**Necessity of proof of loss.** Where the stipulation is construed as intended merely to protect the surety from avoidable loss, failure to give notice does not discharge the sureties unless loss is shown,<sup>3</sup> and then only to the extent of the loss proved.<sup>4</sup> This rule requiring loss to be proved is especially applicable to compensated sureties<sup>5</sup> or to sureties not on the same basis as gratuitous sureties,<sup>6</sup> unless notice is made a condition precedent to the surety's liability, as discussed *infra* § 253. A compensated surety will not be discharged for failure to notify him of the principal's uncompleted performance within the time specified, where time is not of the essence of the contract, and no claim is made against principal or surety on account of the delayed performance.<sup>7</sup>

**Partial failure to notify.** Where there is a failure to give notice of some defaults, but notice of others is seasonably given, the failure, while effective as a bar to the surety's liability for the earlier defaults, does not relieve him from liability for the others,<sup>8</sup> especially where no claim is made against the surety with respect to the earlier defaults.<sup>9</sup> Furthermore, if notice is given to some sureties but

not to others, the liability of the sureties notified will not be affected by failure to give notice to the others, where by its terms the bond is joint and several.<sup>10</sup>

#### b. Time for Notice

Notice of default when required must be given within the time, if any, specified in the contract, or, if no time is specified, within a reasonable time.

Notice of default when required must be given within the time, if any, specified in the contract,<sup>11</sup> or, if no time, or no definite time, is specified, within a reasonable time,<sup>12</sup> as where the contract provides for immediate notice.<sup>13</sup> The time does not begin to run against the obligee until he knows, or has had reasonable opportunity to know, of the principal's default,<sup>14</sup> and knowledge within the meaning of this rule is actual knowledge.<sup>15</sup> The time runs, however, from the date of actual knowledge, and not from a later date of formal notice of default.<sup>16</sup> Where time is not of the essence of the contract secured and no claim is made by the obligee for failure to perform on time, the surety is not released because notice of default is not given within the time specified in the suretyship contract, computing such time from the date fixed in the contract secured for its completion.<sup>17</sup>

2. U.S.—*Jack v. Craighead Rice Mill Co.*, C.C.A.Ark., 167 F.2d 96, certiorari denied New Amsterdam Cas. Co. v. Craighead Rice Mill Co., 68 S.Ct. 1340, 334 U.S. 829, 92 L.Ed. 1756.  
50 C.J. p 170 note 44.

3. U.S.—*Jack v. Craighead Rice Mill Co.*, C.C.A.Ark., 167 F.2d 96, certiorari denied New Amsterdam Cas. Co. v. Craighead Rice Mill Co., 68 S.Ct. 1340, 334 U.S. 829, 92 L.Ed. 1756.

Mich.—*Mac Near v. Malow*, 276 N.W. 433, 282 Mich. 239.

Minn.—*Hormel v. American Bonding Co.*, 128 N.W. 12, 112 Minn. 288, 33 L.R.A.N.S., 513.  
50 C.J. p 171 note 46.

4. Wash.—*Heffernan v. U. S. Fidelity, etc., Co.*, 79 P. 1095, 37 Wash. 477.  
50 C.J. p 171 note 47.

5. U.S.—*Jack v. Craighead Rice Mill Co.*, C.C.A.Ark., 167 F.2d 96, certiorari denied New Amsterdam Cas. Co. v. Craighead Rice Mill Co., 68 S.Ct. 1340, 334 U.S. 829, 92 L.Ed. 1756—*Prudence Co. v. Fidelity & Deposit Co.*, D.C.N.Y., 2 F. Supp. 454.

Mich.—*Rose v. Ramm*, 237 N.W. 60, 354 Mich. 259.

Wash.—*Parsons v. Pacific Surety Co.*, 125 P. 954, 69 Wash. 595—*Monro v. National Surety Co.*, 92 P. 250, 47 Wash. 482.  
50 C.J. p 171 note 48.

6. Wis.—*Overly Special School Dist. No. 44 v. Haber*, 214 N.W. 342, 193 Wis. 403.  
50 C.J. p 171 note 49.

7. Minn.—*Fitger Brewing Co. v. American Bonding Co.*, 149 N.W. 539, 127 Minn. 330.  
50 C.J. p 171 note 50.

8. Pa.—*Corpus Juris cited in Shaw v. New Amsterdam Casualty Co.*, 164 A. 916, 917, 310 Pa. 213.  
50 C.J. p 171 note 51.

9. Utah.—*Lyman v. Title Guaranty, etc., Co.*, 158 P. 423, 48 Utah 230.

10. Wis.—*Overly Special School Dist. No. 44 v. Haber*, 214 N.W. 342, 193 Wis. 403.  
50 C.J. p 171 note 53.

11. U.S.—*American Surety Co. of New York v. Scott*, C.C.A.Colo., 63 F.2d 961.  
50 C.J. p 171 note 54.

12. Or.—*Haddock Const. Co. v. Wilber*, 169 P.2d 599, 178 Or. 659.  
50 C.J. p 171 note 55.

**Notice held timely**  
U.S.—*Starrett Bros. & Eken v. Asher Fireproofing Co.*, 59 F.2d 358, 61 App.D.C. 182.  
Vt.—*Springfield Co-op. Freeze Locker Plant v. Wiggins*, 63 A.2d 182, 115 Vt. 445.

**Notice held not in time**  
Or.—*Haddock Const. Co. v. Wilber*, 169 P.2d 599, 178 Or. 659.

13. Ga.—*Thomason v. Keeney*, 70 S.E. 220, 8 Ga.App. 852.  
50 C.J. p 171 note 56.

#### Provision held void

Under statute providing that no stipulation in contract, requiring notice to be given of claim for damages as condition precedent to right to sue, shall be valid unless it is reasonable, and that any stipulation for less than ninety days shall be void, bond requiring that notice be given surety immediately is void.—*Employers' Liability Assur. Corporation v. Eckert*, Tex.Civ.App., 46 S.W.2d 464, affirmed, Com.App., *Mingus v. Employers' Liability Assur. Co.*, 65 S.W.2d 292.

14. Pa.—*Corpus Juris quoted in Thomas Holme Bldg. & L. Ass'n v. New Amsterdam Cas. Co.*, 188 A. 374, 376, 124 Pa.Super. 187.  
50 C.J. p 171 note 57—9 C.J. p 857 note 98.

15. Pa.—*Corpus Juris quoted in Thomas Holme Bldg. & L. Ass'n v. New Amsterdam Cas. Co.*, 188 A. 374, 376, 124 Pa.Super. 187.  
W.Va.—*Wait v. Homestead Bldg. Assoc.*, 85 S.E. 637, 76 W.Va. 431.

16. Tex.—*Walsh v. Paducah M. E. Church South*, Civ.App., 173 S.W. 241.

17. Minn.—*Pulaski Hall Assoc. v. American Surety Co.*, 143 N.W. 715, 123 Minn. 222.

*Prior to default.* Notice need not be given until there is an actual default,<sup>18</sup> although it may be given prior to an actual default where so close thereto as to make it substantially a notice of the default and where the certainty of the impending default is established.<sup>19</sup> On the other hand, a notice so far in advance of a possible default as to be unrelated thereto is insufficient.<sup>20</sup>

### c. Sufficiency of Notice

Notice is sufficient where it is in accordance with the terms of the contract, but actual notice may suffice, although not in conformity with the contract in all respects.

Notice is sufficient where it is in accordance with the terms of the contract,<sup>21</sup> but actual notice may suffice, although not in conformity with the contract in all respects.<sup>22</sup> A requirement of verified notice does not require that it be sworn to.<sup>23</sup> A letter, if not objected to on the ground of absence of more detailed proof, satisfies a requirement of notice of default and written proof.<sup>24</sup>

### d. Waiver and Estoppel as to Notice

Notice of default may be waived, and a surety may be estopped to defend on the ground of failure to notify of the original default.

Notice of default may be waived,<sup>25</sup> for example, by provisions of the suretyship contract,<sup>26</sup> or by

subsequent correspondence between the parties,<sup>27</sup> or by acquiescence by the surety having knowledge of the breach in the contractor's continuing to act under the contract.<sup>28</sup> Acknowledgment by the surety of receipt of notice of default from the creditor constitutes a waiver of notice in the particular method or within the time prescribed by the bond.<sup>29</sup> A surety who signs the suretyship contract after default in performance of the guaranteed contract thereby acquiesces in the extension of time allowed for performance and is estopped to defend on the ground of failure to notify of the original default.<sup>30</sup> A surety company will be bound by waiver of its general agent,<sup>31</sup> notwithstanding a contract provision against waiver, except by writing executed by the president or vice president under the corporate seal.<sup>32</sup>

## § 151. Failure to Terminate Employment after Default or Dishonest Conduct

Where the suretyship contract guarantees the faithful performance of duties by an agent or servant, the obligee's continuance of the agent or servant in his employment after knowledge of the latter's default or dishonest conduct will discharge the surety from liability for loss arising from subsequent dishonesty or default, but mere negligence on the part of the obligee in acquiring information does not operate to discharge the surety.

Where the suretyship contract guarantees the

18. S.C.—Chester v. National Surety Co., 74 S.E. 37, 91 S.C. 17.

19. U.S.—Empire State Surety Co. v. Hanson, Colo., 184 F. 58, 107 C.C.A. 1.

50 C.J. p 172 note 62.

20. Ind.—Wainwright Trust Co. v. U. S. Fidelity, etc., Co., 114 N.E. 470, 63 Ind.App. 309.

50 C.J. p 172 note 63.

21. La.—Jeanerette Bank v. Drullhet, 89 So. 674, 149 La. 505.

50 C.J. p 172 note 64.

### Joint surety

Notice to one surety is necessary to bind joint surety.—Firestone Tire & Rubber Co. v. Hart, 158 A. 90, 104 Vt. 100.

Notice construed as to liability covered

Vt.—Springfield Co-op. Freeze Locker Plant v. Wiggins, 63 A.2d 182, 115 Vt. 445.

22. N.Y.—McKegney v. Illinois Surety Co., 155 N.Y.S. 1041, 170 App.Div. 261.

Or.—Sykes v. Sperow, 179 P. 488, 91 Or. 568.

23. Ark.—Nick Peay Constr. Co. v. Miller, 139 S.W. 1107, 100 Ark. 284.

24. Minn.—Clow v. A. W. Scott Co., 203 N.W. 410, 162 Minn. 501.

N.Y.—Fass v. Illinois Surety Co., 158 N.Y.S. 890, 95 Misc. 267, affirmed 164 N.Y.S. 239, 177 App. Div. 596.

25. U.S.—Jack v. Craighead Rice Mill. Co., C.C.A. Ark., 167 F.2d 96, certiorari denied New Amsterdam Cas. Co. v. Craighead Rice Mill. Co., 68 S.Ct. 1340, 334 U.S. 829, 92 L.Ed. 1756.

Hawaii.—Craig v. Uyeoka, 32 Hawaii 913.

Mich.—St. Matthew's Evangelical Lutheran Church v. U. S. Fidelity & Guaranty Co., 192 N.W. 784, 222 Mich. 256.

Mo.—Boppert v. Illinois Surety Co., 126 S.W. 768, 140 Mo.App. 675.

Okl.—Briggs v. J. R. Watkins Co., 157 P.2d 462, 195 Okl. 254.

### Subsequent default

The acceptance and retention by surety on a contractor's bond of a renewal premium were not a waiver of the surety's right to notice of the contractor's default, where there was no default by the contractor until several months after the payment of the premium.—Wainwright Trust Co. v. United States Fidelity & Guaranty Co., 114 N.E. 470, 63 Ind.App. 309.

26. U.S.—Maryland Casualty Co. v. Dunlap, C.C.A. Mass., 68 F.2d 289.

Okl.—Briggs v. J. R. Watkins Co., 157 P.2d 462, 195 Okl. 254.

Tex.—New Jersey Ins. Co. v. Anderson, Civ.App., 90 S.W.2d 338, error dismissed.

50 C.J. p 172 note 69.

### Bills and notes

In holder's suit on note against maker and sureties, sureties were liable, notwithstanding lack of notice of nonpayment; such notice being expressly waived in note.—Farmers' Nat. Bank v. Jones, 28 S.W.2d 787, 234 Ky. 591, 70 A.L.R. 335.

27. Md.—Maryland Casualty Co. v. East Baltimore Driving Assoc., 108 A. 517, 135 Md. 105.

28. Mo.—Rule v. Anderson, 142 S.W. 358, 160 Mo.App. 347.

29. Cal.—Fruit Growers' Supply Co. v. Goss, 41 P.2d 357, 4 Cal.App.2d 651.

Minn.—Johnson v. Laurence, 214 N.W. 24, 171 Minn. 202.

Wash.—Ellers Music House v. Hopkins, 131 P. 838, 73 Wash. 281.

30. Tex.—U. S. Fidelity, etc., Co. v. Means, etc., Iron Works, 132 S.W. 536, 63 Tex.Civ.App. 56.

31. Or.—Sykes v. Sperow, 179 P. 488, 91 Or. 568.

32. Or.—Sykes v. Sperow, *supra*.

faithful performance of duties by an agent or servant, the obligee's continuance of the agent or servant in his employment after knowledge of the latter's default or dishonest conduct will discharge the surety from liability for loss arising from subsequent dishonesty or defalcations;<sup>33</sup> but mere negligence on the part of the obligee in acquiring information does not operate to discharge the surety.<sup>34</sup> The surety, however, remains liable for all the defaults committed prior to the obligee's discovery.<sup>35</sup> When a person employed commits an act of dishonesty or is unfaithful to his trust, the employer may end the contract for his own protection, and what he may do and ought to do for his own sake the surety may require to be done for his;<sup>36</sup> but if, after notice to or knowledge on the part of the surety of the default or dishonesty of the agent or servant, he consents to the obligee's continued employment of the agent or servant, the surety remains liable for subsequent defaults,<sup>37</sup> subject to performance of any conditions attached to the continued obligation.<sup>38</sup> The burden is on the surety to show that the obligee had knowledge of the employee's default and continued the employment without notifying the surety thereof.<sup>39</sup>

*Employees of corporation.* Where the obligee is a corporation, and an officer of the corporation is the one against whom knowledge of the employee's faithlessness is proved, it is held in some jurisdictions that the general rule applies, and that the surety is discharged,<sup>40</sup> unless the officer having knowledge is an officer of a distinct corporation subsidiary to, or a branch of, the obligee corporation.<sup>41</sup> In other jurisdictions, it is held that the surety is not discharged, even though knowledge of default is brought home to some of the officers of the obligee.<sup>42</sup>

*Applications and limitations of rule.* Generally,

this rule is held to have no application to cases of mere breach of duty or contract obligations by the servant or agent not involving dishonesty or want of integrity on his part, or fraud or concealment on the part of the master or employer.<sup>43</sup> There is no active duty on the employer either to notify the sureties or to dismiss the agent or employee for a mere default which does not in itself involve dishonesty,<sup>44</sup> or to give notice of a mere failure to report or account punctually, or turn over or remit funds, under the terms of the contract, the performance of which is secured, unless there is knowledge of an actual defalcation.<sup>45</sup> Other authorities hold that, where the incompetency or negligence on the part of a servant is so gross or habitual that good faith to the sureties requires the master to discharge the servant or at least give notice to the sureties,<sup>46</sup> or where the employee's breach of the employment contract, whether by dishonesty or not, justifies the dismissal by the employer or master,<sup>47</sup> a continuance of the employment without notice to the surety discharges the latter from further liability.

## § 152. Nonperformance of Conditions; Prevention of Performance

- a. Nonperformance of conditions
- b. Prevention of performance

### a. Nonperformance of Conditions

If the surety has annexed conditions, to be performed by the creditor or obligee after the contract has been entered into, a failure to perform them releases the surety from liability.

If a surety has annexed conditions, to be performed by the creditor or obligee after the contract has been entered into, a failure to perform them releases the surety from liability,<sup>48</sup> regardless of

33. Minn.—Lac Qui Parle Town Farmers Union Fire Ins. Co. v. Remsburg, 263 N.W. 455, 195 Minn. 402.

50 C.J. p 168 note 8.

34. Minn.—Lac Qui Parle Town Farmers Union Ins. Co. v. Remsburg, *supra*.

Tex.—U. S. Fidelity, etc., Co. v. Means, etc., Iron Works, 132 S.W. 536, 63 Tex.Civ.App. 56.

35. Md.—Lake v. Thomas, 36 A. 437, 84 Md. 608.

50 C.J. p 168 note 10.

36. N.Y.—Emery v. Baltz, 94 N.Y. 408.

37. N.Y.—Emery v. Baltz, *supra*.

50 C.J. p 168 note 11.

38. N.Y.—Emery v. Baltz, *supra*.

50 C.J. p 168 note 12.

39. Tex.—Foster v. Franklin L. Ins. Co., Civ.App., 72 S.W. 91. 50 C.J. p 168 note 13.

40. Mich.—Ætna Ins. Co. v. Fowler, 66 N.W. 470, 108 Mich. 557. 50 C.J. p 168 note 14.

41. Ky.—Taylor v. Commonwealth Bank, 2 J.J.Marsh. 564. 50 C.J. p 168 note 15.

42. Md.—McShane v. Howard Bank, 20 A. 776, 73 Md. 135, 10 L.R.A. 552.

Pa.—Pittsburg, etc., R. Co. v. Shaef-fer, 59 Pa. 350.

43. Minn.—Lac Qui Parle Town Farmers Union Fire Ins. Co. v. Remsburg, 263 N.W. 455, 195 Minn. 402.

50 C.J. p 169 note 18.

44. Minn.—Manchester F. Assur. Co. v. Redfield, 71 N.W. 709, 69 Minn. 10.

50 C.J. p 169 note 19.

45. Cal.—Metropolitan Loan Assoc. v. Esche, 17 P. 675, 75 Cal. 513. 50 C.J. p 169 note 20.

46. Minn.—Manchester F. Assur. Co. v. Redfield, 71 N.W. 709, 69 Minn. 10.

50 C.J. p 169 note 22.

47. Ill.—Rapp v. Phoenix Ins. Co., 113 Ill. 390, 55 Am.R. 427.

50 C.J. p 169 note 23.

48. Ark.—Berman v. Shelby, 125 A. W. 124, 93 Ark. 472.

Wis.—Corpus Juris quoted in Klatt v. Franklin State Bank, 248 N. W. 158, 163, 211 Wis. 613, rehear-

whether the obligee is or is not negligent,<sup>49</sup> and the principal cannot waive performance.<sup>50</sup> Thus, if the surety has entered into his contract under an agreement providing for security for himself,<sup>51</sup> or has stipulated that a demand be made on the principal,<sup>52</sup> or on the surety,<sup>53</sup> or that demand be made at a particular place,<sup>54</sup> or has stipulated that the principal shall be prosecuted criminally,<sup>55</sup> he cannot be held liable if the conditions have not been fulfilled. In order to relieve the surety, however, the creditor or obligee must have notice of the conditions,<sup>56</sup> and the surety is not relieved by nonperformance of an agreement made with him by the principal, with which the creditor or obligee is not connected,<sup>57</sup> or by the breach of an independent agreement between the creditor and the principal.<sup>58</sup>

A substantial compliance with conditions is sufficient, if they are performed as fully as the circumstances will allow.<sup>59</sup> Failure to observe provisions in statutes, which are directory merely, will not discharge a surety,<sup>60</sup> nor will failure by a creditor or obligee to observe provisions in the contract which were inserted for the benefit of the latter,<sup>61</sup> or which were inserted for the benefit of the principal,<sup>62</sup> or if they consist of restrictions so un-

reasonable as practically to amount to a release by tending to defeat recovery.<sup>63</sup>

*Placing principal in default.* Where the principal is not in default until he has been placed in default by the creditor serving notice on him to perform, a failure to give sufficient notice will discharge the surety,<sup>64</sup> the form and requisites of such notice depending on the terms and requirements of the contract.<sup>65</sup> However, where the default is in no way dependent on notice, the failure of the creditor to send, or of the principal to receive, notice does not discharge the surety.<sup>66</sup>

*Building contracts.* In accordance with general rules the sureties on a builder's bond are discharged unless there is a compliance with the conditions imposed by the bond,<sup>67</sup> such as a condition that there shall be notice of the commencement of the work,<sup>68</sup> or a condition that liens be released,<sup>69</sup> or as to giving additional bonds.<sup>70</sup> However, compliance with the formal requirements as to the mode of annulling the contract if the contractor fails to prosecute the work diligently in the judgment of a designated official is not a prerequisite to the maintenance of an action on the contractor's bond, where he has refused to proceed with the work;<sup>71</sup> and it has

ing denied and modified on other grounds 249 N.W. 72, 211 Wis. 613. 50 C.J. p 166 note 81.

#### Duty of surety

Where agreement by creditor to procure security deed from debtor to surety contained express warranty that deed would be properly executed and entitled to record, surety could rely on warranty and would be under no duty to make inspection of deed, or to exercise diligence to ascertain whether creditor had complied with warranty.—*Stedham v. Farmers' State Bank*, 126 S. E. 875, 33 Ga.App. 438.

49. Pa.—*Larrabee v. Title Guaranty, etc. Co.*, 95 A. 416, 250 Pa. 135, L.R.A.1916F 709.

50. S.C.—*Griffith v. Newell*, 48 S.E. 259, 69 S.C. 300. Wis.—*Charley v. Potthoff*, 95 N.W. 124, 118 Wis. 258.

51. Tex.—*Reeves v. Jowell*, Civ. App., 140 S.W. 364. 50 C.J. p 167 note 84.

52. N.M.—*Feder Silberberg Co. v. McNeil*, 133 P. 975, 18 N.M. 44, 49 L.R.A.N.S., 458. 50 C.J. p 167 note 86.

53. Cal.—*Morgan v. Menzies*, 3 P. 807, 65 Cal. 243. 50 C.J. p 167 note 87.

54. La.—*Hamer v. Johnson*, 15 La. 242—*Fort v. Cortes*, 14 La. 180.

55. N.Y.—*People v. Jansen*, 7 Johns. 332, 5 Am.D. 275.

50 C.J. p 167 note 89.

56. U.S.—*Joyce v. Cockrill*, Ohio, 92 F. 838, 35 C.C.A. 38, affirmed 21 S.Ct. 227, 179 U.S. 591, 45 L.Ed. 332.

50 C.J. p 167 note 91.

57. Mich.—*Somerville v. Stevenson*, 194 N.W. 408, 224 Mich. 186.

50 C.J. p 167 note 92.

58. N.Y.—*Ellis v. McCormick*, 1 Hill. 313.

50 C.J. p 167 note 93.

59. Fla.—*Robinson v. Epping*, 4 So. 812, 24 Fla. 237.

50 C.J. p 167 note 94.

60. Ill.—*Moreland v. State Bank*, 1 Ill. 263.

50 C.J. p 167 note 96.

61. Wis.—*Corpus Juris* quoted in *Klatte v. Franklin State Bank*, 248 N.W. 158, 163, 211 Wis. 613, rehearing denied and modified on other grounds 249 N.W. 72, 211 Wis. 613.

50 C.J. p 167 note 97.

62. Or.—*Enterprise Hotel Co. v. Book*, 85 P. 333, 48 Or. 58.

Wis.—*Corpus Juris* quoted in *Klatte v. Franklin State Bank*, 248 N.W. 158, 163, 211 Wis. 613, rehearing denied and modified on other grounds 249 N.W. 72, 211 Wis. 613.

63. N.C.—*Tarboro Bank v. Fidelity, etc. Co.*, 38 S.E. 908, 128 N.C. 366, 83 Am.S.R. 682.

64. U.S.—*U. S. Fidelity, etc. Co. v. Sutherlin Constr. Co.*, C.C.A.La., 263 F. 360.

65. U.S.—*U. S. Fidelity, etc. Co. v. Sutherlin Constr. Co.*, supra.

66. Vt.—*Montpelier v. National Surety Co.*, 122 A. 484, 97 Vt. 111.

67. Pa.—*Tarentum Realty Co. v. McClure*, 79 A. 551, 230 Pa. 266. 9 C.J. p 857 note 95.

68. La.—*Orleans, etc., R. Co. v. International Constr. Co.*, 37 So. 10, 113 La. 409.

69. U.S.—*Shelton v. American Surety Co., Pa.*, 131 F. 210, 66 C.C.A. 94, certiorari denied 25 S.Ct. 791, 195 U.S. 633, 49 L.Ed. 354.

9 C.J. p 858 note 1.

70. Conn.—*Chester v. Leonard*, 37 A. 397, 68 Conn. 495.

71. U.S.—*Graham v. U. S., Md.*, 34 S.Ct. 143, 231 U.S. 474, 53 L.Ed. 319.

9 C.J. p 858 note 7.

#### Extension of time for performance

The sureties on a building contractor's bond cannot defeat recovery on the ground that the contractor was not allowed extensions of time because of various delays, where there was no showing that requests for extension were made except in one instance and no evidence of any failure or refusal to grant an extension where the claim was made and pressed.—*Price v. Seibel*, App., 253 S.W. 212, certio-

been held that, as the owner may waive any delay on the part of the contractor, the surety is not released by the owner's failure to give him immediate notice of the failure of the contractor to complete the building in the time specified.<sup>72</sup> Furthermore, where the conditions inserted in the contract are for the benefit of the contractor, a waiver of such conditions by the contractor does not release the surety.<sup>73</sup> However, as to the condition that insurance shall be procured by the owner, some decisions hold that a failure to procure the insurance discharges the surety,<sup>74</sup> while other decisions hold that the failure to procure insurance does not discharge the surety if there is no loss which such insurance would have covered.<sup>75</sup>

### b. Prevention of Performance

Where performance of the contract secured is rendered impossible by the act of the creditor or obligee, the sureties are discharged, since the surety cannot be held liable for the nonperformance of the contract resulting from some act or omission on the part of the creditor or obligee.

Where performance of the contract secured is rendered impossible by the act of the creditor or obligee, the sureties are discharged,<sup>76</sup> since the surety cannot be held liable for the nonperformance of the contract resulting from some act or omission on the part of the creditor or obligee.<sup>77</sup> A surety on the recognizance of a debtor is discharged if the creditor enjoins further proceedings;<sup>78</sup> and a surety on a forthcoming bond is released if the creditor seizes and sells the property for which the bond was given.<sup>79</sup> However, mere delay or interference in the performance of the contract by the

creditor or obligee will not necessarily discharge the surety.<sup>80</sup>

### § 153. Reservation of Rights

A transaction between the principal and the creditor or obligee, which otherwise would operate to discharge the surety, will not, as a general rule, have that effect if the creditor or obligee reserves all rights against the surety, or reserves the right to sue the principal, at the request of the surety.

A transaction between the principal and the creditor or obligee, which otherwise would operate to discharge a surety, will not, as a general rule, have that effect if the creditor or obligee reserves all rights against the surety,<sup>81</sup> or reserves the right to sue the principal, at the request of the surety,<sup>82</sup> the effect of such reservation being to make the agreement with the principal conditional on the consent of the surety.<sup>83</sup> In fairness and honesty, the reservation agreement should in terms reserve not only the creditor's right against the surety, but the surety's right against the principal as well.<sup>84</sup> The reservation cannot be made at a time later than that of the transaction which discharged the surety.<sup>85</sup> Notice to the surety of the reservation is not necessary.<sup>86</sup> If the negotiations between the principal and the creditor have resulted in an absolute discharge or abandonment of the contract, a reservation against a surety would be unavailing, since there would be no rights to reserve.<sup>87</sup>

### § 154. Taking Additional Security or Substitution of Collateral Securities

A surety is not discharged by the act of the creditor or obligee in taking additional security, and as a gen-

rari quashed State ex rel. Seibel v. Trimble, 253 S.W. 215, 299 Mo. 164.

72. Mo.—Lackland v. Renshaw, 165 S.W. 314, 256 Mo. 133.  
9 C.J. p 858 note 8.

73. U.S.—George A. Fuller Co. v. Doyle, C.C.Mo., 87 F. 687.  
Utah.—Corporation of President of Church of Jesus Christ of Latter-Day Saints v. Hartford Accident & Indemnity Co., 95 P.2d 736, 98 Utah 297.

74. Neb.—Gallagher v. St. Patrick's Church, 63 N.W. 864, 45 Neb. 535.  
9 C.J. p 858 note 4.

75. Ark.—Roland v. Lindsey, 146 S. W. 115, 104 Ark. 49, Ann.Cas.1914C 332.

La.—Town of Mandeville v. Paquette, 95 So. 391, 153 La. 33.  
9 C.J. p 858 note 4.

76. U.S.—Puerto Rico v. Title Guaranty, etc., Co., Pa., 33 S.Ct. 362, 227 U.S. 382, 57 L.Ed. 561.  
50 C.J. p 168 note 5.

Arbitrary termination of contract by

obligee as discharge see supra § 128.

77. U.S.—Vanadium Corp. of America v. Fidelity & Deposit Co. of Md., C.C.A.N.Y., 159 F.2d 105.  
50 C.J. p 168 note 4.

78. Mass.—Palmer v. Everett, 7 Allen 358.

79. La.—Jacobson v. Seville, 6 La. Ann. 277.

80. U.S.—Knutson v. Metallic Slab Form Co., C.C.A.Tex., 128 F.2d 408, rehearing denied 130 F.2d 200.

Mich.—Doherty v. Detroit Fidelity & Surety Co., 214 N.W. 833, 240 Mich. 36.

81. Ill.—City Nat. Bank & Trust Co. v. Burnham, 17 N.E.2d 505, 297 Ill.App. 211.

Mass.—Karcher v. Burbank, 21 N.E. 2d 542, 303 Mass. 303, 124 A.L.R. 1292.

Pa.—Corpus Juris cited in In re Roy's Estate, 157 A. 800, 801, 305 Pa. 541.

50 C.J. p 116 note 24.

Effect of reservation of rights against surety on defense of discharge resulting from:

Extension of time of payment see infra § 190.

Release of:

Cosurety see infra § 231.

Principal see infra § 223.

82. Ala.—Prout v. Decatur Branch Bank, 6 Ala. 309.

Va.—Exchange Bldg., etc., Co. v. Bayless, 21 S.E. 279, 91 Va. 134.

83. Miss.—Hunt v. Knox, 34 Miss. 655.

50 C.J. p 116 note 26.

84. Ohio.—Gholson v. Savin, 31 N. E.2d 858, 137 Ohio St. 551, 139 A. L.R. 75.

85. Ala.—Elyton v. Hood, 25 So. 745, 121 Ala. 373.

86. N.Y.—Morgan v. Smith, 70 N.Y. 537.

50 C.J. p 116 note 32.

87. Ohio.—Gholson v. Savin, 31 N. E.2d 858, 137 Ohio St. 551, 139 A. L.R. 75.

50 C.J. p 116 note 34.

eral rule substitution of collateral will not discharge the surety in the absence of injury in fact.

A surety is not discharged by the act of the creditor or obligee in taking additional security,<sup>88</sup> or receiving possession of property of the principal, although it is sufficient to pay the debt.<sup>89</sup> This rule is applicable, although the additional security is accepted after the maturity of the obligation,<sup>90</sup> unless a binding agreement to extend the time of payment of the obligation is made, as discussed *infra* § 174. Thus, the addition of a guaranty to a note will not release a maker thereof who is a surety.<sup>91</sup> A fortiori taking additional security to protect a debt other than that on which the surety is liable will not discharge him.<sup>92</sup>

**Substitution of collateral.** As a general rule substitution of collateral will not discharge the surety in the absence of injury in fact.<sup>93</sup> However, it has been held that substitution of security of a different kind discharges the surety, although the security substituted was as good as the security surrendered.<sup>94</sup> In any event, an unauthorized substitution of securities causing actual injury to the surety will result in his complete<sup>95</sup> or *pro tanto*<sup>96</sup> discharge.

### § 155. Taking of New Security or Execution of New Contract

While a new contract made by the creditor or obligee to take the place of a former one ordinarily will discharge

the sureties on the old contract, a new bond does not necessarily take the place of the old one, but may be cumulative.

While a new contract made by the creditor or obligee to take the place of a former one will, in general, discharge sureties on the old contract,<sup>97</sup> a new contract between the creditor or obligee and the principal without notice to the surety, made after the principal's default and notice given to the surety thereof, not constituting a departure from the original contract, does not release the surety from liability.<sup>98</sup> Furthermore, as the rights and liabilities of a surety become fixed on a building contractor's default, the surety is not released from all liability when the owner relets the work to another contractor.<sup>99</sup> Hence, a new contract with a surety or its nominal representative for the completion of the work contracted for, made after the default of the principal and notice by the surety that it would complete the contract, will not discharge the surety from the liability for obligations incurred by the principal under the contract.<sup>1</sup>

A new bond does not necessarily take the place of the old one, but may be cumulative;<sup>2</sup> nor does the taking of bonds in judicial proceedings discharge sureties who were liable before such bonds were given.<sup>3</sup> However, if the intention is clearly otherwise, the new bond will be held to release the sureties on the first one.<sup>4</sup> If the relation terminates

88. U.S.—*U. S. v. Axman*, C.C.Cal., 153 F. 982.

Ark.—*Bank of Maynard v. Carroll*, 49 S.W.2d 369, 185 Ark. 788.

Ga.—*W. T. Rawleigh Co. v. Overstreet*, 32 S.E.2d 574, 71 Ga.App. 873.

Minn.—*Trovatten v. Minea*, 7 N.W.2d 390, 213 Minn. 544, 144 A.L.R. 1263.

N.C.—*Maxwell v. Southern Fidelity Mut. Ins. Co.*, 9 S.E.2d 428, 217 N.C. 762.

Pa.—*Plummer v. Wilson*, 185 A. 311, 323 Pa. 118.

50 C.J. p 155 note 75.

Taking additional security and extending time see *infra* § 177.

89. Neb.—*Greenwood First Nat. Bank v. Wilbern*, 90 N.W. 1126, 93 N.W. 1002, 95 N.W. 12, 65 Neb. 242.

90. Pa.—*First Nat. Bank v. Jones' Estate*, 6 A.2d 273, 334 Pa. 577.

91. Neb.—*Anderson v. Hall*, 94 N.W. 981, 4 Neb. Unoff., 494.

92. Ky.—*Royse v. Winchester Bank*, 146 S.W. 738, 148 Ky. 368.

93. N.Y.—*Keeler v. Hollweg*, 55 N.Y.S. 821, 36 App.Div. 490.

50 C.J. p 156 note 81.

Changing form of indebtedness in connection with extension of time see *infra* § 176.

94. Tex.—*Albright v. Allday*, Civ. App., 37 S.W. 646.

50 C.J. p 156 note 82.

95. Va.—*Ashby v. Smith*, 9 Leigh 164, 36 Va. 164.

96. N.J.—*Monroe v. De Forest*, 31 A. 773, 53 N.J.Eq. 264.

Ohio.—*Frazier v. Bank*, 2 Ohio App. 159, 20 Ohio Cir.Ct.N.S., 562.

97. U.S.—*U. S. v. Stephanidis*, D.C. N.Y., 46 F.2d 691—*Chesapeake Transit Co. v. Walker & Son*, C.C. Pa., 158 F. 850, affirmed *Chesapeake Transit Co. v. Mott*, 169 F. 543, 95 C.C.A. 41.

Ga.—*Haigler v. Adams*, 63 S.E. 715, 5 Ga.App. 637.

Pa.—*First Nat. Bank v. Innerst*, Com.Pl., 51 York Leg.Rec. 145.

Wash.—*Kraht v. Empire State Surety Co.*, 113 P. 773, 62 Wash. 339.

50 C.J. p 128 note 13.

New bond as:

Discharging surety on injunction bond see *Injunctions* § 294.

Releasing surety on bond of municipal office see *Municipal Corporations* § 547 d.

New note

Where payee accepts new note for same debt and new note is not signed by surety who signed old

note, surety is released from liabil-

ity on old note.—*Brown v. Cooper Co.*, Tex.Civ.App., 99 S.W.2d 637, error dismissed.

98. U.S.—*Wing & Bostwick Co. v. U. S. Fidelity & Guaranty Co.*, C.C. N.Y., 150 F. 672.

99. U.S.—*U. S. v. U. S. Fidelity, etc., Co.*, Cal., 35 S.Ct. 298, 236 U.S. 512, 59 L.Ed. 696.

1. U.S.—*Board of Education of City of Asbury Park v. Maryland Casualty Co. of Baltimore, Md.*, C.C.A. N.J., 27 F.2d 20.

N.Y.—*Harley v. Mapes Reeves Constr. Co.*, 68 N.Y.S. 191, 33 Misc. 626.

2. Or.—*Hand Mfg. Co. v. Marks*, 52 P. 512, 53 P. 1072, 59 P. 549, 36 Or. 523.

50 C.J. p 128 note 15.

New bond of:

Executor or administrator see *Executors and Administrators* § 959.

Guardian see *Guardian and Ward* § 207 e.

3. N.Y.—*Smith v. Falconer*, 11 Hun 481, affirmed 79 N.Y. 633.

50 C.J. p 128 note 16.

4. Iowa.—*Ramsey v. Coolbaugh*, 13 Iowa 164.

50 C.J. p 128 note 17.

by the making of a new obligation, the sureties on the prior one are not discharged as to defaults which already have occurred.<sup>5</sup> In any event the release of a surety by the making of a new bond is not effected until the new bond is executed and accepted.<sup>6</sup>

*New lease.* The giving of a new lease which supersedes the old one will release from liability sureties on the first one.<sup>7</sup>

## § 156. Knowledge of Existence of Relationship

As a general rule, in order that a surety, as such, may be discharged by acts of the creditor or obligee, the latter must have knowledge of the existence of the relation.

As a general rule, in order that a surety, as such may be discharged by acts of the creditor or obligee, the latter must have knowledge of the existence of the relation,<sup>8</sup> or it must appear from the face of the contract;<sup>9</sup> but, if the creditor or obligee has knowledge, it is not necessary that the relation be shown on the face of the instrument.<sup>10</sup> Although the creditor or obligee did not possess such knowledge originally, or if the relation arose from transactions occurring after the contract was entered into, he must respect the rights of the surety when informed that the relation exists, as discussed supra § 32.

## § 157. Prejudice to Surety

As a general rule, in order for a gratuitous surety to be discharged, it is not necessary that he show prejudice in fact; if technically his rights have been violated, he will be discharged whether he has in fact been harmed or benefited.

As a general rule, in order for a surety to be discharged, it is not necessary that he show prejudice in fact; if technically his rights have been violated, he will be discharged whether he has in fact been harmed or benefited.<sup>11</sup> However, in some jurisdictions the rule is that the release of a surety without payment or performance can only result from some act or omission by the creditor which proves or may prove injurious to the surety,<sup>12</sup> and, under the statutes existing in a few jurisdictions, a surety is discharged in most cases, only in so far as he has been prejudiced.<sup>13</sup>

*Compensated surety.* As a general rule, a compensated surety must be prejudiced by the act of the creditor or obligee before it will be discharged thereby.<sup>14</sup>

## § 158. Consent of Surety

A surety is not discharged by any act of the creditor or obligee to which he consents.

A surety is not discharged by any act of the creditor or obligee to which he consents.<sup>15</sup> Consent may be given at the time the act or alteration is made,<sup>16</sup> or by ratification of an act or altera-

5. N.C.—*Sharpe v. Connelly*, 11 S. E. 177, 105 N.C. 87.  
50 C.J. p 128 note 18.

6. N.Y.—*Reilly v. Dodge*, 14 N.Y.S. 129, 59 N.Y.Super. 189, affirmed 29 N.E. 1011, 131 N.Y. 153.  
50 C.J. p 128 note 19.

### Renewal note

Where surety signed renewal note on condition that obligee obtain other signatures, failure to perform condition does not affect surety's liability on original note.

III.—*Belorodker Loan & Investment Co. v. Goldenberg*, 253 Ill.App. 416.  
N.C.—*Bank of Benson v. Jones*, 61 S.E. 193, 147 N.C. 419.

7. Mo.—*Hotel Milton Co. v. Powell*, 123 S.W. 953, 146 Mo.App. 208.

8. U.S.—*Corpus Juris* cited in *Mississippi Valley Trust Co. v. Bussey*, C.C.A.Fla., 49 F.2d 881, 883.  
N.J.—*Corpus Juris* cited in *Mann v. Bugbee*, 167 A. 202, 207, 113 N.J. Eq. 434.

N.Y.—*White v. Angello*, 254 N.Y.S. 123, 142 Misc. 233.

Wash.—*Alaska Pac. Salmon Co. v. Matthewson*, 101 P.2d 606, 3 Wash. 2d 560.

50 C.J. p 111 note 64.

Knowledge of existence of relation on extension of time for payment or other performance see *infra* § 187.

9. Tex.—*Lubbock First Nat. Bank v. Alexander*, Civ.App., 4 S.W.2d 238.  
50 C.J. p 112 note 65.

10. Mich.—*Stevens v. Oaks*, 25 N. W. 309, 58 Mich. 343.  
Pa.—*First Nat. Bank v. Innerst*, Com.Pl., 51 York Leg.Rec. 145.  
50 C.J. p 112 note 66.

11. Tex.—*Corpus Juris* cited in *Lloyd v. Thorp*, Civ.App., 42 S.W. 2d 263, 265.

50 C.J. p 112 note 69.

Necessity of prejudice by:

Alteration of contract see *supra* § 124.

Extension of time of payment see *infra* §§ 188, 189.

Release of:

Cosurety see *infra* § 231.

Security see *infra* § 204.

12. U.S.—*Denver Engineering Works Co. v. Elkins*, C.C.Pa., 179 F. 922, reversed on other grounds 181 F. 684, 105 C.C.A. 1.

50 C.J. p 112 note 70.

13. Mont.—*Dodd v. Vucovich*, 99 P. 296, 38 Mont. 188.

50 C.J. p 112 note 72.

14. U.S.—*Atlantic Trust, etc., Co. v. Laurinburg, Va.*, 163 F. 690, 90 C.C.A. 274, certiorari denied 29 S. Ct. 683, 213 U.S. 573, 53 L.Ed. 656.  
50 C.J. p 112 note 73.

15. N.Y.—*Comey v. United Surety Co.*, 111 N.E. 832, 217 N.Y. 268, rehearing denied 112 N.E. 1055, 218 N.Y. 625—*Corpus Juris* cited in *Carpenter v. Hogan*, 50 N.Y.S.2d 123, 127, 182 Misc. 103.

50 C.J. p 112 note 75.

Consent of surety to:

Alteration of contract or obligation see *supra* § 124.

Extension of time of performance or payment see *infra* § 191.

Release of:

Cosurety see *infra* § 231.

Principal see *infra* § 223.

Relinquishment of security held by creditor or obligee see *infra* § 205.

Unauthorized payment to principal see *supra* § 133.

16. Mich.—*Board of Education of City of Sault Ste Marie v. Chaussee*, 177 N.W. 975, 211 Mich. 61.

50 C.J. p 112 note 75.

tion at a time subsequent thereto,<sup>17</sup> or it may be given in advance, as at the time the contract of suretyship is entered into.<sup>18</sup> If assent is conditional, the conditions must be performed in order that the surety's liability may continue.<sup>19</sup> Where there are two or more sureties, assent by fewer than all does not prevent the discharge of the others.<sup>20</sup>

*Party necessary to give consent.* If the surety is living, the consent must be given by him<sup>21</sup> or his agent;<sup>22</sup> if he is dead, by his personal representatives.<sup>23</sup>

*Consent by a surety mentally incapable* will operate the same as if no consent had been given.<sup>24</sup>

### § 159. — Implied Consent

Consent may be implied from the conduct of the surety.

Consent may be implied from the conduct of the surety,<sup>25</sup> such as advice or a request to perform the acts relied on as a discharge,<sup>26</sup> or from a course of business or usage known to the surety.<sup>27</sup> Where consent is to be implied, the facts from which it is to be implied must very clearly warrant the implication.<sup>28</sup> Mere knowledge of acts done by the creditor or obligee subsequent to the making of the

contract of suretyship without objection on the part of the surety is not consent by the latter,<sup>29</sup> for, as a general rule, some affirmative action is necessary.<sup>30</sup>

### § 160. Waiver by, or Estoppel of, Surety

- a. In general
- b. New promise
- c. Taking indemnity or security from principal

#### a. In General

A surety may waive his defenses, or by his acts and conduct be estopped to assert them.

A surety may waive his defenses,<sup>31</sup> or by his acts and conduct be estopped to assert them.<sup>32</sup> So, knowledge at the time of entering into the contract of suretyship of acts done prior thereto without notice of dissent will estop the surety from claiming the advantage thereof.<sup>33</sup> Ordinarily, whatever will estop the principal from asserting a defense will also estop the surety as to that defense.<sup>34</sup> Waiver, unlike estoppel, is always a question of intention,<sup>35</sup> to be proved either by express declarations or by acts or omissions, from which it may be inferred.<sup>36</sup>

17. N.Y.—*Corpus Juris* cited in *Carpenter v. Hogan*, 50 N.Y.S.2d 123, 127, 182 Misc. 103. 50 C.J. p 113 note 77.

18. Tex.—*Brown Iron Co. v. Templeman*, 69 S.W. 249, 30 Tex.Civ. App. 50. 50 C.J. p 113 note 78.

19. Minn.—*Norwegian Evangelical Lutheran Bethlehem Cong. v. U. S. Fidelity, etc., Co.*, 83 N.W. 487, 81 Minn. 32.

20. U.S.—*Mundy v. Stevens*, Pa., 61 F. 77, 9 C.C.A. 366. 50 C.J. p 113 note 80.

21. U.S.—*U. S. v. Cushman*, C.C.N. H., 25 F.Cas.No.14,907, 2 Sumn. 310.

22. U.S.—*Federal Surety Co. v. Millsbaugh, etc., Corp.*, C.C.A.Ind., 14 F.2d 937.

50 C.J. p 113 note 82.

23. U.S.—*U. S. v. Cushman*, C.C.N. H., 25 F.Cas.No.14,907, 2 Sumn. 310.

50 C.J. p 113 note 83.

24. Ill.—*Gaar v. Hulse*, 90 Ill.App. 548.

25. N.M.—*Corpus Juris* quoted in *Pacific Nat. Agr. Credit Corporation v. Hagerman*, 51 P.2d 857, 860, 39 N.M. 549, 101 A.L.R. 1301. 50 C.J. p 113 note 85.

Right to imply consent to:  
Alteration of contract see supra § 124.

Diversion of instrument see supra § 122.

Extension of time of payment see infra § 191.

Relinquishment of security see infra § 205.

26. N.M.—*Corpus Juris* quoted in *Pacific Nat. Agr. Credit Corporation v. Hagerman*, 51 P.2d 857, 860, 39 N.M. 549, 101 A.L.R. 1301. 50 C.J. p 114 note 86.

27. N.M.—*Corpus Juris* quoted in *Pacific Nat. Agr. Credit Corporation v. Hagerman*, 51 P.2d 857, 860, 39 N.M. 549, 101 A.L.R. 1301.

50 C.J. p 114 note 87.

28. N.M.—*Corpus Juris* quoted in *Pacific Nat. Agr. Credit Corporation v. Hagerman*, 51 P.2d 857, 860, 39 N.M. 549, 101 A.L.R. 1301.

50 C.J. p 114 note 88.

29. N.M.—*Corpus Juris* quoted in *Pacific Nat. Agr. Credit Corporation v. Hagerman*, 51 P.2d 857, 860, 39 N.M. 549, 101 A.L.R. 1301.

50 C.J. p 114 note 89.

Mere silence or passive consent after knowledge of breach of condition under which surety signed does not constitute acquiescence or consent to change by surety.—*Pacific Nat. Agr. Credit Corporation v. Hagerman*, 51 P.2d 857, 39 N.M. 549, 101 A.L.R. 1301.

30. N.M.—*Corpus Juris* quoted in *Pacific Nat. Agr. Credit Corporation v. Hagerman*, 51 P.2d 857, 860, 39 N.M. 549, 101 A.L.R. 1301. 50 C.J. p 114 note 90.

31. U.S.—*State-Planters' Bank &*

*Trust Co. v. First Nat. Bank*, C.C. A.Va., 76 F.2d 527, certiorari denied 55 S.Ct. 923, 295 U.S. 764, 79 L.Ed. 1706.

Tex.—*Evans v. First Nat. Bank*, Civ. App., 101 S.W.2d 1080, error refused.

50 C.J. p 114 note 92.

Waiver of defense caused by:  
Change or alteration in contract or obligation see supra § 124.

Extension of time see infra § 192.  
Failure to give notice of default in time or manner required see supra § 150.

Unauthorized payment see supra § 136.

Waiver, estoppel, or consent to release of security see infra § 205.

32. Iowa.—*Empire State Surety Co. v. Des Moines*, 181 N.W. 870, 132 N.W. 837, 152 Iowa 531.

50 C.J. p 114 note 93.

33. Wash.—*Columbia Security Co. v. Ethna Accident, etc., Co.*, 183 P. 137, 108 Wash. 116.

Estoppel or waiver as to defects in suretyship contract see supra § 83.

34. Mo.—*State v. Blakemore*, 205 S. W. 626, 275 Mo. 695.

35. Ind.—*Cleveland, etc., R. Co. v. Moore*, 82 N.E. 52, 84 N.E. 540, 170 Ind. 328.

50 C.J. p 114 note 96.

36. Colo.—*Southern Surety Co. v. Chris Irving Plumbing, etc., Co.*, 184 P. 356, 67 Colo. 311.



It is essential that the surety have knowledge of the facts which would justify his considering himself discharged or not bound,<sup>37</sup> although it is not necessary that he be aware of their legal effect.<sup>38</sup> If his ignorance results from his own negligence he will be conclusively presumed to have knowledge.<sup>39</sup> If, with knowledge of such facts, he does any affirmative act which contemplates the continued existence of his status as a surety, he thereby waives the right to claim that he is discharged.<sup>40</sup> An offer to make a payment in order to avoid litigation is not a waiver of the provisions of the suretyship contract,<sup>41</sup> and an offer to pay a note, by the surety's attorney, under the mistaken belief that the surety is liable, will not estop the surety from defending on the ground that he has been released.<sup>42</sup> A surety cannot waive his defense to the detriment of his own creditors,<sup>43</sup> and a waiver by the principal will not affect the surety.<sup>44</sup>

#### b. New Promise

If a surety makes a new promise to pay the debt or acknowledges its continued existence, he thereby waives any defense he may have by reason of any act of the creditor or obligee.

If a surety makes a new promise to pay the debt,<sup>45</sup> or acknowledges its continued existence,<sup>46</sup>

he thereby waives any defense he may have by reason of any act of the creditor or obligee. However, a new promise in ignorance of a release is not binding.<sup>47</sup> As a general rule a new consideration is not regarded as necessary,<sup>48</sup> although the contrary is held in a few jurisdictions,<sup>49</sup> at least where necessary in order to revive the principal obligation.<sup>50</sup> The payment of interest by a surety, after his release by operation of law, will not alone operate as a new promise,<sup>51</sup> and part payment with the money of the principal, although the surety does not state that he acts as agent of the principal,<sup>52</sup> or declarations that he may have to pay or expects to pay,<sup>53</sup> or negotiations looking to a settlement,<sup>54</sup> or the mailing of a letter which is never received,<sup>55</sup> will not operate to reinstate the obligation.

#### c. Taking Indemnity or Security from Principal

As to whether a surety waives a defense by taking indemnity from the principal after knowledge of the facts, the cases are not in accord.

On the question whether a surety waives a defense by taking indemnity from the principal after knowledge of the facts, the cases are not in entire accord, it having been held that this is not a waiver,<sup>56</sup> while other cases are to the contrary.<sup>57</sup>

37. Mo.—Boppert v. Illinois Surety Co., 126 S.W. 768, 140 Mo.App. 675.

Pa.—First Nat. Bank v. Innerst, Com.Pl., 51 York Leg.Rec. 145. 50 C.J. p 114 note 98.

38. Ohio.—Rindskopf v. Doman, 28 Ohio St. 516.

Vt.—Churchill v. Bradley, 5 A. 189, 58 Vt. 403, 56 Am.R. 563.

39. Miss.—State v. Harney, 57 Miss. 863.

50 C.J. p 115 note 1.

40. U.S.—Jack v. Craighead Rice Mill Co., C.C.A.Ark., 167 F.2d 96, certiorari denied New Amsterdam Casualty Co. v. Craighead Rice Mill Co., 68 S.Ct. 1340, 334 U.S. 829, 92 L.Ed. 1756.

N.Y.—Corpus Juris cited in Carpenter v. Hogan, 50 N.Y.S.2d 123, 127, 182 Misc. 103.

Okl.—U. S. Fidelity & Guaranty Co. v. Kern, 62 P.2d 1173, 178 Okl. 378.

Pa.—Spring Garden Building & Loan Ass'n v. Rhodes, 190 A. 530, 126 Pa.Super. 192.

50 C.J. p 115 note 2.

41. Colo.—Southern Surety Co. v. Chris Irving Plumbing, etc., Co., 184 P. 356, 67 Colo. 311.

50 C.J. p 115 note 3.

42. Ky.—Morehead v. Citizens' Deposit Bank, 113 S.W. 501, 130 Ky. 414, 23 L.R.A.N.S., 141.

43. Minn.—Campion v. Whitney, 14 N.W. 806, 30 Minn. 177.

50 C.J. p 115 note 5.

44. U.S.—Maryland Fidelity, etc., Co. v. U. S., N.Y., 137 F. 866, 70 C.C.A. 204.

50 C.J. p 115 note 6.

#### Reaffirmation by principal

Where contractor in execution of his contract with subcontractor charged a large amount to subcontractor for lumber paid for by contractor, and subcontractor ratified the full charge, if ratification was erroneous, subcontractor's surety could have it corrected but surety was not warranted in rescinding and repudiating liability under the contract of suretyship because of defaults of the contractor under the circumstances without having specifically complained.—Knutson v. Metallic Slab Form Co., C.C.A.Tex., 128 F.2d 408, rehearing denied 130 F.2d 200.

45. N.Y.—Corpus Juris cited in Carpenter v. Hogan, 50 N.Y.S.2d 123, 127, 182 Misc. 103.

50 C.J. p 115 note 8.

New promise as waiving defense resulting from discharge by: Alteration of contract see supra § 124.

Diversion of contract or use of funds for unauthorized purpose see supra § 122.

Extension of time see infra § 192.

46. N.Y.—Corpus Juris cited in Carpenter v. Hogan, 50 N.Y.S.2d 123, 127, 182 Misc. 103.

50 C.J. p 115 note 9.

47. Ga.—Crandall v. Shepard, 144 S.E. 772, 166 Ga. 889.

48. N.Y.—Carpenter v. Hogan, 50 N.Y.S.2d 123, 182 Misc. 103.

50 C.J. p 115 note 10.

49. Ky.—Steger v. Jackson, 102 S. W. 329, 139 Ky. 491, 31 Ky.L. 434.

50 C.J. p 115 note 11.

50. Mich.—Detroit First Nat. Bank v. Currie, 110 N.W. 499, 147 Mich. 72, 118 Am.S.R. 537, 9 L.R.A.N.S., 693, 11 Ann.Cas. 241.

50 C.J. p 115 note 12.

51. Ill.—Brockman v. Sieverling, 6 Ill.App. 512.

50 C.J. p 115 note 13.

52. Me.—Lime Rock Bank v. Mallett, 42 Me. 349.

53. N.H.—Fowler v. Brooks, 13 N. H. 240.

54. Ky.—Slaughter v. Hampton, 90 S.W. 981, 28 Ky.L. 904.

50 C.J. p 116 note 16.

55. Tex.—Cruse v. Gau, Civ.App., 193 S.W. 405.

56. N.H.—Fowler v. Brooks, 13 N. H. 240.

50 C.J. p 116 note 18.

57. Tex.—Campbell Printing Press v. Powell, Civ.App., 24 S.W. 965.

50 C.J. p 116 note 19.

If a surety erroneously supposing himself liable takes security, he may be liable to the extent thereof.<sup>58</sup> However, a surety does not waive a defense if he did not in fact accept the security,<sup>59</sup> if he ac-

cepted security which appears not to be of any value,<sup>60</sup> or if he accepted the security without the knowledge of the creditor and subsequently surrendered it to the principal.<sup>61</sup>

#### D. EXTENSION OF TIME OF PAYMENT OR PERFORMANCE

##### § 161. In General

A surety's contract cannot be extended by imposing thereon a new and different date for performance by the principal to the prejudice or possible prejudice of the surety without his concurrence.

While a surety's contract cannot be extended by imposing thereon a new and different date for performance by the principal to the prejudice or possible prejudice of the surety without his concurrence,<sup>62</sup> a creditor may, with the consent of the surety, grant the principal debtor an extension of time of payment,<sup>63</sup> or he may, in the absence of such consent, make such an agreement with the principal debtor if he reserves all rights against the surety<sup>64</sup> so that the agreement does not operate as

absolute and final on the liability of the surety, but, rather, operates as a qualified and conditional suspension of the remedies which the creditor expressly retains against the surety.<sup>65</sup>

##### § 162. Operation and Effect

As a general rule, an extension to the principal of the time of payment or performance of the principal obligation by the creditor or obligee, without the consent of the surety, will discharge the surety.

As a general rule, an extension to the principal of the time of payment or performance of the principal obligation by the creditor or obligee, without the consent of the surety, will discharge the surety.<sup>66</sup> The reasons for the discharge of the surety

58. Tenn.—Hoss v. Crouch, Ch.A., 48 S.W. 724.

59. Tex.—Campbell Printing-Press Mfg. Co. v. Powell, Civ.App., 36 S.W. 1005.

60. Iowa.—Phelps v. Walkey, 50 N.W. 560, 84 Iowa 120.

Wis.—Fay v. Tower, 16 N.W. 558, 58 Wis. 286.

61. Ind.—Rittenhouse v. Kemp, 37 Ind. 258.

62. La.—O'Banion v. Willis, 129 So. 440, 14 La.App. 638.

Miss.—Hederman v. Cox, 193 So. 19, 188 Miss. 21.

Extension of time granted by court see *infra* § 244.

63. Mass.—Brockton Sav. Bank v. Shapiro, 42 N.E.2d 826, 311 Mass. 695.

Effect of surety's consent see *infra* § 191.

64. Mass.—Brockton Sav. Bank v. Shapiro, *supra*.

Effect of reservation of rights see *infra* § 190.

65. Mass.—Brockton Sav. Bank v. Shapiro, *supra*.

66. U.S.—Sauder v. Dittmar, C.C.A. Kan., 118 F.2d 524.

Ark.—City of Morrilton v. Moose, 49 S.W.2d 1044, 185 Ark. 1051.

Colo.—Drescher v. Fulham, 52 P. 685, 11 Colo.App. 62.

Del.—Equitable Trust Co. v. Shaw, 194 A. 24, 22 Del.Ch. 47.

Fla.—Anderson v. Trueman, 130 So. 12, 100 Fla. 727.

Ga.—Benson v. Henning, 178 S.E. 406, 50 Ga.App. 492.

Ill.—Anschell v. Flynn, 256 Ill.App. 230.

Ind.—Owen County State Bank v. Guard, 26 N.E.2d 395, 217 Ind. 75.

Iowa.—Federal Land Bank of Omaha, Neb., v. Christiansen, 298 N.W. 641, 230 Iowa 537—Eilers v. Frieling, 234 N.W. 275, 211 Iowa 841.

Ky.—U. S. Fidelity & Guaranty Co. v. Mayo Arcade Corporation, 70 S.W.2d 531, 253 Ky. 763—Henderson v. Phoenix Ins. Co., 25 S.W.2d 359, 233 Ky. 217.

La.—Electrical Supply Co. v. Eugene Freeman, Inc., 152 So. 510, 178 La. 741—Manale v. Harris, App., 165 So. 339—Item Co. v. Polazzo, 134 So. 345, 18 La.App. 594, modified on other grounds 138 So. 458, 18 La.App. 594—O'Banion v. Willis, 129 So. 440, 14 La.App. 638.

Me.—Leavitt v. Youngtown Pressed Steel Co., 166 A. 505, 132 Me. 76—Blumenthal v. Serota, 151 A. 138, 129 Me. 187.

Mass.—Taborsak v. Massachusetts Bonding & Insurance Co., 193 N.E. 729, 289 Mass. 8—Conway Sav. Bank v. Vinick, 192 N.E. 81, 287 Mass. 448—Manufacturers' Finance Co. v. Rockwell, 180 N.E. 224, 278 Mass. 502.

Minn.—Bursell v. Morgan, 233 N.W. 12, 181 Minn. 462.

Mont.—U. S. Building & Loan Ass'n v. Burns, 4 P.2d 703, 90 Mont. 402.

Mo.—Corpus Juris cited in State ex rel. Hardy v. Farris, 47 S.W.2d 198, 200, 226 Mo.App. 1007—Dickherber v. Turnbull, App., 31 S.W.2d 234—Jobe v. Buck, 31 S.W.2d 98, 224 Mo.App. 621.

Neb.—Nordeen v. Nelson, 279 N.W. 323, 134 Neb. 707.

N.J.—Adelman v. Franklin Wash-

ington Trust Co., 44 A.2d 399, 137 N.J.Eq. 257—Oriental Building & Loan Ass'n v. Nutley & Avondale Realty Co., 19 A.2d 351, 129 N.J. Eq. 292—Hunt v. Gorenberg, 155 A. 881, 9 N.J.Misc. 463.

N.Y.—Becker v. Faber, 19 N.E.2d 997, 280 N.Y. 146, 121 A.L.R. 1010, reargument denied Becker v. Intermann, 21 N.E.2d 216, 280 N.Y. 730—Yonkers Builders Supply Co. v. Petro Luciano & Son, 199 N.E. 45, 269 N.Y. 171, 102 A.L.R. 759—DuPort v. First Nat. Bank of Glens Falls, 29 N.Y.S.2d 729, 262 App.Div. 267, reversed on other grounds 43 N.E.2d 34, 288 N.Y. 261—Irving Trust Co. v. Hutchinson Holding Corporation, 270 N.Y. S. 684, 241 App.Div. 107—Bank of U. S. v. Andron, 277 N.Y.S. 594, 155 Misc. 21—Sturman v. Lomor Realty Co., 265 N.Y.S. 564, 148 Misc. 277—Buffalo Forge Co. v. Fidelity & Casualty Co. of New York, 256 N.Y.S. 329, 142 Misc. 647.

Or.—Walsh v. Young, 180 P.2d 535, 181 Or. 185.

Pa.—Plummer v. Wilson, 185 Pa. 311, 322 Pa. 118—Germantown Trust Co. v. Emhardt, 184 A. 457, 321 Pa. 561, followed 184 A. 460, 321 Pa. 567—Spring Garden Building & Loan Ass'n v. Rhodes, 190 A. 530, 126 Pa.Super. 102—Pure Oil Co. v. Shilfer, 175 A. 895, 115 Pa.Super. 319—In re Uhlig's Estate, 167 A. 479, 109 Pa.Super. 604—Hause v. Smith, Com.Pl., 56 Dauph.Co. 392—First Nat. Bank & Trust Co. of Dallastown v. Innerst, Com.Pl., 51 York Leg.Rec. 145.

are that the extension amounts to an alteration of the principal contract without his consent,<sup>67</sup> that it operates as a new loan to the principal,<sup>68</sup> and that it impairs the surety's right of subrogation<sup>69</sup> by preventing his payment of the debt and procedure against the principal for indemnity.<sup>70</sup>

*Applications of rule.* The rule that an extension of time discharges the surety has been applied to agreements for extension of the time of performance of a contract,<sup>71</sup> arbitrations extending the time for payment of the principal debt,<sup>72</sup> agreements not to sue to collect the debt<sup>73</sup> or for a continuance<sup>74</sup> or stay<sup>75</sup> of proceedings, including a stay of execution by agreement of the parties,<sup>76</sup> and various other extensions.<sup>77</sup> A mere stipulation for postponement of one of the ordinary proceedings in an action will not discharge the surety<sup>78</sup> on an undertaking given therein.<sup>79</sup> An extension of an independent contract obviously will not discharge the surety.<sup>80</sup> An agreement by the creditor with the principal not to sue the surety until after a certain time does not discharge the latter.<sup>81</sup>

*Discharge of cosurety.* When the principal debtor and one of the sureties make a valid agreement

by which the time of payment of the debt is extended, every other surety who does not consent to such extension is released from liability.<sup>82</sup> The release of a surety operates to relieve his cosurety from liability for that proportion of the debt which the surety released should have paid as between himself and the cosurety had he not been released.<sup>83</sup> The mere giving of time to one or two cosureties whose obligations are equal will not discharge the other.<sup>84</sup>

### § 163. — Sureties on Negotiable Instruments

In the absence of a statute providing otherwise, the general rule as to the discharge of the surety by an extension of time to the principal is applicable to sureties on negotiable instruments.

In the absence of a statute providing otherwise, the general rule as to the discharge of the surety by an extension of time to the principal is applicable to sureties on negotiable instruments.<sup>85</sup> Where the suretyship relation arises independently of the negotiable instrument, an extension will discharge the surety.<sup>86</sup>

#### *Under provisions of the Negotiable Instruments*

R.I.—Industrial Trust Co. v. Goldman, 193 A. 852, 59 R.I. 11, 112 A.L.R. 1313.

S.D.—Zastrow v. Knight, 229 N.W. 925, 56 S.D. 554, 72 A.L.R. 379.

Tex.—Texas Nat. Bank of Beaumont v. Debes, 120 S.W.2d 794, 132 Tex. 207—Brinker v. First Nat. Bank, Com.App., 37 S.W.2d 136—Trimble v. Whitson, Civ.App., 77 S.W.2d 899—Dansby v. Stroud, Civ.App., 48 S.W.2d 1018, error refused.

Wash.—Gillman v. Purdy, 9 P.2d 1092, 167 Wash. 659, followed in 9 P.2d 1094, 167 Wash. 701. 50 C.J. p 130 note 39.

The defense is personal to the surety and cannot be set up for him by another creditor of the principal. —Turner v. Stewart, 41 S.E. 924, 51 W.Va. 493.

Under early decisions the defense of discharge by an extension of time was unavailable to a surety in an action at law, the defense being regarded as purely equitable in character.—Devers v. Ross, 10 Gratt. 252, 51 Va. 252, 60 Am.D. 331—50 C.J. p 132 note 56.

67. Mont.—U. S. Building & Loan Ass'n v. Burns, 4 P.2d 703, 90 Mont. 402.

Pa.—Hanse v. Smith, Com.Pl., 56 Dauph.Co. 392.

Tex.—Dansby v. Stroud, Civ.App., 48 S.W.2d 1018, error refused. 50 C.J. p 131 note 41.

Effect of alteration or modification of contract generally see *supra* § 124.

#### *Risk of surety increased*

S.D.—Zastrow v. Knight, 229 N.W. 925, 56 S.D. 554, 72 A.L.R. 379.

68. Ind.—Spurgeon v. Smitha, 17 N.E. 105, 114 Ind. 453—Musgrave v. Glasgow, 3 Ind. 31.

69. Ky.—U. S. Fidelity & Guaranty Co. v. Mayo Arcade Corporation, 70 S.W.2d 531, 253 Ky. 763.

S.D.—Zastrow v. Knight, 229 N.W. 925, 56 S.D. 554, 72 A.L.R. 379.

50 C.J. p 131 note 43.

70. Ky.—U. S. Fidelity & Guaranty Co. v. Mayo Arcade Corporation, 70 S.W.2d 531, 253 Ky. 763.

Mont.—U. S. Building & Loan Ass'n v. Burns, 4 P.2d 703, 90 Mont. 402.

S.D.—Zastrow v. Knight, 229 N.W. 925, 56 S.D. 554, 72 A.L.R. 379.

50 C.J. p 131 note 44.

71. Mich.—Todd v. Greenwood Tp. School Dist. No. 1, 40 Mich. 294.

N.Y.—Livingston v. Moore, 44 N.Y.S. 125, 15 App.Div. 15, appeal dismissed 56 N.E. 148, 161 N.Y. 602.

50 C.J. p 131 note 46.

72. N.Y.—Coleman v. Wade, 6 N.Y. 44.

50 C.J. p 131 note 47.

73. Tex.—McKaughan v. Baldwin, Civ.App., 153 S.W. 660.

50 C.J. p 132 note 48.

74. Mich.—Walker v. Archer, 37 N.W. 754, 128 Mich. 603.

Tex.—Wybrants v. Lutch, 24 Tex. 309.

75. N.Y.—Ducker v. Rapp, 67 N.Y. 464—Boughton v. Orleans Bank, 2 Barb.Ch. 458.

76. Miss.—Miller v. Lewis, 60 So. 654, 103 Miss. 598. 50 C.J. p 132 note 51.

77. Me.—Phillips v. Rounds, 33 Me. 357.

50 C.J. p 132 note 52.

78. N.Y.—Ducker v. Rapp, 67 N.Y. 464.

50 C.J. p 132 note 53.

79. Wash.—Hall, etc., Furniture Co. v. Schmidt, 35 P. 424, 7 Wash. 606.

50 C.J. p 132 note 54.

80. Kan.—Allen v. Hopkins, 61 P. 750, 62 Kan. 175.

50 C.J. p 132 note 55.

81. Ala.—Armstead v. Thomas, 9 Ala. 586.

82. Tex.—Short v. Shannon, Civ. App., 211 S.W. 463.

83. Wis.—Hallock v. Yankey, 78 N.W. 156, 102 Wis. 41, 72 Am.S.R. 861.

84. Ky.—Koehler v. Hussey, 57 S.W. 241, 22 Ky.L. 317.

50 C.J. p 132 note 61.

85. S.D.—Citizens' State Bank of Colman v. Rosenwald, 256 N.W. 264, 63 S.D. 50.

50 C.J. p 133 note 66.

Reservation of rights see *infra* § 190.

86. Mo.—Citizens' Bank v. Douglass, 161 S.W. 601, 178 Mo.App. 664.

50 C.J. p 134 note 72.

Act to the effect that one who, by the terms of a negotiable instrument, is absolutely required to pay it is primarily liable, and that only persons secondarily liable are discharged by extension or renewal without their assent, a joint maker of a note is not discharged by extension of the time of payment, even though he is a mere surety as between himself and the other maker.<sup>87</sup> An indorser surety, however, is discharged as one secondarily liable.<sup>88</sup> There is authority to the effect that the surety will be discharged as to one not a holder in due course,<sup>89</sup> although other authority is to the contrary.<sup>90</sup>

### § 164. — Surety Having Security

A surety taking security from his principal against liability by reason of the suretyship may not be permitted to urge a discharge by reason of an extension of time by the creditor.

A surety by taking security from his principal against liability by reason of the suretyship in effect appropriates that portion of the property or effects of the principal to the payment of the debt and may not be permitted to urge a discharge by reason of an extension of time by the creditor.<sup>91</sup> If, however, security taken from the principal by a surety to indemnify him against loss proves to be worthless,<sup>92</sup> or is lost without the fault of the surety,<sup>93</sup> he will be discharged by an extension of the time of payment. This is true also if security taken by him is returned to the principal before the extension is granted, the creditor not being aware of the indemnity at the time the extension is granted.<sup>94</sup>

### § 165. — Surety on Collateral Security

It has been held that an unauthorized extension of

a principal note will discharge the surety on an instrument given as collateral.

It has been held that an unauthorized extension of a principal note will discharge the surety on an instrument given as collateral,<sup>95</sup> while other authority is to the contrary.<sup>96</sup>

### § 166. — Principal Debtors in Relationship of Principal and Surety Inter Se

Where two persons are bound for the same debt, and there is an obligation on the part of one to exonerate the other, in the event of payment being enforced against such other, and this is known to the creditor, then the creditor cannot extend the time of payment to the party ultimately liable without discharging the other debtor, even though such debtor occupies the position of a principal debtor to the creditor.

Where two persons are bound for the same debt, and there is an obligation on the part of one to exonerate the other, in the event of payment being enforced against such other, and this is known to the creditor, then the creditor cannot extend the time of payment to the party ultimately liable without discharging the other debtor, even though such debtor occupies the position of a principal debtor to the creditor,<sup>97</sup> as where debtors become sureties by another's assuming the indebtedness,<sup>98</sup> and as in the case of former partners, some of whom have assumed to pay firm debts.<sup>99</sup> Where the rule is adhered to that one who signs an obligation as a principal cannot assert as against the creditor or obligee that he is, in fact, merely a surety, one who signs as a joint maker<sup>1</sup> or as a joint and several maker<sup>2</sup> cannot assert that he has been discharged by an extension of time to the principal debtor without his consent.

87. Cal.—Mortgage Guarantee Co. v. Chotiner, 64 P.2d 138, 8 Cal.2d 110, 108 A.L.R. 1080.

Mich.—Buckeye Commercial Sav. Bank v. Protogere, 231 N.W. 65, 250 Mich. 652.

50 C.J. p 133 note 68—8 C.J. p 74 notes 91, 92.

Where the law of a foreign jurisdiction is not pleaded and proved, it will be assumed that the common-law rule prevails, and the surety will be discharged by an extension.—A. B. Klise Lumber Co. v. Enkema, 181 N.W. 201, 148 Minn. 5—50 C.J. p 134 note 73.

88. Mass.—Maglione v. Penta, 165 N.E. 424, 266 Mass. 413. 50 C.J. p 134 note 69.

89. Iowa.—Fullerton Lumber Co. v. Snouffer, 117 N.W. 50, 139 Iowa 176.

50 C.J. p 134 note 70.

90. Okl.—Oklahoma State Bank v. Seaton, 170 P. 477, 69 Okl. 99. 50 C.J. p 134 note 71.

91. Wash.—McDougall v. Walling, 58 P. 669, 21 Wash. 478, 75 Am.S.R. 849. 50 C.J. p 134 note 74.

92. Wash.—Thompson v. Metropolitan Bldg. Co., 164 P. 222, 95 Wash. 546. 50 C.J. p 134 note 75.

93. Iowa.—Citizens' Bank v. Barnes, 30 N.W. 857, 70 Iowa 412. 50 C.J. p 134 note 76.

94. Ind.—Rittenhouse v. Kemp, 37 Ind. 258.

95. Ohio.—Slagle v. Pow, 41 Ohio St. 603. 50 C.J. p 134 note 79.

96. Pa.—Delaware County Trust, etc., Co. v. Haser, 8 Del.Co. 125,

affirmed 48 A. 694, 199 Pa. 17, 85 Am.S.R. 763.

50 C.J. p 134 note 80.

97. N.C.—Hamilton v. Benton, 104 S.E. 78, 180 N.C. 79.

50 C.J. p 135 note 85.

Necessity of knowledge on part of creditor see *infra* § 187.

98. N.C.—Hamilton v. Benton, *supra*.

50 C.J. p 135 note 86.

As between grantor and grantee of mortgaged premises see *Mortgages* § 415 d.

99. Or.—Lazelle v. Miller, 67 P. 307, 40 Or. 549.

50 C.J. p 135 note 87.

1. La.—Moriarty v. Bagnetto, 34 So. 701, 110 La. 598.

50 C.J. p 135 note 88.

2. Md.—Yates v. Donaldson, 5 Md. 389, 61 Am.D. 283.

50 C.J. p 135 note 84.

### § 167. — After Judgment against Principal and Surety

Where the suretyship relation survives a judgment against principal and surety, an extension of time after such judgment will discharge the surety.

Where the suretyship relation is held to survive a judgment against principal and surety, an extension of time after such judgment will discharge the surety.<sup>3</sup> Where, however, the surety is regarded as having become a principal by virtue of such judgment, an extension of time thereafter will not discharge him.<sup>4</sup>

### § 168. — Extension by One of Several Creditors or Obligees

An extension of time, or a stay of execution, granted to the principal by one of two joint creditors, has been held to release the surety as to both.

An extension of the time of payment,<sup>5</sup> or a stay of execution,<sup>6</sup> granted to the principal by one of two joint creditors, has been held to release the surety as to both. It has also been held that where a contractor gives a bond to secure laborers and materialmen, as well as to secure the performance of his contract, an extension of time for completing the work will not affect the liability of the sureties on the bond, for labor and material furnished.<sup>7</sup>

### § 169. — Extension as to One of Joint Principals

A contract of extension entered into between the creditor and one of several joint makers of the principal contract operates to discharge the sureties in the absence of their assent.

A contract of extension entered into between the creditor and one of several joint makers of the principal contract operates to discharge the sureties if not assented to by them.<sup>8</sup>

### § 170. — Extension as to Part of Debt

An extension of time granted to the principal for a portion of his indebtedness will not discharge a surety as to the balance.

An extension of time granted to the principal for a portion of his indebtedness will not discharge a surety as to the balance.<sup>9</sup> If a surety is liable for different payments,<sup>10</sup> such as installments of rent,<sup>11</sup> an extension of time as to one or more will not affect the liability of the surety as to the others. The surety is, however, discharged as to the particular payment for which an extension was granted.<sup>12</sup> An agreement that the indebtedness may be paid in installments after maturity is an extension of time discharging the surety.<sup>13</sup>

### § 171. — Where Period of Maturity Not Fixed

Where no period of maturity is fixed, no extension of time can discharge the surety.

Where no period of maturity is fixed, no extension of time can discharge the surety.<sup>14</sup> Where the surety has become liable for all debts of the principal to become due, extensions granted to the principal will not discharge the surety if the debt as extended answers to the description of those intended to be secured.<sup>15</sup> Under a statute providing that a contractor's bond is to stand as security for specified claims and demands until the same are fully paid, sureties on such a bond are not discharged by an extension of time as to claims or demands of the character specified in the statute.<sup>16</sup> An extension for a period not in excess of that limited by statute for the bringing of suit on the original indebtedness will not discharge a compensated surety.<sup>17</sup>

3. Tex.—*Pilgrim v. Dykes*, 24 Tex. 383.

50 C.J. p 135 note 90.

4. Tenn.—*Bryant v. Rudisell*, 4 Heisk. 656.

50 C.J. p 135 note 92.

5. Ky.—*Clark v. Patton*, 4 J.J. Marsh. 33, 30 Am.D. 203.

Ohio.—*Corpus Juris* cited in *McClintock-Field Co. v. Wells*, 178 N.E. 20, 21, 40 Ohio App. 181.

6. Ky.—*Givens v. Briscoe*, 3 J.J. Marsh. 529.

N.Y.—*Bangs v. Strong*, 10 Paige 11, affirmed 7 Hill 250, 42 Am.D. 641.

7. U.S.—*U. S. Fidelity, etc., Co. v. U. S., Colo.*, 24 S.Ct. 142, 191 U.S. 416, 48 L.Ed. 242.

50 C.J. p 135 note 95.

8. Wash.—*Warburton v. Ralph*, 33 P. 140, 9 Wash. 527.

9. N.Y.—*Klein v. Long*, 50 N.Y.S. 419, 27 App.Div. 158.

50 C.J. p 135 note 97.

One of several notes

Tex.—*Dansby v. Stroud*, Civ.App., 48 S.W.2d 1018.

10. Ala.—*Corpus Juris* cited in *Maulitz v. Jones*, 133 So. 701, 702, 222 Ala. 609.

Wash.—*Gillman v. Purdy*, 9 P.2d 1092, 167 Wash. 659, followed in 9 P.2d 1094, 167 Wash. 701.

50 C.J. p 135 note 98.

11. N.D.—*Bleeker v. Johnson*, 190 N.W. 1010, 49 N.D. 156.

50 C.J. p 136 note 99.

12. Wash.—*Gillman v. Purdy*, 9 P.2d 1092, 167 Wash. 659, followed in 9 P.2d 1094, 167 Wash. 701.

50 C.J. p 136 note 1.

13. Cal.—*Fordyce v. Ellis*, 29 Cal. 96.

50 C.J. p 136 note 2.

14. La.—*Electrical Supply Co. v. Eugene Freeman, Inc.*, 152 So. 510, 178 La. 741.

Mo.—*Corpus Juris* quoted in *State ex rel. Hardy v. Farris*, 47 S.W. 2d 198, 200, 226 Mo.App. 1007.

50 C.J. p 136 note 4.

15. Mo.—*Corpus Juris* quoted in *State ex rel. Hardy v. Farris*, 47 S.W.2d 198, 200, 226 Mo.App. 1007.

Pa.—*Corpus Juris* cited in *In re Cancelmo's Estate*, 162 A. 454, 455, 308 Pa. 178.

50 C.J. p 136 note 5.

16. N.D.—*Thompson Yards v. Kingsley*, 208 N.W. 949, 54 N.D. 49.

17. Ga.—*National Surety Co. v.*

In the case of a compensated surety on a contractor's bond it is ordinarily held that extension for a reasonable or customary period,<sup>18</sup> or for a period not in excess of that limited in the bond for bringing suit thereon,<sup>19</sup> will not discharge the surety.

## § 172. — Affirmative Relief

A surety who has been discharged by an extension of time to the principal need not wait until he is proceeded against, to take advantage of his defense, but is entitled to relief in equity.

A surety who has been discharged by an extension of time to the principal need not wait until he is proceeded against, to take advantage of his defense. He is entitled to relief in equity,<sup>20</sup> and can obtain an injunction restraining proceedings against him,<sup>21</sup> or against execution on a judgment obtained before he had notice of the extension of time.<sup>22</sup>

## § 173. Requisites and Sufficiency of Extension

In order to constitute an extension discharging the surety, it should appear that the extension was for a definite period, pursuant to an enforceable agreement between the principal and a creditor having knowledge of the suretyship relation, and that it was made without consent of the surety or with a reservation of rights with respect to him.

In order to constitute an extension discharging the surety, it should appear that the extension was for a definite period, pursuant to an enforceable agreement between the principal and a creditor having knowledge of the suretyship relation, and that it was made without consent of the surety or with a reservation of rights with respect to him.<sup>23</sup> The right of a surety to consider himself discharged by an extension of time to the principal is not affected by the fact that the principal did not know of the suretyship relation.<sup>24</sup> In order to discharge the surety by an extension it must appear that the contract did in fact provide for an extension.<sup>25</sup>

The contract must be one which precludes the creditor from,<sup>26</sup> or at least hinders him in,<sup>27</sup> enforcing the principal contract within the period during which he could otherwise have enforced it, and which precludes the surety from paying the debt.<sup>28</sup> If the principal confess judgment under an agreement with the creditor for a stay of execution, it has been held that the surety is not discharged if the creditor could not have obtained judgment, in the ordinary course, any sooner than the postponed time;<sup>29</sup> but if the extension is longer than the time which would be required to obtain judgment and execution in a suit not defended, the surety is discharged, although the principal might have obtained as great delay by defending the suit.<sup>30</sup> If the creditor agrees to receive pay-

Walker County, 104 S.E. 18, 25 Ga.App. 643.

18. U.S.—U. S. Fidelity, etc., Co. v. U. S., Colo., 24 S.Ct. 142, 191 U.S. 416, 48 L.Ed. 242.

50 C.J. p 136 note 10.

19. W.Va.—Ohio County v. Clemens, 100 S.E. 680, 85 W.Va. 11, 15, 7 A.L.R. 373.

50 C.J. p 136 note 11.

20. Ga.—McCrary v. Coley, Ga. Dec. 104.

N.C.—Pipkin v. Bond, 40 N.C. 91.

21. N.J.—Slatoff v. Theurich, 199 A. 49, 123 N.J.Eq. 598.

50 C.J. p 136 note 13.

Burden of proof

N.J.—Schumann v. Fidelity Union Trust Co., 8 A.2d 852, 126 N.J.Eq. 349, affirmed 12 A.2d 724, 127 N.J.Eq. 249.

22. N.C.—Howerton v. Sprague, 64 N.C. 451.

50 C.J. p 136 note 14.

23. Ga.—Benson v. Henning, 178 S. E. 406, 50 Ga.App. 492.

Binding agreement see *infra* § 174.

Consent of surety see *infra* § 191.

Definite period of extension see *infra* § 175.

Knowledge of relationship see *infra* § 187.

Reservation of rights see *infra* § 190.

Other statements of elements

Cal.—Edwards v. Mortgage Securities of Santa Barbara, 44 P.2d 1056, 6 Cal.App.2d 641.

Me.—Blumenthal v. Serota, 151 A. 138, 129 Me. 187.

R.I.—Industrial Trust Co. v. Goldman, 193 A. 852, 59 R.I. 11, 112 A. L.R. 1313.

50 C.J. p 136 note 19 [a].

24. Iowa.—Howard v. Clark, 36 Iowa 114.

Tex.—Short v. Shannon, Civ.App., 211 S.W. 463.

25. Mo.—Mercantile Trust Co. v. Donk, 178 S.W. 113.

50 C.J. p 137 note 22.

26. U.S.—Gleason v. McDonald, C.C. A.Mich., 103 F.2d 837.

Fla.—Slottow v. Hull Inv. Co., 129 So. 577, 100 Fla. 244.

Iowa.—Eilers v. Frieling, 234 N.W. 275, 211 Iowa 841.

Ky.—Bradford v. Union Trust Co., 47 S.W.2d 536, 242 Ky. 709.

La.—O'Banion v. Willis, 129 So. 440, 14 La.App. 632.

N.Y.—Becker v. Faber, 19 N.E.2d 997, 280 N.Y. 146, 121 A.L.R. 1010,

reargument denied Becker v. Intemann, 21 N.E.2d 216, 280 N.Y.

730—Polaris Bldg. Corporation v. Bimberg, 241 N.Y.S. 738, 137 Misc.

289—Acme Investors Corp. v. Kahan, 64 N.Y.S.2d 6.

Pa.—First Nat. Bank of Dallastown v. Innerst, Com.Pl., 51 York Leg. Rec. 145.

50 C.J. p 139 note 45.

Tying creditor's hands

In order to effect the release of the surety by an agreement to extend the time of payment, the creditor must so tie his hands under the new agreement as to preclude himself from enforcing the old contract during the period covered by the extension.—Industrial Loan & Investment Co. v. Miller, 141 So. 587, 163 Miss. 288—Graham v. Pepple, 97 So. 180, 132 Miss. 612, 30 A.L.R. 1278.

27. Vt.—Austin v. Dorwin, 21 Vt. 38.

50 C.J. p 140 note 46.

28. U.S.—Gleason v. McDonald, C.C. A.Mich., 103 F.2d 837.

50 C.J. p 140 note 48.

29. Ohio.—Upington v. May, 40 Ohio St. 247.

50 C.J. p 140 note 49.

30. N.Y.—Bower v. Tiemann, 3 Den. 378.

50 C.J. p 140 note 50.

ment of the debt in property, instead of money, at a distant day after maturity there is an extension discharging the surety.<sup>31</sup>

### § 174. — Necessity of Binding Agreement

There must be a binding and enforceable contract extending the time of payment to the principal debtor in order to effect a release of the surety.

Mere delay,<sup>32</sup> indulgence,<sup>33</sup> or forbearance<sup>34</sup> to the principal will not discharge the surety. In order to effect his release there must be contract for extension, binding and enforceable<sup>35</sup> at law<sup>36</sup> or in equity.<sup>37</sup> A binding contract is not shown where the agreement for extension has been executed by only a portion of the parties between whom it purports to be made.<sup>38</sup>

*Mutual assent.* The rule applicable to contracts generally requiring mutual assent applies to contracts for an extension having the effect of discharging the surety.<sup>39</sup> A mere unaccepted offer is insufficient to constitute a contract for extension discharging the surety.<sup>40</sup> It has been said that the contract must be positive,<sup>41</sup> definite,<sup>42</sup> and complete.<sup>43</sup>

### § 175. — Necessity of Fixed or Definite Period of Extension

The extension of the principal debt must be for a fixed or definite period in order to discharge the surety.

The extension of the principal debt must be for a fixed or definite period in order to effect a discharge of the surety.<sup>44</sup> It is not sufficient that the

31. La.—Millaudon v. Arnous, 3 Mart.N.S., 596.

N.Y.—Wagman v. Hoag, 14 Barb. 232.

32. N.J.—Burack v. Mayers, 187 A. 767, 121 N.J.Eq. 135, affirmed 191 A. 841, 122 N.J.Eq. 5.

Pa.—Plummer v. Wilson, 185 A. 311, 322 Pa. 118.

33. Miss.—Industrial Loan & Investment Co. v. Miller, 141 So. 587, 163 Miss. 288.

N.Y.—Acme Investors Corp. v. Kahan, 64 N.Y.S.2d 6, 50 C.J. p 137 note 23.

Leniency to a debtor in default or delay permitted by creditor without change in time when payment might be demanded does not constitute an extension of the time for payment.—Becker v. Faber, 19 N.E.2d 997, 280 N.Y. 146, 121 A.L.R. 1010, reargument denied Becker v. Intemann, 21 N.E.2d 216, 280 N.Y. 730—Acme Investors Corp. v. Kahan, 64 N.Y.S. 2d 6.

34. Miss.—Industrial Loan & Investment Co. v. Miller, 141 So. 587, 163 Miss. 288.

Pa.—Plummer v. Wilson, 185 A. 311, 322 Pa. 118—Germantown Trust Co. v. Emhardt, 184 A. 457, 321 Pa. 561, followed 184 A. 460, 321 Pa. 567, 50 C.J. p 137 note 24.

35. U.S.—Gleason v. McDonald, C.C. A.Mich., 103 F.2d 837.

Cal.—Corpus Juris quoted in Edwards v. Mortgage Securities of Santa Barbara, 44 P.2d 1056, 1058, 6 Cal.App.2d 641.

Ga.—Benson v. Henning, 178 S.E. 406, 50 Ga.App. 492.

Iowa.—Ellers v. Frieling, 234 N.W. 275, 211 Iowa 841.

Ky.—U. S. Fidelity & Guaranty Co. v. Mayo Arcade Corporation, 70 S. W.2d 531, 253 Ky. 763—Bradford v. Union Trust Co., 47 S.W.2d 536, 242 Ky. 709.

Or.—Walsh v. Young, 180 P.2d 535, 181 Or. 185.

Ky.—Henderson v. Phoenix Ins. Co., 25 S.W.2d 359, 233 Ky. 217.

Miss.—Industrial Loan & Investment Co. v. Miller, 141 So. 587, 163 Miss. 288.

N.J.—Adelman v. Franklin Washington Trust Co., 44 A.2d 399, 137 N. J.Eq. 257—Burack v. Mayers, 187 A. 767, 121 N.J.Eq. 135, affirmed 191 A. 841, 122 N.J.Eq. 5.

N.Y.—Becker v. Faber, 19 N.E.2d 997, 280 N.Y. 146, 121 A.L.R. 1010, reargument denied Becker v. Intemann, 21 N.E.2d 216, 280 N.Y. 730—Hermann v. Gressel, 266 N.Y.S. 263, 148 Misc. 775—Acme Investors Corp. v. Kahan, 64 N.Y.S. 2d 6.

Pa.—First Nat. Bank v. Jones' Estate, 6 A.2d 273, 334 Pa. 577—Germantown Trust Co. v. Emhardt, 184 A. 457, 321 Pa. 561, followed 184 A. 460, 321 Pa. 567—First Nat. Bank & Trust Co. of Dallastown v. Innerst, Com.Pl., 51 York Leg.Rec. 145.

S.D.—Citizens' State Bank of Colman v. Rosenwald, 256 N.W. 264, 63 S.D. 50—Zastrow v. Knight, 229 N.W. 925, 56 S.D. 554, 72 A.L.R. 379.

Va.—Livermon v. Lloyd, 157 S.E. 146, 155 Va. 940.

50 C.J. p 137 note 26, p 146 note 32. Illegal contracts see infra § 185.

Parties to contract see infra § 180.

The transaction must involve all essentials of binding contract in order to exonerate surety by extension of time to principal debtor.—Bradford v. Union Trust Co., 47 S. W.2d 536, 242 Ky. 709.

36. Va.—Cape Charles Bank, Inc. v. Farmers' Mut. Exch., 92 S.E. 918, 120 Va. 771.

50 C.J. p 138 note 27.

37. Mass.—Wilson v. Powers, 130 Mass. 127.

Va.—Cape Charles Bank, Inc. v.

Farmers' Mut. Exch., 92 S.E. 918, 120 Va. 771.

38. U.S.—Uniontown Bank v. Mackey, Ind., 11 S.Ct. 844, 140 U.S. 220, 35 L.Ed. 485.

50 C.J. 144 note 16.

39. Ark.—Vaughan v. Vernon, 100 S.W. 92, 82 Ark. 28.

50 C.J. p 144 note 11.

40. Mo.—Todd v. James, 138 S.W. 929, 157 Mo.App. 416.

50 C.J. p 144 note 12.

41. Miss.—Industrial Loan & Investment Co. v. Miller, 141 So. 587, 163 Miss. 288.

50 C.J. p 144 note 13.

42. Md.—Berman v. Elm Loan, etc., Assoc., 78 A. 1104, 114 Md. 191, 195.

50 C.J. p 144 note 14.

43. Ky.—Marshall v. Hollingsworth, 179 S.W. 34, 166 Ky. 190, 194.

50 C.J. p 144 note 15.

Performance of conditions see infra § 186.

44. Ark.—City of Morrilton v. Moose, 49 S.W.2d 1044, 185 Ark. 1051.

Cal.—Corpus Juris quoted in Edwards v. Mortgage Securities of Santa Barbara, 44 P.2d 1056, 1058, 6 Cal.App.2d 641.

Fla.—Slottow v. Hull Inv. Co., 129 So. 577, 100 Fla. 244.

Ga.—Finch v. Provident Mut. Life Ins. Co. of Philadelphia, 190 S.E. 675, 55 Ga.App. 518—Benson v. Henning, 178 S.E. 406, 50 Ga.App. 492.

Ky.—U. S. Fidelity & Guaranty Co. v. Mayo Arcade Corporation, 70 S. W.2d 531, 253 Ky. 763—Henderson v. Phoenix Ins. Co., 25 S.W.2d 359, 233 Ky. 217.

Miss.—Love v. Clark, 158 So. 484, 171 Miss. 758.

Mo.—Jobe v. Buck, 31 S.W.2d 98, 224 Mo.App. 621.

Neb.—Shuler v. Hummel, 95 N.W. 350, 1 Neb.Unof. 204.

creditor actually does wait a long time after an agreement for delay.<sup>45</sup> Any fixed period of extension, however short, is sufficient,<sup>46</sup> such as a few days,<sup>47</sup> a day,<sup>48</sup> or even a moment.<sup>49</sup> In accordance with the general rule it has been held that the surety is not discharged by an agreement to dismiss a suit without specification of any day up to which indulgence is to be given,<sup>50</sup> or by a stay or withdrawal of execution without a definite extension.<sup>51</sup>

An extension for a specified number of days is for a fixed or definite time so as to discharge the surety.<sup>52</sup> There is authority to the effect that a reasonable time is a definite time within the meaning of the rule,<sup>53</sup> while other authority is to the contrary.<sup>54</sup> An agreement to extend the time for payment until the debtor is able to pay has been held to release the surety.<sup>55</sup> An extension until demand has been held not to be for a definite period.<sup>56</sup> In accordance with the facts and circumstances of the particular case various agreements

have been held to constitute<sup>57</sup> or not to constitute<sup>58</sup> an extension for a fixed or definite period.

### § 176. — Changing Form or Evidence of Indebtedness.

Merely changing the form or the evidence of indebtedness, or taking an additional evidence thereof, involves no extension and does not discharge the surety. Taking new evidence of indebtedness to mature at a later date is an extension discharging the surety.

Merely changing the form<sup>59</sup> or the evidence of indebtedness,<sup>60</sup> or taking an additional evidence thereof,<sup>61</sup> involves no extension and does not discharge the surety. If a note of the principal is not taken as payment of the original debt<sup>62</sup> or does not suspend the creditor's right of action<sup>63</sup> the surety is not discharged. Taking a new evidence of indebtedness to mature at a later date is an extension discharging the surety,<sup>64</sup> as where the creditor takes from the principal a note<sup>65</sup> or draft<sup>66</sup> for the debt payable at a future day. So also, the taking of a note in renewal of a former note<sup>67</sup>

N.J.—Adelman v. Franklin Washington Trust Co., 44 A.2d 399, 137 N.J.Eq. 257—Scheerer v. Lippman & Lowy, 4 A.2d 272, affirmed 4 A.2d 273, 125 N.J.Eq. 93.

Va.—Corpus Juris quoted in Hofheimer v. Booker, 180 S.E. 145, 148, 164 Va. 358.

50 C.J. p 138 note 31.

#### Second extension

Where second time extension did not specify definite period therefor, it has been held that parties should be understood as contemplating repetition of first extension, as regards surety's release.—Dickherber v. Turnbull, Mo.App., 31 S.W.2d 234.

45. Ind.—Bucklen v. Huff, 53 Ind. 474.

Va.—Corpus Juris quoted in Hofheimer v. Booker, 180 S.E. 145, 148, 164 Va. 358.

48. Va.—Corpus Juris quoted in Hofheimer v. Booker, 180 S.E. 145, 148, 164 Va. 358.

50 C.J. p 139 note 33.

47. N.Y.—Becker v. Faber, 19 N.E. 2d 997, 280 N.Y. 146, 121 A.L.R. 1010, reargument denied Becker v. Intemann, 21 N.E.2d 216, 280 N.Y. 780.

48. Va.—Corpus Juris quoted in Hofheimer v. Booker, 180 S.E. 145, 148, 164 Va. 358.

50 C.J. p 139 note 34.

49. Va.—Corpus Juris quoted in Hofheimer v. Booker, 180 S.E. 145, 148, 164 Va. 358.

50 C.J. p 139 note 35.

50. Ala.—David v. Malone, 48 Ala. 423.

Ind.—Tracy v. Quillen, 65 Ind. 249.

51. Miss.—McGee v. Metcalf, 20 Miss. 535, 51 Am.D. 122.

50 C.J. p 139 note 38.

52. Tex.—Cruse v. Gau, Civ.App., 193 S.W. 405.

50 C.J. p 139 note 39.

53. Tex.—C. C. Slaughter Co. v. Elller, Civ.App., 196 S.W. 704.

50 C.J. p 139 note 40.

54. Ind.—Alexander v. Capitol Lumber Co., 105 N.E. 45, 181 Ind. 527.

55. N.Y.—Sturman v. Lomor Realty Co., 285 N.Y.S. 564, 148 Misc. 277.

56. N.Y.—Corpus Juris cited in Colonial Beacon Oil Co., Inc. v. Jones, 298 N.Y.S. 218, 219, 163 Misc. 826.

50 C.J. p 139 note 42.

57. Iowa.—Ellers v. Frieling, 234 N.W. 275, 211 Iowa 841.

50 C.J. p 139 note 43.

58. Mo.—Dickherber v. Turnbull, App., 31 S.W.2d 234.

50 C.J. p 139 note 44.

59. Miss.—W. T. Rawleigh Co. v. Wing, 4 So.2d 222.

#### Form of account

The change of an indebtedness of principal from an open to a stated account without more did not extend time for payment of indebtedness, and did not release sureties from obligation to pay debt evidenced by the stated account on the ground that there had been an extension of time to pay the indebtedness without notice to, or approval by, the sureties, especially where the sureties expressly waived notice "of the extension of time in which to pay for the goods so purchased."—W. T. Rawleigh Co. v. Wing, supra.

60. N.Y.—Corpus Juris cited in Colonial Beacon Oil Co., Inc. v. Jones, 298 N.Y.S. 218, 163 Misc. 826.

50 C.J. p 140 note 53.

Taking additional or substituted security as discharge generally see infra § 154.

61. Tenn.—Dies v. Wilson County Bank, 165 S.W. 248, 129 Tenn. 89, Ann.Cas.1915A 1090.

50 C.J. p 140 note 54.

62. Ohio.—American Fidelity Co. v. Metropolitan Pav. Brick Co., 30 O.C.A. 209.

Wis.—Paine v. Voorhees, 26 Wis. 522.

63. N.Y.—Fox v. Parker, 44 Barb. 541.

Pa.—Hummelstown Brownstone Co. v. Knerr, 25 Pa.Super. 465.

64. Va.—Whitehead v. Planters Bank & Trust Co., 21 S.E.2d 724, 180 Va. 76—Harris v. Citizens Bank & Trust Co., 200 S.E. 652, 172 Va. 111.

65. Mich.—People v. Grant, 100 N.W. 1006, 138 Mich. 60.

50 C.J. p 140 note 58.

66. N.Y.—Albany City Fire Ins. Co. v. Devendorf, 43 Barb. 444—Bangs v. Mosher, 23 Barb. 478.

67. Ind.—Owen County State Bank v. Guard, 26 N.E.2d 395, 217 Ind. 75.

Mich.—In re Visscher's Estate, 266 N.W. 825, 275 Mich. 472.

N.J.—Adelman v. Franklin Washington Trust Co., 44 A.2d 399, 137 N.J.Eq. 257.

Va.—Whitehead v. Planters Bank & Trust Co., 21 S.E.2d 724, 180 Va. 76—Harris v. Citizens Bank &



or judgment<sup>68</sup> is an extension.

Taking a check with the understanding that the drawer did not have any money in the bank, but would deposit some within two or three days, is not an extension;<sup>69</sup> nor is a surety discharged because the creditor takes a note of the principal for an indebtedness for which the surety is not liable<sup>70</sup> or if the original note is retained as collateral security for the new notes.<sup>71</sup> A note<sup>72</sup> or bill of exchange<sup>73</sup> of the principal, taken for the purpose of having the proceeds thereof, when obtained, applied on the original indebtedness, does not discharge the surety, although such action has been taken by the principal with the expectation that the creditor will refrain from pressing for immediate payment.<sup>74</sup>

### § 177. — Taking New Collateral

The creditor does not extend the time of payment so as to discharge the surety merely by taking new security maturing after the debt becomes due.

The creditor does not extend the time of payment so as to discharge the surety merely by taking new security maturing after the debt becomes due,<sup>75</sup> such as a mortgage,<sup>76</sup> a guaranty,<sup>77</sup> a warrant of attorney to confess judgment,<sup>78</sup> or an order on a third person;<sup>79</sup> nor is an extension ef-

fected by taking a bond<sup>80</sup> or note<sup>81</sup> of the principal as collateral security. The mere taking of the note of the principal does not of itself establish an agreement to give further time, since it is presumed to have been taken as collateral security;<sup>82</sup> it must be shown to have been substituted for the previous liability of the principal.<sup>83</sup> A renewal note, however, is presumed to be in extinguishment of the original note and not mere collateral.<sup>84</sup>

If the agreement between the principal and the creditor is that the latter will not proceed on the original debt if the subsequent note is paid,<sup>85</sup> or if the creditor realizes from the collateral security,<sup>86</sup> there is an extension discharging the surety. If the principal turns over property for the purpose of having it converted into money, and payment made from the proceeds, and the creditor consents to a sale thereof on credit, it will constitute such an extension as to discharge a surety.<sup>87</sup>

### § 178. — Payment of Interest

The mere fact of the payment or acceptance of interest in advance without an agreement to extend the time of payment will not discharge a surety.

The mere fact of the payment or acceptance of interest in advance,<sup>88</sup> although at a greater rate,<sup>89</sup> without an agreement to extend the time of pay-

Trust Co., 200 S.E. 652, 172 Va. 111.

50 C.J. p 140 note 62.

#### Actual acceptance

It has been held that it is not the agreement to accept a renewal note, but the actual acceptance thereof, which discharges the surety.—Bell v. Austin, Tex.Civ.App., 30 S.W.2d 559—50 C.J. p 141 note 71.

68. Cal.—Morley v. Dickinson, 12 Cal. 561.

N.Y.—McNulty v. Hurd, 18 Hun 1, affirmed 86 N.Y. 547.

69. La.—Bordelon v. Weymouth, 14 La. Ann. 93.

70. N.C.—Fitts v. A. F. Messick Grocery Co., 57 S.E. 164, 144 N.C. 463.

71. N.Y.—Newburgh Nat. Bank v. Bigler, 83 N.Y. 51.

50 C.J. p 141 note 67.

72. Pa.—Schlager v. Teal, 39 A. 963, 185 Pa. 322.

73. N.Y.—Fairport Union Free School Bd. of Education v. Fonda, 77 N.Y. 350.

50 C.J. p 141 note 69.

74. N.J.—Dodson v. Taylor, 28 A. 316, 56 N.J. Law 11.

Vt.—Austin v. Curtis, 31 Vt. 64.

75. Or.—Corpus Juris quoted in Fred Christensen, Inc. v. Hansen

Const. Co., 21 P.2d 195, 197, 142 Or. 549.

Pa.—Plummer v. Wilson, 185 A. 311, 322 Pa. 118.

50 C.J. p 141 note 72.

Consideration for extension in general see infra § 182.

76. Tenn.—Watauga Bank v. Matson, 41 S.W. 1062, 99 Tenn. 390.

50 C.J. p 141 note 73.

77. Cal.—Williams v. Covilland, 10 Cal. 419.

78. Ind.—Merriman v. Barker, 22 N.E. 992, 121 Ind. 74.

79. Wis.—Brill v. Holle, 11 N.W. 42, 53 Wis. 537.

80. Or.—Corpus Juris quoted in Fred Christensen Inc. v. Hansen Const. Co., 21 P.2d 195, 197, 142 Or. 549.

50 C.J. p 141 note 77.

81. Or.—Corpus Juris quoted in Fred Christensen Inc. v. Hansen Const. Co., 21 P.2d 195, 197, 142 Or. 549.

50 C.J. p 141 note 78.

82. Or.—Corpus Juris quoted in Fred Christensen Inc. v. Hansen Const. Co., 21 P.2d 195, 197, 142 Or. 549.

50 C.J. p 142 note 79.

83. Or.—Corpus Juris quoted in Fred Christensen Inc. v. Hansen

Const. Co., 21 P.2d 195, 197, 142 Or. 549.

Tex.—Lutterloh v. McIlhenny Co., 11 S.W. 1063, 74 Tex. 73.

84. Kan.—Schnitzler v. Wichita Fourth Nat. Bank, 42 P. 436, 1 Kan.App. 674.

50 C.J. p 142 note 81.

85. Ind.—Brannon v. Irons, 49 N.E. 469, 19 Ind.App. 305.

50 C.J. p 142 note 82.

86. Mo.—Smarr v. Schmitter, 38 Mo. 478.

Tenn.—Lea v. Dozier, 10 Humphr. 447.

87. La.—Brown v. Roberts, 14 La. Ann. 259.

50 C.J. p 142 note 85.

88. Ala.—Culwell v. Edmondson, 129 So. 276, 221 Ala. 424.

Ga.—First Nat. Bank v. Chipstead, 163 S.E. 306, 45 Ga.App. 113.

50 C.J. p 142 note 87.

Acceptance of interest in advance as prima facie evidence of contract to extend see infra § 272.

Accommodation surety on negotiable note was not released by holder's acceptance of interest in advance of maturity of note, in absence of agreement to extend time of payment.—Lynn v. Young, 78 S.W.2d 25, 257 Ky. 358.

89. Me.—Eaton v. Waite, 56 Me. 221.

ment will not discharge a surety. The payment of interest as it accrues after maturity of the debt, coupled with indulgence in fact, does not constitute a contract for extension discharging the surety.<sup>90</sup>

*Past-due interest.* A contract for extension will not be implied from payment of past-due interest at a rate greater than was due.<sup>91</sup>

### § 179. — Where Maturity of Principal Debt or Period of Surety's Obligation Indefinite

If no definite time of payment of the principal obligation is fixed, an agreement fixing a definite time of payment is not an extension discharging the surety.

If no definite time of payment of the principal obligation is fixed, an agreement fixing a definite time of payment is not an extension discharging the surety.<sup>92</sup> Where the surety guarantees an obligation for as long as it may exist, without specification of any definite period, extensions of time for payment will not discharge the surety.<sup>93</sup> If the surety has agreed to become responsible for all debts owing by the principal at a certain future time, any extensions granted to the principal which do not expire later than such time will not affect the liability of the surety.<sup>94</sup>

### § 180. — Parties to Extension

The contract extending the time of payment must be made between the creditor and the principal in order to discharge the surety.

The contract extending the time of payment must be made between the creditor and the principal in order to discharge the surety.<sup>95</sup> The extension

agreement must be an agreement with the principal, or at least an agreement of which the principal has a legal right to avail himself.<sup>96</sup> The surety will not be discharged by a contract of extension between the principal and one purporting to represent the creditor, but lacking authority to do so,<sup>97</sup> such as an unauthorized agent<sup>98</sup> or an attorney.<sup>99</sup> However, if the creditor, on learning that someone assuming to act for him has granted an extension of time, does not insist on his objection thereto, a ratification thereof may be indicated.<sup>1</sup>

*Executors and administrators.* In some jurisdictions an administrator<sup>2</sup> or an executor<sup>3</sup> of a creditor has power to grant an extension of time to the principal which will discharge the surety; in others the rule is to the contrary.<sup>4</sup> It has been held that a principal becoming administrator of the estate of a surety may discharge such estate by giving his individual note, after maturity, for the amount of the principal bond.<sup>5</sup>

*Partner executing without authority* a firm obligation in place, and in extension, of his individual obligation does not thereby discharge the surety on the latter.<sup>6</sup>

*Receiver.* A contract of extension made by a receiver without authority so to contract will not discharge the surety.<sup>7</sup>

### § 181. — Formal Requisites of Extension Agreement

Ordinarily the form of the contract extending the time of payment is immaterial, and it may be oral.

Ordinarily the form of the contract extending

90. Iowa.—Dyar v. Shenkberg, 61 N.W. 403, 93 Iowa 154.

50 C.J. p 142 note 91.

91. Ill.—Stearns v. Sweet, 78 Ill. 446.

N.Y.—New York Life Ins. Co. v. Casey, 70 N.E. 916, 178 N.Y. 381.

92. U.S.—U. S. Fidelity, etc., Co. v. U. S., Colo., 24 S.Ct. 142, 191 U.S. 416, 48 L.Ed. 242.

50 C.J. p 143 note 94.

93. Minn.—Farmington v. Reisinger, 218 N.W. 444, 174 Minn. 56.

50 C.J. p 143 note 95.

94. Mo.—Johnson v. Franklin Bank, 73 S.W. 191, 173 Mo. 171.

50 C.J. p 143 note 96.

95. Cal.—Corpus Juris quoted in Edwards v. Mortgage Securities of Santa Barbara, 44 P.2d 1056, 1058, 6 Cal.App.2d 641.

Ga.—Benson v. Henning, 178 S.E. 406, 50 Ga.App. 492.

Ky.—Henderson v. Phoenix Ins. Co., 25 S.W.2d 359, 233 Ky. 217.

N.J.—Adelman v. Franklin Washing-

ton Trust Co., 44 A.2d 399, 137 N.J.Eq. 257.

Or.—Walsh v. Young, 180 P.2d 535, 181 Or. 185.

S.D.—Zastrow v. Knight, 229 N.W. 925, 56 S.D. 554, 72 A.L.R. 379.

50 C.J. p 143 note 98.

96. S.D.—Zastrow v. Knight, supra.

97. Va.—Livermon v. Lloyd, 157 S. E. 146, 155 Va. 940.

50 C.J. p 143 note 99.

*Trustee*

Where court authorized loan of money under court's control, trustee's extension of time was not binding so as to relieve surety, where there was no decree authorizing it.—Livermon v. Lloyd, supra.

98. Md.—Vanderford v. Farmers, etc., Nat. Bank, 66 A. 47, 105 Md. 164.

50 C.J. p 143 note 1.

99. W.Va.—Ohio County v. Clemens, 100 S.E. 680, 85 W.Va. 11, 7 A.L.R. 373.

50 C.J. p 143 note 2.

1. N.Y.—Kane v. Cortesy, 2 N.E. 874, 100 N.Y. 132.

50 C.J. p 143 note 3.

*Ratification not shown*

Va.—Livermon v. Lloyd, 157 S.E. 146, 155 Va. 940.

2. Mo.—West v. Brison, 13 S.W. 95, 99 Mo. 684.

3. Ind.—Underwood v. Sample, 70 Ind. 446.

4. Ky.—Davies County Bank, etc., Co. v. Wright, 110 S.W. 361, 129 Ky. 21, 33 Ky.L. 457, 17 L.R.A., N.S., 1122.

50 C.J. p 144 note 6.

5. Va.—Callaway v. Price, 32 Gratt. 1, 73 Va. 1.

6. N.H.—Williams v. Gilchrist, 11 N.H. 535.

50 C.J. p 144 note 8.

7. U.S.—Robertson v. Blower, C.C. A.Tex., 263 F. 695.

50 C.J. p 144 note 9.

the time of payment is immaterial provided it is of a character which is binding and enforceable.<sup>8</sup> It need not be express,<sup>9</sup> but may be inferred from acts, declarations, facts, and circumstances.<sup>10</sup> Ordinarily a contract for extension discharging a surety may be oral.<sup>11</sup> Where the agreement for an extension, however, is of a character which is required by statute to be in writing, an oral contract will be insufficient.<sup>12</sup> If to admit the oral contract in evidence would have the effect of varying a written instrument<sup>13</sup> or a contract under seal,<sup>14</sup> evidence thereof will not be allowed at law, and the surety will not be discharged, although even in such case the surety may be discharged in equity.<sup>15</sup>

## § 182. — Consideration in General

An agreement for the extension of time must be supported by a sufficient consideration in order to effect the discharge of the surety.

An agreement for the extension of time must be supported by a sufficient consideration in order to effect the discharge of the surety.<sup>16</sup> Mutuality is

essential.<sup>17</sup> An agreement for a stay of execution, like any other extension agreement, ordinarily must be supported by a sufficient consideration in order to effect the discharge of a surety.<sup>18</sup> It has been held that, where such an agreement has been actually performed, the surety is discharged irrespective of consideration in its inception.<sup>19</sup> A judgment providing for stay of execution and entered on the consent of parties other than the surety discharges the latter entirely aside from the question of consideration.<sup>20</sup>

*Sufficiency in general.* The payment of,<sup>21</sup> or promise to pay,<sup>22</sup> as by a note,<sup>23</sup> money additional to that due on the principal obligation is sufficient consideration to support an extension agreement discharging a surety. An actual money consideration is not, however, essential,<sup>24</sup> since the consideration may consist of mutual promises.<sup>25</sup>

*Obtaining additional security.* If the principal, as consideration for an extension of time, gives his creditor additional security, it is sufficient,<sup>26</sup> although the security may be inadequate.<sup>27</sup> A transfer of property by the principal,<sup>28</sup> or an or-

8. Va.—Cape Charles Bank, Inc. v. Farmers' Mut. Exch., 92 S.E. 918, 120 Va. 771.

50 C.J. p 144 note 18.

Necessity of binding agreement generally see supra § 175.

9. N.C.—Revell v. Thrash, 44 S.E. 596, 132 N.C. 803.

Va.—Cape Charles Bank, Inc. v. Farmers' Mut. Exch., 92 S.E. 918, 120 Va. 771.

10. La.—O'Banion v. Willis, 129 So. 440, 14 La.App. 638.

50 C.J. p 144 note 21.

11. Tex.—Shults v. Krauskopf, Tex. Civ.App., 288 S.W. 544.

Va.—Cape Charles Bank, Inc. v. Farmers' Mut. Exch., 92 S.E. 918, 120 Va. 771.

12. Me.—Turner v. Williams, 73 Me. 466.

50 C.J. p 144 note 24.

13. Ind.—Mullendore v. Wertz, 75 Ind. 431, 39 Am.R. 155.

50 C.J. p 144 note 25.

14. Ill.—Wittmer v. Ellison, 72 Ill. 301.

50 C.J. p 145 note 26.

15. W.Va.—Glenn v. Morgan, 23 W. Va. 467.

50 C.J. p 145 note 27.

16. U.S.—Baker v. Reconstruction Finance Corporation, C.C.A.Fla., 109 F.2d 536.

Ark.—City of Morrilton v. Moose, 49 S.W.2d 1044, 185 Ark. 1051.

Cal.—Berkowitz v. Tyderko, Limited, 57 P.2d 173, 13 Cal.App.2d 561.

—Garrett v. Bomash, 51 P.2d 1100,

10 Cal.App.2d 288—Fruit Growers' Supply Co. v. Goss, 41 P.2d 357, 4 Cal.App.2d 651.

Fla.—Slottow v. Hull Inv. Co., 129 So. 577, 100 Fla. 244.

La.—O'Banion v. Willis, 129 So. 440, 14 La.App. 638.

Me.—Blumenthal v. Serota, 151 A. 138, 129 Me. 187.

Miss.—Love v. Clark, 158 So. 484, 171 Miss. 758.

Mo.—Jobe v. Buck, 31 S.W.2d 98, 224 Mo.App. 621.

Neb.—Shuler v. Hummel, 95 N.W. 350, 1 Neb. Unoff., 204.

N.J.—Burack v. Mayers, 187 A. 767, 121 N.J.Eq. 135, affirmed 191 A. 841, 122 N.J.Eq. 5—Hunt v. Goren-

berg, 155 A. 881, 9 N.J.Misc. 463.

N.Y.—Monroe County Sav. Bank v. Baker, 264 N.Y.S. 101, 147 Misc. 522—Polaris Bldg. Corporation v. Bimberg, 241 N.Y.S. 738, 137 Misc. 289.

50 C.J. p 145 note 30.

Valuable consideration held necessary

Ga.—Finch v. Provident Mut. Life Ins. Co. of Philadelphia, 190 S.E. 675, 55 Ga.App. 518.

Ky.—U. S. Fidelity & Guaranty Co. v. Mayo Arcade Corporation, 70 S. W.2d 531, 253 Ky. 763.

Miss.—Industrial Loan & Investment Co. v. Miller, 141 So. 587, 163 Miss. 288.

Mo.—Dickherber v. Turnbull, App., 31 S.W.2d 234.

17. Ind.—Weaver v. Prebster, 77 N. E. 674, 37 Ind.App. 582.

50 C.J. p 146 note 38.

### Mutuality held present

Iowa.—Eilers v. Freiling, 234 N.W. 275, 211 Iowa 841.

18. Ga.—Luden v. Enterprise Lumber Co., 91 S.E. 102, 146 Ga. 284, L.R.A.1917C 485.

50 C.J. p 146 note 34.

19. Tex.—Traywick v. Gunn, Civ. App., 293 S.W. 273.

20. Tex.—Reliable Iron Works v. First State Bank, etc., Co., Civ. App., 241 S.W. 592.

21. N.Y.—Sturman v. Lomor Realty Co., 265 N.Y.S. 564, 148 Misc. 277.

40 C.J. p 146 note 39.

22. Wis.—Riley v. Gregg, 16 Wis. 666.

40 C.J. p 146 note 40.

23. N.Y.—McNulty v. Hurd, 86 N. Y. 547.

50 C.J. p 146 note 41.

24. Ill.—English v. Landon, 54 N.E. 911, 181 Ill. 614.

50 C.J. p 146 note 42.

25. Ill.—English v. Landon, supra.

50 C.J. p 146 note 43.

26. Wash.—Merchants' Bank v. Bussell, 48 P. 242, 16 Wash. 546.

50 C.J. p 148 note 82.

Additional security as extension see supra § 177.

As ground for discharge of surety see infra § 154.

27. Ind.—Underwood v. Sample, 70 Ind. 446.

50 C.J. p 148 note 83.

28. Tex.—C. C. Slaughter Co. v. Elller, Civ.App., 196 S.W. 704.

50 C.J. p 148 note 84.

der on a third person for property,<sup>29</sup> an assignment of the interest of the principal in a partnership,<sup>30</sup> giving a mortgage on real<sup>31</sup> or on personal<sup>32</sup> property, or giving another mortgage,<sup>33</sup> or giving another note,<sup>34</sup> as collateral security is a sufficient consideration for an extension of time to discharge the surety.

*Payments on account of other debts.* The payment of,<sup>35</sup> or promise to pay,<sup>36</sup> another matured debt owing by the principal to the creditor is not a consideration sufficient to support an extension agreement discharging the surety. The promise to pay, before maturity, another debt of the principal is a sufficient consideration.<sup>37</sup> Application of a portion of the money paid on the principal debt to a different obligation has been held sufficient consideration to support an extension agreement.<sup>38</sup>

*Other considerations.* Particular considerations have been held sufficient,<sup>39</sup> such as a confession of judgment by the principal in favor of his creditor,<sup>40</sup> consent to entry of judgment against the principal,<sup>41</sup> and a purchase of property by the principal from the creditor at the request of the latter.<sup>42</sup> Particular considerations have been held insufficient,<sup>43</sup> such as a promise to pay the debt at a future time<sup>44</sup> or out of the proceeds of some particular property,<sup>45</sup> and an agreement to pay the principal debt at a future day or, in default thereof, to deliver a specific article in payment.<sup>46</sup>

### § 183. — Partial Payment of Principal

Payment or the promise to pay at or after maturity part of the amount due ordinarily is not a sufficient consideration for an extension of the time of payment of the balance.

Although there is some authority to the contrary,<sup>47</sup> it has been held that payment<sup>48</sup> or the promise to pay<sup>49</sup> at or after maturity part of the amount due is not a sufficient consideration for an extension of the time of payment of the balance. It has also been held that part payment, before maturity, of the debt for which the surety is liable is a sufficient consideration.<sup>50</sup>

### § 184. — Payment of Interest

- a. In general
- b. Rate

#### a. In General

A promise to pay, or the actual payment of, interest already accrued and due is not a sufficient consideration to support an extension of time discharging a surety.

A promise to pay,<sup>51</sup> as by giving a note,<sup>52</sup> or the actual payment of,<sup>53</sup> interest already accrued and due is not a sufficient consideration to support an extension of time discharging a surety. The payment of interest in advance,<sup>54</sup> as by giving a note therefor,<sup>55</sup> is a sufficient consideration.

*Interest for period of extension.* The mere pay-

29. Wis.—Robinson v. Dale, 38 Wis. 330.

30. Vt.—Whittle v. Skinner, 23 Vt. 531.

31. Mo.—Semple v. Atkinson, 64 Mo. 504.

50 C.J. p 148 note 87.

32. Neb.—Lee v. Brugmann, 55 N. W. 1053, 37 Neb. 232.

50 C.J. p 148 note 88.

33. Tex.—Wylie v. Hightower, 11 S.W. 1118, 74 Tex. 306.

34. N.J.—A. v. B., 1 N.J.Law J. 22. N.Y.—Clark v. House, 16 N.Y.S. 777.

50 C.J. p 149 note 90.

35. S.D.—Bunker v. Taylor, 74 N. W. 450, 10 S.D. 526.

50 C.J. p 147 note 55.

36. Minn.—Thysell v. Holm, 145 N. W. 164, 124 Minn. 541.

50 C.J. p 147 note 56.

37. Ind.—Buck v. Smiley, 64 Ind. 481.

38. Wash.—Lipsett v. Dettering, 162 P. 1007, 94 Wash. 629.

50 C.J. p 147 note 58.

39. Ky.—U. S. Fidelity & Guaranty Co. v. Mayo Arcade Corporation, 70 S.W.2d 531, 253 Ky. 763.

72 C.J.S.—42

Mo.—Dickherber v. Turnbull, App., 31 S.W.2d 234.

N.J.—Burack v. Mayers, 187 A. 767, 121 N.J.Eq. 135, affirmed 191 A. 841, 122 N.J.Eq. 5.

40. Pa.—Riddle v. Thompson, 104 Pa. 330—Blank v. Weber, 2 Walk. 205.

41. Ky.—U. S. Fidelity & Guaranty Co. v. Mayo Arcade Corporation, 70 S.W.2d 531, 253 Ky. 763.

42. Vt.—Dunham v. Downer, 31 Vt. 249.

43. N.Y.—Polaris Bldg. Corporation v. Bimberg, 241 N.Y.S. 738, 137 Misc. 289.

44. Ind.—Hume v. Mazelin, 84 Ind. 574.

45. Miss.—Wadlington v. Gary, 15 Miss. 522.

46. Miss.—Govan v. Binford, 25 Miss. 151.

47. La.—Freeman v. Profflet, 11 Rob. 33—O'Banion v. Willis, 129 So. 440, 14 La.App. 638.

48. Neb.—Shuler v. Hummel, 95 N. W. 350, 1 Neb.Unof. 204.

50 C.J. p 146 note 52.

Payment of interest as consideration see *infra* § 184.

49. Cal.—Burrows Shoe Co. v. Brotherton, 288 P. 879, 106 Cal. App. 162.

Ga.—Rutledge v. Temple Banking Co., 121 S.E. 707, 31 Ga.App. 686.

50 C.J. p 147 note 53.

50. Ala.—Ray v. Summerlin, 100 So. 482, 211 Ala. 334.

50 C.J. p 147 note 54.

51. Ga.—Tatum v. Morgan, 33 S.E. 940, 108 Ga. 336.

50 C.J. p 147 note 60.

52. N.Y.—Gahn v. Niemcewicz, 11 Wend. 312.

53. Ark.—Ward v. Nutt, 179 S.W. 667, 120 Ark. 448.

50 C.J. p 147 note 62.

Effect where no provision for extension see *supra* § 178.

Usurious interest see *infra* § 185.

54. Ark.—Colvin v. Glover, 220 S. W. 832, 143 Ark. 498.

50 C.J. p 147 note 63.

55. Mo.—Steele v. Johnson, 69 S.W. 1065, 98 Mo.App. 147.

50 C.J. p 147 note 64.

ment of interest as it matures during the period of extension does not constitute a consideration sufficient to support a contract for extension discharging the surety,<sup>56</sup> but the promise to pay interest which will accrue during such period ordinarily is regarded as constituting a sufficient consideration,<sup>57</sup> although there is also authority to the contrary.<sup>58</sup> It has been held that an agreement for extension raises an implied promise to pay interest constituting a consideration which will support such agreement.<sup>59</sup>

#### b. Rate

A promise to pay, or payment of, interest at a rate higher than that demanded by the original contract has been held a consideration sufficient to support an extension discharging the surety.

It has been both affirmed<sup>60</sup> and denied<sup>61</sup> that payment of interest at a rate higher than that demanded by the original contract is a consideration sufficient to support an extension discharging the surety. A promise to pay interest at a higher rate ordinarily is regarded as a sufficient consideration.<sup>62</sup>

*Same rate.* There is a conflict of authority as to whether a promise to pay interest at the same rate is a sufficient consideration.<sup>63</sup> In some jurisdictions a promise to pay interest at the rate specified in the original contract,<sup>64</sup> or at the rate which the principal is bound by law to pay,<sup>65</sup> is regarded as not constituting any consideration for an extension of time. In other jurisdictions the rule is to the contrary.<sup>66</sup>

*Reduced rate.* A promise to pay interest at a reduced rate is not a sufficient consideration.<sup>67</sup>

*Interest on interest.* An agreement to pay interest on interest shows a consideration sufficient to support an extension discharging the surety.<sup>68</sup>

### § 185. — Fraudulent and Usurious or Other Illegal Contracts

Ordinarily an illegal contract of extension will not discharge the surety if executory; but a contract of extension, although illegal in its inception, may discharge the surety if already executed.

Ordinarily an illegal contract of extension will not discharge the surety if executory.<sup>69</sup> This rule has been applied, for example, to contracts attacked as constituting a preference under a bankruptcy act<sup>70</sup> or because of failure to observe statutory requirements relative to corporations.<sup>71</sup> A contract of extension, however, although illegal in its inception, may discharge the surety if already executed.<sup>72</sup>

*Fraud.* An executory agreement for an extension obtained by fraud practised on the creditor, being voidable, will not discharge the surety.<sup>73</sup> The rule is applied where the creditor has granted an extension of time because of a representation by the principal that the surety has consented thereto,<sup>74</sup> because he fraudulently has been induced to accept a worthless note,<sup>75</sup> or where the creditor gave time to the principal on condition that a new bond<sup>76</sup> or note<sup>77</sup> be executed, and the principal forged the signatures of the sureties to the new instrument. It has been held that, where the signature of a surety to a renewal note is obtained by a false representation of the principal to which the creditor is not a party, the extension is valid

56. Iowa.—Dyar v. Shenkberg, 61 N.W. 403, 93 Iowa 154. 50 C.J. p 147 note 66.

57. Iowa.—Eilers v. Frieling, 234 N.W. 275, 211 Iowa 841. Neb.—Shuler v. Hummel, 95 N.W. 350, 1 Neb.Unof. 204.

Va.—Corpus Juris quoted in Hofheimer v. Booker, 180 S.E. 145, 148, 164 Va. 358. 50 C.J. p 148 note 67.

58. Ga.—Harrell v. Kutz, 95 S.E. 717, 22 Ga.App. 235. 50 C.J. p 148 note 68.

59. Tex.—C. C. Slaughter Co. v. Eller, Civ.App., 196 S.W. 704. 50 C.J. p 148 note 69.

60. Mo.—Jobe v. Buck, 31 S.W.2d 98, 224 Mo.App. 621—Citizens' Bank v. Hilkemeyer, App., 12 S.W. 2d 516.

Receipt of increased interest without agreement to extend see supra § 178.

61. N.Y.—New York Life Ins. Co.

v. Casey, 70 N.E. 916, 178 N.Y. 381—Rafel v. Maurer, 167 N.Y.S. 941, 101 Misc. 621, affirmed 170 N.Y.S. 1107, 183 App.Div. 931.

62. Mo.—Jobe v. Buck, 31 S.W.2d 98, 224 Mo.App. 621. 50 C.J. p 148 note 74.

63. Okl.—Adams v. Ferguson, 147 P. 772, 44 Okl. 544.

64. Okl.—Stetler v. Boling, 152 P. 452, 52 Okl. 214. 50 C.J. p 148 note 76.

65. N.Y.—Monroe County Sav. Bank v. Baker, 264 N.Y.S. 101, 147 Misc. 522. 50 C.J. p 148 note 77.

66. Neb.—Shuler v. Hummel, 95 N.W. 350, 1 Neb. Unoff., 204. 50 C.J. p 148 note 78.

67. Ga.—Millsaps v. Hayes, 144 S.E. 326, 38 Ga.App. 483. 50 C.J. p 148 note 79.

68. N.C.—Scott v. Fisher, 14 S.E. 799, 110 N.C. 311, 28 Am.S.R. 688.

69. Ill.—Parlin, etc., Co. v. Hutson, 65 N.E. 93, 198 Ill. 389. 50 C.J. p 149 note 91.

70. Md.—Frederick-Town Sav. Inst. v. Michael, 32 A. 189, 340, 81 Md. 487, 33 L.R.A. 628.

71. Colo.—Byers v. Hussey, 4 Colo. 515. 50 C.J. p 149 note 93.

72. Ill.—Parlin, etc., Co. v. Hutson, 65 N.E. 93, 198 Ill. 389. 50 C.J. p 149 note 94.

73. Tex.—Red River Nat. Bank v. Bray, 148 S.W. 290, 105 Tex. 312. 50 C.J. p 149 note 95.

74. Iowa.—Dwinnell v. McKibben, 61 N.W. 985, 93 Iowa 331. 50 C.J. p 149 note 96.

75. N.Y.—Douglass v. Ferris, 33 N.E. 1041, 138 N.Y. 192, 34 Am.S.R. 435.

76. W.Va.—Lytle v. Cozad, 21 W. Va. 183.

77. Kan.—Severy State Bank v. Hoyt, 172 P. 994, 103 Kan. 44. 50 C.J. p 149 note 99.

and the surety on the original note is released.<sup>78</sup> If the creditor, on learning of the fraud practiced on him by the principal, does not act promptly, the surety will be discharged unless it clearly appears that he has not been prejudiced.<sup>79</sup> Where the fraudulent contract has already been executed, the surety is discharged.<sup>80</sup>

**Usury.** Whether an extension granted on an executory agreement to pay usury will discharge the surety depends largely on the effect of usury on the contract, under the statutes of the different jurisdictions. If such agreement is made illegal, the agreement for an extension is not binding, and hence the surety is not discharged,<sup>81</sup> although the delay is actually given in pursuance of the agreement;<sup>82</sup> in other jurisdictions the surety is discharged.<sup>83</sup> Actual payment of usurious interest in advance of its due date and of the expiration of the period of extension discharges the surety, under the general rule relative to executed contracts.<sup>84</sup> Actual payment of usurious interest, however, after expiration of the period of extension, pursuant to a previous executory agreement to pay usury, does not discharge the surety.<sup>85</sup>

## § 186. — Performance of Conditions

If a creditor has annexed conditions to his agreement for an extension of time, the agreement is not binding if the conditions are not performed, and the surety is not discharged.

Not only must the agreement for an extension be complete, but, if the creditor has annexed conditions to his agreement for an extension of time, the agreement is not binding if the conditions are not performed, and the surety is not discharged.<sup>86</sup> It

has been held that a contract for extension made conditional on the surety's consent does not discharge the latter.<sup>87</sup>

## § 187. Knowledge of Relationship

As a general rule, the creditor must have knowledge of the existence of the suretyship relation in order to discharge the surety on the ground that the time of payment has been extended without his consent.

As a general rule, the creditor must have knowledge of the existence of the suretyship relation in order to discharge the surety on the ground that the time of payment has been extended without his consent.<sup>88</sup>

## § 188. Prejudice to Surety

The general rule is that a surety is discharged by an unauthorized extension of time irrespective of whether or not he suffered prejudice in fact.

In the absence of statutes making actual prejudice essential to discharge the surety, the general rule is that a surety is discharged by an unauthorized extension of time irrespective of whether or not he suffered prejudice in fact,<sup>89</sup> as where the surety was not in fact prejudiced by the extension because the principal was insolvent<sup>90</sup> or a discharged bankrupt.<sup>91</sup> In other words, legal prejudice sufficient to discharge the surety is presumed from the alteration of the contract.<sup>92</sup>

## § 189. — Compensated Surety

Prejudice in fact is essential to the discharge of a compensated surety by an extension of time.

Prejudice in fact is essential to the discharge of a compensated surety by an extension of time,<sup>93</sup>

78. Ohio.—*Farmers', etc., Bank v. Lucas*, 26 Ohio St. 385.

79. Me.—*Sandy River Nat. Bank v. Miller*, 19 A. 109, 82 Me. 137. 50 C.J. p 149 note 2.

80. Ill.—*Parlin, etc., Co. v. Hutson*, 65 N.E. 93, 198 Ill. 389. 50 C.J. p 149 note 3.

81. N.J.—*Burack v. Mayers*, 137 A. 767, 121 N.J.Eq. 135, affirmed 191 A. 841, 122 N.J.Eq. 5.

Tex.—*Terrell v. Barrack*, 2 Willson Civ.Cas.Ct.App. § 667—*Hoerr v. Coffin*, 1 White & W.Civ.Cas.Ct. App. § 185. 50 C.J. p 150 note 5.

82. Ala.—*Gilder v. Jeter*, 11 Ala. 256.

83. Ga.—*Hays v. Edwards*, 121 S.E. 858, 31 Ga.App. 725. 50 C.J. p 150 note 7.

84. W.Va.—*Parsons v. Harrold*, 32 S.E. 1002, 46 W.Va. 122. 50 C.J. p 150 note 8.

85. D.C.—*Green v. Lake*, 13 D.C. 162.

Vt.—*Smith v. Hyde*, 36 Vt. 303—*Burgess v. Dewey*, 33 Vt. 618.

86. Ky.—*Bradford v. Union Trust Co.*, 47 S.W.2d 536, 242 Ky. 709. 50 C.J. p 150 note 12.

87. Okl.—*Kuhlman v. Leavens*, 50 P. 171, 5 Okl. 562. 50 C.J. p 150 note 13.

88. U.S.—*Sauder v. Dittmar*, C.C.A. Kan., 118 F.2d 524.

Me.—*Blumenthal v. Serota*, 151 A. 138, 129 Me. 187.

Pa.—*Spring Garden Building & Loan Ass'n v. Rhodes*, 190 A. 530, 126 Pa.Super. 102.

R.I.—*Industrial Trust Co. v. Goldman*, 193 A. 852, 59 R.I. 11, 112 A.L.R. 1313.

Wash.—*Alaska Pac. Salmon Co. v. Mathewson*, 101 P.2d 606, 3 Wash. 2d 560.

50 C.J. p 150 note 15.

89. Me.—*Blumenthal v. Serota*, 151 A. 138, 129 Me. 187.

S.D.—*Zastrow v. Knight*, 229 N.W. 925, 56 S.D. 554, 72 A.L.R. 379.

50 C.J. p 153 note 37. Prejudice as essential to discharge of compensated surety see infra § 189.

90. Cal.—*Braun v. Crew*, 193 P. 531, 183 Cal. 728. 50 C.J. p 153 note 38.

91. Ind.—*Post v. Losey*, 12 N.E. 121, 111 Ind. 74, 60 Am.R. 677. Tex.—*Short v. Shannon*, Civ.App., 211 S.W. 463.

92. Me.—*Blumenthal v. Serota*, 151 A. 138, 129 Me. 187. 50 C.J. p 153 note 40.

93. Iowa.—*In re Tabasinsky's Estate*, 293 N.W. 578, 228 Iowa 1102. Mich.—*Grinnell Realty Co. v. General Casualty & Surety Co.*, 234 N.W. 125, 253 Mich. 16.

Mo.—*Corpus Juris cited in State ex*

the rule of strictissimi juris being inapplicable to paid sureties with respect to the effect of an extension of time.<sup>94</sup> Where, however, actual prejudice is shown, a compensated surety will be discharged by an extension of time.<sup>95</sup> The rule denying discharge to a compensated surety in the absence of prejudice in fact has been applied to a surety compensated only in the sense that he was a large stockholder in the principal corporation.<sup>96</sup>

## § 190. Reservation of Rights

The rule that an extension of time without the consent of the surety discharges the surety does not apply where the creditor or obligee reserves his rights against the surety.

The rule that an extension of time without the consent of the surety discharges the surety does not apply where the creditor or obligee reserves his rights against the surety<sup>97</sup> or reserves the right to sue the principal at the surety's request.<sup>98</sup> Such a reservation cannot be implied,<sup>99</sup> but must be express,<sup>1</sup> clear,<sup>2</sup> and definite.<sup>3</sup> The creditor must not only retain the original instrument of indebtedness,<sup>4</sup> but must expressly reserve the right of immediate action.<sup>5</sup> A reservation to the principal of

the right to pay off the debt before expiration of the period of extension will not prevent discharge of the surety.<sup>6</sup>

*Surety on negotiable instrument.* Where rights are reserved, a surety on a negotiable instrument is not discharged by a renewal,<sup>7</sup> provided the original instrument is retained with the right of immediate action thereon,<sup>8</sup> although it is otherwise if the creditor binds himself not to proceed on the original note unless the renewal note is not paid at maturity.<sup>9</sup>

## § 191. Consent of Surety

- a. In general
- b. What constitutes

### a. In General

A surety is not discharged by an extension of the time of payment or performance to which he consents.

A surety is not discharged by an extension of the time of payment or performance to which he consents,<sup>10</sup> as where he consents in advance,<sup>11</sup> for example, where the extension is permissible within the express or implied provisions of the contract ex-

rel. *Hardy v. Farris*, 47 S.W.2d 198, 201, 226 Mo.App. 1007.

N.C.—*Corpus Juris* cited in *Maxwell v. Southern Fidelity Mut. Ins. Co.*, 9 S.E.2d 428, 431, 217 N.C. 762.

Or.—*Corpus Juris* cited in *Fred Christensen, Inc. v. Hansen Const. Co.*, 21 P.2d 195, 197, 142 Or. 549. 50 C.J. p 153 note 46.

### Material prejudice

Miss.—*Hartford Accident & Indemnity Co. v. N. O. Nelson Mfg. Co.*, 135 So. 349, 160 Miss. 504.

94. U.S.—*U. S. Fidelity, etc., Co. v. U. S. Colo.*, 24 S.Ct. 142, 191 U.S. 416, 48 L.Ed. 242. 50 C.J. p 154 note 48.

95. Vt.—*American Surety Co. v. Creamery Comrs.*, 127 A. 289, 98 Vt. 313. 50 C.J. p 154 note 49.

96. Kan.—*Olathe First Nat. Bank v. Livermore*, 133 P. 734, 90 Kan. 395, 47 L.R.A.N.S., 274.

97. Ill.—*City Nat. Bank & Trust Co. v. Burnham*, 17 N.E.2d 505, 297 Ill.App. 211.

Mass.—*Taborsak v. Massachusetts Bonding & Insurance Co.*, 193 N.E. 729, 289 Mass. 8—*Conway Sav. Bank v. Vinick*, 192 N.E. 81, 287 Mass. 448—*Manufacturers Finance Co. v. Rockwell*, 180 N.E. 224, 278 Mass. 503.

Pa.—*Central Penn Nat. Bank of Philadelphia v. Tinkler*, 40 A.2d 389, 351 Pa. 123.

S.D.—*Citizens' State Bank of Colman v. Rosenwald*, 256 N.W. 264, 63 S.D. 50.

W.Va.—*Holbert v. Safe Ins. Co.*, 171 S.E. 422, 114 W.Va. 221. 50 C.J. p 154 note 53.

98. Va.—*Exchange Bldg., etc., Co. v. Bayless*, 21 S.E. 279, 91 Va. 134. 50 C.J. p 154 note 53.

99. N.Y.—*National Park Bank v. Koehler*, 97 N.E. 468, 204 N.Y. 174. 50 C.J. p 116 note 27.

1. Ill.—*City Nat. Bank & Trust Co. v. Burnham*, 17 N.E.2d 505, 297 Ill.App. 211.

S.D.—*Citizens State Bank of Colman v. Rosenwald*, 256 N.W. 264, 63 S.D. 50.

2. N.Y.—*Calvo v. Davies*, 73 N.Y. 211, 29 Am.R. 130. 50 C.J. p 116 note 28.

3. S.D.—*Citizens State Bank of Colman v. Rosenwald*, 256 N.W. 264, 63 S.D. 50.

4. S.D.—*Citizens' State Bank of Colman v. Rosenwald*, supra.

5. S.D.—*Citizens' State Bank of Colman v. Rosenwald*, supra.

6. Tex.—*C. C. Slaughter Co. v. Miller*, Civ.App., 196 S.W. 704. 50 C.J. p 154 note 54.

7. Tenn.—*Meredith v. Dibrell*, 155 S.W. 163, 127 Tenn. 387, 46 L.R.A., N.S., 92, Ann.Cas.1914B 1079. 50 C.J. p 154 note 56.

Effect of extension on sureties on

negotiable instruments generally see supra § 163.

8. Tenn.—*Dies v. Wilson County Bank*, 165 S.W. 248, 129 Tenn. 89, Ann.Cas.1915A 1090. 50 C.J. p 154 note 57.

9. S.D.—*Citizens' State Bank of Colman v. Rosenwald*, 256 N.W. 264, 63 S.D. 50.

Tex.—*Templeman v. Texas Brewing Co.*, Civ.App., 35 S.W. 935.

10. Mass.—*Conway Sav. Bank v. Vinick*, 192 N.E. 81, 287 Mass. 448—*Manufacturers Finance Co. v. Rockwell*, 180 N.E. 224, 278 Mass. 503.

Pa.—*Central Penn Nat. Bank of Philadelphia v. Tinkler*, 40 A.2d 389, 351 Pa. 123—*Corpus Juris* cited in *Pure Oil Co. v. Shlifer*, 175 A. 895, 897, 115 Pa.Super. 319.

Tex.—*Borden v. Arnold*, Civ.App., 94 S.W.2d 216, error refused. 50 C.J. p 151 note 17.

Consent generally see supra § 153. Waiver of defense see infra § 192.

11. Fla.—*Anderson v. Trueman*, 139 So. 12, 100 Fla. 727.

Mo.—*Ruskamp v. Fetchling*, Ariz. 101 S.W.2d 524.

Pa.—*Central Penn Nat. Bank of Philadelphia v. Tinkler*, 40 A.2d 389, 351 Pa. 123—*Corpus Juris* cited in *Pure Oil Co. v. Shlifer*, 175 A. 895, 897, 115 Pa.Super. 319.

Tex.—*Borden v. Arnold*, Civ.App., 94 S.W.2d 216, error refused. 50 C.J. p 151 note 18.

executed by the surety,<sup>12</sup> such as a bond<sup>13</sup> or note.<sup>14</sup> If assent is conditional, the condition must be performed in order that the surety's liability may continue.<sup>15</sup>

*Consent of one surety* does not bind his co-surety.<sup>16</sup>

### b. What Constitutes

An implied consent may be sufficient to preclude the surety from asserting the defense of extension of time.

An implied consent may be sufficient to preclude the surety from asserting the defense of extension of time,<sup>17</sup> as where the surety's consent is inferred from the fact that he was instrumental in procuring the extension.<sup>18</sup> Consent is not shown, however, by the surety's mere inquiry as to whether an extension may be granted,<sup>19</sup> or, in the absence of

agency, by his declaration that any arrangement made by the principal will be satisfactory,<sup>20</sup> or by the existence of a clause in the principal contract imposing a penalty for delay.<sup>21</sup> Consent to an extension for a specified time,<sup>22</sup> or at a specified time,<sup>23</sup> or in a specified way<sup>24</sup> will not be construed as consent to a longer or different sort of extension. Consent in a note to extensions of time will be construed as limited to the period covered by the statute of limitations on the note.<sup>25</sup>

*Surety's knowledge of extension.* It is not essential that the surety should know of the extension in order to be discharged,<sup>26</sup> and his knowledge and passive failure to object do not show consent.<sup>27</sup>

*Number of extensions.* Consent to one extension will not be construed as consent to subsequent and additional extensions.<sup>28</sup> Where the language so in-

12. Ky.—*Corpus Juris* cited in *State Nat. Bank of Frankfort v. Thompson*, 126 S.W.2d 412, 415, 277 Ky. 537.

Neb.—*Nordeen v. Nelson*, 279 N.W. 333, 134 Neb. 707.

Pa.—*Corpus Juris* cited in *Pure Oil Co. v. Shlifer*, 175 A. 895, 897, 115 Pa.Super. 319.

50 C.J. p 151 note 19—9 C.J. p 860 note 29.

Express waiver in advance see *infra* § 192.

**Solvency or insolvency of principal**  
Surety's liability for renewal notes of principal under suretyship agreement providing that renewal or extension of time of payment should not affect surety's liability was not affected by solvency or insolvency of principal.—*Central Penn. Nat. Bank of Philadelphia v. Tinkler*, 40 A.2d 339, 351 Pa. 123.

13. N.Y.—*Levy v. Jones*, 55 N.Y.S. 2d 607, 269 App.Div. 295, appeal granted 57 N.Y.S.2d 135, 269 App. Div. 901.

50 C.J. p 151 note 20—9 C.J. p 860 note 29.

14. Ark.—*Holman v. Armstrong*, 63 S.W.2d 339, 187 Ark. 958.

Mo.—*Ruskamp v. Fetchling*, App., 181 S.W.2d 524.

Tex.—*Brinker v. First Nat. Bank*, Com.App., 37 S.W.2d 136—*Borden v. Arnold*, Civ.App., 94 S.W.2d 216, error refused.

50 C.J. p 151 note 21.

### Termination of authority

Death of one of parties secondarily liable terminated principal maker's authority under note to execute extension agreement; hence subsequent extension made without consent of parties secondarily liable and proper representative of deceased operated for their release.—

*Brinker v. First Nat. Bank*, Tex.Com. App., 37 S.W.2d 136.

15. Tex.—*Lond v. Patton*, 93 S.W. 519, 43 Tex.Civ.App. 11, 50 C.J. p 113 note 79.

16. N.H.—*Crosby v. Wyatt*, 10 N.H. 318.

N.Y.—*Mutual Life Ins. Co. of New York v. Barca Realty Corporation*, 48 N.Y.S.2d 306, affirmed 48 N.Y.S. 2d 332, 267 App.Div. 955, appeal denied 49 N.Y.S.2d 272, 267 App. Div. 984, appeal denied 50 N.Y.S. 2d 163, 268 App.Div. 768, affirmed 63 N.E.2d 118, 294 N.Y. 925.

### Insolvent indorser

Surety on note of corporation, who signed renewal note as surety, was held not relieved of liability on renewal note by failure of payee to obtain signature of other indorser on original note, where such other indorser was insolvent, and his signature was not required on renewal note at request of surety.—*Woolfolk v. Mathews*, 188 S.E. 729, 54 Ga.App. 694.

17. Cal.—*Fruit Growers' Supply Co. v. Goss*, 41 P.2d 357, 4 Cal.App.2d 651.

50 C.J. p 152 note 23.

18. Minn.—*A. B. Klise Lumber Co. v. Enkema*, 181 N.W. 201, 148 Minn. 5.

50 C.J. p 152 note 24.

### Inference repelled by express dissent

N.Y.—*Irving Trust Co. v. Hutchinson Holding Corporation*, 270 N.Y. S. 684, 241 App.Div. 107.

19. N.Y.—*Clarke v. House*, 16 N.Y. S. 777.

50 C.J. p 152 note 25.

20. La.—*Deull v. Martel*, 10 La. Ann. 643.

50 C.J. p 152 note 26.

21. Ark.—*Bankers' Surety Co. v. Watt*, 177 S.W. 20, 118 Ark. 492.

22. Neb.—*McGavock v. Omaha Nat. Bank*, 90 N.W. 230, 64 Neb. 440, 50 C.J. p 152 note 28.

23. U.S.—*Edwards v. Goode, Tex.*, 228 F. 664, 143 C.C.A. 186, 50 C.J. p 152 note 29.

24. N.Y.—*Smith v. Townsend*, 25 N. Y. 479.

50 C.J. p 152 note 30.

### Extension in nature of indulgence

Surety, executing contract providing that extension of time by note or otherwise, granted principal debtor by creditor in connection with debtor's failure to pay indebtedness, should not release surety, consented only to extension in nature of indulgence, not to extension agreement transferring to trustees creditor's right to grant extensions, and such agreement so impaired surety's right of subrogation as to discharge him.—*Pure Oil Co. v. Shlifer*, 175 A. 895, 115 Pa.Super. 319.

25. N.H.—*Conway Sav. Bank v. Dow*, 39 A. 975, 69 N.H. 228.

50 C.J. p 152 note 31.

26. Ga.—*Stewart v. Parker*, 55 Ga. 656.

50 C.J. p 152 note 32.

27. Minn.—*A. B. Klise Lumber Co. v. Enkema*, 181 N.W. 201, 148 Minn. 5.

50 C.J. p 152 note 33.

28. S.C.—*Tuten v. Bowden*, 175 S.E. 510, 173 S.C. 256, 94 A.L.R. 1443, 50 C.J. p 152 note 34.

Consent to "any extension" has been construed as a consent to only one extension.

Ind.—*Oyler v. McMurray*, 34 N.E. 1004, 7 Ind.App. 645.

S.C.—*Tuten v. Bowden*, 175 S.E. 510, 173 S.C. 256, 94 A.L.R. 1443.



dicates, however, consent may be held to include further extensions.<sup>29</sup>

## § 192. Waiver, Ratification, and Estoppel

A surety may waive the right to a discharge by an extension of time, or lose it through ratification or estoppel.

Since the right to a discharge by extension of time is a personal privilege of the surety,<sup>30</sup> he may waive such right<sup>31</sup> or lose it through ratification<sup>32</sup> or estoppel.<sup>33</sup> If the surety is ignorant of the granting of the extension, no waiver thereof can be shown.<sup>34</sup> Waiver cannot be shown by a letter of the surety never received by the addressee.<sup>35</sup>

*Waiver in advance.* The waiver may be in ad-

vance,<sup>36</sup> as by an express provision in the contract to that effect.<sup>37</sup>

*Subsequent waiver.* Waiver may be shown by acts subsequent to the extension,<sup>38</sup> such as the surety's subsequent promise to pay the debt or his acknowledgment of its continued existence,<sup>39</sup> by his giving the creditor written notice to sue,<sup>40</sup> or by his acceptance of security from the principal after the extension.<sup>41</sup> An agreement by a surety for a further extension of time of payment after a previous extension to the principal is a waiver of the latter defense.<sup>42</sup> Also the acceptance of a premium by a compensated surety after an extension of which it had knowledge is a waiver of the discharge.<sup>43</sup>

## E. INDUCING INACTION OR SURRENDER OF SECURITY BY SURETY

### § 193. Act of Creditor

A surety is discharged by any act of the creditor inducing him to forego taking steps to protect

himself, as discussed *infra* § 194, or inducing him to relinquish security, as discussed *infra* § 195.

Examine Pocket Parts for later cases.

29. S.C.—Tuten v. Bowden, *supra*.  
Tex.—Brinker v. First Nat. Bank, Com.Pl., 37 S.W.2d 136.  
50 C.J. p 152 note 35.

30. N.Y.—Corpus Juris cited in Carpenter v. Hogan, 50 N.Y.S.2d 123, 127, 182 Misc. 103.

N.C.—Corpus Juris quoted in Maxwell v. Southern Fidelity Mut. Ins. Co., 9 S.E.2d 428, 432, 217 N.C. 762.  
50 C.J. p 155 note 60.

31. N.Y.—Corpus Juris cited in Carpenter v. Hogan, 50 N.Y.S.2d 123, 127, 182 Misc. 103.

N.C.—Corpus Juris quoted in Maxwell v. Southern Fidelity Mut. Ins. Co., 9 S.E.2d 428, 432, 217 N.C. 762.

Tex.—Texas Nat. Bank of Beaumont v. Debes, 120 S.W.2d 794, 132 Tex. 297.

50 C.J. p 155 note 61.  
Waiver of defenses generally see *supra* § 160.

32. N.C.—Corpus Juris quoted in Maxwell v. Southern Fidelity Mut. Ins. Co., 9 S.E.2d 428, 432, 217 N.C. 762.

50 C.J. p 155 note 62.

33. Neb.—Nordeen v. Nelson, 279 N.W. 323, 134 Neb. 707.

N.C.—Corpus Juris quoted in Maxwell v. Southern Fidelity Mut. Ins. Co., 9 S.E.2d 428, 432, 217 N.C. 762.

Wis.—Irvine v. Adams, 4 N.W. 573, 43 Wis. 468, 33 Am.R. 817.

50 C.J. p 155 note 63.

*Surety not estopped*

Alleged surety was not estopped to set up contract under which payee extended time of land purchase-money note in preference to

subsequent contract under which surety's liability was greatly increased, but without consideration, because lands decreased in value and payee took loss, where payee could not have foreclosed before date to which extension was made in any case.—American Fruit Growers v. Hawkinson, 106 S.W.2d 564, 21 Tenn.App. 127.

34. Mass.—Schwartz v. American Surety Co., 121 N.E. 424, 231 Mass. 490.

50 C.J. p 155 note 64.

35. Tex.—Cruse v. Gau, Civ.App., 193 S.W. 405.

50 C.J. p 155 note 65.

36. N.C.—Rasberry v. West, 171 S.E. 350, 205 N.C. 406.

Tex.—Texas Nat. Bank of Beaumont v. Debes, 120 S.W.2d 794, 132 Tex. 297—Brinker v. First Nat. Bank, Com.App., 37 S.W.2d 136.

Consent in advance see *supra* § 191.

37. Ky.—Simmerman v. National Deposit Bank of Owensboro, 24 S.W.2d 912, 232 Ky. 844.

Miss.—W. T. Rawleigh Co. v. Wing, 4 So.2d 222.

N.C.—Rasberry v. West, 171 S.E. 350, 205 N.C. 406.

Tex.—Simpson v. McDonald, 179 S.W.2d 239, 142 Tex. 444, conformed to, Civ.App., 179 S.W.2d 1023—Sloan v. Dahl, Civ.App., 27 S.W.2d 284, error refused.

50 C.J. p 155 note 67.

38. Ala.—Culwell v. Edmondson, 129 So. 276, 221 Ala. 424.

N.Y.—Carpenter v. Hogan, 50 N.Y.S.2d 123, 182 Misc. 103.

N.C.—Corpus Juris quoted in Maxwell v. Southern Fidelity Mut. Ins. Co., 9 S.E.2d 428, 432, 217 N.C. 762.

Tex.—Texas Nat. Bank of Beaumont v. Debes, 120 S.W.2d 794, 132 Tex. 297—Brinker v. First Nat. Bank, Com.App., 37 S.W.2d 136.

39. N.Y.—Corpus Juris cited in Carpenter v. Hogan, 50 N.Y.S.2d 123, 127, 182 Misc. 103.

N.C.—Corpus Juris quoted in Maxwell v. Southern Fidelity Mut. Ins. Co., 9 S.E.2d 428, 432, 217 N.C. 762.

50 C.J. p 155 note 69.

40. Ind.—Brink v. Reid, 23 N.E. 770, 122 Ind. 257.

N.C.—Corpus Juris quoted in Maxwell v. Southern Fidelity Mut. Ins. Co., 9 S.E.2d 428, 432, 217 N.C. 762.

41. N.C.—Corpus Juris quoted in Maxwell v. Southern Fidelity Mut. Ins. Co., 9 S.E.2d 428, 432, 217 N.C. 762.

Okl.—Kremke v. Rademaker, 159 P. 475, 60 Okl. 133.

42. Ala.—Corpus Juris cited in First Nat. Bank of Birmingham v. Hendrix, 4 So.2d 407, 409, 241 Ala. 675.

N.H.—New Hampshire Sav. Bank v. Colcord, 15 N.H. 119, 41 Am.D. 685.

N.C.—Corpus Juris quoted in Maxwell v. Southern Fidelity Mut. Ins. Co., 9 S.E.2d 428, 432, 217 N.C. 762.

S.C.—State Agricultural, etc., Soc. v. Taylor, 88 S.E. 372, 104 S.C. 167.

### § 194. — Inducing Surety to Refrain from Protecting Himself

A surety is discharged by any act of the creditor inducing him to refrain from protecting himself.

A surety is discharged by any act of the creditor inducing him to forego taking steps to protect himself,<sup>44</sup> such as a false representation<sup>45</sup> or concealment<sup>46</sup> of material facts. In order to effect the surety's discharge by a representation, it must appear that the surety was deceived<sup>47</sup> by a representation on which he had a right to rely,<sup>48</sup> or by concealment of facts the creditor was obligated to reveal,<sup>49</sup> and that in consequence of such representation or concealment the surety did in fact alter his line of conduct to his injury.<sup>50</sup> A pro tanto injury will result in a pro tanto discharge.<sup>51</sup>

*Particular representations.* Subject to the foregoing rules, ordinarily it is held that the surety is discharged by the creditor's statement that the debt has been paid or settled,<sup>52</sup> or that the creditor will look to and enforce the obligation only against the principal<sup>53</sup> or other parties liable,<sup>54</sup> and that the surety will not be called on for payment,<sup>55</sup> where in reliance thereon the surety refrains from securing himself to his injury. However, in the absence of proof of resultant injury,<sup>56</sup> a surety is not dis-

charged by the creditor's mere statement that the principal is good for the amount of the debt,<sup>57</sup> that the creditor will not look to the surety,<sup>58</sup> that security held by the creditor will be sufficient,<sup>59</sup> that he does not want the surety any longer,<sup>60</sup> that he does not consider him bound,<sup>61</sup> or that he need not trouble himself.<sup>62</sup>

### § 195. — Inducing Surety to Relinquish Security

A surety is discharged by any act of the creditor inducing him to relinquish security.

If the surety, relying on notice from the creditor that the debt has been paid, releases security given to him,<sup>63</sup> or if he is induced to give up such security by any arrangement between the principal and the creditor,<sup>64</sup> or by direction of the creditor,<sup>65</sup> he will be discharged to the extent of the value of the security released. The surety is not discharged, however, by releasing security if he relies on statements made by one without authority to bind the creditor<sup>66</sup> or if the security is released through the fraud of the principal in which the creditor did not participate.<sup>67</sup> A surety is not discharged by the representations of the creditor by which the surety is induced to apply funds given to him by the debtor to apply to the payment of the secured debt to the

44. Ga.—Franklin Savings & Loan Co. v. Branan, 188 S.E. 67, 54 Ga. App. 363.

Iowa.—Heinz v. Davenport Bank & Trust Co., 298 N.W. 785, 230 Iowa 546—In re Carpenter's Estate, 231 N.W. 376, 210 Iowa 553—Security Savings Bank of Wellman v. Smith, 122 N.W. 825, 144 Iowa 203. 50 C.J. p 156 note 85.

45. Mo.—Neelyville Bank v. Lee, 168 S.W. 796, 182 Mo.App. 185. 50 C.J. p 156 note 86.

46. Iowa.—Security Savings Bank of Wellman v. Smith, 122 N.W. 825, 144 Iowa 203. 50 C.J. p 156 note 87.

47. Mo.—Neelyville Bank v. Lee, 168 S.W. 796, 182 Mo.App. 185. 50 C.J. p 156 note 88.

48. Pa.—Troop v. Franklin Sav., etc., Co., 339 A. 492, 291 Pa. 18. 50 C.J. p 156 note 89.

49. Ark.—Molitor v. People's Bldg., etc., Assoc., 269 S.W. 363, 168 Ark. 53. 50 C.J. p 156 note 90.

50. Tex.—National Bank of Commerce v. Gilvin, Civ.App., 152 S.W. 652. 50 C.J. p 156 note 91.

51. Mo.—Neelyville Bank v. Lee, 196 S.W. 43, 196 Mo.App. 496. 50 C.J. p 157 note 92.

52. Ga.—Franklin Savings & Loan Co. v. Branan, 188 S.E. 67, 54 Ga. App. 363.

50 C.J. p 157 note 94.

53. Mo.—Neelyville Bank v. Lee, 168 S.W. 796, 182 Mo.App. 185. 50 C.J. p 157 note 95.

54. Iowa.—In re Carpenter's Estate, 231 N.W. 376, 210 Iowa 553.

55. Ala.—Teague v. Russell, 2 Stew. 420.

56. Mo.—Neelyville Bank v. Lee, App., 208 S.W. 143. 50 C.J. p 157 note 96.

Statement that principal had "straightened up" note and that surety had "nothing else to worry about" made by president of bank holding note, in reliance on which surety failed to secure amount of note from principal as he might have done, has been held sufficient to establish an estoppel precluding recovery from surety.—Franklin Savings & Loan Co. v. Branan, 188 S.E. 67, 54 Ga.App. 363.

57. N.Y.—Howe Mach. Co. v. Farrington, 82 N.Y. 121. 50 C.J. p 157 note 97.

58. Ind.—Huntington First Nat. Bank v. Williams, 26 N.E. 75, 126 Ind. 423. 50 C.J. p 157 note 98.

59. Ky.—Gillen v. Kentucky Nat. Bank, 8 S.W. 193, 10 Ky.L. 97. Tex.—Bruce v. Laing, Civ.App., 64 S.W. 1019.

60. Pa.—Brubaker v. Okeson, 36 Pa. 519.

61. N.Y.—Wheeler v. Benedict, 36 Hun 478. 50 C.J. p 157 note 2.

62. Tex.—National Bank of Commerce v. Gilvin, Civ.App., 152 S.W. 652. 50 C.J. p 157 note 3.

63. Iowa.—Rowley v. Jewett, 9 N.W. 353, 56 Iowa 492. 50 C.J. p 157 note 4.

64. Ky.—Schuff v. Germania Safety Vault, etc., Co., 43 S.W. 229, 19 Ky.L. 1457. 50 C.J. p 157 note 5.

65. Ky.—Speed v. Willow Springs Distilling Co., 130 S.W. 1103, 140 Ky. 269. 50 C.J. p 157 note 6.

66. S.C.—Butler v. Hamilton, 2 S.C.Eq. 226, 2 Am.D. 692. Tex.—Beckham v. Shackelford, 29 S.W. 200, 8 Tex.Civ.App. 660.

67. Ill.—Gillett v. Wiley, 19 N.E. 287, 126 Ill. 310, 9 Am.S.R. 587. Vt.—Washington Dist. Prob. Ct. v. St. Clair, 52 Vt. 24.

payment of some other claim where no fraud is charged<sup>68</sup> or where the surety did not offer to restore the status quo by reviving the discharged claim.<sup>69</sup>

## § 196. Act of Principal

The surety is not discharged because he relied on information from the principal, and was thereby induced

to refrain from protecting himself, unless the creditor participated therein.

The surety is not relieved of liability because he relied on information from the principal and was thereby induced to refrain from protecting himself,<sup>70</sup> even though such information was fraudulent,<sup>71</sup> unless the creditor was a party to the fraud.<sup>72</sup>

## F. RELINQUISHMENT, LOSS, OR MISAPPLICATION OF FUNDS OR SECURITIES

### § 197. In General

An obligee, who has securities or funds in his possession or control applicable to the payment of the secured debt, is under the obligation to the surety to use ordinary care and prudence to preserve them for the surety's benefit, and the surety is discharged from liability if the creditor relinquishes or loses them, or consents to a material alteration of the security to the prejudice of the surety, or by any act deprives the surety of the right of subrogation.

A creditor or obligee, who has securities, property, or funds in his possession or control applicable to the payment of the secured debt, is under obligation to the surety to use ordinary care and prudence to preserve such securities, property, or funds for the surety's benefit,<sup>73</sup> and the surety is discharged from further liability either entirely or pro tanto, as discussed infra § 206, if the creditor, in dereliction of his duty, relinquishes<sup>74</sup> or, accord-

68. Ga.—Jones v. Watson, 79 S.E. 239, 13 Ga.App. 390.

69. Ga.—Jones v. Watson, *supra*.

70. Iowa.—Reints v. Uhlenhopp, 128 N.W. 400, 149 Iowa 284. 50 C.J. p 158 note 11.

71. Tex.—Bond v. Ray, 5 Humphr. 492.

72. N.Y.—Sally v. Elmore, 2 Paige 497.

Vt.—Wilson v. Green, 25 Vt. 450, 60 Am.D. 279.

73. U.S.—City of Oakwood, Ohio, v. Hartford Accident & Indemnity Co., C.C.A.Ohio, 81 F.2d 717.

Fla.—Standard Accident Ins. Co. v. Bear, 184 So. 97, 134 Fla. 523, 127 A.L.R. 1.

Hawaii.—Holzinger v. Goo, 36 Hawaii 506.

Ky.—State Nat. Bank of Frankfort v. Thompson, 126 S.W.2d 412, 277 Ky. 527.

Mass.—Killoren v. Hernan, 20 N.E. 2d 946, 303 Mass. 93—Atlas Finance Corporation v. Trocchi, 19 N.E.2d 722, 302 Mass. 477—Hamlen v. Rednalloh, Co., 197 N.E. 149, 291 Mass. 119, 99 A.L.R. 1230.

Mo.—Lewis v. Paul Brown Realty & Inv. Co., 193 S.W.2d 13, 354 Mo. 1025.

N.J.—Corpus Juris cited in Boorstein v. Miller, 3 A.2d 87, 91, 124 N.J.Eq. 526.

Okl.—First Nat. Bank v. Godwin, 47 P.2d 116, 173 Okl. 169.

Pa.—First Nat. Bank & Trust Co. of Ford City v. Stolar, 197 A. 499, 130 Pa.Super. 480.

S.D.—Wright v. Anderson, 253 N.W. 484, 62 S.D. 444.

Tex.—First Nat. Bank of Fort Worth v. Brown, Civ.App., 172 S.W.2d 151, error refused.

W.Va.—Colerider v. Central Nat.

Bank of Buckhannon, 37 S.E.2d 466, 128 W.Va. 520.

Wis.—City of Wauwatosa v. Volpano, 272 N.W. 459, 224 Wis. 503. 50 C.J. p 158 note 14.

Rights and remedies of surety generally as to preservation, collection, and application of collateral see infra §§ 289-291.

#### Equitable aid to restore loss

Where holder of note secured by trust deed unconditionally released trust deed for benefit of another, he became a volunteer and could not invoke equity to restore his loss.—McKinney v. Lynch, Mo.App., 102 S.W. 2d 944.

74. U.S.—Fidelity & Deposit Co. of Maryland v. Hunt, C.C.A.Pa., 107 F.2d 42—Hale County, Tex., v. American Indemnity Co., C.C.A. Tex., 63 F.2d 275, rehearing denied Hale County v. American Indemnity Co., 65 F.2d 1017, certiorari denied American Indemnity Co. v. Hale County, Tex., 54 S.Ct. 207, 290 U.S. 697, 78 L.Ed. 599—U. S. v. U. S. Fidelity & Guaranty Co., D.C.Pa., 35 F.Supp. 959.

Fla.—Standard Accident Ins. Co. v. Bear, 184 So. 97, 134 Fla. 523, 127 A.L.R. 1.

Ind.—Owen County State Bank v. Guard, 26 N.E.2d 395, 217 Ind. 75.

Iowa.—Federal Land Bank of Omaha, Neb., v. Christiansen, 298 N.W. 641, 230 Iowa 587.

Ky.—State Nat. Bank of Frankfort v. Thompson, 126 S.W.2d 412, 277 Ky. 527—Rommel Bros. v. Clark, 74 S.W.2d 933, 255 Ky. 554.

La.—Pontchartrain Apartments v. Maryland Casualty Co., 129 So. 671, 171 La. 67.

Mass.—Atlas Finance Corporation v. Trocchi, 19 N.E.2d 722, 302 Mass.

477—Museum of Fine Arts v. American Bonding Co., 97 N.E. 633, 211 Mass. 124.

Mo.—McKinney v. Lynch, App., 102 S.W.2d 944.

Neb.—Nordeen v. Nelson, 279 N.W. 323, 134 Neb. 707.

N.J.—Corpus Juris cited in Boorstein v. Miller, 3 A.2d 87, 91, 124 N.J.Eq. 526—Burack v. Mayers, 187 A. 767, 121 N.J.Eq. 135, affirmed 191 A. 841, 122 N.J.Eq. 5.

N.Y.—Rutherford Nat. Bank v. Maniello, 271 N.Y.S. 69, 240 App.Div. 506, affirmed 195 N.E. 203, 266 N.Y. 568.

Okl.—First Nat. Bank v. Godwin, 47 P.2d 116, 173 Okl. 169.

Or.—Walsh v. Young, 180 P.2d 535, 181 Or. 185.

Pa.—Double Dollar Building & Loan Ass'n v. Kuslim, 159 A. 39, 306 Pa. 121—Lichtenthaler v. Thompson, 13 Serg. & R. 157, 15 Am.D. 591—Spring Garden Building & Loan Ass'n v. Rhodes, 190 A. 530, 126 Pa.Super. 102.

S.D.—Wright v. Anderson, 253 N.W. 484, 62 S.D. 444.

Tenn.—Corpus Juris cited in J. C. Mahan Motor Co. v. Lyle, 67 S.W. 2d 745, 747, 167 Tenn. 193.

Tex.—First Nat. Bank of Fort Worth v. Brown, Civ.App., 172 S.W.2d 151, error refused—New Amsterdam Casualty Co. v. F. Redondo & Co., Civ.App., 158 S.W.2d 334, error refused—Myers v. Southard, Civ. App., 110 S.W.2d 1185—Thompson v. Welders Supply Co., Civ.App., 82 S.W.2d 753.

Vt.—Bancroft v. Granite Sav. Bank & Trust Co., 44 A.2d 542, 114 Vt. 336.

Wis.—City of Wauwatosa v. Volpano, 272 N.W. 459, 224 Wis. 503—Well-McLain Co. v. Maryland Cas-

ing to the judicial decisions on the question, loses<sup>75</sup> them by his voluntary acts<sup>76</sup> or through his negligence,<sup>77</sup> or if he consents to a material alteration of the security to the prejudice of the surety,<sup>78</sup> or by any act deprives the surety of the right of subrogation.<sup>79</sup> Relinquishment operates as a discharge of the surety without regard to the existence of collusion<sup>80</sup> or the time when the creditor received the security held by him,<sup>81</sup> or whether the surety has knowledge thereof,<sup>82</sup> or whether the principal lacked capacity to enter into the contract.<sup>83</sup> However, relinquishment does not so operate where the creditor has no knowledge, and is not chargeable with knowledge, of the existence of the suretyship<sup>84</sup> or where the act relied on as constituting the relinquishment was not the proximate cause of the loss.<sup>85</sup>

*Loss not attributable to creditor.* Sureties are not

discharged if the loss of security results from the fault of someone other than the creditor.<sup>86</sup> If relinquishment of security is by a part only of those entitled to enforce the liability of a surety, the rights of the others to hold the surety are not affected.<sup>87</sup> It has been held that sureties are not discharged if relinquishment or loss of security is procured by means of fraud of the principal.<sup>88</sup> A surety is not discharged by relinquishment of security by a cosurety<sup>89</sup> or a loss caused by the surety himself,<sup>90</sup> or through his negligence,<sup>91</sup> or with his consent,<sup>92</sup> or by a third person, such as by one holding security in trust;<sup>93</sup> nor can the right of the creditor to proceed against a surety be prejudiced by the misappropriation of property of the principal by a cosurety.<sup>94</sup> It has been held that a surety is not discharged by a loss of security resulting from an order of court.<sup>95</sup>

ualty Co., 258 N.W. 175, 217 Wis. 126.

50 C.J. p 158 note 16.

**Fact that surety was not in position to enforce subrogation when impairment took place does not prevent discharge.**—First Nat. Bank & Trust Co. of Ford City v. Stolar, 197 A. 493, 130 Pa.Super. 480.

**Election of remedies or waiver not shown**

Where creditor's right to proceed against security only was lost because of rejection of claim against estate, creditor's attempted waiver of recourse against assets of estate and reliance on garnishment bond only held not election of remedies which would release surety on bond; nor did it amount to waiver of right to recover on bond, where alleged waiver was unsupported by consideration and surety on bond had not changed its position.—Guarantee Title & Trust Co. v. Babbitt Bros. Trading Co., 53 P.2d 734, 47 Ariz. 47.

75. Tex.—Thompson v. Welders Supply Co., Civ.App., 82 S.W.2d 753.

50 C.J. p 158 notes 17, 18.

76. Tex.—Indemnity Ins. Co. of North America v. Bassett, Civ. App., 299 S.W. 714.

50 C.J. p 158 note 17.

77. Hawaii.—Holzinger v. Goo, 36 Hawaii 506.

Ky.—Rommel Bros. v. Clark, 74 S.W. 2d 933, 255 Ky. 554.

Mo.—Lewis v. Paul Brown Realty & Inv. Co., 193 S.W.2d 13, 354 Mo. 1025.

**Tex.**—First Nat. Bank of Fort Worth v. Brown, Civ.App., 172 S.W.2d 151, error refused.

50 C.J. p 158 note 18.

78. Pa.—Jacob Sall Building & Loan Ass'n v. Heller, 171 A. 464, 314 Pa.

237—Double Dollar Building & Loan Ass'n v. Kushin, 159 A. 39, 306 Pa. 121.

50 C.J. p 159 note 19.

79. U.S.—Real Estate-Land Title & Trust Co. v. Commonwealth Bond Corporation, C.C.A.N.Y., 63 F.2d 237—Hodgins v. National Surety Corporation, D.C.Wis., 41 F.Supp. 881.

Or.—Walsh v. Young, 180 P.2d 535, 181 Or. 185.

50 C.J. p 159 note 20.

**Subrogation agreement not breached**

Where city was required to reduce claim against assets of insolvent bank by amount realized from collateral held by it, reduction accordingly by agreement with liquidator of depository bank did not breach subrogation agreement with depository's sureties.—City of Akron v. Fidelity & Casualty Co. of New York, C.C.A. Ohio, 136 F.2d 288.

80. Tex.—Scott v. Llano County Bank, 89 S.W. 749, 99 Tex. 221.

81. Ind.—Holland v. Johnson, 51 Ind. 346.

Md.—Frenner v. Yingling, 37 Md. 491.

82. Md.—Frenner v. Yingling, supra.

83. Ind.—Sample v. Cochran, 82 Ind. 260.

84. Or.—Walsh v. Young, 180 P.2d 535, 181 Or. 185.

50 C.J. p 159 note 25.

Knowledge of existence of relation as essential to discharge of surety by acts of creditor generally see supra § 156.

85. Tex.—Self Motor Co. v. Crowell First State Bank, Civ.App., 226 S.W. 428.

50 C.J. p 159 note 26.

86. Tex.—Womack v. Davidson, Civ. App., 242 S.W. 1107.

50 C.J. p 159 note 27.

87. U.S.—U. S. Fidelity, etc., Co. v. Omaha Bldg., etc., Co., Neb., 116 F. 145, 53 C.C.A. 465, certiorari denied 23 S.Ct. 843, 187 U.S. 642, 47 L.Ed. 346.

50 C.J. p 159 note 28.

88. N.Y.—Hamlin v. Klein, 40 N.Y. S. 833, 8 App.Div. 413.

50 C.J. p 159 note 29.

**Relinquishment induced by fraud**

Where a beneficiary of a contractor's indemnity bond by some voluntary act dissipated the security which protected the surety on the bond, the latter was exonerated notwithstanding the act was induced by fraud on the part of the contractor.—New Amsterdam Casualty Co. v. F. Redondo & Co., Tex.Civ.App., 158 S.W.2d 334, error refused.

89. Pa.—Whitehill v. Wilson, 3 Penn. & W. 405, 24 Am.D. 326—In re Barton's Estate, 3 Del.Co. 580.

90. N.Y.—Schroepel v. Shaw, 5 Barb. 338, affirmed 3 N.Y. 446.

91. S.C.—Brannon v. Harris, 109 S.E. 396, 117 S.C. 423.

50 C.J. p 159 note 33.

92. Ark.—Scott v. Montgomery County Bank, 250 S.W. 902, 158 Ark. 644.

93. Tex.—Murrell v. Scott, 51 Tex. 520.

Vt.—Hardwick Sav. Bank, etc., Co. v. Drenan, 44 A. 347, 71 Vt. 289.

94. Ark.—State Bank v. Bozeman, 13 Ark. 631.

Ind.—Prather v. Young, 67 Ind. 480.

95. Vt.—Hardwick Sav. Bank, etc., Co. v. Drenan, 44 A. 347, 71 Vt. 289.

50 C.J. p 159 note 38.

*Character of funds or securities.* The rule applies to any funds<sup>96</sup> or property<sup>97</sup> belonging to the principal which may be rightfully retained, or to claims of the principal against third persons,<sup>98</sup> or to a mortgage or deed of trust,<sup>99</sup> or other lien on property of the principal,<sup>1</sup> such as a judgment or execution lien, as discussed *infra* § 201. The creditor must have the right to apply the money to the secured debt before he can be charged with releasing the surety by not applying such funds;<sup>2</sup> and the lien must be in existence, or the surety must request the creditor to take steps to establish it, in order to give the surety a right to its protection.<sup>3</sup> A surety is not discharged by surrender of security which is not enforceable<sup>4</sup> or by the release of a collateral mere personal obligation of the principal debtor<sup>5</sup> or of some third person.<sup>6</sup>

*Where there are several sets of sureties on several debts,* and securities are delivered to a creditor applicable to the several debts, the fact that the creditor did not collect some of the securities is no defense to an action at law against the sureties on a particular debt.<sup>7</sup>

*Independent transactions.* A surety is not discharged by a relinquishment of security given for some independent matter<sup>8</sup> or if money is paid the

principal as compensation for services arising from some independent transaction.<sup>9</sup>

## § 198. Misapplication of Funds or Securities

The creditor must account to the surety for funds or property received as security for the debt for which the surety is bound, and if he fraudulently encumbers or conceals, or misapplies, such funds or property the surety is discharged to the extent of the value of the security encumbered, concealed, or misapplied.

The creditor, having received funds or property as security for the debt, must account for it to the surety in an action against him,<sup>10</sup> it being his duty to the surety to appropriate such funds or property<sup>11</sup> and any profits therefrom<sup>12</sup> to the debt for which the security was given. If the creditor fraudulently encumbers or conceals it,<sup>13</sup> or applies it to a purpose other than the satisfaction of that debt,<sup>14</sup> even though the debt secured is not yet due,<sup>15</sup> or applies funds already appropriated to the purposes of the contract to other purposes,<sup>16</sup> the surety is discharged to the extent of the value of the security encumbered, concealed or misapplied.

On the other hand, the fact that proceeds of the property of the principal were distributed improperly by an erroneous judgment of a court does not discharge the surety,<sup>17</sup> and, if the creditor applies

96. Tex.—Thompson v. Welders Supply Co., Civ.App., 82 S.W.2d 753.

50 C.J. p 160 note 39.

97. Tex.—First Nat. Bank of Fort Worth v. Brown, Civ.App., 172 S.W.2d 151, error refused.

50 C.J. p 160 note 40.

98. Ind.—Crim v. Fleming, 101 Ind. 154.

50 C.J. p 160 note 41.

99. Mo.—McKinney v. Lynch, App., 102 S.W.2d 944.

Tex.—First Nat. Bank of Fort Worth v. Brown, Civ.App., 172 S.W.2d 151, error refused.

50 C.J. p 160 note 42.

1. Tex.—Thompson v. Welders Supply Co., Civ.App., 82 S.W.2d 753.

50 C.J. p 160 note 43.

2. Ill.—Ewen v. Wilbor, 70 N.E. 575, 208 Ill. 492.

3. Ala.—Perrine v. Firemen's Ins. Co., 22 Ala. 575.

50 C.J. p 160 note 47.

4. Iowa.—Bedwell v. Gephart, 24 N.W. 585, 67 Iowa 44.

50 C.J. p 160 note 48.

5. Conn.—Glazier v. Douglass, 32 Conn. 393.

Va.—Conner v. West, 105 S.E. 762, 129 Va. 85.

6. Conn.—Glazier v. Douglass, 32 Conn. 393.

Va.—Conner v. West, 105 S.E. 762, 129 Va. 85.

7. Ill.—Rock Island State Bank v. Bryan, 108 N.E. 1004, 268 Ill. 151.

8. Okl.—Strother v. Wilkinson, 216 P. 436, 90 Okl. 247.

50 C.J. p 160 note 53.

9. Mass.—Fine Arts Museum v. American Bonding Co., 97 N.E. 633, 211 Mass. 124.

50 C.J. p 160 note 54.

10. Pa.—Spalding v. Susquehanna County Bank, 9 Pa. 28.

Collateral pledged by surety; Liability to legatees

Where mother bequeathed to each of her three children one third of stock which she had pledged as security for note signed by her as surety, payee's surrender, after mother's death, of portion of stock without consent of one of three children, was wrongful surrender of such child's proportionate part, and payee was liable to such child for one third of value of stock at time of surrender, subject to right of payee to apply stock in satisfaction of obligation of mother's estate to payee.—State Nat. Bank of Frankfort v. Thompson, 136 S.W.2d 412, 277 Ky. 527.

11. S.D.—Wright v. Anderson, 253 N.W. 484, 62 S.D. 444.

Vt.—Bancroft v. Granite Sav. Bank & Trust Co., 44 A.2d 542, 114 Vt. 336.

50 C.J. p 160 note 57.

12. Ky.—McKee v. Buford, 3 B.Mon. 432—Cornell v. Eagan, 5 N.Y.St. 1.

13. Okl.—First Nat. Bank v. Godwin, 47 P.2d 116, 173 Okl. 169.

50 C.J. p 161 note 59.

14. Ga.—Corpus Juris cited in Kennedy v. Farmers' & Merchants' Bank, 169 S.E. 769, 47 Ga.App. 104.

N.Y.—In re Metz' Estate, 18 N.Y.S. 2d 883, 173 Misc. 813, reversed on other grounds 30 N.Y.S.2d 502, 262 App.Div. 508.

Okl.—First Nat. Bank v. Godwin, 47 P.2d 116, 173 Okl. 169.

S.D.—Wright v. Anderson, 253 N.W. 484, 62 S.D. 444.

Vt.—Bancroft v. Granite Sav. Bank & Trust Co., 44 A.2d 542, 114 Vt. 336.

W.Va.—Koblegard Co. v. Maxwell, 34 S.E.2d 116, 127 W.Va. 630.

50 C.J. p 161 note 60.

15. Tex.—Western Bank, etc., Co. v. Gibbs, Civ.App., 96 S.W. 947.

16. Wis.—Platteville Joint School Dist. No. 4 v. Bailey-Marsh Co., 194 N.W. 171, 181 Wis. 202.

17. Ga.—McCalla v. Knox, 10 S.E. 624, 84 Ga. 291.

security given by one cosurety for both his personal indebtedness and liability as surety to payment of his personal indebtedness, the liability of the other cosurety is not affected.<sup>18</sup> Consent by a creditor to an application of funds to which he is entitled under his contract to the payment of other claims, thereby reducing by so much the amount of the debt on which the surety is secondarily liable, is not a misapplication of funds discharging the surety.<sup>19</sup>

*Agreement to apply funds.* Where the creditor has bound himself by contract to apply certain funds within his control to the payment of the debt, his breach of such contract will discharge the surety from further liability.<sup>20</sup>

### § 199. Disposition of Security for Less than Value

If the property of the principal is sold irregularly or negligently by the creditors, so that it brings less than its value, the surety is discharged pro tanto; but the mere fact that property is sold for less than its full value, if the sale was made regularly and in good faith, will not release the surety.

If property of the principal is sold irregularly or negligently by the creditors, so that it brings less than its value, the surety is discharged pro tanto,<sup>21</sup> as where the creditor bid in the property at a nominal sum<sup>22</sup> or prevented others from bidding at the sale.<sup>23</sup> However, the mere fact that property is sold for less than its full value will not release a surety, if the sale was made regularly and in good faith,<sup>24</sup> and although sold at private sale, if the creditor has the right to sell at private sale,<sup>25</sup> and if the property was sold for its

full market value the surety remains liable, although it might be worth more to him.<sup>26</sup> If the value of property sold at its market value has declined since the sale, the surety is not prejudiced and cannot complain.<sup>27</sup> So, where the sale is made to the surety, he cannot complain that the property was sold for less than its value.<sup>28</sup>

### § 200. Failure to Register or Record Instrument

A surety has been held to be discharged by the failure of the creditor to record the instrument evidencing the obligation in consequence of which the security is lost; but there are also decisions to the contrary.

A surety has been held to be discharged by failure of the creditor to record the instrument evidencing the obligation, such as a mortgage, in consequence of which the security is lost;<sup>29</sup> but it has also been held that the surety is not discharged by failure of the creditor to record the instrument evidencing the obligation,<sup>30</sup> especially if the surety did not request the creditor to record the instrument.<sup>31</sup> It has been held that a surety is discharged by omission of the creditor to file a purchase-money note whereby the benefit of the security is lost to the surety.<sup>32</sup> The surety is not discharged, however, where the security is not entitled to be recorded,<sup>33</sup> or where the creditor's rights to the security are not affected by the failure to record,<sup>34</sup> or the surety was not injured by such failure.<sup>35</sup> If the creditor has agreed to record a mortgage, he must do so within a reasonable time.<sup>36</sup>

18. Minn.—National City Bank v. Zimmer Vacuum Renovator Co., 156 N.W. 265, 132 Minn. 211.

19. Cal.—Wolf v. Aetna Indemnity Co., 126 P. 470, 163 Cal. 597.

20. Minn.—Minneapolis Brewing Co. v. Yahnke, 181 N.W. 331, 143 Minn. 178.

50 C.J. p 161 note 67.

*Agreement not supported by consideration*

Creditor's agreement to apply proceeds of warrants, pledged as security for corporate contractor's indebtedness, on note for sums subsequently borrowed by corporation, was held no defense to action on note against surety on note where agreement was not supported by consideration.—People's State Bank of Frankfort v. McDermott, 64 S.W. 2d 484, 251 Ky. 140.

*Payments held not to constitute misapplication of funds*

Pa.—In re Waber's Estate, 177 A. 51, 317 Pa. 497.

21. U.S.—Dibert v. Wernicke, Ohio, 214 F. 673, 131 C.C.A. 109. 50 C.J. p 161 note 68.

22. Ala.—Denson v. Gray, 21 So. 925, 113 Ala. 608.

23. Ind.—Nichols v. Burch, 27 N.E. 737, 128 Ind. 324.

24. Iowa.—Moyers v. Stubblefield, 200 N.W. 488, 199 Iowa 631. 50 C.J. p 161 note 71.

25. Pa.—Iron City Nat. Bank v. Rafferty, 56 A. 445, 207 Pa. 238.

26. Ky.—Gillen v. Kentucky Nat. Bank, 8 S.W. 193, 10 Ky.L. 97.

27. Or.—Denny v. Seeley, 55 P. 976, 34 Or. 364.

28. N.Y.—Coe v. Cassidy, 72 N.Y. 133.

29. Hawaii.—Holzinger v. Goo, 36 Hawaii 506.

Mo.—Corpus Juris cited in Lewis

v. Paul Brown Realty & Inv. Co., 193 S.W.2d 13, 16, 354 Mo. 1025. 50 C.J. p 161 note 78.

30. N.Y.—Westchester Mortg. Co. v. Thomas B. McIntire, Inc., 161 N.Y. S. 384, 174 App.Div. 525. 50 C.J. p 161 note 76.

31. Ind.—Philbrooks v. McEwen, 29 Ind. 347. S.C.—Lang v. Brevard, 22 S.C.Eq. 59.

32. Ga.—Bledsoe v. Ivey, 107 S.E. 615, 27 Ga.App. 235.

33. Ind.—Guyer v. Union Trust Co., 104 N.E. 82, 55 Ind.App. 472.

34. U.S.—Evans v. Kister, Ky., 92 F. 828, 35 C.C.A. 28.

35. Ga.—La Boon v. Wright & Locklin, 155 S.E. 770, 42 Ga.App. 275.

50 C.J. p 159 note 26 [a].

36. Kan.—Redlon v. Heath, 52 P. 862, 59 Kan. 255.

## § 201. Loss or Release of Lien of Judgment or Execution

Relinquishment or loss of judgment and execution liens, except by operation of law, operates to prevent recovery against the surety.

The rule that relinquishment or loss of funds or securities by the creditor prevents a recovery against the surety, as discussed supra § 197, applies to judgment<sup>37</sup> and execution<sup>38</sup> liens. If a judgment, however, is lost by operation of law, the surety is not discharged,<sup>39</sup> as where an action is brought on a judgment, and a new judgment obtained, the lien of the first judgment being lost by the rendition of the second.<sup>40</sup>

*Release of execution.* If the creditor, having levied an execution on the property of the principal, afterward releases the levy, as a general rule he thereby deprives himself of recourse against the surety.<sup>41</sup> This is not so, however, if the release is procured by the principal without the consent or concurrence of the creditor,<sup>42</sup> or where a judgment is a lien on real property, whether or not levied on,<sup>43</sup> or where the creditor releases one levy to take out another, benefiting the surety thereby,<sup>44</sup> or where an execution is taken out against both principal and surety and a levy first made on land of the principal is dismissed and levy then made on land of the surety,<sup>45</sup> or where proceedings under a defective levy are discontinued,<sup>46</sup> or where the

lien is lost by operation of law<sup>47</sup> or by virtue of a forthcoming or delivery bond, the forfeiture of which is not given the operation and effect of a judgment.<sup>48</sup> The release of a levy of the property of a cosurety releases the other cosureties to the extent of the proportion of the debt equitably due from the cosurety on whose property the levy was made and released.<sup>49</sup> The release of the cosurety's property would not have that effect, however, where both cosureties are, with respect to each other and the creditor, also joint principals,<sup>50</sup> or where the signature of the cosurety whose property was released was forged.<sup>51</sup>

## § 202. Discontinuance of Proceedings

A surety is not discharged because the creditor discontinues proceedings which have been begun, or by the return, at the request of the creditor, of an execution against property of the principal before a levy, or by the withdrawal of an execution which is void.

A surety is not discharged because the creditor discontinues proceedings which have been begun,<sup>52</sup> or by the return, at the request of the creditor, of an execution against property of the principal before a levy,<sup>53</sup> or by the withdrawal of an execution which is void.<sup>54</sup> So it has been held that the surety is not discharged by the release of an attachment against the property of the principal<sup>55</sup> unless the suit and attachment were at the request of the surety, in which event it has been considered that

37. Tex.—Corpus Juris cited in Thompson v. Welders Supply Co., Civ.App., 82 S.W.2d 753, 754. 50 C.J. p 162 note 87.

38. Tex.—Corpus Juris cited in Thompson v. Welders Supply Co., Civ.App., 82 S.W.2d 753, 754. 50 C.J. p 162 note 88.

39. Iowa.—Perry v. Saunders, 36 Iowa 427. Discharge of principal by operation of law as not discharging surety see infra § 232.

40. Iowa.—Perry v. Saunders, supra.

41. Ind.—Kimmel v. State, 128 N.E. 708, 75 Ind.App. 168.

Ky.—Darland v. Springfield First Nat. Bank, 197 S.W. 826, 177 Ky. 261. 50 C.J. p 162 note 91—23 C.J. p 821 note 3.

42. Ala.—Summerhill v. Trapp, 48 Ala. 363. N.C.—Hamilton v. Mooney, 84 N.C. 12.

43. U.S.—Wood v. Brown, Colo., 104 W. 203, 43 C.C.A. 474. 50 C.J. p 162 note 92.

44. Pa.—Siegel v. Bally, 97 A. 401, 252 Pa. 231.

Va.—Walker v. Commonwealth, 18 Gratt. 13, 59 Va. 13, 98 Am.D. 631.

45. Ga.—Manry v. Shepperd, 57 Ga. 63.

N.C.—Forbes v. Smith, 40 N.C. 369, 49 Am.D. 432.

46. Ark.—Wilson v. White, 102 S. W. 201, 82 Ark. 407, 12 Ann.Cas. 378.

Me.—Somersworth Sav. Bank v. Worcester, 76 Me. 327.

47. Pa.—Siegel v. Bally, 97 A. 401, 252 Pa. 231.

48. Ill.—Ambrose v. Weed, 11 Ill. 488.

49. Ky.—Darland v. Springfield First Nat. Bank, 197 S.W. 826, 177 Ky. 261.

50 C.J. p 162 note 97. Release of cosurety generally see infra § 231.

Release of execution and security deed

Where two sureties on note were liable to bank as sureties for six hundred sixty-four dollars and sixteen cents, and one surety owning land worth about two thousand seven hundred dollars owed bank also one thousand five hundred dollars on his personal note, and bank in consideration of receiving eight hundred one

dollars and seventy-five cents "together with other funds from the borrower," released such land from lien of execution on indebtedness of six hundred sixty-four dollars and sixteen cents, and from operation of security deed given by surety to secure the one thousand five hundred dollars indebtedness, and the surety thereafter died owning no property, the cosurety was released from liability as surety.—Bullock Mortgage Loan Co. v. Jones, 10 S.E.2d 88, 63 Ga.App. 55.

50. Va.—Alexander v. Byrd, 8 S.E. 577, 85 Va. 690.

51. Ill.—Stoner v. Millikin, 85 Ill. 218.

52. Cal.—Corpus Juris cited in Edwards v. Mortgage Securities of Santa Barbara, 44 P.2d 1056, 1058, 6 Cal.App.2d 641. 50 C.J. p 162 note 1.

53. W.Va.—Knight v. Charter, 22 W.Va. 422. 50 C.J. p 162 note 2.

54. Ark.—Wilson v. White, 102 S. W. 201, 82 Ark. 407, 12 Ann.Cas. 378.

55. Mass.—Curtice v. Bothamly, 8 Allen 336. 50 C.J. p 162 note 4.

the surety will be discharged.<sup>56</sup> An abandonment of an attachment of property in a suit against one surety is no bar to the maintenance of a suit against another.<sup>57</sup>

### § 203. Failure to Obtain or Preserve Security

The creditor is under no obligation to exercise a greater degree of care in preserving security than a prudent man would use under the circumstances, and ordinarily does not owe any duty to the surety to obtain security or to employ active vigilance to realize on his security or to preserve it.

The creditor is under no obligation to exercise a greater degree of care in preserving security than a prudent man would use under the circumstances.<sup>58</sup> He does not owe any duty to the surety to obtain security<sup>59</sup> or to secure additional security.<sup>60</sup> He may waive security if it is offered,<sup>61</sup> and may take security for other claims for which the surety is not liable.<sup>62</sup> Ordinarily it is not necessary for the creditor to employ active vigilance to realize on his security.<sup>63</sup> He is not bound to revive judgment<sup>64</sup> or to prevent the principal from removing property not in the possession of the creditor,<sup>65</sup> it being the duty of the surety and not that of the creditor to invoke the law in such cases.<sup>66</sup>

Also the creditor is not under any duty to take active steps to preserve security,<sup>67</sup> at least where he is not in possession of the property constituting the security,<sup>68</sup> as to insure,<sup>69</sup> pay taxes,<sup>70</sup> or make repairs,<sup>71</sup> unless the agreement expressly provides

that the creditor shall keep them up.<sup>72</sup> The creditor is under no duty to administer on the estate of a deceased principal in order to protect the surety if the latter has an equal opportunity of doing so.<sup>73</sup> Likewise the owner of a building in progress of erection is not under any obligation to see that the contractor applies the payments made to him, in discharge of claims for material and labor;<sup>74</sup> and a surety is not discharged although, by delay of the creditor, property in the possession of the latter has depreciated in value<sup>75</sup> or has been injured by fire.<sup>76</sup> The creditor is not proscribed from buying property from the principal merely because it deprives him of the right to attach it.<sup>77</sup>

*Act affecting validity.* Where security taken by a creditor requires some act by him to make it valid, it has been held that he impliedly agrees to perform such act,<sup>78</sup> and if he neglects or fails to do so, and the security is thereby lost or impaired, the surety may be discharged.<sup>79</sup>

### § 204. Necessity of Injury to Surety

Relinquishment of security by the creditor has been held not to operate as a discharge of a surety who is not injured by the transaction; the burden is on the creditor to show that the surety has not been injured.

It has been held that the rule that relinquishment of the security by the creditor operates as a discharge of the surety does not apply to a surety who is not injured by the transaction.<sup>80</sup> The burden,

56. Mo.—State Bank v. Matson, 24 Mo. 333.

Va.—Ashby v. Smith, 9 Leigh 164, 36 Va. 164.

57. Me.—Chipman v. Todd, 60 Me. 282.

58. Pa.—Irwin First Nat. Bank v. Foster, 139 A. 609, 291 Pa. 72. 50 C.J. p 163 note 7.

59. S.C.—Rouss v. King, 48 S.E. 220, 69 S.C. 168.

60. N.H.—Berlin Nat. Bank v. Guay, 81 A. 475, 76 N.H. 216.

61. S.C.—Rouss v. King, 48 S.E. 220, 69 S.C. 168—Folk v. Cruikshanks, 38 S.C.L. 243.

62. Ga.—Stokes v. Gillis, 6 S.E. 841, 81 Ga. 187. 50 C.J. p 163 note 11.

63. Tex.—First Nat. Bank of Fort Worth v. Brown, Civ.App., 172 S.W.2d 151, error refused.

Va.—Ward v. Bank of Pocahontas, 187 S.E. 491, 167 Va. 169. 50 C.J. p 163 note 12.

64. Pa.—Campbell v. Sherman, 25 A. 35, 151 Pa. 70, 31 Am.S.R. 735—Appeal of Kindt, 102 Pa. 441.

65. Ga.—Lumsden v. Leonard, 55 Ga. 374.

50 C.J. p 163 note 14.

66. Kan.—Goodacre v. Skinner, 28 P. 705, 47 Kan. 575.

Vt.—Crane v. Stickles, 15 Vt. 252.

67. Ind.—Vance v. English, 78 Ind. 80.

Tex.—First Nat. Bank of Fort Worth v. Brown, Civ.App., 172 S.W.2d 151, error refused.

#### Inaction or passive negligence

Dissipation or loss of security, held to secure payment of debt or performance of obligation, as result of creditor's or obligee's inaction or passive negligence, does not discharge surety.—First Nat. Bank of Fort Worth v. Brown, supra.

68. Tex.—Stetson v. First Nat. Bank, Civ.App., 44 S.W.2d 792, error refused.

69. Mass.—Lonstein v. Harrington, 163 N.E. 655, 265 Mass. 81.

S.C.—Rouss v. King, 54 S.E. 615, 74 S.C. 251.

70. Ind.—Wasson v. Hodshire, 8 N.E. 621, 108 Ind. 26.

71. Ark.—Grisard v. Hinson, 6 S.W. 906, 50 Ark. 229.

72. Ga.—Kenney v. Armour Fertilizer Works, 126 S.E. 284, 33 Ga. App. 126.

73. Ill.—Grindol v. Ruby, 14 Ill. App. 439.

74. Ky.—Mayes v. Lane, 76 S.W. 399, 116 Ky. 566, 25 Ky.L. 824.

75. Ala.—Gray v. Brown, 22 Ala. 262.

Md.—Gray v. Farmers' Nat. Bank, 32 A. 518, 81 Md. 631.

76. Ky.—Cromwell v. Rankin, 97 S.W. 415, 30 Ky.L. 123.

Minn.—Bardwell v. Witt, 44 N.W. 983, 42 Minn. 468.

77. Ga.—Echols v. Head, 68 Ga. 152.

78. Mo.—Lewis v. Paul Brown Realty & Inv. Co., 193 S.W.2d 13, 354 Mo. 1025.

79. Mo.—Lewis v. Paul Brown Realty & Inv. Co., supra. Failure to register or record instrument see supra § 200.

80. U.S.—Chapman v. Hoage, App. D.C., 56 S.Ct. 333, 296 U.S. 526, 80 L.Ed. 370—Marchand v. Frellsen, La., 105 U.S. 423, 26 L.Ed. 1057.

Ga.—Marshall v. Dixon, 9 S.E. 167, 82 Ga. 435—La Boon v. Wright & Locklin, 155 S.E. 770, 42 Ga.App. 275.

Ind.—Kimmel v. State, 128 N.E. 708, 75 Ind.App. 168, rehearing denied 130 N.E. 239, 75 Ind.App. 168.



however, is on the creditor to show that the surety has not been injured.<sup>81</sup> A surety is not discharged by a release of security in which he has no interest,<sup>82</sup> or to which the principal does not have any title,<sup>83</sup> or of which the creditor has no possession or control,<sup>84</sup> or no right to retain,<sup>85</sup> or which he did not accept.<sup>86</sup> The surety is not discharged by the release of security where prior, valid liens would exhaust it entirely,<sup>87</sup> or when the surety has obtained otherwise all that his right of subrogation could possibly secure to him,<sup>88</sup> or if the creditor took the security under a binding agreement with the principal to return it,<sup>89</sup> unless such agreement was made subject to the surety's right to a precedent payment of the debt.<sup>90</sup>

### § 205. Consent or Estoppel of Surety

The rule that the relinquishment or misapplication of security by the creditor discharges the surety does not apply to one who has consented thereto, or participated therein, or who, with knowledge of the relinquishment or misapplication, acquiesces therein, or who became a surety after the release, knowing that it had been made.

The rule that the relinquishment or misapplication

of security by the creditor or obligee discharges the surety applies where the relinquishment or misapplication takes place without the consent of the surety,<sup>91</sup> and does not apply to one who has consented thereto,<sup>92</sup> or participated therein,<sup>93</sup> or who, with knowledge of the relinquishment or misapplication, acquiesces therein,<sup>94</sup> or who became surety after the release, knowing that it had been made.<sup>95</sup> A surety is not discharged by failure of the creditor to sell the collateral in default of the debtor to pay in the absence of request of the surety that the sale be had,<sup>96</sup> or where the security has been relinquished by mistake to the knowledge of the surety and he delays for an unreasonable time in protecting himself.<sup>97</sup>

### § 206. Extent of Discharge

While a relinquishment, loss, impairment, or misapplication of security by the creditor may under some circumstances have the effect of discharging the surety altogether, ordinarily it discharges him pro tanto.

A relinquishment, loss, impairment, or misapplication of security by the creditor does not necessarily have the effect of discharging the surety altogether,<sup>98</sup> but, according to the decisions on the

Ky.—Hunter v. Liberty Nat. Bank & Trust Co., 126 S.W.2d 807, 277 Ky. 538—State Nat. Bank of Frankfort v. Thompson, 126 S.W.2d 412, 277 Ky. 527.

N.J.—Burack v. Mayers, 187 A. 767, 121 N.J.Eq. 135, affirmed 191 A. 841, 122 N.J.Eq. 5.

Okl.—Corpus Juris quoted in Wattenbarger v. City of Vinita, 40 P. 2d 6, 7, 170 Okl. 222.

Tex.—Turner v. Montgomery, Civ. App., 67 S.W.2d 637, 50 C.J. p 163 note 28.

Prejudice to surety as essential to discharge of surety by acts or conduct of creditor generally see supra § 157.

81. U.S.—Allen v. O'Donald, C.C.Or., 38 F. 17, rehearing denied 28 F. 346, affirmed Cross v. Allen, 12 S. Ct. 67, 141 U.S. 528, 35 L.Ed. 843—Allen v. O'Donald, C.C.Or., 23 F. 573, 50 C.J. p 163 note 29.

82. Iowa.—Goodhue First Nat. Bank v. Iowa Bonding, etc., Co., 183 N.W. 832, 149 Minn. 279, 50 C.J. p 163 note 30. Security in independent transaction see supra § 197.

83. Md.—Mayers v. Krawshaw, 170 A. 752, 166 Md. 169, 50 C.J. p 163 note 31.

84. Tex.—Dillard v. Chandler, Civ. App., 157 S.W. 303.

Va.—Triplett v. Culpeper Second Nat. Bank, 92 S.E. 897, 121 Va. 183.

85. Ky.—Eades v. Muhlenberg County Sav. Bank, 163 S.W. 494, 157 Ky. 416, 50 C.J. p 163 note 33.

86. Ga.—Sherman v. Stephens, 118 S.E. 567, 30 Ga.App. 509, 50 C.J. p 163 note 34.

87. Ga.—Jones v. Hawkins, 60 Ga. 52, Minn.—Moss v. Pettingill, 3 Minn. 217.

Deduction of amount of prior liens in computing value of security see infra § 206.

88. Ga.—Marshall v. Dixon, 9 S.E. 167, 82 Ga. 435.

89. Wash.—Farmers' State Bank v. Gray, 162 P. 531, 94 Wash. 431, 50 C.J. p 164 note 36.

90. Va.—Morton v. Dillon, 19 S.E. 654, 90 Va. 592, 50 C.J. p 164 note 37.

91. Mass.—Atlas Finance Corporation v. Trocchi, 19 N.E.2d 722, 302 Mass. 477.

Okl.—First Nat. Bank v. Godwin, 47 P.2d 116, 173 Okl. 169, Or.—Walsh v. Young, 180 P.2d 535, 181 Or. 185.

Vt.—Bancroft v. Granite Sav. Bank & Trust Co., 44 A.2d 542, 114 Vt. 336.

Wis.—City of Wauwatosa v. Volpano, 272 N.W. 456, 224 Wis. 503.

92. Okl.—First Nat. Bank v. Godwin, 47 P.2d 116, 173 Okl. 169, 50 C.J. p 164 note 39.

#### Note authorizing release of collateral

Where note provided that payee was not obliged to foreclose on collateral but could release it and could file suit without first foreclosing, sureties were not discharged from liability because payee failed to avail itself of security.—Ewing v. Mechanics Loan & Savings Co., 7 S.E.2d 533, 61 Ga.App. 806.

93. Tex.—Corpus Juris cited in Turner v. Montgomery, Civ.App., 67 S.W.2d 637, 640, 50 C.J. p 164 note 40.

94. Mont.—Columbus State Bank v. Erb, 147 P. 617, 50 Mont. 442.

Okl.—Corpus Juris quoted in Wattenbarger v. City of Vinita, 40 P. 2d 6, 8, 170 Okl. 222.

95. N.Y.—Sapiro v. Sisley, 125 N.Y. 5. 467.

96. Ky.—Cromwell v. Rankin, 97 S.W. 415, 30 Ky.L. 123.

97. Iowa.—Gaar v. Taylor, 105 N.W. 125, 128 Iowa 636, 50 C.J. p 164 note 44.

98. U.S.—Hale County, Tex., v. American Indemnity Co., C.C.A. Tex., 63 F.2d 275, rehearing denied Hale County v. American Indemnity Co., 65 F.2d 1017, certiorari denied American Indemnity Co. v. Hale County, Tex., 54 S.Ct. 207, 290 U.S. 697, 78 L.Ed. 599.

Ga.—Ward v. McLamb, 45 S.E. 688, 118 Ga. 811.

N.J.—Burack v. Mayers, 187 A. 767,

question, discharges him pro tanto,<sup>99</sup> that is, to the extent only to which he has been injured thereby,<sup>1</sup> which is the value of the security so misapplied, lost, or relinquished,<sup>2</sup> or the extent to

which its value has been impaired,<sup>3</sup> and such value is prima facie the face value at the place where the security is enforceable.<sup>4</sup> If the surety is not injured at all, he is not discharged.<sup>5</sup>

121 N.J.Eq. 135, affirmed 191 A. 841, 122 N.J.Eq. 5.

#### Substitution of building and loan shares

(1) It has been held that building and loan association's cancellation, without consent of surety on mortgagor's bond, of mortgagor's shares in particular series held as collateral security for debt and substitution of new shares releases the surety.—*Jacob Sall Building & Loan Ass'n v. Heller*, 171 A. 464, 314 Pa. 237.—*Spring Garden Building & Loan Ass'n v. Rhodes*, 190 A. 530, 126 Pa. Super. 102.

(2) Fact that principal obligation provided that association might at any time appropriate on account of debt secured, withdrawal or cancellation value of shares held as collateral security does not alter result.—*Jacob Sall Building & Loan Ass'n v. Heller*, supra.

(3) In a somewhat similar case, where shares in building and loan association were pledged as collateral security for debt and, on default by debtor, association agreed to cancel shares originally held, to apply withdrawal value to reduction of loan and payment of arrearages, and to accept smaller number of shares in later series as collateral for balance due, and this was done without consent of surety, it was held that surety was discharged.—*Double Dollar Building & Loan Ass'n v. Kushin*, 159 A. 39, 306 Pa. 121.

#### Security exceeding debt

If the value of the lost security equals or exceeds the amount of the debt, the surety is entitled to a complete discharge.—*Holzinger v. Goo*, 36 Hawaii 506.

99. U.S.—*Fidelity & Deposit Co. of Maryland v. Hunt*, C.C.A.Pa., 107 F.2d 42.—*Hale County, Tex. v. American Indemnity Co.*, C.C.A. Tex., 63 F.2d 275, rehearing denied *Hale County v. American Indemnity Co.*, 65 F.2d 1017, certiorari denied *American Indemnity Co. v. Hale County, Tex.*, 54 S.Ct. 207, 290 U.S. 697, 78 L.Ed. 599.—*U. S. v. U. S. Fidelity & Guaranty Co.*, D. C.Pa., 35 F.Supp. 959.

Fla.—*Standard Accident Ins. Co. v. Bear*, 184 So. 97, 134 Fla. 523, 127 A.L.R. 1.

N.J.—*Boorstein v. Miller*, 3 A.2d 87, 124 N.J.Eq. 526.

N.Y.—*In re Metz' Estate*, 18 N.Y.S. 2d 883, 173 Misc. 813, reversed on other grounds 30 N.Y.S.2d 502, 262 App.Div. 508.

Pa.—*First Nat. Bank & Trust Co. of*

*Ford City v. Stolar*, 197 A. 499, 130 Pa.Super. 480.

Wis.—*City of Wauwatosa v. Volpano*, 272 N.W. 459, 224 Wis. 503. 50 C.J. p 164 notes 46, 47.

Disposition of security for less than value as effecting pro tanto discharge see supra § 199.

#### Failure to apply all securities

Where rights of surety are altered by creditor's failure to apply for surety's benefit all moneys and securities of principal within his control which he has right to apply, surety is released pro tanto.—*Koble-gard Co. v. Maxwell*, 34 S.E.2d 116, 127 W.Va. 630.

1. U.S.—*Chapman v. Hoage*, App.D. C., 56 S.Ct. 333, 296 U.S. 526, 80 L.Ed. 370.

Iowa.—*Federal Land Bank of Omaha, Neb. v. Christiansen*, 293 N.W. 641, 230 Iowa 537.

Ky.—*Hunter v. Liberty Nat. Bank & Trust Co.*, 126 S.W.2d 807, 277 Ky. 538.—*State Nat. Bank of Frankfort v. Thompson*, 126 S.W.2d 412, 277 Ky. 527.

Mo.—*Lewis v. Paul Brown Realty & Inv. Co.*, 193 S.W.2d 13, 354 Mo. 1025.

Neb.—*Nordeen v. Nelson*, 279 N.W. 323, 134 Neb. 707.

N.J.—*Burack v. Mayers*, 187 A. 767, 121 N.J.Eq. 135, affirmed 191 A. 841, 122 N.J.Eq. 5.

Or.—*Wallin v. Young*, 180 P.2d 535, 181 Or. 185.

Pa.—*First Nat. Bank & Trust Co. of Ford City v. Stolar*, 197 A. 499, 130 Pa.Super. 480.

Tex.—*Corpus Juris cited in Turner v. Montgomery*, Civ.App., 67 S.W. 2d 637, 640.

50 C.J. p 164 note 46.

2. Hawaii.—*Holzinger v. Goo*, 36 Hawaii 506.

Ky.—*Corpus Juris cited in State Nat. Bank of Frankfort v. Thompson*, 126 S.W.2d 412, 416, 277 Ky. 527.—*Rommel Bros. v. Clark*, 74 S.W.2d 933, 255 Ky. 554.

La.—*Pontchartrain Apartments v. Maryland Casualty Co.*, 129 So. 671, 171 La. 67.

Mass.—*Museum of Fine Arts v. American Bonding Co.*, 97 N.E. 633, 211 Mass. 124.—*Atlas Finance Corporation v. Trocchi*, 19 N.E.2d 722, 302 Mass. 477.

Mo.—*McKinney v. Lynch*, App., 102 S.W.2d 944.—*McKinney v. Lynch*, App., 45 S.W.2d 874.

Ok.—*First Nat. Bank v. Godwin*, 47 P.2d 116, 173 Okl. 169.

Or.—*Wallin v. Young*, 180 P.2d 535, 181 Or. 185.

Pa.—*First Nat. Bank & Trust Co. of*

*Ford City v. Stolar*, 197 A. 499, 130 Pa.Super. 480.

S.D.—*Wright v. Anderson*, 253 N.W. 484, 62 S.D. 444.

Tex.—*New Amsterdam Casualty Co. v. F. Redondo & Co.*, Civ.App., 158 S.W.2d 334, error refused.—*Myers v. Southard*, Civ.App., 110 S.W.2d 1185.—*Thompson v. Welders Supply Co.*, Civ.App., 82 S.W.2d 753.

Vt.—*Bancroft v. Granite Sav. Bank & Trust Co.*, 44 A.2d 542, 114 Vt. 336.

50 C.J. p 164 note 47.

#### Difference between value of property and amount of prior liens

(1) Where creditor released mortgage securing debt, and property subject to mortgage which was also subject to prior liens was sold, surety was discharged to extent of difference between value of property and amount of indebtedness secured by prior liens.—*Lubbock First Nat. Bank v. Alexander*, Tex.Civ.App., 4 S.W.2d 298.

(2) Where amount of prior liens on security lost exceeds value of security, surety is not discharged.—*Teague v. Farmers' State Bank of Center*, Tex.Civ.App., 55 S.W.2d 639.

#### Expenses of sheriff's sale

In ascertaining the value of goods released from a levy, the expenses of a sheriff's sale should be deducted.—*Commonwealth v. Haas*, 16 Serg. & R., Pa., 252.

3. Tex.—*New Amsterdam Casualty Co. v. F. Redondo & Co.*, Civ.App., 158 S.W.2d 334, error refused.

4. Iowa.—*Monroe Bank v. Gifford*, 44 N.W. 553, 79 Iowa 300.

#### Amount realized at sheriff's sale not conclusive

Where payee of judgment note, which was executed by one maker as surety for other makers, subordinated lien of judgment thereon to mortgage obtained by payee on realty of principal makers, without surety's knowledge, and purchased realty at sheriff's sale under bond accompanying mortgage for amount of taxes and costs, amount realized at such sale was not conclusive as to value of realty between payee and surety, with respect to whether surety was injured by subordination of judgment lien, and hence discharged.—*First Nat. Bank & Trust Co. of Ford City v. Stolar*, 197 A. 499, 130 Pa.Super. 480.

5. Ky.—*Hunter v. Liberty Nat. Bank & Trust Co.*, 126 S.W.2d 807, 277 Ky. 538.—*State Nat. Bank of Frankfort v. Thompson*, 126 S.W. 2d 412, 277 Ky. 527.

## § 207. Affirmative Relief

Relinquishment, loss, or misapplication of funds or securities by the creditor may entitle the surety to affirmative relief, such as the return of any part of the security which the surety himself originally furnished, or, in a proper case, to an injunction against the creditor taking steps to enforce his claim against him.

Relinquishment, loss, or misapplication of funds or securities by the creditor may entitle the surety to affirmative relief.<sup>6</sup> Thus relinquishment, when proved, entitles the surety to the return of any part of the security which he himself originally furnished,<sup>7</sup> or to the return of any money paid

by him on the debt before he was aware of any relinquishment or loss of security by the creditor,<sup>8</sup> or, in a proper case, to an injunction against the creditor taking steps to enforce his claim against him.<sup>9</sup> Where a surety, for the price of land purchased by another, has an equity to be reimbursed by a sale of the land for any sum which he has paid or is liable to pay, he may file his bill in equity to prevent a conveyance to the purchaser by the vendor who has retained the title as security for the purchase money.<sup>10</sup>

## G. NEGLECT TO ACT OR PROCEED AGAINST PRINCIPAL

## § 208. In General

Except where required by contract or statute, the creditor owes the surety no duty of active diligence in proceeding against the principal, and mere want of diligence or forbearance will not affect the right of the creditor to pursue the surety.

Except in so far as the creditor or obligee may be required in equity to proceed first against the principal, as discussed *infra* § 287, or as the contrary may be required by provisions of the govern-

ing statute, as discussed *infra* § 209, or in the suretyship contract, as discussed *infra* § 210, the creditor owes the surety no duty of active diligence in proceeding against the principal,<sup>11</sup> and mere want of diligence<sup>12</sup> or forbearance<sup>13</sup> will not affect the right of the creditor to pursue the surety, since the latter, at any time after default of the principal, is entitled to pay the debt and reimburse himself by enforcing it against the principal.<sup>14</sup> The

Necessity of injury to surety from relinquishment or loss of security generally see *supra* § 204.

6. U.S.—*In re Sanderson*, D.C.Vt., 150 F. 236.

7. U.S.—*In re Sanderson*, *supra*.

8. N.Y.—*Chester v. Kingston Bank*, 17 Barb. 271, affirmed 16 N.Y. 336. 50 C.J. p 165 note 54.

Recovery of payments made after relinquishment see *infra* § 294.

9. Tex.—*Traywick v. Gunn*, Civ. App., 293 S.W. 273. 50 C.J. p 165 note 55.

10. N.C.—*Smith v. Smith*, 40 N.C. 34.

11. Tex.—*Stetson v. First Nat. Bank*, Civ.App., 44 S.W.2d 792, error refused.

12. Miss.—*North American Life Ins. Co. v. Smith*, 172 So. 135, 178 Miss. 238.

Va.—*Ward v. Bank of Pocahontas*, 187 S.E. 491, 167 Va. 169.

13. U.S.—*American Surety Co. of New York v. U. S.*, C.C.A.Okl., 112 F.2d 903.

Ala.—*State v. McElroy*, 125 So. 303, 220 Ala. 453.

Ariz.—*Kerby v. State ex rel. Frohmiller*, 187 P.2d 698, 62 Ariz. 294.

Ark.—*Rogers' Estate v. Hardin*, 143 S.W.2d 544, 201 Ark. 1—*Gazette Pub. Co. v. Stephens*, 135 S.W.2d 313, 193 Ark. 641.

Ge.—*Scott v. Gaudling*, 2 S.E.2d 69, 187 Ga. 751, 122 A.L.R. 200, answer to certified question conformed to 3 S.E.2d 766, 60 Ga.App. 306—*Griffin v. H. C. Whitmer Co.*, 194 S.E. 895, 57 Ga.App. 203—*Hicks v.*

*Bank of Wrightsville*, 194 S.E. 892, 57 Ga.App. 233.

Md.—*Mayers v. Krawshaar*, 170 A. 752, 166 Md. 169.

Mich.—*Buckeye Commercial Sav. Bank v. Protogere*, 231 N.W. 65, 250 Mich. 652.

Miss.—*North American Life Ins. Co. v. Smith*, 172 So. 135, 178 Miss. 238.

Neb.—*Nordeen v. Nelson*, 279 N.W. 323, 134 Neb. 707.

N.Y.—*Becker v. Faber*, 19 N.E.2d 997, 280 N.Y. 146, 121 A.L.R. 1010, reargument denied *Becker v. Intemann*, 21 N.E.2d 216, 280 N.Y. 730—*Merrill v. Equitable Surety Co. of New York*, Sup.Ct., 227 N.Y.S. 266, 131 Misc. 541—*Otto v. Lincoln Sav. Bank of Brooklyn*, 49 N.Y.S. 2d 407, reversed on other grounds 51 N.Y.S.2d 561, 268 App.Div. 400, affirmed 62 N.E.2d 236, 294 N.Y. 798.

Tex.—*Pope v. Litwin*, Civ.App., 57 S.W.2d 1105, error dismissed—*Stetson v. First Nat. Bank*, Civ.App., 44 S.W.2d 792, error refused—*Golden v. First State Bank of Bomarton*, Civ.App., 38 S.W.2d 628—*Sloan v. Dahl*, Civ.App., 27 S.W. 2d 284, error refused.

Va.—*Corpus Juris* cited in *Fidelity & Casualty Co. of New York v. Lackland*, 8 S.E.2d 306, 310, 175 Va. 178—*Ward v. Bank of Pocahontas*, 187 S.E. 491, 167 Va. 169. Wash.—*Legal Adjustment Bureau v. West Coast Const. Co.*, 298 P. 429, 162 Wash. 260. 50 C.J. p 172 note 79.

Failure to present note for payment Surety's liability on note being primary, payee's failure to present

note at bank at date of maturity did not discharge debt of surety.—*Dry v. Reynolds*, 172 S.E. 351, 205 N.C. 571.

## Failure to press one debtor

Payee's forbearance, without consideration therefor, to press one of makers for payment of note, while insisting on payments from other makers, did not release surety on ground that maker was released.—*Arnold v. Darby*, 176 S.E. 914, 49 Ga. App. 629.

## Where surety questions absence of principal

Omission of principal from action prior to judgment does not operate to discharge the surety where, during the pendency of the action and antecedent to the judgment, the surety raises the question of the effect of the absence of his principal in the action and the court has power fully to provide for the equities of the parties by bringing in the absent principal.—*Albany Exchange Sav. Bank v. Winne*, 6 N.Y.S.2d 699, 168 Misc. 853.

14. Tex.—*Stetson v. First Nat. Bank*, Civ.App., 44 S.W.2d 792, error refused.

Va.—*Fidelity & Casualty Co. of New York v. Lackland*, 8 S.E.2d 310, 175 Va. 178.

Right of recourse to principal in general see *infra* § 300.

The surety must himself use diligence, and take such effectual means as will enable him to call on the creditor to sue or to give him, the surety, the means of suing.—*Mayers v. Krawshaar*, 170 A. 752, 166 Md. 169—*Freaner v. Yingling*, 37 Md. 491.

consequences of the delay,<sup>15</sup> such as the subsequent insolvency of the principal,<sup>16</sup> or the fact that remedies against the principal may be lost by lapse of time,<sup>17</sup> are immaterial. There is added reason for denying relief to a surety if he contributes to the delay,<sup>18</sup> or if he consents, or is party to it, in any way.<sup>19</sup> Forbearance or indulgence given on a new and distinct consideration, or under such a binding obligation as precludes the creditor from pursuing his remedies on the debt may, however, discharge the surety.<sup>20</sup> So, delay under circumstances raising an estoppel to assert the claim may discharge the surety.<sup>21</sup>

### § 209. Statutory Provisions

Where a statute so provides, the creditor may be required to pursue the principal first; but a general provision of law, or of a by-law, that a defaulting officer must be proceeded against will not release his sureties, although such provision is ignored.

Where a statute so provides, the creditor or ob-

lige may be required to pursue the principal first;<sup>22</sup> but a general provision of law, or of a by-law, that a defaulting officer must be proceeded against will not release his sureties, although such provision is ignored.<sup>23</sup>

### § 210. Contractual Provisions

Where the contract of suretyship so provides, the creditor may be required to pursue the principal first, but where time limitations in the suretyship contract on payment or bringing of suit are construed for the benefit of the creditor his failure to comply therewith does not discharge the surety.

Where the contract of suretyship so provides, the creditor may be required to pursue the principal first.<sup>24</sup> Thus, if the surety's contract stipulates that the creditor shall proceed against the principal without delay,<sup>25</sup> or before a certain fixed date,<sup>26</sup> or before the surety shall be called on to pay,<sup>27</sup> the surety is not liable unless such stipulation is complied with, even though the principal's default

15. Ala.—State v. McElroy, 125 So. 903, 220 Ala. 452.

Ga.—Scott v. Gaulding, 2 S.E.2d 69, 187 Ga. 751, 122 A.L.R. 200, answer to certified question conformed to 3 S.E.2d 766, 60 Ga.App. 306.

N.Y.—Schroepell v. Shaw, 3 N.Y. 446—Merrill v. Equitable Surety Co. of New York, 227 N.Y.S. 266, 131 Misc. 541.

16. Ariz.—Kerby v. State ex rel. Frohmiller, 157 P.2d 698, 62 Ariz. 294.

Tex.—Sloan v. Dahl, Civ.App., 27 S.W.2d 284, error refused. 50 C.J. p 173 note 81.

17. Neb.—Eickhoff v. Eickenbary, 72 N.W. 308, 52 Neb. 332. 50 C.J. p 173 note 82.

Bar of action by limitations as discharging surety see *infra* § 233.

18. Ind.—Davis v. Leitzman, 70 Ind. 275.

50 C.J. p 173 note 83.

19. Miss.—Carraway v. Odeneal, 56 Miss. 223.

20. Ga.—Scott v. Gaulding, 2 S.E. 2d 69, 187 Ga. 751, 122 A.L.R. 200, answers to certified question conformed to 3 S.E.2d 766, 60 Ga.App. 306—Curan v. Colbert, 3 Ga. 239, 46 Am.D. 427.

Extension of time of payment or performance see *supra* §§ 161-192.

21. Tex.—Darrach v. Lion Bonding, etc., Co., Civ.App., 200 S.W. 1101. 50 C.J. p 173 note 85.

22. U.S.—American Surety Co. of New York v. U. S., C.C.A.Okl., 112 F.2d 903.

50 C.J. p 173 note 86.

#### Issuance of execution

Under statute discharging surety from liability under any judgment

after the lapse of seven years without execution being issued for collection of judgment, when seven years have elapsed after the rendition of the judgment before any execution issued and when the same period elapses after return of one execution before another issues, surety is discharged from liability on the judgment.—Frick Co. v. Eversole, 116 S.W.2d 333, 273 Ky. 160—50 C.J. p 173 note 86 [c] (8).

#### In Texas

(1) Under a statute providing that the principal may be sued jointly with the surety, but that no judgment shall be rendered against the surety unless judgment shall have been previously, or at the same time shall be, rendered against the principal, except where plaintiff may discontinue his suit, for certain reasons there given, among them that the principal is actually or notoriously insolvent, and providing that the surety may be sued without the necessity of suing the principal, when, among other things, the principal is insolvent, a judgment against a surety without service on the principal, and without proof of his insolvency, cannot be sustained.—Welch v. Phelps, etc., Windmill Co., Civ.App., 37 S.W. 175.

(2) In an action on a note the payee's failure to seek judgment against the wife who signed with her husband as maker of note has been held not to bar judgment against the surety where the facts disclosed that there was no pleading, or proof that the house involved, for the materials in constructing which the note had been given, was the separate property of the wife, or that the house was constructed on

land constituting her separate estate, and that there was no showing that the note had been given for necessities for the wife or her family or for the benefit of her separate estate, and facts also disclosed that the wife was actually and notoriously insolvent, and her whereabouts actually unknown to her husband and the surety; nor could the surety escape liability because of alleged negligence on the part of the payee in securing service of citation on the husband under record.—Turner v. Montgomery, Civ.App., 67 S.W.2d 637.

(3) Other adjudications relating to construction, operation, and effect of statute referred to or related statutory provisions see 50 C.J. p 173 note 86 [f].

23. Tenn.—Nashville v. Knight, 12 Lea 700.

50 C.J. p 174 note 87.

24. U.S.—American Surety Co. of New York v. U. S., C.C.A.Okl., 112 F.2d 903.

Forbearance or indulgence given on new and distinct consideration as discharging surety see *supra* § 208.

25. Md.—Berman v. Elm Loan, etc., Assoc., 78 A. 1104, 114 Md. 191. Or.—Walker v. Goldsmith, 7 Or. 161.

26. N.Y.—William L. Crow Constr. Co. v. Carroll P. Brennan, Inc., 187 N.Y.S. 493, 196 App.Div. 71, affirmed 135 N.E. 949, 233 N.Y. 635.

#### Suit brought in time

Cal.—Fruit Growers' Supply Co. v. Goss, 41 P.2d 357, 4 Cal.App.2d 651.

27. N.Y.—Toles v. Adea, 91 N.Y. 562.

lies in repudiating the guaranteed contract.<sup>28</sup> However, where time limitations in the suretyship contract on payment<sup>29</sup> or the bringing of suit<sup>30</sup> are construed for the benefit of the creditor, his failure to comply therewith does not discharge the surety. A mere recital of the principal's obligation to pay is not sufficient to require the obligee to proceed against the principal before suing the surety.<sup>31</sup> An oral agreement cannot be shown to vary an absolute undertaking by the surety as shown in his written contract;<sup>32</sup> and an agreement by the creditor, without consideration, to proceed against the principal is void.<sup>33</sup>

### § 211. Failure to Present Claim against Decedent's or Insolvent's Estate

Failure of the creditor to present his claim against the estate of a deceased principal, within the statutory period allowed, does not discharge the surety, and the rule is the same with respect to the estate of an insolvent or bankrupt principal.

Failure of the creditor or obligee to present his claim against the estate of a deceased principal, within the statutory term for presentation of claims, does not discharge the surety,<sup>34</sup> especially if the surety admits that there are no funds in the hands of the principal's representative.<sup>35</sup> The rule is the same with respect to the estate of an insolvent or bankrupt principal; the creditor is not obliged to have his claim allowed, and to receive dividends,<sup>36</sup> although the assets might be sufficient to pay all claims in full.<sup>37</sup> However, it has been stated that

a surety is entitled to expect at least ordinary diligence in the filing of claims by the creditor against the debtor's receiver,<sup>38</sup> and it has been held that, where the creditor has pleaded and been allowed the indebtedness of the surety's principal and has acquiesced in all matters pertaining to said indebtedness, the surety cannot be expected or required to take steps which the record showed unnecessary to protect himself from liability on a further claim which he had no reason to believe existed,<sup>39</sup> and that the creditor is precluded from making further claim against the surety in such case on principles of estoppel,<sup>40</sup> as well as the rule prohibiting splitting of causes of action.<sup>41</sup>

*Statutory provisions.* Some statutes provide that failure to present certain enumerated claims against the estate of a deceased principal shall operate to discharge the surety.<sup>42</sup> Where the claim is within the terms of the statute, the surety will be discharged if it is not duly presented.<sup>43</sup>

### § 212. Delay in Prosecution of Proceedings

Delay in the prosecution of proceedings against the principal will not discharge the surety even though it results in a loss which might not otherwise have occurred.

Delay in enforcing the claim against the principal will not release a surety, although it occurs after suit has been instituted,<sup>44</sup> especially where the surety unites with the principal in resisting recovery.<sup>45</sup> Thus, after judgment against the prin-

28. N.Y.—William L. Crow Constr. Co. v. Carroll P. Brennan, Inc., 187 N.Y.S. 493, 196 App.Div. 71, affirmed 135 N.E. 949, 233 N.Y. 635.

29. Okl.—Vogel v. Bastin, 203 P. 219, 84 Okl. 273.

30. Iowa.—Bartlett v. Illinois Surety Co., 119 N.W. 729, 142 Iowa 538.

31. La.—Parham v. Cobb, 7 La. Ann. 157.

50 C.J. p 174 note 94.

32. Mass.—Hanchet v. Birge, 12 Metc. 545.

33. Wash.—Legal Adjustment Bureau v. West Coast Const. Co., 298 P. 429, 163 Wash. 260. 50 C.J. p 174 note 96.

34. U.S.—Corpus Juris cited in County of Platte v. New Amsterdam Casualty Co., D.C.Neb., 6 F.R.D. 475, 502.

Iowa.—In re Carpenter's Estate, 231 N.W. 376, 210 Iowa 553.

Miss.—North American Life Ins. Co. v. Smith, 173 So. 135, 178 Miss. 238.

Wash.—Donnerberg v. Oppenheimer, 46 F. 254, 15 Wash. 290.

50 C.J. p 174 note 97.

35. La.—Trimble v. Brichta, 11 La. Ann. 271.

36. Ga.—Higdon v. Bell, 102 S.E. 546, 25 Ga.App. 54.

Va.—Corpus Juris cited in Fidelity & Casualty Co. of New York v. Lackland, 8 S.E.2d 306, 310, 175 Va. 178.

50 C.J. p 175 note 99.

37. Ky.—Krupp v. St. Martinus Ritter-Verein, 53 S.W. 648, 21 Ky.L. 938.

38. Iowa.—Heinz v. Davenport Bank & Trust Co., 298 N.W. 785, 230 Iowa 546.

39. Iowa.—Heinz v. Davenport Bank & Trust Co., 298 N.W. 785, 230 Iowa 546.

40. Iowa.—Heinz v. Davenport Bank & Trust Co., supra.

41. Iowa.—Heinz v. Davenport Bank & Trust Co., supra.

42. Ill.—Harris v. Buder, 62 N.E.2d 131, 326 Ill.App. 471.

Statute inapplicable to contracts executed before its passage

Ill.—Field v. Brokaw, 37 N.E. 80, 148 Ill. 654.

43. Ill.—Huddleston v. Francis, 16 N.E. 243, 124 Ill. 195.

50 C.J. p 175 note 3.

Where the statute is complied with, the surety is not discharged.—Harris v. Buder, 62 N.E.2d 131, 326 Ill.App. 471.—James v. Plank, 159 Ill. App. 293.

44. N.Y.—Merrill v. Equitable Surety Co. of New York, 227 N.Y.S. 266, 131 Misc. 541.

50 C.J. p 175 note 4.

Service against principal not perfected

Judgment creditor was entitled to revive dormant judgment against surety on joint and several note, over objection that surety's liability had been increased, and that surety had consequently been discharged from liability, because service was never perfected on principal and no judgment was rendered against him.—Hicks v. Bank of Wrightsville, 194 S.E. 892, 57 Ga.App. 233.

45. U.S.—Creath v. Sims, Miss., 5 How. 192, 12 L.Ed. 110.

Ind.—Kirtz v. Spaugh, Wills. 267.

principal, the creditor's delay or failure to exhaust his remedy against the principal will not relieve the surety from liability.<sup>46</sup> So delay in issuing execution after judgment has been obtained,<sup>47</sup> or a stay of execution,<sup>48</sup> does not discharge a surety; nor is delay after a levy on the principal's property a defense to his surety.<sup>49</sup> Delay in prosecuting the proceedings against the principal will not discharge the surety even though it results in a loss which might otherwise have been avoided,<sup>50</sup> as where the principal disposes of his property meanwhile,<sup>51</sup> or it is destroyed,<sup>52</sup> or is discharged from the lien of the judgment.<sup>53</sup>

*A mere abandonment* of a suit against the principal does not ipso facto discharge the surety.<sup>54</sup>

*A valid and binding agreement to stay proceedings* on a judgment against the principal entered

into by the creditor and principal without the consent of the surety has been held, in equity, to discharge the surety from any further liability to the creditor.<sup>55</sup>

### § 213. Resort to Other Securities

In the absence of a contract or statute providing otherwise, a surety is not released by delay on the part of the creditor in enforcing, or by his failure to resort to, collateral security, even though the principal becomes insolvent or the security eventually is lost.

In the absence of a contract<sup>56</sup> or statute<sup>57</sup> providing otherwise, a surety is not released by delay on the part of the creditor in enforcing,<sup>58</sup> or by his failure to resort to,<sup>59</sup> collateral security, even though the principal become insolvent<sup>60</sup> or the security eventually is lost.<sup>61</sup> A fortiori, a surety has no ground to complain where the creditor's de-

46. N.Y.—Merrill v. Equitable Surety Co. of New York, 227 N.Y.S. 266, 131 Misc. 541.

47. Mo.—Saussenthaler v. Federal Union Surety Co., 193 S.W. 286, 197 Mo.App. 112.  
50 C.J. p 175 note 6.

48. N.H.—Morrison v. Citizens' Nat. Bank, 20 A. 300, 65 N.H. 253, 23 Am.S.R. 39, 9 L.R.A. 282.  
50 C.J. p 175 note 7.

#### Judgment by consent and stay

Surety on bond for repayment of loan was not released, where principal, without surety's knowledge, entered into stipulation with creditor providing for entry of judgment against principal and sixty days' stay of execution.—Ramish v. Astor, 42 P.2d 334, 5 Cal.App.2d 225.

#### In Kentucky

(1) The rule stated in the text has been followed.—Stringfellow v. Williams, 6 Dana 236—Finn v. Stratton, 5 J.J.Marsh. 364.

(2) However, in an early case it was held that a stay of execution by the creditor, when levied on the property of the principal, without the privity or consent of the sureties, operated as a release of the sureties.—Jones v. Bullock, 3 Bibb 467.

49. N.Y.—Merrill v. Equitable Surety Co. of New York, 227 N.Y.S. 266, 131 Misc. 541.  
50 C.J. p 175 note 11.

50. N.Y.—Merrill v. Equitable Surety Co. of New York, supra.

*Delay after levy of execution* will not relieve the surety although the principal avails himself of an adjournment of an execution sale to procure a release of his property as exempt.—Lilly v. Roberts, 58 Ga. 363.

51. Tex.—Koch v. Cornwell, Civ. App., 40 S.W. 144.

50 C.J. p 175 note 8.

52. Ark.—Thompson v. Robinson, 34 Ark. 44.

53. Ga.—Lumsden v. Leonard, 55 Ga. 374.

54. Ga.—Griffin v. H. C. Whitmer Co., 194 S.E. 895, 57 Ga.App. 203—Waddell v. J. R. Watkins Medical Co., 104 S.E. 250, 25 Ga.App. 657.

55. N.Y.—Boughton v. Orleans Bank, 2 Barb.Ch. 458.

56. Va.—Ward v. Bank of Pocahontas, 187 S.E. 491, 167 Va. 169.

57. Idaho.—Lewiston First Nat. Bank v. Williams, 23 P. 552, 2 Idaho (Hasb.) 670.  
50 C.J. p 176 note 24.

58. Ala.—State v. McElroy, 125 So. 903, 220 Ala. 452.

Ark.—Gazette Pub. Co. v. Stephens, 135 S.W.2d 313, 199 Ark. 641.

Cal.—Edwards v. Mortgage Securities of Santa Barbara, 44 P.2d 1056, 6 Cal.App.2d 641.

Okl.—Yell v. Davis, 123 P.2d 681, 190 Okl. 322—Baker v. Gaines Bros. Co., 166 P. 159, 65 Okl. 192.  
Va.—Ward v. Bank of Pocahontas, 187 S.E. 491, 167 Va. 169.

50 C.J. p 175 note 16.  
Discharge of surety where cause of action against principal barred by statute of limitations see infra § 233.

*Delay not amounting to a bar of the statute of limitations* in enforcing collateral securities which the principal debtor may have placed in the creditor's hands does not discharge the surety.—North American Life Ins. Co. v. Smith, 172 So. 135, 178 Miss. 238—Clopton v. Spratt, 52 Miss. 251.

*Where the pledged property is not in the hands of the mortgagee*, but is permitted to remain with the mortgagor, the mere indulgence or

even negligence in the matter of delaying a foreclosure through legal proceedings does not have the effect in law to release the sureties on the debt.—Ramsey v. Wahl, Tex.Com. App., 235 S.W. 838—Stetson v. First Nat. Bank, Tex.Civ.App., 44 S.W.2d 792, error refused—Golden v. Bank, Tex.Civ.App., 38 S.W.2d 628—Dillard v. Chandler, Tex.Civ.App., 157 S.W. 308.

59. Mo.—Corpus Juris cited in Ruskamp v. Fetchling, App., 101 S.W. 2d 524, 526.

N.Y.—In re Metz' Estate, 18 N.Y.S. 2d 883, 173 Misc. 813, reversed on other grounds 30 N.Y.S.2d 502, 262 App.Div. 508.

Okl.—Yell v. Davis, 123 P.2d 681, 190 Okl. 322—Baker v. Gaines Bros. Co., 166 P. 159, 65 Okl. 192.

Tex.—Ramsey v. Wahl, Com.App., 235 S.W. 838—First Nat. Bank of Fort Worth v. Brown, Civ.App., 172 S.W.2d 151, error refused—Teague v. Farmers' State Bank of Center, Civ.App., 55 S.W.2d 639—Stetson v. First Nat. Bank, Civ. App., 44 S.W.2d 792, error refused.

Va.—Ward v. Bank of Pocahontas, 187 S.E. 491, 167 Va. 169.

50 C.J. p 175 note 17.

*Right of surety to compel creditor to resort to other security* see infra § 233.

#### Bank not appropriating deposit of principal

The facts that the principal in a note payable to a bank has funds on deposit in the bank after the maturity of the note exceeding the sum due thereon and the bank fails to appropriate them to the payment of the note do not discharge the surety.—Voss v. German American Bank, 83 Ill. 599, 25 Am.R. 415.

60. Tenn.—Miller v. Knight, 7 Bart. 127.

61. Ala.—State v. McElroy, 125 So. 903, 220 Ala. 452.

lay or failure to resort to the security is the result of the surety's own wrongful act.<sup>62</sup> It is equally clear that the surety is without proper ground for complaint if the security is resorted to first.<sup>63</sup> If the creditor has two or more securities, he is at liberty to resort to either,<sup>64</sup> but the surety will not be liable until other security has been exhausted if he has made that an express term in his contract.<sup>65</sup> Where there are two or more securities, one of them constitutes the primary fund, where the creditor and surety have entered into a binding agreement to that effect.<sup>66</sup> The creditor's right to proceed against the surety without resorting to the security is not affected in any way by an agreement between principal and surety to which he is not a party.<sup>67</sup>

**Failure to proceed against cosurety.** A surety is not discharged by the failure of the creditor to proceed against a cosurety<sup>68</sup> or by his dismissal of an action as to one of the sureties or his representatives.<sup>69</sup> So the fact that, on the death of one of the cosureties, the creditor may dismiss his

suit against that surety without prejudice and proceed against the remaining defendants does not operate as a discharge in favor of the other sureties.<sup>70</sup>

## § 214. Notice by Surety to Creditor to Proceed against Principal

As a general rule, a surety cannot impose any burden on the creditor to proceed against the principal, nor will the surety be discharged by the creditor's failure to do so, but statutes in many jurisdictions afford the surety such right.

While it has been held that at common law the creditor's failure to comply with the surety's request to proceed against the principal operated to discharge the surety when, by the negligence of the creditor, the means of recovering the debt from the principal had been lost, or damage accrued to the surety,<sup>71</sup> as a general rule, in the absence of statute, a surety cannot, by notice, impose any burden on the creditor to proceed against the principal, nor will the surety be discharged by the creditor's failure to do so<sup>72</sup> or by his discontinuance of a suit

Tex.—Ramsey v. Wahl, Com.App., 235 S.W. 838—Stetson v. First Nat. Bank, Civ.App., 44 S.W.2d 792, error refused—Golden v. Bank, Civ.App., 38 S.W.2d 628—Dillard v. Chandler, Civ.App., 157 S.W.2d 303.

50 C.J. p 176 note 19.

62. Tex.—Turner v. Montgomery, Civ.App., 67 S.W.2d 637.

63. Tex.—Borschow v. Stephenson, Civ.App., 166 S.W. 121.

64. Cal.—Sather Banking Co. v. Arthur R. Briggs Co., 72 P. 352, 135 Cal. 724.

50 C.J. p 176 note 21.

65. Minn.—Beebe v. Canney, 55 N.W. 61, 52 Minn. 491.

50 C.J. p 176 note 25.

66. N.Y.—Ensign v. Jarvis, 41 N.E. 503, 147 N.Y. 687.

67. Mo.—Sigler v. Booze, 65 Mo. App. 555.

68. Ark.—Rogers' Estate v. Hardin, 143 S.W.3d 544, 201 Ark. 1.

Ga.—Scott v. Gaulding, 2 S.E.2d 69, 157 Ga. 751, 122 A.L.R. 200, answer to certified questions conforming to 3 S.E.2d 766, 60 Ga.App. 305.

50 C.J. p 187 note 99.

**Failure to file claim against estate of deceased surety within time permitted for filing claims has been held not to relieve the cosurety.**

Iowa.—In re Carpenter's Estate, 231 N.W. 376, 210 Iowa 553.

Minn.—First Minneapolis Trust Co. v. Niccollet Syndicate, 255 N.W. 240, 193 Minn. 307.

69. Tex.—Carlton v. Krueger, 115

S.W. 619, 1178, 54 Tex.Civ.App. 48.

70. Ga.—Barnett v. Ferris, 146 S.E. 345, 39 Ga.App. 206—Ellis v. Geer, 137 S.E. 290, 36 Ga.App. 519.

71. Ala.—Howle v. Edwards, 11 So. 748, 97 Ala. 649.

50 C.J. p 177 note 44.

In Pennsylvania

(1) In an early case it was held that if the obligee was requested by the surety to proceed against the principal, in order to save the debt, and he neglected or refused to do so, the surety, both in law and in equity, was exonerated.—Eddowes v. Niell, 4 Dall. 133.

(2) However, in a somewhat later case it was stated that "sitting as a court of law, we cannot say, that a creditor neglecting to sue his principal debtor, on the requisition of his surety, thereby discharges his surety in general."—Dehuff v. Turbett, 3 Yeates 157, 162.

(3) It has also been stated that sureties cannot make the creditor use collateral in his hands or resort to the principal in the first instance.—American Mechanics Bldg., etc., Assoc. v. Dunlap, 20 Lanc.L.Rev. 59.

(4) The statement referred to in the second paragraph has been criticized, the court saying that it was not a decision and must have been made in great haste or there must have been an inaccuracy in the report.—Cope v. Smith, 8 Serg. & R. 109, 116.

(5) In any event, it has been held in a number of cases that a surety

will be discharged if the creditor refuses to sue the principal debtor on request, provided the debt might have been collected by suit at that time.—Second Saving Fund & Loan Ass'n v. Bailey, 170 A. 869, 313 Pa. 519—Conrad v. Foy, 68 Pa. 381—Shimer v. Jones, 47 Pa. 268—Wetzel v. Sponsler's Executors, 18 Pa. 460—Cope v. Smith, supra.

(6) Surety, in order to justify his release after notice to obligee to proceed against principal, must show that his request was reasonable and that he was deprived of what was not merely a speculative benefit.—Keystone Bank of Spangler, Pa., v. Booth, 6 A.2d 417, 334 Pa. 545—Gardner v. Ferree, 15 Serg. & R. 28, 16 Am.D. 513.

(7) Where evidence fails to show that creditor would have collected anything from principal, notice to proceed is ineffectual to discharge the surety.—Keystone Bank of Spangler, Pa., v. Booth, supra.

(8) The statute providing that the surety shall not be discharged by reason of notice to the creditor to collect the amount of the debt from the principal unless such notice is in writing and signed by the party giving the same cannot be otherwise construed than as limiting sub modo the exercise of a right theretofore existing, and does not of itself alone operate to relieve from liability.—Commonwealth v. National Surety Co., 164 A. 788, 310 Pa. 108, 89 A.L.R. 564.

72. N.M.—Kemp Lumber Co. v. Stanley, 160 P. 351, 22 N.M. 198. 50 C.J. p 176 note 32.

commenced against the principal after notice from the surety not to discharge the latter.<sup>73</sup> Statutes in many jurisdictions afford the surety the right by notice to require the creditor to bring suit against the principal,<sup>74</sup> and under such statutes the creditor's failure to comply with such notice duly given will discharge the surety<sup>75</sup> or extinguish the creditor's remedy against the surety.<sup>76</sup> In jurisdictions where such right was not afforded the surety at common law, such statutes have been regarded as in derogation of common law,<sup>77</sup> and as such it has been held that they must be strictly construed<sup>78</sup> and strictly complied with.<sup>79</sup> On the other hand, there is authority for the view that such statutes are to be regarded as remedial legislation,<sup>80</sup> and as such should be construed liberally to one complying fairly with their terms.<sup>81</sup>

The terms of the statute determine the nature and extent of the right conferred.<sup>82</sup> This right of the surety to compel the creditor to act is not granted by implication by a statute giving a surety a right by suit against principal and creditor to compel payment by the principal of his debt to the creditor.<sup>83</sup> Under a statute providing that a surety may require his creditor to proceed against the principal, or to pursue any other remedy in his power which the surety himself cannot pursue, and that, if the creditor neglects to do so, the surety is

exonerated to the extent to which he is thereby prejudiced, it has been held that the creditor is under no obligation, after notice, to pursue any remedy which the surety himself could pursue.<sup>84</sup>

Although there is some authority to the contrary,<sup>85</sup> it has been held that the rule exonerating the surety where the creditor fails or refuses to comply with the surety's request to proceed against the principal is not repealed or impaired by the provisions of the Negotiable Instruments Act.<sup>86</sup> The fact that the guaranteed contract was made in a foreign state is immaterial.<sup>87</sup> Where the creditor holds his claim by assignment, it has been held that his failure to act on notice discharges his assignor as well as the original surety of the claim.<sup>88</sup> A statute giving the surety a right to compel the creditor to bring action does not give him a right to compel the creditor to have the principal arrested, and failure of the creditor to comply with such a request does not discharge the surety.<sup>89</sup>

**Nonresidence.** A creditor, who otherwise would have been compelled to sue the principal after receiving notice from the surety to do so, in order to retain his right against the surety, is not bound to follow his principal out of the state.<sup>90</sup> If the principal is a nonresident at the time notice is given, and has no property within the state, failure of the creditor to sue does not discharge the surety.<sup>91</sup>

73. N.J.—Manning v. Shotwell, 5 N.J.Law 584, 8 Am.D. 622.

74. Ark.—W. T. Rawleigh Co. v. Moore, 121 S.W.2d 106, 196 Ark. 1148.

Tex.—Dansby v. Stroud, Civ.App., 48 S.W.2d 1018, error refused.

The statutory remedy is cumulative in those states where the surety already had the right under the common law.—Howle v. Edwards, 11 So. 748, 97 Ala. 649—50 C.J. p 177 note 44.

75. Ind.—Reiman v. Terre Haute Sav. Bank, 180 N.E. 490, 96 Ind. App. 652.

Miss.—North American Life Ins. Co. v. Smith, 172 So. 135, 178 Miss. 238.

Mo.—Massillion Engine & Thresher Co. v. Hayward, App., 256 S.W. 586, applying Arkansas law.

Ohio.—Galloway v. Barnesville Loan, 57 N.E.2d 337, 74 Ohio App. 23.

Tex.—Southern Surety Co. v. Lafferty, Civ.App., 43 S.W.2d 460, reversed on other grounds Nacogdoches County v. Lafferty, Com. App., 61 S.W.2d 994.

59 C.J. p 176 note 35.

76. Statute goes to remedy and not right

A statute providing that the surety may at any time after the debt

becomes due give notice in writing to the creditor to proceed to collect it from the principal, and if the creditor refuses or fails to commence an action within three months the surety shall be discharged, has been held to go only to the remedy and not to affect either the nature, obligation, construction, or validity of the contract, the statute being in the nature of a limitation of actions.—Sally v. Bank of Union, 103 S.E. 460, 150 Ga. 281—Overstreet v. W. T. Rawleigh Co., 43 S.E.2d 774, 75 Ga.App. 483.

77. Ark.—W. T. Rawleigh Co. v. Moore, 121 S.W.2d 106, 196 Ark. 1148—Thompson v. Treller, 101 S.W. 174, 82 Ark. 247.

78. Ark.—W. T. Rawleigh Co. v. Moore, 121 S.W.2d 106, 196 Ark. 1148—Thompson v. Treller, 101 S.W. 174, 82 Ark. 247.

79. Ark.—W. T. Rawleigh Co. v. Moore, 121 S.W.2d 106, 196 Ark. 1148.

80. Ind.—Reiman v. Terre Haute Sav. Bank, 180 N.E. 490, 96 Ind. App. 652.

81. Ind.—Reiman v. Terre Haute Sav. Bank, 180 N.E. 490, 96 Ind. App. 652.

82. Tex.—Southern Surety Co. v. Lafferty, Civ.App., 43 S.W.2d 460,

reversed on other grounds Nacogdoches County v. Lafferty, Com. App., 61 S.W.2d 994.

#### Refusal to permit suit by surety

The surety must establish, not merely the fact of notice, but a refusal by the creditor to bring suit or to allow him to bring suit against the principal in the creditor's name.—Ingels v. Sutliff, 13 P. 828, 36 Kan. 444—Turner v. Hale, 8 Kan. 38.

83. Minn.—Huey v. Pinney, 5 Minn. 310.

84. Okl.—Miller v. State, 152 P. 409, 52 Okl. 76—Palmer v. Noe, 150 P. 462, 48 Okl. 450.

85. N.Y.—Citizens First Nat. Bank of Frankfort v. Parkinson, 44 N.Y.S.2d 840, 266 App.Div. 1055.

86. Miss.—North American Life Ins. Co. v. Smith, 172 So. 135, 178 Miss. 238.

50 C.J. p 177 note 45.

87. Ga.—J. R. Watkins Co. v. Seawright, 149 S.E. 389, 40 Ga.App. 314.

88. Ky.—Hurst v. Chambers, 12 Bush 155.

89. La.—Cougot v. Fournier, 4 Rob. 420.

90. Ark.—Thompson v. Treller, 101 S.W. 174, 82 Ark. 247.

91. Wash.—Seattle Crochery Co. v.



There is a conflict of authority as to whether the nonresidence rule applies where the nonresident has property in the state which may be subjected to the payment of the debt. In some states the surety is not released;<sup>92</sup> in other states the failure of the creditor to proceed against the property discharges the surety.<sup>93</sup> It has been held that, where the statutes give the creditor the alternative of bringing suit himself or sending a copy of the contract to the surety and allowing him to sue in the creditor's name, nonresidence of the principal does not excuse a failure to comply.<sup>94</sup> Where residence of the principal is necessary to give effect to the surety's notice under the statute, the burden is on the surety to prove that the principal is within the jurisdiction.<sup>95</sup> If the creditor, being ignorant of the principal's residence, shows that he has exercised reasonable diligence to ascertain it, but without effect, the surety remains liable.<sup>96</sup>

**Insanity.** It has been held that the statute does not apply to claims against the estates of insane principals.<sup>97</sup>

**Death.** Where the statute requires the creditor to commence suit against the principal forthwith or within a stated time after receiving notice, it has been held that death of the principal before notice given,<sup>98</sup> or during the time allowed for commencing suit,<sup>99</sup> takes the case out of the statute, and the surety remains bound. However, where the statute allows a reasonable time after notice for the bringing of the action, it has been held that death of the principal does not excuse the creditor's failure to sue, and the surety is discharged,<sup>1</sup> if he shows that the principal left an estate in the state and that administration has been had.<sup>2</sup>

**Availability of defense.** The creditor's failure to act after notice has been held to be a defense available to the surety equally at law and in equity.<sup>3</sup> It is not lost by the fact that the surety has signed a note which contains the provisions that time of payment may be extended without discharging the surety;<sup>4</sup> nor is it unavailable because the suretyship contract provides that it shall not be necessary for the creditor to exhaust his remedies against the principal debtor before proceeding against the surety.<sup>5</sup> Of course, the defense is not open to the surety if no notice was given by him under the statute,<sup>6</sup> unless he was prevented from giving it by the creditor himself,<sup>7</sup> or if he has withdrawn it or waived it, as discussed *infra* § 222. If the surety for a consideration has consented to an extension of time, he cannot show in defense a notice to commence suit within that time.<sup>8</sup>

**Extent of discharge.** In those jurisdictions where the failure of the creditor to prosecute his claim against the principal debtor after demand by the surety is available to the surety as a defense the surety has been held to be discharged only to the extent of the loss which results.<sup>9</sup>

**What law governs.** The law of the place where the suretyship contract was made prevails over the law in force in the state where action is brought where the law in the two states differs.<sup>10</sup>

**Cosureties.** Such a statute has been held to give no protection to a surety against another surety by requiring the creditor to bring suit against the sureties, but is limited to a surety's requiring the creditor to bring suit against the principal debtor.<sup>11</sup> The discharge of a cosurety by a failure of the

Haley, 33 P. 650, 6 Wash. 302, 36 Am.S.R. 156.

50 C.J. p 177 note 50.

92. Ala.—Hightower v. Ogletree, 21 So. 934, 114 Ala. 94.

Ind.—Conklin v. Conklin, 54 Ind. 239.

93. Ark.—Thompson v. Trelor, 101 S.W. 174, 82 Ark. 247.

Tenn.—Hancock v. Bryant, 2 Yerg. 476.

94. Iowa.—Cleophas v. Walker, 233 N.W. 257, 211 Iowa 122—Hayward v. Fullerton, 39 N.W. 651, 75 Iowa 371.

95. Ala.—Hightower v. Ogletree, 21 So. 934, 114 Ala. 94.

Tex.—Petty v. Cleveland, 2 Tex. 404.

96. Mo.—Cox v. Jeffries, 73 Mo.App. 412.

97. Tex.—National Bank of Commerce v. Glavin, Civ.App., 152 S.W. 652.

98. Ark.—Copeland v. Union Industrial Loan Corporation, 48 S.W.2d 845, 185 Ark. 643.

Mo.—Hickam v. Hollingsworth, 17 Mo. 475.

99. Mo.—Davis v. Gillilan, 71 Mo. App. 498.

50 C.J. p 177 note 59.

1. Ind.—Dally v. Robinson, 86 Ind. 382.

2. Ind.—Whittlesey v. Heberer, 48 Ind. 260.

3. Miss.—Smith v. Clopton, 48 Miss. 66.

4. Ill.—School Trustees v. Southard, 31 Ill.App. 359.

5. Ga.—Overstreet v. W. T. Raleigh Co., 43 S.E.2d 774, 75 Ga. App. 483.

6. Okl.—Yell v. Davis, 123 P.2d 631, 190 Okl. 322.

Tex.—Pope v. Litwin, Civ.App., 57 S.W.2d 1105, error dismissed.

Va.—Ward v. Bank of Pocahontas, 187 S.E. 491, 167 Va. 169.

50 C.J. p 177 note 64.

7. Mo.—Triplet v. Randolph, 46 Mo. App. 569.

8. Ga.—Armour Fertilizer Works v. Bond, 77 S.E. 22, 139 Ga. 246.

9. U.S.—Chapman v. Hoage, App.D. C. 56 S.Ct. 333, 296 U.S. 526, 80 L.Ed. 370.

By terms of statute the exoneration of the surety is limited to the extent to which he is prejudiced by the creditor's refusal or failure to act—Hollis v. Parks, 219 P. 110, 92 Okl. 291.

10. Pa.—Tenant v. Tenant, 1 A. 532, 110 Pa. 478.

50 C.J. p 177 note 71.

11. W.Va.—State v. Citizens' Nat. Bank of Philippi, 171 S.E. 810, 114 W.Va. 338.

creditor to bring suit after notice from such cosurety to do so does not discharge the other sureties.<sup>12</sup>

### § 215. — Insolvency of Principal

There is a conflict of authority as to whether the subsequent insolvency of the principal operates to discharge a surety who had previously notified the creditor to sue.

There is a conflict of authority as to whether the subsequent insolvency of the principal operates to discharge a surety who had previously notified the creditor to sue, some courts holding that circumstance immaterial,<sup>13</sup> others holding on equitable grounds that the surety is discharged thereby,<sup>14</sup> if he can establish the fact that, when notice was given, the principal was solvent,<sup>15</sup> and not merely that he could pay this debt.<sup>16</sup> However, even in these states the surety is not discharged if it appears that the creditor offered to allow the surety to proceed against the principal by attachment<sup>17</sup> or that the principal was beyond the jurisdiction.<sup>18</sup>

**Statutory provisions.** Under statutes giving a surety a right on general terms to compel action by the creditor by giving him written notice and discharging him from further liability on the creditor's refusal or failure to comply, insolvency of the principal at the time notice was given by the surety,<sup>19</sup> or so soon thereafter as to make an action futile,<sup>20</sup> or at the time the suretyship contract was entered into<sup>21</sup> is an excuse for the creditor's noncompliance and the surety is not discharged. The bur-

den is on the creditor to show that action would have been unavailing.<sup>22</sup> Under statutes conditioning the surety's right to compel action on the surety's apprehension that his principal is about to become insolvent it has been held that the surety is discharged on proof of apprehension of insolvency, the giving of notice to the creditor, and the refusal of the creditor to act within the time allowed,<sup>23</sup> and it is not necessary that the surety should go further with his proof and show that the principal later did become insolvent.<sup>24</sup> The surety's right does not accrue under such statute if the principal is shown to be already insolvent at the time of giving notice, the "apprehension" of the statute being related to a future condition.<sup>25</sup> However, evidence of insolvency at a prior time is not evidence of insolvency at the time, and apprehension of insolvency at a later time will then entitle the surety to proceed under the statute.<sup>26</sup>

### § 216. — Persons Entitled to Give Notice

The notice must come from the surety, or someone authorized to give it in his behalf, and the suretyship relation must have existed at the inception of the contract, although it is not necessary that it should appear from the instrument or that the creditor had knowledge of it at the time.

The notice must come from the surety, or someone authorized to give it in his behalf, and not from a third person.<sup>27</sup> The suretyship relation must have existed at the inception of the contract,<sup>28</sup> but it is not necessary that it shall appear from

12. Ind.—Martin v. Orr, 96 Ind. 491. 50 C.J. p 178 note 72.

13. Mont.—Smith v. Fryler, 1 P. 214, 4 Mont. 489, 47 Am.R. 358. Ohio.—Morrison v. Equitable Nat. Bank, 9 Ohio S. & C.P. 31, 6 Ohio N.P. 7.

14. N.Y.—National Sav. Bank of City of Albany v. Fermac Corporation, 271 N.Y.S. 836, 241 App. Div. 204, affirmed 195 N.E. 145, 266 N.Y. 443—Mutual Life Ins. Co. of New York v. Barca Realty Corporation, 48 N.Y.S.2d 306, affirmed 48 N.Y.S.2d 332, 267 App.Div. 955, appeal denied 49 N.Y.S.2d 272, 267 App.Div. 984, appeal denied 50 N.Y.S.2d 163, 268 App.Div. 768, affirmed 63 N.E.2d 118, 294 N.Y. 925. 50 C.J. p 178 note 74.

15. N.Y.—Hunt v. Purdy, 82 N.Y. 486, 37 Am.R. 587. 50 C.J. p 178 note 75.

16. N.Y.—Herrick v. Borst, 4 Hill 650.

17. N.Y.—Warner v. Beardsley, 8 Wend. 194.

18. N.Y.—Warner v. Beardsley, supra.

Pa.—Boyd v. Commonwealth, 36 Pa. 355.

Nonresidence of principal generally see supra § 214.

19. W.Va.—Corpus Juris cited in State v. Citizens' Nat. Bank of Philippi, 171 S.E. 810, 811, 114 W. Va. 338.

#### In Texas

(1) The rule stated in the text has been followed.—Bumpus v. Lovejoy, Civ.App., 196 S.W. 631—Robertson v. Angle, Civ.App., 76 S. W. 317.

(2) However, in an action in which the court found that the principal was solvent at the time the request by the surety for suit against the principal was made, the court went on to say that, had the principal been insolvent, "we do not agree with appellant in their conclusion of law that such fact would excuse the failure to file suit pursuant to request."—Houston Cent. Bank, etc., Co. v. Hill, Civ.App., 160 S.W. 1099, 1102.

20. Pa.—Weller v. Hoch, 25 Pa. 525.

W.Va.—Corpus Juris cited in State v. Citizens' Nat. Bank of Philippi, 171 S.E. 810, 114 W. Va. 338.

21. N.C.—Bizzell v. Smith, 17 N.C. 27.

W.Va.—Corpus Juris cited in State v. Citizens' Nat. Bank of Philippi, 171 S.E. 810, 811, 114 W. Va. 338.

22. Pa.—Strickler v. Burkholder, 47 Pa. 476.

23. Iowa.—Shenandoah Nat. Bank v. Ayres, 54 N.W. 367, 87 Iowa 526.

24. Iowa.—Shenandoah Nat. Bank v. Ayres, supra. 50 C.J. p 178 note 86.

25. Iowa.—Graham v. Rush, 35 N. W. 518, 73 Iowa 451.

26. Iowa.—Graham v. Rush, supra.

27. Pa.—Geddis v. Hawk, 10 Serg. & R. 33. 50 C.J. p 178 note 89.

28. Ind.—Fensler v. Prather, 43 Ind. 119.

#### Person not a surety within statute

(1) One signing his name on back of note under printed provision that undersigned indorsers guaranteed payment of note and waived presentment, protest, etc., was guarantor as well as indorser of note, and not surety thereon, within statute authorizing surety to require creditor, by written notice, to commence ac-

the instrument<sup>29</sup> or even that the creditor had knowledge of it at the time the liability was created.<sup>30</sup> However, while it has been held that one who signs a note as accommodation maker is not a surety but the one primarily liable to a holder for value who has no knowledge that he is an accommodation maker only and cannot claim a right under the statute to give notice to such a holder,<sup>31</sup> it has been held that, as against one who knows that he is an accommodation maker, he is entitled to give notice.<sup>32</sup>

Where the statute giving the surety the right to compel action by notice restricts the privilege to sureties on certain designated contracts, only sureties within the enumerated classes can exercise the right.<sup>33</sup> It has been held that the right to give notice does not extend to involuntary sureties,<sup>34</sup> and that an indorser cannot claim the privilege<sup>35</sup> unless the indorsement was for the purpose of security merely.<sup>36</sup> On the other hand, it has been held that an accommodation acceptor can avail himself of it.<sup>37</sup> An indemnified surety is denied the privilege, since he has no equities;<sup>38</sup> but a surety's right is not taken away by the fact that he has made a part payment of the debt<sup>39</sup> or because he is officially connected with the creditor corporation.<sup>40</sup>

### § 217. — To Whom Notice May Be Given

Notice by a surety to proceed against the principal may be given to the person having legal title; but no-

tice to an agent or attorney of the creditor will not suffice if the authority of such agent or attorney to receive it does not appear, even though the notice is in fact communicated to the creditor.

Notice by a surety to a creditor to proceed against the principal may be given to the person having the legal title without seeking an equitable owner;<sup>41</sup> and generally notice may be addressed to the holder of the instrument whether he holds it for collection<sup>42</sup> or as collateral security.<sup>43</sup> Notice to an agent or attorney of the creditor will not suffice if the authority of such agent or attorney to receive it does not appear,<sup>44</sup> even though the notice is in fact communicated to the creditor;<sup>45</sup> and generally notice to a public officer will not release a surety.<sup>46</sup> If there are two creditors, notice must be given to both.<sup>47</sup>

### § 218. — Time for Giving Notice

Generally speaking, the surety may give notice to the creditor to proceed against the principal at any time authorized by the statute creating the right; but it has been held that notice may not be given before a cause of action accrues to the creditor.

Generally speaking, the surety may give notice to the creditor to proceed against the principal at any time authorized by the statute creating the right.<sup>48</sup> Notice cannot be given before a cause of action accrues to the creditor<sup>49</sup> or before the amount due has been ascertained if a condition to the liability of the principal.<sup>50</sup> If the surety de-

tion on note against principal debtor, and providing for forfeiture of creditor's right to amount due thereon, if he fails to commence action within reasonable time after such notice.—*Galloway v. Barnesville Loan*, 57 N.E.2d 337, 74 Ohio App. 23.

(2) So, pledge of corporation stock as security for payment of pledgor's indebtedness to pledgee and money thereafter lent to corporation by pledgee did not make pledgor a surety within similar statute.—*Carter v. Curlew Creamery Co.*, 147 P. 2d 276, 20 Wash.2d 275, 151 A.L.R. 921.

29. Ind.—*Hamrick v. Barnett*, 27 N. E. 106, 1 Ind.App. 1.  
50 C.J. p 178 note 91.

30. Mo.—*O'Howell v. Kirk*, 41 Mo. App. 523.

31. Ga.—*Rich v. Warren*, 69 S.E. 573, 135 Ga. 394.

32. Mo.—*Martinsburg Bank v. Bunch*, 251 S.W. 742, 212 Mo.App. 242.

Tex.—*Houston Cent. Bank, etc., Co. v. Hill*, Civ.App., 160 S.W. 1099.

33. Ark.—*Hall v. Equitable Surety Co.*, 191 S.W. 32, 26 Ark. 535.  
50 C.J. p 179 note 95.

34. Ill.—*Fish v. Glover*, 39 N.E. 1081, 154 Ill. 86.

35. Mo.—*Boatmen's Sav. Bank v. Johnson*, 24 Mo.App. 316.

#### Accommodation indorser

An accommodation indorser, who indorses a note before delivery, under the Uniform Negotiable Instruments Act, is not a surety within the provisions of a statute giving a surety the right to require the creditor to proceed against the principal with resulting exoneration from liability if the creditor fails, refuses, or neglects to sue the principal.—*Bank of Conway v. Stary*, 200 N.W. 505, 51 N.D. 399.

36. S.D.—*Bailey Loan Co. v. Seward*, 69 N.W. 58, 9 S.D. 326.

Tex.—*Williams v. J. Ogg, etc., Lumber Co.*, 94 S.W. 420, 42 Tex.Civ. App. 558.

37. Tex.—*Van Alstyne v. Sorley*, 32 Tex. 518.

38. Ark.—*Wilson v. Tebbetts*, 29 Ark. 579, 21 Am.R. 165.

Ga.—*Bailey v. New*, 29 Ga. 214.

39. Iowa.—*Hayward v. Fullerton*, 39 N.W. 651, 75 Iowa 371.

40. Iowa.—*Newton First Nat. Bank v. Smith*, 25 Iowa 216.

41. W.Va.—*Gillilan v. Ludington*, 6 W.Va. 138.

Service of notice see *infra* § 220.

42. Pa.—*Wetzel v. Sponsler*, 18 Pa. 460.

50 C.J. p 179 note 5.

43. Ga.—*McCrary v. King*, 27 Ga. 26.

44. W.Va.—*Kitson v. Messenger*, 27 S.E.2d 265, 126 W.Va. 60.

50 C.J. p 179 note 7.

45. Ill.—*Bartlett v. Cunningham*, 85 Ill. 22.

50 C.J. p 179 note 8.

46. Ark.—*Wilson v. White*, 102 S. W. 201, 32 Ark. 407, 12 Ann.Cas. 378.

50 C.J. p 179 note 9.

47. Ark.—*Kelly v. Matthews*, 5 Ark. 223.

48. Ga.—*Overstreet v. W. T. Raleigh Co.*, 43 S.E.2d 774, 75 Ga.App. 483.

49. Ind.—*Scales v. Cox*, 6 N.E. 622, 106 Ind. 261.

50 C.J. p 179 note 11.

50. Ariz.—*Prescott Nat. Bank v. Head*, 90 P. 328, 11 Ariz. 213, 21 Ann.Cas. 990.

50 C.J. p 179 note 12.

lays giving notice to the creditor to sue the principal until he himself has been sued by the creditor, it is not then too late for him to give the notice under a statute which permits him to give notice "at any time" after the debt becomes due,<sup>51</sup> although under a statute omitting these words it has been held that an action already started by the creditor against the surety alone exempts the creditor thereafter from application of the statute.<sup>52</sup> After the creditor has already recovered judgment against all on whom he could get service of process, notice cannot be served on him to bring another suit.<sup>53</sup>

## § 219. — Form and Sufficiency of Notice

- a. In general
- b. Under statutes

### a. In General

In jurisdictions where, under common-law rule, a surety is discharged if he gives notice and the principal later becomes insolvent, an oral notice has been held sufficient, and it is not necessary that it should inform the creditor of facts suggesting the probability of loss if enforcement of payment is delayed.

In jurisdictions where, under the common-law rule, a surety is discharged if he gives notice and the principal later becomes insolvent, an oral notice has been held sufficient.<sup>54</sup> It is not necessary that it should inform the creditor of facts suggesting the probability of loss if enforcement of payment is delayed.<sup>55</sup> It has been held that it must be accompanied by an offer to indemnify the creditor.<sup>56</sup> A tender of expenses is not required, however, unless the creditor expressly puts his refusal to sue the principal on the ground of the cost.<sup>57</sup> The evidence of giving notice to the creditor must be clear.<sup>58</sup>

### b. Under Statutes

- (1) In general
- (2) Contents of notice

#### (1) In General

Generally speaking, statutory requirements as to the manner in which notice shall be given must be complied with strictly to effect the surety's release.

Generally speaking, statutory requirements as to the manner in which notice shall be given must be complied with strictly to effect the surety's release.<sup>59</sup> The statutes generally call for a written notice, and in such case an oral one will not operate as a release of the surety.<sup>60</sup> Since the requirement as to writing is a personal privilege of the creditor, it may be waived by him,<sup>61</sup> and the waiver may be either express<sup>62</sup> or implied, as where the creditor accepts oral notice and promises compliance therewith;<sup>63</sup> and a surety who relies on the creditor's promise under such circumstances and foregoes means of indemnity and protection is discharged when the creditor fails to bring suit.<sup>64</sup> Written notice is not waived by a failure to object to the introduction of evidence showing an oral request,<sup>65</sup> or by bringing a suit long afterward,<sup>66</sup> or because of a conversation which led the surety to presume that he was released.<sup>67</sup> In some states a waiver of written notice must itself be in writing to avail the surety.<sup>68</sup>

#### (2) Contents of Notice

Notice must be clear, explicit, and unambiguous, amounting to a command, and, if the statute indicates the terms to be used in the notice, a substantial compliance therewith is essential.

Notice must be clear, explicit,<sup>69</sup> and unambigu-

51. Ga.—Overstreet v. W. T. Rawleigh Co., 43 S.E.2d 774, 75 Ga. App. 483.

50 C.J. p 179 note 18.

52. Ala.—Taylor v. Taylor, 75 So. 912, 200 Ala. 164.

53. Ind.—Irwin v. Helgenberg, 21 Ind. 106.

54. Ala.—Strader v. Houghton, 9 Port. 334—Bruce v. Edwards, 1 Stew. 11, 18 Am.D. 33.

55. N.Y.—Remsen v. Beekman, 25 N.Y. 552—King v. Baldwin, 17 Johns. 384, 8 Am.D. 415.

56. Minn.—Huey v. Pinney, 5 Minn. 310.

57. Pa.—Wetzel v. Sponsler, 18 Pa. 460.

58. Pa.—Conrad v. Foy, 68 Pa. 381—Wolleshlare v. Searles, 45 Pa. 45.

59. Ga.—Bowen v. Mobley, 151 S.E. 667, 40 Ga.App. 833.

50 C.J. p 180 note 23.

60. Ga.—Gettis v. Gormley, 175 S.E. 393, 49 Ga.App. 339.

Ind.—Reisman v. Terre Haute Sav. Bank, 180 N.E. 490, 96 Ind.App. 652.

Ky.—Goodloe v. Anderson, 121 S.W. 2d 958, 275 Ky. 460.

Tex.—First Nat. Bank of Fort Worth v. Brown, Civ.App., 172 S.W.2d 151, error refused—Pope v. Titwin, Civ.App., 57 S.W.2d 1105, error dismissed.

50 C.J. p 180 note 25.

61. Ga.—Gettis v. Gormley, 175 S.E. 393, 49 Ga.App. 339.

50 C.J. p 180 note 26.

62. Ga.—Gettis v. Gormley, supra.

Ky.—Hamblin v. McCallister, 4 Bush. 418.

63. Ga.—Gettis v. Gormley, 175 S.E. 393, 49 Ga.App. 339.

50 C.J. p 180 note 28.

64. Ga.—Longley v. Johnson, 95 S.E. 315, 22 Ga.App. 96.

65. Iowa.—Davis v. Payne, 45 Iowa 194.

66. Wash.—Kittridge v. Stegmier, 39 P. 242, 11 Wash. 3.

67. Tex.—Beasley v. Boothe, 22 S.W. 255, 3 Tex.Civ.App. 98.

50 C.J. p 180 note 32.

68. Ky.—Hibler v. Shipp, 78 Ky. 64.

50 C.J. p 180 note 33.

69. W.Va.—Williams v. Zimmerman, 20 S.E.2d 785, 124 W.Va. 453.

50 C.J. p 180 note 34.

Notice held sufficiently definite and positive

Pa.—Second Saving Fund & Loan

ous,<sup>70</sup> not needing explanation or elucidation.<sup>71</sup> If the statute indicates the terms to be used in the notice, a substantial compliance therewith is essential.<sup>72</sup> Unless the statute so requires, the grounds fixed by the statute permitting the giving of notice need not be stated.<sup>73</sup> The notice must amount to a command;<sup>74</sup> it is not sufficient to express a hope,<sup>75</sup> a wish,<sup>76</sup> or a desire;<sup>77</sup> nor will it be a sufficient compliance for the surety to give a hint,<sup>78</sup> to make a request,<sup>79</sup> to urge,<sup>80</sup> to suggest,<sup>81</sup> to advise,<sup>82</sup> to instruct to dun the principal,<sup>83</sup> or to state that the surety refuses to remain liable,<sup>84</sup> or that he will not pay except under compulsion.<sup>85</sup> If it is doubtful whether the surety intended to request suit as a matter of favor, or to require it as a matter of right, it is for the jury to determine from the facts how the parties understood it.<sup>86</sup> The burden is on the surety to show that the terms of the notice comply with the requirements of the statute.<sup>87</sup>

ute.<sup>87</sup>

**Signature.** Where the statute does not otherwise provide, it has been held that it is not essential to the validity of the notice that it be signed by the surety,<sup>88</sup> especially where the notice itself indicates that it is by the surety, and the surety personally serves it on the creditor.<sup>89</sup>

## § 220. — Service of Notice

The statutory notice must be given to the person entitled to sue at the time it is served, and the manner of service must follow the statutory requirements or valid contractual provisions on the subject.

The statutory notice by a surety to sue must be given to the person entitled to sue at the time it is served.<sup>90</sup> The manner of service must follow the statutory requirements<sup>91</sup> or valid contractual provisions on the subject.<sup>92</sup> Under a statute providing for service by delivery of a copy to the per-

Ass'n v. Bailey, 170 A. 369, 313 Pa. 519.

70. Pa.—Greenawalt v. Kreider, 3 Pa. 264, 45 Am.D. 639.

71. Pa.—Shimer v. Jones, 47 Pa. 268.

72. W.Va.—Williams v. Zimmerman, 20 S.E.2d 785, 124 W.Va. 458. 50 C.J. p 180 note 37.

### Notice held sufficient

Ind.—Reiman v. Terre Haute Sav. Bank, 180 N.E. 490, 96 Ind.App. 652.

### "Collect" and "institute suit"

(1) A notice by a surety requiring creditor to collect it from principal maker has been held insufficient under provision that a creditor may be required by a surety "forthwith to institute suit" on the contract involved.—Williams v. Zimmerman, 20 S.E.2d 785, 124 W.Va. 458.

(2) However, in a number of cases it has been held that a requirement by a surety that the creditor "collect" is equivalent to a demand "to institute suit."

Ind.—Franklin v. Franklin, 71 Ind. 573.

Ky.—Baker v. Whittaker, 197 S.W. 644, 177 Ky. 197.

Ohio.—Hiff v. Weymouth, 40 Ohio St. 101.

Pa.—Strickler v. Burkholder, 47 Pa. 476.

Tex.—Sullivan v. Dwyer, Civ.App., 42 S.W. 355.

### Parties

Ark.—W. T. Rawleigh Co. v. Moore, 121 S.W.2d 106, 196 Ark. 1148.

Iowa.—Harriman v. Egbert, 36 Iowa 270.

50 C.J. p 180 note 37 [a] (2), (3).

### County of debtor's residence

(1) Under a statute providing that no notice shall be considered a compliance which does not state

county of principal's residence, notice must state county of principal debtor's residence.—Gettis v. Gormley, 175 S.E. 393, 49 Ga.App. 339—Bowen v. Mobley, 151 S.E. 667, 40 Ga.App. 833.

(2) A notice fatally defective in this respect, but received by the creditor with the remark "all right," could amount to nothing more than a promise by the creditor, without consideration, to proceed against the principal debtor, and would have no effect on the obligation of the surety.—Bowen v. Mobley, supra.

(3) A notice stating that the principal's residence is a named city or town, without stating the county, is not the notice required by the statute.—Seckinger v. Springfield Exch. Bank, 145 S.E. 94, 38 Ga.App. 667.

73. Ala.—Shehan v. Hampton, 8 Ala. 942.

50 C.J. p 181 note 38.

74. Ohio.—Porter v. First Nat. Bank, 43 N.E. 165, 54 Ohio St. 155. 50 C.J. p 181 note 39.

75. Ark.—Bates v. State Bank, 7 Ark. 394, 46 Am.D. 293.

76. Ohio.—Baker v. Kellogg, 29 Ohio St. 663.

Tenn.—Farrish v. Gray, 1 Humphr. 88.

77. Colo.—Bowling v. Chambers, 77 P. 16, 20 Colo.App. 113.

50 C.J. p 181 note 42.

78. Pa.—Greenawalt v. Kreider, 3 Pa. 264, 45 Am.D. 639.

79. Okl.—Union Mut. Ins. Co. v. Page, 164 P. 116, 65 Okl. 101, L.R. A.1918C 1.

50 C.J. p 181 note 44.

80. N.Y.—Coykendall v. Constable, 1 N.Y.S. 9, 48 Hun 360, affirmed 22 N.E. 1128, 117 N.Y. 627.

81. Ky.—Benge v. Eversole, 160 S. W. 911, 156 Ky. 131.

50 C.J. p 181 note 46.

82. Ark.—Glenn v. Union Bank, etc., Co., 233 S.W. 798, 150 Ark. 38. Dak.—Kennedy v. Falde, 29 N.W. 667, 4 Dak. 319.

83. Ala.—Darby v. Berney Nat. Bank, 11 So. 881, 97 Ala. 643.

50 C.J. p 181 note 48.

84. Mo.—Lockridge v. Upton, 24 Mo. 184.

Pa.—Wilson v. Glover, 3 Pa. 404.

50 C.J. p 181 note 49.

85. Tex.—Williams v. J. Ogg, etc., Lumber Co., 94 S.W. 420, 42 Tex. Civ.App. 558.

50 C.J. p 181 note 50.

86. Ga.—Bethune v. Dozier, 10 Ga. 235.

87. Ky.—Benge v. Eversole, 160 S. W. 911, 156 Ky. 131.

50 C.J. p 181 note 52.

88. Iowa.—Cleophas v. Walker, 233 N.W. 257, 211 Iowa 122.

89. Iowa.—Cleophas v. Walker, supra.

90. Ala.—W. P. Brown, etc., Lumber Co. v. Steele, 70 So. 161, 195 Ala. 211.

50 C.J. p 181 note 53.

### Service on attorney of creditor held insufficient

W.Va.—Kitson v. Messenger, 27 S.E. 2d 265, 126 W.Va. 60.

91. Mo.—Conway v. Campbell, 38 Mo.App. 473.

92. Ark.—W. T. Rawleigh Co. v. Moore, 121 S.W.2d 106, 196 Ark. 1148.

### Registered mail; place of service

Where surety contract provided that any notice in any way affecting rights of creditor must be delivered by registered mail to creditor at cer-

son notified, it has been held that personal service is required,<sup>93</sup> and that the statute does not permit the mailing of a copy to such person.<sup>94</sup> Where neither the statute nor the contract makes provision for the manner of service of notice, it has been held that service by mail is sufficient.<sup>95</sup> The requirement of a written notice does not necessitate the making of the notice in duplicate, one copy to be served and the other retained by the surety.<sup>96</sup> Where the notice is in duplicate, either copy may be served.<sup>97</sup> Proof of service of notice must follow the statutory requirements where they exist.<sup>98</sup>

## § 221. — Compliance with Notice

- a. In general
- b. Time within which action must be begun
- c. Against whom action must be brought
- d. Necessity and sufficiency of prosecution

### a. In General

On receipt of notice duly served, the creditor must comply with the statutory requirements or the surety will be discharged.

On receipt of notice duly served, the creditor must comply with the statutory requirements<sup>99</sup> either by bringing suit himself<sup>1</sup> or by sending the necessary papers to the surety and permitting him to sue in the creditor's name,<sup>2</sup> the creditor's duties and rights being determined by the terms of the statute in force when he receives the notice to

sue.<sup>3</sup> The creditor is not compelled to resort to additional remedies, such as attachment, to enforce the collection of his claim;<sup>4</sup> nor is he obliged to realize on security in his hands if he offers to assign it to the surety on the latter's payment of the claim, and permits the surety to sue in the creditor's name.<sup>5</sup>

*Courts open to creditor.* The bringing of a suit in a court not having jurisdiction of the debtor is the equivalent of no suit at all and cannot be urged as compliance with the notice.<sup>6</sup> If the statute will be complied with by bringing suit in any one of two or more courts, the creditor has the privilege of selecting either, although the matter might be expedited if another were chosen.<sup>7</sup> However, where one of the courts open to the creditor has jurisdiction over the surety only, and the other has jurisdiction over both principal and surety, the creditor must bring his action in the latter court.<sup>8</sup>

### b. Time within Which Action Must Be Begun

The time within which an action must be commenced depends to a large extent on the terms of the statute imposing the duty on the creditor.

The time within which an action must be commenced depends to a large extent on the terms of the statute imposing the duty on the creditor.<sup>9</sup> Under some statutes action must be commenced within a reasonable time.<sup>10</sup> Under others action must be brought in the first term of court having jurisdiction, after notice is received,<sup>11</sup> and, under such a statute, if the court is in session when the no-

tain place, sending a letter, which was not registered and was sent to a different place and which requested creditor to institute suit forthwith against principal did not exonerate such surety.—*W. T. Rawleigh Co. v. Moore*, supra.

93. Mo.—*Conway v. Campbell*, 38 Mo.App. 473.

94. Mo.—*Conway v. Campbell*, supra.

95. Ark.—*W. T. Rawleigh Co. v. Moore*, 121 S.W.2d 106, 196 Ark. 1148.

96. Mo.—*Lewis v. Warden*, 148 S. W. 165, 163 Mo.App. 256.

97. Mo.—*Sparks v. Munson*, 76 Mo. App. 83.

98. Tenn.—*Miller v. Childress*, 2 Humphr. 320.  
50 C.J. p 181 note 60.

99. Ind.—*Reiman v. Terre Haute Sav. Bank*, 180 N.E. 490, 96 Ind. App. 652.

Miss.—*North American Life Ins. Co. v. Smith*, 172 So. 135, 178 Miss. 238.

Mo.—*Massillion Engine & Thresher*

*Co. v. Hayward*, App., 256 S.W. 536, applying Arkansas law.

Ohio.—*Galloway v. Barnesville Loan*, 57 N.E.2d 337, 74 Ohio App. 23.

Tex.—*Southwestern Surety Co. v. Lafferty*, Civ.App., 43 S.W.2d 460, reversed on other grounds *Nacogdoches County v. Lafferty*, Com.App., 61 S.W.2d 994.

1. Iowa.—*German-American Bank v. Denmire*, 12 N.W. 237, 58 Iowa 137.

2. Iowa.—*Pleasantville Citizens' Bank v. Hickman*, 162 N.W. 606, 179 Iowa 1178.  
50 C.J. p 181 note 65.

3. Ky.—*Nichols v. McDowell*, 14 B. Mon. 6.  
50 C.J. p 182 note 66.

4. Tex.—*Robertson v. Angle*, Civ. App., 76 S.W. 317.

5. Okl.—*Poteau Nat. Bank v. Lowrey*, 157 P. 103, 57 Okl. 304.

6. Ga.—*Overstreet v. W. T. Rawleigh Co.*, 43 S.E.2d 774, 75 Ga. App. 483.

7. Miss.—*Mississippi Valley Trust*

*Co. v. Brewer*, 128 So. 83, 157 Miss. 890.

50 C.J. p 182 note 70.

8. Mo.—*Sisk v. Rosenberger*, 82 Mo. 46—*Hardy v. Worthen*, 53 Mo.App. 580.

9. Miss.—*Mississippi Valley Trust Co. v. Brewer*, 128 So. 83, 157 Miss. 890.

10. Ill.—*Segal v. Feinberg*, 26 N.E. 2d 752, 304 Ill.App. 595.  
50 C.J. p 182 note 73.

What is a "reasonable time" is determined by circumstances of each case.—*Segal v. Feinberg*, supra.

*Time held reasonable*

A delay of three months.

Ill.—*Segal v. Feinberg*, 26 N.E.2d 752, 304 Ill.App. 595.

Kan.—*Ingels v. Sutliff*, 13 P. 828, 36 Kan. 444.

11. Miss.—*Mississippi Valley Trust Co. v. Brewer*, 128 So. 83, 157 Miss. 890.

50 C.J. p 182 note 75.

*Suit by nonresident in federal court having jurisdiction at first term of such court after notice was sufficient compliance, notwithstanding*

tice is received, action must be brought at once, and not at a subsequent term.<sup>12</sup> Under still other statutes action must be commenced within a certain fixed time after receiving notice.<sup>13</sup> The statute places no obligation on the creditor to act prior to notice served on him by the surety,<sup>14</sup> and so a surety who complains of the time at which the creditor first took steps to realize on collateral held by him must show a prior demand for action at some earlier time.<sup>15</sup> A delay by the creditor in commencing suit may be justified, however, by circumstances, and by proof of diligence of the creditor therein,<sup>16</sup> provided the facts in justification are established by proof.<sup>17</sup> Delay is not excused by the fact that the surety is not injured thereby,<sup>18</sup> or by the country being in a state of civil war, if the courts are open.<sup>19</sup> Where a creditor justifies a failure to commence an action by denying receipt of notice, evidence of a cosurety's financial standing is admissible as tending to show that reliance thereon, and not the reason given, was the real ground for not bringing action.<sup>20</sup> It is a question of law whether a creditor has been duly diligent in proceeding against the principal.<sup>21</sup>

#### c. Against Whom Action Must Be Brought

The suit must be a suit against the principal, not the surety, and, where the statute provides who shall be made parties defendant, the statutory requirements must be met.

The suit contemplated by the statute is a suit against the principal, not the surety,<sup>22</sup> and, where

the notice requires suit to be brought against all principals, if there are more than one, all must be sued.<sup>23</sup> The statute sometimes provides who shall be made parties defendant, and the statutory requirements must be met,<sup>24</sup> both principal and surety being necessary parties defendant in some jurisdictions;<sup>25</sup> principal only or principal and surety<sup>26</sup> but not the surety alone,<sup>27</sup> in others. A statute merely requiring that, on notice from the surety, the claim shall be put in suit has been construed to permit the bringing of an action against the surety alone without joining the principal,<sup>28</sup> the surety in such action being allowed, however, by notifying the principal, to have judgment against him at the same time that judgment is secured against himself by the creditor.<sup>29</sup>

#### d. Necessity and Sufficiency of Prosecution

The statute is not complied with by merely instituting suit, but it also includes the duty of prosecuting it with due diligence.

The statute is not complied with by merely instituting suit, but it also includes the duty of prosecuting it with due diligence,<sup>30</sup> a surety being discharged if the suit once instituted is dismissed for some cause not explained,<sup>31</sup> or by failure properly to plead,<sup>32</sup> or by failure to take out an alias summons to the next term if service is not obtained at the first,<sup>33</sup> or by failure to prosecute to effect,<sup>34</sup> or by an inexcusable delay in taking out execution of the judgment,<sup>35</sup> unless the statute only requires diligence in prosecuting the suit "to judg-

ing it was not brought at first term of state court.—Mississippi Valley Trust Co. v. Brewer, *supra*.

12. Ind.—Hamrick v. Barnett, 27 N. E. 106, 1 Ind.App. 1.

Pa.—Wetzel v. Sponsler, 18 Pa. 460.

13. Ga.—Gettis v. Gormley, 175 S.E. 393, 49 Ga.App. 339.

50 C.J. p 182 note 78.

14. Miss.—Johnson v. Success Brick Mach. Co., 61 So. 178, 62 So. 4, 104 Miss. 217.

50 C.J. p 182 note 79.

15. Okl.—Moorehead v. Daniels, 153 P. 623, 57 Okl. 298.

16. Tex.—Robertson v. Angle, Civ. App., 76 S.W. 317.

50 C.J. p 182 note 81.

17. Mo.—Patton v. Cooper, 84 Mo. App. 427.

50 C.J. p 182 note 82.

18. Tex.—Sullivan v. Dwyer, Civ. App., 42 S.W. 355.

19. Mo.—Cockrill v. McCurdy, 33 Mo. 365.

20. Kan.—Vandl v. Hagler, 27 Kan. 497.

21. N.C.—Neal v. Freeman, 85 N.C. 441.

22. Iowa.—Pleasantville Citizens' Bank v. Hickman, 162 N.W. 606, 179 Iowa 1178.

50 C.J. p 182 note 87.

23. Mo.—Hammond v. McHargue, 156 S.W. 725, 170 Mo.App. 497.

24. Mo.—Davis v. Gillilan, 71 Mo. App. 498.

25. Mo.—Davis v. Gillilan, *supra*.

50 C.J. p 182 note 91.

26. Ind.—Rowe v. Buchtel, 13 Ind. 381.

27. Ohio.—Starling v. Buttles, 2 Ohio 303.

28. Ala.—Scott v. Bradford, 5 Port. 443.

29. Ala.—Scott v. Bradford, *supra*.

30. Ind.—Reiman v. Terre Haute Sav. Bank, 180 N.E. 490, 96 Ind. App. 652.

50 C.J. p 183 note 97.

31. Ind.—Overturf v. Martin, 2 Ind. 507.

Second suit within prescribed time  
On creditor's dismissal of suit without surety's permission, creditor was required to bring another suit within period of time prescribed by statute from date of original no-

tice to prevent discharge of surety.—Gettis v. Gormley, 175 S.E. 393, 49 Ga.App. 339.

32. Ark.—Hempstead v. Watkins, 6 Ark 317, 42 Am.D. 696.

33. Mo.—Peters v. Linenschmidt, 53 Mo. 464.

34. Ind.—Reiman v. Terre Haute Sav. Bank, 180 N.E. 490, 96 Ind. App. 652.

Delay of final judgment will not of itself operate to discharge the surety where there is no contention that suit was not prosecuted in the ordinary way, under the rules of procedure in the court, subject to the exigencies of any lawsuit pending in any court.—Mississippi Valley Trust Co. v. Brewer, 128 So. 83, 157 Miss. 890.

35. Ind.—Martin v. Orr, 96 Ind. 491.—Reiman v. Terre Haute Sav. Bank, 180 N.E. 490, 96 Ind.App. 652.

Lapse of over a year after judgment without issuing execution thereon was held unreasonable time within statute discharging surety.—Reiman v. Terre Haute Sav. Bank, *supra*.

ment," in which case the creditor is under no obligation to take out execution.<sup>36</sup> A statute requiring a creditor to take out execution against the principal on notice by the surety does not require the taking out of a second execution if one has been taken out already.<sup>37</sup> Where execution is issued but is stayed for sufficient reasons, it has been held that the surety is not discharged.<sup>38</sup> It has also been held that a statute requiring commencement of action after notice does not require the bringing of a second action where it is shown that an action against the principal had already been filed before notice received in the county of his residence but that the sheriff had made a return that he could not be found.<sup>39</sup>

## § 222. — Withdrawal or Waiver of Notice

A surety's release from liability by reason of the creditor's failure to sue the principal debtor may be

waived, and such waiver may be effected by a provision in the suretyship contract, or by acts or conduct of the surety after giving notice.

A surety's release from liability by reason of the creditor's failure to sue the principal debtor may be waived.<sup>40</sup> Such waiver may be effected by a provision in the suretyship contract,<sup>41</sup> or by acts or conduct of the surety after giving notice.<sup>42</sup> The surety may waive or withdraw his notice by requesting the creditor not to sue,<sup>43</sup> or by acquiescing in the dismissal of a suit brought in compliance with his notice,<sup>44</sup> in which case the surety's liability continues. A surety does not waive his rights under a notice given to the creditor to sue by requesting an indulgence for his creditor after the statutory time for bringing suit has elapsed,<sup>45</sup> or by asking for indulgence for himself, not for the principal.<sup>46</sup> Waiving diligence or promptness in bringing a suit against the principal does not mean acquiescence in the failure to bring any suit at all.<sup>47</sup>

## H. RELEASE

### § 223. Release of Principal

The release of the principal debtor, without the consent of the surety, releases the surety, but it has been held that the creditor in releasing the principal may reserve his rights against the surety.

The general rule is that the release of the principal debtor, without the consent of the surety, releases the surety.<sup>48</sup> Similarly, it has been held that a covenant not to sue the principal will release the

36. Va.—Harrison v. Price, 25 Gratt. 553, 66 Va. 553.

37. Ky.—National Surety Co. v. Arterburn, 62 S.W. 862, 110 Ky. 332, 23 Ky.L. 281.

38. Where evidence indicated that debtor was execution proof, creditor's alleged failure to proceed against debtor did not discharge surety, in absence of showing that anything was lost by creditor's failure to follow up its levy.—Keystone Bank of Spangler, Pa. v. Booth, 6 A.2d 417, 334 Pa. 545.

39. Ga.—J. R. Watkins Co. v. Seawright, 149 S.E. 389, 40 Ga.App. 314.

40. Pa.—Commonwealth v. National Surety Co., 164 A. 788, 310 Pa. 108, 39 A.L.R. 564.

41. Pa.—Commonwealth v. National Surety Co., supra.

50 C.J. p 177 note 67.

#### Provisions not effecting waiver

(1) A provision in the suretyship contract to the effect that creditor may proceed against the sureties without first exhausting its remedies against the principal does not operate to waive the right of the surety to give notice to the creditor to sue the principal.

Ga.—Overstreet v. W. T. Rawleigh Co., 43 S.E.2d 774, 75 Ga.App. 483.

Miss.—Warren v. W. T. Raleigh Co., 165 So. 436, 174 Miss. 603.

(2) The right is not waived by contract whereby sureties waived notice of time extension.—Warren v. W. T. Raleigh Co., supra.

42. Tex.—Corpus Christi City Nat. Bank v. Pope, Civ.App., 260 S.W. 903.

43. Tex.—Turbeville v. Worsham, Civ.App., 274 S.W. 639.

50 C.J. p 183 note 8.

44. Wash.—Kittridge v. Stegmier, 39 P. 242, 11 Wash. 3.

45. Ga.—Bailey v. New, 29 Ga. 214.

46. Ga.—Bailey v. New, supra.

47. Ga.—J. R. Watkins Co. v. Seawright, 154 S.E. 293, 41 Ga.App. 617.

48. U.S.—Crane Co. v. James McHugh Sons, C.C.A.Okl., 108 F.2d 55—Sarasota County, Fla., v. American Surety Co. of New York, C.C.A.Fla., 68 F.2d 543—National Surety Co. v. George E. Breece Lumber Co., C.C.A.N.M., 60 F.2d 847—Haddad v. Western Contracting Corp., D.C.W.Va. 71 F.Supp. 212.

Ala.—Scott v. McGriff, 132 So. 177, 222 Ala. 344.

Ill.—Bank of America v. Jorjorian, 24 N.E.2d 896, 303 Ill.App. 184.

Mass.—Karcher v. Burbank, 21 N.E. 2d 542, 303 Mass., 303, 124 A.L.R. 1292.

N.H.—Judge of Probate v. Campion, 185 A. 894, 88 N.H. 195.

N.J.—Brooks-Wright, Inc. v. Maryland Casualty Co., 39 A.2d 446, 135 N.J.Eq. 510.

N.Y.—Bank of U. S. v. Moskowitz, 268 N.Y.S. 705, 150 Misc. 629—Dumbadze v. Agency of Canadian Car & Foundry Co., 38 N.Y.S.2d 991, affirmed Gurge v. Agency of Canadian Car & Foundry Co., 45 N.Y.S.2d 955, 267 App.Div. 782, appeal denied In re Dumbadze's Estate, 47 N.Y.S.2d 815, 267 App. Div. 878.

N.C.—First & Citizens Nat. Bank of Elizabeth City v. Hinton, 4 S.E.2d 322, 216 N.C. 158.

N.D.—Hettinger County v. Trousdale, 5 N.W.2d 417, 72 N.D. 203.

Ohio.—Gholson v. Savin, 31 N.E.2d 858, 137 Ohio St. 551.

S.C.—Salway v. Maryland Casualty Co., 179 S.E. 787, 176 S.C. 215.

Wash.—Spaulding v. Aetna Casualty & Surety Co., 4 P.2d 526, 164 Wash. 665.

Wis.—National Bank of La Crosse v. Funke, 255 N.W. 147, 215 Wis. 541, 93 A.L.R. 365.

50 C.J. p 93 note 30, p 183 note 12.

#### Reason for rule

The surety is discharged because he cannot recover over against a principal who has been discharged by his creditor.—Sarasota County, Fla., v. American Surety Co. of New York, C.C.A.Fla., 68 F.2d 543.

Release of subsequent grantee as-



surety.<sup>49</sup> While it has been held that, where the principal debtor by the terms of the release is fully discharged, the reservation of a right to enforce the claim against the surety is ineffectual,<sup>50</sup> and that the claim against the surety is not preserved unless it appears from the reservation that the release is, in fact, a mere covenant not to sue, and not a discharge of the principal debtor,<sup>51</sup> other authorities have held that a creditor, in releasing the principal debtor, may reserve his rights against a surety, and by such reservation the surety may be held liable for the unpaid part of the debt.<sup>52</sup>

In the absence of a statute otherwise providing, a surety is not discharged by release of the principal if he consents thereto;<sup>53</sup> or if he waives his right to defend on that ground;<sup>54</sup> or if, when he became surety, security was placed in his hands

to indemnify him against possible loss from his undertaking;<sup>55</sup> or if he has undertaken, by a new contract with the creditor, to settle the matter of his own liability;<sup>56</sup> or where a statute provides that the release of the principal shall not operate as a discharge of the surety.<sup>57</sup> Of course, a surety is not discharged by release of his principal given by the creditor after he has assigned his claim to another,<sup>58</sup> or by the release of a third person, who assisted the principal in committing the default,<sup>59</sup> unless the rights of the sureties are interfered with thereby, resulting in loss to them.<sup>60</sup>

So the sureties are not released where the transaction relied on as constituting a release of the principal does not have that legal effect,<sup>61</sup> as where it is without consideration,<sup>62</sup> or is so indefinite and uncertain as to be unenforceable,<sup>63</sup> or is procured by the principal's fraud,<sup>64</sup> unless the surety

summing notes secured by lien also released the maker of the notes who stood in relation of surety.—*Mays v. Sanders*, Tex.Civ.App., 36 S.W. 108.

#### Doctrine of "res judicata" applied

In action on bond required on appeal and conditioned that appellant should pay all damages if decree was affirmed, where attorney for appellee executed in consideration of payment of costs and attorney's fees

#### Restatement of the Law of Security

"Where the creditor releases a principal, the surety is discharged, unless . . . the creditor in the release reserves his rights against the surety. Restatement of the Law of Security, Sec. 122."—*Haddad v. Western Contracting Corp.*, D.C.W. Va., 71 F.Supp. 212, 223.

The release of a comaker of a note, who, as to the other maker, is merely a surety, did not release

59 La.—*Union Nat. Bank v. Legendre*, 35 La.Ann. 787.

Md.—*McShane v. Howard Bank*, 20 A. 776, 73 Md. 135, 10 L.R.A. 552.

60. Ill.—*Foss v. Chicago*, 34 Ill. 488.

61. N.J.—*Brooks-Wright, Inc. v. Maryland Casualty Co., Ch.*, 29 A. 2d 882, 133 N.J.Eq. 15, reversed on other grounds 39 A.2d 446, 135 N.J.Eq. 510.

is injured by the passiveness of the obligee after discovery of the fraud.<sup>65</sup> At common law the release of a debtor whose person was in execution on a *capias ad satisfaciendum* extinguished the judgment itself and the liability of the judgment debtor's surety,<sup>66</sup> but this rule has been held not to apply to a commitment in contempt proceedings so as to release the sureties of the contemnor,<sup>67</sup> or to a discharge from imprisonment under a *capias ad satisfaciendum*, where the statutes preserve the judgment.<sup>68</sup> The liability of a surety once released cannot be revived without his consent;<sup>69</sup> and, if the surety, in ignorance of the release of the principal, has made payment, he can recover the amount paid.<sup>70</sup> A partial release operates to discharge the surety *pro tanto* only.<sup>71</sup>

## § 224. — Release of One of Several Principals

A release of one of several persons jointly bound as principals releases the surety on their bond, but this rule does not apply when the coprincipal was released from a different obligation than the one on which the surety is bound.

The general rule is that a release of one of sev-

eral persons jointly bound as principals releases the surety on their bond,<sup>72</sup> but this rule does not apply when the coprincipal was released from a different obligation than the one on which the surety is bound.<sup>73</sup> Where a bond is given by joint trustees binding them jointly for their joint acts and each one severally for his own act, it has been held that the release of a trustee not in default does not release the surety from liability for a cotrustee's own acts.<sup>74</sup> A release to principals with a joint and several liability contingent on performance of a settlement agreement by one will not relieve the surety of the other, in the event of failure of the first to fulfill his obligation under the settlement.<sup>75</sup>

## § 225. — Compromise and Settlement

A composition, or compromise and settlement, between the creditor and the principal, by which the latter is discharged from liability, discharges his surety.

A composition, or a compromise and settlement between the creditor or obligee and the principal, by which the latter is discharged from liability, discharges his surety,<sup>76</sup> even though the discharge was

Md.—Parr v. State, 17 A. 1020, 71 Md. 220.

65. Pa.—Gordon v. McCarty, 3 Whart. 407.

66. U.S.—U. S. v. Stansbury, Md., 1 Pet. 573, 7 L.Ed. 267.

50 C.J. p 184 note 31.

67. Ark.—Hawkins v. Mims, 36 Ark. 145, 38 Am.R. 30.

68. U.S.—U. S. v. Stansbury, Md., 1 Pet. 573, 7 L.Ed. 267.

50 C.J. p 184 note 33.

69. Ky.—Calloway v. Snapp, 78 Ky. 561.

Mich.—Greenlee v. Lowing, 35 Mich. 63.

70. N.Y.—Hirsh v. Munger, 3 Thomps. & C. 290.

Recovery of payments after discharge generally see *infra* § 294.

71. N.J.—Corpus Juris cited in Mann v. Bugbee, 167 A. 202, 206, 113 N.J.Eq. 434.

N.C.—First & Citizens Nat. Bank of Elizabeth City v. Hinton, 4 S. E.2d 332, 216 N.C. 159.

50 C.J. p 184 note 36.

72. Okl.—Sudberry v. Johnston, 45 P.2d 1086, 172 Okl. 641.

Pa.—Appeal of Taxpayers Report of Controller Northumberland County, Com.Pl., 21 Northumb.Leg.J. 32.

50 C.J. p 184 note 37.

Payee's release of one of principal makers of note constituted alteration of original obligation, as well as impairment of remedies and rights of creditor against principal,

and, where made without consent of surety, it operated to discharge surety from all liability on note.—Sudberry v. Johnston, 45 P.2d 1086, 172 Okl. 641.

### Release not shown

Ga.—Arnold v. Darby, 176 S.E. 914, 49 Ga.App. 629.

73. N.Y.—Everett v. Mitchell, 48 N.Y.S. 303, 23 App.Div. 332.

50 C.J. p 184 note 38.

74. N.Y.—Kirby v. Turner, Hopk. 309.

50 C.J. p 184 note 39.

75. Tex.—Galveston, etc., R. Co. v. Walker, 219 S.W. 815, 110 Tex. 286.

50 C.J. p 184 note 40.

76. U.S.—Haddad v. Western Contracting Corp., D.C.W.Va., 71 F. Supp. 212.

Iowa.—Heinz v. Davenport Bank & Trust Co., 298 N.W. 785, 230 Iowa 546.

La.—Manale v. Harris, App., 165 So. 339.

N.H.—Fellows Box Co. v. Mills, 167 A. 153, 86 N.H. 267.

N.J.—Slatoff v. Theurich, 199 A. 49, 123 N.J.Eq. 593.

N.Y.—Dumbadze v. Agency of Canadian Car & Foundry Co., 38 N.Y. S.2d 991, affirmed Gurge v. Agency of Canadian Car & Foundry Co., 45 N.Y.S.2d 955, 267 App.Div. 782, appeal denied *In re Dumbadze's Estate*, 47 N.Y.S.2d 315, 267 App. Div. 878.

Ohio.—Gholson v. Savin, 31 N.E.2d 858, 137 Ohio St. 551, 139 A.L.R.

75—Harris v. De Paulina, 178 N. E. 225, 40 Ohio App. 57.

Wis.—National Bank of La Crosse v. Funke, 255 N.W. 147, 215 Wis. 541, 93 A.L.R. 365.

50 C.J. p 183 note 13, p 185 note 42.

### Compromise of suit against receiver

Makers of note, executed as collateral to original notes, were held exonerated by creditors' compromise of suit involving originals against debtor's receiver.—First Nat. Bank v. Holding, 4 P.2d 709, 90 Mont. 529.

### Surety not deprived of right to restrain creditor

Where claimed reservation of right against surety does not appear on face of composition agreement, the fact that the agreement provides that those released shall have the benefit of legislative enactments with respect to the compromise and discharge of claims against one or more joint debtors does not deprive mere surety of right to injunction restraining creditor from maintaining action against him.—Slatoff v. Theurich, 199 A. 49, 123 N. J.Eq. 593.

### Discharge not revoked

Where subcontractor was discharged by settlement with principal contractor, subcontractor's surety was discharged and such discharge was not revoked by subsequent action of subcontractor in suing on the subcontract rather than on the settlement agreement.—Haddad v. Western Contracting Corp., D.C.W.Va., 71 F.Supp. 212.

the result of new security given by the principal to the creditor which has proved worthless.<sup>77</sup> However, an unconsummated<sup>78</sup> or fraudulent<sup>79</sup> agreement to compromise, falling short of any effective settlement, will not discharge the surety. A surety is discharged by failure of the creditor to rescind promptly after knowledge that a settlement with the principal was procured through the latter's fraud<sup>80</sup> or through mistake.<sup>81</sup>

## § 226. — Effect on Collateral Securities

A release of the principal also will release sureties liable on collateral security for the debt, and property pledged or mortgaged to secure the debt.

A release of the principal also will release sureties liable on collateral security for the debt,<sup>82</sup> and property pledged<sup>83</sup> or mortgaged to secure the debt.<sup>84</sup>

## § 227. Release of Surety

The surety is discharged by an express release of his liability pursuant to an arrangement between the creditor and surety, or between the creditor and principal.

The surety is discharged by an express release

of his liability pursuant to an arrangement between the creditor and the surety,<sup>85</sup> or between the creditor and the principal.<sup>86</sup> In order to effect his discharge an agreement for the release of a surety must amount to a binding and enforceable contract,<sup>87</sup> and it is no defense that there was a mere understanding that the surety was to be released.<sup>88</sup> A surety is not discharged by a contract for his release made between the creditor and the principal, and unexecuted through no fault of the creditor,<sup>89</sup> nor is a retiring partner released as surety because the creditor has all of his dealings with the continuing partners.<sup>90</sup> Sureties cannot release themselves from their obligations and undertakings by their own acts and conduct without the consent of the creditor.<sup>91</sup>

*Formal requisites.* In the absence of statute, no particular form of release is required.<sup>92</sup> It has been held that a surety on a note may not under the terms of the Negotiable Instruments Act be discharged by a parol release.<sup>93</sup>

## § 228. — Consideration

An executory agreement for the release of the surety does not discharge him unless supported by consideration, although representations made in connection

### Transaction not a "settlement"

A bank's acceptance of its embezzling cashier's property without notice to surety company, which had bound itself to indemnify the bank, under an agreement to sell, apply on indebtedness, and pay the balance, if any, to cashier, was held not a "settlement" within a provision of the bond releasing surety in case of settlement by the bank, since the bank did not release debtor or condone his offense, and surety was not deprived of any right which it would have against the cashier on paying the bond.—*Bank of Waterproof v. Fidelity & Deposit Co. of Maryland*, C.C.A.La., 297 F. 217.

77. Ky.—*Newman v. Hazelrigg*, 1 Bush 412.

78. Mass.—*Tuckerman v. Newhall*, 17 Mass. 581.

### Resolution not carried out

A settlement or adjustment of a defaultation provided for by a resolution of the lodge does not discharge the surety if it is not carried out.—*Swisher v. Fidelity, etc., Co.*, 164 Ill. App. 243.

79. Tex.—*Southern Surety Co. v. Adams*, Civ.App., 278 S.W. 943. 50 C.J. p 185 note 45.

80. N.Y.—*Douglass v. Ferris*, 33 N. E. 1041, 138 N.Y. 192, 34 Am.S.R. 485.

Ohio.—*Goodin v. State*, 18 Ohio 6

81. Ill.—*Brown v. Haggerty*, 26 Ill. 469.

50 C.J. p 185 note 48.

82. Cal.—*Montgomery v. Sayre*, 34 P. 646, 100 Cal. 182, 38 Am.S.R. 271.

Ill.—*Dupee v. Blake*, 35 N.E. 867, 148 Ill. 453.

83. N.J.—*O'Mara v. Nugent*, 37 N. J.Eq. 326.

Pa.—*Denny v. Lyon*, 38 Pa. 98, 80 Am.D. 463.

84. N.Y.—*Dibble v. Richardson*, 63 N.E. 829, 171 N.Y. 131.

50 C.J. p 185 note 51.

85. Mass.—*Harris v. Brooks*, 21 Pick. 195, 32 Am.D. 254.

Ohio.—*Franklin Bank Co. of Newark, Ohio v. G. E. Howell Provision Co.*, 17 Ohio N.P., N.S., 561.

Pa.—*Maryland Casualty Co. v. Bowser*, 70 Pa.Super. 304.

Tex.—*Pegues v. Moss*, Civ.App., 140 S.W.2d 461, error granted—*Logan v. Green*, Civ.App., 53 S.W.2d 119.

50 C.J. p 185 note 52.

Release held immaterial where creditor was not suing on obligation to which release related, but on a different obligation, although both obligations had common sureties.—*Crane Co. v. James McHugh Sons*, C.C.A.Okl., 108 F.2d 55.

86. Idaho.—*Maydole v. Peterson*, 63 P. 1048, 7 Idaho 502.

50 C.J. p 185 note 53.

Original parties to building contract cannot release surety from li-

ability to subcontractor, whose rights have become fixed.—*Inman v. Nolan*, Mo.App., 288 S.W. 1007.

87. Cal.—*Sherman v. American Surety Co.*, 173 P. 161, 178 Cal. 286.

50 C.J. p 185 note 54.

Authority of officer of corporate creditor shown

Pa.—*Maryland Casualty Co. v. Bowser*, 70 Pa.Super. 304.

88. Ga.—*Dendy v. Gamble*, 59 Ga. 434.

89. Pa.—*Troop v. Franklin Sav., etc., Co.*, 139 A. 492, 291 Pa. 18.

50 C.J. p 185 note 57.

90. Pa.—*Campbell v. Floyd*, 25 A. 1033, 153 Pa. 84, followed in 25 A. 1038.

91. Or.—*Closset v. Portland Amusement Co.*, 290 P. 556, 134 Or. 414, rehearing denied 293 P. 720, 134 Or. 414.

92. Cal.—*White Sewing Mach. Co. v. Courtney*, 75 P. 296, 141 Cal. 674.

50 C.J. p 186 note 60.

### Letter construed

Letter to surety, stating that "we have released you on this indorsement," released him from all liability, not merely for future indebtedness of principal.—*Elmer Candy Co. v. Baumann*, La.App., 150 So. 427.

93. Mich.—*Buckeye Commercial Sav. Bank v. Protogere*, 231 N.W. 65, 250 Mich. 652.

therewith may discharge the surety irrespective of consideration where he acts on them to his injury.

An executory agreement for the release of the surety does not discharge him unless supported by consideration,<sup>94</sup> although representations made in connection therewith may discharge the surety irrespective of consideration where he acts on them to his injury.<sup>95</sup> Where there is a consideration, the release being in writing, it need not be recited.<sup>96</sup> A payment by the principal<sup>97</sup> or by the surety<sup>98</sup> on account of past-due principal indebtedness will not support an agreement to release the surety. However, in the application of the general rules as to what may constitute a consideration, it has been held, among other instances,<sup>99</sup> that a payment by the surety which is not to be credited on the indebtedness,<sup>1</sup> or a note of the principal for an additional sum,<sup>2</sup> is a sufficient consideration. Likewise, a consideration exists if, by agreement of all the parties, the creditor, having property of the principal to apply to the secured debt, is to apply it in extinguishment of another debt of the principal for which the surety is not liable<sup>3</sup> or if the surety has performed,<sup>4</sup> or agrees to perform,<sup>5</sup> services. A refusal of a judgment creditor to levy on the property of the principal at the instance of the surety,<sup>6</sup> the acceptance of another surety<sup>7</sup> or of a mortgage,<sup>8</sup> or the agreement of the surety to refrain from taking indemnity from the principal<sup>9</sup> constitutes a sufficient consideration.

## § 229. — Conditional Release

If the release is contingent on performance of spec-

ified conditions, it will not be operative unless such conditions are performed.

If the release is contingent on performance of specified conditions, it will not be operative unless such conditions are performed.<sup>10</sup>

## § 230. — Effect on Supplemental and Collateral Sureties

Since a surety occupies the position of principal to a supplemental surety, it has been held that a release of the surety will discharge the supplemental surety.

Since a surety occupies the position of principal to a supplemental surety, a release of the surety ordinarily will discharge the supplemental surety.<sup>11</sup> If, after a judgment against the principal has been affirmed, he obtains an injunction restraining further proceedings, a release of a surety on the injunction bond releases a surety on the supersedeas bond, at least to the extent of the property owned by the former.<sup>12</sup>

## § 231. Release of Cosurety

By the strict rule of the common law, where cosureties are bound jointly, a release of one discharges all, but in equity a release of one or more sureties will not have the effect of discharging the others, except from the payment of the proportion of the debt which the sureties discharged ought to have contributed, and the equitable rule is now frequently accepted.

By the strict rule of the common law, where cosureties are bound jointly, a release of one discharges all,<sup>13</sup> although such result does not follow a covenant not to sue,<sup>14</sup> or a release so construed.<sup>15</sup>

94. Ky.—People's State Bank of Frankfort v. McDermott, 64 S.W. 2d 484, 251 Ky. 140. 50 C.J. p 186 note 61.

95. Ga.—Johnson v. Longley, 83 S. E. 952, 142 Ga. 814. 50 C.J. p 186 note 62.

Representations inducing surety to: Refrain from protecting himself see supra § 194. Relinquish security see supra § 195.

96. Me.—Burrill v. Saunders, 36 Me. 409.

97. Ky.—Muse v. Fraley, 50 S.W. 534, 20 Ky.L. 1936.

98. Ky.—Sulphur Deposit Bank v. Peak, 62 S.W. 268, 110 Ky. 579, 23 Ky.L. 19, 96 Am.S.R. 466.

Pa.—Martin v. Frantz, 18 A. 20, 127 Pa. 389, 14 Am.S.R. 589.

99. Ark.—Easley v. Vaughan, 281 S.W. 670, 170 Ark. 887. 50 C.J. p 186 note 67.

1. U.S.—In re Kimbrough-Veasby Co., 292 F. 757.

Tex.—McIlhenny Co. v. Blum, 4 S. W. 367, 68 Tex. 197.

2. Ind.—Taylor v. Meek, 4 Blackf. 388.

3. Vt.—Austin v. Belknap, 54 Vt. 495.

4. N.Y.—Hope v. Eddington, Lalor p 43.

5. Kan.—Gilbert v. State Ins. Co., 44 P. 442, 3 Kan.App. 1.

6. Pa.—Westmoreland Bank v. Klingensmith, 7 Watts 523.

7. Ark.—Reid v. Nunnally, 24 Ark. 356.

8. Ind.—Clodfelter v. Hulet, 72 Ind. 137.

9. Minn.—Heitsch v. Cole, 50 N.W. 235, 47 Minn. 320.

10. Ill.—Mueller v. Dobschuetz, 89 Ill. 176.

50 C.J. p 186 note 77.

11. Neb.—Brown v. Chicago, etc., R. Co., 107 N.W. 1024, 76 Neb. 792.

12. Ga.—Lewis v. Armstrong, 7 S. E. 114, 80 Ga. 402.

13. U.S.—U. S. v. Clamp, D.C.Tex., 292 F. 317.

50 C.J. p 186 note 80.

Effect of release of levy on cosurety's property see supra § 201.

### Consent

Where sureties by written instrument authorized principal to release one surety on signing by another in surety's stead, substituted surety was not under terms of instrument required to affix his signature to original instrument of suretyship with respect to sureties' liability thereon; and, where substituted surety agreed in separate instrument to guarantee amount of contract in place of surety, sureties were not released from liability on ground that substituted surety was guarantor and not surety, where substituted surety intended by instrument to accept full liability of released surety and take his place as surety.—Vermont Marble Co. v. Bayne, 190 N.E. 291, 356 Ill. 127.

14. Ill.—Thomason v. Clark, 31 Ill. App. 404.

50 C.J. p 187 note 81.

15. Ill.—Clark v. Mallory, 83 Ill. App. 488, affirmed 56 N.E. 1099, 185 Ill. 227.

as where rights against other cosureties are reserved.<sup>16</sup>

In equity, however, the cosureties remain liable for their proportionate share,<sup>17</sup> more particularly where rights are reserved as against the sureties not released,<sup>18</sup> or where the intention not to release the other sureties is apparent;<sup>19</sup> and the equitable rule is now frequently accepted<sup>20</sup> in some cases under the application of statutes permitting the release or compromise of a claim against one joint debtor without discharge of the others.<sup>21</sup> Under this rule the cosureties are entitled to a reduction of their total liability to the extent that on performance of their obligations the released surety could have been compelled to make contribution,<sup>22</sup> but, where suit for contribution could not have been maintained against the released surety, the remaining sureties are not entitled to a reduction of their total liability.<sup>23</sup>

Where the cosureties are bound severally, a discharge of one does not discharge the others,<sup>24</sup> unless a right of contribution has been taken away or seriously affected,<sup>25</sup> and the same rule has been applied in some jurisdictions where they are bound jointly and severally.<sup>26</sup> So, the discharge of one of several sureties from a joint and several obligation with an express reservation as to the other

obligors does not release the other sureties.<sup>27</sup> Where a bond is joint and several in its terms, one surety cannot claim to be discharged because the other surety is relieved on a plea which is purely personal.<sup>28</sup> Where the sureties are not bound by the same but by separate instruments, a release of one will not release the others.<sup>29</sup>

**Unenforceable release.** An attempted release which is not enforceable because of a lack of consideration will not release the cosureties.<sup>30</sup> A release, without authority, is a nullity, and will not affect the liability of cosureties.<sup>31</sup>

**Accord and satisfaction.** Acceptance by the creditor, from one cosurety of his proportionate part of the debt, does not amount to accord and satisfaction.<sup>32</sup>

**Surety who has become coprincipal.** If a surety, by subsequent acts, has become a coprincipal, as between himself and his cosurety, his release will release his former cosurety entirely.<sup>33</sup>

**Statutory provisions for release.** Under a statute providing that the release, discharge, voluntary withdrawal, or incompetency of a surety on any official bond does not affect the bond as to the remaining sureties thereon, or alter or change their liability in any respect, the release of one

N.Y.—Hood v. Hayward, 1 N.Y.S. 566, 48 Hun 330, modified on other grounds 26 N.E. 331, 124 N.Y. 1.

16. Creditor who discharges one cosurety either in full or in part may reserve his right against cosurety either for the entire claim, or for the portion equitably due from such cosurety.—Bristol Bank & Trust Co. v. Broderick, 139 A. 455, 122 Conn. 310.

17. Md.—Smith v. State, 46 Md. 617.

N.Y.—Morgan v. Smith, 70 N.Y. 537, 50 C.J. p 187 note 85.

18. S.C.—Massey v. Brown, 4 S.C. 85.

Va.—Hewitt v. Adams, 1 Patt. & H. 34.

19. S.C.—Poole v. Bradham, 141 S. E. 267, 143 S.C. 156—Massey v. Brown, 4 S.C. 85.

20. Ark.—Austin v. J. R. Watkins Co., 46 S.W.2d 16, 185 Ark. 85.

Pa.—Freeman v. Sundheim, 35 A.2d 295, 348 Pa. 248—Bell v. Sundheim 40 Pa. Dist. & Co. 380—Commonwealth v. Scott, Com.Pl., 35 Luz. Leg. Reg. 367.

50 C.J. p 187 note 83.

**Proof of release contrary to judgment**

Surety could prove that obligees had fully released cosurety, notwith-

standing obligees had recovered judgment against cosurety on contrary finding, where surety was not party to, and had no notice of, proceedings in which contrary finding was made.—Newburger v. Lubell, 193 N.E. 440, 266 N.Y. 4.

**Allocation of credit between principal and interest**  
Pa.—Bell v. Sundheim, 40 Pa. Dist. & Co. 380.

21. Kan.—Sparks v. Nech, 26 P.2d 586, 138 Kan. 343.  
50 C.J. p 187 note 89.

**Sureties becoming debtors in solido**  
Under the code the remission or conventional discharge granted to one of the sureties does not release the other, but this provision does not apply to persons who while sureties became debtors in solido with the principal and among themselves, such fact rendering their contract subject to regulation by the same principles established by the code for debtors in solido under which remission or conventional discharge in favor of one of the co-debtors in solido discharges all others, unless the creditor has expressly reserved his right against the latter, and in the latter case he cannot claim the debt without making a deduction on the part of him to whom he has made the remission.

—Elmer Candy Co. v. Baumann, La. App., 150 So. 427.

22. Pa.—Freeman v. Sundheim, 35 A.2d 295, 348 Pa. 248.

23. Pa.—Freeman v. Sundheim, supra.

24. N.J.—Morgan v. Clark, 36 A.2d 149, 22 N.J. Misc. 102.  
50 C.J. p 187 note 90.

25. N.J.—Morgan v. Clark, supra.

26. Tex.—Montgomery v. Boyd, Civ. App., 171 S.W. 273.  
50 C.J. p 187 note 91.

27. Tex.—Lane v. Moon, 103 S.W. 211, 46 Tex. Civ. App. 625.

28. Tex.—Munoz v. Brassel, Civ. App., 108 S.W. 417.

29. N.J.—Morgan v. Clark, 36 A.2d 149, 22 N.J. Misc. 102.  
50 C.J. p 187 note 94.

30. Ga.—Williams-Thompson Co. v. Williams, 73 S.E. 409, 10 Ga. 251—Sherman v. Stephens, 118 S.E. 567, 30 Ga. App. 509.

31. Tenn.—Wynne v. Edwards, 7 Humphr. 418.  
50 C.J. p 187 note 97.

32. Pa.—Martin v. Frantz, 18 A. 20, 127 Pa. 389, 14 Am. S.R. 589.

33. Tex.—Roberson v. Tonn, 13 S. W. 385, 76 Tex. 535.

cosurety on an official bond does not operate as a discharge of the others.<sup>34</sup> A similar rule has been applied in the case of the release of a surety on a guardian's bond under a statute authorizing the release of such a surety by the court on application therefor.<sup>35</sup> Likewise, where provision is made for a cancellation of the liability of a surety on the bond of a public depository by statutory notice

of withdrawal, the withdrawal of one or more of the sureties does not terminate the liability of the remaining sureties.<sup>36</sup>

*A discharge by order of court of a surety's cosureties, on their payment of their proportionate amount of the liability, does not release the surety from liability for his proportionate share.*<sup>37</sup>

## I. DISCHARGE BY OPERATION OF LAW

### § 232. In General

The general rule that a surety is discharged when the liability of his principal is extinguished does not apply when the extinction is caused by operation of law, and not by the act of the creditor, but, if the contract of the principal is changed or enlarged by statute or order of court, the surety may be discharged.

The general rule that a surety is discharged when the liability of his principal is extinguished, as discussed supra § 116, does not apply when the extinction is caused by operation of law, and not by the act of the creditor,<sup>38</sup> and the defense is personal to the principal,<sup>39</sup> but the surety remains liable.<sup>40</sup> However, if the contract of the principal is changed or enlarged by legislative enactment,<sup>41</sup> or by order of court,<sup>42</sup> the general rule as to discharge by alteration of contract applies, and the surety is discharged, unless the contract was entered into subject to the power of the legislature

to change the law.<sup>43</sup>

*Statutory method.* In some jurisdictions statutes provide a method for a surety on certain obligations to obtain a discharge from liability thereon,<sup>44</sup> as by petition to a court for a discharge and an order requiring the principal to give a new bond.<sup>45</sup> Such statutory method has been held not to abrogate the surety's common-law right to be discharged.<sup>46</sup> It has been held that the Negotiable Instruments Act does not abrogate common-law or statutory methods already in existence under which a surety on a note who signs on the face thereof may be discharged.<sup>47</sup> However, it has also been held that such surety cannot be discharged in a manner other than that provided in the Negotiable Instruments Act.<sup>48</sup>

*The discharge of a cosurety by operation of law does not release the other sureties,*<sup>49</sup> or reduce

34. Cal.—People v. Otto, 18 P. 869, 77 Cal. 45.

35. Ky.—Frederick v. Moore, 13 B. Mon. 470.

36. Idaho.—Washington County v. Weiser Nat. Bank, 255 P. 310, 43 Idaho 600.

37. Minn.—State v. Bongard, 94 N. W. 1093, 89 Minn. 426.

38. Ga.—Corpus Juris cited in Franklin v. Mobley, 42 S.E.2d 755, 760, 202 Ga. 212.

Ind.—Corpus Juris cited in McKee v. Harwood Automotive Co., 183 N.E. 646, 647, 204 Ind. 233.

50 C.J. p 93 note 32, p 188 note 10. Loss of lien of judgment by operation of law as not releasing surety see supra § 201.

#### Statute construed

(1) A statute providing that the obligation of the surety shall cease if the obligation of the principal from any cause becomes extinct has been held to be a mere affirmation of the common law rule, the words "from any cause" meaning any cause dependent on an act of the creditor, and not including a cause in which the law was the mover and over which the creditor has no control and with which his acts have nothing to do.—Franklin v. Mobley,

42 S.E.2d 755, 202 Ga. 212—Phillips v. Solomon, 42 Ga. 192.

(2) Even if such statute were construed as embracing an extinction of the principal's debt by operation of law, a statute merely abrogating all remedies for the enforcement of a debt would not render the debt itself extinct within the meaning of such statute.—Franklin v. Mobley, supra.

39. Ala.—Phillips v. Wade, 66 Ala. 53.

50 C.J. p 188 note 11.

40. Kan.—Failor v. Wehe, 158 P. 74, 98 Kan. 325.

50 C.J. p 188 note 12.

41. Mo.—Schuster v. Weiss, 21 S. W. 438, 114 Mo. 158, 19 L.R.A. 182. 50 C.J. p 188 note 13.

Discharge of sureties on official bonds by statutory change of duties see Officers § 165.

42. Wis.—Sage v. Strong, 40 Wis. 575.

50 C.J. p 188 note 14.

43. N.Y.—Horner v. Lyman, 2 Abb. Dec. 399, 4 Keyes 237.

44. Mo.—Massachusetts Bonding & Insurance Co. v. Simonds-Shields-Lonsdale Grain Co., 49 S.W.2d 645, 226 Mo.App. 1071.

#### Statute inapplicable to construction contract

A statute providing how a surety company may be released from liability on an official bond has no application to surety companies on construction contracts.—National Surety Co. v. Lincoln County, Mont., 238 F. 705, 151 C.C.A. 555.

45. Discretion in ordering new bond. Statute providing that court may in its discretion require principal to give new bond requires sound judicial, not arbitrary, discretion.—Massachusetts Bonding & Insurance Co. v. Simonds-Shields-Lonsdale Grain Co., 49 S.W.2d 645, 226 Mo. App. 1071.

46. Mo.—Massachusetts Bonding & Insurance Co. v. Simonds-Shields-Lonsdale Grain Co., supra.

47. Tex.—Howth v. J. I. Case Threshing Mach. Co., Civ.App., 280 S.W. 238.

48. Mich.—Buckeye Commercial Sav. Bank v. Protogere, 231 N.W. 65, 250 Mich. 652.

Ohio.—Richards v. Market Exch. Bank Co., 90 N.E. 1000, 81 Ohio St. 348, 26 L.R.A., N.S., 99.

49. Mich.—Corpus Juris cited in Westveer v. Landwehr, 267 N.W. 849, 851, 276 Mich. 326.

their liability pro tanto.<sup>50</sup> The liability of a surety who has been discharged from his obligation by operation of law cannot, without his consent, be revived against him by the voluntary act of a cosurety.<sup>51</sup>

### § 233. Bar of Action by Limitations

There is a conflict of authority as to whether a surety is discharged merely because the cause of action against the principal is barred by limitations; it has been held that a surety is not discharged because the statute of limitations has run in favor of a cosurety.

There is a conflict of authority as to whether a surety is discharged merely because the cause of action against the principal is barred,<sup>52</sup> some courts holding that he is not discharged,<sup>53</sup> others holding that he is.<sup>54</sup> A surety is not discharged because the statute of limitations has run in favor of a cosurety,<sup>55</sup> but he remains liable for the whole debt.<sup>56</sup>

### § 234. Change of Parties or Status

- a. In general
- b. Principal
- c. Creditor or obligee
- d. Surety

#### a. In General

Generally speaking, a material change in the status

of the original parties to a contract involving suretyship which affects their substantial rights operates to discharge the surety.

Where there is a material change of the status of the original parties to a contract involving suretyship which affects their substantial rights, without the knowledge or consent of the surety, it has been held that the surety is relieved from any obligation thereunder.<sup>57</sup> Thus, the liability of sureties on a bond given to certain person or persons as obligees is terminated by such obligees becoming incorporated,<sup>58</sup> or by an unincorporated company, constituted by the obligees, being merged into an incorporated company,<sup>59</sup> or by the obligee entering into a partnership,<sup>60</sup> or by the obligor, a corporation, merging with another corporation and losing its identity.<sup>61</sup> However, where the security runs to a fraternal organization and is for the benefit of a subordinate branch, it has been held that a change of status of the beneficiary which is immaterial to the risk, as by incorporation, will not release the sureties.<sup>62</sup>

#### b. Principal

As a general rule a surety will be discharged by a change of principals to which he has not consented.

As a general rule a surety will be discharged by a change of principals to which he has not

Pa.—Freeman v. Sundheim, 35 A.2d 295, 348 Pa. 248.

Wis.—Corpus Juris cited in Klatte v. Franklin State Bank, 248 N.W. 158, 162, 211 Wis. 613, rehearing denied and modified on other grounds 249 N.W. 72, 211 Wis. 613. 50 C.J. p 188 note 20.

Discharge of surety by operation of law as affecting right of contribution see *infra* § 358.

#### Disability of coverture

Ky.—Dorman v. Carnes, 96 S.W.2d 869, 265 Ky. 361.

50. Vt.—Wetmore, etc., Granite Co. v. Ryle, 107 A. 109, 93 Vt. 245.

51. Ga.—McLin v. Harvey, 69 S.E. 123, 8 Ga.App. 360.

52. Ga.—Corpus Juris quoted in Scott v. Gaulding, 2 S.E.2d 69, 70, 187 Ga. 751, 122 A.L.R. 200, answer to certified question conformed to 3 S.E.2d 766, 60 Ga.App. 306.

Va.—Corpus Juris cited in Fidelity & Casualty Co. of New York v. Lackland, 8 S.E.2d 306, 309, 175 Va. 178.

53. N.M.—Romero v. Hopewell, 210 P. 231, 28 N.M. 259.

50 C.J. p 188 note 23.

#### Set-off on merger not justified

Where note on which defendants claimed to be only secondarily lia-

ble was merged with note on which defendants were primarily liable, the payee's failure to proceed against the principal on the merged note before the statute of limitations had run would not justify setting off amount of merged note against amount of note sued on, since defendants had power and duty to make delay harmless and protect themselves from loss, and their failure to do so constituted negligence on their part precluding their holding payee liable on ground of negligence; nor could set off be justified on ground of contract by payee to see that merged note did not outlaw the first note, where alleged agreement was unsupported by consideration and was, therefore, invalid.—Legal Adjustment Bureau v. West Coast Const. Co., 298 P. 429, 162 Wash. 260.

54. Kan.—Molvane v. Sedgley, 64 P. 1038, 63 Kan. 105, 55 L.R.A. 552. 50 C.J. p 188 note 24.

Defenses of principal available to surety generally see *infra* § 255. Right of surety to avail himself of defense that action against principal is barred by limitation see Limitations of Actions § 13 b.

55. Ga.—Corpus Juris quoted in Scott v. Gaulding, 2 S.E.2d 69, 70, 187 Ga. 751, 122 A.L.R. 200, answer to certified question con-

formed to 3 S.E.2d 766, 60 Ga.App. 306.

50 C.J. p 188 note 25.

56. Ga.—Corpus Juris quoted in Scott v. Gaulding, 2 S.E.2d 69, 70, 187 Ga. 751, 122 A.L.R. 200, answer to certified questions conformed to 3 S.E.2d 766, 60 Ga.App. 306.

Ohio.—Camp v. Bostwick, 20 Ohio St. 337, 5 Am.R. 669.

57. Cal.—People v. Fidelity & Deposit Co. of Maryland, 82 P.2d 495, 28 Cal.App.2d 325.

Pa.—Pure Oil Co. v. Shlifer, 175 A. 895, 115 Pa.Super. 319.

58. Pa.—Wanamaker v. Shoemaker, 70 Pa.Super. 473.

50 C.J. p 98 note 46.

59. Pa.—Bensinger v. Wren, 100 Pa. 500.

60. Ill.—Barnett v. Smith, 17 Ill. 565.

61. N.Y.—Worth Corporation v. Metropolitan Casualty Ins. Co. of New York, 255 N.Y.S. 470, 142 Misc. 734.

#### Previous defaults

Surety is liable for defaults occurring previous to merger.—Worth Corporation v. Metropolitan Casualty Ins. Co. of New York, *supra*.

62. Pa.—State Camp P. O. S. A. v. Kelley, 110 A. 339, 267 Pa. 49.

consented.<sup>63</sup> He will be discharged by the erasure of the name of the principal,<sup>64</sup> or by substitution<sup>65</sup> or addition<sup>66</sup> of principals. The insertion in the body of the bond as a principal of the name of a surety who has signed the bond, and its subsequent erasure, will not release sureties who signed after the insertion and before the erasure when the bond, considered as a whole, shows the surety's true relation.<sup>67</sup> A surety is not discharged by a removal of the principal from one place to another;<sup>68</sup> but, if a surety has become liable for the principal in a particular building, the surety is not liable for another person who succeeds to the occupancy of that building, although the creditor is not notified of the change.<sup>69</sup> The dissolution of a corporation by the governor because of delinquency in the payment of a license fee will not discharge a surety on its bond where the statute provides that such delinquency shall not operate to impair the rights of others.<sup>70</sup>

#### c. Creditor or Obligees

A surety generally is discharged by a change of the obligee without his consent.

In general, a surety is discharged by a change of

the obligee without his consent.<sup>71</sup> So a surety on an undertaking given to two or more joint obligees or creditors is not liable after any change in such obligees<sup>72</sup> unless the intention, appearing from the instrument, is to be bound to the obligees as a class or fluctuating body.<sup>73</sup> A surety for a purchaser of goods from a partnership will be discharged by the withdrawal of a member of the partnership before the time for performance of the contract.<sup>74</sup> Where a corporation is the obligee, its dissolution releases sureties on bonds held by it.<sup>75</sup> After the consolidation of two or more corporations, sureties on bonds given to such corporations are sometimes liable to the new corporation, by virtue of the statutory provisions under which such consolidation is effected.<sup>76</sup>

#### d. Surety

As a general rule a surety will be discharged by a change of cosureties, but it has been held that, where sureties are severally bound for specified sums, the addition of other sureties separately bound for specific sums will not discharge the prior sureties.

A surety will be discharged by the erasure of the name of a cosurety<sup>77</sup> or by a substitution of

63. Ky.—Georgetown First Nat. Bank v. Gatewood, 39 S.W. 509, 19 Ky.L. 225.

64. U.S.—Martin v. Thomas, Wis., 24 How. 315, 16 L.Ed. 689.

65. Ill.—Vincent v. People, 25 Ill. 500.

Ky.—Georgetown First Nat. Bank v. Gatewood, 39 S.W. 509, 19 Ky.L. 225.

#### Third person taking over construction contract

(1) When a principal and his surety fail to complete a contract, the reletting of the work under conditions differing from the former contract in order to complete the undertaking does not of itself discharge the principal and surety thereof.—State v. Smith, 119 So. 56, 167 La. 301.

(2) So, where a surety under a building contract agreed with the owner on default of the contractor to complete the contract under the supervision of a third party and the agreement provided that the third party should pay a debt owing by him to the owner and evidenced by a note, it has been held that the agreement did not relieve the surety from liability on the ground that the third party appointed to complete the contract could not act disinterestedly between the parties, and that his acts resulted to the prejudice of the surety, of which there was no showing.—Keenan v. Empire State Surety Co., 113 P. 636, 63 Wash. 250.

(3) Where a contractor gave a bond to pay all persons for labor and materials supplied in connection with the work and a subcontractor for bricks became financially embarrassed and a materialman of the subcontractor continued to furnish bricks to parties carrying on the original contracts, who had an interest to do so, the surety on the bond was not relieved from liability.—Phila. v. Nichols Co., 63 A. 886, 214 Pa. 265.

(4) However, it has been held that, where a third person takes over a construction contract, the contractor's surety is not liable for work done by such third person.—Northern Minnesota Drainage Co. v. Mageau, 154 N.W. 1092, 131 Minn. 243.

66. Mo.—Moberly Bank v. Meals, 295 S.W. 73, 316 Mo. 1158.  
Tex.—Shults v. Krauskopf, Civ.App., 286 S.W. 544.

The addition of two names to a promissory note as makers after its execution and delivery, without the knowledge and consent of a person who has previously signed it as surety for the original maker, has been held to furnish the surety with a valid defense to the note.—McVean v. Scott, 46 Barb. N.Y., 379.

67. U.S.—Rankin v. Tygard, Mo., 198 F. 795, 119 C.C.A. 591.

68. S.C.—Rouss v. King, 54 S.E. 615, 74 S.C. 251, 48 S.E. 220, 69 S.C. 168.

50 C.J. p 95 note 98.

69. N.Y.—Manhattan Gas Light Co. v. Ely, 39 Barb. 174, 25 How.Pr. 237.

50 C.J. p 95 note 99.

70. Or.—Dowd v. American Surety Co., 139 P. 112, 69 Or. 418.

71. U.S.—Corpus Juris quoted in Baltimore Trust Co. v. Metropolitan Casualty Ins. Co. of New York, D.C.Md., 3 F.Supp. 404, 409, affirmed, C.C.A., 68 F.2d 121.

Mich.—Corpus Juris cited in Reichert v. State Savings Bank of Royal Oak, 246 N.W. 95, 96, 261 Mich. 227.

N.Y.—Shiya v. Erickson, City Ct., 282 N.Y.S. 812, 156 Misc. 738.

50 C.J. p 97 note 35.

72. U.S.—Bowers v. Cobb, C.C. Mass., 31 F. 678.

50 C.J. p 97 note 38.

73. Colo.—Gargan v. School Dist. No. 15, 4 Colo. 53.

Ohio.—Bakers' Union v. Streuve, 3 Ohio Dec., Reprint, 110, 3 Wkly.L. Gaz. 253.

74. Ohio.—Black v. Albery, 106 N. E. 38, 89 Ohio St. 240.

75. Pa.—Washington Bank v. Barrington, 2 Penn. & W. 27.

50 C.J. p 98 note 41.

76. Mo.—Springfield Lighting Co. v. Hobart, 68 S.W. 942, 98 Mo.App. 227.

50 C.J. p 98 note 42.

77. R.I.—Shepard Land Co. v. Banigan, 87 A. 531, 36 R.I. L.

50 C.J. p 98 note 50.



cosureties.<sup>78</sup> It has been held that the addition of a cosurety after the execution and delivery of the suretyship contract will discharge the sureties who signed at the inception of the contract,<sup>79</sup> but the added sureties are bound.<sup>80</sup> However, it has been held that, where sureties are severally bound for specified sums, the addition of other sureties separately bound for specific sums will not discharge the prior sureties,<sup>81</sup> and that the addition of a guaranty<sup>82</sup> or supplemental sureties<sup>83</sup> will not affect the liability of a surety.

### § 235. — Assignment or Transfer

Generally, an assignment of the principal contract by the obligee or the obligor discharges the surety, unless he consents thereto or the right to assign was contemplated by the contract, but the rule is otherwise as to assignments of leases.

An assignment of the principal contract by the obligee discharges the surety unless he consents thereto, where the contract runs to a designated obligee,<sup>84</sup> except in the case of an assignment for collection merely.<sup>85</sup> So, an assignment of a con-

tract by the principal will discharge a surety for its performance<sup>86</sup> unless the right to assign was contemplated by the contract.<sup>87</sup> However, an assignment of a contract by the principal so as to enable the assignee to act as his agent will not release the surety.<sup>88</sup> The consent of both contracting parties to the assignment of a contract is necessary in order to release a surety thereon,<sup>89</sup> and, where the assent of one of two or more obligees is not sufficient to vary the obligation of the contract, the assent of one will not release the surety.<sup>90</sup>

*Assignment of lease.* As a general rule the assignment of a lease by the tenant does not discharge his surety from liability;<sup>91</sup> especially is this true where the right to assign was contemplated by the lease.<sup>92</sup> The same is true as to assignments by the lessor where the parties contemplated that the lease should be assignable.<sup>93</sup> However, if the right to assign is negatived in the lease, its assignment, if accepted by the lessor, will release a surety of the lessee,<sup>94</sup> and, likewise, the surety is released

Erasure of surety's name by stranger see supra § 130.

Release of cosureties in general see supra § 231.

78. Wash.—Fairhaven v. Cowgill, 36 P. 1093, 8 Wash. 686.

50 C.J. p 98 note 51.

79. Ind.—Fry v. P. Bannon Sewer Pipe Co., 101 N.E. 10, 179 Ind. 309. 50 C.J. p 98 note 52.

80. Neb.—Stoner v. Keith County, 67 N.W. 311, 48 Neb. 279.

50 C.J. p 98 note 53.

81. La.—State v. Dunn, 11 La. Ann. 549.

50 C.J. p 98 note 54.

82. Neb.—Anderson v. Hall, 94 N.W. 981, 4 Neb. Unoff., 494.

83. Ind.—Holthouse v. State, 97 N.E. 130, 49 Ind. App. 178.

50 C.J. p 98 note 56.

"Supplemental surety" defined see infra § 386.

84. Mont.—Standard Sewing-Mach. Co. v. Smith, 152 P. 38, 51 Mont. 245, L.R.A.1918A 292.

N.Y.—Shiya v. Erickson, 282 N.Y.S. 812, 156 Misc. 738.

50 C.J. p 97 note 36.

Where a bond provides for its assignability, an assignee of the obligee may recover thereon against surety.—McClure v. Weigand Tea & Coffee Co., 12 P.2d 877, 158 Okl. 115.

Bond referring to assignable contract

U.S.—Massachusetts Bonding & Ins. Co. v. Feutz, C.A.Mo., 182 F.2d 752.

Obligee not affected by provision against assignment

Provision of bond that no right of

action shall accrue for use or benefit of any other than the obligee and that no interest or right of action thereon may be assigned without written consent of surety must be considered as a whole, and so considered assignment of bond as security for payment of money did not render the bond invalid and did not preclude obligee from maintaining action on the bond.—Jack v. Craighead Rice Mill. Co., C.C.A.Ark., 167 F.2d 96, certiorari denied, New Amsterdam Cas. Co. v. Craighead Rice Mill. Co., 68 S.Ct. 1340, 334 U.S. 829, 92 L.Ed. 1756.

85. U.S.—Denver Engineering Works v. Elkins, C.C.Pa., 179 F. 922, reversed on other grounds 181 F. 684, 105 C.C.A. 1.

86. Mich.—Todd v. Greenwood Tp. School Dist. No. 1, 40 Mich. 294.

87. N.Y.—Sachs v. American Surety Co., 76 N.Y.S. 335, 72 App.Div. 60, affirmed 69 N.E. 1130, 177 N.Y. 551.

88. Cal.—Los Angeles Stone Co. v. National Surety Co., 173 P. 79, 178 Cal. 247.

50 C.J. p 96 note 4.

89. Or.—Multnomah County School Dist. No. 45 v. Hallock, 169 P. 130, 86 Or. 687.

50 C.J. p 96 note 5.

90. U.S.—U. S. v. Illinois Surety Co., Ill., 226 F. 653, 141 C.C.A. 409, affirmed 37 S.Ct. 614, 244 U.S. 376, 61 L.Ed. 1206.

91. N.Y.—Kamioner v. Balkind, 158 N.Y.S. 310, 93 Misc. 458.

50 C.J. p 97 note 27.

If unconditional assignment is not

prohibited by lease, assignment does not constitute alteration of contract of original lessee's surety and does not release him.—Whale v. Rice, 49 P.2d 737, 173 Okl. 530.

*Void assignment of Indian lands*

Where lease of Indian coal lands provided that an assignment thereof should not be made without the approval of the secretary of the interior, and assignment of lease also provided that it was subject to secretary's approval, assignment was void and ineffectual in absence of the requisite approval, and, hence, there was no alteration of surety's contract with assignor, and surety was not discharged from its obligation under assignor's bond.—American Surety Co. of New York v. U. S., C.C.A.Okla., 112 F.2d 903.

92. U.S.—American Surety Co. of New York v. U. S., supra. Or.—Closset v. Portland Amusement Co., 290 P. 556, 134 Or. 414, rehearing denied 293 P. 720, 134 Or. 414.

50 C.J. p 97 note 28.

93. Okl.—Whale v. Rice, 49 P.2d 737, 173 Okl. 530.

94. Pa.—Bedford v. Jones, 5 Leg. Gaz. 230.

50 C.J. p 97 note 29.

If lease prohibits assignment or imposes condition thereon and lessor without approval of surety of original lessee consents to such assignment or waives such condition, surety's contract is thereby altered and he is released.—Whale v. Rice, 49 P.2d 737, 173 Okl. 530.

if the landlord voluntarily accepts another as his tenant by way of substitution for the first lessee,<sup>95</sup> especially where the lease contemplates such substitution and provides for the release of the first lessee from further liability on a substitution made in accordance with the terms of the lease.<sup>96</sup> It has been held that an assignment by the assignee of a lease will release his surety from further liability.<sup>97</sup>

*Transfer of business and property.* The transfer of the business of a contractor to a corporation formed for that purpose during the progress of the work on a contract does not release the surety on the bond of such contractor conditioned on the payment by such contractor, his heirs, successors, executors, or administrators to all persons supplying him or them with labor or materials in the prosecution of the work.<sup>98</sup> Also, the transfer by a corporation of its business and property to another will not release its sureties on a note where the obligee refused to take the transferee's note in lieu of that of the corporation.<sup>99</sup> A surety on notes executed in payment of property will not be discharged where, subsequent to the transfer, with his knowledge and consent, of the property to another, the seller assented to the transfer, on the transferee assuming payment of the notes, no agreement being made to release either the original purchaser or his surety.<sup>1</sup>

### § 236. — Bankruptcy or Insolvency of Parties

The effect of a discharge in bankruptcy as to sureties of the bankrupt is discussed in Bankruptcy

§ 581, and the discharge in bankruptcy of a claim against the bankrupt as surety is considered Bankruptcy § 566. The operation and effect of a discharge in insolvency proceedings are discussed in Insolvency § 17.

Examine Pocket Parts for later cases.

### § 237. — Dissolution or Receivership of Corporate Surety

The dissolution or receivership of a surety company will not release it from liability on its surety bond.

The dissolution<sup>2</sup> or receivership<sup>3</sup> of a surety company will not release it from liability on its surety bond.

### § 238. — Formation of, or Change in Partnership

A surety for one person as principal is not liable for the acts of a partnership of which his principal is a member, or for the acts of a partnership afterward formed by the principal with another; and a surety for a partnership cannot be held liable for debts or obligations incurred after a change in the personnel of the firm, unless the suretyship contract contemplates such liability.

A surety for one person as principal is not liable for the acts of a partnership of which his principal is a member,<sup>4</sup> or for the acts of a partnership afterward formed by the principal with another,<sup>5</sup> nor is a surety for an individual liable for materials furnished his partner and charged to such partner individually.<sup>6</sup> However, if a principal, who takes in a partner after the formation of the suretyship contract, is treated and continues to act in an individual capacity, his surety will not be discharged.<sup>7</sup> A surety for a partnership cannot

95. N.Y.—Brill v. Friedhoff, 169 N.Y.S. 193, 102 Misc. 565, reversed on other grounds 172 N.Y.S. 544, 184 App.Div. 673, affirmed 129 N.E. 909, 229 N.Y. 547.

50 C.J. p 97 note 30.

#### Transferee not accepted

Transferee of stock who dissolved corporation which accepted assignment of lease contemplating assignment was held owner of lease by assignment, precluding contention that sureties on rent bond were released because lessor accepted transferee as lessee.—Closset v. Portland Amusement Co., 290 P. 556, 134 Or. 414, rehearing denied 293 P. 720, 134 Or. 414.

96. Wash.—Spaulding v. Aetna Casualty & Surety Co., 4 P.2d 526, 164 Wash. 665.

97. Pa.—Wiley's Est., 12 Phila. 152, 50 C.J. p 97 note 31.

98. U.S.—Illinois Surety Co. v. John

Davis Co., Ill., 37 S.Ct. 614, 244 U.S. 376, 61 L.Ed. 1206.

#### Rule applied to partnership reorganized as corporation

U.S.—James Miles & Son Co. v. Aetna Casualty & Surety Co., D.C.Mass., 1 F.Supp. 925.

99. Tex.—Rusk First Nat. Bank v. Rusk Pure Ice Co., Civ.App., 136 S.W. 89.

1. Tex.—Trotti v. Gaar, 126 S.W. 670, 59 Tex.Civ.App. 433.

2. Ill.—Evans v. Illinois Surety Co., 131 N.E. 262, 298 Ill. 101.

3. Ill.—Evans v. Illinois Surety Co., supra.

**Prosecution of claim to judgment** is not prevented by appointment of chancery receiver.—New York v. Surety Co., 167 N.Y.S. 752, 180 App. Div. 513.

4. Okl.—Peery v. Merrill, 179 P. 28, 75 Okl. 55.

Or.—Wallowa County School Dist.

No. 6 v. Smith, 127 P. 797, 63 Or. 586, 43 L.R.A., N.S., 65.

Change in partnership as obligee: supra § 234 c.

5. Mich.—White Sewing-Machine Co. v. Hines, 28 N.W. 157, 61 Mich. 423.

50 C.J. p 96 note 17.

6. Or.—Wallowa County School Dist. No. 6 v. Smith, 127 P. 797, 63 Or. 586, 43 L.R.A., N.S., 65.

7. Or.—Wallowa County School Dist. No. 6 v. Smith, supra.

50 C.J. p 96 note 19.

#### Surety becoming partner

The obligation of a surety on a note is not changed by the fact that the surety afterward becomes a partner in the business of the principal; nor would the fact that a note was afterward renewed when the surety was a partner to the principal maker change the obligation.—Runyan v. Moon, 267 Ill. 312.

not be held for debts or obligations incurred after a change in the personnel of the firm<sup>8</sup> unless the suretyship contract contemplates a continuing security for the firm without reference to its composition.<sup>9</sup> So a surety for a firm is not liable after a new member is added<sup>10</sup> or after a change caused by the withdrawal of a member or the dissolution of the firm, as by the death of a member.<sup>11</sup> However, if the surety has become liable for the performance of a particular contract by a partnership, its subsequent dissolution before the completion of the contract will not release him from liability for each of the former partners as far as that particular contract is concerned,<sup>12</sup> unless the contract is thereby discharged.<sup>13</sup>

### § 239. — Consent of Surety to Change

A surety who consents to a change of principals is not released from liability on his suretyship contract.

A surety who consents to a change of principals is, in accordance with the general rules as to consent and waiver of defenses by a surety, as discussed supra §§ 158-160, not released from liability on his suretyship contract.<sup>14</sup>

### § 240. Death of Parties

#### a. In general

#### b. Death of surety

#### a. In General

As a general rule the death of the principal has no effect on the liability of his surety as to anything which occurred prior to his death unless the cause of action is such as abates with the death of the principal.

As a general rule the death of the principal has no effect on the liability of his surety as to anything which occurred prior to his death,<sup>15</sup> unless the cause of action is such as abates with the death of the principal.<sup>16</sup> If the obligation was for a fixed term or undertaking, the surety is liable as to defaults arising after the principal's death, whether or not an administrator has been appointed.<sup>17</sup> If, however, the liability of the principal terminates with his death, his sureties cannot be held for anything which arises thereafter.<sup>18</sup> So a surety for a firm is not liable for the acts of the surviving partners after the death of one<sup>19</sup> unless it appears that the suretyship contract created a continuing liability.<sup>20</sup>

#### b. Death of Surety

As a general rule the liability of a surety is not discharged by his death unless the suretyship contract discloses an intention to discharge him, but equity will not enforce payment from the surety's estate where it does not appear that the principal is unable to pay, and, while the surety's liability remains contingent, it is not enforceable in the probate court.

As a general rule the liability of a surety is not discharged by his death,<sup>21</sup> especially where the

2. U.S.—*Corpus Juris* cited in *New Amsterdam Casualty Co. v. Basic Building & Loan Ass'n*, C.C. A.N.J., 60 F.2d 950, 953.

50 C.J. p 96 note 20.

3. Pa.—*Elliott-Lewis Electrical Co. v. Hausman*, 158 A. 626, 104 Pa. Super. 322.

50 C.J. p 96 note 21.

10. U.S.—*Corpus Juris* cited in *New Amsterdam Casualty Co. v. Basic Building & Loan Ass'n*, C.C. A.N.J., 60 F.2d 950, 953.

11. *Dupee v. Blake*, 35 N.E. 867, 148 Ill. 453.

12. U.S.—*National Surety Co. v. George H. Breece Lumber Co.*, C. C.A.N.M., 60 F.2d 847.

50 C.J. p 97 note 23.

13. U.S.—*National Surety Co. v. George H. Breece Lumber Co.*, supra.

50 C.J. p 97 note 25.

14. U.S.—*National Surety Co. v. George H. Breece Lumber Co.*, supra.

15. Okl.—*Peery v. Merrill*, 179 P. 23, 75 Okl. 55.

50 C.J. p 97 note 24.

16. Neb.—*Bell v. Walker*, 74 N.W. 617, 54 Neb. 232.

50 C.J. p 96 note 10.

16. Mo.—*Melvin v. Evans*, 48 Mo. App. 421.

50 C.J. p 96 note 11.

17. Cal.—*Albany v. U. S. Fidelity, etc., Co.*, 176 P. 705, 38 Cal.App. 466.

50 C.J. p 96 note 12.

#### Restriction of remedies of surety

The remedies of holder of bond secured by mortgage suing to recover interest were not altered by death of persons liable over to sureties for payment of bond, even though sureties, if compelled to pay, could not pursue personal representatives of decedents without foreclosing the mortgage, and no contingent claims were filed against such decedents' personal representatives.—*Rochester Sav. Bank v. Stoeltzen & Tapper*, 26 N.Y.S.2d 718, 176 Misc. 140.

18. Mich.—*Corpus Juris* cited in *City of Ann Arbor v. Massachusetts Bonding & Ins. Co.*, 276 N. W. 486, 282 Mich. 378.

50 C.J. p 96 note 13.

19. U.S.—*Connecticut Mut. Life Ins. Co. v. Bowler*, C.C.Me., 6 F. Cas.No.3,106, Holmes 263.

N.Y.—*Richardson v. Steuben County*, 160 N.Y.S. 445, 174 App.Div. 491, reversed on other grounds 122 N.E. 449, 226 N.Y. 13.

Dissolution of partnership by death of member as affecting liability of surety for partnership see supra § 238.

20. U.S.—*National Surety Co. v. George H. Breece Lumber Co.*, C. C.A.N.M., 60 F.2d 847.

50 C.J. p 96 note 15.

21. U.S.—*U. S., for Use and Benefit of Wilhelm, v. Chain, W.Va.*, 57 S. Ct. 394, 300 U.S. 31, 81 L.Ed. 487.

Ark.—*Rogers' Estate v. Hardin*, 143 S.W.2d 544, 201 Ark. 1.

Ga.—*Stephens v. Stone*, 167 S.E. 545, 46 Ga.App. 293.

Ky.—*Tolly v. Champion*, 229 S.W. 90, 191 Ky. 114.

Mich.—*People v. Benmore*, 299 N.W. 773, 298 Mich. 701.

Pa.—*Corpus Juris* cited in *Thommen v. Aldine Trust Co.*, 153 A. 750, 751, 302 Pa. 409.

24 C.J. p 290 note 56—50 C.J. p 99 note 58.

Liability of surety on bail bond as surviving death of surety see Bail § 83.

Even though the contract does not purport to bind heirs, executors, or administrators, the rule stated in the text applies.—*Thommen v. Aldine Trust Co.*, 153 A. 750, 302 Pa. 409—*White v. Commonwealth*, 39 Pa. 167.

suretyship contract purports to bind his heirs, devisees, and personal representatives,<sup>22</sup> but his estate is liable for money coming into the principal's hands thereafter,<sup>23</sup> and for the latter's subsequent defaults,<sup>24</sup> unless the suretyship contract, properly construed, discloses an intention to discharge the surety on his death.<sup>25</sup> However, equity will not enforce payment out of a decedent's estate of a debt on which he was surety where it does not appear that the principal is unable to pay,<sup>26</sup> and, while such liability remains contingent, it is not enforceable in the probate court.<sup>27</sup>

**Divisible contracts.** Where the consideration passes at different times, and the contract is, therefore, separate and divisible, it has been held that the liability of the estate of the surety is terminated by his death, and notice of that event,<sup>28</sup> but not by the death of the surety without such notice.<sup>29</sup>

**Where liability of surety is joint.** Under the common-law rule, where the liability of the surety is joint, his estate is not liable in an action at law after his death,<sup>30</sup> although in equity it has been held that his estate is discharged only where it appears that he has received no benefit from the joint obligation.<sup>31</sup> The common-law rule applies, even

though the contract is in terms made binding on the executors and administrators of the obligors.<sup>32</sup> It does not apply, however, where the contract is several as well as joint,<sup>33</sup> or where the contract was made joint instead of several by fraud or mistake,<sup>34</sup> or there was a previous equity which gave the promisee a right to a several indemnity from each of the obligors, as in case of money loaned to both of them.<sup>35</sup> Moreover, under statutory modifications of the common-law rule, the surety is not discharged by his death, but his estate remains liable, although the surety was jointly liable.<sup>36</sup>

**One cosurety, after the death of the other,** is not freed from liability,<sup>37</sup> especially where he has knowledge of the death of his cosurety and makes no effort to withdraw,<sup>38</sup> or the liability sought to be enforced is for defaults occurring after the death of the cosurety.<sup>39</sup>

## § 241. Insanity of Parties

A surety is not discharged by the insanity of his principal.

A surety is not discharged by the insanity of his principal.<sup>40</sup>

22. U.S.—U. S., for Use and Benefit of Wilhelm, v. Chain, W.Va., 57 S.Ct. 394, 300 U.S. 31, 81 L.Ed. 487. Iowa.—Balsor v. Baker, 264 N.W. 116, 220 Iowa 1216, 103 A.L.R. 995.

23. U.S.—Hecht v. Weaver, C.C.Or., 34 F. 111, 13 Sawy. 199. Ill.—Rapp v. Phenix Ins. Co., 113 Ill. 390, 55 Am.R. 427.

24. U.S.—U. S., for Use and Benefit of Wilhelm, v. Chain, W.Va., 57 S.Ct. 394, 300 U.S. 31, 81 L.Ed. 487. 50 C.J. p 99 note 60.

### Real or personal property bound

Bond under terms of which surety purports to bind his heirs, devisees, and personal representatives continues in force after death of surety and will bind estate of surety in hands of his heirs, devisees, or personal representatives, whether property received be realty or personalty.—Baker v. Baker, 264 N.W. 116, 220 Iowa 1216, 103 A.L.R. 995.

25. U.S.—U. S., for Use and Benefit of Wilhelm, v. Chain, W.Va., 57 S.Ct. 394, 300 U.S. 31, 81 L.Ed. 487.

### Surety having voice in transactions secured

Where it appeared from suretyship contract that decedent was to guaranty claimant against loss through dealings in securities by corporation of which decedent was a member, and after death of surety claimant and her husband acquired fifty per cent voice in management of busi-

ness and securities dealings of corporation to complete exclusion of decedent's estate latter was not liable to claimant for losses suffered.—In re Lillenthal's Estate, 240 N.Y.S. 849, 136 Misc. 762.

26. Va.—Jones v. Degge, 5 S.E. 799, 84 Va. 685.

24 C.J. p 290 note 58.

27. Mo.—Sauer v. Griffin, 67 Mo. 654.

28. R.I.—National Eagle Bank v. Hunt, 13 A. 115, 16 R.I. 148.

24 C.J. p 291 note 61.

29. U.S.—Hecht v. Weaver, C.C.Or., 34 F. 111, 13 Sawy. 199.

24 C.J. p 291 note 62.

30. N.Y.—Richardson v. Draper, 23 Hun 188, affirmed in 87 N.Y. 337.

24 C.J. p 291 note 63—50 C.J. p 99 note 63.

31. N.Y.—Richardson v. Draper, 87 N.Y. 337—Carpenter v. Provoost, 4 N.Y.Super. 537.

32. Pa.—Pecker v. Julius, 2 Browne 31.

33. N.Y.—Douglass v. Ferris, 33 N.E. 1041, 138 N.Y. 192, 34 Am.S.R. 435.

34. Ill.—Powell v. Kettella, 6 Ill. 491.

24 C.J. p 291 note 65.

35. Tex.—Boyd v. Bell, 7 S.W. 657, 69 Tex. 735.

24 C.J. p 291 note 66.

36. Wash.—Olson v. Seldovia Sal-

mon Co., 154 P. 1107, 89 Wash. 547.

24 C.J. p 291 note 67—50 C.J. p 99 note 62.

37. Wis.—Klatte v. Franklin State Bank, 248 N.W. 158, 211 Wis. 613, rehearing denied and modified on other grounds 249 N.W. 72, 211 Wis. 613.

**Cosurety, although ignorant of death,** was not discharged by death of cosurety where another surety's previous withdrawal with such cosurety's knowledge did not induce cosurety's withdrawal.—Klatte v. Franklin State Bank, *supra*.

38. Mich.—Westveer v. Landwehr, 267 N.W. 849, 276 Mich. 326.

Wis.—Klatte v. Franklin State Bank, 248 N.W. 158, 211 Wis. 613, rehearing denied and modified on other grounds 249 N.W. 72, 211 Wis. 613.

39. Que.—Beckett v. Addyman, 9 Q.B.D. 783.

### Claim arising after claim against deceased barred

The failure of creditor to proceed against estate of one surety before statute of nonclaims destroyed creditor's remedy against estate did not release cosurety, where bar of statute of nonclaims attached before creditor's cause of action arose.—Oliver v. Franklin Fire Ins. Co. of Philadelphia, 114 S.W.2d 1071, 195 Ark. 840.

40. Ark.—Corpus Juris cited in W.

## § 242. Judgment and Execution against Principal Alone

The creditor's recovery of an unsatisfied judgment against the principal does not discharge the surety, and the mere levy of an execution under a judgment against the principal is not in itself a discharge of the surety.

The creditor's recovery of an unsatisfied judgment against the principal does not discharge the surety.<sup>41</sup> However, if the judgment is paid by the principal, the surety is discharged.<sup>42</sup> Where several notes are sued on in one action against the principal and the execution is satisfied only in part, a surety for some of the notes may insist on a proportional application on the notes on which he is liable.<sup>43</sup>

*The mere levy of an execution* under a judgment against the principal is not in itself a discharge of the surety.<sup>44</sup> Generally, there is no satisfaction in favor of a surety if, without any neglect or fault of plaintiff or the officer, the levy has failed to result in actual satisfaction.<sup>45</sup>

## § 243. Judgment against Surety and Principal

As a general rule the relation of principal and surety is not terminated by a judgment against the principal and surety, although there is authority to the contrary.

The general rule is that the relation of principal and surety is not terminated by reason of a judgment having been obtained against the principal and surety.<sup>46</sup> However, there is authority to the contrary.<sup>47</sup> An attempt has been made by one court to reconcile the cases on the theory that in equity

the unanimous rule is that the relation is not terminated by reason of the judgment,<sup>48</sup> while there is a conflict in the law cases.<sup>49</sup> As long as the relation continues, the equities which inhere therein obtain and are available for the surety's relief.<sup>50</sup> It has been held that as against all persons chargeable with notice that a judgment debtor is a surety, any act which would have relieved the judgment debtor before judgment has the same effect after judgment and constitutes a sufficient defense to any action thereon, notwithstanding the judgment did not determine whether the liability was primary or secondary.<sup>51</sup> Where an execution is issued against the principal and his surety jointly, and levied on the property of the surety only, and the property is released by the execution plaintiff at his request, the levy is not a satisfaction of the execution in favor of the surety; and it can make no difference that the principal, whose property was not levied on, did not consent to the release.<sup>52</sup>

## § 244. Stay or Extension Granted by Court

A stay or extension granted by the court will not discharge the surety, especially if the order or judgment is invalid or revocable.

A stay or extension granted by the court will not discharge the surety,<sup>53</sup> especially if the order or judgment is invalid<sup>54</sup> or revocable.<sup>55</sup>

*The state*, in the collection of penalties, is held not to occupy the position of an ordinary creditor, and the respite of a replevied fine by the governor will not release the sureties on the replevy bond.<sup>56</sup>

T. Rawleigh Co. v. McAteer, 158 S.W.2d 701, 703, 203 Ark. 776.

N.Y.—Severson v. Macomber, 138 N.Y.S. 250, 153 App.Div. 482, affirmed 106 N.E. 72, 212 N.Y. 274.

41. U.S.—In re United Cigar Stores, C.C.A.N.Y., 68 F.2d 895.

Cal.—Ramish v. Astor, 42 P.2d 334, 5 Cal.App.2d 225, 50 C.J. p 188 note 28.

42. Ky.—Hunter v. Hunter, 7 Ky. Op. 235.

Payment of debt secured by principal in general see supra § 140.

### Doctrine of res judicata applied

Where all claims that obligee had against principal had been litigated and had been paid in full and accepted for, the doctrine of "res judicata" precluded obligee from collecting from sureties remainder of amount which had been unsuccessfully asserted against principal.—Pritchard v. Nelson, C.C.A.Va., 137 F.2d 312.

43. Mass.—Blackstone Bank v. Hill, 10 Pick. 129.

44. Ky.—Hunter v. Hunter, 7 Ky. Op. 235.

45. N.C.—Hamilton v. Mooney, 84 N.C. 12.

Delay in prosecution of proceedings against principal as discharging surety see supra § 212.

Loss or release of lien of judgment or execution as discharging surety see supra § 201.

46. Or.—Corpus Juris cited in Walin v. Young, 180 P.2d 535, 541, 181 Or. 185.

50 C.J. p 189 note 32.

47. U.S.—Findlay v. U. S. Bank, C. C. Ohio, 9 F.Cas.No.4,791, 2 McLean 44.

50 C.J. p 189 note 34.

48. N.Y.—Storms v. Thorn, 3 Barb. 314.

50 C.J. p 189 note 35.

49. N.Y.—Storms v. Thorn, supra.

50. Mo.—Stolze v. U. S. Fidelity, etc., Co., 131 S.W. 915, 153 Mo. App. 29.

N.Y.—La Farge v. Harter, 11 Barb. 159, affirmed 9 N.Y. 241.

51. Neb.—In re Mathews' Estate, 279 N.W. 301, 134 Neb. 607.

52. Va.—Walker v. Commonwealth, 18 Gratt. 13, 59 Va. 13, 98 Am.D. 681.

53. Ark.—Kissire v. Plunkett-Jarrell Grocer Co., 145 S.W. 567, 103 Ark. 473.

50 C.J. p 189 note 39.

### Under mandatory statutory provision

Del.—Houston v. Hurley, 2 Del.Ch. 247.

50 C.J. p 189 note 40.

54. Tenn.—Lane v. Howell, 1 Lea 275.

50 C.J. p 189 note 41.

55. Ky.—Helm v. Commonwealth, 79 Ky. 67.

50 C.J. p 189 note 42.

56. Ky.—Nall v. Springfield, 9 Bush 673.

## VII. RIGHTS AND REMEDIES OF CREDITOR

## A. AGAINST PRINCIPAL

## § 245. In General

A creditor's right to maintain an action against a principal exists independently of his rights as against the surety.

The right of the creditor to maintain an action against the principal exists independently of his rights as against the surety,<sup>57</sup> and he may maintain a bill in equity against the principal even though he has a remedy at law against the surety;<sup>58</sup> and his remedy at law against the surety need not first be exhausted.<sup>59</sup> On the other hand, if there is a clear remedy at law against the surety, equity will not entertain jurisdiction of a bill brought against the representatives of a deceased principal and surety jointly.<sup>60</sup> The right of the creditor to proceed against the principal alone is not affected by the fact that other creditors of the principal may be unable to satisfy their claims.<sup>61</sup> A release of the surety does not affect the liability of the principal.<sup>62</sup> An extension of time granted to the surety does not affect the liability of the principal.<sup>63</sup> Where an action is dismissed as to the surety and prosecuted against the principal alone, the rule of strict construction of the contract in favor of the obligors does not apply.<sup>64</sup>

*Separate actions* cannot be maintained at the same time against the principal and the sureties.<sup>65</sup>

## § 246. Defenses in General

Where the principal alone is sued, he may interpose only such defenses as are relevant to the suit, and may not set up a defense available only to a surety.

A principal may not set up defenses available only to a surety.<sup>66</sup> Limitation provisions in the bond are not available to the principal if he is sued on the contract to secure the performance of which the bond was given.<sup>67</sup>

## § 247. Payment by Surety

Payment by a surety prevents recovery from the principal.

Payment by the surety prevents recovery from the principal,<sup>68</sup> and part payment by the surety will discharge the principal to the extent of the amount paid.<sup>69</sup> Part payment by the surety and his release by the creditor will not bar the creditor's action against the principal for the balance due after deducting the amount paid by the surety.<sup>70</sup>

## § 248. Actions

The application of the general rules of civil actions to suits against a principal have been considered *supra* §§ 245-247, while their application in cases against both the principal and the sureties are discussed *infra* §§ 249-281.

Examine Pocket Parts for later cases.

57. N.J.—*Corpus Juris* cited in *Stulz-Sickles Co. v. Fredburn Const. Corporation*, 169 A. 27, 31, 114 N.J.Eq. 475.

**Bringing in surety**

Principal can insist on presence of surety who is within jurisdiction in action by creditor to end that equities between principal and surety can be determined.—*Albany Exchange Sav. Bank v. Winne*, 6 N.Y. S.2d 699, 168 Misc. 853.

58. Conn.—*Middletown Bank v. Russ*, 8 Conn. 135, 8 Am.D. 164.

59. N.Y.—*Speiglemeyer v. Crawford*, 6 Paige 254.

N.C.—*Alexander v. Taylor*, 62 N.C. 36.

60. Va.—*Linney v. Dare*, 2 Leigh 588, 29 Va. 588.

61. Pa.—*Baldwin v. Ralston*, 6 Pa. Dist. 198.

Tex.—*Rogan v. Williams*, 63 Tex. 123.

62. Miss.—*Austin-Western Road Mach. Co. v. John A. Spencer, Inc.*, 193 So. 336, 187 Miss. 388. 50 C.J. p 191 note 83.

**Consideration**

Since a creditor may release a surety without affecting the liability of the principal, it is of no concern to the principal what consideration moved the creditor to release the surety.—*Mumford v. Solomon*, 68 S.E. 1075, 8 Ga.App. 291.

**Release after judgment**

Judgment creditor after obtaining judgment in solido against principal obligors on note and sureties was entitled to release latter without prejudicing rights against former as to obligation represented by judgment, and such release was not abandonment or extinguishment of principal's liability on obligation represented by judgment.—*Nelson v. Kinnebrew*, La.App., 140 So. 139.

63. N.Y.—*Perkins v. Squier*, 1 *Thomps. & C.* 620.

S.C.—*Fraser v. Fishburne*, 4 S.C. 314.

64. Mo.—*Akin v. Rice*, 117 S.W. 655, 137 Mo.App. 147.

65. Tenn.—*Kendrick v. Moss*, 58 S.W. 127, 104 Tenn. 376.

66. Ark.—*Marshall v. Sloan*, 26 Ark. 513. 50 C.J. p 191 note 87.

67. U.S.—*Marshalltown Stone Co. v. Louis Drach Constr. Co.*; *C.C. Iowa*, 123 F. 746.

68. Ky.—*Maysville Tel. Co. v. Maysville First Nat. Bank*, 134 S.W. 886, 142 Ky. 578. 50 C.J. p 191 note 89.

69. Me.—*Emery v. Richardson*, 61 Me. 99.

70. Miss.—*Austin-Western Road Mach. Co. v. John A. Spencer, Inc.*, 193 So. 336, 187 Miss. 388.

## B. AGAINST SURETY OR PRINCIPAL AND SURETY

## § 249. In General

On default of the principal, suit may be brought at once against the surety; and if the surety is deceased his liability may become that of his estate.

On default of the principal, suit may be brought at once against the surety<sup>71</sup> or one who has assumed liability in place of the original surety<sup>72</sup> unless the obligee has waived the breach or default.<sup>73</sup> Action must be brought on the instrument to which the sureties are parties, and not on the transaction which it secures.<sup>74</sup> Where the creditor has two or more instruments available for the enforcement of his claim, he may resort to either<sup>75</sup> although the parties on one may possess rights against those on another;<sup>76</sup> and an action on one instrument does not affect the right of the creditor or obligee afterward to bring suit on another.<sup>77</sup> Death of the principal does not affect the right of action against the surety.<sup>78</sup> Where the default of a principal has not been established, a bill for an accounting against a surety is not proper.<sup>79</sup> A statute giving a creditor the right to require his debtor to give security where he has become insolvent after contracting the obligation does not apply to sureties so as to give the creditor the right to compel him to secure his obligation.<sup>80</sup>

*Against estate of deceased surety.* The estate of a deceased surety remains liable for the default of his principal and his liability as surety may, by the terms of his contract, become that of his estate and heirs.<sup>81</sup> Statutes providing that the surety cannot be sued unless joined with the principal or un-

less judgment has been previously rendered against the principal have been held to apply to the bringing of an action against a deceased surety's estate.<sup>82</sup> Realty of a deceased surety cannot be proceeded against until his liability has been established by a suit on the bond.<sup>83</sup> A judgment recovered against principal and surety jointly bars the right to proceed against the surety's estate separately.<sup>84</sup>

## § 250. Nature and Form of Remedy

Generally, an action at law is the proper means of enforcing a surety's liability, but equity will give relief in a proper case.

An action at law is the proper means of enforcing a claim against sureties,<sup>85</sup> and the only means, in the absence of peculiar conditions vesting jurisdiction in equity,<sup>86</sup> but a court of equity will give relief on a proper case being made out<sup>87</sup> or as an incident to its equity jurisdiction in matters of trust and account,<sup>88</sup> but equity will not relieve where the remedy at law is adequate.<sup>89</sup> Recovery cannot be had in general assumpsit under the money counts, but a surety must be declared against specially.<sup>90</sup>

*Summary statutory proceedings against sureties are cumulative.*<sup>91</sup>

## § 251. Conditions Precedent

There must be compliance with all proper conditions precedent before an action can be maintained.

Plaintiff must comply with conditions precedent

71. U.S.—Asbury Park Board of Education v. Maryland Casualty Co., C.C.A.N.J., 27 F.2d 20.  
50 C.J. p 191 note 91.

Principle that sureties are favorites of law does not preclude recovery when facts are sufficient to show that provisions of bond have been breached.—Roper v. Caterpillar Tractor Co., 37 P.2d 812, 98 Mont. 76.

72. Colo.—People v. National Surety Co., 188 P. 653, 68 Colo. 231.  
50 C.J. p 191 note 92.

73. N.Y.—Lamotte v. Title Guaranty, etc., Co., 151 N.Y.S. 148, 165 App.Div. 573, affirmed 117 N.E. 1073, 221 N.Y. 690.

74. Ark.—Willamoules v. Strong, 8 Ark. 467.

75. Wash.—W. T. Rawleigh Co. v. Graham, 103 P.2d 1076, 4 Wash.2d 407, 123 A.L.R. 596.  
50 C.J. p 191 note 96.

76. Ga.—Sutton v. Williams, 1 S.E. 175, 77 Ga. 570.

Tenn.—Tennessee Hospital v. Fuqua, 1 Lea 608.

77. Iowa.—Clapp v. Wallace, 266 N.W. 493, 221 Iowa 672.  
50 C.J. p 191 note 98.

78. Tex.—Boggs v. State, 46 Tex. 10.—National Bank of Commerce v. Gilvin, Civ.App., 152 S.W. 652.

79. Conn.—Bissell v. Ames, 17 Conn. 121.

Mich.—Grady v. Hughes, 44 N.W. 1050, 80 Mich. 184.

80. Puerto Rico.—Gelabert v. Morales, 28 Puerto Rico 611.

81. N.Y.—Matter of Sullard, 186 N.Y.S. 251, 114 Misc. 288.

Liability of surety's estate see Executors and Administrators § 376.

82. Tex.—Hume v. Perry, Civ.App., 186 S.W. 594.  
50 C.J. p 192 note 8.

83. N.C.—Williams v. McNair, 4 S.E. 131, 133, 98 N.C. 332.

84. U.S.—U. S. v. Archer, C.C.Pa., 24 F.Cas.No.14,464, 1 Wall.Jr. 173,

affirmed U. S. v. Price, 9 How. 83, 13 L.Ed. 561.

85. U.S.—Fidelity & Deposit Co. of Maryland v. U. S., for Use of Talbert, C.C.A.Ga., 35 F.2d 940.  
50 C.J. p 192 note 11.

86. U.S.—Fidelity & Deposit Co. v. U. S., for Use of Talbert, supra. Fla.—Grant v. Amiker, 162 So. 712, 120 Fla. 356.

87. N.Y.—Guffanti v. National Surety Co., 90 N.E. 174, 196 N.Y. 452, 134 Am.S.R. 848.  
50 C.J. p 192 note 12.

88. N.Y.—Lord v. Tiffany, 98 N.Y. 412, 50 Am.R. 689.  
50 C.J. p 192 note 13.

89. Fla.—St. Augustine First Nat. Bank v. Perkins, 87 So. 912, 81 Fla. 341.

90. Vt.—Arbuckle v. Templeton, 25 A. 1095, 65 Vt. 205.  
50 C.J. p 192 note 15.

91. U.S.—Antioch First Nat. Bank v. McKean, C.C.A.Or., 285 F. 557.

to his right to recover against the surety.<sup>92</sup> As discussed *infra* § 287, ordinarily, in the absence of a statute or circumstances under which a court of equity may order it, the creditor or obligee cannot be required to resort to the principal before proceeding against the surety; and the creditor may bring his action against the surety without having proceeded first against the principal<sup>93</sup> and although the amount of the principal's liability has not been established;<sup>94</sup> and his right is not defeated by the fact that the surety, compelled to pay the judgment, has a right of subrogation which will be denied him if no judgment against the principal is rendered.<sup>95</sup>

In the case of a condition imposed on the holder of a bond that he will exhaust all legal remedies against the principal before suing the sureties, it is not violated where suit is brought in the first instance against the latter, the principal being insolvent.<sup>96</sup> In the absence of the provision for completion of the contract by the obligee, such a completion is not a condition precedent to an action by the obligee against a surety for the performance of the contract.<sup>97</sup> So, where the undertaking of the surety is that the principal shall discharge certain claims, his liability accrues on default by the principal, although the claims have not been discharged by the obligee.<sup>98</sup> However, where the

liability of the surety is dependent on the establishment of a valid lien on the property of the obligee, the validity of the lien must be established before suit can be brought against the surety.<sup>99</sup> Return of an execution unsatisfied, where otherwise necessary under the terms of the contract to fix the surety's liability, may be excused by a discharge of the principal in bankruptcy.<sup>1</sup> It is not necessary that an arbitration clause in the principal contract should be complied with as a condition to the bringing of an action on the contract of suretyship where the contract of suretyship does not incorporate such provision either expressly or impliedly.<sup>2</sup> Under a statute giving the creditor or obligee the right to sue all or any one of the persons liable, after decease of the principal he may bring his action against the sureties without first verifying his claim and making demand of the personal representative of deceased.<sup>3</sup>

## § 252. — Demand on Principal or Surety

Unless required by statute or contract, the creditor need not make demand for payment or performance by the principal before bringing suit.

In the absence of a statutory or contractual requirement,<sup>4</sup> it is not necessary that payment or performance of his obligation be first demanded of the principal,<sup>5</sup> even though there is a strong prob-

92. Ala.—Maryland Casualty Co. v. Cunningham, 173 So. 506, 234 Ala. 80.

Va.—American Surety Co. v. Plank & Whitsett, 165 S.E. 660, 159 Va. 1.

### Procurement of final decree

Mass.—Union Market Nat. Bank of Watertown v. Nonantum Inv. Co., 197 N.E. 57, 291 Mass. 439.

93. U.S.—In re United Cigar Stores Co., C.C.A.N.Y., 68 F.2d 895—Downer v. U. S. Fidelity & Guaranty Co. of Maryland, C.C.A.Pa., 46 F.2d 733.

N.Y.—Merrill v. Equitable Surety Co. of New York, 227 N.Y.S. 266, 131 Misc. 541.

N.C.—Watson v. King, 156 S.E. 93, 200 N.C. 8.

Pa.—McRoberts v. Burns, Com.Pl., 93 Pittsb.Leg.J. 354—Greensburg Building & Loan Ass'n v. Dell, Com.Pl., 22 West.Co. 299.

S.C.—Corpus Juris quoted in Small v. National Surety Corporation, 19 S.E.2d 658, 661, 199 S.C. 392.

Wis.—State Bank of Mt. Horeb v. Banking Commission, 2 N.W.2d 363, 240 Wis. 189.

50 C.J. p 192 note 20.

Sureties for payment of mortgage debt could not be prejudiced by

being sued with mortgagor for interest due on bond secured by mortgagee without first exhausting remedies against owner of land, even though mortgagee was fully aware of suretyship relation.—Rochester Sav. Bank v. Stoeltzen & Tapper, 26 N.Y.S.2d 718, 176 Misc. 140.

### Deceased surety

The holders of notes and obligations on which a decedent was surety could have sued the executrix and compelled her to pay such obligations, there being sufficient assets, without proceeding against the principals.—Tolly v. Champion, 229 S.W. 90, 191 Ky. 114.

94. S.C.—Corpus Juris quoted in Small v. National Surety Corporation, 19 S.E.2d 658, 661, 199 S.C. 392.

50 C.J. p 192 note 21.

95. Ariz.—First Nat. Bank v. Standard Accident Ins. Co., 297 P. 864, 38 Ariz. 77.

96. Mo.—Heralson v. Mason, 53 Mo. 211.

97. N.Y.—Corney v. United Surety Co., 111 N.E. 832, 217 N.Y. 268, rehearing denied 112 N.E. 1055, 218 N.Y. 625.

S.C.—Crymes v. Gaul Const. Co., 108 S.E. 175, 117 S.C. 18.

50 C.J. p 192 note 23.

98. Colo.—Empire State Surety Co. v. Lindenmeier, 131 P. 437, 54 Colo. 497, Ann.Cas.1914C 1189.

50 C.J. p 192 note 24.

99. La.—Greater New Orleans Homestead Assoc. v. Globe Indemnity Co., 8 La.App. 262.

1. U.S.—In re Martin, D.C.N.Y., 105 F. 753.

2. Cal.—Oakdale Irr. Dist. v. Beard, 190 P. 224, 47 Cal.App. 66.

3. Ky.—Singer Sewing Mach. Co. v. Combs, 11 S.W.2d 994, 227 Ky. 61.

Tex.—Marine Banking & Trust Co. v. Federal Trust Co., Civ.App., 64 S.W.2d 409.

4. N.Y.—Waterloo First Nat. Bank v. Story, 93 N.E. 940, 200 N.Y. 846, 34 L.R.A.N.S., 154, 21 Ann.Cas. 542.

50 C.J. p 193 note 31.

Demand at place specified in bill or note may be necessary to charge sureties.—Fort v. Cortes, 14 La. 180.

5. U.S.—McCaughn v. Philadelphia Barge Co., D.C.Pa., 44 F.2d 665.

Ky.—Fritts v. Kirchdorfer, 124 S.W. 882, 136 Ky. 643.

50 C.J. p 193 note 32.



ability that the principal would have paid or performed if demand had been made,<sup>6</sup> and more especially where demand would have been useless;<sup>7</sup> nor is it requisite, before proceeding against sureties, that the principal be called on to account.<sup>8</sup> Demand on the sureties is not necessary before bringing suit against them,<sup>9</sup> since the commencement of the suit is a sufficient demand.<sup>10</sup>

### § 253. — Notice of Default

It is generally not necessary that sureties be notified of the default of the principal unless notice is required by statute or contract.

In the absence of a statute to the contrary or provisions in the contract so requiring, notice of the default of the principal need not be given to the sureties before they can be sued on the obligations,<sup>11</sup> even though the rules and by-laws of the obligee require such information to be given to them,<sup>12</sup> or the sureties are injured by lack of it,<sup>13</sup> since it is their duty to make inquiry and ascertain whether the principal is discharging the obligation resting on him.<sup>14</sup> An agreement by the obligee with the principal not to inform his sureties of his default will not release them if they do not make any inquiries.<sup>15</sup> On the other hand, where there is a stipulation in the contract for notice of default, compliance therewith is a condition precedent to an action against the sureties.<sup>16</sup>

### § 254. Defenses

A surety, when sued, may generally make the same defenses in an action at law as may be made in a court of equity.

Generally the surety may make the same defenses in an action at law as may be made in a court of equity.<sup>17</sup> Where the surety is, or has become, bound as a principal, he may not set up any defense arising out of the suretyship relation.<sup>18</sup> Non-performance of a contract between principal and creditor or obligee which is in no way connected with the surety's obligation is no defense to the surety,<sup>19</sup> nor can the surety defend on the ground that there has been no default when the contract performed by the principal is not a part of the original contract for the performance of which the surety became bound.<sup>20</sup> It is no defense that plaintiff refused to do more than his contract required.<sup>21</sup> The fact that the obligee has attempted to enforce the claim against the principal<sup>22</sup> or that a claim has been filed and allowed as against the principal's estate<sup>23</sup> is not a defense. It is no defense that the surety was not a party to the transaction wherein the principal breached his obligation.<sup>24</sup>

Many matters of defense available to a surety have already been considered in connection with the general treatment of the creation and existence of the relationship, discussed supra §§ 9-86, the nature and extent of the liability of the surety, supra §§ 87-115, and the discharge of the surety from his liability, supra §§ 116-244.

*Waiver of one defense* does not imply a waiver of other defenses available to the surety.<sup>25</sup>

*Matters personal to a surety* may be set up by him in his defense.<sup>26</sup>

*Declaration of war.* The fact that the principal

6. Tenn.—Weaver v. Ruhm, Ch. App., 47 S.W. 171.
7. Mont.—Mutual Oil Co. v. Hamilton, 236 P. 545, 73 Mont. 335.
- N.Y.—Mattone v. Illinois Surety Co., 123 N.Y.S. 236.
8. U.S.—Smith v. U. S., Mo., 5 Pet. 292, 8 L.Ed. 130.
- 50 C.J. p 193 note 35.
9. Md.—Ward v. Schlosser, 75 A. 116, 111 Md. 528.
- 50 C.J. p 193 note 36.
10. Ala.—Rowe v. New Brockton Bank, 92 So. 643, 207 Ala. 334.
- N.Y.—Heinemann v. Brasch, 103 N.Y.S. 720, 53 Misc. 552.
11. U.S.—Prudence Co. v. Fidelity & Deposit Co. of Maryland, D.C. N.Y., 2 F.Supp. 454.
- Del.—W. T. Rawleigh Co. v. Warrington, 199 A. 666, 9 W.W.Harr. 366.
- Ky.—Fritts v. Kirchdorfer, 124 S.W. 882, 136 Ky. 643.
- 50 C.J. p 193 note 41.

12. N.H.—New Hampshire Sav. Bank v. Downing, 16 N.H. 187.
13. U.S.—Smith v. U. S., Mo., 5 Pet. 292, 8 L.Ed. 130.
- 50 C.J. p 193 note 43.
14. Ala.—Avery Drug Co. v. Ely-Robertson-Barlow Drug Co., 69 So. 931, 194 Ala. 507.
- 50 C.J. p 193 note 44.
15. N.J.—Grover v. Hoppock, 26 N.J.Law 191.
16. Ind.—Knight, etc., Co. v. Castle, 87 N.E. 976, 172 Ind. 97, 27 L.R.A., N.S., 573.
- Pa.—Woodling v. U. S. Fidelity & Guaranty Co., Com.Pl., 15 Northumb.Leg.J. 354.
- 50 C.J. p 194 note 46.
17. Fla.—Bear v. Duval Lumber Co., for Use and Benefit of Standard Accident Ins. Co., 150 So. 614, 112 Fla. 240.
- 50 C.J. p 194 note 50.
18. U.S.—Sprigg v. Mt. Pleasant

- Bank, Ohio, 10 Pet. 257, 9 L.Ed. 416.
- 50 C.J. p 194 note 52.
19. Ky.—Harlan Fuel Co. v. Wiggington, 262 S.W. 957, 203 Ky. 546.
20. Iowa.—Charles Weitz' Sons v. U. S. Fidelity, etc., Co., 219 N.W. 411, 206 Iowa 1025.
21. Md.—Etna Indemn. Co. v. George A. Fuller Co., 73 A. 738, 74 A. 369, 111 Md. 321.
- 50 C.J. p 194 note 55.
22. Tex.—National Bank of Commerce v. Gilvin, Civ.App., 152 S.W. 652.
23. Ind.—Hayes v. Hayes, 64 Ind. 243.
24. U.S.—U. S. v. Gotham Pharmaceutical Corporation, D.C.N.Y., 1 F.R.D. 744.
25. Utah.—Paxton v. Spencer, 265 P. 751, 71 Utah 313.
26. Ind.—Campbell v. Gates, 17 Ind. 126.

becomes an alien enemy is not available as a defense to his sureties.<sup>27</sup>

## § 255. — Defenses of Principal Available to Surety

A surety ordinarily may avail himself of any defense which his principal may have except those purely personal to the principal or those which the principal has waived or precluded himself from urging.

A surety ordinarily may avail himself of any

defense which his principal may have<sup>28</sup> except those purely personal to the principal<sup>29</sup> or those which the principal has waived or precluded himself from urging.<sup>30</sup> Failure of a principal to offer a defense in an action against him to which the surety was not made a party will not prevent the surety, in a subsequent action against the principal and himself, from setting up any defense his principal could have made.<sup>31</sup> Generally a surety cannot set up the defense that the contract is invalid if the principal could not.<sup>32</sup>

27. Ala.—*Bean v. Chapman*, 62 Ala. 58.

Md.—*Paul v. Christie*, 4 Harr. & M. 161.

28. U.S.—*Provident Trust Co. of Philadelphia v. Metropolitan Casualty Ins. Co. of N. Y.*, C.C.A.Pa., 152 F.2d 875, certiorari denied 65 S.Ct. 810, two cases, 327 U.S. 789, 90 L.Ed. 1015—*National Surety Corporation v. U. S.*, C.C.A.Tex., 143 F.2d 831, certiorari denied 65 S.Ct. 268, 323 U.S. 782, 89 L.Ed. 625—*Phelps v. Dawson*, C.C.A.S.D., 97 F.2d 339, 116 A.L.R. 1343—*American Surety Co. of New York v. City of Akron*, C.C.A.Ohio, 95 F.2d 966—*Corpus Juris* cited in *Tuolumne Gold Dredging Corp. v. Walter W. Johnson Co.*, D.C.Cal., 71 F.Supp. 111, 114—*Modern Brokerage Corporation v. Massachusetts Bonding & Insurance Co.*, D.C.N.Y., 54 F.Supp. 939, opinion adhered to 56 F.Supp. 696.

Fla.—*Bear v. Duval Lumber Co. for Use and Benefit of Standard Accident Ins. Co.*, 150 So. 614, 112 Fla. 240.

Ga.—*Greenwood v. Greenwood*, 163 S.E. 318, 44 Ga.App. 848.

Iowa.—*Benson v. Alleman*, 263 N.W. 305, 220 Iowa 731.

Ky.—*Skaggs v. Marcum*, 57 S.W.2d 670, 247 Ky. 712.

La.—*J. R. Watkins Co. v. Calhoun*, App., 44 So.2d 726.

Mich.—*Corpus Juris* quoted in *Hurst v. Charron*, 255 N.W. 419, 421, 267 Mich. 210.

N.H.—*Lavigne v. Lavigne*, 176 A. 282, 87 N.H. 223.

N.J.—*Better Plan Building & Loan Ass'n v. Holden*, 169 A. 289, 114 N.J.Eq. 587.

N.C.—*Chozen Confections v. Johnson*, 11 S.E.2d 472, 218 N.C. 500.

50 C.J. p 194 note 61—3 C.J. p 717 note 93.

### Defenses available to surety

(1) Where court has found that contractor had performed its contract, contractor's surety guaranteeing the performance of the contract was entitled to contractor's defense of *res judicata*.—*Tuolumne Gold Dredging Corp. v. Walter W. Johnson Co.*, D.C.Cal., 71 F.Supp. 111.

(2) Where principal was compe-

tent to enter contract, any defense available to principal excused surety, including want of consideration.—*Skaggs v. Marcum*, 57 S.W.2d 670, 247 Ky. 712.

29. U.S.—*National Surety Corporation v. U. S.*, C.C.A.Tex., 143 F.2d 831, certiorari denied 65 S.Ct. 268, 323 U.S. 782, 89 L.Ed. 625—*Phelps v. Dawson*, C.C.A.S.D., 97 F.2d 339, 116 A.L.R. 1343—*Osborne v. Bryce*, C.C.Wis., 23 F. 171.

Mich.—*Corpus Juris* quoted in *Hurst v. Charron*, 255 N.W. 419, 421, 267 Mich. 210.

N.Y.—*Adamson v. Adamson*, 295 N.Y.S. 506, 251 App.Div. 187—*Sancourt Realty Corporation v. Dowling*, 222 N.Y.S. 288, 220 App.Div. 660.

50 C.J. p 194 note 62.

Even if accommodation maker was a surety for maker, defenses available to maker that holder of note held it as agent and that note was bought with funds of partnership composed of maker and agent's principal, and that principal had agreed with maker to purchase note with maker's share of profits of partnership, and that funds to buy note came from that source, would not be available to accommodation maker.—*Adamson v. Adamson*, 295 N.Y.S. 506, 251 App.Div. 187.

30. U.S.—*U. S. for Use and Benefit of Farwell, Ozmun, Kirk & Co. v. Shea-Adamson Co.*, D.C.Minn., 21 F.Supp. 831.

Ala.—*Lyon v. Leavitt*, 3 Ala. 430.

Iowa.—*Independent School Dist. of Dubuque in Dubuque County v. Sass*, 261 N.W. 30, 220 Iowa 1.

Mich.—*Corpus Juris* quoted in *Hurst v. Charron*, 255 N.W. 419, 421, 267 Mich. 210.

Mo.—*Union State Bank v. American Surety Co.*, 23 S.W.2d 1038, 324 Mo. 438.

Va.—*Ross v. Woodville*, 4 Munf. 324, 18 Va. 324.

Wyo.—*Corpus Juris* cited in *State Bank of Wheatland v. Turpen*, 34 P.2d 1, 4, 47 Wyo. 284, rehearing denied 37 P.2d 679, 47 Wyo. 328.

50 C.J. p 194 note 63.

### Defenses held not available

(1) Where general contractor by fraud secured release under seal

from subcontractor and used release to obtain payment from board of education, surety on general contractor's bond was estopped to set up the release as a bar to subcontractor's action on the bond.—*John N. Price & Sons v. Maryland Casualty Co.*, D.C.N.J., 50 F.Supp. 319.

(2) In an action on a surety contract to secure performance of a construction contract by the principal, who was to be financed by funds raised by subscription and paid to him, surety could not contend that payment by certificate of deposit and Liberty bond accepted by principal as payment did not satisfy terms of bond requiring payment in money.—*Union State Bank v. American Surety Co.*, 23 S.W.2d 1038, 324 Mo. 438.

(3) Defense that materialman's assignment of claim as to certain supplies furnished contractor violated rule against splitting cause of action could not be asserted by contractor's surety, where the contractor had waived it, notwithstanding materialman had previously sued to recover for other items, furnished under same running account, where items assigned were individualized, in absence of showing that greater burden was placed on surety thereby.—*State Bank of Wheatland v. Turpen*, 34 P.2d 1, 47 Wyo. 284, rehearing denied 37 P.2d 679, 47 Wyo. 328.

### Defense of payment

In suit on note against principal maker and sureties, principal maker's failure to move for new trial or to appeal after default judgment for plaintiff was rendered, notwithstanding plea of general issue with notice of payment by all defendants was undisposed of, did not operate as waiver of defense of payment on part of sureties, since, if note was paid, no action or inaction on part of principal maker could make sureties liable.—*Randall v. Gunter*, 179 So. 362, 181 Miss. 332.

31. Mich.—*Corpus Juris* quoted in *Hurst v. Charron*, 255 N.W. 419, 421, 267 Mich. 210.

W.Va.—*State v. Duggan*, 135 S.E. 270, 102 W.Va. 312.

32. Mich.—*Corpus Juris* quoted in

## § 256. — Defenses of Cosurety Available to Surety

A surety may not urge a defense purely personal to a cosurety.

Defenses which are purely personal to a cosurety and not interposed by him may not be availed of by a surety.<sup>33</sup> So, where one of the cosureties is discharged in equity by the conduct of the creditor, a judgment in favor of the cosurety so discharged from liability does not operate to discharge a cosurety who is not in a position to avail himself of a like defense personal to himself.<sup>34</sup>

## § 257. Counterclaim and Set-Off

The availability of particular matters of counterclaim and set-off are discussed *infra* §§ 258-260.

Examine Pocket Parts for later cases.

## § 258. — Of Surety's Claim

Generally a surety may set off his claims against the plaintiff.

Subject to the rules relating to recoupment, set-off, and counterclaim generally, sureties, when sued, may set off their claims against plaintiff.<sup>35</sup> A surety may interpose as a counterclaim a judgment held by him against plaintiff,<sup>36</sup> and may counterclaim for damages arising out of the failure of plaintiff to perform an agreement which was the inducement of the surety to assume the relation-

ship.<sup>37</sup> Where by statute the counterclaim must be in favor of all defendants, a surety cannot set up a personal debt due him from plaintiff in an action against him and his principal.<sup>38</sup>

## § 259. — Of Cosurety's Claim

A claim of a cosurety cannot be set off by a surety; but the cosurety may intervene to set off his own claim.

One surety cannot set off a claim of his cosurety,<sup>39</sup> but the cosurety can intervene for the purpose of setting off a claim against the creditor.<sup>40</sup>

## § 260. — Of Principal's Claim

- a. In joint action against principal and surety
- b. In suit against surety alone

### a. In Joint Action against Principal and Surety

Generally, where the principal and surety are sued jointly, a claim in favor of the principal can be set off against the demand of the creditor or obligee.

Since a defense available to a principal is generally available to a surety, whatever defense is available to the principal by way of recoupment is also available to the surety.<sup>41</sup> Although there is some authority to the contrary,<sup>42</sup> generally, when the principal and surety are sued jointly, a claim in favor of the principal can be set off against the demand of the creditor or obligee,<sup>43</sup> against a re-

Hurst v. Charron, 255 N.W. 419, 421, 267 Mich. 210.  
50 C.J. p 195 note 65.

33. Ind.—Burwell v. Columbia First Nat. Bank, 159 N.E. 15, 86 Ind. App. 581.

Ky.—Sulphur Deposit Bank v. Peak, 62 S.W. 268, 110 Ky. 579, 23 Ky.L. 19.

34. Pa.—Maryland Fidelity, etc., Co. v. Phillips, 84 A. 432, 235 Pa. 469.

35. U.S.—Maryland Fidelity, etc., Co. v. Duke, C.C.A.Wash., 293 F. 651.  
50 C.J. p 195 note 69.

**Matters of set-off**

In action by bank against its former president and his son to collect interest on notes executed by son on which former president was surety, wherein defendants by way of set-off alleged that former president had left in the bank three hundred dollars of his salary with intention of applying it as a credit on interest due on the notes, defendants, although entitled to credit for the sum left with the bank, were not entitled to interest on such sum from date it was left until principal of the notes was satisfied, since

amount was to be credited to past-due interest, and not to principal.—Pool v. First Nat. Bank of Princeton, 155 S.W.2d 4, 287 Ky. 684.

36. N.Y.—Cornell v. Donovan, 13 N. Y.St. 741.

37. Ky.—Gaar v. Louisville Banking Co., 11 Bush 180, 21 Am.R. 209—Murphy v. Hubble, 2 Duv. 247.

38. Iowa.—Corbett v. Hughes, 39 N. W. 500, 75 Iowa 281.

39. Que.—Bowyear v. Pawson, 6 Q. B.D. 540.

40. Kan.—Burton v. Decker, 38 P. 783, 54 Kan. 608.

41. Ala.—Merchants' Bank v. Acme Lumber, etc., Co., 49 So. 782, 160 Ala. 435.

50 C.J. p 195 note 77.

42. Ala.—McCreary v. Jones, 11 So. 600, 96 Ala. 592.

50 C.J. p 195 note 78.

43. U.S.—American Surety Co. of New York v. City of Akron, C.C. A.Ohio, 95 F.2d 966.

Ill.—People v. Erick, 11 N.E.2d 955, 367 Ill. 446—Heiple v. Lehman, 192 N.E. 858, 358 Ill. 222.

Mo.—Gooding v. Vaught, App., 279 S.W. 208.

N.Y.—Iroquois Door Co. v. Leavenworth Apartment Co., 137 N.Y.S. 122, 77 Misc. 462.  
50 C.J. p 195 note 79.

**Claim in favor of principal only**

Statute providing that counterclaim may be any new matter constituting cause of action in favor of defendant, or all of defendants if more than one, against plaintiff, or all of plaintiffs if more than one, does not apply where principal and surety are sued jointly, so that, in suit on attachment bond for damages for alleged wrongful issuance of writ of attachment in mortgage foreclosure action, principal on bond could file counterclaim based on deficiency judgment obtained in foreclosure action, although counterclaim was not in favor of surety on bond, since principal was primarily liable.—Imes v. Hamilton, 269 N.W. 757, 222 Iowa 777.

**Surety without interest in subject matter**

In action on bond against principal and surety, principal may plead set-off or cross action in subject matter of which surety has no interest.

U.S.—Atlantic Coast Line R. Co. v.

lator,<sup>44</sup> or against an assignee,<sup>45</sup> unless, in the latter case, the instrument is negotiable and the assignee a bona fide holder in due course.<sup>46</sup> It has been held that the consent of the principal is necessary before the surety can avail himself of a set-off of the principal's claim<sup>47</sup> and that this consent is shown by their joining in the plea of set-off.<sup>48</sup>

If suit is brought on several distinct claims, to which a set-off is allowed, it should be applied ratably; and a surety for a part of the claims has no right to have it applied first to those debts for which he is liable.<sup>49</sup>

### b. In Suit against Surety Alone

Generally, unless permitted by statute, a surety sued alone may not avail himself of a claim of the principal against the creditor where he has no interest in the claim.

In accordance with the rule that defenses available to the principal are likewise available to the

surety, it has been held that a surety, when sued alone, may set off any claim which the principal may set off against the demand of the creditor;<sup>50</sup> and this privilege is secured to the surety by force of some statutes.<sup>51</sup> It is, however, generally held that, in the absence of a statute permitting it, a surety cannot, when sued alone, avail himself of a claim of the principal against the creditor where he has no interest in the claim<sup>52</sup> except on the insolvency of the principal<sup>53</sup> or the creditor,<sup>54</sup> or unless the principal consents thereto,<sup>55</sup> and it has been assigned to the surety.<sup>56</sup> It has been held that the assignment must have been made before the suit is brought.<sup>57</sup> The principal may intervene and set off a debt in an action against the surety alone,<sup>58</sup> and a surety sued alone may set off a credit due the principal where the principal has been made a party by cross complaint and both he and the creditor have consented to the adjudication of the credit.<sup>59</sup> Sureties cannot set off a de-

U. S. Fidelity & Guaranty Co., D. C.Ga., 52 F.Supp. 177.

Ga.—Johnson Lumber Co. v. Akers Lumber Co., 172 S.E. 667, 48 Ga. App. 329.

44. Ind.—Myers v. State, 45 Ind. 160.

45. Ind.—Hoffman v. Zollinger, 39 Ind. 461.

Vt.—Brundridge v. Whitecomb, 1 D. Chipm. 180.

46. Ohio.—Armstrong v. Warner, 31 N.E. 877, 49 Ohio St. 376, 17 L.R.A. 466.

47. Ill.—Luther v. Mathis, 211 Ill. App. 596.

48. Ill.—Heiple v. Lehman, 272 Ill. App. 513, affirmed 192 N.E. 858, 358 Ill.App. 222—Luther v. Mathis, 211 Ill.App. 596.

49. Me.—Franklin Bank v. Cooper, 36 Me. 221.

50. Ky.—Harlan Fuel Co. v. Wiggington, 262 S.W. 957, 203 Ky. 546. 50 C.J. p 196 note 88.

51. Vt.—Flagg v. Locke, 52 A. 424, 74 Vt. 320.

50 C.J. p 196 note 89.

52. U.S.—Meeker v. Halsey, C.C.A. N.Y., 87 F.2d 299—National Surety Co. v. George E. Breece Lumber Co., C.C.A.N.M., 60 F.2d 847—*Corpus Juris* cited in Clark Car Co. v. Clark, C.C.A.Pa., 48 F.2d 169, 170—*Corpus Juris* cited in Atlantic Coast Line R. Co. v. U. S. Fidelity & Guaranty Co., D.C.Ga., 52 F. Supp. 177, 188—U. S., for Use of Johnson v. Morley Const. Co., D. C.N.Y., 12 F.Supp. 1017—U. S. for Use and Benefit of Johnson v. Morley Const. Co., D.C.N.Y., 11 F. Supp. 841.

Ala.—Whaley v. Henderson, 148 So. 848, 227 Ala. 158.

N.Y.—City of New York v. Fidelity & Deposit Co. of Maryland, 3 N.Y. S.2d 714, 253 App.Div. 676—Adamson v. Adamson, 295 N.Y.S. 506, 251 App.Div. 187—Sterne v. Talbott, 35 N.Y.S. 412, 89 Hun 368. 50 C.J. p 196 note 91.

Test of rule prohibiting surety from setting up counterclaim asserting independent cause of action in favor of principal against creditor is whether principal is barred from bringing action on particular cause of action sought to be set forth in surety's counterclaim.—U. S. for Use and Benefit of Johnson v. Morley Const. Co., D.C.N.Y., 11 F. Supp. 841.

### Independent claim

In action on surety bond guaranteeing payment by contractors to city of weekly sums for privilege of sorting and reclaiming waste materials at certain of the city's land dumps, surety could not assert claim that city diverted the materials belonging to the contractors, deprived contractors of certain of the dumps, and improperly separated garbage from refuse deposited at certain dumps, since the claim of the contractors was not a mere failure of consideration, but was an independent claim, for an amount far in excess of the claim against the surety.—City of New York v. Fidelity & Deposit Co., of Maryland, 3 N.Y.S. 2d 714, 253 App.Div. 676.

### Statute permitting equitable defenses

In suit by subcontractors against principal contractor, which failed to answer, and surety, statute permitting equitable defenses to be interposed in law action was inapplicable and did not entitle surety to file

counterclaim for damages resulting from delay in furnishing of materials, since surety had no legal right to interpose counterclaim.—U. S. for Use and Benefit of Johnson v. Morley Const. Co., D.C.N.Y., 11 F.Supp. 841.

53. U.S.—*Corpus Juris* cited in Clark Car Co. v. Clark, C.C.A.Pa., 48 F.2d 169, 170—*Corpus Juris* cited in Atlantic Coast Line R. Co. v. U. S. Fidelity & Guaranty Co., D. C.Ga., 52 F.Supp. 177, 188—Bank of America Nat. Trust & Savings Ass'n v. Maryland Casualty Co., D. C.Cal., 37 F.Supp. 677.

50 C.J. p 196 note 92.

Surety on insolvent corporation's bond to pay sums found due certain person on accounting was entitled to set off amount found due to corporation from such person.—Clark Car Co. v. Clark, C.C.A.Pa., 48 F.2d 169.

54. U.S.—Meeker v. Halsey, C.C.A. N.Y., 87 F.2d 299.

N.Y.—Dalziel v. Oregon-Washington R. & Nav. Co., 219 N.Y.S. 727, 219 App.Div. 394.

50 C.J. p 196 note 93.

55. U.S.—Meeker v. Halsey, C.C.A. N.Y., 87 F.2d 299.

Ala.—Whaley v. Henderson, 148 So. 848, 227 Ala. 158.

50 C.J. p 196 note 94.

56. Colo.—Thalheimer v. Crow, 22 P. 779, 13 Colo. 397.

50 C.J. p 196 note 95.

57. Ill.—Ewen v. Wilbor, 70 N.E. 575, 208 Ill. 492.

58. U.S.—Atlantic Coast Line R. Co. v. U. S. Fidelity & Guaranty Co., D.C.Ga., 52 F.Supp. 177.

Minn.—Becker v. Northway, 46 N.W. 210, 44 Minn. 61, 20 Am.S.R. 543.

59. U.S.—National Surety Co. v.

mand which their principal would not be entitled to set off.<sup>60</sup> The claim of the principal must be due<sup>61</sup> and be a liquidated demand.<sup>62</sup> A statute providing for equitable set-off has been held to allow the surety to set off a debt of a principal who is a nonresident without property in the jurisdiction where the suit is brought;<sup>63</sup> but the right to plead equitable set-off may be waived.<sup>64</sup> A statute permitting the determination of a controversy between parties before the court where possible without prejudice to the rights of others will not permit a surety to counterclaim where the principal's rights would be prejudiced.<sup>65</sup>

**Interest.** Interest should be allowed on an amount due from the creditor to the principal when such amount is applied by way of set-off.<sup>66</sup>

### § 261. Conclusiveness of Adjudication against Principal in Action against Surety

As a general rule, in all cases where the liability of a surety is dependent on the outcome of litigation in which his principal is or may be involved, a judgment

against the principal is binding and conclusive on the surety, in the absence of fraud or collusion or want of jurisdiction by the court; where the liability assumed by the surety is not contingent on the outcome of litigation in which his principal is or may be involved, a judgment against the principal is not conclusive against the surety.

For what purpose and to what extent a judgment against a principal may be introduced in evidence against the surety is a matter about which there is much contrariety of opinion in the decisions of the courts,<sup>67</sup> and it has been said to be difficult to find in the books a question on which the cases are in more hopeless conflict,<sup>68</sup> since whether or not a judgment against the principal is conclusive as to the surety must be determined from the nature of the surety's obligation and the language and terms of the contract of suretyship.<sup>69</sup>

As a general rule, in all cases where the liability of a surety is dependent on the outcome of litigation in which his principal is or may be involved, a judgment against the principal is binding and conclusive on the surety,<sup>70</sup> and the surety may not

- George E. Breece Lumber Co., C. C.A.N.M., 60 F.2d 847.
60. Wash.—*Corpus Juris* quoted in *Kampondonk v. American Bonding Co. of Baltimore*, 107 P.2d 588, 591, 6 Wash.2d 312.
- 50 C.J. p 196 note 98.
61. Mich.—*Marquette Opera House Bldg. Co. v. Wilson*, 67 N.W. 128, 109 Mich. 223.
62. Va.—*Kinzie v. Rieley*, 42 S.E. 872, 100 Va. 709.
63. U.S.—*Atlantic Coast Line R. Co. v. U. S. Fidelity & Guaranty Co.*, D.C.Ga., 52 F.Supp. 177.
64. U.S.—*Atlantic Coast Line R. Co. v. U. S. Fidelity & Guaranty Co.*, *supra*.
65. U.S.—*U. S., for Use and Benefit of Johnson v. Morley Const. Co.*, D.C.N.Y., 11 F.Supp. 841.
66. La.—*Bronaugh v. Neal*, 1 Rob. 23.
67. Ill.—*Grommes v. St. Paul Trust Co.*, 35 N.E. 820, 147 Ill. 634, 37 Am.S.R. 248.
- N.Y.—*In re Gellis' Estate*, 252 N.Y. S. 725, 141 Misc. 432.
- N.D.—*Corpus Juris* cited in *State ex rel. Coan v. Plaza Equity Elevator Co.*, 261 N.W. 46, 50, 65 N.D. 658.
- Conclusiveness as against principal of adjudication against surety see *infra* § 327.
- Effect of judgment in favor of principal see *supra* § 116.
68. Vt.—*Ballatine v. Fenn*, 78 A. 713, 84 Vt. 117, 40 L.R.A.N.S., 698.
69. Okl.—*Corpus Juris* cited in *Reed v. U. S. Fidelity & Guaranty Co.*, 52 P.2d 822, 824, 175 Okl. 235. 50 C.J. p 197 note 6.
- Liability of surety as dependent on contract see *supra* § 91.
- Necessity for clear expression**
- A stipulation that surety's liability extends to principal's obligation established in litigation to which surety is not a party must be clearly expressed where it is not implied from the nature of the undertaking.
- Sears, Roebuck & Co. v. 9 Avenue-31 Street Corporation*, 9 N.E.2d 20, 274 N.Y. 388, remittitur amended 10 N.E.2d 589, 274 N.Y. 636.
70. U.S.—*Hartford Accident & Indemnity Co. v. Gainesville Nat. Bank in Gainesville, Texas*, C.C.A. Tex., 124 F.2d 97—*State-Planters' Bank & Trust Co. v. First Nat. Bank, C.C.A.Va.*, 76 F.2d 527, certiorari denied 55 S.Ct. 923, 295 U.S. 764, 79 L.Ed. 1706—*Manufacturers' Finance Corporation v. Vye-Neill Co.*, D.C.Mass., 46 F.2d 146, affirmed, C.C.A., 62 F.2d 625, certiorari denied *Kane v. Manufacturers' Finance Corporation*, 53 S.Ct. 657, 289 U.S. 738, 72 L.Ed. 1486.
- Cal.—*Prescott v. Farquhar*, 55 P.2d 283, 12 Cal.App.2d 286.
- Ky.—*Brewer v. Kirk*, 77 S.W.2d 34, 256 Ky. 822.
- Mass.—*Giatas v. Demoulas*, 170 N.E. 921, 271 Mass. 51.
- Miss.—*Ottis Finance Co. v. Myers*, 152 So. 834, 169 Miss. 407.
- Mo.—*Kopitsky v. Schwenker*, App., 85 S.W.2d 180, followed in 85 S.W.2d 185—*Spickard v. Continental Casualty Co.*, 64 S.W.2d 734, 228 Mo.App. 233.
- N.Y.—*Yonkers Builders Supply Co. v. Petro Luciano & Son*, 199 N.E. 45, 269 N.Y. 171, 102 A.L.R. 759—*Fried v. Continental Casualty Co.*, 279 N.Y.S. 816, 155 Misc. 487.
- N.C.—*Speight Box & Panel Co. v. Ipock*, 8 S.E.2d 243, 217 N.C. 375.
- Okl.—*Tingley v. Smith*, 72 P.2d 729, 181 Okl. 84.
- Or.—*W. T. Rawleigh Co. v. Krueger*, 36 P.2d 987, 148 Or. 403.
- Pa.—*Thommen v. Aldine Trust Co.*, 153 A. 750, 302 Pa. 409—*Commonwealth v. Fidelity & Deposit Co.*, 73 A. 327, 224 Pa. 95—*Greiner v. Brubaker*, 30 A.2d 621, 151 Pa. Super. 515, certiorari denied *Royer v. Greiner*, 64 S.Ct. 42, 320 U.S. 742, 88 L.Ed. 440, rehearing denied 64 S.Ct. 194, 320 U.S. 813, 88 L.Ed. 491 and 64 S.Ct. 434, 320 U.S. 816, 88 L.Ed. 493—*Commonwealth v. McMenamin*, 184 A. 679, 122 Pa. Super. 91—*Commonwealth v. Eclipse Literary and Social Club*, 178 A. 341, 117 Pa.Super. 339.
- S.C.—*Whisenhunt v. Sandel*, 181 S. E. 61, 177 S.C. 207, 100 A.L.R. 376.
- Vt.—*Probate Court, District of Lamotte v. American Fidelity Co.*, 35 A.2d 495, 113 Vt. 418.
- Wash.—*Goodwin v. American Surety Co. of New York*, 68 P.2d 619, 190 Wash. 457—*Blakiston v. Osgood Panel & Veneer Co.*, 23 P.2d 397, 173 Wash. 435.
- 50 C.J. p 197 note 7.
- As exception to rule binding only parties**
- The rule that a surety on particular types of bonds may be concluded by the judgment rendered against the principal is sometimes said to constitute an exception to

interpose defenses which should or might have been set up in the action in which the judgment was recovered,<sup>71</sup> or require proof of the facts on which the judgment rests,<sup>72</sup> or attack the validity of the judgment,<sup>73</sup> except for fraud or collusion<sup>74</sup> or want of jurisdiction.<sup>75</sup> The rule is applicable even though the surety had no notice of the suit or opportunity to defend,<sup>76</sup> but it has also been held that in the absence of actual or implied knowledge or notice of the suit on the part of the surety the judgment is not conclusive as to his liability,<sup>77</sup> and it is only prima facie evidence that the surety is liable.<sup>78</sup> The surety is not concluded as to matters not in issue in the action in which the judgment was rendered,<sup>79</sup> such as defensive matters personal

to the surety;<sup>80</sup> so a judgment against the principal is not conclusive that the contract of suretyship binds the surety,<sup>81</sup> and the surety may show that his liability does not extend to the obligation which is sought to be enforced.<sup>82</sup>

Where the liability assumed by the surety is not contingent on the outcome of litigation, in which his principal is or may be involved, a judgment against the principal is not conclusive against the surety,<sup>83</sup> and he may offer as a defense any matter which could have been interposed in the action in which the judgment was recovered,<sup>84</sup> and may show that the judgment was based on insufficient facts<sup>85</sup> or on incorrect rules of law.<sup>86</sup> Such a judgment against the principal is in some jurisdic-

the general rule that only parties to an action are bound by the judgment rendered therein, although it is also sometimes said that it does not in fact constitute an exception to the general rule but is based on a fair and reasonable interpretation of the contract.—*Easton v. Boston Inv. Co.*, 196 P. 796, 51 Cal.App. 246—34 C.J. p 1050 notes 9-11.

#### Judgment retaxing costs

Iowa.—*Springer v. Metropolitan Casualty Ins. Co.*, 249 N.W. 226, 216 Iowa 1333.

71. U.S.—*Hartford Accident & Indemnity Co. v. Gainesville Nat. Bank in Gainesville, Texas*, C.C.A. Tex., 124 F.2d 97.

Fla.—*Bear v. Duval Lumber Co.*, for Use and Benefit of Standard Accident Ins. Co., 150 So. 614, 112 Fla. 240.

Ky.—*Brewer v. Kirk*, 77 S.W.2d 34, 256 Ky. 822.

Mass.—*Martiniello v. Robitaille*, 199 N.E. 534, 293 Mass. 200. 50 C.J. p 197 note 8.

#### Trover bond

After judgment against defendant in a trover suit, the surety on the trover bond for eventual condemnation of money may not raise any question which the principal could have raised before judgment.—*Waldrop v. Wolff*, 40 S.E. 830, 114 Ga. 610—*Faulk v. Hearn*, 174 S.E. 176, 49 Ga.App. 76—*King v. Irwin*, 171 S.E. 302, 47 Ga.App. 699—*Taliaferro v. Farkas*, 166 S.E. 426, 46 Ga. App. 9.

72. Ill.—*Garrity v. Elger*, 111 N.E. 735, 272 Ill. 127, affirmed 38 S.Ct. 298, 246 U.S. 97, 65 L.Ed. 596.

73. Okl.—*Pennington Grocery Co. v. Ortwein*, 88 P.2d 331, 184 Okl. 501.

Tex.—*Lawyers Lloyds of Texas v. Webb*, Civ.App., 154 S.W.2d 867. 50 C.J. p 197 note 9.

74. U.S.—*Manufacturers' Finance Corporation v. Vye-Neill Co.*, D.C. Mass., 46 F.2d 146, affirmed, C.C.

A., 62 F.2d 625, certiorari denied. *Kane v. Manufacturers' Finance Corporation*, 53 S.Ct. 657, 289 U.S. 738, 72 L.Ed. 1486.

Ky.—*Brewer v. Kirk*, 77 S.W.2d 34, 256 Ky. 822.

Mass.—*Giatus v. Demoulas*, 170 N.E. 921, 271 Mass. 51.

Mo.—*Kopitsky v. Schwenker*, App., 85 S.W.2d 180, followed in 85 S.W. 2d 185.

N.Y.—*In re Gellis' Estate*, 252 N.Y. S. 725, 141 Misc. 432.

N.C.—*Speight Box & Panel Co. v. Ipock*, 8 S.E.2d 243, 217 N.C. 375. Vt.—*Probate Court, District of Lamoille v. American Fidelity Co.*, 35 A.2d 495, 113 Vt. 418.

Wash.—*Goodwin v. American Surety Co. of New York*, 68 P.2d 619, 190 Wash. 457. 50 C.J. p 197 note 10.

75. Okl.—*Pennington Grocery Co. v. Ortwein*, 88 P.2d 331, 184 Okl. 501.—*Tingley v. Smith*, 72 P.2d 729, 181 Okl. 84. 50 C.J. p 198 note 11.

76. Ky.—*Brewer v. Kirk*, 77 S.W.2d 34, 256 Ky. 822.

Wash.—*Goodwin v. American Surety Co. of New York*, 68 P.2d 619, 190 Wash. 457.

77. Ohio.—*Standard Accident Ins. Co. v. Hattie*, 197 N.E. 817, 50 Ohio App. 206—*Laird v. Columbia Casualty Co.*, 6 Ohio Supp. 188.

78. U.S.—*Lake County, for Use and Benefit of Baxley, v. Massachusetts Bonding & Insurance Co.*, C.C.A.Fla., 75 F.2d 6.

79. Ill.—*Sacks v. American Bonding Co. of Baltimore*, 92 N.E.2d 510, 340 Ill.App. 564.

La.—*Ocean Coffee Co. v. Employers Liability Assur. Corporation*, App., 178 So. 782, affirmed 179 So. 18, 189 La. 11.

Me.—*Macomber v. Moor*, 148 A. 682, 128 Me. 481.

N.D.—*Clark v. Ellingson*, 161 N.W. 199, 35 N.D. 546.

80. Ind.—*State ex rel. Stone v. U.*

S. Fidelity & Guaranty Co., 78 N.E.2d 881, 119 Ind.App. 63.

Mass.—*Giatus v. Demoulas*, 170 N.E. 921, 271 Mass. 51.

81. Ala.—*Merrill v. Travis*, 26 So. 2d 258, 248 Ala. 42.

82. N.Y.—*Gillmore v. Equitable Surety Co.*, 239 N.Y.S. 530, 228 App.Div. 188.

83. U.S.—*Kramer v. Morgan*, C.C.A. N.Y., 85 F.2d 96—*Lake County, for Use of Baxley, v. Massachusetts Bonding & Insurance Co.*, C.C.A. Fla., 84 F.2d 115.

Cal.—*Kane v. Mendenhall*, 56 P.2d 498, 5 Cal.2d 749.

N.Y.—*Sears, Roebuck & Co. v. 9 Avenue-31 Street Corporation*, 9 N.E.2d 20, 274 N.Y. 388, remittitur amended 10 N.E.2d 589, 274 N.Y. 636—*Gillmore v. Equitable Surety Co.*, 239 N.Y.S. 530, 228 App.Div. 188—*Stutson v. New Amsterdam Casualty Co.*, 10 N.Y.S.2d 749, 170 Misc. 419.

Wash.—*Omicron Co. v. U. S. Fidelity & Guaranty Co.*, 152 P.2d 716, 21 Wash.2d 703.

50 C.J. p 198 note 15.

84. Ga.—*Calvitt v. Savannah*, 101 S.E. 129, 24 Ga.App. 481.

50 C.J. p 198 note 16.

#### Litigation of primary liability of principal

In absence of unequivocal language to contrary, surety can litigate primary liability of principal even though such liability has been conclusively established against principal in litigation to which surety was not party.—*Sears, Roebuck & Co. v. 9 Avenue-31 Street Corporation*, 9 N.E.2d 20, 274 N.Y. 388, remittitur amended 10 N.E.2d 589, 274 N.Y. 636.

85. Wash.—*State v. Fidelity, etc., Co.*, 253 P. 446, 142 Wash. 400.

86. N.Y.—*Sears, Roebuck & Co. v. 9 Avenue-31 Street Corporation*, 9 N.E.2d 20, 274 N.Y. 388, remittitur amended 10 N.E.2d 589, 274 N.Y. 636.

tions held to be prima facie evidence against the surety<sup>87</sup> unless obtained by fraud or collusion,<sup>88</sup> but a judgment on matters not connected with the suretyship relation is not admissible.<sup>89</sup> In other jurisdictions the judgment is not, in such a case, admissible as evidence to charge the surety,<sup>90</sup> especially if the surety had no notice of the action against the principal,<sup>91</sup> unless the surety has so contracted,<sup>92</sup> and a recovery by one person on a bond is not evidence in an action by another person on the same bond.<sup>93</sup> The judgment may be admissible for other purposes<sup>94</sup> and is evidence of the fact of its rendition.<sup>95</sup>

*Sureties having notice and opportunity to defend* an action against their principal are, as a general rule, bound and concluded by the judgment rendered against the principal<sup>96</sup> except where it has been obtained by fraud or collusion;<sup>97</sup> and if not conclusive the judgment is at least prima facie evidence against the surety.<sup>98</sup> If the surety participates in the action against his principal, he is con-

cluded as to the issues therein decided against the principal,<sup>99</sup> or issues which could have been raised,<sup>1</sup> even though suit against him was dismissed before trial,<sup>2</sup> but not as to matters not involved in, or material to, the first action.<sup>3</sup> A surety acting as witness for the principal has been held concluded by a judgment against the principal deciding matters on which the surety seeks to rely.<sup>4</sup>

*A judgment by default* against the principal has been held to be prima facie evidence of the surety's liability,<sup>5</sup> but not conclusive against him;<sup>6</sup> but it has also been held to be conclusive<sup>7</sup> in the absence of fraud or collusion.<sup>8</sup>

Where principal and surety are sued together, a default judgment against the principal has been held not to be admissible as evidence against the surety,<sup>9</sup> but it has also been held to be admissible as evidence against him,<sup>10</sup> and to constitute prima facie proof of the default by the principal and of the measure of damages.<sup>11</sup> If admitted, it constitutes no more than prima facie proof.<sup>12</sup>

87. U.S.—Massachusetts Bonding & Insurance Co. v. Robert E. Denike, Inc., C.C.A.N.J., 92 F.2d 657—Lake County, for Use of Baxley, v. Massachusetts Bonding & Insurance Co., C.C.A.Fla., 84 F.2d 115—U. S. v. American Surety Co. of New York, C.C.A.N.Y., 56 F.2d 734—Herzog v. Des Lauriers Steel Mould Co., D.C.Pa., 46 F.Supp. 211. N.D.—Corpus Juris cited in State ex rel. Coan v. Plaza Equity Elevator Co., 261 N.W. 46, 50, 65 N.D. 658. Okl.—Corpus Juris cited in Wright v. Fidelity & Deposit Co. of Maryland, 54 P.2d 1084, 1088, 176 Okl. 274. 50 C.J. p 198 note 13.
88. S.D.—Farmers' El. Co. v. U. S. Fidelity, etc., Co., 172 N.W. 519, 41 S.D. 614. 50 C.J. p 198 note 14.
89. Md.—Roberts v. Woven Wire Mattress Co., 46 Md. 374. 50 C.J. p 199 note 25.
90. Minn.—Gilloley v. Sampson, 281 N.W. 3, 203 Minn. 233. 50 C.J. p 198 note 18.
91. N.Y.—Farley v. Patterson, 152 N.Y.S. 59, 166 App.Div. 358. 50 C.J. p 198 note 19.
92. N.Y.—Thomson v. MacGregor, 81 N.Y. 592, 9 Abb.N.Cas. 138.
93. N.Y.—People v. McHenry, 19 Wend. 482.
94. Ala.—Firemen's Ins. Co. v. McMillan, 29 Ala. 147.
95. Minn.—Gilloley v. Sampson, 281 N.W. 3, 203 Minn. 233. 50 C.J. p 199 note 23.
96. U.S.—Lake County, for Use and Benefit of Baxley, v. Massachu-

- setts Bonding & Insurance Co., C. C.A.Fla., 75 F.2d 6.
- Kan.—Corpus Juris cited in Olmstead v. Fidelity & Deposit Co. of Maryland, 28 P.2d 722, 724, 138 Kan. 825.
- Ohio.—Laird v. Columbia Cas. Co., 6 Ohio Supp. 188. 50 C.J. p 199 note 30.
97. U.S.—Lake County, for Use and Benefit of Baxley v. Massachusetts Bonding & Insurance Co., C. C.A.Fla., 75 F.2d 6.
- Ohio.—Laird v. Columbia Casualty Co., 6 Ohio Supp. 188.
98. Okl.—Wright v. Fidelity & Deposit Co. of Maryland, 54 P.2d 1084, 176 Okl. 274. 50 C.J. p 199 note 31.
99. U.S.—Corpus Juris quoted in Massachusetts Bonding & Insurance Co. v. Robert E. Denike, Inc., C.C.A.N.J., 92 F.2d 657, 658—Corpus Juris quoted in Herzog v. Des Lauriers Steel Mould Co., D.C.Pa., 46 F.Supp. 211, 213.
- Iowa.—Goltry v. Relph, 276 N.W. 614, 224 Iowa 692.
- N.J.—Brown v. Lefkowitz, 145 A. 737, 7 N.J.Misc. 424.
- N.Y.—Sears, Roebuck & Co. v. 9 Avenue-31 Street Corporation, 9 N.E.2d 20, 274 N.Y. 388, remittitur amended 10 N.E.2d 589, 274 N.Y. 636.
- Okl.—Tolliver v. First Nat. Bank, 64 P.2d 1215, 179 Okl. 191.
- Wash.—Pasco v. Pacific Coast Casualty Co., 172 P. 566, 101 Wash. 496.
- Nature of participation**  
The surety on a government contractor's bond participates in an action against the contractor so as to

- be bound by the judgment, where its mechanical engineer attends the trial by its orders and arranges for the attendance of witnesses desired by the contractor.—Massachusetts Bonding & Insurance Co. v. Robert E. Denike, Inc., C.C.A.N.J., 92 F.2d 657.
1. Okl.—Tolliver v. First Nat. Bank, 64 P.2d 1215, 179 Okl. 191.
2. Mo.—Stoops v. Wittler, 1 Mo. App. 430.
3. Wash.—Pasco v. Pacific Coast Casualty Co., 172 P. 566, 101 Wash. 496.
4. Iowa.—Beh v. Bay, 103 N.W. 119, 127 Iowa 246, 109 Am.S.R. 385.
5. N.C.—Charleston & W. C. Ry. Co. v. Robert G. Lassiter & Co., 179 S. E. 879, 208 N.C. 209.
6. Ill.—Lesczanskis v. Downs, 121 N.E. 590, 286 Ill. 281. 50 C.J. p 199 note 40.
7. Mass.—Martiniello v. Robitaille, 199 N.E. 534, 293 Mass. 200.
- Mich.—Sauer v. Detroit Fidelity, etc., Co., 213 N.W. 98, 237 Mich. 697, 51 A.L.R. 1485.
8. Mass.—Martiniello v. Robitaille, 199 N.E. 534, 293 Mass. 200.
9. U.S.—U. S., for Use of Vigilanti v. Pfeiffer-Neumeyer Const. Corporation, D.C.N.Y., 25 F.Supp. 403.
10. Mo.—Home Ins. Co. of New York v. Savage, 103 S.W.2d 900, 231 Mo.App. 569.
11. Mo.—Home Ins. Co. of New York v. Savage, supra.
12. U.S.—U. S. v. Rundle, Wash., 107 F. 227, 46 C.C.A. 251, 52 L.R.A. 505.
- Mo.—Corpus Juris cited in Home

**Confessed judgment.** Where a judgment against a principal, if contested, would be binding on the surety, a confessed judgment may be so regarded<sup>13</sup> unless there is fraud or collusion in the confession of judgment,<sup>14</sup> but it has also been held that such a judgment is not binding on the surety.<sup>15</sup>

## § 262. Jurisdiction and Venue

The venue of an action by a creditor against a surety is frequently a matter of special statutory regulation.

The venue of an action by a creditor against a surety is frequently a matter of special statutory regulation.<sup>16</sup> In some jurisdictions, by statute, suit may be brought against a surety company in the county of plaintiff's residence.<sup>17</sup> Other statutes allow suit against surety companies at the place where they become sureties, or where the principal can be sued.<sup>18</sup> A statute requiring suit to be brought in the county where one or more codefendants are found has been held inapplicable to suit against a foreign surety company<sup>19</sup> which may be brought in the county wherein plaintiff resides.<sup>20</sup> A statute providing for suit on a bond in any jurisdiction has been interpreted as denoting the place, county, or territorial limits within which any court authorized to entertain a suit on the

bond sits.<sup>21</sup>

Where the liability of the principal has not been established, a court which has no jurisdiction of the action against the principal has no jurisdiction of an action against the surety.<sup>22</sup>

## § 263. Time to Sue, Limitations, and Laches

- a. In general
- b. Contractual provisions
- c. Laches

### a. In General

An action against a surety must be brought within the time, if any, fixed by statute.

An action against a surety must be brought within the time, if any, fixed by statute,<sup>23</sup> and suit cannot be brought thereafter, although the obligee was ignorant of the suretyship.<sup>24</sup> The period of limitations begins to run from the time at which the surety becomes liable on his obligation.<sup>25</sup> The time will be extended only in accordance with the provisions of the statute,<sup>26</sup> and an oral promise by the surety to pay the debt will not extend the time or revive the action where the statute does not so provide.<sup>27</sup> Under statutes the running of the period

Ins. Co. of New York v. Savage, 103 S.W.2d 900, 902, 231 Mo.App. 569.

13. Ga.—Ford v. Eskridge, 186 S.E. 204, 53 Ga.App. 466.

N.C.—Speight Box & Panel Co. v. Ippock, 8 S.E.2d 243, 217 N.C. 375. Tex.—Lindsey v. Williams, Civ.App., 228 S.W.2d 243.

50 C.J. p 199 note 37.

14. Tex.—Lindsey v. Williams, supra.

15. R.I.—Andrews v. Indemnity Ins. Co. of North America, 181 A. 403, 55 R.I. 341.

50 C.J. p 199 note 39.

16. N.Y.—Long v. Ferris, 94 N.Y.S. 2d 493, 196 Misc. 567.

50 C.J. p 199 note 43.

Venue of actions against sureties generally see the C.J.S. title Venue § 14, also 67 C.J. p 37 note 94—p 38 note 5.

**Place of incorporation of bonding company**

(1) Statute relating to place where fidelity or bonding companies may be sued was held applicable to corporation incorporated under laws of United States or of any state having power to guarantee fidelity of persons holding positions of public or private trust.—Burns v. Duncan, 133 S.W.2d 1000, 23 Tenn.App. 374.

(2) Provision in state statute that nonresident and domestic fidelity and bonding companies may be sued

"in the county in which the principal office of company is located" primarily contemplated suit against bonding company incorporated under laws of state, since principal office of nonresident corporation ordinarily is not in any county of state.—Burns v. Duncan, supra.

17. Mich.—Taylor v. Davarn, 157 N.W. 572, 191 Mich. 243.

50 C.J. p 199 note 49.

18. Va.—Hopkins v. Commonwealth, 105 S.E. 673, 129 Va. 137.

50 C.J. p 199 note 50.

19. Mich.—People v. Maryland Fidelity, etc., Co., 127 N.W. 765, 163 Mich. 94.

20. Mich.—People v. Maryland Fidelity, etc., Co., supra.

21. Tex.—Sullivan v. Westhoff, Civ. App., 38 S.W.2d 604.

22. S.C.—Thompson v. Queen City Coach Co., 168 S.E. 693, 169 S.C. 231.

23. Ky.—Harned v. Harned, 110 S.W.2d 674, 270 Ky. 735.

50 C.J. p 200 note 55.

**Surety of construction contractor**

The claim of an owner of a building against the surety of the construction contractor is not barred by the limitation of time prescribed for suits against the surety by materialmen and laborers.—Costanza v. Cannata, 36 So.2d 627, 214 La. 29.

**Surety on bond in judicial proceeding**

Ky.—Dugan v. Champion Coal, etc., Co., 49 S.W. 958, 105 Ky. 321, 20 Ky.L. 1641.

37 C.J. p 754 note 94.

**Statute relating to claim against estate**

The statute relating to diligence in presentation of claim against estate when principal maker of a note dies does not contemplate that action must be taken as against sureties within one-year period fixed by filing of a claim against an estate.—Harris v. Buder, 62 N.E.2d 131, 326 Ill.App. 471.

24. Ky.—Weller v. Ralston, 89 S.W. 693, 28 Ky.L. 572.

50 C.J. p 200 note 56.

25. N.H.—Newell v. Clark, 61 A. 555, 73 N.H. 289.

50 C.J. p 200 note 58.

26. Ky.—Jones' Ex'r v. Jones, 122 S.W.2d 779, 275 Ky. 753.

27. Ky.—Sparkman's Guardian v. Huff, 98 S.W.2d 484, 266 Ky. 183.

**"Obstruct or hinder"**

Alleged statement of surety that he would pay note, or as much thereof as might not be paid by the principal, did not come within the interpretation of the words "obstruct or hinder" as used in statute providing that if surety shall abscond, conceal himself, or by removal from the state, or otherwise obstruct or hin-



of limitations may cease for a specified period on the death of the surety,<sup>28</sup> but the death of the principal will not so operate.<sup>29</sup> The statute in effect at the time of the breach governs, and not that in force at the time of the execution of the contract.<sup>30</sup> Failure to sue within the statutory period for one breach of a bond will not bar an action for a subsequent breach.<sup>31</sup> While the surety may be discharged by lapse of the period of limitation specially applicable to sureties, a mortgage given by him as security for the debt will not be barred until the debt itself is barred.<sup>32</sup>

The principal cannot waive the benefit of the statute for his surety.<sup>33</sup>

**Premature action.** An action brought against the surety before breach of the contract covered by the bond is premature in the absence of an anticipatory breach binding the surety.<sup>34</sup>

### b. Contractual Provisions

Ordinarily the time within which an action against a surety may or must be brought may be fixed by contractual provisions.

Although such provisions have been held void as an attempt to nullify the general law of limitations applicable to written contracts,<sup>35</sup> ordinarily it is held that the time within which an action against a surety may or must be brought may be fixed by contractual provisions;<sup>36</sup> and no action can be brought after the expiration of the time so fixed<sup>37</sup> unless the delay has been occasioned by the surety.<sup>38</sup> Provisions limiting the time for bringing an action on the obligation must be reasonable;<sup>39</sup> and where the object of the bond would be defeated by a construction of such a provision according to its strict terms it will not be so construed.<sup>40</sup> The time at which the period begins to run depends on the terms of the limitations provision.<sup>41</sup> A provision for suit to be brought within a certain time after completion of a contract has been held not to apply to an action for damages for nonperformance.<sup>42</sup>

**Waiver.** Such a limitation may be waived by the surety,<sup>43</sup> and the waiver may be either express or implied.<sup>44</sup> The owner of a building in course of erection may waive the default of the contractor in failing to complete it within the time pre-

der his being sued, the time of such obstruction shall not be construed as part of the time of limitation in statutes dealing with limitations in actions against sureties.—*Jones' Ex'r v. Jones*, 122 S.W.2d 779, 275 Ky. 753.

28. Tex.—*Low v. Felton*, 19 S.W. 693, 84 Tex. 378.

29. Tex.—*Acers v. Acers*, 56 S.W. 196, 22 Tex.Civ.App. 584.

30. Ohio.—*King v. Nichols*, 2 Ohio Dec., Reprint, 564, 4 West.L. Month. 25.  
50 C.J. p 200 note 57.

31. Mass.—*McKim v. Williams*, 134 Mass. 136.  
50 C.J. p 200 note 59.

32. Ky.—*Craddock v. Lee*, 61 S.W. 22, 22 Ky.L. 1651.

33. Mass.—*Dawes v. Shed*, 15 Mass. 6, 3 Am.D. 80.

34. Pa.—*McCormick v. Fidelity & Casualty Co. of New York*, 161 A. 532, 307 Pa. 484.

#### Rejection of tender of anticipatory breach

Lessors unequivocally rejecting alleged tender of anticipatory breach of lessee's contract to erect new building on leased premises within certain time could not sue surety on bond for performance of contract during such time, and could not revive tender, without consent of lessee and its surety, by commencing suit on bond for performance of contract.—*McCormick v. Fidelity & Casualty Co. of New York*, supra.

35. Tex.—*Equitable Surety Co. v. Stemmons*, Civ.App., 239 S.W. 1037.

36. U.S.—*American Surety Co. of New York v. Wheeling Structural Steel Co.*, D.C.W.Va., 26 F.Supp. 395, reversed on other grounds, C. C.A., *American Surety Co. v. Wheeling Structure Steel Co.*, 114 F.2d 237.

Ind.—*Meyer v. Building & Realty Service Co.*, 196 N.E. 250, 209 Ind. 125, 100 A.L.R. 1442.

Tenn.—*J. R. Hale & Sons v. R. C. Stone Engineering Co.*, 14 Tenn. App. 461.  
50 C.J. p 200 note 69.

37. Cal.—*Western Pipe & Steel Co. of California v. Tuolumne Gold Dredging Corporation*, 146 P.2d 61, 63 Cal.App.2d 21.

Ind.—*Meyer v. Building & Realty Service Co.*, 196 N.E. 250, 209 Ind. 125, 100 A.L.R. 1442.

Tenn.—*J. R. Hale & Sons v. R. C. Stone Engineering Co.*, 14 Tenn. App. 461.  
50 C.J. p 200 note 70.

38. Wash.—*Harding Hotel Co. v. U. S. Fidelity, etc., Co.*, 233 P. 276, 133 Wash. 272.  
50 C.J. p 201 note 71.

#### Surety held not responsible for delay

Tenn.—*J. R. Hale & Sons v. R. C. Stone Engineering Co.*, 14 Tenn. App. 461.

39. Cal.—*Gintjee v. Knieling*, 170 P. 641, 35 Cal.App. 563.  
50 C.J. p 201 note 72.

40. Minn.—*Fitger Brewing Co. v.*

*American Bonding Co.*, 149 N.W. 539, 127 Minn. 330.  
50 C.J. p 201 note 73.

41. Cal.—*Western Pipe & Steel Co. of California v. Tuolumne Gold Dredging Corporation*, 146 P.2d 61, 63 Cal.App.2d 21.  
50 C.J. p 201 note 74.

*Surety on building contractor's bond* Minn.—*Church of Immaculate Conception v. Curtis*, 153 N.W. 259, 130 Minn. 111.

Tenn.—*J. R. Hale & Sons v. R. C. Stone Engineering Co.*, 14 Tenn. App. 461.  
9 C.J. p 858 note 6.

42. N.Y.—*Comey v. United Surety Co.*, 111 N.E. 832, 217 N.Y. 268, Ann.Cas.1917E 424, rehearing denied 112 N.E. 1055, 218 N.Y. 625—*Pezenik v. Massachusetts Bonding & Insurance Co.*, 250 N.Y.S. 456, 140 Misc. 297.

43. U.S.—*American Surety Co. of New York v. Wheeling Structural Steel Co.*, D.C.W.Va., 26 F.Supp. 395, reversed on other grounds, C. C.A., *American Surety Co. v. Wheeling Structure Steel Co.*, 114 F.2d 237.

Tenn.—*Corpus Juris* cited in *J. R. Hale & Sons v. R. C. Stone Engineering Co.*, 14 Tenn.App. 461, 471.  
50 C.J. p 201 note 76.

44. U.S.—*American Surety Co. of New York v. Wheeling Structural Steel Co.*, D.C.W.Va., 26 F.Supp. 395, reversed on other grounds, C. C.A., *American Surety Co. v. Wheeling Structure Steel Co.*, 114 F.2d 237.

scribed,<sup>45</sup> or he may waive the apparent breach caused by the mere filing of a materialman's lien, and wait until the rendition of a judgment thereon, and the time provided in which to bring suit will begin to run from such latter breach.<sup>46</sup>

### c. Laches

Independently of statutory or contractual limitations, the action of the creditor against the surety may be barred by laches.

Independently of statutory or contractual limitations, the action of the creditor against a surety may be barred by laches.<sup>47</sup> Mere delay will not amount to laches,<sup>48</sup> and if the action is commenced before the statute of limitations has run, or the time fixed by contract has expired, mere delay is not a defense to the action.<sup>49</sup> Plaintiff is not barred by laches where the delay was the result of his proceeding against the principal and a cosurety, by reason of which defendant's liability was materially reduced,<sup>50</sup> or by failure to take futile steps to prevent losses.<sup>51</sup> The rule that laches of its agents cannot be imputed to a government applies to actions by a government against a surety.<sup>52</sup>

## § 264. Parties

### a. In general

### b. Defendants

### c. New parties; intervention

#### a. In General

Ordinarily only the obligee or beneficiaries of the bond can enforce the liability of sureties thereon.

Ordinarily only the obligee or beneficiaries of the bond can enforce the liability of sureties thereon.<sup>53</sup> Persons not expressly named as obligees in a bond may recover thereon where they are included within a class to which the right has been given by statute<sup>54</sup> or by an express provision in the instrument.<sup>55</sup> Where the instrument is a promissory note which has not been delivered to the payee named therein, it has been held that the surety's liability cannot be enforced by one not the payee who advanced money thereon,<sup>56</sup> even in the name of the payee with his consent,<sup>57</sup> unless the sureties consented to such advancement;<sup>58</sup> but there is other authority which holds that the person advancing the money may have a right of action against the surety.<sup>59</sup>

Under the general rule of contracts allowing a third party beneficiary to maintain an action on a contract made between others for his benefit, a person not a party to the obligation, but for whose benefit it was made, may enforce it,<sup>60</sup> and may

45. Wash.—Beebe v. Redward, 77 P. 1052, 35 Wash. 615.

46. Wash.—Martin v. Empire State Surety Co., 101 P. 876, 53 Wash. 290.

50 C.J. p 201 note 78.

47. Tex.—Darrah v. Lion Bonding, etc., Co., Civ.App., 200 S.W. 1101. 50 C.J. p 201 note 81.

#### Prompt action

A person seeking to hold a surety should act promptly.—Brock v. Fidelity & Deposit Co. of Maryland, 75 P.2d 605, 10 Cal.2d 512.

48. Ind.—Patterson v. State Bank, 102 N.E. 880, 55 Ind.App. 331.

50 C.J. p 201 note 82.

49. Mo.—Clinton County v. Smith, 141 S.W. 1091, 238 Mo. 118, 37 L.R.A., N.S., 272.

Okla.—Van Antwerp v. Schultz, 217 P.2d 1034.

50. Va.—Turk v. Ritchie, 52 S.E. 339, 104 Va. 587.

51. Ill.—Cicero v. Grisko, 144 Ill. App. 564, affirmed 88 N.E. 478, 240 Ill. 220.

52. U.S.—Gaussens v. U. S., La., 97 U.S. 584, 24 L.Ed. 1009.

Ill.—People v. Whittemore, 97 N.E. 683, 253 Ill. 378.

Laches as defense to action by government generally see Equity § 114.

53. Utah.—Corporation of President of Church of Jesus Christ of Latter-Day Saints v. Hartford Accident & Indemnity Co., 95 P.2d 736, 98 Utah 297.

Wash.—Rust v. United States Fidelity & Guaranty Co., 151 P. 248, 87 Wash. 93.

50 C.J. p 201 note 87.

54. Miss.—Continental Casualty Co. v. Crook, 128 So. 574, 157 Miss. 518, 72 A.L.R. 186.

50 C.J. p 202 note 88.

55. Ky.—Owens v. Georgia Life Ins. Co., 177 S.W. 294, 165 Ky. 507.

**Language of the defeasance clause** in a bond, standing alone, will not give rise to a direct action on such bond in favor of parties not elsewhere in the instrument accorded such right.—Standard Accident Ins. Co. v. Knox, 184 S.W.2d 612, 144 Tex. 296—Standard Accident Ins. Co. v. Blyth, 107 S.W.2d 880, 130 Tex. 201.

56. Iowa.—Howe v. Selby, 6 N.W. 39, 53 Iowa 670.

57. Me.—Manufacturers' Bank v. Cole, 39 Me. 188.

N.C.—Dewey v. Cochran, 49 N.C. 184. Ohio.—Clinton Bank v. Ayres, 16 Ohio 282.

58. Me.—Starrett v. Barber, 20 Me. 457.

59. Ala.—Planters', etc., Bank v. Blair, 4 Ala. 613.

N.Y.—Utica Bank v. Ganson, 10 Wend. 314.

Vt.—Montpelier Bank v. Joyner, 33 Vt. 481.

60. U.S.—American Surety Co. of New York v. Scott, C.C.A.Colo., 63 F.2d 961.

Ala.—Ingram v. Evans, 148 So. 593, 227 Ala. 14.

Cal.—Crane Co. v. Borwick Trenching Corporation, 32 P.2d 387, 138 Cal.App. 319.

N.J.—Newton A. K. Bugbee & Co. v. Consolidated Indemnity & Insurance Co., 168 A. 388, 111 N.J.Law 323—J. Jacob Shannon & Co. v. Continental Casualty Co., 148 A. 738, 106 N.J.Law 200.

N.Y.—American Surety Co. of New York v. Wells Water Dist., 1 N.Y.S.2d 614, 253 App.Div. 19, 254 App.Div. 717, affirmed American Surety Co. of New York v. Wells Water Dist., Town of Wells, 19 N.E.2d 926, 280 N.Y. 528, motion denied 20 N.E.2d 1023, 280 N.Y. 673—First Nat. Bank v. Bankers' Trust Co., 271 N.Y.S. 191, 151 Misc. 233—Merrill v. Equitable Surety Co. of New York, 227 N.Y. S. 266, 131 Misc. 541.

Okla.—Etna Casualty & Surety Co. v. Tucker, 50 P.2d 339, 174 Okl. 343.

Pa.—Pennsylvania Supply Co. v. National Casualty Co., Com.Pl., 53

join with the obligee in an action on the bond,<sup>61</sup> especially where the contract so provides;<sup>62</sup> but one who is not a beneficiary cannot enforce it.<sup>63</sup> Where an agent in whose name a contract is made is regarded as trustee of an express trust, he may maintain an action against a surety in his own name under provisions allowing actions by trustees of express trusts to be so maintained.<sup>64</sup> Where the surety contract is under seal the obligee therein may maintain an action against the surety although the beneficial interest is in another.<sup>65</sup> Under a statute requiring actions to be brought in the name of the real party in interest, an action against a principal and sureties cannot be regarded as an action on behalf of the sureties.<sup>66</sup>

**Indemnitor.** One who has entered an agreement to indemnify the surety cannot enforce the surety's liability on his bond.<sup>67</sup>

**Assignees.** The right to enforce the obligation of the surety may be assigned,<sup>68</sup> although the contract does not contain the words "successors and assigns;"<sup>69</sup> but the claim against a surety cannot

be transferred separately from that against the principal, since whoever has the latter is entitled to the former.<sup>70</sup> A materialman, to whom the contractor assigned his building or improvement contract has been held to be in no better position to recover from the surety on the contractor's bond than the contractor would have been for his own default.<sup>71</sup>

**Estoppel.** A surety who receives a premium is estopped to deny the capacity of the obligee to sue on the bond.<sup>72</sup>

### b. Defendants

The surety may be joined with the principal in an action by the creditor, and, where the liability is joint and several, the creditor may sue anyone separately if the court has jurisdiction of the entire case.

Since the surety is jointly or jointly and severally liable with the principal to the creditor, the surety may in any case be joined with the principal in an action by the creditor,<sup>73</sup> and, where the liability is joint and several, the creditor may sue anyone separately<sup>74</sup> if the court has jurisdiction of the

Dauph.Co. 124, affirmed 31 A.2d 453, 152 Pa.Super. 453—Pennsylvania Supply Co. v. National Casualty Co., Com.Pl., 51 Dauph.Co. 381.

50 C.J. p 202 note 91.

#### Real parties in interest

Where, by an order of final settlement of an estate, certain persons as heirs and legatees were determined to be owners of a mill and equipment which executors, by a valid contract in writing, had agreed to lease and sell, such persons were the real parties in interest and proper parties to bring action to enforce liability on a bond given to executors to secure performance of contract.—Beck v. Megli, 114 P.2d 305, 153 Kan. 721, 135 A.L.R. 1124.

61. Minn.—Harriet State Bank v. Samels, 204 N.W. 938, 164 Minn. 265.

62. Pa.—Philadelphia v. Harry C. Nichols Co., 63 A. 886, 214 Pa. 265. 50 C.J. p 202 note 93.

63. Cal.—Crane Co. v. Borwick Trenching Corporation, 32 P.2d 387, 138 Cal.App. 319. 50 C.J. p 202 note 94.

64. Cal.—Earl Fruit Co. v. Harmen, 266 P. 592, 90 Cal.App. 640. 50 C.J. p 202 note 96.

65. Ill.—Galesburg Sanitary Dist., for Use of Anderson v. American Surety Co. of New York, 32 N.E.2d 407, 393 Ill.App. 457.

66. Mo.—Citizens' Bank v. Burrus, 77 S.W. 748, 178 Mo. 716.

67. Ark.—Darby v. U. S. Fidelity,

etc., Co., 250 S.W. 524, 158 Ark. 641.

68. U.S.—Corpus Juris cited in Feutz v. Massachusetts Bonding & Ins. Co., D.C.Mo., 85 F.Supp. 418, 423.

50 C.J. p 202 note 1.

#### Assignee held without right

Even if surety bond which ran to vendees and their legal representatives and secured performance of vendor's agreement to obtain extension of lease passed to vendees' assignee with assignment of lease, assignee could not recover on bond, where landlord refused to give extension because assignee had not paid rent for two months and because the assignee, which had assigned for benefit of creditors, was not desirable tenant.—Shiya v. Erickson, 282 N.Y.S. 812, 156 Misc. 738.

#### Interest of assignees

Where a bond was furnished for the benefit of one party and his assignees, assignees to the extent of their assigned interest stood in the shoes of the party as to rights under the bond.—Feutz v. Massachusetts Bonding & Ins. Co., D.C.Mo., 85 F. Supp. 418.

#### Bond for payment of rent

The assignee of a lease and a bond given to secure the payment of the rent could maintain an action on the lease and bond against the sureties.—Gardner v. Stangebye, 185 N.W. 369, 48 N.D. 513.

69. Pa.—Citizens' Trust, etc., Co. v. Howell, 19 Pa.Super. 255.

70. La.—Andrus v. Chretien, 3 La. 48.

71. Iowa.—Sibley Lumber Co. v. Madsen, 200 N.W. 425, 198 Iowa 880.

72. U.S.—Equitable Surety Co. v. Muddy Bottom Swamp Land Dist. No. 1, Miss., 256 F. 773, 168 C.C. A. 119.

73. Ala.—Scott v. U. S. Fidelity & Guaranty Co., 41 So.2d 298, 252 Ala. 373.

Del.—W. T. Rawleigh Co. v. War-  
rington, 199 A. 666, 9 W.W.Harr. 866.

Ga.—Durham v. Greenwold, 3 S.E.2d 585, 188 Ga. 165—Zachry v. City Council of Augusta, 52 S.E.2d 339, 78 Ga.App. 746—W. T. Rawleigh Co. v. Overstreet, 32 S.E.2d 574, 71 Ga.App. 873—Hartsfield Co. v. Whitfield, 30 S.E.2d 648, 71 Ga. App. 257—Arkansas Fuel Oil Co. v. Young, 16 S.E.2d 909, 66 Ga.App. 33—Hicks v. Bank of Wrightsville, 194 S.E. 892, 57 Ga.App. 233.

Ky.—Dorman v. Carnes, 96 S.W.2d 869, 265 Ky. 361.

La.—Brock v. First State Bank & Trust Co., 175 So. 569, 187 La. 766. N.Y.—Rochester Sav. Bank v. Stoeltzen & Tapper, 26 N.Y.S.2d 718, 176 Misc. 140.

N.C.—Watson v. King, 156 S.E. 93, 200 N.C. 8.

S.C.—McKenzie v. Standard Accident Ins. Co., 1 S.E.2d 502, 189 S.C. 475. 50 C.J. p 202 note 7.

74. U.S.—Home Indemnity Co. of New York v. O'Brien, C.C.A.Mich., 104 F.2d 413—Downer v. U. S. Fi-

entire case.<sup>75</sup> Accordingly, under statutory provisions allowing joinder of parties severally liable on the same obligation, a principal and surety so liable may be sued together<sup>76</sup> or separately.<sup>77</sup> Under express statutory provisions in some jurisdictions, a surety may be sued alone in certain enumerated instances or situations,<sup>78</sup> and in all other instances or situations not enumerated the principal must be joined with the surety.<sup>79</sup> Failure to join the principal in an action against the surety is proper where judgment has been obtained against the principal,<sup>80</sup> particularly when expressly so provided by statute.<sup>81</sup> A principal and surety may be joined as defendants in the same action only where their obligations are joint,<sup>82</sup> and they may not be joined in the same action where the surety's liability arose on a collateral undertaking.<sup>83</sup> Stipulations that the principal must be made a party are sufficiently complied with where, by leave of court and without objection, the trustee of the insolvent principal is made a party defendant.<sup>84</sup>

All the sureties may be joined in one action,<sup>85</sup> and sureties on a bond may be joined with the sureties on a subsequent bond executed as additional security for the performance of the same contract.<sup>86</sup> Sureties who are not liable for the same demand may not be joined.<sup>87</sup> Where by statute one surety may be released or discharged without releasing or discharging the other sureties, a surety so released need not be made a party defendant to an action against the remaining sureties.<sup>88</sup>

In equity the principal and all of the sureties should be made parties defendant<sup>89</sup> unless insolvent<sup>90</sup> or beyond the jurisdiction.<sup>91</sup> If the bill is filed for the purpose of reaching property of the principal only, the surety is not a necessary,<sup>92</sup> although he is a proper,<sup>93</sup> party; nor is a surety a necessary party where the object of the suit is an accounting by the principal.<sup>94</sup> A cosurety must be made a party where a bill is brought to enforce a judgment lien on the land of a surety.<sup>95</sup>

delity & Guaranty Co. of Maryland, C.C.A.Pa., 46 F.2d 733.

Ga.—Zachry v. City Council of Augusta, 52 S.E.2d 339, 78 Ga.App. 746—Hartsfield Co. v. Whitfield, 30 S.E.2d 648, 71 Ga.App. 257—Hicks v. Bank of Wrightsville, 194 S.E. 892, 57 Ga.App. 233.

Ky.—Dorman v. Carnes, 96 S.W.2d 869, 265 Ky. 361.

S.C.—McKenzie v. Standard Accident Ins. Co., 1 S.E.2d 502, 189 S.C. 475.

Wash.—Kampendonk v. American Bonding Co. of Baltimore, 107 P. 2d 588, 6 Wash.2d 312.

50 C.J. p 203 note 9.

75. S.C.—Knight v. Fidelity & Casualty Co. of New York, 192 S.E. 558, 184 S.C. 362—Thompson v. Queen City Coach Co., 168 S.E. 693, 169 S.C. 231.

76. Mont.—Wibaux v. Grinnell Live-Stock Co., 22 P. 492, 9 Mont. 154.

50 C.J. p 203 note 12.

77. Okl.—Prentice v. Roff First Nat. Bank, 224 P. 963, 101 Okl. 232.

50 C.J. p 203 note 13.

78. Ariz.—U. S. Fidelity & Guaranty Co. v. Alfalfa Seed & Lumber Co., 297 P. 862, 38 Ariz. 48.

Tex.—Johnson v. First Mortg. Loan Co. of San Angelo, Civ.App., 135 S.W.2d 806.

#### Single ground for nonjoinder

Under statute permitting suit against surety without joining principal, only one ground specified by statute for nonjoinder of principal need be proved.—Duree v. Aetna Ins. Co., Tex.Civ.App., 66 S.W.2d 764.

79. Ariz.—U. S. Fidelity & Guaranty

Co. v. Alfalfa Seed & Lumber Co., 297 P. 862, 38 Ariz. 48.

50 C.J. p 203 note 10.

#### Benefit of surety

The statute providing that no surety shall be sued unless his principal is joined or unless a judgment has previously been rendered against principal, except in certain cases, is for benefit of surety.—Johnson v. First Mortg. Loan Co. of San Angelo, Tex.Civ.App., 135 S.W.2d 806.

#### Mandatory provision

Language of statutory provision that, except in certain cases, no surety shall be sued unless his principal is joined or unless a judgment has been previously rendered against principal, is mandatory, and the enumeration of the four situations when principal need not be joined, by necessary implication, excludes other cases not excepted.—Johnson v. First Mortg. Loan Co. of San Angelo, supra.

#### Insane principal

Fact that a principal was not sui juris and that principal's estate was in guardianship did not constitute an exception to statute, and the statutory exceptions cannot be enlarged to include estates of insane principals.—Johnson v. First Mortg. Loan Co. of San Angelo, supra.

80. N.Y.—Pezenik v. Massachusetts Bonding & Insurance Co., 250 N. Y.S. 456, 140 Misc. 297.

81. Tex.—Latimer v. Texas & N. O. R. Co., Civ.App., 56 S.W.2d 933, error refused.

82. Del.—W. T. Rawleigh Co. v. Warrington, 199 A. 666, 9 W.W. Harr. 366.

83. Del.—Corpus Juris cited in W. T. Rawleigh Co. v. Warrington, 199 A. 666, 669, 9 W.W.Harr. 366.

50 C.J. p 203 note 15.

84. Wis.—Eau Claire School Dist. v. Blystone, 170 N.W. 721, 168 Wis. 471.

85. Ill.—Vermont Marble Co. v. Bayne, 190 N.E. 291, 356 Ill. 127.

86. Ala.—Matthews v. Mauldin, 38 So. 849, 142 Ala. 434, 4 Ann.Cas. 344.

9 C.J. p 91 note 39.

87. N.Y.—Southmayd v. Jackson, 37 N.Y.S. 201, 15 Misc. 476.

88. Ohio.—Walsh v. Miller, 38 N.E. 381, 51 Ohio St. 462.

89. Ala.—National Surety Co. v. Coleman, 104 So. 821, 213 Ala. 377.

50 C.J. p 203 note 16.

90. Ala.—National Surety Co. v. Coleman, supra.

50 C.J. p 203 note 17.

91. Ala.—National Surety Co. v. Coleman, supra.

92. N.J.—Cooper v. Cooper, 5 N.J. Eq. 498—Adams v. Thompson, 6 L. J.Ch. 109.

93. Ala.—Tedder v. Steele, 70 Ala. 347.

N.J.—Rutherford v. Alyea, 32 A. 70, 53 N.J.Eq. 580, reversed on other grounds 34 A. 1078, 54 N.J.Eq. 411.

94. N.J.—Rutherford v. Alyea, supra—Dorshelmer v. Rorback, 23 N. J.Eq. 46.

50 C.J. p 203 note 23.

95. W.Va.—Findley v. Smith, 26 S. E. 370, 42 W.Va. 299.

*Contracts for benefit of third person.* An action may be brought by one for whose benefit the contract was made against the principal and surety without joining as defendant the obligee on the bond.<sup>96</sup>

*Sureties for limited amounts.* Where several sureties are independently liable for limited amounts, in an action against some of them the others are proper,<sup>97</sup> but not necessary,<sup>98</sup> parties.

*Death of principal or surety.* A creditor can enforce his claim against the property of a deceased surety without making the other sureties parties,<sup>99</sup> and in like manner he may sue a surviving surety without making the personal representative of a deceased surety a party.<sup>1</sup> A statute which provides that, except in certain enumerated cases, no surety shall be sued unless the principal is joined with him requires the principal to be joined in a suit against the estate of a deceased surety.<sup>2</sup>

In a suit in equity, if a principal or surety be dead, his personal representative should be joined with the surviving party.<sup>3</sup>

### c. New Parties; Intervention

General rules with respect to the bringing in of new parties and intervention are applicable in an action against a surety to enforce his liability.

General rules with respect to the bringing in of new parties are applicable in an action against a surety to enforce his liability.<sup>4</sup> Subject to the rules as to intervention generally, and under statutes providing for the intervention of a person not a party who has an interest in the subject of the action, in a proper case the principal may intervene in an action by the creditor against the surety,<sup>5</sup> but in the absence of such an interest in the subject of the action as will support the right he will not

be permitted to intervene.<sup>6</sup> Where consent of the adverse party is necessary, a principal cannot intervene where no consent is given.<sup>7</sup> The surety may intervene to set up a defense if the principal is insolvent and does not defend, and the rights of the surety are endangered.<sup>8</sup>

*In an action on an agreement to become surety,* defendant is not entitled to have his contemplated principal made a party defendant.<sup>9</sup>

## § 265. Process and Appearance

The rules relating to the necessity and sufficiency of service of process in civil actions generally apply to actions by a creditor against a surety.

In accordance with the rules relating to the necessity and sufficiency of service of process in civil actions generally, in an action by a creditor or obligee against a surety it is essential that the surety be served with process<sup>10</sup> unless there is a statute to the contrary which enters into, and forms a part of, the contract.<sup>11</sup> Service on the principal is not requisite in order to obtain a valid judgment against the surety<sup>12</sup> unless the principal and surety are joined in one action and a joint judgment is rendered against them.<sup>13</sup> Many statutes provide as to the manner of service of process on surety companies, and service made in accordance with the statute is sufficient.<sup>14</sup>

## § 266. Declaration, Petition, or Complaint

In an action against a surety, every material fact which constitutes the plaintiff's cause of action must be alleged.

In accordance with the general rules of pleading in civil actions, in an action against a surety every material fact which constitutes plaintiff's cause of action must be alleged.<sup>15</sup> The obligation of the

96. Ind.—American Surety Co. v. Lauber, 53 N.E. 793, 22 Ind.App. 326—Young v. Young, 52 N.E. 776, 21 Ind.App. 509.

97. Tex.—White v. Alexander, 131 S.W. 437, 62 Tex.Civ.App. 512. 50 C.J. p 204 note 27.

98. Tex.—Bolton v. Gifford, 100 S.W. 240, 45 Tex.Civ.App. 140. 50 C.J. p 204 note 28.

99. Miss.—Horne v. Tartt, 24 So. 971, 76 Miss. 304.

1. Ga.—Thomasson v. Farmers' & Merchants' Nat. Bank of Rockmart, 153 S.E. 419, 170 Ga. 555—J. R. Watkins Co. v. Brewer, 36 S.E.2d 442, 73 Ga.App. 331.

2. Tex.—Johnson v. First Mortg. Loan Co. of San Angelo, Civ.App., 135 S.W.2d 896.

3. W.Va.—Clark v. Nickell, 79 S.E. 1020, 73 W.Va. 69, Ann.Cas.1917A 1286.

50 C.J. p 203 note 19.

4. Mo.—Gary Realty Co. v. Swinney, 17 S.W.2d 505. 50 C.J. p 204 note 35.

5. Colo.—Empson v. Aetna Casualty, etc., Co., 206 P. 378, 71 Colo. 282.

50 C.J. p 204 note 38.

6. N.Y.—Charles F. Garrigues Co. v. Casualty Co., 161 N.Y.S. 1126, 175 App.Div. 895, affirmed 115 N.E. 1036, 220 N.Y. 588—World Film Corp. v. American Surety Co., 176 N.Y.S. 2.

7. Ala.—Ex parte Proskauer, 59 Ala. 194.

8. Ga.—Price v. Carlton, 48 S.E. 721, 121 Ga. 12.

9. Ind.—Webster v. Smith, 30 N.E. 139, 4 Ind.App. 44.

10. La.—Diamond v. Petit, 3 La. Ann. 37.

11. Ill.—Illinois Surety Co. v. Munro, 124 N.E. 528, 289 Ill. 570. 50 C.J. p 204 note 46.

12. Ga.—Wesley v. Lewis, 127 S.E. 660, 33 Ga.App. 783. 50 C.J. p 204 note 47.

13. Ky.—Howse v. Reeves, etc., Co., 76 S.W. 513, 25 Ky.L. 949.

14. N.C.—Pardue v. Absher, 94 S.E. 414, 174 N.C. 676. 50 C.J. p 204 note 49.

15. U.S.—U. S., to Use of Cornish v. New Amsterdam Casualty Co., D. C.Pa., 56 F.Supp. 183.

Okla.—Barton v. Harmon, 221 P.2d 666.

Pa.—Aldwyn Corporation v. Fidelity

principal should be clearly set forth<sup>16</sup> and a breach thereof alleged,<sup>17</sup> but it is unnecessary for plaintiff to set forth in *hæc verba* the contract with the principal where he alleges the substance of the agreement<sup>18</sup> or to set forth the specific matters constituting the breach, where he makes a general allegation thereof.<sup>19</sup> The declaration or petition should set forth the contract of suretyship,<sup>20</sup> and it should sufficiently show that defendant is charged as a surety;<sup>21</sup> but where the principal and surety are bound jointly the suretyship need not be noticed.<sup>22</sup> An averment of a breach by the surety is unnecessary.<sup>23</sup> It is not necessary to allege any effort to collect from the principal<sup>24</sup> or to allege the insolvency of the principal<sup>25</sup> where such matters are not essential to the liability of the surety. Where, by statute, remedies against the principal must first be exhausted before proceeding against the surety,

an averment that the principal had no property is sufficient to show compliance with such requirements.<sup>26</sup>

Matters which the surety may interpose as a defense need not be negated.<sup>27</sup> Waiver of matters of discharge must be pleaded where the action is against a surety who had been discharged by an extension of time to the maker of the note.<sup>28</sup> In a suit on a common-law bond, rather than one given pursuant to statute, compliance with the statute need not be alleged.<sup>29</sup>

In determining whether a complaint states a cause of action the whole pleading must be considered.<sup>30</sup>

*Execution of the contract* by the sureties must be alleged,<sup>31</sup> and an averment of execution by the principal, even though the bond is made a part of

& Deposit Co. of Maryland, Com. Pl., 54 Dauph. Co. 273—McRoberts v. Burns, Com. Pl., 93 Pittsb. Leg. J. 354.

W. Va.—Haines v. Kuykendall, 199 S. E. 449, 120 W. Va. 549.  
50 C.J. p 205 note 52.

#### Declaration or petition held sufficient

(1) Action on bond indemnifying plaintiff against loss on deposits in bank—Mutual Oil Co. v. Hamilton, 236 P. 545, 73 Mont. 385.

(2) Action on bond to secure future indebtedness.—Buttrill v. Occidental Life Ins. Co., Tex. Civ. App., 45 S.W.2d 636.

(3) Action on bond indemnifying bank against loss from paying liabilities of another insolvent bank—Farmers' Atlantic Bank v. First Nat. Bank, 152 S.E. 403, 198 N.C. 477.

(4) Action on contract of suretyship for goods sold.—Hoadley v. W. T. Rawleigh Co., 44 N.E.2d 231, 112 Ind. App. 563.

(5) Action on contractor's bond. Fla.—Tappin v. McIntosh, 140 So. 773, 104 Fla. 715.

Ga.—McArthur v. McGilvray, 57 S.E. 1058, 1 Ga. App. 643.

Miss.—Continental Casualty Co. v. Crook, 128 So. 574, 157 Miss. 518, 72 A.L.R. 186.

N.C.—Owen v. Salvation Army, 152 S.E. 800, 198 N.C. 610.

Pa.—Raub Supply Co. v. National Casualty Co., Com. Pl., 47 Dauph. Co. 446.

(6) Other actions.—Cartwright v. Farmers Bank of Tifton, 41 S.E.2d 818, 74 Ga. App. 847—50 C.J. p 205 note 52 [b].

16. Cal.—Stockton Sav. Bank v. McCown, 150 P. 985, 170 Cal. 600.  
50 C.J. p 205 note 53.

17. Colo.—L. H. Heiselt, Inc., v.

Brown, 120 P.2d 644, 108 Colo. 562.

50 C.J. p 205 note 54.

18. Ill.—Vermont Marble Co. v. Bayne, 15 N.E.2d 510, 368 Ill. 618.

19. N.Y.—Chicago Crayon Co. v. Slattery, 123 N.Y.S. 987, 68 Misc. 148.

Tex.—National Surety Co. v. Tomball First State Bank, Civ. App., 244 S.W. 217.

20. Ill.—Vermont Marble Co. v. Bayne, 15 N.E.2d 510, 368 Ill. 618.

21. Ga.—Brilliant Coal Co. v. Gandy, 180 S.E. 379, 51 Ga. App. 264.

Tex.—Chickasaw Lumber Co. v. Blanke, Civ. App., 185 S.W.2d 140, refused for want of merit.

50 C.J. p 206 note 57.

One not party to bond cannot maintain action thereon without alleging that it was executed for use and benefit of third persons, and that he comes within class intended to be protected.—Southwestern Dredging Corporation v. Chicago, R. I. & P. Ry. Co., 32 P.2d 274, 168 Okl. 217.

#### Estoppel of surety

Petition alleging that defaulting construction company's surety repeatedly promised plaintiff to complete principal's contract, for purpose of defrauding plaintiff, and that plaintiff consequently deferred suit, was held to show estoppel of surety to plead time limit for suit provided in surety's bond.—Loftis v. Metropolitan Casualty Ins. Co. of New York, 167 S.E. 729, 46 Ga. App. 438.

#### Surety on note

N.Y.—Butler v. Rawson, 1 Den. 105.  
8 C.J. p 380 note 70.

#### Allegations held sufficient

Ind.—Hoadley v. W. T. Rawleigh Co., 44 N.E.2d 231, 112 Ind. App. 563.

N.C.—Owen v. Salvation Army, 152 S.E. 800, 198 N.C. 610.

22. W. Va.—Riley v. Jarvis, 26 S.E. 366, 43 W. Va. 43.

23. Cal.—Farley v. Moran, 31 P. 158, 3 Cal. Unrep. Cas. 572.

24. Okl.—Walter A. Wood Mowing, etc., Co. v. Farnham, 33 P. 867, 1 Okl. 375.

Pa.—Sullivan Smythfield Co. v. Welsh, 91 Pa. Super. 413.

25. Ga.—Arkansas Fuel Oil Co. v. Young, 16 S.E.2d 909, 66 Ga. App. 33.

Pa.—Northern New York Nurseries v. Kovach, 96 Pa. Super. 400—Sullivan Smythfield Co. v. Welsh, 91 Pa. Super. 413.

Tex.—Goodrich v. First Nat. Bank, Civ. App., 70 S.W.2d 609, error refused.

50 C.J. p 206 note 61.

26. Puerto Rico.—Royal Bank of Canada v. McCormick, 27 Puerto Rico 383.

27. Ind.—Hoadley v. W. T. Rawleigh Co., 44 N.E.2d 231, 112 Ind. App. 563.

Tex.—Constitution Indemnity Co. of Philadelphia v. Armbrust, Civ. App., 25 S.W.2d 176, error refused.  
50 C.J. p 207 note 90.

28. Tex.—Cruse v. Gau, Civ. App., 193 S.W. 405.

29. N.Y.—Clark Plastering Co. v. Seaboard Surety Co., 182 N.E. 71, 259 N.Y. 424, 85 A.L.R. 845.

30. Ind.—Illinois Surety Co. v. Frankfort Heating Co., 97 N.E. 158, 178 Ind. 208.  
50 C.J. p 206 note 63.

31. Wash.—Church v. Campbell, 35 P. 381, 7 Wash. 547.

50 C.J. p 206 note 64—9 C.J. p 93 note 86.

the complaint, is not sufficient to charge the surety with the execution of the bond<sup>32</sup> or to require of him an affirmative denial of such proposition.<sup>33</sup> When it is necessary that the bond of the principal and sureties be executed by the principal, if the complaint shows that the principal never executed the contract it should also set out that the sureties waived its execution by him,<sup>34</sup> although it has been held that in such a case an allegation of delivery by defendant is sufficient.<sup>35</sup>

**Consideration.** As a general rule the petition must contain an allegation that the surety received consideration,<sup>36</sup> and a consideration between the principal and the obligee must be shown;<sup>37</sup> but it is not necessary to allege that the surety received payment for his undertaking.<sup>38</sup> Consideration for a supplemental agreement to incur obligations outside the bond must be alleged.<sup>39</sup>

**Performance and fulfillment of conditions.** Where the obligation of the surety is predicated on performance by plaintiff of his part of the contract, it has been held necessary that plaintiff allege performance on his part,<sup>40</sup> and a complaint which shows on its face a failure to perform such conditions is bad;<sup>41</sup> but where it is the principal's breach which imposes liability on the surety it has been held that it is not essential for plaintiff to allege performance on his part in order to fasten prima facie liability on the surety.<sup>42</sup> The complaint must show satisfaction of conditions precedent to

the surety's liability,<sup>43</sup> but a general allegation of performance of such conditions is sufficient.<sup>44</sup> If performance was waived, the facts constituting such waiver must be pleaded.<sup>45</sup> Where notice of principal's default is made a condition precedent to the surety's liability, compliance with such condition must be pleaded<sup>46</sup> unless the matters assigned as breaches lie as much within the knowledge of the surety as of plaintiff;<sup>47</sup> and, if notice is not a condition precedent, the failure to give it is matter of defense which need not be negated.<sup>48</sup> A complaint which shows on its face noncompliance with conditions by the obligee is bad.<sup>49</sup>

**Alteration of contract.** If a contract authorizes alterations therein, and alterations have been made, they should be set out,<sup>50</sup> but minor changes in plans and specifications not amounting to a new or substituted contract need not be alleged;<sup>51</sup> and, if the contract provides that an extension of time shall not release a surety, an extension, if made, need not be alleged.<sup>52</sup>

**Nonpayment.** It has been held that nonpayment of the obligation must be clearly set forth,<sup>53</sup> but a statement of facts which shows nonpayment is sufficient without an express allegation to that effect.<sup>54</sup> Nonpayment of the obligation need not be alleged where payment is regarded as a matter of defense.<sup>55</sup>

**Damages.** Damage must be alleged,<sup>56</sup> but actual

**Averment of signature by surety held sufficient**

Ala.—Birmingham News Co. v. Moseley, 141 So. 689, 225 Ala. 45.

32. Wash.—Seattle Crockery Co. v. Haley, 33 P. 650, 6 Wash. 302, 36 Am.S.R. 156.

33. Wash.—Seattle Crockery Co. v. Haley, supra.

34. Minn.—Bjoin v. Anglim, 107 N. W. 558, 97 Minn. 526.

35. Mich.—People v. Carroll, 115 N. W. 42, 151 Mich. 233.

36. Ga.—Loewenherz v. Weil, 127 S. E. 883, 33 Ga.App. 760.

50 C.J. p 206 note 70.

**Suretyship after delivery of instrument**

A consideration for the execution of a negotiable instrument must be alleged as to a stranger who is sought to be held as a surety who signed after delivery.—Stone v. White, 3 Gray, Mass., 589.

37. Pa.—Bixler v. Ream, 3 Penn. & W. 282.

38. Pa.—Homewood Peoples Bank v. Cull, 85 Pa.Super. 480.

39. Ark.—Goode v. Aetna Casualty, etc., Co., 13 S.W.2d 6, 178 Ark. 451.

40. La.—Natchitoches Sweet Potato Co. v. Perfection Curing Co., 96 So. 808, 153 La. 916.

41. Ky.—Pond Creek Coal Co. v. Citizens' Trust, etc., Co., 186 S.W. 494, 170 Ky. 601.

50 C.J. p 206 note 75.

42. Cal.—Blackwood v. McCallum, 203 P. 758, 187 Cal. 655.

50 C.J. p 206 note 74.

43. Ind.—Detroit Fidelity & Surety Co. v. Bushong, 175 N.E. 683, 96 Ind.App. 352.

50 C.J. p 206 note 76.

44. S.D.—Davison County v. Watertown Tile, etc., Co., 196 N.W. 96, 47 S.D. 101.

45. N.Y.—Potsdam v. Aetna Casualty, etc., Co., 217 N.Y.S. 641, 218 App.Div. 27.

46. Ky.—U. S. Fidelity, etc., Co. v. Columbus Baptist Church, 102 S. W. 325, 31 Ky.L. 520.

50 C.J. p 206 note 81.

47. Cal.—People v. Edwards, 9 Cal. 286.

48. Ind.—Knight, etc., Co. v. Castle, 87 N.E. 976, 173 Ind. 97, 27 L.R.A., N.S., 573.

49. D.C.—Washington, etc., Nat. Bank v. London, etc., Indemn. Co., 10 F.2d 641, 56 App.D.C. 76.

50. Cal.—People Lumber Co. v. Gillard, 68 P. 576, 136 Cal. 55.

51. Cal.—Wolf v. Aetna Indemnity Co., 126 P. 470, 163 Cal. 597.

52. Ind.—Mankedick v. Consolidated Coal, etc., Co., 57 N.E. 256, 25 Ind.App. 135.

53. Cal.—Stockton Sav. Bank v. McCown, 150 P. 985, 170 Cal. 600.

54. Mont.—Mutual Oil Co. v. Hamilton, 236 P. 545, 73 Mont. 385.

**Lien on realty**

Complaint in suit on bond alleging plaintiff's judgment against obligees constituted lien on realty is sufficient to allege nonpayment of judgment.—Jenicek v. Barman, 18 P.2d 978, 129 Cal.App. 496.

55. Ind.—Hoadley v. W. T. Rawleigh Co., 44 N.E.2d 231, 112 Ind. App. 563.

56. La.—Godwin v. Davidson, 112 So. 728, 163 La. 804.

N.Y.—Cooney v. Winants, 19 Wend. 504.

damage,<sup>57</sup> or the items constituting such damage,<sup>58</sup> need not be shown; but it is sufficient if a general claim is made<sup>59</sup> or a claim for the total amount of the damages.<sup>60</sup>

**Interest.** If interest is desired it must be claimed in the complaint.<sup>61</sup>

**Amendment.** Subject to the rules governing the amendment of declarations, petitions, or complaints generally, in a proper case plaintiff may amend his petition,<sup>62</sup> but the allowance of an amendment is not an adjudication as to the materiality or effect of evidence in support of the amendment.<sup>63</sup>

## § 267. Plea, Answer, or Affidavit of Defense

### a. In general

### b. Matters of release or discharge

### a. In General

The general rules governing pleas, answers, or affidavits of defense in civil actions apply as to the sufficiency of such pleadings in actions against a surety.

The general rules governing pleas, answers, or affidavits of defense in civil actions apply as to the sufficiency of such pleadings in actions against a surety.<sup>64</sup> Where separate actions are instituted on the same instrument, a plea filed in one cannot be extended to the others, but a plea must be filed in each suit.<sup>65</sup> Special or affirmative defenses should be pleaded specially,<sup>66</sup> such as delivery of the instrument without authority,<sup>67</sup> lack of consideration,<sup>68</sup> limitations,<sup>69</sup> fraud, duress, or misrepresentation,<sup>70</sup> and nonperformance of conditions precedent by plaintiff.<sup>71</sup> Likewise, if the surety wishes to avail himself of his statutory exemption from

57. Wash.—Johnson v. Cook, 64 P. 729, 24 Wash. 474.

58. Ga.—Adams v. Haigler, 51 S.E. 638, 123 Ga. 659.

59. Conn.—Alfred E. Joy Co., Inc. v. New Amsterdam Casualty Co., 120 A. 684, 98 Conn. 794.

60. Cal.—Summers v. L. F. S. Syndicate, 189 P. 286, 46 Cal.App. 250.

61. Colo.—Empire State Surety Co. v. Lindenmeier, 181 P. 437, 54 Colo. 497, Ann.Cas.1914C 1189.

La.—Colonial Creosoting Co. v. Perry, 124 So. 182, 169 La. 90.

62. Ga.—McKibben v. Luther Williams Banking Co., 123 S.E. 726, 32 Ga.App. 419.

50 C.J. p 207 note 98—9 C.J. p 114 note 78 [b].

63. N.Y.—Michigan SS. Co. v. American Bonding Co., 95 N.Y.S. 1034, 109 App.Div. 55.

64. Ga.—Graham v. Marks, 25 S.E. 931, 98 Ga. 67.

50 C.J. p 207 note 2.

**Plea to require extraneous proof of accounts and agreement**

Where sureties expressly contracted with obligee of accounts to pay amount due agreeing that any acknowledgment or approval thereof by the maker should be binding on them, sureties when sued thereon were bound to raise the issue of their correctness and execution by plea of non est factum in order to prevent the introduction of the accounts and agreement in evidence without extraneous proof.—W. T. Rawleigh Co. v. Sherley, Tex.Civ. App., 165 S.W.2d 465, error dismissed.

**Plea, answer, or affidavit of defense held proper or sufficient**

Ga.—W. T. Rawleigh Co. v. Kelly, 50 S.E.2d 113, 78 Ga.App. 10—J. R. Watkins Co. v. Ellington, 29 S.E.2d 300, 70 Ga.App. 722.

Ill.—Fisher v. U. S. Fidelity & Guaranty Co., 39 N.E.2d 67, 313 Ill. App. 66.

50 C.J. p 207 note 2 [b].

**Plea, answer, or affidavit of defense held insufficient**

U.S.—Prudence Co. v. Fidelity & Deposit Co. of Maryland, D.C.N.Y., 2 F.Supp. 454.

Fla.—Bear v. Duval Lumber Co., for Use and Benefit of Standard Accident Ins. Co., 150 So. 614, 112 Fla. 240—Standard Accident Ins. Co. v. Duval Lumber Co., 126 So. 643, 99 Fla. 525.

Ga.—J. R. Watkins Co. v. Brewer, 36 S.E.2d 442, 73 Ga.App. 331.

Ky.—Goodloe v. Anderson, 121 S.W. 2d 958, 275 Ky. 460.

Pa.—Plummer v. Wilson, 185 A. 311, 322 Pa. 118—Elliott-Lewis Electrical Co. v. Hausman, 158 A. 626, 104 Pa.Super. 322—Pennsylvania Turnpike Commission to Use of Albright v. U. S. Fidelity & Guaranty Co., Com.Pl., 51 Dauph.Co. 256, affirmed 23 A.2d 416, 343 Pa. 543.

50 C.J. p 207 note 2 [i], [k].

65. Md.—Wall v. Wall, 2 Harr. & G. 79.

66. Pa.—Plummer v. Wilson, 185 A. 311, 322 Pa. 118—Harmony Tp. School Dist. v. U. S. Fidelity & Guaranty Co., 53 Pa.Dist. & Co. 547.

**Special pleas held insufficient**

Ga.—Rich v. W. T. Rawleigh Co., 171 S.E. 228, 47 Ga.App. 571.

67. Or.—Baker County v. Huntington, 79 P. 187, 46 Or. 275.

50 C.J. p 207 note 5.

**Benefit to principal**

(1) Mere allegation that surety received no consideration is insufficient in absence of allegation that no benefit was given to principal.—Bloomfield Trust Co. v. Trojanowski, 147 A. 847, 298 Pa. 61.

(2) So, in suit on note, plea that defendant signed note as surety in renewal of note signed by her as surety while her husband was living, and that she received no consideration from original transaction and no new consideration was insufficient as against general demurrer, where plea did not allege that in renewal transaction there was no extension of time of payment or forbearance to sue given principal.—Singleton v. Farmers & Merchants Bank, 191 S.E. 478, 55 Ga.App. 776.

69. Ky.—Moore's Adm'x v. Brookins, 126 S.W.2d 1059, 277 Ky. 668.

**Affidavit of defense to merits**

Whether or not a limitation in a bond given as surety for performance of a contract restricting the obligee to commencing suit on or before the last day for performance of the contract is a reasonable limitation is a question which can be raised only by an affidavit of defense to the merits, and it cannot be determined on an affidavit of defense raising questions of law in an action on the bond, especially where the statement of claim avers plaintiff was induced to delay bringing suit within the period fixed by the bond by reason of the fact that negotiations with defendant for payment of its claim were taking place up to the day before suit was brought.—Harmony Tp. School Dist. v. U. S. Fidelity & Guaranty Co., 53 Pa.Dist. & Co. 547.

70. Pa.—Bloomfield Trust Co. v. Trojanowski, 147 A. 847, 298 Pa. 61.

50 C.J. p 208 note 6.

**Fraud or misrepresentation held properly pleaded**

Ga.—W. T. Rawleigh Co. v. Kelly, 50 S.E.2d 113, 78 Ga.App. 10.

71. U.S.—George A. Fuller Co. v. Doyle, C.C.Mo., 87 F. 687.



suit until the principal has been sued, he must plead it specifically.<sup>72</sup> Where it is sought to defend on the ground that the surety signed only on express agreement that other sureties were to be obtained, the plea must distinctly allege the incompleteness of the instrument<sup>73</sup> and notice to plaintiff of the condition.<sup>74</sup>

In order to obtain any benefit arising out of the relationship, the surety must set up the fact of suretyship and demand his privileges;<sup>75</sup> and where the fact of suretyship is not apparent from the face of the instrument he must aver knowledge of the suretyship by the creditor<sup>76</sup> and acceptance of defendant as surety by the creditor.<sup>77</sup> An answer setting up the suretyship merely is not a bar to the action but only matter for ground of direction as to execution on the judgment.<sup>78</sup>

**Admissions.** The rule that matters not traversed or denied are deemed admitted applies to the pleas or answers of a surety.<sup>79</sup> If the sureties unite with the principal in a plea to the merits, they admit the suretyship.<sup>80</sup> An admission in the answer that misappropriation occurred on the date alleged in the petition is not an admission that such misappropriation was within the terms of the contract so as to render the surety liable therefor.<sup>81</sup> A plea of performance admits the execution of the instrument.<sup>82</sup>

**Counterclaim in answer.** A breach of agreement

by plaintiff, when relied on as a basis of recovery of damages by the surety, should be set up by way of counterclaim.<sup>83</sup> Where a principal becomes a party defendant in an action against a surety, he may in his answer counterclaim against plaintiff,<sup>84</sup> and dismissal of the action by plaintiff will not prevent litigation of the counterclaim.<sup>85</sup> In an action against several makers of a note, a claim in favor of one of them may not be pleaded by him as a set-off unless he alleges that he is the principal and that the other makers are only sureties.<sup>86</sup>

**Joint or separate pleas or answers.** Where suit is brought against principal and sureties, each may sever and plead as many pleas as are necessary;<sup>87</sup> the surety may plead separately a defense which is personal to him,<sup>88</sup> and he may set up defenses of his principal by joint or separate plea.<sup>89</sup> A successful plea by one defendant discharges the others unless the matter of the plea is of a character going to the personal discharge of the pleader, of which the others could take no advantage,<sup>90</sup> and so a defense pleaded by the principal, not personal to him, inures to the benefit of the surety.<sup>91</sup> Where the defense is in its nature joint, several defendants may join in the same plea,<sup>92</sup> and where they join in pleas they cannot afterward sever and plead matter of personal discharge.<sup>93</sup> If the principal and surety are sued jointly, a joint plea or answer must be good as to both,<sup>94</sup> and if they join in a plea which is sufficient as for one but not for the

72. Tex.—Petty v. Cleveland, 2 Tex. 404.

50 C.J. p 208 note 8.

73. Ala.—Stone v. Goldberg, 60 So. 744, 6 Ala.App. 249.

50 C.J. p 208 note 10.

**Plea or answer held sufficient**

Ala.—Birmingham News Co. v. Moseley, 141 So. 689, 225 Ala. 45.

Ark.—W. T. Rawleigh Co. v. Winters, 156 S.W.2d 253, 203 Ark. 149.

74. Ky.—Thompson v. Citizens Bank, etc., Co., 1 S.W.2d 770, 222 Ky. 492.

50 C.J. p 208 note 11.

75. Tex.—Stetson v. First Nat. Bank, Civ.App., 44 S.W.2d 792, error refused.

50 C.J. p 208 note 12.

76. Cal.—Granger v. Harper, 17 P. 2d 135, 217 Cal. 16.

Or.—Walsh v. Young, 180 P.2d 535, 181 Or. 185.

Tex.—Stetson v. First Nat. Bank, Civ.App., 44 S.W.2d 792, error refused.

77. Cal.—Granger v. Harper, 17 P. 2d 135, 217 Cal. 16.

78. Ind.—Moorman v. Barton, 16 Ind. 206.

79. U.S.—Friday v. Smith, Pa., 195 F. 742, 115 C.C.A. 542.

Cal.—Goldberg v. Rempp, 273 P. 63, 95 Cal.App. 452.

80. Ala.—Welch v. Fourier, 6 Ala. 516.

81. Kan.—Toledo Computing Scale Co. v. Mercer, 166 P. 480, 101 Kan. 242.

82. Md.—Burtles v. State, 4 Md. 273.

83. Ky.—New York Store Mercantile Co. v. Gorham, 199 S.W. 64, 178 Ky. 535.

84. Ohio.—General Constr. Co. v. Lakewood, 17 Ohio Cir.Ct., N.S., 165.

85. Ohio.—General Constr. Co. v. Lakewood, supra.

86. Ind.—Lynn v. Crim, 96 Ind. 89.

—Gregory v. Gregory, 89 Ind. 345.

—Harris v. Rivers, 53 Ind. 216—Dodge v. Dunham, 41 Ind. 186.

W.Va.—Choen v. Guthrie, 15 W.Va. 100.

87. Ala.—Williams v. Hinkle, 15 Ala. 713.

88. Ill.—McChesney v. Bell, 59 Ill. App. 84.

#### Repleader

Where corporation operating bonded warehouse sued another corporation in state court, and second corporation filed cross claim alleging wrongful conversion and filed third-party claim against first corporation's surety, asserting joint liability of principal and surety, court could properly direct a repleader to permit surety to present its separate defense that the liability was several and that if recovery were granted against it surety should recover over against principal.—Texas Wool & Mohair Marketing Ass'n v. Standard Accident Ins. Co., C.A.Tex., 175 F.2d 835.

89. W.Va.—State v. Duggan, 135 S. E. 270, 102 W.Va. 312.

90. Ark.—Gordon v. State, 11 Ark. 12.

91. Tex.—Scarborough v. Kerr, Civ. App., 70 S.W.2d 607.

50 C.J. p 208 note 17.

92. N.J.—Bordentown Tp. v. Wallace, 11 A. 267, 50 N.J.Law 13.

93. N.Y.—Andrus v. Waring, 20 Johns. 153.

94. Ohio.—Slipher v. Fisher, 11 Ohio 299.

other the plea is bad as to both.<sup>95</sup>

*Amendments* may be allowed in a proper case,<sup>96</sup> but an application for permission to amend must be timely made.<sup>97</sup>

### b. Matters of Release or Discharge

- (1) In general
- (2) Payment or performance
- (3) Extension of time
- (4) Failure to sue principal
- (5) Alteration of instrument or contract

#### (1) In General

Matters of release or discharge must be specially pleaded.

Matters of release or discharge must be specially pleaded.<sup>98</sup> If the surety sets up a discharge by reason of some act of plaintiff which injured him, he must allege the acts which caused such injury.<sup>99</sup> A plea of a release of the surety on condition must allege performance of the condition by defendant.<sup>1</sup> He must specially plead release of his principal,<sup>2</sup> and such a plea must be certain and definite.<sup>3</sup> An averment that the surety has been "lulled into security by the surrender" of a note to the principal by plaintiff sufficiently indicates knowledge of the surrender by the surety, and prejudice.<sup>4</sup> An allegation that plaintiff, a bank, had not applied money of the principal "on deposit, and payable to his order," sufficiently shows that the deposit was a general one, and liable to appropriation on the debt.<sup>5</sup>

*Relinquishment or loss of securities.* The sure-

ty must plead specially a release by reason of the relinquishment or loss of securities by the creditor,<sup>6</sup> and the plea of relinquishment must show the value of such security<sup>7</sup> and that the release was without the consent of the surety;<sup>8</sup> and such defense cannot be made by alleging a change made in the contract.<sup>9</sup> A plea of loss of security which shows that persons other than the surety and creditor were interested in the security is bad.<sup>10</sup>

#### (2) Payment or Performance

A surety relying on payment as a discharge or release must generally plead it specially and set forth all material facts.

In accordance with the general rules governing the pleading of payment, considered in Payment §§ 83-85, a surety relying on payment as a discharge or release must generally plead it specially<sup>11</sup> and set forth all material facts.<sup>12</sup> An equitable discharge of a surety will not support a plea of payment.<sup>13</sup>

#### (3) Extension of Time

The surety must specially plead an extension of time to the principal.

The surety must specially plead an extension of time to the principal.<sup>14</sup> If an extension of time to the principal is claimed as a defense, the plea should aver that plaintiff had knowledge of the suretyship,<sup>15</sup> that the extension was given without the surety's consent,<sup>16</sup> that there was a consideration therefor,<sup>17</sup> and of what the consideration consisted.<sup>18</sup> The time for which the extension was

95. N.J.—Bordentown Tp. v. Wallace, 11 A. 267, 50 N.J.Law 13. 9 C.J. p 111 note 94.

96. Ga.—J. R. Watkins Co. v. Ellington, 29 S.E.2d 300, 70 Ga.App. 722.

50 C.J. p 209 note 26.

Plea of non est factum may be filed as amendment to defendant's original plea after first term if there is enough in original plea to amend by.—J. R. Watkins Co. v. Ellington, supra.

97. U.S.—U. S. for Use and Benefit of Johnson v. Morley Const. Co., D.C.N.Y., 11 F.Supp. 841.

98. Ky.—American Surety Co. of New York v. Noe, 53 S.W.2d 178, 245 Ky. 42.

La.—Templeman Bros. Lumber Co. v. Sinnot, 9 La.App., Orleans, 305.

99. Ga.—Rich v. W. T. Rawleigh Co., 171 S.E. 228, 47 Ga.App. 571. 50 C.J. p 209 note 28.

1. Ill.—Lyle v. Morse, 24 Ill. 95.

2. Conn.—King v. Malone, 99 A. 691, 91 Conn. 342.

50 C.J. p 209 note 30.

3. Md.—Mitchell v. Williamson, 6 Md. 210.

4. Iowa.—Kirby v. Landis, 6 N.W. 173, 54 Iowa 150.

5. Ark.—Dawson v. Real Estate Bank, 5 Ark. 283.

6. Minn.—Pulaski Hall Assoc. v. American Surety Co., 143 N.W. 715, 123 Minn. 222. 50 C.J. p 209 note 34.

Plea or answer held sufficient Ga.—Kennedy v. Farmers' & Merchants' Bank, 169 S.E. 769, 47 Ga. App. 104.

7. Idaho.—Halley First Nat. Bank v. Watt, 64 P. 223, 7 Idaho 510.

8. Ga.—Halley First Nat. Bank v. Watt, supra.

9. Mo.—Howard County v. Baker, 24 S.W. 200, 119 Mo. 397.

10. Ill.—State Bank v. Bryan, 108 N.E. 1004, 268 Ill. 151.

11. Ind.—Hoadley v. W. T. Rawleigh Co., 44 N.E.2d 231, 112 Ind. App. 563.

50 C.J. p 209 note 41.

12. Ga.—First Nat. Bank of Com-

merce, Ga., v. Simmons, 173 S.E. 241, 48 Ga.App. 728.

50 C.J. p 209 note 42.

Plea or answer held sufficient

Ga.—Jones v. Moore, 189 S.E. 425, 54 Ga.App. 803.

13. R.I.—Shelton v. Hurd, 7 R.I. 403, 84 Am.D. 564.

14. Mo.—C. A. Burton Mach. Co. v. National Surety Co., App., 182 S. W. 801.

50 C.J. p 210 note 44.

Plea or answer held sufficient

Ga.—Robbins v. Calhoun Nat. Bank, 168 S.E. 116, 46 Ga.App. 489. 50 C.J. p 210 note 44 [bj].

15. Ind.—McCloskey v. Indianapolis Mfrs', etc., Union, 67 Ind. 86, 33 Am.R. 76.

16. Ill.—American Hard Rubber Co. v. Howe, 117 N.E. 425, 280 Ill. 431. 50 C.J. p 210 note 46.

17. N.Y.—Polaris Bldg. Corporation v. Bimberg, 241 N.Y.S. 738, 137 Misc. 289.

50 C.J. p 210 note 47.

18. Ga.—Finch v. Provident Mut.

granted should be named,<sup>19</sup> and if it shows on its face that there was no definite time, no agreement, and no consideration, the plea is bad.<sup>20</sup> Facts which prove the extension need not be pleaded.<sup>21</sup> A plea that the principal had executed a promissory note to plaintiff does not indicate an extension.<sup>22</sup> A plea that extension was given on receiving a note must aver acceptance by plaintiff.<sup>23</sup> Where a binding extension does not discharge the surety except to the amount of loss or damage caused by such extension, a plea suggesting hypotheses, contingencies, and possibilities of loss, without stating in form or substance that the extension caused loss, is bad,<sup>24</sup> and one which does not show loss is bad.<sup>25</sup>

#### (4) Failure to Sue Principal

Where the surety relies on a discharge by the failure of the creditor to proceed, after notice, against the principal, or against security in the creditor's hands, a plea that the plaintiff did not proceed against the principal on receipt of notice to sue from the surety should state with certainty all the material facts.

Where the surety relies on a discharge by the failure of the creditor to proceed, after notice, against the principal, or against security in the possession of the creditor, a plea that plaintiff did not proceed against the principal on receipt of notice to sue from the surety should state with certainty all the material facts,<sup>26</sup> alleging that the notice was in writing, when this is required by the statute,<sup>27</sup> and that the principal was solvent at the time notice was given,<sup>28</sup> but defendant need not state that

he apprehended that the principal was about to become insolvent or remove from the state,<sup>29</sup> or that plaintiff had notice of defendant's character as surety.<sup>30</sup> It is not necessary that the notice be set out; and, if set out, an error therein is not fatal.<sup>31</sup> The failure of plaintiff to sue can be stated in general terms; and the exact time of delay need not be named.<sup>32</sup> An answer that the surety has been discharged by failure of plaintiff to bring suit after notice to do so should aver that suit could have been brought at the time notice was given,<sup>33</sup> and that the surety was injured, exposed to greater liability, or his risk increased, by the failure of plaintiff to sue.<sup>34</sup> Where statutes bar an action against the surety after a certain time has elapsed after notice to sue the principal, a plea which substantially follows the statute is good.<sup>35</sup>

#### (5) Alteration of Instrument or Contract

As a general rule, discharge of the surety by an alteration of the instrument or contract, in order to be available as a defense, must be specially pleaded.

As a general rule, discharge of the surety by an alteration of the instrument or contract, in order to be available as a defense, must be specially pleaded,<sup>36</sup> and the changes made should be set out.<sup>37</sup>

### § 268. Replication or Reply

A replication in an action by a creditor or obligee against a surety must deny or set up matter in avoidance of the defendant's answer.

Life Ins. Co. of Philadelphia, 190 S.E. 675, 55 Ga.App. 518.  
Vt.—Marshall v. Aiken, 25 Vt. 327.

19. Ga.—Finch v. Provident Mut. Life Ins. Co. of Philadelphia, 190 S.E. 675, 55 Ga.App. 518.  
50 C.J. p 210 note 49.

20. Ind.—Beck v. O'Dell, 140 N.E. 527, 193 Ind. 386.

21. Minn.—St. Paul Trust Co. v. St. Paul Chamber of Commerce, 73 N.W. 408, 70 Minn. 486.

22. Ind.—Lindeman v. Rosenfield, 67 Ind. 246, 33 Am.R. 79.

23. N.J.—Morris Canal, etc., Co. v. Van Vorst, 21 N.J.Law 100.

24. U.S.—U. S. v. Lynch, D.C.Del., 192 F. 364.

25. U.S.—U. S. Fidelity, etc., Co. v. U. S., Pa., 178 F. 692, 102 C.C.A. 192.

Loss or prejudice held sufficiently shown

Ky.—U. S. Fidelity & Guaranty Co. v. Mayo Arcade Corporation, 70 S.W.2d 531, 253 Ky. 763.

26. N.D.—Brioschi-Minuti Co. v.

Elson-Williams Constr. Co., 172 N.W. 239, 41 N.D. 638.  
50 C.J. p 210 note 59.

Refusal to comply with statutory request

Surety desiring to defeat his liability on note, through holder's failure to sue at first term of court after note matured, must allege that he made statutory request to sue and that holder failed to comply.—Pope v. Litwin, Tex.Civ.App., 57 S.W.2d 1105, error dismissed.

27. Ky.—Goodloe v. Anderson, 121 S.W.2d 958, 275 Ky. 460.  
50 C.J. p 210 note 60.

28. Ala.—Darby v. Berney Nat. Bank, 11 So. 881, 97 Ala. 643.

29. Ala.—Shehan v. Hampton, 8 Ala. 942.

Iowa.—Newton First Nat. Bank v. Smith, 25 Iowa 210.

30. Ill.—Payne v. Webster, 19 Ill. 103.

31. Tenn.—Waterford v. Hensley, Mart. & Y. 275.

32. W.Va.—Gillilan v. Ludington, 6 W.Va. 128.

33. Ind.—Field v. Burton, 71 Ind. 380.

34. Ga.—McElveen v. Floyd, 153 S.E. 615, 41 Ga.App. 537.

Depreciation in value of property

In action for interest on bond secured by mortgage, defense by sureties that they demanded that mortgage be foreclosed some time before action was commenced and that market value had depreciated in interim was bad where amount of depreciation or that premises had become worth less than mortgage debt was not alleged.—Rochester Sav. Bank v. Stoeltzen & Tapper, 26 N.Y. S.2d 718, 176 Misc. 140.

35. Ala.—Shehan v. Hampton, 8 Ala. 942.

Ill.—McAllister v. Ely, 18 Ill. 249.  
50 C.J. p 210 note 68.

36. Ky.—Harlan Fuel Co. v. Wiggington, 262 S.W. 957, 203 Ky. 546.  
50 C.J. p 211 note 69.

Plea or answer held insufficient

Ga.—Rich v. W. T. Rawleigh Co., 171 S.E. 228, 47 Ga.App. 571.

37. U.S.—Randle v. Barnard, C.C. Mo., 99 F. 348, affirmed 110 F. 906, 49 C.C.A. 177.

Md.—Leppert v. Flaggs, 60 A. 450, 101 Md. 71.

Under general rules of pleading in civil actions, a replication in an action by a creditor or obligee against a surety must deny or set up matter in avoidance of defendant's answer.<sup>38</sup> Where the answer of defendant is in effect a denial of liability, a reply is not required to complete the issue.<sup>39</sup> To the answer of a surety that the name of a new surety was added to a note without his consent, a reply that defendant, with full knowledge of the facts, fully ratified the note, and agreed to pay, sufficiently alleges a ratification;<sup>40</sup> but, to an answer alleging that the note was signed after delivery without consideration, a reply that defendant agreed to pay one half of the note if another surety would pay one half, which the latter had agreed to do, is insufficient in not showing with whom the agreement was made, or the performance of the condition.<sup>41</sup> A replication showing an acknowledgment of liability by the surety may be sufficient, even though it does not allege the time of the acknowledgment.<sup>42</sup> Where the plea is that defendant was discharged by failure of plaintiff to sue after defendant had notified him to do so, plaintiff cannot recover without pleading that defendant has not sustained any injury.<sup>43</sup> Where defendant pleads that plaintiff obtained, in a prior suit, a verdict on a counterclaim for the identical damages claimed in the present action, a replication merely alleging that the recoupment, in the former suit, was directed to special counts only, which were not submitted to the jury, without showing that the plea of recoupment was withdrawn or disallowed, or that the finding did not extinguish all of his claim against the surety, is demurrable.<sup>44</sup>

### § 269. Issues, Proof, and Variance

In an action by a creditor or obligee against a surety, only such matters as are put in issue and supported

by evidence can be considered, the proof must conform to the pleadings, and matters in issue need not be proved.

In accordance with the rules relating to issues, proof, and variance in civil actions generally, in an action by a creditor or obligee against a surety, only such matters as are put in issue and supported by evidence can be considered;<sup>45</sup> the proof must conform to the pleadings,<sup>46</sup> and matters not in issue need not be proved.<sup>47</sup> One who states a cause of action against defendant as surety, but proves an action against him as principal, cannot recover,<sup>48</sup> and, where the sureties have alleged one defense, evidence of a different defense is inadmissible.<sup>49</sup> Where the surety desires to prove error in a decree against the principal, the errors must be pleaded.<sup>50</sup> An allegation in a declaration on a bond that the sureties consented in writing to an extension of time does not change the form of action from debt on a specialty to assumpsit so as to make the bond inadmissible.<sup>51</sup> A variance between the evidence offered by a surety, and the allegations in his answer, will not be fatal if the evidence sustains the gist of his defense.<sup>52</sup>

Under the general issue evidence is admissible to show an extension of time releasing the surety;<sup>53</sup> discharge by failure to comply with an agreement to secure the signature of a cosurety;<sup>54</sup> or that plaintiff has enough money of the principal to satisfy the demand.<sup>55</sup> In some jurisdictions, under a general denial of execution or the general issue, a surety may show that, after he signed the bond, and without his knowledge, it was altered, as by the erasure of a signature of a cosurety and addition of another,<sup>56</sup> while in others evidence of a material alteration is not admissible.<sup>57</sup> Where evidence of payment is admissible under the general denial when nonpayment is alleged in the declara-

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| <p>38. Ala.—Birmingham News Co. v. Moseley, 141 So. 689, 225 Ala. 45.</p> <p>39. Ind.—Cooke v. Williamson, 11 Ind. 242.</p> <p>40. Ind.—Owens v. Tague, 29 N.E. 784, 3 Ind.App. 245.</p> <p>41. Ind.—Owens v. Tague, supra.</p> <p>42. Ala.—Culwell v. Edmondson, 129 So. 276, 221 Ala. 424.</p> <p>43. W.Va.—Gillilan v. Ludington, 6 W.Va. 128.</p> <p>44. Ala.—Maryland Fidelity, etc., Co. v. Robertson, 34 So. 933, 136 Ala. 379.</p> <p>45. Or.—Templeton v. Cook, 138 P. 230, 69 Or. 313.</p> <p>50 C.J. p 211 note 82.</p> <p>46. Okl.—Yell v. Davis, 123 P.2d 681, 190 Okl. 322.</p> <p>Tex.—Shade v. Anderson, Civ.App., 36 S.W.2d 1041.</p> | <p>Wash.—Twedt v. Siverson, 17 P.2d 43, 170 Wash. 662.</p> <p>50 C.J. p 211 note 84.</p> <p><b>Held no variance</b></p> <p>U.S.—Prudence Co. v. Fidelity &amp; Deposit Co. of Maryland, N.Y., 56 S. Ct. 387, 297 U.S. 198, 80 L.Ed. 581, motion denied 56 S.Ct. 679, amended on other grounds 56 S.Ct. 935, 298 U.S. 642, 80 L.Ed. 1374.</p> <p>Ill.—Vermont Marble Co. v. Bayne, 15 N.E.2d 510, 368 Ill. 618.</p> <p>47. Ill.—Vermont Marble Co. v. Bayne, supra.</p> <p>La.—De Blanc v. Cazale, App., 144 So. 624.</p> <p>50 C.J. p 211 note 83.</p> <p>48. Mo.—Cockrell v. Williams, 193 S.W. 869, 195 Mo.App. 400.</p> <p>49. Ky.—Stepp v. Hatcher, 67 S.W. 819, 23 Ky.L. 2441.</p> | <p>50. S.C.—Davant v. Webb, 31 S.C. L. 379.</p> <p>51. D.C.—Wilkinson v. McKimmie, 36 App.D.C. 336, affirmed 33 S.Ct. 879, 229 U.S. 590, 57 L.Ed. 1342.</p> <p>52. Or.—Lazelle v. Miller, 67 P. 307, 40 Or. 549.</p> <p>53. Ill.—Harrison v. Thackaberry, 94 N.E. 172, 248 Ill. 512.</p> <p>54. Ind.—Hunter v. Ft. Wayne First Nat. Bank, 87 N.E. 734, 172 Ind. 62.</p> <p>55. Mich.—Marquette Opera House Bldg. Co. v. Wilson, 67 N.W. 123, 109 Mich. 223.</p> <p>56. Wash.—Fairhaven v. Cowgill, 36 P. 1093, 8 Wash. 686.</p> <p>50 C.J. p 212 note 94.</p> <p>57. Ky.—Harlan Fuel Co. v. Wiggington, 262 S.W. 957, 203 Ky. 546.</p> |
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tion or complaint, as considered in Payment § 91, a surety may, where the complaint avers nonpayment, establish payment under a general denial.<sup>58</sup>

### § 270. Presumptions and Burden of Proof

The general rules relating to presumptions in civil actions apply in an action by a creditor or obligee against a surety. In such an action, the plaintiff has the burden of proving matters which are essential to his cause of action, and the surety has the burden of proving an affirmative defense.

The general rules relating to presumptions in civil actions apply in an action by a creditor or obligee against a surety.<sup>59</sup>

In accordance with the rules relating to burden of proof in civil actions generally, in an action by

a creditor or obligee against a surety, plaintiff has the burden of proving matters which are essential to his cause of action,<sup>60</sup> such as execution of the contract of suretyship,<sup>61</sup> default or breach of the principal,<sup>62</sup> loss or damage sustained as a result of the default or breach,<sup>63</sup> and liability of the surety therefor.<sup>64</sup> The burden is on plaintiff to prove that he gave notice of default where so required,<sup>65</sup> and to prove waiver by the surety of matters operating as a discharge.<sup>66</sup> Where loss or relinquishment of security in plaintiff's hands discharges the surety, the burden is on plaintiff to show that the surety was not injured by the act of plaintiff releasing or substituting the security,<sup>67</sup> or that the surety assented to the release or substitution.<sup>68</sup>

58. Wyo.—Riner v. New Hampshire F. Ins. Co., 60 P. 262, 9 Wyo. 81, rehearing denied 64 P. 1062, 9 Wyo. 446.

59. N.Y.—Kings County Trust Co. v. Giovinco, 194 N.E. 60, 266 N.Y. 137.

Tex.—Green v. American Refining Properties, Civ.App., 22 S.W.2d 343.

50 C.J. p 212 note 99.

#### Coverage of surety bond

Rebuttable presumption exists that surety bond covers only transactions occurring after its execution.—Commonwealth v. Ramsey, 171 A. 575, 314 Pa. 508.

#### Misappropriation of funds

Where funds collected by principal are not paid on demand, it will be presumed in determining surety's liability that such funds were misappropriated at time of their receipt.—City of Salisbury v. Lysterly, 180 S.E. 701, 208 N.C. 386.

#### Renewal note

Where renewal note does not obligate all parties to original note, it is not presumed that it was accepted in payment of original, with respect to discharging sureties.—Farmers' Nat. Bank v. Jones, 28 S.W.2d 787, 234 Ky. 591, 70 A.L.R. 335.

#### Loss or damage

In mortgagee's action for breach of bond for completion of building, trier of facts could properly assume that interest on investment along with taxes and insurance were losses flowing from failure to receive finished building, in absence of a showing to the contrary.—Prudence Co. v. Fidelity & Deposit Co. of Maryland, N.Y., 56 S.Ct. 387, 297 U.S. 198, 80 L.Ed. 581, motion denied 56 S.Ct. 679, amended on other grounds 56 S.Ct. 935, 298 U.S. 642, 80 L.Ed. 1374.

#### Consideration for extension of time for payment

On question whether vendor's subsequent letter extending time for payment was supported by separate

consideration so as to release surety of purchaser under land contract, writing itself carried presumption of consideration, although presumption could be overcome by testimony to the contrary.—Berkowitz v. Tyderko, Limited, 57 P.2d 173, 13 Cal.App.2d 561.

60. U.S.—Maryland Casualty Co. v. New Jersey Shipbuilding & Dredging Co., C.C.A.N.J., 50 F.2d 825. Tex.—Means v. Floyd West & Co., Civ.App., 74 S.W.2d 518.

50 C.J. p 212 note 3.

One not party to bond cannot recover thereon without proving that it was executed for the use and benefit of third persons, and that he comes within the class intended to be protected.—Southwestern Dredging Corporation v. Chicago, R. I. & P. Ry. Co., 32 P.2d 274, 168 Okl. 217.

61. Ala.—J. R. Watkins Co. v. Stimpson, 6 So.2d 430, 242 Ala. 359.

#### Signature of surety

The burden of proof is on the creditor to establish the genuineness of the surety's signature, where he denied signing the contract.—J. R. Watkins Medical Co. v. Montgomery, 215 S.W. 638, 140 Ark. 487.

62. Cal.—Hubermann v. National Surety Co., 174 P. 79, 37 Cal.App. 569.

50 C.J. p 213 note 4.

#### Delay in performance by principal

In action on bond securing building contract requiring completion within sixty working days under which work was suspended without contractor's fault to permit owner to change drawings, burden was on owner to show how much of the delay was attributable to contractor's fault and how many working days prior to contractor's default were used in performing work required by contract as amended.—Massachusetts Bonding & Insurance Co. v. John R. Thompson Co., C.C.A. Mo., 88 F.2d 825, certiorari denied

57 S.Ct. 941, 301 U.S. 707, 81 L.Ed. 1361.

63. U.S.—Union Indemnity Co. v. Vetter, C.C.A.Fla., 40 F.2d 606. Mass.—Leshefsky v. American Employers' Ins. Co., 199 N.E. 395, 293 Mass. 164, 103 A.L.R. 1388.

50 C.J. p 212 note 3 [d].

#### Expenditures to complete contract

In action by church on bond of company contracting to furnish marble facing for chapel to recover amount paid by church for marble in excess of contract price after contractor's default, burden was on plaintiff to prove that all money advanced by it to contractor before default was necessarily and reasonably spent in producing and transporting marble, but it need not prove that expenditures were reasonably, necessarily, prudently, or wisely made.—Corporation of President of Church of Jesus Christ of Latter-Day Saints v. Hartford Accident & Indemnity Co., 95 P.2d 736, 98 Utah 297.

64. Tex.—Etna Casualty & Surety Co. v. Russell, Com.App., 24 S.W.2d 385, rehearing denied 33 S.W.2d 189—Means v. Floyd West & Co., Civ.App., 74 S.W.2d 518.

#### Notice by surety to collect debt

Where plaintiff fails to sue the principal after notice by the surety to collect the debt from the principal immediately, plaintiff has the burden of proving that suit would have been futile at the time notice was given.—Strickler v. Burkholder, 47 Pa. 476.

65. U.S.—New Amsterdam Casualty Co. v. Farmers' Co-op. Union, C.C.A.Kan., 2 F.2d 214.

50 C.J. p 213 note 5.

66. W.Va.—Hamilton v. Republic Casualty Co., 135 S.E. 259, 102 W. Va. 32.

67. Tex.—Hatch v. First State Bank, Civ.App., 270 S.W. 1093.

50 C.J. p 214 note 21.

68. N.J.—Van Hoesen v. Gelfen,

Where the principal has been released from liability, it has been held that the burden of proving the surety's assent to the release is on plaintiff.<sup>69</sup> Where the liability of a surety is made to depend on some material condition expressed in the suretyship contract, a compliance with the terms of the condition must be proved by plaintiff.<sup>70</sup>

The surety has the burden of proving an affirmative defense.<sup>71</sup> The surety has the burden of proving want of consideration for the principal obligation,<sup>72</sup> or illegality of consideration,<sup>73</sup> or that the default of the principal occurred prior to the contract of suretyship.<sup>74</sup> In like manner, the burden is on the surety to show that he has been discharged by some act of plaintiff,<sup>75</sup> such as failure of the creditor to sue the principal debtor after notice,<sup>76</sup> or release of the principal;<sup>77</sup> or to show injury by substitution of one security for another;<sup>78</sup> or to prove that the obligee acquiesced in unlawful performance by the principal.<sup>79</sup> Where statutes require, in a proper case, procedure against a principal before proceeding against the surety, the surety must prove that the principal was within

the jurisdiction of the court, so that he might be first proceeded against, as required by statute, in order to take advantage of his exemption.<sup>80</sup> Where a judgment against a principal is prima facie evidence against the surety, if a judgment has been obtained against his principal for fraudulent acts, the burden is on the surety to show that such acts were not fraudulent.<sup>81</sup> One who is sued as a joint debtor has the burden of proving that he was a mere surety if such relationship is not shown on the face of the instrument.<sup>82</sup>

Although it has been held that the burden is on plaintiff to show performance and compliance on his part with the terms of the contract,<sup>83</sup> it has otherwise been held that the surety has the burden of showing nonperformance or breach.<sup>84</sup> The burden is on the surety to prove payment as a defense,<sup>85</sup> but, where the surety by general denial puts in issue plaintiff's allegation of nonpayment, it has been held that plaintiff has the burden of proving such allegation.<sup>86</sup> Where the surety claims payment by transfer of certain conveyances, the burden is on plaintiff to show that these were mere-

143 A. 137, 103 N.J.Eq. 234, affirmed 158 A. 343, 110 N.J.Eq. 69.

69. U.S.—Crane Co. v. James McHugh Sons, C.C.A.Okl., 108 F.2d 55.

70. Ind.—Detroit Fidelity & Surety Co. v. Bushong, 175 N.E. 683, 96 Ind.App. 352.

71. N.Y.—Schneider v. Louis Friedman Realty Co., 47 N.Y.S.2d 22.

Wash.—Union Fruit Producers v. Plumb, 95 F.2d 1033, 1 Wash.2d 278.

50 C.J. p 213 note 8.

#### Violation of statute

In wholesaler's action against retailer and sureties, sureties attempting to avoid liability by pleading that wholesaler and retailer were engaged in selling drugs and medicines in violation of statute had burden of establishing defense.—W. T. Rawleigh Co. v. Shogren, 257 N. W. 102, 192 Minn. 483.

#### Excessive expenditure

In owner's action against surety on building contractor's bond for amount spent by plaintiff to complete work after contractor's default, defendant must show wherein reasonable expenditure was exceeded.—Corporation of President of Church of Jesus Christ of Latter-Day Saints v. Hartford Accident & Indemnity Co., 95 P.2d 736, 98 Utah 297.

72. Tex.—Green v. American Refining Properties, Civ.App., 22 S. W.2d 343.

50 C.J. p 213 note 10.

73. Pa.—Fountain v. Bigham, 84 A.

181, 235 Pa. 35, Ann.Cas.1913D 1185.

74. Minn.—Lac Qui Parle Town Farmers Union Fire Ins. Co. v. Remsburg, 263 N.W. 455, 195 Minn. 402.

75. Ga.—Sherman v. Stephens, 118 S.E. 567, 30 Ga.App. 509.

50 C.J. p 213 note 14.

#### Increased risk

Surety must show change in circumstances brought about by creditor and principal debtor materially increased risk, where surety's contract is independent.—Providence, Fall River & Newport Steamboat Co. v. Massachusetts Bay S. S. Corporation, D.C.Mass., 38 F.2d 674.

76. Ga.—Arnold v. Darby, 176 S.E. 914, 49 Ga.App. 629.

Tex.—Pope v. Litwin, Civ.App., 57 S.W.2d 1105, error dismissed.

50 C.J. p 213 note 15.

77. U.S.—Crane Co. v. James McHugh Sons, C.C.A.Okl., 108 F.2d 55.

Ga.—Arnold v. Darby, 176 S.E. 914, 49 Ga.App. 629.

78. Mass.—North Ave. Sav. Bank v. Hayes, 74 N.E. 311, 188 Mass. 135.

N.Y.—Lock Haven State Bank v. Smith, 49 N.E. 680, 155 N.Y. 185.

79. U.S.—Lincoln County v. Coast Bridge Co., D.C.Mont., 231 F. 468, affirmed 238 F. 705, 151 C.C.A. 555.

80. Tex.—Petty v. Cleveland, 2 Tex. 404.

81. S.D.—Farmers' El. Co. v. U. S.

Fidelity, etc., Co., 172 N.W. 519, 41 S.D. 614.

82. Cal.—Farmers', etc., Bank v. De Shorb, 70 P. 771, 137 Cal. 685.

50 C.J. p 213 note 9.

#### Knowledge of suretyship

Apparent principal debtor who claims to be surety, must show that creditor knew he was surety at time of act in question.

Ga.—Benson v. Henning, 178 S.E. 406, 50 Ga.App. 492.

Or.—Walsh v. Young, 180 P.2d 535, 181 Or. 185.

Tex.—Stetson v. First Nat. Bank, Civ.App., 44 S.W.2d 792, error refused.

50 C.J. p 213 note 9 [a].

#### Knowledge and acceptance as surety

Apparent principal, pleading his suretyship in action on either negotiable or nonnegotiable instrument, must prove that plaintiff not only knew of suretyship, but accepted defendant as surety.—Granger v. Harper, 17 P.2d 135, 217 Cal. 16.

83. N.Y.—Stendal v. Ackerman, 86 N.Y.S. 463, 43 Misc. 54.

Ohio.—Koppitz-Melchers Brewing Co. v. Schults, 67 N.E. 719, 68 Ohio St. 407.

84. Ark.—Lena Lumber Co. v. Brickhouse, 292 S.W. 1007, 173 Ark. 348.

50 C.J. p 213 note 7.

85. Ky.—People's State Bank of Frankfort v. McDermott, 64 S.W. 2d 484, 351 Ky. 140.

50 C.J. p 213 note 16.

86. Mont.—Mutual Oil Co. v. Hamilton, 236 P. 545, 73 Mont. 385.

ly security;<sup>87</sup> and, where payment made by the principal before being adjudicated a bankrupt has been returned by plaintiff after a claim of preference by the trustee in bankruptcy, plaintiff may have the burden of proving that the payment was a preference.<sup>88</sup>

**Conditional execution.** Where it is claimed that the bond was executed and delivered on condition, the burden is on the surety to prove the condition,<sup>89</sup> and that the obligee had notice of it;<sup>90</sup> but, where there is no evidence that the surety knew of the delivery of the suretyship contract in violation of the condition under which it was signed, there is no duty on the part of the surety to prove notice to plaintiff.<sup>91</sup> Where the bond is incomplete for failure of the principal to sign, the burden is on plaintiff to prove that the bond was executed and delivered in an incomplete condition with the purpose of the surety to be bound.<sup>92</sup>

**Alteration of contract.** The burden is on the surety to prove an alteration of the contract,<sup>93</sup> and, while it has been held that he has the burden of proving that he did not assent to the alteration,<sup>94</sup> it has also been held that the burden of showing assent is on plaintiff.<sup>95</sup> Where the principal and surety disclaim any knowledge as to who made the alteration, the burden is on plaintiff who had possession of the instrument to explain the alteration.<sup>96</sup>

**Extension of time.** The burden of proof to show an extension of time is on the surety.<sup>97</sup> In this connection he has the burden of proving the elements essential to an extension discharging a surety, such as a binding and enforceable contract<sup>98</sup> supported by adequate consideration.<sup>99</sup> Plaintiff has the burden of proving a valid subsisting obligation where extension is claimed,<sup>1</sup> and it has been held that he must prove that the surety, after a discharge by an extension of time or otherwise, made a new promise<sup>2</sup> or assented to the extension,<sup>3</sup> although as to this there is also authority holding that the surety has this burden.<sup>4</sup>

**Usury.** After proof of usury, the burden is on plaintiff to show that the surety signed with knowledge of the usury.<sup>5</sup>

## § 271. Admissibility of Evidence

The general rules governing the admissibility of evidence in civil cases apply in an action by a creditor or obligee against a surety.

In accordance with, and subject to, the general rules governing the admissibility of evidence in civil cases, in an action by a creditor or obligee against a surety, plaintiff may introduce any competent evidence to establish liability,<sup>6</sup> and the amount of loss or damage he has suffered by reason of the principal's default.<sup>7</sup> Plaintiff may in-

87. S.D.—Commercial, etc., Bank v. Cassem, 145 N.W. 551, 33 S.D. 294.

88. Ark.—Parker v. Gates, 135 S.W. 330, 97 Ark. 621.

89. U.S.—Title Guaranty, etc., Co. v. Schmidt, Iowa, 213 F. 199, 129 C.C.A. 543.

Ala.—J. R. Watkins Co. v. Stimpson, 6 So.2d 430, 242 Ala. 359.

90. U.S.—Title Guaranty, etc., Co. v. Schmidt, Iowa, 213 F. 199, 129 C.C.A. 543.

91. Ala.—J. R. Watkins Co. v. Stimpson, 6 So.2d 430, 242 Ala. 359.

92. Ind.—American Surety Co. v. Pangburn, 105 N.E. 769, 182 Ind. 116, Ann.Cas.1916E 1126.

93. Ky.—Brown v. Wilson, 1 S.W. 2d 767, 222 Ky. 454.  
50 C.J. p 214 note 32.

94. Minn.—Guderian v. Leland, 63 N.W. 175, 61 Minn. 67.  
50 C.J. p 214 note 33.

95. Cal.—Tuohy v. Woods, 55 P. 683, 122 Cal. 665.  
50 C.J. p 214 note 34.

96. Ky.—Kelly v. King, 145 S.W. 2d 78, 284 Ky. 429.

97. Ark.—Colvin v. Glover, 220 S.W. 332, 143 Ark. 498.

Pa.—First Nat. Bank & Trust Co.

of Dallastown v. Innerst, Com.Pl., 51 York Leg.Rec. 145.

50 C.J. p 214 note 35.

### Prejudice

Surety for hire, to be discharged by creditor's extension of time of performance, must not only prove extension to definite date without his consent, but also that he was prejudiced thereby.—State ex rel. Hardy v. Farris, 47 S.W.2d 198, 226 Mo.App. 1007—50 C.J. p 214 note 35 [a].

98. D.C.—Green v. Lake, 13 D.C. 162.

99. N.Y.—Polaris Bldg. Corporation v. Bimberg, 241 N.Y.S. 738, 137 Misc. 289.

50 C.J. p 214 note 38.

1. N.H.—Tenney v. Knowlton, 60 N.H. 572.

2. Ohio.—Bramble v. Ward, 40 Ohio St. 267.

3. Cal.—Alexander v. Bosworth, 147 P. 607, 26 Cal.App. 589.

50 C.J. p 214 note 41.

4. Minn.—Guderian v. Leland, 63 N.W. 175, 61 Minn. 67.

50 C.J. p 214 note 42.

5. Ga.—Lott v. Peterson, 98 S.E. 361, 23 Ga.App. 458—Omega Bank v. Ford, 93 S.E. 106, 20 Ga.App. 496.

6. Ill.—Corpus Juris cited in Vermont Marble Co. v. Bayne, 15 N.E. 2d 510, 513, 368 Ill. 618—Belorodker Loan & Investment Co. v. Goldenberg, 253 Ill.App. 416.

50 C.J. p 215 note 46.

### Altered note

(1) The subsequent alteration of a note without consent does not render it inadmissible as evidence against one who had signed his name thereto as surety.—Dwinnell v. McKibben, 61 N.W. 985, 93 Iowa 331.

(2) The erasure by pen of the middle initial in the designation of a payee in a promissory note is an immaterial alteration where it is merely the correction of a mistake, so that the altered note is admissible in evidence without explanation of the alteration in an action by the payee against the surety.—Cole v. Hills, 44 N.H. 227.

(3) Fact that surety's name on note was in different colored ink and inserted between names of other signers does not show alteration precluding its introduction in evidence.—Bowers v. Hefebower, 243 Ill.App. 129.

7. D.C.—Zipkin v. Investors Syndicate, 152 F.2d 678, 80 U.S.App.D.C. 302.

introduce any competent evidence to show nonpayment<sup>8</sup> or default,<sup>9</sup> that notice of default was given,<sup>10</sup> the nature of the notice to sue,<sup>11</sup> and assent to extension of time,<sup>12</sup> and the creditor can show a conversation between himself and the principal indicating that the creditor was induced to grant an extension on a representation by the principal that the surety agreed thereto.<sup>13</sup> A writing which apparently amounts to an extension may be explained.<sup>14</sup> Where the surety claims discharge for noncompliance with tender and demand, evidence is admissible to show that security demanded was given to secure other debts as well as that on which the surety was liable.<sup>15</sup>

The surety may introduce any proper evidence to show nonliability<sup>16</sup> and mitigation of loss or damage.<sup>17</sup> Competent evidence is admissible on the part of the surety to show fraud, duress, or misrepresentations,<sup>18</sup> extension of time to the principal,<sup>19</sup> or an alteration of the contract,<sup>20</sup> or of any other matters of release or discharge.<sup>21</sup>

The whole or any part of the contract between

plaintiff and the principal may be offered by either plaintiff or defendant to establish a claim or defense.<sup>23</sup> Conversations and correspondence between the principal and creditor can be offered in evidence by the surety to show the circumstances under which the contract was made.<sup>22</sup>

Irrelevant evidence offered by either party is properly excluded.<sup>24</sup>

**Admissions.** Although an admission of one surety is inadmissible as evidence against a cosurety,<sup>25</sup> it is nevertheless admissible against the maker of it as a declaration against interest.<sup>26</sup>

## § 272. Weight and Sufficiency of Evidence

Every fact constituting a material element of a cause of action or defense in an action by a creditor or obligee against a surety must be established by satisfactory evidence or a preponderance of the evidence.

As in civil actions generally, every fact constituting a material element of a cause of action by a creditor or obligee against a surety must be established by satisfactory evidence or a preponderance of the evidence.<sup>27</sup> Plaintiff must establish

111.—Vermont Marble Co. v. Bayne, 15 N.E.2d 510, 368 Ill. 618. 50 C.J. p 215 note 47.

8. Mont.—Mutual Oil Co. v. Hamilton, 236 P. 545, 73 Mont. 385.

9. Ill.—Vermont Marble Co. v. Bayne, 15 N.E.2d 510, 368 Ill. 618.

10. Minn.—Farmers' Co-Op. Exch. Co. v. U. S. Fidelity, etc., Co., 184 N.W. 792, 150 Minn. 126. 50 C.J. p 217 note 56.

11. Ky.—Benge v. Eversole, 160 S. W. 911, 156 Ky. 131. 50 C.J. p 217 note 57.

12. Ga.—Ver Nooy v. Pitner, 86 S. E. 456, 17 Ga.App. 229.

Utah.—Christensen v. Hamilton Realty Co., 129 P. 412, 42 Utah 70.

13. Mo.—White v. Middlesworth, 42 Mo.App. 368.

14. Ill.—Wing v. Beach, 31 Ill.App. 78.

15. Ala.—Bradshaw v. Mushat, 84 So. 406, 17 Ala.App. 202.

16. Ala.—Birmingham News Co. v. Moseley, 141 So. 689, 225 Ala. 45. Tex.—Bartley v. Comer, Civ.App., 89 S.W. 82. 50 C.J. p 215 note 48.

17. Ga.—Webb-Harris Auto Co. v. Industrial Acceptance Corp., 137 S.E. 770, 164 Ga. 54. 50 C.J. p 216 note 49.

18. Pa.—Fountain v. Bigham, 84 A. 131, 235 Pa. 35, Ann.Cas.1913D 1185. 50 C.J. p 216 note 51.

19. S.D.—Windhorst v. Bergendahl, 111 N.W. 544, 21 S.D. 218, 130 Am. S.R. 715. 50 C.J. p 216 note 52.

20. Ga.—J. R. Watkins Co. v. Ellington, 29 S.E.2d 300, 70 Ga.App. 722. 50 C.J. p 216 note 53.

21. La.—People's State Bank v. U. S. Fidelity, etc., Co., 98 So. 263, 154 La. 835. 50 C.J. p 216 note 54.

**Notice to sue principal**

Evidence of notice by sureties to creditor to sue principal may properly be admitted in suit against sureties.

Ga.—J. R. Watkins Co. v. Seawright, 154 S.E. 293, 41 Ga.App. 617.

Iowa.—Cleophas v. Walker, 233 N. W. 257, 211 Iowa 122.

22. Ga.—J. R. Watkins Co. v. Ellington, 29 S.E.2d 300, 70 Ga.App. 722. 50 C.J. p 216 note 50.

23. Cal.—Gintjee v. Knieling, 170 P. 641, 35 Cal.App. 563.

Ill.—Vermont Marble Co. v. Bayne, 15 N.E.2d 510, 368 Ill. 618.

**Account signed or acknowledged by principal**

(1) In seller's action against buyer and sureties to recover balance due for goods sold buyer, where surety contract bound sureties to pay seller for all goods sold buyer and further provided that any statement made by buyer as to amount of indebtedness due at any time should be binding on sureties, one of sureties could not complain of admission in evidence of an account stated because it was signed by buyer alone, and not by surety.—Hoadley v. W. T. Rawleigh Co., 44 N.E.2d 231, 112 Ind.App. 563.

(2) Where petition in action on written surety agreement pleaded the agreement, and the account stated with the written acknowledgment and approval of the principal executed with the authority, knowledge, and approval of the defendant sureties, the account should have been admitted in evidence without further proof of its correctness and execution, since sureties might have denied such execution under oath, thus casting on plaintiff burden of proof of due execution.—W. T. Rawleigh Co. v. Sherley, Tex.Civ.App., 165 S.W.2d 465, error dismissed.

24. Ga.—La. Boon v. Wright & Locklin, 155 S.E. 770, 42 Ga.App. 275.

Iowa.—Perry Auto Co. v. Mainland, 294 N.W. 281, 229 Iowa 187.

Pa.—Mechanics' Trust Co. v. Fidelity & Casualty Co. of New York, 156 A. 146, 304 Pa. 536.

Utah.—Corporation of President of Church of Jesus Christ of Latter-Day Saints v. Hartford Accident & Indemnity Co., 95 P.2d 736, 98 Utah 297.

W.Va.—Morrison v. Harmon, 167 S. E. 741, 113 W.Va. 304.

25. Iowa.—Hunter v. Porter, 109 N. W. 283, 183 Iowa 391.

**Admissibility of admissions by principal against surety, and of admissions by surety against principal see Evidence § 366.**

26. Iowa.—Hunter v. Porter, *supra*.

27. Ill.—Wilson Grocery Co. v. National Surety Co., 218 Ill.App. 584.



by such evidence a breach or default of the principal<sup>28</sup> and loss or damage thereby.<sup>29</sup> The same facts which establish nonpayment as to the principal affect the sureties.<sup>30</sup> Where default consists of a crime, the rules in civil cases must be applied to ascertain from the preponderance of evidence the guilt of the principal,<sup>31</sup> and it is not necessary that proof be sufficient to sustain a conviction;<sup>32</sup>

and, where the time of defalcation is in issue, the time charged in an information charging embezzlement, to which the principal pleaded guilty, is sufficient.<sup>33</sup>

The surety must establish by satisfactory evidence or by a preponderance of the evidence the particular matter of defense on which he relies,<sup>34</sup>

W.Va.—Haines v. Kuykendall, 199 S. E. 449, 120 W.Va. 549.  
50 C.J. p 217 note 66.

#### Case must be clearly proved

Pa.—Thommen v. Wolfe, 13 Pa. Dist. & Co. 491.

#### Evidence held insufficient to show liability of surety

Ga.—Hill v. Opelika Wholesale Grocery Co., 192 S.E. 242, 56 Ga.App. 142.

Ky.—Kelly v. King, 145 S.W.2d 78, 284 Ky. 429.

La.—Gardner v. O'Keefe, 99 So. 398, 155 La. 447.

Tex.—National Surety Co. v. Atasco Ice, etc., Co., Civ.App., 223 S.W. 597.

50 C.J. p 218 note 86 [a].

#### Evidence held sufficient

##### (1) In general.

U.S.—Prudence Co. v. Fidelity & Deposit Co. of Maryland, D.C.N.Y., 7 F.Supp. 392, reversed on other grounds, C.C.A., 77 F.2d 834, modified on other grounds 56 S.Ct. 387, 297 U.S. 198, 80 L.Ed. 581, motion denied 56 S.Ct. 679, amended on other grounds 56 S.Ct. 935, 298 U.S. 642, 80 L.Ed. 1374.

Ga.—Pack v. Atlanta Georgian Co., 176 S.E. 523, 49 Ga.App. 549.

La.—Hopkins v. National Surety Co., 97 So. 297, 154 La. 61.

Neb.—First Trust Co. of Omaha v. Glendale Realty Co., 250 N.W. 68, 125 Neb. 283.

Tex.—Detroit Fidelity & Surety Co. v. First Nat. Bank, Civ.App., 68 S.W.2d 406—Constitution Indemnity Co. of Philadelphia v. Armbrust, Civ.App., 25 S.W.2d 176, error refused—Dallas Homestead, etc., Assoc. v. Thomas, 81 S.W. 1041, 35 Tex.Civ.App. 268.

50 C.J. p 218 note 85 [a].

(2) To show that contractor's notice to defauling subcontractor and surety constituted election to terminate performance and to sue for breach.—Pacific Coast Engineering Co. v. Detroit Fidelity & Surety Co., 5 P.2d 838, 214 Cal. 384.

(3) To show that loan made by obligee suing on bond was loan secured thereby.—Municipal Bond Co. v. Balboa Const. Co., 34 P.2d 1032, 140 Cal.App. 57.

(4) To show that the payee was diligent in trying to collect the note from the maker.—Garrett v. Bishop, 196 S.E. 910, 57 Ga.App. 818.

(5) To show surety waived alteration of contract.—Haddad v. Western Contracting Corp., D.C.W.Va., 71 F.Supp. 212.

(6) To show that subcontractor's surety authorized contractor to complete job which subcontractor was unable to finish.—Constitution Indemnity Co. of Philadelphia v. Morgan, Tex.Civ.App., 49 S.W.2d 497, error refused.

(7) To show consent by surety to extension of note.—Cravey v. Ashburn Bank, 151 S.E. 564, 40 Ga.App. 806.

(8) To show that surety received sufficient and timely notice of principal's default.

U.S.—Glens Falls Indem. Co. v. Basich Bros. Const. Co., C.C.A.Cal., 165 F.2d 649, certiorari denied 68 S.Ct. 1347, 334 U.S. 833, 92 L.Ed. 1760.

Colo.—Federal Surety Co. v. White, 295 P. 281, 88 Colo. 238.

Va.—Maryland Casualty Co. v. Clintwood Bank, 154 S.E. 492, 155 Va. 181.

#### 28. Evidence held insufficient to show default or breach

U.S.—Massachusetts Bonding & Insurance Co. v. John R. Thompson Co., C.C.A.Mo., 88 F.2d 825, certiorari denied 57 S.Ct. 941, 301 U.S. 707, 81 L.Ed. 1361.

Fla.—J. R. Watkins Co. v. Eatmon, 191 So. 199, 140 Fla. 144.

Ind.—Sparta State Bank v. Myers, 177 N.E. 258, 202 Ind. 553.

W.Va.—Haines v. Kuykendall, 199 S. E. 449, 120 W.Va. 549.

50 C.J. p 217 note 67 [b].

#### Evidence held sufficient to show default or breach

Tex.—Maryland Casualty Co. v. Walsh & Burney Co., Civ.App., 119 S.W.2d 94.

50 C.J. p 217 note 67 [a].

29. Miss.—National Surety Co. v. Runnelstown Cons. School Trustees, 111 So. 445, 146 Miss. 277.

50 C.J. p 217 note 68.

#### Evidence held insufficient to show loss or damage

Ala.—Everglades Const. Co. v. American Surety Co., 156 So. 829, 229 Ala. 290.

50 C.J. p 217 note 68 [b].

#### Evidence held sufficient to show loss or damage

U.S.—Northwestern Jobbers Credit

Bureau v. National Surety Corporation, D.C.Minn., 54 F.Supp. 716.

Vt.—Springfield Co-op. Freeze Locker Plant v. Wiggins, 63 A.2d 182, 115 Vt. 445.

50 C.J. p 217 note 68 [a].

30. Pa.—Guldin v. Faber, 1 Walk. 435.

31. Kan.—McIntyre v. American Surety Co., 156 P. 690, 97 Kan. 629.

Mo.—Farmers' L. & T. Co. v. Southern Surety Co., 226 S.W. 926, 285 Mo. 621.

32. Ill.—Wilson Grocery Co. v. National Surety Co., 218 Ill.App. 584.

Mo.—Grand Lodge of United Brothers of Friendship and Sisters of Mysterious Ten v. Massachusetts Bonding & Insurance Co., 25 S.W. 2d 783, 324 Mo. 938.

Mont.—Montana Auto Finance Corporation v. Federal Surety Co., 278 P. 116, 85 Mont. 149.

50 C.J. p 217 note 71.

33. Wis.—Armenia Lodge No. 97 I. O. O. F. v. U. S. Fidelity, etc., Co., 176 N.W. 68, 171 Wis. 210.

34. Ark.—Bank of Maynard v. Carroll, 49 S.W.2d 369, 185 Ark. 788.

#### Evidence held insufficient

(1) To establish sureties' defense that wholesaler and retailer were engaged in selling drugs and medicines in violation of statute, in wholesaler's action against retailer and sureties for goods sold.—W. T. Rawleigh Co. v. Shogren, 257 N.W. 102, 192 Minn. 483.

(2) To establish that holders of notes were estopped to seek recovery from surety on notes because of delay in attempting to enforce collection of indebtedness until principal became insolvent.—Lincoln County Bank v. Maddox, 114 S.W.2d 821, 21 Tenn.App. 648.

(3) To show that employer continued employee in service after discovery of dishonesty.—Lac Qui Parle Town Farmers Union Fire Ins. Co. v. Remsburg, 263 N.W. 455, 195 Minn. 402.

(4) To establish defense that other signatures were to be procured on the obligation before the surety would be bound.—W. T. Rawleigh Co. v. Disheroon, 134 S.W.2d 4, 199 Ark. 479.

(5) To show other matters see 50 C.J. p 218 note 86 [a].

such as lack of consideration;<sup>35</sup> discharge or release<sup>36</sup> by payment or performance,<sup>37</sup> by release of the principal,<sup>38</sup> or by extension of time;<sup>39</sup> that the creditor knew of the default of the principal, but failed to notify the surety;<sup>40</sup> that the surety gave plaintiff notice to sue;<sup>41</sup> fraud or misrepresentations;<sup>42</sup> noncompliance with the contract by the creditor or obligee;<sup>43</sup> material alteration of the contract;<sup>44</sup> and injury resulting therefrom when

injury must be shown;<sup>45</sup> or rescission or termination of the contract.<sup>46</sup>

*Prima facie evidence.* Undisputed testimony for plaintiff, showing a balance due him and no action releasing the surety, has been held to establish a prima facie case;<sup>47</sup> and the amount acknowledged by a public officer to be due by him to the state, in his return to the auditor, is prima facie

#### Evidence held sufficient to establish defense

Ky.—Kelly v. King, 145 S.W.2d 78, 284 Ky. 429.  
50 C.J. p 218 note 85 [a].

#### 35. Evidence insufficient to show lack of consideration

Ky.—Skaggs v. Marcum, 57 S.W.2d 670, 247 Ky. 712.

#### Evidence sufficient to show lack of consideration

Tex.—Green v. American Refining Properties, Civ.App., 22 S.W.2d 343.

36. Ark.—Bank of Maynard v. Carroll, 49 S.W.2d 369, 185 Ark. 788.

#### Evidence insufficient to show discharge or release

Ark.—Bank of Maynard v. Carroll, supra.

Colo.—Federal Surety Co. v. White, 295 P. 281, 88 Colo. 238.

Mo.—McKinney v. Lynch, App., 45 S.W.2d 874.

#### Evidence sufficient to show discharge or release

Mo.—McKinney v. Lynch, App., 102 S.W.2d 944.

37. Ill.—Peter Schoenhofen Brewing Co. v. Dailey, 193 Ill.App. 86.

#### Evidence insufficient to show payment or performance

N.J.—Edmund D. Cook, Inc. v. Commercial Casualty Ins. Co., 190 A. 99, 15 N.J.Misc. 256, affirmed 190 A. 102, 117 N.J.Law 440.  
50 C.J. p 217 note 74 [b].

#### Evidence sufficient to show payment or performance

Mo.—St. Charles Sav. Bank v. Denker, 204 S.W. 902.

#### Evidence sufficient to show partial payment

Ky.—Pool v. First Nat. Bank of Princeton, 155 S.W.2d 4, 287 Ky. 684.

38. La.—Tooke v. Burke, 75 So. 668, 141 La. 746.

50 C.J. p 218 note 78.

39. Acceptance of interest in advance may be evidence of agreement to extend so as to discharge surety, but it is not conclusive.—Lynn v. Young, 78 S.W.2d 25, 257 Ky. 358—50 C.J. p 217 note 75 [b] (5).

#### Evidence held insufficient to show extension of time

Ark.—Holman v. Armstrong, 63 S.W.2d 339, 187 Ark. 958.

Mo.—First Nat. Bank v. Fulton, App., 28 S.W.2d 368.

50 C.J. p 217 note 75 [b].

#### Evidence held sufficient to show extension of time

Iowa.—Eilers v. Frieling, 234 N.W. 275, 211 Iowa 841.

La.—Item Co. v. Polazzo, 134 So. 345, 18 La.App. 594, modified on other grounds 138 So. 458, 18 La.App. 594—O'Banion v. Willis, 129 So. 440, 14 La.App. 638.

50 C.J. p 217 note 75 [a].

#### Evidence held sufficient to show non-consent of surety

La.—O'Banion v. Willis, supra.

40. Ark.—U. S. Fidelity & Guaranty Co. v. Lyons & Carnahan, 70 S.W.2d 552, 188 Ark. 1078.

50 C.J. p 218 note 76.

#### Evidence held insufficient to show failure to give notice

Ark.—U. S. Fidelity & Guaranty Co. v. Lyons & Carnahan, supra.

41. Oral proof that surety notified creditor to sue principal or permit surety to sue must be clear, positive, convincing, and satisfactory.—Cleophas v. Walker, 233 N.W. 257, 211 Iowa 122.

#### Evidence held insufficient to show notice to sue

Ala.—White v. Haralson, 124 So. 417, 220 Ala. 189.

50 C.J. p 218 note 77 [b].

#### Evidence held sufficient to show notice to sue

Iowa.—Cleophas v. Walker, 233 N.W. 257, 211 Iowa 122.

Ky.—Baker v. Whittaker, 197 S.W. 644, 177 Ky. 197.

#### 42. Clear proof

Where fraud is alleged, the proof must be clear, precise, and indubitable.—Ferguson Packing Co. v. Mihalic, 99 Pa.Super. 158.

#### Proof by facts and circumstances

Fraud may be sufficiently shown by several facts and circumstances, although no one of them by itself would prove it.—Franklin Bank v. Cooper, 39 Me. 542.

#### Evidence held insufficient to show fraud or misrepresentations

U.S.—Northwestern Jobbers Credit

Bureau v. National Surety Corporation, D.C.Minn., 54 F.Supp. 716.

Ill.—Belorodker Loan & Investment Co. v. Goldenberg, 253 Ill.App. 416.  
50 C.J. p 218 note 79 [b].

#### Evidence held sufficient to show fraud or misrepresentations

N.Y.—Phillips v. U. S. Fidelity, etc., Co., 193 N.Y.S. 647, 200 App.Div. 208.

#### 43. Evidence held insufficient to show noncompliance

Ark.—W. T. Rawleigh Co. v. Tiffin, 139 S.W.2d 252, 200 Ark. 427.

50 C.J. p 218 note 81 [a].

#### Evidence held sufficient to show non-compliance

Neb.—Doran v. National Surety Co., 250 N.W. 82, 125 Neb. 299.

N.M.—Pacific Nat. Agr. Credit Corporation v. Hagerman, 51 P.2d 857, 39 N.M. 549, 101 A.L.R. 1301.

#### 44. Evidence held insufficient to show alteration of contract

Ala.—Hardegree v. Riley, 122 So. 814, 219 Ala. 607.

Cal.—Storm & Butts v. Lipscomb, 3 P.2d 567, 117 Cal.App. 6.

Ky.—Citizens Bank of Morehead v. Nickell, 126 S.W.2d 320, 277 Ky. 424.

Pa.—Koch v. Moyer, 153 A. 198, 103 Pa.Super. 270.

50 C.J. p 218 note 83 [b].

#### Evidence held sufficient to show alteration of contract

Ky.—Kelly v. King, 145 S.W.2d 78, 284 Ky. 429.

Tenn.—Fidelity Bond & Mortgage Co. v. American Surety Co., 14 Tenn.App. 211.

50 C.J. p 218 note 83 [a].

45. Ill.—Mathes v. Stewart, 249 Ill. App. 558.

50 C.J. p 218 note 84.

#### Evidence held sufficient to show prejudice or injury

Tenn.—National Acceptance Co. v. Royal Indemnity Co., 9 Tenn.App. 515.

46. N.Y.—Matter of People, 226 N.Y.S. 175, 222 App.Div. 304, reversed on other grounds 165 N.E. 323, 250 N.Y. 410.

50 C.J. p 218 note 82.

47. Miss.—Chicago Portrait Co. v. Maddox, 73 So. 278, 112 Miss. 434.

evidence of the amount due, not only against himself, but also against his sureties.<sup>48</sup> While the surety has the burden of proving an extension of time, as discussed supra § 270 b, the acceptance of interest in advance may be prima facie evidence of a contract to extend,<sup>49</sup> raising a presumption of fact.<sup>50</sup> In an action against sureties on a note, the note is prima facie evidence against them.<sup>51</sup> Possession of the bond by the obligee at the time a surety's name was erased, together with failure to proceed against that surety, is prima facie evidence of the obligee's consent to the erasure.<sup>52</sup> Where the bond of suretyship provides that a written statement by an employer, based on the accounts of the principal, "shall be prima facie evidence" of a loss sustained by the wrongful act of the principal, the employer makes out a prima facie case by offering such a statement in evidence.<sup>53</sup>

*Inferences from evidence.* General rules govern the sufficiency or insufficiency of evidence to support inferences.<sup>54</sup>

### § 273. Trial

The general rules relating to trials in civil actions ordinarily apply in actions against sureties.

48. Ky.—Rodes v. Commonwealth, 6 B.Mon. 359.

49. Va.—Cape Charles Bank v. Farmers' Mut. Exch., 92 S.E. 918, 120 Va. 771.

50 C.J. p 219 note 90.

50. Tex.—Guerguin v. Boone, 77 S.W. 630, 33 Tex.Civ.App. 622.

50 C.J. p 219 note 91.

#### Rebuttal of presumption

Presumption that prepayment of interest indicates time extension discharging surety was held rebutted where obligor on mortgage, having received routine notices from bank that interest would be due on specified date, mailed checks therefor which sometimes reached bank from one to five days before interest day, and checks were thereupon put in course of collection and entries made on books by clerks.—Kings County Trust Co. v. Giovinco, 194 N.E. 60, 266 N.Y. 137.

51. Ky.—Brown v. Wilson, 1 S.W. 2d 767, 222 Ky. 454.

52. N.D.—Hilleboe v. Warner, 118 N.W. 1047, 17 N.D. 594.

53. U.S.—American Surety Co. v. Pauly, N.Y., 72 F. 484, 18 C.C.A. 657, affirmed 18 S.Ct. 563, 170 U.S. 160, 42 L.Ed. 987.

54. Ky.—Brown v. Wilson, 1 S.W. 2d 767, 222 Ky. 454.

50 C.J. p 219 notes 96, 97.

#### Extension of time

(1) Agreement of obligee to grant

obligor extension of time so as to release sureties can be implied from actions and circumstances attending transaction between parties.—O'Banion v. Willis, 129 So. 440, 14 La.App. 638.

(2) Mere acceptance of additional security for debt raises no implication of extension of time for payment such as releases surety.—Plummer v. Wilson, 185 A. 311, 322 Pa. 118.

#### Alteration of instrument

Testimony of sureties that they signed unaltered note, left with maker before delivery to payee, did not authorize inference that payee altered note.—Rankin v. Griffith, 139 S.E. 360, 37 Ga.App. 203.

55. Iowa.—Granner v. Byam, 255 N.W. 653, 218 Iowa 535.

#### Submission of issues to jury

(1) In general.—Granner v. Byam, supra.

(2) In suit against subcontractor and surety, evidence of oral contract for rolling subgrade not included in written contract and on which surety was not bound was erroneously submitted to jury without exempting surety from liability for breach of oral contract.—Inland Engineering & Construction Co. v. Maryland Casualty Co., 290 P. 367, 76 Utah 435.

56. La.—Hennen v. Wood, 16 La. Ann. 263.

The general rules relating to trials in civil actions ordinarily apply in actions against sureties,<sup>55</sup> and, in accordance with such rules, a surety may not complain of irregularity in the proceeding which does not affect him.<sup>56</sup> It has been held that the right to make the concluding argument rests with defendant surety,<sup>57</sup> although there is other authority to the effect that such right is with plaintiff creditor.<sup>58</sup>

### § 274. — Questions of Law and Fact

a. In general

b. Direction of verdict

#### a. In General

In actions by a creditor or obligee against a surety, questions of law are matters for the court to determine, but questions of fact are for the jury, where the evidence on such questions is in conflict.

General rules govern in determining what are questions of law and fact in actions by a creditor or obligee against a surety.<sup>59</sup> Since questions of law are matters for the court to determine,<sup>60</sup> it is for the court to pass on the construction of written instruments,<sup>61</sup> and to determine whether the evidence is sufficient to go to the jury.<sup>62</sup> On the oth-

57. Ky.—Columbia Finance, etc., Co. v. Mitchell, 72 S.W. 350, 24 Ky. L. 1844.

58. Ky.—Stepp v. Hatcher, 67 S.W. 819, 23 Ky.L. 2441.

59. Or.—Haddock Const. Co. v. Wilber, 169 P.2d 599, 178 Or. 659.

#### Increase of liability

Whether change in circumstances effected by parties to principal contract increases surety's liability, causing discharge, is question of fact.—Providence, Fall River & Newport Steamboat Co. v. Massachusetts Bay S. S. Corporation, D.C. Mass., 38 F.2d 674.

Legality of transaction may be a question of fact.—W. T. Rawleigh Co. v. Hammons, La.App., 24 So.2d 406.

60. Or.—Haddock Const. Co. v. Wilber, 169 P.2d 599, 178 Or. 659.

50 C.J. p 219 note 5.

61. Cal.—Ingalls v. Bell, 110 P.2d 1068, 43 Cal.App.2d 366.

Colo.—W. T. Rawleigh Co. v. Dickneite, 61 P.2d 1028, 99 Colo. 276.

Pa.—Cohen v. Bank of Philadelphia & Trust Co., 156 A. 742, 102 Pa. Super. 279.

62. Tex.—People's Finance Co. of Dallas v. Sabanovich, Com.App., 26 S.W.2d 187.

50 C.J. p 219 note 6.

Where evidence was undisputed on whether surety ratified alteration in note, its effect was question of law.

er hand, questions of fact on which the evidence is conflicting are for the jury to determine.<sup>63</sup> On a trial without a jury, questions of fact are for the trial court.<sup>64</sup>

Generally, where it is doubtful from the testimony what relationship defendant assumed, that point should be left with the jury.<sup>65</sup> Accordingly, it is a question for the jury, on conflicting evidence, whether defendant whose name appeared on the face of a note was a surety only;<sup>66</sup> but, in an action on an instrument, where defendants did not admit that they were sureties on the obligation but admitted the execution of the obligation in which they were stated to be sureties, as set out in the complaint, their relationship on the obligation is presented to the court for determination as a matter of law.<sup>67</sup> The jury are not obliged to believe any witness, and are not bound to find that certain defendants are sureties when the instrument is silent as to that point.<sup>68</sup> Where statutes provide

that the clerk shall certify, in recording the judgment, the relationship of defendants, it is not the duty of the jury to find which defendant is the principal and which is the surety.<sup>69</sup>

Where the evidence is conflicting, it is for the jury to decide whether there was a bone fide contract between the principal and the creditor;<sup>70</sup> whether a surety lacked capacity at the time he executed the contract,<sup>71</sup> or executed it under duress;<sup>72</sup> whether the surety's signature is genuine;<sup>73</sup> and whether a contract set out in the declaration was the one for the performance of which defendant gave bond.<sup>74</sup> Likewise, it is for the jury to pass on questions of fact relating to default,<sup>75</sup> such as whether a default relied on was within the terms of the contract,<sup>76</sup> or whether default was due to plaintiff's conduct;<sup>77</sup> and the jury should also, in case of conflicting evidence, determine whether plaintiff suffered loss by reason of the breach.<sup>78</sup>

—People's Finance Co. of Dallas v. Sabanovich, *supra*.

**Evidence held insufficient to go to jury**

Iowa.—Smith v. Tullis, 259 N.W. 202, 219 Iowa 712.

50 C.J. p 219 note 6 [b].

63. U.S.—Vanadium Corp. of America v. Fidelity & Deposit Co. of Md., C.C.A.N.Y., 159 F.2d 105.—R. P. Farnsworth & Co. v. Electrical Supply Co., C.C.A.La., 112 F.2d 150, 130 A.L.R. 192, rehearing denied 113 F.2d 111, 130 A.L.R. 197, certiorari denied 61 S.Ct. 139, 311 U.S. 700, 85 L.Ed. 454.

Cal.—Ingalls v. Bell, 110 P.2d 1068, 43 Cal.App.2d 356.

Fla.—J. R. Watkins Co. v. Eatmon, 191 So. 199, 140 Fla. 144.

Ga.—J. R. Watkins Co. v. Ellington, 29 S.E.2d 300, 70 Ga.App. 722.

Mo.—J. R. Watkins Co. v. Doty, App., 167 S.W.2d 85.

50 C.J. p 219 note 7.

**Evidence held for jury**

(1) As to whether principal defendant was indebted to plaintiff at time of execution of contract.—J. R. Watkins Co. v. Ellington, 29 S.E.2d 300, 70 Ga.App. 722.

(2) As to conversion by principal.—Stilley v. Dawsey, 150 S.E. 763, 153 S.C. 276.

(3) As to unauthorized payments by creditor.—Somers Lumber Co. v. Best, 164 A. 419, 110 N.J.Law 199—50 C.J. p 219 note 6 [a] (6).

(4) As to other particular matters.

Ga.—J. R. Watkins Co. v. Brewer, 36 S.E.2d 442, 73 Ga.App. 331.

N.J.—Waton v. Detroit Fidelity & Surety Co., 160 A. 657, 109 N.J.Law 71.

64. Mo.—First Nat. Bank v. Fulton, App., 28 S.W.2d 368.

50 C.J. p 221 note 46.

**Comaker or surety**

Whether defendant in action on notes was comaker or surety was a question for trial court sitting as jury.—First Nat. Bank v. Fulton, *supra*.

**Release or discharge of surety**

U.S.—Prudence Co. v. Fidelity & Deposit Co. of Maryland, C.C.A.N.Y., 77 F.2d 834, modified on other grounds 56 S.Ct. 387, 297 U.S. 198, 80 L.Ed. 581, motion denied 56 S.Ct. 679, amended on other grounds 56 S.Ct. 935, 298 U.S. 642, 80 L.Ed. 1374.

Mo.—First Nat. Bank v. Fulton, App., 28 S.W.2d 368.

50 C.J. p 221 note 46 [a], [c].

65. Mo.—Jobe v. Buck, 31 S.W.2d 98, 224 Mo.App. 621.

50 C.J. p 220 note 8.

66. Ala.—Culwell v. Edmondson, 129 So. 276, 221 Ala. 424.

Mo.—Jobe v. Buck, 31 S.W.2d 98, 224 Mo.App. 621.

67. N.C.—Dillard v. Farmers' Mercantile Co., 129 S.E. 598, 190 N.C. 225.

68. N.Y.—Brink v. Stratton, 72 N.Y.S. 87, 64 App.Div. 331, reversed on other grounds 68 N.E. 148, 176 N.Y. 150, 63 L.R.A. 182.

69. Neb.—Smith v. Roehrig, 133 N.W. 230, 90 Neb. 262.

70. N.Y.—Juell v. New Amsterdam Casualty Co., 229 N.Y.S. 190, 223 App.Div. 612.

**Subterfuge**

Whether contracts for delivery of lumber guaranteed by surety were mere subterfuge to secure perform-

ance by so-called "seller" of loan agreements simultaneously executed therewith, and of which surety was not informed, was a question for jury.—National Surety Co. v. Russell, C.C.A.Ind., 66 F.2d 104.

71. Ill.—Harty v. Smith, 74 Ill.App. 194.

50 C.J. p 220 note 12.

72. Pa.—Fountain v. Bigham, 84 A. 131, 235 Pa. 35, Ann.Cas.1913D 1185.

73. Ark.—J. R. Watkins Medical Co. v. Montgomery, 215 S.W. 638, 140 Ark. 437.

50 C.J. p 219 notes 6 [a] (3), 7 [a] (18).

74. Ala.—U. S. Fidelity, etc., Co. v. Damskibsskieselskabet Habi, 35 So. 344, 138 Ala. 348.

Mo.—Suburban Mut. Bldg., etc., Assoc. v. Paulus, 80 Mo.App. 36.

**Substituted contract**

Whether bond delivered to secure original building contract never carried out secured subsequent contract substituted for original and bearing same date was a question for jury.—Kroeger v. Union Indemnity Co., 14 P.2d 258, 40 Ariz. 467.

75. Pa.—McClelland v. New Amsterdam Casualty Co., 185 A. 198, 322 Pa. 429.

76. Pa.—American District Tel. Co. v. Lenning, 21 A. 162, 139 Pa. 594. 50 C.J. p 220 note 16.

77. Mich.—Doherty v. Detroit Fidelity, etc., Co., 214 N.W. 833, 240 Mich. 36.

78. D.C.—Zipkin v. Investors Syndicate, 152 F.2d 678, 80 U.S.App.D.C. 802.

50 C.J. p 220 note 18.

and how much;<sup>79</sup> whether certain items of damage were the result of a breach of contract;<sup>80</sup> and what is a reasonable time for the surety to exercise an option to perform after default by the principal.<sup>81</sup>

The jury likewise should pass on the point of acceptance of work by the obligee as performance of the contract;<sup>82</sup> whether a return of collateral by plaintiff was negligence releasing the surety;<sup>83</sup> the amount of loss of security in the creditor's hands;<sup>84</sup> consent of the surety to nonobservance of conditions in the bond;<sup>85</sup> whether or not the creditor was notified to sue;<sup>86</sup> whether the surety was released by statements of plaintiff;<sup>87</sup> and whether a note was accepted as payment.<sup>88</sup> Whether or not one was an agent for one of the parties is a question of fact for the jury,<sup>89</sup> but the extent of his authority is for the court.<sup>90</sup>

**Fraud.** It is generally a question for the jury whether the surety was induced to become such by plaintiff's fraud,<sup>91</sup> or fraud of which he had knowledge,<sup>92</sup> or whether the surety was or was not misled by the misrepresentations.<sup>93</sup> It is for the jury to determine whether a failure of the obligee to inform the sureties of a shortage of the principal

before execution indicates bad faith.<sup>94</sup>

**Notice of default.** Whether a surety was given notice of his principal's default as required by the terms of his obligation ordinarily is a question for the jury on conflicting evidence.<sup>95</sup> The question what constitutes a reasonable time for giving notice to the surety of any act or omission that might involve loss pursuant to a provision of the contract ordinarily is for the jury,<sup>96</sup> but whether a reasonable time has elapsed before the required notice was given is for the court to decide as a matter of law, where there is no conflict of testimony, and different conclusions cannot be drawn from the testimony.<sup>97</sup>

**Extension of time for payment or performance.** Whether an agreement for an extension of time has been made,<sup>98</sup> and, if made, what are its terms,<sup>99</sup> and whether the surety consented to the extension,<sup>1</sup> are questions properly to be submitted to the jury; but the effect of the extension, if proved, is for the court.<sup>2</sup>

**Alteration of contract.** The question whether or not there was an alteration of the principal obligation so as to discharge the surety is for the jury;<sup>3</sup>

79. N.Y.—New York v. Kelly, 98 N. Y. 467, 50 Am.R. 699.

80. D.C.—Zipkin v. Investors Syndicate, 152 F.2d 678, 80 U.S.App. D.C. 302.

Minn.—MacLeod v. National Surety Co., 158 N.W. 619, 133 Minn. 351.

81. Ga.—Thomason v. Keeney, 62 S. E. 470, 4 Ga.App. 721, 70 S.E. 220, 8 Ga.App. 852.

82. N.Y.—Detroit Water Com'rs v. Burr, 32 N.Y.Super. 25.

83. Tex.—Brown v. Farmers', etc., Nat. Bank, 31 S.W. 285, 33 Tex. 265, 33 L.R.A. 359.

#### Injury

Payee's release to maker of collateral securing note, resulting in loss or destruction of collateral, was held not as matter of law noninjurious to surety.—Kennedy v. Farmers' & Merchants' Bank, 169 S.E. 769, 47 Ga.App. 104.

**Evidence held insufficient for jury** on question whether mortgaged property securing note was lost by negligence of payee holding mortgage.—Golden v. First State Bank of Bomarton, Tex.Civ.App., 33 S.W. 2d 628.

84. Iowa.—Mingus v. Daugherty, 54 N.W. 66, 87 Iowa 56, 43 Am.S.R. 354.

50 C.J. p 220 note 24.

85. Iowa.—Randolph State Bank v. Osborn, 223 N.W. 493, 207 Iowa 729.

Pa.—Tarentum Realty Co. v. McClure, 79 A. 551, 230 Pa. 266.

86. Ark.—Skillern v. Baker, 100 S. W. 764, 82 Ark. 86, 118 Am.S.R. 52, 12 Ann.Cas. 243.

87. N.C.—Rouss v. Krauss, 36 S.E. 146, 126 N.C. 667.

Wis.—Lloyd Inv. Co. v. Illinois Surety Co., 160 N.W. 58, 164 Wis. 282.

88. U.S.—Pittsburgh-Buffalo Co. v. American Fidelity Co., Pa., 219 F. 818, 135 C.C.A. 488.

50 C.J. p 220 note 28.

89. Or.—Wollenberg v. Sykes, 89 P. 143, 49 Or. 163.

90. Or.—Wollenberg v. Sykes, supra.

Wash.—Mills v. Title Guaranty, etc., Co., 172 P. 248, 101 Wash. 162.

91. Pa.—Meek v. Frantz, 33 A. 413, 171 Pa. 632.

50 C.J. p 219 notes 6 [a] (4), 7 [a] (8), p 220 note 33.

#### Diligence

Whether defendant was lacking in proper diligence in signing note as surety on misrepresentation of plaintiff's agent that note was secured by first chattel mortgage, so as to authorize recovery against defendant on note, was a question for jury.—Hardin Supply Co. v. Parker-son, 185 S.E. 591, 53 Ga.App. 342.

92. Okl.—Farmers' State Bank v. Mowry, 232 P. 26, 107 Okl. 275.

93. Va.—Atlantic Trust, etc., Co. v.

Union Trust, etc., Corp., 67 S.E. 182, 110 Va. 286, 135 Am.S.R. 937.

50 C.J. p 220 note 35.

94. Minn.—Traders' Ins. Co. v. Herber, 69 N.W. 701, 67 Minn. 106.

95. Or.—Bross v. McNicholas, 133 P. 782, 66 Or. 42, Ann.Cas.1915B 1272.

50 C.J. p 171 note 55 [a], p 220 note 37.

**Evidence held insufficient for jury** Pa.—Phillips v. American Liability & Surety Co., 162 A. 435, 309 Pa. 1.

96. Or.—Haddock Const. Co. v. Wilber, 169 P.2d 599, 178 Or. 659.

97. Or.—Haddock Const. Co. v. Wilber, supra.

98. Ga.—First Nat. Bank v. Chipstead, 163 S.E. 306, 45 Ga.App. 113.

50 C.J. p 219 notes 6 [a] (1), (2), 7 [a] (7), p 220 note 38.

99. Mass.—Brooks v. Wright, 13 Allen 72.

1. Minn.—Bandler v. Bradley, 124 N.W. 644, 110 Minn. 66.

Wash.—Lipsett v. Detering, 162 P. 1007, 94 Wash. 629.

2. Miss.—Moore v. Redding, 13 So. 849, 69 Miss. 841.

3. Ga.—Heard v. Tappan, 43 S.E. 375, 116 Ga. 930.

50 C.J. p 219 note 7 [a] (11), (13), p 221 note 42.

Fact of alteration of written instru-

but the materiality of the alteration, where made, is for the court.<sup>4</sup> It is for the jury to determine whether a change in the contract was contemplated by the parties,<sup>5</sup> and the construction of the alteration agreement is for the court.<sup>6</sup>

### b. Direction of Verdict

In actions by a creditor or obligee against a surety, the court may, in a proper case, direct a verdict for plaintiff or surety; but a directed verdict is improper when a question for the jury is presented.

In accordance with the rules governing the direction of a verdict in civil actions generally, in a proper case the court may direct a verdict for plaintiff<sup>7</sup> or surety;<sup>8</sup> but a directed verdict is improper when a question for the jury is presented,<sup>9</sup> as when the evidence is conflicting<sup>10</sup> or inconclusive,<sup>11</sup> or where the jury may draw inferences therefrom which favor the party against whom the verdict is to be directed.<sup>12</sup> Where the surety interposes no defense, it is improper to refuse to direct a verdict.<sup>13</sup> It is proper on directing verdict for

the penal sum of the bond to direct an assessment of damages.<sup>14</sup>

### § 275. — Instructions

In an action by a creditor or obligee against a surety, the court should properly instruct the jury as to all the issues raised by the pleadings, including the measure of the surety's liability; and such instructions must be warranted by the evidence, and not be misleading or confusing.

The rules governing instructions in civil actions generally are applicable to actions by a creditor or obligee against a surety.<sup>15</sup> Subject to these rules, the jury should be properly instructed on the measure of the surety's liability.<sup>16</sup> General rules require that the court should properly instruct the jury as to all the issues raised by the pleadings;<sup>17</sup> and, where such facts are in issue, the jury should be correctly instructed as to execution and delivery of the bond,<sup>18</sup> extension of time,<sup>19</sup> agreements to release the surety,<sup>20</sup> material changes in the contract so as to release the surety,<sup>21</sup> and, like-

ment as question of law or fact in action between parties to instrument see *Alteration of Instruments* § 94.

#### **Ratification**

Surety's testimony that everything contained in pleadings in receivership suit was true was affirmative admission, leaving jury no question on whether he ratified alteration in note by bringing suit.—*People's Finance Co. of Dallas v. Sabanovich, Tex.Com.App.*, 26 S.W.2d 187.

#### **Time of alteration**

In an action on note, alterations apparent on face of note did not require a directed verdict for defendant sureties, where evidence was conflicting as to whether changes were made before or after signing of note.—*Johnson v. T. M. Dover Mercantile Co.*, 261 S.W. 913, 164 Ark. 371.

4. Ga.—*Heard v. Tappan*, 42 S.E. 375, 116 Ga. 930.  
50 C.J. p 221 note 43.

5. Ind.—*State v. Lund*, 139 N.E. 466, 80 Ind.App. 349.

6. Pa.—*Bardley v. Deckerhoof*, 24 A. 1067, 151 Pa. 374.

7. U.S.—*American Surety Co. of New York v. Scott, C.C.A.Colo.*, 63 F.2d 961.

Ga.—*Rankin v. Griffith*, 139 S.E. 360, 87 Ga.App. 203.  
50 C.J. p 221 note 48.

#### **Peremptory instruction**

In action on contract of suretyship with defenses of non est factum and forgery where instrument conclusively showed no alteration and one surety admitted signature to be his and two bankers gave opinion that

signatures were those of the sureties, plaintiff was entitled to a peremptory instruction.—*Furst v. Spurlock*, 160 S.W.2d 635, 290 Ky. 139.

8. Ill.—*Vermont Marble Co. v. Bayne*, 10 N.E.2d 971, 292 Ill.App. 647, reversed on other grounds 15 N.E.2d 510, 368 Ill. 618.  
50 C.J. p 221 note 49.

#### **Nominal damages**

Where plaintiff was entitled to recover at least nominal damages, surety was not entitled to a directed verdict.—*Darby State Bank v. Pew*, 195 P. 852, 59 Mont. 144.

#### **Nonsuit**

Plaintiff held properly nonsuited.—*Empson v. Aetna Casualty & Surety Co.*, 266 P. 373, 71 Colo. 282.

9. N.Y.—*Millard Constr. Co. v. Deiches*, 134 N.Y.S. 998, 150 App. Div. 71, affirmed 101 N.E. 1111, 208 N.Y. 575.

10. U.S.—*R. P. Farnsworth & Co. v. Electrical Supply Co.*, C.C.A.La., 112 F.2d 150, 130 A.L.R. 192, rehearing denied 113 F.2d 111, 130 A.L.R. 197, certiorari denied 61 S. Ct. 139, 311 U.S. 700, 85 L.Ed. 454.  
50 C.J. p 221 note 51.

11. Tex.—*Darrah v. Lion Bonding, etc., Co., Civ.App.*, 200 S.W. 1101.

12. Ga.—*Short v. Jordan*, 146 S.E. 31, 39 Ga.App. 45.  
50 C.J. p 221 note 53.

13. Okl.—*J. R. Watkins Co. v. Pruitt*, 266 P. 770, 130 Okl. 231.

14. Mass.—*Brown v. London, etc., Indemn. Co.*, 144 N.E. 395, 249 Mass. 511.

15. Ala.—*Shows v. Brunson*, 159 So. 248, 229 Ala. 682.

Ga.—*Smith v. Georgia Battery Co.*, 169 S.E. 381, 46 Ga.App. 840.

#### **Construction of instruction**

Pa.—*Rochester First Nat. Bank v. Fry*, 144 A. 416, 294 Pa. 425.  
51 C.J. p 112 note 8 [a].

16. U.S.—*Western Surety Co. v. City of Devils Lake, C.C.A.N.D.*, 58 F.2d 161.

Iowa.—*J. R. Watkins Medical Co. v. Moss*, 141 N.W. 497, 160 Iowa 244.

17. Colo.—*W. T. Rawleigh Co. v. Dickneite*, 61 P.2d 1028, 99 Colo. 276.

Tex.—*Smith v. Traders' Nat. Bank*, 17 S.W. 779, 82 Tex. 368.

#### **Instructions held not erroneous**

Ark.—*W. T. Rawleigh Co. v. Moore*, 55 S.W.2d 63, 186 Ark. 571.

Ga.—*J. R. Watkins Co. v. Ellington*, 29 S.E.2d 300, 70 Ga.App. 722.

Pa.—*Phillips v. American Liability & Surety Co.*, 162 A. 435, 309 Pa. 1—*Ferguson Packing Co. v. Mihalio*, 99 Pa.Super. 158.

18. Ind.—*American Surety Co. v. Pangburn*, 105 N.E. 769, 182 Ind. 116, Ann.Cas.1916E 1126.  
50 C.J. p 221 note 60.

19. Mo.—*Dickherber v. Turnbull*, App., 31 S.W.2d 234.  
50 C.J. p 221 note 61.

20. Iowa.—*Hunter v. Porter*, 109 N. W. 283, 133 Iowa 391.

21. Ga.—*Heard v. Tappan*, 43 S.E. 375, 116 Ga. 930—*Smith v. Georgia Battery Co.*, 169 S.E. 381, 46 Ga. App. 840.  
50 C.J. p 221 note 63.

#### **Charge held not erroneous**

In action on note against sureties, charges predicated verdict for sure-

wise, should be correctly instructed as to fraud,<sup>22</sup> failure to notify of default,<sup>23</sup> failure of the creditor to sue the principal before proceeding against the surety,<sup>24</sup> release of security by the creditor,<sup>25</sup> and destruction of security of the surety.<sup>26</sup>

Other general rules applied include those requiring the instructions not to be misleading or confusing<sup>27</sup> and that the instruction be warranted by the evidence.<sup>28</sup> A requested instruction not properly stating necessary matters may be refused<sup>29</sup> or may be modified by the court.<sup>30</sup> Where the court has substantially given the charge asked by a surety on his defense, the refusal to repeat the charge is no ground of complaint.<sup>31</sup> A charge which submits improper issues to the jury is bad.<sup>32</sup>

## § 276. — Verdict and Findings

The verdict or findings in an action by the creditor or obligee against a surety must be supported by the evidence; and the findings must not be inconsistent with each other or contrary to law.

General rules apply to the verdict or findings in an action by the creditor or obligee against a surety.<sup>33</sup> Thus, the verdict or findings must be supported by the evidence.<sup>34</sup> A verdict is not objectionable by reason of words which are mere surplusage.<sup>35</sup> Findings must not be inconsistent with each other<sup>36</sup> or contrary to law;<sup>37</sup> and, where evidence warrants a finding that one who was a

surety afterward assumed liability as a principal, a general verdict based on such finding is not inconsistent with a special finding that he was originally a surety.<sup>38</sup>

Under a statute requiring the court to find, where requested, the relationship between defendants, such finding is justified on the introduction of testimony on the matter.<sup>39</sup> Where the contract stipulates that an extension shall not release the surety thereon, there need not be a finding that there was an extension.<sup>40</sup> Conclusions of law stated on findings of fact must be supported by the findings.<sup>41</sup> The time of default may properly be found by the court where the pleadings do not mention the date of the default.<sup>42</sup>

## § 277. Judgment

- a. In general
- b. Against whom rendered and designation of relationship
- c. Amount and provision for execution
- d. Amendment and vacation

### a. In General

The judgment in an action by a creditor or obligee against a surety must conform to the pleadings, proof, and findings, and ordinarily a surety cannot be made liable by a judgment entered without any proceeding against him; but, under some statutes, judgment against a surety is authorized on judgment against the principal.

ties on material change or alteration were not erroneous because they did not limit verdict to changes set up in plea and because they did not define "material change," where, in oral charge, court mentioned material changes set up in plea and jury could not have been misled.—Shows v. Brunson, 159 So. 248, 229 Ala. 682.

### Instruction held erroneous

An instruction which permits the jury to determine that an alteration, immaterial in law, is material should not be given.

Ill.—Donnell Mfg. Co. v. Jones, 49 Ill.App. 327.

Tex.—Randall v. Smith, 2 Tex. Unrep. Cas. 397.

22. Ga.—W. T. Rawleigh Co. v. Kelly, 50 S.E.2d 113, 78 Ga.App. 10. 50 C.J. p 221 note 64.

### Misrepresentation

In action against contract sureties asserting that they had been induced to sign contract by misrepresentations of material fact, omission of word "willfully" in charge referring to misrepresentation of material fact "made to deceive" was not error, notwithstanding language of statute was "made willfully to deceive."—W. T. Rawleigh Co. v. Kelly, *supra*.

23. Iowa.—Frutchev v. Derby, 179 N.W. 519, 190 Iowa 1254.

24. Ill.—Wurster v. Albrecht, 237 Ill.App. 284.

25. Iowa.—Monroe Bank v. Gifford, 44 N.W. 558, 79 Iowa 300.

26. Iowa.—Riniker v. Newkirk, 179 N.W. 825.

27. Ky.—Title Guaranty, etc., Co. v. Hay, 176 S.W. 957, 165 Ky. 76. 50 C.J. p 221 note 69.

28. Mo.—Dickherber v. Turnbull, App., 31 S.W.2d 234. 50 C.J. p 221 note 70.

29. Ga.—Moorefield v. Fidelity Mut. L. Ins. Co., 69 S.E. 119, 135 Ga. 186. 50 C.J. p 221 note 71.

30. Va.—U. S. Fidelity, etc., Co. v. Country Club, 105 S.E. 686, 129 Va. 306.

31. Tex.—Smith v. Traders' Nat. Bank, 17 S.W. 779, 82 Tex. 368.

32. Tex.—Jackson v. Rollins, 128 S.W. 681, 61 Tex.Civ.App. 162.

33. Tex.—Southern Surety Co. v. Bus Union Station, Civ.App., 23 S.W.2d 484, error dismissed. 50 C.J. p 222 note 76.

34. Ark.—Colvin v. Glover, 220 S.W. 832, 143 Ark. 498. 50 C.J. p 222 note 77.

### Evidence held sufficient to sustain finding

Mo.—Farmers' & Traders' Bank of Auxvasse v. Harrison, 12 S.W.2d 755, 321 Mo. 815. 50 C.J. p 222 note 77 [c].

35. Ind.—Guthrie v. Carpenter, 70 N.E. 486, 162 Ind. 417.

36. Findings held not inconsistent Kan.—J. R. Watkins Medical Co. v. Hamm, 130 P. 650, 89 Kan. 138. 50 C.J. p 222 note 79 [a].

37. Tex.—Thompson v. Godden, Civ. App., 2 S.W.2d 528.

38. Iowa.—Wilson v. Onstott, 96 N.W. 779, 121 Iowa 263.

39. Kan.—Kupfer v. Sponhorst, 1 Kan. 75.

Okl.—Moore v. Frensley, 224 P. 304, 98 Okl. 146.

40. Ind.—Mankedick v. Consolidated Coal, etc., Co., 57 N.E. 256, 25 Ind.App. 135.

41. Ind.—Highway Iron Products Co. v. Phillips, 153 N.E. 926, 85 Ind.App. 700. 50 C.J. p 222 note 85.

42. Or.—Bingham, etc., Co. v. National Brick, etc., Co., 133 P. 1187, 66 Or. 113.

General rules as to judgment in civil actions apply to judgments in actions by a creditor or obligee against a surety.<sup>43</sup> A surety cannot be made liable by a judgment entered without any proceeding against him,<sup>44</sup> and a judgment against a surety cannot be based on a verdict against the principal alone;<sup>45</sup> but, where the surety by his obligation has consented that a judgment be rendered against him, it may be entered without notice to him.<sup>46</sup> As in other cases, the judgment must conform to the pleadings and proof,<sup>47</sup> and must conform to the findings.<sup>48</sup> Statutes in some jurisdictions require judgment to be rendered against the principal where he is a resident, before final judgment may be entered against a surety.<sup>49</sup>

*Where counterclaim of principal is interposed,* judgment thereon should be for the principal alone.<sup>50</sup>

*Summary judgment.* Under some statutes, judgment against a surety is authorized on judgment against the principal;<sup>51</sup> but the remedy is allowed only in the cases expressly named in the statute,<sup>52</sup> and, in the absence of a statute allowing a summary judgment, no such recovery may be had against sureties on a common-law bond;<sup>53</sup> and a judgment based on a stipulation must comply with requirements for confessed judgment.<sup>54</sup>

## b. Against Whom Rendered and Designation of Relationship

Where a principal and his surety are sued in the same action, judgment may be entered against both, and, in a proper case, judgment may then be rendered in favor of the surety against his principal or cosureties; a judgment against principal and surety need not designate that it is against one as surety except where it is so required by statute.

Where a principal and his surety are sued in the same action, judgment may be entered against both.<sup>55</sup> Subject to rules of general application as to joint defendants, where suit is brought against the principal and surety jointly on the same instrument, the judgment ordinarily must be against both or neither,<sup>56</sup> and rendered against both at the same time.<sup>57</sup> Where judgment is obtained against the principal alone, the surety is discharged;<sup>58</sup> but, in some circumstances, judgment may be rendered against the surety alone,<sup>59</sup> as where the principal becomes insolvent pending the suit,<sup>60</sup> or where the contract is several as well as joint.<sup>61</sup> Where the principal and surety may be sued together or separately, the judgment may be joint or several or joint and several.<sup>62</sup> Separate judgments may be rendered in favor of a principal and sureties jointly sued.<sup>63</sup> If, after the death of the principal, judgment is entered against him and his sureties, it will be stricken off as against him, but not as against his sureties.<sup>64</sup> Where the principal dies

43. Tex.—Robinson v. Chamberlain, 68 S.W. 209, 29 Tex.Civ.App. 170. 50 C.J. p 223 note 88.

Lessors properly recovered on surety bond guaranteeing performance of lease requiring lessee to pay taxes, insurance, and repair costs, where lessee failed to take possession.—American Surety Co. of New York v. Hutchinson, C.C.A.Tex., 63 F.2d 536.

44. S.C.—Earle v. Cureton, 13 S.C. 19. 50 C.J. p 223 note 89.

45. Ga.—Cobb v. Wise, 71 Ga. 103.

46. Iowa.—Andres v. Schlueter, 118 N.W. 429, 140 Iowa 389. Or.—McCargar v. Moore, 157 P. 1107, 171 P. 587, 173 P. 258, 88 Or. 682.

47. Tex.—Robinson v. Chamberlain, 68 S.W. 209, 29 Tex.Civ.App. 170. 50 C.J. p 223 note 91.

48. Ind.—National Surety Co. v. Schneidermann, 96 N.E. 955, 49 Ind.App. 139. 50 C.J. p 223 note 92.

Judgment held supported by findings Ark.—Burke v. International Life Ins. Co., 17 S.W.2d 314, 179 Ark. 651. 50 C.J. p 223 note 92 [a].

49. Tex.—Head v. Texas State Bank, Civ.App., 16 S.W.2d 298. 50 C.J. p 223 note 94.

50. Ky.—Gardner v. Alexander, 169 S.W. 466, 159 Ky. 713.

51. Minn.—Stapp v. The Steam-Boat Clyde, 47 N.W. 160, 44 Minn. 510. 50 C.J. p 224 note 30.

52. Ala.—Garrott v. Fuller, 36 Ala. 179. 50 C.J. p 224 note 31.

53. Tex.—Britt v. Luce, Civ.App., 114 S.W.2d 267.

54. Wash.—Kalb-Gilbert Lumber Co. v. Cram, 111 P. 1050, 60 Wash. 664, 107 P. 381, 57 Wash. 550.

55. Ga.—Manry v. Waxelbaum Co., 33 S.E. 701, 108 Ga. 14—W. T. Rawleigh Co. v. Overstreet, 32 S. E.2d 574, 71 Ga.App. 373.

### Excess cost of construction

In action for contractor's failure to comply with plans, court should decree that ultimate payment of excess cost of construction should fall on contractor's surety.—Constitution Indemnity Co. of Philadelphia v. Armbrust, Tex.Civ.App., 25 S.W. 2d 176, error refused.

56. Ill.—Kingsland v. Koeppe, 28 N. E. 48, 137 Ill. 344, 13 L.R.A. 649. 50 C.J. p 223 note 96.

57. La.—Griffing v. Caldwell, 16 La. 294.

Pa.—Shively v. U. S., 5 Watts 332.

58. Miss.—McKinney v. Green, 52 Miss. 70.

59. Ind.—McKee v. Harwood Automotive Co., 183 N.E. 646, 204 Ind. 233.

### Cross action

Where seller filed cross action on note against infant buyer and sureties in infant's suit to recover money paid on automobile, not a necessity, facts stated in infant's complaint were sufficient "severance" to permit seller's recovery against sureties alone.—McKee v. Harwood Automotive Co., 183 N.E. 646, 204 Ind. 233.

60. La.—Kuhn v. Abat, 2 Mart., N.S., 168.

61. Ill.—Rehm v. Halverson, 64 N. E. 388, 197 Ill. 378.

62. Cal.—Mahana v. Alexander, 263 P. 260, 88 Cal.App. 111.

63. S.D.—Western Twine Co. v. Wright, 78 N.W. 942, 11 S.D. 521, 44 L.R.A. 438.

64. Pa.—Commonwealth v. Joyce, 18 Pa.Co. 193.



after judgment is rendered, and before satisfaction, a scire facias may go against his administrators.<sup>65</sup>

*Judgment in favor of surety against principal or cosurety.* In a proper case, where a judgment is recovered by the creditor or obligee, judgment may be rendered in favor of the surety against his principal<sup>66</sup> or cosureties.<sup>67</sup> Where, however, separate judgments are obtained on a bond against cosureties, one of such sureties, on taking an assignment of the judgment against him, cannot enforce it as against the other surety, except as to his share of the sum due on the bond after it has been ascertained by an accounting.<sup>68</sup>

*Designation of relationship.* At common law, a judgment against principal and surety need not designate that it is against one as surety;<sup>69</sup> but under statute such designation may be requisite;<sup>70</sup> and it has been held, without reference to statute, that, where it appears from the face of a bond that one defendant is principal and the others sureties, it is proper to enter judgment against the former as principal and the others as sureties.<sup>71</sup> A statute of this kind, however, does not apply where the principal is not before the court;<sup>72</sup> or where judgment is by default against the surety;<sup>73</sup> or if evidence is not introduced to show the relationship;<sup>74</sup> or where all the defendants are principals, although they sustain the relationship of sureties among themselves.<sup>75</sup> Where the statutes merely permit the surety to have his relationship determined on request and judgment entered accordingly, the judgment need not designate the surety's relationship where no such application has been made.<sup>76</sup>

### c. Amount and Provision for Execution

Ordinarily, judgment against principal and surety must be for the same amount against all the defendants, but the judgment must not be in excess of the penalty named in the bond. Under some statutes, the judgment should direct that the sheriff levy on the property of the principal first.

Judgment against principal and surety must be for the same amount against all the defendants,<sup>77</sup> unless sureties on a bond are bound in different amounts, in which case a separate judgment should be rendered against each for the full amount for which he is bound, although more than the amount due from the principal cannot be collected.<sup>78</sup> Judgment may not be rendered against the surety for an amount greater than that entered against the principal in a prior action.<sup>79</sup> Subject to the rules considered supra §§ 112-115 as to the amount recoverable, the judgment must not be in excess of the penalty named in the bond.<sup>80</sup> Where a surety bond was issued to individuals in a trade-name, and suit is brought by individual parties at interest, it is not necessary for the judgment to indicate the amount due to each individual.<sup>81</sup> Where, on an accounting between the creditor and surety, an amount is found due the latter, the surety may be entitled to interest on the amount due him from the date of filing of his cross-bill.<sup>82</sup>

*Provision for execution.* Under some statutes, a judgment should direct that the sheriff levy on the property of the principal first.<sup>83</sup> However, judgment need not be framed to subject the principal's property when the surety does not ask such relief.<sup>84</sup> A decree in equity should provide for first exhausting the estate of the principal,<sup>85</sup> unless he is utter-

65. Tenn.—Swan v. Hazen, 6 Humphr. 46.

66. La.—Singer Lumber Co. v. Globe Indemnity Co., App., 161 So. 327.

50 C.J. p 224 note 25.

Statutory actions by surety against principal see infra §§ 336-338.

67. Ala.—Young v. Clark, 2 Ala. 264.

68. Md.—Norwood v. Norwood, 2 Harr. & J. 238.

69. Ga.—Keaton v. Cox, 26 Ga. 162. Ind.—Rooker v. Wise, 14 Ind. 276.

70. Mich.—Prentiss v. Spalding, 2 Dougl. 84.

50 C.J. p 223 note 8.

71. Tex.—Day v. Johnson, Civ.App., 33 S.W. 676.

9 C.J. p 127 note 86.

72. Mont.—Brownlee v. Young, 63 P. 798, 25 Mont. 38.

Ohio.—Wilkins v. Ohio Nat. Bank, 31 Ohio St. 565.

73. N.C.—Morehead Banking Co. v. Duke, 28 S.E. 191, 121 N.C. 110.

74. N.C.—Morehead Banking Co. v. Duke, supra—Gatewood v. Burns, 6 S.E. 635, 99 N.C. 357.

75. Mont.—Brownlee v. Young, 63 P. 798, 25 Mont. 38.

76. Okl.—Harn v. Security Nat. Bank, 177 P. 598, 74 Okl. 164.

50 C.J. p 224 note 14.

77. Mich.—Lafar v. Monroe Cir. Judge, 77 N.W. 265, 118 Mich. 677.

50 C.J. p 224 note 15.

78. Cal.—Heppe v. Johnson, 14 P. 833, 73 Cal. 265.

9 C.J. p 127 note 85—50 C.J. p 224 note 16.

79. Cal.—State Athletic Commission of California v. Massachusetts Bonding & Insurance Co., 117 P.2d 75, 46 Cal.App.2d 823.

80. Cal.—Heberling v. Day, 209 P. 908, 59 Cal.App. 13.

Ga.—Johnston v. Sheppard, 95 S.E. 743, 22 Ga.App. 206.

Necessity of separate action

In a single action on a bond

against the principal and surety, judgment may be entered against the principal as well as against the surety only for the maximum liability of the bond; any greater liability against the principal must be asserted in a separate action.—City of Philadelphia v. Toner, 68 Pa.Dist. & Co. 280.

81. Tex.—Southern Surety Co. v. Bus Union Station, Civ.App., 23 S.W.2d 484, error dismissed.

82. Ala.—Everglades Const. Co. v. American Surety Co., 156 So. 829, 229 Ala. 290.

83. Tex.—Traywick v. Gunn, Civ. App., 298 S.W. 273.

50 C.J. p 224 note 19.

84. Ind.—Rooker v. Wise, 14 Ind. 276.

Tex.—Bonner Oil Co. v. Gaines, Civ. App., 179 S.W. 686, affirmed 191 S.W. 552, 108 Tex. 232.

85. Cal.—Corpus Juris quoted in

ly insolvent.<sup>86</sup> A statute authorizing the court to order that the property of the principal shall be exhausted before resort is had to the property of the surety does not authorize the court to order that the debt shall be paid by levy and sale of the property of one or more of the sureties.<sup>87</sup> Hence, where one of two sureties has paid one half of the amount of the liability, he is not entitled to an order directing the sheriff first to levy on, and sell the property of, his cosurety.<sup>88</sup>

#### d. Amendment and Vacation

In an action by a creditor or obligee against a surety, irregularities in the judgment are amendable. A judgment entered on an altered bond will be opened, even as to the one who made the alteration.

In an action by a creditor or obligee against a surety, irregularities in the judgment are amendable.<sup>89</sup>

*Vacation or setting aside.* A judgment entered on an altered bond will be opened, even as to the one who made the alteration.<sup>90</sup> Where a judgment against the principal and surety on a bond is canceled for fraud of the judgment creditor and principal, it is proper for the court to decree that the bond is void and that the surety is discharged from liability thereon.<sup>91</sup> Fraud practiced by one surety on another with respect to defending an action on a bond has been held not to authorize the vacating of a judgment for the obligee who had no notice of the alleged fraud.<sup>92</sup>

### § 278. Execution and Enforcement of Judgment

Where a joint judgment has been rendered against a principal and surety, the execution must issue against both, although the surety has been discharged by facts occurring after the judgment. Where there are two or more sureties, the judgment creditor is at liberty to levy execution on the property of any one of them.

Where a joint judgment has been rendered against a principal and surety, the execution must issue against both, although the surety has been

discharged by facts occurring after the judgment,<sup>93</sup> but the court from which the process issues will take care that it is not used to work injustice.<sup>94</sup> The principal debtor may not compel the creditor to resort to personal property of the surety before resorting to the land of the principal;<sup>95</sup> nor will equity enjoin execution against the surety on the ground that the creditor is proceeding in equity to enforce a lien on the land of the principal for the same debt.<sup>96</sup> Although a levy on property of the principal more than sufficient to satisfy the debt has been made, nevertheless a levy may be made on the property of the surety where the property of the principal is not sold for want of bidders.<sup>97</sup> Failure of an execution to designate that some of the debtors are principals and others sureties as required by statute will not avail the principal.<sup>98</sup>

*Sale.* An execution sale will not be enjoined for mere irregularities in the notice.<sup>99</sup> As against an innocent purchaser from a purchaser on execution issued against the principal and cosureties, one of such cosureties cannot show that he has been released from liability by reason of the fact that the creditor had released his cosurety,<sup>1</sup> more particularly where he has taken no legal proceedings to have the execution declared invalid.<sup>2</sup>

*Pending appeal or writ of error.* Where the principal prosecutes an appeal or a writ of error, execution should not issue against the surety pending the proceedings in error,<sup>3</sup> and cannot issue where a supersedeas bond has been filed.<sup>4</sup>

*As between cosureties.* Where there are two or more sureties, the judgment creditor is at liberty to levy execution on the property of any one of them.<sup>5</sup> Equity will not direct the manner of execution against the property of sureties whose liabilities are equal, and they are in no sense sureties for each other.<sup>6</sup> Where cosureties are equally responsible, the fact that there is a decree establishing an attachment lien against the property of

Hamburger v. Ellingson, 33 P.2d 850, 851, 139 Cal.App. 311.  
50 C.J. p 224 note 21.

86. Cal.—Corpus Juris quoted in Hamburger v. Ellingson, 33 P.2d 850, 851, 139 Cal.App. 311.  
Fla.—May v. May, 19 Fla. 373.

87. Ind.—Schooley v. Fletcher, 45 Ind. 86.

88. Ind.—Schooley v. Fletcher, supra.

89. Ga.—Saffold v. Wade, 56 Ga. 174.  
50 C.J. p 224 note 27.

90. Pa.—Commonwealth v. Carl, 12 Pa. Dist. 759, 6 Dauph. Co. 166.

91. Ga.—Goldberg v. Fuller, 172 S. E. 52, 178 Ga. 58.

92. Kan.—Sparks v. Nech, 26 P.2d 586, 138 Kan. 343.

93. Ill.—Brinton v. Gerry, 7 Ill. App. 238.

Pa.—Mortland v. Himes, 8 Pa. 265.

94. Pa.—Mortland v. Himes, supra.

95. Tex.—Kendrick v. Rice, 16 Tex. 254.

96. W. Va.—Post v. Bailey, 69 S.E. 910, 68 W. Va. 434.

97. Mo.—Moss v. Craft, 10 Mo. 720.

98. Kan.—Walker v. Columbus State Bank, 67 P. 552, 64 Kan. 884.

99. Ark.—Walker v. Files, 127 S.W. 739, 94 Ark. 453.

Tex.—Hillsman v. Cline, Civ. App., 145 S.W. 726.

1. Ga.—Gunn v. Slaughter, 9 S.E. 772, 83 Ga. 124.

2. Ga.—Gunn v. Slaughter, supra.

3. Pa.—Gstalter v. McSorley, 26 Pa. Dist. 79.

4. Tex.—Wren v. Peel, 64 Tex. 374.

5. Neb.—Minick v. Brock, 59 N.W. 782, 41 Neb. 512.

6. Neb.—Peterson v. Kinney, 203 N. W. 628, 113 Neb. 214—Minick v. Brock, 59 N.W. 782, 41 Neb. 512.

some of them and a general judgment against all of them does not give them, as among themselves, any right to direct the officer as to which property shall be first sold.<sup>7</sup>

## § 279. — Exhaustion of Property of Principal

- a. In general
- b. Under statutory provisions
- c. "Discussion"

### a. In General

Where a judgment has been obtained against both the principal and the surety, the creditor may, at law, levy on the property either of the surety or of the principal, unless it is otherwise provided by statute; but in equity, the property of the principal ordinarily should be subjected first to the discharge of the obligation.

Where a judgment has been obtained against both the principal and the surety, the creditor, in the absence of a provision to the contrary in the statutes, may, at law, levy on the property either of the surety or of the principal.<sup>8</sup> In chancery, however, the property of the principal should be subjected first to the discharge of the obligation,<sup>9</sup> or, in event of the death of the principal, his heirs or devisees or legatees who have received assets by descent or will are made liable before resort can be had to the sureties,<sup>10</sup> unless to reach the property of the principal would involve great delay;<sup>11</sup> and in a proper case execution against the surety will be enjoined until after the property of the principal has been exhausted.<sup>12</sup> Where the judgment provides for execution on the surety's property only if the property of the principal is insufficient, the return of several executions nulla bona is prima facie sufficient to authorize the levy on the surety's property.<sup>13</sup>

### b. Under Statutory Provisions

Under statutes which render it necessary to exhaust the property of the principal before proceeding against that of the surety, the surety ordinarily is entitled to have execution issued first against his principal when the relationship is apparent in the judgment.

A number of statutory provisions render it necessary to exhaust the property of the principal before proceeding against that of the surety,<sup>14</sup> and the surety is entitled to have execution issued first against his principal.<sup>15</sup> Under such statutes, it has been held necessary to exhaust the property of the principal first when the relationship is apparent in the judgment,<sup>16</sup> but, where the judgment does not indicate that any of the defendants are sureties, the statutes do not apply.<sup>17</sup> Such statutes have been held not to apply where the principal is not sued,<sup>18</sup> or is insolvent,<sup>19</sup> or is dead,<sup>20</sup> although as to this there is also authority to the contrary.<sup>21</sup> Such statutes do not apply where the principal's property is in the custody of the court by its receiver<sup>22</sup> or where the judgment does not show the relationship and order of liability;<sup>23</sup> nor can a stranger, whose interests are adverse to the surety, claim the benefit of the statute for the latter.<sup>24</sup> Such statutes have been held to be merely directory,<sup>25</sup> and, if the officer disregards his instructions and resorts to the property of the surety first, the execution sale is nevertheless valid, but he is liable in damages to the surety.<sup>26</sup> The statute does not apply where both defendants are principals, although, as between them, the relationship of principal and surety exists.<sup>27</sup>

### c. "Discussion"

In some jurisdictions, a surety may claim the benefit of "discussion" to compel the creditor to exhaust the property of the principal debtor before having recourse to the surety, or his property, where that is legally practicable.

7. Mo.—*Dollarhide v. Parks*, 5 S. W. 3, 92 Mo. 178.

8. Cal.—*Corpus Juris* quoted in *Hamburger v. Ellingson*, 33 P.2d 550, 851, 139 Cal. 311.  
50 C.J. p 225 note 52.

9. Va.—*Wytheville Crystal Ice, etc., Co. v. Frick Co.*, 30 S.E. 491, 96 Va. 141.  
50 C.J. p 225 note 53.

10. Ill.—*Thomas v. Adams*, 30 Ill. 37.

11. W.Va.—*Cumberland First Nat. Bank v. Parsons*, 24 S.E. 554, 42 W.Va. 137.

12. Ark.—*Hill v. Crowley*, 18 S.W. 540, 55 Ark. 450.  
50 C.J. p 225 note 56.

13. Tex.—*Magill v. Rugeley*, Civ. App., 171 S.W. 528.

14. Ky.—*Meador v. Meador*, 10 S.W. 651, 88 Ky. 217, 10 Ky.L. 783.

50 C.J. p 225 note 58.  
15. Ind.—*McTaggart v. Dolan*, 86 Ind. 314.  
50 C.J. p 225 note 59.

16. Ind.—*Johnson v. Harris*, 69 Ind. 305.  
Tenn.—*Morris v. McAnally*, 3 Coldw. 304.

17. Ind.—*Douch v. Bliss*, 80 Ind. 316.

18. Ind.—*Watson v. Beabout*, 18 Ind. 281.  
N.C.—*Davis v. Sanderlin*, 23 N.C. 389.

19. Pa.—*Kirkpatrick v. White*, 29 Pa. 176.  
50 C.J. p 226 note 63.

20. Tex.—*Planters', etc., Nat. Bank*

*v. Robertson*, Civ.App., 86 S.W. 643.

21. Ohio.—*Eckert v. Myers*, 15 N. E. 862, 45 Ohio St. 525.

22. Ind.—*Knodel v. Baldrige*, 73 Ind. 54.

23. Miss.—*Work v. Harper*, 31 Miss. 107, 66 Am.D. 549.  
50 C.J. p 226 note 67.

24. Miss.—*Hyman v. Seaman*, 33 Miss. 185.

25. U.S.—*In re Nashville Laundry, D.C.Tenn.*, 240 F. 795.  
50 C.J. p 226 note 69.

26. Tenn.—*Sellers v. Fite*, 3 Baxt. 131.  
50 C.J. p 226 note 70.

27. Mont.—*Brownlee v. Young*, 63 P. 798, 25 Mont. 38.

In jurisdictions having the civil law, and under the statutes therein, a surety may claim the benefit of "discussion" to compel the creditor to exhaust the property of the principal debtor before having recourse to the surety, or his property,<sup>28</sup> where that is legally practicable.<sup>29</sup> This remedy, however, cannot be claimed in case of judicial security<sup>30</sup> or by a surety who becomes liable in solido,<sup>31</sup> and cannot be claimed as against a privileged creditor<sup>32</sup> or one who has a special hypothecation of the principal's property.<sup>33</sup> The remedy is not available where the principal's estate is not subject to execution,<sup>34</sup> or where the property is in litigation,<sup>35</sup> or has passed from the possession of the principal,<sup>36</sup> or the principal is not sued<sup>37</sup> or is insolvent.<sup>38</sup> The surety must point out the property to be resorted to,<sup>39</sup> and advance or tender the cost of the proceeding.<sup>40</sup>

### § 280. Appeal and Error

Sureties may, on appeal, show nonliability under a plea of their principal, which was sufficient to defeat a judgment against him.

General rules govern appeals in actions by a creditor against sureties.<sup>41</sup> Whether a judgment against a principal and surety may be reversed as to the principal and affirmed as to the surety, or vice versa, is discussed in Appeal and Error § 1921. Sureties may, on appeal, show nonliability under a plea of their principal, which was sufficient to defeat a judgment against him.<sup>42</sup> Although the surety's answer was insufficient, the judgment will

not be reversed where the sufficiency of the answer was not challenged.<sup>43</sup> Where a verdict is found on a plea of non assumpsit, and the jury do not pass on a plea by the surety that he was discharged because plaintiff gave the principal time for payment without the consent of the surety, the judgment will not be reversed.<sup>44</sup> A statute which prevents a bonding company from doing business after non-payment of a judgment against it, where no appeal has been taken within a specified time, does not preclude an appeal after that time.<sup>45</sup>

### § 281. Costs

Generally, sureties may be liable for the costs of the proceedings against them, but a finding for defendants in an action against the principal and surety may entitle the surety to recover costs.

As a general rule, the sureties may be liable for the costs of the proceeding against them;<sup>46</sup> but a finding for defendants in an action against the principal and surety may entitle the surety to recover costs.<sup>47</sup> A judgment for costs is not erroneous as being against a married woman where she and her husband were joined as beneficiaries of the nominal plaintiff in his action against the sureties.<sup>48</sup> A statute providing for the recovery of attorney's fees, where the surety's refusal to pay requires action, is penal and must be strictly construed.<sup>49</sup>

The liability of the surety for costs and expenses incurred by the creditor or obligee in an endeavor to enforce the liability of the principal is considered supra § 114.

28. Puerto Rico.—People v. American Surety Co., 10 Puerto Rico Fed. 190.

50 C.J. p 226 note 75.

"Discussion" defined see 27 C.J.S. p 141 notes 57, 58.

29. La.—Stafford v. Harper, 32 La. Ann. 1076.

30. Puerto Rico.—Muriente v. Terraza, 22 Puerto Rico 686.  
50 C.J. p 226 note 77.

31. La.—Myer v. Kendall, 76 So. 800, 142 La. 361—New Orleans Canal, etc., Co. v. Escoffie, 2 La. Ann. 830.

50 C.J. p 226 note 78.

32. La.—Myer v. Kendall, 76 So. 800, 142 La. 361.

33. La.—Myer v. Kendall, supra.

34. La.—Lepretre v. Barthet, 25 La. Ann. 124.

35. La.—Dejean's Syndics v. Martin, 7 Mart.N.S., 194.  
50 C.J. p 226 note 82.

36. La.—Womack v. Fluker, 13 La. Ann. 196.

37. La.—Stafford v. Harper, 32 La. Ann. 1076.

38. La.—Morgan v. Their Creditors, 4 La. 5—Delazerry v. Blanque's Syndics, 6 Mart. 560.

39. La.—Continental Supply Co. v. Fisher Oil Co., 91 So. 287, 150 La. 890.  
50 C.J. p 226 note 86.

40. La.—Continental Supply Co. v. Fisher Oil Co., supra.  
50 C.J. p 226 note 87.

41. Tex.—Lange v. Fritze, Civ.App., 53 S.W. 583.

#### Parties

In a suit by a creditor against principal and sureties, on appeal by the principal, sureties against whom the judgment of the lower court was rendered properly were made parties to the appeal.—Lange v. Fritze, supra.

#### Reversible error

In an action by a creditor against a surety on a bond, instructions which permitted the jury to determine what alterations were material, thereby conferring on them the power to call that material which was immaterial in law, constituted

reversible error.—Donnell Mfg. Co. v. Jones, 49 Ill.App. 327.

42. Tex.—Garrett v. Dodson, Civ. App., 199 S.W. 875.

43. Iowa.—Citizens' Bank v. Hickman, 162 N.W. 606, 179 Iowa 1178.

44. N.Y.—Daniels v. Hallenbeck, 19 Wend. 408.

45. Kan.—State v. U. S. Fidelity, etc., Co., 106 P. 1040, 81 Kan. 660, 26 L.R.A., N.S., 865.

46. Cal.—Heppe v. Johnson, 14 P. 833, 73 Cal. 265.  
50 C.J. p 92 note 15.

47. Cal.—Thomas Haverly Co. v. Pacific Indemnity Co., 11 P.2d 864, 215 Cal. 555.

48. Mo.—Greene County v. Wilhite, 35 Mo.App. 39.

49. La.—Price v. Brenner, 137 So. 750, 18 La.App. 266.

#### Statute held not repealed

La.—Baton Rouge Sash & Door Works v. Burkes, 8 La.App. 654.

#### Statute held applicable to building contract bonds

La.—Baton Rouge Sash & Door Works v. Burkes, supra.

## C. RECOURSE TO INDEMNITY OR SECURITY OF SURETY

## § 282. In General

As a general rule, where a surety receives security as indemnity from his principal, the creditor is entitled to the benefit thereof, or, if security is given to protect sureties liable for different debts, it should be apportioned among the several creditors; but indemnity or security given by a stranger or third person to the transaction to the surety is not available to the creditor.

As a general rule, where a surety receives security as indemnity from his principal, the creditor is entitled to the benefit thereof.<sup>50</sup> Decisions, however, recognize this rule only as far as the securities are given for the better protection or payment of the debt,<sup>51</sup> and hold that the creditor has no right to securities given the surety for his own personal indemnity<sup>52</sup> until the surety has been damnified<sup>53</sup> or both principal and surety are insolvent,<sup>54</sup> although, as to this, the contrary has also been held.<sup>55</sup> In any case, the giving of securities is regarded, in equity, as a trust for the better security of the debt,<sup>56</sup> available to the creditor, even though he was ignorant of it at the

time it was given,<sup>57</sup> and enforceable by anyone entitled to enforce the contract made by the surety;<sup>58</sup> and it is immaterial whether the surety received it at the time he incurred liability, or at a later date.<sup>59</sup> Since the right of subrogation is an equitable one, growing out of the relationship arising through contract, it does not exist where the contract was not executed by the principal,<sup>60</sup> or where the supposed surety is not in fact bound.<sup>61</sup>

*Security also for debt of principal to surety.* Some conflict exists as to the rights of the creditor where the property is given by the principal to secure a debt due by the principal to the surety as well as to indemnify the surety for the debt due the creditor. Some courts hold that the creditor is entitled to all of the security if necessary to satisfy his claim before the security is applied to a debt existing between the principal and surety,<sup>62</sup> while other courts hold that the surety is entitled to indemnify himself in full as to his individual claims before the creditor is entitled to anything,<sup>63</sup> espe-

50. U.S.—Haynes v. U. S. Fidelity & Guaranty Co., D.C.Okla., 6 F. Supp. 272.

Ala.—*Corpus Juris* cited in *Pickens County v. National Surety Co.*, 155 So. 620, 622, 329 Ala. 191.

Cal.—*Banta v. Rosasco*, 55 P.2d 601, 12 Cal.App.2d 420.

Ind.—*Huffmond v. Bence*, 27 N.E. 347, 128 Ind. 131.

Ky.—*Commonwealth Life Ins. Co. v. Combs*, 65 S.W.2d 696, 251 Ky. 540—*Alexander v. West*, 44 S.W.2d 518, 241 Ky. 541—*Tilford v. James*, 7 B.Mon. 336.

Mo.—*Burnside v. Fetzner*, 63 Mo. 107.

N.Y.—*Wicks v. Carmichael*, 16 N.Y. S.2d 395, 172 Misc. 924—*Auburn Bank v. Throop*, 18 Johns. 505.

N.C.—*Sherrod v. Dixon*, 26 S.E. 770, 120 N.C. 60—*Long v. Miller*, 93 N. C. 22.

Pa.—*Appeal of Harmony Nat. Bank*, 101 Pa. 428—*Appeal of Rice*, 79 Pa. 168—*Jack v. Morrison*, 48 Pa. 113—*Wright v. Harrisburg Trust Co.*, 43 Pa.Dist. & Co. 47, 51 Dauph. Co. 213—*Wright v. Harrisburg Trust Co.*, Com.Pl., 51 Dauph.Co. 413.

Va.—*First Nat. Co. v. State-Planters Bank & Trust Co.*, 180 S.E. 281, 164 Va. 491.

50 C.J. p 227 note 97.

#### Basis of rule

Equitable subrogation of creditor to securities held by surety is based on creditor's right to avail himself of rights of surety against principal debtor.—*Brogan v. Ferguson*, 133 So. 317, 101 Fla. 1311.

#### Rule not impaired by statute

Rule that creditor should have benefit of any obligation or security given by principal to surety for payment of debt and remedy to enforce it in equity court was not impaired by statute with respect to mortgage foreclosure proceedings and action on bond for deficiency.—*Black Diamond Building & Loan Ass'n of Newark v. Redlinghouse*, 165 A. 630, 113 N.J.Eq. 1—*Green v. Stone*, 34 A. 1099, 54 N.J.Eq. 387, 55 Am.S.R. 577.

51. Va.—*Schmelz v. Rix*, 28 S.E. 890, 95 Va. 509.

50 C.J. p 227 note 98.

52. Ga.—*Importers, etc., Bank v. McGhees*, 16 S.E. 27, 88 Ga. 702. Miss.—*Clay v. Freeman*, 20 So. 871, 74 Miss. 816.

Va.—*Commonwealth Bank v. Boiseau*, 12 Leigh 387, 39 Va. 387. 50 C.J. p 227 note 99.

53. Cal.—*Taylor v. De Camp*, 23 P. 2d 61, 132 Cal.App. 640. 50 C.J. p 227 note 1.

54. Ark.—*Dyer v. Jacoway*, 88 S.W. 901, 76 Ark. 171, 6 Ann.Cas. 393. Conn.—*Jones v. Quinnpiack Bank*, 29 Conn. 25.

55. Ga.—*Importers, etc., Bank v. McGhees*, 16 S.E. 27, 88 Ga. 702—*Burnett v. Gainesville Nat. Bank*, 110 S.E. 753, 28 Ga.App. 255.

56. U.S.—*Prudence Realization Corporation v. Geist*, N.Y., 62 S.Ct. 978, 316 U.S. 89, 86 L.Ed. 1293—*Haynes v. U. S. Fidelity & Guaranty Co.*, D.C.Okla., 6 F.Supp. 272.

Conn.—*Stearns v. Bates*, 46 Conn. 306—*New London Bank v. Lee*, 11 Conn. 112, 27 Am.D. 713.

Md.—*Owens v. Miller*, 29 Md. 144. Mass.—*Franklin County Nat. Bank v. Greenfield First Nat. Bank*, 138 Mass. 515.

Mo.—*Thornton v. National Exch. Bank*, 71 Mo. 221.

Neb.—*Richards v. Yoder*, 6 N.W. 629, 10 Neb. 429.

Pa.—*Wright v. Harrisburg Trust Co.*, 43 Pa.Dist. & Co. 47, 51 Dauph. Co. 213—*Wright v. Harrisburg Trust Co.*, Com.Pl., 51 Dauph.Co. 413.

50 C.J. p 227 note 4.

57. N.C.—*Blanton v. Bostic*, 35 S.E. 1035, 126 N.C. 418.

50 C.J. p 228 note 5.

58. Md.—*McCracken v. German Fire Ins. Co.*, 43 Md. 471—*Boyd v. Parker*, 43 Md. 182.

59. Miss.—*Osbourn v. Noble*, 46 Miss. 449.

60. Miss.—*Bibb v. Martin*, 22 Miss. 87.

61. Tex.—*Beckville Continental State Bank v. Reed*, Civ.App., 284 S.W. 265, reversed on other grounds, Com.App., 2 S.W.2d 426. 50 C.J. p 228 note 9.

62. Neb.—*South Omaha Nat. Bank v. Wright*, 63 N.W. 126, 45 Neb. 23. N.Y.—*Ten Eyck v. Holmes*, 3 Sandf. Ch. 428.

63. Mass.—*Eastman v. Foster*, 8 Metc. 19—*Becket First Cong. Soc. v. Snow*, 1 Cush. 510.

cially where the surety has transferred the security;<sup>64</sup> and still others hold that the security will be apportioned pro rata.<sup>65</sup>

*Security given to protect sureties liable for different debts* should be apportioned among the several creditors.<sup>66</sup>

*Where surety mortgaged his own property to the creditor to secure payment*, and afterward took a mortgage of property of the principal as indemnity, the creditors may subject either mortgaged properties to payment of their debt, but cannot appropriate both.<sup>67</sup> In such cases, the surety is entitled to indemnify himself out of the mortgage given him before the creditor can demand the property of the principal in his hands.<sup>68</sup>

*A written promise to indemnify* the surety is not a promise for the benefit of the creditor or obligee on which he may recover.<sup>69</sup>

*Indemnity or security given by a stranger or third person* to the transaction to the surety is not available to the creditor,<sup>70</sup> although such third person is a partner of the principal;<sup>71</sup> and the right

of recourse does not extend to security given by co-sureties to each other<sup>72</sup> or by a surety to a supplemental surety.<sup>73</sup> Likewise, the person who indemnified the surety may not be held liable by the creditor,<sup>74</sup> although if the securities given by a third person or stranger are for payment of the debt they can be reached;<sup>75</sup> and it has been held that a third person who lent money to the principal to deposit with the surety as indemnity cannot retake it.<sup>76</sup>

*Assignment of security to creditor.* Where the surety is willing, he may at any time assign to the creditor any property of the principal in his hands,<sup>77</sup> provided he holds it as indemnity for the debt owing to such creditor.<sup>78</sup> The effect is the same as though a decree in chancery had been made directing such assignment.<sup>79</sup> The substitution of the creditor in place of the surety as to property in the hands of the latter does not give the creditor any rights greater than the surety had.<sup>80</sup> Where a surety assigns a mortgage given him for his indemnity to the creditor, taking from him a discharge from liability, the mortgage is no longer in force.<sup>81</sup>

64. Tenn.—Waller v. Oglesby, 3 S. W. 504, 85 Tenn. 321.

65. Ky.—Moore v. Moberly, 7 B. Mon. 299.

66. Tenn.—Hamilton Nat. Bank of Chattanooga v. Hamilton Trust & Sav. Bank, 3 Tenn.App. 312. 50 C.J. p 228 note 15.

67. Cal.—Van Orden v. Durham, 35 Cal. 186.

68. Cal.—Van Orden v. Durham, supra.

69. Ill.—Seefeldt v. Wilgen, 193 Ill. App. 315.

70. N.Y.—Seward v. Huntington, 94 N.Y. 104.

Pa.—Corpus Juris cited in In re Philadelphia Co. for Guaranteeing Mortgages, 37 Pa.Dist. & Co. 47, 49—Bell v. Taggart, Com.Pl., 55 Dauph.Co. 393.

W.Va.—W. F. Shawver Sons Co. v. Board of Education of Loudon Dist., 186 S.E. 307, 117 W.Va. 531. 50 C.J. p 228 note 19.

*Security for payment of state bonds* U.S.—Well v. Alabama State Land Co., C.C.Ala., 175 F. 252.

71. U.S.—American Surety Co. v. Lawrenceville Cement Co., C.C.Me., 110 F. 717.

72. U.S.—Hampton v. Phipps, S.C., 2 S.Ct. 622, 108 U.S. 260, 27 L.Ed. 719.

73. Ky.—Shackleford v. Stockton, 6 B.Mon. 390.

74. Md.—Dinsmore v. Sachs, 105 A. 524, 133 Md. 434.

N.M.—Hasbrouck v. Carr, 145 P. 133, 19 N.M. 586.

Pa.—Bell v. Taggart, Com.Pl., 55 Dauph.Co. 393.

W.Va.—Corpus Juris cited in W. F. Shawver Sons Co. v. Board of Education of Loudon Dist., 186 S.E. 307, 308, 117 W.Va. 531.

#### In California

(1) It has been held that an undertaking to pay surety all loss which he might sustain or for which he might become liable by having executed bond was not one for benefit of creditor of principal in bond executed by surety on which such creditor might sue.—Taylor v. De Camp, 23 P.2d 61, 132 Cal.App. 640.

(2) It has also been held, however, that the obligee of the surety bond was entitled to sue a third person on his contract to indemnify the surety from all loss sustained on the bond.—Union Oil Co. of California v. Pacific Surety Co., 187 P. 14, 182 Cal. 69.

(3) So, the state was held entitled to recover on indemnity agreement executed to surety company, which had executed bail bond providing that indemnitors would indemnify and save surety harmless from all liability, where surety company became insolvent, and summary judgment against company remained wholly unpaid.—Los Angeles County v. Leach, 59 P.2d 1045, 15 Cal.App.2d 721.

75. N.M.—Hasbrouck v. Carr, 145 P. 133, 19 N.M. 586.

76. Cal.—Trimlett v. Lynch, 187 P. 59, 45 Cal.App. 42.

77. Ala.—Russell v. La Roque, 13 Ala. 149.

50 C.J. p 228 note 26.

#### Proof

Assignment by sureties to creditor of mortgage given to secure debt may be proved by oral testimony.—Arnett v. Salyersville Nat. Bank, 46 S.W.2d 124, 242 Ky. 216.

#### Termination of surety's liability

Where building corporation deposited sum with insurer as collateral for damages arising from issuance of title policy in conformance with corporation's obligation to protect mortgagee against defect in title to realty, and insurer agreed to turn over collateral to mortgagee unless mortgagee should request issuance of policy, mortgagee although he requested issuance of policy, was not precluded from asserting his right to have collateral handed over to him for his own protection, where insurer's liability ceased because of liquidation.—In re Lawyers Title & Guaranty Co., 50 N.Y.S.2d 257, 183 Misc. 294.

78. Tex.—Anderson v. Sims, 4 S.W. 471.

79. Vt.—Paris v. Hulett, 26 Vt. 308.

80. Miss.—Bibb v. Martin, 22 Miss. 87.

Tex.—Anderson v. Sims, 4 S.W. 471.

81. Me.—Sumner v. Bachelder, 30 Me. 35.

## § 283. Property to Which Right Extends

Where the right to recourse to indemnity or security of the surety exists, it may be enforced against whatever property the principal has given the surety, whether it is real property or personalty.

Where the right to recourse to indemnity or security of the surety exists, it may be enforced against whatever property the principal has given the surety, whether it is real property,<sup>82</sup> personalty,<sup>83</sup> money,<sup>84</sup> deeds of trust,<sup>85</sup> liens,<sup>86</sup> bonds,<sup>87</sup> indemnity bonds,<sup>88</sup> promissory notes,<sup>89</sup> or a judgment confessed by the principal as indemnity to the surety.<sup>90</sup> A creditor has no lien on money intrusted by the principal to the surety to pay the debt so as to prevent recovery thereof by the principal on failure of the surety so to apply it.<sup>91</sup>

*Mortgage to surety.* As a general rule, the right of the creditor to avail himself of security furnished the surety extends, in a proper case, to mortgages of land<sup>92</sup> or of chattels.<sup>93</sup> Such right rests according to one view primarily on whether the mortgage was executed for the security of the debt as well as for the ultimate protection of the surety indorser.<sup>94</sup> Where the mortgage is for the security of the debt, the creditor has an interest in it and becomes a cestui que trust.<sup>95</sup> On the other hand, where the security is purely personal for the purpose of indemnifying the surety, a trust is not attached to it for the creditor and there is no action or remedy to which the creditor can be substituted until the surety has been damnified.<sup>96</sup> According to another view, the creditor has an equi-

table claim to the security whether the condition is that the mortgagor shall pay the debt or whether it merely stipulates that he shall indemnify the surety.<sup>97</sup>

Mortgages given by cosureties, each to the other as security to indemnify him against any claim against his proportion assumed, are not in equity securities for the payment of the principal debt which inure to the benefit of creditors on the principle of subrogation.<sup>98</sup> So, where joint indorsers of certain notes enter into an agreement whereby they are to share equally in the payment of any amounts unpaid by the maker and severally execute mortgages to a trustee to secure the performance of this agreement, the holders of the notes are not entitled to be subrogated to the rights of the indorsers in the mortgages.<sup>99</sup> Where, however, a mortgage was given by a surety to his cosurety, as security against the debt of the creditor, the mortgagee has been held in equity to be a trustee for the creditor.<sup>1</sup>

When a creditor has recourse to a mortgage which has been given as security, the creditor is entitled to the priority which such mortgage may have over claims held by other creditors of the principal;<sup>2</sup> nor is the right to the benefit of a mortgage lost by the fact that the surety has foreclosed a mortgage held by him;<sup>3</sup> but, if the creditor has no interest in the proceeds thereof, he cannot vacate a sale under foreclosure by the surety.<sup>4</sup>

**Reason for rule**

Since the design of such a mortgage is merely to protect the sureties, that protection is given by the creditor's discharge, and the condition of the mortgage is fulfilled.—*Sumner v. Bacheider*, *supra*.

82. Miss.—*Carpenter v. Bowen*, 42 Miss. 28.

N.C.—*Matthews v. Joyce*, 85 N.C. 258.

83. Conn.—*Belcher v. Hartford Bank*, 15 Conn. 381.

Md.—*Hilleary v. Hurdle*, 6 Gill 105.

84. Iowa.—*Nourse v. Weitz*, 95 N. W. 261, 120 Iowa 708.

50 C.J. p 229 note 35.

85. N.C.—*Blanton v. Bostic*, 35 S.E. 1035, 126 N.C. 418.

50 C.J. p 229 note 36.

86. Ala.—*Forrest v. Luddington*, 68 Ala. 1.

87. Md.—*Baltimore, etc., R. Co. v. Trimble*, 51 Md. 99.

88. La.—*King v. Harman*, 6 La. 607, 26 Am.D. 485.

89. N.Y.—*Clark v. Ely*, 2 Sandf.Ch. 166.

Tenn.—*Breedlove v. Stump*, 3 Yerg. 257.

90. N.Y.—*Crosby v. Crafts*, 5 Hun 327, affirmed 69 N.Y. 607.

Pa.—*Hincken v. McGlathery*, 8 Pa. Co. 267.

50 C.J. p 229 note 43.

91. Ky.—*Spaulding v. Henshaw*, 80 Ky. 55, 44 Am.R. 461.

92. Ala.—*Troy v. Smith*, 33 Ala. 469.

Ky.—*Slack v. Winburn*, 136 S.W.2d 579, 281 Ky. 464—*Fields v. Letcher State Bank*, 54 S.W.2d 910, 246 Ky. 229—*Arnett v. Salyersville Nat. Bank*, 46 S.W.2d 124, 242 Ky. 216.

50 C.J. p 229 note 37.

**Unaccrued right of surety**

Banks were held entitled to enforce liens of mortgages indemnifying sureties on mortgagor's notes to banks against loss, although sureties were not entitled to such relief before paying debts.—*Fields v. Letcher State Bank*, 76 S.W.2d 908, 256 Ky. 592.

93. Ala.—*Troy v. Smith*, 33 Ala. 469. 50 C.J. p 229 note 38.

94. Ill.—*Chambers v. Prewitt*, 50 N. E. 145, 172 Ill. 615.

41 C.J. p 377 note 24.

95. Vt.—*Greene v. McDonald*, 40 A. 1085, 70 Vt. 372.

41 C.J. p 377 note 25, p 462 note 27.

96. Ill.—*Chambers v. Prewitt*, 50 N. E. 145, 172 Ill. 615.

41 C.J. p 377 note 26.

97. U.S.—*Swift v. Kortrecht*, Tenn., 112 F. 709, 50 C.C.A. 429.

41 C.J. p 377 note 27.

98. U.S.—*Hampton v. Phipps*, S.Ct., 2 S.Ct. 622, 108 U.S. 260, 27 L.Ed. 719.

99. N.Y.—*Seward v. Huntington*, 94 N.Y. 104.

1. U.S.—*U. S. v. Sturges*, C.C.N.Y., 27 F.Cas.No.16,414, 1 Paine 525.

2. U.S.—*Swift v. Kortrecht*, Tenn., 112 F. 709, 50 C.C.A. 429.

3. Mass.—*Eastman v. Foster*, 8 Metc. 19.

50 C.J. p 229 note 45.

4. Ark.—*Miller v. Carnall*, 22 Ark. 274.

## § 284. Enforcement and Loss of Right

The creditor need not take any steps to enforce the debt or first obtain a judgment against the principal in order to avail himself of the right of subrogation; but, if the surety could not have enforced the security except on the happening of a contingency, the creditor cannot enforce it unless the contingency arises.

In order to avail himself of the right of subrogation, it is not necessary that the creditor take any steps to enforce the debt;<sup>5</sup> nor is it necessary that he have first obtained a judgment against the principal.<sup>6</sup> Where the creditor has a right of recourse to securities in the hands of a surety, his right is not lost by the fact that he cannot enforce any personal liability by reason of the insolvency of either or both principal and surety,<sup>7</sup> or because the surety has been discharged in bankruptcy,<sup>8</sup> or although, the debt being a joint one, on the death of the surety his estate cannot be held;<sup>9</sup> and although ordinarily a discharge of the principal by the creditor will release the surety, as discussed supra § 223, it has been held that such a release will not deprive the creditor of his right of recourse to securities in the hands of the surety.<sup>10</sup> An extension of time will not bar recourse to the security, although the personal liability cannot be enforced.<sup>11</sup> Under some circumstances, however, the creditor's right of recourse to the security may be waived by action taken by him.<sup>12</sup>

The creditor cannot enforce directly for his benefit a trust created for the benefit of the surety;<sup>13</sup> but the proper procedure is to file a bill asking for subrogation; and, as a part of the relief granted, the property can then be applied in payment of the debt.<sup>14</sup> Should the creditor, for any reason, fail in establishing his rights to subrogation, he is not deprived from afterward attaching any property of the principal in the hands of the surety.<sup>15</sup> Where the surety could not have enforced the security except on the happening of a contingency, the creditor cannot enforce it unless the contingency arises.<sup>16</sup>

## § 285. Transfer or Release by Surety

Where the creditor has a right of recourse to property of the principal in the hands of the surety, his rights are superior to claims of others against the surety and cannot be altered or impaired by the surety; but, where no right has yet accrued to the creditor, the surety may in good faith release the security.

Where the creditor has a right of recourse to property of the principal in the hands of the surety, his rights are superior to claims of others against the surety,<sup>17</sup> and cannot be altered or impaired by the surety;<sup>18</sup> and the surety may not divert the security to other objects.<sup>19</sup> The equitable lien of the creditor attaches as against an assignee<sup>20</sup> or a pledgee,<sup>21</sup> although it has been held

5. Ala.—Saffold v. Wade, 51 Ala. 214.

Mich.—Union Nat. Bank v. Rich, 64 N.W. 339, 106 Mich. 319.

6. Tenn.—Ray v. Proffet, 15 Lea 517—Breedlove v. Stump, 3 Yerg. 257.

7. Va.—New Martinsville Bank v. Hart, 137 S.E. 222, 103 W.Va. 290.

50 C.J. p 229 note 50.

### Insolvency of surety

#### (1) In general.

Pa.—Wright v. Harrisburg Trust Co., 43 Pa.Dist. & Co. 47, 51 Dauph. Co. 213—Wright v. Harrisburg Trust Co., Com.Pl., 51 Dauph.Co. 413.

Tenn.—Lewis v. Koehn, 5 Tenn.App. 530.

(2) Where building corporation which was obligated to protect mortgagee against impairment of security for mortgage debt arising out of encroachment of building on public streets, procured policy covering such defect in title, but was required to deposit a sum with insurer as collateral for damages which might arise from issuance of policy and insurer's liability ceased because of its liquidation, mortgagee and not building corporation was entitled to collateral as long as collateral was necessary to protect mortgagee's position, notwithstanding mortgagee was not a party to deposit agreement.—In re Lawyers Title & Guaranty Co., 50 N.Y.S.2d 257, 183 Misc. 294.

8. Ky.—Magoffin v. Boyle Nat. Bank, 69 S.W. 702, 24 Ky.L. 585.

9. N.Y.—Crosby v. Crafts, 5 Hun 327, affirmed 69 N.Y. 607.

10. Wis.—Jones v. Ward, 36 N.W. 711, 71 Wis. 152.

11. Ky.—Helm v. Young, 9 B.Mon. 394.

N.Y.—Newsam v. Finch, 25 Barb. 175.

12. U.S.—Ex parte Morris, D.C. Mass., 17 F.Cas.No.9,823, 2 Lowell 424.

Mass.—New Bedford Sav. Inst. v. Fairhaven Bank, 9 Allen 175.

13. Mich.—Union Nat. Bank v. Rich, 64 N.W. 339, 106 Mich. 319.

14. Ky.—U. S. Bank v. Stewart, 4 Dana 27.

### Amount of recovery

Tex.—Lloyds America v. El Paso-Hudspeth Counties Road Dist. of Texas, Civ.App., 107 S.W.2d 1008, error refused.

In action against principal by surety to compel payment, creditor may be subrogated on his own or surety's application to rights of surety in security received from

principal.—Alexander v. West, 44 S.W.2d 518, 241 Ky. 541.

### Parties

In suit against surety on bond given to secure deposits of road district with bank for interest from date on which bank closed to date of foreclosure of government bonds pledged to indemnify surety on theory that such pledge inured to benefit of district, insolvent bank and its receiver were not necessary parties.—Lloyds America v. El Paso-Hudspeth Counties Road Dist. of Texas, Tex.Civ. App., 107 S.W.2d 1008, error refused.

15. Ind.—Joseph v. People's Sav. Bank, 31 N.E. 524, 132 Ind. 39.

16. Miss.—Bush v. Stamps, 26 Miss. 463.

50 C.J. p 230 note 60.

17. N.Y.—Vail v. Foster, 4 N.Y. 312.

18. Ark.—Dyer v. Jacoway, 88 S.W. 901, 76 Ark. 171, 6 Ann.Cas. 393.

50 C.J. p 230 note 63.

19. N.Y.—Haggarty v. Pittman, 1 Paige 298, 19 Am.D. 434.

20. Ala.—Martin v. Decatur Branch Bank, 31 Ala. 115.

50 C.J. p 230 note 65.

21. Tenn.—McRady v. Thomas, 16 Lea 173.



otherwise when the assignee had no notice, express or constructive, of the creditor's equity.<sup>22</sup> If the surety unjustly releases the security, the right of the creditor therein is not defeated.<sup>23</sup> Where a surety receives a mortgage as security, and afterward acquires title to the property, the right of the creditor is not affected.<sup>24</sup> Where, however,

no right has yet accrued to the creditor, the surety may in good faith release the security.<sup>25</sup> Thus, if, before the creditor has taken steps to subject the security to his claim, the surety, in good faith, releases it to the principal, the creditor may not complain.<sup>26</sup>

## VIII. RIGHTS AND REMEDIES OF SURETY

### A. AS TO CREDITOR OR OBLIGEE

#### § 286. In General

- a. General rules
- b. Performance or completion of contract by surety

##### a. General Rules

A surety for the performance of a contract has a material interest in the rights and remedies to which the creditor is entitled thereunder. Apart from statutory remedies, a surety's proper remedy at law to protect his rights ordinarily is to pay the debt and pursue the principal for reimbursement.

A surety for the performance of a contract has a material interest in the rights and remedies to which the creditor is entitled under the contract;<sup>27</sup> but such a surety acquires an interest in an earlier contract between the principal and obligee, to which the surety is not a party, only where it touches on the liability of the surety;<sup>28</sup> and only where such liability is touched on in connection with something material can the surety avail himself of a variance between the contract and the bond as a defense to an action on the bond.<sup>29</sup>

A surety's rights are zealously guarded both at law and in equity.<sup>30</sup> The rights which an accommodation surety has under the law and by which his burdens are lightened are not to be ousted by the mere implications of his contract of suretyship.<sup>31</sup>

A surety has the rights accorded him by statute.<sup>32</sup>

As to the protection of his rights, the surety's proper remedy at law ordinarily is to pay the debt and pursue the principal for reimbursement,<sup>33</sup> or, where a remedy is provided by statute, to proceed under the statute.<sup>34</sup> In equity, however, his remedy is not necessarily confined, as at law, to obtaining indemnity after payment of the debt,<sup>35</sup> and, where protection can be afforded him without substantial injury to the creditor, a court of equity may award that relief without the debt being first paid by the surety.<sup>36</sup>

Various particular rights of the surety as against the creditor or obligee have been treated elsewhere in this title, such as his right to terminate the

22. Pa.—Appeal of Mifflin County Nat. Bank, 98 Pa. 150.

23. N.C.—Blanton v. Bostic, 35 S.E. 1035, 126 N.C. 418.  
50 C.J. p 230 note 68.

24. Neb.—Oak Creek Valley Bank v. Helmer, 80 N.W. 891, 59 Neb. 176.

25. Tenn.—Walker v. Oglesby, 3 S. W. 504, 85 Tenn. 321.  
50 C.J. p 230 note 71.

26. Ky.—Tilford v. James, 7 B.Mon. 336.

27. Ky.—Hardcastle v. Rector, 2 Ky.L. 209, 11 Ky.Op. 4.

**Profits after completion of building**  
Surety on bond guaranteeing completion of buildings was not entitled, where obligee purchased uncompleted buildings, to share in profits realized following completion.—Mechanics' Trust Co. v. Fidelity & Casualty Co. of New York, 156 A. 146, 304 Pa. 526.

**Surety held entitled to note**  
N.J.—Edmund D. Cook, Inc., v. Com-

mercial Casualty Ins. Co., 190 A. 99, 15 N.J.Misc. 256, affirmed 190 A. 102, 117 N.J.Law 440.

**Participation in fund created by surety for payment**

Pa.—Croft v. Mausoleum Bldg. Corp., Com.Pl., 9 Fay.L.J. 116.

28. Conn.—New Haven v. National Steam Economizer Co., 65 A. 959, 79 Conn. 482.

Pa.—Young v. American Bonding Co., 77 A. 623, 228 Pa. 373.

29. Conn.—New Haven v. National Steam Economizer Co., 65 A. 959, 79 Conn. 482.

Pa.—Young v. American Bonding Co., 77 A. 623, 228 Pa. 373.

30. U.S.—Magee v. Manhattan Life Ins. Co., Ala., 92 U.S. 93, 23 L.Ed. 699.

N.Y.—First Citizens Bank & Trust Co. of Utica v. Sherman's Estate, 294 N.Y.S. 131, 250 App.Div. 339.

31. Miss.—Warren v. W. T. Raleigh Co., 165 So. 436, 174 Miss. 603.

32. Cal.—Murphy v. Hellman Commercial Trust & Savings Bank, 185 P. 485, 63 Cal.App. 579.

33. U.S.—Pinckney v. Wylie, C.C.A. Tex., 86 F.2d 541.

Tex.—Dansby v. Stroud, Civ.App., 48 S.W.2d 1018, error refused.  
50 C.J. p 230 note 82.

**Reimbursement against principal generally see infra § 307.**

34. La.—Cougot v. Fournier, 4 Rob. 420.

**Statutory remedies see infra §§ 336-338.**

35. N.J.—Greenberg v. Leff, 146 A. 196, 104 N.J.Eq. 502.

36. Idaho.—Corpus Juris cited in Saunders v. Saunders, 291 P. 1069, 49 Idaho 733, 71 A.L.R. 350.

N.J.—Greenberg v. Leff, 146 A. 196, 104 N.J.Ch. 502.

**Requiring recourse in equity to principal or security generally see infra §§ 301-305.**

suretyship contract, discussed supra § 129, or to rescind or cancel it for fraud, supra § 75, or to be discharged from liability thereunder, supra §§ 148-160, or to set up other defenses against his liability under the contract, supra §§ 254-260. Subrogation of a surety to the rights of the creditor is discussed in the C.J.S. title Subrogation §§ 47-56, also 60 C.J. p 740 note 5-p 770 note 98; the rights of a surety on a highway contractor's bond are discussed in Highways § 210 c (4).

**Assertion of rights after judgment.** One who sustains the relationship of surety on a debt may assert his rights as such even after judgment has been entered against him on such debt.<sup>37</sup>

**Right in debt of creditor to principal.** A surety has an interest in the sum owed by a creditor to a bankrupt principal, which interest the surety may assert in his own right, and not merely through the principal.<sup>38</sup>

**Right in property pledged or note.** A surety has not, by virtue of the contract of suretyship alone, any right, title, or interest in property which his principal has pledged to a creditor as security for a debt.<sup>39</sup> A surety on a note has no right to demand the delivery thereof to him on its being paid by the principal debtor.<sup>40</sup>

**Lien on funds derived from contract covered.**

A corporate surety company for hire, surety on a construction bond, ordinarily does not have an equitable lien on the funds derived from the contract covered by such bond.<sup>41</sup>

**A surety securing the payment of rent** on the lessee's default has no greater rights in the premises than the lessee,<sup>42</sup> and has no right to demand, as a condition to the discharge of the obligation assumed by him, that he be permitted to sublet the premises free from the restrictions contained in the lease.<sup>43</sup>

#### b. Performance or Completion of Contract by Surety

A surety for the performance of a contract may, on the principal's default, perform the contract himself; a surety assuming a defaulted building contract is entitled to the benefits thereof from the time of the default.

As a general rule, a surety for the performance of a contract may, on default of his principal, perform the contract himself.<sup>44</sup> So, where the bond so provides, the surety may, on default by the builder, elect to complete the contract and to stand on the terms of the bond<sup>45</sup> or voluntarily to pay any damages resulting from the builder's default;<sup>46</sup> and where he thus assumes the defaulted contract he is entitled to the benefits of

37. Ohio.—Gholson v. Savin, 31 N. E.2d 858, 137 Ohio St. 551, 139 A. L.R. 75.

38. U.S.—Glades County, Fla., v. Detroit Fidelity & Surety Co., C.C. A.Fla., 57 F.2d 449.

Interest in fund as pledged security U.S.—Glades County, Fla., v. Detroit Fidelity & Surety Co., supra.

39. Ga.—Conley v. Kelley, 160 S.E. 532, 43 Ga.App. 822.

40. Iowa.—Mitchell v. Burgher, 249 N.W. 357, 216 Iowa 869.

41. Okl.—N. O. Nelson Mfg. Co. v. McDougal, 43 P.2d 399, 171 Okl. 477.

42. Tex.—Silbert v. Keton, Civ.App., 29 S.W.2d 824, error refused. Bonds to secure rent generally see Landlord and Tenant § 475.

43. Tex.—Silbert v. Keton, supra.

44. Ark.—Coddington v. Brown, 185 S.W. 809, 123 Ark. 486. 50 C.J. p 230 note 79.

**Performance as not by principal**

Performance of a building contract by the surety of the contractor after abandonment by the latter is not in law a performance by the principal, and the surety occupies a new relation to the owner, exactly as though it had been a stranger to

the original contract.—Winter v. Hazen-Latimer Co., 42 App.D.C. 469.

45. Colo.—Howard v. Fisher, 283 P. 1042, 86 Colo. 493.

Tex.—Southern Surety Co. v. Weaver Bros., Com.App., 56 S.W.2d 634 —Corpus Juris quoted in W. H. Putegnat Co. v. Fidelity & Deposit Co. of Maryland, Com.App., 29 S. W.2d 1004, 1006. 9 C.J. p 857 note 89.

**Reasonable time for exercise of option**

Ga.—Thomason v. Keeney, 62 S.E. 470, 4 Ga.App. 721.

**Building contract and contractor's bond sued on together**

Neb.—First Nat. Bank v. School District No. 1, 110 N.W. 349, 77 Neb. 570.

**Assumption of dominion over enterprise**

Under terms of bond, surety, on contractor's abandonment, had right to assume dominion over enterprise and demand possession and control over building in process of construction.—W. H. Putegnat Co. v. Fidelity & Deposit Co. of Maryland, Tex.Com. App., 29 S.W.2d 1004.

**Implication as to compliance by surety**

Where defaulting building contractor's surety completed contract

and received balance of contract price, law implied surety's assertion of past compliance with contract terms or promise so to comply.—W. H. Putegnat Co. v. Fidelity & Deposit Co. of Maryland, supra.

**Waiver of right; terms of special contract**

Where a bond for the performance of a building contract reserved to the surety the right to complete the building in case of an abandonment by the contractor, and the surety, after abandonment, waived such right on condition that the contract for completing the building should be let to the lowest of three bidders who should give a bond for faithful performance, and the building was completed under a special contract let to the lowest of three bidders, the provision in the original contract for auditing the expense of completion did not apply to the special contract.—Y. M. C. A. of North Yakima v. Gibson, 108 P. 766, 58 Wash. 307.

46. Colo.—Howard v. Fisher, 283 P. 1042, 86 Colo. 493.

Idaho.—American Surety Co. v. State Univ., 81 P. 604, 11 Idaho 183.

Tex.—Corpus Juris quoted in W. H. Putegnat Co. v. Fidelity & Deposit Co. of Maryland, Com.App., 29 S. W.2d 1004, 1006.

the contract from the time of the builder's default,<sup>47</sup> together with any sum which may be due the builder at the time the default is declared,<sup>48</sup> less deductions for defects in the work and material furnished by the builder.<sup>49</sup> As discussed supra § 90, the surety also becomes subject to all of the builder's liabilities. The completion of the building contract by a defaulting contractor's surety effects an assignment of the contract to the surety.<sup>50</sup> The surety is entitled to no lien for his work where the contractor is not entitled to one by reason of a failure to record the contract.<sup>51</sup>

Where the work is carried out by a person liable to indemnify the surety of a subcontractor after the latter's default, the contractor's bond is not discharged.<sup>52</sup>

## § 287. Recourse to, and Exhaustion of, Remedy against Principal

- a. At law
- b. In equity
- c. Under statutes

### a. At Law

At law, unless permitted by statute, a surety generally cannot require the creditor, before proceeding against the surety, to resort to, and exhaust his remedies against, the principal.

There is a direct conflict between the rules existing at common law and in equity as to the right of a surety to require the creditor or obligee to proceed first against the principal debtor or the security furnished by the principal.<sup>53</sup> In accordance with the rule that, in the absence of statute or agreement otherwise, a surety is primarily liable, discussed supra § 87, and with the rule that his proper remedy is to pay the debt and pursue the principal for reimbursement, discussed supra § 286 a, the surety cannot at law, unless permitted by statute, and in the absence of any agreement limiting the application of the security,<sup>54</sup> require the creditor or obligee, before proceeding against the surety, to resort to, and exhaust his remedies against, the principal,<sup>55</sup> or exhaust his remedies

47. Tex.—Southern Surety Co. v. Weaver Bros., Com.App., 56 S.W.2d 634—Corpus Juris quoted in W. H. Putegnat Co. v. Fidelity & Deposit Co. of Maryland, Com.App., 29 S.W.2d 1004, 1006.

9 C.J. p 857 note 91.

Suit for performance of contract see infra § 299 a.

#### Right to retained percentage

Ky.—Illinois Surety Co. v. Mitchell, 197 S.W. 844, 177 Ky. 367.

#### Payments to contractor in violation of contract

A surety on a building contract, which completed the work on the contractor's failure, was entitled to recover from the owner of the building payments made by him to the contractor in violation of the contract.—Fidelity & Deposit Co. v. Merchants' & Farmers' Bank, 179 S. W. 1019, 120 Ark. 519.

48. Tex.—Corpus Juris quoted in W. H. Putegnat Co. v. Fidelity & Deposit Co. of Maryland, Com. App., 29 S.W.2d 1004, 1006.

9 C.J. p 857 note 91.

#### Contract price less amount paid contractor before abandonment

N.Y.—Waterford Board of Education v. First Nat. Bank, 24 N.Y.S. 392, 70 Hun 526.

Surety held entitled to progress payment if one, in fact, was earned.—Seglin Const. Co. v. Columbia Casualty Co., 264 N.Y.S. 144, 239 App. Div. 803.

49. Idaho.—American Bonding Co. v. State University, 81 P. 604, 11 Idaho 163.

50. Tex.—W. H. Putegnat Co. v. Fidelity & Deposit Co. of Maryland, Com.App., 29 S.W.2d 1004—Southern Surety Co. v. Weaver Bros., Civ.App., 35 S.W.2d 255, affirmed, Com.App., 56 S.W.2d 634.

51. Cal.—Watterson v. Owens River Canal Co., 143 P. 90, 25 Cal.App. 247.

Tex.—Corpus Juris quoted in W. H. Putegnat Co. v. Fidelity & Deposit Co. of Maryland, Com.App., 29 S. W.2d 1004.

52. Pa.—Philadelphia v. Harry C. Nichols Co., 63 A. 886, 214 Pa. 265.

53. N.D.—Bingham v. Mears, 61 N. W. 808, 4 N.D. 437, 27 L.R.A. 257. 50 C.J. p 231 note 88.

Conditions precedent to action by creditor against surety see supra §§ 251-253.

Execution first against property of principal see supra § 279.

Failure to proceed against principal after notice by surety as ground for discharge see supra §§ 214-222.

Neglect to act or proceed against principal as affecting creditor's right to pursue surety see supra §§ 208-222.

Resort to, and exhaustion of, other securities or remedies as condition precedent to action on appeal bond see Appeal and Error § 2079.

54. Mass.—Killoren v. Hernan, 20 N.E.2d 946, 303 Mass. 93.

55. Cal.—State Athletic Commission v. Massachusetts Bonding & Ins. Co., 117 P.2d 75, 46 Cal.App.2d 823.

Md.—Allied Mortg. Cos. v. Kolker, 23 A.2d 32, 180 Md. 126.

Mass.—Killoren v. Hernan, 20 N.E. 2d 946, 303 Mass. 93.

N.J.—Keer v. New Jersey Title Guarantee & Trust Co., 170 A. 887, 115 N.J.Eq. 388.

Pa.—Read v. Pennsylvania Co. for Insurance on Lives and Granting Annuities, 12 A.2d 925, 338 Pa. 389.

Tex.—Corpus Juris cited in Marine Banking & Trust Co. v. Federal Trust Co., Civ.App., 64 S.W.2d 409. 50 C.J. p 231 note 92.

#### Parties bound unconditionally and in solido

On the accrual of a cause of action against a principal and surety who have bound themselves unconditionally and in solido, the surety is without right in law to force the creditor to exhaust all of his remedies against the principal before suing the surety.—Brock v. First State Bank & Trust Co., 175 So. 569, 187 La. 766.

#### Effect of contractual provision

Since the text rule is true with or without a provision to that effect in the contract, the creditor acquires nothing by such a provision and the surety surrenders nothing.—Overstreet v. W. T. Rawleigh Co., 43 S.E. 2d 774, 75 Ga.App. 483.

#### Pursuit of remedy given by bond

Fact that one suing on bond has not chosen to pursue principal first is no answer or defense if he is following remedy given by bond.—Downer v. U. S. Fidelity & Guaranty Co. of Maryland, C.C.A.Pa., 46 F.2d 733.

against his receiver,<sup>56</sup> or his estate, in case of his death,<sup>57</sup> particularly where both principal and surety are equally bound,<sup>58</sup> or the surety's liability is on a contract and absolute promise, depending on no such condition expressed in the contract or implied by law.<sup>59</sup>

Where a surety dies, the cause of action survives against his personal representatives, as discussed in Abatement and Revival § 137 a, and the creditor may proceed against such representatives without exhausting his remedies against the principal and living cosurety.<sup>60</sup>

*Discussion*, in the civil law, cannot be demanded by the surety before judgment, but only under execution;<sup>61</sup> and a plea of discussion need not be examined on its merits if it does not comply with statutory requirements.<sup>62</sup>

### b. In Equity

A court of equity, before the surety has paid the debt, and for good cause shown, may, at the instance of the surety and for his protection, require the creditor or obligee first to proceed against the principal debtor.

A court of equity, before the surety has paid the debt, and for good cause shown, may, at the instance of the surety and for his protection, require the creditor or obligee first to proceed against the principal debtor,<sup>63</sup> or against his estate, if he is deceased,<sup>64</sup> unless an adequate remedy at law is

provided by statute, as discussed *infra* subdivision c of this section. However, peculiar circumstances rendering such interference necessary and proper must exist,<sup>65</sup> and ordinarily the character of complainant as surety must appear on the face of the instrument.<sup>66</sup> It has been held that this equity assistance cannot be invoked where it appears that the principal is insolvent<sup>67</sup> or before the debt is due.<sup>68</sup>

On the other hand, it has also been held that a court of chancery will not compel a creditor to proceed against the principal debtor before he resorts to the surety,<sup>69</sup> and that a surety is not entitled in equity to stay the proceedings on an execution against himself until the property of the principal is exhausted.<sup>70</sup>

Where all the parties are before the court and their liabilities ascertained, a decree may be made in the first instance against the principal, where this can be done without delay or injury to the creditor;<sup>71</sup> but it has been doubted whether a creditor with the surety's money or its equivalent in his hands will be compelled, without resorting thereto, first to exhaust his remedies against the principal.<sup>72</sup>

*Indemnity to creditor.* Before the surety is entitled to such assistance from a court of equity, he must first offer to indemnify the creditor in his

### Judgment requiring credit

Judgment creditor must first exhaust assets of debtor, where judgment against surety on bond releasing attachment required judgment creditor to credit amount in court resulting from judicial sale.—*Detroit Fidelity & Surety Co. v. Gilliam*, 34 S.W.2d 971, 237 Ky. 425.

56. La.—*French Market Ice Mfg. Co. v. Landauer*, 4 La.A., Orleans, 80.

57. Tex.—*Corpus Juris* cited in *Marine Banking & Trust Co. v. Federal Trust Co.*, Civ.App., 64 S.W.2d 409.  
50 C.J. p 231 note 94.

58. Md.—*Garey v. Hignutt*, 32 Md. 552.  
Mich.—*People v. Butler*, 42 N.W. 273, 74 Mich. 643.

59. Mo.—*Carr v. Card*, 34 Mo. 513.  
N.Y.—*Johnson v. Ackerman*, 3 Daly 430.

60. Wash.—*Olson v. Saldovia Salmon Co.*, 154 P. 1107, 89 Wash. 547.

61. La.—*U. S. ex rel. Landry v. National Surety Co. of New York*, 187 So. 9, 191 La. 1017.

"Discussion:"

Defined see 27 C.J.S. p 141 note 55 et seq.

Generally see *supra* § 279.

62. La.—*Thompson-Ritchie Grocery Co. v. Cary*, 135 So. 707, 17 La. App. 270.

63. Cal.—*State Athletic Commission v. Massachusetts Bonding & Ins. Co.*, 117 P.2d 75, 46 Cal.App. 2d 823.

N.J.—*Keer v. New Jersey Title Guarantee & Trust Co.*, 170 A. 887, 115 N.J.Eq. 388.  
50 C.J. p 231 note 99.

"As against the principal, the surety is only bound to pay what the principal cannot."—*Nutz v. Murray-Nutz, Inc.*, 156 A. 668 670, 109 N.J. Eq. 95—*Delaware, etc., R. Co. v. Oxford Iron Co.*, 38 N.J.Eq. 151, 153.

Prior exhaustion of legal remedies against debtor required.—*Hamilton Nat. Bank of Chattanooga v. Hamilton Trust & Sav. Bank*, 3 Tenn.App. 312.

64. S.C.—*Pride v. Boyce*, 14 S.C.Eq. 275, 33 Am.D. 78.  
Va.—*Faxton v. Rich*, 7 S.E. 531, 85 Va. 378, 1 L.R.A. 639.

65. Wis.—*Stein v. Benedict*, 58 N.W. 891, 83 Wis. 603.  
50 C.J. p 231 note 99, p 232 note 8.

Right to equitable relief held not shown

Pa.—*Stewart v. National Surety Co.*, 17 Pa.Dist. & Co. 463.

66. U.S.—*In re Babcock*, C.C.Mass., 2 F.Cas.No.696, 3 Story 393.  
Tex.—*Terrel v. Townsend*, 6 Tex. 149.

67. Ala.—*Alabama Bank & Trust Co. v. Garner*, 142 So. 568, 225 Ala. 269.  
50 C.J. p 232 note 5.

68. Wis.—*Hinckley v. Pfister*, 53 N.W. 21, 83 Wis. 64.

69. Ala.—*Skinner v. Barney*, 19 Ala. 698.

### Surety on replevin bond

It has been held in equity that in the absence of statute prescribing a different procedure a surety, against whom judgment on a replevin bond has been rendered cannot compel the creditor first to proceed against the property of his principal even though the principal has sufficient property to satisfy the judgment.—*Walker v. Files*, 127 S.W. 739, 94 Ark. 453.

70. Tenn.—*Winham v. Crutcher*, 2 Tenn.Ch. 535.

71. Va.—*Southall v. Farish*, 7 S.E. 534, 85 Va. 403, 1 L.R.A. 641.

72. Va.—*Southall v. Farish*, *supra*.

proceedings against the principal<sup>73</sup> and to pay whatever the principal fails to pay;<sup>74</sup> or he may be ordered by the court to give such indemnity.<sup>75</sup>

### c. Under Statutes

In situations coming within statutes so providing, a surety may require the creditor, before proceeding against him, to proceed first against the principal, or to proceed against the principal at the same time.

In some jurisdictions the rights and remedies of the surety as against the creditor, with respect to prior recourse to, and exhaustion of, remedy against the principal, and as embodied in statutes, are, in many respects, the same rights as were enforced by equity prior to the statutes,<sup>76</sup> and are based on the implied obligation of the principal to save the surety harmless.<sup>77</sup> As in equity, as discussed supra subdivision b of this section, the surety, in cases within the statute, may require the creditor, before proceeding against him, to proceed first against the principal debtor,<sup>78</sup> or to proceed against the principal at the same time,<sup>79</sup> or to pursue any other remedy in his power.<sup>80</sup> Where such a statute is of a special nature, the remedy applies only in case of such sureties as come within the terms of the statute.<sup>81</sup> Where such a statutory remedy is applicable, the surety cannot sue in equity to compel the creditor to proceed against the principal, since an adequate remedy at law is afforded by the statute.<sup>82</sup>

*Provision for direct action against surety.* The rule that a judgment cannot be rendered against the surety until it has been judicially determined that the person making the claim has a valid one

against the principal and has taken the necessary steps to enforce the payment thereof has no application to a statutory bond where the legislature has provided that a direct action may be brought against the surety.<sup>83</sup>

*Adjustment of rights.* A statute, permitting a surety, in an action against him and his principal, to have the rights between them adjusted without affecting the proceedings of plaintiff is not a limitation of the surety's rights as they existed before,<sup>84</sup> but is an additional and more complete remedy than that which existed under the common law.<sup>85</sup> Such statutory remedy is not available to an alleged surety in a suit by a creditor as to whom he is in fact a principal obligor.<sup>86</sup>

## § 288. Recourse to, and Exhaustion of, Other Property or Securities

- a. At law
- b. In equity
- c. Under statutes

### a. At Law

Except where the suretyship contract provides otherwise, at common law a creditor ordinarily cannot be required, before proceeding against the surety, to resort to and exhaust collateral security held by him for payment of the indebtedness, or to proceed against other property of the principal which is subject to the satisfaction of the debt, or to avail himself of other means of enforcement; nor can he be compelled to realize first on any particular one of several securities.

At common law the creditor or obligee ordinarily cannot be required, before proceeding against the surety, to resort to and exhaust collateral security

73. U.S.—In re Babcock, C.C.Mass., 2 F.Cas.No.696, 3 Story 393.

50 C.J. p 232 note 9.

Recourse to, and exhaustion of, other property or securities in equity see infra § 288 b.

74. U.S.—In re Babcock, supra.

75. Cal.—Dane v. Corduan, 24 Cal. 157, 85 Am.D. 53.

50 C.J. p 232 note 11.

76. N.D.—Storing v. Stutsman, 210 N.W. 653, 54 N.D. 701.

50 C.J. p 232 note 13.

"These code sections are the enactment of rules developed in equity to give relief from the common law doctrine which permitted the creditor to enforce remedies against the surety without reference to his rights against the principal."—State Athletic Commission v. Massachusetts Bonding & Ins. Co., 117 P.2d 75, 79, 46 Cal.App.2d 823.

77. N.D.—Storing v. Stutsman, 210 N.W. 653, 54 N.D. 701.

Implied contract by principal to re-

imburse or indemnify surety see infra § 316.

Rights and remedies of surety against principal see infra §§ 300-338.

78. Ind.—Barnes v. Sammons, 27 N. E. 747, 128 Ind. 596.

50 C.J. p 232 note 16.

79. Tex.—Ritter v. Hamilton, 4 Tex. 325.

50 C.J. p 232 note 17.

80. N.D.—Storing v. Stutsman, 210 N.W. 653, 54 N.D. 701.

81. La.—Macready v. Schenck, 6 So. 517, 41 La.Ann. 456.

50 C.J. p 232 note 19.

### Execution of joint judgment

Statute requiring, in action against principal and surety, execution to be levied first on principal's property in county, contemplates joint judgment enforceable by execution against both principal and surety; in action on note not secured by lien, against administrator and comaker, a surety, judgment directing postponement of execution

against surety until estate should be fully administered and sums realized therefrom received and credited on the judgment was held erroneous, since, as against administrator, judgment is not capable of execution, but only in due course of administration.—Marine Banking & Trust Co. v. Federal Trust Co., Tex. Civ.App., 64 S.W.2d 411—Marine Banking & Trust Co. v. Federal Trust Co., Tex.Civ.App., 64 S.W.2d 409.

82. Ind.—Barnes v. Sammons, 27 N. E. 747, 128 Ind. 596.

83. La.—La Rose v. Alliance Casualty Co., App., 150 So. 455.

84. Wash.—Denny v. Sayward, 39 P. 119, 10 Wash. 422, error dismissed 15 S.Ct. 777, 158 U.S. 180, 39 L.Ed. 941.

85. Wash.—Denny v. Sayward, supra.

86. Wash.—Wenatchee First Nat. Bank v. Fowler, 102 P. 1038, 54 Wash. 65.

50 C.J. p 232 note 23.

held by him for the payment of the indebtedness,<sup>87</sup> especially where the securities are claimed by other persons, who are not in court,<sup>88</sup> nor can he be required to realize first on any particular one of several securities;<sup>89</sup> and the fact that the creditor holds collateral security cannot be asserted by the surety as a defense to an action against him by the creditor on the obligation.<sup>90</sup> If the creditor or obligee has received collateral security from the principal, without any stipulation that it is to be held for any particular debt,<sup>91</sup> or holds any property of the principal,<sup>92</sup> the creditor or obligee can apply it to debts for which the surety is not liable. In accordance with these rules, the creditor cannot be compelled first to enforce a mortgage which he holds on the principal's property as security for the indebtedness.<sup>93</sup>

The creditor, however, may be required to proceed against the collateral first, where the suretyship contract or undertaking provides for such application of the funds or securities,<sup>94</sup> or where,

under the terms of the bond, a foreclosure of the security given by the principal is a condition precedent to a right of recovery against the surety;<sup>95</sup> and the surety can control the application of payments where payment is made from the proceeds of collateral given to secure the particular debt guaranteed by the surety.<sup>96</sup>

*Other property or means of enforcement.* The creditor cannot be required to proceed against and apply other property of the principal which is subject to the satisfaction of the indebtedness<sup>97</sup> or to avail himself of other means of enforcement<sup>98</sup> before proceeding against the surety, except that where it is stipulated that the surety shall be liable for a deficiency only after the application, on the indebtedness, of security held by the creditor, he cannot be held liable if the conditions have not been fulfilled.<sup>99</sup> For example, a surety cannot compel the creditor or obligee to attach the property of the principal before proceeding against the surety,<sup>1</sup> especially where no legal grounds for at-

87. Pa.—Read v. Pennsylvania Co. for Insurance on Lives and Granting Annuities, 12 A.2d 925, 338 Pa. 389—Quaker City Nat. Bank v. O'Callaghan, 95 Pa.Super. 69. 50 C.J. p 233 note 25.

Application of payments see supra § 144.

Recourse to, and exhaustion of, other property or securities on: Appeal bond see Appeal and Error § 2079.

Execution on judgment against surety see supra § 279.

Right of creditor to resort to indemnity to surety see supra § 282.

#### **Surety on bond**

At law, surety is required to pay obligation of bond before it can seek benefit of other security held by the creditor.—U. S. Fidelity & Guaranty Co. v. City of Cleveland, C.C.A.Ohio, 88 F.2d 915.

#### **Security for several loans**

(1) A creditor holding collateral security for payment of several loans may apply proceeds thereof in manner most beneficial to him; neither principal debtor nor his surety has power to direct such creditor as to manner in which collateral shall be applied.—Killoren v. Hernan, 20 N.E.2d 946, 303 Mass. 93.

(2) Application of proceeds of securities generally see infra § 290.

88. Pa.—Klopp v. Lebanon Valley Bank, 39 Pa. 489.

89. Ill.—Dallemand v. Nova Scotia Bank, 54 Ill.App. 600. 50 C.J. p 233 note 27.

#### **Full recovery on collateral note**

Where grantee of security deed extended time for payment of in-

stallment, on consideration of grantor giving additional security in form of collateral note, and foreclosure sale proceeds were insufficient to pay entire debt, grantee was entitled to recover entire amount of collateral note, without making pro rata deduction for foreclosure sale proceeds.—Federal Land Bank of Columbia v. Fulcher, 171 S.E. 152, 47 Ga.App. 602.

90. Pa.—Homewood Peoples Bank v. Cull, 85 Pa.Super. 480.

50 C.J. p 233 note 28.

Defenses of surety generally see supra §§ 254-260.

91. Ariz.—Security Trust & Savings Bank v. June, 1 P.2d 970, 38 Ariz. 513.

Mass.—Thibert v. Morello, 178 N.E. 516, 277 Mass. 286.

50 C.J. p 105 note 78.

#### **Basis of principle; debt least secured**

The principle permitting a creditor, in the absence of an agreement for a specific pledge to a particular debt, to apply the proceeds of collateral to the notes it secures, as he deems best, is based on the right of the creditor to protect himself by the payment of the debt or debts least secured.—Koblegard Co. v. Maxwell, 34 S.E.2d 116, 127 W.Va. 630.

#### **Pro rata application of proceeds not required**

W.Va.—Koblegard Co. v. Maxwell, supra.

92. Wis.—Lowe v. Reddan, 100 N. W. 1038, 123 Wis. 90.

50 C.J. p 105 note 79.

93. Me.—Livermore Falls Trust, etc., Co. v. Richmond Mfg. Co., 79 A. 844, 108 Me. 206.

50 C.J. p 233 note 29.

94. Miss.—Christian v. Merchants Nat. Bank & Trust Co., 195 So. 485, 188 Miss. 586.

50 C.J. p 233 note 30.

95. Minn.—Beebe v. Canney, 55 N. W. 61, 52 Minn. 491.

96. Ariz.—Security Trust & Savings Bank v. June, 1 P.2d 970, 38 Ariz. 513.

50 C.J. p 106 note 92.

97. Cal.—People's Lumber Co. v. Gillard, 68 P. 576, 136 Cal. 55.

50 C.J. p 233 note 32.

98. La.—Dick v. Reynolds, 4 Mart., N.S., 525.

50 C.J. p 233 note 33.

#### **Termination of obligation**

Where mortgagee's obligation to make construction payments was contractual obligation with mortgagor, obligation terminated with maturity of mortgage debt, after which surety of contractor which dealt with mortgagor had no right to compel payment of balance of advance money from mortgagee.—Jersey Land Co. v. Gunzenhauser, 176 A. 371, 117 N.J.Eq. 463.

99. Tex.—Durrell v. Farwell, 30 S. W. 539, 31 S.W. 185, 38 Tex. 98.

50 C.J. p 167 note 90.

1. U.S.—Davis v. Patrick, Neb., 57 F. 909, 6 C.C.A. 632, error dismissed 16 S.Ct. 1200, 163 U.S. 623, 41 L.Ed. 316.

50 C.J. p 233 note 34.

tachment are shown;<sup>2</sup> and a surety for the payment of rent on the tenant's default cannot require the landlord to distrain,<sup>3</sup> or to seize the tenant's crop,<sup>4</sup> or to enforce his lien.<sup>5</sup>

**Security held by surety.** The creditor or obligee cannot be required to take and apply security held by the surety for his indemnity<sup>6</sup> or to wait until the surety realizes on it.<sup>7</sup>

**Effect of contract.** Where by contract between the debtor and creditor, of which the surety is chargeable with notice, it is stipulated that payments from the proceeds of collateral may, at the creditor's election, be first applied to payment of that portion of the debt not guaranteed by the surety, the latter has no right to compel pro rata application to the portion of the debt guaranteed by him.<sup>8</sup>

## b. In Equity

Where there is danger of hardship to the surety, and the rights of the creditor and third persons will not be substantially injured by such procedure, equity, at the surety's instance, may require the creditor to resort to property of the principal which is subject to the indebtedness, or to collateral security in his hands, before resorting to the surety or any security furnished by him,

provided the surety offers to indemnify the creditor and pay any resulting deficiency.

In equity a surety is entitled to the benefit of all securities which the creditor obtains against the principal,<sup>9</sup> and this is so where the principal has become insolvent,<sup>10</sup> whether or not the debt has been paid by the surety.<sup>11</sup> It has been broadly declared that the surety is not bound to pay anything that the principal's property will pay;<sup>12</sup> and where there is danger of hardship to the surety, and it can be done without substantial injury or prejudice to the creditor or obligee, a court of equity, at the instance of the surety, may require the creditor or obligee to resort to the property of the principal debtor which is subject to the indebtedness,<sup>13</sup> or to any collateral security of the principal debtor in the hands of the creditor or obligee,<sup>14</sup> before resorting to the surety or to any security furnished by him,<sup>15</sup> provided the security furnished by the principal is as available as that furnished by the surety<sup>16</sup> and that procedure does not cause any injury to the rights of third persons,<sup>17</sup> and provided he offers to indemnify the creditor<sup>18</sup> and to pay any deficiency that may result,<sup>19</sup> and provided the terms of the contract do not prevent such action in equity.<sup>20</sup>

2. Ark.—Thompson v. Robinson, 34 Ark. 44.

3. Ill.—Hall v. Hoxsey, 84 Ill. 616. 50 C.J. p 234 note 36.

4. S.C.—Miller v. White, 25 S.C. 235.

5. La.—Ledoux v. Jones, 20 La. Ann. 539.

50 C.J. p 234 note 38.

6. U.S.—McLaughlin v. Potomac Bank, D.C., 7 How. 220, 12 L.Ed. 675.

50 C.J. p 234 note 39.

7. S.C.—Rutledge v. Greenwood, 2 S.C. Eq. 389.

8. Ohio.—Advance Thresher Co. v. Hogan, 78 N.E. 436, 74 Ohio St. 307.

50 C.J. p 107 note 6.

9. Tenn.—Henry v. Compton, 2 Head 549—Hamilton Nat. Bank of Chattanooga v. Hamilton Trust & Sav. Bank, 3 Tenn. App. 312.

10. Tenn.—Hamilton Nat. Bank of Chattanooga v. Hamilton Trust & Sav. Bank, supra.

W. Va.—Corpus Juris cited in Capon Valley Bank v. State Road Commission, 163 S.E. 44, 45, 111 W. Va. 491.

50 C.J. p 234 note 43.

11. Minn.—Benson v. Saffert-Gugisberg Cement Constr. Co., 201 N.W. 424, 161 Minn. 269.

Tenn.—Henry v. Compton, 2 Head 549.

12. N.J.—Nutz v. Murray-Nutz,

Inc., 156 A. 668, 109 N.J. Eq. 95—Delaware, etc., R. Co. v. Oxford Iron Co., 38 N.J. Eq. 151.

13. U.S.—Epstein v. Goldstein, C.C. A.N.Y., 118 F.2d 73—Glades County, Fla., v. Detroit Fidelity & Surety Co., C.C.A. Fla., 57 F.2d 449.

Kan.—Corpus Juris cited in Federal Land Bank of Wichita v. Butz, 135 P.2d 883, 886, 156 Kan. 662.

N.Y.—Hayes v. Ward, 4 Johns. Ch. 123, 8 Am.D. 554.

50 C.J. p 234 note 43.

"Equity will itself go far to exonerate a solvent surety and to prevent his property being sold by compelling the principal to pay and by subjecting first the principal's property, especially that put up as security for the debt"—Pinckney v. Wylie, C.C.A. Tex., 86 F.2d 541, 543.

**Property obtained through illegal contract**

A surety can compel the creditor to apply on the debt property of the principal which the creditor has obtained from the principal through an illegal contract, the surety not being connected with the illegality.—Breese v. Schuler, 48 Ill. 329.

**Accommodation security; availability of foreclosure**

If first defendant executed agreement for extension of time for payment of bonds secured by mortgages solely for accommodation of second defendant, and debt as well as mortgaged property was that of second defendant, first defendant was sure-

ty and equity would not permit him to be sued at law for interest and taxes when mortgagee was at liberty to bring action to foreclose mortgage.—Bankers Trust Co. v. Berens, 41 N.Y.S.2d 790, 180 Misc. 619.

14. U.S.—Pinckney v. Wylie, C.C.A. Tex., 86 F.2d 541.

50 C.J. p 234 note 44.

15. Me.—Matthews v. Matthews, 148 A. 796, 128 Me. 495.

50 C.J. p 234 note 46.

**Mortgages of separate properties**

When principal and surety each mortgages his own property to secure the principal's debt, the surety is entitled to have the property of the principal sold first, and the proceeds of the sale applied in satisfaction of the debt.

Ala.—Oden v. Valentine, 127 So. 219, 220 Ala. 626.

Tenn.—Gates v. Armstrong, 3 Tenn. App. 75.

50 C.J. p 234 note 46 [b].

16. N.C.—Gary v. Cannon, 38 N.C. 64.

17. Conn.—Orvis v. Newell, 17 Conn. 97.

50 C.J. p 235 note 48.

18. N.Y.—Hayes v. Ward, 4 Johns. Ch. 123, 8 Am.D. 554.

50 C.J. p 235 note 49.

19. Vt.—McCollum v. Hinckley, 9 Vt. 143.

50 C.J. p 235 note 50.

20. U.S.—U. S. Fidelity & Guaranty

This right of the surety is superior to a lien subsequently acquired on the principal's property.<sup>21</sup> The creditor, however, is not required to resort to property which is not of any value by reason of prior liens;<sup>22</sup> nor is he required to resort to other property or security where he would be unduly inconvenienced and delayed in the collection of his debt.<sup>23</sup>

*Waiver or loss of surety's rights.* The surety does not lose his rights in this respect merely because the property to which he wishes the creditor to resort has been levied on<sup>24</sup> or sold<sup>25</sup> unless there was collusion between the principal and surety in making the sale;<sup>26</sup> nor is the right lost because the surety has consented to an exchange of securities.<sup>27</sup>

*Stay of proceedings.* If proceedings already have been begun against the surety by the creditor or obligee, the surety is entitled to have them stayed until the collateral security can be enforced.<sup>28</sup>

### c. Under Statutes

Under some statutes a creditor may be required to resort to the principal's property before proceeding against the surety.

In some jurisdictions the equity rule discussed supra subdivision b of this section in many respects is now embodied in statutes under which the creditor may be required to resort to the property of the principal before proceeding against the surety.<sup>29</sup>

Under a statute permitting any one or more of several defendants to have the question of suretyship determined, a defendant, in an action on a note and to foreclose a mortgage securing it, may, by cross complaint, show that he is a surety, and ask that the interest of the principal in the land covered by the mortgage be sold before the property of the cross complainant is resorted to.<sup>30</sup>

Under a statute providing that whenever property is hypothecated with the property of a principal the surety is entitled to have the property of the principal first applied to the discharge of the obligation, the creditor may not apply property of the principal to other debts, to the detriment of the surety.<sup>31</sup>

## § 289. As to Preservation, Collection, and Application of Collateral

A surety has a beneficial right or interest in the collateral held by the creditor for the principal debt; the creditor must exercise good faith toward the surety in preserving, applying, or disposing of the security or its proceeds, not only for the creditor's security, but for the surety's indemnity.

The surety, by his very character and relationship of surety, has a beneficial right or interest in the collateral held by the creditor for the principal debt,<sup>32</sup> whether the security is obtained at the time of, or subsequent to, the surety's assumption of lia-

Co. v. City of Cleveland, C.C.A. Ohio, 88 F.2d 915.

21. Ark.—Robbins-Sanford Mercantile Co. v. Johnson, 266 S.W. 260, 166 Ark. 330, 37 A.L.R. 1258. 50 C.J. p 235 note 51.

22. Minn.—Northwestern Mut. Life Ins. Co. v. Allis, 23 Minn. 337.

23. W.Va.—Armstrong v. Poole, 5 S.E. 257, 30 W.Va. 666. 50 C.J. p 235 note 54.

24. U.S.—McMullen v. Ritchie, C.C. Ohio, 64 F. 253, modified on other grounds 79 F. 522, 25 C.C.A. 50, certiorari denied 18 S.Ct. 945, 168 U.S. 710, 42 L.Ed. 1212. Tenn.—Henry v. Compton, 2 Head 549.

25. N.C.—Polk v. Gallant, 22 N.C. 395, 34 Am.D. 410.

26. Mich.—Stratton v. Thomas, 94 N.W. 1053, 133 Mich. 281. 50 C.J. p 235 note 57.

27. Miss.—Solomon v. Meridian First Nat. Bank, 17 So. 383, 72 Miss. 854.

28. N.J.—Kidd v. Hurley, 33 A. 1057, 54 N.J.Eq. 177. 50 C.J. p 235 note 59.

29. Cal.—Birkhofer v. Krumm, 40 P.2d 553, 4 Cal.App.2d 43.

Kan.—Federal Land Bank of Wichita v. Butz, 135 P.2d 883, 156 Kan. 662.

50 C.J. p 235 note 63.

Discussion see supra § 279.

**Obligation secured by trust deed or mortgage**

Under such statute surety on obligation secured by trust deed or mortgage may require creditor to resort first to trust deed or mortgage security.—Everts v. Matteson, 132 P.2d 476, 21 Cal.2d 437.

**Demand by surety on creditor that property of principal first be applied to discharge of debt held required.**—Garrett v. Bomash, 51 P.2d 1100, 10 Cal.App.2d 288.

**Comaker of note held not surety** Cal.—Garrett v. Bomash, supra.

30. Ind.—Chaplin v. Baker, 24 N.E. 233, 124 Ind. 385.

31. S.D.—State v. Mellette, 113 N. W. 83, 21 S.D. 404.

32. U.S.—Corpus Juris cited in Town of River Junction v. Maryland Casualty Co., C.C.A.Fla., 110 F.2d 278, 281, 134 A.L.R. 727, cer-

tiorari denied Maryland Casualty Co. v. Town of River Junction, 60 S.Ct. 1077, 310 U.S. 634, 84 L.Ed. 1404.

N.J.—Burack v. Mayers, 187 A. 767, 121 N.J.Eq. 135, affirmed 191 A. 841, 122 N.J.Eq. 5.

Pa.—Corpus Juris cited in First Nat. Bank & Trust Co. of Ford City v. Stolar, 197 A. 499, 502, 130 Pa.Super. 480.

Tex.—National Liberty Ins. Co. v. Watts, Civ.App., 101 S.W.2d 1060. 50 C.J. p 235 note 67.

Application of payments generally see supra § 144.

Discharge of surety by loss or relinquishment of funds or securities see supra §§ 197-207.

Preservation and collection of pledged property generally see Pledges §§ 68-78.

**Belief as to obligee's dealing with security**

Surety was entitled to benefit of security held by obligee of surety bond, and surety was entitled to believe that obligee would deal with its security as do holders of security generally, and as expressly provided in contract between principal and obligee.—Hochevar v. Maryland Casualty Co., C.C.A.Ohio, 114 F.2d 948.



bility,<sup>33</sup> or with or without his knowledge.<sup>34</sup> The creditor is regarded as a trustee of the security,<sup>35</sup> and, as such, must exercise good faith toward the surety in his preservation, disposition, or application of the security or its proceeds, not only for the creditor's security, but also for the surety's indemnity.<sup>36</sup>

This duty of the creditor, however, ordinarily is not a positive duty,<sup>37</sup> and he is not liable to the surety for a loss resulting from mere passivity,<sup>38</sup> but only where he has done some affirmative act which impairs or releases the security.<sup>39</sup> If the creditor fails to collect and apply certain property or security to the payment of the principal's indebtedness, as he has agreed to do, the surety has a right of action against him therefor,<sup>40</sup> and is entitled to full relief if the collateral is sufficient to satisfy the debt,<sup>41</sup> but if it is not sufficient he is entitled only to pro tanto relief.<sup>42</sup> The creditor's refusal to furnish the surety a statement of a sale of the collateral will not warrant an inference that the creditor has omitted to perform his duty as to the collections.<sup>43</sup>

*Demand of sale.* Where the agreement gives the creditor the right to sell the collateral at any time after the maturity of the indebtedness, and apply the proceeds to its payment, the surety may, at any time after maturity, demand such sale,<sup>44</sup> and if he fails to make such demand he may not complain of the creditor's failure to sell,<sup>45</sup> and may not contend that he is liable only for any deficit which might arise after the exhaustion of the collateral.<sup>46</sup>

*Insurance.* Where a mortgage is given as addi-

tional security, the mortgagor's surety has no right of action against the mortgagee creditor for a failure to take out insurance on the property unless he has agreed to do so.<sup>47</sup>

*Securities given to surety for his indemnity* may be resorted to by the creditor, as discussed supra § 282, and where such security is not sufficient to cover the entire debt for which the surety is liable, if the surety has paid part of the debt, the proceeds of the security should be applied to the balance due before the surety is entitled to anything.<sup>48</sup>

## § 290. — Application of Proceeds

A surety has a right to have the proceeds of the securities applied to the indebtedness secured, for which he became surety, in preference to any other indebtedness, unless the contract provides for application to other indebtedness.

The surety has a right to have the proceeds of the securities held by the creditor applied to the indebtedness secured, for which he became surety,<sup>49</sup> in preference to any other indebtedness,<sup>50</sup> unless provision is made in the contract for application to other indebtedness;<sup>51</sup> and he may sue in equity to compel the creditor to collect collateral or funds in exoneration of the suretyship.<sup>52</sup> If the creditor misapplies or releases the security, the surety may be entitled to a discharge from liability, as discussed supra §§ 197-207, and he may sue in equity to compel a release from his liability, as considered infra § 299 b, or he may avail himself of such misapplication or release as a defense to an action at law against him on the principal obligation.<sup>53</sup>

33. Pa.—*Corpus Juris* cited in *First Nat. Bank & Trust Co. of Ford City v. Stolar*, 197 A. 499, 502, 130 Pa.Super. 480.

Tex.—*National Liberty Ins. Co. v. Watts*, Civ.App., 101 S.W.2d 1060 —*Hatch v. Brackettville First State Bank*, Civ.App., 270 S.W. 1093.

34. Pa.—*Corpus Juris* cited in *First Nat. Bank & Trust Co. of Ford City v. Stolar*, 197 A. 499, 502, 130 Pa.Super. 480.

Tex.—*National Liberty Ins. Co. v. Watts*, Civ.App., 101 S.W.2d 1060 —*Hatch v. Brackettville First State Bank*, Civ.App., 270 S.W. 1093.

35. Tex.—*Nunn v. Smith*, Civ.App., 194 S.W. 400.

36. Me.—*Maine Cent. R. Co. v. National Surety Co.*, 94 A. 929, 113 Me. 465, L.R.A.1916A 881, 50 C.J. p 236 note 72.

37. Tex.—*Nunn v. Smith*, Civ.App., 194 S.W. 400.

38. Tex.—*Nunn v. Smith*, supra.

39. N.Y.—*Hayes v. Ward*, 4 Johns. Ch. 123, 8 Am.D. 54.

Tex.—*Nunn v. Smith*, Civ.App., 194 S.W. 406.

Relinquishment or loss of security as ground for discharge see supra §§ 197-207.

40. Iowa.—*Richey v. Farmer's, etc.*, Sav. Bank, 121 N.W. 2.

Ky.—*New York Store Mercantile Co. v. Gorham*, 199 S.W. 64, 178 Ky. 535.

41. Ky.—*New York Store Mercantile Co. v. Gorham*, supra.

42. Ky.—*New York Store Mercantile Co. v. Gorham*, supra.

43. Iowa.—*Richey v. Farmer's, etc.*, Sav. Bank, 121 N.W. 2.

44. Ky.—*Cromwell v. Rankin*, 97 S. W. 415, 30 Ky.L. 123.

45. Ky.—*Cromwell v. Rankin*, supra.

46. Ky.—*Cromwell v. Rankin*, supra.

50 C.J. p 236 note 82.

47. Ark.—*Kissire v. Plunkett-Jarrell Grocer Co.*, 145 S.W. 567, 103 Ark. 473.

50 C.J. p 236 note 83.  
Duties and liabilities of mortgagee as to insurance generally see *Mortgages* § 328.

48. Mass.—*Kelly v. Herrick*, 131 Mass. 373.

49. La.—*Interstate Trust, etc., Co. v. Young*, 65 So. 611, 135 La. 465.

50 C.J. p 236 note 83.  
Application of payments generally see supra § 144.

50. Ky.—*Saulsberry v. Nethercutt*, 2 Ky.L. 426, 11 Ky.Op. 163.

50 C.J. p 236 note 89.

51. Tenn.—*Merchants' Bank, etc., Co. v. Bushnell*, 218 S.W. 709, 142 Tenn. 275.

50 C.J. p 236 note 90.

52. Vt.—*Hale v. Windsor Sav. Bank*, 98 A. 993, 90 Vt. 487.

53. Vt.—*Patch v. Montpelier First Nat. Bank*, 96 A. 423, 90 Vt. 4.

50 C.J. p 237 note 94.

*Effect of assignment.* Where, on assignment of the principal contract, the assignee executes a bond for the purpose of protecting the principal and his surety from liability, any right of the surety as to the application of a deposit made by the principal passes against the assignee.<sup>54</sup>

### § 291. — Accounting

A surety is entitled, in equity, to an accounting of security received by the creditor, but must show that the property or security unaccounted for was subject to the payment of the principal's indebtedness.

The surety is entitled, in equity, to an accounting of security received by the creditor or obligee,<sup>55</sup> or by his assignee,<sup>56</sup> especially where the creditor has converted such collateral to his own use.<sup>57</sup> However, in order to require such accounting, the surety must show that the property or security unaccounted for was subject to the payment of the principal's indebtedness.<sup>58</sup>

### § 292. Right to Surrender of Security; Contribution

A surety paying the principal debt or performing the principal obligation is entitled to a surrender to him of the collateral pledged for such debt or obligation; but, where the principal pays the debt, the surety has no right to receive the collateral from the creditor. A surety paying a note and receiving it from the payee with the latter's indorsement thereon is not entitled to contribution from the payee.

Where the surety pays the principal debt or performs the principal obligation, he is entitled to a surrender to him by the creditor of the collateral pledged for such debt or obligation<sup>59</sup> to the ex-

tent of enforcing it against the principal for reimbursement;<sup>60</sup> but, where the principal has himself paid the debt, the surety has no right to receive the collateral from the creditor.<sup>61</sup>

Under a statutory provision entitling the surety to tender to the creditor the amount of the debt and demand the securities therefor to be delivered up to him to be enforced against the principal or cosureties, the surety is entitled, on such tender, to a surrender only of securities which were deposited for the particular debt for which he is surety,<sup>62</sup> and therefore is not entitled to a surrender of securities which were deposited for the principal debt and also for other indebtedness.<sup>63</sup>

It is too late to tender payment and demand surrender of the collateral after a judgment has been entered and the collateral sold thereunder.<sup>64</sup>

A surety paying a note and receiving it from the payee with the latter's indorsement thereon is not entitled to contribution from the payee.<sup>65</sup> A general insurance carrier's surety on a supersedeas appeal bond can assert any defense to a special insurance carrier's claim for contribution for the amount paid on a joint and several judgment against both carriers as coinsurers which the general carrier could have asserted.<sup>66</sup> Contribution between cosureties is discussed *infra* §§ 352-371.

*Return of deposit on lease.* Under a receipt attached to a lease for a term of years to the effect that a sum of money was deposited by a surety as a deposit for security for the payment of rent accruing for the last year of the term, the surety

54. Minn.—Yanish v. J. Neils Lumber Co., 111 N.W. 921, 101 Minn. 78.

50 C.J. p 237 note 95.

55. Me.—Maine Cent. R. Co. v. National Surety Co., 94 A. 929, 113 Me. 465, L.R.A.1916A 881.

50 C.J. p 237 note 97.

Liability of pledgee to account generally see Pledges § 31.

When principal fails to pay, and securities pledged with creditor by surety have been sold, surety has right to accounting from creditor.—Scott v. National City Bank of Tampa, 139 So. 367, 107 Fla. 810.

56. N.Y.—Cory v. Leonard, 56 N.Y. 494.

57. Ind.—Shortal v. Standerford, 157 N.E. 109, 87 Ind.App. 167. 50 C.J. p 237 note 99.

58. Iowa.—Richey v. Farmer's, etc., Sav. Bank, 121 N.W. 2. 50 C.J. p 237 note 1.

59. U.S.—Corpus Juris cited in Town of River Junction v. Mary-

land Casualty Co., C.C.A.Fla., 110 F.2d 278, 281, 134 A.L.R. 727, certiorari denied Maryland Casualty Co. v. Town of River Junction, 60 S.Ct. 1077, 310 U.S. 634, 84 L.Ed. 1404.

Minn.—Knoblauch v. Foglesong, 33 N.W. 865, 37 Minn. 320.

Tex.—Corpus Juris cited in Lewis v. Chain Inv. Co., Civ.App., 63 S.W. 2d 517.

50 C.J. p 237 note 3.

Return of property pledged on payment or other discharge generally see Pledges §§ 47-49.

Surrender to principal of security to surety see *infra* § 321 a.

Assignment as condition of payment Sureties on an appeal bond are not, on affirmance of the order appealed from, entitled to an assignment of it as a condition of their making payment.—Wadley v. Poucher, 9 N.Y.S. 50, 55 Hun 612.

60. Okl.—Wills v. Fuller, 150 P. 693, 47 Okl. 720.

Reimbursement generally see *infra* §§ 306-310.

61. Ala.—Dilburne v. Youngblood, 5 So. 175, 85 Ala. 449.

62. Ala.—Bradshaw v. Mushat, 84 So. 406, 17 Ala.App. 202.

Pa.—Corpus Juris quoted in Gildner v. First Nat. Bank & Trust Co. of Bethlehem, 19 A.2d 910, 915, 342 Pa. 145.

63. Ala.—Bradshaw v. Mushat, 84 So. 406, 17 Ala.App. 202.

64. Pa.—Philadelphia Life Ins. Co. v. Maryland Fidelity, etc., Co., 22 Pa.Dist. 615, affirmed 90 A. 632, 244 Pa. 236.

50 C.J. p 237 note 10.

65. Ohio.—Rechline v. Weis, 2 Ohio Supp. 380.

66. Tex.—U. S. Fidelity & Guaranty Co. v. Century Indemnity Co., Civ. App., 78 S.W.2d 737, error dismissed.

Special carrier held not entitled to contribution from general carrier's surety.—U. S. Fidelity & Guaranty Co. v. Century Indemnity Co., *supra*.

can recover the deposit on termination of the lease in the first year of the term.<sup>67</sup>

### § 293. Recovery of Payments

In some circumstances a surety may recover back a payment made by him to the creditor, as where there was duress, fraud, a failure of consideration, or mistake of fact without a failure to exercise ordinary prudence; but he cannot recover back a payment voluntarily made with full knowledge of the facts.

A surety may recover back a payment made by him to the creditor or obligee when there has been a failure of consideration<sup>68</sup> or which he has been compelled to pay through duress<sup>69</sup> or fraud,<sup>70</sup> or which he has made under an agreement for a settlement made between him and the creditor, which the latter violates.<sup>71</sup> Likewise, a surety may recover a payment which, through ignorance of facts, he has made by mistake of fact<sup>72</sup> unless such mistake is the result of failure to exercise ordinary prudence.<sup>73</sup>

Where security, given by a surety, is converted into money, and brings more than the amount for which he is liable, he can recover the excess.<sup>74</sup>

*Interest.* Where the surety is allowed to recover payments made by him, he is entitled to interest thereon;<sup>75</sup> but if the surety would not be entitled to interest on security given by him to the creditor he is not entitled to interest on the proceeds thereof.<sup>76</sup>

*Payments not recoverable.* A surety cannot re-

cover back a payment which he has voluntarily made with full knowledge of all the facts,<sup>77</sup> although under a mistake of law,<sup>78</sup> and which has been obtained by the creditor in good faith and applied on the debt.<sup>79</sup> A surety cannot recover an amount paid for his release<sup>80</sup> although the principal afterward pays the debt in full.<sup>81</sup>

An owner's premature payments to a contractor, and his failure to retain a per cent of the sums due, have been held not such a violation of a surety contract as to enable the surety to recover from the owner sums paid by the surety to workmen and materialmen.<sup>82</sup>

### § 294. — Payment after Discharge

A surety may recover payments made by him, without knowledge of the facts, after his discharge by the creditor's acts, as by the relinquishment or misapplication of security or a release of the principal or surety.

A surety may recover payments made by him, without knowledge of the facts, after he has been discharged by acts of the creditor or obligee,<sup>83</sup> as by the relinquishment or loss<sup>84</sup> or the misapplication<sup>85</sup> of security, or by a release of the principal<sup>86</sup> or of the surety.<sup>87</sup>

### § 295. — Payment of Judgment

A surety paying a judgment against him may recover the amount paid after a reversal; but where he pays a judgment against his principal which is afterward reversed he cannot recover from the judgment creditor.

67. N.Y.—Joseph v. Creston Co., 176 N.Y.S. 316, 188 App.Div. 97, affirmed 130 N.E. 889, 230 N.Y. 549.

68. Ill.—Gerard v. Knapp, 26 Ill. App. 307.

50 C.J. p 238 note 12.

Consideration for surety's obligation see supra §§ 63-70.

Recovery of payment for failure of consideration generally see Payment § 158.

Want or failure of consideration for principal's obligation see supra § 25.

69. Mich.—Kalmbach v. Foote, 44 N.W. 603, 79 Mich. 336.

50 C.J. p 238 note 13.

70. N.Y.—Chester v. Kingston Bank, 16 N.Y. 336.

71. Ala.—Nabors v. Camp, 14 Ala. 460.

50 C.J. p 238 note 15.

72. Cal.—Gay v. Milwaukee Brewery, 166 P. 1017, 34 Cal.App. 75.

50 C.J. p 238 note 16.

Recovery of payments made by mistake of fact see Payment § 157.

*Retention of certificate*

Surety's retention, without assertion of any right thereto, of receipt-

er's certificate sent it by creditor, was held not to estop surety to sue for balance of money paid by him to creditor without knowledge of creditor's settlement with principal debtor.—Sarasota County, Fla., v. American Surety Co. of New York, C.C.A.Fla., 68 F.2d 543.

73. Miss.—Anderson v. Western Union Tel. Co., 27 So. 838, 77 Miss. 851.

74. Ky.—Hardy Buggy Co. v. Paducah Banking Co., 210 S.W. 452, 183 Ky. 776.

N.Y.—Manning v. Sweeting, 4 N.Y.St. 842.

75. Ga.—Riggins v. Brown, 12 Ga. 271.

Right to interest on money paid through mistake generally see Interest § 11.

76. N.Y.—Manning v. Sweeting, 4 N.Y.St. 842.

77. Miss.—Corpus Juris cited in McLean v. Love, 157 So. 361, 362, 172 Miss. 168.

50 C.J. p 238 note 21.

Recovery of voluntary payments generally see Payment §§ 132-144.

78. Miss.—Pass v. Grenada County, 14 So. 447, 71 Miss. 426.

50 C.J. p 238 note 22.

79. Ky.—Meyer v. Central Nat. Bank, 7 Ky.Op. 418.

80. Mass.—Wilson v. Whitmore, 5 N.E. 304, 140 Mass. 469.

81. Mass.—Wilson v. Whitmore, supra.

82. Va.—American Surety Co. v. Plank & Whitsett, 165 S.E. 660, 159 Va. 1.

83. Ga.—Riggins v. Brown, 12 Ga. 271.

50 C.J. p 238 note 26.

Discharge generally see supra §§ 116-244.

84. Mo.—Sumner v. Tuck, 10 Mo. App. 269, affirmed 2 S.W. 476, 90 Mo. 324.

50 C.J. p 238 note 27.

85. Tex.—Bruce v. Laing, Civ.App., 64 S.W. 1019.

50 C.J. p 238 note 28.

86. N.Y.—Hirsh v. Munger, 3 Thomps. & C. 290.

Pa.—Fox v. Litwiler, 12 Pa.Dist. 337.

87. Md.—Lodge v. Boone, 3 Harr. & J. 218.

Where the surety has paid a judgment or decree against him, he may recover the amount so paid after a reversal thereof;<sup>88</sup> but where he pays a judgment against his principal, and it is afterward reversed, he cannot recover from the judgment creditor, since there is no legal privity between them, and the remedy of the surety is against the principal.<sup>89</sup> So also, the surety cannot recover on a contract of settlement made between a judgment creditor and the principal, with respect to which there is no privity between the surety and the creditor.<sup>90</sup>

*Suit by principal for surety.* The fact that the surety has a remedy over against the principal for reimbursement or that he is authorized by statute to compel the principal to perform the obligation for which the surety has bound himself does not authorize the principal to sue, on behalf of the surety, for the recovery of money improvidently paid by the surety on a void judgment.<sup>91</sup>

#### § 296. — Effect of Recovery from Principal

Where, after the surety has paid the debt, the creditor recovers from the principal, the surety may recover from the creditor the amount obtained from the principal, or, if there are several sureties, a proportionate part.

Where, after the surety has paid the debt, recovery is had by the creditor from the principal, the surety may recover from the creditor the amount obtained from the principal,<sup>92</sup> or a proportionate part, if there are several sureties.<sup>93</sup>

#### § 297. — Payment by Cosurety

Where one surety makes full payment, a cosurety paying his proportionate part to the creditor cannot recover his payment, the creditor's duty being to account with the surety who paid in excess of his share.

Where, after the full payment by one surety, a cosurety pays his proportionate part to the creditor, such cosurety cannot recover his payment,<sup>94</sup> it being the duty of the creditor in such case to account with the surety who paid in excess of his share.<sup>95</sup>

#### § 298. — Usury

A surety has been permitted to recover back from the creditor usury paid by himself. It has been held that he may recover usury exacted from his principal; under other authorities only the principal may do so.

In accordance with the doctrine permitting a debtor to recover usury paid by him, as discussed in the C.J.S. title Usury §§ 85, 93-100, also 66 C.J. p 268 note 1-p 269 note 15, p 284 note 9-p 291 note 90, a surety has been permitted to recover back from the creditor or obligee usury paid by himself;<sup>96</sup> and it has been held that, although the principal has reimbursed him, recovery of the usury must be had, not by the principal, but by the surety who paid it.<sup>97</sup> Where a surety has paid usury for his principal, he has right to sue for and reclaim it<sup>98</sup> unless he has been repaid the amount thereof by the principal.<sup>99</sup> It has been held that, where the surety obtains a surrender of the original usurious obligation by giving his individual obligation therefor, this does not constitute a payment of the old obligation, and, in an action by the creditor to enforce the new obligation, the surety is entitled to credit for a usurious payment made on the old one.<sup>1</sup>

*Payments by principal.* It has been held that a surety in a bond may recover or claim credits thereon for sums exacted from his principal as usurious interest.<sup>2</sup> On the other hand, the recovery of such

88. Ala.—Williams v. Simmons, 22 Ala. 425.

Mich.—Kalmbach v. Foote, 44 N.W. 603, 79 Mich. 236.

89. N.Y.—Garr v. Martin, 20 N.Y. 306.

90. Pa.—Appeal of Winter, 61 Pa. 307.

50 C.J. p 239 note 33.

91. Cal.—More v. Churchill, 101 P. 9, 155 Cal. 368.

50 C.J. p 239 note 36.

Reimbursement see *infra* § 307.

92. Ky.—Hardy Buggy Co. v. Paducah Banking Co., 210 S.W. 452, 183 Ky. 776.

*Payment to officer of obligee*

Payment by former employee under agreement with employer's president for payment of claims arising out of employee's forgery constituted payment to employer, so as to

entitle surety to reimbursement for amount paid by him to employer.—Fidelity & Deposit Co. of Maryland v. Leib, C.C.A.Pa., 42 F.2d 15.

*Employer's waiver of payment of full amount of employee's defalcation did not affect obligation to reimburse surety company.*—Fidelity & Deposit Co. of Maryland v. Leib, *supra*.

*Surety's right to discovery*

Surety company paying amount of fidelity bond was entitled to discovery as to sums received by employer under agreement with defaulting employee.—Fidelity & Deposit Co. of Maryland v. Leib, *supra*.

93. Ky.—Hardy Buggy Co. v. Paducah Banking Co., 210 S.W. 452, 183 Ky. 776.

94. Tex.—Wash v. Sullivan, Civ. App., 84 S.W. 368.

95. Tex.—Wash v. Sullivan, *supra*.

96. Ohio.—Kock v. Block, 29 Ohio St. 565.

50 C.J. p 239 note 44.

Right of surety to recover from principal usury paid see the C.J.S. title Usury § 135, also 66 C.J. p 341 notes 62-63.

97. Ky.—Hahn v. Walker, 3 Dana 183.

98. Ky.—Kirkpatrick v. Wherritt, 7 B.Mon. 388.

99. Ky.—Kirkpatrick v. Wherritt, *supra*.

1. W.Va.—Moore v. Johnson, 12 S. E. 918, 34 W.Va. 672.

50 C.J. p 239 note 43.

2. Ky.—Crutcher v. Trabue, 5 Dana 80.

50 C.J. p 239 note 49.

voluntary payments has been held to be a personal privilege of the principal which does not inure to the benefit of, and cannot be recovered by, the surety,<sup>3</sup> particularly where the interest has been paid on other instruments<sup>4</sup> or in other transactions in which the surety was not bound as such;<sup>5</sup> and after the principal has been adjudged bankrupt the surety cannot have the benefit of such payments of usury.<sup>6</sup>

## § 299. Actions against Creditor

- a. At law
- b. In equity

### a. At Law

A surety may maintain an action at law against the creditor on any of various grounds arising out of the relationship, such as breach of agreement, fraud, negligence in preserving and applying collateral, and conversion of collateral.

A surety may maintain an action at law against the creditor or obligee for damages for the breach of an agreement by which the surety was induced to enter into the suretyship contract,<sup>7</sup> or for fraud of the creditor or obligee in procuring him to sign the contract,<sup>8</sup> in which action a judgment or decision in a prior action by the obligee against the surety, as to such fraud, is conclusive of such fact,<sup>9</sup> but not a judgment in a prior action in

which the creditor or obligee did not participate.<sup>10</sup> The surety may also sue for damages for negligence or fraud on the part of the creditor in preserving and applying collateral held by him,<sup>11</sup> or for converting such collateral,<sup>12</sup> and in such action the surety is not concluded by a judgment obtained against him by the creditor in an action on the contract of suretyship wherein the surety set up the misappropriation of the collateral by the creditor as a defense, without pleading it as a counterclaim, which defense was objected to by the creditor and ruled out by the court.<sup>13</sup>

A surety for the performance of a contract has no right of action thereon against the obligee for money due under the contract<sup>14</sup> unless, on default of the principal, he performs the contract under authority of the terms of the agreement between the parties,<sup>15</sup> or with the consent of the obligee,<sup>16</sup> in which case he will be subrogated to all the rights of the principal, as discussed in the C.J.S. title Subrogation § 57, also 60 C.J.S. p 771 note 99-p 772 note 5.

A surety for the performance of a contract may recover from the obligee the amount of a judgment resulting from the latter's failure to retain a percentage of the payment, as required by the contract.<sup>17</sup>

3. N.H.—Savage v. Fox, 60 N.H. 17. 50 C.J. p 239 note 50.

4. S.C.—Cantey v. Blair, 19 S.C.Eq. 46.

5. Ga.—Mordecai v. Stewart, 37 Ga. 364.

6. Ga.—Woolfolk v. Plant, 46 Ga. 423.

7. Ky.—New York Store Mercantile Co. v. Gorham, 199 S.W. 64, 178 Ky. 535.

Recovery of payments see supra §§ 293-298.

#### Statement of claim

Pa.—National Casualty Co. v. Ferry, Com.Pl., 56 Dauph.Co. 369.

8. Mass.—Province Securities Co. v. Maryland Casualty Co., 168 N.E. 252, 269 Mass. 75.

Fraud in inducing contract generally see supra §§ 75-77.

9. Mass.—Province Securities Corp. v. Maryland Casualty Co., supra. 50 C.J. p 240 note 56.

10. N.H.—Guay v. Eastman, 92 A. 840, 77 N.H. 422. 50 C.J. p 240 note 57.

11. Mich.—Roberts v. Yale First Nat. Bank, 112 N.W. 1129, 149 Mich. 507.

50 C.J. p 240 note 58.

Affirmative relief in case of loss or

misapplication of funds or securities generally see supra § 207.

12. Mo.—Ely Walker Dry Goods Co. v. Karnes, 9 S.W.2d 245, 223 Mo. App. 115.

50 C.J. p 240 note 59.

Conversion of pledged property generally see Pledges §§ 35-42.

13. N.Y.—De Graaf v. Wyckoff, 22 N.E. 1118, 118 N.Y. 1.

14. Pa.—Philadelphia v. McLinden, 11 Pa.Dist. 128, 26 Pa.Co. 287. 50 C.J. p 240 notes 61-63.

15. Mich.—Howard v. Holland Public Schools, 14 N.W. 712, 50 Mich. 94.

Performance or completion of contract by surety generally see supra § 286 b.

16. U.S.—Hitchcock v. U. S., 27 Ct. Cl. 185, affirmed 17 S.Ct. 142, 164 U.S. 237, 41 L.Ed. 412. 50 C.J. p 240 note 65.

Condition of immediate completion of work held not complied with by surety.—Jersey Land Co. v. Gunzenhauser, 176 A. 371, 117 N.J.Eq. 463.

Inconsistency of counts held without prejudice

Mich.—Rohde v. Biggs, 66 N.W. 331, 108 Mich. 446.

17. U.S.—Hochevar v. Maryland

Casualty Co., C.C.A.Ohio, 114 F.2d 948.

N.C.—Fidelity & Deposit Co. of Maryland v. Board of Education of Pender County, 162 S.E. 763, 202 N.C. 354, modified on other grounds 169 S.E. 926, 204 N.C. 607. Unauthorized payments to principal as discharging surety see supra §§ 133-136.

#### Compliance with retention clause held not implied

U.S.—Hochevar v. Maryland Casualty Co., C.C.A.Ohio, 114 F.2d 948.

Promise not to pay until conditions satisfied held implied.—Hochevar v. Maryland Casualty Co., supra.

#### Failure to perfect statutory liens

Where right of surety on bond given to secure contractor's performance of contract to have obligee retain certain percentages out of amount due contractor to assure latter's performance of contract did not depend on subrogation, and bond required surety to pay unpaid laborers and materialmen, irrespective of whether they perfected statutory liens, fact that laborers and materialmen had not perfected liens was immaterial in determining surety's right to recover from obligee an amount equal to judgments against surety in favor of unpaid material-

*Set-off as defense.* Where the surety sues the creditor in contract, the latter may avail himself of his right to proceed against the surety for the indebtedness of the principal by way of set-off.<sup>18</sup>

### b. In Equity

- (1) In general
- (2) Injunction

#### (1) In General

A surety without an adequate remedy at law may sue the creditor in equity for protection and relief as to his rights and liabilities or for the adjustment of equities arising out of the contract.

Subject to the rules relating to procedure in equity generally, where there is no adequate remedy at law, a surety may bring a suit in equity against the creditor or obligee for protection and relief as to his rights and liabilities,<sup>19</sup> such as to compel an accounting by the creditor of the collateral placed in his hands<sup>20</sup> or of his transactions with the principal,<sup>21</sup> or to compel a release from liability by reason of the creditor's acts,<sup>22</sup> or for the adjustment of equities arising out of the contract.<sup>23</sup> Where claims against a surety exceed the amount of the penalty of the bond, the surety may sue in equity to secure a pro rata distribution of the amount of the penalty between several claimants;<sup>24</sup> but where a surety against whom an action at law is brought on a claim against the bond knows of other claims against it and has an opportunity, in that action, to present his defense to such claims by interpleader, he cannot, after the claimant recovers judgment, proceed in equity to litigate matters that he could have litigated in the action at law.<sup>25</sup>

Where a contractor's surety seeks an equity in

the reserve fund provided for the protection of creditors, and brings the creditors and all parties into court, he subjects himself to whatever direct judgment may be entered on his liability to any party.<sup>26</sup>

*Motion by surety to satisfy judgment against him,* on the ground of an unauthorized release of the principal, is equitable in its nature<sup>27</sup> and should be granted where plaintiff in the judgment has no just right to enforce it.<sup>28</sup>

*Property as surety.* An owner of property which occupies the position of surety for the performance of a contract is entitled, in a proper case, to the remedies given by equity,<sup>29</sup> and he may have his property relieved of the burden by equitable application of set-offs by compelling the principal debtor to pay or by reducing the demand of the creditor to its equitable proportion, and permitting the owner to redeem his property by the payment of the true amount due,<sup>30</sup> and, where the creditor has a valid claim against the principal debtor from which the property owner should be relieved by the application of offsets, the latter is entitled to maintain a suit against the creditor to compel such offsets.<sup>31</sup>

*Attorney's fees.* A surety is not entitled to attorney's fees in a concursus proceeding brought by him at the expense of creditors for whose benefit the bond was given.<sup>32</sup>

#### (2) Injunction

In a proper case a surety may maintain a bill in equity to enjoin the creditor from proceeding against him or improperly collecting from him, or to restrain execution against him.

A surety may maintain a bill in equity to re-

men and laborers after obligee paid retained percentages to contractor, without surety's consent.—Hochewar v. Maryland Casualty Co., *supra*.

18. Pa.—Domestic Sewing Mach. Co. v. Saylor, 86 Pa. 287.

Set-off to claim arising out of contract generally see the C.J.S. title Set-Off and Counterclaim § 36, also 57 C.J. p 398 note 43—p 399 note 50.

19. Wis.—St. Croix Timber Co. v. Joseph, 124 N.W. 1049, 142 Wis. 55.

21 C.J. p 181 note 42—23 C.J. p 559 note 80 [a]—50 C.J. p 240 note 69.

A surety making part payment of a debt may, when the debt is due, sue in equity both the creditor and the principal debtor to compel, by a suit in the nature of one for specific performance, such debtor to pay the debt out of his own property, in exoneration of the surety.—Fergus-

son v. Brogan, 149 So. 772, 111 Fla. 224.

20. Iowa.—Stringfield v. Graff, 22 Iowa 438.

50 C.J. p 240 note 70.

Accounting generally see *supra* § 291.

21. N.Y.—Fox v. Cowan, 70 N.Y.S. 2d 96, 272 App.Div. 785.

22. W.Va.—Williams v. Brown, 74 S.E. 409, 70 W.Va. 472.

50 C.J. p 240 note 71.

Discharge from liability by acts or conduct of creditor or obligee generally see *supra* §§ 148-160.

23. U.S.—Maryland Casualty Co. v. Dunkirk Water Com'rs, D.C.N.Y., 21 F.2d 1005.

50 C.J. p 241 note 72.

24. U.S.—American Surety Co. v. Mills, Idaho, 232 F. 841, 147 C.C.A. 35.

25. Or.—New Amsterdam Casualty

Co. v. Hyde, 34 P.2d 930, 148 Or. 229, rehearing denied 35 P.2d 980, 148 Or. 229.

26. Wash.—Maryland Casualty Co. v. Washington Nat. Bank, 159 P. 689, 92 Wash. 497.

27. Ala.—Tennessee - Hermitage Nat. Bank v. Hagan, 119 So. 4, 218 Ala. 390.

28. Ala.—Tennessee - Hermitage Nat. Bank v. Hagan, *supra*.

29. N.J.—Corpus Juris cited in Tipula v. Garfield Mill. Inc., 170 A. 228, 229, 115 N.J.Eq. 246. 50 C.J. p 241 note 77.

30. Wis.—St. Croix Timber Co. v. Joseph, 124 N.W. 1049, 142 Wis. 55.

50 C.J. p 241 note 78.

31. Wis.—St. Croix Timber Co. v. Joseph, *supra*.

32. La.—McDonald v. Harris Gas, etc., Co., 2 La.App. 241.

strain the creditor from proceeding against him where he has been discharged from liability,<sup>33</sup> or to restrain him from collecting from the surety more than the latter's just proportion of the debt, where by the creditor's act the surety is deprived of his right of contribution from his cosureties,<sup>34</sup> or to restrain the creditor from collecting a usurious debt from him;<sup>35</sup> and, if he was not a party to the usury, and was ignorant thereof, he may maintain his bill without tendering the amount that is actually due.<sup>36</sup> However, it has been held that a surety is not entitled to enjoin the entry of a judgment against him where such relief would prejudice the legal rights of the creditor.<sup>37</sup>

**Restraining execution.** Where the rule obtains that the property of the principal must first be levied on for the principal indebtedness, as discussed supra § 279, a surety may obtain an injunction to restrain the taking of his property until after the principal's property has been subjected;<sup>38</sup> and this rule applies even though the only available property of the principal is encumbered, if his interest therein can be sold for the amount of the execution.<sup>39</sup> The surety is also entitled to an injunction restraining an execution against his property to satisfy a judgment against the principal and surety where, after the judgment is entered, a stay of execution is granted to the principal by the creditor

without the surety's assent;<sup>40</sup> and a surety may be entitled to an injunction against an execution issued for too large an amount.<sup>41</sup> A surety cannot have the enforcement of a judgment against him and his solvent principal restrained on the ground of the latter's primary liability, since he has an adequate legal remedy by paying the debt and suing the principal for reimbursement.<sup>42</sup>

An uncontroverted allegation, by a surety in a suit to enjoin execution, that plaintiff in execution was dead at the time of issuance is sufficient.<sup>43</sup>

**Conclusiveness of previous judgment.** On a bill for injunctive relief against a judgment rendered against him on his bond, a surety cannot, in the absence of fraud, contest the merits of a previous judgment or decree rendered against his principal,<sup>44</sup> and, therefore, where his principal does not appeal from an order dissolving an injunction, his surety has no right to another injunction on the same ground.<sup>45</sup>

**Extension of time for payment.** A surety is entitled to exoneration in full by injunction against an execution sale of his property, after a release of the principal debtor's property from a judgment lien and extension of time for payment without the surety's consent.<sup>46</sup>

## B. AS TO PRINCIPAL

### § 300. In General

As between principal and surety, equity always lends aid for the latter's protection. Out of the relationship the surety acquires the right to be exonerated by the principal.

It has been declared to be the established law that as between principal and surety equity always lends aid for the protection of the surety.<sup>47</sup>

Out of a suretyship relation the surety acquires

33. N.C.—Hawkins v. Hall, 38 N.C. 280.

50 C.J. p 241 note 82.

#### Alteration of instrument

(1) Equity will not enjoin the negotiation of a promissory note as affecting the liability of a surety, on a bill by such surety, where he was not discharged from liability by reason of an alteration of the note.—Nickerson v. Swett, 135 Mass. 514.

(2) Injunction against negotiation and transfer of instruments or securities for payment of money generally see Injunctions § 74.

34. W.Va.—Williams v. Carr, 35 S. E. 69, 76 W.Va. 139.

50 C.J. p 241 note 83.

35. Del.—Hazel v. Sinex, 6 A. 625, 6 Del.Ch. 19.

Recovery of usury paid see supra § 298.

36. Del.—Hazel v. Sinex, supra.

37. N.J.—Sea Isle City Realty Co.

v. Ocean City First Nat. Bank, 99 A. 929, 87 N.J.Eq. 84.

50 C.J. p 242 note 89.

38. Ark.—Hill v. Crowley, 18 S.W.

540, 55 Ark. 450.

50 C.J. p 242 note 91.

Injunction restraining levy or sale under execution generally see Executions §§ 151-163.

39. Iowa.—Barnes v. Cavanagh, 3 N.W. 801, 53 Iowa 27.

40. Iowa.—Okey v. Sigler, 47 N.W. 911, 32 Iowa 94.

50 C.J. p 242 note 93.

41. Ala.—Fryer v. Austill, 2 Stew. 119.

23 C.J. p 559 note 80.

42. Wis.—Stein v. Benedict, 53 N. W. 891, 83 Wis. 603.

43. Tex.—Dailey v. Wynn, 33 Tex. 614.

44. Ala.—McBroom v. Sommerville, 2 Stew. 515.

50 C.J. p 242 note 96.

45. Va.—Ross v. Woodville, 4 Munf. 324, 18 Va. 324.

46. Tex.—Traywick v. Gunn, Civ. App., 293 S.W. 273.

Extension of time of payment or performance generally see supra §§ 161-192.

#### Sufficiency of evidence

In a suit by one claiming to be a surety to restrain a suit on a bond to recover a deficiency arising in mortgage foreclosure, and contending that the mortgagee, with knowledge of the suretyship and without complainant's knowledge and consent, gave an extension to the person principally liable for payment of the debt, evidence has been held insufficient to establish the elements necessary for such relief.—Schumann v. Fidelity Union Trust Co., 3 A.2d 852, 126 N.J.Eq. 349, affirmed 12 A.2d 724, 127 N.J.Eq. 249.

47. Pa.—Massachusetts Bonding & Insurance Co. v. Smyser-Royer Co.,

the right to be exonerated by the principal debtor.<sup>48</sup> A surety's right to recover from the principal, in a separate action, the amount paid by the surety on the obligation is not destroyed by the obligee's failure to proceed against the principal.<sup>49</sup>

A surety for contractors, on taking over their construction job, has been held to have the right, as against them and under its contract, to continue their machinery in use on the job.<sup>50</sup>

Subrogation of a surety to the rights of the principal is discussed in the C.J.S. title Subrogation § 57, also 60 C.J. p 771 note 99-p 772 note 5.

### § 301. Rights Before Payment or Satisfaction of Principal Debt or Obligation

A surety has many rights, as to his principal, before the surety pays the debt, and the relationship of debtor and creditor is generally held to exist between them from the making of the suretyship contract; but the surety's right of action against the principal ordinarily accrues at the time of payment by the former.

Whether a surety is deemed to be a creditor of his principal from the date of his suretyship or from the date of his payment of the debt depends very much on the character of the remedy or redress he may seek.<sup>51</sup> While many of the rights of a surety as to his principal depend on payment by him,<sup>52</sup> he possesses many before payment;<sup>53</sup> and such rights have their inception as soon as he executes the instrument<sup>54</sup> and are fixed by the law in force at that time.<sup>55</sup> Thus it is generally held that the relationship of debtor and creditor exists between the principal and surety from the time the contract of suretyship is made,<sup>56</sup> although in some cases it has been asserted that the relationship does not arise until the surety pays the debt of the principal.<sup>57</sup>

Usually the surety, before payment, cannot interfere with the right of the principal to deal with his property as he pleases.<sup>58</sup> Ordinarily, and this

51 Pa. Dist. & Co. 464, 57 York Leg. Rec. 185.

48. Mass.—Pappone v. Masters, 90 N.E.2d 907, 325 Mass. 437.  
Reimbursement or indemnity see infra § 307.

49. Ariz.—First Nat. Bank v. Standard Accident Ins. Co., 297 P. 864, 38 Ariz. 77.

50. Mich.—State Bank of Beaverton v. Southern Surety Co., 245 N.W. 500, 260 Mich. 482.

51. Miss.—Loughridge v. Bowland, 52 Miss. 546.

Okl.—Timmons v. Hanna Const. Co., 55 P.2d 110, 176 Okl. 180.

Right of surety to set aside fraudulent conveyance of principal see Fraudulent Conveyances § 77 b.

52. Okl.—Timmons v. Hanna Const. Co., supra.

Va.—Corpus Juris quoted in Dickenson v. Charles, 4 S.E.2d 351, 353, 173 Va. 393.

Rights after payment or satisfaction see infra §§ 306-310.

53. Okl.—Corpus Juris quoted in Timmons v. Hanna Const. Co., 55 P.2d 110, 176 Okl. 180.

Va.—Corpus Juris quoted in Dickenson v. Charles, 4 S.E.2d 351, 353, 173 Va. 393.

Retention of principal's property on his insolvency

Pa.—In re Gordon, Com.Pl., 44 Dauph.Co. 223.

54. Okl.—Corpus Juris quoted in Timmons v. Hanna Const. Co., 55 P.2d 110, 176 Okl. 180.

Va.—Corpus Juris quoted in Dickenson v. Charles, 4 S.E.2d 351, 353, 173 Va. 393.

Implied agreement to indemnify

surety arising on execution of contract see infra § 316.

55. Miss.—Washburn v. Blundell, 22 So. 946, 75 Miss. 266.

Okl.—Corpus Juris quoted in Timmons v. Hanna Const. Co., 55 P.2d 110, 176 Okl. 180.

Va.—Corpus Juris quoted in Dickenson v. Charles, 4 S.E.2d 351, 353, 173 Va. 393.

56. U.S.—Corpus Juris cited in Howard Johnson, Inc. of Fla. v. Tucker, C.C.A.Fla., 157 F.2d 959, 962—Fidelity & Deposit Co. of Maryland v. Hobbs, C.C.A.N.M., 144 F.2d 5.

Minn.—National Surety Co. v. Wittich, 237 N.W. 690, 184 Minn. 44.

Miss.—Fidelity & Deposit Co. of Maryland v. Deposit Guaranty Bank & Trust Co., 144 So. 700, 164 Miss. 286, 85 A.L.R. 860.

Ohio.—Corpus Juris cited in In re Deal's Estate, 46 N.E.2d 643, 647, 70 Ohio App. 503—Yakey v. Strunk, 7 Ohio N.P., N.S., 177, affirmed 91 N.E. 1143, 81 Ohio St. 568.

Okl.—Corpus Juris quoted in Timmons v. Hanna Const. Co., 55 P.2d 110, 176 Okl. 180.

Va.—Corpus Juris quoted in Dickenson v. Charles, 4 S.E.2d 351, 353, 173 Va. 393.

50 C.J. p 242 note 4.

In action to set aside fraudulent conveyance see Fraudulent Conveyances § 77 b.

Implied contract for indemnification or reimbursement see infra § 316.

Rule in equity

W.Va.—Roush v. Seigrist, 197 S.E. 25, 119 W.Va. 725.

Surety on appeal bond satisfying judgment against principal after af-

firmance in appellate court and denial of leave to further appeal, and receiving assignment thereof, became judgment creditor of principal as of date of original entry of judgment.—Globe Indemnity Co. v. Park-Lexington Corporation, 277 N.Y.S. 407, 154 Misc. 854.

57. U.S.—Ward v. First Nat. Bank, C.C.A.Mo., 76 F.2d 256.

Mo.—Farmers & Mechanics Sav. Bank of Troy v. Jennings, App., 138 S.W.2d 703.

50 C.J. p 242 note 3.

Simple contract creditor

N.C.—Saleed v. Abeyounis, 9 S.E.2d 399, 217 N.C. 644.

Tex.—Armstrong v. Anderson, Civ. App., 91 S.W.2d 775, reversed on other grounds Anderson v. Armstrong, 120 S.W.2d 444, 132 Tex. 122, rehearing denied 132 S.W.2d 393, 132 Tex. 122.

In Iowa

(1) Until the surety has paid, the principal is not the surety's debtor.—Johnston v. Grimm, 229 N.W. 716, 209 Iowa 1050.

(2) It has also been held that the overwhelming weight of authority is that the relationship of creditor and debtor arises immediately on the signing by the surety of the obligation because of the implied promise of the principal to reimburse him in case he is compelled to pay it.—Leach v. Bassman, 227 N.W. 339, 208 Iowa 1374.

58. U.S.—Corpus Juris cited in Corn Exchange Nat. Bank & Trust Co. v. Maryland Casualty Co., D.C. Pa., 18 F.Supp. 971, 973.

50 C.J. p 243 note 5.

Right to seize principal's property  
The mere existence of the rela-



is the common-law rule,<sup>59</sup> where one is surety for another for the payment of a debt, the right of action by the surety against the principal accrues at the time of the payment by the former;<sup>60</sup> and the payment must be made before the action for reimbursement is brought, as discussed *infra* § 309 a, notwithstanding the surety became such through misrepresentations made to him.<sup>61</sup> This rule has been changed or modified by some statutes.<sup>62</sup>

### § 302. — As to Debts Due Principal from Surety

In a suit by the principal on a claim against the surety, the mere fact of suretyship is no defense if no action has been taken against him on the debt for which he is surety. If the principal or his estate is insolvent, equity recognizes the surety's right to retain any funds of the principal in his hands, and the principal cannot recover from his surety without first indemnifying him.

When the surety is sued by the principal on a claim held by the latter against the former, the mere fact of the suretyship will not be a defense to the surety if no action has been taken against him on the debt for which he is surety,<sup>63</sup> nor will it be a defense against the personal representative of the principal;<sup>64</sup> and it has been held that the surety cannot refuse to pay claims which have been assigned to the principal if the surety has not paid anything on the debt for which he is lia-

ble, although judgment has been obtained against him.<sup>65</sup> The principal has the right to assign to the creditor, as security, a debt due from the surety to the principal,<sup>66</sup> but an oral agreement between the principal and the surety that a debt of the latter to the former shall go in satisfaction of the liability about to be assumed by the surety will not prevail over an oral assignment of the debt by the principal to a third person before the surety became bound.<sup>67</sup>

A surety who has been fully indemnified by the principal cannot object to paying a debt owing by him to the principal.<sup>68</sup> If, however, the principal<sup>69</sup> or his estate<sup>70</sup> is insolvent, equity recognizes the right of the surety to retain any funds of the principal in his hands, and the principal will not be allowed to recover from his surety without first indemnifying the latter.<sup>71</sup> The rule has been held to apply even as against an assignee of the principal;<sup>72</sup> but such application has also been refused.<sup>73</sup>

*Stay of proceedings when creditor's action pending.* If a surety sued by his principal does not object that suit has been begun against him on the debt for which he is liable as surety, it is discretionary with the trial court afterward to allow a stay of proceedings.<sup>74</sup>

tionship of surety and principal does not always give the surety the right to seize any and all property of the principal which may come into its hands by virtue of independent and unrelated transactions, prior to the surety's payment of the principal debt.—*Corn Exchange Bank & Trust Co. v. Maryland Casualty Co.*, D.C. Pa., 18 F.Supp. 971.

59. Ohio.—*Litler v. Horsey*, 2 Ohio 209.  
50 C.J. p 243 note 7.

60. U.S.—*Ward v. First Nat. Bank*, C.C.A.Mo., 76 F.2d 256.  
Ill.—*Runyan v. Moon*, 267 Ill.App. 312.

Minn.—*Bennett v. Bennett*, 42 N.W. 2d 39, 230 Minn. 415.  
Mo.—*Farmers & Mechanics Sav. Bank of Troy v. Jennings*, App., 138 S.W.2d 703—*Henneke v. Strack*, App., 101 S.W.2d 743.

N.Y.—*Merrill v. Equitable Surety Co. of New York*, 227 N.Y.S. 266, 131 Misc. 541.

Pa.—*Bishoff v. Fehl*, 29 A.2d 58, 345 Pa. 539, 143 A.L.R. 1058.  
50 C.J. p 243 note 7.

Commencement of running of statute of limitations see *Limitations of Actions* § 160 b

Rights of surety against estate of principal see *infra* § 315.

#### Attack on fraudulent conveyance

(1) Surety may, in equitable action for indemnity for debt not due, attack principal's fraudulent conveyance, and court may, as permitted by statute, adjudge lien on land.—*Cloud v. Middleton*, 44 S.W.2d 559, 241 Ky. 595.

(2) Sureties as persons who may attack conveyance see *Fraudulent Conveyances* § 77 b.

61. Mo.—*Citizens' Bank v. Burrus*, 77 S.W. 748, 178 Mo. 716.

62. Okl.—*Walton v. Williams*, 49 P. 1022, 5 Okl. 642.  
50 C.J. p 243 note 11.

63. Mass.—*Jones v. Wolcott*, 15 Gray 541.  
50 C.J. p 243 note 12.

64. Ala.—*Tyree v. Parham*, 66 Ala. 424.

65. Ind.—*Root v. Moriarty*, 39 Ind. 85.

66. N.C.—*Miller v. Cherry*, 57 N.C. 197.

67. Ky.—*Newby v. Hill*, 2 Metc. 530.

68. N.Y.—*Holden v. Gilbert*, 7 Paige 208.

69. N.J.—*Corpus Juris* cited in

*Tipula v. Garfield Mill, Inc.*, 170 A. 238, 239, 115 N.J.Eq. 246.  
50 C.J. p 244 note 18.

#### Indemnity against suretyship liability; set-off

The surety of an insolvent principal may retain the amount of his own indebtedness to the principal by way of indemnity against the suretyship liability; where makers of joint and several note held by receiver of insolvent bank were two of the sureties on bank's bond to city for protection of city's deposit, and city had recovered judgment against the sureties, the makers of the note were entitled to set-off.—*Waugh v. Hood*, 198 S.E. 515, 120 W. Va. 291, rehearing denied 9 S.E.2d 135, 120 W.Va. 291.

70. Va.—*Barnes v. Barnes*, 56 S.E. 172, 106 Va. 319.  
50 C.J. p 244 note 19.

71. Pa.—*Beaver v. Beaver*, 23 Pa. 167.

50 C.J. p 244 note 20.

72. Pa.—*Craighead v. Swartz*, 67 A. 1003, 219 Pa. 149.  
50 C.J. p 244 note 21.

73. Wis.—*Kinsey v. Ring*, 53 N.W. 842, 83 Wis. 536.

74. Minn.—*Richardson v. Merritt*, 77 N.W. 234, 407, 968, 74 Minn. 354.

### § 303. — Enforcement of Payment or Other Exoneration

In equity and under some statutes, after the maturity of the debt or accrual of liability, a surety who has not paid the debt, even though he has not been troubled by the creditor, has a right to compel the principal to exonerate him from liability, to pay the debt, or to secure him against loss.

Before maturity of the debt, or accrual of liability, for which he is surety, the surety has no

right of action in equity to be indemnified against apprehended danger of loss by reason of his undertaking.<sup>75</sup> After maturity, however, in the absence of a present remedy at law,<sup>76</sup> although he has not paid and has not been troubled by the creditor, or asked by him to pay, he has the right, before payment, to go into a court of equity, at any time, to compel the principal to exonerate him from liability or to pay the debt,<sup>77</sup> or to secure him against

**75. U.S.—Corpus Juris** quoted in *Morley Const. Co. v. Maryland Casualty Co.*, C.C.A.Mo., 84 F.2d 522, 526, reversed on other grounds 57 S.Ct. 325, 300 U.S. 185, 81 L.Ed. 598, rehearing denied 57 S.Ct. 505, 300 U.S. 687, 81 L.Ed. 888, conformed to, C.C.A., 90 F.2d 976, certiorari denied 58 S.Ct. 266, 302 U.S. 748, 82 L.Ed. 578, rehearing denied 58 S.Ct. 362, 302 U.S. 779, 82 L.Ed. 602—*American Bonding & Trust Co. of Baltimore City v. Logansport & W. V. Gas Co.*, C.C.Ind., 95 F. 49.  
**Recourse to security or indemnity** see *infra* § 304.

#### **Indorser as not surety; grounds for attachment**

An indorser of a note is not a surety within a statute authorizing a surety to maintain an action against his principal to obtain indemnity against the liability for which he is bound, before it is due, whenever any grounds for attachment exist, and in such actions to obtain orders of attachment.—*Rice v. Dorrian*, 22 S.W. 218, 57 Ark. 541.

**76. Mass.—Kiloren v. Hernan**, 20 N.E.2d 946, 303 Mass. 93—*Broadway National Bank of Chelsea v. Hayward*, 189 N.E. 199, 285 Mass. 459.

#### **Remedy at law held not available**

**Pa.—Massachusetts Bonding & Insurance Co. v. Smyser-Royer Co.**, 51 Pa.Dist. & Co. 464, 57 York Leg. Rec. 185.

**77. U.S.—Corpus Juris** cited in *Continental Casualty Co. v. Caldwell*, C.C.A.La., 120 F.2d 742, 746—*Chicago Title & Trust Co. v. Fox Theatres Corporation*, C.C.A.N.Y., 91 F.2d 907—*Admiral Oriental Line v. U. S.*, C.C.A.N.Y., 86 F.2d 201—*Glades County, Fla., v. Detroit Fidelity & Surety Co.*, C.C.A. Fla., 57 F.2d 449.

**Ala.—Hawkins v. Holman**, 195 So. 880, 239 Ala. 541.

**Cal.—Carpenter v. Park**, 66 P.2d 224, 19 Cal.App.2d 567.

**Fla.—Corpus Juris** cited in *Ferguson v. Brogan*, 149 So. 772, 774, 111 Fla. 224.

**Iowa.—Corpus Juris** quoted in *McKey-Fansher Co. v. Rowen*, 5 N.W. 2d 911, 912, 232 Iowa 660.

**Miss.—Fidelity & Deposit Co. of Maryland v. Deposit Guaranty Bank & Trust Co.**, 144 So. 700, 184 Miss. 286, 85 A.L.R. 860.

**Mont.—Corpus Juris** cited in *Maryland Casualty Co. v. Walsh*, 155 P.2d 759, 761, 116 Mont. 559.

**Pa.—Massachusetts Bonding & Insurance Co. v. Smyser-Royer Co.**, 51 Pa.Dist. & Co. 464, 57 York Leg. Rec. 185—*Massachusetts Bonding & Insurance Co. v. Smyser-Royer Co.*, Com.Pl., 58 York Leg.Rec. 109, 50 C.J. p 244 note 27.

**Pleading** see *infra* § 330.

#### **Great weight of authority**

**Me.—Matthews v. Matthews**, 148 A. 796, 128 Me. 495.

#### **Aid or procedure quia timet**

(1) The bill in equity is a bill quia timet, or in the nature of a bill quia timet.

**Idaho.—Saunders v. Saunders**, 291 P. 1069, 49 Idaho 733, 71 A.L.R. 350.

**Me.—Matthews v. Matthews**, 148 A. 796, 128 Me. 495.

**Tenn.—Henegar v. Brannon**, 137 S. W.2d 889, 24 Tenn.App. 1.

(2) A surety is indeed a favorite of equity, which will extend its aid in exoneration, quia timet, before he pays.—*American Surety Co. of New York v. Lewis State Bank*, C.C.A. Fla., 58 F.2d 559.

(3) Surety claiming exoneration proceeds before payment quia timet, seeking to have payment made to creditor.—*Glades County, Fla., v. Detroit Fidelity & Surety Co.*, C.C.A. Fla., 57 F.2d 449.

**Surety is not required to suffer judgment** before taking steps to compel principal debtor to comply with his obligations, but may recover against principal debtor before payment of accommodation debt or suffering judgment therefor.—*Woodward v. Hollis*, 222 P.2d 862, 93 Colo. 17.

#### **Absence of personal liability; exoneration of property**

A person who, without assuming any personal liability, has given security for another's debt may maintain an action, the debt being due and unpaid, to compel the principal debtor to exonerate his prop-

erty.—*Matthews v. Matthews*, 148 A. 796, 128 Me. 495.

#### **Surety as equitable assignee**

A surety seeking in equity to compel the principal to perform the obligation when due stands in the position of an equitable assignee of the creditor's claim against the principal and not of the principal's property or property interests.—*Maryland Cas. Co. v. Walsh*, 155 P.2d 759, 116 Mont. 559.

#### **Enforcement of liability of all indemnitors**

Surety can obtain relief in equity against indemnified principal debtor before actual loss occurs where, incident to other equitable relief, it is appropriate to ascertain and enforce liability of all indemnitors of single debt in single equity suit brought to enforce such debt, which may require consideration of several phases of one general transaction concerning land resorted to as security and forming subject matter of equitable controversy before court.—*Ferguson v. Brogan*, 149 So. 772, 111 Fla. 224.

#### **Property not free from legal claims; unassailable fund**

Principal quia timet cannot move creditor into position of doubtfulness by requiring him to participate in questionable effort to convert into money property which may not be wholly free from legal claims and penalties; although surety is a favorite of equity and may, if he fears, secure its aid before payment, essence of such relief is clear conscience and certainty of unassailable fund.—*Johnson v. Thomas*, D.C.Tex., 16 F.Supp. 1013.

#### **Creditor as codefendant; stakeholder**

(1) The creditor may be made a codefendant in such action, provided he can himself enforce performance, and neglects or refuses to do so.—*Carpenter v. Park*, 66 P.2d 224, 19 Cal.App.2d 567.

(2) A mere stakeholder, who is not alleged to owe anything as yet, should not be drawn into the controversy between the other parties.—*Southwestern Surety Ins. Co. v. Wells*, D.C.Pa., 217 F. 294.

(3) Parties generally see *infra* § 329.

s.<sup>78</sup> provided no rights of the creditor are adjudged thereby.<sup>79</sup> The doctrine in such cases rests on the simple right, as between the principal and surety, that the surety has to be protected by the principal;<sup>80</sup> a surety is awarded exoneration in order that mischief and circuity of action may be avoided;<sup>81</sup> he is not obliged to make inroads on his own resources when the loss must in the end fall on the principal.<sup>82</sup>

It is not essential that the claim of the surety for relief should depend on the fact that he will incur irreparable injury;<sup>83</sup> nor must he show any fraudulent disposition of property,<sup>84</sup> or the presence of a wrongful purpose,<sup>85</sup> or special reason for fearing loss;<sup>86</sup> and the insolvency of the surety will not preclude him from maintaining the claim.<sup>87</sup>

It has been held, however, that a surety cannot invoke the doctrine of exoneration unless his liability is imminent<sup>88</sup> and absolute,<sup>89</sup> and that a court of equity will not interfere in behalf of a

surety to compel the principal to pay the debt before it has been ascertained that the fund primarily liable is insufficient to discharge it,<sup>90</sup> or while the creditor is in court seeking to enforce it,<sup>91</sup> unless such proceedings will not subject the latter to undue delay.<sup>92</sup> So a surety who has received an agreed security for his assuming the position has been denied the right to proceed in equity before payment to compel the principal to give him any further security;<sup>93</sup> and the fact that by reason of the death or insolvency of his cosureties he has become the only responsible party on the bond does not entitle a surety to additional security.<sup>94</sup> The form in which that protection may be secured is not material where the right to it exists and it can be had without prejudice to the creditor.<sup>95</sup>

*Personal right of surety; rights of creditor.* The right of a surety to exoneration against his principal is a personal right and not a right to which a creditor is entitled to be subrogated;<sup>96</sup> and any such right of the surety cannot in any event be ex-

Idaho.—*Sassaman v. Root*, 218 P. 374, 37 Idaho 588. C.J. p 245 note 29.

*Exoneration or concealment of funds.* Surety held entitled to exoneration where it appeared that innocent principal, unless restrained, could convert or conceal funds, with irreparable loss to surety.—*Morley Const. Co. v. Maryland Casualty Co.*, 13 A.Mo., 90 F.2d 976, rehearing denied 57 S.Ct. 505, 300 U.S. 687, 81 Ed. 888, certiorari denied 58 S.Ct. 5, 302 U.S. 748, 82 L.Ed. 578, rehearing denied 58 S.Ct. 362, 302 U.S. 779, 82 L.Ed. 602.

Ala.—*Alabama Bank & Trust Co. v. Garner*, 142 So. 568, 225 Ala. 369.

Me.—*Matthews v. Matthews*, 148 A. 796, 128 Me. 495.  
 Ill.—*Stulz-Sickles Co. v. Fredburn Const. Corporation*, 169 A. 27, 114 N.J.Eq. 475—*Philadelphia & Reading R. Co. v. Little*, 7 A. 356, 41 N.J.Eq. 519.

Iowa.—*Corpus Juris* quoted in *McKey-Fansher Co. v. Rowen*, 5 N.W.2d 911, 912, 232 Iowa 660.

Ms.—*Corpus Juris* cited in *Fidelity & Deposit Co. of Maryland v. Deposit Guaranty Bank & Trust Co.*, 144 So. 700, 702, 164 Miss. 286, 85 A.L.R. 860.

C.J. p 245 note 30.

The duty of a principal in such circumstances is to see that the surety is not hurt or his credit impaired.—*Woodward v. Hollis*, 23 P. 862, 93 Colo. 17, 863.

U.S.—*Falvey v. Foreman-State Nat. Bank*, C.C.A.III., 101 F.2d 409, certiorari denied 59 S.Ct. 835, 307

U.S. 632, 83 L.Ed. 1514—*Southwestern Surety Ins. Co. v. Wells*, D.C.Pa., 217 F. 294.

82. U.S.—*Admiral Oriental Line v. U. S.*, C.C.A.N.Y., 86 F.2d 201.

Pa.—*Massachusetts Bonding & Insurance Co. v. Smyser-Royer Co.*, Com.Pl., 58 York Leg.Rec. 109.

83. Iowa.—*Corpus Juris* quoted in *McKey-Fansher Co. v. Rowen*, 5 N.W.2d 911, 912, 232 Iowa 660. 50 C.J. p 245 note 31.

*Solvency, insolvency, or fraud of principal.*

If the principal is solvent, the decree need not go further than to require the principal to pay; but, where he is fraudulent or insolvent, or has absconded, the equity of exoneration needs and may have further protection; injunctions, receivers, and equitable garnishments have been granted, property recovered from third persons, and funds traced and applied—*Glades County, Fla. v. Detroit Fidelity & Surety Co.*, C.C.A.Fla., 57 F.2d 449.

84. Iowa.—*Corpus Juris* quoted in *McKey-Fansher Co. v. Rowen*, 5 N.W.2d 911, 912, 232 Iowa 660.

Kan.—*Hutchinson Wholesale Grocer Co. v. Brand*, 99 P. 592, 79 Kan. 340.

85. U.S.—*Morley Const. Co. v. Maryland Casualty Co.*, Mo., 57 S.Ct. 325, 300 U.S. 185, 81 L.Ed. 593, rehearing denied 57 S.Ct. 505, 300 U.S. 687, 81 L.Ed. 888, conformed to, C.C.A., 90 F.2d 976, certiorari denied 58 S.Ct. 266, 302 U.S. 748, 82 L.Ed. 578, rehearing denied 58 S.Ct. 362, 302 U.S. 779, 82 L.Ed. 602.

86. Iowa.—*Corpus Juris* quoted in *McKey-Fansher Co. v. Rowen*, 5 N.W.2d 911, 912, 232 Iowa 660.

Kan.—*Hutchinson Wholesale Grocer Co. v. Brand*, 99 P. 592, 79 Kan. 340.

87. N.C.—*Ferrer v. Barrett*, 57 N.C. 455.

88. U.S.—*Falvey v. Foreman-State Nat. Bank*, C.C.A.III., 101 F.2d 409, certiorari denied 59 S.Ct. 835, 307 U.S. 632, 83 L.Ed. 1514.

89. U.S.—*Falvey v. Foreman-State Nat. Bank*, supra—*Southern Surety Ins. Co. v. Wells*, D.C.Pa., 217 F. 294.

Pa.—*Massachusetts Bonding & Insurance Co. v. Smyser-Royer Co.*, 51 Pa.Dist. & Co. 464, 57 York Leg. Rec. 185—*Massachusetts Bonding & Insurance Co. v. Smyser-Royer Co.*, Com.Pl., 58 York Leg.Rec. 109.

90. N.Y.—*Slauson v. Watkins*, 86 N.Y. 597.

91. N.Y.—*Slauson v. Watkins*, 86 N.Y. 597.

92. W.Va.—*Webster Springs First Nat. Bank v. McGraw*, 101 S.E. 474, 85 W.Va. 298. 50 C.J. p 245 note 37.

93. Ky.—*Mitchell v. Woodington*, 8 Ky.Op. 475.

Mich.—*Nash v. Burchard*, 49 N.W. 492, 87 Mich. 85.

94. Ill.—*Ridgeway v. Potter*, 3 N.E. 91, 114 Ill. 457, 55 Am.R. 875.

95. Ill.—*Roberts v. American Bonding, etc., Co.*, 83 Ill.App. 463.

96. Ohio.—*Parker v. Wheeler*, 191 N.E. 798, 47 Ohio App. 301.

exercised for the benefit of one creditor to the exclusion of all other interested persons.<sup>97</sup> Under the doctrine of exoneration, a surety is subrogated only to the creditor's rights against the debtor.<sup>98</sup>

*Custody or control of fund.* The exoneration of a surety does not entitle him to custody or control of the fund applied in his exoneration.<sup>99</sup>

*Under some statutes* a surety may maintain an action against his principal to compel him to perform the obligation when due.<sup>1</sup> Such statutes have been held valid,<sup>2</sup> since they involve only a statutory recognition of one of the well-established doctrines of equity jurisprudence;<sup>3</sup> the principle underlying such a statute is based on the duty of every person to perform his agreements, a court of equity enforcing the actual accomplishment of the thing stipulated for on the ground that what is lawfully agreed to be done ought to be done.<sup>4</sup>

Under a statute providing that an action may be brought against two or more persons for the purpose of compelling one to satisfy a debt to the other, for which plaintiff is bound for security, the real character of such an action is that it is one in the nature of exoneration and subrogation,<sup>5</sup> and it is in equity, and not at law,<sup>6</sup> notwithstanding a money judgment is asked for.<sup>7</sup>

Under at least one statute, a surety may maintain an action against his principal to obtain indemnity against the debt or liability for which he is bound, before it is due, whenever any of the stat-

utory grounds exist for an order for arrest and bail or for an attachment;<sup>8</sup> such a statute has been said to be meant to change the common-law rule,<sup>9</sup> so that a surety should not be compelled to stand by and see the principal, for whose obligations he is bound, fraudulently dispose of his property and leave his just debts to be paid by those whom he has deluded into becoming his sureties.<sup>10</sup>

*Receivership.* A surety has been held unable to maintain a proceeding in equity to compel his principal to convey his property to a receiver, to secure him before he has paid the debt, and before recovering judgment and exhausting his remedies at law;<sup>11</sup> but where the court otherwise has jurisdiction in the particular proceeding before it to protect the surety it may appoint a receiver on facts justifying such appointment,<sup>12</sup> to the end that the property in the custody of the court, and the interests of all claimants thereto, may be fully protected.<sup>13</sup>

## § 304. — Recourse to Security or Indemnity

In the absence of contractual authority, a surety cannot apply security before the debt matures or before he becomes liable therefor. After maturity, if he is indemnified against loss or damage, ordinarily he must suffer such loss before he can recover on the indemnity, while if the indemnity is against liability it may be enforced before payment; the right of the surety in these respects is controlled by the terms of the agreement.

In the absence of express contractual authority to do so,<sup>14</sup> the surety cannot apply security before

97. Ohio.—Parker v. Wheeler, supra.

98. U.S.—Falvey v. Foreman-State Nat. Bank, C.C.A.Ill., 101 F.2d 409, certiorari denied 59 S.Ct. 835, 307 U.S. 632, 83 L.Ed. 1514.

Extent of surety's subrogation to creditor's rights generally see the C.J.S. title Subrogation § 52, also 60 C.J. p 751 note 84—p 753 note 2.

99. U.S.—Morley Const. Co. v. Maryland Casualty Co., Mo., 57 S.Ct. 325, 300 U.S. 185, 81 L.Ed. 593, rehearing denied 57 S.Ct. 505, 300 U.S. 637, 81 L.Ed. 888, conformed to, C.C.A., 90 F.2d 976, certiorari denied 58 S.Ct. 266, 302 U.S. 748, 82 L.Ed. 578, rehearing denied 58 S.Ct. 362, 302 U.S. 779, 82 L.Ed. 602.

N.J.—Stulz-Sickles Co. v. Fredburn Const. Corporation, 169 A. 27, 114 N.J.Eq. 475.

1. Cal.—Karn v. Wills, 123 P.2d 640, 50 Cal.App.2d 604.

Mont.—Maryland Cas. Co. v. Walsh, 155 P.2d 759, 116 Mont. 559, 50 C.J. p 245 note 43.

Statutory remedies generally see infra §§ 336-338.

Prior payment of debt by surety not required.—Lincoln Bank & Trust Co. v. Arnold, 75 S.W.2d 751, 256 Ky. 80.

The heirs of the surety may obtain relief under such a statute, when, as between them and the principal debtor, their property is secondarily liable for the debt.—Meador v. Meador, 10 S.W. 651, 88 Ky. 217, 10 Ky.L. 783.

2. Cal.—Josephian v. Lion, 227 P. 204, 66 Cal.App. 650.

3. Cal.—Karn v. Wills, 123 P.2d 640, 50 Cal.App.2d 604—Josephian v. Lion, 227 P. 204, 66 Cal.App. 650.

4. Cal.—Karn v. Wills, 123 P.2d 640, 50 Cal.App.2d 604.

5. Colo.—Woodward v. Hollis, 222 P.2d 862, 93 Colo. 17.

Payment by principal to assignee of accommodation party held required.—Woodward v. Hollis, supra.

Statute applied to continuing and withdrawing partners

Colo.—Faricy v. J. S. Brown Mer-

cantile Co., 288 P. 639, 87 Colo. 427.

6. Colo.—Woodward v. Hollis, 22 P. 2d 862, 93 Colo. 17.

7. Colo.—Woodward v. Hollis, supra.

8. U.S.—Kelleam v. Maryland Casualty Co. of Baltimore, Md., C.C.A. Okl., 112 F.2d 940, reversed on other grounds 61 S.Ct. 595, 312 U. S. 377, 85 L.Ed. 899.

9. Okl.—Walton v. Williams, 49 P. 1022, 5 Okl. 642.

10. Okl.—Walton v. Williams, supra.

11. U.S.—Corpus Juris cited in Johnson v. Thomas, D.C.Tex., 16 W.Supp. 1013, 1018.

50 C.J. p 246 note 46.

12. U.S.—Central Surety & Insurance Corporation v. Bagley, D.C. Cal., 44 F.2d 808, 50 C.J. p 246 note 47.

13. U.S.—Central Surety & Insurance Corporation v. Bagley, supra.

14. Conn.—Calkins v. Lockwood, 17 Conn. 154, 42 Am.D. 729.

50 C.J. p 246 note 50.

maturity of the debt<sup>15</sup> or before he has become liable therefor;<sup>16</sup> and previous to that time he has no interest which he can assign.<sup>17</sup>

After the debt matures, however, even before the surety pays it, he can, under some decisions, have recourse to his indemnity.<sup>18</sup> If the surety is indemnified against loss or damage, ordinarily he must suffer such loss before he can recover on the indemnity,<sup>19</sup> the recovery of a judgment against him<sup>20</sup> or the allowance of a demand against his estate<sup>21</sup> being such a damnification as will entitle him or his administrator to look to his security. If, however, the indemnity is against liability, no damage need be sustained and the indemnity may be enforced before payment.<sup>22</sup>

So, where a promissory note shows on its face that it was given by a principal as a mere indemnity to secure the payee as surety, the latter cannot recover thereon without proving that he has sustained loss by payment of the obligation against which he was indemnified;<sup>23</sup> but, although there is some authority to the contrary,<sup>24</sup> a promissory note in ordinary form given to the payee by his principal as collateral security may be sued on when it matures, notwithstanding the debt for which the payee is surety for the maker has not

been paid;<sup>25</sup> and the liability of a surety for a debt not due may furnish a good consideration for a promissory note, on a promise, either express or implied by law, on the part of the surety, that he will pay and discharge the debt of his principal.<sup>26</sup> Such a note may be the foundation of an action and a valid attachment, before payment of the secured debt, at least to the extent of the actual payment made by the surety before taking judgment in his action.<sup>27</sup> A note executed after the action is commenced, however, will not support it.<sup>28</sup>

The right of the surety in these respects will be controlled by the terms of the agreement between the parties, as where it is stipulated that the surety may enforce his security on default of the principal<sup>29</sup> or the contract is otherwise of such a nature as to give the surety the right to enforce his security before payment.<sup>30</sup>

If the principal, to secure his surety, has given the latter a warrant for a judgment, the surety can enter judgment as soon as the debt is due and before payment, for the entire amount authorized thereby;<sup>31</sup> and he can assign a confessed judgment to the creditor,<sup>32</sup> but he cannot enforce the judgment by execution for any more than is necessary for his indemnity.<sup>33</sup>

15. Mich.—Burt v. Gamble, 57 N.W. 261, 98 Mich. 402.  
50 C.J. p 246 note 51.

Enforcement of payment by principal or other exoneration see supra § 303.

Rights of surety to security in possession of cosurety see infra §§ 347-350.

Security for protection of surety generally see infra §§ 317-321.

16. Iowa.—Nourse v. Weitz, 95 N.W. 251, 120 Iowa 708.  
50 C.J. p 246 note 52.

#### Payment of note

Right of sureties on a note to recover on a promise to them by a purchaser of property covered by a deed of trust to them as indemnity, in accordance with which they released the deed, does not depend on their payment of the note, since it belonged to plaintiffs as between them and such purchaser.—Elmer v. Campbell, 117 S.W. 622, 136 Mo.App. 100.

17. N.Y.—Comley v. Dazian, 21 N.E. 135, 114 N.Y. 161.  
50 C.J. p 246 note 53.

18. Idaho.—Saunders v. Saunders, 291 P. 1069, 49 Idaho 733, 71 A.L.R. 350.

Iowa.—Corpus Juris cited in McCrum v. Rubbert, 257 N.W. 766, 767, 219 Iowa 454, 97 A.L.R. 1073.

Mich.—Butler v. Ladue, 12 Mich. 173.  
50 C.J. p 246 note 54.

Only surplus of proceeds from sale of securities, after payment to creditors, held available to surety.—Wright v. Harrisburg Trust Co., 43 Pa.Dist. & Co. 47, 51 Dauph.Co. 213—Wright v. Harrisburg Trust Co., 51 Dauph.Co. 413.

19. N.Y.—Newburgh Nat. Bank v. Bigler, 83 N.Y. 51.  
50 C.J. p 246 note 55.

Indemnity against loss or damage generally see Indemnity § 14 c. Indemnity mortgages see Mortgages §§ 170-174.

20. Pa.—Carman v. Noble, 9 Pa. 366.

21. Vt.—Pond v. Warner, 2 Vt. 533.

22. N.Y.—Newburgh Nat. Bank v. Bigler, 83 N.Y. 51.  
50 C.J. p 246 note 58.

Indemnity against liability generally see Indemnity § 14 b.

23. Mo.—Borum v. Reed, 73 Mo. 461.  
50 C.J. p 246 note 59.

24. S.C.—Woodbridge v. Scott, 5 S.C.L. 193.

25. Ala.—Searcy v. Shows, 85 So. 444, 204 Ala. 218.  
50 C.J. p 246 note 61.

26. Mass.—Swift v. Crocker, 21 Pick. 241.  
50 C.J. p 247 note 62.

Consideration for indemnity contracts generally see infra § 315 b.

27. N.H.—Osgood v. Osgood, 39 N.H. 209.

50 C.J. p 247 note 63.

28. Mass.—Swift v. Crocker, 21

Pick. 241.

29. Ga.—Jones v. Norton, 71 S.E. 687, 9 Ga.App. 333.  
50 C.J. p 247 note 66.

#### Failure to pay materialmen

When contractor assigned to surety on its statutory bond all moneys due at time of any breach or default or thereafter becoming due, failure to pay materialmen was such default as imposed duty to turn over payments to surety, since default under bond was default under contract.—Martin v. National Surety Co., Mo., 57 S.Ct. 531, 300 U.S. 588, 81 L.Ed. 822.

30. Kan.—Bates v. Wiggin, 14 P. 442, 37 Kan. 44, 1 Am.S.R. 234.

50 C.J. p 247 note 67.

31. Pa.—Holfelder v. Schramm, 100 A. 267, 255 Pa. 493.

50 C.J. p 247 note 68.

32. Pa.—Harrisburg Bank v. Douglass, 4 Watts 95, 28 Am.D. 689.

33. Pa.—Appeal of Borland, 66 Pa. 470.

*Property of a deceased principal* on which a surety has a lien for his indemnity may be withheld from distribution for a reasonable time until it can be ascertained whether the surety will be liable.<sup>34</sup>

### § 305. — Action on Collateral Agreement to Pay Debt

A surety who has not paid the demand has a right of action against the principal for breach of the latter's agreement with the surety to do so.

Where the principal has agreed with the surety to pay the demand, and there is a breach of the agreement, the surety, even though he himself has not paid the demand, has a right of action against the principal.<sup>35</sup>

### § 306. Rights after Payment or Satisfaction

The rights of a surety to subrogation are discussed in the C.J.S. title Subrogation §§ 46-62, also 60 C.J. p 740 note 4-p 781 note 97, and his right to set aside a fraudulent conveyance by the

principal is discussed in Fraudulent Conveyances § 77 b.

Examine Pocket Parts for later cases.

### § 307. — Reimbursement or Indemnity

- a. In general
- b. Effect of taking security
- c. With respect to particular parties and relations
- d. Enforcement of security
- e. Notice and demand

#### a. In General

A surety who pays the debt is entitled to recover from the principal the amount so paid; but after payment by the principal a surety has no claim by reason of his suretyship.

In view of the implied contract between the parties, which obliges a principal to reimburse his surety when the latter has paid the debt, as discussed infra § 316, the surety is entitled to recover from the principal the amount so paid,<sup>36</sup> or his

34. La.—Montgomery's Succession, 2 La. Ann. 469.

35. Mich.—Hall v. Nash, 10 Mich. 303.  
50 C.J. p 247 notes 72, 73.

36. U.S.—*Corpus Juris* cited in Joe Balestrieri & Co. v. Commissioner of Internal Revenue, C.C.A. 9, 177 F.2d 867, 872—American Surety Co. of New York v. Bethlehem Nat. Bank of Bethlehem, Pa., C.C. A.Pa., 116 F.2d 75, reversed on other grounds 62 S.Ct. 226, 314 U.S. 314, 86 L.Ed. 241, 138 A.L.R. 509—Ward v. First Nat. Bank, C. C.A.Mo., 76 F.2d 256—National Surety Corporation v. Peoples Milling Co., D.C.Ky., 57 F.Supp. 281—In re Seigel, D.C.Ga., 43 F. Supp. 778.

Ariz.—Hill v. Alfalfa Seed & Lumber Co., 297 P. 868, 38 Ariz. 70.

Cal.—Merner Lumber Co. v. Brown, 21 P.2d 590, 218 Cal. 136—State Athletic Commission of California v. Massachusetts Bonding & Insurance Co., 117 P.2d 75, 46 Cal. App.2d 823—Johnson v. Mortgage Guarantees Co., 4 P.2d 208, 117 Cal. App. 416.

Del.—Industrial Trust Co. v. Cantara, 165 A. 338, 5 W.W.Harr. 364.

D.C.—Laher v. Gall, to Use of Mercury Indemnity Co. of St. Paul, 110 F.2d 697, 71 App.D.C. 345.

Fla.—Scott v. National City Bank of Tampa, 139 So. 367, 107 Fla. 810—Anderson v. Trueman, 130 So. 12, 100 Fla. 727.

Ky.—Huffman v. National Surety Co., 51 S.W.2d 950, 244 Ky. 714.

Md.—Blair v. Baker, 76 A.2d 129.

Mo.—Farmers & Mechanics Sav. Bank of Troy v. Jennings, App.,

138 S.W.2d 703—Henneke v. Strack, App., 101 S.W.2d 743.

N.Y.—Newman v. Roth, 35 N.Y.S.2d 662, 264 App.Div. 344, affirmed 47 N.E.2d 961, 290 N.Y. 559, motion denied 50 N.E.2d 247, 290 N.Y. 865—Merrill v. Equitable Surety Co. of New York, 227 N.Y.S. 266, 131 Misc. 541.

Ohio.—Maryland Cas. Co. v. Gough, 65 N.E.2d 858, 146 Ohio St. 305—Gholson v. Savin, 31 N.E.2d 858, 137 Ohio St. 551, 139 A.L.R. 75—Hinman v. Uthoff, 90 N.E.2d 590, 87 Ohio App. 120—Barger v. Gething, App., 52 N.E.2d 94—Harris v. De Paulina, 178 N.E. 225, 40 Ohio App. 57.

Pa.—National Surety Corp. v. Nulton, 55 Pa.Dist. & Co. 149—New York Casualty Co. v. Gibbon & Kohl, Com.Pl., 32 Luz.Leg.Reg. 33.

Tenn.—Akers v. Gillentine, App., 231 S.W.2d 372.

Tex.—J. R. Phillips Inv. Co. v. Road Dist. No. 18 of Limestone County, Civ.App., 172 S.W.2d 707, error refused—Pegues v. Moss, Civ. App., 140 S.W.2d 461, error granted—Dandby v. Stroud, Civ.App., 48 S.W.2d 1018, error refused—Lewis v. Easley, Civ.App., 34 S.W. 2d 376.

Utah.—Beaver County v. Home Indemnity Co., 52 P.2d 435, 88 Utah 1.

Va.—Aetna Casualty & Surety Co. v. Whaley, 3 S.E.2d 395, 173 Va. 11.

Wis.—U. S. Fidelity & Guaranty Co. v. Pullen, 283 N.W. 462, 230 Wis. 137.

50 C.J. p 247 note 76.

Actions and proceedings see infra §§ 323-335.

Recovery of money paid under sec-

ondary liability generally see Money Paid § 3 b (3).

"A surety who pays the debt of his principal, upon the plainest principles of natural reason and justice, has a right to be reimbursed by him."—Dickenson v. Charles, 4 S.E. 2d 351, 853, 173 Va. 393—Kendrick v. Forney, 22 Gratt. 748, 749, 63 Va. 748, 749.

#### Principle recognized by law and equity courts

Va.—Dickenson v. Charles, 4 S.E.2d 351, 173 Va. 393—Kendrick v. Forney, 22 Gratt. 748, 63 Va. 748.

#### Right given by statute

U.S.—Phelps v. Dawson, C.C.A.S.D., 97 F.2d 339, 116 A.L.R. 1343—In re Clear Lake Beach Co., D.C.Cal., 12 F.Supp. 250.

Cal.—Pacific Indemnity Co. v. Hargreaves, 98 P.2d 217, 36 Cal.App.2d 328.

Ga.—Campbell v. Rybert, 167 S.E. 924, 46 Ga.App. 461.

Mont.—Maryland Cas. Co. v. Walsh, 155 P.2d 759, 116 Mont. 559—Kipp v. Paul, 103 P.2d 675, 110 Mont. 513.

One of the normal incidents of a bond is the right of the surety to recourse against the principal for losses paid by surety.—Commercial Standard Ins. Co. v. Ebner, Tex., 228 S.W.2d 507.

#### Effect of Negotiable Instruments Law

A provision of the Negotiable Instruments Law that "where the instrument is paid by a person secondarily liable thereon, it is not discharged" does not change the settled rule that a surety who pays the principal obligation has a right of

reasonable outlay,<sup>37</sup> even though the creditor was not bound to respect the suretyship,<sup>38</sup> and although the surety made payment to secure his individual release,<sup>39</sup> or the principal was not a party to the suit in which the judgment paid was had<sup>40</sup> or had not signed the bond.<sup>41</sup> The rights of sureties against their principal are not affected by any private arrangement among themselves for the distribution of the liability<sup>42</sup> or by the particular manner in which the relationship arose.<sup>43</sup>

Where there is an express contract to indemnify, the surety's right necessarily depends on its terms,<sup>44</sup> which may be such as to preclude the right to be reimbursed.<sup>45</sup>

A surety has no claim by reason of his suretyship after payment of the debt by the principal,<sup>46</sup> notwithstanding a special agreement between the creditor and surety that the former's claim against the latter remain unextinguished;<sup>47</sup> nor does one surety have any right against the principal where payment of the debt was made by his cosurety.<sup>48</sup>

*Payment of bill or note by surety.* A surety, on

payment of a bill or note, is entitled to maintain an action against the maker for reimbursement.<sup>49</sup> The payment of a note by the surety therein cannot be regarded as a payment by him of an original debt of the principal which was discharged by the proceeds of the secured note, so as to deprive the principal of a right which depended on his having paid such original debt.<sup>50</sup>

A payment by one of the makers of a joint and several note, who is in reality a surety for the other, will not operate as a payment unless this was so intended, and an action for his benefit may be brought on a note in the name of the payee.<sup>51</sup>

*Double suretyship.* When judgment has been recovered against a surety and his principal, which the former has paid, he cannot recover from the latter where the judgment was founded on a default of a third person for whom the surety was surety to the principal, the surety's liability to the principal in such case being primary.<sup>52</sup>

*Assertion of rights against distributees or devisee.* If, when the surety's rights accrue, the prin-

action on the implied obligation of reimbursement, irrespective of what right he might be able to assert in equity by subrogation, equitable assignment, or otherwise.—*W. H. Marston Co. v. Kochritz*, 293 P. 120, 109 Cal.App. 331.

**Stock and money deposited as margin**  
Ind.—*Damler v. Baine*, 51 N.E.2d 885, 114 Ind.App. 534.

**Relative liabilities of principal and surety**

In an action on a note, where judgment is rendered against both principal and surety, and right to reimbursement is claimed, the relative liabilities thereon of the principal and surety inter sese continue the same as on the note.—*Saied v. Abeyounis*, 9 S.E.2d 399, 217 N.C. 644.

**Satisfaction of judgment; judgment over**

(1) Surety on bond of guardian who was removed was entitled to provision in judgment against guardian and surety that, on satisfying judgment, surety was entitled to judgment over against guardian.—*In re Deming's Guardianship*, 73 P.2d 764, 192 Wash. 190.

(2) Receiver could not escape liability to his surety for amount of judgment against receiver, which surety had satisfied, on ground that judgment against receiver was void because rendered after his discharge, where he was not discharged until April 28, 1944, and judgment was rendered on Jan. 13, 1943.—*American*

*Sur. Co. of N. Y. v. Payne*, 29 N.W. 2d 118, 318 Mich. 670.

37. Mo.—*Wilson v. Massachusetts Bonding & Ins. Co.*, 190 S.W.2d 944, 238 Mo.App. 882.

**Surety's property charged with principal's consent**

Where the surety's property is used to satisfy the principal's duty, it is the duty of the principal to reimburse the surety to the extent of his reasonable outlay if the surety's property has been subjected to a charge with the consent of the principal.—*Damler v. Baine*, 51 N.E.2d 885, 114 Ind.App. 534.

38. N.J.—*Irick v. Black*, 17 N.J.Eq. 189.

50 C.J. p 248 note 77.

39. Mich.—*Lange v. Perley*, 11 N.W. 193, 47 Mich. 352.

50 C.J. p 248 note 78.

40. Ill.—*U. S. Fidelity, etc., Co. v. Connors*, 222 Ill.App. 1.

41. Tex.—*Marsh v. Phillips, Civ. App.*, 144 S.W. 1160.

42. Ark.—*Corpus Juris* quoted in *Shinn v. Kitchens*, 186 S.W.2d 168, 173, 208 Ark. 321.

50 C.J. p 248 note 81.

43. Ark.—*Corpus Juris* quoted in *Shinn v. Kitchens*, 186 S.W.2d 168, 173, 208 Ark. 321.

50 C.J. p 248 note 82.

44. Kan.—*Lindenberger v. Zweifel*, 262 P. 538, 124 Kan. 737.

50 C.J. p 248 note 83.

Express contract for indemnification on reimbursement see *infra* § 315.

45. Ky.—*Craig v. Vanpelt*, 3 J.J. Marsh. 489.

50 C.J. p 248 note 84.

46. U.S.—*Samuels v. E. F. Drew & Co., D.C.N.Y.*, 286 F. 281.

S.C.—*Putney v. McDow*, 30 S.E. 605, 52 S.C. 540.

47. U.S.—*Samuels v. E. F. Drew & Co., D.C.N.Y.*, 286 F. 281.

48. La.—*Bannon v. Barnett*, 7 La. Ann. 105.

Tex.—*Jackson v. Murray*, 14 S.W. 235, 77 Tex. 644.

49. Ill.—*Runyan v. Moon*, 267 Ill. App. 312.

N.Y.—*Salzberg v. Deutsch*, 270 N.Y. S. 595, 150 Misc. 870.

8 C.J. p 588 note 76.

**Surety and principal both makers**

(1) As between principal and surety both signing as makers, surety, if required to pay note, may recover from principal.—*Raleigh Banking & Trust Co. v. York*, 155 S.E. 263, 199 N.C. 624.

(2) Ostensible coprincipal on note, actually surety, may, after paying amount due by principal, recover it in suit against principal upon obligation of principal arising otherwise than on note.—*Campbell v. Rybert*, 167 S.E. 924, 46 Ga.App. 461.

50. Ind.—*Gerdone v. Gerdone*, 70 Ind. 62.

50 C.J. p 248 note 88.

51. N.H.—*Rockingham Bank v. Claggett*, 29 N.H. 292.

52. U.S.—*U. S. Fidelity & Guaranty Co. v. Haggart, N.D.*, 163 F. 801, 91 C.C.A. 289.

50 C.J. p 248 note 89.

principal has died and his estate has been distributed, the surety may assert his rights against the distributees of the estate.<sup>53</sup>

### b. Effect of Taking Security

A surety's rights to reimbursement are not affected by his taking security unless there was an agreement that he should look to such security only.

The rights of a surety to reimbursement from his principal are not affected by his taking security from his principal<sup>54</sup> or from a third person<sup>55</sup> unless there was an agreement that the surety should look to such security only.<sup>56</sup>

### c. With Respect to Particular Parties and Relations

- (1) In general
- (2) Where there are two or more principals
- (3) One who assumes liability without principal's request

#### (1) In General

Any one of several sureties who makes payments is entitled to recover the amounts paid. The principal cannot recover from his surety; but a former principal who has become surety can recover from the former surety who has become principal, in the absence of an agreement to the contrary.

Any one of several sureties who makes payments is entitled to recover the amounts so paid by him.<sup>57</sup> So a surety, after contributing to a cosurety who has paid the creditor, has a right to be reimbursed

by the principal,<sup>58</sup> notwithstanding the cosurety, having previously obtained a judgment against the principal for the whole amount, assigns it thereafter to another.<sup>59</sup>

The principal cannot recover from his surety,<sup>60</sup> even though the former appears to be the surety;<sup>61</sup> but, after a change in the relationship, a former principal who has become surety can recover from the former surety who has become principal,<sup>62</sup> unless there was some express agreement with respect to the matter forbidding it.<sup>63</sup>

A principal who has applied for a supersedeas bond securing only himself is not liable under provisions therein securing others.<sup>64</sup>

#### (2) Where There Are Two or More Principals

While coobligors who are principals are jointly liable to their surety, a surety can recover the full amount paid from any of his principals.

Coobligors who are principals are jointly liable to their surety for the amount paid by him;<sup>65</sup> and a surety can recover the full amount from any of his several principals,<sup>66</sup> and, although there is some authority to the contrary,<sup>67</sup> this rule has been held to obtain where the default was committed by one only<sup>68</sup> unless such default was committed with the connivance of the surety<sup>69</sup> or there was an express agreement that the principals were to be liable in certain proportions.<sup>70</sup> It does not make any difference that judgment has been rendered against

53. Md.—Colonial Trust Co. v. Fidelity, etc., Co., 123 A.187, 144 Md. 117.

Right of action against distributees generally see Descent and Distribution § 132.

Rights of surety against estate of principal see *infra* § 313.

Petition by a surety on the bond of a county clerk against the sole devisee of the latter was held to state a cause of action.—U. S. Fidelity & Guaranty Co. v. Huckstep, Mo. App., 72 S.W.2d 838.

54. U.S.—Corpus Juris cited in Massachusetts Bonding & Ins. Co. v. Fago Const. Corporation, D.C. Md., 82 F.Supp. 619, 622.

Iowa.—Corpus Juris cited in McCrum v. Rubbert, 257 N.W. 766, 767, 219 Iowa 454, 97 A.L.R. 1073. 50 C.J. p 248 note 95, 249 note 98. Security for protection of surety generally see *infra* §§ 317-321.

55. La.—Hancock v. Holbrook, 3 So. 351, 40 La. Ann. 53.

Pa.—Wesley Church v. Moore, 10 Pa. 273.

56. Mass.—Cornwall v. Gould, 4 Pick. 444.

57. U.S.—Hall v. Smith, Md., 5 How. 96, 12 L.Ed. 66. 50 C.J. p 249 note 99.

58. Me.—Goodall v. Wentworth, 20 Me. 322.

Mass.—Ilsey v. Jewett, 2 Metc. 168.

59. Mass.—Ilsey v. Jewett, *supra*. 50 C.J. p 249 note 2.

60. Mass.—Paine v. Drury, 19 Pick. 400.

50 C.J. p 249 note 3.

61. N.Y.—Mohawk, etc., R. Co. v. Costigan, 2 Sandf.Ch. 306.

Va.—Boulware v. Hartsook, 3 S.E. 289, 83 Va. 679.

62. Cal.—Davis v. Heimbach, 17 P. 199, 75 Cal. 261.

50 C.J. p 249 note 5.

63. Ark.—Newton v. More, 14 Ark. 166.

64. U.S.—Fidelity & Deposit Co. of Maryland v. Burden, C.C.A.N.Y., 30 F.2d 610, certiorari denied 50 S.Ct. 19, 280 U.S. 562, 74 L.Ed. 616.

65. Ohio.—Eckert v. Myers, 15 N.E. 862, 45 Ohio St. 525. 50 C.J. p 249 note 8.

66. Vt.—Warner v. Hall, 5 Vt. 156. 50 C.J. p 249 note 9.

The surety on a joint appeal bond by two defendants, who has paid the bond, may recover of either defendant, although judgment on appeal was in favor of one and against the other.—Cotton v. Alexander, 4 P. 259, 32 Kan. 339.

#### Recovery from survivor

(1) A surety in a note for two principal promisors, one deceased, having paid it, may recover the amount paid from the surviving principal promisor.—Riddle v. Bowman, 27 N.H. 236.

(2) Rights of surety against estate of principal see *infra* § 313.

67. Mass.—Towne v. Ammidown, 20 Pick. 535—Brazier v. Clark, 5 Pick. 96.

68. Ky.—Albro v. Robinson, 19 S. W. 587, 93 Ky. 195, 14 Ky.L. 124. 50 C.J. p 249 note 11.

69. N.Y.—Tighe v. Morrison, 22 N. E. 164, 116 N.Y. 263, 5 L.R.A. 617.

70. Pa.—Duncan v. Keiffer, 3 Binn. 126.



some of the principals only<sup>71</sup> or that the surety executed the instrument before some of the principals had signed it.<sup>72</sup>

### (3) One Who Assumes Liability without Principal's Request

A surety has a right to reimbursement or indemnity from his principal only where he became surety with the knowledge, and at the request, express or implied, of the principal.

A surety who executed the contract without the knowledge of the principal cannot recover from the latter,<sup>73</sup> since there cannot be an implied promise on the part of the principal to pay the surety if there was no request, express or implied,<sup>74</sup> to incur the liability;<sup>75</sup> so the right to indemnity against the principal arises only when the surety became such at the request, express or implied, of the principal.<sup>76</sup> A request from the principal has been implied from his accepting the benefit of the surety's contract,<sup>77</sup> from the appearance of the surety in court to defend a suit,<sup>78</sup> and from the fact that the principal knew that a surety was required in the particular case;<sup>79</sup> and, where two or more debtors are jointly liable, a request by one of them will be regarded as a request by all.<sup>80</sup>

### d. Enforcement of Security

After payment by the surety, there is no obstacle to

his enforcing any security he may hold; nor will he be restrained from enforcing security because he entered into a compromise with the creditor, in good faith and to the principal's advantage.

After payment by the surety, there is no longer any obstacle in the way of his enforcing any security he may hold,<sup>81</sup> but if the surety has not been given any security he does not acquire a lien on the property of his principal by the mere fact of having made payment.<sup>82</sup> The fact that the debt of the principal was usurious will not prevent the surety from retaining his security;<sup>83</sup> nor will he be restrained from enforcing security because he entered into a compromise with the creditor, if it was made in good faith and is manifestly to the advantage of the principal.<sup>84</sup>

Abandonment of an indemnity agreement made by the principal will not be implied in the absence of a contract discharging it.<sup>85</sup>

### e. Notice and Demand

In order to recover from the principal, the surety, in the absence of contractual requirement, is not required to give him notice that payment has been made or to make a demand on him.

In order to recover from the principal, the surety is not, in the absence of a contract governing the matter, required to give him notice that pay-

71. Kan.—Cotton v. Alexander, 4 P. 359, 32 Kan. 339. 50 C.J. p 249 note 14.

72. Conn.—Babcock v. Hubbard, 2 Conn. 536.

73. Cal.—Corpus Juris cited in Holmes v. Hughes, 14 P.2d 149, 150, 125 Cal.App. 290.

N.Y.—Corpus Juris cited in People, by Van Schaick v. Lawyers' Title and Guaranty Co., 268 N.Y.S. 554, 149 Misc. 498, 150 Misc. 174, affirmed in re People, by Van Schaick, 271 N.Y.S. 950, 241 App. Div. 808, affirmed People, by Van Schaick v. Lawyers' Title & Guaranty Co., 191 N.E. 720, 265 N.Y. 20, reargument denied and motion granted in re Lawyers' Title & Guaranty Co., 192 N.E. 414, 265 N.Y. 287, motion granted in re People, by Van Schaick, 195 N.E. 126, 266 N.Y. 402. 50 C.J. p 249 note 16.

74. U.S.—Howell v. Commissioner of Internal Revenue, C.C.A., 69 F. 2d 447, certiorari denied Howell v. Helvering, 54 S.Ct. 864, 292 U.S. 654, 78 L.Ed. 1503.

Tex.—Corpus Juris cited in Jagoe Const. Co. v. U. S. Fidelity & Guaranty Co., Com.App., 58 S.W. 2d 503, 508.

Implied promise generally see infra § 316.

75. Cal.—Corpus Juris cited in Holmes v. Hughes, 14 P.2d 149, 150, 125 Cal.App. 290.

N.Y.—Corpus Juris cited in People, by Van Schaick v. Lawyers' Title and Guaranty Co., 268 N.Y.S. 554, 149 Misc. 498, 150 Misc. 174, affirmed in re People, by Van Schaick, 271 N.Y.S. 950, 241 App. Div. 808, affirmed People, by Van Schaick v. Lawyers' Title & Guaranty Co., 191 N.E. 720, 265 N.Y. 20, reargument denied and motion granted in re Lawyers' Title & Guaranty Co., 192 N.E. 414, 265 N.Y. 287, motion granted in re People, by Van Schaick, 195 N.E. 126, 266 N.Y. 402.

Tex.—Corpus Juris cited in Jagoe Const. Co. v. U. S. Fidelity & Guaranty Co., Com.App., 58 S.W. 2d 503, 508. 50 C.J. p 249 note 17.

76. N.Y.—People, by Van Schaick, v. Lawyers' Title & Guaranty Co., 268 N.Y.S. 554, 149 Misc. 498, 150 Misc. 174, affirmed in re People, by Van Schaick, 271 N.Y.S. 950, 241 App.Div. 808, affirmed People, by Van Schaick v. Lawyers' Title & Guaranty Co., 191 N.E. 720, 265 N.Y. 20, reargument denied and motion granted in re Lawyers' Title & Guaranty Co., 192 N.E. 414, 265 N.Y. 287, motion granted in re

People, by Van Schaick, 195 N.E. 126, 266 N.Y. 402.

77. U.S.—Hall v. Smith, Md., 5 How. 96, 12 L.Ed. 66.

Me.—Powers v. Nash, 37 Me. 322.

78. Ill.—Snell v. Warner, 63 Ill. 176.

79. N.Y.—Whiteside v. Connolly, 46 N.Y.S. 940, 21 Misc. 19. 50 C.J. p 249 note 20.

80. Ill.—Hamilton v. Johnston, 82 Ill. 39.

81. Ind.—State Bank v. Davis, 4 Ind. 653.

50 C.J. p 249 note 23. Indemnity mortgages, when enforceable see Mortgages § 173. Security for protection of surety generally see infra §§ 317-321.

82. Ind.—Wood v. Wood, 24 N.E. 751, 124 Ind. 545, 9 L.R.A. 173. 50 C.J. p 250 note 24.

83. Ga.—Polhill v. Broen, 10 S.E. 921, 84 Ga. 338—Irwin v. McKnight, 76 Ga. 669.

Illegality as defense to action for reimbursement see infra § 325 d.

84. Mo.—Destrehan v. Scudder, 11 Mo. 484.

85. Ky.—McHargue v. Whitaker, 198 S.W. 895, 178 Ky. 169. 50 C.J. p 250 note 27.

ment has been made<sup>86</sup> or to make a demand on him.<sup>87</sup>

### § 308. — As to Debt Due Principal from Surety

A surety who has satisfied the debt may, as against the principal or his assignee, set off the amount against a debt to the principal.

After the surety has satisfied the debt for which he was liable, he may, as against the principal or his assignee, set off the amount against a debt to the principal.<sup>88</sup>

### § 309. — Payment or Satisfaction Sufficient to Create Liability

- a. In general; time and manner of payment
- b. Voluntary payment

- c. Payment by note, draft, or other obligation
- d. Satisfaction in, or levy on, property
- e. Part payments

#### a. In General; Time and Manner of Payment

In the absence of special contract, a surety must make payment before he can bring an action for reimbursement or indemnity against his principal; but it is immaterial to his right how he extinguished the secured debt or paid the sum he seeks to recover.

In the absence of special contract,<sup>89</sup> payment must be made by a surety before an action for reimbursement or indemnity is, or can be, brought by him against his principal.<sup>90</sup> Moreover, a surety who before maturity has paid the debt on which he was liable as such cannot recover from the principal until it becomes due;<sup>91</sup> nor can he before then set off the amount so paid against a debt due the principal.<sup>92</sup>

86. N.C.—Sikes v. Quick, 52 N.C. 19. Notice to indemnitor in action based on:

Express contract generally see Indemnity § 15.

Implied contract generally see Indemnity § 26.

87. Cal.—Clanton v. Coward, 7 P. 787, 67 Cal. 373.

50 C.J. p 250 note 31.

Demand as condition precedent to action on indemnity contract see Indemnity § 30.

88. Me.—Fox v. Cutts, 6 Me. 240. 50 C.J. p 250 note 33.

Bankruptcy of principal:

Provability of surety's claim against estate of bankrupt principal see Bankruptcy § 397.

Set-offs and counterclaims see Bankruptcy § 211.

Effect of set-off against assignor on title of assignee for benefit of creditors generally see Assignments for Benefit of Creditors § 157.

Payment by surety after insolvency of principal

(1) In equity, surety may set off amount of claim he is required to pay for insolvent principal against his indebtedness to principal, even though payments are not actually made by surety until after principal's insolvency, since they are deemed to relate back to date of suretyship contract.—Dickenson v. Charles, 4 S.E.2d 351, 173 Va. 393.

(2) Relation of payment back to time of entering into contract generally see infra § 316a.

89. Mass.—Broadway Nat. Bank of Chelsea v. Hayward, 189 N.E. 199, 285 Mass. 459.

Effect of payment by surety as extinguishing debt see the C.J.S. title Subrogation § 54, also 60 C.J. 754 note 10—p 757 note 19.

Express contract for indemnification or reimbursement see infra § 315. Extent of recovery see infra § 335.

90. U.S.—Fidelity & Deposit Co. of Maryland v. Hobbs, C.C.A.N.M., 144 F.2d 5—Chicago Title & Trust Co. v. Fox Theatres Corporation, C.C.A.N.Y., 91 F.2d 907—Ward v. First Nat. Bank, C.C.A.Mo., 76 F.2d 256.

Ill.—Darst v. Bates, 51 Ill. 439.

Iowa.—Johnston v. Grimm, 229 N.W. 716, 209 Iowa 1050.

Minn.—Bennett v. Bennett, 42 N.W. 2d 39, 230 Minn. 415.

Mo.—Corpus Juris cited in Wilson v. Massachusetts Bonding & Ins. Co., 190 S.W.2d 944, 947, 238 Mo. App. 882—Henneke v. Strack, App., 101 S.W.2d 743.

N.Y.—Scripture v. Buckley, 241 N.Y. S. 635, 137 Misc. 155—Merrill v. Equitable Surety Co. of New York, 227 N.Y.S. 266, 131 Misc. 541.

Okl.—Jones v. Nelson, 10 P.2d 408, 156 Okl. 236.

Pa.—Bishoff v. Fehl, 29 A.2d 58, 345 Pa. 539, 143 A.L.R. 1058.

Tenn.—Corpus Juris cited in Henegar v. Brannon, 137 S.W.2d 889, 892, 24 Tenn.App. 1.

Tex.—Meier v. Service Corporation of National Ass'n of Credit Men, Civ.App., 129 S.W.2d 690, error dismissed, judgment correct. 50 C.J. p 250 note 36.

Commencement of running of statute of limitations see Limitations of Actions § 160b.

Evidence of payment see infra § 331. Right of action as accruing at time of payment see supra § 301.

"Until the surety pays the debt for which he is security, his demand has no existence."—Farmers & Mechanics Sav. Bank of Troy v. Jennings, Mo.App., 138 S.W.2d 703, 704.

"The implied obligation to indem-

nify the surety . . . matures only when he has been injured by being compelled to make payment of the debt."—Howard Johnson, Inc., of Fla. v. Tucker, C.C.A.Fla., 157 F.2d 959, 962.

Payment in full

Pa.—Wright v. Harrisburg Trust Co., 43 Pa.Dist. & Co. 47, 51 Dauph. 213—Wright v. Harrisburg Trust Co., 51 Dauph.Co. 413.

Rule applied to payment of bill or note.

(1) Generally.—Henegar v. Brannon, 137 S.W.2d 889, 24 Tenn.App. 1—8 C.J. p 588 note 78.

(2) Payment of a renewal note by the surety entitles him to reimbursement from the parties liable on the original obligation.—Frye v. Sims, 86 S.E. 249, 144 Ga. 74—50 C. J. p 251 note 48.

(3) As between him and borrowing maker, accommodation comaker is surety and, until he actually pays note, has no right to sue borrower, right to sue being based on implied contract and not on note.—Goldberg v. Albert, 291 N.Y.S. 855, 161 Misc. 281.

(4) Where, after the maturity of a note, money is paid by the surety to the payee, on an agreement that it is to be considered as indemnity, and that the payee shall sue the maker in his own name at the expense of, and for the benefit of, the surety, there is no payment of the note, and an action by the payee is not barred thereby.—Brown v. Whittington, 64 P. 649, 39 Or. 300.

91. Ind.—White v. Miller, 47 Ind. 385.

Ohio.—Schick v. Ott, 7 Ohio Cir.Ct., N.S., 325, 27 Ohio Cir.Ct. 697.

92. Ind.—Jackson v. Adamson, 7 Blackf. 597.

It is immaterial to the surety's right how he extinguished the secured debt or paid the sum he seeks to recover.<sup>93</sup> Thus a surety may recover from his principals for a payment on their obligation made in the first instance by a stranger and repaid to the latter by the surety,<sup>94</sup> if the surety procured payment to be made by the third person;<sup>95</sup> and where the surety gives his principal the money with which to pay the debt, with the understanding that it is to be so applied, as between them the latter is estopped to claim that he paid the debt with his own money.<sup>96</sup> A surety who replevies the debt by a valid replevy bond may proceed against the principal as though he had made actual payment in money,<sup>97</sup> as may a surety who, having an account in the obligee bank for more than the amount due on the suretyship obligation, directed the cashier to charge the amount thereof to his account, which the cashier agreed to do.<sup>98</sup> Where an obligee gives the bond to the surety thereon, such surety cannot support assumpsit against the principal for money paid, laid out, and expended by him for the use of the latter, or any of the common money counts.<sup>99</sup>

*Payment into court* pending an accounting between the creditor and surety of the amount of a judgment which the former has recovered against the latter on the suretyship obligation is a sufficient payment to entitle the surety to reimbursement from the principal,<sup>1</sup> even though the accounting between the creditor and the surety has not been determined and the court still retains the money.<sup>2</sup>

*Imprisonment of surety on a capias ad satisfaciendum* is not satisfaction to the creditor.<sup>3</sup>

*Where a surety of an administrator succeeds him*, owing to a breach of the bond, and indorses upon the bond a receipt of the money due thereon as money received from himself as surety, and has charged himself with it in his inventory, he can maintain an action against the administrator for money paid for the use of the latter.<sup>4</sup>

#### b. Voluntary Payment

- (1) In general; present legal obligation
- (2) As affected by character of instrument
- (3) No legal obligation to pay
- (4) Waiver of objection or defense by surety

##### (1) In General; Present Legal Obligation

A surety is entitled to reimbursement if he satisfies a present liability, and he need not wait to be coerced by process, or for demand, suit, judgment, issuance of execution, or maturity of the debt; nor is his right affected by the fact that he paid without request or permission from, or notice to, the principal. The fact that the creditor could not compel the principal to pay is not necessarily a defense to the principal against the surety who has paid.

Whatever present liability on the part of a surety exists, or has become fixed by judicial determination, may be paid off and satisfied by him without waiting to be coerced by process, and such payment will entitle him to reimbursement from his principal;<sup>5</sup> a payment by a surety cannot be said to be voluntary as long as the obligation is en-

93. N.H.—Lord v. Staples, 23 N.H. 448.

50 C.J. p 250 note 39.

94. Va.—Harper v. McVeigh, 1 S. E. 193, 82 Va. 751.

95. Miss.—Presley v. Donaldson, 33 Miss. 92.

96. Ky.—Holtzclaw v. Craynor Smith Lumber Co., 114 S.W. 271.

97. Ky.—Lucas v. Chamberlain, 8 B.Mon. 276—Burns v. Parish, 3 B. Mon. 8.

98. Iowa.—Gribben v. Clement, 119 N.W. 596, 141 Iowa 144, 133 Am. S.R. 157.

50 C.J. p 251 note 44.

99. Va.—Butterworth v. Ellis, 6 Leigh 106, 33 Va. 106.

Nature and form of surety's action generally see *infra* § 323.

1. Me.—Vermeule v. York Cliffs Impr. Co., 74 A. 800, 105 Me. 350, 134 Am.S.R. 553.

2. Me.—Vermeule v. York Cliffs Impr. Co., *supra*.  
50 C.J. p 251 note 47.

3. N.Y.—Powell v. Smith, 8 Johns. 249.

4. Mass.—Hazelton v. Valentine, 113 Mass. 472.

5. U.S.—Corpus Juris cited in Massachusetts Bonding & Ins. Co. v. Fargo Const. Corporation, D.C.Md., 82 F.Supp. 619, 622—National Surety Corporation v. Peoples Milling Co., D.C.Ky., 57 F.Supp. 281.

Ky.—Huffman v. National Surety Co., 51 S.W.2d 950, 244 Ky. 714.

Mass.—Counellis v. Counellis, 54 N. E.2d 177, 315 Mass. 694.

Minn.—American Surety Co. of New York v. Cunningham, 275 N.W. 1, 200 Minn. 566.

Mo.—Corpus Juris cited in Wilson v. Massachusetts Bonding & Ins. Co., 190 S.W.2d 944, 947, 238 Mo. App. 882—Henneke v. Strack, App., 101 S.W.2d 743.

Neb.—U. S. Fidelity & Guaranty Co. v. Bates, 296 N.W. 560, 139 Neb. 131.

N.Y.—U. S. Guaranty Co. v. Nabogis, 6 N.Y.S.2d 461, 169 Misc. 81.

Or.—National Surety Co. v. Johnson, 239 P. 538, 115 Or. 624.

Pa.—Royal Indemnity Co. v. Gunzburg, 173 A. 438, 114 Pa.Super. 303—National Surety Co. v. Nulton 55 Pa.Dist. & Co. 149—Maryland Casualty Co. v. Mellner, Com. Pl., 19 Leh.L.J. 278.

Wis.—U. S. Fidelity & Guaranty Co. v. Pullen, 283 N.W. 462, 230 Wis. 137.

50 C.J. p 251 note 52.

"The . . . [surety] was not required to resist an incontestable claim."—American Employers' Ins. Co. v. Radzeweluk, 4 N.Y.S.2d 74, 76, 167 Misc. 447.

#### Judicial determination not essential

(1) It is not the law that a surety is legally bound to pay only after judicial determination, particularly where a statute provides that if a surety satisfies the principal obligation, or any part of it, with or without legal proceedings, the principal is bound to reimburse what the surety has disbursed.—Kipp v. Paul, 103 P.2d 675, 110 Mont. 513.

forceable.<sup>6</sup> Thus the surety has been allowed to recover where the payment was made without demand or suit,<sup>7</sup> before, or without, rendition of judgment,<sup>8</sup> before execution issued,<sup>9</sup> or before maturity of the debt.<sup>10</sup>

It is no ground of objection to the surety's right that he paid to avoid seizure and arrest,<sup>11</sup> that the principal had a demand against the creditor of

which the surety did not take advantage,<sup>12</sup> that payment was made without request<sup>13</sup> or permission<sup>14</sup> from the principal to pay, or that the surety did not notify the principal of his intention to pay.<sup>15</sup> Likewise, the right of the surety is not affected by a compromise or settlement with the creditor which does not injure the rights of the principal<sup>16</sup> unless the settlement was made by

(2) Where principal's liquor license had been revoked for violation of law and surety on bond conditioned on nonviolation had paid its liability on bond, surety was entitled to sue principal on its agreement to reimburse surety for loss sustained, notwithstanding absence of any adjudication by court that principal had violated law.—*Etna Casualty & Surety Co. v. Fleischman Wine & Liquor Co.*, 200 N.E. 23, 269 N.Y. 614.

#### Proof of liability not necessary

Where surety company in fidelity bond in good faith made payment under bond to employee's employer for amount of alleged shortage, employee became bound, as a matter of law, under terms of bond to reimburse company for payment without necessity of company's proving its liability under bond.—*Central Sur. & Ins. Corp. v. Martin*, Tex.Civ. App., 224 S.W.2d 773.

6. Va.—*Randolph v. Randolph*, 3 Rand. 490, 24 Va. 490.

7. Ky.—*Huffman v. National Surety Co.*, 51 S.W.2d 950, 244 Ky. 714. Mass.—*Counellis v. Counellis*, 54 N.E. 2d 177, 315 Mass. 694.

Mo.—*Corpus Juris* cited in *Henneke v. Strack*, App., 101 S.W.2d 743, 748.

Or.—*New Amsterdam Casualty Co. v. Terrall*, 107 P.2d 843, 165 Or. 390—*National Surety Co. v. Johnson*, 239 P. 538, 115 Or. 624.

Pa.—*Royal Indemnity Co. v. Gunzburg*, 173 A. 438, 114 Pa.Super. 303. Wis.—*U. S. Fidelity & Guaranty Co. v. Pullen*, 283 N.W. 462, 230 Wis. 137.

50 C.J. p 251 note 53.

#### Reason for rule

(1) Implied contract on part of principal to indemnify surety takes effect from time relationship of principal and surety is entered into.—*In re Deal's Estate*, 46 N.E.2d 643, 70 Ohio App. 503.

(2) When implied contract arises generally see *infra* § 316.

Even without a contract provision so authorizing, a surety may discharge obligation of principal without waiting for suit to be filed against him and is thereupon entitled to look to principal for reimbursement.—*National Surety Corporation v. Peoples Milling Co.*, D.C. Ky., 57 F.Supp. 281.

#### Payment of overdue note

Payment by surety of note which was overdue was not voluntary even though made without demand or suit.—*Henneke v. Strack*, Mo.App., 101 S.W.2d 743.

#### Licensee-principal's failure to answer charges

Where liquor licensee failed to answer charges by control board or to seek review of its findings, court, in action of surety on bond against licensee for indemnity, would presume that board's action was legal and that proof sustained order revoking license; licensee's refusal to meet charges and failure to challenge board's findings precluded his questioning his surety's good faith in paying penalty of bond; such failure and licensee's quiescence, notwithstanding board's revocation of license, justified surety in paying penalty to board, which entitled surety to indemnity, without waiting for law action.—*Fidelity & Casualty Co. of New York v. Zappolo*, 274 N.Y.S. 698, 153 Misc. 258.

8. Mo.—*U. S. Fidelity & Guaranty Co. v. Huckstep*, App., 72 S.W.2d 838.

Mont.—*Kipp v. Paul*, 103 P.2d 675, 110 Mont. 513.

Pa.—*Royal Indemnity Co. v. Gunzburg*, 173 A. 438, 114 Pa.Super. 303.

50 C.J. p 251 note 54.

Under statute requiring principal to reimburse surety for amount paid to satisfy principal obligation without legal proceedings, it was unnecessary for surety to wait until receiver obtained judgment against it in his suit on fidelity bond before paying sum agreed on in settlement of his claim.—*Pacific Indemnity Co. v. Hargreaves*, 98 P.2d 217, 36 Cal. App.2d 338.

#### Effect of agreement to indemnify surety

(1) Where agreement by which defendants agreed to indemnify surety for any amount surety was required to pay pursuant to bond authorized surety to make settlement if it deemed itself liable, regardless of whether such liability in fact existed, and authorized it to make settlement without notifying defendants, surety was under no necessity to require its liability on the bond to be fixed by final judg-

ment before making settlement with claimant in order to recover on indemnity agreement.—*Maryland Casualty Co. v. Spitscaufsky*, 178 S.W. 2d 368, 352 Mo. 547.

(2) Express contract for indemnification or reimbursement generally see *infra* § 315.

#### Reversal of judgment in favor of bail

Where a recognizance has been forfeited and suit brought on it, resulting in a judgment in favor of the bail, and, on appeal, the judgment is reversed and the cause remanded, the liability of the bail is fixed and if he compromises with the state and pays a part of the amount of the recognizance in discharge of the forfeiture, he may look to his principal for repayment.—*Stevens v. Hay*, 61 Ill. 399.

9. Ala.—*Stallworth v. Preslar*, 34 Ala. 505.

10. Ind.—*Ross v. Menefee*, 25 N.E. 545, 125 Ind. 432.

50 C.J. p 251 note 56.

Right of surety to reimbursement before maturity of debt see *supra* subdivision a of this section.

11. La.—*Montgomery v. Russell*, 10 La. 330.

12. Mass.—*Rawson v. Rawson*, 105 Mass. 214.

50 C.J. p 252 note 59.

13. Or.—*National Surety Co. v. Johnson*, 239 P. 538, 115 Or. 624.

50 C.J. p 252 note 61.

The law implies a request to the surety to do this in behalf of the principal.—*Counellis v. Counellis*, 54 N.E.2d 177, 315 Mass. 694—*Hazelton v. Valentine*, 113 Mass. 472.

14. Mass.—*Counellis v. Counellis*, 54 N.E.2d 177, 315 Mass. 694—*Hazelton v. Valentine*, 113 Mass. 472.

Or.—*National Surety Co. v. Johnson*, 239 P. 538, 115 Or. 624.

15. Or.—*New Amsterdam Casualty Co. v. Terrall*, 107 P.2d 843, 165 Or. 390—*National Surety Co. v. Johnson*, 239 P. 538, 115 Or. 624.

50 C.J. p 252 note 63.

16. Mo.—*Maryland Casualty Co. v. Spitscaufsky*, 178 S.W.2d 368, 352 Mo. 547.

Mont.—*Kipp v. Paul*, 103 P.2d 675, 110 Mont. 513.

Or.—*National Surety Co. v. Johnson*, 239 P. 538, 115 Or. 624.

the surety without legal responsibility and without the principal's being a party thereto.<sup>17</sup>

*Obligations unenforceable by creditor against principal.* While it has been said that the principal must have been bound legally for the debt,<sup>18</sup> it has been held that if the creditor can hold the surety it will not necessarily be a defense to the principal, as against the surety, that the principal could not be compelled by the creditor to pay the debt.<sup>19</sup> Where the principal, having a defense against the creditor, negligently fails to plead it, and suffers judgment in an action by the creditor to go against him or his surety, on payment thereof by the latter he may recover from the principal.<sup>20</sup> Likewise, a surety compelled to pay a debt which is barred, as against the principal, by a statute of limitations, may recover from the principal the amount he is so compelled to pay,<sup>21</sup> and this applies where the creditor has failed to present his claim against the estate of the principal within the time designated by statute.<sup>22</sup>

Where the contract of the parties provides that the surety is entitled to credit for all disbursements made in good faith under the belief that he was liable or that it was necessary to make them, a surety making payment under such conditions is entitled to reimbursement.<sup>23</sup>

*Payment of confessed judgment.* Although a surety is prohibited by a statutory provision from suffering judgment to go against him by confession or default when the principal debtor is willing to defend, if he does suffer such judgment to be rendered he can maintain an action to recover the money from the principal,<sup>24</sup> but in such case he occupies the position of the creditor suing on

the original debt, and must establish its validity and repel all defenses against it.<sup>25</sup>

## (2) As Affected by Character of Instrument

The surety's right to reimbursement is not affected by the fact that the bond on which payment was made could not have been exacted of the principal by the obligee, or by objections to the instrument which the principal is estopped to set up. The fact that a bond is not a good statutory bond will not defeat liability if it is a valid common-law obligation.

The right of the surety to reimbursement from the principal is not affected by the fact that the bond on which payment was made could not have been exacted of the principal by the obligee<sup>26</sup> or by objections to the sufficiency of the instrument which the principal is estopped to set up;<sup>27</sup> and the fact that a bond is not a good statutory bond will not defeat liability if it is a valid and binding common-law obligation.<sup>28</sup>

With respect to the right of the surety on the bond of a licensee to recover from the latter, the surety has no express or implied duty to inform him of the forfeiture of the bond before paying the amount due on the forfeiture, such payment not being, on this ground, voluntary;<sup>29</sup> nor is the surety, paying in good faith, prevented from recovering by the fact that the licensee may have been deprived of his rights by reason of faulty notice, or lack of notice, of revocation from the public authorities.<sup>30</sup>

## (3) No Legal Obligation to Pay

A surety cannot recover from his principal for a payment made by the surety with knowledge of the facts and without legal compulsion.

Where payment is made with knowledge of the facts,<sup>31</sup> a surety cannot recover from his princi-

Wis.—U. S. Fidelity & Guaranty Co. v. Pullen, 283 N.W. 462, 230 Wis. 137.

50 C.J. p 252 note 60.

"The . . . [surety] had a perfect right to protect itself by making a reasonable adjustment of a valid claim against it."—Royal Indemnity Co. v. Gunzburg, 173 A. 438, 439, 114 Pa.Super. 303.

**Power to compromise held given by bond**

Cal.—Glens Falls Indem. Co. v. Perscallo, App., 216 P.2d 567.

17. U.S.—Massachusetts Bonding & Ins. Co. v. Darby, D.C.Mo., 59 F. Supp. 175.

**Payment without legal obligation generally see infra subdivision b (3) of this section.**

18. Or.—National Surety Co. v. Johnson, 239 P. 538, 115 Or. 624. 50 C.J. p 252 note 64.

**Liability of principal as measure of liability of surety see supra § 92.**

19. Tex.—Lane v. Moon, 103 S.W. 211, 46 Tex.Civ.App. 625.

20. Ala.—Dampskibsskadeselskabet Hæbil v. U. S. Fidelity, etc., Co., 39 So. 54, 142 Ala. 363.

50 C.J. p 252 note 67.

21. Kan.—Leslie v. Compton, 172 P. 1015, 103 Kan. 92, L.R.A.1918F 706. 50 C.J. p 252 note 68.

**Debt barred as to surety but not as to principal see infra subdivision b (4) of this section.**

22. Tex.—Willis v. Chowning, 40 S. W. 395, 90 Tex. 617, 59 Am.S.R. 842.

50 C.J. p 252 note 69.

23. Ark.—Peay v. Southern Surety Co., 216 S.W. 722, 141 Ark. 265.

Pa.—Maryland Casualty Co. v. Mellner, Com.Pl., 19 Lehl.J. 278.

24. Ala.—Riley v. Stallworth, 56 Ala. 431.

25. Ala.—Riley v. Stallworth, supra.

26. La.—Maryland Fidelity, etc., Co. v. Johnson, 2 La.App., Orleans, 290.

Mass.—Frith v. Sprague, 14 Mass. 455.

27. N.Y.—Bates v. Merrick, 2 Hun 568, 5 Thomps. & C. 701.

50 C.J. p 252 note 74.

28. Ala.—Halsey v. Murray, 20 So. 575, 112 Ala. 185.

50 C.J. p 252 note 75.

29. N.Y.—U. S. Guaranty Co. v. Nabogis, 6 N.Y.S.2d 461, 169 Misc. 31.

30. N.Y.—U. S. Guaranty Co. v. Nabogis, supra.

31. Mo.—Corpus Juris cited in Central Surety & Insurance Cor-

pal for a payment made if the surety was not under any legal obligation to make it,<sup>32</sup> as where the principal is not liable and the surety may assert the same defense,<sup>33</sup> or where the surety or the principal has been discharged or released from liability,<sup>34</sup> unless, as discussed *infra* subdivision b (4) of this section, the surety having a good defense to an action for the debt properly waived it. A discharge of others than the principal or surety does not, however, affect the surety's rights.<sup>35</sup>

A payment will not be merely voluntary if the surety was ignorant of the facts constituting a defense<sup>36</sup> and could not have discovered them with due diligence,<sup>37</sup> but a payment by a surety, made with knowledge of the facts, although under the mistaken belief that he was bound to make it, is voluntary, within the inhibition against payment where there is no legal liability.<sup>38</sup>

A part only of the surety's payment may be voluntary, in which case he can recover for the part only which was not voluntary.<sup>39</sup> Thus interest for which he and the principal were not liable is not recoverable;<sup>40</sup> and where deductions should have been made, but the surety pays the full amount, he cannot recover from the principal for the amount

in excess of that properly due.<sup>41</sup>

*Before accounting.* Where an accounting by the principal in a trust capacity may be necessary to fix liability, ordinarily such accounting must be had before payment of the surety of the alleged liability can operate to charge the principal.<sup>42</sup> The parties interested may, however, occupy such relations as to estop themselves to object that the payment was made before such accounting.<sup>43</sup>

*Rights to security.* If the surety is not liable for the debt, he cannot acquire any rights to security by making payment.<sup>44</sup>

#### (4) Waiver of Objection or Defense by Surety

A surety's right to reimbursement from his principal is not affected by his waiver of a personal defense or of the statute of limitations or frauds.

The surety, in order to be entitled to reimbursement from his principal, is not compelled to take advantage of every technical objection.<sup>45</sup> He may waive a personal defense,<sup>46</sup> such as incapacity from coverture<sup>47</sup> or a change in the contract between the creditor and the principal.<sup>48</sup>

If the surety pays after the debt is barred both

potation v. Hinton, 130 S.W.2d 235, 239, 233 Mo.App. 1218.  
Wis.—London & Lancashire Indemnity Co. v. Crook, 6 N.W.2d 681, 241 Wis. 571, 144 A.L.R. 513.  
50 C.J. p 253 note 79.

32. U.S.—Corpus Juris cited in Massachusetts Bonding & Ins. Co. v. Fargo Const. Corporation, D.C. Md., 82 F.Supp. 619, 622—Massachusetts Bonding & Ins. Co. v. Darby, D.C.Mo., 59 F.Supp. 175.  
Minn.—Corpus Juris cited in American Surety Co. of New York v. Cunningham, 275 N.W. 1, 3, 200 Minn. 566.

Mo.—Corpus Juris cited in Wilson v. Massachusetts Bonding & Ins. Co., 190 S.W.2d 944, 947, 238 Mo. App. 882—Corpus Juris cited in Central Surety & Insurance Corporation v. Hinton, 130 S.W.2d 235, 239, 233 Mo.App. 1218.

Mont.—Kipp v. Paul, 103 P.2d 675, 110 Mont. 513.

N.Y.—Indemnity Ins. Co. of North America v. Farkas, 76 N.Y.S.2d 426, 191 Misc. 424, reversed on other grounds 89 N.Y.S.2d 741, 195 Misc. 554.

Pa.—National Surety Corp. v. Nulton, 55 Pa.Dist. & Co. 149.

Wis.—London & Lancashire Indemnity Co. v. Crook, 6 N.W.2d 681, 241 Wis. 571, 144 A.L.R. 513.  
50 C.J. p 252 note 77.

Debt barred by limitation see *infra* subdivision b (4) of this section.

Illegality as defense generally see *infra* § 325d.

Payment outside terms of indemnity contract see *infra* § 315a.

Payment held not merely voluntary Cal.—Metropolitan Casualty Ins. Co. of New York v. Stone, 12 P.2d 665, 124 Cal.App. 430.

Mich.—American Sur. Co. of N. Y. v. Payne, 29 N.W.2d 113, 318 Mich. 670.

Neb.—U. S. Fidelity & Guaranty Co. v. Bates, 296 N.W. 560, 139 Neb. 131.

N.Y.—American Employers' Ins. Co. v. Radzeweluck, 4 N.Y.S.2d 74, 167 Misc. 447.

33. Minn.—American Surety Co. of New York v. Cunningham, 275 N. W. 1, 200 Minn. 566.

Wis.—London & Lancashire Indemnity Co. v. Crook, 6 N.W.2d 681, 241 Wis. 571, 144 A.L.R. 513.

34. Ind.—Windle v. Williams, 47 N. E. 680, 18 Ind.App. 153.  
50 C.J. p 253 note 78.

35. Tenn.—Shapira v. Paletz, Ch. App., 59 S.W. 774.  
50 C.J. p 253 note 81.

36. Ark.—Turman v. Looper, 42 Ark. 500.  
50 C.J. p 253 note 82.

37. Me.—Hichborn v. Fletcher, 66 Me. 209, 22 Am.R. 562.

N.Y.—Hyde v. Miller, 60 N.Y.S. 974, 45 App.Div. 396, affirmed, 60 N.E. 1113, 168 N.Y. 590.

38. Mass.—Bancroft v. Abbott, 3 Allen 524.

39. Ky.—Lucking v. Gegg, 12 Bush 298—Tennell v. Dozier, Hard. 47.

40. Ky.—Lucking v. Gegg, 12 Bush 298.

50 C.J. p 253 note 86.

Recovery of interest generally see *infra* § 335 c.

41. Mass.—Washburn v. Pond, 2 Allen 474.

42. S.C.—Richardson v. Day, 20 S. C. 412.

Accounting and settlement as condition precedent to action on bonds see Executors and Administrators § 973, Guardian and Ward § 213d.

43. S.C.—Richardson v. Day, 20 S.C. 412.

50 C.J. p 253 note 89.

44. Ala.—Smith v. McGehee, 14 Ala. 404.

50 C.J. p 253 note 90.

45. S.C.—Reynolds v. Harral, 33 S. C.L. 87.

Defenses generally see *infra* § 325.

46. Pa.—National Surety Co. v. Nulton, 55 Pa.Dist. & Co. 149.  
50 C.J. p 253 note 93.

47. Ill.—Ricketson v. Giles, 91 Ill. 154.

48. Pa.—Brown v. Marmaduke, 93 A. 1023, 248 Pa. 247.

50 C.J. p 253 note 95.

as to him and to his principal, he cannot recover;<sup>49</sup> but, if the debt is not barred as to the principal, the surety may waive the statute of limitations for himself, and payment under such circumstances will not be voluntary so as to deprive him of the right to reimbursement.<sup>50</sup> So the rule permitting the surety to waive defenses is applied to the defense of the statute of frauds; he may pay the debt, although his promise was not in writing, and recover the amount from the principal.<sup>51</sup>

### c. Payment by Note, Draft, or Other Obligation

For purposes of reimbursement from the principal, a surety is deemed to have paid if the creditor accepts his note or draft as payment; and he is entitled to reimbursement before such instrument is paid.

For purposes of reimbursement from the principal, payment may be sufficiently made by a surety by the passing of negotiable security,<sup>52</sup> and payment will be deemed to have been made by the surety if he gives his own note<sup>53</sup> or draft,<sup>54</sup> where it is accepted by the creditor as payment;<sup>55</sup> and the surety is entitled to reimbursement from the principal before the instrument so accepted by the creditor has been paid<sup>56</sup> or although it is uncollectable,<sup>57</sup> unless something remains to be done to carry his engagement into effect.<sup>58</sup> A nonnegotiable note, however, will not be regarded as payment.<sup>59</sup>

A surety contributing to his cosurety by giving his own note is entitled to reimbursement from the principal.<sup>60</sup>

### d. Satisfaction in, or Levy on, Property

The surety may recover from the principal if he has satisfied the debt in property, such as land, or if it has been satisfied by levy on his property.

It is sufficient to entitle the surety to recover from the principal that he has satisfied the debt in property,<sup>61</sup> such as land,<sup>62</sup> or that it has been satisfied by levy on his property,<sup>63</sup> or by a judicial sale under a decree enforcing a judgment for the secured debt<sup>64</sup> unless the sale is ineffectual<sup>65</sup> or unless the surety by his subsequent conduct loses the benefit of such payment.<sup>66</sup>

The giving of a nonnegotiable note secured by a mortgage has been held insufficient to constitute payment.<sup>67</sup>

### e. Part Payments

A surety who has paid any part of the indebtedness can maintain an action for the amount paid.

A surety who has paid any part of the indebtedness can maintain an action for the amount paid.<sup>68</sup> The right is not affected by the intent with which such partial payment was made<sup>69</sup> or by the fact that the principal paid a part of the indebtedness and that, on payment of the balance by the surety, he took an assignment of the claim against the principal.<sup>70</sup> Several suits may be brought if the surety is obliged to make several payments.<sup>71</sup>

## § 310. — Purchase of Property at Execution Sale

A principal cannot, by buying property of the surety

49. Tenn.—Henderson v. Locke, 282 S.W. 193, 153 Tenn. 108. 50 C.J. p 253 note 96.

50. Mass.—Shaw v. Loud, 12 Mass. 447.

Mich.—McClatchie v. Durham, 7 N. W. 76, 44 Mich. 435.

Debt barred as to principal but not as to surety see supra subdivision b (1) of this section.

51. Cal.—Corpus Juris quoted in Christie v. Commercial Casualty Ins. Co., 45 P.2d 263, 267, 5 Cal. App.2d 710.

Miss.—Corpus Juris cited in Franklin Life Ins. Co. v. Rogers, 173 So. 428, 429, 178 Miss. 513. 50 C.J. p 254 note 98.

52. Ky.—Lucas v. Chamberlain, 8 B.Mon. 276.

Sufficiency of payment by bill or note generally see Payment § 23.

53. Ky.—Wilson v. Hite, 157 S.W. 41, 154 Ky. 61.

50 C.J. p 254 note 2.

Payment of note by surety by giving his own note

Cal.—McDonough v. Nowlin, 118 P. 463, 17 Cal.App. 45. 3 C.J. p 538 note 77.

54. Iowa.—Sapp v. Alken, 28 N.W. 24, 68 Iowa 699.

55. Ky.—Porter v. Bedell, 116 S.W. 2d 641, 273 Ky. 296.

50 C.J. p 254 note 4.

56. Tex.—Yndo v. Rivas, Civ.App., 142 S.W. 920, affirmed 180 S.W. 96, 107 Tex. 468.

50 C.J. p 254 note 5.

57. Iowa.—Hardin v. Branner, 25 Iowa 364.

50 C.J. p 254 note 6.

58. Mo.—Hearne v. Keath, 63 Mo. 84.

50 C.J. p 254 note 7.

59. Tex.—Boulware v. Robinson, 8 Tex. 327, 53 Am.D. 117.

50 C.J. p 254 note 8.

60. Cal.—Stone v. Hammell, 21 P. 203, 3 Cal.Unrep.Cas. 128.

61. Ala.—Smith v. Pitts, 52 So. 402, 167 Ala. 461.

Extent of recovery see infra § 335.

62. N.H.—Lord v. Staples, 23 N.H. 448.

50 C.J. p 254 note 11.

63. N.H.—Lord v. Staples, supra.

50 C.J. p 254 note 13.

64. Va.—Harper v. McVeigh, 1 S.E. 193, 82 Va. 751.

65. Ky.—Head v. McDonald, 7 T.B. Mon. 203.

50 C.J. p 254 note 15.

66. Ky.—Jarvis v. Whitman, 12 B. Mon. 97.

50 C.J. p 254 note 16.

67. Ind.—Bennett v. Buchanan, 3 Ind. 47.

68. Iowa.—Jefferson v. Century Sav. Bank, 120 N.W. 308, 143 Iowa 83.

50 C.J. p 254 note 17.

"It is not necessary for a surety to pay the entire debt in order to give rise to the equity of indemnity as against the debtor."—Newman v. Roth, 35 N.Y.S.2d 662, 671, 264 App. Div. 344, affirmed 47 N.E.2d 961, 290 N.Y. 559, motion denied 50 N.E.2d 247, 290 N.Y. 865.

69. Tenn.—Hall v. Hall, 10 Humphr. 352.

50 C.J. p 254 note 18.

70. Ky.—Cook v. Landrum, 82 S.W. 585, 26 Ky.Law Rep. 813.

71. Md.—Bullock v. Campbell, 3 Gill 182.

sold on execution for the principal's debt, acquire title thereto unless the surety permits such purchase even though in fraud of his creditors. A surety may purchase his principal's property at an execution sale although the execution is against them jointly.

If property of the surety is sold on execution for the debt of the principal, the latter, by buying it, cannot acquire title thereto<sup>72</sup> unless the surety permits such purchase even though in fraud of his own creditors;<sup>73</sup> and if there are two or more principals a purchase by one of them inures to the benefit of the surety.<sup>74</sup> It is competent, however, for a surety to purchase the property of his principal at an execution sale although the execution is against them jointly.<sup>75</sup>

### §.311. Contribution between Surety and Principal

The right of a principal to compel contribution by a surety as a cosurety is discussed *infra* § 353.

Examine Pocket Parts for later cases.

### § 312. Enforcement against Principal of Execution against Surety

Payment of the debt by a surety operates as an assignment of the judgment rendered against him and his principal, and the execution may be continued for his use against his principal.

Payment of the debt by a surety operates as an

assignment of the judgment rendered against him and his principal, and the execution may be continued for his use against his principal<sup>76</sup> provided he makes it appear to the court that he is merely a surety<sup>77</sup> and that he actually paid the execution.<sup>78</sup>

Under a statute so providing, a surety who has been compelled to pay a judgment rendered against him and his principal, or any part thereof, is entitled to have execution thereof against his principal.<sup>79</sup>

### § 313. Rights of Surety against Estate of Principal

Ordinarily a surety's right of action against the estate of a deceased principal accrues when the surety pays the debt; but after maturity of the debt or accrual of liability the surety, even though he has not paid or been troubled by the creditor, may, in equity, compel payment of the debt from the principal's estate.

Ordinarily, where one is surety for another for the payment of a debt, and the latter has died, the right of action by the surety against his estate accrues at the time of the payment by the surety.<sup>80</sup> However, after maturity of the debt or accrual of liability, the surety, although he has not been troubled by the creditor, has the right, before payment, to go into a court of equity, at any time, to compel payment of the debt from the estate of the principal.<sup>81</sup>

72. Ind.—Madgett v. Fleenor, 90 Ind. 517.

50 C.J. p 255 note 21.

73. Ala.—Pond v. Wadsworth, 24 Ala. 531.

74. Mo.—McCollum v. Boughton, 30 S.W. 1023, 33 S.W. 476, 34 S.W. 480, 132 Mo. 601, 35 L.R.A. 480.

75. Ala.—Carlos v. Ansley, 8 Ala. 900.

76. Ga.—Adams v. Keeler, 30 Ga. 86.

Md.—Sothoren v. Reed, 4 Harr. & J. 307.

Payment of judgment by surety generally see Judgments § 556.

Subrogation of surety to rights of creditor see the C.J.S. title Subrogation §§ 47-56, also 60 C.J. p 740 note 5—p 770 note 98.

#### Summary procedure

(1) Surety cannot summarily proceed at law to enforce by execution judgment which has been rendered against principal and surety and which has been paid by surety and has been assigned to him; such execution can be quashed on motion.—First Nat. Bank v. Barrett, 94 S. W.2d 928, 230 Mo.App. 1196.

(2) Summary remedies generally see *infra* § 337.

Judgment paid by debtor secondarily liable

However, it has been held that judgment paid by debtor secondarily liable will not sustain execution for his benefit against property of debtor primarily liable.—Greenbrier Valley Bank v. Holt, 171 S.E. 906, 114 W.Va. 363.

77. Ga.—Adams v. Keeler, 30 Ga. 86.

78. Circumstances held not to amount to payment

Me.—Nickerson v. Whittier, 20 Me. 223.

79. Tex.—Winkler v. First Nat. Bank, Civ.App., 134 S.W.2d 341.

50 C.J. p 263 note 79. Statutory remedies generally see *infra* §§ 336-338.

80. Cal.—Hill's Estate, 7 P. 664, 67 Cal. 238.

50 C.J. p 243 note 8.

Assertion of rights against distributees or devisees see *supra* § 307 a. Enforceability of surety's demand for reimbursement against principal's estate generally see Executors and Administrators § 376.

Insolvency of principal's estate where debt due principal from surety see *supra* § 302.

Right as against administrator or widow's exemption

Where a landlord went security for a tenant on notes given by the latter for an implement, under an agreement that it should belong to the landlord until the tenant paid for it, and, on the death of the tenant, the landlord had to pay the notes, he was not entitled to the implement either as against the administrator or the widow's claim for exemption.—Bower v. Repsher, 2 Walk, Pa., 387.

#### Superior right of heir's assignee

Assignee of interest of heir in estate was held entitled to superior right over that of surety of such heir, as administrator to have distributed to surety share of heir in estate, in reimbursement for sums which surety had been compelled to pay for heir's misuse of funds and property of estate.—U. S. Fidelity & Guaranty Co. v. Mathews, 279 P. 655, 207 Cal. 556.

81. Idaho.—Sassaman v. Root, 218 P. 374, 37 Idaho 588.

50 C.J. p 245 note 28.

Where principal becomes insolvent before debt is paid but after it is due, surety may compel payment of debt from principal's assets; where bank, guardian, became insolvent,



§ 314. Duty to Indemnify Surety

The duty of the principal to indemnify the surety before payment or satisfaction by the latter of the principal debt or obligation is discussed supra §§ 301-305, and after such payment or satisfaction, supra §§ 306-310.

Examine Pocket Parts for later cases.

§ 315. Express Contract for Indemnification or Reimbursement

- a. In general
- b. Consideration
- c. Construction

a. In General

The validity of a contract by a principal to indemnify or reimburse his surety is governed by the rules applicable to contracts generally. Valid contracts of this nature will be enforced in accordance with their terms.

Since, as discussed infra § 317, a principal is bound to indemnify without express contract, a contract by him to indemnify his surety against loss requires only general language;<sup>82</sup> and valid contracts of this nature will be enforced in accordance with their terms;<sup>83</sup> but a surety making a payment or incurring a loss in circumstances outside the terms of the indemnity contract cannot recover thereon.<sup>84</sup> An indemnity contract executed by an employee to a surety as part of the con-

sideration for writing the employee's bond, and including an agreement to hold the surety harmless from loss, in addition to an agreement to repay any money paid out by the surety, has been held not void as against public policy.<sup>85</sup>

*Acceptance of offer.* Where an indemnity agreement constituting an offer is not acted on by the surety within a reasonable time by executing a bond, there is no acceptance and the indemnitors are not bound.<sup>86</sup>

*Severability of illegal portion.* A contract by a principal to indemnify his surety is severable into its legal and its illegal portions,<sup>87</sup> and may be enforced as to the former.<sup>88</sup>

*Particular provisions.* A provision in such a contract that vouchers for payments made by the surety shall be conclusive between the parties<sup>89</sup> or prima facie evidence of the fact and extent of the principal's liability<sup>90</sup> is reasonable and valid, as are a provision that, on a failure to pay, when due, any of the notes on which the suretyship is based the surety shall have the right to declare the other notes due and proceed to enforce his security,<sup>91</sup> a stipulation for attorney's fees if the surety is compelled to sue the principal for reimbursement,<sup>92</sup> and a provision that a bonded employee agrees that in any accounting between him and the surety, the surety shall be entitled to credit for

but receiver paid principal to new guardian, surety was entitled to compel bank or legal representative to pay interest on guardianship funds.—*Fidelity & Deposit Co. of Maryland v. Deposit Guaranty Bank & Trust Co.*, 144 So. 700, 164 Miss. 286, 85 A.L.R. 860.

82. U.S.—*American Bonding Co. v. Alcatraz Constr. Co.*, N.Y., 202 F. 483, 123 C.C.A. 225.

Requisites and validity of express contract of indemnity generally see Indemnity §§ 4-7.

83. U.S.—*U. S. for Use and Benefit of W. A. Rushlight Co. v. Davidson*, D.C.Idaho, 71 F.Supp. 401. Mich.—*American Sur. Co. of N. Y. v. Payne*, 29 N.W.2d 118, 318 Mich. 670.

Mo.—*Maryland Casualty Co. v. Spitaufsky*, 178 S.W.2d 368, 352 Mo. 547.

Neb.—*U. S. Fidelity & Guaranty Co. v. Bates*, 296 N.W. 560, 139 Neb. 131.

N.Y.—*Etna Casualty & Surety Co. v. Fleischman Wine & Liquor Co.*, 200 N.E. 23, 269 N.Y. 614.

Okl.—*Miller v. National Surety Co.*, 14 P.2d 228, 159 Okl. 76.

Tex.—*Indemnity Ins. Co. of North*

*America v. McMillan*, Civ.App., 153 S.W.2d 264.

Utah.—*Beaver County v. Home Indemnity Co.*, 52 P.2d 435, 88 Utah 1. Loss sustained because of suit on bond.

N.C.—*U. S. Fidelity & Guaranty Co. v. Hill*, 162 S.E. 604, 202 N.C. 238.

84. U.S.—*American Surety Co. of New York v. Singer Sewing Mach. Co.*, D.C.N.Y., 18 F.Supp. 750.

Mo.—*Maryland Cas. Co. v. Zahner*, 190 S.W.2d 996.

Payment without legal obligation see supra § 309 b (3).

85. U.S.—*Hartford Accident & Indemnity Co. v. Flanagan*, D.C.Ohio, 28 F.Supp. 415.

86. U.S.—*American Surety Co. of New York v. Egan*, C.C.A.Mich., 62 F.2d 223.

87. Minn.—*Hartford Accident & Indemnity Co. v. Dahl*, 278 N.W. 591, 202 Minn. 410.

Waiver of statutory exemption held illegal.—*Hartford accident & Indemnity Co. v. Dahl*, supra.

88. Minn.—*Hartford Accident & Indemnity Co. v. Dahl*, supra.

89. U.S.—*American Bonding Co. v.*

*Alcatraz Constr. Co.*, N.Y., 202 F. 483, 123 C.C.A. 225.

Validity of "conclusive evidence" clauses of contracts generally see Contracts § 229 notes 86-88.

**Good faith in effecting settlement**

A provision that surety on official bond must exercise good faith in effecting settlement of claim against principal should be read into indemnity agreement, so as to sustain provision that any proper evidence of surety's payment of loss or damage shall be conclusive evidence against principal; a surety, failing to consult with principal about proposed settlements of personal injury claims against principal before concluding settlements, did not fulfill full duty under indemnity contract and could not recover indemnity from principal.—*Fidelity & Cas. Co. of N. Y. v. McNamara*, 36 S.E.2d 402, 127 W.Va. 731.

90. Tenn.—*National Sur. Corp. v. Buckles*, 219 S.W.2d 207, 31 Tenn. App. 610.

91. Ga.—*Jones v. Norton*, 71 S.E. 687, 9 Ga.App. 333.

92. Wash.—*American Surety Co. v. Heather*, 228 P. 857, 131 Wash. 73. Right to recover attorney's fees generally see infra § 335 d (2).

any disbursements made to the employer in good faith under the belief that the surety was liable for the amount disbursed or that it was necessary or expedient to make such disbursements, whether or not such liability, necessity, or expediency existed.<sup>93</sup>

**Signature by another.** A principal on a surety bond which was signed for him by another as his attorney is estopped to deny liability to the surety on the ground that he had not signed the bond or authorized anyone to sign it for him, where, shortly after the bond was filed, a sworn report of sale was filed in which he stated that he had furnished a surety bond.<sup>94</sup>

**Effect of failure to read.** One signing an application for a bond cannot avoid personal liability under the indemnity clause, in the absence of fraud on the part of the surety, despite the applicant's failure to read the clause,<sup>95</sup> especially where he filled in the blanks and no agent of the surety participated in doing so.<sup>96</sup>

#### b. Consideration

The sufficiency of consideration for a principal's contract to indemnify his surety is governed by the rules applicable to consideration for contracts generally.

In accordance with the rules governing consideration for contracts generally, forbearance by the surety from withdrawing from the suretyship

contract is sufficient consideration to support a contract of indemnity by the principal against loss thereon by the surety,<sup>97</sup> and an agreement by a surety on a contractor's bond, on assignment of the contract, to continue on the bond is sufficient.<sup>98</sup> A promise by a surety to his principal to pay the outstanding debt is a good consideration for an express promise by the principal to pay the surety a like sum on demand.<sup>99</sup>

**Execution of bond before application signed.** A bond, even though executed prior to the signing of an application therefor whereby the principal agrees to indemnify the surety, is a valid consideration for the indemnifying agreement.<sup>1</sup>

#### c. Construction

The construction of an express contract of a principal to reimburse or indemnify his surety is governed by the rules relating to the construction of contracts generally and indemnity contracts particularly; so, such agreements are to be construed so as to effectuate the parties' intent.

The rules relating to the construction of contracts generally, as discussed in Contracts §§ 294-372, and of indemnity contracts in particular, as discussed in Indemnity §§ 8-19, are applicable in construing express contracts of principals to reimburse or indemnify their sureties.<sup>2</sup> Such agreements must be construed to give effect to the intent of the parties<sup>3</sup> and to accomplish the purposes

93. Tex.—Central Sur. & Ins. Corp. v. Martin, Civ.App., 224 S.W.2d 773.

94. Iowa.—Indemnity Ins. Co. of North America v. Opdycke, 273 N.W. 373, 223 Iowa 502.

95. N.Y.—St. Paul Mercury Indem. Co. v. Manganaro, 60 N.Y.S.2d 177, 186 Misc. 161.

96. Tenn.—National Sur. Corp. v. Buckles, 219 S.W.2d 207, 31 Tenn. App. 610.

97. Okl.—American Surety Co. v. Cabell, 159 P. 352, 58 Okl. 145.  
Consideration for express contracts of indemnity generally see Indemnity § 6.

98. Ind.—U. S. Fidelity, etc., Co. v. George S. Schauer Co., 126 N.E. 860, 73 Ind.App. 171.

99. N.H.—Osgood v. Osgood, 39 N.H. 209.  
50 C.J. p 256 note 63.

1. La.—Conway v. Union Indemnity Co., 169 So. 73, 185 La. 240.

2. Ga.—U. S. Fidelity & Guaranty Co. v. Schwalbe, 13 S.E.2d 512, 64 Ga.App. 413.

Mass.—Hartford Accident & Indemnity Co. v. Casassa, 16 N.E.2d 860, 301 Mass. 246.

50 C.J. p 256 note 66.

#### Joint and several liability held shown

Iowa.—Indemnity Ins. Co. of North America v. Opdycke, 273 N.W. 373, 223 Iowa 502.

**Individual operations of principals held covered.**—Maryland Casualty Co. v. Spitcaufsky, 178 S.W. 2d 368, 352 Mo. 547.

**Agreements held to be with distinct partnership entities**

U.S.—Maryland Cas. Co. v. Glassell-Taylor Co., D.C.La., 63 F.Supp. 718.

#### Payment of amount of surety's obligation

As affecting enforcement of liquor licensee's agreement to indemnify surety against liability on licensee's bond, surety had right, under provisions of agreement, to discharge his obligation to the State Liquor Authority under the forfeited bond on licensee's failure to comply with surety's demand to pay over in cash the amount of surety's obligation.—Peerless Casualty Co. v. Sawitz & Simon, 23 N.Y.S.2d 71, 260 App.Div. 448.

#### Default of administrator

It is only where administrator defaults in performance of duty under the law and bona fide demand is

made on compensated surety for performance of his obligation under bond that surety may assert administrator's liability under indemnity agreement.—Indemnity Ins. Co. of North America v. Brennan, 42 N.Y.S. 2d 633, 180 Misc. 430.

**Facts adjudicated in prior suit as to nature of agreement constituted by bond were held conclusive against surety.**—American Surety Co. of New York v. Singer Sewing Mach. Co., D.C.N.Y., 18 F.Supp. 750.

3. Ala.—Kilgore v. Union Indemnity Co., 132 So. 901, 222 Ala. 375.  
Ga.—U. S. Fidelity & Guaranty Co. v. Schwalbe, 13 S.E.2d 512, 64 Ga. App. 413.

**Injuries "in and about" the construction of a road were held not to include death of motorist who ran into an improperly and negligently guarded excavation.**—U. S. Fidelity & Guaranty Co. v. Schwalbe, 13 S.E. 2d 512, 64 Ga.App. 413.

#### Individuals bound by company application

Under agreement by construction company and interested individuals indemnifying surety, application by construction company for bond was held sufficient to bind individual indemnitors.—American Surety Co. of

in view,<sup>4</sup> and all the attendant circumstances must be considered.<sup>5</sup> They are to be construed so as to impose on the surety the obligation of acting in good faith<sup>6</sup> and in the exercise of a reasonable discretion,<sup>7</sup> and so as to give due effect to each and every part thereof, according to the intention of the parties at the time;<sup>8</sup> and, where the operative words of the agreement are clear and unambiguous, they cannot be controlled by an erroneous recital.<sup>9</sup>

The rule, discussed in Contracts § 298, that, when two or more papers are executed at the same time or at different times as part of the same transaction, they will be read together, has been applied in construing indemnity agreements between principal and surety.<sup>10</sup>

It has been said that, in view of the implied obligation of the principal to indemnify or reimburse the surety, as discussed infra § 316, an express agreement therefor adds nothing to the surety's rights,<sup>11</sup> and that, where a statute requires a principal to reimburse a surety who has satisfied the principal obligation or any part thereof, an express agreement by the principal to indemnify, and keep indemnified, the surety becomes material only if it entitles the surety to indemnify without his first

satisfying any part of the principal obligation;<sup>12</sup> but the obligations of one signing applications for supersedeas bonds to reimburse the sureties thereon are to be ascertained from the terms of his application.<sup>13</sup>

**Construction against surety.** Where the agreement by the principal to indemnify the surety is drawn by the surety, it must be strictly construed,<sup>14</sup> and if there are any doubts as to its meaning, they must be resolved against him.<sup>15</sup> Where, under the terms of an indemnity agreement contained in an application for a faithful-performance bond, the principal is in the position of a guarantor to the surety, the agreement will be strictly construed in favor of the principal.<sup>16</sup>

**Amendment of agreement.** Where an indemnity agreement provides that it cannot be changed or modified except by a specified officer, a letter from an adjuster of the surety is not efficacious to amend the contract by waiver or otherwise.<sup>17</sup>

**Particular provisions.** A clause in the suretyship contract making vouchers or other evidence of payment by the surety conclusive evidence of the principal's liability to the surety is to be strictly construed in the light of all the facts with the end in view of doing justice between the parties,<sup>18</sup> and,

New York v. Egan, C.C.A.Mich., 62 F.2d 223.

4. Ala.—Kilgore v. Union Indemnity Co., 132 So. 901, 222 Ala. 375.

5. Ga.—U. S. Fidelity & Guaranty Co. v. Schwalbe, 13 S.E.2d 512, 64 Ga.App. 413.

6. Ala.—Kilgore v. Union Indemnity Co., 132 So. 901, 222 Ala. 375. W.Va.—Fidelity & Cas. Co. of N. Y. v. McNamara, 36 S.E.2d 402, 127 W.Va. 731.

7. Ala.—Kilgore v. Union Indemnity Co., 132 So. 901, 222 Ala. 375.

8. Cal.—McDonough v. Waxman, 284 P. 482, 103 Cal.App. 169. 50 C.J. p 257 note 67.

**Surety required to perform contract**  
Indemnity agreement was held intended to become operative only in event that surety was required to perform the contract.—Glens Falls Indemnity Co. v. American Awning & Tent Co., 180 A. 367, 55 R.I. 284, reargument denied 181 A. 297, 55 R.I. 303.

**Loss as result of assault held not covered.**—Maryland Cas. Co. v. Zahner, Mo.App., 190 S.W.2d 996.

**New bond held not included under indemnity agreement applicable to earlier bond.**—Maryland Casualty Co. v. Corley's Estate, 139 So. 390, 162 Miss. 554.

9. N.Y.—American Surety Co. v.

Thurber, 4 N.Y.S. 191, 56 N.Y. Super. 338, affirmed 23 N.E. 1129, 121 N.Y. 655.

10. Neb.—Madison First Nat. Bank v. School Dist., 110 N.W. 349, 77 Neb. 570. 50 C.J. p 257 note 70.

**Construction with other instrument made part**

Bail bonds, which by terms of indemnity contract were made part thereof, are as much part thereof as though copied therein, and instruments will be construed together in determining liability on indemnity contract.—Bryson v. Fischer, 253 Ill.App. 502.

11. U.S.—Fouts v. Maryland Casualty Co., C.C.A.N.C., 30 F.2d 357, certiorari denied 49 S.Ct. 348, 279 U.S. 852, 73 L.Ed. 991.—Springfield Nat. Bank v. American Surety Co., C.C.A.Ohio, 7 F.2d 44, certiorari denied 46 S.Ct. 104, 269 U.S. 578, 70 L.Ed. 421.

12. Mont.—Maryland Cas. Co. v. Walsh, 155 P.2d 759, 116 Mont. 559.

13. U.S.—Maryland Fidelity, etc., Co. v. Burden, C.C.A.N.Y., 30 F.2d 610. 50 C.J. p 257 note 73.

14. Mo.—Maryland Cas. Co. v. Zahner, App., 190 S.W.2d 996.

15. Mo.—Maryland Cas. Co. v. Zahner, supra.

16. U.S.—Massachusetts Bonding & Ins. Co. v. Darby, D.C.Mo., 59 F. Supp. 175.

17. U.S.—Triangle Engineer Corp. v. Travelers Indem. Co., D.C.N.Y., 72 F.Supp. 112.

18. U.S.—U. S. Fidelity, etc., Co. v. Worthington, C.C.A.Ala., 6 F.2d 502, certiorari denied 46 S.Ct. 119, 269 U.S. 583, 70 L.Ed. 424. Evidence in actions and proceedings by surety against principal generally see infra § 331.

**Payment of purported loss on fraudulent proof**

Where principal agreed to indemnify surety company for losses which surety might "sustain, incur or become liable for in consequence of said bond" and agreed that "any proper evidence of the payment by the company of any such losses" should be conclusive evidence against principal of the fact and extent of his liability to surety, the latter provision was limited to losses for which surety actually became liable and did not make principal liable where there was no proof of loss or damage on part of surety, but surety paid purported loss on basis of fraudulent proof of loss.—London & Lancashire Indemnity Co. v. Crook, 6 N.W.2d 681, 241 Wis. 571, 144 A.L.R. 513.

while it is applicable to determine the extent of liability of the principal to the surety,<sup>19</sup> it is not the basis for determining the surety's liability to the principal on another cause of action.<sup>20</sup>

Under an agreement of the principal to reimburse the surety for every kind of liability or loss sustained or incurred "by reason of the execution" of the bond by the surety, the liability or loss to the surety must be such as normally arises from the execution of the bond;<sup>21</sup> and the agreement cannot be held to apply to a liability which might be assumed by the surety without reason where none can exist in the present or in the near future,<sup>22</sup> or to a loss sustained otherwise than in the natural course of events.<sup>23</sup>

A provision in a contract, giving a surety company the right in its discretion to retain collateral deposited with it until its liability on account of the bond ceases, does not release it from failure to exercise due diligence as to the collateral.<sup>24</sup>

A provision giving the surety the right to retain special counsel is not incompatible with a request made by the surety, after being served in an action on the bond, that the principal furnish the surety with the name and address of the attorney whom the principal would retain to defend the surety in the action, with the understanding that the principal would save the surety harmless from

any judgment which might be rendered against him.<sup>25</sup>

*Where insolvency supervenes*, a surety's claim of indemnity is postponed until payments in full are made to all claimants who are members of the class of creditors covered by the bond;<sup>26</sup> in such circumstances, equitable principles forbid the surety to secure indemnity by independent contract with the debtor at the expense of the creditor whose claim he has undertaken to secure.<sup>27</sup>

## § 316. Implied Contract for Indemnification or Reimbursement

- a. In general
- b. Bail

### a. In General

In the absence of an express agreement, there is an implied contract that the principal will indemnify or reimburse the surety for any payment the latter may make to the creditor or any loss he may sustain in compliance with the suretyship contract. Under most authorities, this implied contract arises when the suretyship is made, and not when payment is made by the surety thereunder.

In the absence of an express agreement, there is, in a relationship of principal and surety, an implied contract that the principal will indemnify or reimburse the surety for any payment the latter may make to the creditor or any loss he may sustain in compliance with the contract of suretyship, and save the surety harmless.<sup>28</sup> This im-

19. U.S.—U. S. Fidelity, etc., Co. v. Worthington, C.C.A. Ala., 6 F.2d 502, certiorari denied 46 S.Ct. 119, 269 U.S. 583, 70 L.Ed. 424.

20. U.S.—U. S. Fidelity, etc., Co. v. Worthington, *supra*.

21. N.Y.—Continental Casualty Co. v. National Slovak Sokol, 199 N.E. 412, 269 N.Y. 283.

#### Attorneys' fees

(1) Under indemnity agreement in executor's bond granting surety right to recover from principal for counsel fees "by reason or in consequence of his having executed said bond," the attorneys' fees expended by surety in his action against principal seeking recovery under the agreement were not recoverable; but surety was entitled to recover amount expended by him for attorneys' fees for purpose of appearing in opposition to a petition by an heir of the estate to set aside executor's final account, on proper proof of surety's good faith and the reasonableness of the fees paid.—U. S. Fidelity & Guaranty Co. v. Falk, 7 N.W.2d 398, 214 Minn. 138.

(2) Recovery of attorneys' fees in action against principal generally see *infra* § 335 d (3).

#### Costs of removing cause to federal court

Principal was held not liable for costs incurred by surety in attempting to remove cause involving suspensive appeal bonds from state to federal court, where there is no reason why surety's rights could not have been as fully protected in state court as in federal.—Succession of Barrow, 145 So. 262, 176 La. 42.

#### Particular constructions of phrase

(1) Under administrator's agreement to indemnify surety against any loss it might sustain by reason of execution of bonds to protect estate against loss arising out of conduct of coadministrators, surety, if called on to bear loss when execution issued against surcharged coadministratrix was returned unsatisfied, could look to administrator for indemnity.—In re Booker's Estate, 91 N.Y.S.2d 16, 195 Misc. 513.

(2) Other constructions.—Miller v. Fitzpatrick, 236 N.Y.S. 638, 227 App. Div. 745—50 C.J. p 256 note 66 [g].

22. N.Y.—Continental Casualty Co. v. National Slovak Sokol, 199 N.E. 412, 269 N.Y. 283.

23. N.Y.—Continental Casualty Co. v. National Slovak Sokol, *supra*.

24. U.S.—Maryland Fidelity, etc., Co. v. Redfield, C.C.A. Idaho, 7 F. 2d 800.

25. U.S.—Triangle Engineer Corp. v. Travelers Indem. Co., D.C.N.Y., 72 F.Supp. 112.

26. U.S.—American Sur. Co. of N. Y. v. Sampsell, Cal., 66 S.Ct. 571, 327 U.S. 269, 90 L.Ed. 663—American Surety Co. of New York v. Westinghouse Electric Mfg. Co., Fla., 56 S.Ct. 9, 296 U.S. 133, 80 L.Ed. 105—In re Stratton, D.C. Cal., 53 F.Supp. 131, affirmed, C.C. A., American Sur. Co. of N. Y. v. Sampsell, 148 F.2d 936, affirmed 66 S.Ct. 571, 327 U.S. 269, 90 L.Ed. 663.

#### Laborers and materialmen

U.S.—American Sur. Co. of N. Y. v. Sampsell, Cal., 66 S.Ct. 571, 327 U.S. 269, 90 L.Ed. 663.

27. U.S.—American Surety Co. of New York v. Westinghouse Electric Mfg. Co., Fla., 56 S.Ct. 9, 296 U.S. 133, 80 L.Ed. 105—Jenkins v. National Surety Co., Utah, 48 S.Ct. 445, 277 U.S. 258, 72 L.Ed. 874.

28. U.S.—Corpus Juris cited in Joe Balestrieri & Co. v. Commissioner of Internal Revenue, C.A.9, 177 F. 2d 867, 872—Howard Johnson, Inc.,

plied contract has been held to arise or take effect when the suretyship is made or contracted,<sup>29</sup> and not when payment is made by the surety thereun-

der<sup>30</sup> or when the surety sustains his loss;<sup>31</sup> payment merely fixes the amount of damages for which the principal is liable under his original agreement

of Fla. v. Tucker, C.C.A.Fla., 157 F.2d 959—Fidelity & Deposit Co. of Maryland v. Hobbs, C.C.A.N.M., 144 F.2d 5—American Surety Co. of New York v. Bethlehem Nat. Bank of Bethlehem, Pa., C.C.A.Pa., 116 F.2d 75, reversed on other grounds 62 S.Ct. 226, 314 U.S. 314, 86 L.Ed. 241, 138 A.L.R. 509—Howell v. Commissioner of Internal Revenue, C.C.A., 69 F.2d 447, certiorari denied Howell v. Helvering, 54 S.Ct. 864, 292 U.S. 654, 78 L.Ed. 1503—In re Seigel, D.C.Ga., 48 F. Supp. 778.

Ark.—Corpus Juris cited in Shinn v. Kitchens, 186 S.W.2d 168, 172, 208 Ark. 321.

Cal.—Merner Lumber Co. v. Brown, 21 P.2d 590, 218 Cal. 136—Johnson v. Mortgage Guarantee Co., 4 P.2d 208, 117 Cal.App. 416—W. H. Marston Co. v. Kochritz, 293 P. 120, 109 Cal.App. 331.

Fla.—Scott v. National City Bank of Tampa, 139 So. 367, 107 Fla. 810.

Iowa.—Roberts v. Roberts, 1 N.W. 2d 269, 231 Iowa 394—Corpus Juris cited in Hirtz v. Koppes, 234 N.W. 854, 857—Johnston v. Grimm, 229 N.W. 716, 209 Iowa 1050—Van Patten v. Waugh, 98 N.W. 119, 122 Iowa 302.

Ky.—Corpus Juris cited in Napier v. Duff, 136 S.W.2d 1083, 1085, 281 Ky. 779.

Minn.—Hartford Accident & Indemnity Co. v. Dahl, 278 N.W. 591, 202 Minn. 410—National Surety Co. v. Wittich, 237 N.W. 690, 184 Minn. 44.

Mo.—Krebs v. Bezler, 89 S.W.2d 935, 338 Mo. 365, 103 A.L.R. 1177—Haliburton v. Carter, 55 Mo. 438.

N.Y.—Goldberg v. Albert, 291 N.Y. S. 855, 161 Misc. 281—Salzberg v. Deutsch, 270 N.Y.S. 595, 150 Misc. 370.

Ohio.—In re Deal's Estate, 46 N.E. 2d 643, 70 Ohio App. 503—Yakey v. Strunk, 7 Ohio N.P.N.S., 177, affirmed 91 N.E. 1143, 81 Ohio St. 568.

Pa.—Corpus Juris quoted in Bishop v. Fehl, 29 A.2d 58, 60, 345 Pa. 539, 143 A.L.R. 1058.

S.C.—Corpus Juris quoted in Bessinger v. National Sur. Corp., 35 S.E.2d 658, 659, 207 S.C. 365.

Tex.—Corpus Juris cited in Jagoe Const. Co. v. United States Fidelity & Guarantee Co., Com.App., 53 S.W.2d 503, 508—Armstrong v. Anderson, Civ.App., 91 S.W.2d 775, reversed on other grounds Anderson v. Armstrong, 120 S.W.2d 444, 132 Tex. 132, rehearing denied 132 S.W.2d 393, 132 Tex. 132—Lewis v. Easley, Civ.App., 34 S.W.2d 376.

Utah.—Beaver County v. Home Indemnity Co., 52 P.2d 435, 88 Utah 1.

Va.—Dickenson v. Charles, 4 S.E.2d 351, 173 Va. 393—Aetna Casualty & Surety Co. v. Whaley, 3 S.E. 2d 395, 173 Va. 11.

W.Va.—Perkins v. Hall, 17 S.E.2d 795, 123 W.Va. 707.

Wis.—In re Onstad's Estate, 271 N. W. 652, 224 Wis. 332, 109 A.L.R. 630.

50 C.J. p 255 note 26.

Implied contract of indemnity generally see Indemnity §§ 20-27.

Where party assumes liability as surety without principal's request see supra § 307 c (3).

"Generally, the surety has faith in his principal and does not expect to be called upon to pay, although recognizing the obligation. Generally, the principal expects to pay and does not expect the surety to be called upon. Sometimes the surety is called upon, and when such a situation arises, he is entitled to recover from his principal whether or not anything is said about reimbursement."—Barger v. Gething, Ohio App., 52 N.E.2d 94, 96.

"The theory of law which implies an obligation on the part of a principal to reimburse his surety, if and when the surety pays the obligation of the principal, is based upon equitable considerations. The liability of the latter is made to depend upon the damage suffered by the surety because of the default of the principal, and it is but equitable, in circumstances where the surety has satisfied the principal's obligation, that the latter should reimburse the surety."—Pacific Indemnity Co. v. Harper, 94 P.2d 586, 589, 14 Cal.2d 379, 124 A.L.R. 1169.

Universal holding at common law

Ky.—Napier v. Duff, 136 S.W.2d 1083, 281 Ky. 779.

That the surety is compensated does not affect his right.—Bessinger v. National Sur. Corp., 35 S.E.2d 658, 207 S.C. 365.

Whether the surety is a company or an individual the law implies a contract to reimburse.—Phelps v. Dawson, C.C.A.S.D., 97 F.2d 339, 116 A.L.R. 1343.

Either principal on joint bond impliedly undertakes to indemnify surety for loss through breach of bond by either principal.—Andrews v. U. S. Fidelity & Guaranty Co., 151 S.E. 745, 154 S.C. 456.

An allegation of an oral promise to pay does not take away the implied promise arising under the law.

—Barger v. Gething, Ohio App., 52 N.E.2d 94.

29. U.S.—Howard Johnson, Inc., of Fla. v. Tucker, C.C.A.Fla., 157 F. 2d 959—Fidelity & Deposit Co. of Maryland v. Hobbs, C.C.A.N.M., 144 F.2d 5—Scott v. Norton Hardware Co., C.C.A.Va., 54 F.2d 1047. Minn.—Corpus Juris cited in National Surety Co. v. Wittich, 237 N.W. 690, 691, 184 Minn. 44.

Ohio.—In re Deal's Estate, 46 N.E. 2d 643, 70 Ohio App. 503—Yakey v. Strunk, 7 Ohio N.P.N.S., 177, affirmed 91 N.E. 1143, 81 Ohio St. 568.

Va.—Dickenson v. Charles, 4 S.E.2d 351, 173 Va. 393.

50 C.J. p 255 notes 26, 27.

Relationship of debtor and creditor arising at execution of contract see supra § 301.

30. U.S.—Fidelity & Deposit Co. of Maryland v. Hobbs, C.C.A.N.M., 144 F.2d 5.

Minn.—National Surety Co. v. Wittich, 237 N.W. 690, 184 Minn. 44. 50 C.J. p 255 note 28.

"No new contract is made when the money is paid by the surety." Mass.—Rice v. Southgate, 16 Gray, Mass., 142, 143.

Ohio.—In re Deal's Estate, 46 N.E. 2d 643, 70 Ohio App. 503—Yakey v. Strunk, 7 Ohio N.P.N.S., 177, 182, affirmed 91 N.E. 1143, 81 Ohio St. 568.

Va.—Dickenson v. Charles, 4 S.E.2d 351, 354, 173 Va. 393.

In Missouri

(1) When the surety signed the bond, this act created an existing cause of action contingent on the principal's default; an implied contract was then raised by law that the principal should indemnify the surety, and this implied contract took effect from the date of the surety's signing the bond, and not merely from the time he paid the money, the payment in such case relating to the inception of the implied liability.—Berry v. Ewing, 3 S.W. 877, 91 Mo. 395.

(2) However, it has also been held that an implied promise of the principal to pay arises in favor of the surety immediately on his payment of the debt of the principal.—Lincoln County v. El. I. Du Pont De Nemours & Co., 32 S.W.2d 292, 224 Mo.App. 1183.

31. U.S.—Scott v. Norton Hardware Co., C.C.A.Va., 54 F.2d 1047.

Va.—Dickenson v. Charles, 4 S.E. 2d 351, 173 Va. 393.

to indemnify the surety,<sup>32</sup> relates back to the time the contract was entered into by which the liability to pay was incurred,<sup>33</sup> and matures the cause of action.<sup>34</sup> Under other authority, however, an implied promise on the part of the principal to reimburse the surety arises in favor of the latter through, or immediately on, his payment of the debt.<sup>35</sup>

*Expenses incurred by surety without principal's fault.* Where the contingency against which the surety has contracted does not arise, and he sustains no damage and incurs no liability on account of the acts, neglect, or default of the principal, in the absence of an express contract of indemnity, the latter ought not to be charged with the payment of expenses incurred by the surety in an action brought by a third person.<sup>36</sup>

### b. Bail

- (1) In civil cases
- (2) In criminal cases

#### (1) In Civil Cases

The rule that the contract of suretyship implies a right in the surety to be indemnified by the principal obtains in the law of bail in civil cases.

The rule, stated *supra* subdivision a of this section, that the contract of suretyship implies a right in the surety to be indemnified or reimbursed by the principal obtains in the law of bail in civil cases;

es;<sup>37</sup> the principal in a recognizance executed in a civil case must indemnify his bail for any loss the latter may have sustained by reason of the breach of the undertaking.<sup>38</sup> However, such bail do not acquire any lien in equity on a tract of land for their indemnity,<sup>39</sup> even though the debt they have paid was for the price which the principal engaged to pay therefor.<sup>40</sup>

### (2) In Criminal Cases

Under most authorities, the common law will not imply a contract on the part of a person bailed in a criminal case to indemnify his bail for what they have been compelled to pay on their recognizance by reason of his default; but the rule does not apply where cash bail is authorized.

Although there is authority to the contrary,<sup>41</sup> it is held at common law that, for reasons of public policy, the law will not imply a contract on the part of a person bailed in a criminal case to indemnify his bail for what they have been compelled to pay on their recognizance by reason of his default;<sup>42</sup> in jurisdictions where cash bail is authorized, however, the common-law rule does not apply,<sup>43</sup> and recovery may be had by the bail against accused<sup>44</sup> unless it was understood, at the time of deposit, that the money should be forfeited by non-appearance.<sup>45</sup>

## § 317. Security for Protection of Surety

### a. In general

32. U.S.—Fidelity & Deposit Co. of Maryland v. Hobbs, C.C.A.N.M., 144 F.2d 5.

Minn.—Hartford Accident & Indemnity Co. v. Dahl, 278 N.W. 591, 202 Minn. 410—Corpus Juris cited in National Surety Co. v. Wittich, 237 N.W. 690, 691, 184 Minn. 44.

Ohio.—In re Deal's Estate, 46 N.E. 2d 643, 70 Ohio App. 503—Yaakey v. Strunk, 7 Ohio N.P.N.S., 177, 182, affirmed 91 N.E. 1143, 81 Ohio St. 568.

Va.—Dickenson v. Charles, 4 S.E.2d 351, 173 Va. 393.  
50 C.J. p 255 note 29.

33. U.S.—Howard Johnson, Inc., of Fla. v. Tricker, C.C.A.Fla., 157 F. 2d 959, 962—Fidelity & Deposit Co. of Maryland v. Hobbs, C.C.A.N.M., 144 F.2d 5.

Minn.—Hartford Accident & Indemnity Co. v. Dahl, 278 N.W. 591, 202 Minn. 410—Corpus Juris cited in National Surety Co. v. Wittich, 237 N.W. 690, 691, 184 Minn. 44.

Ohio.—In re Deal's Estate, 46 N.E. 2d 643, 70 Ohio App. 503—Yaakey v. Strunk, 7 Ohio, N.P.N.S., 177, 182, affirmed 91 N.E. 1143, 81 Ohio St. 568.

Va.—Dickenson v. Charles, 4 S.E.2d 351, 173 Va. 393.  
50 C.J. p 255 note 30.

34. U.S.—Fidelity & Deposit Co. of Maryland v. Hobbs, C.C.A.N.M., 144 F.2d 5.

35. Cal.—W. H. Marston Co. v. Kochritz, 293 P. 120, 109 Cal.App. 331.

Iowa.—Johnston v. Grimm, 229 N.W. 716, 209 Iowa 1050.

Me.—Vermeule v. York Cliffs Impr. Co., 74 A. 800, 105 Me. 350, 134 Am.S.R. 553.

#### Payment of note

The principal's obligation to reimburse surety paying principal's note is implied from surety's act of payment and is not based on note, which is discharged by such payment.—Roberts v. Roberts, 1 N.W.2d 269, 231 Iowa 394—Van Patten v. Waugh, 98 N.W. 119, 122 Iowa 302.

36. Cal.—Pacific Indemnity Co. v. Harper, 94 P.3d 586, 589, 14 Cal.2d 379, 124 A.L.R. 1169.

"Where the surety has not been called upon to answer for the default of the principal, and has not paid any part of the principal obligation, it would seem . . . just that no recovery of expenses should be imposed against the principal where the litigation out of which the expenses arose, resulted, in effect, in a determination that there was

no default upon the part of the principal."—Pacific Indemnity Co. v. Harper, *supra*.

37. Ky.—Adair v. Campbell, 4 Bibb. Ky. 18.

38. Ky.—Adair v. Campbell, *supra*.

39. Ky.—Adair v. Campbell, *supra*.

40. Ky.—Adair v. Campbell, *supra*.

41. Ga.—Flemming v. Shockley, 68 S.E. 1013, 8 Ga.App. 229.  
50 C.J. p 255 note 33.

42. U.S.—U. S. v. Ryder, N.J., 4 S.Ct. 196, 110 U.S. 729, 28 L.Ed. 308.  
50 C.J. p 256 note 34.

Express contracts to indemnify person on account of becoming bail for prisoner charged with crime—see Contracts § 227.

43. Okl.—Exchange Trust Co. v. Mann, 269 P. 275, 131 Okl. 302.  
50 C.J. p 256 note 36.

44. N.Y.—Badolato v. Molinari, 174 N.Y.S. 512, 106 Misc. 342.  
50 C.J. p 256 note 37.

45. Mo.—Hutchinson v. Brassfield, 86 Mo.App. 40.

- b. What may constitute
- c. Assignment as security
- d. Delivery or registration of security

### a. In General

A principal may lawfully give security to his surety, whose liability to pay the principal's debt constitutes sufficient consideration for giving security.

The principal lawfully may give security to his surety; and agreements in respect thereto are valid,<sup>46</sup> although the liability of the surety is contingent and remote,<sup>47</sup> and for various obligations,<sup>48</sup> and it is uncertain which obligation covers, and which set of sureties is liable for, the principal's default.<sup>49</sup> So, the agreement is valid as to all parties, even though it does not specify of what the security consists<sup>50</sup> and some of the sureties do not know that a security has been given thereunder.<sup>51</sup>

**Consideration.** Where the surety has entered into his contract<sup>52</sup> or into a renewal thereof<sup>53</sup> in reliance on security to be given him, there is, according to one view, sufficient consideration for

the giving of the security; there is, however, authority to the contrary.<sup>54</sup> So, after he has entered into the relationship, and before a breach, a surety's liability to pay the principal's debt constitutes a sufficient consideration for giving security.<sup>55</sup>

### b. What May Constitute

Money, notes, mortgages, a right of action, or other property, or a confession of judgment ordinarily may be placed in the hands of the surety for his protection.

Money,<sup>56</sup> notes,<sup>57</sup> mortgages,<sup>58</sup> security deeds,<sup>59</sup> a right of action,<sup>60</sup> or other property<sup>61</sup> ordinarily may be placed in the hands of the surety by the principal for the former's protection, and the principal may confess judgment in favor of the surety for that purpose.<sup>62</sup>

Money of a ward cannot, by agreement between a guardian and the surety on his bond, be held by the latter for his indemnity;<sup>63</sup> nor can the guardian and the surety under such an agreement control it jointly.<sup>64</sup> It is not, however, illegal for a guardian to deliver to his surety for the protection of

46. La.—Maryland Fidelity, etc., Co. v. Johnston, 42 So. 357, 117 La. 880.

50 C.J. p 256 note 45.

Effect of taking security on right to reimbursement see *infra* § 307 b.

Recourse to security:

Before payment or satisfaction of debt see *supra* § 304.

After payment or satisfaction of debt see *supra* § 307 d.

"A surety who obligates himself to pay a debt may take security to protect himself in case of maturity of the obligation and he . . . [had] a right to protect himself by procuring all the security possible."—Sanner v. Sanner, 257 Ill.App. 305, 328.

Counter security under statute

Tenn.—Kincaid v. Sharp, 3 Head 151, 154.

Statute as not limitation

A statute providing that mortgages may be taken by sureties to indemnify them against loss is not a limitation, and does not prevent a surety from taking other security.—Richey v. First Nat. Bank of Commerce, 180 S.E. 740, 180 Ga. 751.

47. N.H.—Fling v. Goodall, 40 N.H. 208.

48. Ind.—Simmons Hardware Co. v. Thomas, 46 N.E. 645, 147 Ind. 313.

N.H.—Fling v. Goodall, 40 N.H. 208.

49. Miss.—State v. Hemingway, 10 So. 575, 69 Miss. 491.

50. Vt.—Roberts v. W. H. Hughes Co., 83 A. 807, 86 Vt. 76.

What may constitute security see *infra* subdivision b of this section.

51. Vt.—Roberts v. W. H. Hughes Co., *supra*.

52. Md.—Colonial Trust Co. v. Fidelity, etc., Co., 123 A. 187, 144 Md. 117.

50 C.J. p 256 note 57.

53. Ind.—Mayer v. Grottendrick, 68 Ind. 1.

54. N.Y.—Ceas v. Bramley, 18 Hun 187.

55. Wis.—Maryland Casualty Co. v. Hjorth, 202 N.W. 665, 187 Wis. 270. 50 C.J. p 256 note 60.

56. Me.—Woodbury v. Bowman, 14 Me. 154, 31 Am.D. 40.

S.C.—McNish v. Pope, 28 S.C.Eq. 186.

**Certificate of deposit**

Surety who entered bail bond for plaintiff who obtained certificate of deposit from bank in which plaintiff had account and delivered certificate as security to surety who could withdraw funds on his indorsement alone when necessary to protect himself against loss occasioned by forfeiture of bond, was held not liable as trustee for loss on certificate occasioned by insolvency of bank before surety was released from liability on bond.—Kosior v. National Surety Co., 171 A. 94, 112 Pa.Super. 390.

57. Me.—Woodbury v. Bowman, 14 Me. 154, 31 Am.D. 40.

58. Vt.—Roberts v. W. H. Hughes Co., 83 A. 807, 86 Vt. 76.

50 C.J. p 258 note 81.

Indemnity mortgages generally see *Mortgages* §§ 170-174.

**Assignment held valid as chattel mortgage** as between parties, although not as to third persons without notice; a defeasance clause may be implied.—Maple v. Seaboard Sur Co., 73 N.E.2d 80, 117 Ind.App. 627.

**Use of equipment in performance of contract**

Under chattel mortgage on all equipment used by contractors in performance of their contracts, surety has no right, on default of contractors, to recover any equipment unless evidence indicates that such equipment was used in performance of contract; evidence sustained finding that equipment sought to be recovered by replevin pursuant to assignment was used on projects.—Maple v. Seaboard Sur. Co., *supra*.

59. Ga.—Richey v. First Nat. Bank of Commerce, 180 S.E. 740, 180 Ga. 751.

60. N.Y.—Lawyers' Surety Co. v. Reinach, 54 N.Y.S. 205, 25 Misc. 150.

61. Ky.—Porter v. Howard, 1 A.K. Marsh. 358.

50 C.J. p 258 note 83.

62. Pa.—Appeal of Borland, 66 Pa. 470.

50 C.J. p 258 note 84.

**Surety paying note as legal holder**

A surety paying note and receiving it from payee with payee's indorsement "without recourse" signed by payee's agent was legal holder, and under authority granted in warrant of attorney could secure judgment by confession against maker.—Rechtine v. Wels, Com.Pl., 2 Ohio Supp. 380, 381.

63. N.Y.—Poultney v. Randall, 22 N.Y.Super. 232.

50 C.J. p 258 note 85.

64. Ga.—Maryland Fidelity, etc., Co. v. Butler, 60 S.E. 851, 130 Ga. 225, 16 L.R.A.N.S., 994.

50 C.J. p 258 note 86.

the latter property of the ward, if there was no intention for the surety to use the property, and the guardian does not lose proper control over it.<sup>65</sup>

Where the surety on a contractor's bond in connection with a federal project would be subject to a certain maximum liability in an action pending against the surety and the contractor, the surety has been held to be entitled to have such maximum amount deposited in the registry of the federal court from funds payable to the contractors, to protect the surety against such action.<sup>66</sup>

### c. Assignment as Security

Security to a surety may take the form of an assignment to him by his principal; what is covered by such an assignment is determined from the language thereof.

An assignment to a surety, to become effective on the date of the application for the bond, on the happening of any specified defaults under the contract, is one for security only.<sup>67</sup> An assignment by a principal of any moneys due or to become due under contracts covered by former or subsequent bonds executed by the surety, in the event of a claim or default, is a present assignment and not a mere promise to assign in the future.<sup>68</sup> The question as to what is covered by an assignment, as security, to a surety on default of the principal

is to be determined, not by general equitable principles,<sup>69</sup> but by a consideration of the language of the assignment itself;<sup>70</sup> a surety releasing his claim on any part of the funds so assigned loses his right thereto.<sup>71</sup>

A surety to whom a defaulting trustee's beneficial interest in an estate is assigned takes it subject to the payment of the expense of an audit necessitated by the trustee's known defalcations.<sup>72</sup>

Where the principal assigns to the surety all payments due the principal from the obligee, and appoints the surety his agent to collect payments and make a full release, the surety becomes a pledgee whose character is that of a trustee for the principal to pay the debt and pay over the surplus,<sup>73</sup> and the surety may not so deal with the trust property as to destroy or even impair its value.<sup>74</sup>

### d. Delivery or Registration of Security

Where title to security is transferred to the surety, immediate delivery thereof may not be necessary; but if the security requires registration, and registration is not had, the surety cannot hold it against subsequent bona fide purchasers.

Where the title to the security is transferred by the principal to the surety, immediate delivery thereof may not be necessary;<sup>75</sup> but if the security is of the kind which requires registration, and reg-

65. Ga.—Rogers v. Hopkins, 70 Ga. 454.

66. U.S.—Maryland Cas. Co. v. Glassell-Taylor Co., D.C.La., 63 F.Supp. 718.

Federal funds payable on a different project to a contractor constituting a distinct entity are not available for the surety's protection.—Maryland Cas. Co. v. Glassell-Taylor Co., supra.

67. U.S.—Street v. Pacific Indemnity Co., C.C.A.Cal., 61 F.2d 106.

#### What law governs validity

The validity of assignments to contractor's surety of moneys due and to become due to contractor under Ohio contracts in event of default on former or subsequent bonds executed by surety was governed by laws of Ohio.—In re Allied Products Co., C.C.A.Ohio, 134 F.2d 725, certiorari denied Barnett v. Maryland Casualty Co., 64 S.Ct. 40, 320 U.S. 740, 88 L.Ed. 438, and Continental Casualty Co. v. Barnett, 64 S.Ct. 59, 320 U.S. 740, 88 L.Ed. 438.

68. U.S.—In re Allied Products Co., C.C.A.Ohio, 134 F.2d 725, certiorari denied Barnett v. Maryland Casualty Co., 64 S.Ct. 40, 320 U.S. 740, 88 L.Ed. 438, and Continental Casualty Co. v. Barnett, 64 S.Ct. 59, 320 U.S. 740, 88 L.Ed. 438.

69. U.S.—Maryland Casualty Co. v. Lacy, C.C.A.N.C., 46 F.2d 409.

70. U.S.—Maryland Casualty Co. v. Lacy, supra.

#### Retained percentage

(1) Retained percentage covered by assignment to contractor's surety on default, and applicable by surety to losses sustained on other contracts, was percentage computed on entire contract price, exclusive of final payment; under contract between contractor and surety, certain per cent of monthly estimates was to be withheld regardless of who completed contract, and this was amount covered by assignment.—Maryland Casualty Co. v. Lacy, supra.

(2) Priority in retained percentage see infra § 318.

#### Default following performance

Where contractor agreed that in event of claim or default in connection with any former or subsequent bonds executed by surety for contractor all payments due or to become due should be paid to surety such covenant to operate as an assignment, the right of surety to moneys due on contracts fully performed by contractor did not terminate, but continued where contractor defaulted on a third contract with another which surety was required to make good.—In re Allied Products Co., C.C.A.Ohio, 134 F.2d 725, certiorari denied Barnett v.

Maryland Casualty Co., 64 S.Ct. 40, 320 U.S. 740, 88 L.Ed. 438, and Continental Casualty Co. v. Barnett, 64 S.Ct. 59, 320 U.S. 740, 88 L.Ed. 438.

71. U.S.—Maryland Casualty Co. v. Lacy, C.C.A.N.C., 46 F.2d 409.

#### Retained percentage

In computing under contract "retained percentage" which, under assignment, surety could apply on losses from other contracts, amounts retained by highway commission and later released by surety should be excluded, in the absence of a showing that they were used in completing particular contract; but surety was entitled to hold, and apply as part of "retained percentage," amount released to be paid into fund which was being paid out under joint direction of company and contractor for completion of contract.—Maryland Casualty Co. v. Lacy, supra.

72. Cal.—In re Whitney's Estate, 11 P.2d 1107, 124 Cal.App. 109.

73. N.Y.—Petrosi Bros. Contracting Corporation v. Town of Greece, 29 N.Y.S.2d 305.

74. N.Y.—Petrosi Bros. Contracting Corporation v. Town of Greece, supra.

75. Kan.—Bates v. Wiggin, 14 P. 442, 37 Kan. 44, 1 Am.S.R. 224. 50 C.J. p 258 note 88.



istration is not had, the surety cannot hold it as against subsequent bona fide purchasers.<sup>76</sup> Where title to property passes directly from the seller to the surety for the purchaser, the latter's rights are superior to those of a subsequent purchaser of the principal, even though the security was not registered.<sup>77</sup>

*Payment of cash to an agent of the surety*, as collateral, is sufficient to show the surety's possession thereof,<sup>78</sup> whether or not the agent actually turned the money over to the surety.<sup>79</sup>

### § 318. — Rights as against Third Persons

A surety's right to security given him by his principal is superior to secret equities of third persons, to subsequent liens, and to rights subsequently accruing; but he cannot retain security as against prior attaching creditors, against prior liens unless the holders thereof delay enforcement of their claims, or against those acquiring rights under a prior contract with the principal.

The right of the surety to security given him by his principal is superior to secret equities of third persons<sup>80</sup> and to subsequent liens;<sup>81</sup> and they have been held superior to the rights of mortgagees,<sup>82</sup> assignees in insolvency,<sup>83</sup> receivers,<sup>84</sup> subsequent purchasers,<sup>85</sup> subsequent attaching credi-

tors,<sup>86</sup> and other creditors.<sup>87</sup> However, the sureties cannot retain security as against prior liens unless the holders thereof delay the enforcement of their claims,<sup>88</sup> or against prior attaching creditors,<sup>89</sup> or against those acquiring rights under a prior contract with the principal.<sup>90</sup>

Where the security is notes, the sureties can bring suit thereon;<sup>91</sup> but this rule does not apply where the principal has paid the debt.<sup>92</sup>

Where the principal has transferred control of his property to a trustee for indemnity of the surety, the latter cannot hold the trustee to a greater liability than he undertook to assume.<sup>93</sup>

*Under agreement to transfer.* As against all persons having notice, a surety becoming such on an agreement of the principal to transfer certain stock certificates as collateral security has an enforceable equity therein.<sup>94</sup>

*Retained percentage.* As against general creditors of the principal, a surety has priority in the percentage of the contract price retained by the owner in a building or construction contract to secure performance of the contract.<sup>95</sup>

76. N.C.—Smith v. Washington, 16 N.C. 318.

77. N.C.—Worthy v. Cole, 69 N.C. 157.

50 C.J. p 258 note 90.  
Rights as against third persons generally see infra § 318.

78. N.Y.—Toney v. New Amsterdam Casualty Co., 208 N.Y.S. 49, 124 Misc. 361.

79. N.Y.—Toney v. New Amsterdam Casualty Co., supra.

80. Ga.—Phipps v. Mansfield, 62 Ga. 209.

Ohio.—Dueber Watch Case Mfg. Co. v. Daugherty, 57 N.E. 455, 62 Ohio St. 589.

Rights and remedies of surety as to third persons generally see infra §§ 339-342.

81. N.J.—Bridgeton Nat. Bank v. Commercial Casualty Ins. Co., 180 A. 832, 119 N.J.Eq. 39.

50 C.J. p 258 note 92.

82. Ky.—McCrae v. Gunter, 18 S.W. 1034, 14 Ky.L. 5.

50 C.J. p 258 note 94.  
Indemnity mortgages generally see Mortgages §§ 170-174.

83. Conn.—Merwin v. Austin, 18 A. 1029, 58 Conn. 22, 7 L.R.A. 84.

50 C.J. p 259 note 95.  
84. Kan.—Bates v. Wiggins, 14 P. 442, 37 Kan. 44, 1 Am.S.R. 234.

50 C.J. p 259 note 96.  
85. Wis.—Knaggs v. Green, 4 N.W. 700, 48 Wis. 601, 33 Am.R. 838.

50 C.J. p 258 note 93.

Effect of requirements as to delivery or registration of security see supra § 317 d.

86. U.S.—In re Allied Products Co., C.C.A.Ohio, 134 F.2d 725, certiorari denied Barnett v. Maryland Casualty Co., 64 S.Ct. 40, 320 U.S. 740, 88 L.Ed. 438, and Continental Casualty Co. v. Barnett, 64 S.Ct. 59, 320 U.S. 740, 88 L.Ed. 438.

Trustee in bankruptcy was held to be in same position as subsequent attaching creditor with respect to money due principal before bankruptcy.—In re Allied Products Co., supra.

#### What law governs

The priority of assignments to a contractor's surety of moneys due and to become due to the contractor under contracts made in a particular state, over the claims of subsequently attaching creditors of the contractor, is governed by the laws of that state.—In re Allied Products Co., supra.

87. Kan.—Maryland Fidelity, etc., Co. v. Helwig, 213 P. 666, 113 Kan. 174.

50 C.J. p 259 note 97.

88. Tenn.—Ellis v. Temple, 4 Coldw. 315, 94 Am.D. 200.

50 C.J. p 259 note 98.

89. Tenn.—Frankie v. Douglas, 1 Lea 476.

50 C.J. p 259 note 99.

90. Ohio.—Greenless v. Shinnick, 7 Ohio Dec. 385, 2 Cinc.L.Bul. 282.

50 C.J. p 259 note 1.

91. Minn.—Klein v. Funk, 84 N.W. 460, 82 Minn. 3.

Wyo.—Bolin v. Metcalf, 42 P. 12, 44 P. 694, 6 Wyo. 1, 71 Am.S.R. 898.

92. Tex.—Morgan v. Hays, Civ.App. 147 S.W. 315.

Surrender and accounting of security generally see infra § 321.

93. Ala.—Smith v. Houston, 8 Ala. 736.

50 C.J. p 259 note 4.

94. Ohio.—Dueber Watch Case Mfg. Co. v. Daugherty, 57 N.E. 455, 62 Ohio St. 589.

95. U.S.—In re Scofield Co., N.Y., 215 F. 45, 131 C.C.A. 353.

50 C.J. p 259 note 9.

"The ten per cent retained each month has . . . been established to be an agreed security to be held by the owner for the protection of himself and the surety. . . . In these retained percentages the contractor can give no one a right superior to that of the surety, for the surety's right dates from the making of the contract which pledged them."—Town of River Junction v. Maryland Casualty Co., C.C.A.Fla., 110 F.2d 278, 281, 134 A.L.R. 727, certiorari denied Maryland Casualty Co. v. Town of River Junction, 69 S.Ct. 1077, 310 U.S. 634, 84 L.Ed. 404.

## § 319. — Application of Security

- a. In general
- b. Application to particular debts or liabilities

### a. In General

A surety holding security is entitled to have it applied in satisfaction of the debt for the amount for which he is actually liable; where he acts with reasonable prudence and in the utmost good faith, and applies his security judiciously in discharge of the principal's liability, the latter has no ground for complaint.

A surety holding security from his principal is entitled to have it applied in satisfaction of the debt<sup>96</sup> for the amount for which he is actually liable;<sup>97</sup> and he is entitled to retain the profits also of any such security as incident to it until he is discharged from liability.<sup>98</sup> Where the surety has acted with reasonable prudence and in the utmost good faith,<sup>99</sup> and has applied his security judiciously in discharge of the liability of the principal,<sup>1</sup> the latter has no ground for complaint.

### b. Application to Particular Debts or Liabilities

- (1) In general
- (2) Renewal or new obligation

#### (1) In General

Security given to indemnify a surety against liability on a particular debt or obligation cannot be applied to claims arising out of different obligations; nor can a surety appropriate security to his own debts.

Where security is given to indemnify a surety against liability on a particular debt or obligation, he cannot apply it to claims arising out of different obligations.<sup>2</sup> A surety cannot appropriate security to his own debts,<sup>3</sup> and should apply it in

extinguishing his claims for payments in the order in which they were made.<sup>4</sup>

Security against liability on a note to be discounted at a particular bank is enforceable, although the note is discounted at a different bank.<sup>5</sup>

#### (2) Renewal or New Obligation

Unless rights of innocent third persons would be infringed, security given sureties covers renewals of the debts by them, and new notes given by them to raise money to pay the original indebtedness; and security may apply to obligations substituted by the surety for the original one or to a new bond given by the principal.

Security given to sureties covers renewals of the debts by them,<sup>6</sup> and new notes given to them to raise money with which to pay the original indebtedness,<sup>7</sup> unless the rights of innocent third persons are infringed thereby.<sup>8</sup> The security, by its express terms, may apply to obligations substituted by the sureties for the original one.<sup>9</sup> Likewise, security to indemnify sureties on a bond applies to a new bond given by the principal.<sup>10</sup> However, security given to a firm does not cover new notes given by the principal and indorsed after the death of one partner by the surviving partners individually, since the security was not given or intended for their individual benefit.<sup>11</sup>

A parol agreement that a mortgage indemnifying the sureties on one note could be used as a lien to indemnify such sureties on a second note, after the first note was paid, gives the sureties no rights to the lien of the mortgage.<sup>12</sup>

Where the indemnity is executed by a third person, it has been held that the security does not cover a renewal as between the original parties.<sup>13</sup> Some authorities, however, do not thus distinguish between cases where the indemnity is executed by a

96. W.Va.—Lewis v. Toney, 85 S.E. 30, 76 W.Va. 80.  
50 C.J. p 259 note 10.

#### Amount necessary to satisfy payment

Sureties on note could subject only so much of value of property covered by mortgage, given by principal and his wife to secure sureties against liability, as was necessary to satisfy amount paid by latter, as against deceased wife's heirs.—Fields v. Letcher State Bank, 54 S. W.2d 910, 246 Ky. 229.

97. S.C.—Hellams v. Abercrombie, 15 S.C. 110, 40 Am.R. 684.  
50 C.J. p 259 note 11.

98. Vt.—Slick v. Munson, 2 Aik. 150, 16 Am.D. 689.

99. Ky.—Mattingly v. Linthicum, 4 Ky.Op. 582.  
50 C.J. p 260 note 13.

1. N.C.—Smith v. Kiser, 4 S.E. 204, 98 N.C. 379.  
50 C.J. p 260 note 14.

2. U.S.—Southern Surety Co. v. Greenville, C.C.A.Tenn., 261 F. 929.  
50 C.J. p 260 note 15.

3. Me.—Ware v. Otis, 8 Me. 387.

4. Vt.—Whipple v. Briggs, 30 Vt. 111.

5. Ohio.—Patterson v. Johnston, 7 Ohio 225.

6. Ind.—Bray v. First Ave. Coal Min. Co., 47 N.E. 1073, 148 Ind. 599.  
50 C.J. p 260 note 19.

7. Ky.—Jarboe v. Shiveley, 59 S.W. 328, 109 Ky. 402, 22 Ky.L. 968, 95 Am.S.R. 384.  
50 C.J. p 260 note 20.

8. Mo.—Seymore v. Dabbs, 155 S.W. 493, 170 Mo.App. 151.  
50 C.J. p 260 note 21.

9. Wash.—New Amsterdam Casualty Co. v. Hamilton, 212 P. 147, 123 Wash. 147.  
50 C.J. p 260 note 22.

10. U.S.—U. S. v. Leary, Va., 38 S. Ct. 1, 245 U.S. 1, 62 L.Ed. 113.  
50 C.J. p 260 note 23.

11. N.Y.—Power v. Alger, 13 Abb. Pr. 284.

12. Ky.—Roberts v. Terry, 170 S.W. 965, 161 Ky. 397.  
Necessity that mortgages be in writing see Mortgages § 99.

13. Tex.—Westbrook v. Belton Nat. Bank, Civ.App., 75 S.W. 842.  
50 C.J. p 260 note 26.

third person and those where it is given by the principal himself.<sup>14</sup>

### § 320. — Application of Excess

Other creditors of the principal are entitled to the benefit of any excess of security over the principal's debt for which the surety is liable, unless the principal has instructed him to pay such excess to others.

The surety is accountable for any excess of the security delivered to him over the amount he has paid on the debt, as discussed *infra* § 321 a, and other creditors of the principal are entitled to the benefit of any excess of security over the debt of the principal for which the surety is liable,<sup>15</sup> unless the principal has instructed the surety to pay such excess to others.<sup>16</sup>

### § 321. — Surrender and Accounting

- a. In general
- b. Actions

#### a. In General

A surety holding security of the principal is obliged to return it only where circumstances make it improper for him to retain it, as where he is released or discharged, or the agreement as to the security requires such return or is void.

A surety is under no obligation to return security placed in his hands by the principal until he is dis-

charged from liability to the obligee,<sup>17</sup> or until the provisions of a contract governing the conditions under which return is to be made have been complied with,<sup>18</sup> or until demand has been made,<sup>19</sup> or at least until he has notice of facts making return mandatory.<sup>20</sup>

If, however, the surety has sufficient of principal's money with which to pay the debt,<sup>21</sup> and which may be used for that purpose,<sup>22</sup> or if the surety is released or discharged for any cause,<sup>23</sup> or if the agreement in respect of the security is void,<sup>24</sup> the principal is entitled to a return of the security, and can compel an accounting by the surety, or by third persons wrongfully in possession thereof,<sup>25</sup> or can bring an action in tort for its conversion.<sup>26</sup> So, where a bond does not become operative as an obligation, because of the nonoccurrence of a happening which is a condition precedent, the intended principal may recover from the surety collateral deposited with him;<sup>27</sup> and, where certain security is deposited with the surety on condition that security previously deposited be released, the surety is not entitled to retain the second deposit after he has refused to release the first.<sup>28</sup>

Where he has paid the debt, the surety must account for any excess of the security over the amount paid,<sup>29</sup> since there is an implied promise

14. Ind.—Mayer v. Grottendick, 68 Ind. 1.  
Ohio.—Wise v. Willard, 41 Ohio St. 679.

15. Or.—Williams v. Gallick, 3 P. 469, 11 Or. 337.  
50 C.J. p 262 note 69.

16. Miss.—O'Reilly v. Hendricks, 10 Miss. 388.

17. Pa.—Commonwealth v. Riebsamen, 75 Pa.Super. 234.  
50 C.J. p 260 note 29.

Right of:

Indemnitor to compel return of deposits see Indemnity § 39.

Surety to retain consideration for undertaking without accounting for it see *infra* § 322.

Third person to whom agreement to surrender has been indorsed see *infra* § 339.

18. Mass.—Fowler v. Rice, 17 Pick. 100.

Pa.—Baturin v. Harrisburg Trust Co., Com.Pl., 45 Dauph.Co. 94.  
50 C.J. p 260 note 30.

Termination of liability; good faith

Where agreement between principal and surety required surety, on being furnished competent evidence satisfactory to him of full termination of surety's liability under bond, to return all collateral deposited by principal with surety, the require-

ment that surety be satisfied that liability had terminated also required that he act in good faith.—Hannum v. New Amsterdam Casualty Co., 5 A.2d 365, 333 Pa. 397.

19. Pa.—Dewart v. Masser, 40 Pa. 302.

20. Notice that suretyship has ceased

Pa.—Dewart v. Masser, *supra*.

21. Ga.—Polhill v. Brown, 10 S.E. 921, 84 Ga. 338.  
50 C.J. p 261 note 33.

22. Iowa.—Burhans v. Squires, 39 N.W. 181, 75 Iowa 59.

50 C.J. p 261 note 34.

23. La.—Chaffe v. Lisso, 33 La. Ann. 206.

50 C.J. p 261 note 35.

Cancellation of bond with no liability of surety

U.S.—Petrinovic v. American Surety Co., C.C.A.N.Y., 145 F.2d 978.

Notice by commissioner of internal revenue to surety that bond is released held sufficient, since the presumption is that commissioner did his duty.—Hannum v. New Amsterdam Casualty Co., 5 A.2d 365, 333 Pa. 397.

24. N.Y.—Poultney v. Randall, 22 N.Y.Super. 232.

25. N.C.—Buford v. Neely, 17 N.C. 481.

26. Conn.—Ayres v. French, 41 Conn. 142.

Conversion held not shown

Cal.—McCoy v. Northwestern Casualty & Surety Co., 39 P.2d 864, 3 Cal.App.2d 534.

27. Pa.—Kushin v. Independence Indemnity Co., 167 A. 286, 311 Pa. 578.—Martz v. Continental Casualty Co., 14 A.2d 863, 141 Pa.Super. 187.

Bond not acceptable to obligee

Where bond, which was to be acceptable to lessor, was rejected, one depositing collateral to indemnify surety was entitled to return of collateral.—Kushin v. Independence Indemnity Co., 167 A. 286, 311 Pa. 578.

Failure to issue renewal liquor license

Pa.—Martz v. Continental Casualty Co., 14 A.2d 863, 141 Pa.Super. 187.

28. D.C.—Equitable Surety Co. v. National Capital Bank, 278 F. 1002, 51 App.D.C. 289.

29. Or.—Kelsey v. Hutchinson, 245 P. 1077, 118 Or. 325.  
50 C.J. p 261 note 41.

Application of excess generally see *supra* § 320.

that he will refund the difference;<sup>30</sup> and a surety who has completed a contract of the principal on default of the latter, and collected the payments due thereon, is liable to an accounting therefor in an action by the principal.<sup>31</sup>

The surety must account for the proceeds of security even though he has taken an assignment of prior liens thereon discharged by him.<sup>32</sup>

Where a surety, who has agreed to surrender security and take a bond instead, breaks his agreement, he is liable for the expenses necessarily incurred in procuring and offering the bond.<sup>33</sup>

*Surrender by cosurety.* Security given to two or more cosureties cannot be surrendered by one so as to affect the rights of the others.<sup>34</sup>

*Insolvency of estate of surety.* Where the principal, in contemplation of a probable loss to the estate by reason of the suretyship, delivers property to the principal devisees of the surety, and the debt is not paid, because the estate of the surety is insolvent, the principal may recover the value of the property.<sup>35</sup>

*As between principal and guarantor of surety.* Where a surety failed to give his principal credit for a sum of money received, and, after paying the bond of the principal on which he was liable, claimed and received from a guarantor of such bond the full amount paid, in an action by the principal against the surety the principal cannot recover such sum, since the surety is liable to the guarantor therefor.<sup>36</sup>

## b. Actions

### (1) In general

### (2) Charges and credits on accounting

### (1) In General

General rules apply in an action by a principal against his surety for an accounting of property placed in the latter's hands as security, or of assumpsit for its return.

In accordance with the general rules governing civil actions, where, on abandonment of a contract by the contractor, his surety assumes the contract and takes over materials, moneys, and equipment, the contractor has an action in assumpsit for money had and received for any excess over that needed to complete the work,<sup>37</sup> even though a bill in equity for an accounting will lie.<sup>38</sup> Where a bill in equity against a contractor's surety by the contractor's assignee for the benefit of creditors, for an accounting, is based on an indemnity agreement, and only incidentally involves the bond, the suit will not be dismissed because the terms of the bond preclude suit after a date which has passed<sup>39</sup> or because of the fact that the contractor defaulted and abandoned the contract.<sup>40</sup> Such a bill has been held not dismissible because of the running of the ordinary statute of limitations as to particular items<sup>41</sup> or on the ground of laches, where the surety depended merely on lapse of time without any evidence to show prejudice from delay.<sup>42</sup>

It has been held that, unless a waiver by him protecting the principal from liability is filed, a surety is a necessary party in an action by the principal against his cosurety in order to adjust payments by him.<sup>43</sup>

General rules as to the admissibility<sup>44</sup> and weight and sufficiency<sup>45</sup> of evidence, and the burden of proof<sup>46</sup> apply.

30. U.S.—U. S. Fidelity, etc., Co. v. Worthington, C.C.A.Ala., 6 F.2d 502, certiorari denied 46 S.Ct. 119, 269 U.S. 583, 70 L.Ed. 424.

31. Pa.—Markee v. Philadelphia, 113 A. 359, 270 Pa. 337. 50 C.J. p 261 note 43.

32. N.H.—Riddle v. Bowman, 27 N. H. 236.

33. N.Y.—Cook v. Casler, 78 N.Y.S. 661, 76 App.Div. 279.

34. N.H.—Hayes v. Davis, 18 N.H. 600.

35. Ky.—Kerr v. Hough, 61 S.W. 262, 22 Ky.L. 1693.

36. S.C.—Campbell v. Boyce, 38 S. C.L. 391.

37. U.S.—U. S. Fidelity, etc., Co. v. Worthington, C.C.A.Ala., 6 F.2d 502, certiorari denied 46 S.Ct. 119, 269 U.S. 583, 70 L.Ed. 424.

Action by surety against principal: Generally see *infra* §§ 323-335. Statutory remedies see *infra* §§ 326-338.

38. U.S.—U. S. Fidelity, etc., Co. v. Worthington, *supra*.

39. R.I.—Goff v. U. S. Fidelity & Guaranty Co., 51 A.2d 553, 72 R.I. 363.

40. R.I.—Goff v. U. S. Fidelity & Guaranty Co., *supra*.

41. R.I.—Goff v. U. S. Fidelity & Guaranty Co., *supra*.

#### Reason for rule

The running of the ordinary statute of limitations as to such items would not necessarily bar the whole proceeding for an accounting, unless there were no other basis or claim in the bill which would affect the amount of loss.—Goff v. U. S. Fidelity & Guaranty Co., *supra*.

42. R.I.—Goff v. U. S. Fidelity & Guaranty Co., *supra*.

43. Or.—Kelsey v. Hutchinson, 245 P. 1077, 118 Or. 325.

44. U.S.—Maryland Fidelity, etc.,

Co. v. Redfield, C.C.A.Idaho, 7 F. 2d 800. 50 C.J. p 261 note 55.

#### 45. Permitting security to remain in insolvent bank

On issue whether loss on certificate of deposit, occasioned by insolvency of bank should fall on plaintiff or on surety who entered bail bond for plaintiff, who gave certificate as security, evidence was held not to show that surety negligently permitted certificate to remain in bank after its vice-president had knowledge that bank was of doubtful solvency.—Kosior v. National Surety Co., 171 A. 94, 112 Pa. Super. 390.

#### Evidence held sufficient

Kan.—Leeman v. Page, 100 P. 504, 79 Kan. 479. 50 C.J. p 262 note 56.

#### 46. Applicability to particular liability

In resisting surrender of security, the burden is on the surety to show

Where the complaint of the principal states that property was conveyed to secure the surety after he became such, there is not a fatal variance because the evidence shows that it was before he became surety.<sup>47</sup>

The giving or refusal of instructions is controlled by the usual principles applicable in the form of action employed.<sup>48</sup>

## (2) Charges and Credits on Accounting

In taking the account, the surety is entitled to credit for all reasonable disbursements by him arising out of the relationship; he may be held responsible for the profits of the property, but not for losses not fairly imputable to him.

In taking the account with respect to security, the surety is entitled to be credited with all reasonable disbursements by him arising out of the relationship.<sup>49</sup> Reasonable amounts paid as counsel fees or other expenses are to be credited to him,<sup>50</sup> and he will be allowed interest on money paid by him in discharge of encumbrances on the property,<sup>51</sup> unless it would be inequitable to allow such interest.<sup>52</sup> The value of property placed in his possession will be taken as of the time it was transferred to him,<sup>53</sup> and the surety has been held responsible for its profits,<sup>54</sup> but he is not chargeable with losses not fairly imputable to him.<sup>55</sup>

*Claim of surety not party to action.* In a suit by the principal against a surety for an accounting for property transferred to him to secure him

and a cosurety, enough of the amount found due the principal to cover an amount paid by the cosurety should be held in abeyance until the latter's claim is settled or adjudicated.<sup>56</sup>

## § 322. Rights as to Consideration for Undertaking

A surety who has received a consideration is entitled to retain it without accounting for it.

Where a surety has received something as a consideration, he is entitled to retain it without accounting for it.<sup>57</sup> Likewise, if he has incurred liability on the promise of consideration he can bring suit to recover it,<sup>58</sup> even though his undertaking has not resulted in the benefit expected from it by his principal.<sup>59</sup>

## § 323. Actions and Proceedings

Apart from express contract, a surety's action against his principal for indemnification or reimbursement is on the contract implied by law, and, under most authorities, cannot be maintained on the principal claim or evidence of indebtedness. The form of the action is assumpsit, but in a proper case the remedy may be in equity.

The right of a surety to recover from his principal the amount which he has paid in the latter's behalf is a right which may be established in a court of law.<sup>60</sup> In the absence of an express contract, an action by the surety against his principal for indemnification or reimbursement is brought on the contract implied by law,<sup>61</sup> though an express con-

that a mortgage was intended to secure him not only on a bail bond executed when the mortgage was assigned to him, but on others that it might be necessary to give in the proceedings.—*Smith v. Wigler*, 65 A. 900, 72 N.J.Eq. 559, reversed on other grounds 70 A. 186, 74 N.J.Eq. 435.

47. Ind.—*Warden v. Nolan*, 37 N.E. 821, 10 Ind.App. 334.

48. Instructions held erroneous or properly refused.

U.S.—*Maryland Fidelity, etc., Co. v. Redfield*, C.C.A.Idaho, 7 F.2d 800. 50 C.J. p 262 note 59.

49. Kan.—*Leeman v. Page*, 100 P. 504, 79 Kan. 479. 50 C.J. p 262 note 60.

50. Pa.—*Commonwealth v. Riebsamen*, 75 Pa.Super. 234.

51. N.H.—*Riddle v. Bowman*, 27 N. H. 236.

52. Or.—*Kelsey v. Hutchinson*, 245 P. 1077, 118 Or. 325. 50 C.J. p 262 note 63.

53. La.—*Montgomery v. Russell*, 10 La. 330.

Vt.—*Crane v. Thayer*, 18 Vt. 162, 46 Am.D. 142.

54. Mont.—*Leggat v. Palmer*, 102 P. 327, 39 Mont. 303. 50 C.J. p 262 note 65.

55. La.—*Thomas v. Breedlove*, 6 La. 573. 50 C.J. p 262 note 66.

56. Or.—*Kelsey v. Hutchinson*, 245 P. 1077, 118 Or. 325.

57. Tenn.—*Nashville Bank v. Grundy*, Meigs 256.

50 C.J. p 262 note 73. Premiums of surety companies see infra § 397.

Presumptions as to consideration see infra § 361 a.

58. Ga.—*Blount v. Bowne*, 9 S.E. 164, 82 Ga. 346. 50 C.J. p 262 note 75.

59. U.S.—*Culbertson v. Stillinger*, C.C.Md., 6 F.Cas.No.3,463, Taney 75. 50 C.J. p 262 note 75.

60. Mo.—*Lincoln County v. E. I. Du Pont De Nemours & Co.*, 32 S.W. 2d 292, 234 Mo.App. 1183.

Action by principal against surety for accounting of security see supra § 321 b.

Limitations of actions:

Plea of prescription and limitation see infra § 330 b.

What statute applies see Limitations of Actions § 69.

When statute begins to run see Limitations of Actions § 160 b.

Particular actions by surety against principal:

Action by surety company for consideration for undertaking see infra § 397.

Action to set aside fraudulent conveyance by principal see Fraudulent Conveyances § 77 b.

Right of subrogation see the C.J.S. title Subrogation §§ 46-62, also 60 C.J. p 740 note 4-p 781 note 97.

61. Cal.—*Merner Lumber Co. v. Brown*, 21 P.2d 590, 218 Cal. 136. Ga.—*Gay v. Powell*, 53 S.E.2d 581, 79 Ga.App. 288—*Lamis v. Callianos*, 194 S.E. 923, 57 Ga.App. 238.

Ill.—*Runyan v. Moon*, 267 Ill.App. 312.

Mo.—*Krebs v. Bezler*, 89 S.W.2d 935, 338 Mo. 365, 103 A.L.R. 1177.

Tex.—*Lewis v. Easley*, Civ.App., 34 S.W.2d 376.

Wis.—*In re Onstad's Estate*, 271 N.

tract of indemnity between the surety and the principal does not preclude a suit on the implied contract.<sup>62</sup> Although there is some authority to the contrary,<sup>63</sup> the surety's action cannot, under most authorities, be maintained on the principal claim or evidence of indebtedness.<sup>64</sup> The fact that there has been a formal assignment of the judgment<sup>65</sup> or execution<sup>66</sup> in the creditor's action does not prevent the surety from maintaining his suit for reimbursement.

The form of the action is assumpsit<sup>67</sup> for money

paid,<sup>68</sup> and, although a contrary view has been taken,<sup>69</sup> it has been held that an action for money had and received will not lie.<sup>70</sup> A surety cannot declare in tort for the purpose of evading the bankruptcy laws.<sup>71</sup>

The claim for reimbursement has been held a purely legal one, enforceable only by action at law, in the absence of special circumstances;<sup>72</sup> the remedy, however, may be by bill in equity in a proper case,<sup>73</sup> as where the surety on a joint obligation seeks to recover from the estate of a de-

W. 652, 224 Wis. 332, 109 A.L.R. 630.

50 C.J. p 265 note 21.

Express contract of indemnity between principal and surety generally see supra § 315.

Implied contract of indemnity between principal and surety generally see supra § 316.

#### Open account

Where surety paid half of note, remedy for recovering from principal the amount paid was not limited to action on note, and surety could sue individually on open account to recover amount paid.—Gay v. Powell, 53 S.E.2d 581, 79 Ga.App. 288.

62. Mass.—Gibbs v. Bryant, 1 Pick. 118.

63. Okl.—Pendergraft v. Phillips, 156 P. 1189, 57 Okl. 105.

50 C.J. p 265 note 22.

Subrogation of surety to rights of creditor in debt and evidences thereof see the C.J.S. title Subrogation § 54, also 60 C.J. p 754 note 10—p 757 note 19.

#### Two causes of action on note

(1) Where surety on a note pays the obligation, a cause of action on the note or on the implied obligation of the principal to reimburse the surety arises, and one cause of action may remain enforceable even though the other has become barred.—In re Seigel, D.C.Ga., 43 F.Supp. 778.

(2) Where two sureties discharge note on default of principal, each paying one half of the face amount of note, they may bring joint action on note against principal or each may sue principal separately, not on the note, but on implied promise of principal to reimburse them.—Gay v. Powell, 53 S.E.2d 581, 79 Ga.App. 288—Lamis v. Callianos, 194 S.E. 923, 57 Ga.App. 238.

(3) Ostensible coprincipal on note, actually surety, may, after paying amount due from principal, recover it in suit against principal, either on note after transfer or on obligation of principal arising otherwise.—Campbell v. Rybert, 167 S.E. 924, 46 Ga.App. 461.

#### In Texas

(1) The question has been one of

great difficulty to the courts of the state.—Fox v. Kroeger, 35 S.W.2d 679, 119 Tex. 511, 77 A.L.R. 663.

(2) Where a surety pays the debt of his principal, he has his election to either pursue his legal remedies and bring an action in assumpsit, or to prosecute an action on the debt itself.—Fox v. Kroeger, 35 S.W.2d 679, 119 Tex. 511, 77 A.L.R. 663, overruling *Faires v. Cockerell*, 31 S.W. 190, 88 Tex. 428, 28 L.R.A. 528—*City Nat. Bank of Houston v. Moody*, Civ.App., 115 S.W.2d 745, error dismissed.—*Self v. Thompson*, Civ. App., 35 S.W.2d 245.

(3) This rule applies with equal force to all debts whether or not represented by a negotiable instrument.—Fox v. Kroeger, 35 S.W.2d 679, 119 Tex. 511, 77 A.L.R. 663—*Self v. Thompson*, Civ.App., 35 S.W.2d 245.

(4) Surety purchasing note to avoid being sued thereon, with intention to sue principal for amount thereof, had such right.—*Lewis v. Hasley*, Civ.App., 34 S.W.2d 376.

(5) Other particulars of Texas rule see 50 C.J. p 265 note 23 [b], [d].

64. Cal.—*Merner Lumber Co. v. Brown*, 21 P.2d 590, 218 Cal. 136. W.Va.—*Perkins v. Hall*, 17 S.E.2d 795, 123 W.Va. 707.

50 C.J. p 265 note 23—§ C.J. p 588 note 76 [a].

#### Weight of authority and reason

Wis.—In re Onstad's Estate, 271 N.W. 652, 224 Wis. 332, 109 A.L.R. 630.

#### Accommodation maker

(1) Accommodation maker who paid note on default of principal maker was held entitled to recover, as surety, only amount paid, on principal maker's implied promise to indemnify, and not entitled to recover, on note itself, full amount thereof.—In re Onstad's Estate, supra.

(2) Rights of accommodating against accommodated party to note generally see Bills and Notes § 750.

#### In Missouri

(1) A surety who has paid the note on which he was surety must,

at law, base his action on the implied promise and not on the original obligation.—*Kelley v. Briggs*, App., 290 S.W. 105—*Van Hoose v. Southwestern Mach. Co.*, 154 S.W. 165, 169 Mo.App. 54.

(2) However, in equity he has the right to treat himself as the owner of the note and to proceed accordingly without reference to his legal remedies.—*Ferd Helm Brewing Co. v. Jordan*, 85 S.W. 927, 116 Mo.App. 286.

65. Mich.—*Archer v. Laidlaw*, 97 N. W. 159, 135 Mich. 88.

50 C.J. p 266 note 24.

66. U.S.—*McDaniel v. Riggs*, D.C., 16 F.Cas.No.8,745, 3 Cranch C.C. 167.

50 C.J. p 266 note 25.

67. Pa.—*Bishoff v. Fehl*, 29 A.2d 53, 345 Pa. 539, 143 A.L.R. 1058.

Tex.—*Fox v. Kroeger*, 35 S.W.2d 679, 119 Tex. 511, 77 A.L.R. 663—*City Nat. Bank of Houston v. Moody*, Civ.App., 115 S.W.2d 745, error dismissed—*Self v. Thompson*, Civ. App., 35 S.W.2d 245—*Lewis v. Hasley*, Civ.App., 34 S.W.2d 376.

50 C.J. p 266 note 26.

#### Implied assumpsit

Ill.—*Runyon v. Moon*, 267 Ill.App. 312.

68. U.S.—*Maryland Fidelity, etc., Co. v. Claiborne Parish School Board*, D.C.La., 11 F.2d 404.

50 C.J. p 266 note 27.

Manner of payment to support action see supra § 309 a.

69. U.S.—*McDaniel v. Riggs*, D.C., 16 F.Cas.No.8,745, 3 Cranch C.C. 167.

70. Mass.—*Ford v. Keith*, 1 Mass. 139, 2 Am.D. 4.

71. N.C.—*Ledbetter v. Torney*, 33 N.C. 294.

72. Mich.—*Southern Surety Co. v. Nichols*, 214 N.W. 137, 239 Mich. 158.

50 C.J. p 266 note 32.

73. Mo.—*U. S. Fidelity & Guaranty Co. v. Huckstep*, App., 72 S.W.2d 838.

50 C.J. p 266 note 33.

Surety making part payment of debt may, when debt is due, sue

ceased principal,<sup>74</sup> and a surety whose right to exoneration is only equitable must sue in equity.<sup>75</sup>

*Time to sue and limitations.* The limitation of time set forth in a bond issued by a surety does not apply in an action by him under an agreement of the principal to indemnify the surety.<sup>76</sup> Where a surety on a note brings suit against the principal alleging payment, but fails to prove payment or that the action had accrued before the institution of the suit, a demurrer to his evidence on the ground that the action was prematurely brought is properly sustained.<sup>77</sup> Under an express contract to indemnify the surety, the surety, when impleaded in a concurso proceeding, has been held to have a right of action against the indemnitor even though the surety has not yet sustained actual loss or damage.<sup>78</sup>

The requirement of payment by the surety before a right of action for reimbursement arises or an action may be brought is discussed supra §§ 301, 309.

*Finding.* In an action for money paid in settlement of a claim on the fidelity bond of a bank president, the finding of the trial court that the receiver of the bank first learned of the loss claimed under the bond on or about a certain day is a finding as to when the bank learned of the loss.<sup>79</sup>

*A surety for a receiver,* on an allowance of compensation for the receiver's services, is entitled to petition the court to have such amount as he paid under the bond applied to his indemnity for what he has paid out for the receiver,<sup>80</sup> but the surety may claim no allowance as compensation to the receiver on a part of the fund which was wrongfully misappropriated.<sup>81</sup>

both creditor and principal debtor in equity to compel, by a suit in the nature of one for specific performance, debtor to pay debt out of his own property in exoneration of surety.—*Ferguson v. Brogan*, 149 So. 772, 111 Fla. 224.

*A surety paying a note* and receiving it from payee with payee's indorsement thereon could sue maker in a court of equity on theory of indemnity, but such right was not exclusive of any other right which surety might have in a court of law.—*Rechtine v. Weis*, 2 Ohio Supp. 380.

74. Ohio.—*Barnes v. Shinneberger*, Tapp. 214.  
Va.—*Mountjoy v. Bank*, 6 Munf. 337, 20 Va. 337.

Rights of surety against estate of principal generally see supra § 313.

75. U.S.—*Glades County, Fla. v.*

*Detroit Fidelity & Surety Co., C. C.A.Fla.*, 57 F.2d 449.

Enforcement of payment or other exoneration generally see supra § 303.

76. N.Y.—*Continental Casualty Co. v. National Slovak Sokol*, 199 N. E. 412, 269 N.Y. 283—*American Employers' Ins. Co. v. Radzeweluk*, 4 N.Y.S.2d 74, 167 Misc. 447.

77. Okl.—*Jones v. Nelson*, 10 P.2d 408, 156 Okl. 236.

78. La.—*Cook v. Ruston Oil Mills & Fertilizer Co.*, 127 So. 347, 170 La. 10.

79. Cal.—*Pacific Indemnity Co. v. Hargreaves*, 98 P.2d 217, 36 Cal. App.2d 338.

80. Mass.—*Commonwealth v. Gould*, 118 Mass. 300.

81. Va.—*Fidelity, etc., Co. v. Anderson*, 150 S.E. 413, 155 Va. 535.

## § 324. — Jurisdiction and Venue

A question of jurisdiction is to be determined as of the time when the surety makes the payment giving rise to his cause of action.

A question of jurisdiction is to be determined as of the time when the surety makes the payment giving rise to his cause of action against the principal.<sup>82</sup> Where the trial court had jurisdiction of the subject matter and parties in an action in which separate judgments were rendered, and error proceedings were not prosecuted, whether the trial court had authority to render separate judgments is immaterial on the question of an alleged surety's right to reimbursement from the principal.<sup>83</sup>

The general rules as to the nature or subject of an action as fixing venue are discussed in the C.J.S. title Venue §§ 6-78, also 67 C.J. p 24 note 5—p 94 note 80.

## § 325. — Defenses

- a. In general
- b. Incapacity of principal
- c. Nonexecution of contract by principal
- d. Illegality
- e. Payment, satisfaction, and release

### a. In General

Various particular circumstances have been held to be, or not to be, available as defenses in actions by sureties against their principals for indemnification or reimbursement.

Various particular circumstances have been held to be, or not to be, available as defenses in actions by sureties against their principals for indemnification or reimbursement.<sup>84</sup> When sued by a surety, defendant may show that he is a cosurety

82. N.C.—*Smith v. Moore*, 63 N.C. 138.

50 C.J. p 266 note 37.

83. Ohio.—*Hinman v. Uthoff*, 90 N. E.2d 590, 87 Ohio App. 120.

84. U.S.—*Whipple v. American Surety Co. of New York, C.C.A.Ga.*, 92 F.2d 673.

Mich.—*American Sur. Co. of N. Y. v. Payne*, 29 N.W.2d 118, 318 Mich. 670.

N.Y.—*American Employers' Ins. Co. v. Radzeweluk*, 4 N.Y.S.2d 74, 167 Misc. 447.

Okl.—*Miller v. National Surety Co.*, 14 P.2d 228, 159 Okl. 76.

Defenses in:

Actions for premiums see infra § 397.

Summary proceedings see infra § 337.

Nonpayment see supra § 301.

Payment of debt by principal or cosurety see supra § 307.

with plaintiff, and not a principal,<sup>85</sup> although plaintiff actually supposed that defendant was a principal;<sup>86</sup> and, in a suit for reimbursement by the assignee of a surety who had paid the debt, the principal may rely on any defense he may have had against the surety.<sup>87</sup> A principal who has a good defense against the creditor, but fails to avail himself of it in a joint action against him and the surety, cannot set it up in a subsequent action for indemnity by the surety who paid the judgment in the former suit,<sup>88</sup> and it is no defense in an action by a surety who has been compelled to pay a judgment in a replevin action in a suit on the replevin bond that the principal was not served in the latter suit.<sup>89</sup> The fact that misleading information was furnished to the principal by his secretary acting for the principal and not for the surety is not available as a defense to an action by the surety on an indemnity agreement.<sup>90</sup>

In action to compel principal to pay debt, the defense that the creditor may, by reason of his laches, lose his right of action against the surety is not available.<sup>91</sup>

**Indemnity bond.** In an action on a bond executed by the principal to the surety to secure the latter for payments made on the suretyship obligation, it is no defense that the surety executed his policy of indemnity to the assignee of the obligee in the original transaction instead of to the obligee himself;<sup>92</sup> nor is the fact that plaintiff-surety company thereafter transferred its assets to another company which assumed its liabilities and lent plaintiff money to fulfill its obligations.<sup>93</sup>

**Estoppel.** The fact that the principal has, in an action brought by the obligee, assisted the surety in defending against a liability not imposed by the suretyship contract does not estop him to assert his nonliability thereunder in a subsequent action

by the surety against the principal.<sup>94</sup>

**Novation.** In an action by an employee's bondsman to recover from the employee the amount which plaintiff paid to the employer for a shortage in the employee's account, an alleged novation between the employer and the employee has been held not usable as a defense.<sup>95</sup>

**Failure to take charge of litigation.** The right of a surety on a replevin bond to recover from his principal the amount paid thereon by the surety is not affected by his failure to take charge of the litigation and keep the principal informed as to the progress thereof.<sup>96</sup>

### b. Incapacity of Principal

Where the contract secured may be avoided for incapacity of the principal, he may defeat the surety's action founded on an implied contract for reimbursement; but if an infant is bound for the original debt, his surety may recover for reimbursement.

Where the original contract secured may be avoided on the ground of incapacity of the principal, he may defeat an action by the surety founded on an implied contract for reimbursement;<sup>97</sup> but if an infant is bound for the original debt, however, his surety may recover for reimbursement.<sup>98</sup>

### c. Nonexecution of Contract by Principal

A surety cannot recover from the principal where the latter did not execute the contract, unless he is liable without having done so.

A surety cannot recover from the principal where the latter did not execute the contract,<sup>99</sup> as where the name of the latter was signed without authority,<sup>1</sup> unless the principal is liable without having executed the contract.<sup>2</sup>

### d. Illegality

Where the surety pays with knowledge of facts rendering the transaction illegal, the payment is voluntary and he cannot recover from the principal.

Setting up claim due to principal see supra § 302.

Surety without request see supra § 307 c (3).

Voluntary payment see supra § 309 b.

Waiver of defenses in action by creditor see supra § 309 b (4).

85. Ga.—Schlosburg v. Tanenbaum, 144 S.E. 804, 38 Ga.App. 641.

86. N.H.—Whitehouse v. Hanson, 42 N.H. 9.

87. Ky.—Hite v. Campbell, 10 B. Mon. 80.

88. Idaho.—Corpus Juris edited in Fidelity & Deposit Co. of Maryland v. Mason, 42 P.2d 486, 487, 55 Idaho 397.

50 C.J. p 266 note 42.

89. Colo.—Dunkle v. Haight, 189 P. 783, 68 Colo. 404.

90. Mont.—American Surety Co. v. Butler, 284 P. 1011, 86 Mont. 584.

91. N.J.—Holcombe v. Fetter, 67 A. 1078, 70 N.J.Eq. 300.

92. U.S.—Zane v. Citizens' Trust, etc., Co., Pa., 117 F. 814, 55 C.C.A. 38.

50 C.J. p 266 note 46.

93. U.S.—Zane v. Citizens' Trust, etc., Co., supra.

94. Mont.—American Surety Co. v. Butler, 284 P. 1011, 86 Mont. 584.

95. La.—Standard Accident Ins. Co. v. Fell, App., 2 So.2d 519.

96. Tex.—American Surety Co. v. Fielder, Civ.App., 36 S.W.2d 818.

97. Ind.—Ayers v. Burns, 87 Ind. 245, 44 Am.R. 759.

50 C.J. p 267 note 49.

98. N.H.—Conn v. Coburn, 7 N.H. 368, 26 Am.D. 746.

50 C.J. p 267 note 50.

Infant's contract of suretyship generally see Infants § 76 d.

99. Tenn.—Winham v. Crutcher, 3 Tenn.Ch. 666—Murray v. Winham, 3 Tenn.Ch. 336.

1. Tenn.—Winham v. Crutcher, 3 Tenn.Ch. 666—Murray v. Winham, 3 Tenn.Ch. 336.

2. Mont.—Woodman v. Calkins, 34 P. 187, 13 Mont. 363, 40 Am.S.R. 449.



Although the rule is different if the surety had no knowledge of the taint of illegality,<sup>3</sup> where a surety pays, knowing of facts which render the transaction illegal, such payment is a voluntary one, and no recovery can be had from the principal,<sup>4</sup> even though the surety was compelled to pay in another jurisdiction.<sup>5</sup> So, sureties cannot recover from their principal where their agreement is illegal, although the contract between the principal and the creditor is perfectly legal and valid.<sup>6</sup> However, the fact that the transaction which necessitated the giving of the contract of suretyship was illegal will not make the contract itself illegal.<sup>7</sup>

In an action by a surety against his principal to recover money paid on a bond conditioned on the latter's compliance with a statute, the principal's denial that he violated the statute presents no defense, where its effect is to deny the legality of the proceedings whereby the assessment was made against him which the surety was obliged to pay.<sup>8</sup> Likewise, a liquor licensee cannot resist enforcement of his agreement to indemnify the surety on his bond on the ground that proceedings to forfeit the bond were illegal and proceedings to review have been instituted, since until the order, which is not alleged to be void *ab initio*, is vacated, the surety is required to comply therewith.<sup>9</sup>

#### e. Payment, Satisfaction, and Release

Reimbursement or satisfaction by, or release of, the principal is a good defense in an action against him by the surety.

The principal can prove in his defense that he already has reimbursed his surety,<sup>10</sup> or facts which show a good defense by way of accord and satisfac-

tion or as an executed compromise<sup>11</sup> and release.<sup>12</sup> Such a defense is not established, however, by a showing that the principal has transferred to his surety, in payment, notes which prove worthless;<sup>13</sup> and an agreement by the principal to convey to the surety a certain lot of land is not a defense if the agreement has not been complied with.<sup>14</sup>

Where one cosurety has paid the creditor, the principal cannot escape liability to him by showing payment to another cosurety,<sup>15</sup> and the liability of the principal is not affected by the fact that the surety who brings suit and who paid a debt has released a cosurety.<sup>16</sup>

#### § 326. — Set-Off or Counterclaim

While a principal may have a valid counterclaim in a suit by the surety, he cannot offset as against the surety's claim a sum which he would be bound to repay to the surety if recovered.

A principal, in an action against him by a surety for reimbursement, may interpose a valid counterclaim held by him.<sup>17</sup> A principal cannot offset as against the surety's claim a sum which he would be bound to repay to the surety if recovered.<sup>18</sup> A claim of the principal against the surety on his notes, which might have been, but was not, litigated in the suit against both on the notes, resulting in a decree against them, which the surety paid, cannot, in the absence of a showing that the surety is insolvent, be used by the principal, in an injunction suit against the enforcement of an execution issued for the surety's use against the principal, to offset the amount of the decree in execution.<sup>19</sup>

3. Conn.—Valente v. Porto, 105 A. 338, 93 Conn. 146.

Surety's right to recover from principal usury paid see the C.J.S. title Usury § 132, also 68 C.J. p 333 note 20-p 334 note 40.

4. U.S.—Forsyth v. Woods, Mo., 11 Wall. 484, 20 L.Ed. 207.

50 C.J. p 267 note 56.

Recovery back from creditor see supra §§ 293-298.

Voluntary payment generally see supra § 309 b.

5. Mo.—Harley v. Stapleton, 24 Mo. 248.

6. Ill.—Ramsay v. Whitbeck, 56 N. E. 522, 183 Ill. 550.

50 C.J. p 267 note 58.

7. Iowa.—Green v. Schoenhofen Brewing Co., 72 N.W. 655, 103 Iowa 352.

50 C.J. p 267 note 59.

8. Pa.—Royal Indemnity Co. v. Gunzburg, 173 A. 438, 114 Pa. Super. 303.

9. N.Y.—Peerless Casualty Co. v. Sawitz & Simon, 23 N.Y.S.2d 71, 260 App.Div. 448.

10. Md.—Nihiser v. Nihiser, 96 A. 611, 127 Md. 451.

50 C.J. p 267 note 61.

Effect of principal's discharge in bankruptcy on surety's right to reimbursement see Bankruptcy § 567.

11. Iowa.—Corpus Juris cited in McCrum v. Rubbert, 257 N.W. 766, 767, 219 Iowa 454.

50 C.J. p 267 note 62.

12. N.C.—Moore v. Isley, 22 N.C. 372.

50 C.J. p 267 note 63.

Joint judgment against principal and surety; release of surety

Pa.—American Surety Co. v. United Societies, Com.Pl., 93 Pittsb.Leg.J. 308.

Release of security

Where principal on tax abatement bond executed deed of trust to surety as security for agreement to in-

demnify him and deed was released so that principal might raise money to effectuate pending settlement of his liability to the United States, without intention to release principal from his contractual obligation to indemnify surety, principal was not released.—Pink v. Hanby, 18 S. E.2d 127, 220 N.C. 667.

13. W.Va.—Taylor v. Cox, 9 S.E. 70, 32 W.Va. 148.

14. S.C.—Fraser v. Goode, 37 S.C. L. 199.

15. Pa.—Lowry v. Lumbermen's Bank, 2 Watts & S. 210.

16. Ky.—Crowdus v. Shelby, 6 J.J. Marsh. 61.

17. Mass.—Hartford Accident & Indemnity Co. v. Casassa, 16 N.E.2d 860, 301 Mass. 246.

18. Cal.—U. S. Fidelity, etc., Co. v. Smith, 275 P. 878, 97 Cal.App. 492.

50 C.J. p 268 note 69.

19. Miss.—Edwards Bros. v. Bilbo, 103 So. 209, 138 Miss. 484.

### § 327. — Conclusiveness as against Principal of Adjudication against Surety

A judgment against a surety, with proof of payment by him, is prima facie evidence in an action to recover the amount from the principal.

A judgment against the surety, with proof of payment thereof by him, is competent prima facie evidence in an action to recover the amount from the principal.<sup>20</sup> A judgment against a surety is not binding on the principal who was not a party to the suit,<sup>21</sup> although it is otherwise where the principal had notice of the suit,<sup>22</sup> unless there was collusion between the creditor and the surety<sup>23</sup> or negligence by the latter.<sup>24</sup> On the other hand, where the judgment has been rendered against the principal as well as the surety, the former is concluded as to all matters actually determined against, or waived by, him;<sup>25</sup> and infancy,<sup>26</sup> want of consideration,<sup>27</sup> or illegality<sup>28</sup> cannot be pleaded by the principal in an action by the surety to recover the amount paid on such judgment.

The mere fact that the judgment is against the surety alone in an action against him and the principal has, however, been held not to preclude the surety, afterward in an action against the principal, from showing that the debt was that of the principal.<sup>29</sup>

### § 328. — Conditions Precedent

A statutory requirement that a surety paying a judgment must, in order to claim repayment or contri-

bution by his principal, file a notice of payment and claim is mandatory.

A statutory requirement that a surety paying a judgment must, in order to claim a right of repayment or contribution by his principal, file a notice of such payment and claim with the clerk of the court where the judgment was rendered, within a specified time after payment, is mandatory.<sup>30</sup>

### § 329. — Parties

- a. In general
- b. Plaintiff
- c. Defendant

#### a. In General

The creditor is a proper party in a suit by a surety against his principal for exoneration.

In a suit by a surety against his principal for exoneration, the creditor, while he may not be a necessary party,<sup>31</sup> is at least a proper one,<sup>32</sup> that he may "be at hand to receive the money."<sup>33</sup> In a suit by a surety to enjoin its principal, a contractor, from disposing, or obtaining the balance, of moneys due under the contract, a bank which claims the money and holds a voucher therefor has been held an indispensable party.<sup>34</sup>

Parties in summary actions are discussed *infra* § 337, and actions by personal representatives of sureties, in Executors and Administrators § 710 f.

Where the principal dies while an action against him and his surety is pending, if either party wants

20. Mo.—Lincoln County v. El. I. Du Pont De Nemours & Co., 32 S.W.2d 292, 224 Mo.App. 1183. 50 C.J. p 268 note 71.

Conclusiveness and effect as against indemnitor of prior adjudication against indemnitee generally see Indemnity § 32.

Conclusiveness as:

Against surety of adjudication in action against principal see *supra* § 261.

Between cosureties, of former adjudication see *infra* § 370.

Persons responsible over as concluded by judgments generally see Judgments § 811.

Full faith and credit clause of constitution has been applied so as to give full and complete effect to judgment for costs against principal, paid by surety.—Lloyd v. U. S. Fidelity & Guaranty Co., D.C.Mun. App., 31 A.2d 669, certiorari denied 64 S.Ct. 88, 320 U.S. 780, 88 L.Ed. 468, rehearing denied 64 S.Ct. 204, 320 U.S. 814, 88 L.Ed. 491, and rehearing denied 64 S.Ct. 1148, 322 U.S. 770, 88 L.Ed. 1595.

21. N.Y.—Wallace v. Straus, 21 N.Y. 66, 113 N.Y. 238, 242. 50 C.J. p 268 note 72.

22. N.J.—North v. North, 114 A. 411, 93 N.J.Eq. 70, affirmed 116 A. 871, 93 N.J.Eq. 508. 50 C.J. p 268 note 73.

23. N.C.—Hare v. Grant, 77 N.C. 203.

24. N.C.—Hare v. Grant, *supra*.

25. Kan.—Reed v. Humphrey, 76 P. 390, 69 Kan. 155. 50 C.J. p 268 note 76.

Conclusiveness of judgment generally see Judgments §§ 592-848. Summary remedy see *infra* § 337.

26. Ind.—Dewitt v. Boring, 23 N.E. 1085, 123 Ind. 4.

27. Mo.—Pitts v. Fugate, 41 Mo. 405.

28. Ga.—Maples v. Cox, 74 Ga. 701. 50 C.J. p 268 note 79. Illegality as defense generally see *supra* § 325 d.

29. S.C.—Peters v. Barnhill, 19 S.C. L. 234.

50 C.J. p 268 note 80.

30. Okl.—Miller v. Andrews, 43 P. 2d 415, 171 Okl. 479.

Payment of judgment by surety generally see Judgments § 556.

31. Ala.—Alabama Bank & Trust Co. v. Garner, 142 So. 568, 225 Ala. 269.

32. Ala.—Alabama Bank & Trust Co. v. Garner, *supra*.

33. Ala.—Alabama Bank & Trust Co. v. Garner, *supra*.

34. U.S.—Garretson v. National Surety Co., C.C.A.Fla., 63 F.2d 847, certiorari denied National Surety Co. v. Garretson, 54 S.Ct. 55, 290 U.S. 638, 78 L.Ed. 555.

Reason for rule

In the controversy raised by the suit the bank has an interest of such a nature that a final decree cannot be made without affecting that interest; such a decree cannot properly be made in a suit to which one who is directly interested in resisting the granting of the relief sought therein is not a party.—Garretson v. National Surety Co., C.C.A. Fla., 63 F.2d 847, certiorari denied National Surety Co. v. Garretson, 54 S.Ct. 55, 290 U.S. 638, 78 L.Ed. 555.

the heirs and representatives of the principal made parties, the duty rests on such party to interplead them.<sup>35</sup>

### b. Plaintiff

The action against the principal is properly brought by the surety making payment, and can be maintained only in his name. Sureties paying the debt cannot join as plaintiffs, but must sue separately, unless they are permitted to join by statute, or have made payment jointly.

The action against the principal is properly brought by the surety who makes the payment,<sup>36</sup> and can be maintained only in his own name.<sup>37</sup> At law sureties who have paid the debt cannot join as plaintiffs but must sue separately,<sup>38</sup> unless they are permitted to join by statute,<sup>39</sup> or have made payment jointly,<sup>40</sup> as where payment is made from a joint fund<sup>41</sup> or by a joint note.<sup>42</sup>

Cosureties who have not paid anything have no interest in the suit to recover back the amount paid by plaintiff.<sup>43</sup> So, it has been held that, if a suit is necessary to enforce securities, cosureties are not necessary parties thereto;<sup>44</sup> but the cosureties<sup>45</sup> and the creditor<sup>46</sup> are proper parties plaintiff in an action to compel the principal to pay the debt and exonerate the sureties.

### c. Defendant

If the original liabilities of several principals are in distinct proportions, a separate action must be brought against each. When the surety proceeds in equity, all interested parties not complainants should be made defendants, and, where the debt is unpaid and the surety seeks exoneration or indemnity by such suit, the creditor must be a party.

Coobligors who are principals are jointly liable to their surety, as discussed supra § 307 c (2), but, if the original liabilities of several principals are in distinct proportions, a separate action must be brought against each one.<sup>47</sup> A surety who has paid a note and received contribution from a cosurety is not a necessary party to a suit by the latter against the principal for the amount contributed,<sup>48</sup> and so, where the surety has paid the debt, he may proceed against the principal or may subject a fund without making the creditor a party.<sup>49</sup>

In accordance with the well recognized general rule, as discussed in Equity § 133, when the surety proceeds in equity, all interested parties who are not complainants should be made defendants,<sup>50</sup> and, where the debt is unpaid and the surety seeks exoneration or indemnity by such suit, the creditor must be a party,<sup>51</sup> since the ultimate relief is, not to have the amount paid to the surety, but to the creditor.<sup>52</sup>

## § 330. — Pleading

### a. In general

#### b. Issues, proof, and variance

### a. In General

The complaint, declaration, or petition in an action by the surety against his principal must state every fact necessary to entitle the plaintiff to recover.

The complaint, declaration, or petition in an action by the surety against his principal must state every fact necessary to entitle plaintiff to recover.<sup>53</sup>

35. Tex.—Kimball-Krough Pump Co. v. Judd, Civ.App., 88 S.W.2d 579.

36. Mo.—Bush v. Haeussler, 26 Mo. App. 265.

50 C.J. p 269 note 82.

Payment by one of several sureties generally see supra § 307 c (1).

Real or necessary party in interest U.S.—Hartford Accident & Indemnity Co. v. Flanagan, D.C.Ohio, 28 F.Supp. 415.

N.Y.—American Employers' Ins. Co. v. Radzeweluk, 4 N.Y.S.2d 74, 167 Misc. 447.

37. U.S.—U. S. v. Preston, Pa., 27 F.Cas.No.16,087, 4 Wash.C.C. 446.

50 C.J. p 269 note 83.

38. N.C.—Hudson v. Aman, 74 S.E. 97, 158 N.C. 429.

50 C.J. p 269 note 84.

39. Md.—Fuhrman v. Fuhrman, 80 A. 1082, 115 Md. 436.

50 C.J. p 269 note 85.

40. Ga.—Gay v. Powell, 53 S.E.2d 581, 79 Ga.App. 288—Lamis v. Callanos, 194 S.E. 923, 57 Ga.App. 232.

50 C.J. p 269 note 86.

41. Vt.—Thomas v. Carter, 22 A. 720, 63 Vt. 609, 14 L.R.A. 82.

50 C.J. p 269 note 87.

42. N.Y.—Enos v. Leach, 18 Hun 139.

50 C.J. p 269 note 88.

43. Cal.—Townsend v. Sullivan, 84 P. 435, 3 Cal.App. 115.

50 C.J. p 269 note 89.

44. Ind.—Morgan v. Street, 62 N.E. 99, 28 Ind.App. 131.

50 C.J. p 269 note 90.

45. N.C.—Ferrer v. Barrett, 57 N.C. 455.

46. N.C.—Ferrer v. Barrett, supra.

47. Cal.—Chipman v. Morrill, 20 Cal. 130.

48. Cal.—Stone v. Hammell, 22 P. 203, 3 Cal.Unrep.Cas. 128.

Joining principal and cosurety in action for contribution see infra § 377.

49. N.C.—Murphy v. Jackson, 58 N. C. 11.

50. Me.—Scribner v. Adams, 73 Me. 541.

50 C.J. p 269 note 99.

51. Ky.—Hurm v. Collignon, 261 S. W. 602, 202 Ky. 807.

50 C.J. p 269 note 1.

52. N.C.—Murphy v. Jackson, 58 N.C. 11.

50 C.J. p 269 note 2.

53. Mont.—Corpus Juris cited in Kipp v. Paul, 103 P.2d 675, 677, 110 Mont. 513.

Or.—New Amsterdam Casualty Co. v. Terrall, 107 P.2d 843, 165 Or. 390.

50 C.J. p 269 note 5.

In actions for money paid generally see Money Paid § 12.

Pleading in statutory actions by surety against principal see infra § 337.

Fleadings held sufficient Ala.—Kilgore v. Union Indemnity Co., 132 So. 901, 222 Ala. 375.

Mo.—Henneke v. Strack, App., 101 S.W.2d 743—Way v. Raby, App., 49 S.W.2d 672.

Mont.—Kipp v. Paul, 103 P.2d 675, 110 Mont. 513.

Wis.—U. S. Fidelity & Guaranty Co.

It must show affirmatively, by proper allegation, the facts disclosing a liability of the principal for which plaintiff surety was responsible,<sup>54</sup> and the fact of payment,<sup>55</sup> and should contain allegations showing the nature of the obligation,<sup>56</sup> whether the promise was in writing,<sup>57</sup> and the name of the payee;<sup>58</sup> but it is not necessary that the pleader use the precise words of the obligation,<sup>59</sup> words of equivalent meaning being sufficient.<sup>60</sup> In short, the petition should so state the facts of the claim sued on as to identify it so that the record without other aid would support a plea in bar of another suit between the same parties on the same claim.<sup>61</sup>

Where the surety's legal obligation to pay appears from the facts alleged in his pleading, in an action for reimbursement, he need not allege that the payment was made at defendant's request,<sup>62</sup> and, if the indebtedness paid by the surety was evidenced by a judgment, it is not necessary to set forth a copy of the judgment,<sup>63</sup> or to allege that the court rendering it was within the state and had jurisdiction;<sup>64</sup> and, in the absence

of any exception to the general law of suretyship, a surety suing a principal for reimbursement need not allege that a judgment was obtained against the surety adjudicating the fact of the principal's default.<sup>65</sup>

The complaint has been held to be founded on the implied contract of indemnity, notwithstanding the original claim was based on a note which is shown to have been satisfied,<sup>66</sup> and although it is alleged that the surety procured a transfer of the claim by the creditor to himself.<sup>67</sup> In an action to enforce payment by the principal or other exoneration, the bill should allege that the debt is past due<sup>68</sup> and that the surety is liable on it.<sup>69</sup>

The surety cannot obtain specific relief except such as is consistent with the allegations and prayer in his complaint.<sup>70</sup>

*Demurrer, plea, or affidavit of defense.* It is no ground for demurrer in an action by a surety on a note to recover from the principal a forced payment to a holder for value that defendant had a

v. Pullen, 283 N.W. 462, 230 Wis. 137.

50 C.J. p 269 note 5 [a].

#### Recovery of attorney's fees

A general count for money paid is sufficient in an action by the bondsman to recover back money paid for the benefit of his principal; and, if the action is brought on both general and special counts, any objections based on the latter are immaterial.—*Mitchell v. Chambers*, 5 N.W. 57, 43 Mich. 150.

#### Cross bill held germane to original bill

Ala.—*Hawkins v. Holman*, 195 So. 880, 239 Ala. 541.

54. Or.—*New Amsterdam Casualty Co. v. Terrall*, 107 P.2d 843, 165 Or. 390—*National Surety Co. v. Johnson*, 239 P. 538, 115 Or. 624.

Loss caused by wrongful act of principal on fidelity bond Pa.—*National Surety Corp. v. Nulton*, 55 Pa. Dist. & Co. 149.

#### Complaint held insufficient

Or.—*New Amsterdam Casualty Co. v. Terrall*, 107 P.2d 843, 165 Or. 390.

50 C.J. p 270 note 6 [a].

55. Ky.—*Huffman v. National Surety Co.*, 51 S.W.2d 950, 244 Ky. 714. Tenn.—*Henegar v. Brannon*, 137 S.W.2d 889, 24 Tenn.App. 1.

#### Allegation of past compulsion or obligation to pay

(1) In action by surety against principal for amount paid on note, allegation that plaintiff was compelled to pay the note was a sufficient allegation that he actually

paid it.—*Henneke v. Strack*, Mo. App., 101 S.W.2d 743.

(2) In surety's action against principal to recover money paid on bond, averment that surety "was obliged to pay" was sufficiently definite statement of payment, word "was" being past indicative of "be" and indicating an accomplished fact.—*Royal Indemnity Co. v. Gunzburg*, 173 A. 438, 114 Pa.Super. 303. **Oblique's acknowledgment of payment**

In surety's action against principal to recover money paid on bond, principal could not claim lack of specific allegation that surety paid where attached to surety's statement was oblique's written acknowledgment of payment.—*Royal Indemnity Co. v. Gunzburg*, supra.

#### Allegation of nonsatisfaction of note sued on

Sureties, alleging that note sued on was not satisfied by them or anyone else, were not entitled to judgment against defaulting principal for balance due and sale of land to satisfy mortgage securing them against liability.—*Flelds v. Letcher State Bank*, 54 S.W.2d 910, 246 Ky. 229.

56. Ky.—*Lossie v. Frederick*, 108 S.W. 885, 32 Ky.L. 1343.

57. Ky.—*Lossie v. Frederick*, supra.

58. Ky.—*Lossie v. Frederick*, supra.

59. Wash.—*American Surety Co. v. Heather*, 228 P. 857, 131 Wash. 73.

60. Wash.—*American Surety Co. v. Heather*, supra.

61. Ky.—*Lossie v. Frederick*, 108 S.W. 885, 32 Ky.L. 1343.

62. Cal.—*Clanton v. Coward*, 7 P. 787, 67 Cal. 373.

50 C.J. p 270 note 13.

63. Ind.—*Harker v. Gildewell*, 23 Ind. 219.

50 C.J. p 270 note 14.

64. Ind.—*Hopewell v. Kerr*, 36 N. El. 48, 3 Ind.App. 11.

65. Mo.—*U. S. Fidelity & Guaranty Co. v. Huckstep*, App., 72 S.W.2d 838.

Payment before rendition of judgment generally see supra § 309 b (1).

66. Ind.—*Runkle v. Pullin*, 97 N.El. 956, 49 Ind.App. 619—*Goodwin v. Davis*, 43 N.El. 831, 15 Ind.App. 120.

Action on principal claim or evidence of indebtedness generally see supra § 323.

67. Tex.—*Boyd v. Beville*, 44 S.W. 287, 91 Tex. 439—*Green v. Hoppe*, Civ.App., 175 S.W. 1117.

68. Ohio.—*Rapp v. Cincinnati Plastic Relief Co.*, 10 Ohio Cir.Ct. N.S., 575, 30 Ohio Cir.Ct. 433.

50 C.J. p 270 note 19.

69. Mass.—*Cotting v. Otis El. Co.*, 101 N.El. 367, 214 Mass. 294.

50 C.J. p 270 note 20.

70. Wis.—*Hinckley v. Pfister*, 53 N. W. 21, 83 Wis. 64.

50 C.J. p 270 note 21.

Prayer of cross bill held sufficient Ala.—*Hawkins v. Holman*, 195 So. 880, 239 Ala. 541.

good defense to the note in the hands of the original payee, and that plaintiff, with knowledge of such defense, voluntarily made such payment,<sup>71</sup> such contention being available only in a plea to the merits.<sup>72</sup> In an action by the surety to obtain reimbursement for the amount of the judgment paid by it, a merely defective statement of the fact of nonpayment by defendant to the surety of the amount paid by the latter is good when tested only by general demurrer.<sup>73</sup>

In order for a plea or affidavit of defense to be sufficient it must set up a defense to the cause of action alleged in plaintiff's pleadings.<sup>74</sup> A plea that defendant sued as maker of a note was in fact surety thereon to the knowledge of a cosurety presents a good defense to an action by such cosurety to recover the full amount of the note which he has paid.<sup>75</sup>

An amendment of the surety's pleading may be permitted in a proper case.<sup>76</sup> So, in a proceeding by a surety to foreclose a chattel mortgage of the principal, given to indemnify the surety, it has been held proper to permit an amendment crediting the mortgagor with a sum paid by the surety before maturity.<sup>77</sup> The allowance of an amended answer rests largely in the discretion of the trial court.<sup>78</sup>

*Ambiguous pleadings are defective.*<sup>79</sup>

#### b. Issues, Proof, and Variance

In actions by sureties against their principals the proof is confined to the issues raised by the pleadings, and a material variance between the pleadings and proof is fatal.

In accordance with the general rules of pleadings

in actions by sureties against their principals, the proof is confined to the issues raised by the pleadings.<sup>80</sup> The plea of "prescription and limitation," expressed in general terms, must be understood as applying to the time which had elapsed after the cause of action accrued as between plaintiff and defendant,<sup>81</sup> and under it defendant cannot raise the defense that the surety had not availed himself of the statute of limitations in the suit against him by the creditor.<sup>82</sup> Variance as to a note cannot arise in an action by a surety on the note for money paid to the use of the principal,<sup>83</sup> since the note itself is not declared on, as discussed supra § 323. The bill or complaint will not be dismissed for an immaterial variance,<sup>84</sup> but a material one is fatal.<sup>85</sup>

### § 331. — Evidence

- a. Presumptions and burden of proof
- b. Admissibility
- c. Weight and sufficiency

#### a. Presumptions and Burden of Proof

In an action by a surety against his principal, the surety has the burden of proving every fact essential to his right to recover. As in other civil actions the court will indulge in appropriate presumptions arising from the facts proved.

In an action by a surety against his principal, the surety has the burden of proving every fact essential to his right to recover.<sup>86</sup> Accordingly, the surety must show that he became such at the principal's request.<sup>87</sup> The burden is on him to show the relation, in an action in which his right to a particular recovery depends on his relation as surety to another as principal,<sup>88</sup> and, if the surety has paid voluntarily, he must show that the

71. Mo.—Baldridge v. Ryan, App., 260 S.W. 536.

72. Mo.—Baldridge v. Ryan, supra.

73. Ariz.—Sandoval v. U. S. Fidelity, etc., Co., 100 P. 816, 12 Ariz. 348.

74. Ill.—U. S. Fidelity, etc., Co. v. Connors, 222 Ill.App. 1.

75. Ga.—Schlossburg v. Tanenbaum, 144 S.E. 804, 38 Ga.App. 641.

76. Pa.—National Surety Corp. v. Nulton, 55 Pa.Dist. & Co. 149.

77. Ga.—Shattles v. Baker, 89 S.E. 373, 18 Ga.App. 300.

78. N.C.—Pink v. Hanby, 18 S.E. 2d 127, 220 N.C. 667.

79. Mont.—Oppman v. Steinbrenner, 42 P. 1015, 17 Mont. 369. 50 C.J. p 270 note 30.

80. Defense not alleged  
A principal who has not alleged a defense tending to rebut a prima facie case made out by the surety

cannot avail himself of it.—U. S. Fidelity, etc., Co. v. Connors, 222 Ill. App. 1.

81. Tex.—Ennis v. Cocke, 2 Tex. 592.

82. Tex.—Ennis v. Cocke, supra. Time to sue generally see supra § 323.

83. Ind.—Cameron v. Warbritton, 9 Ind. 351.

84. Tenn.—Shapira v. Paletz, Ch. App., 59 S.W. 774. 50 C.J. p 271 note 38.

85. Mass.—Hunneman v. Lowell Sav. Inst., 91 N.E. 526, 205 Mass. 441.

86. Contract conflicting with obligation

In a suit for exoneration, a surety has the burden of proving that the principal, as the creditor's agent, made an oral contract conflicting with the surety's written obligation.

—Alabama Bank & Trust Co. v. Garner, 142 So. 568, 225 Ala. 269.

Existence of principal's obligation  
Mo.—U. S. Fidelity & Guaranty Co. v. Huckstep, App., 72 S.W.2d 838.

87. Miss.—Edge v. Keith, 21 Miss. 295.

Mo.—McPherson v. Meek, 30 Mo. 345. Assumption of liability of surety without request of principal generally see supra § 307 c (8).

Putting up collateral security

One putting up stock as collateral security for another, which stock was applied on indebtedness by pledgee, was only required to show that putting up of the stock as collateral security was done with the knowledge or at the request of such other person.—Barger v. Gething, Ohio App., 52 N.E.2d 94.

88. U.S.—Westgate v. Maryland Cas. Co., C.C.A.Mich., 147 F.2d 177. 50 C.J. p 271 note 46.

debt was in fact recoverable.<sup>89</sup> The burden is on a former principal to show that the relation has been changed by the former surety's assuming the debt.<sup>90</sup> In an action for money paid, the surety should prove the original agreement by proof of the bond or other contract,<sup>91</sup> and, if the fact does not appear on the face of the instrument, he should show it by other means.<sup>92</sup>

On the other hand, the burden of proving affirmative defenses rests on defendant.<sup>93</sup> The burden of going forward with the evidence may shift from one side to the other as the case proceeds.<sup>94</sup>

Presumptions as to the nature of the liability on a note signed by two or more makers is discussed in Bills and Notes § 658.

**Payment.** A surety, in order to recover from a principal money paid, must prove that he has paid the debt or discharged the principal for the amount he seeks to recover.<sup>95</sup> A payment by the surety on the principal's account is presumed to be made at the request of the latter,<sup>96</sup> and to extinguish his liability to the creditor.<sup>97</sup> If it does not appear when the surety made payment, it will be presumed that it was at maturity of the debt,<sup>98</sup> and before he brought suit.<sup>99</sup> Where a surety pays a judgment and receives an assignment thereof, it will be presumed that such payment was made on the date of the assignment.<sup>1</sup> In the absence of evidence of a partnership or joint interest, the presumption is that, where two or more sureties have paid the debt of the principal, each fulfilled his duty by paying his own share.<sup>2</sup>

As against the principal, a surety is bound by the presumptive satisfaction of an execution arising from a previous levy on personal property belonging to the principal, and the burden is on him to destroy, by sufficient proof, the presumption of payment thus created.<sup>3</sup>

Partial payments before maturity are presumed to have been made by the principal rather than by the surety.<sup>4</sup>

**Consideration.** It is presumed, after forfeiture of bail bonds, that no further obligation to pay premiums or service charges thereon exists,<sup>5</sup> and, in the absence of evidence to the contrary, the presumption is that a consideration passed from the surety to a third person paying the obligation for him.<sup>6</sup>

**Compliance with statutory provisions.** In the absence of proof to the contrary, compliance by a foreign surety company with the laws of the state will be presumed.<sup>7</sup>

#### b. Admissibility

General rules governing the admissibility of evidence in civil actions have been applied in actions by sureties against their principals.

General rules have been applied in determining the admissibility of evidence in actions by a surety against his principal, as, for example, in determining the admissibility of evidence pertaining to the agreement of the parties,<sup>8</sup> payment or settlement of the obligation,<sup>9</sup> the principal's liability to

89. Ala.—Halsey v. Murray, 20 So. 575, 112 Ala. 185.

#### Purchase of lost instrument

Owner of lost stock certificate, who secured duplicate on filing proof of ownership and bond, was not liable to surety, which reserved right to secure discharge on default of owner and which purchased lost certificate when it reappeared, without proof that holder had title thereto, since owner was not in default unless surety became liable to holder of lost certificate on its presentation.—American Surety Co. of New York v. Cunningham, 275 N.W. 1, 200 Minn. 566, 112 A.L.R. 892.

90. Ky.—Stratton v. Heuser, 42 S. W. 1133, 19 Ky.L. 1019.

91. Miss.—Edge v. Keith, 21 Miss. 295.

92. Miss.—Edge v. Keith, *supra*.

93. Ky.—Maryland Casualty Co. v. Cowherd, 145 S.W.2d 843, 284 Ky. 659.

94. Puerto Rico.—Roig v. Rodriguez, 16 Puerto Rico 193. 50 C.J. p 271 note 52.

Burden of evidence generally see Evidence § 110.

95. Ky.—Huffman v. National Surety Co., 51 S.W.2d 950, 244 Ky. 714. Me.—Vermeule v. York Cliffs Impr. Co., 74 A. 800, 105 Me. 350, 134 Am.S.R. 553.

Tenn.—Henegar v. Brannon, 137 S. W.2d 889, 24 Tenn.App. 1.

96. N.Y.—Blanchard v. Blanchard, 113 N.Y.S. 882, 61 Misc. 497, affirmed 118 N.Y.S. 1095, 133 App. Div. 937, affirmed 94 N.E. 630, 201 N.Y. 134, 37 L.R.A., N.S., 783.

97. Ala.—Collins v. Boyd, 14 Ala. 505.

50 C.J. p 271 note 60.

98. Iowa.—Heaton v. Ainley, 74 N. W. 766.

99. Miss.—Presly v. Donaldson, 33 Miss. 92.

1. Iowa.—Searing v. Berry, 11 N. W. 708, 58 Iowa 20.

2. Me.—Lombard v. Cobb, 14 Me. 222.

3. Miss.—Brown v. Kidd, 34 Miss. 291.

4. Me.—Talbot v. Hathaway, 93 A. 834, 113 Me. 324, 1 A.L.R. 772.

50 C.J. p 271 note 65.

5. Cal.—Tischhauser v. Jarvis, 273 P. 66, 95 Cal.App. 524. Action by surety company for premiums see *infra* § 397.

6. Miss.—Presly v. Donaldson, 33 Miss. 92.

7. Minn.—New York Fidelity, etc., Co. v. Eickhoff, 65 N.W. 351, 63 Minn. 170, 56 Am.S.R. 464, 30 L. R.A. 586.

50 C.J. p 272 note 70.

8. Utah.—Hartford Accident & Indemnity Co. v. Clegg, 135 P.2d 919, 103 Utah 414.

50 C.J. p 272 note 73 [a].

9. D.C.—Lloyd v. U. S. Fidelity & Guaranty Co., Mun.App., 31 A.2d 669, certiorari denied 64 S.Ct. 83, 320 U.S. 780, 88 L.Ed. 468, rehearing denied 64 S.Ct. 204, 320 U.S. 814, 88 L.Ed. 491, and rehearing denied 64 S.Ct. 1148, 322 U.S. 770, 88 L.Ed. 1595.

the surety,<sup>10</sup> and other matters.<sup>11</sup> Evidence is always admissible to show the equitable rights of the principal and surety toward each other,<sup>12</sup> and, as between the immediate parties, to show their true relation in fact, although different from that indicated by the instrument or their relative positions thereon.<sup>13</sup> Evidence which is material to the right to recover the amount alleged to have been paid by plaintiff as surety is admissible,<sup>14</sup> as is the note on which the payment was made.<sup>15</sup>

### c. Weight and Sufficiency

General rules governing the weight and sufficiency

Ga.—Gay v. Powell, 53 S.E.2d 581, 79 Ga.App. 288.  
50 C.J. p 272 note 74.

10. Judgment of creditors against surety was held admissible in interpleader action between surety and principal's assignee to show principal's liability to surety.—Lincoln County v. E. I. Du Pont De Nemours & Co., 32 S.W.2d 292, 224 Mo.App. 1183.

11. Mont.—Leggat v. Palmer, 102 P. 327, 39 Mont. 302.  
50 C.J. p 272 note 75.

#### Inducement to sign as surety

In action on open account to recover, among other things, an amount paid by creditor as surety on note of debtor, testimony by creditor that debtor told him that, if he would sign as surety, a certain other would sign as surety also was admissible.—Gay v. Powell, 53 S.E.2d 581, 79 Ga.App. 288.

#### Note deposited as collateral

In action on open account to recover, among other things, amount paid by creditor as surety on note of debtor, evidence respecting another note, deposited by creditor with payee of first note as collateral, was admissible over objection of irrelevancy and immateriality.—Gay v. Powell, 53 S.E.2d 581, 79 Ga.App. 288.

#### Financial ability; possession of funds

(1) In action by surety on bond of former sheriff to recover under indemnity clause for counsel fees and other expenses incurred in defending suit by county against former sheriff and the surety, court should have admitted testimony concerning former sheriff's financial ability at the time of the litigation by county against them.—Maryland Casualty Co. v. Cowherd, 145 S.W.2d 843, 284 Ky. 659.

(2) In action on bond to reimburse garnishment bondsman for attorney's fee paid to defend action on garnishment bond against debtor and bondsman jointly, evidence that debtor had funds to pay original judgment on which garnishment

proceedings were based was held properly excluded as immaterial.—Coggin v. U. S. Fidelity & Guaranty Co., Tex.Civ.App., 100 S.W.2d 206, error dismissed.

12. U.S.—In re May, D.C.Mass., 16 F.Cas.No.9,327, 17 Nat.Bankr.Reg. 192.

Md.—Nihiser v. Nihiser, 96 A. 611, 127 Md. 451.

13. N.J.—Apgar v. Hiller, 24 N.J. Law 812.  
50 C.J. p 272 note 78.

Relation of parties to commercial paper see Bills and Notes § 675.

14. Md.—Nihiser v. Nihiser, 96 A. 611, 127 Md. 451.

15. Ind.—Cameron v. Warbritton, 9 Ind. 351.

Pa.—Hill v. Voorhies, 22 Pa. 68.

16. U.S.—Kelleam v. Maryland Casualty Co. of Baltimore, Md., C.C.A. Okl., 112 F.2d 940, reversed on other grounds 61 S.Ct. 595, 312 U.S. 377, 85 L.Ed. 899.

D.C.—Lloyd v. U. S. Fidelity & Guaranty Co., Mun.App., 31 A.2d 669, certiorari denied 64 S.Ct. 88, 320 U.S. 780, 88 L.Ed. 468, rehearing denied 64 S.Ct. 204, 320 U.S. 814, 88 L.Ed. 491, and rehearing denied 64 S.Ct. 1148, 322 U.S. 770, 88 L.Ed. 1595.

La.—U. S. Fidelity & Guaranty Co. v. Sellers, 137 So. 869, 18 La.App. 366.

Tex.—U. S. Fidelity & Guaranty Co. v. Holcomb, Civ.App., 269 S.W. 487.

50 C.J. p 272 note 81 [a].

#### Title of holder of lost certificate

In action by surety against owner of lost stock certificate which surety purchased on its reappearance, evidence that holder of lost certificate was innocent purchaser for value without notice was insufficient to establish title of holder under common law, which applied in absence of proof of law of situs of lost certificate at time of its transfer to prior holders.—American Surety Co. of New York v. Cunningham, 275 N.W. 1, 200 Minn. 566, 112 A.L.R. 892.

of evidence in civil actions have been applied in actions by sureties against their principals.

The rules determinative of the weight and sufficiency of evidence in civil actions generally have been applied in determining the weight and sufficiency of evidence in actions by sureties against their principals,<sup>16</sup> for example, with respect to the sufficiency of evidence to sustain findings<sup>17</sup> or to support a verdict<sup>18</sup> or judgment.<sup>19</sup>

**Liability.** The record of an action by the creditor is prima facie evidence, in a suit by the surety for reimbursement, of the liability of the surety and of the liability of the principal over to him.<sup>20</sup>

#### 17. Evidence held sufficient to sustain finding

Cal.—Merner Lumber Co. v. Brown, 21 P.2d 590, 218 Cal. 136—Pacific Indemnity Co. v. Hargreaves, 98 P.2d 217, 36 Cal.App.2d 338.

Iowa.—McKey-Fansher Co. v. Rowen, 5 N.W.2d 911, 232 Iowa 660.

Ky.—Moseley v. Gregory, 54 S.W.2d 29, 245 Ky. 620.

Wis.—London & Lancashire Indemnity Co. v. Crook, 6 N.W.2d 681, 241 Wis. 571, 144 A.L.R. 513.

50 C.J. p 273 note 83 [a].

D.C.—National Surety Co. v. Anacostia Finance Corp., 26 F.2d 985, 58 App.D.C. 507.

50 C.J. p 273 note 83 [b].

#### Suretyship and payment; parol evidence required

In action by surety on note against principal to recover amount paid by surety, findings as to suretyship and payment could not be based on note alone, but required parol evidence of the relationship of the parties and the circumstances attending the payment.—Henneke v. Strack, Mo.App., 101 S.W.2d 743.

#### 18. Evidence held sufficient

Ga.—Gay v. Powell, 53 S.E.2d 581, 79 Ga.App. 288.

Ohio.—Commercial Casualty Ins. Co. v. Creager, App., 43 N.E.2d 900.

Okl.—Minton v. American Surety Co. of New York, 88 P.2d 823, 184 Okl. 602.

#### 19. Evidence held sufficient

Ky.—Doll v. Reed, 13 S.W. 1081, 12 Ky.L. 300.

50 C.J. p 273 note 84 [a].

20. Ark.—Bone v. Torrey, 16 Ark. 83—Snider v. Greathouse, 16 Ark. 72, 63 Am.D. 54.

Conclusiveness of adjudication in action by creditor against surety see supra § 327.

#### Payment on demand by liquor board

Where control board revoked liquor license when licensee did not answer charges and his surety, on demand by board, paid penalty of bond, surety was prima facie entitled to indemnity, and licensee did not overcome effect of such proof by denial that he violated liquor law

Where the application for a bond provides that vouchers showing payment by the surety of any claim in connection with indemnity on behalf of applicant shall be conclusive evidence of the fact and amount of liability, a surety producing a voucher in a suit against the principal for reimbursement for money paid makes out a prima facie case,<sup>21</sup> and is entitled to recover from the principal where the latter makes no effort to rebut such prima facie case by proof of fraud or lack of good faith.<sup>22</sup> On the other hand, a surety's compromise with the creditor is only prima facie evidence of the principal's liability on the indemnifying agreement,<sup>23</sup> and cannot prevail against the principal's uncontradicted testimony denying all charges of guilt or irregularity.<sup>24</sup>

**Payment.** Possession by the surety of the note on which he was surety is prima facie evidence that he has paid it<sup>25</sup> and has not been repaid by the principal,<sup>26</sup> and the assignment to the surety of a judgment recovered by the creditor against the principal sufficiently shows that the surety paid the judgment in full;<sup>27</sup> on the other hand, possession of such a note by the principal is prima facie evidence of payment by him.<sup>28</sup> In particular cases the evidence has been held sufficient<sup>29</sup> or insufficient<sup>30</sup> to show payment by the surety, or insufficient to show that the surety had accepted payment of the indebtedness due him from the principal.<sup>31</sup>

### § 332. — Questions of Law and Fact

In an action by a surety against his principal, con-

troverted questions of fact are for the jury. The direction of a verdict is proper only where the evidence warrants it.

In an action by a surety against his principal, it is for the jury to determine controverted questions of fact under proper instruction of the court.<sup>32</sup> Thus, on conflicting evidence, whether the surety acted in good faith,<sup>33</sup> or whether a promise sued on was original or collateral,<sup>34</sup> is a question which should be submitted to the jury. So, also, where the defense is that the relation of the parties has changed, whether the original surety was entitled to recover from the original principal the amount of a judgment previously rendered against the former is a question for the jury.<sup>35</sup> On the other hand, where the evidence on an issue is legally insufficient, it should not be submitted to the jury.<sup>36</sup>

**Direction of verdict.** Although a directed verdict has been held proper where the material facts were admitted,<sup>37</sup> or one party has failed to make out his case,<sup>38</sup> a verdict should not be directed when such a procedure is not warranted by the evidence.<sup>39</sup> So, the direction of a verdict for the surety is improper where there is a direct conflict in the evidence offered by the parties.<sup>40</sup>

### § 333. — Instructions

In an action by a surety against his principal, the court in its instructions should state correctly the legal principals applicable to the case.

In an action by a surety against his principal, it is the duty of the court to state correctly in its

or board's rules.—*Fidelity & Casualty Co. of New York v. Zappolo*, 274 N.Y.S. 698, 153 Misc. 258.

21. La.—*Standard Accident Ins. Co. v. Fell*, App., 2 So.2d 519.

22. La.—*Standard Accident Ins. Co. v. Fell*, supra.

23. Ill.—*National Slovak Soc. of U. S. A., for Use of American Surety Co. of New York v. Matlocha*, 29 N.E.2d 946, 307 Ill.App. 41.

24. Ill.—*National Slovak Soc. of U. S. A., for use of American Surety Co. of New York v. Matlocha*, supra.

25. Ala.—*Corpus Juris* cited in *McGlaughn v. Pearman*, 18 So.2d 80, 82, 245 Ala. 524.

Tex.—*Corpus Juris* cited in *American Surety Co. v. Fielder*, Civ. App., 36 S.W.2d 818, 819, 50 C.J. p 271 note 56.

26. Ala.—*Corpus Juris* cited in *McGlaughn v. Pearman*, 18 So.2d 80, 82, 245 Ala. 524.

Me.—*Talbot v. Hathaway*, 93 A. 834, 113 Me. 324, 1 A.L.R. 772.

27. Tex.—*American Surety Co. v. Fielder*, Civ.App., 36 S.W.2d 818.

28. Pa.—*Herr v. Witmer*, 28 Pa. Dist. 413.

29. Cal.—*Merner Lumber Co. v. Brown*, 21 P.2d 590, 218 Cal. 136, 50 C.J. p 272 note 82 [a].

**Payment in good faith**  
Tenn.—*National Sur. Corp. v. Buckles*, 219 S.W.2d 207, 31 Tenn.App. 610.

**Presumption of payment by principal held rebutted**

Me.—*Talbot v. Hathaway*, 93 A. 834, 113 Me. 324, 1 A.L.R. 772, 50 C.J. p 272 note 82 [b].

31. Ky.—*Porter v. Bedell*, 116 S.W. 2d 641, 273 Ky. 296.

32. Minn.—*U. S. Fidelity & Guaranty Co. v. Falk*, 7 N.W.2d 398, 214 Minn. 138.

Ohio.—*Commercial Casualty Ins. Co. v. Creager*, App., 43 N.E.2d 900.

**Acceptance of property by surety in satisfaction**

Ky.—*Moseley v. Gregory*, 54 S.W.2d 29, 245 Ky. 620.

**Reasonable attorney's fees and expenses**

Tex.—*U. S. Fidelity & Guaranty Co.*

*v. Holcomb*, Civ.App., 269 S.W. 487.

33. Mo.—*National Surety Co. v. Casner*, 253 S.W. 1057.

N.Y.—*National Surety Co. v. Fulton*, 183 N.Y.S. 287, 192 App.Div. 645.

34. Ill.—*Early v. Cassens*, 216 Ill. App. 581.

35. S.D.—*Heinrich v. Magee*, 217 N. W. 631, 52 S.D. 371.

36. Ky.—*Maryland Casualty Co. v. Cowherd*, 145 S.W.2d 843, 284 Ky. 659.

37. Mass.—*Maryland Fidelity, etc., Co. v. Cataldo*, 164 N.E. 379, 265 Mass. 458.

38. N.J.—*Title Guaranty, etc., Co. v. Fusco Constr. Co.*, 101 A. 248, 90 N.J.Law 630.

Tex.—*American Surety Co. v. Fielder*, Civ.App., 36 S.W.2d 818.

39. Miss.—*U. S. Fidelity, etc., Co. v. White*, 63 So. 329, 106 Miss. 23.

Pa.—*Maryland Fidelity, etc., Co. v. Call*, 81 Pa.Super. 132.

40. Iowa.—*Fidelity Deposit Co. v. Ryan*, 282 N.W. 721, 225 Iowa 1260.



instructions the legal principles applicable to the case.<sup>41</sup> The instructions must conform to the pleadings and the evidence,<sup>42</sup> and must not be argumentative<sup>43</sup> or confusing.<sup>44</sup>

### § 334. — Judgment

If the surety is seeking to enforce payment, the court should make the necessary orders; a court having all interested parties before it should adjudicate and protect, by its decree, all the equities of the parties as exposed by the evidence.

In a suit by a surety against his principal for indemnity before payment, under a statute giving such remedy, the judgment against the principal should be for a particular sum to be realized on execution, and not merely that the principal indemnify the surety.<sup>45</sup> If the surety is suing to enforce payment, the court should make such orders as may be necessary to accomplish this purpose.<sup>46</sup> Thus, the court, having all interested parties before it, should adjudicate, adjust, and protect, by its decree, all the equities of the respective parties as they are exposed by the evidence.<sup>47</sup> A personal judgment may be had against the principal,<sup>48</sup> and, if the surety's action is brought in the same court in which the creditor's claim has proceeded to judgment, it is proper to order the amount collected on the judgment against the principal to be paid into court for the benefit of the owner of the original judgment.<sup>49</sup> A decree for payment to the surety before he has paid the debt is er-

roneous,<sup>50</sup> the proper decree being that the proceeds of the judgment be applied on the debt<sup>51</sup> or for the payment of the amount to the holders of the debt.<sup>52</sup>

*Judgment for specific thing.* The surety is entitled to judgment against the principal for the same specific thing he himself has been adjudged to pay.<sup>53</sup>

*Conclusiveness.* A judgment in an action by sureties against the principal to foreclose a mortgage to satisfy the indebtedness paid and unpaid is not conclusive as to the amount of claims of creditors not parties at the time it was rendered.<sup>54</sup>

### § 335. — Amount or Extent of Recovery

- a. In general
- b. As affected by medium of payment
- c. Interest
- d. Costs and expenses

#### a. In General

In an action against his principal for reimbursement, a surety is not entitled to recover more than the amount or value actually paid by him, with interest; the principal is entitled to the benefit of any compromise or settlement with the creditor.

The measure of recovery in an action by a surety against his principal for reimbursement is the amount he had to pay on the claim against which he was indemnified,<sup>55</sup> and it is the same whether

41. Iowa.—Hubenthal v. Gibbons, 150 N.W. 1067, 168 Iowa 630.

50 C.J. p 273 note 92.

**Instructions held proper or erroneously refused**

Ga.—Gay v. Powell, 53 S.E.2d 581, 79 Ga.App. 288.

Ky.—Moseley v. Gregory, 54 S.W.2d 29, 245 Ky. 620.

50 C.J. p 273 note 92 [c].

**Instruction held erroneous or properly refused**

Mo.—Maryland Casualty Co. v. Spitaufsky, 178 S.W.2d 368, 352 Mo. 547.

50 C.J. p 273 note 92 [d].

42. Mo.—Maryland Casualty Co. v. Spitaufsky, supra.

**Instruction held not improper under pleadings**

Ga.—Gay v. Powell, 53 S.E.2d 581, 79 Ga.App. 288.

**Instructions held erroneous or properly refused**

Tex.—Coggin v. U. S. Fidelity & Guaranty Co., Civ.App., 100 S.W.2d 206, error dismissed.

50 C.J. p 273 note 93 [a].

43. **Instruction held not argumentative**

Ga.—Gay v. Powell, 53 S.E.2d 581, 79 Ga.App. 288.

44. **Instruction held not confusing**

Ga.—Gay v. Powell, supra.

Ky.—Moseley v. Gregory, 54 S.W.2d 29, 245 Ky. 620.

45. La.—Mudd v. Rogers, 10 La. Ann. 648.

46. Kan.—Hutchinson Wholesale Grocer Co. v. Brand, 99 P. 592, 79 Kan. 340.

**Enforcement of payment generally see supra § 303.**

47. Cal.—Josephian v. Lion, 227 P. 204, 66 Cal.App. 650.

Pa.—Massachusetts Bonding & Ins. Co. v. Smyser-Royer Co., Com.Pl., 58 York Leg.Rec. 202.

50 C.J. p 273 note 3.

**Joint liability of surety with principal**

In suit for exoneration, surety may be declared jointly liable with principal, notwithstanding as indorser of notes he could not be sued jointly with principal, he comes into a court of equity seeking relief, submits himself to the jurisdiction of the court, and offers to do equity.—Alabama Bank & Trust Co. v. Garner, 142 So. 568, 225 Ala. 269.

**Affirmative relief against creditor**

(1) In suit by surety for exoneration, in absence of special equities,

affirmative relief cannot be granted as against creditor.—Alabama Bank & Trust Co. v. Garner, supra.

(2) Rights and remedies of surety as to creditor or obligee generally see supra §§ 286-299.

48. Kan.—Hutchinson Wholesale Grocer Co. v. Brand, 99 P. 592, 79 Kan. 340.

49. Kan.—Hutchinson Wholesale Grocer Co. v. Brand, supra.

50. W.Va.—Lewis v. Toney, 85 S.E. 30, 76 W.Va. 80.

51. W.Va.—Lewis v. Toney, supra.

52. Ky.—Rutherford v. Richart, 2 Ky.Op. 161.

53. Va.—Graves v. Webb, 1 Call 443, 5 Va. 443.

50 C.J. p 273 note 9.

54. Ky.—Hurm v. Collignon, 261 S.W. 602, 202 Ky. 807.

55. U.S.—U. S. for Use and Benefit of W. A. Rushlight Co. v. Davidson, D.C.Idaho, 71 F.Supp. 401.

La.—Cook v. Ruston Oil Mills & Fertilizer Co., 127 So. 347, 170 La. 10.

50 C.J. p 274 notes 12, 13.

**Full reimbursement**

(1) Surety who paid note was entitled to judgment against principal

the action is brought on the implied, or on an express, promise to reimburse.<sup>56</sup> The surety cannot collect any more than the amount or value actually paid by him<sup>57</sup> with interest, as discussed infra subdivision c of this section, even though he has taken an assignment of the full claim;<sup>58</sup> the principal can be held only for the amount for which the surety became liable, either primarily or secondarily.<sup>59</sup> Accordingly the principal is entitled to the benefit of any compromise or settlement made with the creditor;<sup>60</sup> but a proper charge made by the surety for the suretyship need not be credited against the amount of the recovery,<sup>61</sup> and the principal can have no benefit from a voluntary payment made to the surety by the latter's partner, where

there is no privity between such partner and the principal.<sup>62</sup>

The surety is not entitled to recover for remote and indirect losses suffered by him which could have been avoided by payment of the debt.<sup>63</sup>

A party suing as surety for the full amount of a note paid may recover one half of it where it appears that one half of the proceeds was used for his benefit.<sup>64</sup>

#### b. As Affected by Medium of Payment

A surety paying in property or depreciated paper may recover to the extent of its value; if the property is of greater value than the amount of the debt, he is not entitled to recover the excess from the principal.

maker for full amount paid.—Salzberg v. Deutsch, 270 N.Y.S. 595, 150 Misc. 870.

(2) A surety who has been made to pay should have full reimbursement out of the assets of the principal debtor as far as it can be given him without injustice to others; and the rights and interests which must be balanced in determining what is a just distribution are those of the surety, the creditor whom he has secured, and the general creditors.—*American Surety Co. of New York v. Bethlehem Nat. Bank of Bethlehem, Pa.*, D.C.Pa., 33 F.Supp. 722, reversed on other grounds 116 F.2d 75, reversed on other grounds 62 S.Ct. 226, 314 U.S. 314, 86 L.Ed. 241, 138 A.L.R. 509.

(3) Where one who stands in position of surety is obliged to pay all or part of common obligation, he is entitled to full reimbursement from the principal, and statute permitting contribution between codebtors who are each liable in the same right is inapplicable.—*Gholson v. Savin*, 31 N.E.2d 858, 137 Ohio St. 551, 139 A.L.R. 75.

(4) A surety on a draft, when he satisfies a judgment against himself and the acceptor and principal debtor jointly, may recover of the principal debtor the full amount paid in satisfaction, since as between himself and the principal he is not compelled to contribute.—*Wainwright v. Atkins*, 61 So. 454, 104 Miss. 438.

**Money paid out for breach of prior bond**

*Mass.*—*Hartford Accident & Indemnity Co. v. Casassa*, 16 N.E.2d 860, 301 Mass. 246.

**Value of stock put up as collateral**  
*Ohio.*—*Barger v. Gething*, App., 52 N.E.2d 94.

56. *Ariz.*—*Sandoval v. U. S. Fidelity, etc., Co.*, 100 P. 816, 12 *Ariz.* 348, reversed on other grounds 32 S.Ct. 298, 223 U.S. 227, 56 L.Ed. 415.

57. *U.S.*—*Ward v. First Nat. Bank, C.C.A.Mo.*, 76 F.2d 256.

*Ark.*—*Corpus Juris* cited in *Shinn v. Kitchens*, 186 S.W.2d 168, 173, 208 *Ark.* 321.

*D.C.*—*Laber v. Gall, to Use of Mercury Indemnity Co. of St. Paul*, 110 F.2d 697, 71 App.D.C. 345.

*Ky.*—*Huffman v. National Surety Co.*, 51 S.W.2d 950, 244 *Ky.* 714.

*Mo.*—*Farmers & Mechanics Sav. Bank of Troy v. Jennings*, App., 138 S.W.2d 703—*Lincoln County v. E. I. Du Pont De Nemours & Co.*, 32 S.W.2d 292, 224 *Mo.App.* 1183.

*Tex.*—*Indemnity Ins. Co. of North America v. McMillan*, Civ.App., 153 S.W.2d 264—*Corpus Juris* cited in *American Surety Co. v. Fielder*, Civ.App., 36 S.W.2d 818, 819.

50 C.J. p 274 note 14.

"It is a well-settled rule of law that a surety will not be allowed to speculate on his principal."—*American Surety Co. v. Fielder*, *Tex.Civ. App.*, 36 S.W.2d 818, 819.

At common law, a principal's obligation to his surety was merely that of indemnity, and surety could not realize a profit at principal's expense, but could recover from principal only the amount actually paid in satisfying principal's obligation.—*Napier v. Duff*, 136 S.W.2d 1083, 281 *Ky.* 779.

**Rule under statute**

*Ky.*—*Napier v. Duff*, *supra*.

**Payment of note**

*Mo.*—*Henneke v. Strack*, App., 101 S.W.2d 743.

**Offset by surety held limited to amount said by him to satisfy judgment, and not full amount of judgment.**—*Koudsi v. Mathiwas*, *Tex.Civ. App.*, 147 S.W.2d 585.

58. *D.C.*—*Laber v. Gall, to Use of Mercury Indemnity Co. of St. Paul*, 110 F.2d 697, 71 App.D.C. 345.

50 C.J. p 274 note 16.

**Suing principal on original obligation**

Under a statute providing that, if a surety pays the whole or any part of a debt or liability for which he is bound as such, he may recover the amount from the principal by action of law, a surety who discharges his principal's obligation is limited to recovering the amount actually paid, even though he takes an assignment of the obligation from the creditor and brings action against the principal thereon; a surety may not be permitted to circumvent the statute by suing on the original obligation rather than on the obligation of indemnity.—*Napier v. Duff*, 136 S.W.2d 1083, 281 *Ky.* 779.

59. *Or.*—*New Amsterdam Casualty Co. v. Terrall*, 107 P.2d 843, 165 *Or.* 390—*National Surety Co. v. Johnson*, 239 P. 538, 115 *Or.* 624.

60. *D.C.*—*Laber v. Gall, to Use of Mercury Indemnity Co. of St. Paul*, 110 F.2d 697, 71 App.D.C. 345.

50 C.J. p 274 note 17.

**Settlement by ordinarily prudent person**

If surety settled liability asserted against it by payment of a sum of money, surety was entitled to recover of principal such sum, if any, not in excess of amount paid, as an ordinarily prudent person, in conduct of his own business, and under same circumstances, would have paid to settle such a liability asserted against him.—*Indemnity Ins. Co. of North America v. McMillan*, *Tex. Civ.App.*, 153 S.W.2d 264.

61. *Ark.*—*Shinn v. Kitchens*, 186 S.W.2d 168, 208 *Ark.* 321.

62. *Ark.*—*Shinn v. Kitchens*, *supra*.

63. *Tenn.*—*Vance v. Lancaster*, 3 *Hayw.* 130.

50 C.J. p 274 note 18.

64. *Pa.*—*Mundorf v. Wier*, 33 *Pa. Super.* 348.

A surety who makes a payment in property, as in land, may recover from his principal to the extent of the value thereof;<sup>65</sup> and, where the surety pays in depreciated paper, he is not entitled to recover more than its value.<sup>66</sup> However, the promise implied on payment by a surety is a promise to pay the debt, not the value of the property;<sup>67</sup> therefore, if the property is of greater value than the amount of the debt, the surety is not entitled to recover the excess from the principal,<sup>68</sup> and, if the debt is satisfied by execution sale of the surety's property, his recovery is measured by the judgment satisfied, and not merely by the value of the property,<sup>69</sup> or it is measured by what the property sold for, regardless of any greater actual value.<sup>70</sup>

The value of the property is its market value<sup>71</sup> at the time of payment;<sup>72</sup> but, if the principal and surety agree on the value of such property, other creditors of the principal do not have any right to object.<sup>73</sup>

#### c. Interest

A surety may recover from the principal for interest paid the creditor. He is also entitled to interest, at the statutory rate, on the amount he was required to pay the creditor, such interest running from the date of payment by him.

The surety is entitled to recover against the principal reimbursement for interest paid by the former to the creditor.<sup>74</sup> He is also entitled to recover interest, at the statutory rate,<sup>75</sup> on the amount which he has been required to pay to the creditor,<sup>76</sup> such interest, under the rules or statutes governing the accrual of interest, being held to run from the date of payment by the surety,<sup>77</sup> and not from the date of institution of his suit against the principal for reimbursement;<sup>78</sup> but a surety against whom judgment is recovered for the diversion of funds by the principal has been held entitled, on recovering judgment over against the principal, to interest from the date of the conversion.<sup>79</sup>

#### d. Costs and Expenses

- (1) In general
- (2) Attorney's fees

##### (1) In General

A surety can recover from his principal all reasonable expenses and necessary costs incurred because of the relationship, but, in the absence of express agreement or joinder by the principal in the action, not for costs and expenses unnecessarily incurred.

A surety can recover from his principal all reasonable expenses and necessary costs that he has incurred because of the relationship;<sup>80</sup> if the prin-

65. Appraised value of land N.H.—Lord v. Staples, 23 N.H. 448.

66. Va.—Southall v. Farish, 7 S.E. 534, 85 Va. 403, 1 L.R.A. 641. 50 C.J. p 274 note 23.

Payment in depreciated currency generally see Payment § 21.

#### Leading case

Ark.—Jordan v. Adams, 7 Ark. 348.

67. Ky.—Hickman v. McCurdy, 7 J. J. Marsh. 555.

68. Ky.—Hickman v. McCurdy, supra.

69. Iowa.—Coleman v. Riggs, 16 N. W. 583, 61 Iowa 543.

70. Ky.—Taylor v. Jefferson, 180 S.W. 801, 167 Ky. 454.

71. W.Va.—Fearnster v. Withrow, 9 W.Va. 296—Fearnster v. Withrow, 12 W.Va. 611—Butler v. Butler, 8 W.Va. 674.

72. W.Va.—Butler v. Butler, supra. 50 C.J. p 274 note 29.

73. Va.—Southall v. Farish, 7 S.E. 534, 85 Va. 403, 1 L.R.A. 641. 50 C.J. p 275 note 30.

74. Mass.—Hartford Accident & Indemnity Co. v. Casassa, 16 N.E.2d 860, 301 Mass. 246.

Mo.—Lincoln County v. El. I. Du Pont De Nemours & Co., 32 S.W.2d 292, 224 Mo.App. 1183. 50 C.J. p 275 note 32.

In summary actions see supra § 337. Recovery of interest for which sure-

ty and principal were not liable see supra § 309 b (3).

75. Mo.—Farmers & Mechanics Sav. Bank of Troy v. Jennings, App., 138 S.W.2d 703—Henneke v. Strack, App., 101 S.W.2d 743. 50 C.J. p 275 note 33 [b].

76. Ind.—Damier v. Baine, 51 N.E. 2d 885, 114 Ind.App. 534.

Ky.—Huffman v. National Surety Co., 51 S.W.2d 950, 244 Ky. 714.

Mo.—Farmers & Mechanics Sav. Bank of Troy v. Jennings, App., 138 S.W.2d 703—Henneke v. Strack, App., 101 S.W.2d 743.

Ohio.—Barger v. Gething, App., 52 N.E.2d 94.

Tenn.—National Sur. Corp. v. Buckles, 219 S.W.2d 207, 31 Tenn. App. 610. 50 C.J. p 275 note 33.

77. Ky.—Huffman v. National Surety Co., 51 S.W.2d 950, 244 Ky. 714.

Mo.—Maryland Casualty Co. v. Spitaufsky, 178 S.W.2d 368, 352 Mo. 547—Farmers & Mechanics Sav. Bank of Troy v. Jennings, App., 138 S.W.2d 703—Henneke v. Strack, App., 101 S.W.2d 743.

Tenn.—National Sur. Corp. v. Buckles, 219 S.W.2d 207, 31 Tenn. App. 610.

50 C.J. p 275 note 34.

When interest begins to run on money paid at another's request generally see Interest § 45.

78. Mo.—Maryland Casualty Co. v. Spitaufsky, 178 S.W.2d 368, 352 Mo. 547.

79. Tex.—Armstrong v. Anderson, Civ.App., 91 S.W.2d 775, reversed on other grounds Anderson v. Armstrong, 120 S.W.2d 444, 132 Tex. 122, rehearing denied 132 S.W.2d 393, 132 Tex. 122.

80. Ky.—Maryland Casualty Co. v. Wood, 177 S.W.2d 365, 296 Ky. 476.

Mo.—Lincoln County v. El. I. Du Pont De Nemours & Co., 32 S.W.2d 292, 224 Mo.App. 1183.

Utah.—Beaver County v. Home Indemnity Co., 52 P.2d 435, 88 Utah 1. 50 C.J. p 275 note 35.

Recovery of costs and expenses by indemnitee generally see Indemnity § 13 d.

Expense incurred in resisting action on prior bond

Mass.—Hartford Accident & Indemnity Co. v. Casassa, 16 N.E.2d 860, 301 Mass. 246.

Expenses held reasonable and legitimate

Ky.—Maryland Casualty Co. v. Cowherd, 145 S.W.2d 843, 284 Ky. 659.

Successful defense in suit against surety alone

The statute providing that, if surety on bond satisfies principal obligation, principal must reimburse what surety has disbursed, includ-

principal and surety are sued together, the surety is justified in expecting that the principal will satisfy the claim, and can recover the costs of the suit which he is compelled to pay;<sup>81</sup> and the surety may recover costs and expenses, including those incurred in litigation, when the contract of the parties so provides,<sup>82</sup> provided they are not unreasonable or unnecessarily incurred.<sup>83</sup> However, the principal is not liable for costs and expenses unnecessarily incurred by the surety in litigation carried on by him in an attempt to avoid his liability<sup>84</sup> or to defeat the efforts of a party seeking to enforce it,<sup>85</sup> unless there was an express agreement for indemnity as to costs,<sup>86</sup> or the suit in which the costs were incurred was instituted by the principal and surety.<sup>87</sup>

The principal is not liable, in the absence of an agreement to that effect,<sup>88</sup> for expenses incurred in defending the title to securities transferred to the surety by way of indemnity,<sup>89</sup> for expenses incurred by the surety because of his refusal to pay creditor,<sup>90</sup> or for disbursements incurred by the surety in inspecting the job, when the principal gave notice that he might be forced to quit, in order to enable the surety to decide whether or not to take over the job in the event of the principal's withdrawal.<sup>91</sup>

It is incumbent on a surety seeking to recover from his principal costs and expenses incurred in litigation to show that the litigation was entered into in good faith and on reasonable grounds, and

was a measure of defense necessary to the interests of both parties, and was calculated so to result.<sup>92</sup>

*Where the amount is not specified* in an agreement by the principal to pay expenses, the surety can recover only reasonable expenses.<sup>93</sup>

*Surety for receiver.* Under a counter bond agreeing to indemnify a surety for all damages incurred by reason of his suretyship, recovery against the indemnitor is not limited to the expenses incurred by reason of the guaranty that the receiver shall perform faithfully the duties of his office,<sup>94</sup> but extends to all expenses incurred by reason of the suretyship which would not otherwise have been incurred.<sup>95</sup>

## (2) Attorney's Fees.

A surety may recover attorney's fees from the principal when the contract so provides; further, he has been held entitled to recover for attorney's fees paid in defending a suit, if the defense was made with the principal's consent or at his request, or to his advantage, or in good faith and in the exercise of reasonable discretion. Fees incurred in controversies collateral to the suretyship itself are not recoverable in an action on a contract of indemnity.

In the absence of a contract for the payment of attorney's fees in case of suit by the surety against the principal for money paid in discharge of the original obligation, such fees are not recoverable.<sup>96</sup> It has been held that the law does not imply an agreement on the part of the principal to repay to the surety expenditures by the latter for attorney's

ing necessary costs and expenses, precludes surety on employee's fidelity bond from recovering from principal amount of costs, and expenses paid by surety in successfully defending employer's action against surety alone on bond, in absence of agreement by principal to indemnify surety, especially where there was no judicial determination in such action that principal had defaulted.—*Pacific Indemnity Co. v. Harper*, 94 P.2d 586, 14 Cal.2d 379, 124 A.L.R. 1169.

81. N.J.—*Appgar v. Hiler*, 24 N.J. Law 812.

82. U.S.—*U. S. v. U. S. Fidelity & Guaranty Co.*, D.C.Minn., 1 F.R.D. 112.

Ga.—*American Surety Co. v. Davis*, 157 S.E. 912, 43 Ga.App. 145.

La.—*American Bonding Co. of Baltimore v. Catlett*, App., 11 So.2d 50.

Pa.—*In re Bacher's Estate*, 69 Pa. Dist. & Co. 471.

Utah.—*Hartford Accident & Indemnity Co. v. Clegg*, 135 P.2d 919, 108 Utah 414.

**Contract held not contrary to public policy**

Ky.—*Maryland Casualty Co. v. Cowherd*, 145 S.W.2d 843, 284 Ky. 659.

**Joint control agreement held not to authorize recovery of expenses.**—*Commercial Casualty Ins. Co. v. Creager*, Ohio App., 43 N.E.2d 900.

83. Mass.—*Hartford Accident & Indemnity Co. v. Casassa*, 16 N.E.2d 860, 301 Mass. 246.

84. Mass.—*Sheehan v. Carroll*, 124 Mass. 67.

Miss.—*Whitworth v. Tilman*, 40 Miss. 76.

85. U.S.—*Leary v. U. S.*, Va., 40 S. Ct. 446, 253 U.S. 94, 64 L.Ed. 798. 50 C.J. p 276 note 38.

86. N.Y.—*Albany v. Andrews*, 52 N.Y.S. 1129, 29 App.Div. 20. 50 C.J. p 276 note 40.

87. Miss.—*Whitworth v. Tilman*, 40 Miss. 76.

88. S.C.—*Peurifoy v. Loyal*, 151 S.E. 579, 154 S.C. 267. 50 C.J. p 276 note 42.

89. S.C.—*Peurifoy v. Loyal*, supra.

90. Utah.—*Beaver County v. Home*

*Indemnity Co.*, 52 P.2d 435, 88 Utah 1.

91. U.S.—*Triangle Engineer Corp. v. Travelers Indem. Co.*, D.C.N.Y., 72 F.Supp. 112.

### **Reason for rule**

The bonding business is conducted for profit, and the premiums are based on some expectation of business expense.—*Triangle Engineer Corp. v. Travelers Indem. Co.*, supra.

92. Ky.—*Maryland Casualty Co. v. Wood*, 177 S.W.2d 365, 296 Ky. 476.

50 C.J. p 276 note 44.

93. Tex.—*U. S. Fidelity & Guaranty Co. v. Holcomb*, Civ.App., 269 S.W. 487.

94. Cal.—*Aetna Casualty, etc., Co. v. Ebniclos*, 286 P. 453, 104 Cal. App. 723.

95. Cal.—*Aetna Casualty, etc., Co. v. Ebniclos*, supra.

53 C.J. p 419 note 38.

96. Tex.—*Hays v. Housewright*, Civ.App., 133 S.W. 922.

Recovery of attorney's fees by indemnitee generally see *Indemnity* § 13 c.

fees in defending suit on the original obligation.<sup>97</sup> Under other authority, the surety can recover for attorney's fees paid by him in defending a suit, if such defense was made with the consent<sup>98</sup> or at the request<sup>99</sup> of the principal, or in the absence of notice from the principal that he is employing counsel to defend the action,<sup>1</sup> or in good faith and in the exercise of reasonable discretion,<sup>2</sup> or if the litigation was advantageous to the principal,<sup>3</sup> as by procuring the remission of a forfeiture of a bail bond.<sup>4</sup> If the surety was liable on a note with an

attorney's fee clause, and is compelled to pay such fee, it being reasonable, he can recover it from the principal.<sup>5</sup>

Attorney's fees may be recovered when the contract of the parties so provides,<sup>6</sup> even though the principal is also liable to his own attorneys for their fees,<sup>7</sup> and notwithstanding the principal notifies the surety not to employ counsel or to go to any expense in connection with the case, since he himself is in a position to defend the suit;<sup>8</sup> but, if the contract requires the consent of the prin-

97. *Tex.—Armstrong v. Anderson*, Civ.App., 91 S.W.2d 775, reversed on other grounds *Anderson v. Armstrong*, 120 S.W.2d 444, 132 Tex. 122, rehearing denied 132 S.W.2d 393, 132 Tex. 122.

#### Reason for rule

When a surety is forced to pay the debt of his principal, the surety becomes a simple contract creditor of the principal, and no rule of law allows a simple contract creditor to recover attorney's fees.—*Armstrong v. Anderson*, Civ.App., 91 S.W.2d 775, reversed on other grounds *Anderson v. Armstrong*, 120 S.W.2d 444, 132 Tex. 122, rehearing denied 132 S.W.2d 393, 132 Tex. 122.

98. *Pa.—In re Bacher's Estate*, 69 Pa. Dist. & Co. 471.  
50 C.J. p 276 note 47.

99. *Pa.—In re Bacher's Estate*, supra.

1. *Ala.—Kilgore v. Union Indemnity Co.*, 132 So. 901, 222 Ala. 375.

2. *Ky.—Corpus Juris cited in Maryland Casualty Co. v. Wood*, 177 S.W.2d 365, 367, 296 Ky. 476—*Maryland Casualty Co. v. Cowherd*, 145 S.W.2d 843, 284 Ky. 659—*Fidelity & Casualty Co. of New York v. Mauney*, 116 S.W.2d 960, 273 Ky. 400.

*Okla.—Maryland Casualty Co. v. Ballard*, 259 P. 528, 126 Okl. 270.

*Pa.—In re Bacher's Estate*, 69 Pa. Dist. & Co. 471—*New York Casualty Co. v. Gibbon & Kohl*, Com.Pl., 32 Luz. Leg. Reg. 33.

*Tex.—Indemnity Ins. Co. of North America v. McMillan*, Civ.App., 153 S.W.2d 264.

#### Employment of counsel by principal

Where principal employed competent local counsel who presented every available defense and defeated action against principal and surety, employment by surety of counsel who interposed no different defense was not reasonably necessary, and hence principal was not liable to surety for counsel fees and expenses incurred in making separate defense; principal's letter to counsel employed by surety expressing gratification over outcome of litigation and appreciation for co-operation of

surety and counsel did not preclude principal from avoiding such liability.—*Maryland Casualty Co. v. Wood*, 177 S.W.2d 365, 296 Ky. 476.

#### Principal acting as counsel

Where former judge, who was an attorney with ten years' experience, assured surety on his bond that he would himself defend action against him and surety for alleged negligence and that he would and could satisfy any judgment rendered therein, employment of counsel by surety was not reasonably necessary and judge was not liable to surety for counsel fees and expenses incurred in making separate defense, in absence of showing of any advantage surety might have obtained thereby.—*Maryland Casualty Co. v. Wood*, supra.

3. *Pa.—In re Bacher's Estate*, 69 Pa. Dist. & Co. 471.

4. *Ky.—Ellis v. Norman*, 44 S.W. 429, 19 Ky.L. 1798.

*Pa.—Abeles v. Mitchell*, 13 Phila. 81.

5. *Ill.—Ellis v. Conrad Seipp Brewing Co.*, 69 N.E. 808, 207 Ill. 291.  
50 C.J. p 276 note 51.

6. *U.S.—U. S. v. U. S. Fidelity & Guaranty Co.*, 1 F.R.D. 112.

*Ga.—American Surety Co. v. Davis*, 157 S.E. 912, 43 Ga.App. 145.

*La.—Conway v. Union Indemnity Co.*, 169 So. 73, 185 La. 240—*American Bonding Co. of Baltimore v. Catlett*, App., 11 So.2d 50.

*Minn.—U. S. Fidelity & Guaranty Co. v. Falk*, 7 N.W.2d 398, 214 Minn. 138.

*N.C.—Pink v. Hanby*, 18 S.E.2d 127, 220 N.C. 667—*Maryland Casualty Co. v. Teer*, 197 S.E. 558, 214 N.C. 29.

*Pa.—Massachusetts Bonding & Insurance Co. v. Smyser-Royer Co.*, Com.Pl., 58 York Leg. Rec. 109.

*Tex.—Indemnity Ins. Co. of North America v. McMillan*, 153 S.W.2d 264.

50 C.J. p 276 note 52.

Validity of contractual provision for attorney's fees see supra § 315 a.

Contract held not contrary to public policy

*Ky.—Maryland Casualty Co. v. Cowherd*, 145 S.W.2d 843, 284 Ky. 659.

#### Fees incurred in defense of action on bond

*U.S.—Triangle Engineer Corp. v. Travelers Indem. Co.*, D.C.N.Y., 72 F.Supp. 118.

*Ky.—Maryland Casualty Co. v. Cowherd*, 145 S.W.2d 843, 284 Ky. 659.

#### Suit to preserve surety's claim against principal's estate

*Pa.—In re Bacher's Estate*, 69 Pa. Dist. & Co. 471.

#### Recovery in consolidated action; third-party complaint

*U.S.—Triangle Engineer Corp. v. Travelers Indem. Co.*, D.C.N.Y., 72 F.Supp. 112.

#### Request that surety join defense

Subcontractor was liable under indemnity agreement to surety on bond for special counsel fees incurred by surety in defending action against surety on bond by contractor, notwithstanding surety allegedly would have incurred no such expense if it had allowed subcontractor to provide his own lawyer to defend the surety, and subcontractor did not request surety to join in defense of action.—*Triangle Engineer Corp. v. Travelers Indem. Co.*, supra.

Joint control agreement held not to authorize recovery of attorney's fees.—*Commercial Casualty Ins. Co. v. Creager*, Ohio App., 43 N.E.2d 900.

#### Indemnity agreement signed after execution of bond

Surety on bond was held not entitled, under indemnity agreement to recover from principal attorney's fees for defending suit on bond where application containing indemnity agreement was signed after execution of bond.—*Armstrong v. Anderson*, Civ.App., 91 S.W.2d 775 reversed on other grounds *Anderson v. Armstrong*, 120 S.W.2d 444, 132 Tex. 122, rehearing denied 132 S.W.2d 393, 132 Tex. 122.

7. *U.S.—Triangle Engineer Corp. v. Travelers Indem. Co.*, D.C.N.Y., 72 F.Supp. 112.

50 C.J. p 276 note 52 [b].

8. *N.C.—Maryland Casualty Co. v. Teer*, 197 S.E. 558, 214 N.C. 29.

principal to defend, a surety, who has defended without obtaining such consent cannot recover;<sup>9</sup> nor can the surety recover under his contract for fees incurred by him in a situation against which the surety has also contracted to indemnify the principal.<sup>10</sup>

A surety can recover for attorney's fees incurred in the prosecution of a suit to enforce the principal's indemnity agreement.<sup>11</sup>

Counsel fees incurred in controversies collateral to the suretyship itself,<sup>12</sup> as in an action by the surety against the principal for premiums,<sup>13</sup> or in anticipation of loss thereunder when none actually occurred,<sup>14</sup> are not recoverable in an action on a contract of indemnity.

Where the amount is not specified in an agreement by the principal to pay attorney's fees, the surety can recover only reasonable fees.<sup>15</sup>

### § 336. Statutory Remedies

Statutory enactments giving the surety convenient remedies for enforcing his rights do not exclude available common-law remedies.

A number of statutory enactments give the surety more convenient remedies for enforcing his rights

as against the principal, as by provisions permitting him to have the suretyship established in the action against the principal, and on payment of the judgment to file a complaint and obtain an execution against the principal;<sup>16</sup> or, as discussed supra § 312, giving the surety the right to have the judgment against him and his principal stand and be enforced by execution against the principal; or authorizing recovery by a surety against his principal, whenever judgment is rendered against the surety, even though such judgment remains unpaid.<sup>17</sup>

Statutory remedies of the surety are cumulative and do not exclude such common-law remedy as might have been available to the surety before the statute.<sup>18</sup>

### § 337. — Summary Remedies

Statutes providing a summary remedy whereby a surety who has been charged may move for judgment against the principal are strictly construed, and a party claiming thereunder must bring himself within the statutory provisions and conform thereto.

A summary remedy is sometimes provided by statute whereby a surety who has been charged may move for judgment against the principal.<sup>19</sup> Such statutes are constitutional,<sup>20</sup> but they are in derogation

9. Tex.—American Surety Co. v. Lehr, Civ.App., 93 S.W. 681.

10. N.Y.—Home Indem. Co. v. Mangano, 57 N.Y.S.2d 190, affirmed 66 N.Y.S.2d 635, 271 App.Div. 873, appeal denied 70 N.Y.S.2d 135, 272 App.Div. 757.

W.Va.—National Surety Co. v. Conley, 152 S.E. 3, 108 W.Va. 589.

Same surety on bonds of sheriff and deputies

N.Y.—Home Indem. Co. v. Mangano, 57 N.Y.S.2d 190, affirmed 66 N.Y.S.2d 635, 271 App.Div. 873, appeal denied 70 N.Y.S.2d 135, 272 App.Div. 757.

W.Va.—National Surety Co. v. Conley, 152 S.E. 3, 108 W.Va. 589.

11. La.—U. S. Fidelity & Guaranty Co. v. Sellers, 187 So. 869, 18 La. App. 366.

12. Okl.—American Surety Co. v. Cabell, 159 P. 352, 58 Okl. 145. 50 C.J. p 276 note 54.

Aiding or coercing administrator's performance of duties

Compensated surety on administrator's bond is not entitled, by reason of clause in indemnity agreement for payment of surety's obligation of attorney fees by reason of execution of bond, to payment for attorney's fees for supervising, aiding, or coercing administrator's performance of duties; nor does attempt of surety to obtain discharge of bond by requiring administrator

to account entitle surety to require administrator to pay fees of surety's attorney for such supervising, etc.—Indemnity Ins. Co. of North America v. Brennan, 42 N.Y.S.2d 633, 180 Misc. 430.

13. N.J.—Maryland Fidelity, etc., Co. v. Crouse, 90 A. 1026, 86 N.J. Law 55.

N.Y.—National Surety Co. v. Breuchaud, 160 N.Y.S. 77, 173 App.Div. 795.

14. La.—In re Mitchell-Borne Constr. Co., 82 So. 377, 145 La. 379.

15. Ky.—Maryland Casualty Co. v. Cowherd, 145 S.W.2d 843, 284 Ky. 659.

Tex.—U. S. Fidelity & Guaranty Co. v. Holcomb, Civ.App., 269 S.W. 487.

16. Ind.—Boys v. Simmons, 72 Ind. 593.

50 C.J. p 263 note 78.

17. Ohio.—Purviance v. Sutherland, 2 Ohio St. 478.

50 C.J. p 263 note 80.

Enforcement, before payment by surety, of payment by principal or other exoneration see supra § 303.

18. Neb.—Drexel v. Pusey, 77 N.W. 351, 57 Neb. 30.

50 C.J. p 265 note 19.

19. Mo.—Eisenbarth v. Equity Mut. Ins. Co., App., 189 S.W.2d 168.

50 C.J. p 263 note 82.

Judgment on notion or summary proceedings generally see Judgments §§ 219-227.

Summary proceedings generally see the C.J.S. title Summary Proceedings §§ 1-4, also 60 C.J. p 1013 note 1-p 1019 note 24.

Statutes as providing additional remedy

(1) Such statutes merely provide a remedy in addition to that which might be invoked under equitable powers providing for contribution or subrogation, not based on the instrument evidencing the original obligation, but arising from implied obligation to pay.—Perkins v. Hall, 17 S.E.2d 795, 123 W.Va. 707.

(2) Implied obligation to pay generally see supra § 316.

Supplementary judgment by inserting amount

Under statute dealing with summary proceedings, in surety's action for indemnity for debt not due, motion to supplement first judgment by inserting amount fixed by plaintiff meanwhile discharging obligation was proper without supplemental pleading setting up amount due plaintiff.—Cloud v. Middleton, 44 S.W.2d 559, 241 Ky. 595.

20. N.C.—North Wilkesboro Bank v. Wilkesboro Hotel Co., 61 S.E. 570, 147 N.C. 594.

50 C.J. p 263 note 83.

tion of the principles of common law,<sup>21</sup> and are construed strictly,<sup>22</sup> and the party claiming thereunder must bring himself within the statutory provisions.<sup>23</sup>

In enforcing his rights in a summary proceeding the surety is required to connect the instrument on which he was bound with the judgment paid,<sup>24</sup> and the record should show facts indicating the suretyship relation.<sup>25</sup> Notice to the principal is sometimes expressly required,<sup>26</sup> but, although there is authority to the contrary,<sup>27</sup> where notice is not expressly required by statute it has been said to be unnecessary,<sup>28</sup> this doctrine being operative, however, only within the state where it is held, and not empowering citizens of such state to obtain judgments against nonresidents without notice.<sup>29</sup>

A surety who has paid several sums may maintain as many motions, and recover several judgments against his principal.<sup>30</sup> A surety is entitled to his remedy, even though he confessed judgment without service of process.<sup>31</sup> Where there is a joint judgment against several sureties which none have paid, all must join in the summary action against the principal.<sup>32</sup>

**Defenses.** In summary proceedings by the surety, the principal may avail himself of any equitable circumstances to show that he was not bound to pay the entire demand.<sup>33</sup>

**Interest.** Under a statute providing for judgment against the principal for the sum paid by the surety, it has been held that interest on such sum cannot be awarded.<sup>34</sup>

**Judgment.** In a summary proceeding for judgment against the principal, the judgment must show the necessary jurisdictional facts;<sup>35</sup> an order or judgment in substantial compliance with the statute is sufficient,<sup>36</sup> and surplusage therein may be disregarded.<sup>37</sup> If there are several principals, the judgment against them should be joint,<sup>38</sup> although it is not absolutely void if rendered against some of them only;<sup>39</sup> and, if there are several sureties, the judgment for them, before payment, must be joint,<sup>40</sup> but after payment it must be separate in favor of those paying.<sup>41</sup>

Judgment on the motion may be entered against the principal's estate where the administrator is a party to the action.<sup>42</sup>

A judgment for the amount paid, with interest from a given date, is defective if the record does not show when the money was paid.<sup>43</sup>

### § 338. — Attachment

Before the surety has satisfied the debt, he may have an attachment against his principal's property only in cases provided for by statute, which may give the remedy even before the debt is due; after payment of the debt he may have such attachment.

A surety is not ordinarily entitled to an attachment against his principal's property before he has satisfied the debt,<sup>44</sup> but after payment of the debt by the surety he may have an attachment,<sup>45</sup> and under various statutes the surety is given the remedy by attachment before payment, or even before the debt is due, as a means of enforcing indemnity against loss by reason of his suretyship.<sup>46</sup> Under

21. Ark.—Prairie Creek Coal Min. Co. v. Kittrell, 155 S.W. 496, 107 Ark. 361.

50 C.J. p 263 note 84.

22. N.C.—North Wilkesboro Bank v. Wilkesboro Hotel Co., 61 S.E. 570, 147 N.C. 594.

50 C.J. p 263 note 86.

23. Miss.—Dibrell v. Dandridge, 51 Miss. 55.

50 C.J. p 264 note 87.

24. Ala.—Brown v. Wheeler, 3 Ala. 287.

25. Miss.—Brown v. Oldham, 1 Miss. 493.

26. Ind.—Bragg v. Cason, 4 Ind. 632.

50 C.J. p 264 note 90.

27. Ala.—Brown v. Wheeler, 3 Ala. 287—Scott v. Bradford, 5 Port. 443.

28. Tenn.—Newnan v. Campbell, Mart. & Y. 63—Williams v. Greer, 4 Hayw. 235.

29. La.—McNairy v. Bell, 5 Rob. 418.

30. Va.—Ayres v. Lewellin, 3 Leigh 609.

31. Tenn.—Roberts v. Rose, 2 Humphr. 145.

50 C.J. p 264 note 95.

32. Ohio.—Litler v. Horsey, 2 Ohio 209.

50 C.J. p 264 note 96.

33. Ky.—Tennell v. Dozier, Hard. p. 47.

50 C.J. p 264 note 97.

34. Ky.—Reading v. Holton, Hard. 68.

35. Tenn.—Jones v. Read, 1 Humphr. 335.

50 C.J. p 264 note 99.

Judgment in actions generally see supra § 334.

36. N.C.—North Wilkesboro Bank v. Wilkesboro Hotel Co., 61 S.E. 570, 147 N.C. 594.

37. N.C.—North Wilkesboro Bank v. Wilkesboro Hotel Co., supra.

38. Tenn.—Voorhies v. Dickson, 1 Sneed 348.

39. Tenn.—Hall v. Tompkins, 9 Humphr. 592.

50 C.J. p 264 note 4.

40. Tenn.—McNairy v. Eastland, 10 Yerg. 310—Newnan v. Campbell, Mart. & Y. 63.

41. Tenn.—Graham v. Green, 4 Hayw. 187.

42. Tenn.—Whiteside v. Latham, 2 Coldw. 91.

43. Ala.—Brown v. Wheeler, 3 Ala. 287.

44. La.—Bannon v. Barnett, 7 La. Ann. 105.

50 C.J. p 264 note 10.

Persons entitled to attachment generally see Attachment § 20.

45. Ky.—Scott v. Doneghy, 17 B. Mon. 321.

Neb.—Danker v. Jacobs, 112 N.W. 579, 79 Neb. 435.

46. Okl.—Walton v. Williams, 41 P. 1022, 5 Okl. 642.

50 C.J. p 264 note 12.

Enforcement by surety of payment by principal or other exoneration see supra § 303.

such statutes the remedy is available only in cases provided for by them,<sup>47</sup> but a principal who induces the surety to sue out attachments will not be heard to object that there was no cause therefor.<sup>48</sup>

*Note indorsed to surety.* Where the payee of a note indorses it before maturity to a surety thereon, the surety is entitled to an attachment if the payee could have obtained one,<sup>49</sup> but it has been held otherwise where the note was indorsed to

the surety after maturity.<sup>50</sup>

*Attachment of guardian.* A remedy by attachment of a delinquent guardian to enforce the delivery of the estate by him to his successor does not extend to justify such attachment in favor of a surety who has made good the deficiencies of a removed guardian, the claim of such surety not differing from any original debt for which no arrest can be made.<sup>51</sup>

### C. AS TO THIRD PERSONS

#### § 339. In General

A surety's rights or remedies as to third persons, including a surety for the debtor in a distinct demand, depend on the language of the particular instrument involved and the relationship of the parties.

The theory that payment by the surety to the creditor relates back to the time when the contract of suretyship was entered into, as discussed supra § 316 a, cannot be invoked to do injustice as against third persons,<sup>52</sup> and cannot be resorted to in order to give the surety rights which the obligee himself never had.<sup>53</sup>

A bill by the surety on a bond to the United States for the payment of a tax on a designated quantity of oil, to require the collector of internal revenue to assert a lien on the oil and for the appointment of a receiver, has been held dismissible as to the collector as without equity.<sup>54</sup>

The rights of a surety, as against third persons, in security given for the protection of the surety are discussed supra § 318, and in security given to a cosurety, infra § 348.

*As against another surety.* One surety of a non-resident debtor cannot, by bill or attachment in chancery, draw from another, who is surety for such debtor in a distinct demand, any funds which he may owe the nonresident, to the prejudice of such surety.<sup>55</sup>

*Third party beneficiary; materialman.* Where a

contractor's bond contains a provision that the bond is for the benefit of materialmen, as well as of the owner of property, a materialman's claim against the surety is not subject to the defenses available to the surety against the owner-promisee.<sup>56</sup>

*Return of security.* A surety after discharge is warranted in returning security to the principal on the surrender by the latter of the former's agreement so to return, notwithstanding such agreement had been indorsed with a request to deliver the collateral to another.<sup>57</sup> A surety who has been indemnified by the deposit of collateral by a third person and who has surrendered it under a mistake of fact has been held entitled to equitable relief by a decree for its return.<sup>58</sup> A surety paying a garnishment judgment on a claim against the person furnishing money as security, without knowledge that the money belongs to another, has been held not liable to the real owner.<sup>59</sup>

#### § 340. Reimbursement of Surety

A surety generally has no rights, as against third persons not parties to the suretyship or indemnity contracts, to reimbursement for money paid on account of the suretyship relation; but a partner's surety obliged to pay a firm debt can recover from the other partners, and a surety can recover from a third person, for whom the principal acted as agent, money paid in a matter within the scope of the agency.

Generally speaking, a surety has no rights, as against third persons not parties to the suretyship

47. Ky.—Patterson v. Caldwell, 1 Metc. 489.

50 C.J. p 265 note 18.

48. Ky.—Jarboe v. Colvin, 4 Bush 70.

49. Neb.—Danker v. Jacobs, 112 N. W. 579, 79 Neb. 435.

50. Colo.—Fitch v. Hammer, 31 P. 336, 17 Colo. 591.

51. Pa.—Noll's Estate, 5 Pa. Dist. 716.

52. N.D.—Gilbertson v. Northern Trust Co., 207 N.W. 42, 53 N.D. 502, 42 A.L.R. 1353.

53. N.D.—Gilbertson v. Northern Trust Co., supra.

54. U.S.—Johnson v. Thomas, D.C. Tex., 16 F.Supp. 1013.

55. Ky.—Sims v. Wallace, 6 B.Mon. 410.

56. N.C.—Asheville Supply & Foundry Co. v. Catawba Const. Co., 151 S.E. 93, 198 N.C. 177.

57. Pa.—Shields v. U. S. Fidelity, etc., Co., 119 A. 172, 276 Pa. 345. 50 C.J. p 277 note 60.

Return of security as between principal and surety see supra § 321.

58. U.S.—U. S. Fidelity & Guaranty Co. v. Heller, D.C.Pa., 259 F. 885.

59. Wash.—Young v. Globe Indemnity Co., 286 P. 651, 156 Wash. 260.

Evidence held to sustain finding that agent of bail bond surety believed money received from accused's sister as security belonged to latter, and not to another.—Young v. Globe Indemnity Co., supra.



or indemnity contracts, to be reimbursed for money paid on account of the suretyship relation.<sup>60</sup> So, a surety has no claim for reimbursement against a person merely because the latter has received money<sup>61</sup> or property<sup>62</sup> from the principal.

A surety on a contractor's bond has been held not entitled to judgment against a materialman contracting to indemnify the surety against loss, for fees of attorneys employed by the surety to represent it in concurso proceedings by the owner who completed the construction after the contractor abandoned it,<sup>63</sup> or for reimbursement of expenses of the surety's adjuster in investigating the claims of the owner.<sup>64</sup> A warrantor who, by agreement with the surety on a contractor's bond, expressly made himself solidarily liable with the contractor for the surety's loss may not assert, as a defense to the surety's call in warranty, that the surety has not exercised the rights of the contractor under the contract with the owner.<sup>65</sup>

*Surety for one of several debtors.* If a person becomes surety for one only of two joint debtors, he cannot recover from the other;<sup>66</sup> but, where a surety for one partner is obliged to make payment of what is actually a firm debt, he can recover from the other partners.<sup>67</sup>

*Priority of right.* Where a surety, by the terms of a bond given for the faithful performance of a contract, assumed obligations to make certain payments under certain conditions, its obligations and rights, when called on to perform, relate back to the date of giving the bond, so that, by virtue of an assignment to it by the contractor in the application for the bond, it has a right to money owed by the obligee to the contractor prior to the right of one receiving an assignment of claims from the contractor after the date of execution of the bond.<sup>68</sup>

*Surety on customs duty bonds.* Where bonds have been executed by one member of a firm to secure duties to the United States government on property imported into the United States, the other copartner is not liable to reimburse the surety.<sup>69</sup> So, a surety who pays a bond given by a consignee for duties cannot look to the consignor or real owner.<sup>70</sup>

*Where principal was agent for another.* If the principal acted as the agent of another person, and the surety pays money in a matter within the scope of such agency, the surety can recover from such third person,<sup>71</sup> although the existence of the agency was unknown to the surety at the time of payment.<sup>72</sup>

### § 341. Contribution

The absence of liability of a surety for contribution to persons other than cosureties is discussed infra § 353.

Examine Pocket Parts for later cases.

### § 342. Wrongful Acts

A surety injured by the wrongful or fraudulent act of a third person dealing with the principal may maintain an action against such person.

The bail of a person arrested on a *capias ad respondendum* may, at common law, maintain an action against a person who fraudulently aids and assists the principal in absconding from the state, in consequence of which the bail is compelled to pay the debt.<sup>73</sup> Also, a surety on a guardian's bond may recover from a third person funds transferred to him by the principal in violation of a trust where such third person had knowledge of the facts;<sup>74</sup> and the mere fact that mortgages securing loans by

60. Cal.—In re Clear Lake Beach Co., D.C.Cal., 12 F.Supp. 250.

50 C.J. p 277 notes 62-64.

Right of surety to recover indemnity from distributees of estate of deceased principal see supra § 307 a.

Subrogation see the C.J.S. title Subrogation §§ 46-62, also 60 C.J. p 740 note 4-p 781 note 96.

61. N.Y.—Brown v. Houck, 41 Hun 16.

50 C.J. p 277 note 63.

62. N.C.—Cureton v. Moore, 55 N. C. 204.

50 C.J. p 277 note 64.

Right of surety to set aside fraudulent conveyance of principal see Fraudulent Conveyances § 77 b.

63. La.—Cook v. Ruston Oil Mills & Fertilizer Co., 127 So. 347, 170 La. 18.

64. La.—Cook v. Ruston, Oil Mills & Fertilizer Co., supra.

65. La.—Madison Lumber Co. v. Globe Indemnity Co., App., 161 So. 775, rehearing denied 163 So. 434.

66. Ohio.—Cunningham v. Clarkson, Wright p. 217.

50 C.J. p 277 note 65.

67. N.Y.—Donegan v. Moran, 5 N.Y. S. 575, 53 Hun 21.

50 C.J. p 277 note 66.

68. Neb.—Dakota County v. Central Bridge & Construction Co., 235 N.W. 309, 136 Neb. 118.

69. U.S.—Knox v. Devens, C.C. Mass., 14 F.Cas.No.7,905, 5 Mason 380.

50 C.J. p 277 note 67.

70. La.—Hawes v. Pierce, 1 Mart. N.S., 357.

50 C.J. p 278 note 68.

71. Tex.—McGregor v. Hudson, Civ. App., 30 S.W. 489.

50 C.J. p 278 note 69.

72. Mo.—Higgins v. Dellinger, 22 Mo. 397.

N.Y.—City Trust, etc., Co. v. American Brewing Co., 67 N.E. 62, 174 N.Y. 486.

73. N.C.—March v. Wilson, 44 N.C. 143.

74. N.J.—Stokes v. Burlington County Trust Co., 108 A. 863, 91 N.J.Eq. 39.

50 C.J. p 278 note 72.

Right of cestui que trust to follow trust property transferred to third persons generally see the C.J.S. title Trusts §§ 441-446, also 65 C. J. p 936 note 60-p 936 note 16.

the principal to the third person and by the third person to the principal individually were recorded | is not notice to the surety to estop it to maintain the suit in such a case.<sup>75</sup>

## IX. RIGHTS AND LIABILITIES BETWEEN COSURETIES

### A. IN GENERAL

#### § 343. In General

Cosuretyship is the relation between two or more sureties bound for the same duty of the principal and who as between themselves should share the loss caused by default of the principal.

Cosuretyship is the relation between two or more sureties who are bound to answer for the same duty of the principal and who as between themselves should share the loss caused by the default of the principal.<sup>76</sup> It has been said that cosuretyship must have a basis in intent and understanding of the parties.<sup>77</sup>

#### § 344. Who Are Cosureties

Cosureties are sureties who are legally bound on contracts of suretyship for the same debtor or obligor and for the same debt or obligation.

A cosurety is one who undertakes with another

to be responsible for the debt or duty of a third person;<sup>78</sup> and, therefore, as used in the plural, cosureties are sureties who are legally bound, as among themselves, on contracts of suretyship, for the same debtor or obligor and for the same debt or obligation,<sup>79</sup> the test of cosuretyship being a common liability on the same debt or obligation,<sup>80</sup> and a right of contribution.<sup>81</sup> This common liability, so as to constitute cosuretyship, may arise out of the same instrument,<sup>82</sup> and it may arise at the same time<sup>83</sup> or at different times.<sup>84</sup> The sureties may have become such without communicating or negotiating with each other,<sup>85</sup> and each without knowledge that the others had entered into the relation.<sup>86</sup> The relation may arise, although each surety has limited his liability to a portion only of the entire amount,<sup>87</sup> and although they are not bound in equal

75. Ky.—Taylor v. Harris, 176 S.W. 168, 164 Ky. 654.  
50 C.J. p 278 note 73.

76. Wis.—Hartford Accident & Indemnity Co. v. Worden-Allen Co., 297 N.W. 436, 238 Wis. 124.

77. U.S.—Feutz v. Massachusetts Bonding & Ins. Co., D.C.Mo., 85 F. Supp. 418.

78. Conn.—Monson v. Drakeley, 40 Conn. 552, 16 Am.R. 74.

79. U.S.—State of Arkansas v. Pufahl, C.C.Ark., 52 F.2d 116.

Ala.—Corpus Juris cited in U. S. Fidelity & Guaranty Co. v. Yelding Bros. Co. Department Stores, 143 So. 176, 183, 225 Ala. 307.

Ga.—Taff v. Larey, 116 S.E. 866, 29 Ga.App. 631.

Minn.—Stone-Ordean-Wells Co. v. Taylor, 166 N.W. 1069, 139 Minn. 432, L.R.A.1918E 93.

50 C.J. p 279 note 86.

80. Ala.—U. S. Fidelity & Guaranty Co. v. Yelding Bros. Co. Department Stores, 143 So. 176, 225 Ala. 307.

Ill.—Corpus Juris cited in Aetna Casualty & Surety Co. of Hartford, Conn. v. Village of Maywood, 262 Ill.App. 206, 221.

Mich.—French v. Young, 290 N.W. 861, 292 Mich. 443.

Minn.—Southern Surety Co. v. Tessum, 228 N.W. 326, 178 Minn. 495, 66 A.L.R. 1136.

N.Y.—Indemnity Ins. Co. of North America v. American Surety Co., 268 N.Y.S. 203, 239 App.Div. 522—In re General Indemnity Corpora-

tion of America, 289 N.Y.S. 1046, 159 Misc. 892.

Pa.—Corpus Juris cited in Fidelity & Casualty Co. of New York v. American Surety Co. of New York, 169 A. 226, 227, 313 Pa. 145.  
50 C.J. p 279 notes 86, 87.

"A common interest and a common burden alone are required to create the relation, and to enable the cosurety who has paid more than his due proportion to claim contribution from those who have paid less than their just proportion of the common liability."

U.S.—U. S. Fidelity, etc., Co. v. Naylor, Kan., 237 F. 314, 316, 151 C. C.A. 20.

Pa.—Fidelity & Casualty Co. of New York v. American Surety Co. of New York, 169 A. 226, 227, 313 Pa. 145.

Where liabilities of innocent independent sureties are in issue, the letter of their bonds must cover faithful performance of their respective principals of an obligation common to them and which creates accountability to the same creditor source.—Maryland Casualty Co. v. Gough, 51 N.E.2d 216, 72 Ohio App. 260.

81. Ohio.—Assets Realization Co. v. American Bonding Co., 102 N.E. 719, 88 Ohio St. 216, 251, Ann.Cas. 1915A 1194.

50 C.J. p 279 note 88.

82. U.S.—U. S. Fidelity, etc., Co. v. Naylor, Kan., 237 F. 314, 151 C.C.A. 20.

Pa.—Fidelity & Casualty Co. of New York v. American Surety Co. of New York, 169 A. 226, 313 Pa. 145.

83. U.S.—U. S. Fidelity, etc., Co. v. Naylor, Kan., 237 F. 314, 151 C.C. A. 20.

Minn.—Stone-Ordean-Wells Co. v. Taylor, 166 N.W. 1069, 1070, 139 Minn. 432, L.R.A.1918E 93.

Pa.—Fidelity & Casualty Co. of New York v. American Surety Co. of New York, 169 A. 226, 313 Pa. 145.

84. Ala.—Corpus Juris cited in U. S. Fidelity & Guaranty Co. v. Yelding Bros. Co. Department Stores, 143 So. 176, 183, 225 Ala. 307.

Ga.—Taff v. Larey, 116 S.E. 866, 869, 29 Ga.App. 631.

Minn.—Stone-Ordean-Wells Co. v. Taylor, 166 N.W. 1069, 1070, 139 Minn. 432, L.R.A.1918E 93.

50 C.J. p 279 note 92.

85. Ga.—Taff v. Larey, 116 S.E. 866, 869, 29 Ga.App. 631.

N.Y.—Norton v. Coons, 6 N.Y. 33.

86. Ala.—Corpus Juris cited in U. S. Fidelity & Guaranty Co. v. Yelding Bros. Co. Department Stores, 143 So. 176, 183, 225 Ala. 307.

Ga.—Taff v. Larey, 116 S.E. 866, 29 Ga.App. 631.

50 C.J. p 279 note 94.

Relation of accommodation indorsers to each other see Bills and Notes § 756.

87. N.Y.—Toucey v. Schell, 37 N.Y. S. 879, 15 Misc. 350.

amounts.<sup>88</sup> Defrauded makers of notes, transferred by the payee to an innocent holder as security, are as between themselves cosureties.<sup>89</sup> A surety may be the cosurety of another, although his liability as a surety is not personal but is limited to pledged property.<sup>90</sup> Persons who would otherwise not be cosureties may assume such relation by agreement between themselves.<sup>91</sup>

*Sureties who are not cosureties.* In accordance with the above definition sureties are not cosureties, where they are not bound for the same obligation or principal,<sup>92</sup> or where, although bound for the same obligation, they do not occupy between each other the same relative position in respect of such obligation,<sup>93</sup> as where the liability of one surety terminates at the instant the liability of the other begins.<sup>94</sup> The fact that a person is jointly and severally liable, by statute, for the acts of another does not make him a cosurety with the surety on such other's bond, covering such acts.<sup>95</sup> A surety who is not legally bound is not a "surety" in any real sense of the term and, therefore, is not a cosurety with other sureties.<sup>96</sup>

*Presumptions.* Where several persons execute the

same instrument in the same capacities as sureties, they are presumed to be cosureties,<sup>97</sup> as in the case of accommodation indorsers of an instrument prior to delivery thereof.<sup>98</sup> However, where they sign in different capacities, they are presumed not to be cosureties,<sup>99</sup> as in the case of an indorser and surety maker of a note<sup>1</sup> or of an acceptor and an indorser,<sup>2</sup> although they may become cosureties by an express understanding to that effect.<sup>3</sup>

*Sureties for broker.* Where two persons authorize their broker to pledge their securities as collateral for the broker's indebtedness on a loan, each becomes to the extent of their pledge a surety for such indebtedness, and as between themselves cosureties even without an agreement to that effect,<sup>4</sup> and such relationship continues as long as both continue sureties for the same debt,<sup>5</sup> and is not affected by an order by one of such parties for a broker's sale of sufficient securities held by the broker to pay any balance due the broker, so as to enable such party to demand his securities from the pledgee.<sup>6</sup> However, such relation of cosuretyship may be destroyed without an agreement between the sureties where they cease to be sureties for the

88. Ga.—Taff v. Larey, 116 S.E. 866, 869, 29 Ga.App. 631.

La.—Stockmeyer v. Oertling, 35 La. Ann. 467.

89. Neb.—Vian v. Hilberg, 196 N.W. 153, 111 Neb. 232.

50 C.J. p 279 note 97.

90. Or.—Schiska v. Schramm, 51 P. 2d 668, 151 Or. 647.

**Pledged bonds**

One who authorized a bank to pledge his bonds to county treasurer as security for deposit of county funds was held cosurety with surety on bank's depositary bond.—Schiska v. Schramm, *supra*.

91. N.Y.—Empire Trust Co. v. Bartley & Co., 16 N.Y.S.2d 248, 258 App.Div. 249.

92. U.S.—State of Arkansas v. Pu-fahl, C.C.A. Ark., 52 F.2d 116.

S.D.—American Surety Co. v. Western Surety Co., 22 N.W.2d 429, 71 S.D. 126.

Wis.—U. S. Fidelity & Guaranty Co. v. Commercial Casualty Ins. Co., 268 N.W. 111, 222 Wis. 151.

50 C.J. p 279 note 98.

**Sureties held not cosureties**

(1) In general.—Southern Surety Co. v. Nichols, 214 N.W. 137, 239 Mich. 158—50 C.J. p 279 note 98 [a].

(2) Surety for receiver and surety for assistant receiver.—Maryland Casualty Co. v. Gough, 65 N.E.2d 868, 146 Ohio St. 305.

(3) Sureties on separate bonds of separate guardians of same incom-

petent.—Southern Surety Co. v. Tes-sum, 228 N.W. 326, 178 Minn. 495, 66 A.L.R. 1136.

(4) A surety on a bond guaranteeing faithful administration of surviving parent as natural tutor of minors, and the surety on a bond guaranteeing payment of purchase price of property adjudicated to surviving parent owning property in common with minors.—Globe Indemnity Co. of New York v. Aetna Casualty & Surety Co. of Hartford, Conn., 192 So. 234, 193 La. 721.

93. N.Y.—Frederick Snare Corp. v. Globe Indemnity Co., 194 N.Y.S. 353, 201 App.Div. 505, affirmed 138 N.E. 439, 234 N.Y. 543.

50 C.J. p 279 note 99.

**Surety on obligation satisfying prior obligation**

Surety signing note, proceeds of which were used to take up former note on which he was also surety, is to be deemed maker as to cosurety.—Bazer v. Grimmett, 135 So. 54, 16 La.App. 613.

**Common obligation of separate principals**

Where sureties are bound on two different bonds for different principals, and surety on one bond assumes no responsibility for acts or defaults of principal on other bond, they are not cosureties, and the fact that there may be a default for which both principals are accountable, or for which they might both be charged jointly, does not make

the obligation common to both sureties.—Maryland Casualty Co. v. Gough, 65 N.E.2d 868, 146 Ohio St. 305.

94. Tex.—American Surety Co. v. North Texas Nat. Bank, Civ.App., 14 S.W.2d 88.

95. Ill.—Wanack v. Michels, 74 N.E. 84, 215 Ill. 87.

50 C.J. p 280 note 2.

96. Ohio.—Russell v. Failor, 1 Ohio St. 327, 59 Am.D. 631.

49 C.J. p 280 note 4.

97. Iowa.—Mockler v. Lohman, 170 N.W. 744, 185 Iowa 448.

50 C.J. p 280 note 5.

98. Wash.—Caldwell v. Hurley, 83 P. 318, 41 Wash. 296.

50 C.J. p 280 note 6.

99. Tenn.—Stacy v. Rose, Ch.App., 58 S.W. 1087.

50 C.J. p 280 notes 7, 8.

1. Ind.—Knopf v. Morel, 13 N.E. 51, 111 Ind. 570.

50 C.J. p 280 note 8.

2. U.S.—Robinson v. Kilbreth, C.C. Ohio, 20 F.Cas.No.11,957, 1 Bond 592.

Ala.—Moody v. Findley, 43 Ala. 167.

3. Ind.—Nurre v. Chittenden, 56 Ind. 462.

50 C.J. p 280 note 10.

4. N.Y.—Unangst v. Roe, 177 N.Y. S. 706, 107 Misc. 516.

5. N.Y.—Unangst v. Roe, *supra*.

6. N.Y.—Unangst v. Roe, *supra*.

same debt,<sup>7</sup> as where the broker and his creditor change the collateral.<sup>8</sup>

### § 345. — Sureties by Different Instruments

Sureties bound for a common principal to insure performance of the same duty or obligation are cosureties, although they are bound by different instruments.

Sureties who are bound for a common principal to insure the performance of the same duty or obligation are cosureties although they are bound by different instruments;<sup>9</sup> but not if the obligations are different,<sup>10</sup> as in the case of sureties on a renewal note and sureties on the original note.<sup>11</sup> Sureties on the general bond of an officer are not cosureties with the sureties on a bond given by such officer for some special purpose,<sup>12</sup> unless the general bond covers the duties for which the special bond is given.<sup>13</sup>

*Sureties on successive bonds* for the same obligation are cosureties if the bonds remain in force and are merely cumulative,<sup>14</sup> but not where the latter bond supersedes the former, and the liability of the surety on the first bond terminates as to the future when the second is given.<sup>15</sup> Sureties on different bonds given in successive steps in litigation are not

cosureties,<sup>16</sup> as in the case of sureties on a bond to pay a judgment and sureties for the original debt.<sup>17</sup>

### § 346. Rights and Liabilities in General

The rights and liabilities as between cosureties depend on the contract between them and the relationship each may sustain to the other.

Between cosureties there exists a number of rights and liabilities depending on the contract between them and the relationship each may sustain to the other.<sup>18</sup> Growing out of the relationship generally, there arises the right to contribution and the right of one cosurety to the benefit of security or indemnity in the hands of the other, as discussed *infra* §§ 347-371; and, since the relationship existing between them is one of mutual trust and confidence,<sup>19</sup> there is imposed on each of them a duty to do all in his power to avert or diminish the common liability.<sup>20</sup> As between themselves each, in the absence of other agreement, is equally liable for but a proportionate share of the debt,<sup>21</sup> and neither can force the other to bear the entire burden;<sup>22</sup> but sureties, who would otherwise be cosureties, may agree among themselves that one should be primarily liable,<sup>23</sup> and it is competent for a surety

7. N.Y.—Unangst v. Roe, *supra*.

8. N.Y.—Unangst v. Roe, *supra*.  
Taking additional or substituted security as discharge of surety see *supra* § 154.

9. Ala.—*Corpus Juris* cited in U. S. Fidelity & Guaranty Co. v. Yelding Bros. Co. Department Stores, 143 So. 176, 183, 225 Ala. 307.  
Ga.—Taff v. Larey, 116 S.E. 866, 869, 29 Ga.App. 631.

Iowa.—New Amsterdam Casualty Co. v. Bookhart, 235 N.W. 74, 212 Iowa 994, 76 A.L.R. 897.

Ohio.—Commercial Casualty Ins. Co. v. Knutsen Motor Trucking Co., 173 N.E. 241, 36 Ohio App. 241.

Pa.—Fidelity & Casualty Co. of New York v. American Surety Co. of New York, 169 A. 226, 313 Pa. 145.

Tex.—Western Indemnity Co. v. Murray, Com.App., 237 S.W. 1109, 50 C.J. p 280 note 17.

10. Cal.—King v. Hartford Accident & Indemnity Co., 24 P.2d 906, 133 Cal.App. 711.

N.Y.—Indemnity Ins. Co. of North America v. American Surety Co., 268 N.Y.S. 203, 239 App.Div. 522, 50 C.J. p 281 note 18.

*Obligations of separate guardians on separate bonds*

Minn.—Southern Surety Co. v. Tesum, 228 N.W. 326, 178 Minn. 495, 66 A.L.R. 1136.

11. Neb.—Chapman v. Garber, 64 N.W. 362, 46 Neb. 16.  
N.C.—Hutchins v. McCauley, 22 N.C. 399.

12. Tex.—Lacy v. Rollins, 12 S.W. 314, 74 Tex. 566.  
50 C.J. p 281 note 21.

13. Minn.—Hartford Accident & Indemnity Co. v. Anderson, 256 N.W. 185, 192 Minn. 200.  
50 C.J. p 281 note 22.

14. Cal.—*Corpus Juris* quoted in Associated Constructors v. Paonessa, 88 P.2d 924, 925, 13 Cal.2d 241.  
Ind.—Gray v. American Surety Co. of New York, 175 N.E. 686, 93 Ind. App. 377—Southern Surety Co. v. State ex rel. Spraggins, 128 N.E. 622, 74 Ind.App. 31.

N.H.—*Corpus Juris* cited in Century Indemnity Co. v. Maryland Casualty Co., 193 A. 221, 223, 89 N.H. 121.  
50 C.J. p 281 note 23.

15. Ala.—*Corpus Juris* cited in U. S. Fidelity & Guaranty Co. v. Yelding Bros. Co. Department Stores, 143 So. 176, 225 Ala. 307.

Cal.—*Corpus Juris* quoted in Associated Constructors v. Paonessa, 88 P.2d 924, 925, 13 Cal.2d 241.  
Ga.—Tittle v. Bennett, 21 S.E. 62, 94 Ga. 405.

16. Cal.—King v. Hartford Accident

& Indemnity Co., 24 P.2d 906, 133 Cal.App. 711.

50 C.J. p 281 note 25.

Rights and liabilities as between sureties and successive sureties in judicial proceedings see *infra* § 390.

17. Ind.—Fidelity & Deposit Co. of Maryland v. Sluss, 15 N.E.2d 372, 214 Ind. 258, 117 A.L.R. 575.

N.Y.—Katz v. Mendelsohn, 184 N.E. 45, 260 N.Y. 434.

50 C.J. p 281 note 26.

18. Ind.—South Bend First Nat. Bank v. Mayr, 127 N.E. 7, 189 Ind. 299.

50 C.J. p 281 note 29.

Right to subrogation see the C.J.S. title Subrogation §§ 46-62, also 60 C.J. p 740 note 5-p 781 note 97.

19. Ky.—Lampton v. Staebler, 67 S.W.2d 473, 252 Ky. 405.

Pa.—Ely v. Edwards, 168 A. 362, 110 Pa.Super. 514.

S.C.—Butler v. Spencer, 107 S.E. 154, 116 S.C. 177.

50 C.J. p 281 note 32.

20. Ark.—Fishback v. Weaver, 34 Ark. 569.

21. Ky.—Crawford v. Wiedemann, 166 S.W. 595, 159 Ky. 18.

50 C.J. p 281 note 34.

22. Iowa.—Mockler v. Lohman, 170 N.W. 744, 185 Iowa 448.

23. Iowa.—Hoyt v. Griggs, 146 N.W. 745, 164 Iowa 672.

to limit the extent of his liability with respect to the others.<sup>24</sup> As between sureties respecting the same debt or obligation, who are not cosureties, the primary liability rests on the last.<sup>25</sup>

### § 347. Recourse to Indemnity to Cosurety

The rights and liabilities of cosureties with respect to indemnity or security in the hands of one of them are considered *infra* §§ 348-350.

Examine Pocket Parts for later cases.

### § 348. — From Principal

- a. Before mutual rights of cosureties are adjusted
- b. After mutual rights of cosureties are adjusted

#### a. Before Mutual Rights of Cosureties are Adjusted

- (1) In general
- (2) Distinct debts or obligations
- (3) Security given for benefit of one surety
- (4) Rights as to third persons

#### (1) In General

As a general rule cosureties are entitled to participate equally in benefits received by any one of them from the principal.

Cosureties are in general entitled to participate

equally in all benefits received by any one of their number from the principal,<sup>26</sup> such as payments made by the latter,<sup>27</sup> or collected from him by suit;<sup>28</sup> and they are entitled to the benefit of any security or indemnity which has been received by a cosurety from the principal,<sup>29</sup> or of the proceeds of any such security or indemnity,<sup>30</sup> whether such security or indemnity has been received before<sup>31</sup> or after<sup>32</sup> the surety receiving the security or indemnity has entered into the relationship and whether it has been received directly or indirectly.<sup>33</sup> As the rule is sometimes otherwise stated security<sup>34</sup> or indemnity<sup>35</sup> obtained by one surety inures to the benefit of all the cosureties. The cosurety receiving the security or indemnity is regarded as occupying the position of a trustee for the others,<sup>36</sup> with all the duties incident to such relationship;<sup>37</sup> and it makes no difference that it was given to him without the knowledge of the others.<sup>38</sup> However, a purchase of the principal's property by a surety, if made in good faith and for a reasonable consideration, will not give his cosureties any rights therein.<sup>39</sup>

If cosureties have paid unequal amounts, they are entitled to participate in proportion to the amounts they have paid.<sup>40</sup>

*Sharing consideration for indemnity.* Where a surety has obtained indemnity by the payment of a consideration, his cosurety cannot claim the benefit thereof without paying his proportion of such consideration.<sup>41</sup>

24. Ky.—Vansant's Ex'r v. Gardner's Ex'r, 42 S.W.2d 300, 240 Ky. 318.

N.C.—Citizens' Nat. Bank v. Burch, 59 S.E. 71, 145 N.C. 316.

25. N.Y.—National Surety Co. v. Trilby Realty Corporation, 293 N.Y.S. 219, 249 App.Div. 566.

Liability as between accommodation parties to bills and notes see Bills and Notes § 756.

26. Mass.—Labbe v. Bernard, 82 N.E. 688, 196 Mass. 551, 14 L.R.A., N.S., 457.

50 C.J. p 282 notes 41-43.

27. Ga.—McLewis v. Furgerson, 59 Ga. 644.

50 C.J. p 282 note 42.

28. Mo.—Harrison v. Phillips, 46 Mo. 520.

50 C.J. p 282 note 43.

29. Ala.—Tyus v. De Jarnette, 26 Ala. 280.

Ky.—Pigman v. Combs, 73 S.W.2d 33, 255 Ky. 228.

N.C.—Blanton v. Bostic, 35 S.E. 1035, 126 N.C. 418.

Okl.—Provine v. Wilson, 80 P.2d 291, 153 Okl. 77.

Pa.—Ely v. Edwards, 168 A. 362, 110 Pa.Super. 514.

Tex.—Lloyds Casualty Insurer v. Farrar, Civ.App., 167 S.W.2d 221, affirmed 174 S.W.2d 302, 141 Tex. 497.

50 C.J. p 282 note 44.

#### Reason for rule

The taking of such indemnity from the principal lessens his ability to pay. It would be a fraud on the cosureties to allow a surety to convert such indemnity to his sole use, in the absence of consent of the cosureties.—Beaver County v. Home Indemnity Co., 52 P.2d 435, 88 Utah 1.

30. Cal.—Williams v. Riehl, 59 P. 762, 127 Cal. 365, 78 Am.S.R. 60.

50 C.J. p 282 note 45.

31. Ohio.—Niece v. Rogers, 14 Ohio Cir.Ct. 646, 7 Ohio Cir.Dec. 671.

32. Cal.—Burr v. Gardella, 200 P. 493, 53 Cal.App. 377.

50 C.J. p 282 note 47.

33. Ala.—Steele v. Brown, 18 Ala. 700.

34. Ark.—Rose v. Million, 228 S.W. 376, 147 Ark. 530.

50 C.J. p 282 note 50.

35. Mo.—Broussard v. Mason, 173 S.W. 698, 187 Mo.App. 281.

50 C.J. p 282 note 51.

36. Pa.—Corpus Juris quoted in Ely v. Edwards, 168 A. 362, 364, 110 Pa.Super. 514.

S.C.—Butler v. Spencer, 107 S.E. 154, 116 S.C. 177.

50 C.J. p 283 note 52.

37. Pa.—Corpus Juris quoted in Ely v. Edwards, 168 A. 362, 364, 110 Pa.Super. 514.

50 C.J. p 283 note 53.

#### Extent of duty

Surety disposing of the securities and applying the proceeds was charged with a trust requiring from him more than the ordinary diligence which a man might use in his own affairs.—Butler v. Spencer, 107 S.E. 154, 116 S.C. 177.

38. Okl.—Provine v. Wilson, 80 P. 2d 291, 183 Okl. 77.

50 C.J. p 283 note 54.

39. W.Va.—Miller v. Lilly, 105 S.E. 826, 87 W.Va. 608.

50 C.J. p 283 note 55.

40. Wyo.—Bolln v. Metcalf, 42 P. 12, 44 P. 694, 6 Wyo. 1, 71 Am.S.R. 898.

50 C.J. p 283 note 56.

41. Ala.—White v. Banks, 21 Ala. 705, 56 Am.D. 283.

*Restraining relinquishment.* A bill in equity may be maintained to restrain the relinquishment of such security by the surety possessing it.<sup>42</sup>

### (2) Distinct Debts or Obligations

A surety with an individual claim against the principal need not share security or indemnity received on such claim with cosureties on a joint obligation.

Where security has been given to a surety for the benefit of all the sureties for a particular obligation, he cannot apply it to a separate debt of the principal to himself;<sup>43</sup> but a surety having an individual claim against the principal,<sup>44</sup> or being surety for the same principal on another distinct obligation,<sup>45</sup> is under no duty to share the security or indemnity obtained by him from the principal with his cosureties on the joint obligation, if it is insufficient to indemnify him as to his individual claim or as to the separate suretyship obligation, except as to individual demands against the principal purchased or arising after entering into the relationship.<sup>46</sup> Payment or security given for the benefit of sureties liable for a particular debt or obligation is not available to sureties who are liable for a distinct debt or obligation, although for the same principal.<sup>47</sup> Where the surety takes security to indemnify himself as surety on several debts, on which he is surety with different cosureties, and such security is insufficient to satisfy all of the debts, it should be applied on all of them in the proportion that each bears to the aggregate sum.<sup>48</sup>

### (3) Security Given for Benefit of One Surety

As a general rule cosureties have no right to participate in security given by the principal to a surety who stipulated for such security for his exclusive benefit at the time of entering into the relationship.

While it has been said that there are antagonistic authorities on the point,<sup>49</sup> as a general rule, a surety may, at the time of entering into the relationship, stipulate for security or indemnity for his exclusive benefit<sup>50</sup> and, in the absence of imposition or fraud,<sup>51</sup> or a showing that the security or indemnity was intended for the benefit of all,<sup>52</sup> the cosureties have no right to participate in the security or indemnity thus obtained,<sup>53</sup> except to the extent of the surplus remaining after the exoneration of the surety obtaining it.<sup>54</sup> On the other hand, where the security or indemnity so obtained is without the knowledge or consent of one becoming a cosurety at the same time as the surety receiving the security or indemnity,<sup>55</sup> or of one becoming surety with the understanding that the other will also become a cosurety with him,<sup>56</sup> the security or indemnity inures to the benefit of all, and security given to a surety after entering into the relationship inures equally to the benefit of all, even though intended for the sole benefit of the one to whom it was given,<sup>57</sup> unless the other sureties consent to the arrangement, in which case they waive their right of participation.<sup>58</sup> Of course, sureties may, by agreement, renounce their right to take the benefit of any securities they may respectively obtain.<sup>59</sup>

42. Mass.—Sheehan v. Taft, 110 Mass. 331.

Effect of relinquishment or loss of security see *infra* § 363.

43. Iowa.—Hoover v. Mowrer, 50 N. W. 62, 84 Iowa 43, 35 Am.S.R. 293. 50 C.J. p 283 note 59.

44. Tex.—Sanders v. Wettermark, 49 S.W. 900, 20 Tex.Civ.App. 175. 50 C.J. p 283 note 60.

45. Tex.—Urbahn v. Martin, 46 S. W. 291, 19 Tex.Civ.App. 93. 50 C.J. p 283 note 61.

46. N.H.—Brown v. Ray, 13 N.H. 102, 45 Am.D. 361. 50 C.J. p 284 note 62.

47. Ohio.—Assets Realization Co. v. American Bonding Co., 102 N.E. 719, 88 Ohio St. 216, Ann.Cas.1915A 1194. 50 C.J. p 284 note 63.

48. Minn.—Mueller v. Barge, 56 N. W. 36, 54 Minn. 314. 50 C.J. p 284 note 64.

49. Pa.—National Surety Co. v. Franklin Trust Co., 170 A. 683, 685, 313 Pa. 501.

50. U.S.—Fulton v. Lloyds Casual-

ty Co., C.C.A.Ohio, 75 F.2d 295, certiorari denied 55 S.Ct. 655, 296 U.S. 602, 79 L.Ed. 1689 and U. S. v. Squire, 56 S.Ct. 119, 296 U.S. 602, 80 L.Ed. 427.

Pa.—Corpus Juris edited in National Surety Co. v. Franklin Trust Co., 170 A. 683, 685, 313 Pa. 501. 50 C.J. p 284 note 65.

51. U.S.—Fulton v. Lloyds Casualty Co., C.C.A.Ohio, 75 F.2d 295, certiorari denied Squire v. Lloyds Casualty Co., 55 S.Ct. 655, 296 U.S. 602, 79 L.Ed. 1689 and U. S. v. Squire, 56 S.Ct. 119, 296 U.S. 602, 80 L.Ed. 427. 50 C.J. p 284 note 66.

52. U.S.—Fulton v. Lloyds Casualty Co., C.C.A.Ohio, 75 F.2d 295, certiorari denied Squire v. Lloyds Casualty Co., 55 S.Ct. 655, 296 U.S. 602, 79 L.Ed. 1689 and U. S. v. Squire, 56 S.Ct. 119, 296 U.S. 602, 80 L.Ed. 427. 50 C.J. p 284 note 67.

53. U.S.—Fulton v. Lloyds Casualty Co., C.C.A.Ohio, 75 F.2d 295, certiorari denied Squire v. Lloyds Casualty Co., 55 S.Ct. 655, 296 U. S. 602, 79 L.Ed. 1689 and U. S. v.

Squire, 56 S.Ct. 119, 296 U.S. 602, 80 L.Ed. 427.

Pa.—National Surety Co. v. Franklin Trust Co., 170 A. 683, 313 Pa. 501.

50 C.J. p 284 note 68.

54. N.C.—McDowell County v. Nichols, 42 S.E. 938, 131 N.C. 501—Moore v. Moore, 11 N.C. 358, 15 Am.D. 523.

55. Iowa.—Hoover v. Mowrer, 50 N. W. 62, 84 Iowa 43, 35 Am.S.R. 293. Kan.—People's State Bank v. T'Miller, 116 P. 884, 85 Kan. 272.

56. Ohio.—Niece v. Rogers, 14 Ohio Cir.Ct. 646, 7 Ohio Cir.Dec. 671. 50 C.J. p 284 note 71.

57. N.C.—Baber v. Hanle, 80 S.E. 57, 163 N.C. 538, 596, 12 A.L.R. 1518. 50 C.J. p 284 note 74.

58. Ala.—Tyus v. De Jarnette, 26 Ala. 280.

59. Iowa.—Security Sav. Bank v. Peddicord, 194 N.W. 79, 196 Iowa 215.

50 C.J. p 284 note 76.

(4) Rights as to Third Persons

A surety's right to security given to a cosurety is superior to the rights of subsequent judgment creditors of the principal.

The right of a surety to security given to a cosurety is superior to the rights of subsequent judgment creditors of the principal.<sup>60</sup> On the other hand, it has been held that, where the security given to the sureties is in the form of an absolute deed to land, the rights of one levying execution on the undivided interest of one of the sureties in such land are unaffected by the rights of the cosureties.<sup>61</sup> As against the creditors of the principal, a surety is entitled to security held by a supplemental surety.<sup>62</sup> Security given to a surety can be followed by his cosureties into the hands of third persons, if it can be done without injury to the latter.<sup>63</sup>

b. After Mutual Rights of Cosureties Are Adjusted

After payment of the creditor and adjustment of the rights and liabilities of the cosureties as among themselves, any security thereafter received by one of the sureties does not inure to the benefit of the others.

After the creditor has been paid, and the cosureties have adjusted their rights and liabilities as to each other, the equities among them cease, each becoming an independent creditor of the principal for the amount paid by such surety, so that any security<sup>64</sup> or funds<sup>65</sup> thereafter received by one of them from the principal do not inure to the benefit of the others. The rule has been held to be otherwise when the principal is a state collector.<sup>66</sup>

§ 349. — From Creditor

A surety receiving securities from the creditor on payment of the debt has been held to hold them for the benefit of the cosureties.

A surety, to whom the creditor has turned over securities in his possession on payment of the debt,

has been held to hold them, as a trustee, for the benefit of his cosureties.<sup>67</sup> On the other hand, it has been held that, where a surety paying the debt purchases property on the foreclosure of a mortgage assigned to him by the creditor, he holds the property free from any trust for his cosurety,<sup>68</sup> although he is chargeable with the fair cash value of the property at the time of the sale, less any expenses incurred in the foreclosure, in arriving at a basis for contribution.<sup>69</sup>

§ 350. — From Third Persons

Security given to a surety by a third person generally does not inure to the benefit of cosureties.

The rule, that any security or indemnity given to one cosurety inures to the benefit of all has been held to apply only to that given by the principal, and does not apply to security or indemnity given by a third person,<sup>70</sup> except that whatever security or advantage the surety receives from a third person, in consequence of the suretyship, he must apply to the relief of his cosureties.<sup>71</sup>

§ 351. Recourse to Security to Creditor or Obligor from Cosurety

It has been both affirmed and denied that security furnished to the creditor by a surety inures to the benefit of a cosurety who pays the debt.

A surety paying the principal obligation has been held not to be entitled to the benefit of security given to the creditor or obligor by a cosurety as collateral on the principal indebtedness<sup>72</sup> or as security for the latter's indorsement.<sup>73</sup> However, it has also been held that a surety who pays the debt and receives from the creditor a security which has been given by a cosurety is entitled to the benefit of the security, although only to the extent to which contribution may be exacted from the cosurety.<sup>74</sup>

60. Tenn.—Bobbitt v. Flowers, 1 Swan 511.  
50 C.J. p 284 note 78.

61. Me.—Jewett v. Bailey, 5 Me. 87.  
50 C.J. p 284 note 80.

62. Ohio.—Butler v. Birkey, 13 Ohio St. 514.

63. Vt.—Hinsdill v. Murray, 6 Vt. 136.

64. Ky.—Corpus Juris quoted in Hunt v. Starks, 75 S.W.2d 787, 789, 256 Ky. 130.  
50 C.J. p 285 note 84.

65. Me.—Gould v. Fuller, 18 Me. 364.

N.H.—Messer v. Swan, 4 N.H. 481.  
50 C.J. p 285 note 85.

66. Mo.—Harrison v. Phillips, 46 Mo. 520, 527.  
50 C.J. p 285 note 86.

67. Colo.—Milner v. Eskridge, 163 P. 1115, 62 Colo. 430.

68. N.Y.—Livingston v. Van Rensselaer, 6 Wend. 63.

69. N.Y.—Livingston v. Van Rensselaer, supra.

70. Utah.—Beaver County v. Home Indemnity Co., 52 P.2d 435, 88 Utah 1.  
50 C.J. p 285 note 92.

71. Mass.—Labbe v. Bernard, 82 N. E. 688, 196 Mass. 551.  
50 C.J. p 285 note 93.

72. Mass.—Bowditch v. Green, 3 Metc. 360.  
50 C.J. p 285 note 95.

73. Mich.—Marshall, etc., Bank v. Mooney, 171 N.W. 533, 205 Mich. 513.

50 C.J. p 285 note 96.

74. N.J.—Corpus Juris cited in Sanderson v. Cicero State Bank, 6 A. 2d 130, 132, 125 N.J.Eq. 450.

50 C.J. p 285 notes 97-1.  
Measure of contribution see infra § 369.

Assignment of security to surety

The rights of one cosurety against another because of the settlement of the principal's debt by one cosurety were unaffected by the fact that the collateral security given by the latter to the creditor was assigned to the cosurety settling the debt.—Sanderson v. Cicero State Bank, 6 A.2d 130, 125 N.J.Eq. 450.

## B. CONTRIBUTION

## § 352. Right to Contribution in General

- a. In general
- b. Nature and origin of right

## a. In General

The doctrine of contribution which permits one who discharges a common liability to recover of the coobligor the aliquot portion which the latter ought to bear is applicable in the field of suretyship.

The doctrine of contribution under which one who has discharged a common liability or burden may recover of another also liable the aliquot portion which the latter ought to pay or bear, as discussed in Contribution §§ 1-13, has been held to have its most common application in the field of suretyship, it being well settled that, as between cosureties, there exist a reciprocal right and liability to contribution in favor of the surety paying more than his proportionate share of a common obligation, to the extent of the excess paid, in order to equalize the common burden.<sup>75</sup> In order to be entitled to contribution, however, the obligation

paid by the surety must be valid and existing against the principal or the cosurety.<sup>76</sup>

## b. Nature and Origin of Right

Contribution between cosureties is based on equitable principles which equalize the common burdens which two or more may be called on to bear.

The reciprocal right and liability to contribution among cosureties is not founded on contract.<sup>77</sup> It is based on general considerations of justice,<sup>78</sup> or on equitable principles,<sup>79</sup> such as the maxim that equality is equity,<sup>80</sup> which equalize the common burdens which two or more may be called on to bear;<sup>81</sup> it is an equitable right growing out of the relationship between cosureties,<sup>82</sup> which springs up at the time the relationship is entered into,<sup>83</sup> and is fully consummated when the surety is compelled to pay the debt<sup>84</sup> or more than his portion thereof.<sup>85</sup> The law courts speak of it as being based on an implied contract between the sureties whereby each promises to reimburse the other for any payment in excess of his proportion of the debt,<sup>86</sup> and it is on

75. Md.—*Corpus Juris* cited in *Schindler v. Danzer*, 157 A. 283, 287, 161 Md. 384.

Ohio.—*Jones v. Berkley*, 12 Ohio Supp. 82.

Contribution among:

Guarantors see *Guaranty* § 115.

Indorsers of bills and notes see *Bills and Notes* § 756.

Successive sureties on administration bonds see *Executors and Administrators* § 946.

76. Ga.—*McLain v. Harwey*, 69 S.E. 123, 8 Ga.App. 360.

Effect of voluntary payments on right to contribution see *infra* § 367.

It is of essence of right to contribution that there be a valid obligation of the principal debtor.—*Russell v. Fallor*, 1 Ohio St. 327, 59 Am. D. 631.

77. Ill.—*Weger v. Robinson Nash Motor Co.*, 172 N.E. 7, 340 Ill. 81.

N.H.—*Century Indemnity Co. v. Maryland Casualty Co.*, 193 A. 221, 89 N.H. 121.

Ohio.—*Jones v. Berkley*, 12 Ohio Supp. 82.

Va.—*Houston v. Bain*, 196 S.E. 657, 170 Va. 378.

50 C.J. p 286 notes 9-11.

78. Neb.—*Exchange Elevator Co. v. Marshall*, 22 N.W.2d 403, 147 Neb. 48.

50 C.J. p 286 note 11 [c] (2), (3).

79. Ala.—*Drummond v. Drummond* 168 So. 428, 232 Ala. 401—*Scott v. McGriff*, 132 So. 177, 222 Ala. 344.

Ark.—*Taylor v. Joiner*, 24 S.W.2d 326, 180 Ark. 869.

Ky.—*Hunt v. Starks*, 75 S.W.2d 787, 256 Ky. 120.

Pa.—*National Surety Co. v. Franklin Trust Co.*, 170 A. 683, 313 Pa. 501, 95 A.L.R. 300.

50 C.J. p 286 note 11 [c] (1), (3).

80. Ky.—*Lampton v. Staebler*, 67 S.W.2d 473, 252 Ky. 405.

Va.—*Cooper v. Greenberg*, 61 S.E.2d 875.

50 C.J. p 286 note 11 [b].

81. Ill.—*Weger v. Robinson Nash Motor Co.*, 172 N.E. 7, 340 Ill. 81.

—*Trego v. Estate of Cunningham*, 108 N.E. 350, 267 Ill. 367.

Neb.—*Exchange Elevator Co. v. Marshall*, 22 N.W.2d 403, 147 Neb. 48.

N.H.—*Century Indemnity Co. v. Maryland Casualty Co.*, 193 A. 221, 89 N.H. 121.

Ohio.—*Jones v. Berkley*, 12 Ohio Supp. 82.

Va.—*Houston v. Bain*, 196 S.E. 657, 170 Va. 378.

50 C.J. p 286 note 11.

## Reasons for rule

(1) The rule of contribution is an equitable rule based on fact that those who become sureties for the same duty ought to share the results of the default.

S.C.—*Lucas v. Garrett*, 41 S.E.2d 212, 209 S.C. 521, 169 A.L.R. 660.

Wis.—*Hartford Accident & Indemnity Co. v. Worden-Allen Co.*, 297 N.W. 436, 238 Wis. 124.

(2) Other reasons.—*Connor v.*

*Craig*, 115 N.E. 309, 226 Mass. 255, 256—50 C.J. p 286 note 11 [a].

82. Ohio.—*Jones v. Berkley*, 12 Ohio Supp. 82.

Va.—*Cooper v. Greenberg*, 61 S.E.2d 875—*Houston v. Bain*, 196 S.E. 657, 170 Va. 378.

50 C.J. p 286 note 12.

83. Ohio.—*Jones v. Berkley*, 12 Ohio Supp. 82.

Va.—*Cooper v. Greenberg*, 61 S.E. 2d 875—*Houston v. Bain*, 196 S.E. 657, 170 Va. 378.

50 C.J. p 286 note 13.

84. Ohio.—*Jones v. Berkley*, 12 Ohio Supp. 82.

Va.—*Cooper v. Greenberg*, 61 S.E. 2d 875—*Houston v. Bain*, 196 S.E. 657, 170 Va. 378.

50 C.J. p 286 note 14, p 294 note 31 [a].

85. Ohio.—*Jones v. Berkley*, 12 Ohio Supp. 82.

86. Ala.—*Drummond v. Drummond*, 168 So. 428, 232 Ala. 401—*Scott v. McGriff*, 132 So. 177, 222 Ala. 344.

Ill.—*Weger v. Robinson Nash Motor Co.*, 172 N.E. 7, 340 Ill. 81—*Trego v. Estate of Cunningham*, 108 N.E. 350, 267 Ill. 367.

Mont.—*Kipp v. Paul*, 103 P.2d 678, 110 Mont. 518.

Ohio.—*Jones v. Berkley*, 12 Ohio Supp. 82.

50 C.J. p 286 note 15—24 C.J. p 291 note 68.

Legal presumption and implication

Ky.—*Vansant's Ex'r v. Gardner's Ex'r*, 42 S.W.2d 300, 240 Ky. 318.



this theory that the common-law courts began to enforce the right, as discussed *infra* § 372. The right has also been said to arise from the consideration that a surety engages to indemnify his cosurety against loss arising from his own neglect to pay his own share of the debt if the principal should neglect to pay.<sup>87</sup> It is a right, not a mere privilege dependent on judicial discretion,<sup>88</sup> and, except as to rights and property connected with the transaction,<sup>89</sup> the claim of a cosurety for contribution is no higher than that of any other claim.<sup>90</sup>

### § 353. Persons Entitled and Subject to Contribution

The right and liability to contribution usually exists among cosureties.

In the absence of an agreement to the contrary, cosureties are, as a general rule, entitled and subject to contribution among themselves,<sup>91</sup> on paying more than their proportionate shares of the debt, as considered *infra* §§ 364-368. Thus, sureties may be entitled to contribution where they are bound on the same debt or obligation for the same principal,<sup>92</sup> even though they became bound by different

87. Me.—Crosby v. Wyatt, 23 Me. 156.

An agreement to sign as cosurety with another involves a duty of making contribution and is in effect one for partial indemnity.—Kladivo v. Melberg, 227 N.W. 833, 210 Iowa 306.

88. Wis.—In re Koch, 134 N.W. 663, 148 Wis. 548.

"This equity having once arisen between cosureties, this reasonable expectation that each will bear his share of the burden is, as it were, a vested right in each, and remains for his protection until he is released of all his liability in excess of his ratable share of the burden."—Assets Realization Co. v. American Bonding Co., 102 N.E. 719, 88 Ohio St. 216, 253, Ann.Cas.1915A 1194—Jones v. Berkley, 12 Ohio Supp. 82, 85.

#### Assignable right

A surety's right to enforce contribution from his cosureties might be assigned to one of such cosureties for purposes of suit.—Lindblom v. Johnston, 158 P. 972, 92 Wash. 171.

89. Pa.—C. G. Gawthrop Co. v. Fibre Specialty Co., 101 A. 760, 257 Pa. 349.

90. Pa.—C. G. Gawthrop Co. v. Fibre Specialty Co., *supra*.

91. U.S.—Maryland Casualty Co. v. Cox, C.C.A.Tenn., 104 F.2d 354—Nelson v. Century Indemnity Co., C.C.A.Cal., 65 F.2d 765, certiorari denied Century Indemnity Co. v. Nelson, 54 S.Ct. 120, 290 U.S. 683, 78 L.Ed. 588.

Ala.—U. S. Fidelity & Guaranty Co. v. Yelding Bros. Co. Department Stores, 143 So. 176, 225 Ala. 307—Scott v. McGriff, 132 So. 177, 222 Ala. 344.

Ark.—Taylor v. Joiner, 24 S.W.2d 326, 180 Ark. 869.

Conn.—Jaronko v. Czerwinski, 166 A. 388, 117 Conn. 15, 90 A.L.R. 299.

Ga.—Reed v. Liberty Nat. Bank & Trust Co., 162 S.E. 154, 44 Ga.App. 544.

Ill.—Weger v. Robinson Nash Motor Co., 172 N.E. 7, 340 Ill. 81.

Ky.—Winston v. Slaton, 103 S.W.2d

675, 267 Ky. 831—Pigman v. Combs, 73 S.W.2d 33, 255 Ky. 228.

Md.—Schindel v. Danzer, 157 A. 283, 161 Md. 384.

Mich.—French v. Young, 290 N.W. 861, 292 Mich. 443.

Minn.—Sansome v. Samuelson, 24 N.W.2d 702, 222 Minn. 417, 170 A.L.R. 1158—Southern Surety Co. v. Tessum, 228 N.W. 326, 178 Minn. 495, 66 A.L.R. 1136.

Mo.—Phelps v. Scott, 30 S.W.2d 71, 325 Mo. 711, 71 A.L.R. 290.

N.H.—Century Indemnity Co. v. Maryland Casualty Co., 193 A. 221, 89 N.H. 121.

N.J.—Sanderson v. Cicero, 6 A.2d 130, 125 N.J.Eq. 450.

N.Y.—Salzberg v. Deutsch, 270 N.Y. S. 595, 150 Misc. 870.

Ohio.—Maryland Casualty Co. v. Gough, 65 N.E.2d 858, 146 Ohio St. 305—Commercial Casualty Ins. Co. v. Knutsen Motor Trucking Co., 173 N.E. 241, 38 Ohio App. 241—Jones v. Berkley, 12 Ohio Supp. 82.

Okl.—Martin v. Coogan, 55 P.2d 1037, 176 Okl. 391.

Or.—U. S. National Bank of Portland v. Embury, 25 P.2d 149, 144 Or. 488.

Pa.—Commonwealth ex rel. Schnader v. National Surety Co., 37 A.2d 753, 349 Pa. 599—Freeman v. Lundheim, 35 A.2d 295, 348 Pa. 248—In re Raymond's Estate, Orph., 19 Erie Co. 373.

S.D.—American Surety Co. v. Western Surety Co., 22 N.W.2d 422, 71 S.D. 126.

Tenn.—Ross v. Williams, 11 Heisk. 410—Gregory v. Beasley, 7 Tenn. App. 467.

Tex.—Lloyds Casualty Insurer v. Farrar, Civ.App., 167 S.W.2d 231, affirmed 174 S.W.2d 302, 141 Tex. 497—Pegues v. Moss, Civ.App., 140 S.W.2d 461, error dismissed—Lewis v. Easley, Civ.App., 34 S.W.2d 376.

Va.—Houston v. Bain, 196 S.E. 657, 170 Va. 378.

W.Va.—Charter v. Maxwell, 52 S.E. 2d 753.

50 C.J. p 287 note 23—13 C.J. p 827 note 80.

#### Well-established right

U.S.—In re Commercial Nat. Bank

of Philadelphia, D.C.Pa., 54 F. Supp. 570.

#### Consideration for obligation

Surety's liability on bond was sufficient consideration for renewal notes executed with his cosureties with respect to their right to contribution after paying notes.—Shattuck v. Ellis, 288 P. 162, 49 Idaho 330.

**Stockholders, cosureties with non-stockholder** for corporate debt, were not primarily liable with respect to their right to contribution, lacking proof they owed for unpaid stock subscriptions.—Shattuck v. Ellis, *supra*.

#### Pledged property as cosurety

A surety is entitled to contribution from one who pledges property for the same obligation from the proceeds of the pledged property; it is not necessary that the pledgor be personally bound.—Schiska v. Schramm, 51 P.2d 668, 151 Or. 647.

#### Sureties on recognizance bond

Minn.—Sansome v. Samuelson, 24 N.W.2d 702, 222 Minn. 417, 170 A.L.R. 1158.

Wash.—Belond v. Guy, 54 P. 995, 20 Wash. 160.

92. Ill.—Weger v. Robinson Nash Motor Co., 172 N.E. 7, 340 Ill. 81.

Mich.—French v. Young, 290 N.W. 861, 292 Mich. 443.

N.H.—Century Indemnity Co. v. Maryland Casualty Co., 193 A. 221, 89 N.H. 121.

N.Y.—Indemnity Ins. Co. of North America v. American Surety Co., 268 N.Y.S. 203, 239 App.Div. 522.

Ohio.—Jones v. Berkley, 12 Ohio Supp. 82.

Va.—Houston v. Bain, 196 S.E. 657, 170 Va. 378.

50 C.J. p 287 note 25.

**Test of cosuretyship, with respect to contribution, is a common liability to same parties for same debt or duty.**

N.Y.—Indemnity Ins. Co. of North America v. American Surety Co., 268 N.Y.S. 203, 239 App.Div. 522—In re General Indemnity Corporation of America, 289 N.Y.S. 1046, 159 Misc. 892.

instruments,<sup>93</sup> in different amounts,<sup>94</sup> at different times,<sup>95</sup> and without knowledge of each other's engagements.<sup>96</sup> In some jurisdictions contribution among cosureties has been provided for by statute,<sup>97</sup> such statutes, however, being merely codifications of the common law.<sup>98</sup>

**Surety for compensation.** The fact that the surety seeking contribution is a paid surety does not preclude his obtaining contribution from an accommodation cosurety.<sup>99</sup>

**Fraud.** A surety under no obligation to the ob-

ligee because of fraud, as discussed supra §§ 75-77, cannot be required to contribute to his cosurety.<sup>1</sup>

**Sureties who are not cosureties.** Where the relationship between a surety and another is not that of cosuretyship, the right and liability to contribution based on such relation does not exist.<sup>2</sup> Accordingly, a surety is not liable for contribution to his principal;<sup>3</sup> nor can a person who, although appearing to be a surety on an instrument, is in fact the principal, having received part or all of the sum borrowed,<sup>4</sup> or who has subsequently become the principal by assuming the indebtedness,<sup>5</sup> have con-

Ohio.—Jones v. Berkley, 12 Ohio Supp. 82.

#### Absence of Liability

Makers of demand notes transferred to bank as security not being liable thereon to bank were held not liable to accommodation maker who is liable to the bank as cosureties.—State & City Bank & Trust Co. v. Hedrick, 151 S.E. 723, 198 N.C. 374.

93. Ind.—Gray v. American Surety Co. of New York, 175 N.E. 686, 93 Ind.App. 377.

Iowa.—Federal Surety Co. v. France, 238 N.W. 460, 212 Iowa 1403—New Amsterdam Casualty Co. v. Bookhart, 235 N.W. 74, 212 Iowa 994, 76 A.L.R. 897.

N.H.—Century Indemnity Co. v. Maryland Casualty Co., 193 A. 221, 89 N.H. 121.

N.Y.—Indemnity Ins. Co. of North America v. American Surety Co., 268 N.Y.S. 203, 239 App.Div. 522.

N.C.—Humphrey v. American Surety Co., 197 S.E. 137, 213 N.C. 651—Adams v. Adams, 193 S.E. 661, 212 N.C. 337.

Ohio.—Commercial Casualty Ins. Co. v. Knutsen Motor Trucking Co., 173 N.E. 241, 36 Ohio App. 241.

S.D.—American Surety Co. v. Western Surety Co., 22 N.W.2d 429, 71 S.D. 126.

50 C.J. p 288 note 26.

94. N.Y.—Aspinwall v. Sacchi, 57 N.Y. 331—Armitage v. Pulver, 37 N.Y. 494.

Measure of contribution see *infra* § 369.

#### Different penalties

Sureties on second public depository bond for township's funds deposited in bank which failed were held liable in contribution to surety on first bond, notwithstanding bonds had different penalties, since the fact that the two bonds had different penalties did not constitute them independent or substitutionary obligations, the only effect being to determine proportions in which contribution should be made as between signers of respective instruments.—Gray v. American Surety Co. of New York, 175 N.E. 686, 93 Ind.App. 377.

95. Iowa.—Federal Surety Co. v.

France, 238 N.W. 460, 212 Iowa 1403—New Amsterdam Casualty Co. v. Bookhart, 235 N.W. 74, 212 Iowa 994, 76 A.L.R. 897.

50 C.J. p 288 note 28.

Right of contribution between cosureties on successive or additional bonds of executors or administrators see Executors and Administrators § 946.

96. Ind.—Gray v. American Surety Co. of New York, 175 N.E. 686, 93 Ind.App. 377.

50 C.J. p 288 note 29.

97. Ky.—Hunt v. Starks, 75 S.W.2d 787, 256 Ky. 120.

98. Ga.—Bigby v. Douglas, 51 S.E. 606, 123 Ga. 635.

99. Iowa.—New Amsterdam Casualty Co. v. Bookhart, 235 N.W. 74, 212 Iowa 994, 76 A.L.R. 897.

50 C.J. p 287 note 23 [d].

1. Mass.—Connor v. Craig, 115 N.E. 309, 226 Mass. 255.

2. Ark.—Taylor v. Joiner, 24 S.W.2d 326, 180 Ark. 869.

III.—Ætna Casualty & Surety Co. of Hartford, Conn., v. Village of Maywood, 262 Ill.App. 206.

Ky.—Simmernan v. National Deposit Bank of Owensboro, 24 S.W.2d 912, 232 Ky. 844.

Minn.—Southern Surety Co. v. Tesum, 228 N.W. 326, 178 Minn. 495, 66 A.L.R. 1136.

N.Y.—Indemnity Ins. Co. of North America v. American Surety Co., 268 N.Y.S. 203, 239 App.Div. 522—In re General Indemnity Corporation of America, 289 N.Y.S. 1046, 159 Misc. 892.

Ohio.—Maryland Casualty Co. v. Gough, 65 N.E.2d 858, 146 Ohio St. 305.

Pa.—Fidelity & Casualty Co. of New York v. American Surety Co. of New York, 169 A. 226, 313 Pa. 145.

S.D.—American Surety Co. v. Western Surety Co., 22 N.W.2d 429, 71 S.D. 126.

Wis.—Hartford Accident & Indemnity Co. v. Worden-Allen Co., 297 N.W. 436, 238 Wis. 124—U. S. Fidelity & Guaranty Co. v. Commercial Casualty Co., 268 N.W. 111, 222 Wis. 151.

50 C.J. p 278 note 74.

#### Surety on expired bond

A surety which paid to commissioners of city's sinking fund principal amount of bonds on which it was surety for depository bank in liquidation was not entitled to contribution from surety for previous year where previous surety's bond fixed its obligation for definite period, and there was no showing that principal defaulted during time fixed.—Commissioners of Sinking Fund of Louisville v. Anderson, D.C. Ky., 20 F.Supp. 217, affirmed for plaintiff, C.C.A., 110 F.2d 961, certiorari denied 61 S.Ct. 28, 311 U.S. 669, 85 L.Ed. 429—American Bonding Co. v. Anderson, D.C.Ky., 20 F.Supp. 217, reversed on other grounds for defendant, C.C.A., 110 F.2d 961.

3. U.S.—Hampel v. Mitchell, C.C.A. Tex., 36 F.2d 223.

50 C.J. p 278 note 75.

**One under subsisting liability for debt superseded by bond, signed by him and another as sureties, was held liable for full amount of note they jointly executed to procure money to pay judgment.**—Taylor v. Joiner, 24 S.W.2d 326, 180 Ark. 869.

#### Surety as maker of note

Act of surety in signing note, proceeds of which were used to take up other note on which he was surety, was not "accommodation" as respected cosurety and right to contribution.—Bazer v. Grimmett, 135 So. 54, 16 La.App. 613.

**Owner of entire debt as principal has no right of contribution against surety.**—Hampel v. Mitchell, C.C.A. Tex., 36 F.2d 223.

**Partners signing banking partnership's county depository bonds as sureties were held not entitled to contribution against other sureties.**—Hampel v. Mitchell, *supra*.

4. Ark.—Taylor v. Joiner, 24 S.W.2d 326, 180 Ark. 869.

Pa.—Lehigh Valley Trust Co. v. Strauss, 101 A. 1047, 258 Pa. 382.

50 C.J. p 278 note 76.

5. Ark.—Taylor v. Joiner, 24 S.W.2d 326, 180 Ark. 869.

50 C.J. p 278 note 77.

tribution from a surety for the debt. Where separate obligations of the principal are covered by different bonds with different sureties, the surety on one of such obligations cannot have contribution from the surety on another.<sup>6</sup> A mere surety is not liable for contribution to reimburse an indemnitor of a cosurety,<sup>7</sup> even where such indemnitor is the principal.<sup>8</sup> Where by statute a surety, who fails to justify after exception to his sufficiency is made, is released from liability on the undertaking, he is not liable for contribution to a cosurety.<sup>9</sup>

### § 354. — Surety Who Signs at Request of Cosurety

Some authorities hold that, in the absence of agreement to the contrary or of circumstances making contribution inequitable, a surety may have contribution from a cosurety who became such at the request of the surety.

It has been said by some courts that the right to contribution does not exist against a cosurety who became bound at the request of the surety seeking contribution.<sup>10</sup> However, other authorities hold that the right to contribution exists in such cases,<sup>11</sup> in the absence of circumstances making contribution inequitable,<sup>12</sup> or of an agreement or understanding

to the contrary,<sup>13</sup> or unless the cosurety signed for the benefit of the surety.<sup>14</sup> While these rules are in apparent conflict, it should be noted that in all the cases stating and adopting the former rule in principle there are present circumstances other than the mere request, thus casting serious doubt on the proposition whether a mere request alone is sufficient to defeat contribution.<sup>15</sup>

### § 355. — Contribution from Estate of Cosurety

A decedent's estate may be held liable for contribution to a surety on an obligation as to which the decedent was a cosurety.

On the death of one of several sureties who are cosureties, his liability for contribution to a cosurety may be enforced against his estate.<sup>16</sup>

### § 356. Limitation, Loss, or Waiver of Right

Contribution between cosureties generally is not enforced where it would be inequitable.

Since the right of contribution is founded on equitable principles, contribution between cosureties generally will not be enforced between them when it would be inequitable.<sup>17</sup> Thus a surety's breach

6. Ky.—Fidelity & Casualty Co. of New York v. Breathitt County, 123 S.W.2d 250, 276 Ky. 173.

#### General and special purpose bonds

The surety on revenue bond of sheriff, who had failed to account for and pay over to county all money collected as taxes, was not entitled to contribution from sureties on the sheriff's official bond.—Fidelity & Casualty Co. of New York v. Breathitt County, *supra*.

7. Kan.—Miller v. Kroenert, 106 P. 459, 81 Kan. 590.

8. Kan.—Miller v. Kroenert, *supra*.

9. N.Y.—Finkelstein v. Punie, 147 N.Y.S. 317, 162 App.Div. 119, appeal dismissed 119 N.E. 1042, 223 N.Y. 534.

10. Pa.—Mickley v. Stocksleger, 10 Pa.Co. 345.

50 C.J. p 288 note 34.

Contribution from supplemental sureties see *infra* § 388.

11. Ky.—Corpus Juris cited in Vansant's Ex'x v. Gardner's Ex'x, 42 S.W.2d 300, 302, 240 Ky. 318. 50 C.J. p 288 note 35.

#### Sounder and better rule

Ky.—Vansant's Ex'x v. Gardner's Ex'x, *supra*.

12. Wis.—American Exch. Bank v. Lake Motor Co., 218 N.W. 596, 195 Wis. 304.

13. Ky.—Vansant's Ex'x v. Gardner's Ex'x, 42 S.W.2d 300, 240 Ky. 318.

50 C.J. p 288 note 37.

Agreements affecting right to contribution see *infra* § 357.

14. Ky.—Vansant's Ex'x v. Gardner's Ex'x, *supra*. 50 C.J. p 288 note 38.

15. Mich.—McKee v. Campbell, 27 Mich. 497.

50 C.J. p 288 note 40.

16. Ala.—Handley v. Heflin, 4 So. 725, 84 Ala. 600.

Ill.—Trego v. Cunningham, 108 N.E. 350, 267 Ill. 367—Conover v. Hill, 76 Ill. 432.

Ind.—Beach v. Bell, 38 N.E. 819, 139 Ind. 167.

Mass.—Bachelder v. Fiske, 17 Mass. 464.

Miss.—Apperson v. Willbourn, 58 Miss. 439.

N.J.—Stothoff v. Dunham's Ex'rs, 19 N.J.Law 181.

N.Y.—Johnson v. Harvey, 84 N.Y. 363, 38 Am.R. 515—Barry v. Ransom, 12 N.Y. 462—Egbert v. Hanson, 70 N.Y.S. 383, 34 Misc. 596.

Pa.—Wetmore v. Dobbins, 2 Pa. Super. 110, 38 Wkly.N.C. 540.

Tenn.—Reeves v. Pulliam, 7 Baxt. 119.

Va.—Pace v. Pace's Adm'r, 30 S.E. 361, 95 Va. 792, 44 L.R.A. 459.

24 C.J. p 291 note 68.

Whether the cosurety died before or after the default, contribution can be had from his estate.—Wycokoff v. Gardner, N.J.Ch., 5 A. 801.

#### Contrary view

A surety paying the debts of his principal has been held to acquire

no rights against any persons other than the principal that the creditor did not have, and, therefore, could not compel the estate of a joint cosurety to contribute.—Waters v. Riley, 2 Harr. & G., Md., 305, 18 Am. D. 802.

17. Ill.—Aetna Casualty & Surety Co. of Hartford, Conn., v. Village of Maywood, 262 Ill.App. 206.

Ky.—Lampton v. Staebler, 67 S.W. 2d 473, 252 Ky. 405.

Pa.—National Surety Co. v. Franklin Trust Co., 170 A. 683, 313 Pa. 501, 95 A.L.R. 300.

S.C.—Lucas v. Garrett, 41 S.E.2d 212, 215, 209 S.C. 521, 169 A.L.R. 660.

Wis.—Hartford Accident & Indemnity Co. v. Worden-Allen Co., 297 N.W. 436, 238 Wis. 124.

50 C.J. p 286 note 11 [d].

#### Misrepresentations

Surety company which executed bonds for sheriff and paid claims resulting from sheriff's default, and which through its state agent represented to sheriff's prior sureties, who had executed bond on understanding that it was to be a temporary bond effective only until the sheriff should secure surety company to execute all bonds required of sheriff, that the bonds executed by the company released the prior sureties of liability on their bonds, was estopped from claiming contribution from the prior sureties who, because of the representations,

of duty toward his cosurety will defeat the former's right to contribution,<sup>18</sup> and so will any act on the part of the surety which increases the liability of the cosurety.<sup>19</sup> The right to contribution is not destroyed by the death of the cosurety,<sup>20</sup> and, where all of the cosureties have entered into an express agreement concerning contribution, the insolvency<sup>21</sup> or death<sup>22</sup> of one surety will not affect the liability of the others. The right is not defeated by a surety's participation in a preferential payment by the principal to the obligee,<sup>23</sup> or by the failure of the surety to present his claim against the bankrupt estate of the principal.<sup>24</sup> A surety against whom a judgment is rendered does not lose his right to contribution by suing out a writ of error and superseding the judgment.<sup>25</sup>

### § 357. — Agreement between Cosureties

The right to contribution by a surety against a cosurety may be limited or destroyed by agreement between the cosureties.

Sureties, who otherwise would be cosureties, and subject and entitled to contribution, may, by agreement, limit<sup>26</sup> or destroy<sup>27</sup> their rights to contribution, and generally regulate the order of their liability among themselves.<sup>28</sup> Such agreement may be either expressed<sup>29</sup> or implied,<sup>30</sup> and, although it may be by parol,<sup>31</sup> it must be supported by a valid

consideration;<sup>32</sup> if valid, such agreement supersedes the contract implied by law.<sup>33</sup> One of several sureties on the same obligation may limit his liability to the obligee without affecting his responsibility to a cosurety to contribute pro rata in a common loss.<sup>34</sup> A conditional agreement regulating the right of contribution cannot be enforced if the condition has not been complied with.<sup>35</sup>

### § 358. — Release or Discharge of Cosurety in General

A valid release by a surety of his cosurety terminates the liability of the cosurety for contribution.

A release by a surety of his cosurety terminates the liability of the latter for contribution,<sup>36</sup> provided, however, the release is supported by a sufficient consideration,<sup>37</sup> and such release is equivalent to payment by such cosurety, as far as other cosureties are concerned, so that the latter cannot be held liable for any portion of the share of such released cosurety.<sup>38</sup> Some authorities have held that a discharge of a surety from his liability to the creditor is a discharge of his obligation to contribute to a cosurety,<sup>39</sup> whether by operation of law<sup>40</sup> or by the act or neglect of the creditor.<sup>41</sup> Generally, however, it is held that a discharge of one cosurety by the creditor<sup>42</sup> or by operation of law<sup>43</sup> will not affect the right of the others to contribution

failed to have bond executed by them canceled.—National Union Indemnity Co. v. Giles, 120 S.W.2d 1043, 275 Ky. 171.

18. Wis.—In re Koch, 134 N.W. 663, 148 Wis. 543.  
50 C.J. p 289 note 47.

19. Ky.—Foley v. Robertson, 286 S.W. 851, 215 Ky. 647.  
50 C.J. p 289 note 48.

Discharge of sureties on guardian's bonds see Guardian and Ward, § 207 et seq.

20. S.C.—Aiken v. Peay, 36 S.C.L. 15, 53 Am.D. 684.

21. Tex.—Dennis v. Sanger, 39 S.W. 997, 15 Tex.Civ.App. 411.

22. Tex.—Dennis v. Sanger, supra.

23. Mo.—Eisleben v. Schueddig, App., 7 S.W.2d 282.  
50 C.J. p 289 note 52.

24. Mo.—Quackenboss v. Harbaugh, 249 S.W. 940, 298 Mo. 240.

25. Ala.—John v. Jones, 16 Ala. 454.

26. Okl.—Tucker v. Gant, 185 P.2d 205, 199 Okl. 233, 172 A.L.R. 1443.  
50 C.J. p 289 note 59.

27. Md.—Schindel v. Danzer, 157 A. 283, 161 Md. 384.

S.C.—Lucas v. Garrett, 41 S.E.2d 212, 215, 209 S.C. 521, 169 A.L.R. 660.

W.Va.—Huffman v. Manley, 98 S.E. 613, 83 W.Va. 503.

Wis.—Hartford Accident & Indemnity Co. v. Worden-Allen Co., 297 N.W. 436, 238 Wis. 124.  
50 C.J. p 289 note 60.

28. Md.—Schindel v. Danzer, 157 A. 283, 161 Md. 384.

Okl.—Provine v. Wilson, 80 P.2d 291, 183 Okl. 77.  
50 C.J. p 289 note 61.

29. Okl.—Tucker v. Gant, 185 P.2d 205, 199 Okl. 233, 172 A.L.R. 1443.  
—Provine v. Wilson, 80 P.2d 291, 183 Okl. 77.

50 C.J. p 289 note 57.

30. Okl.—Tucker v. Gant, 185 P.2d 205, 199 Okl. 233, 172 A.L.R. 1443.  
50 C.J. p 289 note 58.

31. Wash.—Handsaker v. Pedersen, 128 P. 230, 71 Wash. 218.  
50 C.J. p 289 note 62.

Indemnity contract as not within statute of frauds see Frauds, Statute of § 26.

32. Ark.—Barton v. Haltom, 125 S.W. 418, 93 Ark. 631.

Md.—Schindel v. Danzer, 157 A. 283, 161 Md. 384.

50 C.J. p 289 note 63.

33. Cal.—Kellogg v. Lopez, 78 P. 1056, 145 Cal. 497.

Pa.—Patterson v. Patterson, 23 Pa. 464.

Right to contribution as contract implied by law see supra § 343.

34. Okl.—Tucker v. Gant, 185 P.2d 205, 199 Okl. 233, 172 A.L.R. 1443.  
Or.—Rose v. Wollenburg, 59 P. 190, 36 Or. 154.

35. Ky.—Davezac v. Seiler, 20 S.W. 375, 93 Ky. 418, 14 Ky.L. 497.  
50 C.J. p 290 note 65.

36. Ohio.—Jones v. Berkley, 12 Ohio Supp. 82.

50 C.J. p 290 note 67.

37. Ky.—Kelley v. Ramsey, 195 S.W. 1111, 176 Ky. 584.

50 C.J. p 290 note 68.

38. Ala.—Cummings v. May, 8 So. 790, 91 Ala. 233.

50 C.J. p 290 note 69.

39. Ga.—McLin v. Harvey, 69 S.E. 123, 8 Ga.App. 360.

50 C.J. p 290 note 75.

40. Ga.—McLin v. Harvey, 69 S.E. 123, 8 Ga.App. 360.

50 C.J. p 290 note 76.

41. N.Y.—Waggoner v. Walrath, 24 Hun 443, affirmed 92 N.Y. 639.

50 C.J. p 290 note 77.

42. Tex.—Teague First State Bank v. Hare, Civ.App., 190 S.W. 1113.

50 C.J. p 290 note 70.

43. Ind.—Reiter v. Cumback, 27 N.E. 443, 1 Ind.App. 41.

50 C.J. p 290 note 71.

from the surety so discharged, unless they have consented to the release,<sup>44</sup> or have paid with knowledge of the facts,<sup>45</sup> or unless the release or discharge is of such character as terminates the contract under which the obligation of the sureties arose.<sup>46</sup> So, also, a surety who signs his bond with knowledge that a surety on a prior conditional bond is thereby relieved from liability has been held not to be entitled to contribution from such prior surety.<sup>47</sup> Payment in part by a new note of a surety does not constitute a novation so as to discharge a cosurety from his obligation to contribute.<sup>48</sup>

*Discharge by running of limitations against creditor.* A conflict of authority exists on the question whether a surety may enforce contribution against a cosurety as to whom the statute of limitations has barred an action by the creditor.<sup>49</sup> Some of the authorities hold that the right to contribution is lost or does not exist in such cases,<sup>50</sup> but in most jurisdictions the general rule is that, notwithstanding a surety has been discharged from liability to the creditor by the statute of limitations, he is nevertheless liable for contribution to a cosurety paying the debt in whose favor the statute has not run;<sup>51</sup> and a like rule applies where the estate of a surety has been discharged from liability to the creditor because of the latter's failure to present his claim against the estate within the statutory period.<sup>52</sup>

*Substitute surety.* A surety giving a substitute bond for the full amount of the obligation is not entitled to contribution from a prior surety whose liability was released before default on the giving of the substitute bond.<sup>53</sup>

### § 359. — Release or Discharge of Principal in General

Whatever discharges the principal from his obligation discharges a cosurety from his obligation of contribution.

Whatever discharges the principal from his obligation discharges a cosurety from his obligation of contribution,<sup>54</sup> so that a release of the principal by a surety will prevent such surety from obtaining contribution from his cosureties;<sup>55</sup> and likewise a discharge of the principal by the creditor or obligee releases all the sureties from liability for contribution.<sup>56</sup>

### § 360. — Extension of Time to Principal or to Surety

Generally an extension of time to the principal granted by a surety or by the creditor with the consent of a surety deprives such surety of his right to contribution from a cosurety.

Except where the matter is controlled by agreement or custom to the contrary,<sup>57</sup> an extension of time for payment or performance granted to the principal by a surety,<sup>58</sup> or by the creditor with the consent of a surety,<sup>59</sup> takes away the right of such surety to enforce contribution, even though his cosureties have not been prejudiced by the extension.<sup>60</sup> So a surety on a note which has been renewed by a cosurety and the principal is not liable for contribution to such cosurety when the latter is compelled to pay the renewal note,<sup>61</sup> unless the renewal was made without objection by the cosurety and with no intent to release him.<sup>62</sup>

44. N.Y.—Bouchaud v. Dias, 3 Den. 238.

50 C.J. p 290 note 72.

45. N.C.—Craven v. Freeman, 82 N. C. 361.

50 C.J. p 290 note 73.

46. N.H.—Boardman v. Paige, 11 N. H. 431.

47. N.C.—Beaman v. National Surety Corporation, 185 S.E. 624, 210 N.C. 126.

48. La.—Fox v. Corry, 89 So. 410, 149 La. 445.

50 C.J. p 290 note 78.

49. Ga.—Corpus Juris cited in Scott v. Gaulding, 2 S.E.2d 69, 71, 187 Ga. 751.

Neb.—Frew v. Scoular, 162 N.W. 496, 101 Neb. 131, L.R.A.1917F 1065, Ann.Cas.1918E 511.

50 C.J. p 290 note 80-p 291 note 82.

50. Ga.—McLain v. Harvey, 69 S.E. 123, 8 Ga.App. 360.

50 C.J. p 290 note 80, p 291 note 84.

51. Neb.—Frew v. Scoular, 162 N. W. 496, 101 Neb. 131, L.R.A.1917F 1065, Ann.Cas.1918E 511.

50 C.J. p 291 note 81.

52. N.Y.—Hard v. Mingle, 99 N.E. 542, 206 N.Y. 179, 42 L.R.A., N.S., 1131.

50 C.J. p 291 note 82.

53. Mich.—Fidelity & Deposit Co. of Maryland v. Hartshorn, 285 N. W. 462, 288 Mich. 575.

#### Defective release

A surety giving substitute bond for full amount of liability cannot avail himself of defective release against the surety on prior bond, where default occurred after substitute bond was given.—Fidelity & Deposit Co. of Maryland v. Hartshorn, supra.

54. Mass.—Hobart v. Stone, 10 Pick. 215.

50 C.J. p 291 note 86.

Release of principal as discharge of surety see supra §§ 223-226.

55. Minn.—Bull v. Rich, 100 N.W. 212, 101 N.W. 489, 92 Minn. 475.

50 C.J. p 291 note 87.

56. Tex.—Hamilton v. Glasscock, 9 S.W. 207.

50 C.J. p 291 note 88.

57. Me.—Crosby v. Wyatt, 23 Me. 156.

N.H.—Crosby v. Wyatt, 10 N.H. 318.

50 C.J. p 291 notes 90, 91.

58. Ala.—Clark v. Dane, 28 So. 960, 128 Ala. 122.

Tex.—Short v. Shannon, Civ.App., 211 S.W. 463.

59. N.H.—Crosby v. Wyatt, 10 N.H. 318.

N.Y.—Boughton v. Orleans Bank, 2 Barb.Ch. 458.

60. Tex.—Short v. Shannon, Civ. App., 211 S.W. 463.

50 C.J. p 292 note 94.

61. Ind.—Knight v. Kerfoot, 110 N. E. 206, 184 Ind. 31.

50 C.J. p 292 note 95.

62. W.Va.—Wolfe v. Kelley, 194 S. E. 77, 119 W.Va. 428.

### § 361. — Effect of Causing or Participating in Default of Principal

A surety loses his right to contribution, to the extent of the loss suffered by his cosureties through the wrongful act of the surety.

A surety loses his right to contribution, to the extent of the loss suffered by his cosureties,<sup>63</sup> if the default resulted from his wrongful act<sup>64</sup> or if he participated in the wrongful act of a principal,<sup>65</sup> unless all of the sureties were equally at fault or acquiesced in the wrong.<sup>66</sup>

### § 362. Effect of Indemnity from Principal; Reimbursement

A surety who has been fully reimbursed by the principal is not entitled to contribution from his cosureties.

A surety is not entitled to contribution if he has been reimbursed by the principal, or from the principal's estate.<sup>67</sup> Generally, however, the right to contribution is not affected by the fact that the surety has received security on account of his liability,<sup>68</sup> where such security is, or may prove to be, worthless,<sup>69</sup> or unavailable,<sup>70</sup> although the surety will be accountable to his cosurety for a proportionate part of the proceeds realized from such security or indemnity;<sup>71</sup> and a surety cannot claim contribution from his cosureties without crediting the latter with

funds received from the principal or in his behalf,<sup>72</sup> or without showing that such property failed to satisfy the debt.<sup>73</sup> In some jurisdictions the rule is stated that, where a surety has control or possession of security or indemnity against the common liability, he is under a duty to appropriate it to the common liability before seeking contribution from his cosureties;<sup>74</sup> so that a surety, being sued for contribution, is credited with payments received by the surety as indemnity, as discussed *infra* § 369. Of course a surety who has been fully indemnified by the principal after assuming the debt is not entitled to contribution.<sup>75</sup>

### § 363. Effect of Relinquishment or Loss of Security or Funds of Principal

As a general rule, voluntary relinquishment of security held by a surety, before termination of the liability of the cosureties, forfeits his right to contribution to the extent of the value of such security.

Subject to the necessity in some jurisdictions that there be present fraud in the relinquishment,<sup>76</sup> if, before the liability of his cosureties is terminated, a surety voluntarily relinquishes,<sup>77</sup> either before or after payment of the debt,<sup>78</sup> or loses or causes the loss of,<sup>79</sup> or negligently fails to enforce or apply to the debt,<sup>80</sup> security or indemnity held or controlled by him, he forfeits his right to contribution to the extent of the value of such security<sup>81</sup> and a surety

63. Mo.—Broussard v. Mason, 173 S.W. 698, 187 Mo.App. 281.

Pa.—Eshleman v. Bolenius, 22 A. 758, 144 Pa. 269.

64. Mo.—Dennig v. Meckfessel, 261 S.W. 55, 303 Mo. 525.

50 C.J. p 292 note 98.

65. Ga.—Healey v. Scofield, 60 Ga. 450—Scofield v. Gaskill, 60 Ga. 277.

66. Pa.—Pomeroy v. Sterrett, 38 A. 476, 183 Pa. 17.

Vt.—Briggs v. Boyd, 37 Vt. 534.

67. N.C.—Robinson v. McDowell, 41 S.E. 287, 130 N.C. 246.

50 C.J. p 293 note 11.

68. Cal.—Williams v. Riehl, 59 P. 762, 127 Cal. 365, 78 Am.S.R. 60.

50 C.J. p 292 note 2.

69. Ky.—Hall v. Gleason, 166 S.W. 608, 158 Ky. 789.

50 C.J. p 292 note 3.

70. Ala.—Norwood v. Washington, 33 So. 869, 136 Ala. 657.

50 C.J. p 292 note 4.

71. Ill.—Johnson v. Vaughn, 65 Ill. 425.

Mo.—Mosely v. Fullerton, 59 Mo. App. 143.

72. Mass.—Labbé v. Bernard, 82 N. E. 688, 196 Mass. 551, 14 L.R.A., N.S., 457.

50 C.J. p 292 note 6.

73. Mo.—Broussard v. Mason, 173 S.W. 698, 187 Mo.App. 281.

74. Ala.—Norwood v. Washington, 33 So. 869, 136 Ala. 657.

75. Ill.—Silvey v. Dowell, 53 Ill. 260.

50 C.J. p 293 note 10.

76. N.C.—Brandon v. Medley, 54 N. C. 313.

50 C.J. p 293 note 13.

77. Ky.—Lampton v. Staebler, 67 S. W.2d 473, 252 Ky. 405.

50 C.J. p 293 note 14.

78. N.J.—Paulin v. Kaighn, 29 N.J. Law 480.

79. Ky.—Lampton v. Staebler, 67 S. W.2d 473, 252 Ky. 405.

50 C.J. p 293 note 16.

80. W.Va.—Neely v. Bee, 9 S.E. 898, 32 W.Va. 519.

50 C.J. p 293 note 17.

#### Payments into sinking fund

Under contract obligating corporation to deposit percentage of proceeds from sale of rocks with trustee bank as sinking fund, in payment of notes indorsed by sureties, surety who became president of corporation and in sole charge thereof

had duty to continue payments into sinking fund, notwithstanding money could not be conveniently spared, as respects such surety's right to contribution from cosureties, and the fact that the corporation was losing money, and that surety who became corporation's president was supplying personal funds to enable corporation to exist, did not relieve the corporation of duty to continue payments into sinking fund.—Lampton v. Staebler, 67 S.W.2d 473, 252 Ky. 405.

81. Ky.—Lampton v. Staebler, supra.

50 C.J. p 293 note 18.

#### Pro tanto release of cosurety

Where a surety, on paying the principal's debt, received from the creditor a security given by the principal, and that surety lost the security through his act or negligence, his cosurety was not thereby released altogether from the duty of contribution, but was released pro tanto.—Sanderson v. Cicero State Bank, 6 A.2d 130, 125 N.J.Eq. 450.

Value is presumed to be full or face value unless the delinquent proves otherwise.

N.J.—Sanderson v. Cicero State Bank, supra.

50 C.J. p 293 note 18 [a].

who induces cosureties to surrender collateral security held by them for their protection cannot enforce his claim for contribution,<sup>82</sup> but his refusal to accept security will not defeat his right to contribution,<sup>83</sup> except where his cosurety has accepted security under conditions set by the principal which the surety refused to accept.<sup>84</sup> A surety holding funds of the principal which he should have applied to the debt and which he misapplied cannot have contribution.<sup>85</sup>

### § 364. Payment or Satisfaction

As a general rule, the right to contribution from a cosurety does not arise until the surety has paid or satisfied more than his proportionate share of the principal obligation.

Except as limited by the right of a surety to exoneration in equity before payment or as otherwise provided for by statute, it is generally held that a surety is not entitled to contribution from his cosureties,<sup>86</sup> and that a cause of action therefor does not accrue,<sup>87</sup> at law,<sup>88</sup> or in equity,<sup>89</sup> or in a statutory summary proceeding,<sup>90</sup> until the surety has paid, or satisfied, or discharged the en-

tire debt or more than his proportionate share thereof.<sup>91</sup> Although payment by a surety of more than his share entitles him to sue for contribution, even though there remain unadjudicated additional claims by the creditor against the sureties,<sup>92</sup> where the surety pays less than the whole debt, or less than his proportionate share thereof, he will be entitled to contribution if such payment discharges the whole debt as to himself and his cosureties.<sup>93</sup> The right to contribution on payment by a surety of part of the principal debt has been held to arise without regard to the extent of the part which has been paid.<sup>94</sup>

### § 365. — Mode and Sufficiency

Payment by a surety which entitles him to contribution from cosureties may be made by cash or property or by whatever is accepted by the creditor in discharge of the debt.

It is generally held that whatever of value is accepted by the creditor from a surety in payment or satisfaction of the debt,<sup>95</sup> whether it is cash,<sup>96</sup> or property,<sup>97</sup> or other obligations,<sup>98</sup> such as a

82. N.H.—Ayer v. Tilton, 42 N.H. 407.

83. Neb.—Smith v. Mason, 63 N.W. 41, 44 Neb. 610.  
50 C.J. p 294 note 21.

84. Ala.—White v. Banks, 21 Ala. 705, 56 Am.D. 283.  
50 C.J. p 294 note 22.

85. Pa.—In re Skiles, 61 A. 245, 211 Pa. 631.  
50 C.J. p 294 note 23.

86. N.Y.—Empire Trust Co. v. Bartley & Co., 16 N.Y.S.2d 248, 258 App.Div. 249.

Ohio.—Carey v. McCaslin, App., 43 N.E.2d 519.  
Tenn.—Gregory v. Beasley, 7 Tenn. App. 467.

W.Va.—Charter v. Maxwell, 52 S.E. 2d 753.  
50 C.J. p 294 notes 26, 31, 32.

87. Cal.—Jackson v. Lacy, 100 P.2d 313, 37 Cal.App.2d 551.

Mo.—Farmers & Mechanics Sav. Bank of Troy v. Jennings, App., 138 S.W.2d 703—Henneke v. Strack, App., 101 S.W.2d 743.

N.Y.—Hard v. Mingle, 99 N.E. 542, 206 N.Y. 179.  
50 C.J. p 294 note 27.

88. Ala.—Washington v. Norwood, 30 So. 405, 128 Ala. 333.  
50 C.J. p 294 note 28.

89. Ala.—Washington v. Norwood, supra.

S.C.—Gourdin v. Trenholm, 25 S.C. 362.

Exoneration in equity and other re-

lief before payment see infra § 372.

90. Cal.—San Joaquin Valley Bank v. Gate City Oil Co., 173 P. 781, 36 Cal.App. 791.  
50 C.J. p 294 note 30.

91. U.S.—American Bonding Co. v. Anderson, C.C.A.Ky., 110 F.2d 961 —Commissions of Sinking Fund of Louisville, Ky. v. Anderson, C.C.A.Ky., 110 F.2d 961, certiorari denied Commissioners of Sinking Fund of City of Louisville v. Anderson, 61 S.Ct. 28, 311 U.S. 669, 85 L.Ed. 429 —Maryland Casualty Co. v. Cox, C.C.A.Tenn., 104 F.2d 354.

Md.—Schindel v. Danzer, 157 A. 283, 161 Md. 384.

Mich.—French v. Young, 290 N.W. 861, 292 Mich. 443.

N.Y.—Hard v. Mingle, 99 N.E. 542, 206 N.Y. 179—Empire Trust Co. v. Bartley & Co., 16 N.Y.S.2d 248, 258 App.Div. 249.

Ohio.—Carey v. McCaslin, App., 43 N.E.2d 519—Jones v. Berkley, 12 Ohio Supp. 82.

Tex.—Pegues v. Moss, Civ.App., 140 S.W.2d 461, error dismissed.

Va.—Houston v. Bain, 196 S.E. 657, 170 Va. 378.

W.Va.—Charter v. Maxwell, 52 S.E. 2d 753.

50 C.J. p 294 notes 31-33.

Full payment by surety unnecessary  
Failure of surety on bank's depository bond to pay full penal sum of his undertaking did not deprive him of right of contribution from cosurety where depositor was fully

paid.—Schiska v. Schramm, 51 P.2d 668, 151 Or. 647.

#### General and special purpose bond

Surety on bond given by administrator under license to sell realty on making good principal's default in not accounting for proceeds is not entitled to contribution from sureties on administrator's general bond, since the former had paid only his proper share of the common liability.—Hartford Accident & Indemnity Co. v. Anderson, 256 N.W. 185, 192 Minn. 200.

92. Pa.—Malone v. Stewart, 18 Pa. Dist. 905.

50 C.J. p 295 note 34.

93. Ohio.—Carey v. McCaslin, App., 43 N.E.2d 519.

50 C.J. p 295 note 35.

94. La.—Leigh v. Wright, 164 So. 794, 183 La. 765.

95. Ill.—Weger v. Robinson Nash Motor Co., 172 N.E. 7, 340 Ill. 81.

50 C.J. p 295 note 37.

96. Ill.—Weger v. Robinson Nash Motor Co., supra.

50 C.J. p 295 note 38.

97. Neb.—Smith v. Mason, 63 N.W. 41, 44 Neb. 610.

#### Payment may be made in land

Mo.—Frost v. Tracy, 52 Mo.App. 308.

50 C.J. p 295 note 46.

98. Ill.—Weger v. Robinson Nash Motor Co., 172 N.E. 7, 340 Ill. 81.

Neb.—Smith v. Mason, 63 N.W. 41, 44 Neb. 610.

mortgage<sup>99</sup> commercial paper,<sup>1</sup> or bond<sup>2</sup> will be considered as payment entitling the surety to contribution from his cosureties. Similarly, whatever operates to discharge the original obligation of the cosureties is considered such payment as gives rise to contribution,<sup>3</sup> as where a surety individually has assumed the debt<sup>4</sup> or where he has given security for its payment.<sup>5</sup> The right to contribution exists, even though no payment at all has been made by the surety giving it, of the mortgage bond<sup>6</sup> or commercial paper<sup>7</sup> accepted by the creditor as payment, or even though payment thereof was not made until after the suit for contribution has been brought,<sup>8</sup> and even though it has subsequently been returned to the surety by the creditor as a gift.<sup>9</sup> However, a new note signed by the principal and one of the sureties, which, in effect, merely changes the form of the original contract, is not payment by the signing surety.<sup>10</sup>

### § 366. — Payment Not within Scope of Sureties' Undertaking

Payment by a surety to a creditor which is outside the contract on which he and his cosureties are liable does not of itself give the surety a right to contribution.

The mere fact that one cosurety has made payment to the creditor is not of itself sufficient to give him the right of contribution against the other cosureties, if such payment was outside the

contract on which the sureties were liable.<sup>11</sup> Thus, where a surety makes a payment to prevent the very default on the occurrence of which the sureties were to be liable, it has been held that a right of contribution does not exist, since the default for which the sureties had undertaken never occurred,<sup>12</sup> unless such payment has been authorized by the cosurety.<sup>13</sup>

### § 367. — Voluntary Payment

- a. In general
- b. After debt barred by statute of limitations

#### a. In General

As a general rule, a voluntary payment, without legal liability, is insufficient to give rise to the right to contribution.

As discussed supra § 352, it is of the essence of the right to contribution that there be a valid obligation of the principal debtor, so that a surety who voluntarily pays the debt when he is not under legal liability to do so is not generally entitled to contribution;<sup>14</sup> or, as otherwise stated, payment by a surety, to entitle him to contribution, must have been made under compulsion<sup>15</sup> of a legal obligation.<sup>16</sup> Except where it is otherwise provided by statute,<sup>17</sup> payment may be made as soon as

99. S.C.—Sloan v. Gibbs, 35 S.E. 408, 56 S.C. 480, 76 Am.S.R. 559.  
50 C.J. p 295 note 47.

1. Tenn.—Gregory v. Beasley, 7 Tenn.App. 467.

Tex.—Patterson v. Fuller, Civ.App., 110 S.W.2d 1230, error dismissed.  
50 C.J. p 295 note 48.

2. Ky.—Robertson v. Maxcey, 6 Dana 101.  
50 C.J. p 295 note 49.

3. Wis.—Fanning v. Murphy, 105 N.W. 1056, 126 Wis. 538, 110 Am.S.R. 938, 4 L.R.A.N.S., 666.  
50 C.J. p 295 note 41.

4. Kan.—Hotham v. Berry, 108 P. 801, 82 Kan. 412.  
50 C.J. p 295 note 42.

5. Ky.—Lytle v. Pope, 11 B.Mon. 297.

6. Ky.—Robertson v. Maxcey, 6 Dana 101.  
50 C.J. p 295 note 50.

7. Neb.—Smith v. Mason, 63 N.W. 41, 44 Neb. 610.  
50 C.J. p 295 note 51.

8. Pa.—Patterson v. Patterson, 23 Pa. 464.

9. Ky.—Stubbins v. Mitchell, 32 Ky. 535.

10. Ind.—Knight v. Kerfoot, 110 N.E. 206, 184 Ind. 31.  
50 C.J. p 295 note 54.

11. Iowa.—Novak v. Dupont, 83 N.W. 1062, 112 Iowa 334.  
50 C.J. p 296 note 56.

12. Or.—Ladd v. Portland Chamber of Commerce, 60 P. 718, 61 P. 1127, 62 P. 208, 37 Or. 49.  
50 C.J. p 296 note 57.

13. Ill.—Boals v. Wegener, 206 Ill. App. 325.  
50 C.J. p 296 note 58.

14. Wis.—Fanning v. Murphy, 105 N.W. 1056, 126 Wis. 538, 110 Am.S.R. 946, 4 L.R.A.N.S., 666.  
50 C.J. p 296 note 60.

15. Cal.—Schlitz v. Thomas, 216 P. 51, 61 Cal.App. 635.  
50 C.J. p 296 note 61.

16. Ga.—McLin v. Harvey, 69 S.E. 123, 8 Ga.App. 360.  
50 C.J. p 296 note 62.

17. Philippine.—Cacho v. Valles, 45 Philippine 107.  
50 C.J. p 296 note 63.

#### In Louisiana

(1) A Code provision establishes the rule that the right to contribution from cosureties arises only when the surety pays the debt in consequences of a lawsuit against

him.—Leigh v. Wright, 187 So. 649, 192 La. 224—50 C.J. p 296 note 63 [a].

(2) The reason underlying the Code rule is that no one of cosureties should be permitted to pay voluntarily a debt for which they are all bound and thereby cut the others off from such defenses as they might have or might wish to urge.—Leigh v. Wright, 184 So. 794, 183 La. 765.

(3) The rule does not apply, however, where the debt is paid by the surety on demand, and with the consent and concurrence of the cosureties.—Leigh v. Wright, 184 So. 794, 183 La. 765.

(4) Fact that the surety who was bound in solido with others to pay mortgage debt had made monthly payments as they fell due, notwithstanding acceleration provision in deed and mortgage did not take effect until failure for four months to make payment, was held not to preclude contribution from cosureties on theory that payments were prematurely made, where contribution was sought on suretyship contract which bound sureties to pay installments as they became due.—Leigh v. Wright, 16 So. 794, 183 La. 765.



the principal is in default if a legal liability exists,<sup>18</sup> although no suit has been brought by the creditor against the surety,<sup>19</sup> since the paying surety is under no compulsion to incur the additional expense of suits.<sup>20</sup>

Payment has been held compulsory<sup>21</sup> or not voluntary<sup>22</sup> in the sense that it defeats the right to contribution where there is a clear legal duty to pay the debt which is enforceable by judgment and execution or when it cannot be legally resisted,<sup>23</sup> even though made before maturity of the debt,<sup>24</sup> where it is apparent that the principal would be unable to pay the debt at maturity.<sup>25</sup> Payment is not voluntary because a surety does not interpose, against the creditor, a technical or unmeritorious defense,<sup>26</sup> or where he pays in ignorance of a good defense,<sup>27</sup> or waives a defense personal to himself;<sup>28</sup> but it is otherwise where payment is made by a surety who had knowledge of facts constituting a good defense,<sup>29</sup> even though made in good faith and under a mistaken belief that liability exists.<sup>30</sup>

Since mere delay of a creditor, unaccompanied by negligence, causing collateral in his possession to depreciate in value does not discharge the sureties, as discussed supra § 203, a cosurety is not relieved of his obligation to contribute when the surety pays the debt under such circumstances.<sup>31</sup>

Other instances of where payment has been held to be compulsory or not voluntary are set forth in the notes.<sup>32</sup>

#### b. After Debt Barred by Statute of Limitations

Payment of the debt by a surety after it has been barred by the statute of limitations against all the sureties is voluntary and does not entitle him to contribution.

Payment by one of the cosureties after the claim against them has been barred by the statute of limitations is voluntary and does not entitle him to contribution from the other cosureties,<sup>33</sup> but payment by a surety is not voluntary, when made before the statute has run in his favor, even though a cosurety has been discharged by the operation of the statute.<sup>34</sup>

### § 368. — Payment by Principal or with Principal's Funds

Payment of the debt by the surety with money of the principal does not entitle him to contribution from his cosureties.

Payment of the debt by the surety with money or property of the principal in his hands does not entitle him to contribution from his cosureties;<sup>35</sup> nor does payment on behalf of the principal, by a third person who has no recourse against the surety seeking contribution.<sup>36</sup> Where, however, appar-

18. Wis.—Fanning v. Murphy, 105 N.W. 1056, 126 Wis. 538, 110 Am. S.R. 946, 4 L.R.A., N.S., 666. 50 C.J. p 296 note 64.

19. Idaho.—Shattuck v. Ellis, 288 P. 162, 49 Idaho 330.

Ill.—Weger v. Robinson Nash Motor Co., 172 N.E. 7, 340 Ill. 81. 50 C.J. p 296 note 66.

#### Judgment against sureties

In action between cosureties for contribution, statute authorizing contribution from co-judgment debtors without new action was held inapplicable and not to make it necessary that a judgment be first obtained against the sureties.—Shattuck v. Ellis, 288 P. 162, 49 Idaho 330.

20. Mass.—Duffee v. Kelly, 117 N. E. 907, 228 Mass. 571.

Mo.—Sinclair v. Wismann, 167 S.W. 580, 183 Mo.App. 709.

21. Mont.—Corpus Juris cited in Kipp v. Paul, 103 P.2d 678, 110 Mont. 518.

50 C.J. p 297 note 68.

22. Pa.—A. Guckenheimer, etc., Co. v. Kann, 89 A. 807, 243 Pa. 75.

Wash.—Lindblom v. Johnston, 158 P. 972, 92 Wash. 171.

23. Ky.—Winston v. Slaton, 103 S. W.2d 675, 267 Ky. 831.

Vt.—Aldrich v. Aldrich, 56 Vt. 324, 48 Am.R. 791.

24. Kan.—Hotham v. Berry, 108 P. 801, 82 Kan. 412.

50 C.J. p 297 note 71.

25. Kan.—Hotham v. Berry, 108 P. 801, 82 Kan. 412.

50 C.J. p 297 note 72.

26. Del.—Deakne v. Buchanan, 8 Del. 124.

50 C.J. p 297 note 73.

27. Ind.—Houck v. Graham, 6 N.E. 594, 106 Ind. 195, 55 Am.R. 727.

50 C.J. p 297 note 74.

28. Ind.—Houck v. Graham, supra.

50 C.J. p 297 note 75.

29. Mass.—Skillin v. Merrill, 16 Mass. 40.

Ohio.—Russell v. Fallor, 1 Ohio St. 327, 59 Am.D. 631.

50 C.J. p 297 note 76.

30. Mass.—Skillin v. Merrill, 16 Mass. 40.

50 C.J. p 297 note 77.

31. Mass.—Duffee v. Kelly, 117 N. E. 907, 228 Mass. 571.

50 C.J. p 297 note 79.

32. N.Y.—Yawger v. American Surety Co., 106 N.E. 64, 212 N.Y. 292, L.R.A.1915D 481.

50 C.J. p 297 note 80.

#### Payment of judgment

(1) Where one surety has been forced to pay the whole amount of a judgment on the receiver's bond and the sureties are liable thereon, he may have contribution from other sureties who joined in signing the bond.—Ross v. Williams, 11 Heisk. Tenn. 410.

(2) This is true, even though the judgment paid by him may have been irregular or void.—Ross v. Williams, supra.

33. Kan.—Morris v. Hulme, 81 P. 169, 71 Kan. 628.

N.D.—Gronna v. Goldammer, 143 N. W. 394, 26 N.D. 122, Ann.Cas. 1916A 165.

50 C.J. p 297 note 82.

Limitations of actions for contribution see infra § 376.

34. Ohio.—Camp Bostwick, 20 Ohio St. 337, 5 Am.R. 669.

50 C.J. p 297 note 83.

35. Ga.—Linder v. Snow, 45 S.E. 732, 119 Ga. 41.

50 C.J. p 297 note 85.

Recourse to security or indemnity see supra §§ 347-350.

36. Colo.—Worthington v. Keely, 170 P. 194, 64 Colo. 91.

50 C.J. p 298 note 86.

ent means of payment given to him by his principal prove worthless or through subsequent claims of other persons have to be applied in some other manner, his right to contribution is not affected.<sup>37</sup>

### § 369. Measure of Contribution

- a. In general
- b. Effect of cosureties' bankruptcy, insolvency, or absence from jurisdiction
- c. Cosureties bound for different amounts
- d. When full amount paid is recoverable
- e. Basis of apportionment

#### a. In General

A surety paying the loss as to which all the sureties were equally bound is generally entitled to contribution from each of the cosureties of equal proportionate shares.

Since, as between themselves, cosureties are, in the absence of an agreement to the contrary, each liable for equal parts of the loss, as discussed supra § 346, where one of two or more cosureties has paid the whole or part of the debt for which they were all bound, his cosureties are each liable to him for equal proportionate shares of the amount paid,<sup>38</sup> although they are bound by separate instruments;<sup>39</sup> but in no case can the surety seeking contribution recover more than the excess he has paid beyond the amount which, as between himself and the cosureties, it was his duty to pay.<sup>40</sup>

Where, however, the sureties have limited the extent of the liability of each, as between themselves, by agreement, the measure of contribution is governed by such agreement,<sup>41</sup> except in the case of statutory bonds the liability on which may not be limited by agreement.<sup>42</sup> Although one of the cosureties has died, the other cosureties are liable only for such proportionate shares as they would have been liable for had not the former died.<sup>43</sup> Where partners have become sureties in the firm name, they are regarded, for the purpose of contribution, as one surety,<sup>44</sup> and the heirs of a cosurety are liable in such equal sums as amount in the aggregate to the proportionate share of their ancestor.<sup>45</sup>

#### b. Effect of Cosureties' Bankruptcy, Insolvency, or Absence from Jurisdiction

In equity and sometimes at law the amount to be contributed is apportioned among the solvent cosureties within the jurisdiction.

It has generally been held that, if contribution is sought at law, each surety is liable for no more than his exact aliquot proportion, ascertained by dividing the amount for which all the sureties were liable by their entire number, without respect to the solvency of any of them.<sup>46</sup> In equity, however, the amount for which the cosureties are liable in contribution is apportioned among the solvent sureties<sup>47</sup> within the jurisdiction,<sup>48</sup> in the event that any of them are insolvent or out of the jurisdiction. The equitable doctrine is sometimes followed at law,<sup>49</sup> particularly in those jurisdictions where

37. Vt.—*Prindle v. Page*, 21 Vt. 94, 50 C.J. p 298 note 88.  
Effect of indemnity from principal generally see supra § 362.

38. Ga.—*Reed v. Liberty Nat. Bank & Trust Co.*, 162 S.E. 154, 44 Ga. App. 544.

N.H.—*Century Indemnity Co. v. Maryland Casualty Co.*, 193 A. 221, 89 N.H. 121.

N.J.—*Sanderson v. Cicero State Bank*, 6 A.2d 130, 125 N.J.Eq. 450.  
N.Y.—*Salzberg v. Deutsch*, 270 N.Y. S. 595, 150 Misc. 870.

Ohio.—*Maryland Casualty Co. v. Gough*, 65 N.E.2d 858, 146 Ohio St. 305.

Okl.—*Martin v. Coogan*, 55 P.2d 1037, 176 Okl. 391.

Or.—*U. S. National Bank of Portland v. Embody*, 25 P.2d 149, 144 Or. 488.

Tex.—*Hollis v. Winfree*, Civ.App., 216 S.W.2d 625, refused no reversible error—*Lewis v. Easley*, Civ. App., 34 S.W.2d 376.

50 C.J. p 298 notes 90, 91.

39. N.H.—*Century Indemnity Co. v.*

*Maryland Casualty Co.*, 193 A. 221, 89 N.H. 121.

N.C.—*Humphrey v. American Surety Co.*, 197 S.E. 137, 213 N.C. 651.  
50 C.J. p 298 note 93.

40. U.S.—*Maryland Casualty Co. v. Cox*, C.C.A.Tenn., 104 F.2d 354.  
Md.—*Schindel v. Danzer*, 157 A. 283, 161 Md. 384.  
50 C.J. p 298 note 94.

41. Pa.—*A. Guckenheimer, etc., Co. v. Kann*, 89 A. 807, 243 Pa. 75.  
50 C.J. p 298 note 97.

**Contribution in different amounts**  
Cosureties in the same bond may be liable for contribution in different amounts where there is an agreement between them to that effect.—*Tucker v. Gant*, 185 P.2d 205, 199 Okl. 233, 172 A.L.R. 1443.

42. N.M.—*Fidelity & Deposit Co. of Maryland v. Richard*, 103 P.2d 628, 44 N.M. 424.

43. U.S.—*U. S. Fidelity, etc., Co. v. Naylor, Kan.*, 237 F. 314, 151 C.C. A. 20.

50 C.J. p 299 note 98.

44. La.—*Ferriday v. Purnell*, 2 La. Ann. 334.

Mass.—*Chaffee v. Jones*, 19 Pick. 260.

45. Mass.—*Wood v. Leland*, 1 Metc. 387.

46. U.S.—*U. S. Fidelity, etc., Co. v. Naylor, Kan.*, 237 F. 314, 151 C.C. A. 20.

50 C.J. p 299 note 3.

47. Mo.—*Phelps v. Scott*, 30 S.W.2d 71, 325 Mo. 711, 71 A.L.R. 290.

Va.—*Cooper v. Greenberg*, 61 S.E.2d 875.

50 C.J. p 299 note 4.

48. U.S.—*U. S. Fidelity, etc., Co. v. Naylor, Kan.*, 237 F. 314, 151 C.C.A. 20.

50 C.J. p 299 note 5.

49. Pa.—*Freeman v. Sundheim*, 35 A.2d 295, 348 Pa. 248.

50 C.J. p 299 note 6.

**Sureties lost right of division**  
where cosurety had become insolvent before plea for division was made by sureties.—*Commercial Bank & Trust Co. of Alexandria v. Turregano*, 134 So. 383, 172 La. 429.

there are no distinct courts of chancery<sup>50</sup> and where it has been so provided for by statute.<sup>51</sup>

### c. Cosureties Bound for Different Amounts

As a general rule, cosureties bound by separate instruments naming different amounts are liable for contribution in proportion to the amounts named in their respective instruments.

Except as to sureties on official bonds, the penalties of which are regulated by statute, who are liable to contribute equally regardless of the fact that they have justified for different amounts,<sup>52</sup> cosureties who have executed separate instruments for different amounts are liable for contribution in proportion to the amounts named in the respective instruments,<sup>53</sup> and limited, of course, to the penalties named therein;<sup>54</sup> and, where sureties on the same instrument are liable for different amounts, each must contribute the proportion that the amount for which he is liable bears to the aggregate sum.<sup>55</sup> However, the fact that one of the sureties on the same instrument has limited his liability to the obligee to a lesser amount than that for which the other surety is liable has been held not to reduce the amount which he must contribute to the surety paying the loss.<sup>56</sup>

### d. When Full Amount Paid Is Recoverable

A surety paying the debt may recover the entire amount from a cosurety whose wrongful acts caused the default of the principal.

In some cases a surety can recover the entire amount paid by him from another surety, as where the latter by his wrongful act caused the default of the principal<sup>57</sup> or where the amount sought to be recovered is interest charged to the principal on money borrowed by the surety from whom contribution is sought;<sup>58</sup> and where one of two or

more sureties has agreed to be primarily liable as between himself and the others, the entire amount can be collected from him.<sup>59</sup>

### e. Basis of Apportionment

- (1) In general
- (2) Payments, security, and proceeds of security from principal
- (3) Interest
- (4) Costs and attorney's fees

#### (1) In General

Contribution by cosureties to a surety paying the debt is generally based on the exact amount paid by the surety.

Subject to the limitation that contribution cannot be recovered for an amount paid by a surety in excess of the original debt,<sup>60</sup> contribution is generally based on the exact amount paid to satisfy the liability of the sureties, whether the payment is in full or by way of compromise of the whole debt,<sup>61</sup> even though the payment has taken the form of an assignment of the claim of the creditor;<sup>62</sup> and where payment is made in property, real or personal, its value at the time of payment fixes the basis for contribution.<sup>63</sup> The surety being sued for contribution is entitled to credit for any payments he has made on the principal indebtedness.<sup>64</sup>

#### (2) Payments, Security, and Proceeds of Security from Principal

In determining the amount which forms the basis of contribution payments made by the principal to the surety seeking contribution must be deducted.

In ascertaining the amount which forms the basis of contribution, there must be deducted from the entire amount any payments made by the prin-

50. Wis.—Faurot v. Gates, 57 N.W. 294, 86 Wis. 569.  
50 C.J. p 299 note 7.  
51. Ala.—Young v. Clark, 2 Ala. 264.  
50 C.J. p 299 note 8.  
52. N.C.—Davidson County v. Dorsett, 66 S.E. 132, 151 N.C. 307, 18 Ann.Cas. 852.  
50 C.J. p 299 note 10.  
53. U.S.—Maryland Casualty Co. v. Cox, C.C.A.Tenn., 104 F.2d 354.  
Ind.—Gray v. American Surety Co. of New York, 175 N.E. 686, 93 Ind. App. 377.  
N.C.—Humphrey v. American Surety Co., 197 S.E. 137, 213 N.C. 651—Adams v. Adams, 193 S.E. 661, 212 N.C. 337.  
Wis.—Newcomb v. Ingram, 248 N.W. 171, 211 Wis. 88.  
50 C.J. p 300 note 11.

54. Tex.—Western Indemnity Co. v. Murray, Com.App., 237 S.W. 1109.  
55. Pa.—Rodgers v. Tranter, 167 A. 481, 110 Pa.Super. 84, supplemented 167 A. 900, 110 Pa.Super. 84.  
50 C.J. p 300 note 13.  
56. Okl.—Tucker v. Gant, 185 P.2d 205, 199 Okl. 233, 172 A.L.R. 1443.  
Or.—Rose v. Wollenberg, 59 P. 190, 36 Or. 154.  
57. Tenn.—Pile v. McCoy, 41 S.W. 1052, 99 Tenn. 367.  
50 C.J. p 300 note 14.  
58. Or.—Thompson v. Dekum, 52 P. 517, 755, 32 Or. 179.  
59. Wash.—Handsaker v. Pedersen, 128 P. 230, 71 Wash. 218.  
50 C.J. p 300 note 15.  
60. Ind.—Jones v. Bradford, 25 Ind. 305.

Ky.—Hickman v. McCurdy, 7 J.J. Marsh. 555.  
61. La.—Leigh v. Wright, 164 So. 794, 183 La. 765.  
Mo.—Farmers & Mechanics Sav. Bank of Troy v. Jennings, App., 138 S.W.2d 703—Henneke v. Strack, App., 101 S.W.2d 743.  
N.J.—Sanderson v. Cicero State Bank, 6 A.2d 130, 125 N.J.Eq. 450.  
50 C.J. p 300 note 18.  
62. N.J.—Sanderson v. Cicero State Bank, 6 A.2d 130, 125 N.J.Eq. 450.  
50 C.J. p 300 note 19.  
63. Tex.—Edmonds v. Sheahan, 47 Tex. 443.  
50 C.J. p 300 note 21.  
64. Okl.—McAllister v. Border, 222 P. 537, 97 Okl. 1.

principal to the surety seeking contribution,<sup>65</sup> and any funds, security, or proceeds of security held by such surety belonging to the principal.<sup>66</sup> Furthermore, a surety seeking contribution is chargeable with the value of securities which, through his negligence, have become unavailable for application to the common debt.<sup>67</sup> The surety seeking contribution must, however, be allowed credit for any expenses reasonably incurred by him in acquiring or keeping alive such security<sup>68</sup> or in realizing thereon.<sup>69</sup>

### (3) Interest

Interest paid by the surety to the creditor must be included in determining the amount on which contribution is to be based.

In determining the amount on which contribution is based, interest paid by the surety to the creditor must be included,<sup>70</sup> and conversely, interest on the indebtedness, which the creditor failed to collect, cannot be included.<sup>71</sup> In addition, a surety may recover interest on the proportionate share of his cosurety from the date of payment to the creditor<sup>72</sup> at the legal rate,<sup>73</sup> even though the instrument held by the creditor provided for a higher rate.<sup>74</sup> Statutes sometimes provide for a special rate of interest where contribution is sought in a summary proceeding.<sup>75</sup> The cosurety may, however, by bringing into court the amount of his share of the sum due, be released as to any further interest.<sup>76</sup>

### (4) Costs and Attorney's Fees

Where judgment is obtained by the creditor against all the sureties, contribution can be had as to the costs

of the suit by the surety against whom the judgment was enforced.

Where a judgment is obtained by the creditor against all of the sureties, contribution can be had as to the costs of the suit by the surety against whom the judgment was enforced;<sup>77</sup> on the other hand, where, in a suit against several cosureties, judgment is recovered against only one of them, costs of such suit cannot be recovered against the cosureties who prevailed therein.<sup>78</sup> Contribution can be had as to costs incurred in a suit by the creditor against one surety alone which are paid by him, if defense of the suit was reasonably prudent and justifiable<sup>79</sup> or resulted in a reduction of the demand of the creditor;<sup>80</sup> and contribution for attorney's fees paid in resisting the claim of the creditors is allowed under the same conditions.<sup>81</sup> However, a surety, who has funds of the principal in his hands for the purpose of paying the debt, cannot be allowed reimbursement for costs and damages which subsequently accrue without the consent of the cosurety.<sup>82</sup>

Where a surety who has paid his proportionate share of the debt to the creditor is sued for and compelled to pay the balance of the debt, he can recover from his cosurety the necessary costs of the creditor's action against him,<sup>83</sup> and mere willingness, unaccompanied by an offer to pay his share of the original debt before action is brought for the recovery thereof, will not relieve a surety from liability as to contribution for costs;<sup>84</sup> nor will payment of his share after suit begun,<sup>85</sup> except that payment after suit is brought will relieve him of responsibility for costs accruing thereafter;<sup>86</sup> and it will not avail a surety to show that

65. Iowa.—New Amsterdam Casualty Co. v. Bookhart, 235 N.W. 74, 312 Iowa 994, 76 A.L.R. 897.

50 C.J. p 300 note 24.

66. Mo.—Broussard v. Mason, 173 S.W. 698, 187 Mo.App. 281.

50 C.J. p 301 note 25.

67. Ky.—Goodloe v. Clay, 6 B.Mon. 236.

50 C.J. p 301 note 26.

68. Wash.—A amalgamated Gold Mines Co. v. Ridgley, 170 P. 355, 99 Wash. 99.

50 C.J. p 301 note 27.

69. N.C.—Derossset v. Bradley, 63 N.C. 17.

50 C.J. p 301 note 28.

70. Okl.—McAllister v. Border, 222 P. 537, 97 Okl. 1.

W.Va.—Weimer v. Talbot, 49 S.E. 372, 56 W.Va. 257.

71. Ill.—Whittemore v. Weber, 217 Ill.App. 628.

72. Ga.—Reed v. Liberty Nat. Bank

& Trust Co., 162 S.E. 154, 44 Ga. App. 544.

50 C.J. p 301 note 31.

73. Mo.—Farmers & Mechanics Sav. Bank of Troy v. Jennings, App., 138 S.W.2d 703—Henneke v. Strack, App., 101 S.W.2d 743.

50 C.J. p 301 note 32.

74. Wis.—Bushnell v. Bushnell, 46 N.W. 442, 77 Wis. 435, 9 L.R.A. 411.

50 C.J. p 301 note 33.

75. Mo.—Wilkerson v. Sampson, 56 Mo.App. 276.

50 C.J. p 301 note 34.

76. Md.—Smith v. Anderson, 18 Md. 520.

77. Me.—Davis v. Emerson, 17 Me. 64.

50 C.J. p 301 note 36.

78. N.H.—Boardman v. Paige, 11 N. H. 431.

79. La.—Corpus Juris quoted in Globe Indemnity Co. of New York

v. Aetna Casualty & Surety Co. of Hartford, Conn., 192 So. 234, 241, 193 La. 721.

50 C.J. p 301 note 38.

80. La.—Corpus Juris quoted in Globe Indemnity Co. of New York v. Aetna Casualty & Surety Co. of Hartford, Conn., 192 So. 234, 241, 193 La. 721.

50 C.J. p 301 note 39.

81. La.—Corpus Juris quoted in Globe Indemnity Co. of New York v. Aetna Casualty & Surety Co. of Hartford, Conn., 192 So. 234, 241, 193 La. 721.

50 C.J. p 301 note 40.

82. Ala.—John v. Jones, 16 Ala. 454.

83. Mich.—McKee v. Campbell, 27 Mich. 497.

84. Or.—Van Winkle v. Johnson, 5 P. 922, 11 Or. 469, 50 Am.R. 495.

85. Or.—Van Winkle v. Johnson, supra.

86. Md.—Smith v. Anderson, 18 Md. 520.

he was not served with process in the original action by the creditor.<sup>87</sup>

Under some statutes, a surety who pays the debt after it is past due is entitled to recover an attorney's fee from his cosurety if he has given the statutory notice of suit.<sup>88</sup>

### § 370. Conclusiveness of Adjudication against Principal or Surety

A judgment obtained by the creditor against the sureties is conclusive on all of them as to all questions of liability within the issues determined in that action.

In an action for contribution, a judgment or decree obtained against the sureties by the creditor or obligee is admissible<sup>89</sup> to prove its rendition,<sup>90</sup> and is at least prima facie evidence of the debt,<sup>91</sup> and of joint and equal liability therefor.<sup>92</sup> It is conclusive as to all questions of liability within the issues determined in that action,<sup>93</sup> and as to matters which should have been raised therein;<sup>94</sup> conversely, the judgment is not conclusive of matters determined which were not raised by the pleadings in such action.<sup>95</sup>

A judgment or decree is not conclusive, however, on a surety who was not a party to the suit in which it was rendered,<sup>96</sup> unless he has notice of the suit and an opportunity to defend,<sup>97</sup> in which event it has been held that he will be concluded as to such matters as he might have interposed in that suit.<sup>98</sup> Although admissible to prove the

fact of its rendition,<sup>99</sup> and by way of inducement to evidence to show its payment by plaintiff,<sup>1</sup> and the amount,<sup>2</sup> such a judgment or decree is not evidence of the liability of the principal on which the liability of the sureties is predicated,<sup>3</sup> or of the common liability of the sureties.<sup>4</sup> Nevertheless, where a surety has contracted with respect to the conduct of one of the parties in some suit or proceeding in the courts, he is concluded by a judgment therein even though not a party thereto.<sup>5</sup> Where a judgment extinguishes a principal's obligation, the surety's obligation is also extinguished, including any rights of contribution which might have existed in favor of another surety had the principal and the first surety been held to be bound instead of to be not liable.<sup>6</sup>

*Judgment against principal.* A judgment in favor of a surety against the principal has been held not to be admissible as a defense to an action for contribution in the absence of a showing that the surety realized something on such judgment.<sup>7</sup>

### § 371. Enforcement against Cosurety of Judgment or Execution against Surety

Contribution against cosureties may be enforced under some statutes by the issuance of execution on the judgment obtained by the creditor.

Under the statutes of some jurisdictions, a surety who pays a judgment rendered against him and his cosureties may have execution issued under such

87. Or.—Van Winkle v. Johnson, 5 P. 322, 11 Or. 469, 50 Am.R. 495.

88. Ga.—Reed v. Liberty Nat. Bank & Trust Co., 162 S.E. 154, 44 Ga. App. 544.

89. Mo.—Haygood v. McKoon, 49 Mo. 77.  
50 C.J. p 302 note 48.

90. Ala.—Preslar v. Stallworth, 37 Ala. 402.

91. N.C.—Miller v. Pitts, 68 S.E. 171, 152 N.C. 629.

92. Ky.—Vansant's Ex'x v. Gardner's Ex'x, 42 S.W.2d 300, 240 Ky. 318.

93. Ky.—Vansant's Ex'x v. Gardner's Ex'x, *supra*.  
50 C.J. p 302 note 51.

94. Tex.—Eubanks v. Sites, Civ. App., 146 S.W. 952.  
50 C.J. p 302 note 52.

95. Ind.—Knopf v. Morel, 13 N.E. 51, 111 Ind. 570.  
50 C.J. p 302 note 53.

#### Liability between sureties

Judgment rendered against sureties was held not conclusive as between sureties themselves, in suit for contribution.

Ky.—Vansant's Ex'x v. Gardner's Ex'x, 42 S.W.2d 300, 240 Ky. 318.  
Tex.—Eubanks v. Sites, Civ.App., 146 S.W. 952.

96. Iowa.—Federal Surety Co. v. France, 238 N.W. 460, 212 Iowa 1403.

Tex.—Corpus Juris cited in Lehman v. Howard, Civ.App., 133 S.W.2d 800.

50 C.J. p 302 note 54.

#### Cosureties as privies

(1) It has been held that a surety does not derive any right by, through, or under his cosurety and cannot be classified as a "privity" to him within rule that judgment in personam is binding only on parties thereto and their privies.—Lehman v. Howard, Tex.Civ.App., 133 S.W.2d 800.

(2) However, a surviving joint surety and personal representative of other deceased surety have been held to be in privity within rule that judgments are binding on parties and privies.—Firestone Tire & Rubber Co. v. Hart's Estate, 158 A. 92, 104 Vt. 197.

97. N.Y.—Clark v. Norman, 22 N. Y.S. 849, 68 Hun 372.

50 C.J. p 302 note 56.

98. Ala.—Broughton v. Robinson, 11 Ala. 922.

50 C.J. p 302 note 56.

99. Ala.—Means v. Hicks, 65 Ala. 241.

Fla.—Love v. Gibson, 2 Fla. 598.

1. Ala.—Babcock v. Carter, 23 So. 487, 117 Ala. 575, 67 Am.S.R. 193.  
50 C.J. p 302 note 58.

2. N.C.—Leak v. Covington, 6 S.E. 241, 99 N.C. 559.  
50 C.J. p 302 note 59.

3. N.Y.—Clark v. Norman, 22 N.Y. S. 849, 68 Hun 372.  
50 C.J. p 302 note 60.

4. Ala.—Means v. Hicks, 65 Ala. 241.

50 C.J. p 302 note 61.

5. Wis.—Shepard v. Pebbles, 38 Wis. 373.

50 C.J. p 302 note 62.

6. Colo.—Fidelity & Deposit Co. of Md. v. Continental Cas. Co., 193 P.2d 266, 118 Colo. 97.

7. Ill.—Maxwell v. Brown, 186 Ill. App. 271.

judgment to enforce his right to contribution from his cosureties who have not paid their proportionate part of the principal obligation.<sup>8</sup> A surety

paying the amount of a joint judgment against sureties on note had no cause of action thereon against cosurety's heirs as judgment creditor's assignee.<sup>9</sup>

### C. ACTIONS

#### § 372. Nature and Form of Remedy

- a. In general
- b. Exoneration in equity and other relief
- c. Nature and form of action

##### a. In General

Although the doctrine of contribution between cosureties originated in equity, ordinarily it is enforceable either in equity or at law.

Although the doctrine of contribution between cosureties originated out of equitable principles, as discussed in Contribution § 2, and was at first known and enforced only in courts of equity,<sup>10</sup> the right became so well established that common-law courts, sometimes by virtue of statutory provisions, assumed jurisdiction to enforce contribution between cosureties<sup>11</sup> on the theory of an implied promise by each cosurety to reimburse each of the others for any payment in excess of his proportion of the debt.<sup>12</sup> The development of a legal remedy, however, did not deprive equity of its jurisdiction,<sup>13</sup> courts of equity retaining jurisdiction in such cases,<sup>14</sup> regardless of the adequacy of the remedy at law,<sup>15</sup> so that frequently there is a remedy either at law or in equity;<sup>16</sup> but where the machinery of the law is manifestly insufficient the only adequate remedy may be in equity.<sup>17</sup>

##### b. Exoneration in Equity and Other Relief

Under the practice prevailing in some jurisdictions a surety may, before he has paid the debt, file a bill to compel his cosureties to contribute to its payment.

Although it is well settled that generally an action for contribution does not lie until the surety has paid the debt or more than his proportionate share thereof, as considered supra § 364, it has been held in some jurisdictions that a surety, before he has paid the debt, may file a bill in equity to compel his cosureties to contribute with him to its payment<sup>18</sup> or to restrain the collection from him of the share of another surety in whose hands the principal placed funds to satisfy the debt;<sup>19</sup> and, where a solvent surety is indebted to an insolvent cosurety, equity will interfere to prevent the collection of such debt, although the creditor surety has not paid the debt of his principal.<sup>20</sup> Although, in such a suit, the court cannot compel the cosurety to pay to plaintiff his proportionate share of the principal indebtedness,<sup>21</sup> it can issue a decree fixing complainant's right to contribution and provide for his indemnity or exoneration by defendant cosurety when the former pays the latter's share of the indebtedness.<sup>22</sup> There is authority to the effect that it is no objection to a decree ordering defendant sureties each to pay their proportionate

8. Tex.—*Hollis v. Winfree*, Civ. App., 216 S.W.2d 625, refused no reversible error.

9. U.S.—*Apple v. Owens*, C.C.A. Tex., 48 F.2d 807.

10. N.Y.—*Parshelsky v. Palley*, 152 N.Y.S. 351, 166 App.Div. 723, 50 C.J. p 304 note 92.

11. Neb.—*Exchange Elevator Co. v. Marshall*, 22 N.W.2d 403, 147 Neb. 48, 50 C.J. p 304 note 93.

12. Ala.—*Scott v. McGriff*, 132 So. 177, 222 Ala. 344.  
Iowa.—*Elson v. Nickles*, 36 N.W.2d 343, 240 Iowa 292, 50 C.J. p 304 note 94.

**Despite existence of other remedy**  
Sureties on bond having satisfied judgment against them held entitled to maintain independent action on implied contract against cosurety for contribution, notwithstanding summary proceedings on judgment would have been authorized if they had taken assignment as statute en-

titled them to do, statutory remedy being cumulative.—*Vansant's Ex'x v. Gardner's Ex'x*, 42 S.W.2d 300, 240 Ky. 313.

13. Wis.—*German-American Sav. Bank v. Fritz*, 32 N.W. 123, 68 Wis. 390, 50 C.J. p 304 note 96.

##### Concurrent jurisdiction

Fact that surety, paying his share of principal's debt, has remedy at law does not prevent him from suing in equity to enforce contribution from his cosureties, and, even if such remedy is conferred by statute, equity retains concurrent jurisdiction.—*Jones v. Berkley*, 12 Ohio Supp. 82.

14. Ohio.—*Jones v. Berkley*, supra, 50 C.J. p 304 note 97.

15. Ill.—*Whittemore v. Weber*, 217 Ill.App. 628, 50 C.J. p 305 note 98.

16. Ala.—*Werborn v. Kahn*, 9 So. 729, 93 Ala. 201, 50 C.J. p 305 note 99.

##### Insolvency of surety

The right of contribution between cosureties is enforceable at law provided there is no claim of insolvency of a surety.—*Salzberg v. Deutsch*, 270 N.Y.S. 595, 150 Misc. 870.

17. Me.—*Scribner v. Adams*, 73 Me. 541, 50 C.J. p 305 note 1.

18. Or.—*Davis v. Albany First Nat. Bank*, 161 P. 93, 168 P. 929, 86 Or. 474, 50 C.J. p 305 note 4.

19. Ill.—*Silvey v. Dowell*, 53 Ill. 260, 50 C.J. p 305 note 6.

20. Ala.—*Corpus Juris cited in Whaley v. Henderson*, 148 So. 848, 849, 227 Ala. 158.

Ill.—*Keach v. Hamilton*, 84 Ill.App. 413.

21. Pa.—*Reeder v. Union Trust Co.*, 26 Pa.Dist. 833, 50 C.J. p 306 note 8.

22. Pa.—*Reeder v. Union Trust Co.*, supra, 50 C.J. p 306 note 10.

share of the debt to the creditor that the latter is not a party to the suit.<sup>23</sup>

It seems that, where a principal debtor is insolvent, and has a claim against one of two cosureties, the other cosurety may bring an action in equity against his cosurety and the principal debtor to have their accounts adjusted and the amount due the principal applied;<sup>24</sup> and, in order to avoid the whole burden of a judgment against the cosureties from being forced on one of them, equity will restrain an attempted fraudulent transfer of the property of the other in a case where the principal debtor is insolvent.<sup>25</sup>

### c. Nature and Form of Action

An action at law for contribution is generally predicated on an express or implied contract to contribute, and in a proper case assumpsit may lie.

The action at law for contribution is generally brought on the contract which the law implies in the absence of express agreement, discussed supra § 352, and is enforced in an action of assumpsit under the common counts for money paid,<sup>26</sup> except that assumpsit is not the proper form of action by a surety against his cosurety to recover a loss sustained by the former occasioned by the fault of the latter.<sup>27</sup> If, however, the sureties have entered into an express contract as to contribution the action must be brought on such contract.<sup>28</sup> Actions between cosureties for contribution are sometimes regulated by statute, and are governed, as to procedure, by the laws in force at the time they are brought, although enacted after the contract was entered into.<sup>29</sup>

*Proceeding on original debt or judgment.* It is generally held that in order to enforce contribution an action cannot be brought on the original debt;<sup>30</sup> and, where payment of a judgment against the sureties is a satisfaction and extinction thereof, neither can the action for contribution be brought

on such judgment.<sup>31</sup> Nevertheless a surety can enforce contribution from his cosureties by proceeding on the original contract or judgment where, by subrogation or assignment, he acquires the rights of the original creditor.<sup>32</sup>

## § 373. Conditions Precedent

- a. In general
- b. Proceeding against principal; insolvency

### a. In General

Notice and demand ordinarily are not conditions precedent to proceedings for contribution, but may become such where the cosurety is in ignorance of the default or of the payment by the suing surety.

It is a general rule that before commencing suit against a cosurety no notice of the payment of the debt need be given to him,<sup>33</sup> nor need demand for contribution be made,<sup>34</sup> particularly where defendant surety has been the cause for the surety seeking contribution making payment.<sup>35</sup> Likewise, it is unnecessary that notice of the pendency of the suit, by the creditor against the surety now suing for contribution, should have been given to the cosurety.<sup>36</sup>

On the other hand, where the cosurety is ignorant of the default of the principal or of the payment by the surety, notice of the payment or a demand has been held necessary.<sup>37</sup>

### b. Proceeding against Principal; Insolvency

As a general rule an action at law for contribution between cosureties may be maintained without first proceeding against the principal or showing his insolvency; but in equity it should appear either that the plaintiff proceeded against the principal without success or that the latter is insolvent.

The decisions as to whether or not the right to proceed against a surety for contribution depends on the insolvency of the principal are not harmoni-

23. Conn.—Hyde v. Tracy, 3 Day 491.

Creditor as necessary party generally see infra § 377.

24. N.Y.—O'Brien v. Karing, 57 N. Y. 649.

25. Miss.—Bowen v. Hoskins, 45 Miss. 183, 7 Am.R. 728.

26. Tex.—Key v. Oates, Civ.App., 280 S.W. 286.

50 C.J. p 306 note 15.

27. Ala.—Long v. Kent, 6 Ala. 100.

28. Cal.—Kellogg v. Lopez, 78 P. 1056, 145 Cal. 497.

50 C.J. p 306 note 17.

29. N.C.—Deross v. Bradley, 63 N. C. 17.

30. Ala.—Mitchell v. Turner, 37 Ala. 660.

50 C.J. p 306 note 21.

31. Ala.—Morrison v. Marvin, 6 Ala. 797.

50 C.J. p 306 note 23.

32. Mo.—Phelps v. Scott, 30 S.W.2d 71, 325 Mo. 711, 71 A.L.R. 290.

50 C.J. p 306 note 25.

### Election

Surety may, at its election, work out its right of contribution against cosurety, not only through medium of independent and direct claim, but by way of subrogation to rights of creditor whose claim surety has paid.—Commonwealth ex rel. Schnader v. National Surety Co., 37 A.2d 753, 349 Pa. 599.

33. Cal.—Holm v. Burnell, 194 P. 770, 5 Cal.App. 222.

50 C.J. p 307 note 31.

Payment or satisfaction of debt or obligation as condition to contribution see supra §§ 364-368.

34. Iowa.—Wood v. Perry, 9 Iowa. 479.

50 C.J. p 307 note 32.

35. Vt.—Foster v. Johnson, 5 Vt. 60.

50 C.J. p 307 note 33.

36. Pa.—Malin v. Bull, 13 Serg. & R. 441.

37. N.C.—Sherrard v. Woodard, 15 N.C. 360, 363, 25 Am.D. 714.

50 C.J. p 307 note 35.

ous.<sup>38</sup> Based on the principle that the right to contribution arises on payment of the debt by the surety, it is quite generally held that it is not a condition precedent to an action at law for contribution by a surety paying the debt that he first proceed against the principal<sup>39</sup> or that he show the insolvency of the principal.<sup>40</sup> On the other hand, many cases hold that, in order to proceed against his cosurety in equity, a surety must either show that he has proceeded against the principal with due diligence but unsuccessfully or that the latter is insolvent,<sup>41</sup> and in at least one jurisdiction the equitable rule is applied in actions at law.<sup>42</sup> A requirement that the principal be either insolvent or absent from the jurisdiction is sometimes provided for by statute, such statutes being held to have reference to the condition of the principal at the time suit for contribution is brought, and not to the time of payment.<sup>43</sup>

### § 374. Defenses

- a. In general
- b. Judgment in favor of cosurety
- c. Payment

#### a. In General

Broadly speaking, equitable matters may be set up in defense of a suit for contribution whether it is brought in equity or at law.

Generally it may be said that any equitable matters may be set up in defense to an action for contribution,<sup>44</sup> whether the action be at law or in equity,<sup>45</sup> and what are matters of defense depends on definite legal principles, although founded in equitable consideration.<sup>46</sup> Matters which could not have been interposed as a defense to the orig-

inal action of the creditor cannot be set up in defense to the action for contribution;<sup>47</sup> but a surety being sued for contribution not having had notice of the original suit of the creditor against the cosurety may interpose any legal defense which he might have interposed in such suit of the creditor.<sup>48</sup> A breach by a surety of his duty to a cosurety affords both a legal and an equitable defense against his claim for contribution.<sup>49</sup> One may defend on the ground that he did not execute the contract of suretyship,<sup>50</sup> that it was defectively executed,<sup>51</sup> or that there was no consideration therefor.<sup>52</sup>

On the other hand, it is no defense that the principal or defendant surety was not served in the original suit by the creditor;<sup>53</sup> nor is it a defense that plaintiff surety failed to enforce his rights against another cosurety.<sup>54</sup> A surety on a bail bond being sued for contribution cannot defend on the ground that a recovery against him is against public policy,<sup>55</sup> and fraud between the principal and plaintiff surety perpetrated on the creditor or obligee, but not causing the default of the principal, is no defense to the action for contribution.<sup>56</sup> A misrepresentation of law inducing a cosurety to sign as such has been held not a defense to a suit against him for contribution.<sup>57</sup> It has further been held that no defense to an action for contribution is afforded by the fact that insolvency of the principal resulted from mismanagement of plaintiff,<sup>58</sup> or that the assets of the principal were not efficiently administered,<sup>59</sup> or, in the case of a bank acting as cosurety for an insolvent bank, that no accounting had been made as between the two banks,<sup>60</sup> or that the statutory liability of the insolvent bank's stockholders had not been enforced.<sup>61</sup>

38. Neb.—Smith v. Mason, 63 N.W. 41, 44 Neb. 610.

50 C.J. p 307 note 37.

39. N.J.—Wyckoff v. Gardner, Ch., 5 A. 801.

50 C.J. p 307 note 40.

40. Wis.—American Exch. Bank v. Lake Motor Co., 218 N.W. 590, 195 Wis. 304.

50 C.J. p 307 note 41.

Issuance of execution in surety's suit against principal, or use of summary proceedings with return nulla bona, held not prerequisite to surety's right to maintain suit for contribution against cosureties.—Vansant's Ex'x v. Gardner's Ex'x, 42 S.W.2d 800, 240 Ky. 318.

41. Or.—Fischer v. Gaither, 51 P. 736, 32 Or. 161.

50 C.J. p 307 notes 42, 43.

42. Ky.—Bolling v. Doneghy, 1 Duv. 220.

50 C.J. p 308 note 45.

43. N.C.—Shuford v. Cook, 80 S.E. 61, 164 N.C. 46.

44. Miss.—Dennis v. Gillespie, 24 Miss. 581.

50 C.J. p 308 note 49.

45. Colo.—Milner v. Eskridge, 163 P. 1115, 62 Colo. 430.

50 C.J. p 308 note 50.

46. Wis.—In re Koch, 134 N.W. 663, 148 Wis. 548.

47. Okl.—Cummins v. Line, 143 P. 672, 43 Okl. 575.

50 C.J. p 308 note 52.

48. Vt.—Briggs v. Boyd, 37 Vt. 534.

49. Mo.—Broussard v. Mason, 173 S.W. 698, 187 Mo.App. 281.

Wis.—In re Koch, 134 N.W. 663, 148 Wis. 548.

50. S.C.—Hall v. Woodward, 9 S.E. 684, 30 S.C. 564.

50 C.J. p 308 note 57.

51. Mo.—Price v. Edwards, 11 Mo. 524.

50 C.J. p 308 note 58.

52. Mass.—Pratt v. Hedden, 121 Mass. 116.

50 C.J. p 308 note 59.

53. Colo.—Dunkle v. Haight, 189 P. 783, 68 Colo. 404.

54. Wash.—Lindblom v. Johnston, 158 P. 972, 93 Wash. 171.

55. Wash.—Belond v. Guy, 54 P. 995, 20 Wash. 160.

56. Wis.—Shepard v. Pebbles, 38 Wis. 373.

57. Wis.—Schlecht v. Anderson, 232 N.W. 566, 202 Wis. 305.

58. Wis.—Schlecht v. Anderson, supra.

59. Wis.—Schlecht v. Anderson, supra.

60. Wis.—Schlecht v. Anderson, supra.

61. Wis.—Schlecht v. Anderson, supra.



The doctrine of merger, under which a judgment extinguishes the original cause of action so that it cannot again be used as either a cause of action or a defense or set-off, is unavailable as a defense to a cosurety's suit for contribution where the facts do not bring the case within the principles of merger.<sup>62</sup>

#### b. Judgment in Favor of Cosurety

Where only one surety has been adjudged liable in an action by the creditors against cosureties, such surety is precluded from recovering contribution from a surety against whom no judgment was rendered, provided the latter was an adversary party.

Where, in an action by the creditor against cosureties, judgment is taken against one surety only,<sup>63</sup> or only one is found to be liable,<sup>64</sup> such surety cannot compel contribution from the one against whom judgment was not rendered, provided, however, in the action by the creditor, the cosureties were adversary parties;<sup>65</sup> and similarly, if judgment is rendered in favor of both sureties, but the creditor, on appeal as to one only, obtains judgment, the other is not liable to contribution.<sup>66</sup>

#### c. Payment

Ordinarily it is a good defense to a suit for contribution that the defendant cosurety has paid his proportionate share to the creditor or to the plaintiff.

Since a surety is equitably liable for his proportionate share only, under principles discussed supra § 369, it is a good defense to an action for contribution that he has paid such proportion to the creditor,<sup>67</sup> or to plaintiff cosurety,<sup>68</sup> except that payment of an obligation, as to which the surety seeking contribution is not involved, is no defense.<sup>69</sup> If, however, after cosureties have adjusted their accounts, and suppose they had settled them, one of them is forced to make further

payment, he can have contribution as to such additional sum.<sup>70</sup>

#### § 375. Set-Off and Counterclaim

A surety sued for contribution may set off a debt due him from the plaintiff cosurety.

A surety, in an action against him for contribution, can set off a debt due to him from the cosurety seeking contribution.<sup>71</sup> Conversely, a surety in an action against him for a debt owing his cosurety can set off a claim against the latter for contribution.<sup>72</sup>

On the other hand, in an action for contribution, defendant cannot set up a defense that plaintiff was indebted to the principal;<sup>73</sup> nor can defendant set off claims due by plaintiff to the principal<sup>74</sup> or debts due to him individually from the principal.<sup>75</sup>

#### § 376. Time to Sue, Limitations, and Laches

General rules governing limitations and laches ordinarily are applied to suits by cosureties for contribution.

Provisions in statutes of limitation with respect to implied contracts apply to actions between cosureties for contribution,<sup>76</sup> regardless of the form in which the action is brought,<sup>77</sup> except where the action for contribution is founded on the original debt, in which case the statute applied is the one which would have applied against the creditor.<sup>78</sup> The general rules governing the effect of absence, nonresidence, and evasion or obstruction of process on the running of limitations ordinarily apply to suits by cosureties for contribution.<sup>79</sup>

**Laches.** In accordance with the rules appertaining to equitable actions generally, the surety must pursue his remedy with diligence,<sup>80</sup> but mere delay in asserting the right is not such laches as will bar an action for contribution<sup>81</sup> in the absence of anything showing prejudice to the cosurety by

62. Ohio.—Jones v. Berkley, 12 Ohio Supp. 82.

63. N.Y.—Waggoner v. Walrath, 24 Hun 443, affirmed 92 N.Y. 639.

64. W.Va.—Hood v. Morgan, 35 S.E. 911, 47 W.Va. 817.  
50 C.J. p 308 note 65.

65. Mo.—Comstock v. Keating, 91 S.W. 416, 115 Mo.App. 372.  
50 C.J. p 308 note 66.

66. La.—Ledoux v. Durrive, 10 La. Ann. 7.

50 C.J. p 308 note 67.

67. Ala.—White v. Banks, 21 Ala. 705, 56 Am.D. 283.

50 C.J. p 309 note 69.

68. Me.—Chandler v. Furbish, 8 Me. 408.

69. Ala.—Steele v. Mealing, 24 Ala. 285.

50 C.J. p 309 note 71.

70. Minn.—Verge v. Van Der Horck, 59 N.W. 630, 57 Minn. 497.

50 C.J. p 309 note 72.

71. N.C.—Long v. Barnett, 38 N.C. 631.

50 C.J. p 309 note 74.

72. Va.—Wayland v. Tucker, 4 Gratt. 267, 45 Va. 267, 50 Am.D. 76.

50 C.J. p 309 note 75.

73. N.Y.—Davis v. Toulmin, 77 N. Y. 280.

50 C.J. p 309 note 76.

74. Ark.—Bland v. Jones, 3 S.W.2d 58, 176 Ark. 366.

50 C.J. p 309 note 77.

75. Iowa.—Hoover v. Mowrer, 50 N. W. 62, 84 Iowa 43, 85 Am.S.R. 293.

76. Ark.—Cooper v. Rush, 212 S.W. 94, 138 Ark. 602.

50 C.J. p 309 note 81.

77. Ohio.—Neilson v. Fry, 16 Ohio St. 552, 91 Am.D. 110.

78. Ga.—Train v. Emerson, 80 S.E. 554, 141 Ga. 95, 49 L.R.A.N.S., 950.

79. Me.—Crosby v. Wyatt, 23 Me. 156.

50 C.J. p 309 note 87.

80. Iowa.—Bankers' Surety Co. v. Wyman, 120 N.W. 116, 141 Iowa 574.

50 C.J. p 309 note 90.

81. Wash.—Lindblom v. Johnston, 158 P. 972, 92 Wash. 171.

50 C.J. p 309 note 91.

reason of the delay<sup>82</sup> or of anything making it inequitable to enforce the claim.<sup>83</sup>

### § 377. Parties

- a. Plaintiff
- b. Defendant

#### a. Plaintiff

Sureties making payment jointly may properly unite as plaintiffs in an action against cosureties for contribution; but sureties making payments separately may not unite at law except as permitted by statute although they may properly join in equity.

Sureties who have made payment jointly may unite in an action against cosureties for contribution,<sup>84</sup> but sureties who have made payments separately cannot so unite at law<sup>85</sup> except as they may be permitted to do so by statute.<sup>86</sup> In equity two or more sureties may unite whether or not they paid jointly.<sup>87</sup> One of the officers of a corporation, all of whom were cosureties on a corporate indebtedness, on being compelled to pay to the trustee in bankruptcy of the corporation the amount of the debt, as a preference created by all the sureties in causing the corporation to pay the debt while insolvent, may enforce contribution without the interference of the trustee;<sup>88</sup> and, where a firm entitled to enforce contribution transfers all of its assets to a corporation in which the members of the firm are stockholders, the corporation may properly maintain the suit for contribution.<sup>89</sup>

#### b. Defendant

In equity, and under some statutory provisions, cosureties or a surety and his principal may be joined as defendants in actions for contribution.

At law an action for contribution must be brought against each cosurety separately,<sup>90</sup> and a surety and

the principal cannot be joined as defendants.<sup>91</sup> On the other hand, under the equitable rule requiring all interested persons to be made parties, as discussed in Equity § 133, a cosurety's suit brought in equity should join all cosureties and the principal in order to prevent a multiplicity of suits,<sup>92</sup> and under statutory provisions all persons against whom the right to relief is claimed to exist, whether jointly or severally, may be proper parties defendant in a cosurety's suit for contribution.<sup>93</sup> Persons, however, from whom it appears that nothing can be collected, although proper,<sup>94</sup> are not necessary,<sup>95</sup> parties. Thus it is unnecessary to join as party defendant an insolvent principal,<sup>96</sup> or insolvent cosureties,<sup>97</sup> unless it is sought to apportion contribution among the solvent sureties, as discussed supra § 369, in which event the sureties alleged to be insolvent must be joined.<sup>98</sup> A supplemental surety,<sup>99</sup> or cosureties not within the jurisdiction,<sup>1</sup> or a cosurety who has paid his proportionate share<sup>2</sup> is not a necessary party. In a suit in equity brought by a surety before payment of the debt to compel a cosurety to contribute his share, the creditor should be made a party,<sup>3</sup> but the creditor is not a necessary party to a bill in equity to subject indemnity to the claims of cosureties;<sup>4</sup> and, where a cosurety, under contract with another surety to share in funds acquired from the principal, receives the funds as rightfully due from the principal both as to claims by the principal and by the creditor, neither the principal nor the latter's creditor is a necessary party to a suit for accounting between the sureties, and it cannot be properly claimed that the rights of either principal or creditor are involved.<sup>5</sup>

### § 378. Pleading

A cosurety suing for contribution should allege in his complaint all facts essential to state his cause of

82. Wash.—Lindblom v. Johnston, supra.

83. Wash.—Lindblom v. Johnston, supra.

84. Vt.—Prescott v. Newell, 39 Vt. 82.  
50 C.J. p 309 note 95.

85. Me.—Lombard v. Cobb, 14 Me. 222.  
50 C.J. p 310 note 96.

86. Wis.—Schlecht v. Anderson, 232 N.W. 566, 202 Wis. 305.

87. Mich.—Smith v. Rumsey, 33 Mich. 183.  
50 C.J. p 310 note 97.

88. Mo.—Eisleben v. Schueddig, App., 7 S.W.2d 282.

89. Pa.—A. Guckenheimer, etc., Co. v. Kann, 89 A. 807, 243 Pa. 75.  
50 C.J. p 310 note 99.

90. N.C.—Adams v. Hayes, 27 S.E. 47, 120 N.C. 383.  
50 C.J. p 310 note 1.

91. Hawaii.—Wong Tin Look v. Goo Wan Hoy, 22 Hawaii 540.

92. N.C.—Hudson v. Aman, 74 S.E. 97, 158 N.C. 429.  
50 C.J. p 310 note 4.

93. Cal.—Bank of America Nat. Trust & Savings Ass'n v. Fidelity & Deposit Co. of Maryland, 51 P. 2d 472, 9 Cal.App.2d 687.

94. Mo.—Dysart v. Crow, 70 S.W. 689, 170 Mo. 275.  
50 C.J. p 310 note 5.

95. Ind.—Voss v. Lewis, 25 N.E. 892, 126 Ind. 155.

96. Ill.—Johnson v. Vaughn, 65 Ill. 425.  
50 C.J. p 310 note 7.

97. Mo.—Phelps v. Scott, 30 S.W. 2d 71, 325 Mo. 711, 71 A.L.R. 290.  
50 C.J. p 310 note 8.

98. N.Y.—Easterly v. Barber, 66 N.Y. 483.  
50 C.J. p 310 note 11.

99. Ky.—Hilton v. Crist, 5 Dana 384.

1. Ind.—Voss v. Lewis, 25 N.E. 892, 126 Ind. 155.  
50 C.J. p 310 note 9.

2. Ala.—Carter v. Maryland Fidelity, etc., Co., 32 So. 632, 134 Ala. 369, 92 Am.S.R. 41.  
50 C.J. p 310 note 13.

3. S.C.—McKenna v. George, 19 S. C.Eq. 15.

4. Ohio.—Rosenthal v. Sutton, 31 Ohio St. 406.

5. Okl.—Provine v. Wilson, 80 P.2d 291, 183 Okl. 77.

action, such as that the plaintiff has paid the debt and that the defendant has not paid his share.

The general rule requiring plaintiff's initial pleading to aver all matters essential to state his cause of action applies to a bill or complaint by a surety seeking contribution from his cosurety.<sup>6</sup> Accordingly the bill or complaint must allege that plaintiff surety paid the debt,<sup>7</sup> and that defendant cosurety has failed to pay his share,<sup>8</sup> after notice and demand, where required.<sup>9</sup> Similarly where insolvency or inability of the principal to pay is a condition precedent to an action for contribution, plaintiff should allege such insolvency<sup>10</sup> or the inability or failure of the principal to pay.<sup>11</sup> Conversely, no allegation need be made of matters not going to make up the cause of action,<sup>12</sup> and, where insolvency of the principal is not a condition precedent to maintenance of the suit for contribution, plaintiff need not allege such insolvency.<sup>13</sup> Neither conclusions of law<sup>14</sup> nor averments negating matters of defense<sup>15</sup> need be set forth in the complaint.

Where indorsers of a promissory note have agreed to be liable as sureties among themselves, the contract of suretyship must be alleged,<sup>16</sup> but an allegation of protest for nonpayment of the note or a waiver thereof is unnecessary.<sup>17</sup> Where the complaint declares on a special agreement to indemnify, there may be joined therewith allegations on the common counts.<sup>18</sup>

*Pleas.* A special plea of want of consideration for the original undertaking is demurrable.<sup>19</sup>

*Amendments.* Rules governing the amendment of pleadings generally apply to actions for contribution between cosureties.<sup>20</sup>

### § 379. — Issues, Proof, and Variance

Matters not pleaded are unavailable in suits between sureties for contribution.

Matters which have not been pleaded, and hence are not within the issues, cannot be availed of in actions for contribution between cosureties.<sup>21</sup> Thus, where such matters have not been pleaded, the defense of exoneration by plaintiff's relinquishment of security is unavailable,<sup>22</sup> and evidence to prove the insolvency of the principal debtor is inadmissible.<sup>23</sup> On the other hand, where matters are sufficiently pleaded, evidence thereof is admissible.<sup>24</sup> Under the general issue, there may be shown want of consideration for the original undertaking<sup>25</sup> and payment by way of proceeds of security received by plaintiff surety.<sup>26</sup> Proof that payment of the creditor's judgment was advanced by a company which was later reimbursed by plaintiff surety is not a variance from a pleading setting forth that plaintiff had made the payment.<sup>27</sup> Proof of nonresidence of a surety will not sustain an allegation of such surety's insolvency.<sup>28</sup> Where defendant pleads an agreement by plaintiff to exonerate him from liability, a variance between such allegation and the proof is waived by failure to object to such proof at the trial.<sup>29</sup>

6. Ala.—Steele v. Mealing, 24 Ala. 285.

50 C.J. p 310 note 20.

**Complaint held sufficient**

La.—Bazer v. Grimmett, 135 So. 54, 16 La.App. 613.

50 C.J. p 310 note 20 [a].

**Complaint held insufficient**

Tex.—Patterson v. Fuller, Civ.App., 110 S.W.2d 1230, error dismissed.

7. N.Y.—Yawger v. American Surety Co., 106 N.E. 64, 212 N.Y. 292, L.R.A.1915D 481.

N.C.—Lancaster v. Stanfield, 132 S. E. 21, 191 N.C. 340.

8. Cal.—Dodge v. Kimple, 54 P. 94, 121 Cal. 580.

9. N.C.—Shuford v. Cook, 30 S.E. 61, 164 N.C. 46.

50 C.J. p 311 note 23.

**Conditions precedent see supra** § 378.

10. Ky.—Kelley v. Ramsey, 195 S. W. 1111, 176 Ky. 584.

50 C.J. p 311 note 26.

11. Ky.—Oldham v. Price, 5 Ky.Op.

95—Mitchell v. Phelps, 4 Ky.Op. 162.

12. Ind.—Croy v. Clark, 74 Ind. 597, 50 C.J. p 311 note 28.

13. Ind.—Croy v. Clark, supra.

Wis.—Schlecht v. Anderson, 232 N. W. 566, 202 Wis. 305.

50 C.J. p 311 note 28 [a] (2).

14. N.Y.—Van Demark v. Van Demark, 13 How.Pr. 372.

50 C.J. p 311 note 29.

15. N.Y.—Van Demark v. Van Demark, supra.

50 C.J. p 311 note 30.

16. Mo.—Quackenboss v. Harbaugh, 249 S.W. 940, 298 Mo. 240.

50 C.J. p 311 note 32.

17. Mo.—Quackenboss v. Harbaugh, supra.

18. Ill.—Porter v. Horton, 80 Ill. App. 333.

50 C.J. p 311 note 34.

19. Ill.—Maxwell v. Brown, 186 Ill. App. 271.

50 C.J. p 311 note 35.

20. Or.—Thompson v. Hibbs, 76 P. 778, 45 Or. 141.

50 C.J. p 311 note 37.

21. Mass.—Durfee v. Kelly, 117 N. E. 907, 228 Mass. 571.

22. Mass.—Durfee v. Kelly, supra.

23. Ky.—Bolling v. Doneghy, 1 Duv. 220.

24. Iowa.—Elson v. Nickles, 36 N. W.2d 343, 240 Iowa 292.

**Under answer**

In action by surety's administrator for contribution from alleged cosurety, answer denying that note sued on was signed by defendant as surety, as alleged in petition, and alleging that defendant was surety only on interest during lifetime of deceased surety, was sufficient to authorize introduction of evidence to support it; and defendant had right to show what true agreement was.—Elson v. Nickles, supra.

25. Ill.—Maxwell v. Brown, 186 Ill. App. 271.

26. N.J.—Paulin v. Kaighn, 29 N.J. Law 480.

27. Wash.—Lindblom v. Johnston, 158 P. 972, 92 Wash. 171.

28. Ill.—Lueders v. Darling, 239 Ill. App. 492.

50 C.J. p 311 note 46.

29. Ky.—Davezac v. Sellar, 20 S.W. 375, 93 Ky. 418, 14 Ky.L. 497.

## § 380. Evidence

- a. Burden of proof and presumptions
- b. Admissibility; weight and sufficiency

## a. Burden of Proof and Presumptions

As a general rule, the plaintiff has the burden of proving all the material allegations of his complaint.

General rules, discussed in Evidence §§ 103-157 and Contribution § 13 e, ordinarily control in suits by sureties for contribution as respects the burden of proof<sup>30</sup> and presumptions,<sup>31</sup> and accordingly, plaintiff suing for contribution must prove all the material allegations of his complaint.<sup>32</sup> Where insolvency of the principal is a condition precedent to the action for contribution, such insolvency must be proved by plaintiff.<sup>33</sup> On the other hand, defendant must prove all matters of defense.<sup>34</sup> Where security in the hands of a surety is surrendered by him, there is a presumption that they are of the value expressed on their face,<sup>35</sup> and the burden of showing that they were of less value is on the surety surrendering them.<sup>36</sup>

*Fact of cosuretyship.* Ordinarily the burden rests on plaintiff to prove that defendant was his cosurety;<sup>37</sup> but the burden rests on defendant to prove the contrary where there is a presumption that the parties are cosureties,<sup>38</sup> and where, by the instrument, the parties to the action for contribution apparently are cosureties the burden is on defendant to prove that he is a supplemental surety.<sup>39</sup>

Where indorsers of a note are held to be liable in the order in which they indorse, the burden of overcoming the presumption is on the party claiming that the relation of cosuretyship exists between them.<sup>40</sup>

*Payment.* The burden is on plaintiff surety to prove that he paid the debt<sup>41</sup> and to show the damages to which he is entitled;<sup>42</sup> but possession of the instrument on which the original obligation is based creates a presumption of payment.<sup>43</sup>

## b. Admissibility; Weight and Sufficiency

General rules control in respect of the admissibility and weight and sufficiency of the evidence in a suit by a cosurety for contribution.

In accordance with general rules, the liability of the cosurety for contribution, and all matters entering into such liability, may be shown by any competent evidence;<sup>44</sup> and, on the other hand, matters to defeat such liability may likewise be shown by any competent evidence.<sup>45</sup> Where the relationship of the parties is not plainly established by the writing, proper evidence is admissible to show the true relationship existing between them.<sup>46</sup> If contribution is claimed as to an amount paid for an administrator, the inventory and account of the latter are admissible for plaintiff.<sup>47</sup>

General rules govern in respect of the weight and sufficiency of evidence in suits by a cosurety for contribution,<sup>48</sup> as in the case of evidence to show

30. Iowa.—Elson v. Nickles, 36 N.W.2d 343, 240 Iowa 292.

31. Ala.—U. S. Fidelity & Guaranty Co. v. Yelding Bros. Co. Department Stores, 143 So. 176, 225 Ala. 307.

32. Ind.—Knight v. Kerfoot, App., 102 N.E. 983, affirmed 110 N.E. 206, 184 Ind. 31.

33. Ky.—Kelley v. Ramsey, 195 S.W. 1111, 176 Ky. 584—Daniel v. Ballard, 2 Dana 296.

34. Kan.—Livermore v. Ayres, 119 P. 549, 86 Kan. 50.  
50 C.J. p 312 note 53.

35. Colo.—Milner v. Eskridge, 163 P. 1115, 62 Colo. 430.  
N.J.—Paulin v. Kaighn, 29 N.J.Law 480.

36. Colo.—Milner v. Eskridge, 163 P. 1115, 62 Colo. 430.  
N.J.—Paulin v. Kaighn, 29 N.J.Law 480.

37. Iowa.—Elson v. Nickles, 36 N.W.2d 343, 240 Iowa 292.  
50 C.J. p 312 note 54.

38. Ind.—Baldwin v. Fleming, 90 Ind. 177.

Ky.—Walker v. Walker, 15 S.W.2d 298, 228 Ky. 357.

## Presumption as rebuttable

Presumption that when two or more persons were sureties on the same instrument they are cosureties is subject to rebuttal.—Elson v. Nickles, 36 N.W.2d 343, 240 Iowa 292.

39. N.C.—Carr v. Smith, 39 S.E. 831, 129 N.C. 232.  
50 C.J. p 312 note 57.

40. N.D.—Harris v. Jones, 136 N.W. 1080, 23 N.D. 488.  
50 C.J. p 312 note 64.

41. N.C.—Lancaster v. Stanfield, 132 S.E. 21, 191 N.C. 340.  
50 C.J. p 312 note 65.

## Traversed allegations

In surety's suit against cosureties for contribution on ground that he paid and took assignment of notes owned by principal, which became insolvent, where alleged facts were denied by cosureties, burden rested on plaintiff to establish that traversed allegations of petition were true.—Lampton v. Staebler, 67 S.W.2d 473, 252 Ky. 405.

42. N.Y.—Fielding v. Waterhouse, 40 N.Y.Super. 424.  
50 C.J. p 312 note 66.

43. Md.—Carroll v. Bowie, 7 Gill 34.

44. Ky.—Vansant's Ex'r v. Gardner's Ex'r, 42 S.W.2d 300, 240 Ky. 318.

Mo.—Phelps v. Scott, 30 S.W.2d 71, 325 Mo. 711, 71 A.L.R. 290.  
50 C.J. p 312 note 71.

## Evidence held competent

In suits against cosurety's executrix for contribution, statements respecting witness' investigation and conclusion reached on principal's insolvency held competent.—Vansant's Ex'r v. Gardner's Ex'r, 42 S.W.2d 300, 240 Ky. 318.

45. Ala.—Bezzell v. White, 13 Ala. 422.  
50 C.J. p 312 note 73.

46. N.C.—Lancaster v. Stanfield, 132 S.E. 21, 191 N.C. 340.  
50 C.J. p 312 note 75.

47. Ala.—Taylor v. Means, 73 Ala. 468.

48. Tex.—Holland v. Florey, Civ. App., 151 S.W.2d 926.

## Proof of insolvency

Better practice to show insolvency of principal as prerequisite to maintenance of suit against cosurety for

liability,<sup>49</sup> or its absence,<sup>50</sup> and evidence offered on the issue of the true relationship of the parties.<sup>51</sup> A parting with the right of contribution may be established circumstantially,<sup>52</sup> as may an agreement between successive accommodation indorsers to be liable jointly as cosureties.<sup>53</sup> Clear and satisfactory evidence is required to establish joint liability as cosureties on the part of successive accommodation indorsers.<sup>54</sup>

### § 381. Trial

A suit for contribution brought by one cosurety against another may properly be tried before a jury if maintainable at law or if within rules governing jury trials in equity.

Where the complaint in an action for contribution is such as not to bring it within the exclusive jurisdiction of a court of equity, it may properly be tried before a jury.<sup>55</sup> On the other hand, where there are present matters calling for the intervention of a court of equity, there is no right to a trial by jury, except as proper under the practice in equity.<sup>56</sup> As in actions at law generally, questions of fact, when the trial is to a jury, should be submitted to them for determination<sup>57</sup> where the evidence is legally sufficient to go to the jury.<sup>58</sup>

*Instructions.* As in civil actions tried before juries generally, the court should, when the trial is to a jury, fully submit all the issues of fact involved in the case<sup>59</sup> and properly instruct the jury as to the law applicable thereto;<sup>60</sup> and such instructions must conform to the evidence.<sup>61</sup>

*Findings.* The rules governing findings of fact in actions generally are applicable to findings in

actions between cosureties for contribution.<sup>62</sup> Accordingly the findings of fact must be within the issues, as presented by the pleadings.<sup>63</sup>

### § 382. Judgment or Decree

Separate judgments should be rendered against each of several cosureties successfully sued for contribution.

A separate judgment should be rendered against each of several cosureties successfully sued for contribution,<sup>64</sup> and where some of the cosureties are insolvent the judgment must provide for contribution from the cosureties who are solvent.<sup>65</sup> If a bill in equity prays for repayment of the entire amount by defendant on the theory that he is primarily liable to complainant, the decree may provide for equal contribution, such relief being within the general scope of the bill.<sup>66</sup> In equity when there are still undetermined claims of the creditor against the sureties, the decree will be framed so as properly to protect the rights of all the parties.<sup>67</sup> In a proper case a judgment can be rendered against the cosurety for his proportionate share, even though, in the same action, the surety recovers a judgment against the principal for the full amount of his payment.<sup>68</sup> If the bill prays for contribution from cosureties on an official bond, confirmation of a master's report fixing the amount due to creditors in accordance with an order of court is a sufficient decree on which execution may issue.<sup>69</sup>

### § 383. Review

Review in civil cases is discussed in Appeal and Error §§ 1-2095.

Examine Pocket Parts for later cases.

contribution is introduction of execution with nulla bona return, but proof is not restricted to such evidence.—*Vansant's Ex'r v. Gardner's Ex'r*, 42 S.W.2d 300, 240 Ky. 318.  
49. Iowa.—*Elson v. Nickles*, 36 N.W.2d 343, 240 Iowa 292.  
Ky.—*Lampton v. Staebler*, 67 S.W.2d 473, 252 Ky. 405.  
50 C.J. p 312 note 72.  
50. Iowa.—*New Amsterdam Casualty Co. v. Bookhart*, 235 N.W. 74, 212 Iowa 994, 76 A.L.R. 897.  
Ky.—*National Union Indemnity Co. v. Giles*, 120 S.W.2d 1043, 275 Ky. 171.—*Vansant's Ex'r v. Gardner's Ex'r*, 42 S.W.2d 300, 240 Ky. 318.  
50 C.J. p 312 note 74.  
51. Ky.—*Walker v. Walker*, 15 S.W.2d 298, 228 Ky. 357.  
50 C.J. p 312 note 76.  
52. Wis.—*In re Koch*, 134 N.W. 663, 148 Wis. 548.  
50 C.J. p 313 note 78.  
53. Conn.—*Jaronko v. Czerwinski*, 166 A. 388, 117 Conn. 15, 90 A.L.R. 299.

54. Conn.—*Jaronko v. Czerwinski*, supra.  
55. Ind.—*Michael v. Allbright*, 25 N.E. 902, 126 Ind. 172.  
50 C.J. p 313 note 79.  
56. Ill.—*Trego v. Cunningham*, 108 N.E. 350, 267 Ill. 367.  
50 C.J. p 313 note 80.  
57. Iowa.—*Kladivo v. Melberg*, 227 N.W. 833, 210 Iowa 306.  
50 C.J. p 313 note 82.  
58. N.C.—*Lancaster v. Stanfield*, 132 S.E. 21, 191 N.C. 340.  
50 C.J. p 313 note 83.  
59. Ky.—*Smith v. Bales*, 99 S.W. 672, 30 Ky.L. 779.  
50 C.J. p 313 note 85.  
60. Ky.—*Rogers v. Hazel*, 144 S.W. 49, 147 Ky. 333.  
50 C.J. p 313 note 86.  
61. Mo.—*Leeper v. Paschal*, 70 Mo. App. 117.  
50 C.J. p 313 note 87.

62. Ind.—*Knight v. Kerfoot*, 110 N.E. 206, 184 Ind. 31.  
50 C.J. p 313 note 89.  
63. Okl.—*Harsha v. Mock*, 281 P. 763, 139 Okl. 181.  
50 C.J. p 313 note 90.  
64. La.—*Leigh v. Wright*, 164 So. 794, 183 La. 765.  
50 C.J. p 313 note 93.  
65. Tex.—*Key v. Oates*, Civ.App., 280 S.W. 286.  
66. Ky.—*Sanders v. Herndon*, 108 S.W. 908, 128 Ky. 437, 32 Ky.L. 1362, 110 S.W. 862, 33 Ky.L. 669.  
N.Y.—*Livingston v. Van Rensselaer*, 6 Wend. 63.  
67. Pa.—*Malone v. Stewart*, 83 A. 607, 235 Pa. 99.  
68. Tex.—*Jackson v. Murray*, 14 S.W. 235, 77 Tex. 644.  
50 C.J. p 313 note 97.  
69. S.C.—*Lowndes v. Pinckney*, 21 S.C.Eq. 44.

## D. SUMMARY REMEDIES

## § 384. In General

Statutes prescribing a summary remedy for enforcement of contribution by sureties against their cosureties, as on motion, are in derogation of the common law and subject to strict construction.

Statutes prescribing a summary remedy for the enforcement of contribution by sureties against their cosureties are in derogation of the common law<sup>70</sup> and must be strictly construed<sup>71</sup> to embrace only cases therein provided for.<sup>72</sup> Such statutes are not exclusive of other proceedings for the enforcement of contribution,<sup>73</sup> and are applicable to past as well as to future transactions.<sup>74</sup> Such a statute has been said to be declaratory of a recognized rule of legal liability,<sup>75</sup> and, in a proper case, where a surety seeking relief by motion has failed to bring himself within the terms of the statute, the court may treat the proceedings as a civil action and give relief accordingly.<sup>76</sup>

Under some of these statutes a surety against whom a judgment has been rendered for the debt or who has paid more than his ratable share of such judgment may, on motion, obtain a summary judgment against each of his cosureties not parties to the original judgment<sup>77</sup> in the court in which the original judgment was rendered,<sup>78</sup> on notice to his

cosurety<sup>79</sup> and on showing the insolvency of his principal.<sup>80</sup> Other statutes give a remedy by motion to a surety paying a joint judgment against all the sureties<sup>81</sup> or provide for the enforcement of contribution by the issuance of an execution on the judgment obtained against the sureties in favor of the paying surety,<sup>82</sup> and under some statutes the question of suretyship may be determined in a summary proceeding.<sup>83</sup> The record must show the facts necessary to sustain the jurisdiction of the court.<sup>84</sup>

## § 385. Procedure

The general rules governing motions ordinarily control in summary proceedings to enforce contribution by a cosurety; the judgment rendered should be several.

The rules of evidence governing motions apply in summary proceedings to enforce contribution.<sup>85</sup> Thus affidavits may be introduced in opposition to the motion;<sup>86</sup> and the judgment obtained by the creditor against the sureties is admissible in evidence<sup>87</sup> to show the liability of the parties in the original action<sup>88</sup> and to show that payment by the surety was under compulsion.<sup>89</sup> Judgments in the summary proceedings must be several.<sup>90</sup>

## X. RIGHTS AND LIABILITIES AS BETWEEN SURETIES AND SUPPLEMENTAL SURETIES AND SUCCESSIVE SURETIES IN JUDICIAL PROCEEDINGS

## § 386. Supplemental Sureties

A supplemental surety is a surety for a surety.

A supplemental surety is one who, as between

himself and another surety or sureties, is collaterally bound; he is a surety for a surety; and, to him, another surety occupies the position of a principal,

70. Ala.—Nation v. Roberts, 20 Ala. 544.

Ky.—Lansdale v. Cox, 7 T.B.Mon. 401.

71. Ala.—Nation v. Roberts, 20 Ala. 544.

72. Ala.—Nation v. Roberts, supra. 50 C.J. p 303 note 67.

73. Ala.—Roberts v. Adams, 6 Port. 361, 31 Am.D. 694.

Tex.—Eubanks v. Sites, Civ.App., 146 S.W. 952.

74. Ala.—Young v. Clark, 2 Ala. 264.

50 C.J. p 303 note 69.

75. Mo.—Wilkerson v. Sampson, 56 Mo.App. 276.

76. Tenn.—Anderson v. Binford, 2 Baxt. 310.

50 C.J. p 303 note 71.

77. Ala.—Irwin v. Scruggs, 32 Ala. 516.

50 C.J. p 303 note 72.

78. U.S.—Dade v. Mandeville, D.C.,

6 F.Cas.No.3,533, 1 Cranch C.C. 92.

50 C.J. p 303 note 75.

79. W.Va.—Selvey v. Armstrong, 79 S.E. 1019, 73 W.Va. 13.

50 C.J. p 303 note 76.

80. Ind.—Batson v. Lasselle, 1 Blackf. 119.

50 C.J. p 303 note 77.

81. Ky.—Robertson v. Maxcey, 6 Dana 101.

50 C.J. p 303 note 78.

82. Okl.—Walsh v. Kuder, 95 P.2d 876, 186 Okl. 68.

50 C.J. p 304 note 79.

Without further action by court

Where money judgment was rendered against principal and two sureties on fidelity bond, surety who paid judgment and filed with clerk proper notice of claim of contribution of which proper notation was made by the clerk was entitled to execution to enforce contribution

against the other surety without any further action on the part of the court.—Walsh v. Kuder, supra.

83. Ga.—Cooper v. Chamblee, 39 S.E. 917, 114 Ga. 116.

50 C.J. p 304 note 80.

84. Ala.—Weeks v. Yeend, 16 So. 421, 104 Ala. 546.

50 C.J. p 304 note 81.

85. W.Va.—Selvey v. Armstrong, 79 S.E. 1019, 73 W.Va. 13.

50 C.J. p 304 note 82.

86. Cal.—San Joaquin Valley Bank v. Gate City Oil Co., 173 P. 781, 36 Cal.App. 791.

87. W.Va.—Selvey v. Armstrong, 79 S.E. 1019, 73 W.Va. 13.

88. W.Va.—Selvey v. Armstrong, supra.

89. W.Va.—Selvey v. Armstrong, supra.

90. Ky.—Lampton v. Bruner, 2 Litt. 141.

their liabilities being successive.<sup>91</sup> Is is competent for one to become surety for other sureties;<sup>92</sup> but a surety for a surety, that is, a supplemental surety, and the surety are not cosureties.<sup>93</sup> There is no mutuality between him and other sureties.<sup>94</sup> Because as between a surety and a supplemental surety the latter is only collaterally or secondarily liable, the surety is said to occupy the position of principal with respect to the supplemental surety.<sup>95</sup>

### § 387. — Who Are Supplemental Sureties

#### a. In general

#### b. Becoming supplemental surety by stipulation

#### a. In General

A person may become a supplemental surety in various ways.

Subject to the condition that there is present an intention to become merely a surety to the original surety, and not a cosurety, which intention may be shown by extrinsic evidence,<sup>96</sup> a person may become a supplemental surety in various ways;<sup>97</sup> and it has been held that the addition of the word "surety" to his signature may make the signer merely a surety for prior signers, and not a cosurety;<sup>98</sup> but there is also authority to the contrary.<sup>99</sup> An indorser occupies the position of a supplemental surety for prior parties.<sup>1</sup> Since joint debtors are sureties as to each other's share of the debt, under principles discussed supra § 39, a surety for joint debtors occupies the position of a supplemental surety as to each for the other's share of the debt.<sup>2</sup> A person who pledges his own note to secure the payment of another person's note is a

supplemental surety as to an indorser on the latter note.<sup>3</sup>

*The maker of a promissory note* may be a surety for other makers who are sureties if such was the intention;<sup>4</sup> but such an intention is not shown by the mere fact that he signed several months after the others,<sup>5</sup> nor can any such intention arise when the signer is not aware of the other sureties.<sup>6</sup>

#### b. Becoming Supplemental Surety by Stipulation

The authorities are not entirely in accord as to whether or not one may become a supplemental surety by stipulation, and there is some disagreement concerning the necessity for consent of prior sureties.

On the question whether a subsequent surety can stipulate that he is to be a supplemental surety, and not a cosurety with prior parties, the cases are not entirely in accord. Some hold that he can so stipulate where the principal falsely informs him that all prior signers are principals,<sup>7</sup> or where he is ignorant of the existing suretyship,<sup>8</sup> or even where he has knowledge of the suretyship,<sup>9</sup> and although the prior sureties expected that the subsequent surety would be equally liable with them.<sup>10</sup>

By some decisions, the consent of those who have signed as sureties is not necessary to enable a subsequent signer to stipulate that his liability is to be that of a supplemental surety only<sup>11</sup> unless such a stipulation is contrary to the agreement under which the prior sureties signed.<sup>12</sup> Other decisions, however, hold that a subsequent surety cannot stipulate for secondary liability as to other sureties unless such other sureties assent thereto.<sup>13</sup>

91. Ala.—*Corpus Juris* cited in *Albert v. Henry*, 167 So. 561, 562, 232 Ala. 159—*Corpus Juris* cited in *U. S. Fidelity & Guaranty Co. v. Yelding Bros. Co. Department Stores*, 143 So. 176, 182, 225 Ala. 307.

92. N.C.—*Citizens' Nat. Bank v. Burch*, 59 S.E. 71, 145 N.C. 316.

93. Conn.—*Bulkeley v. House*, 26 A. 352, 62 Conn. 459, 21 L.R.A. 247. 50 C.J. p 314 note 6.

94. Conn.—*Monson v. Drakeley*, 40 Conn. 552, 16 Am.R. 74.

95. Ala.—*Corpus Juris* cited in *Albert v. Henry*, 167 So. 561, 562, 232 Ala. 159—*Corpus Juris* cited in *U. S. Fidelity & Guaranty Co. v. Yelding Bros. Co. Department Stores*, 143 So. 176, 182, 225 Ala. 307.

96. Ala.—*Corpus Juris* cited in *U. S. Fidelity & Guaranty Co. v. Yelding Bros. Co. Department*

*Stores*, 143 So. 176, 182, 225 Ala. 307.

Ky.—*Keeton v. Owens*, 15 S.W.2d 487, 228 Ky. 522. 50 C.J. p 314 note 9.

97. Conn.—*Monson v. Drakeley*, 40 Conn. 552, 16 Am.R. 74. 50 C.J. p 314 note 10.

98. Conn.—*Bulkeley v. House*, 26 A. 352, 62 Conn. 459, 21 L.R.A. 247. 50 C.J. p 314 note 11.

99. Ind.—*Baldwin v. Fleming*, 90 Ind. 177. 50 C.J. p 314 note 12.

1. Tenn.—*Commercial Bank v. Layne*, 46 S.W. 762, 101 Tenn. 145. 50 C.J. p 314 note 13.

2. W.Va.—*Brooks v. Miller*, 2 S.E. 219, 29 W.Va. 499. 50 C.J. p 314 note 15.

3. Cal.—*Montgomery v. Sayre*, 34 P. 646, 100 Cal. 182, 38 Am.S.R. 271.

4. Tex.—*Dullnig v. Weekes*, 40 S.W. 178, 16 Tex.Civ.App. 1.

5. Ky.—*McNeil v. Sanford*, 3 B. Mon. 11.

6. Conn.—*Monson v. Drakeley*, 40 Conn. 552, 16 Am.R. 74. 50 C.J. p 314 note 19.

7. Conn.—*Bulkeley v. House*, 26 A. 352, 62 Conn. 459, 21 L.R.A. 247. Ind.—*Bobbitt v. Shryer*, 70 Ind. 513. 551.

8. N.Y.—*Sayles v. Sims*, 73 N.Y. 551.

9. W.Va.—*Huffman v. Manley*, 98 S.E. 613, 83 W.Va. 503. 50 C.J. p 314 note 22.

10. Vt.—*Adams v. Flanagan*, 36 Vt. 400.

11. Conn.—*Bulkeley v. House*, 26 A. 352, 62 Conn. 459, 21 L.R.A. 247. 50 C.J. p 314 note 24.

12. Ohio.—*Crouse v. Wagner*, 41 Ohio St. 470. 50 C.J. p 314 note 25.

13. Ga.—*Simmons v. Camp*, 64 Ga. 726.

50 C.J. p 314 note 26.

company was within the company's power.<sup>30</sup>

*Analogy to insurance.* The business of corporations organized for the purposes of profit, in becoming the sureties for the performance of contracts of various kinds, is largely in the nature of insurance,<sup>31</sup> and, where such a company is organized under the provisions of statutes providing for the organization of insurance companies, it is to all intents and purposes an insurance company.<sup>32</sup>

A common surety may be defined as one which is engaged in business for profit and on terms and conditions fixed by itself,<sup>33</sup> and a surety company may be referred to as a "common surety."<sup>34</sup>

### § 392. Statutory Provisions

It is beyond the power of the courts to deny surety companies the rights, or to relieve them from the liabilities, of becoming sureties where statute confers such rights and imposes such liabilities.

Where the surety company is, by statute, given all the rights of personal sureties and made subject to all the liabilities of such, it is no more within the authority of the courts to deny such corporations the rights thus accorded than it is to relieve them of the liabilities imposed.<sup>35</sup> By statute, provision is frequently made allowing a surety company, authorized under the law of the state to enter into such an obligation, to become a surety on bonds required by law,<sup>36</sup> and the validity of such statutes has been upheld.<sup>37</sup> So it has been held

within the legislative power to authorize a corporation to become a sole surety on bonds, although in the case of natural persons as sureties two or more sureties would be required,<sup>38</sup> or to authorize certain officers of trust who may be required by law or by order of court to give bonds to include as part of their lawful expenses in executing the trust such reasonable sums as they may have paid to a company authorized by the law of the state to do so for becoming a surety thereon.<sup>39</sup>

### § 393. Incorporation and Organization

An interstate consolidation of surety companies creates a new corporation, but a constituent company may continue its separate existence for a specified period in order to pay off its liabilities.

An interstate consolidation of surety companies creates a new corporation,<sup>40</sup> but a constituent surety company continues in existence for a specified period for the purpose of paying its outstanding liabilities.<sup>41</sup>

### § 394. Officers and Agents

Under the general rules of agency, a surety company is bound by the acts of its agent within the scope of his real or apparent authority, but not where he exceeds it.

The general rules of agency, in the absence of evidence to the contrary, are applicable to surety companies and their agents,<sup>42</sup> and a surety company is bound by the acts of its agent within the

State ex rel. Travelers' Indemnity Co. v. Knott, 153 So. 304, 306, 114 Fla. 820.

Mo.—Hicks v. National Surety Co., 155 S.W. 71, 169 Mo.App. 479.

30. Fla.—Corpus Juris quoted in State ex rel. Travelers' Indemnity Co. v. Knott, 153 So. 304, 306, 114 Fla. 820.

Ind.—Massachusetts Bonding, etc., Co. v. State, 127 N.E. 223, 76 Ind. App. 16.

31. U.S.—Greek Catholic Union v. American Surety Co. of New York, C.C.A.Pa., 25 F.2d 31.

Fla.—Corpus Juris quoted in State ex rel. Travelers' Indemnity Co. v. Knott, 153 So. 304, 306, 114 Fla. 820.

N.C.—Forest City Building & Loan Ass'n v. Davis, 133 S.E. 530, 192 N.C. 108, modified on other grounds 138 S.E. 338, 193 N.C. 710. 50 C.J. p 316 note 55.

32. Fla.—Corpus Juris quoted in State ex rel. Travelers' Indemnity Co. v. Knott, 153 So. 304, 306, 114 Fla. 820.

59 C.J. p 317 note 56.

33. Mo.—Long Brothers Grocery Co. v. U. S. Fidelity, etc., Co., 110 S. W. 29, 130 Mo.App. 421.

34. N.C.—Tarboro Bank v. Maryland Fidelity, etc., Co., 38 S.E. 908, 128 N.C. 366, 83 Am.S.R. 682. 50 C.J. p 316 note 49 [a].

35. Fla.—Corpus Juris quoted in State ex rel. Travelers' Indemnity Co. v. Knott, 153 So. 304, 306, 114 Fla. 820.

La.—Wells v. Maryland Fidelity, etc., Co., 83 So. 448, 146 La. 169.

36. Fla.—Corpus Juris quoted in State ex rel. Travelers' Indemnity Co. v. Knott, 153 So. 304, 306, 114 Fla. 820.

50 C.J. p 316 note 47.

37. Fla.—Corpus Juris quoted in State ex rel. Travelers' Indemnity Co. v. Knott, 153 So. 304, 306, 114 Fla. 820.

50 C.J. p 316 note 48.

38. Cal.—San Luis Obispo County v. Murphy, 123 P. 808, 162 Cal. 588, Ann.Cas.1913D 712.

Fla.—Corpus Juris quoted in State ex rel. Travelers' Indemnity Co. v. Knott, 153 So. 304, 306, 114 Fla. 820.

Pa.—In re Bond of Equitable Gas Co., 72 Pa.Super. 371.

50 C.J. p 316 note 49.

39. Fla.—Corpus Juris quoted in State ex rel. Travelers' Indemnity

Co. v. Knott, 153 So. 304, 306, 114 Fla. 820.

Pa.—In re Clark, 46 A. 127, 195 Pa. 520, 48 L.R.A. 587.

40. Ill.—American Bonding & Casualty Co. v. Chicago Bonding & Ins. Co., 226 Ill.App. 475.

41. Ill.—American Bonding & Casualty Co. v. Chicago Bonding & Ins. Co., supra.

42. Pa.—Schenker v. Indemnity Ins. Co. of North America, 16 A.2d 304, 340 Pa. 81.

Tex.—Verschoyle v. Holifield, Civ. App., 90 S.W.2d 907, modified on other grounds 123 S.W.2d 878, 132 Tex. 516.

50 C.J. p 317 note 59.

#### Pleadings

Pleadings held sufficient to sustain judgment against agent of surety.—Verschoyle v. Holifield, supra.

#### What law governs

Where local agent of foreign bonding company had office in state of forum and there was nothing to show that surety bonds were executed and delivered at any place other than in state of forum, law of forum governed scope of agent's authority and effect to be given to alleged consent by agent to use of trade ac-



real or apparent scope of his authority.<sup>43</sup> Where the surety company has put into the hands of agents the power to induce others to accept them as such agents, the company is liable on bonds executed by such agents,<sup>44</sup> and is bound by the recitals therein,<sup>45</sup> especially where approved by a court,<sup>46</sup> even though in fact such execution was beyond the scope of their authority.<sup>47</sup> The agent's apparent authority must be apparent to the party relying on it,<sup>48</sup> and persons dealing with the company are not bound to search its records to ascertain what limitations these place on the agent's power to act for the company.<sup>49</sup> On the other hand, where the agent exceeds both his real and his apparent power, the surety company is not liable.<sup>50</sup>

A general agent of a surety company, acting in the company's interest, is presumed to have authority to do so,<sup>51</sup> particularly where such agent has been permitted by the company to hold himself out as its ostensible agent,<sup>52</sup> and, in the absence of a showing to the contrary, the general agent has all the powers of the corporation itself with respect to

execution and delivery of bonds,<sup>53</sup> and may bind the company by his acts<sup>54</sup> and representations.<sup>55</sup> Ordinarily knowledge possessed by a general agent is chargeable to the surety company,<sup>56</sup> but where the party seeking to charge the surety company participates with its agent in a fraudulent scheme the company is not chargeable with such agent's knowledge<sup>57</sup> and is not responsible for his actions.<sup>58</sup> While the authority of a general agent may be expressly limited,<sup>59</sup> limitations on the powers of an agent of a surety company do not affect persons dealing with the agent without knowledge thereof.<sup>60</sup>

**Power of attorney.** The rules as to the construction of powers of attorney of agents generally, as discussed in Agency § 98, apply in construing the power of attorney of a surety company's agent,<sup>61</sup> and, in the absence of other knowledge, one dealing with an agent of a surety company has a right to rely on the agent's power of attorney.<sup>62</sup> Where a directors' resolution authorizes resident officers of a surety company to appoint an attorney in fact un-

ceptances to finance subcontractor who was principal on bonds.—Anthony P. Miller, Inc. v. Needham, C.C.A.Pa., 122 F.2d 710.

43. Ky.—Western Casualty & Surety Co. v. Meyer, 192 S.W.2d 388, 301 Ky. 487, 164 A.L.R. 769.

La.—Fidelity & Casualty Co. of New York v. Aetna Homestead Ass'n, 162 So. 646, 182 La. 865.

Tex.—Lloyds Casualty Insurer v. Farrar, Civ.App., 167 S.W.2d 221, affirmed 174 S.W.2d 302, 141 Tex. 497.

44. N.Y.—In re Goldberg, 205 N.Y. S. 649, 123 Misc. 438.

50 C.J. p 317 note 65.

45. Va.—National Surety Co. v. Hicklin, 155 S.E. 815, 155 Va. 577.

46. N.Y.—In re Goldberg, 205 N.Y. S. 649, 123 Misc. 438.

50 C.J. p 317 note 66.

47. N.C.—Bowers v. Bryan Lumber Co., 68 S.E. 19, 152 N.C. 604.

48. Wash.—Mills v. Title Guaranty, etc., Co., 172 P. 248, 101 Wash. 162.

49. Or.—Aerne v. Gostlow, 118 P. 277, 60 Or. 113.

50. Va.—Southern Ry. Co. v. Thomas, 30 S.E.2d 575, 182 Va. 788.

**Agent employed solely to solicit and write bonds could not bind company by making representations to persons not in legal relationship with company respecting bonds on which company was then liable.**—Metropolitan Casualty Ins. Co. of New York, N. Y., v. Potomac Builders' Supply Co., 61 F.2d 407, 61 App. D.C. 255.

#### Alteration

Bonding company's agent which wrote bonds for subcontractor was without authority to agree to an alteration of method of payment under subcontracts on which company was surety.—Anthony P. Miller, Inc. v. Needham, C.C.A.Pa., 122 F.2d 710.

51. Ind.—New Amsterdam Casualty Co. v. Madison County Trust Co., 142 N.E. 727, 81 Ind.App. 157.

**Evidence overcoming presumption**  
Tex.—American Surety Co. of New York v. Cross, Civ.App., 80 S.W.2d 470.

52. U.S.—Globe Indemnity Co. v. Unity R. Co., C.C.A.Pa., 272 F. 607.

Or.—Aerne v. Gostlow, 118 P. 277, 60 Or. 113.

53. Ariz.—Kroeger v. Union Indemnity Co., 14 P.2d 258, 40 Ariz. 467.

54. La.—Fidelity & Casualty Co. of New York v. Aetna Homestead Ass'n, 162 So. 646, 182 La. 865.

#### Execution of waiver

Agents of surety and insurance company authorized by contract to issue policies and renewals, to execute contracts of suretyship, and who were guided by instructions in leaflet bearing caption "General Power of Attorney," were held to be general agents, whose execution of waiver bound surety.—Fidelity & Casualty Co. of New York v. Aetna Homestead Ass'n, supra.

55. Ky.—National Union Indemnity Co. v. Giles, 120 S.W.2d 1043, 275 Ky. 171.

56. U.S.—American Surety Co. of New York v. First Nat. Bank, D.C. Pa., 15 F.Supp. 974, affirmed, C.C. A., 96 F.2d 813.

#### Notice to agent

Ariz.—Kroeger v. Union Indemnity Co., 14 P.2d 258, 40 Ariz. 467.

Va.—National Surety Co. v. Hicklin, 155 S.E. 398, reheard 155 S.E. 815, 155 Va. 577.

57. Wash.—Associated Indemnity Corporation v. Del Guzzo, 81 P.2d 516, 195 Wash. 486.

58. Wash.—Associated Indemnity Corporation v. Del Guzzo, supra.

59. Ky.—Title Guaranty, etc., Co. v. Hay, 194 S.W. 922, 175 Ky. 671.

50 C.J. p 317 note 62.

60. Okl.—Massachusetts Bonding, etc., Co. v. Lewis, 195 P. 494, 80 Okl. 187.

50 C.J. p 317 note 63.

61. U.S.—Anthony P. Miller, Inc. v. Needham, C.C.A.Pa., 122 F.2d 710.

Cal.—Karsh v. Fidelity Union Casualty Co., 6 P.2d 980, 119 Cal.App. 543.

50 C.J. p 317 note 72.

#### Territorial restrictions

Power of attorney to act in the name and behalf of surety company, "as surety at Lynchburg," in executing bonds and obligations used quoted words as restrictive and not merely descriptive and defined territorial limit of the authority granted.—Southern Ry. Co. v. Thomas, 30 S.E.2d 575, 182 Va. 788.

62. Wash.—American Sav. Bank, etc., Co. v. Bremerton Gas Co., 168 P. 775, 99 Wash. 18.

der power of attorney to execute bonds, but requires that the nature of each bond be stated in the power of attorney, the latter proviso has been held to be merely directory.<sup>63</sup> Where provision is made for the recording of a power of attorney, persons dealing with the surety company's agent are chargeable with notice of limitations on his authority contained in a duly recorded power of attorney,<sup>64</sup> but, where no provision is made for such recording, the recordation of such an instrument is ineffectual to charge others with notice.<sup>65</sup> Where an agent is given power to issue bonds by a recorded power of attorney and resolution of authority by the company's directors, but such power is limited by an unrecorded letter of instructions of which the obligee has no knowledge, the limitation will not relieve the principal from any obligation which, except for such instruction, would be binding on it.<sup>66</sup> A resolution authorizing the officers to execute powers of attorney appointing attorneys in fact to execute bonds required by the laws of the United States, municipal laws, or otherwise, embraces every law owing its origin and force to the law-making power of the national government,<sup>67</sup> and is not restricted to municipal laws of the United States government.<sup>68</sup>

**Ratification.** A surety company is bound by the acts of its agents where it has ratified them.<sup>69</sup> Thus, where the surety company has received the consideration for the contract, it is put on inquiry as to whether its agents have acted within the scope of their authority<sup>70</sup> and must be deemed to have ratified the acts of the agents.<sup>71</sup>

**Estoppel.** A surety company is estopped to deny the authority of one who has become its agent by reason of compliance with statutory provisions

constituting him an agent<sup>72</sup> or to assert that the signature of the company by the agent is not binding on the company.<sup>73</sup> So, where the agent acts within the apparent scope of his authority, the company is estopped to deny that the agent's act was proper and authorized.<sup>74</sup> The rule applicable to corporations generally, that a corporation having knowledge of the act of a person as its agent without giving notice of such ultra vires act is estopped to deny the existence of such authority, applies to a surety company which permits an agent to make a bond not within the scope of his authority without objection.<sup>75</sup>

### § 395. Corporate Powers and Functions

The general rules governing the powers and functions of private corporations ordinarily control in respect of the powers and functions of surety companies.

The general rules governing the powers and functions of private corporations ordinarily control in respect of the powers and functions of surety companies.<sup>76</sup> A statute authorizing certain corporations to become sureties and making them suable in the same jurisdiction as the principal on the bond has been held inapplicable to a corporation guaranteeing performance of insurance contracts.<sup>77</sup>

### § 396. Execution and Delivery of Bonds or Other Obligations

The power and authority of agents of surety companies to execute and deliver bonds are discussed supra § 394.

Examine Pocket Parts for later cases.

### § 397. Premiums

Questions with respect to premiums of surety com-

63. Ga.—Sasnett v. Owen, 26 S.E. 2d 640, 69 Ga.App. 741.

Failure to comply with such direction does not invalidate the bond.—Sasnett v. Owen, supra.

64. Pa.—Schenker v. Indemnity Ins. Co. of North America, 16 A.2d 304, 340 Pa. 81.

65. Tex.—American Surety Co. of New York v. Cross, Civ.App., 80 S.W.2d 470.

66. Iowa.—Denecke v. West, 169 N.W. 97, 184 Iowa 600.

67. La.—Flaherty v. Jackson, 94 So. 316, 152 La. 679.

68. La.—Flaherty v. Jackson, supra.

69. Ky.—Detroit Fidelity & Surety Co. v. Gilliam, 34 S.W.2d 971, 237 Ky. 425.

**Release**

Corporate surety on subcontractor's bond cannot be heard to repudiate its manager's release of one partner from firm's contract to indemnify surety against loss after ratifying and approving manager's acts inuring to surety's benefit by paying drafts on him.—U. S. Fidelity & Guaranty Co. v. Putfark, 153 So. 9, 180 La. 893.

70. N.C.—Bowers v. Bryan Lumber Co., 68 S.E. 19, 152 N.C. 604.

71. N.C.—Bowers v. Bryan Lumber Co., supra.

50 C.J. p 318 note 75.

72. Miss.—Champernois v. Donald Co., 121 So. 485, 153 Miss. 719.

50 C.J. p 318 note 77.

73. Miss.—Champernois v. Donald Co., supra.

50 C.J. p 318 note 78.

74. Colo.—National Surety Co. v. People, 130 P. 843, 54 Colo. 365.

**Estoppel not shown**

Surety company, giving its agent written power of attorney, held not estopped by its act in intrusting him with its corporate seal to deny his authority to execute cost bond, district clerk, dealing with agent, having no right to assume that he had such authority.—American Surety Co. of New York v. Cross, Tex. Civ.App., 80 S.W.2d 470.

75. Iowa.—Denecke v. West, 169 N.W. 97, 184 Iowa 600.

76. Iowa.—Denecke v. West, 169 N.W. 97, 184 Iowa 600.

Md.—National Surety Co. v. Lanan, 99 A. 790, 129 Md. 542.

Pa.—In re Morganroth Election Contest, 50 Pa.Dist.& Co. 143—Feinberg v. Fried, Com.Pl., 6 Sch.Reg. 208.

77. U.S.—Picard v. Home Indemnity Co., D.C.La., 7 F.Supp. 1014.

panies on suretyship contracts are governed by the rules controlling such matters in contracts for insurance.

Rules analogous to those governing contracts of insurance generally control as to the premiums of surety companies on suretyship contracts,<sup>78</sup> as, for example, with respect to the construction of the contract.<sup>79</sup> The surety company's right to collect premiums cannot be affected by any agreement to which it is not a party,<sup>80</sup> and an agreement to waive a provision in the bond of a right to recover premiums against the principal requires a new consideration.<sup>81</sup> A provision in the contract secured, for premiums to be paid by one other than the principal, does not preclude the surety company from recovering premiums from the principal under his agreement in the application for the bond,<sup>82</sup> even though the third person paid the first premium.<sup>83</sup> Where the principal has enjoyed the benefit of a contract secured by the company, he cannot refuse to pay the premium because of the termination of the company's authority to do business<sup>84</sup> or because the contract secured is in litigation<sup>85</sup> or is in fact declared invalid.<sup>86</sup>

**Accrual and apportionment.** The surety company's right to the payment of the premium payable in advance accrues at the time of the accrual of the company's liability.<sup>87</sup> The principal is liable only for premiums proportionate to the duration of the risk.<sup>88</sup>

**Recovery back of unearned premium.** The mere fact that a surety company is in the hands of receivers and that the principal has been obliged to give new bonds does not entitle the principal to recover against the receivers the amount of unearned premiums.<sup>89</sup>

**Actions for premiums.** If the company has in-

curred liability on the promise of consideration, it can bring suit to recover.<sup>90</sup>

**Termination of liability.** Release of the principal from the contract secured does not release him from his agreement to pay premiums.<sup>91</sup> Where, by reason of a default by the obligee, the principal ceases performance of a contract secured by the surety company, he may notify the surety company that the bond is no longer needed,<sup>92</sup> and thus terminate his liability for future premiums.<sup>93</sup> A usual provision in agreements for the payment of premiums is that the liability therefor shall continue until written evidence of the company's discharge from liability on the bond be furnished it, but such provision is inapplicable where the surety company itself acts in terminating its liability.<sup>94</sup> Discharge of the surety is, however, a defense to a suit for a premium due on a surety bond,<sup>95</sup> even though the surety had not been notified of the discharge.<sup>96</sup> The failure of the obligee to perform the contract secured does not affect the principal's liability for premiums where all the parties treat the bond as continuing.<sup>97</sup>

## § 398. Reinsurance

The general doctrines of reinsurance ordinarily apply to surety companies.

Under the doctrine that the business of a surety company is largely in the nature of insurance, as discussed supra § 391, the doctrines applicable to reinsurance generally apply to surety companies.<sup>98</sup> Thus, the rule applicable to reinsurance contracts generally, that, where the reinsurer assumes the risks of the reinsured and becomes substituted to its contracts, the original insured may recover directly from the reinsurer, applies to such contracts of

78. Mass.—Pacific Surety Co. v. Toye, 112 N.E. 653, 224 Mass. 98. 50 C.J. p 318 note 85.

79. Ark.—Southern Surety Co. v. Perdue, 203 S.W. 576, 134 Ark. 458. 50 C.J. p 318 note 85.

80. Kan.—Maryland Fidelity, etc., Co. v. Callahan, 158 P. 653, 98 Kan. 547.

81. Iowa.—Maryland Fidelity, etc., Co. v. Mansfield, 175 N.W. 528, 187 Iowa 1250.

82. Iowa.—Maryland Fidelity, etc., Co. v. Mansfield, supra.

83. Iowa.—Maryland Fidelity, etc., Co. v. Mansfield, supra.

84. N.Y.—American Fidelity Co. v. Leahy, 178 N.Y.S. 511, 189 App. Div. 242, affirmed 135 N.E. 946, 233 N.Y. 628.

85. U.S.—Mizell v. Elmore, etc.,

Contracting Co., N.Y., 215 F. 88, 131 C.C.A. 396.

86. U.S.—Mizell v. Elmore, etc., Contracting Co., supra.

87. Ind.—Rehm v. McCray, 134 N. E. 505, 78 Ind.App. 540.

88. Ark.—Peay v. Southern Surety Co., 216 S.W. 722, 141 Ark. 265. 50 C.J. p 318 note 94.

89. Md.—Barber Asphalt Pav. Co. v. Poe, 115 A. 24, 139 Md. 332.

90. Miss.—U. S. Fidelity, etc., Co. v. Felder, 62 So. 236, 105 Miss. 683.

Neb.—American Surety Co. v. Mus-selman, 132 N.W. 729, 90 Neb. 58. 50 C.J. p 319 note 6.

91. Ind.—Rehm v. McCray, 134 N. E. 505, 78 Ind.App. 540.

N.Y.—National Surety Co. v. Stallo, 156 N.Y.S. 988, 171 App.Div. 206.

92. Ark.—Southern Surety Co. v. Perdue, 203 S.W. 576, 134 Ark. 458.

93. Ark.—Southern Surety Co. v. Perdue, supra.

94. N.Y.—National Surety Co. v. Stallo, 156 N.Y.S. 988, 171 App. Div. 206.

95. Minn.—Poe v. Cameron, 153 N. W. 129, 130 Minn. 15. 50 C.J. p 319 note 1.

96. Minn.—Poe v. Cameron, 153 N. W. 129, 130 Minn. 15. 50 C.J. p 319 note 2.

97. N.Y.—American Bonding Co. v. Kelly, 158 N.Y.S. 812, 172 App.Div. 437, affirmed 121 N.E. 852, 225 N.Y. 641.

98. Va.—American Bonding Co. v. American Surety Co., 103 S.E. 599, 127 Va. 209.

reinsurance between surety companies.<sup>99</sup> Where, by terms of the reinsurance contract, the reinsurer company agreed to be liable for defaults after a certain time on all bonds on which no written notice of claim was received before a certain time, and, under another clause, the original surety company agreed that there was no default known to its officers, the fact that the latter clause was not true as to a certain bond does not except such bond from the reinsurance contract,<sup>1</sup> particularly where the evidence of such knowledge of an officer is insufficient.<sup>2</sup>

### § 399. Foreign Corporations

A surety company created in one state may do business in another on compliance with the laws of the latter.

Under constitutional or statutory provisions, a surety company created in one state may transact business in another state on compliance with the laws of the latter.<sup>3</sup> Thus under statutes it is usually necessary and sufficient that a foreign surety company first appoint some person residing within the jurisdiction as agent to receive service of process on the company<sup>4</sup> and that it make a deposit of money, securities, or bond.<sup>5</sup> When foreign surety companies are governed by special regulations, the general law pertaining to foreign corporations is not applicable to them;<sup>6</sup> but in the absence of special regulations the validity of the execution of its contracts is governed by rules applicable to the execution of corporate contracts generally.<sup>7</sup> If a foreign company has complied with the requirements of the law, it is not necessary to state in a bond which it signs that it is authorized to transact business in the state,<sup>8</sup> and, where a foreign surety company holds a local certificate to the effect

that it is entitled to do business within the state, the courts may not go behind such certificate and inquire into its charter powers and the sufficiency of its paid-in capital.<sup>9</sup>

*Foreign company as sole surety.* Statutes permitting surety companies to become a sole surety do not apply to a foreign surety company where no such power is found in its charter,<sup>10</sup> even though it holds a certificate of a state official of such authority to be sole surety;<sup>11</sup> but where the charter of a foreign surety company provides that it may execute such bonds and it has complied with the state laws, or a statute so provides, the general rule applies.<sup>12</sup>

*Penalties* are often imposed by statutes for violations of state laws regulating surety companies, and, where a statute imposes a penalty against any person or corporation accepting a surety company as security when the company has not complied with the state regulations and against any agent who has solicited business for the company or acted as agent therefor, the penalty is recoverable only by a suit in the name of the state,<sup>13</sup> and not against one who is not an agent within the specification of the statute.<sup>14</sup>

*Actions.* The general rules governing actions by or against foreign corporations ordinarily control in respect of actions by or against foreign surety companies.<sup>15</sup> Service on one not appointed agent to receive service of process has been held insufficient.<sup>16</sup>

### § 400. Justification by Surety Company

A surety company may or may not be required to furnish justification in order to act, depending on the rule prevailing in the particular jurisdiction.

99. U.S.—U. S. v. Brent, D.C.S.C., 236 F. 771.

Va.—American Bonding Co. v. American Surety Co., 103 S.E. 599, 127 Va. 209.

1. U.S.—National Surety Co. v. U. S., Miss., 256 F. 77, 167 C.C.A. 319, appeal dismissed 40 S.Ct. 393, 253 U.S. 590, 64 L.Ed. 731.

2. U.S.—National Surety Co. v. U. S., supra.

3. La.—Ansley v. Stuart, 46 So. 675, 121 La. 629.  
50 C.J. p 319 note 16—p 320 note 17.

4. Ariz.—Turner v. Franklin, 85 P. 1070, 10 Ariz. 188.  
50 C.J. p 320 note 19.

5. Pa.—In re Surety Bonds, 4 Pa. Dist. 669, 17 Pa.Co. 101.  
50 C.J. p 320 note 20.

6. La.—Moffet v. Koch, 31 So. 40, 106 La. 371.

50 C.J. p 320 note 21.

7. Cal.—Gutzell v. Pennie, 30 P. 836, 95 Cal. 598.

50 C.J. p 320 note 23.

8. Tex.—Clopton v. Goodbar, Civ. App., 55 S.W. 972.

9. La.—Franek v. Brewster, 71 So. 213, 139 La. 46.

10. Pa.—In re Philadelphia, etc., R. Co.'s Bond, 31 Pa.Co. 340.

11. Pa.—In re Philadelphia, etc., R. Co.'s Bond, supra.

12. Cal.—Fox v. Hale, etc., Silver Min. Co., 32 P. 446, 97 Cal. 353.

Pa.—Emery v. Pennsylvania, etc., R. Co., 15 Pa.Dist. 149.

13. Tex.—Davis v. Pullman Co., 79 S.W. 635, 34 Tex.Civ.App. 621.

14. Tex.—Davis v. Pullman Co., supra.

15. La.—Hillebrandt v. Home Indemnity Co., 148 So. 254, 177 La. 349.

#### Jurisdiction generally

Statute authorizing suits against certain sureties in court having original jurisdiction of subject matter held inapplicable to action against surety on qualifying bond of foreign surety company.—Hillebrandt v. Home Indemnity Co., supra.

#### Where suable

Foreign corporation should be separately sued as surety on another such corporation's qualifying bond at former's domicile, rather than that of principal's receiver.—Hillebrandt v. Home Indemnity Co., supra.

16. U.S.—Ulmen v. National Surety Co., D.C.Mont., 4 F.Supp. 194.

While surety companies are sometimes permitted to become sureties on bonds and undertakings without justifying, under statutes so providing,<sup>17</sup> which statutes have been determined to be constitutional,<sup>18</sup> usually under statute or rule of court such a company is required to justify,<sup>19</sup> where excepted to.<sup>20</sup> Unless otherwise provided,<sup>21</sup> justification by a surety company is made in the same manner as by any other surety.<sup>22</sup> It should appear on such justification

that the surplus assets of the company are equal to the amount of its undertaking.<sup>23</sup> Such a showing does not, however, absolutely require approval and acceptance;<sup>24</sup> but sufficient facts must be presented by the objections to overcome the presumption of solvency before a refusal to approve can be proper.<sup>25</sup> Under statutes the certificate of authority of a surety company may be sufficient evidence of its authority.<sup>26</sup>

**PRINCIPALLY.** The word "principally" is a vague, indefinite, and uncertain term.<sup>1</sup> It is defined as meaning in a principal manner; in the chief place or degree; primarily; chiefly; mainly.<sup>2</sup>

"Principally" has been contrasted with "exclusively" see 33 C.J.S. p 114 note 45.

**PRINCIPIA; PRINCIPIIS; PRINCIPIORUM; PRINCIPIUM.** As the first words of maxims as to which there have been no recent applications see 50 C.J. p 321 notes 11-14.

**PRINCIPLE.** The word "principle" is defined as meaning the cause, source, or origin of anything;<sup>3</sup> an original cause;<sup>4</sup> that from which a thing proceeds, as the principle of motion, the principles of action;<sup>5</sup> a general truth;<sup>6</sup> a fundamental truth;<sup>7</sup> a law comprehending many subordinate truths, as

the principles of morality, of law, of government, etc.<sup>8</sup> It is also defined as meaning motive;<sup>9</sup> ground, foundation, that which supports an assertion, an action, or a series of actions, or of reasoning.<sup>10</sup>

"Principle" has been distinguished from "conscience" see 15 C.J.S. p 977 note 27.

**PRINT.** The word "print" is accorded considerable flexibility of meaning by accredited dictionaries,<sup>11</sup> and it has a wide range of signification,<sup>12</sup> having various meanings, depending on the context and the different connections in which it is used.<sup>13</sup> Because of the relation which exists between the noun and the verb, the definition of the one sheds some light on the definition of the other.<sup>14</sup>

*As a noun.* In its broadest sense the word "print" signifies an impression of figures, characters, or let-

17. Minn.—State v. Hennepin County Dist. Ct., 59 N.W. 1055, 58 Minn. 351.

50 C.J. p 320 note 34.

18. Mont.—King v. Pony Gold Min. Co., 62 P. 783, 24 Mont. 470.

50 C.J. p 320 note 35.

19. Cal.—Keefe v. Los Angeles County Super. Ct., 139 P. 899, 23 Cal.App. 750.

50 C.J. p 321 notes 37, 38.

20. N.Y.—Haines v. Hein, 73 N.Y.S. 293, 67 App.Div. 389.

21. N.Y.—Haines v. Hein, supra.

50 C.J. p 321 note 40.

22. N.Y.—Earle v. Earle, 49 N.Y. Super. 57.

23. Cal.—Fox v. Hale, etc., Silver Min. Co., 32 P. 446, 97 Cal. 353.

24. N.Y.—Earle v. Earle, 49 N.Y. Super. 57, 6 N.Y.Civ.Proc. 171 note. 50 C.J. p 321 note 43.

25. N.Y.—Matter of Keogh, 50 N.Y. S. 998, 22 Misc. 747.

26. S.D.—Germantown Trust Co. v. Whitney, 102 N.W. 804, 19 S.D. 108.

50 C.J. p 321 note 46.

#### Conclusive proof

Pa.—In re Morganroth Election Contest, 50 Pa.Dist. & Co. 143.

1. U.S.—Sutton v. Hawkeye Casualty Co., C.C.A.Tenn., 138 F.2d 781, 785.

#### Similarly expressed

A relative term, the meaning of which is oftentimes uncertain and indefinite.—State v. Levitan, 210 N.W. 111, 118, 190 Wis. 646, 48 A.L.R. 434.

2. Webster New Int.D.

3. Cal.—People v. Stewart, 7 Cal. 140, 143.

4. U.S.—Denning Wire & Fence Co. v. American Steel & Wire Co. of New Jersey, Iowa, 169 F. 793, 796, 95 C.C.A. 259.

50 C.J. p 322 note 24.

5. Cal.—People v. Stewart, 7 Cal. 140, 143.

6. Cal.—People v. Stewart, supra.

7. U.S.—Denning Wire & Fence Co. v. American Steel & Wire Co. of New Jersey, Iowa, 169 F. 793, 796, 95 C.C.A. 259.

50 C.J. p 321 note 19.

8. Cal.—People v. Stewart, 7 Cal. 140, 143.

50 C.J. p 321 note 22.

#### Phrases

(1) "Religious principles;" those sentiments concerning the relation

between God and man which may influence human conduct.—State v. Powers, 17 A. 969, 970, 51 N.J.Law 432, 14 Am.S.R. 693. Constitutional provisions prohibiting denial of any civil right because of religious principles see Civil Rights § 3.

(2) Other phrases employing "principle" or "principles" as to which more recent adjudications have not been found see 50 C.J. p 322 notes 27-34.

9. U.S.—Denning Wire & Fence Co. v. American Steel & Wire Co. of New Jersey, Iowa, 169 F. 793, 796, 95 C.C.A. 259.

50 C.J. p 322 note 23.

10. Cal.—People v. Stewart, 7 Cal. 140, 143.

11. Pa.—Lynett v. Huester, 185 A. 835, 837, 322 Pa. 524.

12. U.S.—Alpers v. U. S., C.A.Cal., 175 F.2d 137, 139—Forbes Lithograph Mfg. Co. v. Worthington, C.C.Mass., 25 F. 899, 900.

13. Mo.—In re Publishing Docket in Local Newspaper, 187 S.W. 1174, 1177, 266 Mo. 48, adopted 232 S.W. 454.

14. Mo.—In re Publishing Docket in Local Newspaper, supra.

ters, and in its more common sense it is used as applicable to letters.<sup>15</sup> It is not necessary, however, that the characters produced should be letters or numerals, or the result of types or stereotypes, or be reading matter, but the word "print" includes most of the forms of figures or characters or representations, colored or uncolored, which may be impressed on a yielding surface.<sup>16</sup>

The noun "print" is defined as meaning the impression made;<sup>17</sup> a mark, form, or character; a mark or figure made by impression;<sup>18</sup> a line, character, figures, or indentation made by the pressure of one body or thing on another;<sup>19</sup> that which, being impressed, leaves its form, as a cut in wood or metal, to be impressed on paper;<sup>20</sup> impressions on paper, or engravings on copper, steel, wood, or stone, representing some particular subject or composition, and which may be either colored or uncolored.<sup>21</sup>

"Print" is also defined as meaning a stamp;<sup>22</sup> an engraving;<sup>23</sup> an impression from an engraved plate; a picture impressed upon an engraved surface, etc.;<sup>24</sup> a picture, something complete in itself, similar in kind to an engraving, cut, or photograph.<sup>25</sup>

The word "print" is further defined as meaning

anything printed;<sup>26</sup> a publication or published writing;<sup>27</sup> and also a fabric printed by stamping; a printed cloth.<sup>28</sup>

"Print" has been distinguished from "chromo" see 14 C.J.S. p 1115 note 7.

*As a verb.* There are many definitions of the verb "print,"<sup>29</sup> and it is variously defined as meaning to take an impression of; to copy or take off the impress of; to form an impression upon; to mark by pressure;<sup>30</sup> to make an impression with inked type;<sup>31</sup> to strike off an impression or impressions of, from types, stereotype or engraved plates, or the like, by means of a press;<sup>32</sup> to impress letters, figures, and characters, by types and ink of various forms and colors, upon paper of various kinds, or some such yielding material;<sup>33</sup> to cover with figures by a press or something analogous to it;<sup>34</sup> as, to print calico, etc.;<sup>35</sup> to stamp;<sup>36</sup> to stamp by direct pressure, as from the face of types, plates, or blocks covered with ink or pigments.<sup>37</sup>

"Print" is also defined as meaning to cause to be printed; to obtain the printing or publication of; to put in print, or cause to be put in print or issued from the press; to carry or set forth in print;<sup>38</sup> to publish;<sup>39</sup> as to print newspapers, handbills, books, pictures, and the like.<sup>40</sup>

15. U.S.—Alpers v. U. S., C.A.Cal., 175 F.2d 137, 139—U. S. v. Harman, D.C.Kan., 38 F. 827, 829.

**Similarly expressed**

Letters in a printed book.—Yuengling v. Schile, C.C.N.Y., 12 F. 97, 107, 20 Blatchf. 452.

16. U.S.—Arthur v. Moller, N.Y., 97 U.S. 365, 367, 24 L.Ed. 1046—Alpers v. U. S., C.A.Cal., 175 F.2d 137, 139.

17. U.S.—Yuengling v. Schile, C.C. N.Y., 12 F. 97, 107, 20 Blatchf. 452.

18. U.S.—Arthur v. Moller, N.Y., 97 U.S. 365, 368, 24 L.Ed. 1046. Philippine.—Murphy v. Collector of Customs, 10 Philippine 292, 297.

**Similarly defined**

A mark or form made by impression or printed.—Yuengling v. Schile, C.C.N.Y., 12 F. 97, 107, 20 Blatchf. 452.

19. U.S.—Arthur v. Moller, N.Y., 97 U.S. 365, 368, 24 L.Ed. 1046. 50 C.J. p 322 note 44.

20. U.S.—Yuengling v. Schile, C.C. N.Y., 12 F. 97, 107, 20 Blatchf. 452.

21. U.S.—Arthur v. Moller, N.Y., 97 U.S. 365, 368, 24 L.Ed. 1046. Philippine.—Murphy v. Collector of Customs, 10 Philippine 292, 297. 50 C.J. p 322 note 52.

22. U.S.—Yuengling v. Schile, C.C. N.Y., 12 F. 97, 107, 20 Blatchf. 452.

23. U.S.—Wood v. Abbott, C.C.N.Y., 30 F.Cas.No.17,938, 5 Blatchf. 325, 328.

24. U.S.—Yuengling v. Schile, C.C. N.Y., 12 F. 97, 107, 20 Blatchf. 452.

25. U.S.—Yuengling v. Schile, supra. —Rosenbach v. Dreyfuss, D.C.N.Y., 2 F. 217, 221.

26. U.S.—Yuengling v. Schile, C.C. N.Y., 12 F. 97, 107, 20 Blatchf. 452.

27. U.S.—U. S. v. Warner, D.C. Wash., 59 F. 355, 356.

28. U.S.—Arthur v. Moller, N.Y., 97 U.S. 365, 368, 24 L.Ed. 1046.

29. Pa.—Lynett v. Huester, 185 A. 835, 837, 322 Pa. 524.

30. U.S.—Arthur v. Moller, N.Y., 97 U.S. 365, 367, 24 L.Ed. 1046. Philippine.—Murphy v. Collector of Customs, 10 Philippine 292, 297.

31. Mo.—In re Publishing Docket in Local Newspaper, 187 S.W. 1174, 1175, 266 Mo. 48.

Wis.—State ex rel. Newman v. Pagels, 250 N.W. 430, 432, 212 Wis. 475.

32. U.S.—Arthur v. Moller, N.Y., 97 U.S. 365, 367, 24 L.Ed. 1046. Philippine.—Murphy v. Collector of Customs, 10 Philippine 292, 297.

**Similarly defined**

To impress with transferred characters or delineations by the exer-

cise of force, as with a press or some other mechanical agency.—Acme Coal Co. v. Northrup Nat. Bank, 146 P. 593, 594, 23 Wyo. 66, L.R.A.1915D 1084.

33. U.S.—Alpers v. U. S., C.A.Cal., 175 F.2d 137, 139—Forbes Lithograph Mfg. Co. v. Worthington, C.C.Mass., 25 F. 899, 900.

34. U.S.—Arthur v. Moller, N.Y., 97 U.S. 365, 367, 24 L.Ed. 1046.

Philippine.—Murphy v. Collector of Customs, 10 Philippine 292, 297.

35. U.S.—Arthur v. Moller, N.Y., 97 U.S. 365, 367, 24 L.Ed. 1046.

36. U.S.—Arthur v. Moller, supra. Philippine.—Murphy v. Collector of Customs, 10 Philippine 292, 297.

37. Wyo.—Acme Coal Co. v. Northrup Nat. Bank, 146 P. 593, 594, 23 Wyo. 66, L.R.A.1915D 1084.

38. Cal.—In re McDonald, 201 P. 110, 111, 187 Cal. 158.

39. Cal.—In re McDonald, supra. 50 C.J. p 323 note 71.

**Similarly defined**

To publish in print, as to print disclosures.—Lynett v. Huester, 185 A. 835, 837, 322 Pa. 524.

40. U.S.—Arthur v. Moller, N.Y., 97 U.S. 365, 367, 24 L.Ed. 1046.

**Similarly expressed**

To publish a book, article, music, or the like.—In re McDonald, 201 P. 110, 111, 187 Cal. 158.

While "print" may be familiarly used in the sense of "publish," and in that sense receives recognition in many of the dictionaries,<sup>41</sup> the two words have also been distinguished,<sup>42</sup> and it has been said that they are often confused.<sup>43</sup>

### Printed

The word "printed" has a varied meaning in different connections, depending on the context.<sup>44</sup> While "printed" is not as broad a word as "published,"<sup>45</sup> the two terms are sometimes used interchangeably,<sup>46</sup> although they may,<sup>47</sup> but do not necessarily,<sup>48</sup> differ in meaning. It has been held that "printed" is not synonymous with "publication."<sup>49</sup>

Phrases employing the word "printed" are set out in the note.<sup>50</sup>

### Printing

While the word "printing" may mean an impression,<sup>51</sup> or it may imply a mechanical act,<sup>52</sup> that is, the impress of letters or characters on paper or

other substance,<sup>53</sup> and it also may mean the process of multiplying the copies, by sheets,<sup>54</sup> the term frequently is employed to denote the typographic art, typography in the full sense.<sup>55</sup> In this latter sense the word "printing" is variously defined as meaning art, or practice of impressing letters, characters, or figures on paper, cloth, or other materials;<sup>56</sup> the art of impressing letters;<sup>57</sup> the art of making books or papers by impressing legible characters;<sup>58</sup> the art or process of producing printed matter for reading, including illustrations, etc., by composition and imposition of types, and their subjection, when inked, to pressure upon paper in a printing press;<sup>59</sup> the mechanical art by which type is imprinted on paper.<sup>60</sup> In this sense "printing" signifies an art, something more than a mere mechanical pursuit,<sup>61</sup> and it comprises two distinct trades, composition, or the art of arranging types, and press work, or the art of getting impressions from composed types.<sup>62</sup>

While the process of making letters on paper with

41. Neb.—State v. Cronin, 106 N.W. 986, 75 Neb. 738, 742.  
50 C.J. p 323 note 71 [a].

42. Mo.—In re Publishing Docket in Local Newspaper, 187 S.W. 1174, 1175, 266 Mo. 48.

43. Cal.—In re White's Estate, 190 P.2d 968, 969, 84 Cal.App.2d 409.

44. Mo.—In re Publishing Docket in Local Newspaper, 187 S.W. 1174, 1177, 266 Mo. 48, adopted 232 S.W. 454.

Wis.—State ex rel. Newman v. Pagels, 250 N.W. 430, 433, 212 Wis. 475.

#### Well-defined meaning

Ohio.—Haban v. Suburban Home Mortgage Co., App., 57 N.E.2d 97, 100.

45. Wis.—State ex rel. Newman v. Pagels, 250 N.W. 430, 432, 212 Wis. 475.

Statutes requiring that newspapers designated or selected as publishers of official notices, advertisements, etc., be published within designated locality as not referring to place where paper printed see Newspapers § 7.

46. Wis.—State ex rel. Newman v. Pagels, 250 N.W. 430, 432, 212 Wis. 475.

#### Synonyms

Ark.—Jackson v. Beatty, 57 S.W. 799, 800, 68 Ark. 269.

#### Not altogether synonymous

Ark.—Connerly v. Stephenson, 28 S.W.2d 60, 181 Ark. 833.

#### Printed but not published

(1) A book may be printed yet never published.

Cal.—In re White's Estate, 190 P.2d 968, 969, 84 Cal.App.2d 409.  
Pa.—Lynett v. Huester, 185 A. 835, 837, 322 Pa. 524.

(2) A book may be printed without being published, but it is published only when it is offered for sale or put in general circulation.—Wolfe County Liquor Dispensary Ass'n v. Ingram, 113 S.W.2d 839, 842, 272 Ky. 38.

(3) "A book, a paper, or a pamphlet might be 'printed' but never 'published.' A paper might be 'printed' in St. Louis and 'published' in Chariton County."—In re Publishing Docket in Local Newspaper, 187 S.W. 1174, 1175, 266 Mo. 48.

48. Wis.—State ex rel. Newman v. Pagels, 250 N.W. 430, 432, 433, 212 Wis. 475.

49. Ohio.—Haban v. Suburban Home Mortgage Co., App., 57 N.E.2d 97, 100.

#### 50. Printed publication

(1) Printed matter to which the public mind is exposed.—Western States Mach. Co. v. S. S. Hepworth Co., D.C.N.Y., 51 F.Supp. 859, 871.

(2) Anything which is printed, and without any injunction of secrecy, is distributed to any part of the public in any country.—Thacher v. Falmouth, D.C.Me., 235 F. 151, 153—Cottier v. Stimson, C.C.Or., 20 F. 906, 910.

(3) A printed publication, within the meaning of the patent laws, is one made accessible to any portion of the public, and may include books, catalogues, magazine articles, theses, or trade publications as stated in Patents § 40.

#### Other phrases

(1) "Printed circular" as synonymous with "handbill" see 39 C.J.S. p 769 note 35.

(2) "Printed matter" see 57 C.J.S. p 454 note 38.

(3) Additional phrases as to which more recent adjudications have not been found see 50 C.J. p 323 notes 84–88.

51. Philippine.—Murphy v. Collector of Customs, 10 Philippine 292, 296.

52. U.S.—Alpers v. U. S., C.A.Cal., 175 F.2d 137, 139.  
N.D.—Daly v. Beery, 178 N.W. 104, 106, 45 N.D. 287.

53. N.D.—Daly v. Beery, supra.

54. U.S.—Keene v. Wheatley, C.C. Pa., 14 F.Cas.No.7,644, 4 Phila. 157.

55. La.—Prudhomme v. Savant, 90 So. 640, 641, 150 La. 256.

56. N.Y.—In re American Bank-Note Co., 58 N.Y.S. 275, 277, 27 Misc. 572.  
50 C.J. p 324 note 95.

57. U.S.—Le Roy v. Jamison, C.C. Cal., 15 F.Cas.No.8,271, 3 Sawy. 369, 377.

58. U.S.—Le Roy v. Jamison, supra.

59. La.—Prudhomme v. Savant, 90 So. 640, 641, 150 La. 256.

60. Ohio.—Haban v. Suburban Home Mortgage Co., App., 57 N.E.2d 97, 100.

61. Kan.—Campbell v. Sumner County, 67 P. 866, 867, 64 Kan. 376.

62. La.—Prudhomme v. Savant, 90 So. 640, 641, 150 La. 256.

a typewriter is essentially a process of printing,<sup>63</sup> it has been held that "typewriting" is not "printing."<sup>64</sup>

"Printing" has been compared with or distinguished from "embossing" see 29 C.J.S. p 755 note 25, and "engraving" see 30 C.J.S. p 253 note 41, and it has been said that there is an etymological distinction between the words "printing" and "publication."<sup>65</sup>

What constitutes the printing of a newspaper is discussed in Newspapers § 1. Printing as not amounting to publishing within the meaning of copyright law see Copyright and Literary Property § 13 a (3) (a).

Phrases employing the word "printing" are set out in the note,<sup>66</sup> and for other phrases as to which more recent adjudications have not been found see 50 C.J. p 324 notes 8-12.

**PRINTER.** The person whose mechanical skill has, by means of the type, and printing press, etc., stamped upon the paper the words, sentences, and ideas of the author.<sup>67</sup>

The terms "printer" and "editor" have been compared or distinguished, see 28 C.J.S. p 832 note 51, and in the newspaper business the terms "printer" and "publisher" are sometimes used synonymously as stated in Newspapers § 1.

**PRIOR (English).** Preceding, as in the order of time, of thought, of origin, of dignity, or of importance.<sup>68</sup>

"Prior" and "subsequent" are opposite terms.<sup>69</sup>

**PRIOR (Latin).** Maxims commencing with the Latin word "prior," and as to which there have been no recent applications, see 50 C.J. p 325 notes 49, 51.

**PRIORITY.** A legal preference or precedence.<sup>70</sup>

"Priority" has been distinguished from "appropriation" see 6 C.J.S. p 123 note 62.

The word "priority," or the plural form "priorities," is employed in various connections throughout this work. With reference to liens generally see Liens § 10. The priorities of an attorney's lien are treated in Attorney and Client § 229; of a factor's lien see Factors § 46; of a landlord's lien see Landlord and Tenant §§ 631-637; of a vendor's lien see the C.J.S. title Vendor and Purchaser §§ 396-398, also 66 C.J. p 1245 note 24-p 1249 note 10. For other references see the indexes to the titles Maritime Liens and Mechanics' Liens. Priorities of claims against an estate see Bankruptcy §§ 451-460, Executors and Administrators §§ 457-481, and Insolvency § 14 e (1). The priority of debts over legacies, devises, and distributive shares of a decedent's estate is treated in Executors and Administrators § 484. The priority of a state as a creditor is treated in the C.J.S. title States § 110, also 59 C.J. p 168 note 64-p 169 note 74; the priority of the federal government as a creditor is treated in the C.J.S. title United States § 133, also 65 C.J. p 1368 note 17-p 1371 note 67. The priority of water rights by appropriation is discussed in the C.J.S. title Waters §§ 182-185, also 67 C.J. p 1009 note 13-p 1019 note 62. For reference to other particular applications and specific uses of the term consult the Descriptive-Word Index.

**PRISE.** By reference to the writings of foreign jurists and commentators on the principles of the law of insurance as understood and adopted by commercial communities on the continent of Europe it is manifest that the word "prise" is used in the same sense as the word "capture" in the English language, and means a taking or seizure by force.<sup>71</sup>

63. Cal.—In re Dreyfus, 165 P. 941, 942, 175 Cal. 417, L.R.A.1917F 391.

64. Pa.—Sunday v. Hagenbach, 18 Pa.Co. 540, 541.

65. Pa.—Lynett v. Huester, 185 A. 835, 837, 322 Pa. 524.

"Publication" compared  
N.D.—Daly v. Beery, 178 N.W. 104, 106, 45 N.D. 287.

66. Phrases

(1) "First-class printing" defined and distinguished from "second-class printing" see 36 C.J.S. p 824 note 40.

(2) "Printing corporation" see Corporations § 22c.

(3) "Public printing;" printing which is directly ordered by the

legislature or performed for the agents of the government authorized to procure it to be done.—Ellis v. State, 4 Ind. 1, 5.

(4) "Second-class printing" defined in particular contracts as a much more expensive grade than "first-class printing."—Commonwealth v. Bacon, 111 S.W. 387, 392, 33 Ky.L. 935.

67. Ky.—Brown v. Woods, 6 J.J. Marsh. 11, 19.  
50 C.J. p 823 note 93.

68. Century D.

First in time

Cal.—Cullinan v. Grey, 115 P.2d 460, 463, 18 Cal.2d 147.

Phrases

(1) "Prior appropriation" with re-

spect to right to flowing water see the C.J.S. title Waters § 167, also 50 C.J. p 324 note 16.

(2) "Prior claim" see 14 C.J.S. p 1188 note 71.

(3) "Prior lien" see Liens § 1.

(4) "Prior right" see "preferential right" ante p 480 note 41.

(5) Other phrases as to which more recent adjudications have not been found see 50 C.J. p 324 note 20 [a]-p 325 note 40.

69. N.Y.—Matter of Townsend, 31 N.Y.S. 409, 410, 83 Hun 200.

70. Black L. D.

50 C.J. p 325 note 42.

71. Mass.—Dole v. New England Mut. Mar. Ins. Co., 6 Allen 378, 388, 389.

50 C.J. p 326 note 53.



**PRISIÓN.** In Spanish law, a prison;<sup>72</sup> also, simple imprisonment,<sup>73</sup> distinguished from "cadena" see 12 C.J.S. p 877 note 48.

**PRISON BREACH.** Defined see Escape § 13. "Escape," "prison breach," and "rescue" distinguished see Escape § 2 b.

**PRISONER.** In a broad sense, any person unlaw-

fully restrained of his liberty or unlawfully detained from his proper custody;<sup>74</sup> any person who is being held in confinement against his will.<sup>75</sup>

In a narrower and more technical sense the word "prisoner" is applied to a person deprived of his liberty by virtue of a judicial or other lawful process;<sup>76</sup> as denoting a person committed to prison the term is defined in Prisons § 1.

72. Velázquez Spanish-English D.

73. Philippine.—U. S. v. Bare, 3 Philippine 262, 264.

74. Fla.—Porter v. Porter, 53 S. 546, 547, 60 Fla. 407, Ann.Cas. 1912C 867.

75. U.S.—U. S. ex rel. Carapa v.

Curran, C.C.A.N.Y., 297 F. 946, 950, 36 A.L.R. 877.

76. Utah.—Royce v. Salt Lake City, 49 P. 290, 292, 15 Utah 401, 50 C.J. p 330 note 23.

## PRISONS

This Title includes public buildings for confinement of persons held in judicial custody, in either civil or criminal proceedings, and either to secure their production as parties or witnesses in further proceedings, or as punishment by imprisonment, with or without hard labor, whether such buildings be designated as prisons or as jails, penitentiaries, houses of correction, or otherwise; establishment, maintenance, regulation, and management of such places; rights, powers, duties and liabilities of wardens, jailers, keepers, and other officers; and custody, care, and maintenance of prisoners in general.

**Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index.**

### *Analysis*

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**See also descriptive word index in the back of this Volume**

### § 1. Terminology

- a. Prison
- b. State prison
- c. Penitentiary
- d. Jail
- e. Prisoner

#### a. Prison

The word "prison" has been defined as a place of confinement for the safe custody of persons, in order to their answering in any action civil or criminal; a building for the safe custody or confinement of criminals and more specifically convicted criminals.

A prison is a place of confinement for the safe custody of persons, in order to their answering in

any action, civil or criminal;<sup>1</sup> places maintained by public authority for the detention of those confined under legal process;<sup>2</sup> a building for the safe custody or confinement of criminals and more specifically convicted criminals.<sup>3</sup> In a general sense the term may be said to include every place of confinement under legal process or lawful arrest,<sup>4</sup> but usually it is specifically applied to the place of confinement of convicted criminals,<sup>5</sup> and is used to designate an institution for the imprisonment of persons convicted of the more serious crimes.<sup>6</sup> A prison is not a place of refuge for a criminal; it is for his punishment.<sup>7</sup>

Correctional or industrial institutions for minors within a certain age are not now regarded as prisons;<sup>8</sup> nor is a correctional institution for the care of children committed under a juvenile court act a prison.<sup>9</sup>

*Other terms compared and distinguished.* The word "penitentiary" may be used synonymously with the word "prison."<sup>10</sup> The word "prison" is distinguishable from the word "reformatory"<sup>11</sup> and from the terms "county jail" and "city jail,"<sup>12</sup> although the word "jail" is sometimes used interchangeably with the word "prison."<sup>13</sup>

### b. State Prison

Broadly speaking, the term "state prison" means a place of confinement for state prisoners. The term is

frequently used synonymously with the word "penitentiary".

In a general sense the term "state prison" means a place of confinement for state prisoners; that is, for persons charged with political offenses, and confined for reasons of state.<sup>14</sup> In some statutes the term is used as a proper name.<sup>15</sup>

The term is frequently used synonymously with the word "penitentiary,"<sup>16</sup> and, as used in some statutes, applies to the penitentiary.<sup>17</sup>

It has been stated broadly that the term is never used as meaning "jail,"<sup>18</sup> and has been distinguished from "jail,"<sup>19</sup> and "county jail,"<sup>20</sup> but the term may be employed in some statutes in a sense broad enough to apply to a county jail.<sup>21</sup>

### c. Penitentiary

The word "penitentiary" signifies a prison or place of punishment; a place in which convicts sentenced to confinement and hard labor are confined by authority of law.

"Penitentiary" is an English word in common use,<sup>22</sup> signifying a prison or place of punishment;<sup>23</sup> a place in which convicts sentenced to confinement and hard labor are confined by authority of law.<sup>24</sup> Usually the term is used to designate an institution for the imprisonment of persons convicted of the more serious crimes.<sup>25</sup> It is frequently used as referring to a state prison,<sup>26</sup> as distinguished from a county jail,<sup>27</sup> a city jail,<sup>28</sup> a local prison,<sup>29</sup> or

1. Pa.—Scarborough v. Thornton, 9 Pa. 451, 454.

"Prison bounds" see *infra* § 18.

2. Ind.—State v. Rardon, 46 N.E. 2d 605, 221 Ind. 154.

3. N.Y.—Adie v. Herald Co., 36 N.Y.S.2d 905, 907.

4. Ind.—Chelf v. State, 58 N.E.2d 353, 355, 223 Ind. 70.  
50 C.J. p 329 note 2.

#### Other definition

A public building or other place for the confinement or safe custody of persons, whether as a punishment imposed by the law or otherwise in the course of the administration of justice.—In re Baker, 50 N.Y.S.2d 431, 433, 183 Misc. 113.

5. Ind.—Chelf v. State, 58 N.E.2d 353, 355, 223 Ind. 70.

6. Conn.—State v. Delmonte, 147 A. 825, 826, 110 Conn. 298.

7. Pa.—Commonwealth v. Ramunno, 68 A. 184, 219 Pa. 204, 123 Am.S.R. 653, 14 L.R.A.N.S., 209, 12 Ann.Cas. 818.

8. Miss.—Bryant v. Brown, 118 So. 184, 151 Miss. 398, 60 A.L.R. 1325.  
Neb.—Roberts v. State, 118 N.W. 574, 82 Neb. 651.

9. Pa.—In re Juvenile Ct. Inst., 21 Pa.Dist. 720.

10. Conn.—State v. Delmonte, 147 A. 825, 826, 110 Conn. 298.

11. Conn.—State v. Delmonte, *supra*.

"Reformatory" defined see the C.J.S. title Reformatories § 1, also 53 C.J. p 1058 note 1-p 1059 note 11.

12. Conn.—State v. Delmonte, *supra*.

13. N.Y.—Adie v. Herald Co., 36 N.Y.S.2d 905, 907.

14. N.H.—Martin v. Martin, 47 N.H. 52, 53.

50 C.J. p 330 note 6.

**Prison farm and road convict camps**  
"State prison" consisted of state prison farm and state road convict camps, and hence convict incarcerated in state road convict camp and required to work on roads under control of commissioner of agriculture was lawfully confined in state prison.—Ex parte Green, 157 So. 333, 117 Fla. 157.

15. Mass.—Beard v. Boston, 23 N.E. 826, 151 Mass. 96.

50 C.J. p 330 note 9.

16. Ky.—Denham v. Commonwealth, 84 S.W. 538, 119 Ky. 508.

50 C.J. p 330 note 7.

17. N.C.—Sedberry v. Carver, 77 N.C. 319, 321.

18. Ky.—Denham v. Commonwealth, 84 S.W. 538, 539, 119 Ky. 508, 27 Ky.L. 171.

33 C.J. p 832 note 26 [b].

19. Ky.—Denham v. Commonwealth, *supra*.

20. N.H.—Martin v. Martin, 47 N.H. 52, 53.

21. N.C.—Sedberry v. Carver, 77 N.C. 319, 321.

22. Ga.—Howell v. State, 138 S.E. 206, 164 Ga. 204.

50 C.J. p 330 note 11.

23. Ind.—State v. Rardon, 46 N.E. 2d 605, 609, 221 Ind. 154.

50 C.J. p 330 note 12.

24. Ind.—State v. Rardon, *supra*.  
50 C.J. p 330 note 13.

25. Conn.—State v. Delmonte, 147 A. 825, 826, 110 Conn. 298.

26. N.C.—State v. Burnett, 115 S.E. 57, 184 N.C. 783.

27. Conn.—State v. Delmonte, 147 A. 825, 826, 110 Conn. 298.

N.Y.—People v. Warden, 139 N.Y.S. 212, 154 App.Div. 473.

33 C.J. p 832 note 26 [a].

28. Conn.—State v. Delmonte, 147 A. 825, 826, 110 Conn. 298.

29. Conn.—State v. Delmonte, *supra*.

a reformatory.<sup>30</sup> The word, however, may be employed in a sense sufficiently broad to include a reformatory.<sup>31</sup>

#### d. Jail

The word "jail" has been defined broadly as a building for the confinement of persons held in lawful custody.

"Jail" is a building designated by law or used by the sheriff for the confinement or detention of those persons who are judicially ordered to be kept in custody;<sup>32</sup> a building for the confinement of persons held in lawful custody;<sup>33</sup> a house or building used for the purpose of a public prison, or where persons under arrest are kept;<sup>34</sup> any place of confinement used for detaining a prisoner;<sup>35</sup> a prison appertaining to a county or municipality, in which are confined for punishment persons convicted of misdemeanors committed in the county or municipality.<sup>36</sup> It may include the dwelling house of the jailer living with his family in one part of it.<sup>37</sup> The word "jail" is distinguishable from the word "workhouse."<sup>38</sup>

#### e. Prisoner

The word "prisoner" has been defined as one who is confined in prison on an action or on commandment.

"Prisoner" has been defined as one who is confined in prison on an action or on commandment.<sup>39</sup>

It has been held that a person serving a sentence of imprisonment in a state prison is in contemplation of law a prisoner therein when at work outside the walls of the prison under the surveillance of prison guards.<sup>40</sup>

### § 2. Establishment, Maintenance, Use, Status, and Supervision

Generally, the matters of the establishment, maintenance, and repair of prisons or jails are regulated by statutes with which there must be due compliance.

The authority or duty to erect, furnish, repair, and maintain prisons, penitentiaries, jails, and other places of confinement usually is conferred or imposed by constitutional or statutory provisions<sup>41</sup> which must be complied with,<sup>42</sup> although compliance may be deemed sufficient which is substantial<sup>43</sup> or reasonable.<sup>44</sup> Generally, where authority with respect to the construction or establishment of a prison or jail is conferred on a particular public body or officer, such body or officer has the discretion to determine as to the necessity for the construction of a new prison or jail<sup>45</sup> and as to the size, quality, and cost of materials;<sup>46</sup> and a like rule applies where authority with respect to repairs is so conferred.<sup>47</sup>

The records should show what buildings or apart-

Ohio.—*Bowers v. Bowers*, 151 N.E. 750, 114 Ohio St. 568.

30. Conn.—*State v. Delmonte*, 147 A. 825, 826, 110 Conn. 298.

Ill.—*Henderson v. People*, 46 N.E. 711, 165 Ill. 607.

31. Cal.—*Corpus Juris* cited in *Ex parte Gilham*, 161 P.2d 793, 795, 26 Cal.2d 860—*Ex parte Loncaric*, 162 P.2d 313, 71 Cal.App.2d 144.

Ohio.—*Bowers v. Bowers*, 151 N.E. 750, 114 Ohio St. 568.

50 C.J. p 330 note 18.

32. N.Y.—*People v. Holcomb*, 181 N.Y.S. 780, 783, 111 Misc. 460.

33 C.J. p 832 note 25.

"Jailer" defined see *infra* § 6.

"Jail limits," "jail liberties," "jail yard" see *infra* § 18.

33. N.Y.—*Adle v. Herald Co.*, 36 N.Y.S.2d 905, 907.

34. N.C.—*State v. Bryan*, 89 N.C. 531, 534.

35. Tex.—*Welch v. State*, 8 S.W. 657, 25 Tex.App. 580.

33 C.J. p 832 note 27.

36. Ky.—*Denham v. Commonwealth*, 84 S.W. 538, 539, 119 Ky. 508.

33 C.J. p 832 note 28.

37. Mich.—*Snyder v. People*, 26 Mich. 106, 12 Am.R. 302.

33 C.J. p 832 note 29.

Jail as subject of arson see *Arson* § 6a.

38. Tenn.—*State ex rel. Hurst v. Sullivan County*, 120 S.W.2d 32, 173 Tenn. 414.

The distinction is not removed by a statute, creating a rule for the construction of criminal statutes, which provides that "jail" shall be taken to include workhouse, and "workhouse" shall be taken to include jail, when the context so requires or will permit.—*State ex rel. Hurst v. Sullivan County*, *supra*.

39. Pa.—*Scarborough v. Thornton*, 9 Pa. 451, 454.

50 C.J. p 330 note 25.

"Prisoner" defined generally see *ante* p 847.

40. Cal.—*Bradford v. Glenn*, 205 P. 449, 188 Cal. 350.

50 C.J. p 330 note 23 [c].

41. Colo.—*Hessick v. Moynihan*, 262 P. 907, 83 Colo. 43.

N.J.—*Carrick v. Board of Chosen Freeholders of Hudson County*, 18 A.2d 254, 126 N.J.Law 181.

Pa.—*Commonwealth ex rel. Prison Inspectors of Northampton County v. Kichline*, Com.Pl., 29 North. Co. 89.

50 C.J. p 331 note 28.

Acquisition or construction of municipal jail see *Municipal Corporations* § 1041.

#### Statute not authorizing construction

A statute appropriating money for the construction of additional cell houses, or additions to cell houses, or for the establishing of substations or camps did not authorize expenditure for creation of permanent penal institution.—*Lingo-Leeper Lumber Co. v. Carter*, 17 P.2d 365, 161 Okl. 5.

42. Ind.—*Kokomo v. Harness*, 74 N.E. 270, 35 Ind.App. 384.

50 C.J. p 331 note 29.

43. La.—*State Board of Health v. De Quincy*, 111 So. 789, 163 La. 369.

N.J.—*Allen v. Smith*, 12 N.J.Law 159.

44. Pa.—*Brewer v. Delaware County*, 9 Pa.Dist. & Co. 319.

45. Ky.—*Tate v. Kendrick*, 10 Ky. Op. 93.

46. Ill.—*People v. La Salle County*, 84 Ill. 303, 25 Am.R. 461.

47. Vt.—*Campbell v. Franklin County*, 27 Vt. 178.

Construction, maintenance, and repair of county jail see *Counties* § 167.

ments are intended for the use of prisoners,<sup>48</sup> and such records may not be contradicted by parole evidence<sup>49</sup> or proof of usage,<sup>50</sup> although, where the records cannot be found, ancient usage is sufficient evidence that apartments have been appropriated for a prison.<sup>51</sup>

A political entity which is authorized to care for and dispose of its prisoners in ways other than by the maintenance of a jail is not obliged to maintain a jail.<sup>52</sup>

### § 3. — Use by United States of State Prison or County Jail

Provision has been made in various states for the reception and confinement in state or county prisons or jails of prisoners committed by process or order issued under the authority of the United States.

In response to a recommendation embodied in an early resolution of congress various states have made it the duty of their officers to receive and keep in the state or county prisons any prisoners committed thereto by process or order issued under the authority of the United States, as though they had been committed under the authority of the state, provision having been made by the United States for the support of such prisoners;<sup>53</sup> and the jailer or keeper cannot lawfully refuse to receive persons committed by authority of the United States.<sup>54</sup> Generally, the keeping and subsistence of such prisoners are matters of contract with the proper state or local authorities,<sup>55</sup> and a state statute relating to the amount of compensation to be paid is not binding on the United States unless it con-

sents thereto.<sup>56</sup> The matter is purely one of comity,<sup>57</sup> and a state may refuse to allow the use of its prisons for the confinement of federal convicts.<sup>58</sup>

For certain purposes and to certain intents a state jail lawfully used by the United States may be deemed to be the jail of the United States,<sup>59</sup> and the jailer or keeper to be a United States official or an officer of the federal court for the purpose involved,<sup>60</sup> although it has been said that the jailer is not an officer of the United States.<sup>61</sup>

Sentence of federal offenders to jails, prisons, or penitentiaries maintained by state or subdivision thereof is discussed in Criminal Law § 2000 a, d.

### § 4. — Status as City, County, or State Institution

A distinction between state prisons and those of political subdivisions of the state has been recognized, but it has been laid down broadly that, unless restricted by law, the prisons of a county, city, or town become the public prisons of the state.

While a distinction between state prisons and those of political subdivisions of the state has been recognized,<sup>62</sup> the view has been expressed that, unless restricted by law, the prisons of a county, city, or town become the public prisons of the state.<sup>63</sup> Under a statute providing that sheriffs and other persons authorized to make arrests shall have the use, not to exceed a certain length of time, of city, county, and borough jails, borough authorities have some discretion as to the admission of prisoners to their lockup.<sup>64</sup>

48. Mass.—Burroughs v. Lowder, 8 Mass. 373.

50 C.J. p 331 note 36.

49. Mass.—Burroughs v. Lowder, supra.

50. Mass.—Burroughs v. Lowder, supra.

51. Mass.—Clap v. Cofran, 7 Mass. 98.

52. Miss.—Marshall v. Meridian, 60 So. 135, 103 Miss. 206.

Contract for care, custody, and maintenance of prisoners see infra § 17.

53. U.S.—Randolph v. Donaldson, Va., 9 Cranch 76, 3 L.Ed. 662—U. S. v. Hoffman, D.C.Ill., 13 F.2d 269—Ex parte Shores, D.C.Iowa, 195 F. 627.

Ky.—Holland v. Fayette County, 41 S.W.2d 651, 240 Ky. 37. 50 C.J. p 331 notes 43-45.

54. U.S.—In re Kays, D.C.Cal., 35 F. 288.

50 C.J. p 331 note 45.

55. U.S.—Lewis, etc., County v. U. S., D.C.Mont., 77 F. 732.

50 C.J. p 331 note 47.

56. U.S.—Lewis, etc., County v. U. S., supra.

57. Cal.—Los Angeles County v. Cline, 197 P. 67, 185 Cal. 299.

Mont.—Majors v. Lewis, etc., County, 201 P. 268, 60 Mont. 608.

58. U.S.—Ex parte Shores, D.C. Iowa, 195 F. 627.

59. U.S.—U. S. v. Hoffman, D.C.Ill., 13 F.2d 269.

50 C.J. p 331 note 52.

60. U.S.—Wilson v. U. S., C.C.A. Okl., 26 F.2d 215—U. S. v. Hoffman, D.C.Ill., 13 F.2d 269—In re Morgan, D.C.Iowa, 80 F.Supp. 810.

50 C.J. p 331 note 52.

Responsibility to federal court

Evidence showed that county sheriff accepted and received as a federal prisoner one charged with robbery of bank which was a mem-

ber of the Federal Deposit Insurance Corporation, as result of which the sheriff became responsible for such prisoner to the federal court for such district, even though such sheriff was not under a mandatory duty to receive such prisoner.—In re Morgan, D.C.Iowa, 80 F.Supp. 810.

61. U.S.—Saunders v. U. S., C.C. Me., 73 F. 782.

Ky.—Holland v. Fayette County, 41 S.W.2d 651, 240 Ky. 37.

62. Ind.—Ruble v. State, 52 Ind. 358.

50 C.J. p 332 note 53.

Particular institution held to be a state prison

Ind.—Walton v. State, 88 Ind. 9.

63. Tenn.—Felts v. Memphis, 2 Head 650.

50 C.J. p 332 note 54.

64. Pa.—Shaffer v. Sewickley Borough, 11 Pa.Dist. & Co. 583.

A municipality may, as a general rule, be allowed to use the county jail.<sup>65</sup> In the absence of any statutory regulation, a municipal corporation may lawfully contract with the proper county authorities for the use of a cell or room in the county jail as a place for confining municipal prisoners.<sup>66</sup> Under a contract between a city and county for the assignment of city prisoners to the county workhouse, providing that the prisoners shall be "guarded and taken care of in every way by the county," a city prisoner is made a prisoner of county workhouse under the exclusive charge of the county authorities.<sup>67</sup> Where a statute so provides, county authorities must diet and provide suitable and efficient guards for the convicts sentenced to the county chain gang by the municipalities.<sup>68</sup>

Conversely, a county may have the right to use the jail of a municipal corporation within its limits for the confinement of its prisoners.<sup>69</sup> A statute requiring the court, in all the several counties which have an agreement with a municipal corporation for the detention of prisoners in its house of correction, to sentence prisoners there in cases of crimes not punishable by confinement in state prison makes

the house of correction the common jail of those counties.<sup>70</sup>

### § 5. — Regulation and Supervision

The matter of the supervision of prisons is usually regulated by statute with which there must be due compliance.

The matter of the regulation and control of state prisons is within the jurisdiction of the state<sup>71</sup> and not of local subdivisions of the state,<sup>72</sup> and the legislature has the power and duty to act in this respect to the exclusion of local bodies.<sup>73</sup>

The matter of the supervision of prisons is usually regulated by statute,<sup>74</sup> the provisions of which must be observed.<sup>75</sup> These functions can be performed only by the officers, boards, or other authority to whom they have been intrusted by law.<sup>76</sup>

The rules and regulations for the government of prisons must be adopted by the appropriate authorities<sup>77</sup> in the manner prescribed,<sup>78</sup> and must be within the limits prescribed by law.<sup>79</sup> Where a measure of discretion has been left to the prison inspectors in the execution of a statute, the courts have refused to control that discretion.<sup>80</sup>

65. S.D.—*Scovel v. Pennington*, County, 282 N.W. 524, 66 S.D. 311. 50 C.J. p 332 note 57.

66. Ga.—*Brady v. Joiner*, 28 S.E. 679, 10 Ga. 190.

67. Tenn.—*Hale v. Johnston*, 203 S.W. 949, 140 Tenn. 182.

68. S.C.—*City of Greenville v. Pridmore*, 160 S.E. 144, 162 S.C. 52.

69. Ind.—*Alexandria v. Madison County*, 55 N.E. 31, 23 Ind.App. 116.

50 C.J. p 332 note 60.

70. Mich.—*In re Kreiner*, 120 N.W. 785, 156 Mich. 296.

71. Ky.—*Board of Councilmen of City of Frankfort v. Commonwealth*, 49 S.W.2d 548, 248 Ky. 633.

72. Ky.—*Board of Councilmen of City of Frankfort v. Commonwealth*, supra.

73. Ky.—*Board of Councilmen of City of Frankfort v. Commonwealth*, supra.

Prescribing punishment for offenses as legislative function generally see Constitutional Law § 107.

#### Municipal ordinance not applicable

City ordinance regulating sale and inspection of milk was inapplicable to supply of milk for inmates of state penitentiary located within the city.—*Board of Councilmen of City of Frankfort v. Commonwealth*, supra.

74. Md.—*Edmondson v. Warden of*

Md. House of Correction, 69 A.2d 919.

Mo.—*Corpus Juris* cited in *State v. Becker*, 47 S.W.2d 781, 329 Mo. 1041.

Va.—*Corpus Juris* quoted in *Gutterman v. Commonwealth*, 199 S.E. 508, 509, 171 Va. 519.

50 C.J. p 332 note 64.

Validity of statute empowering boards of freeholders of the several counties to assume control of county jails on an affirmative vote of two-thirds of board members has been upheld.—*Hartman v. Board of Chosen Freeholders of Mercer County*, 21 A.2d 351, 127 N.J.Law 170.

75. Va.—*Corpus Juris* quoted in *Gutterman v. Commonwealth*, 199 S.E. 508, 509, 171 Va. 519.

#### Enforcement of statutes

It is duty of commission of department of penal institutions and state penitentiary warden to see that statutes governing same subject matter as commission's by-laws, rules, and regulations for government of penitentiary are enforced, and fact that breach of such a law or regulation may also constitute a felony or misdemeanor, separately punishable as such, is immaterial.—*Ex parte Rody*, 152 S.W.2d 657, 348 Mo. 1.

Posting of printed copies of regulations in penitentiary

Mo.—*Ex parte Rody*, supra.

76. Va.—*Corpus Juris* quoted in

*Gutterman v. Commonwealth*, 199 S.E. 508, 171 Va. 519.

50 C.J. p 332 note 66.

#### Limitation on authority of county commissioners

Statute authorizing board of county commissioners to correct irregularities in jail does not authorize it to dictate where sheriff shall clean prisoners and permit consultations between them and their lawyers or require him to use certain room in jail for such purposes only.—*Richard v. Board of Com'rs of Boulder County*, 33 P.2d 971, 95 Colo. 158.

77. Mich.—*Hulin v. People*, 31 Mich. 323.

Va.—*Corpus Juris* quoted in *Gutterman v. Commonwealth*, 199 S.E. 508, 509, 171 Va. 519.

78. Va.—*Corpus Juris* quoted in *Gutterman v. Commonwealth*, 199 S.E. 508, 509, 510, 171 Va. 519.

50 C.J. p 332 note 68.

#### Approval of court

Statute conferring on city council the power of prescribing rules for regulation of jail contemplated that city council exercise such power only after approval by the corporation court.—*Gutterman v. Commonwealth*, 199 S.E. 508, 171 Va. 519.

79. Va.—*Gutterman v. Commonwealth*, supra.

50 C.J. p 332 note 69.

80. Pa.—*Commonwealth v. Holloway*, 42 Pa. 446, 82 Am.D. 526.

The attendants and employees of a hospital maintained in connection with a state penitentiary have been held to be under the control of the board of directors and warden of such penitentiary,<sup>81</sup> and to be, in effect, employees of such penitentiary, as discussed *infra* § 6.

**Federal prisons.** Authority to control and administer federal penal institutions is vested in the attorney general<sup>82</sup> or, as sometimes stated, in the attorney general and the bureau of prisons.<sup>83</sup> The federal prison system is not under the administration of the federal courts,<sup>84</sup> and such courts do not superintend or interfere with the administrative conduct of a federal prison<sup>85</sup> or its discipline, as considered *infra* § 18.

## § 6. Officers and Employees

General rules as to the distinctions between public officers and employees usually apply in determining whether a person connected with the operation of a prison or jail is a public officer or an employee.

General rules, as discussed in Officers § 5, control in determining whether a particular person connected with the operation of a prison or jail is a public officer or merely an employee.<sup>86</sup> A deputy sheriff who has been appointed by the sheriff to act as jailer has been regarded as a public officer,<sup>87</sup> and the wardenship of a county penitentiary has been regarded as an office and not an employment.<sup>88</sup> On the other hand, guards of a certain grade in certain county prisons are not public officers,<sup>89</sup> and a guard in a county jail, employed by the sheriff under civil service rules, holds a position, and not an office.<sup>90</sup> The designation by statute of a prison guard as an officer of the state is controlling.<sup>91</sup>

In some jurisdictions the office of deputy sheriff and the office of jailer are separate offices,<sup>92</sup> notwithstanding they are usually held by the same person.<sup>93</sup> The position of jailer is one of common-law origin.<sup>94</sup> Under some statutes a jailer is a peace officer.<sup>95</sup>

The attendants and employees of a hospital maintained in connection with a state penitentiary, who are under the control of the board of directors and of the warden of such penitentiary, have been regarded as, in effect, employees of such penitentiary.<sup>96</sup>

**Terminology.** The term "warden" is sometimes used synonymously with the term "chief officer,"<sup>97</sup> "keeper,"<sup>98</sup> or "chief or principal keeper,"<sup>99</sup> and in the common parlance in some jurisdictions the superintendent of the penitentiary is referred to as "warden."<sup>1</sup>

The term "jailer" has been defined as the keeper of a jail or prison.<sup>2</sup>

A matron has been regarded as a "jail keeper" within the meaning of some statutes.<sup>3</sup>

## § 7. — Appointment, Tenure, and Removal

- a. In general
- b. Eligibility
- c. Term of office; vacancy
- d. Change of status

### a. In General

Generally the terms of the regulatory statute duly construed control in determining in what body or offi-

81. Kan.—Jones v. Botkin, 139 P. 1196, 92 Kan. 242.

82. U.S.—Powell v. Hunter, C.A. Kan., 172 F. 330.

83. U.S.—Sturm v. McGrath, C.A. Kan., 177 F.2d 472—Dayton v. Hunter, C.A.Kan., 176 F.2d 108, certiorari denied 70 S.Ct. 184, 338 U.S. 888, 94 L.Ed. —, rehearing denied 70 S.Ct. 423, 338 U.S. 945, 94 L.Ed. —, rehearing denied 70 S.Ct. 983, 339 U.S. 972, 94 L.Ed. —.

Under earlier statutes, it was stated that the prison system of the United States was under the control of the attorney general and the superintendent of prisons.—Platek v. Aderhold, C.C.A.Ga., 73 F.2d 173.

84. U.S.—Powell v. Hunter, C.A. Kan., 172 F.2d 330.

85. U.S.—Sturm v. McGrath, C.A. Kan., 177 F.2d 472—Dayton v. Hunter, C.A.Kan., 176 F.2d 108, certiorari denied 70 S.Ct. 184, 338

U.S. 888, 94 L.Ed. —, rehearing denied 70 S.Ct. 423, 338 U.S. 945, 94 L.Ed. —, rehearing denied 70 S.Ct. 983, 339 U.S. 972, 94 L.Ed. — —Powell v. Hunter, C.A.Kan., 172 F.2d 330—Platek v. Aderhold, C.C.A.Ga., 75 F.2d 173—Peretz v. Humphrey, D.C.Pa., 86 F.Supp. 706.

86. N.J.—Hosp v. Martin, 84 A. 1059, 83 N.J.Law 299.  
50 C.J. p 333 notes 73-75.

87. Neb.—Scott v. Scotts Bluff County, 183 N.W. 573, 106 Neb. 355.

88. N.J.—Hosp v. Martin, 84 A. 1059, 83 N.J.Law 299.  
50 C.J. p 333 note 73 [b].

89. Second-grade guards in the Philadelphia county prison who were employed by the board of inspectors were not public officers.—Schwartz v. City of Philadelphia, 4 A.2d 573, 134 Pa.Super. 544, reversed on other grounds 12 A.2d 294, 237 Pa. 500.

90. N.J.—Ross v. Hudson County, 102 A. 397, 90 N.J.Law 522.

91. Ky.—Page v. O'Sullivan, 169 S.W. 542, 159 Ky. 703.

92. N.C.—Gowens v. Alamance County, 3 S.E.2d 339, 216 N.C. 107.

93. N.C.—Gowens v. Alamance County, *supra*.

94. N.C.—Gowens v. Alamance County, *supra*.

95. Ky.—Mullins v. Commonwealth, 172 S.W.2d 211, 213, 294 Ky. 593.

96. Kan.—Jones v. Botkin, 139 P. 1196, 92 Kan. 242.

97. N.M.—Woo Dak San v. State, 7 P.2d 940, 942, 36 N.M. 53.

98. N.M.—Woo Dak San v. State, *supra*.

99. N.M.—Woo Dak San v. State, *supra*.

1. N.M.—Woo Dak San v. State, *supra*.

2. Mo.—Lefman v. Schuler, 296 S. W. 808, 814, 317 Mo. 671.

3. N.J.—Roff v. Passaic County, 162 A. 720, 10 N.J.Misc. 1.

cer the power to appoint prison or jail officials or employees is vested.

Generally speaking, in what body or officer the power of appointment of prison or jail officials rests depends on the terms of the regulatory statute duly construed.<sup>4</sup> Generally the legislature has power to provide for the manner of appointment of officials of state prisons<sup>5</sup> and to change or modify an existing method of appointment of such officials.<sup>6</sup>

Statutory provisions as to the appointment of deputies and other subordinate officials must be observed,<sup>7</sup> whether the appointment is to be made by the sheriff alone,<sup>8</sup> or subject to the approval of the judge of some court,<sup>9</sup> or by the jailer alone,<sup>10</sup> or with the approval of a specified court,<sup>11</sup> or by a particular board,<sup>12</sup> or by the county commissioners,<sup>13</sup> or by the municipal assembly.<sup>14</sup> While it has been held that, where the approval of an appointment by a judge is required, the discretion of such judge is not limited to the matter of the personal fitness of the appointee and extends to the necessity of the appointment,<sup>15</sup> and that such discretion cannot be controlled by a court, at

least in the absence of gross abuse,<sup>16</sup> the view has been taken that a court, subject to whose approval the appointment of certain prison officials is to be made, is bound to make every intendment in favor of the appointment as a discreet exercise of the power, and cannot review such an appointment in pursuance of views, preferences, and opinions of any section of the community.<sup>17</sup> Under some statutes, the sheriff alone is entitled to appoint a deputy jailer.<sup>18</sup> The view has been taken that, even in the absence of statutory authorization, a sheriff may appoint a keeper of the county prison.<sup>19</sup>

While it has been held that, in the absence of statute, a sheriff has no power to appoint a physician for the county jail,<sup>20</sup> it has also been held that the sheriff, the warden, or other proper officer or board may appoint or employ a physician under authority implied from statutory powers delegated to him.<sup>21</sup> The view has been expressed that ordinarily the sheriff or other officer who has in his custody a prisoner whose condition requires medical attention should report the condition to the county board of commissioners before he calls

#### 4. In Georgia

Under statute the state prison commission had exclusive power to appoint wardens.—*Minter v. Early County*, 184 S.E. 319, 181 Ga. 754.—*Humber v. Dixon*, 94 S.E. 565, 147 Ga. 480.

#### In New Jersey

The civil service law did not impliedly repeal the provisions of laws of 1887, from which portion of revision of 1937 empowering boards of freeholders to assume control of county jails and appoint jailers was derived.—*Hartman v. Board of Chosen Freeholders of Mercer County*, 21 A.2d 351, 127 N.J.Law 170.

#### In Pennsylvania

(1) Authority to appoint various officials of the Philadelphia County Prison was conferred on the inspectors of such prison by the act of April 14, 1835.—*Baldi v. City of Philadelphia*, 53 Pa. Dist. & Co. 642.

(2) The validity of such statute has been recognized.—*Baldi v. City of Philadelphia*, *supra*.

(3) The view has been taken that various subsequent statutes did not repeal such act of April 14, 1835.—*Baldi v. City of Philadelphia*, *supra*.

5. Mich.—*Jackson v. Michigan Corrections Commission*, 21 S.W.2d 159, 313 Mich. 352.

6. Mich.—*Jackson v. Michigan Corrections Commission*, *supra*.

#### Repeal of statute

Statute providing for the appoint-

ment of wardens by boards of control was repealed by subsequent statute vesting the power of appointment in the governor, to be exercised on the recommendation of the prison commission.—*Jackson v. Michigan Corrections Commission*, *supra*.

7. Ohio.—*State ex rel. Smith v. Robeson*, 3 Ohio N.P.N.S., 5.

8. Neb.—*Dakota County v. Eastcott*, 93 N.W. 679, 4 Neb., Unoff., 151.

50 C.J. p 333 note 82.

9. Ohio.—*State ex rel. Smith v. Robeson*, 3 Ohio N.P.N.S., 5.

50 C.J. p 333 note 82.

10. Nev.—*State v. Hobart*, 13 Nev. 419.

#### 11. In Kentucky

(1) Subject to approval of the county court and perhaps also to fiscal court's control of jailer's expenditures, the matter of employment of deputy jailer is with the jailer himself.—*Moody v. Duerson*, 133 S.W.2d 712, 280 Ky. 527.

(2) A statute relating to deputy jailers in counties having a designated population, which has for its purpose the limiting of number of deputies and employees and salaries which might be paid them, does not limit jailer's right to name his own deputies and employees with the approval of the county court.—*Mullins v. Commonwealth*, 172 S.W.2d 211, 294 Ky. 593.

(3) Where number and salaries of

jailer's deputies and employees had been fixed by order of county court, approved and signed by circuit and county judges and presumably approved by mayor of city in which jail was located, object of such statute relating to deputy jailers in counties having the designated population was fully accomplished, and statute was not violated when jailer subsequently filled a vacancy in the office of deputy jailer by an appointment with approval of county court.—*Mullins v. Commonwealth*, *supra*.

12. Ky.—*Page v. O'Sullivan*, 169 S.W. 542, 159 Ky. 703.

50 C.J. p 333 note 86.

13. Pa.—*Petition of McHenry*, 6 Pa. Dist. 784.

14. Mo.—*Lefman v. Schuler*, 296 S.W. 808, 317 Mo. 671.

15. Ohio.—*State ex rel. Smith v. Robeson*, 3 Ohio N.P.N.S., 5.

16. Ohio.—*State ex rel. Smith v. Robeson*, *supra*.

17. Pa.—*In re Ganser*, 1 Woodw. 258.

50 C.J. p 333 note 89.

18. Ga.—*Drost v. Robinson*, 22 S.E. 2d 475, 194 Ga. 703.

19. Pa.—*Scarborough v. Thornton*, 9 Pa. 451.

20. N.J.—*Clayton v. Monmouth County*, 127 A. 37, 3 N.J.Misc. 46.

21. Me.—*Sawyer v. Androscoggin County*, 102 A. 226, 116 Me. 408.

50 C.J. p 333 note 92.



in a physician,<sup>22</sup> but it has also been held that, in case of an emergency, such sheriff or officer may without previous authorization by such board call a physician.<sup>23</sup> Some statutes have made provision for appointment of a physician by the lessee with the advice and consent of inspectors,<sup>24</sup> and, where such a statute also provides that, if the lessee neglects to fill a vacancy within a specified time, the inspectors are to fill it, it has been held that the rejection by the inspectors of an appointment does not entitle them to act independently until the lessee has had a reasonable time, not exceeding such specified time, after the rejection to make another appointment.<sup>25</sup>

**Civil service.** Under some statutes, the positions of certain jail officials or employees are in the classified civil service.<sup>26</sup>

### b. Eligibility

Constitutional or statutory provisions or other regulations control in determining the eligibility of a person for a prison office or employment.

Eligibility of a person with respect to a prison office or employment depends generally on the terms of constitutional or statutory provisions or other regulations.<sup>27</sup>

### c. Term of Office; Vacancy

Some constitutional or statutory provisions have fixed the term of office of certain prison or jail officials. Subject to constitutional or statutory restrictions, general rules applicable to public offices apply with respect to

the commencement and duration of the term of office of prison and jail officials and with respect to vacancies in such offices.

The term of office of certain prison or jail officials has sometimes been fixed by constitutional or statutory provisions.<sup>28</sup> Some statutes have vested in the governing body of the county the power to fix the term of office of appointive offices of county jails.<sup>29</sup>

Subject to constitutional or statutory restrictions, general rules, stated in Officers §§ 43, 45, 46, apply to the term of office of prison or jail officials with respect to commencement,<sup>30</sup> and duration.<sup>31</sup> So, also, general rules stated in Officers §§ 50-53 usually apply with respect to vacancies in office, the filling of them, and related matters.<sup>32</sup>

### d. Change of Status

A prison official is entitled to exercise the functions of his office until the end of his term, unless his incumbency is sooner terminated by resignation, or by due forfeiture of the office, or by due removal therefrom.

A prison official is entitled to exercise the functions of his office until the end of his term, unless his incumbency is sooner terminated by resignation,<sup>33</sup> or by due forfeiture of the office,<sup>34</sup> or by due removal therefrom.<sup>35</sup>

Generally speaking, in what body or officer the power to remove prison or jail officials is vested depends on the terms of the regulatory constitutional or statutory provision.<sup>36</sup> In the absence

22. N.C.—*Spicer v. Williamson*, 132 S.E. 291, 191 N.C. 487, 44 A.L.R. 1280.

Compensation for medical services rendered to prisoner see *infra* § 25.

23. N.C.—*Spicer v. Williamson*, *supra*.

24. Ala.—*Jones v. Graham*, 24 Ala. 450.

25. Ala.—*Jones v. Graham*, *supra*.

26. County jail physician

N.Y.—*Jacobs v. Board of Sup'rs of Rensselaer County*, 258 N.Y.S. 73, 236 App.Div. 193—*In re Phillips*, 124 N.Y.S. 60, 139 App.Div. 365, affirmed 93 N.E. 1129, 200 N.Y. 521.

27. Ind.—*Howard v. Shoemaker*, 35 Ind. 111.

50 C.J. p 333 note 1.

Eligibility for public office generally see Officers §§ 11-26.

Whether statute repealed

Statute prescribing qualifications of matron was held not repealed by certain later enactments.—*State ex rel. Isham v. City of Spokane*, 98 P.2d 306, 2 Wash.2d 392.

28. Miss.—*McAfee v. Russell*, 29 Miss. 84.

N.J.—*Hosp v. Martin*, 84 A. 1059, 83 N.J.Law 299.

50 C.J. p 334 note 5 [a].

Constitutional provision

Where the length of the term of an elected county jailer was fixed by a provision of the constitution, the legislature did not have power to increase or diminish such term.—*Lowe v. Commonwealth*, 3 Metc. Ky., 237.

Statute held not repealed

Wash.—*State ex rel. Isham v. City of Spokane*, 98 P.2d 306, 2 Wash. 2d 392.

29. Jail physician of a county jail was an appointive county officer within the meaning of a statute giving the governing body of the county the power to fix the term of office of an appointive county officer.—*Jacobs v. Board of Sup'rs of Rensselaer County*, 258 N.Y.S. 73, 236 App.Div. 193.

30. Miss.—*Yerger v. State*, 45 So. 849, 91 Miss. 802.

50 C.J. p 334 note 4.

31. Ind.—*State v. Mayne*, 68 Ind. 285.

50 C.J. p 334 notes 5 [b], 6.

32. Ky.—*Staton v. Commonwealth*, 11 Ky.Op. 374.

50 C.J. p 334 note 7.

33. Kan.—*Lynch v. Chase*, 40 P. 666, 55 Kan. 367.

34. Kan.—*Lynch v. Chase*, *supra*.

35. Ind.—*Baker v. Kirk*, 33 Ind. 517.

Kan.—*Lynch v. Chase*, 40 P. 666, 55 Kan. 367.

Right to receive prescribed compensation until end of term see *infra* § 10 b.

Whether public officer has vested or property right in office see Constitutional Law §§ 251, 600.

36. In California

Power to remove prison directors is conferred on the governor by constitutional provision.—*O'Brien v. Olson*, 169 P.2d 8, 42 Cal.App.2d 449.

In Georgia

(1) The state prison commission had exclusive power to remove wardens by virtue of statute.—*Minter v. Early County*, 184 S.E. 319, 181 Ga. 754—*Humber v. Dixon*, 94 S. E. 565, 147 Ga. 480.

(2) The sheriff alone is entitled to discharge a deputy jailer appoint-

of restriction by provision of the constitution, the legislature has power to provide for the removal of prison officials at the pleasure of the appointing power.<sup>37</sup> The view has been taken that, in the absence of authorization by constitutional or statutory provision, the power of removal is not an incident of the power of appointment with respect to an official whose term of office is fixed by law for a definite period.<sup>38</sup> In exercising power conferred by a constitutional provision to remove prison officials for specified causes after an opportunity to be heard on written charges, the governor acts in a judicial capacity, as distinguished from his executive power.<sup>39</sup>

Subject to qualifications or limitations imposed by constitutional or statutory provisions, the general rules, stated in Officers §§ 59-71, apply to the removal of prison or jail officials or employees.<sup>40</sup> Thus, generally, the power of removal is discretionary and without control where no term or tenure has been fixed by constitution or statute,<sup>41</sup> or where the office is to be held during the pleasure of the appointing power;<sup>42</sup> and, where the power to remove is expressly conferred by statute without limitation as to removal for cause, it is not essential to assign a cause.<sup>43</sup> Where, however, an officer is chosen for a definite term, and provision is made for his removal for cause, a removal without assigning a cause is illegal,<sup>44</sup> and the cause must be legally sufficient.<sup>45</sup> When the causes for removal are specified in the statute or in a valid

rule or regulation adopted thereunder, generally the cause for removal must be one so specified;<sup>46</sup> but where the statute gives power of removal for cause, without specifying the causes, the power is necessarily of a discretionary nature, and the removing authority is the exclusive judge of the cause and the sufficiency thereof.<sup>47</sup>

*Mode and procedure for removal.* In the absence of limitation by constitutional or statutory provision, general rules, stated in Officers §§ 64-66, apply with respect to the mode and proceedings for the removal of prison or jail officials or employees.<sup>48</sup> Where the constitution directs the mode of removal, a statute may not prescribe a different mode.<sup>49</sup>

Statutory provisions for the investigation of a charge and the removal of the officer, where cause is shown, are sufficient authority for the designated tribunal to act.<sup>50</sup> Where removal can be made only for cause, specified charges, notice, and a hearing are required,<sup>51</sup> especially where a statute expressly so provides,<sup>52</sup> since such a statute is considered mandatory.<sup>53</sup> A hearing is not essential, however, where a valid statute confers the absolute power of removal without limitation.<sup>54</sup> The fact that a board, vested with the discretion of removing a prison official, is required to report the removal and the grounds therefor to a body whose failure to concur in the removal imposes the duty of reinstatement does not require the pre-

ed by him.—*Drost v. Robinson*, 22 S.E.2d 476, 194 Ga. 703.

37. Mich.—*Jackson v. Michigan Corrections Commission*, 21 N.W. 2d 159, 313 Mich. 352.

#### Statute held repealed

Mich.—*Jackson v. Michigan Corrections Commission*, *supra*.

38. Tenn.—*Brock v. Foree*, 76 S.W. 2d 314, 168 Tenn. 129.

#### Jail physician

County court was without authority to remove jail physician appointed by court for four-year term.—*Brock v. Foree*, *supra*.

39. Cal.—*O'Brien v. Olson*, 109 P.2d 8, 42 Cal.App.2d 449.

40. Kan.—*Lynch v. Chase*, 40 P. 666, 55 Kan. 367.

41. Kan.—*Lynch v. Chase*, *supra*. 50 C.J. p 334 note 16.

42. Kan.—*Lynch v. Chase*, *supra*. 50 C.J. p 334 note 17.

#### Constitutional provision

A jail warden of a county of the fourth class is an appointed officer within meaning of constitutional provision that appointed officers, other than those specified, may be

removed at pleasure of power by which they shall have been appointed, and, therefore, jail warden was removable, without cause, by appointing power, the board of jail inspectors, notwithstanding the legislature provided as two causes for termination of such tenure misconduct or inefficiency.—*Commonwealth ex rel. Bunch v. Beattie*, 73 A.2d 664, 364 Pa. 572.

43. N.J.—*Sweeney v. Stevens*, 46 N. J.Law 344.

44. Ind.—*Wood v. Selby*, 24 Ind. 183.

45. Ind.—*State v. Mayne*, 68 Ind. 285. 50 C.J. p 334 note 20.

#### Constructive knowledge of illegal acts

Where illegal flogging of prisoners by guards occurred frequently for more than a year, it might be assumed that prison directors, in whom was vested general supervision and management of state prisons, in exercise of reasonable diligence should have discovered the practice, and were chargeable with constructive knowledge of the prac-

tice, as found by governor in removal proceedings.—*O'Brien v. Olson*, 109 P.2d 8, 42 Cal.App.2d 449.

46. Ky.—*Gorham v. Luckett*, 6 B. Mon. 146.

50 C.J. p 334 note 22.

47. Kan.—*Lynch v. Chase*, 40 P. 666, 55 Kan. 367.

48. Kan.—*Lynch v. Chase*, *supra*.

49. Ky.—*Lowe v. Commonwealth*, 3 Metc. 237.

50. Pa.—*In re Lutz's Case*, 8 Pa. Co. 133.

50 C.J. p 334 note 30.

51. Kan.—*Lynch v. Chase*, 40 P. 666, 55 Kan. 367.

50 C.J. p 335 note 33.

52. N.Y.—*People v. Wright*, 44 N.E. 1036, 150 N.Y. 444.

50 C.J. p 335 note 35.

#### Civil service official or employee

N.Y.—*Jacobs v. Board of Sup'rs of Rensselaer County*, 258 N.Y.S. 73, 236 App.Div. 193.

53. N.Y.—*People v. Wright*, 44 N.E. 1036, 150 N.Y. 444.

54. N.J.—*Sweeney v. Stevens*, 46 N. J.Law 344, 345.

ferment of charges, notice, and a hearing before a removal.<sup>55</sup>

While a requirement, that the discharge of an official can be made only after a presentation of the reasons therefor and the allowance of a reasonable time for making an answer in writing and the filing of the proceedings with the civil service commission, must be complied with,<sup>56</sup> and the reasons assigned for the removal must be sufficient on their face,<sup>57</sup> a hearing before the civil service commission is not necessary to make the discharge effective.<sup>58</sup>

Questions as to evidence in proceedings for removal have been considered,<sup>59</sup> and it has been held that, in a proceeding before the governor for the removal of prison officers under authority conferred by a constitutional provision, it is the exclusive province of the governor to determine as to the credibility of witnesses and the weight and sufficiency of their evidence to prove the charges.<sup>60</sup>

It has been held that certiorari, or a writ of review, will lie to review the decision of the governor removing a prison officer in the exercise of power, conferred by a constitutional provision, to remove for cause after an opportunity to be heard on written charges.<sup>61</sup> Such review is governed by the same rules which apply to the ordinary proceedings for a writ of certiorari.<sup>62</sup> On such review the court has no discretion except to determine whether the governor, acting in a quasi-judicial capacity, exceeded his jurisdiction in determining that any one of the charges involved is supported by some substantial evidence,<sup>63</sup> and it is

not permissible for the court to determine that the governor exceeded his jurisdiction in finding the officer charged guilty, if a single material charge on which removal was based is supported by substantial evidence.<sup>64</sup> In a certiorari proceeding to review the removal of a jail employee in the classified civil service, the court cannot go beyond the assignment of reasons for removal where such reasons are sufficient on their face.<sup>65</sup> The due removal from his position of a classified civil service employee in a federal prison, in accordance with statute and the rules of the civil service commission, is not subject to review by the court of claims.<sup>66</sup>

**Effect of removal.** Where the incumbent of one office holds another office ex officio, his removal from the principal office removes him from the other office also.<sup>67</sup>

**Reinstatement.** A prison or jail official or employee wrongfully removed may, by laches, lose his right to reinstatement.<sup>68</sup> An employee who has been properly removed from his position is not entitled to reinstatement.<sup>69</sup>

## § 8. — Sheriff as Jailer Ex Officio

At common law and under some statutes the sheriff is jailer ex officio and has the right to the custody and control of the common or county jail and of the prisoners confined.

At common law the sheriff is jailer ex officio and has the right to the custody and control of the common or county jail and of the prisoners confined therein.<sup>70</sup> A statute may, either express-

55. Ky.—*South v. Sinking Fund Comrs.*, 5 S.W. 567, 86 Ky. 186, 9 Ky.L. 478.

56. N.Y.—*People v. Harvey*, 111 N.Y.S. 167, 127 App.Div. 211.

57. N.Y.—*People v. Harvey*, supra.

58. Cal.—*Cronin v. Los Angeles County Civ. Serv. Commn.*, 236 P. 339, 71 Cal.App. 633.

59. **Method of obtaining evidence**

Fact that warden of county penitentiary participated in arranging to have prisoner induce guard to carry message to, and receive money from, other person, to test guard's integrity, did not warrant disregard of evidence against guard.—*Essex County v. Civil Service Commission of New Jersey*, 157 A. 158, 9 N.J.Misc. 1301.

**Evidence held sufficient**

To sustain supervisor's finding that county penitentiary guard violated penitentiary rules, justifying discharge order.—*Essex County v. Civil Service Commission of New Jersey*, supra.

60. Cal.—*O'Brien v. Olson*, 109 P.2d 8, 42 Cal.App.2d 449.

**Legality of flogging of prisoners**

(1) It was the sole province of governor, sitting in capacity of a judicial officer in proceeding for removal of prison directors, to determine whether prisoners were flogged under circumstances constituting corporal punishment in violation of statute, or merely for purpose of necessary control of inmates, where there was evidence to support either conclusion.—*O'Brien v. Olson*, supra.

(2) In this connection it was stated, however, that prisoners who testified concerning illegal corporal punishment, who were incarcerated for felonies, were subject to the ordinary rule of impeachment.—*O'Brien v. Olson*, supra.

61. Cal.—*O'Brien v. Olson*, supra.

62. Cal.—*O'Brien v. Olson*, supra.

**Credibility of witnesses**

The reviewing court may not interfere with the province of the governor of determining the credibility

of the witnesses and the weight and sufficiency of their evidence to prove the charges preferred.—*O'Brien v. Olson*, supra.

63. Cal.—*O'Brien v. Olson*, supra.

64. Cal.—*O'Brien v. Olson*, supra.

65. N.Y.—*People v. Harvey*, 111 N.Y.S. 167, 127 App.Div. 211.

50 C.J. p 335 note 39 [a].

66. U.S.—*Baskin v. U. S.*, 95 Ct.Cl. 455, certiorari denied 62 S.Ct.

1043, 316 U.S. 675, 86 L.Ed. 1749.

67. Conn.—*Burr v. Norton*, 25 Conn.

103.

68. Ky.—*Stone v. Board of Prison Comrs.*, 176 S.W. 33, 164 Ky. 640.

50 C.J. p 335 note 43.

69. U.S.—*Baskin v. U. S.*, 95 Ct.Cl. 455, certiorari denied 62 S.Ct.

1043, 316 U.S. 675, 86 L.Ed. 1749.

70. Mo.—*State, on Inf. of McKittick, v. Williams*, 144 S.W.2d 98, 346 Mo. 1003.

Ohio.—*In re Moore*, 14 Ohio Cir.Ct. 237, 7 Ohio Cir.Dec. 575.

50 C.J. p 335 notes 45, 49.

ly or by implication, confer virtually the same rights on a sheriff,<sup>71</sup> and some statutes have made provision to such effect.<sup>72</sup>

According to some authorities, where the constitution makes provision for the office of sheriff but is silent as to the rights attaching to the office, the common-law rights attaching to the office from time immemorial are recognized and cannot be detached by statute;<sup>73</sup> but other cases have taken the view that the office of sheriff is a purely ministerial office, the functions and province of which are to execute duties prescribed by law, and which may be contracted, enlarged, or transferred at the will of the legislature.<sup>74</sup> Where the office of jailer is recognized by the constitution, the court may place the jail and prisoners in the exclusive control of the sheriff, if the jailer refuses to perform his duties.<sup>75</sup>

## § 9. — Bonds

Whether a prison official must give a bond generally depends on whether a bond is required by statute.

Statutes sometimes require prison officials to give a bond for the faithful discharge of their duties,<sup>76</sup> and may authorize a board in its discretion to require such a bond from subordinate prison officials.<sup>77</sup> It has been held that, in the absence of any statutory requirement to that effect, the warden of a penitentiary cannot be required to give a bond;<sup>78</sup> but, on the other hand, it has been held that a sheriff may secure the performance of the duties of the jailer by requiring the latter to

give him a bond of indemnity with satisfactory sureties.<sup>79</sup> A statutory requirement that the bond of the warden of a penitentiary shall be approved by the governor and the penitentiary commissioners is for the security and benefit of the public only, and the fact that a warden's bond is not approved by the governor does not affect its validity as against the warden or his bondsmen;<sup>80</sup> but where the statute requires the keeper of the penitentiary to execute a bond to the state, a bond executed to the governor and his successors in office is not a valid statutory bond and cannot be sued on in the name of the governor.<sup>81</sup>

## § 10. — Compensation

- a. Of sheriff
- b. Of other officials or employees

### a. Of Sheriff

Generally the keeping and care of the jail, as a part of the sheriff's official duty, is paid for by his established fees or salary and additional pay therefor may not be recovered by him, unless a statute provides for additional compensation.

Generally the keeping and care of the jail, being a part of the sheriff's official duty, is paid for by his established fees or salary, and he cannot recover any additional pay therefor from the county or state,<sup>82</sup> whether the actual services are performed by himself or by a subordinate appointed by him,<sup>83</sup> except where the statute provides for compensation for such services in addition to his established fees or salary.<sup>84</sup> It has been held that a

Custody and control of prisoners generally see *infra* §§ 18, 19.

Rights, powers, and duties of sheriff generally see the C.J.S. title *Sheriffs and Constables* §§ 35-51, also 57 C.J. p 774 note 91-p 793 note 76.

71. Neb.—*Affierbach v. York County*, 146 N.W. 1050, 95 Neb. 611. 50 C.J. p 335 note 46.

72. Neb.—*O'Dell v. Goodsell*, 30 N.W.2d 906, 149 Neb. 261—*Flint v. Mitchell*, 26 N.W.2d 816, 148 Neb. 244. 50 C.J. p 335 note 46.

73. Tenn.—*State v. Cummins*, 42 S.W. 880, 99 Tenn. 667.

Wis.—*State v. Brunst*, 26 Wis. 412, 7 Am.R. 84. 50 C.J. p 335 note 49.

Substantial abridgment of rights not permissible

Since a sheriff is a constitutional officer, his right to control of jail and custody of prisoners cannot be substantially abridged.—*State v. Knox County*, 54 S.W.2d 973, 165 Tenn. 319.

74. Md.—*Beasley v. Ridout*, 52 A. 61, 94 Md. 641. 50 C.J. p 335 note 50.

75. Ky.—*Staton v. Commonwealth*, 11 Ky.Op. 374.

76. Ill.—*Ramsay v. People*, 64 N.E. 549, 197 Ill. 572. Necessity of official bond generally see *Officers* § 39.

77. Tex.—*Goree v. Ramey*, 14 S.W. 553, 78 Tex. 176. 50 C.J. p 335 note 54.

78. Iowa.—*State v. Heisey*, 9 N.W. 327, 56 Iowa 404. 50 C.J. p 335 note 55.

79. N.Y.—*Willett v. Kipp*, 12 Hun 474.

80. Ill.—*Ramsay v. People*, 64 N.E. 549, 197 Ill. 572.

81. Miss.—*Tucker v. Hart*, 23 Miss. 548.

82. Colo.—*Larimer County v. Branson*, 35 P. 750, 4 Colo.App. 274. 50 C.J. p 336 note 61.

Compensation and reimbursement of sheriff:

Generally see the C.J.S. title *Sheriffs and Constables* §§ 215-260, also 57 C.J. p 1101 note 59-p 1143 note 37.

For maintenance and care of prisoners see *infra* §§ 24-29.

83. Colo.—*Larimer County v. Branson*, *supra*.

Ill.—*Goff v. Douglas County*, 24 N.E. 60, 132 Ill. 323.

84. Neb.—*Flint v. Mitchell*, 26 N.W. 2d 816, 148 Neb. 244—*Affierbach v. York County*, 146 N.W. 1050, 95 Neb. 611. 50 C.J. p 336 note 63, p 361 note 63 [a].

Circumstances constituting sheriff jailer

Sheriff who had occupied living quarters in jail since commencement of his tenure, exercised complete control of jail and supervised those employed to assist him, controlled jail feeding and was subject to call when not actually on duty, was the jailer within meaning of statute

sheriff may receive a share of the fees and emoluments of his deputies, if the parties so agree.<sup>85</sup>

*Use of jailer's residence.* Where the sheriff is ex officio jailer, the use of the jailer's residence is in no sense a part of the income of the office, since these accommodations are furnished to enable the sheriff to better the discharge of his duties.<sup>86</sup>

#### b. Of Other Officials or Employees

- (1) In general
- (2) Change of compensation
- (3) Retirement and pension
- (4) Expenses

##### (1) In General

Constitutional and statutory provisions regulating the matter of compensation of prison or jail officials, other than the sheriff, are controlling with respect to such compensation.

providing a fee for jailer, notwithstanding sheriff had assistance in performing his duties as jailer.—*Flint v. Mitchell*, 26 N.W.2d 816, 148 Neb. 244.

*Amount of compensation as jailer* Neb.—*Flint v. Mitchell*, supra.

85. Mass.—*Austin v. Moore*, 7 Metc. 116.

86. Ga.—*Bynum v. Knighton*, 73 S. E. 400, 187 Ga. 250, Ann.Cas.1913A 908.

87. Kan.—*Lynch v. Chase*, 40 P. 666, 55 Kan. 367.

#### 88. In Kentucky

A constitutional provision that no public officer, except the governor, shall receive more than five thousand dollars per annum as compensation for official services applies to a county jailer.—*Holland v. Fayette County*, 41 S.W.2d 651, 240 Ky. 37.

89. Kan.—*McBrian v. Nation*, 97 P. 798, 78 Kan. 665.

*Invalid statute cannot have this effect.*—*People v. Chapman*, 61 Cal. 262.

90. Kan.—*McBrian v. Nation*, 97 P. 798, 78 Kan. 665.  
50 C.J. p 336 note 68.

91. Ky.—*Page v. O'Sullivan*, 169 S. W. 542, 159 Ky. 703.  
50 C.J. p 336 note 69.

92. Ky.—*Stone v. Pfanz*, 36 S.W. 1128, 99 Ky. 647, 18 Ky.L. 489.  
50 C.J. p 336 note 70.

#### Fee for attending court

(1) Statute providing that fees of jailer for attending county and quarterly courts shall not exceed a specified amount per day contemplates attendance at special terms of county and quarterly courts held in the courtroom or regular terms wherever held.—*Laurel County Fiscal*

*Court v. Steele*, 148 S.W.2d 283, 285 Ky. 407.—*Hickman County v. Jackson*, 156 S.W. 391, 153 Ky. 551.

(2) Where the county judge holds a special term of the county court or the quarterly court in his own office or in the clerk's office, the jailer is not entitled to any pay for attendance.—*Hickman County v. Jackson*, supra.

(3) A jailer is not entitled to compensation under the statute for attendance at an examining trial in a criminal case in which the county judge sits merely as a committing magistrate.—*Hickman County v. Jackson*, supra.

(4) Such statute does not contemplate that the jailer should be paid the specified amount whenever he should attend court.—*Laurel County Fiscal Court v. Steele*, supra.

(5) In such case the amount to be allowed is a matter within discretion of county fiscal court which is entitled to information which will enable it to exercise its discretion fairly and intelligently.—*Laurel County Fiscal Court v. Steele*, supra.

(6) A jailer is entitled to a reasonable compensation, not to exceed the amount specified in the statute.—*Hickman County v. Jackson*, supra.

(7) The amount to which the jailer is entitled under such statute depends on what he did, how long he attended, and the like.—*Hickman County v. Jackson*, supra.

(8) A claim for compensation under such statute was properly rejected by the fiscal court, where the jailer's claim did not furnish information sufficient to authorize allowance of the claim.—*Laurel County Fiscal Court v. Steele*, supra.

(9) Right of public officers or em-

A prison official is entitled to receive the compensation prescribed for his office until the end of his term, unless his incumbency is sooner terminated by resignation, by due forfeiture of the office, or by due removal therefrom.<sup>87</sup>

Subject to constitutional limitation or restrictions,<sup>88</sup> statutes which provide for compensation for prison or jail officials or employees, other than the sheriff, for services control as to the amount of the compensation, the conditions under which it is allowable, and other related matters.<sup>89</sup> Among particular officials or employees who are or have been within the purview of such statutes are chaplains,<sup>90</sup> guards,<sup>91</sup> jailers,<sup>92</sup> matrons,<sup>93</sup> prison boards,<sup>94</sup> and wardens.<sup>95</sup>

The power to provide for the compensation of jail officials is sometimes vested in a particular court or board,<sup>96</sup> which must, in so doing, act with-

employees to witness' fees see the C. J.S. title Witnesses § 38, also 50 C.J. p 337 note 78, 70 C.J. p 71 notes 54-62.

#### Fee for services to court

(1) Even though court room was heated by furnace, lighted by electric light, and supplied with city water, jailer was entitled to reasonable compensation, within statutory limit, if he did anything toward making such services available to circuit court.—*Talbott v. Caudill*, 58 S.W.2d 385, 248 Ky. 146.

(2) Fact that circuit court certified to auditor that jailer furnished fuel, light, and water to court, and that allowance was made for such services was prima facie evidence of correctness and legality of jailer's claim.—*Talbott v. Caudill*, supra.

93. N.Y.—*People v. Coggey*, 117 N. Y.S. 65, 132 App.Div. 268.

#### Compensation measured by compensation of court attendant

Matron of county jail, in charge of female inmates, and employed under supervision of sheriff in county of second class, was a jail keeper, and, as such, was entitled under statute to same compensation as court attendants of such county.—*Roff v. Passaic County*, 162 A. 720, 10 N.J.Misc. 1133.

94. N.D.—*State v. Briggs*, 63 N.W. 206, 5 N.D. 69.  
50 C.J. p 337 note 72.

95. Nev.—*Crosman v. Nightingill*, 1 Nev. 323.

#### 96. In Kentucky

(1) It is the duty of the fiscal court of a county to fix the compensation of the jailer for janitor service.—*Perkins v. Cumberland County*, 172 S.W.2d 651, 294 Ky. 737.

in its statutory powers,<sup>97</sup> and in accordance with valid regulations,<sup>98</sup> and is not authorized to make an order, the effect of which is entirely to deprive such an official of compensation.<sup>99</sup> The authority and duty of a county board to keep and maintain a jail empower it, in the exercise of a reasonable discretion, to employ and pay necessary guards or assistants to the sheriff as keeper of the jail.<sup>1</sup> The determination of the duly authorized body fixing the compensation of a jail official or employee is controlling with respect to the amount of such compensation.<sup>2</sup>

Guards engaged on a monthly compensation are not subject to a deduction of salary while taking a convict before the court under a subpoena.<sup>3</sup>

(2) Such compensation for janitor service should be fixed in advance of the election of the jailer.—*Perkins v. Cumberland County*, supra.

(3) Where jailer's compensation for janitor service was fixed by fiscal court, only remedy of jailer dissatisfied with the amount so fixed was by appeal from order within sixty days from such order.—*Perkins v. Cumberland County*, supra.—*Wolfe County v. Tolson*, 140 S.W.2d 671, 283 Ky. 11.

#### In Oklahoma

(1) Salaries payable to jailers appointed by sheriff, with approval of board of county commissioners, were to be fixed by board within the limitations prescribed by the statute.—*Cavin v. Board of Com'rs of Garfield County*, 33 P.2d 477, 168 Okl. 267.

(2) The sheriff did not have power to fix such salaries.—*Cavin v. Board of Com'rs of Garfield County*, supra.

(3) Such board was authorized to fix such salaries without regard to amount fixed therefor during preceding fiscal year.—*Cavin v. Board of Com'rs of Garfield County*, supra.

#### In Pennsylvania

(1) Under the general county law the salaries of jail physician and of deputies are a matter for the county commissioners.—*Petition of Pritchard*, 30 Pa. Dist. & Co. 367, 85 Pittsb. Leg. J. 676.

(2) The act of April 14, 1835, conferred on the inspectors of the Philadelphia county prison authority to fix the salary or compensation of prison officials and employees.—*Schwarz v. City of Philadelphia*, 4 A.2d 573, 134 Pa. Super. 544, reversed on other grounds 12 A.2d 294, 337 Pa. 500.—*Baldi v. City of Philadelphia*, 53 Pa. Dist. & Co. 642—50 C.J. p 337 note 74 [a].

(3) Accordingly, the city council of Philadelphia did not have authority to fix the salaries of such

officials or employees.—*Baldi v. City of Philadelphia*, supra—50 C.J. p 337 note 74 [a].

(4) It has been held or recognized that various subsequent statutes did not repeal such act of April 14, 1835.—*Baldi v. City of Philadelphia*, supra—50 C.J. p 337 note 74 [a] (1), (2).

(5) If the city council of Philadelphia failed to make an appropriation for the payment of salaries, as fixed by the inspectors, the amounts of salaries were recoverable in an action against the city.—*Schwarz v. City of Philadelphia*, supra.

(6) It has been held, however, that the act of April 14, 1835, was repealed with respect to the power to fix salaries by the act of May 2, 1945, which was intended to establish a uniform and mandatory system by which all salaries payable out of the public treasury of a city of the first class were to be fixed by the council, in view of a provision of the Statutory Construction Act of May 28, 1937, Pa. Annot. St. tit. 46 § 591, as to repeal by implication.—*Page v. City of Philadelphia*, 67 Pa. Dist. & Co. 820.

(7) Power to fix salaries of all employees except two caretakers of house of detention for juvenile offenders in Philadelphia has been held lodged with city council and not with board of managers.—*Richardson v. City of Philadelphia*, 167 A. 573, 312 Pa. 173.

(8) Accordingly, it was held that the council of the city of Philadelphia, and not the prison inspectors had authority to fix the amount of salary of the physician in chief of the Philadelphia county prisons.—*Page v. City of Philadelphia*, supra.

97. *Nev.—Randall v. Lyon County*, 14 P. 583, 20 Nev. 35.  
50 C.J. p 337 note 75.

98. *Cal.—Banks v. Civil Service Commission of City and County of*

Where the appointment of a jailer and the amount of his salary are prescribed by law, the sheriff, receiving such salary to the use of the jailer, cannot refuse to pay it over, even on the ground of the illegality of the appointment.<sup>4</sup> It has been held that deputies of the sheriff designated for duty at a prison are not employees of the prison within a statute requiring a city to pay the salaries of such employees.<sup>5</sup>

In the absence of statutory authorization, deputies or subordinates appointed by the sheriff to perform a part of his duties with respect to jails cannot recover from the county or state pay for their services.<sup>6</sup> A de facto jail officer may be entitled to the emoluments of the office of which he is

*San Francisco*, 74 P.2d 741, 10 Cal. 2d 435.

99. *Minn.—State v. McIntyre*, 25 Minn. 383.

1. *Kan.—Mitchell v. Leavenworth County*, 18 Kan. 188.  
50 C.J. p 337 note 77.

2. *Cal.—Banks v. Civil Service Commission of City and County of San Francisco*, 74 P.2d 741, 10 Cal. 2d 435.

*Okl.—Cavin v. Board of Com'rs of Garfield County*, 33 P.2d 477, 168 Okl. 267.

**Recommendation of appointing officer held not controlling**

*Cal.—Banks v. Civil Service Commission of City and County of San Francisco*, 74 P.2d 741, 10 Cal. 2d 435.

**Inequality of salaries held not remediable by courts**

*Cal.—Banks v. Civil Service Commission of City and County of San Francisco*, supra.

#### Estoppel

Where a deputy jailer accepted from the jailer certain amounts as compensation without objection or claim that he was entitled to greater amounts, and with knowledge that another person was also being paid out of the amount allowed by the orders of the fiscal court approving the budgets of the jailer, such deputy jailer was estopped to claim the full amount so allowed, notwithstanding some allowances and reports contained such deputy jailer's name as sole deputy or assistant.—*Moody v. Duerson*, 138 S.W.2d 712, 280 Ky. 527.

3. *Ohio.—State v. Coffin*, 46 N.E. 819, 56 Ohio St. 240.

4. *S.C.—McLenore v. Lancaster*, 35 S.E. 743, 57 S.C. 382.

5. *La.—State v. New Orleans*, 35 La. Ann. 532.

6. *Ill.—Selbert v. Logan County*, 63 Ill. 155.

50 C.J. p 336 note 65.

actually incumbent;<sup>7</sup> but a mere intruder has no right to fees or salary for services rendered dur-such usurpation.<sup>8</sup> It has been held that the mere fact that an official in the classified civil service is temporarily assigned to perform the duties of a position of a higher grade pending the filling of such position by a permanent appointment does not entitle such official to the salary of the position to which he is so assigned, under particular regulations.<sup>9</sup> Where a duly appointed officer is unlawfully prevented from performing his duties, he is ordinarily entitled to recover as though he had performed them.<sup>10</sup> An employee who has been properly removed from his position is not entitled to compensation for a period after his removal.<sup>11</sup>

The term "deputies," as used in a constitutional provision for the payment to jailers out of the state treasury, with certain limitations, of the salaries of the deputies of jailers, has been construed to include jail or police matrons and assistant matrons,<sup>12</sup> but not jail physicians.<sup>13</sup>

## (2) Change of Compensation

Under proper authorization a change of compensa-

tion of a prison or jail official or employee duly made is effective.

Under proper authorization a change of compensation duly made becomes effective.<sup>14</sup> In the absence of provision to the contrary, boards empowered to fix the compensation of prison officials may change such compensation,<sup>15</sup> and an acceptance by the official of reduced compensation may estop him to question the reasonableness of the reduction.<sup>16</sup> A body other than that authorized to fix the salaries of prison employees may not, acting alone, reduce such salaries.<sup>17</sup>

## (3) Retirement and Pension

Whether prison or jail employees are entitled to membership in retirement and pension systems, and their rights thereunder if so entitled, depend on the terms of the regulatory statute duly construed.

Pension systems of which prison or jail employees are entitled to become members have been set up under some statutes.<sup>18</sup> Whether a particular employee has this right depends largely on the terms of the statute duly construed.<sup>19</sup> A deputy jailer appointed by the sheriff is not an employee of the county within the meaning of some statutes establishing a retirement and pension system for em-

7. Ariz.—Behan v. Davis, 31 P. 521, 3 Ariz. 399.

Pa.—In re McHenry, 6 Pa. Dist. 784.

8. N.J.—Meehan v. Hudson County, 46 N.J. Law 276, 50 Am. R. 421.

9. Cal.—Dunn v. Civil Service Commission of City and County of San Francisco, 40 P.2d 310, 3 Cal. App. 2d 554.

10. Ala.—Jones v. Graham, 21 Ala. 654.

50 C.J. p 337 note 84.

11. U.S.—Baskin v. U. S., 95 Ct. Cl. 455, certiorari denied 62 S. Ct. 1043, 316 U.S. 675, 86 L. Ed. 1749.

### Honorably discharged soldier

The fact that the employee was an honorably discharged soldier was immaterial.—Baskin v. U. S., supra.

12. Ky.—Connors v. Jefferson County Fiscal Court, 125 S.W.2d 206, 277 Ky. 23.

13. Ky.—Connors v. Jefferson County Fiscal Court, supra.

14. Mich.—Michigan State Prison v. Fuller, 163 N.W. 921, 197 Mich. 377, 50 C.J. p 337 note 89.

Change of compensation for maintenance of prisoners see *infra* § 25.

Constitutional prohibition against change in compensation of public officers see Officers § 95.

15. Ariz.—Truman v. Pinal County, 57 P. 65, 6 Ariz. 191, 50 C.J. p 337 note 90.

### Civil service employees

(1) The statute providing that no civil service employees shall be discharged until furnished with a written statement of reasons for such action and allowance of reasonable time to answer, and that action of the appointing authority shall not take effect until approved by order of the civil service commission, does not clothe such commission with jurisdiction to review and determine validity of action of local governing body in decreasing the salaries of jail keepers in exercise of power conferred by statute.—Tanis v. Passaic County, 17 A.2d 807, 126 N.J. Law 303.

(2) Where local board of chosen freeholders in general retrenchment of salaries reduced by resolution salaries of county jail keepers twenty-five per cent and those of court attendants twenty per cent, in an action therefor, jail keepers were not entitled to recover difference of five per cent in salaries on ground that local governing body could not under statute lawfully reduce the salaries of jailers below that fixed for court attendants, since action of local board, although erroneous, was a mere irregular exercise of authority and was final until vacated in a direct proceeding.—Tanis v. Passaic County, supra.

16. Ariz.—Truman v. Pinal County, 57 P. 65, 6 Ariz. 191, 50 C.J. p 337 note 91.

17. Pa.—Schwarz v. City of Phila-

delphia, 4 A.2d 573, 134 Pa. Super. 544, reversed on other grounds 12 A.2d 294, 337 Pa. 500.

18. N.J.—Borger v. Board of Chosen Freeholders, 180 A. 495, 13 N. J. Misc. 676.

### 19. Age of employee

The keeper of a county jail who was in the employ of the county when a pension fund was created by the board of chosen freeholders was entitled to join the system, notwithstanding his age was greater than that specified in a statutory provision that any person of a specified age or over accepting employment in a county shall not be eligible to join a pension fund maintained by the county, on the theory that such keeper was not in the class of persons presently accepting employment in the county.—Borger v. Board of Chosen Freeholders, supra.

### Delay in joining

Jail keeper who made application to join county pension fund within two months after county board of freeholders created pension fund was not guilty of laches which barred him from joining fund, notwithstanding for more than five years after passage of statute authorizing creation of pension fund by contributions of county employees and county board of freeholders, and before board of freeholders created fund, jail keeper paid no contributions.—Borger v. Board of Chosen Freeholders, supra.

ployees of counties.<sup>20</sup> Accordingly, the county authorities may not deduct and deposit in the pension fund a percentage of the salary of such a deputy jailer as contemplated by the statute,<sup>21</sup> and such deputy jailer is not entitled to the benefits provided for by such statute.<sup>22</sup>

The test, in determining whether a jail employee has a permanent disability which permanently incapacitates him so as to entitle him to retirement and to a pension under some statutes, is whether the disability permanently incapacitates him from reasonably performing the duties of his position and not whether he would be presently eligible for original appointment.<sup>23</sup>

#### (4) Expenses

Subject to constitutional restrictions, the expenses of prison or jail officials may be the proper subject of allowance.

The expenses of prison officials or boards must be paid out of the fund provided therefor by law,<sup>24</sup> and although there is no express provision for such allowance, it may be made where the expense is incidental to the performance of a duty imposed or power conferred by law.<sup>25</sup> A statute allowing prison directors a mileage at a specified rate and a certain sum per month for other expenses violates a constitutional provision that such officers shall receive no compensation other than reasonable traveling and other expenses incurred while engaged in the performance of official duties, to be

audited as the legislature may direct.<sup>26</sup>

The words "necessary office expenses," as used in a constitutional provision for the payment to jailers out of the state treasury, with certain limitations, of the salaries of jailers and their deputies and necessary office expenses, have been construed to refer to expenses incident and necessary to the proper conduct of the duties of the office of jailer other than the salaries of deputies.<sup>27</sup>

#### § 11. — Powers and Duties

Generally speaking, the powers and duties of governing bodies in which is invested the control of prisons, and of officers or employees connected directly with a prison or jail, are such as are conferred and imposed expressly or impliedly by law.

The powers and duties of a board or like body vested with the control of a prison are such as are conferred and imposed on it expressly or impliedly by law,<sup>28</sup> such, for example, as the duties to furnish beds and fuel;<sup>29</sup> to provide for medical and surgical attention;<sup>30</sup> and to see that prisoners are kindly and humanely treated.<sup>31</sup> Usually a majority of the officers constituting a state board of prison commissioners may lawfully hold a meeting and transact such business as the board is authorized to transact.<sup>32</sup>

*Jailer or warden.* Generally speaking, the powers and duties of a jailer or of a warden, a sheriff acting as such, or like officer, are those defined

20. Ga.—Drost v. Robinson, 22 S. E.2d 475, 194 Ga. 703.

21. Ga.—Drost v. Robinson, supra. Refund of amount deducted.

In view of the fact that deductions from a deputy jailer's salary were made without authority of law, he was entitled to a refund of the amount so deducted.—Drost v. Robinson, supra.

22. Ga.—Drost v. Robinson, supra. Effect of deductions for pension fund.

The fact that the county authorities had made the deductions from a deputy jailer's salary in purported compliance with the statute did not estop such authorities subsequently to deny that the statute did not apply to such jailer.—Drost v. Robinson, supra.

23. N.J.—Meehan v. Essex County Employees' Commission, 48 A.2d 827, 135 N.J.Law 17.

Incapacity not shown.

Penitentiary guard, who lost sight of one eye, was not incapacitated from reasonably performing his duties, and hence was not entitled to a pension under statute allowing pensions to county employees who

receive a permanent disability which permanently incapacitates them.—Meehan v. Essex County Employees' Commission, 48 A.2d 833, 134 N.J.Law 154, affirmed 48 A.2d 827, 135 N.J.Law 17.

Review of determination allowed.

Where guard of county penitentiary who lost his eye as result of injury arising out of and in the pursuit of his official duties was denied pension, he was allowed writ of certiorari to review decision and determination of the county employees' pension commission on ground that a disputed question of law was involved.—Meehan v. Essex County Employees' Pension Commission, 43 A.2d 829, 133 N.J.Law 212, certiorari dismissed 46 A.2d 383, 134 N.J.Law 154, affirmed 48 A.2d 827, 135 N.J.Law 17.

24. Pa.—In re Penitentiary Salaries, 36 Pa.Co. 403.

25. Pa.—Mogel v. Berks County, 26 A. 227, 154 Pa. 14.  
50 C.J. p 337 note 93.

26. Cal.—People v. Chapman, 61 Cal. 262.

27. Ky.—Connors v. Jefferson Coun-

ty Fiscal Court, 125 S.W.2d 206, 277 Ky. 23.

Salary of a county jail physician appointed by jailer was not necessary office expense of jailer within the meaning of the constitutional provision, since the salary had no relation to the discharge of the duties imposed on jailer.—Connors v. Jefferson County Fiscal Court, supra.

28. Cal.—In re MacDonald, 187 P. 991, 45 Cal.App. 480.  
50 C.J. p 338 notes 1-6.

Fiscal management generally see infra § 17.

Purchase of supplies see infra § 11. Regulation and supervision generally see supra § 5.

29. Pa.—Moore v. Servening, 3 Yeates 443.  
50 C.J. p 338 note 2.

30. N.C.—Spicer v. Williamson, 132 S.E. 291, 191 N.C. 487, 44 A.L.R. 1280.

50 C.J. p 338 note 3.

31. Tenn.—Hale v. Johnston, 203 S.W. 949, 140 Tenn. 182.

50 C.J. p 338 note 5.

32. Idaho.—Ackley v. Perrin, 79 P. 192, 10 Idaho 531.

50 C.J. p 338 note 7.



by statute and limited as prescribed by law;<sup>33</sup> and are regarded as ministerial,<sup>34</sup> public duties.<sup>35</sup> Among other duties which have been imposed<sup>36</sup> are the duty to receive and keep prisoners, as discussed infra § 18; the duty to keep a record describing the prisoners received and containing other information concerning such prisoners;<sup>37</sup> and to permit the inspection of such record;<sup>38</sup> the duty to supply food and board to the prisoners;<sup>39</sup> the duty to supply clean and sufficient bedding;<sup>40</sup> the duty to supply adequate medical and nursing attention in case of illness;<sup>41</sup> the duty to keep the jail clean and sanitary;<sup>42</sup> the duty to treat prison-

ers humanely;<sup>43</sup> the duty to keep prisoners safe and free from harm;<sup>44</sup> and the duty to use reasonable diligence to prevent prisoners from inflicting injuries on each other.<sup>45</sup> It has been stated that, beyond statutory requirements, a sheriff is bound to exercise in the control and management of the jail the degree of care requisite to the reasonably adequate protection of prisoners.<sup>46</sup>

A contract by a jailer to lease that part of the jail set apart for his own use is void.<sup>47</sup> A statute, making it the duty of the jailer or other official to receive and care for the property which a convict has on his person when he enters the pris-

33. Ky.—Howell v. City of Ashland, 39 S.W.2d 468, 239 Ky. 349. 50 C.J. p 338 note 8.

#### Statute and common law

Duties of a jailer are those prescribed by statute and such as were recognized at common law.—Gowens v. Alamance County, 3 S.E.2d 339, 216 N.C. 107.

#### Implied powers

(1) By conferring general powers and imposing general duties on officer in charge of state penitentiary, legislature by necessary implication accorded to such officers all those powers which experience has proved necessary, and such as are customarily employed in the management of penal institutions.—State v. Courser, 92 P.2d 264, 199 Wash. 559.

(2) While statutes did not in so many words authorize the superintendent of the state penitentiary to take and keep, as part of his official files and records, pictures and fingerprints of the inmates of such institution, the statute did, in effect, authorize the superintendent to make and retain such records.—State v. Courser, supra.

#### Sheriff

(1) Sheriff as keeper of the jail had authority under statute to supervise all employees pertaining to safe-keeping of prisoners and operation of jail.—Wichita County v. Vance, Tex.Civ.App., 217 S.W.2d 702, refused no reversible error.

(2) The rule as to operation and maintenance of jail kitchens should be general as it applies to all counties alike, and any discretion in the matter should be granted with preference to sheriff, since he has the responsibility of providing for the personal detention of prisoners.—Wichita County v. Vance, supra.

#### Records and reports

Records, copies of which the warden of a state prison was authorized and required to report to the governor under an earlier statute, should show judgment of conviction, action of board of prison terms and paroles construing the judgment and

fixing the term, and rules and orders of state board of prison directors regarding the conduct and management of state prisons.—Albort v. Smith, 65 P.2d 81, 18 Cal.App.2d 615.

#### Duties under oath

It has been stated that a jailer's duty under his oath to perform his duties as jailer and to treat humanely prisoners who may be brought to the jail is to prisoners whom the sheriff is required to receive.—Tate v. National Surety Corporation, 200 S.E. 314, 58 Ga.App. 874.

#### Powers not conferred and duties not imposed

(1) Warden of state prison was neither authorized nor required either to construe judgments of conviction or to report such construction to governor.—Albort v. Smith, 65 P.2d 81, 18 Cal.App.2d 615.

(2) Warden of federal penitentiary was not required at his own expense to ship prisoner's clothing back to prisoner's wife.—Platek v. Aderhold, C.C.A.Ga., 73 F.2d 173.

(3) Warden of state prison was not required to furnish one who had been convicted of crime of robbery in the first degree with copies of grand jury records of indictments involved or a copy of an exhibit used on his trial.—People ex rel. Reed v. Hogan, 55 N.Y.S.2d 71, 269 App.Div. 802.

34. W.Va.—Smith v. Slack, 26 S.E. 2d 387, 125 W.Va. 812—Clark v. Kelly, 133 S.E. 365, 101 W.Va. 650, 46 A.L.R. 799.

#### Duties not involving discretion

It has been stated broadly that the duties imposed by statute on the sheriff as jailer do not involve any discretion.—Smith v. Slack, 26 S.E. 2d 387, 125 W.Va. 812.

35. N.J.—Sullivan v. McOsker, 86 A. 497, 84 N.J.Law 380, followed in Devlin v. McDermott, 86 A. 500, 84 N.J.Law 403.

36. Ohio.—State v. Coffin, 46 N.E. 819, 56 Ohio St. 240. 50 C.J. p 338 note 11.

37. Ala.—Holcombe v. State ex rel. Chandler, 200 So. 739, 240 Ala. 590.

38. Ala.—Holcombe v. State ex rel. Chandler, supra.

39. Mont.—Pacific Coal Co. v. Silver Bow County, 256 P. 386, 79 Mont. 323. 50 C.J. p 338 note 15.

#### Inherent duty

Feeding of prisoners was not an inherent duty of jailer where municipality could let contract for feeding prisoners to anyone.—Howell v. City of Ashland, 39 S.W.2d 468, 239 Ky. 349.

40. W.Va.—Smith v. Slack, 26 S.E. 387, 125 W.Va. 812.

41. Ga.—Kendrick v. Adamson, 180 S.E. 647, 51 Ga.App. 402.

Okl.—Hunt v. Rowton, 288 P. 342, 143 Okl. 181.

W.Va.—Smith v. Slack, 26 S.E.2d 387, 125 W.Va. 812.

Complaints as to need for medical treatment should be made to state board of correction.—State ex rel. Jacobs v. Warden of Md. Penitentiary, Md., 59 A.2d 753—State ex rel. Renner v. Wright, 51 A.2d 668, 188 Md. 189.

42. Okl.—Hunt v. Rowton, 288 P. 342, 143 Okl. 181.

W.Va.—Smith v. Slack, 26 S.E.2d 387, 125 W.Va. 812. 50 C.J. p 338 note 16.

43. Ga.—Kendrick v. Adamson, 180 S.E. 647, 51 Ga.App. 402.

44. Ga.—Kendrick v. Adamson, supra.

45. Ky.—Lamb v. Clark, 138 S.W.2d 350, 282 Ky. 167.

Tex.—Browning v. Graves, Civ.App., 152 S.W.2d 515, error refused. 50 C.J. p 338 note 6.

46. Neb.—O'Dell v. Goodsell, 41 N. W.2d 123, 152 Neb. 290—O'Dell v. Goodsell, 30 N.W.2d 906, 149 Neb. 261.

47. Ky.—Thompson v. Probert, 2 Bush 144—Miller v. Porter, 8 B. Mon. 282.

Lease of prison property generally see infra § 17.

on, does not authorize the jailer to receive payment of a certificate of deposit belonging to a convict.<sup>48</sup>

*Guards and other assistants.* Since the county jail is a county institution, the duties performed in its maintenance by the assistants of the jailer or warden are public duties,<sup>49</sup> even though such employees are designated by the sheriff.<sup>50</sup> Workhouse guards having the power of policemen necessary to perform their duties, while so engaged, perform service to the public in aid of the enforcement of law and order.<sup>51</sup> The view has been taken that a statute providing that eight hours shall constitute a day's work for state employees is not applicable to penitentiary employees who are paid annual salaries under a statute passed after the eight-hour law.<sup>52</sup>

## § 12. — Civil Liability in General

While generally a prison official is not personally liable with respect to a determination as to which the exercise of judgment is required, in the absence of malice or fraud, a prison or jail official may be liable where he is chargeable with nonperformance or negligent performance of duties imposed by law.

When the exigencies of a case require an officer of a prison to exercise judgment, his determination thereon is in the nature of a judicial, and not of a ministerial, act, for which, in the absence of malice or fraud, no personal liability is incurred.<sup>53</sup> Generally, however, a sheriff may be liable for nonperformance of duties imposed by law on him as jailer.<sup>54</sup> The liabilities of a jailer do not attach to one who, in case of emergency, looks after the discipline of the convicts and the protection of the property of the state until further notice at the request of a superior official.<sup>55</sup> Where there has

been an illegal payment of county funds to a jailer in excess of the amount appropriated for his office, the law raises an implied contract on his part to return the excess amount, for which an action will lie.<sup>56</sup> Under some statutes, however, it has been held that the warden of a jail is not bound to pay into the county treasury money received by him for keeping prisoners from another county, and that an action for money had and received will not lie with respect to such money.<sup>57</sup> A sheriff is not liable to the county for an amount allowed and paid out of county funds for the salary of a guard employed with the approval of the governing body of the county, where such allowance is authorized.<sup>58</sup> If a jailer takes a note for a fine and costs, it is equivalent to the receipt of so much money, and renders the jailer liable for the amount.<sup>59</sup>

Generally, a sheriff is not chargeable with rent for the part of the jail building occupied by him as a residence.<sup>60</sup>

*Negligence.* A jailer or the sheriff in his capacity as jailer may be liable for the negligent performance of duties imposed on him by law.<sup>61</sup> Accordingly, a jailer may be liable for damages proximately resulting from his negligent failure to keep the prison clean and sanitary,<sup>62</sup> and to see that the prisoners conduct themselves in an orderly manner.<sup>63</sup> Generally, an official connected with a jail is not liable for injuries resulting from a defective condition of the premises, where there was no negligence on his part with respect to such condition and he did not have knowledge of it;<sup>64</sup> nor is he liable for an act which is not the proximate cause of the injury.<sup>65</sup>

*Refusal to permit consultation with attorney.*

48. *Payment to jailer is at risk of bank*

Iowa.—Thompson v. Niles, 87 N.W. 732, 115 Iowa 67.

49. N.J.—Sullivan v. McOsler, 86 A. 497, 84 N.J.Law 380, followed in Devlin v. McDermott, 86 A. 500, 84 N.J.Law 403.

50 C.J. p 339 note 22.

50. N.J.—Sullivan v. McOsler, 86 A. 497, 84 N.J.Law 380, followed in Devlin v. McDermott, 86 A. 500, 84 N.J.Law 403.

51. Ohio.—Bell v. Cincinnati, 88 N. E. 128, 80 Ohio St. 1, 23 L.R.A., N. S., 910.

52. Kan.—State v. Martindale, 27 P. 852, 47 Kan. 147.

50 C.J. p 339 note 26.

53. Cal.—Porter v. Haight, 45 Cal. 631.

Mo.—Schoettgen v. Wilson, 48 Mo. 253.

54. W.Va.—Smith v. Slack, 26 S.E. 2d 387, 125 W.Va. 812.

55. Ky.—South v. Julian, 5 Ky.L. 425.

56. Ky.—Wolfe County v. Tolson, 140 S.W.2d 671, 283 Ky. 11.

57. Cal.—Sacramento v. Hardy, 18 Cal. 412.

58. Tex.—State v. Carnes, Civ.App., 106 S.W.2d 397.

59. Vt.—St. Albans Bank v. Dillon, 30 Vt. 123, 73 Am.D. 295.

60. Ind.—Benton County v. Harman, 101 Ind. 551.

Kan.—Day v. Board of Com'rs of Cowley County, 71 P.2d 871, 146 Kan. 492.

*Occupation of rooms required*

Where a sheriff is required by a resolution of the county board to occupy rooms in the jail and to pay

a certain sum for fuel and lights, he is not liable to the county for any claim for rent.—Iler v. Merrick County, 147 N.W. 118, 96 Neb. 114.

61. W.Va.—Smith v. Slack, 26 S.E. 2d 387, 125 W.Va. 812.

50 C.J. p 339 notes 35, 36.

62. Ky.—Bowling Green v. Rogers, 134 S.W. 921, 142 Ky. 558, 34 L.R.A., N.S., 461.

50 C.J. p 339 note 37.

Duty to keep premises clean generally see supra § 11.

63. Ky.—Bowling Green v. Rogers, supra.

50 C.J. p 339 note 36.

64. Tex.—Richardson v. Hills, Civ. App., 104 S.W.2d 151, error dismissed.

50 C.J. p 339 note 38.

65. Tex.—Richardson v. Hills, supra.

While the liability of a sheriff, as jailer, to an attorney for wrongfully preventing such attorney from consulting with his client who is a prisoner has been recognized,<sup>66</sup> it has been held that a statute, making it the duty of officers having custody of prisoners to permit any prisoner to consult an attorney and making such officer liable to the person aggrieved in an action for a specified sum on its violation, gives a right of action only to the person in custody,<sup>67</sup> and not to the attorney.<sup>68</sup>

*Acts of subordinates.* A jailer or warden may be personally liable for the acts of subordinates appointed by him.<sup>69</sup>

*Acts of prisoners.* The warden of a state penitentiary has been held not to be liable for a tort committed by a prisoner unless he directly participates in its commission by a breach of duty.<sup>70</sup> It has also been held that officials who are in charge of a jail and have the custody of prisoners are not liable for injuries inflicted by an escaped prisoner, where the negligent or wrongful acts of such officials are not the proximate cause of the injuries.<sup>71</sup>

### § 13. — Liability for Injuries to Prisoners

A jailer or warden may be liable for an injury proximately resulting to a prisoner from a breach of duty with respect to such prisoner.

A jailer or warden, or sheriff acting as such, may be liable for an injury proximately resulting to a prisoner from a breach of duty with respect to the prisoner,<sup>72</sup> as, for example, a breach of

duty to exercise due care for the safety of a prisoner generally,<sup>73</sup> to keep the jail sanitary and warm,<sup>74</sup> or to furnish food.<sup>75</sup> A prison official is not liable for failing to furnish attendance and care to a prisoner injured by a fellow prisoner when it does not appear that he knew or should have known of the injury;<sup>76</sup> nor is a city marshal responsible for injuries caused by the unhealthy condition of a cell when it does not appear that he knew of such condition and had control of the cells.<sup>77</sup>

Federal prison officials are not liable to a prisoner for erroneous acts by such officials in their capacity as public officers.<sup>78</sup> It has been held, with respect to an injury sustained by a prisoner in connection with the operation of a machine at which he has been put at work, that, in the absence of statute imposing liability, there is no liability on the part of public officers who are vested with general management or superintendence of the prison,<sup>79</sup> or who have the immediate control of the prisoner.<sup>80</sup> The keeper of a jail is not liable to a prisoner for alleged breach of a duty which is not by law imposed on such keeper.<sup>81</sup> There is no liability where the injury sustained results solely from the acts of the prisoner himself.<sup>82</sup>

Where punishment inflicted on a prisoner is proper and authorized, and not cruel or excessive, and is not inflicted with malice or intent to injure, the officer is not liable for an injury resulting therefrom.<sup>83</sup>

66. Tex.—Farrall v. Hood, Civ.App., 32 S.W.2d 480.

Right of prisoner and his attorney to confer generally see *infra* § 18.

67. Colo.—McPhail v. Delaney, 110 P. 64, 48 Colo. 411.

68. Colo.—McPhail v. Delaney, *supra*.

69. N.Y.—New York v. Fox, 133 N. E. 434, 232 N.Y. 167.

50 C.J. p 339 note 43.  
Liability of public officers for acts of subordinates generally see Officers § 128.

70. W.Va.—Kuhns v. Fair, 22 S.E. 2d 455, 124 W.Va. 761.

#### Reason for rule

In reaching the conclusion set forth in the text, it was pointed out that the warden, as lawful custodian of prisoners, was exercising a governmental function under the direction and control of the state board of control.—Kuhns v. Fair, *supra*.

71. N.C.—Moss v. Bowers, 5 S.E.2d 826, 216 N.C. 546.

Liability for escape of prisoner see *infra* § 23.

#### Shooting of person by escaped prisoner

Where an escaped prisoner shot and killed a person and the negligent and wrongful acts imputed to defendants sheriff and jailer related to the escape of the prisoner and failure to take due precautions after such escape, it was held that the injury inflicted was not the natural, probable, and foreseeable result of the acts so imputed.—Moss v. Bowers, 5 S.E.2d 826, 216 N.C. 546.

72. Ga.—Corpus Juris cited in Kendrick v. Adamson, 180 S.E. 647, 648, 51 Ga.App. 647.

Neb.—O'Dell v. Goodsell, 30 N.W.2d 906, 149 Neb. 26.

W.Va.—Smith v. Slack, 26 S.E.2d 387, 125 W.Va. 812.

Liability of sheriff for injury to prisoner generally see C.J.S. title Sheriffs and Constables § 117, also 57 C.J. p 899 notes 37-43.

73. Neb.—O'Dell v. Goodsell, 30 N.W.2d 906, 149 Neb. 261.

74. Utah.—Richardson v. Capwell, 176 P. 205, 63 Utah 618.

W.Va.—Clark v. Kelly, 133 S.E. 365, 101 W.Va. 650, 46 A.L.R. 799.

75. Utah.—Richardson v. Capwell, 176 P. 205, 63 Utah 618.

76. Ky.—Moxley v. Roberts, 43 S.W. 482, 19 Ky.L. 1328.

77. Tex.—Bishop v. Lucy, 50 S.W. 1029, 21 Tex.Civ.App. 326.

78. D.C.—Lang v. Wood, 92 F.2d 211, 67 App.D.C. 287, certiorari denied 58 S.Ct. 48, 302 U.S. 686, 82 L.Ed. 530.

79. Mass.—O'Hare v. Jones, 37 N.E. 371, 161 Mass. 391.

13 C.J. p 922 note 53.

80. Mass.—O'Hare v. Jones, *supra*, 13 C.J. p 922 note 53.

81. Iowa.—Plinske v. Schoemaker, 298 N.W. 840, 230 Iowa 767.

82. Ga.—Kendrick v. Adamson, 180 S.E. 647, 51 Ga.App. 402.

#### Drunkness

The sheriff was not liable where a drunken prisoner set fire to himself and was burned to death.—Kendrick v. Adamson, *supra*.

83. Ohio.—Rose v. Toledo, 1 Ohio Cir.Ct., N.S., 321, 24 Ohio Cir.Ct. 540.

50 C.J. p 339 note 44.

Duties of prison or jail officials to prisoners are discussed generally supra § 11.

*Acts of subordinate.* While in some jurisdictions a sheriff may be liable for injuries to a prisoner which results from breach of duty by a deputy to whom the sheriff has assigned the duty to care for and protect prisoners,<sup>84</sup> it has been held or recognized that officers who have the power of general management, or who are in direct charge, of a prison or jail are not liable to a prisoner for the act of a subordinate,<sup>85</sup> even though appointed by such an officer under proper legal authority,<sup>86</sup> at least where such an officer neither directed the act complained of,<sup>87</sup> nor was negligent in permitting it.<sup>88</sup> Where there is imposed on such officers a duty to see that prisoners are treated humanely, they may be liable for injuries to prisoners resulting from a system of corporal punishment practiced, of which they either knew<sup>89</sup> or, in the exercise of ordinary care, could have known.<sup>90</sup>

*Injuries caused by fellow prisoners.* While a breach of a prison or jail official's duty to use rea-

sonable care to prevent injuries to a prisoner by his fellow prisoners may subject him to liability for the injuries proximately caused thereby,<sup>91</sup> he is not liable for an injury of which his act or neglect was not the proximate cause,<sup>92</sup> or where he had no reason to anticipate the injury.<sup>93</sup> Where a jailer or warden knowingly permits one prisoner to assault another, and uses no reasonable means to prevent it, he is liable to the assaulted prisoner.<sup>94</sup>

## § 14. — Liability on Bond

Liability on the bond of a prison or jail official conditioned for the faithful performance of the duties of his office includes liability for breach of duty imposed either by statute or by other valid regulation.

Where a prison or jail official is required to give a bond conditioned for the faithful performance of the duties of his office, such officer and his sureties are bound with respect to the faithful performance of all the duties imposed, whether by statute or by the rules and regulations of the prison directors,<sup>95</sup> but the sureties are not liable with respect to matters not coming within a fair construc-

84. Ga.—Kendrick v. Adamson, 180 S.E. 647, 51 Ga.App. 402.

Tex.—Browning v. Graves, Civ.App., 152 S.W.2d 515, error refused.

85. Tenn.—Hale v. Johnston, 203 S.W. 949, 140 Tenn. 182.

Liability of:

Public officer for act of subordinate generally see Officers § 128.  
Superior officer for false imprisonment by subordinate or deputy see False Imprisonment § 42 a.

86. Tenn.—Hale v. Johnston, supra.

87. Tenn.—Lunsford v. Johnston, 179 S.W. 151, 132 Tenn. 615.

88. Tenn.—Lunsford v. Johnston, 5 Tenn.Civ.App. 565, affirmed 179 S.W. 151, 132 Tenn. 615.

50 C.J. p 340 note 54.

89. Tenn.—Hale v. Johnston, 203 S.W. 949, 140 Tenn. 182.

Duty to see that prisoners are humanely treated generally see supra § 11.

90. Tenn.—Hale v. Johnston, supra.  
50 C.J. p 340 note 57.

91. Colo.—People ex rel. Coover v. Guthner, 94 P.2d 699, 105 Colo. 37.  
Ky.—Lamb v. Clark, 138 S.W.2d 350, 282 Ky. 167.

La.—Honeycutt v. Bass, App., 187 So. 848.

N.C.—Dunn v. Swanson, 7 S.E.2d 563, 217 N.C. 279.

Tex.—Browning v. Graves, Civ.App., 152 S.W.2d 515, error refused.

50 C.J. p 340 note 59.

Duty to prevent injury by fellow prisoners generally see supra § 11.

### Possession of weapons

If a jailer whose duty it was to care for and protect his prisoners from harm would in the exercise of ordinary care have discovered the presence of weapons and removed them and thereby prevented the death of one prisoner at the hands of another, jailer and his principal, the sheriff, would be responsible in damages.—Browning v. Graves, supra.

### Failure to isolate ill prisoner

Failure of superintendent of health to remove from jail prisoner who had contracted a contagious disease did not relieve sheriff from liability for failure to have prisoner isolated, as regards liability for death of another contracting disease.—Hunt v. Rowton, 288 P. 342, 143 Okl. 181.

92. La.—Corpus Juris quoted in Honeycutt v. Bass, App., 187 So. 848, 850.

50 C.J. p 340 note 60.

93. La.—Corpus Juris quoted in Honeycutt v. Bass, App., 187 So. 848, 850.

50 C.J. p 340 note 61.

94. Ky.—Lamb v. Clark, 138 S.W.2d 350, 282 Ky. 167.

La.—Corpus Juris quoted in Honeycutt v. Bass, App., 187 So. 848, 850.

50 C.J. p 340 note 62.

### "Kangaroo court"

(1) The rule stated in the text has been applied or recognized with respect to acts of a "kangaroo court."—Lamb v. Clark, 138 S.W.2d 350, 282 Ky. 167—50 C.J. p 340 note 62 [a].

(2) Subject to certain qualifications, it has been recognized that the sheriff may be liable with respect to acts of a "kangaroo court."—Eberhart v. Murphy, 194 P. 415, 113 Wash. 449.

(3) Alleged insanitary conduct and abusive language of plaintiff when incarcerated in jail did not justify members of prisoners' "kangaroo court" in assaulting and cruelly beating plaintiff, as regards liability of jailer and his deputy for injuries sustained by plaintiff while in their custody for safe-keeping during period of his detention, and did not constitute a defense to an action against the jailer and his deputy.—Lamb v. Clark, 138 S.W.2d 350, 282 Ky. 167.

95. Ga.—Corpus Juris cited in Kendrick v. Adamson, 180 S.E. 647, 51 Ga.App. 402.

50 C.J. p 340 note 64.

Liability on bond:

For escape see infra § 23.

Of public officer generally see Officers §§ 155-177.

### Sheriff's bond

(1) The surety on the official bond of a sheriff may be required to respond in damages to any person injured by a breach of duty by the sheriff as jailer.

Neb.—O'Dell v. Goodsell, 30 N.W.2d 906, 149 Neb. 261.

Okl.—Hunt v. Rowton, 288 P. 342, 143 Okl. 181.

50 C.J. p 340 note 64 [a].

(2) Surety on sheriff's bond was liable for the death of a prisoner resulting from the negligence of a

tion of the statutes or rules,<sup>96</sup> or with respect to an alleged obligation not imposed on the principal.<sup>97</sup> Some bonds of jail officials are so framed as to preclude recovery thereon by a prisoner who has sustained injury as a result of breach of duty by such an official.<sup>98</sup>

The liability of the sureties on such a bond is a joint one with the officer,<sup>99</sup> and they may be sued, together with the officer, directly on the bond, for his nonfeasance or misfeasance in office, and they will be liable together with him thereon.<sup>1</sup>

## § 15. — Criminal Responsibility

The question whether a prison or jail official is subject to criminal prosecution with respect to official activities depends largely on statutory provisions.

In accordance with the general rule discussed in Criminal Law § 17, a jailer or other person having prisoners in custody is not criminally liable for an act not made punishable by law.<sup>2</sup> Under statutes making a jailer liable for misfeasance or malfeasance in office, or for willful neglect in the discharge of official duties, intent on the part of the jailer to do wrong is essential.<sup>3</sup> It has been held that under a similar provision of the constitution, a jailer is subject to indictment for permitting a jail to become so filthy as to endanger the comfort, health, and lives of prisoners.<sup>4</sup> Jailers have

been regarded as officers within a statute subjecting officers to an indictment for official misconduct;<sup>5</sup> and furnishing prisoners with liquor is official misconduct.<sup>6</sup> The superintendent of a penitentiary may be criminally liable for a failure to turn over to his successor moneys coming into his hands from the hire of convicts, the duty to receive which was imposed by statute.<sup>7</sup> In a prosecution under a statute making it a misdemeanor for a sheriff or jailer to refuse to receive persons apprehended for offenses against the state by a constable or other officer, it is no defense that the sheriff refused to receive a prisoner into his custody from a peace officer because no commitment was produced by the officer.<sup>8</sup>

A sheriff is not criminally responsible for the acts of a jailer appointed by him.<sup>9</sup> A member of the board of trustees of a penitentiary is not guilty of official misconduct because the secretary of the board embezzled funds which he was authorized to deposit,<sup>10</sup> or, without authority, sold products of the penitentiary and converted the proceeds.<sup>11</sup>

*Prosecution.* General rules as to the sufficiency of indictments in criminal cases, stated in Indictments and Informations §§ 90-156, apply to prosecutions for offenses of the type here under consideration.<sup>12</sup> So, also, general rules as to instructions in

jailer, acting for the sheriff, in confining such prisoner with an insane prisoner by whom the deceased prisoner was attacked.—Dunn v. Swanson, 7 S.E.2d 563, 217 N.C. 279.

(3) Judgment against the surety on a sheriff's bond was upheld where the alleged breach of duty by the sheriff was failure to isolate a prisoner who had contracted a contagious disease.—Hunt v. Rowton, 288 P. 342, 143 Okl. 181.

96. Mich.—Hulin v. People, 31 Mich. 333.

50 C.J. p 340 note 65.

### Moneys illegally received

Where jailer's bond provided that jailer would faithfully discharge duties of his office and pay over to all parties entitled thereto any funds that came into his hands by virtue of his office as jailer, sureties on bond were not liable for sums paid jailer for heating and lighting courthouse in excess of the sum appropriated by the fiscal court, since sums paid the jailer illegally were not within contemplation of the bond.—Wolfe County v. Tolson, 140 S.W.2d 671, 283 Ky. 11.

97. Ga.—Kendrick v. Adamson, 130 S.E. 647, 51 Ga.App. 402.

Iowa.—Plinske v. Schoemaker, 298 N.W. 840, 230 Iowa 767.

Tex.—State v. Carnes, Civ.App., 106 S.W.2d 397.

98. La.—Honeycutt v. Bass, App., 187 So. 848.

99. Okl.—Hixon v. Cupp, 49 P. 927, 5 Okl. 545.

1. Okl.—Hixon v. Cupp, supra.

2. N.C.—State v. Earnhardt, 86 S.E. 960, 170 N.C. 725.  
50 C.J. p 340 note 70.

Criminal liability of public officers: Generally see Officers §§ 133, 134. Sheriff generally see the C.J.S. title Sheriffs and Constables §§ 209, 210, also 57 C.J. p 1095 note 12—p 1097 note 56.

### Duty enjoined by law

(1) The warden of a penitentiary was not subject to prosecution under a statute defining as an offense willful neglect or omission of a public officer to perform a duty enjoined by law, where the alleged offense was failure to comply with the rules and regulations of the supervising department.—People v. McCann, 273 N.Y.S. 839, 151 Misc. 792, affirmed 275 N.Y.S. 837, 242 App.Div. 515.

(2) In this connection the view was taken that a duty enjoined by law within the meaning of the statute is a duty enjoined by statute; therefore, that the alleged offense

was not within the purview of the statute.—People v. McCann, supra.

3. Ky.—Lynch v. Commonwealth, 73 S.W. 745, 115 Ky. 309, 24 Ky.L. 2180.

50 C.J. p 340 note 72.

4. Ky.—McBride v. Commonwealth, 4 Bush 381.

50 C.J. p 340 note 73.

5. Puerto Rico.—People v. Rivera, 25 Puerto Rico 569.

50 C.J. p 340 note 74.

6. Pa.—In re Bucks County Prison, 15 Pa.Co. 569.

S.C.—State v. Sellers, 41 S.C.L. 368.

7. S.C.—State v. Neal, 37 S.E. 826, 59 S.C. 259.

50 C.J. p 341 note 76.

8. N.J.—State v. Kelly, 87 A. 128, 84 N.J.Law 1, affirmed 94 A. 1103, 86 N.J.Law 704.

9. S.C.—State v. Sellers, 41 S.C.L. 368.

10. Miss.—Montgomery v. State, 65 So 572, 107 Miss. 518.

11. Miss.—Montgomery v. State, supra.

12. Miss.—Montgomery v. State, supra.

50 C.J. p 341 note 83.

### Indictment held insufficient

N.Y.—People v. McCann, 273 N.Y.S.

criminal cases apply.<sup>13</sup>

## § 16. — Actions by or against

Rules as to matters of procedure applicable in civil actions generally apply in actions involving prison or jail officials.

Under a statute providing that all suits necessary to protect the rights of the state connected with the penitentiary shall be prosecuted in the name of the board of directors, a suit against a warden to secure funds of the state unlawfully converted by him is properly prosecuted in the name of the board.<sup>14</sup>

The general rules governing civil actions apply in an action by or against prison officers and employees with respect to pleading,<sup>15</sup> evidence,<sup>16</sup> questions of law and fact,<sup>17</sup> and instructions.<sup>18</sup>

**Damages.** The right to recover punitive damages in an action against a jail official for an injury to a prisoner resulting from a breach of duty imposed on such official has apparently been rec-

ognized, where the facts warrant such recovery,<sup>19</sup> but it has been held that, where, in such an action, the surety on the bond of defendant official is a party defendant, exemplary damages may not be awarded against the surety,<sup>20</sup> the measure of damages of the surety being limited to compensation for the actual injury.<sup>21</sup>

## § 17. Fiscal and Business Management

- a. In general
- b. Contracts
- c. Leases
- d. Purchase of supplies
- e. Enforcement of claims against prisoners

### a. In General

The fiscal and business management of a prison is largely controlled by statutory provisions.

The fiscal and business management of a prison is largely controlled by statutory provisions.<sup>22</sup> Un-

839, 151 Misc. 792, affirmed 275 N.Y.S. 887, 242 App.Div. 515.

### 13. Instruction as to union of act and intent

In prosecution of former warden of state penitentiary for alleged negligent failure to discover derelictions of chief clerk of penitentiary, the court in connection with proper definition of criminal negligence should have given as instruction substance of statute requiring that in every crime there must exist a union of act and intent or criminal negligence.—*State v. Taylor*, 87 P.2d 454, 59 Idaho 724.

14. Wash.—*Nye v. Kelly*, 53 P. 523, 19 Wash. 73.

### 15. Essential allegations

(1) In an action by a prisoner against a warden for assault and battery and other indignities committed by the warden, by virtue of his office, it was necessary to allege that the injuries did not result as the consequence of plaintiff's wrongful or unlawful acts.—*Stephens v. Conley*, 138 P. 189, 48 Mont. 352, Ann.Cas.1915D 958.

(2) A complaint for cruel and unusual punishment was defective where it failed to allege that the acts complained of were not in accordance with the regulations of the prison or of law, or that they were not necessary for the proper punishment of plaintiff, or to secure submission and obedience on his part.—*Wightman v. Brush*, 10 N.Y.S. 76, 56 Hun 647.

### Pleadings held sufficient

Colo.—*People ex rel. Coover v. Guther*, 94 P.2d 699, 105 Colo. 37.

La.—*Honeycutt v. Bass*, App., 187 So. 848.

Tex.—*Farrall v. Hood*, Civ.App., 32 S.W.2d 480.

### Petition held insufficient

Ohio.—*Rose v. Toledo*, 1 Ohio Cir. Ct. N.S., 321, 24 Ohio Cir.Ct. 540.

### Determination of sufficiency

Where petition alleged that town marshal and deputy placed belligerently intoxicated prisoner in unlocked cell and that there were locks with cells in which prisoners could be individually locked up by marshal and deputy, it was permissible to treat marshal and deputy as jailers, or coofficers in charge of jail, in determining whether exceptions of no cause and right of action for injuries inflicted on fellow prisoner were properly sustained.—*Honeycutt v. Bass*, La.App., 187 So. 848.

### Evidence held admissible

Tex.—*Browning v. Graves*, Civ.App., 152 S.W.2d 515, error refused. 50 C.J. p 341 note 88 [a], [c].

### Evidence held sufficient

Mo.—*Nix v. McMullin*, 193 S.W. 596, 198 Mo.App. 1. 50 C.J. p 341 note 89 [a].

### Questions of fact

Neb.—*O'Dell v. Goodsell*, 30 N.W.2d 906, 149 Neb. 261. 50 C.J. p 341 note 92 [a].

### Demurrer to evidence held properly overruled

Okl.—*Hunt v. Rowton*, 238 P. 342, 143 Okl. 181.

### Evidence justifying or requiring submission to jury

(1) Whether deputy whom sheriff had assigned to care for prisoners was negligent in placing a prison-

er in a compartment with certain other prisoners.—*Browning v. Graves*, Tex.Civ.App., 152 S.W.2d 515, error refused.

(2) Whether such deputy was negligent in failing to discover weapons and to remove them from possession of certain prisoners.—*Browning v. Graves*, Tex.Civ.App., 152 S.W.2d 515, error refused.

(3) Whether sheriff was negligent with respect to failure to provide a guard for jail, adequate ventilation, and outside communication.—*O'Dell v. Goodsell*, 30 N.W.2d 906, 149 Neb. 261.

(4) Whether sheriff was chargeable with breach of duty with respect to acts of "kangaroo court" which caused injury to prisoner.—*Eberhart v. Murphy*, 194 P. 415, 113 Wash. 449.

(5) Whether treatment of person incarcerated was cause of his death.—*Smith v. Slack*, 26 S.E.2d 387, 125 W.Va. 812.

(6) Whether prisoner was guilty of contributory negligence in use of matches as bearing on the cause of fire, in action against sheriff for jail prisoner's death as result of fire.—*O'Dell v. Goodsell*, 41 N.W.2d 123, 152 Neb. 290.

18. Ky.—*Lamb v. Clark*, 138 S.W.2d 350, 282 Ky. 167. 50 C.J. p 341 note 91.

19. Ky.—*Lamb v. Clark*, supra.

20. Okl.—*Hixon v. Cupp*, 49 P. 927, 5 Okl. 545.

In action on bond of public officer generally see Officers § 177 b (2).

21. Okl.—*Hixon v. Cupp*, supra.

22. Miss.—*Franklin County v.*

der a statute providing that the warden of a state prison shall have the custody of all the property pertaining to the prison, that he shall be treasurer of the prison, that all contracts of the prison shall be made by him, and that he may sue and be sued thereon, money deposited in a bank by such warden in his official capacity may not be regarded as the property of the state or held in trust for it by the bank.<sup>23</sup>

Prison funds have been held chargeable with the expense of meals furnished to prison inspectors while at the prison in the discharge of their official duties;<sup>24</sup> and such funds have also been held chargeable with the expenses of a journey made by the inspectors and the warden to inspect and become familiar with the use of a machine which the inspectors were authorized to buy to enable the warden to make a registry of all convicts under his care.<sup>25</sup>

### b. Contracts

The general rules as to the requisites of a valid contract are applicable to contracts by prison officials relating to the care, custody, and maintenance of prisoners or prison property. While there must be a compliance with statutory requirements, in the absence of a statute so providing, a contract for material for a house of detention, entered into by its board of managers, need not be in writing; nor need it be advertised.

The general rules as to the requisites of a valid contract are applicable to contracts by prison officials relating to the care, custody, and maintenance of prisoners or prison property.<sup>26</sup> While there must be a compliance with statutory requirements, such as that the contract must be in writing,<sup>27</sup> and that it must be approved by a board,<sup>28</sup> in the absence of a statute so providing, it is not necessary that a contract for material for a house of detention, entered into by its board of managers,

be in writing,<sup>29</sup> or that it be advertised.<sup>30</sup> Furthermore, a contract between the county commissioners and the managers of a workhouse, whereby the latter agree to receive prisoners sentenced from the county, has been held not rendered void because of an omission by the commissioners subsequently to advertise the making of such contract as required by statute.<sup>31</sup> Also, a contract made by prison inspectors has been held not abrogated by a subsequent statute superseding all prior laws relating to the management of penal institutions but expressly saving existing rights.<sup>32</sup>

*Personal liability.* In the absence of a clear expression by a prison official of an intent to incur personal responsibility,<sup>33</sup> as a general rule, such an official is not liable personally on a contract made by him in good faith on behalf of the prison, although he exceeds his authority in so doing,<sup>34</sup> where the other party to the contract either has full knowledge of the extent of the authority of the official,<sup>35</sup> or has equal means of acquiring such knowledge.<sup>36</sup> While a warden may not be personally liable on a contract entered into by him by virtue of the powers vested in him by law,<sup>37</sup> he may make himself personally liable by the terms of the contract.<sup>38</sup>

### c. Leases

- (1) In general
- (2) Rent

#### (1) In General

The authority to make a lease of a penitentiary or a prison, including the premises and the equipment thereof and the labor of the prisoners therein, may be granted to an official or a board by statute, but leases of this nature, entered into by official or boards, should not exceed the authority granted by statute.

The authority to make a lease of a penitentiary

American Disinfectant Co., 121 So. 271, 153 Miss. 583.

Pa.—Commonwealth ex rel. Prison Inspectors of Northampton County v. Kichline, Com.Pl., 29 North.Co. 89.

23. Mass.—Commonwealth v. Phoenix Bank, 11 Metc. 129.

Powers and duties of officers and employees generally see supra § 11.

24. Pa.—Mogel v. Berks County, 26 A. 227, 154 Pa. 14.

25. Pa.—Mogel v. Berks County, supra.

26. Mont.—State v. State Prison Comrs., 96 P. 736, 37 Mont. 378. 50 C.J. p 341 note 99.

#### Authority to contract

Statute making it duty of county jail physician to render surgical at-

tention to patients of county confined in county jail has been held not to imply power in jail physician to bind county to pay cost of surgical treatment of prisoner by city hospital.—Lauderdale County v. City of Memphis, 71 S.W.2d 686, 167 Tenn. 493.

27. Mass.—Whitmore v. Munn, 11 Cush. 510. 50 C.J. p 341 note 2.

28. Iowa.—Henry Quellmalz Lumber, etc., Co. v. Hollowell, 200 N.W. 177, 198 Iowa 722. 50 C.J. p 341 note 3.

29. Pa.—Price v. Walton, 49 Pa. Super. 1.

30. Pa.—Price v. Walton, supra.

31. Pa.—Commonwealth v. Jones, 90 Pa.Super. 489.

32. Mich.—Rich v. Chamberlain, 65 N.W. 235, 107 Mich. 381. 50 C.J. p 342 note 7.

33. Tenn.—Lauderdale County v. City of Memphis, 71 S.W.2d 686, 167 Tenn. 493.

Civil liability of officers and employees generally see supra § 12.

34. Tenn.—Lauderdale County v. City of Memphis, supra.

35. Tenn.—Lauderdale County v. City of Memphis, supra.

36. Tenn.—Lauderdale County v. City of Memphis, supra.

37. Iowa.—Henry Quellmalz Lumber, etc., Co. v. Hollowell, 200 N.W. 177, 198 Iowa 722.

38. Ga.—King v. Lewis, 122 S.E. 633, 32 Ga.App. 110. 50 C.J. p 342 note 9.

or a prison, including the premises and the equipment thereof and the labor of the prisoners therein, may be granted to an official or a board by statute.<sup>39</sup> Under some statutory provisions, a board is given the authority to lease penitentiary grounds, shops, machinery therein, and other property of the prison, as well as the labor of the prisoners therein,<sup>40</sup> and it has been held within the powers of a board having supervision of prisons to provide by contract for the feeding and clothing of prisoners in the penitentiary as one of the considerations for the leasing of their labor.<sup>41</sup>

Leases of this nature entered into by officials or boards should not exceed the authority granted by statute.<sup>42</sup> Thus, under a statute empowering an official to make a lease of the premises of a prison for a period not to exceed a certain length of time, such official may not make a lease of the premises for a longer period.<sup>43</sup> Also, a statute authorizing prison authorities to lease the prison shops and such vacant grounds as they deem proper has been held to authorize them to lease only the shops, buildings, and grounds owned by the state at the time of the execution of the lease or during its continuance,<sup>44</sup> and does not authorize them to bind the state by a covenant to supply other or additional shops or grounds.<sup>45</sup>

The lessee of a state penitentiary has been held liable in assumpsit for work performed by one who was illegally imprisoned.<sup>46</sup>

Where a lease provides for payment by the state to the lessee of a certain amount each month, the measure of damages for a breach of the contract is the amount so named.<sup>47</sup>

*Transfer of lease.* Where an act of the legislature to aid in the construction of a railroad authorized the lessees of the penitentiary to transfer such lease of it and of the convicts "for the unexpired term thereof" to the railroad, and provided that, on execution of the transfer, the lessees should be released from any further liability to the state,

a transfer not made until nineteen months after the passage of the act is not a compliance therewith and does not release the lessees or the sureties on their bond from liability under the lease up to the time of the transfer.<sup>48</sup>

## (2) Rent

Under a lease of a penitentiary, including the labor of the convicts and the premises and equipment of the penitentiary, the liability of the lessee to pay rent may depend on compliance by the state with its undertaking to permit him to enjoy uninterrupted possession of the premises, machinery, fixtures, etc., and to employ the convicts at such labor as will be most profitable.

Under a lease of a penitentiary including the labor of the convicts and the premises and equipment of the penitentiary, the liability of the lessee to pay rent may depend on compliance by the state with its undertaking to permit him to enjoy uninterrupted possession of the premises, machinery, fixtures, etc., and to employ the convicts at such labor as will be most profitable.<sup>49</sup> While it has been held that the state has the right, notwithstanding such a lease, to make necessary and proper improvements to the prison,<sup>50</sup> it has also been held that the lessee has the right to set off against the rent such damages as he has sustained by reason of the interference with his use of the premises and of the convicts occasioned by the improvement.<sup>51</sup>

A statute authorizing the superintendent, with the governor's approval, to make such improvements in the penitentiary as he deems advisable, not to exceed the sum to be paid by the lessees, and providing that amounts due the state from the lessees shall not be expended or appropriated for any other purpose, appropriates for improvements only such amounts as, in the judgment of the superintendent and the governor, are needed, and does not create a contract with the lessees that all the rent shall be expended for improvements.<sup>52</sup> Where a lease provides that the annual rent shall be a certain amount "net," this means that the state shall

39. Neb.—State v. Holcomb, 65 N. W. 873, 46 Neb. 612.

Power to lease convict labor generally see Convicts § 17.

40. Neb.—State v. Holcomb, supra.

41. Neb.—State v. Holcomb, supra.

42. Minn.—Reed v. Seymour, 24 Minn. 273.

N.Y.—Moyer v. Schleicher, 171 N.Y. S. 661, 184 App.Div. 959.

43. N.Y.—Moyer v. Schleicher, supra.

*Automatic renewal clause*

A lease by the agent and warden of a prison of the premises for three

years, with an automatic renewal clause for further periods of three years, the lessor being obligated to give notice of his intention one year before the termination of one of such periods, is in violation of a statute providing that the lease shall not be for a longer period than three years.—Moyer v. Schleicher, supra.

44. Minn.—Reed v. Seymour, 24 Minn. 273.

50 C.J. p 342 note 13.

45. Minn.—Reed v. Seymour, supra.

46. Ind.—Patterson v. Crawford, 12 Ind. 241.

47. Cal.—People v. Brooks, 16 Cal. 11.

48. Miss.—Hamilton v. State, 8 So. 761.

50 C.J. p 342 note 23.

49. Ky.—Commonwealth v. Todd, 9 Bush 708.

50. Ky.—Commonwealth v. Todd, supra.

51. Ky.—Commonwealth v. Todd, supra.

50 C.J. p 342 note 20.

52. Miss.—Hamilton v. State, 8 So. 761.



receive the amount stipulated and that the lessee shall pay the expenses of administration.<sup>53</sup>

#### d. Purchase of Supplies

By virtue of statute, various officials have been held authorized to purchase supplies for prisons or jails, but the authority of an official in this respect is limited by the enactment empowering him to make such purchases, and, unless the power is duly granted to him, he may not exercise it. A prison official may be compelled by mandate to fulfill the duties imposed on him by statute with respect to the purchase of, and the payment for, supplies.

By virtue of statute, various officials have been held authorized to purchase supplies for prisons or jails.<sup>54</sup> Under some statutory provisions, certain officials are authorized to purchase supplies for a prison, in order to secure the prisoners against escape, sickness, and infection;<sup>55</sup> and, under a statute requiring a jail to be kept in good and sufficient condition and giving the sheriff the custody, keeping, and charge of the jail, such official has been held to have full authority to purchase all supplies necessary to keep the jail in good and sufficient condition.<sup>56</sup> So, too, where a statute requires the sheriff to furnish necessary articles for prisoners and provides that all charges for keeping and maintaining prisoners shall be paid from the county treasury, the sheriff may procure necessary articles on the credit of the county, and the person from whom they were purchased may maintain an action directly against the county for the purchase price.<sup>57</sup> Also, where a statute requires the various counties to maintain jails at their expense, the county supervisors have been held to have, without any express provision to that effect, authority to purchase on behalf of the county the necessary furnishing for the jail.<sup>58</sup>

The authority of an official to purchase prison

supplies is, on the other hand, limited by the enactment empowering him to do so,<sup>59</sup> and, in making such purchases, officials must be governed by the statutory regulations on the subject.<sup>60</sup> Unless the authority to purchase supplies is duly granted to him, an official may not exercise it,<sup>61</sup> and the governing body maintaining the prison or jail is not liable for a purchase made by an unauthorized official;<sup>62</sup> nor is it liable for purchases made by an official in excess of his authority.<sup>63</sup>

A prison official may be compelled by mandate to fulfill the duties imposed on him by statute with respect to the purchase of, and payment for, supplies.<sup>64</sup> It has been held that independent of statute an action may be maintained on the relation of the warden of a penitentiary against the board of purchase and supplies to require it to provide the necessities for the support of the penitentiary.<sup>65</sup>

#### e. Enforcement of Claims against Prisons

Ordinarily, an action may not be maintained against a prison official for the breach of a contract in pursuance of, and strictly within, the limitations of statutory authority; after an award is made under a statutory submission of a suit or controversy with respect to a claim or contract on account of a prison, the claimants may not be deprived of their rights by subsequent legislation.

Unless permitted by statute, an action may not be maintained against a warden or other prison official for the breach of a contract in pursuance of, and strictly within, the limitations of statutory authority.<sup>66</sup> A general statute providing that, when any controversy arises or any suit is pending with respect to any contract or claim on account of the state prison, the warden may submit it to the determination of arbitrators or referees to be approved by the inspectors is not pro tanto repealed by a resolution of the legislature authorizing certain

53. La.—State v. James, 16 So. 751, 47 La. Ann. 173.

54. Iowa.—Feldenheimer v. Woodbury County, 9 N.W. 315, 56 Iowa 379.

Miss.—American Disinfecting Co. v. Oktibbeha County, 110 So. 869.

Mo.—Kansas City Sanitary Co. v. Laclede County, 269 S.W. 395, 307 Mo. 10.

N.Y.—Schenck v. New York, 67 N.Y. 44.

Pa.—Petition of Pritchard, 30 Pa. Dist. & Co. 367, 85 Pittsb. Leg. J. 676.

55. Miss.—American Disinfecting Co. v. Oktibbeha County, 110 So. 869.

56. Mo.—Kansas City Sanitary Co. v. Laclede County, 269 S.W. 395, 307 Mo. 10.

Authorization by county court is

not necessary to render county liable for purchases made by sheriff for jail in order to keep jail in sanitary condition.—Kansas City Sanitary Co. v. Laclede County, supra.

57. Iowa.—Feldenheimer v. Woodbury County, 9 N.W. 315, 56 Iowa 379.

50 C.J. p 343 note 26.

58. N.Y.—Schenck v. New York, 67 N.Y. 44.

50 C.J. p 343 note 27.

59. Miss.—Franklin County v. American Disinfectant Co., 121 So. 271, 153 Miss. 583—American Disinfecting Co. v. Oktibbeha County, 110 So. 869.

60. Neb.—State v. Holcomb, 65 N.W. 873, 46 Neb. 612.

50 C.J. p 342 note 24.

61. Okl.—Western Chemical Co. v.

Board of Com'rs of Pottawatomie County, 44 P.2d 825, 170 Okl. 337.

62. Okl.—Western Chemical Co. v. Board of Com'rs of Pottawatomie County, supra.

63. Miss.—Franklin County v. American Disinfectant Co., 121 So. 271, 153 Miss. 583—American Disinfecting Co. v. Oktibbeha County, 110 So. 869.

64. Ind.—Patton v. State, 19 N.E. 303, 117 Ind. 585.

50 C.J. p 343 note 25.

65. Neb.—State v. Holcomb, 65 N.W. 873, 46 Neb. 612.

66. Iowa.—Henry Quellmalz Lumber, etc., Co. v. Hollowell, 200 N.W. 177, 198 Iowa 722.

Actions by or against officers and employees generally see supra § 16.

officers to adjudicate on and settle certain claims,<sup>67</sup> and after an award under such a submission claimants may not be deprived of their rights by subsequent legislation.<sup>68</sup>

### § 18. Custody and Control of Prisoners

- a. In general
- b. Receiving and holding prisoners and their children; turning over to successor
- c. Censorship and control of prisoners' mail
- d. Employment of prisoners
- e. Privilege of prison bounds
- f. Visitors

#### a. In General

Ordinarily, a jailer or like prison official has a certain amount of discretion with respect to the safe-keeping, security, and discipline of his prisoners; and his acts, in this respect, should be upheld, if reasonably necessary to effectuate the purpose of imprisonment, so that the court will not interfere, where it does not appear that he has misused his power for the purpose of oppression.

Ordinarily, a jailer or like prison official is vested with a certain amount of discretion with respect to the safe-keeping, security, and discipline of his prisoners;<sup>69</sup> and his acts, in this respect, should be upheld, if reasonably necessary to effectuate the purpose of imprisonment,<sup>70</sup> so that the courts will not interfere, where it does not appear that he

has misused his power for the purpose of oppression.<sup>71</sup> Under some statutory provisions, the department of public welfare has the duty of supervising the conduct of prisoners while they are confined in penal institutions or are on parole.<sup>72</sup>

*As to federal penitentiaries or prisons.* It is within the power of congress to provide for the proper care and treatment of federal prisoners during the period of their incarceration,<sup>73</sup> and to set up any form of administrative machinery that it deems necessary for such purpose,<sup>74</sup> and the federal courts have no jurisdiction or power to superintend,<sup>75</sup> or interfere with,<sup>76</sup> the discipline of a federal penitentiary or prison. A prisoner in a federal penitentiary who persists in abusing a privilege or opportunity extended to all prison inmates may not complain of unequal treatment if the privilege is taken away from him.<sup>77</sup>

#### b. Receiving and Holding Prisoners and Their Children; Turning Over to Successor

Ordinarily, a sheriff, warden, jailer, or other prison official has the duty to receive and keep safely in prison all prisoners properly committed until their discharge by law, but a jailer need not receive a person without sufficient written evidence of authority to receive and hold him; a sheriff should turn over to his successor in office the jail and prisoners therein.

Ordinarily, it is a duty imposed by law on the sheriff, jailer, warden, or other prison official to receive<sup>78</sup> and to keep safely in prison<sup>79</sup> all prison-

67. Me.—Allen v. Tinker, 52 Me. 278.

68. Me.—Allen v. Tinker, *supra*.

69. U.S.—Kelly v. Dowd, C.C.A.Ind., 140 F.2d 81, certiorari denied 64 S.Ct. 158, 320 U.S. 786, 88 L.Ed. 473, certiorari denied 64 S.Ct. 639, two cases, 321 U.S. 783, 88 L.Ed. 1075, certiorari denied 64 S.Ct. 1147, 322 U.S. 712, 88 L.Ed. 1554.

50 C.J. p 344 note 47.  
Chastisement of convicts generally see Convicts § 11.

Custody and control of convicts generally see Convicts § 9.

Regulation and supervision of prisons generally see *supra* § 5.

Right of sheriff as jailer ex officio to custody and control of prisons and prisoners confined therein see *supra* § 8.

70. U.S.—Kelly v. Dowd, *supra*.

Right to search prisoner

Superintendent of penitentiary to which prisoner charged with robbing bank was taken for safe-keeping had right to search prisoner and take from him any dangerous weapon, money, or other valuables found on prisoner's person which superintendent reasonably concluded might be connected with crime charged.—

Palmetto State Bank v. English, 186 S.E. 638, 181 S.C. 69.

71. U.S.—Ex parte Taws, Pa., 23 F.Cas.No.13,768, 2 Wash.C.C. 353.

Prisoner has no right to practice law or to maintain a law department within the confines of a state penitentiary.—Siegel v. Ragen, C.A. Ill., 180 F.2d 785, certiorari denied 70 S.Ct. 1015, 339 U.S. 990, 94 L.Ed. —.

72. Ill.—People v. Hill, 181 N.E. 295, 348 Ill. 441.

Construction, operation, and effect of parole see Pardons § 22.

73. U.S.—Estabrook v. King, C.C.A. Mo., 119 F.2d 607.

74. Mo.—Estabrook v. King, *supra*.

Bureau of prisons

The authority, with respect to safe-keeping, care, protection, instruction, and discipline, over persons charged with, or convicted of, offenses against the United States conferred by statute on the bureau of prisons is not limited by the authority conferred on the attorney general over persons convicted of an offense against the United States.—Petition of Wilfong, D.C.Mich., 6 F.R.D. 564, certiorari denied Mo-

Guire v. U. S., 68 S.Ct. 648, 333 U.S. 846, 92 L.Ed. 1129, rehearing denied 68 S.Ct. 896, 333 U.S. 878, 92 L.Ed. 1154.

75. U.S.—Sturm v. McGrath, C.A. Kan., 177 F.2d 472—Dayton v. Hunter, C.A.Kan., 176 F.2d 108, certiorari denied 70 S.Ct. 184, 338 U.S. 888, 94 L.Ed. —, rehearing denied 70 S.Ct. 423, 338 U.S. 945, 94 L.Ed. —, rehearing denied 70 S.Ct. 983, 339 U.S. 972, 94 L.Ed. — —Powell v. Hunter, C.A.Kan., 172 F.2d 330—Nuner v. Miller, C.C.A.Cal., 165 F.2d 986—Peretz v. Humphrey, D.C.Pa., 86 F.Supp. 706.

76. U.S.—Powell v. Hunter, C.A. Kan., 172 F.2d 330—Platek v. Aderhold, C.C.A.Ga., 73 F.2d 173—Peretz v. Humphrey, D.C.Pa., 86 F.Supp. 706.

77. U.S.—Nuner v. Miller, C.C.A. Cal., 165 F.2d 986.

78. Neb.—O'Dell v. Goodsell, 30 N. W.2d 906, 149 Neb. 261.  
50 C.J. p 343 note 33.

79. Ariz.—Howard v. State, 237 P. 203, 28 Ariz. 433, 40 A.L.R. 1275.  
Neb.—O'Dell v. Goodsell, 30 N.W. 2d 906, 149 Neb. 261.  
50 C.J. p 343 note 34.

ers properly committed until their discharge by law. On the other hand, although a jailer, if he sees fit, may waive his right to insist on sufficient written evidence of his authority to receive and hold a prospective prisoner, without rendering himself or the sheriff liable for any consequences which may follow,<sup>80</sup> he need not receive a debtor or other person, as prisoner, without sufficient written evidence of authority to receive and hold him,<sup>81</sup> and he may not be held liable, in such a case, for his refusal to do so,<sup>82</sup> regardless of his motive.<sup>83</sup> By virtue of statute, a sheriff may have the right to refuse to receive any prisoner who is not charged with, or guilty of, an indictable offense.<sup>84</sup>

*Turning over to successor.* It is the duty of the sheriff on the election and qualification of his successor to turn over to the latter the jail and the prisoners therein;<sup>85</sup> and the new sheriff has no control over or power to hold prisoners who are not so assigned.<sup>86</sup>

*Children of prisoner.* The superintendent of a workhouse may not lawfully receive an inmate's child into that institution or permit it to remain therein even on payment of its board,<sup>87</sup> and on the conviction of crime of a mother, her young children will not be permitted to accompany her to the penitentiary.<sup>88</sup>

### c. Censorship and Control of Prisoners' Mail

The prison authorities may properly regulate and control the mail of a prisoner.

The prison authorities may properly regulate and control the mail of a prisoner,<sup>89</sup> and the withholding of mail from a prisoner has been held purely a matter of prison regulation within the administrative discretion of the warden and not within the jurisdiction of the court.<sup>90</sup> Furthermore, a requirement that outgoing letters from prisoners be censored by the prison authorities has been held valid,<sup>91</sup> and the prison authorities may, in a proper case, refuse a prisoner permission to mail a letter, without interference by the court.<sup>92</sup> However, in some instances, provision has been made for the mailing of uncensored letters by prisoners,<sup>93</sup> and it has been held that prison authorities must not prevent freedom of communication by prisoners with the courts, executive officers, or counsel.<sup>94</sup>

### d. Employment of Prisoners

In the absence of statutory permission, a prisoner may not be employed at hard labor, but, by virtue of some statutory provisions, a person sentenced to a workhouse may be kept at hard labor.

In the absence of statutory permission, prisoners may not be employed at hard labor,<sup>95</sup> since such employment would be the imposition of an addi-

80. Me.—Jordan v. McAllister, 40 A. 324, 91 Me. 431.

81. Me.—Putnam v. Fulton, 160 A. 775, 131 Me. 232.  
50 C.J. p 338 note 17.

*Original process for commitment of convict to jail, and not a mere copy thereof, should be left with the jailer as evidence of his authority to hold the prisoner.*—Townsend v. Babbitt, 11 Gray, Mass., 463.

82. Me.—Putnam v. Fulton, 160 A. 775, 131 Me. 232.

*Declaration held demurrable.*  
Me.—Putnam v. Fulton, supra.

83. Me.—Putnam v. Fulton, supra.

84. Ga.—Tate v. National Surety Corporation, 200 S.E. 314, 58 Ga. App. 374.

#### Implied right

Under statute providing penalties for refusal of sheriff to receive persons charged with, or guilty of, indictable offenses, sheriff has by implication right to refuse to receive any prisoner who is not charged with, or guilty of, an indictable offense.—Tate v. National Surety Corporation, supra.

85. N.Y.—French v. Willet, 17 N. Y. Super. 649, 10 Abb.Pr. 99.  
50 C.J. p 344 note 44.

86. N.Y.—Hinds v. Doubleday, 21 Wend. 223—Partridge v. Westervelt, 13 Wend. 500.

87. Tenn.—Peters v. White, 53 S. W. 726, 103 Tenn. 390.

88. N.Y.—People v. Clark, 1 Wheel. Cr. 288.

89. U.S.—Gerrish v. State of Maine, D.C.Me., 89 F.Supp. 244—Reilly v. Hiatt, D.C.Pa., 63 F.Supp. 477.

90. U.S.—Reilly v. Hiatt, supra.

91. U.S.—Gerrish v. State of Maine, D.C.Me., 89 F.Supp. 244.

#### Long-established rule

The requirements that outgoing letters from prisoners be censored by prison authorities is a proper and long-established rule in state as well as federal prisons.—Gerrish v. State of Maine, supra.

92. U.S.—Numer v. Miller, C.C.A. Cal., 165 F.2d 986.

#### Derogatory comments on prison management

Refusal of prison authorities to permit prisoner to mail a lesson sheet of a correspondence course because of derogatory comments therein pertaining to prison management, and statement of prisoner therein that he enrolled in course because he intended to write a book exposing

prison brutality, with admonition that prisoner would not be allowed to proceed with course unless he changed his tactics, did not constitute a denial of prisoner's constitutional rights, and did not present a case cognizable by district court.—Numer v. Miller, supra.

93. U.S.—Lowe v. Hiatt, D.C.Pa., 77 F.Supp. 303.

#### "Prisoners' mail box"

The establishment of a "prisoners' mail box," the procedure through which prisoners in federal penitentiaries may write letters, uncensored in the institution, to the director of the federal bureau of prisons, provides a method by which a prisoner may have access to administrative relief for mistreatment.—Lowe v. Hiatt, supra.

94. Md.—State ex rel. Jacobs v. Warden of Md. Penitentiary, 59 A.2d 753.

*Denial of right to communicate with the courts, without interference by prison authorities, does not require release from custody.*—Warfield v. Raymond, Md., 71 A.2d 876.

95. Utah.—Royce v. Salt Lake City, 49 P. 290, 15 Utah 401.  
Regulation of convict labor in general see Convicts § 13.

tional labor.<sup>96</sup> However, by virtue of some statutory provisions, a person sentenced to a workhouse may be kept at hard labor.<sup>97</sup> A statute providing that the highway commission shall have exclusive power to appoint any guards necessary for the working of prisoners on the public roads has been held not invalid as depriving the sheriff of his rights to guard prisoners.<sup>98</sup>

#### e. Privilege of Prison Bounds

The tendency of modern legislation on the subject of imprisonment for debt is to render it as little irksome as possible, so that it constitutes scarcely a privation of liberty, by the establishment of what are termed "prison bounds," "jail liberties," "jail limits," or "jail yards," which are designated areas, usually of considerable extent, within which the prisoner is permitted to go at liberty on giving a bond that he will not go beyond the prescribed limits.

The tendency of modern legislation on the subject of imprisonment for debt is to render it as little irksome as possible, so that it constitutes scarcely a privation of liberty,<sup>99</sup> by the establishment of what are termed "prison bounds," "jail liberties," "jail limits," or "jail yards," which are designated areas, usually of considerable extent, within which the prisoner is permitted to go at liberty on giving bond that he will not go beyond the prescribed limits.<sup>1</sup> Such areas are generally considered to be, in effect, an extension of the walls of the jail.<sup>2</sup> The functions of a jailer, or like prison official, in allowing prisoners such liberties is administrative in character.<sup>3</sup>

While a sheriff may have no control over the body of a debtor after a bond for jail liberties has been given,<sup>4</sup> a debtor within the prison rules is still a true prisoner in the eyes of the law.<sup>5</sup> The word "committed" in a statute providing for jail liberties for persons committed to jail has been distinguished from the word "convicted," so as to make the statute applicable to persons committed to jail in civil cases rather than to one imprisoned for a criminal offense.<sup>6</sup>

#### f. Visitors

- (1) In general
- (2) Prisoner's attorney

##### (1) In General

A prisoner is not to be allowed untrammelled intercourse with the outside world, and a jailer, or like prison official, may require persons seeking admission to the jail or prison, as visitors, to submit their persons to a proper and orderly examination or search, although he may not search such persons by force or without their consent.

A prisoner is not to be allowed untrammelled intercourse with the outside world,<sup>7</sup> and, by virtue of some statutory provisions, no person, with certain exceptions, may be allowed access to a prisoner in solitary confinement awaiting the infliction of the punishment of death, without an order of the court.<sup>8</sup> Under such a statute, substantial and persuasive reasons should exist for the entry of an order authorizing an excluded person to visit a

96. Utah.—Royce v. Salt Lake City, supra.

97. Ohio.—Bell v. Cincinnati, 88 N. E. 128, 80 Ohio St. 1, 23 L.R.A., N.S., 910.

50 C.J. p 343 note 40.

98. Tenn.—State ex rel. Horner v. Atkinson, 152 S.W.2d 620, 177 Tenn. 660.

#### Provision for approval by sheriff

In the statute providing that, in counties having a certain population, the highway commission shall have exclusive power to appoint any guards necessary for the working of prisoners on the public roads of the counties, the provisions that the appointment of guards shall be approved by the sheriff of the county are too plain to be disregarded.—State ex rel. Horner v. Atkinson, supra.

99. Me.—Codman v. Lowell, 3 Me. 52.

1. Me.—Codman v. Lowell, supra.  
N.Y.—Dole v. Moulton, 2 Johns.Cas. 205.

Avoidance of confinement within prison by debtor subject to imprisonment under execution by

means of prison-limits bond see Executions §§ 434-437.

Right of one committed for contempt to jail liberties see Contempt § 101.

"Jail yard" is a term sometimes used as synonymous with "debtors' liberties."—Codman v. Lowell, 3 Me. 52, 56.

"Prison bounds" are the limits of the territory surrounding a prison, within which an imprisoned debtor, who is out on bonds, may go at will.—Commonwealth v. Donovan, 6 Pa.Dist. & Co. 333.

The territorial limits or location of prison bounds, or of the liberties of the prison, are those duly established by the proper authorities.—Ely v. Parsons, 2 Conn. 382—50 C.J. p 331 note 35.

2. Conn.—Bolton v. Cummings, 25 Conn. 410.

50 C.J. p 330 note 23 [b], p 352 note 8.

3. R.I.—Sullivan v. Davis, 96 A. 216, 38 R.I. 382.

4. Mich.—Kruse v. Kingsbury, 60 N.W. 443, 102 Mich. 100.

50 C.J. p 344 note 65.

5. Va.—Meredith v. Duval, 1 Munf. 76, 15 Va. 76.

50 C.J. p 330 note 25 [c], p 344 note 66.

6. N.C.—State v. Pearson, 6 S.E. 387, 100 N.C. 414.

Right of one imprisoned for crime to jail liberties generally see Convicts § 10.

7. D.C.—Laughlin v. Cummings, 105 F.2d 71, 70 App.D.C. 192.

#### Prisoner's photographer and physician

An application by city prison inmate, awaiting grand jury action, for permission to bring photographer into prison to make photographs of applicant and to have his physician examine him at prison for evidentiary purposes, will be denied, in view of his right to have appropriate notations respecting his injuries and physical appearance made by prison physician and when applicant appears in magistrate's court.—People v. Silvers, 49 N.Y.S. 2d 827, 182 Misc. 627.

8. N.Y.—People v. Dowling, 22 N.Y. S. 2d 645, 175 Misc. 245.

person incarcerated in the death house.<sup>9</sup> On the other hand, a statute providing for the prescribing of rules for the government of a jail does not, as to the lay public, authorize an order prohibiting persons from talking to prisoners.<sup>10</sup>

**Right to search visitors.** A jailer or like prison official may require persons seeking admission to the jail or prison, as visitors, to submit their persons to a proper and orderly examination or search,<sup>11</sup> or permit visitors to enter without being searched if, in his opinion, they are proper persons to be relieved of that formality.<sup>12</sup> If visitors do not consent to be searched, they may be refused admittance,<sup>13</sup> required to depart,<sup>14</sup> or they may be ejected;<sup>15</sup> but a jailer or like prison official has no authority to search them by force or without their consent.<sup>16</sup>

## (2) Prisoner's Attorney

A jailer, or like prison official, has a certain discretion as to admitting attorneys to jail or prison for the purpose of seeing clients, and such visits by an attorney are subject to being regulated by reasonable rules with which he must comply, but an opportunity to consult counsel must be preserved to a prisoner, and a jailer, or like prison official, may not arbitrarily deny a prisoner confined in jail or prison the privilege of conferring with counsel.

A jailer, or like prison official, has a certain discretion as to admitting attorneys to jail or prison for the purpose of seeing clients,<sup>17</sup> and such visits by an attorney are subject to being regulated by reasonable rules with which he must comply.<sup>18</sup> The

rights of an attorney in this respect are not unlimited,<sup>19</sup> and, similarly, the right of a prisoner to consult with an attorney is not an unlimited one.<sup>20</sup> On the other hand, an opportunity to consult counsel must be preserved to a prisoner,<sup>21</sup> and a jailer, or like prison official, may not arbitrarily deny a prisoner confined in jail or prison the privilege of conferring with counsel;<sup>22</sup> nor may he arbitrarily deny an attorney the right to consult with his client who is confined in jail or prison;<sup>23</sup> and these rights apparently apply as to a person confined in jail or prison as a witness.<sup>24</sup>

## § 19. — Place of Confinement

- a. In general
- b. Transfer of prisoners

### a. In General

The place of confinement of prisoners is that which is designated by law.

The place of confinement of prisoners is that which is designated by law.<sup>25</sup> Although the legislature has conferred on the inspectors of a state prison power to contract with a city for the confinement and maintenance of a certain class of convicted persons in the city house of correction, there is no authority for sentencing such convicts to be confined in the house of correction until the power granted the inspectors has been exercised by them and a contract entered into.<sup>26</sup> Under some statutory provisions, the authority of a bureau of

9. N.Y.—*People v. Dowling*, 22 N. Y.S.2d 645, 175 Misc. 245.

In absence of compelling reasons for favorable action, a brother-in-law's application for an order permitting him to visit condemned prisoner, based on affidavit reciting that deponent's wife who was a sister of condemned prisoner had visited him on several occasions and that deponent was informed that prisoner had requested deponent to visit him, was denied, where no compelling reasons existed for favorable action.—*People v. Dowling*, supra.

10. Ky.—*Henry v. Wilson*, 61 S.W. 2d 305, 249 Ky. 589.

#### Reason for rule

Statute providing that county court shall prescribe rules for government of jail only pertains to internal management of jail, and county court order prohibiting persons from talking to prisoners is administrative order and not judicial order.—*Henry v. Wilson*, supra.

11. Ala.—*Shields v. State*, 16 So. 85, 104 Ala. 35, 53 Am.S.R. 17.

12. N.Y.—*People v. Wright*, 40 N.Y.

S. 285, 7 App.Div. 185, affirmed 44 N.E. 1036, 150 N.Y. 444.

13. Ala.—*Shields v. State*, 16 So. 85, 104 Ala. 35, 53 Am.S.R. 17.

14. Ala.—*Shields v. State*, supra.

15. Ala.—*Shields v. State*, supra.

16. Ala.—*Shields v. State*, supra.

17. Tex.—*Farrall v. Hood*, Civ.App., 32 S.W.2d 480—*Wilmans v. Harston*, Civ.App., 234 S.W. 233.

Even when they are discharging professional duties to clients, sheriff has right to exercise discretion and caution in admitting attorneys to jail.—*Farrall v. Hood*, Tex.Civ.App., 32 S.W.2d 480.

18. Tex.—*Farrall v. Hood*, supra.

Forbidding solicitation of business Rule promulgated by sheriff, forbidding attorney, interviewing client, to solicit business from other prisoners, which constitutes misdemeanor, is reasonable.—*Farrall v. Hood*, supra.

19. D.C.—*Laughlin v. Cummings*, 105 F.2d 71, 70 App.D.C. 192.

20. D.C.—*Laughlin v. Cummings*, supra.

21. D.C.—*Laughlin v. Cummings*, supra.

22. Tex.—*Farrall v. Hood*, Civ.App., 32 S.W.2d 480—*Wilmans v. Harston*, Civ.App., 234 S.W. 233. Liability for refusal of right see supra § 12.

23. Tex.—*Farrall v. Hood*, Civ. App., 32 S.W.2d 480. 50 C.J. p 345 note 76.

24. Tex.—*Hamilton v. State*, 153 S.W. 331, 68 Tex.Cr. 419. 50 C.J. p 345 note 77.

25. Ala.—*Ex parte State*, 103 So. 68, 20 Ala.App. 473. 50 C.J. p 345 note 79.

Power of legislature to designate place of imprisonment see Criminal Law § 1976.

#### Imprisonment of:

City prisoners in county jails and vice versa see supra § 4.

United States prisoners in state or county prisons see supra § 3.

26. Mich.—*Humphrey v. People*, 39 Mich. 207—*Dorsey v. People*, 37 Mich. 382.

prisons over certain prisoners may not be limited by an order of a sentencing judge directing that such prisoners remain in a designated jail within the geographic jurisdiction of the court pending an appeal from their convictions, even though they elect not to commence service of their sentences pending appeal.<sup>27</sup>

Where a statute so provides, persons detained for trial on criminal charges should not be put or kept in the same room with prisoners under sentence,<sup>28</sup> and the same is true with respect to persons detained as witnesses.<sup>29</sup> Moreover, persons detained as witnesses have been held to be within a statute providing that persons held on civil process shall not be confined in a room with those arrested on a criminal charge.<sup>30</sup> A sheriff may be liable to punishment if, without strong circumstances of excuse, he should put a debtor in a cell set apart for felons;<sup>31</sup> and a fortiori he may not be punished for refraining from placing a debtor in such a cell without some strong reason for

so doing.<sup>32</sup>

It has been held that, if a sheriff is to be imprisoned, he may not be confined in the county jail, but the coroner is left to the common-law rule by which he may make his own home or any other place a prison.<sup>33</sup>

#### b. Transfer of Prisoners

- (1) In general
- (2) In case of sickness or insanity

##### (1) In General

Under some statutory provisions, authority, express or implied, is given to an official or a board to transfer or remove prisoners from one place of incarceration to another; but a transfer or removal of prisoners should be made only by the authorities designated by statute for that purpose, and only in the cases provided for.

Under some statutory provisions, authority, express or implied, is given to an official or a board to transfer or remove prisoners from one place of incarceration to another.<sup>34</sup> A statute of this

27. U.S.—Petition of Wilfong, D.C. Mich., 6 F.R.D. 564, certiorari denied McGuire v. U.S., 68 S.Ct. 648, 333 U.S. 846, 92 L.Ed. 1129, rehearing denied 68 S.Ct. 896, 333 U.S. 878, 92 L.Ed. 1154.

#### Persons convicted of offense against United States

The authority of the bureau of prisons over persons convicted of an offense against the United States could not be limited by order of sentencing judge that they remain in a designated county jail within the geographic jurisdiction of the court pending appeal from their convictions, even though they elected not to commence service of sentences pending appeal.—Petition of Wilfong, D.C.Mich., 6 F.R.D. 564, certiorari denied McGuire v. U.S., 68 S.Ct. 648, 333 U.S. 846, 92 L.Ed. 1129, rehearing denied 68 S.Ct. 896, 333 U.S. 878, 92 L.Ed. 1154.

28. N.Y.—People v. Williams, 55 N.E.2d 37, 292 N.Y. 297.

29. N.Y.—People v. Williams, supra.

Taking into custody, commitment, and detention of witnesses failing to give security for appearance generally see the C.J.S. title Witnesses § 33, also 70 C.J. p 66 note 61—p 67 note 70.

30. Mich.—In re Lewellen, 62 N.W. 554, 104 Mich. 318.

31. S.C.—Farrar v. Barnes, 46 S.C. L. 224.

32. S.C.—Farrar v. Barnes, supra.

33. N.Y.—Day v. Brett, 6 Johns. 22.

34. U.S.—Zerbst v. Kidwell, C.C.A. Ga., 92 F.2d 756, reversed on other grounds 58 S.Ct. 872, 304 U.S. 359, 82 L.Ed. 1399, 116 A.L.R. 808.

Okl.—Ex parte Allen, 192 P.2d 289, 86 Okl.Cr. 48, certiorari denied Allen v. Burford, 68 S.Ct. 1333, 334 U.S. 830, 92 L.Ed. 1757—Ex parte Neighbors, 187 P.2d 276, 85 Okl. Cr. 183.

50 C.J. p 345 note 86.

#### Statute held not invalid

The statute authorizing transfer of federal prisoners from one place of confinement to another and intended to apply to prisoners confined under sentence pronounced before as well as after its passage is not invalid.—Stroud v. Johnston, C.C.A. Cal., 139 F.2d 171, certiorari denied 64 S.Ct. 846, 321 U.S. 796, 88 L.Ed. 1085.

#### Sentence as including transfer provision

Any judgment sentencing a person convicted of crime to the state prison must be read as if it states that he is subject to be transferred to another penal institution by the board of public welfare under power granted board by statute.—State v. Rardon, 46 N.E.2d 605, 221 Ind. 154—Mellot v. State, 40 N.E.2d 655, 219 Ind. 646.

#### Court hearing held unnecessary

A statute providing for court hearing for transfer from one institution to another, applicable to those originally sentenced to reformatory, does not apply to those sentenced in the first instance to penitentiary.—People v. Wheeler, 64 N.E.2d 865, 292 Ill. 455, certiorari denied 66 S.Ct. 904, 327 U.S. 802, 90 L.Ed. 1027.

**Remand to trial court unnecessary**  
U.S.—Cox v. McConnell, C.C.A. Ga., 80 F.2d 258.

#### Matter of discretion

U.S.—Stroud v. Johnston, C.C.A. Cal., 139 F.2d 171, certiorari denied 64 S.Ct. 846, 321 U.S. 796, 88 L.Ed. 1085.

#### Removal or transfer held proper

(1) In general.

Ind.—Mellott v. State, 40 N.E.2d 655, 219 Ind. 646.

Md.—Belch v. Raymond, 75 A.2d 96.  
N.Y.—People ex rel. Palmer v. Snyder, 18 N.Y.S.2d 378, 259 App.Div. 775, appeal denied 20 N.Y.S.2d 412, 259 App.Div. 937.

Okl.—Ex parte Barber, 196 P.2d 695, 87 Okl.Cr. 201, certiorari denied In re Barber, 69 S.Ct. 59, 335 U.S. 847, 93 L.Ed. 397—Ex parte Neighbors, 187 P.2d 276, 85 Okl.Cr. 183.  
50 C.J. p 345 note 86 [b].

(2) A prisoner sentenced in the District of Columbia under Indeterminate Sentence and Parole Act was lawfully transferred to federal penitentiary outside of District of Columbia.—Bracey v. Zerbst, C.C.A. Kan., 93 F.2d 8.

(3) Persons electing not to commence service of sentences pending appeal from conviction of offenses against the United States and thereupon committed to county jail within geographic jurisdiction of sentencing court were properly removed, notwithstanding their protests, by order of the director of United States prisons to a federal correctional institution beyond the jurisdictional limits of sentencing court, but within the circuit of appellate court having jurisdiction of

nature is remedial,<sup>35</sup> and should be given a liberal construction,<sup>36</sup> so as to apply to prisoners confined under sentences pronounced before, as well as after, its passage,<sup>37</sup> and, ordinarily, a written order is unnecessary to make such a transfer.<sup>38</sup>

On the other hand a transfer or removal of a prisoner should be made only by the authorities designated by statute for the purpose,<sup>39</sup> and only in the cases provided for.<sup>40</sup> Transfers should not be made arbitrarily,<sup>41</sup> or in excess of the powers delegated to the authorities,<sup>42</sup> or contrary to express legislative classifications,<sup>43</sup> so that, where such a transfer is made, it has been held void,<sup>44</sup> and the authorities have been directed to return the prisoner to the proper place of confinement.<sup>45</sup> Moreover, an official may not be required to transfer a prisoner from one institution to another in the absence of good cause shown, even though he

has the authority to make such a transfer.<sup>46</sup>

**Change of location of jail.** By virtue of some statutory provisions, it is the duty of certain officials to remove prisoners to a newly located state prison where the location of such prison has been changed after their incarceration.<sup>47</sup> Where a person convicted of a crime against the United States is sentenced to a state jail, the keeper of such jail has been held authorized to remove such prisoner to another place to which the jail has been removed by the authority of the state legislature.<sup>48</sup>

## (2) In Case of Sickness or Insanity

Ordinarily, a prisoner may be transferred to a hospital where hospital treatment becomes reasonably necessary during his incarceration.

Ordinarily, a prisoner may be transferred to a hospital where hospital treatment becomes reason-

appeal, where the circumstances were such as not to result in a deprivation of the safeguards contemplated by statute.—*Petition of Wilfong*, D.C.Mich., 6 F.R.D. 564, certiorari denied *McGuire v. U. S.*, 68 S.Ct. 648, 333 U.S. 846, 92 L.Ed. 1129, rehearing denied 68 S.Ct. 896, 333 U.S. 878, 92 L.Ed. 1154.

(4) A federal prisoner may, prior to his release, be transferred to a state in which he is wanted for violation of state law.—*Boyce v. U. S.*, D.C.Pa., 52 F.Supp. 115.

(5) On expiration of contract with one workhouse to maintain county prisoners and making of another contract with another workhouse, the sheriff has authority to transfer to latter workhouse a prisoner committed to former.—*In re Robinson*, 30 O.C.A. 333.

35. U.S.—*Stroud v. Johnston*, C.C.A. Cal., 139 F.2d 171, certiorari denied 64 S.Ct. 846, 321 U.S. 796, 88 L.Ed. 1085.—*In re Berman*, C.C.A. Ill., 80 F.2d 361, certiorari denied *Berman v. McDonnell*, 56 S.Ct. 682, 298 U.S. 660, 80 L.Ed. 1386.

36. U.S.—*In re Berman*, C.C.A. Ill., 80 F.2d 361, certiorari denied *Berman v. McDonnell*, 56 S.Ct. 682, 298 U.S. 660, 80 L.Ed. 1386.

### Who may pass on transfers

Under statute authorizing attorney general or his authorized representative to transfer federal prisoners from one place of confinement to another, director of bureau of prisons could pass on transfer of federal prisoners.—*In re Berman*, C.C.A. Ill., 80 F.2d 361, certiorari denied *Berman v. McDonnell*, 56 S.Ct. 682, 298 U.S. 660, 80 L.Ed. 1386.

37. U.S.—*Stroud v. Johnston*, C.C.A. Cal., 139 F.2d 171, certiorari denied 64 S.Ct. 846, 321 U.S. 796, 88

L.Ed. 1085.—*In re Berman*, C.C.A. Ill., 80 F.2d 361, certiorari denied *Berman v. McDonnell*, 56 S.Ct. 682, 298 U.S. 660, 80 L.Ed. 1386.

### Repeal by implication

A statute relating to the transfer of prisoners, purporting to revise the entire subject matter covered by an earlier statute and containing additional provisions for carrying into effect the same objects as the earlier statute, repeals the earlier statute by implication, although no reference is made thereto.—*Ex parte Burns*, Okl.Cr., 202 P.2d 433.—*Ex parte Olden*, Okl.Cr., 199 P.2d 228, overruling *Ex parte Neighbors*, 187 P.2d 276, 85 Okl.Cr. 183.—*Ex parte Himes*, Okl.Cr., 199 P.2d 226.

38. U.S.—*Whittaker v. Brannan*, Va., 252 F. 556, 165 C.C.A. 6.

In absence of statute requiring it, an order of the proper officials for the transfer of prisoners from one penal institution to another need not be in writing.—*Whittaker v. Brannan*, supra—50 C.J. p 345 note 89.

39. Miss.—*Ex parte Buck*, 61 So. 651, 104 Miss. 661.

40. Ind.—*Huber v. Robinson*, 28 Ind. 137.

50 C.J. p 345 note 87.

41. Okl.—*Ex parte Allen*, 192 P.2d 289, 86 Okl.Cr. 48, certiorari denied *Allen v. Burford*, 68 S.Ct. 1333, 334 U.S. 830, 92 L.Ed. 1757.—*Ex parte Neighbors*, 187 P.2d 276, 85 Okl.Cr. 183.

42. Okl.—*Ex parte Neighbors*, 187 P.2d 276, 85 Okl.Cr. 183.

43. Okl.—*Ex parte Allen*, 192 P.2d 289, 86 Okl.Cr. 48, certiorari denied *Allen v. Burford*, 68 S.Ct. 1333, 334 U.S. 830, 92 L.Ed. 1757.—*Ex parte Neighbors*, 187 P.2d 276, 85 Okl.Cr. 183.

44. Okl.—*Ex parte Allen*, 192 P.2d 289, 86 Okl.Cr. 48, certiorari denied *Allen v. Burford*, 68 S.Ct. 1333, 334 U.S. 830, 92 L.Ed. 1757.

45. Okl.—*Ex parte Allen*, 192 P.2d 289, 86 Okl.Cr. 48, certiorari denied *Allen v. Burford*, 68 S.Ct. 1333, 334 U.S. 830, 92 L.Ed. 1757.—*Ex parte Neighbors*, 187 P.2d 276, 85 Okl.Cr. 183.

46. U.S.—*Aderhold v. Lee*, C.C.A. Ga., 68 F.2d 824, certiorari denied *Lee v. Aderhold*, 54 S.Ct. 718, 292 U.S. 633, 78 L.Ed. 1486, and *Davis v. Aderhold*, 54 S.Ct. 861, 292 U.S. 647, 78 L.Ed. 1498.

### What constitutes good cause

(1) Fact that persons convicted in District of Columbia were, because confined at Atlanta, eligible for parole only after serving one third of term, but could be paroled after serving one fifth of term, under subsequent retroactive statute, if confined in District of Columbia, has been held not to empower court to require transfer.—*Aderhold v. Lee*, C.C.A. Ga., 68 F.2d 824, certiorari denied *Lee v. Aderhold*, 54 S.Ct. 718, 292 U.S. 633, 78 L.Ed. 1486, and *Davis v. Aderhold*, 54 S.Ct. 861, 292 U.S. 647, 78 L.Ed. 1498.

(2) One convicted of murder, although without funds, was not entitled to an order directing warden to transfer him from state prison to his home county in order to facilitate consultation with attorneys regarding further proceedings to protect his rights.—*People v. Hoffner*, 76 N.Y.S.2d 915, 191 Misc. 345.

47. Pa.—*In re Reddill's Case*, 1 Whart. 445.

16 C.J. p 1377 note 47.

48. U.S.—*In re Hartwell*, C.C. Mass., 11 F.Cas.No.6,173, 1 Lowell 536.

ably necessary during his incarceration.<sup>49</sup> Under some statutes, a prisoner in a state prison, in a proper case, may be transferred to a state hospital,<sup>50</sup> such as a hospital for the insane,<sup>51</sup> and a statute authorizing an official to remove a prisoner to a state hospital for the insane enters into, and becomes part of, a sentence as though spread on the record with the sentence.<sup>52</sup> The purpose of such a statute is to provide a proper method for such a transfer when the best interests of the prisoner and the other inmates require it,<sup>53</sup> and, under such a statute, the determination of the prisoner's sanity by the designated official has been held an administrative function,<sup>54</sup> which he may exercise without notice to the prisoner,<sup>55</sup> or without giving him an opportunity to be heard or to present evidence as to his sanity.<sup>56</sup>

Where a statute requires the maintenance of hospital quarters in a jail having a "large number" of prisoners, hospital facilities nearest at hand must be used for sick prisoners in jails to which the statute does not apply.<sup>57</sup> Where a prisoner, selected by the county supervisor to work the roads has become ill and has been sent to the penitentiary which has offered its facilities for the treatment of such prisoners, on a refusal, after the prisoner's recovery, to redeliver him, the burden is on the superintendent of the penitentiary to show that the

custody of the convict has been unconditionally delivered.<sup>58</sup>

*In case of contagious disease.* A prisoner found to have a contagious disease should be removed and isolated to some room or place having no connection with the other prisoners.<sup>59</sup>

## § 20. Discharge of Prisoners

- a. In general
- b. On expiration of term of imprisonment

### a. In General

A prisoner may not be discharged before the expiration, by law, of the term of imprisonment duly imposed on him except by proper authority exercised in the manner prescribed by law; provision may be made by statute for the payment of a gratuity to a prisoner on his discharge.

A prisoner may not be discharged before the expiration, by law, of the term of imprisonment duly imposed on him except by proper authority exercised in the manner prescribed by law,<sup>60</sup> and it has been held that, in order to entitle a prisoner to his release, an order purporting to affect the terms of his commitment must be served on the warden.<sup>61</sup> A certificate of discharge of a prisoner relating to a conviction for one offense does not operate to discharge him from an uncompleted sentence for another offense.<sup>62</sup> A statute author-

49. Vt.—*Mangan v. Franzoni*, 75 A. 2d 665.

**Prisoner on close jail execution** may be removed to hospital when hospital treatment is reasonably necessary but the safe and strict or close custody of the sheriff or his deputies should continue while the prisoner is at the hospital.—*Mangan v. Franzoni*, supra.

50. N.Y.—*People ex rel. Russo v. Shaw*, 57 N.Y.S.2d 483, 269 App. Div. 919—*Troutman v. State*, 72 N.Y.S.2d 177, 190 Misc. 449, reversed on other grounds 79 N.Y.S. 2d 709, 273 App.Div. 619.

51. N.Y.—*Troutman v. State*, supra.

#### Length of confinement

A prisoner was not unlawfully confined at state hospital for the insane on ground that his confinement was permanent, where, under governor's order by which prisoner was transferred from prison to hospital for insane, his commitment was for such time as added to the time already served by such prisoner will equal the terms of his original sentences.—*Ex parte Soborsky*, 199 A. 757, 109 Vt. 476.

52. Vt.—*Ex parte Soborsky*, supra.

53. Vt.—*Ex parte Soborsky*, supra.

54. Vt.—*Ex parte Soborsky*, supra.

55. Vt.—*Ex parte Soborsky*, supra.

56. Vt.—*Ex parte Soborsky*, supra.

57. La.—*State v. Brouillette*, 111 So. 491, 163 La. 46.  
50 C.J. p 345 note 91.

58. S.C.—*White v. Sanders*, 103 S. E. 86, 114 S.C. 54.

59. Okl.—*Hunt v. Rowton*, 288 P. 342, 143 Okl. 181.

#### Suitable place

Where a jailer discovers that one of the prisoners is suffering from a contagious disease, he should remove him to a suitable place and keep him there until he has served his sentence.—*Matter of Boyce*, 88 N.Y.S. 841, 43 Misc. 297—50 C.J. p 345 note 92.

60. N.Y.—*Matter of Droege*, 114 N. Y.S. 375, 129 App.Div. 866, appeal dismissed 90 N.E. 340, 197 N.Y. 44.

50 C.J. p 346 note 95.  
Discharge of convicts from custody of lessees for their labor see *Convicts* § 25.

#### Discharge of one imprisoned:

For nonpayment of costs see *Costs* § 464.

For nonpayment of fine see *Fines* § 12.

In bastardy proceedings see *Bastards* § 117 b.

Under execution against person see *Executions* §§ 429-449.

Rearrest after illegal discharge see *Arrest* § 21.

#### Power of supreme court

As respects sheriff's duty to obey order of supreme court justice directing sheriff to release and discharge prisoner, supreme court had complete power to grant, modify, and vacate order of arrest and finally pass on bail.—*Lang v. Dreyer*, 9 N.Y.S.2d 970, 170 Misc. 207.

**When pardon is granted**, a jailer must liberate his prisoner.—*In re Biegle*, 5 Ohio S. & C.P. 583, 7 Ohio N.P. 561—50 C.J. p 346 note 4.

61. Cal.—*Ex parte Sargen*, 27 P.2d 407, 135 Cal.App. 402.

#### Reason for rule

State prison warden, not being required to attend hearing of proceeding, in which prisoner, temporarily removed from his custody, appears as witness, or charged with constructive notice of what happens therein, order, made therein, purporting to affect terms of prisoner's commitment, must be served on warden to entitle prisoner to release.—*Ex parte Sargen*, supra.

62. U.S.—*Banks v. O'Grady*, C.C.A. Neb., 113 F.2d 926.



izing workhouse commissioners to discharge a prisoner under certain circumstances, even if constitutional, does not authorize them to discharge a person sentenced to a term in the workhouse where such sentence has been suspended and the person has never been sent to the workhouse.<sup>63</sup>

A sheriff is not authorized to discharge a prisoner not arrested by him or his deputy by a statute providing that a prisoner who is arrested, charged with a misdemeanor, and held to answer it, or who is arrested by virtue of a *capias* or an indictment for a misdemeanor, shall be discharged by the committing magistrate or officer making the arrest under a *capias* on his own recognizance without security.<sup>64</sup> After a prisoner has been admitted to the liberty of the jail limits on giving a bond, the sheriff no longer has any power to discharge him.<sup>65</sup>

*Gratuities to discharged prisoners.* Provision may be made by statute for the payment of a gratuity to a prisoner on his discharge.<sup>66</sup> Under some statutes, where a prisoner is ordered resentenced,

he is ordinarily not discharged from prison so as to be entitled to a statutory allowance of money,<sup>67</sup> but, if the resentence does not provide for his incarceration in a state prison, he is entitled to such an allowance.<sup>68</sup> The intent of the legislature is controlling in determining whether a later statute on the subject of gratuities to prisoners repeals earlier statutes on the same subject.<sup>69</sup>

#### b. On Expiration of Term of Imprisonment

On the expiration of his term of imprisonment, a prisoner is entitled to be discharged in the absence of any legal justification for his further detention.

On expiration of term of imprisonment, a prisoner is entitled to be discharged in the absence of any legal justification for his further detention,<sup>70</sup> and the head of a penal institution may not hold a prisoner in confinement after the expiration of the term provided in the commitment under which he is held.<sup>71</sup> Moreover, the jurisdiction of a parole board to continue the incarceration of a prisoner ceases at the expiration of the maximum punishment fixed by statute for the crime for which

#### Second offense while on parole

Where prisoner at large under a parole was convicted of another offense and sentenced to penitentiary, a certificate of discharge at conclusion of prisoner's punishment for his second offense, which showed on its face that it related only to conviction for second offense, did not operate to discharge sentence for first offense which had not been completed.—*Banks v. O'Grady*, supra.

63. Tenn.—*Rogers v. State*, 47 S.W. 697, 101 Tenn. 427.  
50 C.J. p 346 note 96.

64. Ala.—*Smith v. Strobach*, 50 Ala. 462.

65. Mich.—*Kruse v. Kingsbury*, 60 N.W. 443, 102 Mich. 100.

66. U.S.—*Carroll v. U. S.*, 100 Ct. Cl. 436.  
50 C.J. p 346 note 5.

#### Discretion of official

Under some statutory provisions a prisoner released by a final discharge is entitled only to such suitable clothing and such sum of money, not to exceed a stated sum, as may be authorized by the attorney general in his discretion.—*Carroll v. U. S.*, supra.

67. N.Y.—*O'Keefe v. Wilson*, 277 N.Y.S. 101, 154 Misc. 340, affirmed 277 N.Y.S. 102, 243 App.Div. 643, affirmed 198 N.E. 383, 268 N.Y. 517, motion denied 198 N.E. 529, 268 N.Y. 632.

68. N.Y.—*O'Keefe v. Wilson*, supra.

#### Suspended sentence

Action of court in resentencing

prisoner imposing indeterminate sentence and suspending execution thereof amounted to discharge from state's prison with respect to prisoner's right to statutory allowance.—*O'Keefe v. Wilson*, supra.

69. U.S.—*Carroll v. U. S.*, 100 Ct. Cl. 436.

Where, from the legislative history of a statute, it is apparent that the legislature intended to legislate fully on the subject of gratuities to prisoners in one enactment, previous enactments on the subject are repealed.—*Carroll v. U. S.*, supra.

70. Ill.—*People v. Montana*, 44 N.E. 2d 569, 380 Ill. 596.  
50 C.J. p 346 note 2.

#### Recommendation of court under parole act

Trial court's recommendation as to minimum and maximum duration of the imprisonment under the parole act is part of the sentence, and, where the duration of imprisonment has expired in accordance with the recommendation, the prisoner must be discharged.—*People v. Montana*, supra.

#### Failure to provide employment

(1) In determining whether a prisoner is entitled to his discharge as having completed his sentence one sentenced to imprisonment and payment of fine and costs, being required by statute to work each day that he is able, has been held entitled to credit of stated sum for each day on which he is physically able and willing to work until full pay-

ment of fine and costs, even though board of supervisors fails to furnish him work and facilities or means therefor, as required by statute, and code sections associated with section containing provision, stricken by amendatory act, that no convict shall be credited with wages while in jail and not at work entitle convict to credit of such sum on his fine and costs for each day spent in jail when ready, able, and willing to work, regardless of title of amendatory act, "An Act to amend [such section] so as to credit convicts with time served in jail."—*Ex parte Jackson*, 171 So. 545, 177 Miss. 509.

(2) However, it has also been held that, under a statute by which a prisoner may work out his fine and costs, a person, under sentence for breach of ordinance, is not entitled to discharge without satisfying sentence, notwithstanding failure of city, after notice, to provide employment for working out fine and costs.—*Scholl v. Heumpreus*, 14 P. 2d 656, 136 Kan. 265.

71. Ky.—*Commonwealth v. Crawford*, 147 S.W.2d 1019, 285 Ky. 382.

#### Where unlawfully detained

A warrant of commitment of a prisoner should distinctly state the terms on which he is entitled to his discharge, and, if the prisoner, after having complied with the terms of his sentence, is unlawfully detained by the keeper, he may be freed from his illegal restraint by appropriate process.—*Kenney v. State*, 5 R.I. 385—13 C.J. p 929 note 69.

he is imprisoned, at which time he should be discharged by the prison authorities.<sup>72</sup> It has been held that on proper notice of a reversal of a conviction it is the duty of a warden to remand his prisoner to the custody of the sheriff.<sup>73</sup> On the other hand, an escaped prisoner who has been convicted and sentenced for another crime may, at the expiration of the latter sentence, be held to serve out the remainder of the first sentence,<sup>74</sup> and one having completed a sentence for escape may be subject to being held on a detainer lodged for a crime committed during his escape.<sup>75</sup>

## § 21. Commutation of Sentence for Good Conduct

- a. In general
- b. Validity and constitutionality of statutes
- c. Nature of right and allowance
- d. Administrative procedure
- e. Computation of allowance
- f. Effect of subsequent conviction
- g. Enforcement of right
- h. Forfeiture of right
- i. Restoration of forfeited credits

72. U.S.—Clark v. Surprenant, C.C. A.Cal., 94 F.2d 969.

Ala.—Pinkerton v. State, 198 So. 157, 29 Ala.App. 472, followed in Lemons v. State, 198 So. 162, first case, 29 Ala.App. 484, certiorari denied 198 So. 162, 240 Ala. 148, certiorari denied Pinkerton v. State, 198 So. 162, 240 Ala. 123.

N.Y.—People ex rel. Cavalski v. Hunt, 22 N.Y.S.2d 353, 174 Misc. 1048.

73. Mich.—People v. Frencavage, 206 N.W. 567, 232 Mich. 369.

74. Ohio.—Henderson v. James, 39 N.E. 805, 52 Ohio St. 242, 27 L.R.A. 290.

75. Pa.—Commonwealth ex rel. Barnes v. Smith, 40 A.2d 104, 156 Pa.Super. 231.

76. N.Y.—People ex rel. Kohlepp v. McGee, 11 N.Y.S.2d 755, 256 App. Div. 792, appeal dismissed 26 N.E.2d 809, 282 N.Y. 677.

Tex.—Ex parte Neisler, 69 S.W.2d 422, 126 Tex.Cr. 26.

50 C.J. p 346 note 6.

Commutation of sentence generally see Pardons § 15.

Indeterminate sentences generally see Criminal Law § 1993.

Parole see Pardons §§ 17-26.

### Power of legislature

The legislature has the power to authorize by statute the reduction

of sentences of convicts as a reward for their good conduct and behavior.—Ex parte Anderson, 192 S.W.2d 280, 149 Tex.Cr. 139.

### Preferential treatment

A prisoner whose statutory rights as of the date of his crime were not diminished by preferential treatment to another group of prisoners has no grievance for which resort may be had to the courts, and redress may only be sought or complaint made to the legislature.—Cook v. Lawes, 285 N.Y.S. 588, 247 App.Div. 735, affirmed 3 N.E.2d 191, 271 N.Y. 574—People ex rel. Ascher v. Lawes, 276 N.Y.S. 322, 243 App. Div. 578—Keith v. Thayer, 281 N.Y.S. 315, 245 App.Div. 188—People ex rel. Montana v. McGee, 16 N.Y.S.2d 162.

### Credit under void sentence

Where convictions were void, but defendant had served time under void sentences, if defendant should be tried and convicted on any one of the original indictments pending against him, he should receive proper credit for good conduct if, under pertinent rules and regulations of state authorities, he is entitled to such credit.—Stonebreaker v. Smyth, 46 S.E.2d 406, 187 Va. 250.

77. N.Y.—People ex rel. Hammond v. Martin, 27 N.Y.S.2d 683, 261 App.Div. 648—People ex rel. Kohlepp v. McGee, 11 N.Y.S.2d 755, 256

## a. In General

The right to a reduction of the term of imprisonment to which a prisoner has been sentenced as a reward for good conduct during his confinement, or credit for "good time," as it is sometimes called, is purely statutory, and may be acquired only in the manner and under the circumstances pointed out by statute.

The right to a reduction of the term of imprisonment to which a prisoner has been sentenced as a reward for good conduct during his confinement, or credit for "good time," as it is sometimes called, is purely statutory,<sup>76</sup> and may be acquired only in the manner and under the circumstances pointed out by statute.<sup>77</sup> So, in the absence of statutory authority, the courts may not compel the granting of good time credits to a prisoner.<sup>78</sup>

Although it has been stated generally that a statute providing for an allowance of good time to prisoners who faithfully perform the duties assigned to them does not form a part of the sentence,<sup>79</sup> ordinarily, the provisions of such a statute become an inherent part of the sentence and punishment assessed,<sup>80</sup> so that a prisoner within the purview of such a statute is entitled to his discharge at the expiration of the time for which his sentence runs, less the time for which he is en-

App.Div. 792, appeal dismissed 26 N.E.2d 809, 282 N.Y. 677—People ex rel. Angley v. Warden of Penitentiary, 273 N.Y.S. 1009, 153 Misc. 307.

Ohio.—Wadden v. Henderson, App., 47 N.E.2d 672.

Or.—Fehl v. Lewis, 64 P.2d 648, 155 Or. 499.

Tex.—Ex parte Baird, Cr., 228 S.W.2d 511.

50 C.J. p 347 note 7.

78. N.Y.—People ex rel. Kohlepp v. McGee, 11 N.Y.S.2d 755, 256 App.Div. 792, appeal dismissed 26 N.E.2d 809, 282 N.Y. 677.

79. Colo.—Ex parte Wier, 78 P.2d 1094, 102 Colo. 321.

80. U.S.—Uryga v. Ragen, C.A.Ill., 181 F.2d 660—Carroll v. Squier, C.C.A.Wash., 136 F.2d 571, certiorari denied 64 S.Ct. 202, 320 U.S. 793, 88 L.Ed. 478—U. S. ex rel. Lashbrook v. Sullivan, D.C.Ill., 55 F.Supp. 548.

Mo.—Ex parte Rody, 152 S.W.2d 657, 348 Mo. 1—Ex parte Carney, 122 S.W.2d 888, 343 Mo. 556.

Tenn.—State v. Harwood, 191 S.W.2d 448, 183 Tenn. 567—Gilliam v. State, 126 S.W.2d 305, 174 Tenn. 388.

Utah.—Corpus Juris cited in Cardisco v. Davis, 64 P.2d 216, 226, 91 Utah 323.

50 C.J. p 347 note 8.

titled to credit as good time earned,<sup>81</sup> since the courts and the administrative bodies are bound by the terms of the statute.<sup>82</sup>

The general rules applicable to the construction of statutes apply to the construction of a statute authorizing good time credits,<sup>83</sup> and the intent of the legislature, as expressed in the language of the statute, should be adhered to.<sup>84</sup> A statute of this nature should be given effect according to the purpose for which it was enacted,<sup>85</sup> which is to encourage prison discipline,<sup>86</sup> to encourage prisoners to observe the rules of the prison and to work faithfully,<sup>87</sup> to act as an inducement for

the good conduct of a prisoner for which reward may be given if earned by him,<sup>88</sup> or to improve the morale and well-being of each inmate in each institution.<sup>89</sup>

What persons are included within a statute authorizing the granting of good time credits to prisoners is determined by the intent of the legislature as gathered from the language of the statute,<sup>90</sup> and, under some statutes, the question depends on whether a prisoner is serving under an indeterminate or general sentence or under a determinate or definite sentence.<sup>91</sup>

The effective date of a statute providing for good

81. Iowa.—State v. Hunter, 100 N. W. 510, 124 Iowa 569, 104 Am.S.R. 361.

50 C.J. p 347 note 9.

82. U.S.—Uryga v. Ragen, C.A.III. 181 F.2d 660.

83. U.S.—Bragg v. Huff, C.C.A.Va. 118 F.2d 1006—Holland v. Hiatt D.C.Pa., 50 F.Supp. 406.

Cal.—Ex parte Daniels, 288 P. 1109 106 Cal.App. 43.

Mo.—Ex parte Carney, 122 S.W.2d 888, 343 Mo. 556.

N.Y.—Latham v. Brophy, 293 N.Y.S. 762, 162 Misc. 107.

Or.—Fehl v. Martin, 64 P.2d 631, 155 Or. 455.

#### Liberal construction

The amendment of parole statute so as to permit parole violator on recommitment to earn commutation for good conduct was remedial and was to be construed liberally.—Jones v. Clemmer, 163 F.2d 852, 82 U.S.App.D.C. 288.

84. Mo.—Ex parte Carney, 122 S.W. 2d 888, 343 Mo. 556.

N.Y.—People ex rel. Swann v. Osborne, 160 N.Y.S. 759, 96 Misc. 497.

85. U.S.—Bragg v. Huff, C.C.A.Va., 118 F.2d 1006.

D.C.—Jones v. Clemmer, 163 F.2d 852, 82 U.S.App.D.C. 288.

Ind.—Dowd v. Johnston, 47 N.E. 2d 976, 221 Ind. 398.

#### Increasing allowances

Statutory amendments increasing allowances granted in reducing sentences of prisoners represent, not cumulations, but substitution of greater allowance than that given under preceding statutes.—Cook v. Lawes, 285 N.Y.S. 588, 247 App.Div. 735, affirmed 3 N.E.2d 191, 271 N.Y. 574.

86. Tex.—Ex parte Baird, Cr., 228 S.W.2d 511.

#### In prison where confined

Commutation is to encourage prison discipline in the prison where the convict is confined.—Ex parte Baird, supra.

87. Ariz.—Beaty v. Shute, 95 P.2d 563, 54 Ariz. 339.

Mo.—Ex parte Carney, 122 S.W.2d 888, 343 Mo. 556.

#### Statute allowing industrial good time

(1) The purpose of the statute regarding allowance of industrial good time to a prisoner is merely to authorize an additional good time to prisoners engaged in industry or confined in industrial camps referred to in the statute.—Bragg v. Huff, C.C.A.Va., 118 F.2d 1006—Holland v. Hiatt, D.C.Pa., 50 F.Supp. 406.

(2) Under such a statute, attorney general may, in his discretion, allow a larger deduction from sentence to prisoners engaged in industry or confined in industrial camps than is allowed in ordinary cases.—Bragg v. Huff, C.C.A.Va., 118 F.2d 1006—Wald v. Hiatt, D.C.Pa., 56 F.Supp. 504.

88. Colo.—Ex parte Wier, 78 P.2d 1094, 102 Colo. 321.

89. Ind.—Dowd v. Johnston, 47 N.E. 2d 976, 221 Ind. 398.

90. Conn.—Glazier v. Reed, 163 A. 766, 116 Conn. 136.

50 C.J. p 346 note 6 [c]—[e].

#### Persons held within statute

(1) Inmates transferred from reformatory to state prison.—Glazier v. Reed, supra.

(2) Parolee, while at large.—Ex parte Dawsett, 19 N.W.2d 110, 311 Mich. 538, certiorari denied Dawsett v. Bush, 67 S.Ct. 299, 329 U.S. 786, 91 L.Ed. 674.

#### Persons held not within statute

(1) One serving sentence on probation.—Brown v. Akin, 55 S.E.2d 875, 80 Ga.App. 309.

(2) One whose sentence is so molded as to permit him to serve it outside confines of chain gang.—Green v. Adams, 153 S.E. 762, 170 Ga. 632.

(3) Prisoners in county penitentiary.—People ex rel. Kohlepp v. McGee, 11 N.Y.S.2d 755, 256 App.Div. 792, appeal dismissed 26 N.E.2d 809, 282

N.Y. 677—People ex rel. Montana v. McGee, 16 N.Y.S.2d 162.

(4) Prisoners in city penitentiary.—People ex rel. Pinchback v. Warden of Penitentiary, 172 N.Y.S. 382, 184 App.Div. 777, 37 N.Y.Cr. 165—People ex rel. Welch v. Slattery, 38 N.Y.S.2d 11, 179 Misc. 899—People ex rel. Angley v. Warden of Penitentiary, 273 N.Y.S. 1009, 153 Misc. 307.

(5) Prisoners in constructive custody of penitentiary but actually confined in federal prison.—Ex parte Baird, Tex.Cr., 228 S.W.2d 511.

#### Place of confinement of United States prisoners

(1) Under a statute so providing, there is a uniform system of commutation for good conduct for United States prisoners, no matter where they are confined.—U. S. v. Jackson, Wash., 143 F. 783, 75 C.C.A. 41—50 C.J. p 347 note 12.

(2) Such statute has been held applicable to all sentences imposed subsequent to its taking effect.—U. S. v. Jackson, supra—50 C.J. p 347 note 13.

(3) However, such statute has been held inapplicable to sentences imposed prior to that time, unless the commutation allowable thereon is less than that provided for by the act.—Woodward v. Bridges, D.C. Mass., 144 F. 156—50 C.J. p 347 note 14.

(4) Prior law see 50 C.J. p 347 note 11.

91. Ind.—Hinkle v. Howard, 73 N.E. 2d 674, 225 Ind. 176—Hinkle v. Dowd, 58 N.E.2d 342, 223 Ind. 91.

Ohio.—Ex parte Tischler, 188 N.E. 730, 127 Ohio St. 404—O'Neill v. Thomas, 173 N.E. 727, 123 Ohio St. 42—Wadden v. Henderson, App., 47 N.E.2d 672—Ex parte Thorpe, 32 N.E.2d 571, 66 Ohio App. 128, affirmed 30 N.E.2d 335, 137 Ohio St. 325.

Utah.—Cardisco v. Davis, 64 P.2d 216, 91 Utah 323.

Word "determinate," as used in Good Time Law covering prisoners

time allowances is determined by the intent of the legislature,<sup>92</sup> and whether or not a statute is operative in a particular case, in point of time, is a question of legislative intent.<sup>93</sup> Thus, the statute may be inapplicable to prisoners convicted before its enactment,<sup>94</sup> or to persons not confined in a penitentiary until after its effective date,<sup>95</sup> or the statute may be applicable to sentences imposed after its effective date irrespective of the date when the offense was committed,<sup>96</sup> or the statute may not only be effective as to persons brought to a prison camp after the date of the enactment but also as to persons brought to such a camp before its date.<sup>97</sup>

Whether there is a repeal of a statute providing for good time allowances by the enactment of a later statute on the same subject depends on the intent of the legislature.<sup>98</sup> So indeterminate sentence statutes may<sup>99</sup> or may not<sup>1</sup> operate as impliedly repealing existing commutation statutes. An escape statute passed after the enactment of a statute providing for deductions from sentences for good conduct has been construed as amending and modifying the latter.<sup>2</sup>

### b. Validity and Constitutionality of Statutes

The validity and constitutionality of statutes authorizing commutation of prison sentences for good conduct have been upheld. While it has been held that statutes of this nature are not invalid in so far as they are made applicable to sentences in force at the time of their enactment, there is also authority to the contrary.

The validity and constitutionality of statutes authorizing commutation of prison sentences for good conduct have been upheld.<sup>3</sup> While it has been held that statutes of this nature are not invalid in so far as they are made applicable to sentences in force at the time of their enactment,<sup>4</sup> there is also authority to the contrary.<sup>5</sup> A statute conditioning the release of prisoners after the service of a maximum sentence, less deductions for good conduct,<sup>6</sup> and providing that prisoners so released shall be subject to the parole laws,<sup>7</sup> is constitutional. Moreover, such a statute is not invalid because it modifies the effect of statutes in force before its enactment.<sup>8</sup> A statute in existence at the time of the imposition of a sentence which deprives an insane prisoner of the right to deduction from his sentence for good time is not invalid.<sup>9</sup>

### c. Nature of Right and Allowance

- (1) In general
- (2) Commuted and suspended sentences

#### (1) In General

Under some statutes the allowances to be made for the good behavior of a prisoner are regarded as a matter of right; under other statutes the credit to be allowed is not a matter of right, but one of grace, and is a matter which is discretionary with the designated officials, so that, in order to entitle a prisoner to credits for good behavior, there must be some affirmative action on the part of the prison board or other proper authority.

Under some statutes the allowances to be made for the good behavior of a prisoner are regarded

confined for a determinate term, signifies a definite number of years fixed by the court and the maximum time under an indeterminate sentence may not be considered as a determinate sentence within the law.—Hinkle v. Dowd, 58 N.E.2d 342, 223 Ind. 91.

**Person given maximum sentence** by judge authorized to impose minimum sentence is entitled to time for good behavior as for definite sentence.—Reeves v. Thomas, 170 N.E. 646, 122 Ohio St. 22.

92. Pa.—Commonwealth ex rel. Campbell v. Ashe, 15 A.2d 409, 141 Pa.Super. 408.

Tex.—Ex parte Anderson, 192 S.W.2d 280, 149 Tex.Cr. 139.

93. N.Y.—Latham v. Brophy, 293 N.Y.S. 762, 162 Misc. 107.

Tex.—Ex parte Anderson, 192 S.W.2d 280, 149 Tex.Cr. 139.

94. N.Y.—Latham v. Brophy, 293 N.Y.S. 762, 162 Misc. 107.

95. Ohio.—Wadden v. Henderson, App., 47 N.E.2d 672.

The phrase a "person confined in the penitentiary" as used in statute establishing a schedule for diminu-

tion of sentence of such persons refers only to those persons confined in penitentiary at time statute became effective and does not include all those who were thereafter confined.—Wadden v. Henderson, supra.

96. Pa.—Commonwealth ex rel. Campbell v. Ashe, 15 A.2d 409, 141 Pa.Super. 408.

97. U.S.—Kastel v. Fish, D.C.Md., 36 F.Supp. 700.

98. U.S.—Kastel v. Fish, supra.

**Statutes held repealed**  
U.S.—Kohler v. Nicholson, C.C.A.Va., 117 F.2d 344—Kastel v. Fish, D.C. Md., 36 F.Supp. 700.

Ind.—Daly v. Carr, 190 N.E. 429, 190 N.E. 612, 206 Ind. 554.

99. Wash.—State v. Kinnear, 261 P. 795, 145 Wash. 686.

50 C.J. p 347 note 22.

1. Pa.—Commonwealth v. Warden Eastern Penitentiary, 23 Pa.Dist. 1032.

50 C.J. p 347 note 23.

2. U.S.—Bickel v. Hiatt, D.C.Pa., 66 F.Supp. 748.

3. Ind.—Hinkle v. Dowd, 58 N.E.2d 342, 223 Ind. 91.

N.Y.—People ex rel. Ascher v. Lawes, 276 N.Y.S. 322, 243 App.Div. 578.

Ohio.—Wadden v. Henderson, App., 47 N.E.2d 672.  
50 C.J. p 347 note 15.

4. N.Y.—People v. Carter, 171 N.Y.S. 945, 103 Misc. 596, affirmed 172 N.Y.S. 913, 186 App.Div. 905.

Pa.—In re Act of May 11, 1901, 10 Pa.Dist. 361.

5. Tenn.—State v. McClellan, 9 S.W. 233, 87 Tenn. 52.  
50 C.J. p 347 note 18.

6. U.S.—Evans v. Hunter, C.C.A. Kan., 162 F.2d 800, certiorari denied 68 S.Ct. 144, 332 U.S. 818, 92 L.Ed. 395—Chandler v. Johnston, C.C.A.Cal., 133 F.2d 139.

7. U.S.—Evans v. Hunter, C.C.A. Kan., 162 F.2d 800, certiorari denied 68 S.Ct. 144, 332 U.S. 818, 92 L.Ed. 395—Chandler v. Johnston, C.C.A.Cal., 133 F.2d 139.

8. U.S.—Chandler v. Johnston, supra.

9. U.S.—Kuczynski v. U. S., C.C.A. Ind., 145 F.2d 310.

as a matter of right,<sup>10</sup> which may not be abridged by subsequent legislation,<sup>11</sup> or at least a right of such nature as may entitle the prisoner to have a determination by the proper authority as to the amount of good time to be allowed.<sup>12</sup> Under other statutes the credit to be allowed a prisoner for good conduct is not a matter of right, but one of grace,<sup>13</sup> and is a matter which is discretionary with the designated officials,<sup>14</sup> so that, in order to entitle

a prisoner to credits for good behavior there must be some affirmative action on the part of the prison board or other proper authority.<sup>15</sup>

In accordance with these rules, an allowance of credit for good behavior has been held to be a matter of privilege,<sup>16</sup> at least in the first instance.<sup>17</sup> The right to such an allowance has been held a contingent one,<sup>18</sup> which the legislature may with-

10. Mich.—In re Canfield, 57 N.W. 807, 98 Mich. 644.  
50 C.J. p 348 note 24.

11. Mich.—In re Canfield, supra.  
50 C.J. p 347 note 20.

12. Pa.—Commonwealth v. Warden Eastern Penitentiary, 23 Pa.Dist. 1032.  
50 C.J. p 348 note 25.

13. U.S.—Uryga v. Ragen, C.A.III, 181 F.2d 660—Hiatt v. Compagna, C.A.Ga., 178 F.2d 42, affirmed Compagna v. Hiatt, 71 S.Ct. 192—Douglas v. King, C.C.A.Mo., 110 F.2d 911, 127 A.L.R. 1200—Lupo v. Zerbst, C.C.A.Ga., 92 F.2d 362, certiorari denied 58 S.Ct. 645, 303 U.S. 646, 82 L.Ed. 1108—U. S. ex rel. Rowe v. Nicholson, C.C.A.Va., 78 F.2d 468, certiorari denied Rowe v. Nicholson, 56 S.Ct. 118, 296 U.S. 573, 80 L.Ed. 405—Brown v. Pescor, D.C.Mo., 74 F.Supp. 549.  
Cal.—Ex parte Smith, 205 P.2d 662, 33 Cal.2d 797—Ex parte Taylor, 13 P.2d 906, 216 Cal. 113—In re Tobin, 20 P.2d 91, 130 Cal.App. 371.  
N.Y.—People ex rel. Marshall v. Webster, 50 N.Y.S.2d 520, 268 App. Div. 844—People ex rel. Stein v. Murphy, 8 N.Y.S.2d 791, 256 App. Div. 856—People ex rel. Kleinger v. Wilson, 5 N.Y.S.2d 934, 254 App. Div. 406—People ex rel. Rice v. Jackson, 54 N.Y.S.2d 814, 183 Misc. 1070.

50 C.J. p 348 note 26.

#### Industrial good time

Credit, designated as "industrial good time" earned by prisoners in prison camps must be granted by prison authorities under the same conditions as credit for good behavior, and such credits are not absolute.—Wipf v. King, C.C.A.Mo., 131 F.2d 33.

14. U.S.—Perry v. Aderhold, D.C. Ga., 56 F.2d 238, reversed on other grounds, C.C.A., Aderhold v. Perry, 59 F.2d 379.

Cal.—Ex parte Smith, 205 P.2d 662, 33 Cal.2d 797—In re Tobin, 20 P.2d 91, 130 Cal.App. 371.

Ill.—People v. Tyson, 65 N.E.2d 796, 393 Ill. 108.

N.Y.—People ex rel. Kohlepp v. McGee, 11 N.Y.S.2d 755, 256 App. Div. 792—People ex rel. Stein v. Murphy, 8 N.Y.S.2d 791, 256 App. Div. 856—People ex rel. Rice v.

Jackson, 54 N.Y.S.2d 814, 183 Misc. 1070—People ex rel. Welch v. Slatery, 38 N.Y.S.2d 11, 179 Misc. 899—People ex rel. Zuris v. Jennings, 234 N.Y.S. 489, 134 Misc. 46, affirmed 236 N.Y.S. 876, 227 App.Div. 763.

Utah.—McCoy v. Harris, 160 P.2d 721, 108 Utah 407.

Wash.—State ex rel. Linden v. Bunge, 73 P.2d 516, 192 Wash. 245.

15. Cal.—Ex parte Taylor, 13 P.2d 906, 216 Cal. 113—Ex parte Buchanan, 40 P.2d 935, 4 Cal.App.2d 269—Ex parte Daniels, 288 P. 1109, 106 Cal.App. 43.  
50 C.J. p 348 note 27.

Under statute permitting extra allowance to trusty prisoners by prison authorities, for good time, determination by prison authorities that prisoner has earned the additional good time or credit on his sentence is a condition precedent to prisoner's right to benefit of such additional credit.—Ex parte Wier, 78 P.2d 1094, 102 Colo. 321.

#### Construction and effect of resolution

(1) A resolution of prison board to the effect that credits are allowed to all prisoners confined in state prison, except to those prisoners named whose credits are disallowed, allows time credit to prisoner whose name is not included in list of prisoners whose credits are disallowed, and such resolution supersedes former order of board disallowing all future credits.—In re Daniels, 300 P. 878, 114 Cal. 698—Ex parte Davis, 294 P. 408, 110 Cal.App. 616—Ex parte Solman, 291 P. 224, 107 Cal. App. 727.

(2) Prison board may not impeach clear unambiguous resolution awarding credits to all prisoners except those named.—In re Daniels, 300 P. 878, 114 Cal. 698.

16. U.S.—Powell v. Hunter, C.A. Kan., 172 F.2d 330—Pagliaro v. Cox, C.C.A.Mo., 143 F.2d 900—U. S. ex rel. Jacobs v. Barc, C.C.A. Mich., 141 F.2d 480, certiorari denied 64 S.Ct. 1262, 322 U.S. 751, 88 L.Ed. 1581—Douglas v. King, C.C.A.Mo., 110 F.2d 911, 127 A.L.R. 1200—Aderhold v. Hudson, C.C.A. Ga., 84 F.2d 559.

Fla.—Dear v. Mayo, 14 So.2d 267, 153 Fla. 164, certiorari denied 64 S.Ct. 42, 320 U.S. 766, 88 L.Ed. 458.

17. U.S.—Lesser v. Humphrey, D.C. Pa., 89 F.Supp. 474.

D.C.—Story v. Rives, 97 F.2d 182, 68 App.D.C. 325, certiorari denied 59 S.Ct. 71, 305 U.S. 595, 83 L. Ed. 377.

Until date arrives when allowance will end imprisonment, a prisoner has no vested right in good time credit.—Pagliaro v. Cox, C.C.A.Mo., 143 F.2d 900—Lupo v. Zerbst, C.C.A. Ga., 92 F.2d 362, certiorari denied 58 S.Ct. 645, 303 U.S. 646, 82 L.Ed. 1108—U. S. ex rel. Rowe v. Nicholson, C.C.A.Va., 78 F.2d 468, certiorari denied Rowe v. Nicholson, 56 S.Ct. 118, 296 U.S. 573, 80 L.Ed. 405—Lesser v. Humphrey, D.C.Pa., 89 F.Supp. 474.

#### Prisoner becoming of unsound mind

(1) Under some statutory provisions, a prisoner, who became of unsound mind before the expiration of his sentence and was transferred to the hospital for defective delinquents before his good time allowance had finally accrued or become vested, was not entitled to deduction from his sentence for good conduct.—Estabrook v. King, C.C.A.Mo., 119 F.2d 607.

(2) Where it was determined that prisoner was of unsound mind before expiration of his sentence, his case was taken out of operation of statute providing for deductions from sentences for good conduct and was governed by statute providing for transfer to hospital, until restored to sanity, or until maximum sentence is served; since conditions under which prisoner's right to have deductions made from sentence for good conduct might become absolute had not occurred before such determination, he was not deprived of any constitutional right by enforcement of statute providing for transfer to hospital until restored to sanity, or until maximum sentence expires.—Douglas v. King, C.C.A.Mo., 110 F.2d 911, 127 A.L.R. 1200.

18. U.S.—Grant v. Hunter, C.C.A. Kan., 166 F.2d 673—Estabrook v. King, C.C.A.Mo., 119 F.2d 607—Douglas v. King, C.C.A.Mo., 110 F.2d 911, 127 A.L.R. 1200.

Tex.—Ex parte Boyd, 212 S.W.2d 156, 152 Tex.Cr. 164.

draw,<sup>19</sup> and to which the legislature may attach such conditions as it will<sup>20</sup> or as it may consider most conducive to the accomplishment of the desired purpose.<sup>21</sup> In order to be allowed statutory good time, it has been held that a prisoner must earn it by his conduct, industry, and obedience,<sup>22</sup> and under particular statutory provisions, allowances for good time may depend on a prisoner's good conduct for the entire period of his imprisonment until such an allowance will end the imprisonment.<sup>23</sup> So, under some statutes, a prisoner's record must show that he has faithfully observed all rules<sup>24</sup> and laws<sup>25</sup> and that he has not been subject to punishment.<sup>26</sup>

On the other hand, even under statutes wherein the commutation of a sentence for good conduct is treated as a matter not of right but of privilege in the first instance, or as something which a prisoner must earn before it becomes a vested right, the allowance of good time becomes a matter of right when the prisoner has complied with all the statutory requirements, and it is mandatory with the warden or other prison official to reduce the sentence in the manner prescribed by statute.<sup>27</sup> Moreover, under such statutes, the legislature may

not withdraw such right as to those prisoners in whom the privilege has ripened into a vested right,<sup>28</sup> and, also, such a prisoner may not be deprived of his right to an allowance by reason of a mistake of the court or the attorney general in designating the place of his confinement.<sup>29</sup> It has also been held that, while the court may commit a person to a workhouse, although his punishment is assessed by the jury at confinement to a penitentiary, such a commitment to a workhouse will not deprive him of good conduct allowances.<sup>30</sup>

## (2) Commuted and Suspended Sentences

Ordinarily, a prisoner is entitled to a diminution of his sentence for good conduct in case of a commutation of his sentence; but this right depends on the terms of the commutation; and, where it is apparent that the authority granting the commutation intended that no allowance for good conduct should be made, such intention will be given effect.

Ordinarily a prisoner is entitled to a diminution of his sentence for good conduct in case of a commutation of his sentence, where the commutation is to such a term of imprisonment as makes a statute providing credits for good time applicable;<sup>31</sup> but this right depends on the terms of the commutation;<sup>32</sup> and, where it is apparent that the au-

19. U.S.—*Estabrook v. King*, C.C.A. Mo., 119 F.2d 607—*Douglas v. King*, C.C.A. Mo., 110 F.2d 911, 127 A.L.R. 1200.

20. U.S.—*Hiatt v. Compagna*, C.A. Ga., 178 F.2d 42, affirmed *Compagna v. Hiatt*, affirmed 71 S.Ct. 192—*Evans v. Hunter*, C.C.A. Kan., 162 F.2d 800, certiorari denied 68 S.Ct. 144, 332 U.S. 818, 92 L.Ed. 395—*Chandler v. Johnston*, C.C.A. Cal., 133 F.2d 139.

D.C.—*Story v. Rives*, 97 F.2d 182, 68 App.D.C. 325, certiorari denied 59 S.Ct. 71, 305 U.S. 595, 83 L.Ed. 377.

21. Fla.—*Dear v. Mayo*, 14 So.2d 267, 153 Fla. 164, certiorari denied 64 S.Ct. 42, 320 U.S. 766, 88 L.Ed. 458.

22. Tex.—*Ex parte Baird*, Cr., 228 S.W.2d 511—*Ex parte Anderson*, 192 S.W.2d 280, 149 Tex.Cr. 139.

The right becomes effective, only when prisoner, having conducted himself properly has earned an allowance.—*Uryga v. Ragen*, C.A.III., 181 F.2d 660.

23. U.S.—*Grant v. Hunter*, C.C.A. Kan., 166 F.2d 673—*Gray v. Swope*, D.C.Wash., 28 F.Supp. 822.

24. U.S.—*Uryga v. Ragen*, C.A.III., 181 F.2d 660—*Powell v. Hunter*, C.A. Kan., 172 F.2d 330—*Gibson v. U. S.*, C.C.A. Mich., 161 F.2d 973—*Taylor v. Squier*, C.C.A. Wash., 143 F.2d 737, certiorari denied 65 S.Ct. 82, 323 U.S. 755, 89 L.Ed. 604—*Wipf v. King*, C.C.A. Mo., 131 F.

2d 33—*Isenberg v. Pescor*, D.C. Mo., 68 F.Supp. 584—*Bickel v. Hiatt*, D.C. Pa., 66 F.Supp. 748—*Pagliari v. Cox*, D.C. Mo., 54 F.Supp. 6, affirmed, C.C.A., 143 F.2d 900—*Gray v. Swope*, D.C. Wash., 28 F.Supp. 822.

25. U.S.—*Uryga v. Ragen*, C.A.III., 181 F.2d 660.

26. U.S.—*Powell v. Hunter*, C.A. Kan., 172 F.2d 330—*Gibson v. U. S.*, C.C.A. Mich., 161 F.2d 973—*Taylor v. Squier*, C.C.A. Wash., 143 F.2d 737, certiorari denied 65 S.Ct. 82, 323 U.S. 755, 89 L.Ed. 604—*Wipf v. King*, C.C.A. Mo., 131 F.2d 33—*Isenberg v. Pescor*, D.C. Mo., 68 F.Supp. 584—*Pagliari v. Cox*, D.C. Mo., 54 F.Supp. 6, affirmed, C.C.A., 143 F.2d 900—*Gray v. Swope*, D.C. Wash., 28 F.Supp. 822.

27. U.S.—*Carroll v. Squier*, C.C.A. Wash., 136 F.2d 571, certiorari denied 64 S.Ct. 202, 320 U.S. 793, 88 L.Ed. 478—*Douglas v. King*, C.C.A. Mo., 110 F.2d 911, 127 A.L.R. 1200—*Clark v. Surprenant*, C.C.A. Cal., 94 F.2d 969—*U. S. ex rel. Anderson v. Anderson*, C.C.A. Minn., 76 F.2d 375—*Lesser v. Humphries*, D.C. Pa., 89 F.Supp. 474—*Bickel v. Hiatt*, D.C. Pa., 66 F.Supp. 748.

D.C.—*Gould v. Green*, 141 F.2d 533, 78 U.S.App.D.C. 363—*King v. U. S.*, 98 F.2d 291, 69 App.D.C. 10—*Story v. Rives*, 97 F.2d 182, 68 App.D.C. 325, certiorari denied 69 S.Ct. 71, 305 U.S. 595, 83 L.Ed. 377.

Mo.—*Ex parte England*, 122 S.W.2d 890, 342 Mo. 915—*Ex parte Carney*, 122 S.W.2d 888, 343 Mo. 556.

His good behavior appearing, a prisoner is entitled as matter of right to specified credits of time allowed for good behavior.—*State ex rel. Neilson v. Harwood*, 194 S.W.2d 448, 183 Tenn. 567.

28. U.S.—*Estabrook v. King*, C.C.A. Mo., 119 F.2d 607—*Douglas v. King*, C.C.A. Mo., 110 F.2d 911, 127 A.L.R. 1200.

29. U.S.—*Aderhold v. Cooper*, C.C.A. Ga., 80 F.2d 259.

30. Tenn.—*Gilliam v. State*, 126 S.W.2d 305, 174 Tenn. 388.

31. S.C.—*Corpus Juris* cited in *Pittman v. Richardson*, 23 S.E.2d 17, 18, 201 S.C. 344, 50 C.J. p 348 note 35.

### Commutation of life sentence

(1) In general.—*State v. Wolfer*, 148 N.W. 896, 127 Minn. 102, L.R.A. 1915B 95.

(2) Where governor in exercise of his pardoning power commutes sentence of life prisoner to a shorter term, status of prisoner is automatically changed and prisoner is entitled to benefits under statute providing for deductions from sentence of prisoners other than life prisoners for good behavior.—*Pittman v. Richardson*, 23 S.E.2d 17, 201 S.C. 344.

32. S.C.—*Corpus Juris* cited in

thority granting the commutation intended that no allowance for good conduct should be made, such intention will be given effect.<sup>33</sup> So, a prisoner may not be entitled to a credit for good behavior where the commutation of his sentence is such that it shows that he has received the benefit of any such allowance.<sup>34</sup> A prisoner granted a conditional commutation of sentence has been held not entitled to a credit for good conduct after the grant of his commutation and before his return to prison on revocation thereof.<sup>35</sup>

**Suspended sentences.** Under a statute giving credit for good behavior at the end of a sentence, a prisoner, a portion of whose sentence has been suspended, is not entitled to such credit on completion of the unsuspended portion of the sentence.<sup>36</sup> Where a sentence of fine and imprisonment provides for its suspension after a certain period of time if the fine and costs are paid, such period may not be reduced by the statutory allowance for good behavior.<sup>37</sup>

*Pittman v. Richardson*, 23 S.E.2d 17, 18, 201 S.C. 344.  
50 C.J. p 348 note 36.

**33. S.C.—Corpus Juris** cited in *Pittman v. Richardson*, 23 S.E.2d 17, 18, 201 S.C. 344.  
50 C.J. p 348 note 37.

#### Allowance not made

(1) In general.—*Meyers v. Jackson*, 224 N.W. 356, 245 Mich. 692—50 C.J. p 348 note 37 [a], [b].

(2) Where governor commuted life sentence of prisoner to expire on a certain date, commutation disclosed intention that no allowance for good conduct should be made, and statute relating to diminution of sentence for good conduct had no application.—*Pittman v. Richardson*, 23 S.E.2d 17, 201 S.C. 344.

**34. Utah.**—*McCoy v. Harris*, 160 P. 2d 721, 108 Utah 407.

**35. U.S.**—*Lupo v. Zerst*, C.C.A.Ga., 92 F.2d 362, certiorari denied 58 S.Ct. 645, 303 U.S. 646, 82 L.Ed. 1108.

**36. S.C.**—*Moore v. Patterson*, 26 S.E.2d 319, 203 S.C. 90, 147 A.L.R. 653—*Nichols v. Patterson*, 25 S.E.2d 745, 202 S.C. 533—*Thompson v. Patterson*, 22 S.E.2d 590, 201 S.C. 221.

**37. Puerto Rico.**—*U. S. v. Velez*, 6 Puerto Rico F. 306.

**38. U.S.**—*Hiatt v. Compagna*, C.A.Ga., 178 F.2d 42, affirmed *Compagna v. Hiatt*, 71 S.Ct. 192.

**Certification of compensation earned**  
Prisoner who had served his en-

tire term as reduced by compensation was entitled to an order directing the warden and other members of the board of parole to certify to the governor the amount of compensation earned.—*People ex rel. Hammond v. Martin*, 27 N.Y.S.2d 683, 261 App.Div. 648.

**39. U.S.**—*U. S. ex rel. Foley v. Ragen*, D.C.Md., 52 F.Supp. 265, reversed on other grounds, C.C.A., 143 F.2d 774.

**40. U.S.**—*Costner v. U. S.*, C.A.N.C., 180 F.2d 892—*Fox v. Sanford*, C.C.A.Ga., 123 F.2d 334—*Bowers v. Dishong*, C.C.A.Fla., 103 F.2d 464—*Bickel v. Hiatt*, D.C.Pa., 66 F.Supp. 748—*Mac Aboy v. Klecka*, D.C.Md., 22 F.Supp. 960.  
D.C.—*King v. U. S.*, 98 F.2d 291, 69 App.D.C. 10—*Story v. Rives*, 97 F.2d 182, 68 App.D.C. 325—*Ex parte Gould*, D.C., 51 F.Supp. 354.

**Notwithstanding punishment is ameliorated**, the status of a prisoner while under conditional release is that of a prisoner on parole, and in legal effect is imprisonment, so that a prisoner's violation of the conditions of his release and his subsequent conviction and imprisonment interrupted service under original sentence and his status and rights were analogous to those of an escaped convict.—*U. S. ex rel. Nicholson v. Dillard*, C.C.A.Va., 102 F.2d 94.

**Ordinary and industrial good conduct covered**

The statute providing that prison-

#### d. Administrative Procedure

- (1) In general
- (2) Keeping record of prisoner

##### (1) In General

The legislature may provide the method whereby statutes authorizing allowances for good behavior may be administered, and, where an administrative agency makes regulations for the allowance of such credits pursuant to statute, such regulations are binding until changed.

The legislature may provide the method whereby statutes authorizing allowances for good behavior may be administered,<sup>38</sup> and, where an administrative agency makes regulations for the allowance of such credits pursuant to statute, such regulations are binding until changed.<sup>39</sup> Under some statutory provisions, a prisoner released because of good time allowances is treated as a parolee,<sup>40</sup> and is subject to all the provisions of law relating to parolees,<sup>41</sup> until the expiration of the maximum term or terms for which he was sentenced. By virtue of statute, such a prisoner may be placed under the jurisdiction of a parole board,<sup>42</sup> and what particu-

ers released with credit for good conduct are to be treated as on parole until expiration of maximum term is applicable to both statute relating to ordinary good time allowance and statute relating to industrial good time allowance.—*Bragg v. Huff*, C.C.A.Va., 118 F.2d 1006—*McNulty v. Humphrey*, D.C.Pa., 90 F.Supp. 383—*Waycaster v. Hiatt*, D.C.Pa., 50 F.Supp. 414—*Holland v. Hiatt*, D.C.Pa., 50 F.Supp. 406.

**41. U.S.**—*McNulty v. Humphrey*, D.C.Pa., 90 F.Supp. 383—*Bickel v. Hiatt*, D.C.Pa., 66 F.Supp. 748—*Mac Aboy v. Klecka*, D.C.Md., 22 F.Supp. 960.  
D.C.—*Story v. Rives*, 97 F.2d 182, 68 App.D.C. 325, certiorari denied 59 S.Ct. 71, 305 U.S. 595, 83 L.Ed. 377—*Ex parte Gould*, D.C., 51 F.Supp. 354.

**42. U.S.**—*U. S. ex rel. Jacobs v. Barc*, C.C.A.Mich., 141 F.2d 480, certiorari denied 64 S.Ct. 1262, 322 U.S. 751, 88 L.Ed. 1581—*Fox v. Sanford*, C.C.A.Ga., 123 F.2d 334—*Bowers v. Dishong*, C.C.A.Fla., 103 F.2d 464—*Zerst v. Kidwell*, C.C.A.Ga., 92 F.2d 766, reversed on other grounds 58 S.Ct. 872, 304 U.S. 359, 82 L.Ed. 1399, 116 A.L.R. 808.

D.C.—*In re Reed*, 158 F.2d 323, 81 U.S.App.D.C. 310—*Gould v. Green*, 141 F.2d 533, 78 U.S.App.D.C. 363—*Story v. Rives*, 97 F.2d 182, 68 App.D.C. 325, certiorari denied 59 S.Ct. 71, 305 U.S. 595, 83 L.Ed. 377.  
N.Y.—*Handler v. Hunt*, 14 N.Y.S.2d 839, 258 App.Div. 772.

lar board has jurisdiction depends on the provisions in force at the time.<sup>43</sup> Under such a statute, a prisoner becomes a ward of the designated board automatically on his release,<sup>44</sup> and the board may be given power to impose conditions on the release of such prisoners.<sup>45</sup>

## (2) Keeping Record of Prisoner

Where a statute makes it the duty of the jailer to keep a correct register of each prisoner showing the good time with which he is entitled to be credited, and such record is not kept, it may not be supplied by parole evidence; but in such case it may be presumed that the prisoner's conduct was unexceptionable, so as to entitle him to the full benefit of the good time credits which he would have earned by such conduct.

Where a statute makes it the duty of the jailer to keep a correct register of each prisoner, showing the good time with which he is entitled to be credited, and such a record is not kept, it may not be supplied by parole evidence;<sup>46</sup> but in such case it may be presumed that the prisoner's conduct was unexceptionable, so as to entitle him to the full benefit of the good time credits which he would

have earned by such conduct.<sup>47</sup> If the record is properly kept it may be sustained and corroborated by parole evidence;<sup>48</sup> and, on behalf of the prisoner, it may be contradicted by such evidence if it is untrue.<sup>49</sup> Where such a record is kept, the prisoner is entitled to full credit for good time from the date of the last entry showing misconduct.<sup>50</sup>

## e. Computation of Allowance

- (1) In general
- (2) Under cumulative and concurrent sentences

### (1) In General

The language of the statute must be followed in determining how the term of the sentence and the deduction for good time are to be computed; and, where the statute is capable of two constructions, that construction should be adopted which would entitle a prisoner to his discharge at the earliest time.

The language of the statute must be followed in determining how the term of the sentence and the deduction for good time is to be computed.<sup>51</sup>

43. D.C.—*Ex parte Gould*, D.C., 51 F.Supp. 354.

Statute construed

D.C.—*Ex parte Gould*, supra.

44. D.C.—*Story v. Rives*, 97 F.2d 182, 68 App.D.C. 325, certiorari denied 59 S.Ct. 71, 305 U.S. 595, 83 L.Ed. 377.

45. U.S.—*Costner v. U. S.*, C.A.N.C., 180 F.2d 892.

D.C.—*In re Reed*, 158 F.2d 323, 81 U.S.App.D.C. 310—*Gould v. Green*, 141 F.2d 533, 78 U.S.App.D.C. 363 —*Ex parte Gould*, D.C., 51 F.Supp. 354.

46. Tenn.—*State v. McClelland*, 9 S.W. 233, 87 Tenn. 52.

47. Tenn.—*Gilliam v. State*, 126 S.W.2d 305, 174 Tenn. 388—*State v. McClelland*, 9 S.W. 233, 87 Tenn. 52.

48. Tenn.—*State v. McClelland*, supra.

49. Tenn.—*State v. McClelland*, supra.

50. Tenn.—*State v. McClelland*, supra.

51. U.S.—*Bickel v. Hiatt*, D.C.Pa., 66 F.Supp. 748—*Kastel v. Fish*, D.C.Md., 36 F.Supp. 700.

Ariz.—*Beatty v. Shute*, 95 P.2d 563, 54 Ariz. 339.

Cal.—*In re Cowen*, 166 P.2d 279, 27 Cal.2d 637, certiorari denied 67 S.Ct. 43, 329 U.S. 742, 91 L.Ed. 640 —*Ex parte Eyre*, 36 P.2d 842, 1 Cal.App. 451.

D.C.—*Story v. Rives*, 97 F.2d 182, 68 App.D.C. 325, certiorari denied 59 S.Ct. 71, 305 U.S. 595, 83 L.Ed. 377.

Fla.—*Brown v. Mayo*, 23 So.2d 273,

156 Fla. 144, certiorari dismissed 66 S.Ct. 815, 327 U.S. 768, 90 L.Ed. 998—*Finch v. Mayo*, 189 So. 27, 137 Fla. 762.

Mo.—*Ex parte Simpson*, 300 S.W. 491.

N.Y.—*Pizza v. Lyons*, 87 N.Y.S.2d 642, 275 App.Div. 747, appeal dismissed 87 N.E.2d 62, 229 N.Y. 672 —*People ex rel. Stein v. Jackson*, 48 N.Y.S.2d 599, 268 App.Div. 812 —*Keenan v. Martin*, 38 N.Y.S.2d 710, 265 App.Div. 981, affirmed 50 N.E.2d 1018, 291 N.Y. 632—*Zaloom v. Martin*, 35 N.Y.S.2d 139, 264 App.Div. 19—*Golden v. Martin*, 34 N.Y.S.2d 975, 264 App.Div. 811—*People ex rel. Le Pore v. Martin*, 30 N.Y.S.2d 859, 263 App.Div. 764—*People ex rel. Hammond v. Martin*, 27 N.Y.S.2d 683, 261 App.Div. 648—*People ex rel. Kleinger v. Wilson*, 5 N.Y.S.2d 934, 254 App.Div. 408—*People ex rel. Labicki v. Brophy*, 294 N.Y.S. 855, 250 App.Div. 831—*O'Neil v. Thayer*, 282 N.Y.S. 584, 245 App.Div. 349, affirmed 200 N.E. 299, 270 N.Y. 521—*People ex rel. Ascher v. Lawes*, 276 N.Y.S. 322, 243 App.Div. 578—*People ex rel. Mason v. Brophy*, 257 N.Y.S. 165, 235 App.Div. 432—*Latham v. Brophy*, 293 N.Y.S. 762, 162 Misc. 107—*Ryan v. Lawes*, 278 N.Y.S. 608, 154 Misc. 572—*People ex rel. De Maggio v. Bates*, 36 N.Y.S.2d 64—*People v. Carbonari*, 32 N.Y.S.2d 933—*Bitz v. Canavan*, 11 N.Y.S.2d 991, reversed on other grounds, 12 N.Y.S.2d 862, 257 App.Div. 247, affirmed 23 N.E.2d 536, 281 N.Y. 699.

Tex.—*Ex parte Sanderson*, 212 S.W.

2d 639, 152 Tex.Cr. 180—*Ex parte Anderson*, 192 S.W.2d 280, 149 Tex.Cr. 139—*Ex parte Neisler*, 69 S.W.2d 422, 126 Tex.Cr. 26.

50 C.J. p 349 note 56.

### Time spent in penitentiary or prison

(1) Under some statutory provisions good conduct deductions from prisoner's sentence may be granted only for time he was incarcerated in penitentiary or prison.

U.S.—*Aderhold v. Ellis*, C.C.A.Ga., 84 F.2d 543, certiorari denied *Ellis v. Aderhold*, 57 S.Ct. 123, 299 U.S. 587, 81 L.Ed. 435—*U. S. ex rel. Capone v. Lloyd*, D.C.Cal., 27 F.Supp. 265. N.Y.—*O'Neil v. Thayer*, 282 N.Y.S. 584, 245 App.Div. 349, affirmed 200 N.E. 299, 270 N.Y. 521. Tex.—*Ex parte Neisler*, 69 S.W.2d 422, 126 Tex.Cr. 26.

(2) So under such a statute prisoner is not entitled to statutory deduction from sentence for good conduct until he reaches penitentiary and is confined therein in execution of his sentence.—*Swope v. Lawton*, C.C.A.Wash., 83 F.2d 814.

(3) Also, these deductions may not be granted, under such a statute, for time spent by prisoner while he was incarcerated in county jail pending appeal from judgment sentencing him to penitentiary, notwithstanding order of district court that sentence should date from time when defendant was first committed to county jail.—*Aderhold v. Ellis*, C.C.A.Ga., 84 F.2d 543, certiorari denied *Ellis v. Aderhold*, 57 S.Ct. 123, 299 U.S. 587, 81 L.Ed. 433.



Where the statute is capable of two constructions, that construction should be adopted which would entitle the prisoner to his discharge at the earliest time.<sup>52</sup>

The operation and effect of an enactment making changes with respect to the computation of good time deductions depend on the intent of the legislature as gathered from the language used.<sup>53</sup> So, by virtue of provisions to that effect, a statutory amendment may not apply to one who has committed a crime prior to such amendment, or to one who was received in prison prior to a specified date, and the law in existence prior to the amendment may continue to apply as to such persons;<sup>54</sup> and, where the amendment so provides, a prisoner's time credits should be calculated under the statute as amended since he entered prison.<sup>55</sup>

A statute relative to the computation of good time allowances expressly providing that any rights or liabilities in existence at the time of its enactment shall not be affected thereby does not operate retroactively,<sup>56</sup> and, where such a statute directs that good conduct time be credited as earned and computed monthly, it is prospective only and does not affect a case within the provisions of an earlier statute.<sup>57</sup> Under a statute providing that a prisoner may earn allowances for good conduct from the time of its taking effect, a prisoner is entitled to credits only for good conduct earned after the statute took effect.<sup>58</sup>

Under some statutes, a prisoner is entitled to credit for good behavior as and when he earns it,<sup>59</sup> and, where the statute so provides, good behavior time should be credited at the end of each year as it is earned.<sup>60</sup> Under statutes whereby the credits are to be allowed on a yearly basis, they should be made during the year in which they are earned,<sup>61</sup> or should be computed on the whole term and accordingly deducted therefrom.<sup>62</sup> Where the statute allows a specified credit for good behavior for each full or calendar month's service, the credits should be computed on the number of months' actual imprisonment with the requisite behavior.<sup>63</sup> Under some statutory provisions, a prisoner's good time credit is allowed at the end of his term of imprisonment, when and if its allowance, together with the time served, will entitle him to his discharge, the sentence thus having been served in full.<sup>64</sup>

The credits allowed for good behavior and those allowed for time spent outside the prison walls by a prisoner as trustee are cumulative and not concurrent under some statutes,<sup>65</sup> and the credits for good behavior should be used finally when such credits, together with the credit earned as trusty, added to the time already served, equal the maximum sentence,<sup>66</sup> but the credit allowed for good behavior is based on the time actually served and not on the extra time allowed for time spent by the prisoner as a trusty.<sup>67</sup> A prisoner has been

(4) Where benefits of statute are extended only to prisoners actually confined in state penitentiary, prisoner is not entitled to credit for commutation time on the basis of his federal imprisonment.—*Ex parte Baird*, Tex. Cr., 228 S.W.2d 511.

52. Colo.—*In re Blocker*, 193 P. 546, 69 Colo. 259.

53. N.Y.—*O'Neil v. Thayer*, 282 N.Y.S. 584, 245 App.Div. 349, affirmed 200 N.E. 299, 270 N.Y. 521.

54. N.Y.—*Palermo v. Wilson*, 282 N.Y.S. 588, 245 App.Div. 372.—*O'Neil v. Thayer*, 282 N.Y.S. 584, 245 App.Div. 349, affirmed 200 N.E. 299, 270 N.Y. 521.—*Latham v. Brophy*, 293 N.Y.S. 762, 162 Misc. 107.

55. Cal.—*Ex parte Albori*, 21 P.2d 423, 218 Cal. 34.

56. U.S.—*Hiatt v. Hilliard*, C.A.Ga., 180 F.2d 453.

57. U.S.—*McKinney v. Clemmer*, D.C.Va., 84 F.Supp. 798.

#### Under earlier statute

(1) A prisoner was credited conditionally and in advance with the whole of his good conduct time subject to withdrawal thereof for mis-

conduct.—*McKinney v. Clemmer*, supra.

(2) The credit for good time for good conduct allowed a prisoner did not accrue until such credit was completely earned.—*Grant v. Hunter*, C.C.A.Kan., 166 F.2d 673.—*U. S. ex rel. Hurwitz v. Alexander*, C.C.A.Conn., 150 F.2d 1013, certiorari dismissed 66 S.Ct. 527, 327 U.S. 764, 90 L.Ed. 995.

(3) Where relator had been sentenced to imprisonment for certain period and thereafter an order was entered vacating sentence previously imposed and sentencing relator to imprisonment for another period, the term to "commence as of today," a credit on original sentence for good conduct could not be applied to the new sentence in reduction of it.—*U. S. ex rel. Hurwitz v. Alexander*, supra.

58. N.Y.—*People v. Carter*, 171 N.Y.S. 945, 103 Misc. 596, affirmed 172 N.Y.S. 913, 186 App.Div. 905.

59. Fla.—*Brown v. Mayo*, 23 So.2d 273, 156 Fla. 144, certiorari dismissed 66 S.Ct. 815, 327 U.S. 768, 90 L.Ed. 998.

In other words, gained time as

earned by good behavior is to be deducted from latter part of sentence.—*Brown v. Mayo*, supra.

60. Ariz.—*Rupp v. Walker*, 154 P.2d 371, 62 Ariz. 101.—*Beatty v. Shute*, 95 P.2d 563, 54 Ariz. 339.

61. Colo.—*In re Blocker*, 193 P. 546, 69 Colo. 259.

62. C.J. p 349 note 59.

63. Neb.—*In re Fuller*, 52 N.W. 577, 34 Neb. 581.

64. C.J. p 349 note 60.

65. Kan.—*In re Kness*, 50 P. 939, 58 Kan. 705.

66. C.J. p 349 note 62.

67. U.S.—*Uryga v. Ragen*, C.A.Ill., 181 F.2d 660.

68. Ariz.—*Rupp v. Walker*, 154 P.2d 371, 62 Ariz. 101.—*Beatty v. Shute*, 95 P.2d 563, 54 Ariz. 339.

69. Ariz.—*Rupp v. Walker*, 154 P.2d 371, 62 Ariz. 101.—*Beatty v. Shute*, 95 P.2d 563, 54 Ariz. 339.

70. Ariz.—*Beatty v. Shute*, 95 P.2d 563, 54 Ariz. 339.

#### Discharge not warranted

A prisoner was not entitled to his discharge where extra time earned by him under statute providing that each day spent by prisoners while

held not entitled to a good time credit for the time he was at liberty under an erroneous discharge on a writ of habeas corpus procured by him,<sup>68</sup> and, under some statutory provisions, a prisoner conditionally released after serving the maximum sentence, less good conduct allowances, and thereafter returned to custody for violating the conditions of his release, has been required to serve the remainder of the original sentence without deducting the time he was out on release.<sup>69</sup>

*Under indeterminate sentence.* In the absence of a statute otherwise providing, where a prisoner is serving under an indeterminate sentence, the rule is that the allowance for good time must be deducted from the maximum time fixed,<sup>70</sup> and not from the minimum time.<sup>71</sup> However, it has also been held that compensation for good behavior should be deducted from the minimum rather than the maximum sentence,<sup>72</sup> and that, where an indeterminate sentence is valid only for the minimum term, the allowance should be computed for that term.<sup>73</sup>

*Commuted sentence.* Where a life sentence is commuted to one for a term of years, the diminution of the sentence for good conduct commences on the date of the prisoner's arrival in prison, according to one view,<sup>74</sup> but according to another view, only from the date of the commutation.<sup>75</sup>

## (2) Under Cumulative and Concurrent Sentences

Where a prisoner is serving under two or more sen-

tences which do not run concurrently, the question whether the allowance for good time should be computed separately on each term, or should be made as if the several sentences were for a single, continuous term of confinement consisting of an aggregate of such sentences, depends on statutory provisions; under some statutory provisions, where a prisoner is serving under two or more sentences concurrently, such sentences may not be aggregated for the purpose of computing the amount of good time allowance.

Under some statutes, where a prisoner is serving under two or more sentences which do not run concurrently, the allowance for good time should be computed separately on each term.<sup>76</sup> However, under other statutes the allowance for good time should be computed as if the several sentences were for a single, continuous term of confinement consisting of an aggregate of such sentences, rather than a series of distinct and independent terms,<sup>77</sup> and, under some statutory provisions, where sentence is imposed at one time for two or more separate offenses and a maximum and minimum period of confinement are fixed on the first sentence and only a maximum on the others, the terms of imprisonment are to be regarded as one continuous term in determining the diminution of sentence by good conduct earned.<sup>78</sup>

A statute providing that the aggregate of a prisoner's several sentences shall be the basis on which his good time credit shall be computed has been held applicable only to cases where sentences are being served while a prisoner is being confined in a penitentiary.<sup>79</sup> Moreover, such a statute has

working as trustees outside the prison walls should be counted as two days in computing time on their sentences, plus the good conduct time earned by him under statute authorizing deduction from sentence for good behavior, added to actual time of incarceration, did not amount to his maximum sentence.—*Beatty v. Shute*, supra.

68. U.S.—*McDonald v. Humphrey*, C.C.A.Minn., 168 F.2d 519—*Hunter v. McDonald*, C.C.A.Kan., 159 F.2d 861, certiorari denied 67 S.Ct. 1735, 331 U.S. 853, 91 L.Ed. 1861.

69. U.S.—*Chandler v. Johnston*, C.C.A.Cal., 133 F.2d 139.

### Statute held valid

U.S.—*Chandler v. Johnston*, supra.  
D.C.—*Story v. Rives*, 97 F.2d 182, 68 App.D.C. 325, certiorari denied 59 S.Ct. 71, 305 U.S. 595, 83 L.Ed. 377.

70. Ariz.—*Clark v. State*, 204 P. 1032, 23 Ariz. 470.  
50 C.J. p 350 note 72.

71. Ariz.—*Orme v. Rogers*, 260 P. 199, 32 Ariz. 502.

72. N.Y.—*People ex rel. Kohlepp v. McGee*, 8 N.Y.S.2d 726, reversed on

other grounds 11 N.Y.S.2d 755, 256 App.Div. 792, appeal dismissed 26 N.E.2d 809, 282 N.Y. 677.

73. Ky.—*Smith v. Bastin*, 232 S.W. 415, 192 Ky. 164.

74. Minn.—*State v. Wolfer*, 148 N. W. 896, 127 Minn. 102, L.R.A.1915B 95.

75. N.C.—*In re McMahon*, 34 S.E. 193, 125 N.C. 38.

76. Ala.—*State Board of Administration v. Jones*, 102 So. 626, 212 Ala. 380.  
50 C.J. p 350 note 66.

77. U.S.—*Wilson v. Hunter*, C.A.Kan., 180 F.2d 456—U. S. ex rel. *Johnson v. O'Donovan*, C.A.Ill., 178 F.2d 810—*Grant v. Hunter*, C.C.A.Kan., 166 F.2d 673—*Gibson v. U. S.*, C.C.A.Mich., 161 F.2d 973—*Youst v. U. S.*, C.C.A.Fla., 151 F.2d 666—*Mills v. Aderhold*, C.C.A.Kan., 110 F.2d 765—*Eori v. Aderhold*, C.C.A.Ga., 53 F.2d 840—*Mouse v. U. S.*, D.C.Kan., 14 F.2d 202—*Bickel v. Hiatt*, D.C.Pa., 66 F.Supp. 748—*Sweetney v. Johnston*, D.C.Cal., 50 F.Supp. 326.

Cal.—*In re Cowen*, 166 P.2d 279, 27

Cal.2d 637, certiorari denied 67 S. Ct. 43, 329 U.S. 742, 91 L.Ed. 640—*Ex parte Albori*, 21 P.2d 423, 218 Cal. 34.

D.C.—*King v. U. S.*, 98 F.2d 291, 69 App.D.C. 10.  
50 C.J. p 350 note 67.

### Invalid rule

A rule entitled "Record Clerk's Manual of the Bureau of Prisons of the Department of Justice" was without legal authority in computing deductions to be made from a prisoner's sentence, where it was contrary to the clear language of the statute providing that, when a prisoner has two or more sentences, the aggregate thereof shall be the basis of his deductions.—*Sweetney v. Johnston*, D.C.Cal., 50 F.Supp. 326.

78. Conn.—*Moulthrop v. Walker*, 26 A.2d 789, 129 Conn. 164.

79. U.S.—*Fitzgerald v. Sanford*, D. C.Ga., 55 F.Supp. 1002, affirmed, C. C.A., 145 F.2d 228, certiorari denied 65 S.Ct. 311, 323 U.S. 806, 89 L.Ed. 643, certiorari denied 65 S. Ct. 911, 324 U.S. 869, 89 L.Ed. 1424.  
Statute held inapplicable to sen-

been held to refer to sentences which are in existence at the same time,<sup>80</sup> and not to a case where a sentence is imposed on one who makes an escape from a sentence which he is already serving,<sup>81</sup> in which event deductions may be calculated at the rate applicable to the sentence imposed for escape and not on the aggregate of the sentence being served and the sentence for escape.<sup>82</sup> Under such a statute, the deductions to which a prisoner may be entitled are based on the maximum period of confinement under the sentences which he is serving.<sup>83</sup> It has also been held that, where a prisoner, in addition to his original sentence, is sentenced for escape, the maximum release date is at the expiration of the total of the two sentences.<sup>84</sup>

**Under concurrent sentences.** Under some statutory provisions only consecutive sentences may be aggregated for the purpose of determining the amount of good time allowance, and, where a prisoner is serving two or more sentences concurrently, such sentences may not be aggregated for such purpose.<sup>85</sup> Moreover, under some statutes, where a prisoner is serving two or more sentences concurrently, he is not entitled to have the allowance for good conduct calculated as on each of the sentences, and have the total thus obtained deducted from the longest sentence.<sup>86</sup>

#### f. Effect of Subsequent Conviction

By virtue of statute, prisoners who have served previous terms may not be allowed good time, or may be allowed less good time than prisoners serving a first term, and prisoners who have had the benefit of a good-conduct allowance may be required to serve out such time on a subsequent conviction.

tence served on parole.—Fitzgerald v. Sanford, *supra*.

80. D.C.—King v. U. S., 98 F.2d 291, 69 App.D.C. 10.

#### Time served under void sentence

Under statute governing deductions from sentences for good conduct, prisoner may not claim or earn as a deduction from a valid sentence a good-time allowance as respects time previously served under a void sentence.—King v. U. S., *supra*.

81. U.S.—Lyons v. Squier, D.C. Wash., 54 F.Supp. 557.

82. U.S.—Aderhold v. Hudson, C.C. A.Ga., 84 F.2d 559.

83. U.S.—Ware v. Hill, D.C.Pa., 28 F.Supp. 346.

84. U.S.—Bickel v. Hiatt, D.C.Pa., 66 F.Supp. 748.

#### Violation of conditional release

Prisoner, who was serving an original term and an added term for escape, on leaving penitentiary, accept-

ed conditional release for whatever period remained to be served of maximum of total of two sentences and having violated the conditions of release within period thereof was required to serve unexpired term of his imprisonment when returned to custody of attorney general on execution of the violator warrant.—Bickel v. Hiatt, *supra*.

85. U.S.—Wilson v. Hunter, C.A. Kan., 180 F.2d 456—Ware v. Hill, D.C.Pa., 28 F.Supp. 346.

86. Ga.—Chattahoochee Brick Co. v. Goings, 69 S.E. 865, 135 Ga. 529, Ann.Cas.1912A 263.

87. N.J.—In re O'Connor, 32 A.2d 361, 130 N.J.Law 194.

50 C.J. p 349 note 50.

88. N.J.—In re O'Connor, *supra*.

The legislative policy has been to give the state board of control of institutions and agencies wide latitude in administering penal institutions, without laying down hard-and-fast rules of procedure as to com-

Under some statutory provisions, prisoners who have served previous terms are not allowed good time.<sup>87</sup> Under such a statute, no hard-and-fast rules need be followed in ascertaining whether a prisoner is a multiple offender,<sup>88</sup> and a refusal to allow a prisoner an opportunity to be heard as to former offenses is not a violation of his constitutional rights.<sup>89</sup> Moreover, under such a statute, a multiple offender is not entitled to a commutation of sentence for good behavior on the ground that his previous convictions were not alleged in the indictment or proved on the trial.<sup>90</sup> Under other statutes prisoners who have served previous terms are allowed less good time than prisoners serving a first term.<sup>91</sup>

Prisoners who have had the benefit of a good-conduct allowance, may, by virtue of statute, be required to serve out such time on a subsequent conviction,<sup>92</sup> or on a conviction for felony before the expiration of the period within which they were originally sentenced,<sup>93</sup> in which case the time so required to be served does not run concurrently with that to be served under the second conviction.<sup>94</sup> Under some statutes good-conduct allowances depend on the aggregate of the sentences in existence when such allowances are earned and may not be affected retroactively by a sentence subsequently imposed,<sup>95</sup> and even though there is continuous custody of the prisoner a subsequent imprisonment under a later sentence has its own separate basis for good-time computation.<sup>96</sup>

#### g. Enforcement of Right

A prisoner entitled to his discharge by reason of having served his term of imprisonment, less the time

mutation of sentences for ascertaining whether a prisoner is a multiple offender.—In re O'Connor, *supra*.

89. N.J.—In re O'Connor, *supra*.

90. N.J.—In re O'Connor, *supra*.

91. Mich.—In re Canfield, 57 N.W. 807, 98 Mich. 644.

50 C.J. p 349 note 51.

92. N.J.—In re O'Connor, 32 A.2d 361, 130 N.J.Law 194.

50 C.J. p 349 note 52.

93. Pa.—In re Commutation of Sentences, 22 Pa.Dist. 206.

50 C.J. p 349 note 53.

94. Pa.—Commonwealth v. Warden Eastern Penitentiary, 24 Pa.Dist. 339—Wycoff's Case, 42 Pa.Co. 223.

95. U.S.—Fitzgerald v. Sanford, C. C.A.Ga., 145 F.2d 228, certiorari denied 65 S.Ct. 311, 323 U.S. 806, 89 L.Ed. 643, certiorari denied 65 S.Ct. 911, 324 U.S. 869, 89 L.Ed. 1424.

96. U.S.—Fitzgerald v. Sanford, *supra*.

which he has earned by good behavior, may secure it in a legal proceeding, but he must make a proper showing that he is entitled to the relief asked for.

A prisoner entitled to his discharge by reason of having served his term of imprisonment, less the time which he has earned by good behavior, may secure it in a legal proceeding,<sup>97</sup> as in a case where no forfeiture of good-time credit has been declared until the prisoner has served for such length of time that, with the diminution of sentence provided for, he is entitled to his discharge,<sup>98</sup> but he must make a proper showing that he is entitled to the relief asked for.<sup>99</sup>

#### h. Forfeiture of Right

##### (1) In general

##### (2) Proceedings; hearing and notice

##### (1) In General

The misconduct of a prisoner may result in the forfeiture, in whole or in part, of his right to a reduction of sentence for good conduct.

The misconduct of a prisoner may result in the forfeiture, in whole or in part, of his right to a

reduction of sentence for good conduct;<sup>1</sup> and this forfeiture may be regulated by statute.<sup>2</sup> A statute revising earlier statutes relative to the forfeiture of good-time allowance and expressly providing that any rights or liabilities in existence at the time of its enactment shall not be affected thereby does not operate retroactively.<sup>3</sup> Thus the enactment of such a revisory statute does not modify a prior forfeiture of a prisoner's entire good-time credit for misconduct,<sup>4</sup> so that where, under the earlier statutory provisions, a prisoner's entire good-time credit might be forfeited by reason of his misconduct, subject only to the right of the attorney general to restore all or any part of it,<sup>5</sup> a prisoner's misconduct prior to the date of the revision works a forfeiture of all good-time credit earnable by him up to the date of the revision, subject only to the right of the attorney general to restore such credit.<sup>6</sup>

Statutory provisions control as to the official who has the authority to forfeit a prisoner's good-time allowance,<sup>7</sup> and, under some statutory provisions, whether or not there shall be a forfeiture of a

97. Iowa.—State v. Hunter, 100 N. W. 510, 124 Iowa 569, 104 Am.S.R. 361.

98. Iowa.—State v. Hunter, supra. 50 C.J. p 348 note 42.

99. Ky.—Smith v. Bastin, 232 S.W. 415, 192 Ky. 164.

1. U.S.—U. S. ex rel. Jacobs v. Barc, C.C.A.Mich., 141 F.2d 480, certiorari denied 64 S.Ct. 1262, 322 U.S. 751, 88 L.Ed. 1581—Aderhold v. Perry, C.C.A.Ga., 59 F.2d 379. Conn.—Moulthrop v. Walker, 26 A.2d 789, 129 Conn. 164.

Tex.—Corpus Juris cited in Ex parte Sanderson, 212 S.W.2d 639, 642, 152 Tex.Cr. 180. 50 C.J. p 348 note 39.

2. U.S.—Uryga v. Ragen, C.A.Ill., 181 F.2d 660—Powell v. Hunter, C.A.Kan., 172 F.2d 330—U. S. ex rel. Jacobs v. Barc, C.C.A.Mich., 141 F.2d 480, certiorari denied 64 S.Ct. 1262, 322 U.S. 751, 88 L.Ed. 1581—Aderhold v. Perry, C.C.A.Ga., 59 F.2d 379—McNulty v. Humphrey, D.C.Pa., 90 F.Supp. 383—Bickel v. Hiatt, D.C.Pa., 66 F.Supp. 748.

Cal.—Ex parte Soldavini, 149 P.2d 193, 64 Cal.App.2d 677.

D.C.—King v. U. S., 98 F.2d 291, 69 App.D.C. 10.

Fla.—Brown v. Mayo, 23 So.2d 273, 156 Fla. 144, certiorari dismissed 66 S.Ct. 815, 327 U.S. 768, 90 L.Ed. 998.

Tex.—Ex parte Boyd, 212 S.W.2d 156, 153 Tex.Cr. 164.

50 C.J. p 348 note 40.

In determining forfeiture of good

time earned, under some statutory provisions, where sentence is imposed at one time for two or more separate offenses and a maximum and minimum period of confinement fixed on the first and only a maximum period fixed on the others, the terms of imprisonment are to be regarded as one continuous term.—Moulthrop v. Walker, 26 A.2d 789, 129 Conn. 164.

#### Conduct after expiration of reduced term

Under some statutory provisions, once a prisoner has been allowed credit for good behavior and by reason thereof his reduced term has expired, his term, as not reduced, may not thereafter be revived by a forfeiture.—In re Cowen, 166 P.2d 279, 27 Cal.2d 637, certiorari denied 67 S.Ct. 43, 329 U.S. 742, 91 L.Ed. 640—Ex parte Shull, 146 P.2d 417, 23 Cal.2d 745.

3. U.S.—Hiatt v. Hilliard, C.A.Ga., 180 F.2d 453.

4. U.S.—McKinney v. Clemmer, D.C.Va., 84 F.Supp. 798.

5. U.S.—Chandler v. Johnston, C.C.A.Cal., 133 F.2d 139—Aderhold v. Hudson, C.C.A.Ga., 84 F.2d 559—Carroll v. Zerbst, C.C.A.Kan., 76 F.2d 961—Aderhold v. Perry, C.C.A.Ga., 59 F.2d 379—Gray v. Swope, D.C.Wash., 28 F.Supp. 822.

#### Prisoner as ward of court

All possible deduction for good time accredited to a prisoner serving consecutive sentences is destroyed by bad conduct even though such conduct occurs after one or

more of the successive sentences has been served, and a prisoner serving consecutive sentences remained a ward of the court when he was conditionally released after serving his sentences less good-time deduction, and, when he breached terms of his conditional release, he was subject to return to penitentiary to serve full remaining portion of term of his sentences without credit for allowance of any good time, notwithstanding breach occurred after first sentence had been served.—Grant v. Hunter, C.C.A.Kan., 166 F.2d 673.

#### Escaped prisoner

Where accused was imprisoned in penitentiary under two consecutive sentences, and escaped while serving the first sentence, accused forfeited not only the allowance for good behavior to which he was entitled when he escaped, but all credits for good behavior during first term.—Gray v. Swope, D.C.Wash., 28 F.Supp. 822.

Ordinary and industrial good-time allowances held lost.—Waycaster v. Hiatt, D.C.Pa., 50 F.Supp. 414—Holland v. Hiatt, D.C.Pa., 50 F.Supp. 406.

6. U.S.—McKinney v. Clemmer, D.C.Va., 84 F.Supp. 798.

7. U.S.—Pagliaro v. Cox, C.C.A.Mo., 143 F.2d 900.

Warden of federal penitentiary could forfeit prisoner's good-time allowance on ground of escape effected before prisoner's delivery to the penitentiary, but after delivery to United States Marshal, and where prisoner escaped while en route to

prisoner's good time is a matter within the discretion of the designated authorities,<sup>8</sup> and the decision of an authorized board in this respect ordinarily should not be interfered with<sup>9</sup> unless it clearly appears that such board exceeded its powers<sup>10</sup> or that substantial injustice has been done,<sup>11</sup> although, in declaring a forfeiture, an official may not act in an arbitrary manner.<sup>12</sup>

Under some statutory provisions a good-time allowance may be forfeited and taken away from a prisoner for good cause,<sup>13</sup> as where he fails faithfully to observe the rules within the meaning of the statute,<sup>14</sup> or in the event of an escape,<sup>15</sup> although, under some statutes forfeiture of good time in the event of an escape is not mandatory.<sup>16</sup>

## (2) Proceedings; Hearing and Notice

### Proceedings for the forfeiture of a prisoner's allow-

penitentiary which attorney general had designated as place for prisoner's confinement after conviction, and, after prisoner was apprehended, attorney general changed designation to another penitentiary, warden of latter penitentiary could forfeit prisoner's good-time allowance because of such escape.—*Pagliari v. Cox*, C.C.A.Mo., 143 F.2d 900.

8. Okl.—*Ex parte Farve*, 79 P.2d 1034, 64 Okl.Cr. 326.

The prison authorities, and not the court, determine whether a prisoner is guilty of such an infraction as will forfeit his right to be credited with a good-time allowance.—*Ex parte Rody*, 152 S.W.2d 657, 348 Mo. 1.

9. Cal.—*Ex parte Taylor*, 13 P.2d 906, 216 Cal. 113.

10. Cal.—*Ex parte Taylor*, supra.

11. Cal.—*Ex parte Taylor*, supra.

12. U.S.—*U. S. ex rel. Lashbrook v. Sullivan*, D.C.Ill., 55 F.Supp. 548.

13. U.S.—*Brown v. Pescor*, D.C.Mo., 74 F.Supp. 549.

### Criminal act unnecessary

Existence or forfeiture of good-time allowance is not dependent on whether prisoner's misconduct also may be a criminal act.—*Pagliari v. Cox*, C.C.A.Mo., 143 F.2d 900.

### Sufficient cause held shown

U.S.—*Uryga v. Ragen*, C.A.Ill., 181 F.2d 660.

D.C.—*Story v. Rives*, 97 F.2d 182, 68 App.D.C. 325, certiorari denied 59 S.Ct. 71, 305 U.S. 595, 83 L.Ed. 377.

14. U.S.—*Uryga v. Ragen*, C.A.Ill., 181 F.2d 660—*Powell v. Hunter*, C.A.Kan., 172 F.2d 330—*Pagliari v. Cox*, D.C.Mo., 54 F.Supp. 6, affirmed, C.C.A., 143 F.2d 900.

Cal.—*Ex parte Taylor*, 13 P.2d 906, 216 Cal. 113—*In re Tobin*, 20 P.2d 91, 130 Cal.App. 371.

Tex.—*Ex parte Boyd*, 212 S.W.2d 156, 152 Tex.Cr. 164.  
50 C.J. p 348 note 41.

15. U.S.—*Carroll v. Zerst*, C.C.A. Kan., 76 F.2d 961—*Bickel v. Hiatt*, D.C.Pa., 66 F.Supp. 748.

Tex.—*Ex parte Sanderson*, 212 S.W. 2d 639, 152 Tex.Cr. 180.

### As misconduct or breach of law

(1) Prisoner who escapes from prison and thereafter makes another attempt to escape demeans himself improperly as well as violates a statute, and commissioner is authorized to deduct from prisoner's good-time allowance for such misconduct notwithstanding no criminal prosecution is instituted against the prisoner.—*State ex rel. Turner v. Gore*, 175 S.W.2d 317, 180 Tenn. 333.

(2) Statute providing that if any person confined in penitentiary for term less than life escapes therefrom or, being out under guard, escapes from officer's custody, he shall be liable to punishment imposed for breaking prison, is a prison law governing penitentiary inmates within statute requiring discharge of any convict confined in penitentiary after he has served three fourths of time for which he was sentenced without having any infraction of rules or law of prison recorded against him.—*Ex parte Rody*, 152 S.W.2d 657, 348 Mo. 1.

16. U.S.—*Bickel v. Hiatt*, D.C.Pa., 66 F.Supp. 748.

17. U.S.—*Lesser v. Humphrey*, D.C. Pa., 89 F.Supp. 474.

Administrative procedure act was not applicable to proceedings of good-time board at penitentiary in proceedings to revoke prisoner's good-time allowance because of alleged violation by prisoner of prison rules.—*Lesser v. Humphrey*, supra.

### Refusal to allow prisoner time

ance for good conduct are controlled by statute, and an administrative authority, in declaring a forfeiture of time credits, ordinarily is not required to adhere to formal procedure; the proceedings may be summary in character but a hearing and notice may be required.

Proceedings for the forfeiture of a prisoner's allowance for good conduct are controlled by statute.<sup>17</sup> Ordinarily an administrative authority, in declaring a forfeiture of time credits, is not required to adhere to formal procedure,<sup>18</sup> or to comply with rules of evidence as in a criminal prosecution before a judicial tribunal,<sup>19</sup> since the proceedings are administrative in nature.<sup>20</sup> So, under a statute authorizing a designated board to forfeit a prisoner's good-behavior allowance for misbehavior after proof of the offense and notice to the prisoner, the proceeding may be summary in character,<sup>21</sup> although a hearing<sup>22</sup> and notice<sup>23</sup> are es-

credits, by adult authority, for current period is not the equivalent of a declaration of a forfeiture of time credits previously allowed which would require notice, hearing, proof, and a finding that prisoner was guilty of misconduct.—*Ex parte Smith*, 205 P.2d 662, 33 Cal.2d 797.

18. Tenn.—*State ex rel. Turner v. Gore*, 175 S.W.2d 317, 180 Tenn. 333.

### Reason for rule

Although forfeiture of prisoner's right to diminution of indeterminate sentence for good behavior may flow from conduct involving a criminal offense, the prisoner is neither tried nor sentenced for violation of a criminal law, and his punishment consists solely in serving of balance of his sentence originally imposed.—*People ex rel. Day v. Lewis*, 34 N.E. 2d 712, 376 Ill. 509.

19. Tenn.—*State ex rel. Turner v. Gore*, 175 S.W.2d 317, 180 Tenn. 333.

Fact that jury acquitted prisoner of charge did not preclude department of public welfare from determining that fight involved an infraction of a prison rule, and, being prisoner's fifth violation, forfeited his earned good time, especially in view of different degree of proof required.—*People ex rel. Day v. Lewis*, 34 N.E. 2d 712, 376 Ill. 509.

20. Mo.—*Corpus Juris cited in Ex parte Rody*, 152 S.W.2d 657, 343 Mo. 1.

50 C.J. p 349 note 46.

21. Cal.—*In re Nelson*, 197 P. 947, 185 Cal. 594.

50 C.J. p 349 note 45.

22. Cal.—*In re Nelson*, supra.

50 C.J. p 349 note 47.

23. Cal.—*In re MacDonald*, 187 P. 991, 45 Cal.App. 480.

50 C.J. p 349 note 48.

sential; and such a statute is sufficiently complied with where a prisoner is brought before the board and, on the charge being read and explained to him, he pleads guilty.<sup>24</sup> It has been held that a deprivation of commutation-time credits on the basis of an administrative classification of a prisoner as a multiple offender is illegal in that it deprives him of his fundamental right to be heard on notice as to his liability to lose commutation time otherwise earned.<sup>25</sup>

Under statutes requiring prisoners to be informed from time to time as to their records as to loss of good time and the reason therefor, and requiring a designated board regularly to pass on reports of infractions of rules, a prisoner should be given, if he so desires, an opportunity to be heard on such reports.<sup>26</sup> It has been held immaterial that an order forfeiting good behavior credits is made at a time subsequent to the expiration of an alleged reduced term where the order is based on an infraction of the rules prior to the expiration of the sentence.<sup>27</sup>

#### 1. Restoration of Forfeited Credits

Under some statutes a designated board or official has the power to restore good-time credits forfeited by reason of the misconduct of a prisoner, for such reasons as to it or him may seem proper; but, under a statute so providing, there may not be a restoration of good-time credit to a prisoner who forfeited it by reason of an escape and was thereafter convicted of the independent offense of escape.

Under some statutes a designated board or official ordinarily has the power to restore good-time credits forfeited by reason of the misconduct of a prisoner, for such reasons as to it or him may seem proper,<sup>28</sup> and, in the absence of an abuse of discretion, the action of a board in restoring such credits may not be interfered with.<sup>29</sup> How-

ever, under a statute so providing, there may not be a restoration of good-time credit to a prisoner who forfeited it by reason of an escape and was thereafter convicted of the independent offense of escape.<sup>30</sup>

#### § 22. Bringing Articles to, or Communicating with, Prisoners as an Offense

By statute, or rules adopted pursuant thereto, it is sometimes made an offense to bring specified articles to prisoners or to communicate with them.

By statute, or rules adopted pursuant thereto, it is sometimes made an offense to bring specified articles to prisoners or to communicate with them.<sup>31</sup> The rules applicable to prosecutions for criminal offenses generally are applicable to prosecutions for such an offense,<sup>32</sup> as, for example, with respect to matters relative to the indictment, information, or complaint,<sup>33</sup> as well as to the trial.<sup>34</sup>

#### § 23. Escape of Prisoners

- a. Necessity of legal taking
- b. Kinds of escape
- c. Acts constituting escape generally
- d. Admitting prisoners to jail liberties
- e. Going beyond jail liberties
- f. Removal by legal process
- g. Discharge of prisoner
- h. Constructive escape
- i. Liability of sheriff or jailer to creditor or other person
- j. Other liabilities
- k. Defenses generally
- l. Recapture or return of prisoner
- m. Actions
- n. Pleading
- o. Evidence

24. Cal.—In re Nelson, 197 P. 947, 185 Cal. 594.  
50 C.J. p 349 note 49.

25. N.J.—Ex parte Macejka, 76 A.2d 843, 10 N.J.Super. 393—Ex parte Breslin, 74 A.2d 373, 9 N.J.Super. 356.

26. Mich.—In re Walsh, 49 N.W. 606, 87 Mich. 466.

27. Cal.—Ex parte Taylor, 13 P.2d 906, 216 Cal. 113.

28. U.S.—Aderhold v. Perry, C.C.A. Ga., 59 F.2d 379.

Cal.—In re Daniels, 300 P. 878, 114 Cal. 698—Ex parte Davis, 294 P. 408, 110 Cal.App. 616—Ex parte Solman, 291 P. 224, 107 Cal.App. 727.

As not of grace

Where prisoner had forfeited his

good-conduct time allowance prior to effective date of revisory statute relative to good-time allowances, subsequent modification of previous forfeiture by restoring to him such of his forfeited good time as was earnable after the critical date was an act of grace, and not of right, to prisoner and apparently an exercise by attorney general of his power to restore good time forfeited.—McKinney v. Clemmer, D.C.Va., 84 F.Supp. 798.

29. Cal.—In re Daniels, 300 P. 878, 114 Cal. 698.

30. U.S.—Lyons v. Squier, D.C. Wash., 54 F.Supp. 557.

Reason for rule

Congress did not intend that there should ever be a restoration of good

time to a prisoner in such a case, since a contrary holding would nullify statute requiring an independent sentence to be served only on expiration of sentence from which prisoner made an escape.—Lyons v. Squier, D.C.Wash., 54 F.Supp. 557.

31. Cal.—People v. Lee Mon, 207 P. 284, 57 Cal.App. 400.  
50 C.J. p 350 note 79.

32. S.C.—State v. Jackson, 115 S.E. 750, 122 S.C. 493.  
50 C.J. p 350 note 81.

33. Wash.—State v. Vanderveer, 196 P. 650, 115 Wash. 184.  
50 C.J. p 350 note 82.

34. S.C.—State v. Jackson, 115 S.E. 750, 122 S.C. 493.  
50 C.J. p 350 note 81 [a], [b].

p. Damages

q. Trial; judgment and enforcement thereof

### a. Necessity of Legal Taking

Before a prisoner can make an escape on which civil liability may be predicated he must have been legally taken into custody, and this requires that the proceedings by which the prisoner was taken must have been valid and sufficient.

Before a prisoner can make an escape on which civil liability may be predicated he must have been legally taken into custody, and this requires that the proceedings, such as the judgment, arrest, and commitment, by which the prisoner was taken, must have been valid and sufficient.<sup>35</sup> If the court rendering judgment against a prisoner had no jurisdiction, the sheriff is not liable for an escape;<sup>36</sup> but if the judgment is not void the fact that it may have been erroneous is immaterial since a judgment may not be attacked collaterally.<sup>37</sup> So whenever the process by which one is arrested is void,<sup>38</sup> or appears to be void,<sup>39</sup> no action lies for his escape; but advantage may not be taken of a mere error or irregularity in the process.<sup>40</sup> An action may be maintained for an escape of a prisoner held on mesne process.<sup>41</sup> If a creditor gives a debtor in execution permission to go at large beyond the jail liberties, an action for escape may not be maintained.<sup>42</sup>

### b. Kinds of Escape

There are, at common law, two kinds of escape, the one, willful and voluntary, the other, negligent; a third kind of escape, due to act of God or the public enemies, is also recognized in the cases.

There are, at common law, two kinds of escape,

the one, willful or voluntary,<sup>43</sup> the other, negligent.<sup>44</sup> A third kind of escape, due to act of God or the public enemies, is also recognized in the cases.<sup>45</sup>

A voluntary escape occurs when a prisoner is allowed to go at large by permission or willful default of the officer in whose custody he is.<sup>46</sup> In this type of escape it is of no consequence that the sheriff relied on the prisoner's honor and promise to return<sup>47</sup> or that the prisoner was a trusty;<sup>48</sup> and any going out of prison with the knowledge or consent of the sheriff or keeper may constitute a voluntary escape.<sup>49</sup>

There is a negligent escape when a prisoner has gone out of sight and control of the officer in whose custody he was, without the knowledge or consent of such officer, but by reason of his careless or negligent conduct.<sup>50</sup> An escape of this nature necessarily implies some neglect of duty or default in the officer.<sup>51</sup>

### c. Acts Constituting Escape Generally

An escape occurs when acts are done which are incompatible with custody, or when a relaxation of confinement is permitted so that a prisoner is not at all times in control of the sheriff or keeper, although there are some emergencies which have been declared a sufficient excuse for a prisoner's temporary liberty.

An escape occurs when acts are done which are incompatible with custody, or when a relaxation of confinement is permitted so that a prisoner is not at all times in the control of the sheriff or keeper.<sup>52</sup> So, where the sheriff places a prisoner in a hospital in charge of persons who are not the sheriff's deputies there is an escape.<sup>53</sup> However, although a sheriff may not, as an indulgence

35. Vt.—Weeks v. Martin, 16 Vt. 237.

50 C.J. p 351 notes 85–87.

Criminal liability see Escape §§ 1–28.

Liability of sheriff other than as jailer see the C.J.S. title Sheriffs and Constables §§ 118–120, also 57 C.J. p 900 note 46–p 902 note 89.

Rescue of persons as offense see the C.J.S. title Rescue §§ 1–13, also 54 C.J. p 698 note 1–p 699 note 99.

36. Conn.—Austin v. Fitch, 1 Root 288.

37. N.Y.—Wesson v. Chamberlain, 3 N.Y. 331.

38. N.Y.—Goodwin v. Griffiths, 88 N.Y. 629.

50 C.J. p 351 note 90.

39. Vt.—Kidder v. Barker, 18 Vt. 454.

50 C.J. p 351 note 91.

40. N.Y.—Jones v. Cook, 1 Cow. 309.

50 C.J. p 351 note 92.

41. N.Y.—Cosgrove v. Bowe, 10 Daly 353, 2 N.Y.Civ.Proc. 61.

42. N.Y.—Poucher v. Holley, 3 Wend. 184—Powers v. Wilson, 7 Cow. 274.

43. N.C.—Adams v. Turrentine, 30 N.C. 147.

44. N.C.—Adams v. Turrentine, supra.

45. N.C.—Mabry v. Turrentine, 30 N.C. 201—Adams v. Turrentine, 30 N.C. 147.

46. N.C.—Sutton v. Williams, 155 S.E. 160, 199 N.C. 546.

50 C.J. p 351 note 98.

#### Liberty not authorized by law

Where a prisoner arrested by a deputy sheriff and placed in the county jail was released by the sheriff, there was a voluntary escape, since a voluntary escape takes place when the prisoner is voluntarily given any liberty not authorized by law.—Hefner v. Hunt, 112 A. 675, 120 Me. 10.

47. Ind.—Hoagland v. State, 40 N.E. 931, 22 Ind.App. 204, 72 Am.S.R. 298.

48. N.C.—Sutton v. Williams, 155 S.E. 160, 199 N.C. 546.

49. N.C.—Sutton v. Williams, supra.

50 C.J. p 351 note 1.

50. Conn.—Carrington v. Parsons, 4 Day 45.

50 C.J. p 351 note 2.

51. N.Y.—Tillman v. Lansing, 4 Johns. 45.

52. Vt.—Corpus Juris cited in Mangan v. Franzoni, 75 A.2d 665, 667.

50 C.J. p 351 note 3.

#### Departure

An escape is the departure of a prisoner from custody before he is discharged by due process of law.—Hefner v. Hunt, 112 A. 675, 120 Me. 10.

53. Vt.—Mangan v. Franzoni, 75 A.2d 665.

or privilege, allow a prisoner to go outside the jail,<sup>54</sup> there are some emergencies which have been declared a sufficient excuse for a prisoner's temporary liberty.<sup>55</sup>

#### d. Admitting Prisoners to Jail Liberties

A departure from the confines of the jail by a prisoner entitled to jail liberties is not an escape for which the sheriff or keeper may be held liable as long as the prisoner keeps within the liberties, but to admit a prisoner to the liberties, except in the cases provided by law, renders a jailer liable for an escape; a sheriff may be liable for an escape if he admits his prisoner to the liberty of the yard on a bond which is not in conformity with statute.

The departure from the confines of the jail by a prisoner entitled to jail liberties is not an escape for which the sheriff or keeper may be held liable as long as the prisoner keeps within the liberties,<sup>56</sup> but to admit a prisoner to the liberties, except in the cases provided by law, renders a jailer liable for an escape.<sup>57</sup> With respect to his liability for an escape, a jailer is not bound to allow a prisoner the privilege of the prison liberties, unless the prisoner gives bond and security not to depart therefrom,<sup>58</sup> and while it has been held that, since the bond is intended as a security to the jailer against the abuse of the privilege by the prisoner, he may waive such security, and grant the liberties without a bond,<sup>59</sup> it has also been held that a sheriff is liable for an escape if he admits a prisoner to the liberties without giving a bond.<sup>60</sup> It is a common condition of a prison limits bond that the prisoner, if not legally discharged within a certain time from the day of his commitment, shall surrender himself to be held in close confinement, so that where he remains outside the prison walls an escape occurs.<sup>61</sup>

*On irregular or insufficient bond.* A sheriff is liable for an escape if he admits his prisoner to the liberty of the yard on a bond which is not in conformity with statute<sup>62</sup> unless the creditor has waived the irregularity and accepted the bond.<sup>63</sup>

On the other hand, if the bail is sufficient when given, the fact that it afterward fails will not render the sheriff liable.<sup>64</sup>

#### e. Going beyond Jail Liberties

Ordinarily, where a prisoner goes or is at large beyond the liberties of the jail, without the assent of the person at whose instance he is in custody, it is an escape for which the officer in charge may be held liable.

Ordinarily, where a prisoner goes or is at large beyond the liberties of the jail, without the assent of the person at whose instance he is in custody, it is an escape for which the officer in charge may be held liable.<sup>65</sup> In some instances a distinction has been drawn between a case in which a prisoner voluntarily goes beyond the jail liberties and one in which he does so involuntarily, and it has been held that, where a prisoner admitted to the liberties of the jail knowingly and voluntarily goes beyond the limits, it is an escape for which the sheriff may be held liable,<sup>66</sup> but that where a prisoner goes beyond the jail liberties involuntarily, as by accidentally or inadvertently going beyond the liberties which are bounded by an imaginary line, and returning immediately before action brought, the sheriff may not be held liable.<sup>67</sup> With respect to whether or not there has been an escape on which liability may be predicated, a bond for the liberties restrains the prisoner within the liberties established by law for the time being;<sup>68</sup> and this contemplates the right of the legislature to alter the prison limits, and such alteration does not impair the obligation of a bond previously given.<sup>69</sup>

#### f. Removal by Legal Process

The removal of a prisoner from the prison or the jail liberties by virtue of a valid legal process which affords justification to the officer taking him is not an escape on which liability may be predicated.

The removal of a prisoner from the prison or the jail liberties by virtue of a valid legal process which affords justification to the officer taking him is not an escape on which liability may be predi-

54. Ill.—Comer v. Huston, 55 Ill. App. 153.

55. Ill.—Comer v. Huston, *supra*. 50 C.J. p 352 note 5.

56. N.Y.—Singer v. Knott, 142 N.E. 435, 237 N.Y. 110. 50 C.J. p 352 note 9. Privilege of prison bounds see *supra* § 18 e.

57. R.I.—Sullivan v. Davis, 96 A. 216, 38 R.I. 382. 50 C.J. p 352 note 10.

58. Ky.—Steinman v. Tabb, 3 Bibb 203.

N.Y.—Brown v. Tracy, 9 How.Pr. 93.

59. N.Y.—Cortis v. Dalley, 47 N.Y.S. 454, 21 App.Div. 1. 50 C.J. p 352 note 12.

60. Me.—Hotchkiss v. Whitten, 71 Me. 577. 50 C.J. p 352 note 13.

61. Ala.—McMichael v. Rapelye, 4 Ala. 383. 50 C.J. p 352 note 14.

62. S.C.—Conyers v. Rhame, 45 S.C. L. 60. 50 C.J. p 352 note 15.

63. Me.—Coffin v. Herrick, 10 Me. 121.

N.Y.—Morton v. Campbell, 37 Barb. 179, 14 Abb.Pr. 410.

64. Conn.—Northum v. Phelps, 1 Root 54.

65. Md.—Jones v. State, 3 Harr. & J. 559. 50 C.J. p 352 note 18.

66. N.Y.—Bissell v. Kip, 5 Johns. 89.

67. N.Y.—Kip v. Babcock, 7 Johns. 178—Ballou v. Kip, 7 Johns. 175.

68. Mass.—Reed v. Fullum, 2 Pick., Mass., 158. 50 C.J. p 353 note 22.

69. Mass.—Reed v. Fullum, *supra*. 50 C.J. p 353 note 23.



cated.<sup>70</sup> Thus it is not an escape to take a prisoner who is imprisoned on execution in a civil suit away from the jail liberties on a habeas corpus.<sup>71</sup> However, where a sheriff suffers his prisoner to get out of his custody, except in obedience to the requirements of the writ, or goes with him out of the way, for the accommodation of the prisoner, it will constitute an escape.<sup>72</sup>

### g. Discharge of Prisoner

- (1) In general
- (2) By order of court

#### (1) In General

Where a sheriff discharges a prisoner of his own will, such a discharge constitutes an escape for which the sheriff may be held liable; but he is relieved from liability where he discharges a prisoner with the consent of the creditor, or where the discharge is made by act of the legislature, or under circumstances authorized by statute.

Since a sheriff has no power to discharge a debtor from prison of his own will, such a discharge is an escape for which he may be held liable.<sup>73</sup> In order to relieve a sheriff from liability the discharge must be made either with the consent of the creditor,<sup>74</sup> by valid order of court, as discussed infra subdivision g (2) this section, by act of the legislature,<sup>75</sup> or under circumstances authorized by statute.<sup>76</sup> Where a prisoner, who is confined under execution on a debt provable in bankruptcy, procures a discharge in bankruptcy and goes beyond the jail liberties the sheriff is not liable as for an escape.<sup>77</sup>

Under some statutory provisions a sheriff who releases a prisoner before his discharge in due course of law is liable to the person aggrieved for such wrongful release.<sup>78</sup>

#### (2) By Order of Court

In an action against a sheriff for an escape it is a defense for him that a valid order for the discharge of the prisoner has been made, although it has never been formally served on him.

In an action against a sheriff for an escape it is a defense for him that a valid order for the discharge of the prisoner has been made,<sup>79</sup> although it has never been formally served on him.<sup>80</sup> If the court making the order had jurisdiction, the sheriff is justified in obeying it, although it may have been for an insufficient cause, or founded on an irregular proceeding.<sup>81</sup> However, if the court did not have jurisdiction, the order of discharge is void, and the sheriff is liable for his act in discharging the prisoner.<sup>82</sup> Hence, in order to protect the sheriff, either the order of discharge must show the facts giving the court jurisdiction<sup>83</sup> or it must be made to appear by proof aliunde that the court had jurisdiction to make the order.<sup>84</sup>

Under a statute making a sheriff liable to the person aggrieved for releasing a prisoner before his discharge in due course of law, a wrong done in releasing a prisoner may be cured by a nunc pro tunc order of the court releasing the prisoner as of the date of the discharge.<sup>85</sup>

### h. Constructive Escape

Where a prisoner is allowed any liberty or authority incompatible with the notion of custody, not merely *salva et arcta custodia*, but of any custody at all, it is deemed an escape on which liability may be based.

Where a prisoner is allowed any liberty or authority incompatible with the notion of custody, not merely *salva et arcta custodia*, but of any custody at all, it is deemed an escape on which lia-

70. N.Y.—Wilckens v. Willet, 4 Abb. Dec. 596, 1 Keyes 521.  
50 C.J. p 353 note 24.

71. N.Y.—Martin v. Wood, 7 Wend. 132.  
50 C.J. p 353 note 25.

72. N.Y.—People v. Stone, 10 Paige 606.

73. N.C.—Wright v. Roberts, 28 N. C. 119.

74. N.Y.—Kellogg v. Gilbert, 10 Johns. 230, 6 Am.D. 335.  
50 C.J. p 353 note 29.

75. Conn.—Fitch v. Badger, 1 Root 72.

76. Mass.—Richards v. Crane, 7 Pick. 216.  
50 C.J. p 353 note 32.

77. N.Y.—Walker v. Harder, 80 N. Y.S. 948, 39 Misc. 749, affirmed 89 N.Y.S. 1118, 96 App.Div. 631.

78. N.Y.—London v. Hessberg, 265 N.Y.S. 829, 147 Misc. 719, affirmed

265 N.Y.S. 832, 240 App.Div. 731, affirmed 191 N.E. 501, 264 N.Y. 435.

#### Discharge before payment

Warrant directing sheriff to keep in jail one convicted of contempt for nonpayment of money, until he shall pay specified sum, and fine to sheriff for account of various persons has been held to render sheriff liable to persons named in original order for discharging prisoner before payment was made.—Bijur v. Jacoby, 183 N.E. 428, 260 N.Y. 289.

79. N.Y.—Richmond v. Praim, 24 Hun 578.

80. Pa.—Stevenson v. Carothers, 3 Yeates 180.

81. N.Y.—Richmond v. Praim, 24 Hun 578.

82. Vt.—Hathaway v. Holmes, 1 Vt. 405.

50 C.J. p 353 note 36.

83. N.Y.—Cable v. Cooper, 15 Johns. 152.

50 C.J. p 353 note 37.

84. N.Y.—Schaffer v. Riseley, 20 N. E. 630, 114 N.Y. 23.

50 C.J. p 353 note 38.

85. N.Y.—Schaffer v. Riseley, 20 N. E. 630, 114 N.Y. 23.

50 C.J. p 353 note 39.

86. N.Y.—Rosenblum v. Higgins, 269 N.Y.S. 306, 240 App.Div. 131, affirmed 193 N.E. 276, 265 N.Y. 472.

#### Release on order of official referee

Any wrong in release of prisoner on order of official referee was cured by court's order confirming referee's report and releasing prisoner nunc pro tunc as of date of discharge, with respect to sheriff's liability for wrongful discharge of prisoner, and prisoner was discharged by due course of law within statute.—Rosenblum v. Higgins, supra.

bility may be based,<sup>86</sup> since the whole doctrine of escapes rests on the notion that there should be an incarceration of the prisoner within the proper limits,<sup>87</sup> and the fact that a person is at liberty to go where he pleases without any restraint, acting or ready to act on him, either physically or morally, excludes the notion of imprisonment.<sup>88</sup>

At common law, if a sheriff is arrested and committed to the county jail, it is an escape, for he cannot be imprisoned in a jail of which he has the custody.<sup>89</sup> On the same principle, if a jailer is committed to his own jail and no new keeper is appointed, it is an escape of the jailer for which the sheriff is liable;<sup>90</sup> but it is not an escape of the other prisoners, if they are in fact kept in custody.<sup>91</sup> So it has been asserted to be an escape, if the sheriff makes a prisoner of the jailer, and gives him the keys.<sup>92</sup> Also, if a sheriff intrusts a prisoner with the keys to the prison, it is an escape, since no man can be his own jailer.<sup>93</sup> However, the correctness of the doctrine of constructive escape has been denied, as being inapplicable to cases arising under a statute giving prisoners the benefit of the prison bounds.<sup>94</sup>

#### 1. Liability of Sheriff or Jailer to Creditor or Other Person

- (1) In general
- (2) After taking bond for liberties
- (3) Liability as between incumbent and predecessor
- (4) Liability on bond

##### (1) In General

It is the keeper of a jail who is liable for an escape, and where a sheriff is held liable he is held qua jailer and not qua sheriff, so that where a sheriff is not the keeper or jailer, and has no control over the jail, he is not liable for an escape.

It is the keeper of a jail who is liable for an escape.<sup>95</sup> Where a sheriff is held liable he is held qua jailer and not qua sheriff.<sup>96</sup> Therefore, where a sheriff is not the keeper or jailer, and has no con-

trol over the jail, he is not liable for an escape.<sup>97</sup> It has been held that a sheriff is not liable for the negligent escape of a debtor committed from another county.<sup>98</sup> The responsibilities of a sheriff are the same after a prisoner has been committed, whether he was arrested under federal or state process.<sup>99</sup>

*For injuries to third person.* Both the sheriff<sup>1</sup> and his jailer<sup>2</sup> may be held liable for injuries done to a third person by a prisoner in the course of an escape, where the sheriff is charged with, and has under his control, the management and direction of the jail.

#### (2) After Taking Bond for Liberties

A bond given to entitle a prisoner to the liberties of the prison yard, if regularly taken and allowed, discharges the sheriff from any further responsibility for the prisoner's remaining in his custody.

A bond given to entitle a prisoner to the liberties of the prison yard is in effect a substitute for the custody of the sheriff, and, if regularly taken and allowed, it discharges the sheriff from any further responsibility for the prisoner's remaining in his custody.<sup>3</sup> Such a bond is assignable;<sup>4</sup> and if the sheriff refuse to assign it to the creditor, on request, after breach of condition, an action on the case will lie against him.<sup>5</sup>

#### (3) Liability as between Incumbent and Predecessor

With respect to his liability for an escape, a sheriff who receives a public jail from his predecessor, although without a deed of assignment, is responsible from that period for the safe-keeping of prisoners there, as though they had been originally committed to his custody.

With respect to his liability for an escape, a sheriff who receives a public jail from his predecessor, although without a deed of assignment, is responsible from that period for the safe-keeping of prisoners there, as though they had been originally committed to his custody.<sup>6</sup> If a new sheriff receives a prisoner from his predecessor he is answerable for his escape, although a voluntary es-

86. U.S.—*Steere v. Field*, C.C.R.I., 22 F.Cas.No.13,350, 2 Mason 486. 50 C.J. p 353 note 42.

87. U.S.—*Steere v. Field*, supra.

88. U.S.—*Steere v. Field*, supra.

89. U.S.—*Steere v. Field*, supra. 50 C.J. p 353 note 43.

90. U.S.—*Steere v. Field*, supra. 50 C.J. p 354 note 44.

91. U.S.—*Steere v. Field*, supra.

92. U.S.—*Steere v. Field*, supra.

93. U.S.—*Steere v. Field*, supra. 50 C.J. p 354 note 47.

94. N.C.—*Currie v. Worthy*, 47 N.C. 104.

50 C.J. p 354 note 48.

95. Pa.—*Keim v. Saunders*, 13 A. 710, 120 Pa. 121.

96. Pa.—*Keim v. Saunders*, supra.

97. Pa.—*Keim v. Saunders*, supra. 50 C.J. p 354 note 51.

98. Vt.—*Chipman v. Sawyer*, 1 Tyler 83, 2 Tyler 61.

99. U.S.—*Spafford v. Goodell*, C.C. Mich., 22 F.Cas.No.13,197, 3 McLean, 97.

1. N.C.—*Sutton v. Williams*, 155 S. E. 160, 199 N.C. 546.

2. N.C.—*Sutton v. Williams*, supra.

3. Me.—*Palmer v. Sawtell*, 3 Me. 447.

50 C.J. p 354 note 56.

4. U.S.—*U. S. v. Noah*, C.C.N.Y., 27 F.Cas.No.15,894, 1 Paine 368.

50 C.J. p 354 note 57.

5. Vt.—*Vilas v. Barker*, 20 Vt. 603. 50 C.J. p 354 note 58.

6. Md.—*Siemaker v. Marriott*, 5 Gill & J. 406.

cape may have existed in the time of his predecessor.<sup>7</sup> Where a prisoner, who had given bond for jail liberties, was not assigned to the new sheriff on his taking charge of the jail, the latter is not liable for an escape thereafter occurring.<sup>8</sup>

An outgoing sheriff is not liable as for an escape for failure to deliver a prisoner to his successor, where the prisoner remains within the jail limits,<sup>9</sup> but he is liable in case of the prisoner's actual escape.<sup>10</sup>

#### (4) Liability on Bond

Suffering a prisoner to escape is a breach of the condition of a sheriff's bond, and the sureties are liable without first fixing the liability of the principal.

Suffering a prisoner to escape is a breach of the condition of a sheriff's bond,<sup>11</sup> and the sureties are liable without first fixing the liability of the principal.<sup>12</sup> Illegally allowing the liberty of the jail yard to a prisoner also constitutes a breach of the jail keeper's bond given for the faithful execution of his office according to law.<sup>13</sup>

#### j. Other Liabilities

A sheriff may take a bond from the jailer to indemnify him for all losses to which he may be subjected by the escape of a prisoner, while in the custody of the jailer; but without a bond of indemnity the jailer is liable to the sheriff only for want of fidelity or due care in the discharge of his duty.

A sheriff has a right to take a bond from the jailer to indemnify him for all losses to which he may be subjected by the escape of a prisoner, while in the custody of the jailer;<sup>14</sup> but without a bond of indemnity the jailer is liable to the sheriff only for want of fidelity or due care in the discharge of his duty.<sup>15</sup>

*Liability of prisoner to state.* The state has been held not entitled to recover in tort from an escaped prisoner the expenses of his recapture and return to prison.<sup>16</sup>

#### k. Defenses Generally

In actions for escape the courts have passed on whether or not particular defenses are available to the defendant.

In actions for escape, among other defenses held to be good,<sup>17</sup> it has been held that it is a good defense to set up that defendant acted under an order of the court enlarging the limits, and that the prisoner was within those limits,<sup>18</sup> that one of two joint debtors was released because the other was discharged by the execution plaintiff,<sup>19</sup> that plaintiff furnished the prisoner with the means of escape,<sup>20</sup> or that the escape was procured by fraud.<sup>21</sup>

Ordinarily a sheriff is not to be held conclusively liable as for an escape on proof that he had taken or allowed the debtor to be out of jail, but he may show the circumstances which induced him so to act, and from such circumstances it may be determined whether the absence of the prisoner from the jail was but temporary and for justifiable and good cause, or was a mere indulgence or privilege granted the prisoner.<sup>22</sup> However, under some of the earlier authorities, nothing but an act of God or the public enemy will relieve a sheriff from liability for the escape from jail of an execution debtor.<sup>23</sup> With respect to the early authorities taking the latter view it has been stated that, under the new and enlightened systems prevailing at the present day, most of the law as set forth therein is practically obsolete.<sup>24</sup>

7. N.Y.—*Rawson v. Turner*, 4 Johns. 469.

50 C.J. p 354 note 60.

8. N.Y.—*Partridge v. Westervelt*, 13 Wend. 500.

9. N.Y.—*Fearick v. Conner*, 9 Daly 523, 60 How.Pr. 506—*Hempstead v. Weed*, 20 Johns. 64, 11 Am.D. 244.

10. N.Y.—*Hempstead v. Weed*, supra.

11. Pa.—*Smith v. Commonwealth*, 59 Pa. 320—*Scarborough v. Thornton*, 9 Pa. 451.

12. Pa.—*Smith v. Commonwealth*, 59 Pa. 320.

13. R.I.—*Sullivan v. Davis*, 96 A. 216, 38 R.I. 382.

14. N.C.—*Turrentine v. Faucett*, 33 N.C. 652.

Pa.—*Scarborough v. Thornton*, 9 Pa. 451.

15. N.C.—*Turrentine v. Faucett*, 33 N.C. 652.

16. N.C.—*State Highway and Public Works Commission v. Cobb*, 2 S.E. 2d 565, 215 N.C. 556.

#### Reason for rule

A crime against the sovereignty of the state violates none of its property rights, and no governmental expenditure paid out for apprehending a criminal or maintaining or recovering his custody incident to punishment can be construed into a tortious invasion of state's property rights, since expenditure is voluntarily made by the state for the protection of the people of the state at large in preserving the integrity of the penal system.—*State Highway and Public Works Commission v. Cobb*, supra.

17. Conn.—*Aetna Ins. Co. v. Blumenthal*, 29 A.2d 751, 129 Conn. 545.

*Reliance on justice's certificate.* Sheriff and deputy jailer were not liable to judgment creditor for illegal release of judgment debtor from

jail, where they acted on justice's certificate showing that he had discharged the debtor, and it was not clear from certificate that proper service was not had on judgment creditor.—*Aetna Ins. Co. v. Blumenthal*, supra.

18. Conn.—*Lampson v. Landon*, 5 Day 506.

19. N.Y.—*Ransom v. Keyes*, 9 Cow. 138.

20. Tenn.—*Love v. McAllister*, 4 Hayw. 65.

21. N.Y.—*Van Wormer v. Van Voast*, 10 Wend. 356.

50 C.J. p 355 note 77.

22. Ill.—*Comer v. Huston*, 55 Ill. App. 153.

23. N.C.—*Rainey v. Dunning*, 6 N.C. 386.

50 C.J. p 354 note 70.

24. Ill.—*Comer v. Huston*, 55 Ill. App. 153.

On the other hand, among other defenses held not to be good,<sup>25</sup> it has been held that it is not a good defense to an action for escape to set up that no prison fees were paid, even where it appeared that the prisoner was not able to pay such fees,<sup>26</sup> that the liberties were undefined by visible boundaries and monuments,<sup>27</sup> that the prisoner had license to go at large from plaintiff<sup>28</sup> or his attorney,<sup>29</sup> or that the prisoner forcibly broke jail.<sup>30</sup> It has also been held not a good defense to set up that a satisfaction piece turned out to be a forgery,<sup>31</sup> that the pleadings were amended to enhance damages,<sup>32</sup> that plaintiff declared generally as in custody instead of declaring specially that he was in close custody,<sup>33</sup> that the order for bail was rescinded after it had been delivered to the sheriff and executed by him,<sup>34</sup> that after being apprised of the escape plaintiff delayed unreasonably to call for an assignment of the bond,<sup>35</sup> or that the prisoner was by law privileged from arrest.<sup>36</sup>

**Insolvency of prisoner.** The insolvency of the prisoner is no defense to an action in debt, or in the nature of one, against a sheriff for an escape.<sup>37</sup> However, the rule is otherwise where the action is on the case.<sup>38</sup>

**Defects in jail.** While it has been held that no action will lie against a prison keeper for the escape of a prisoner through the insufficiency of the jail and without negligence on the keeper's part,<sup>39</sup> the general rule is that a defect in the jail will not constitute a good defense,<sup>40</sup> and the sheriff has been held for an escape, although there was no jail at all in the county.<sup>41</sup>

## 1. Recapture or Return of Prisoner

- (1) In general
- (2) When escape voluntary
- (3) When escape negligent

### (1) In General

In the absence of a statute otherwise providing, an officer may be held liable for an escape of a prisoner in his custody on final process even though he recaptures him; but the rule may be otherwise with respect to a prisoner in his custody on mesne process.

At common law it has been held that when a sheriff suffers a prisoner in his custody on mesne process to go at large without sureties, he may retake him at any time before return of the writ, and if he has the body in court on the return of the writ it is a good defense to an action for an escape.<sup>42</sup> However, it has also been held that where a debtor, arrested on mesne process, escapes after judgment, his return before the issue of execution is no defense.<sup>43</sup>

Although under some statutory provisions the rule is otherwise,<sup>44</sup> an officer who suffers a debtor to escape after an arrest on a *capias ad satisfaciendum* has been held liable for such escape even though he has the prisoner in court on the return day,<sup>45</sup> and an officer may be held liable for an escape even though he retakes and commits the debtor within the life of the execution.<sup>46</sup>

In criminal cases, or in cases somewhat penal in character and procedure, there is no distinction between escape from mesne and final process, and the sheriff is answerable to the state, and the rights of the people demand a recapture.<sup>47</sup>

25. N.Y.—Tanner v. Hallenbeck, 4 How.Fr. 297.

#### Death of prisoner

In an action for the escape of a judgment debtor committed on a *capias ad satisfaciendum*, it is no defense that the debtor, after the escape, and before the commencement of the action for the escape, departed this life.—Tanner v. Hallenbeck, supra—50 C.J. p 357 note 21.

26. Ky.—Commonwealth v. Dulen, 4 Bibb 316.

S.C.—McClain v. Hayne, 6 S.C.L. 212.

27. N.Y.—Bissel v. Kip, 5 Johns. 89.

28. N.Y.—Sweet v. Palmer, 16 Johns. 181.

50 C.J. p 355 note 80.

29. N.Y.—Lovell v. Orser, 14 N.Y. Super. 349.

50 C.J. p 355 note 81.

30. N.Y.—Stone v. Woods, 5 Johns. 182.

31. N.Y.—Lownds v. Remsen, 7 Wend. 35.

32. Vt.—Vilas v. Barker, 20 Vt. 608.

33. N.Y.—Fairfield v. Case, 24 Wend. 381.

34. S.C.—Brissac v. Moorcr, 23 S.C. L. 228.

35. Vt.—Wheeler v. Pettas, 21 Vt. 398.

50 C.J. p 355 note 89.

36. Ohio.—Gill v. Miner, 13 Ohio St. 182.

50 C.J. p 355 note 90.

37. Pa.—Smith v. Commonwealth, 59 Pa. 320—Karch v. Commonwealth, 3 Pa. 269.

50 C.J. p 356 note 19.

38. Pa.—Shuler v. Garrison, 5 Watts & S. 455.

50 C.J. p 357 note 20.

39. La.—Brainard v. Head, 15 La. Ann. 489.

N.H.—Stiles v. Dearborn, 6 N.H. 145.

40. S.C.—Smith v. Hart, 3 S.C.L. 146.

50 C.J. p 356 note 17.

41. Va.—Stone v. Wilson, 10 Gratt. 529, 51 Va. 529.

50 C.J. p 356 note 18.

42. N.H.—Langdon v. Hathaway, 1 N.H. 367.

50 C.J. p 355 note 94.

#### Rescue after recapture

An officer who has suffered an escape of a debtor in his custody on mesne process is not liable in an action for the escape, if he retakes the debtor on fresh pursuit, and the debtor then forcibly rescues himself, on is forcibly rescued by others, from his custody.—Whithead v. Keyes, 1 Allen, Mass., 350—50 C.J. p 355 note 96.

43. N.Y.—Stone v. Woods, 5 Johns. 182.

44. N.Y.—Dash v. Van Kleeck, 7 Johns. 477, 5 Am.D. 291.

50 C.J. p 355 note 99.

45. D.C.—U. S. v. Brent, 24 F.Cas. No.14,639, 1 Cranch C.C. 525.

46. Conn.—Geddes v. Sibley, 163 A. 596, 116 Conn. 22.

47. Ind.—State v. Caldwell, 17 N.E. 185, 115 Ind. 6.

50 C.J. p 356 note 1.

*Under statutes granting liberties on bond.* Since the statutes relative to jail liberties have not altered the common law as to the liability of sheriffs for escapes or taken away their common-law rights as to fresh pursuit and recapture, if a prisoner, who has given to the sheriff a bond for the liberties, voluntarily goes beyond the limits, his bond is forfeited and the sheriff may retake him on fresh pursuit, and recommit him to custody, or bring an action on the bond.<sup>48</sup>

### (2) When Escape Voluntary

Generally, after a voluntary escape from custody and final process, the sheriff may not retake the prisoner and receive him back without the plaintiff's consent.

The general rule is that, after a voluntary escape from custody and final process, the sheriff may not retake the prisoner or receive him back without plaintiff's consent.<sup>49</sup> The voluntary return of the prisoner will not prevent the liability of the sheriff for the escape.<sup>50</sup> Consequently, on a recapture or return without authority of plaintiff, there may not be another escape.<sup>51</sup> If a sheriff discharges a prisoner on the promise of another to pay his fine, and the fine is not paid, he may not rearrest the prisoner, but is liable for the fine.<sup>52</sup>

### (3) When Escape Negligent

Where there is a negligent escape, in order to relieve himself of liability therefor, the jailer has a right to retake the prisoner on fresh pursuit, and return him to his former custody, and if he does so before action is brought by the creditor for the escape he is excused.

Where there is a negligent escape, in order to relieve himself of liability therefor, the jailer has a right to retake the prisoner on fresh pursuit, and return him to his former custody,<sup>53</sup> even where the negligence is occasioned by a misunderstanding of law,<sup>54</sup> and if he does so before action is brought by the creditor for the escape he is excused.<sup>55</sup> So the voluntary return of the prisoner after such escape and before action is brought is equivalent to a retaking on fresh pursuit.<sup>56</sup> However, the recapture on fresh pursuit, or the volun-

tary return, should be made before suit is brought for the escape.<sup>57</sup>

A subsequent escape after recapture will not revive the right of action for the former escape.<sup>58</sup>

### m. Actions

- (1) In general
- (2) Waiver of right of action
- (3) Form of action

#### (1) In General

Under the common law, in the event of an escape of a prisoner taken into custody under a *capias ad satisfaciendum*, the plaintiff has no remedy but to sue the sheriff; but under the statute of William III, as adopted in many of the jurisdictions of the United States, the creditor, in case of an escape, may either retake defendant on a new *capias ad satisfaciendum* or sue out a *feri facias*.

Under the common law, in the event of an escape of a prisoner taken into custody under a *capias ad satisfaciendum*, plaintiff has no remedy but to sue the sheriff.<sup>59</sup> However, under the statute of William III, which is of force in many of the United States, the creditor, in case of an escape, may either retake defendant on a new *capias ad satisfaciendum* or sue out a *feri facias*.<sup>60</sup> Under the statutes allowing a prisoner in execution the benefit of the prison bounds on giving security, plaintiff may either retake him<sup>61</sup> or proceed against his security,<sup>62</sup> or, in case the security shall prove deficient, against the sheriff who is ultimately liable for an escape.<sup>63</sup> Under the act of William III, while plaintiff may have a *capias ad satisfaciendum* or a *feri facias*, if he elects the first, the second is relinquished.<sup>64</sup> So under a prison bounds act, if plaintiff resorts to the bond, he may not have the *feri facias*,<sup>65</sup> and if he retakes and imprisons the escaped prisoner the bond is discharged.<sup>66</sup>

*Persons entitled to sue.* Unless plaintiff could have maintained the original action against the prisoner, no action can be maintained for an escape on mesne process.<sup>67</sup> Furthermore the only party entitled to sue is the one at whose suit the prisoner

48. N.Y.—Barry v. Mandell, 10 Johns. 563.  
50 C.J. p 356 note 15.

49. Ind.—Hoagland v. State, 40 N. E. 931, 22 Ind.App. 204, 72 Am.S.R. 298.  
50 C.J. p 356 note 3.

50. N.Y.—Stickle v. Reed, 23 Hun 417.  
50 C.J. p 356 note 4.

51. N.Y.—Littlefield v. Brown, 1 Wend. 398.

52. Ga.—Williams v. Mize, 72 Ga. 129.

53. Vt.—Sanderson v. Rutland, 43 Vt. 385.  
50 C.J. p 356 note 7.

54. Ga.—Rogers v. May, 25 Ga. 463 —Colley v. Morgan, 5 Ga. 178.

55. Vt.—Sanderson v. Rutland, 43 Vt. 385.  
50 C.J. p 356 note 9.

56. Conn.—Drake v. Chester, 2 Conn. 473.  
50 C.J. p 356 note 10.

57. Va.—Parsons v. Lee, Jeff. p 49.  
50 C.J. p 356 note 11.

58. N.Y.—Middle Dist. Bank v. De-  
yo, 6 Cow. 732.

59. S.C.—Berry v. Hoke, 30 S.C.L. 76.

60. S.C.—Berry v. Hoke, supra.

61. S.C.—Berry v. Hoke, supra.

62. S.C.—Berry v. Hoke, supra.

63. S.C.—Berry v. Hoke, supra.

64. S.C.—Berry v. Hoke, supra.

65. S.C.—Berry v. Hoke, supra.

66. S.C.—Osborne v. Bowman, 2 S. C.L. 208.

67. Me.—Riggs v. Thatcher, 1 Me. 68.

escaping is shown to have been arrested or charged in execution.<sup>68</sup>

**Jurisdiction and venue.** An action for an escape from prison in one county may lie in such county, although the judgment on which the suit against the prisoner was founded is of record in another county.<sup>69</sup> A federal court has jurisdiction of an action against a sheriff for permitting the escape of one arrested as a fraudulent debtor, in proceedings in a state court.<sup>70</sup>

### (2) Waiver of Right of Action

In order that there may be a waiver of a right of action for an escape, there must be such conduct on the part of the one having the right as shows his voluntary and intentional relinquishment or abandonment thereof.

In order that there may be a waiver of a right of action for an escape, there must be such conduct on the part of the one having the right as shows his voluntary and intentional relinquishment or abandonment thereof.<sup>71</sup> Thus it is not a waiver for a creditor's attorney to appear and protest against a discharge.<sup>72</sup> While it has been held not to amount to a waiver for a creditor to resist an application made under the insolvent laws,<sup>73</sup> it has been held otherwise where the creditor acts with knowledge of the escape.<sup>74</sup> Where one detained under mesne process escapes and the sheriff obtains leave to appear and defend the original suit, and judgment is recovered against the original defendant, plaintiff does not thereby elect to consider such defendant in custody, or to discharge the sheriff, since the proceeding only determines the extent of the sheriff's liability.<sup>75</sup>

### (3) Form of Action

Where a statute has not provided a different form of remedy, case is the only form of action which may be brought against a sheriff for the escape of a prisoner committed to his custody, but under some statutory provisions an action of debt may be brought; where a dep-

uty sheriff or jailer permits an escape, the usual course for the sheriff is to resort to the bond of the deputy.

Where a statute has not provided a different form of remedy, case is the only form of action which may be brought against a sheriff for the escape of a prisoner committed to his custody,<sup>76</sup> and where a creditor is unable to obtain judgment on a jail bond by reason of any neglect or default of the sheriff in taking it, or where the debt cannot be collected on it because of the poverty of the signers, case lies against the sheriff as for an escape.<sup>77</sup> However, an action of debt for the escape of a prisoner committed on an execution from a court of record is sometimes authorized by statute.<sup>78</sup> An action of debt given by statute does not take away the common-law right of suing in case, but is a cumulative remedy.<sup>79</sup> In some jurisdictions a sheriff is liable to attachment where, by his negligence and carelessness, he suffers a prisoner to escape,<sup>80</sup> and the injured person need not be driven to his action for an escape.<sup>81</sup>

**By sheriff against jailer.** Where a deputy sheriff or jailer permits an escape, the usual course for the sheriff is to resort to the bond of the deputy;<sup>82</sup> and if the sheriff has omitted to take a bond, the jailer is answerable only in assumpsit on his implied undertaking to serve the sheriff with diligence and fidelity.<sup>83</sup>

### n. Pleading

- (1) In general
- (2) Plea or answer
- (3) Issues, proof, and variance

#### (1) In General

In an action for escape, the declaration or complaint should allege all the facts necessary to state a cause of action.

In an action for escape, the declaration or complaint should allege all the facts necessary to state

68. N.C.—Folsom v. Gregory, 12 N. C. 233.

69. N.Y.—Bogert v. Hildreth, 1 Cal. 1.

70. U.S.—Mewster v. Spalding, C.C. Mich., 17 F.Cas.No.9,513, 6 McLean 24.

71. Me.—Hotchkiss v. Whitten, 71 Me. 577.

72. Me.—Hotchkiss v. Whitten, supra. 50 C.J. p 357 note 36.

73. N.C.—Currie v. Worthy, 48 N.C. 215.

74. N.J.—Richardson v. Rittenhouse, 40 N.J.Law 230, 50 C.J. p 357 note 38.

75. Pa.—Scarborough v. Thornton, 9 Pa. 451.

76. Colo.—Corpus Juris cited in Hershey v. People, 12 P.2d 345, 347, 91 Colo. 113. 50 C.J. p 357 note 40.

77. Vt.—Wheeler v. Pettes, 21 Vt. 398.

78. N.Y.—McCreery v. Willett, 17 N.Y.Super. 643, affirmed 22 N.Y. Super. 600, 23 How.Pr. 129. 50 C.J. p 357 note 41.

Prisoner committed on mesne process is not a prisoner committed for debt within the meaning of a statute making the sheriff liable in action for debt to the creditor or per-

son to whose use any forfeiture was adjudged, or any debt, damages, or costs awarded against such prisoner, for the full amount of such debt, damages, and costs, for the escape of such prisoner, through the insufficiency of the jail or prison in any county.—Lovell v. Bellows, 7 N. H. 375.

79. N.H.—Lovell v. Bellows, supra. 50 C.J. p 357 note 42.

80. Ga.—Craig v. Maltbie, 1 Ga. 544.

81. Ga.—Craig v. Maltbie, supra.

82. N.Y.—Kain v. Ostrander, 8 Johns. 207.

83. N.Y.—Kain v. Ostrander, supra. 50 C.J. p 357 note 43.

a cause of action.<sup>84</sup> So the complaint or declaration should contain substantive allegations showing that the prisoner escaped<sup>85</sup> with the permission<sup>86</sup> or through the negligence<sup>87</sup> of the sheriff. An escape from the custody of the deputy sheriff may be declared on as an escape from the sheriff.<sup>88</sup> Where a commitment has been alleged, such allegation may be considered as including all the facts necessary to a legal commitment.<sup>89</sup>

**Demurrer.** An objection which goes merely to the form and not to the substance of a pleading must be raised by special demurrer and may not be taken advantage of on general demurrer.<sup>90</sup>

## (2) Plea or Answer

The rules applicable to the plea or answer in civil actions generally are applicable to an action for escape.

The rules applicable to the plea or answer in civil actions generally are applicable to an action for escape.<sup>91</sup> Thus an allegation that the sheriff permitted the escape should be denied either generally or specifically,<sup>92</sup> or by the insertion of an averment in the answer which, if true, would be inconsistent, or in conflict, with such allegation.<sup>93</sup> Each defense in an answer which, by its terms, is declared to be "a further and distinct defense" must be complete in itself, and may not be aided by a resort to other parts of the answer to which it contains no reference in terms or by necessary implication.<sup>94</sup> Where discharge is pleaded, it must be shown how the discharge was made.<sup>95</sup>

## (3) Issues, Proof, and Variance

In actions for escape, the rules applicable to issues, proof, and variance in civil actions generally have been applied.

In actions for escape, the rules applicable to issues, proof, and variance in civil actions gener-

ally have been applied.<sup>96</sup> Thus it has been held that a voluntary return may not be shown under the general issue,<sup>97</sup> but it has also been held that a defense of fresh pursuit may be so shown.<sup>98</sup> Further, it may be shown on the general issue, in mitigation of damages, that the debtor had no property.<sup>99</sup> Where there is a plea of voluntary return to a single count for escape, plaintiff may, without a new assignment, prove a single escape on any day before suit brought, and defendant may then show a return into custody before suit, and apply his plea to such return;<sup>1</sup> but if plaintiff has not newly assigned, defendant may not show a previous escape and return as a defense.<sup>2</sup>

**Variance.** In an action against a sheriff for an escape, a variance as to the amount of debt alleged to be due by the prisoner is not material, and will not defeat the action.<sup>3</sup> Although the declaration in case charges a voluntary escape, proof of an escape by gross negligence will sustain a verdict for plaintiff.<sup>4</sup>

## o. Evidence

In an action for escape, an actual escape must be proved by the plaintiff, which may be shown by any competent evidence.

The rules applicable to evidence in civil actions generally are applicable to evidence in an action for escape. In an action for escape an actual escape must be proved by plaintiff,<sup>5</sup> which may be shown by any competent evidence.<sup>6</sup> It is competent for the sheriff to prove that there was no negligence on his part and that he used due means to retake the prisoner,<sup>7</sup> or that the prisoner voluntarily returned before suit was brought.<sup>8</sup> In proving the insufficiency of bail, it is not necessary for plaintiff to show that he proceeded to judgment against the bail without success.<sup>9</sup> Evidence on the part of

84. Ky.—Barns v. Williams, 2 Bibb 562.

85. Ky.—Barns v. Williams, supra. 50 C.J. p 358 note 57.

86. N.Y.—Loosey v. Orser, 17 N.Y. Super. 391.

87. N.H.—Skinner v. White, 9 N.H. 204.

S.C.—Smith v. Hart, 3 S.C.L. 146.

88. N.H.—Skinner v. White, 9 N.H. 204.

89. N.H.—Atherton v. Gilmore, 9 N. H. 185.

50 C.J. p 358 note 61.

90. Vt.—State Treasurer v. Weeks, 4 Vt. 215.

Va.—Burley v. Griffith, 8 Leigh 442, 35 Va. 442.

91. N.Y.—Loosey v. Orser, 17 N.Y. Super. 391.

92. N.Y.—Loosey v. Orser, supra.

93. N.Y.—Loosey v. Orser, supra. 50 C.J. p 358 note 65.

94. N.Y.—Loosey v. Orser, supra.

95. Pa.—Catherwood v. Fidler, 2 Pa. L.J. 296.

50 C.J. p 358 note 68.

96. N.Y.—Howland v. Squier, 9 Cow. 91.

S.C.—Smith v. Hart, 3 S.C.L. 146.

97. N.Y.—Howland v. Squier, 9 Cow. 91.

98. N.C.—Whicker v. Roberts, 32 N. C. 485.

50 C.J. p 358 note 75.

99. Ohio.—Richardson v. Spencer, 6 Ohio 13.

1. N.Y.—Howland v. Squier, 9 Cow. 91.

2. N.Y.—Howland v. Squier, supra.

3. S.C.—Smith v. Hart, 3 S.C.L. 146.

4. S.C.—Smith v. Hart, supra.

5. N.Y.—Singer v. Knott, 142 N.E. 435, 237 N.Y. 110.

50 C.J. p 358 note 88.

6. N.Y.—Patterson v. Westervelt, 17 Wend. 543.

50 C.J. p 358 note 89.

7. Va.—Johnston v. Macon, 4 Call 367, 8 Va. 367.

50 C.J. p 358 note 90.

8. N.Y.—Didsbury v. Van Tassel, 12 N.Y.S. 30.

9. Mass.—Young v. Hosmer, 11 Mass. 89.

plaintiff that the prisoner was seen at large walking in the street is prima facie sufficient to entitle him to recover.<sup>10</sup>

#### D. Damages

- (1) In general
- (2) Mitigation of damages

##### (1) In General

Where the escape is out of execution and the action is in debt against the sheriff on his liability independently of his bond, the plaintiff, on proving the escape, is entitled to recover the whole amount of the debt and costs, and interest; and the same measure of damages has been held applicable for an escape out of execution sued for in case.

Where the escape is out of execution and the action is in debt against the sheriff on his liability independently of his bond, plaintiff, on proving the escape, is entitled to recover the whole amount of the debt and costs,<sup>11</sup> and interest;<sup>12</sup> and the same measure of damages has been held applicable for an escape out of execution sued for in case.<sup>13</sup> However, in an action on the case for an escape on mesne process the jury are not limited, as in an action of debt for an escape on execution, to finding any precise sum, but must assess damages according to the evidence,<sup>14</sup> although only the special damages occasioned by the escape may be recovered.<sup>15</sup> The sheriff's sureties are liable, in an action of debt on the bond, only for the damages actually sustained.<sup>16</sup> Where a state statute makes a sheriff civilly liable for the safe-keeping of prisoners, and any party aggrieved may sue on his bond in the name of the state, the United States may recover expenses of the arrest and keeping of the prisoner, and money expended in recapturing him.<sup>17</sup>

*In action by creditor against county.* In an action on the case against a county for the escape of an execution debtor by reason of defects in the

jail, the special damage which plaintiff has sustained by his escape is the amount to be recovered;<sup>18</sup> and such damage may amount to the whole debt with interest and costs.<sup>19</sup>

*In action by sheriff against county.* The damages recovered against a sheriff for an escape in consequence of there being no jail is the measure of damages in an action by the sheriff against the county commissioners for not providing a jail.<sup>20</sup>

##### (2) Mitigation of Damages

Ordinarily, in an action on the case for an escape, the defendant may show, in mitigation of damages, that the prisoner was insolvent or wholly destitute of property; but where the action is debt, or in the nature of debt, the defendant may not show the insolvency of the debtor in mitigation of damages.

Except where and to the extent that the rule may have been changed by statute, in an action on the case for an escape defendant may show, in mitigation of damages, that the prisoner was insolvent or wholly destitute of property;<sup>21</sup> and this whether the escape was voluntary or negligent,<sup>22</sup> although general reputation of insolvency is not admissible.<sup>23</sup> However, where the action is debt, or in the nature of debt, defendant may not show the insolvency of the debtor in mitigation of damages.<sup>24</sup>

#### q. Trial; Judgment and Enforcement Thereof

General rules apply to the trial, and to judgment and enforcement thereof, in an action for escape.

General rules relating to the trial of civil actions are applicable to actions for escape.<sup>25</sup> Likewise, the general rules as to judgments and their enforcement apply.<sup>26</sup> Since the sheriff is answerable only for the original judgment for the nonpayment of which the prisoner was committed, he should have the benefit of any conditions on which such judgment was payable,<sup>27</sup> and the judgment against him in such a case should not be for a sum payable

10. N.Y.—Steward v. Kip, 7 Johns. 165.

11. N.C.—Lash v. Ziglar, 27 N.C. 702.  
50 C.J. p 359 note 95.

12. Mass.—Whitehead v. Varnum, 14 Pick. 523.  
50 C.J. p 359 note 96.

13. Conn.—Bowen v. Huntington, 3 Conn. 423.

14. S.C.—Smith v. Hart, 3 S.C.L. 146.

15. U.S.—Spafford v. Goodell, C.C. Mich., 22 F.Cas.No.13,197, 3 McLean 97.  
50 C.J. p 359 note 1.

16. Ind.—State v. Newcomer, 8 N.E. 920, 109 Ind. 243.  
50 C.J. p 359 note 3.

17. U.S.—State of Tennessee, to Use of U. S. v. Hill, Tenn., 60 F. 1005, 9 C.C.A. 326, 24 L.R.A. 170.

18. Conn.—Williams v. New Haven County, 2 Root 23.  
50 C.J. p 359 note 5.

19. Conn.—Hubbard v. Shaler, 2 Day 195.

20. Ohio.—Brown County v. Butt, 2 Ohio 348.  
50 C.J. p 359 note 7.

21. Mass.—Nye v. Smith, 11 Mass. 188.  
50 C.J. p 359 note 9.

22. Mass.—Brooks v. Hoyt, 6 Pick. 468.

Ohio.—Hootman v. Shriner, 15 Ohio St. 43.

23. N.Y.—Fairchild v. Case, 24 Wend. 381.

24. Ind.—State v. Hamilton, 33 Ind. 502.  
50 C.J. p 359 note 12.

25. Pa.—Saunders v. Perkins, 21 A. 257, 140 Pa. 102.  
50 C.J. p 359 note 14.

26. Ind.—Hoagland v. State, 40 N. E. 931, 22 Ind.App. 204, 72 Am.S.R. 298.

27. Ind.—Hoagland v. State, supra.



absolutely.<sup>28</sup> Moreover, the sheriff may not be committed to jail for failure to pay the judgment rendered against him.<sup>29</sup> The court will stay execution on the judgment to allow the sheriff time to bring his action on the bond taken for the jail liberties.<sup>30</sup>

## § 24. Compensation and Reimbursement for Maintenance and Care of Prisoners

The right to compensation and reimbursement for the care and maintenance of prisoners is discussed *infra* § 25; who is liable therefor, *infra* § 26; the allowance and payment of claims, *infra* § 27; accounting for fees and emoluments by sheriffs and like officers, *infra* § 28; and actions for salaries, fees, and other emoluments, *infra* § 29.

Examine Pocket Parts for later cases.

## § 25. — Right to

- a. In general
- b. Particular services and expenses
- c. Change of compensation
- d. Persons entitled

### a. In General

Statutory provisions control with respect to the right of a sheriff or other officer to compensation for the care and maintenance of prisoners, and the amount of such compensation, as well as with respect to the right of such an officer to be reimbursed for expenses incurred by him therein; a jailer who allows prisoners to escape has been held to forfeit his fees for keeping them.

Statutory provisions control with respect to the right of a sheriff or other officer to compensation for the care and maintenance of prisoners, and the amount of such compensation, as well as with respect to the right of such an officer to be reimbursed for expenses incurred by him therein;<sup>31</sup> and a sheriff is not entitled to payment for the safe-keeping of a person not within the purview of the

statute.<sup>32</sup> In determining the right to compensation and reimbursement, and the liability of the county or other body therefor, the general rule is that the sheriff takes the office with all its burdens, and subject to the power of the legislature to add new duties, and he may recover no other compensation than that which the law allows;<sup>33</sup> and the same is true of a warden of a penitentiary.<sup>34</sup>

A court has no authority to direct a jailer not to receive a prisoner convicted of crime except on condition of bond being given for the prison charges, nor may a jailer require bond for their payment except in civil cases.<sup>35</sup> Where a sheriff has contracted with the county to keep all the prisoners for a gross sum payable monthly, relinquishing to the county all fees allowed by law for such services, he may not repudiate the contract, after it has been observed by the parties for several years, and recover the excess of the fees over the stipulated compensation, on the ground that the parties, in making the contract, acted under a mistake as to the constitutionality of the statute.<sup>36</sup>

On the other hand, an agreement to accept compensation different from that fixed by law has been held invalid;<sup>37</sup> and it has been held that a jailer may not estop himself to claim the full payment fixed by statute.<sup>38</sup>

*Forfeiture of compensation.* Where, through negligence or misconduct, persons employed to guard prisoners have allowed them to escape, they have been held not entitled to full compensation,<sup>39</sup> and it has also been held that a jailer who allows prisoners to escape forfeits his fees for keeping them.<sup>40</sup>

### b. Particular Services and Expenses

- (1) In general
- (2) Jailer, turnkey, guards, and servants

28. Ind.—Hoagland v. State, *supra*.

29. Ind.—Hoagland v. State, *supra*.

30. N.Y.—McIntyre v. Woods, 5 Johns. 357.

31. Iowa.—McCord v. Page County, 162 N.W. 242, 179 Iowa 1032.

Ky.—Talbot v. Caudill, 58 S.W.2d 385, 248 Ky. 146.

N.Y.—People ex rel. Nugent v. Board of Sup'rs of Oneida County, 121 N.Y.S. 372, 65 Misc. 327.

Okl.—Protest of Kansas City of Southern Ry. Co., 11 P.2d 500, 157 Okl. 246.

Pa.—In re Petition of Pritchard, 30 Pa.Dist. & Co. 367, 85 Pittsb.Leg.J. 676.

S.C.—City of Greenville v. Priddy, 160 S.E. 144, 162 S.C. 52.

50 C.J. p 360 note 25.

Compensation of sheriff as jailer generally see *supra* § 10.

32. Tex.—Nolan County v. Yarbrough, Civ.App., 34 S.W.2d 302.

*Who is prisoner*

In statute giving sheriff right to collect certain sum per day for safe-keeping of prisoners, word "prisoners" means persons charged with violation of criminal laws, so that county was not liable to sheriff for safe-keeping of persons committed only because sheriff had suspicion they might be implicated in crime.—Nolan County v. Yarbrough, *supra*.

33. W.Va.—Tyler County Ct. v. Long, 77 S.E. 328, 72 W.Va. 8, Ann.Cas.1915B 808.

50 C.J. p 360 note 29.

34. Neb.—State v. Wallichs, 19 N.W. 641, 15 Neb. 457.

50 C.J. p 360 note 30.

35. N.H.—In re De Comcey, 22 N.H. 368.

36. Tenn.—Collier v. Montgomery County, 54 S.W. 989, 103 Tenn. 705.

37. Ky.—Winchester v. Azbill, 9 S.W.2d 51, 225 Ky. 389.

50 C.J. p 361 note 33.

38. Ky.—Winchester v. Azbill, *supra*.

39. Ky.—Judge Hickman County Ct. v. Moore, 2 Bush 108.

40. S.C.—Saxon v. Boyce, 17 S.C.L. 66.

Tenn.—McCracken v. State, 8 Yerg. 171.

- (3) Board of prisoners
- (4) Medical attendance
- (5) Persons confined under civil process
- (6) Residence of jailer
- (7) Federal prisoners

### (1) In General

Under some statutes a sheriff is not entitled to any additional compensation for services in keeping the jail or looking after the prisoners; reimbursement or compensation for things necessarily used and consumed in boarding prisoners ordinarily should be refused when these things must be deemed as included in, and paid for, by the per diem or per week allowance for boarding, but it is frequently held that a sheriff is entitled to compensation for property purchased for the county and necessary for use in the jail.

Where the statute merely allows a certain sum for the boarding of each prisoner, or allows the actual cost of boarding, a sheriff is not entitled to any additional compensation for services in keeping the jail or looking after the prisoners, since this is a part of his general duty;<sup>41</sup> and, where a specified allowance for the support of prisoners is fixed as the statutory perquisite of his office, a sheriff, although entitled to any incidental profits above the actual cost,<sup>42</sup> must bear the loss if the actual cost exceeds the allowance.<sup>43</sup>

Reimbursement or compensation for things necessarily used and consumed in boarding prisoners ordinarily should be refused, when these things must be deemed as included in, and paid for, by the per diem or per week allowance for boarding;<sup>44</sup> and it has been held that there may be no reimburse-

ment for disinfectants purchased by a sheriff without authorization<sup>45</sup> or for tobacco and other supplies furnished to prisoners.<sup>46</sup> Also, under some statutory provisions, a sheriff is not entitled to be reimbursed for medical and surgical supplies furnished by the order of the jail physician.<sup>47</sup>

On the other hand, it is frequently held that a sheriff is entitled to compensation or reimbursement for property purchased for the county and necessary for use in the jail,<sup>48</sup> such as articles and supplies to keep the jail clean and fit for occupancy<sup>49</sup> and in repair,<sup>50</sup> beds,<sup>51</sup> bedding,<sup>52</sup> brooms and mops,<sup>53</sup> disinfectants, soap, and toilet articles,<sup>54</sup> fuel,<sup>55</sup> gas,<sup>56</sup> heat,<sup>57</sup> light,<sup>58</sup> water,<sup>59</sup> and necessary clothing furnished prisoners,<sup>60</sup> and the repair<sup>61</sup> and laundry<sup>62</sup> thereof; and where it is necessary to remove a dead body to prevent infection the charge for such service must be paid by the county.<sup>63</sup>

*Allowance for fraction of day.* As a general rule, frequently by virtue of statutory provisions to that effect, a jailer is entitled to his per diem allowance for a whole day although the prisoner is not in jail all day.<sup>64</sup>

*Compensation and reimbursement for capture of escaped prisoner.* If a prisoner escapes, the sheriff has been held not entitled, as a matter of right, to demand reimbursement for expenses incurred in recapturing him, or compensation for services performed in effecting the recapture.<sup>65</sup>

41. Kan.—Norton v. Simms, 118 P. 1071, 85 Kan. 822.  
50 C.J. p 361 note 38.

42. Tex.—Harris County v. Hammond, Civ.App., 203 S.W. 451.

43. Tex.—Harris County v. Hammond, supra.

44. Minn.—Connolly v. Dakota County, 29 N.W. 1, 35 Minn. 365.  
50 C.J. p 361 note 42.

45. Tenn.—State v. Trotter, 218 S. W. 230, 142 Tenn. 160.  
50 C.J. p 361 note 43.

46. W.Va.—Tyler County Ct. v. Long, 77 S.E. 328, 72 W.Va. 8, Ann. Cas.1915B 808.

47. N.Y.—People ex rel. Nugent v. Board of Sup'rs of Oneida County, 121 N.Y.S. 372, 65 Misc. 327.

48. Kan.—Norton v. Simms, 118 P. 1071, 85 Kan. 822.  
50 C.J. p 361 note 45.

49. Kan.—Norton v. Simms, supra.

50. Kan.—Norton v. Simms, supra.

51. Ky.—Holland v. Fayette County, 41 S.W.2d 651, 240 Ky. 37.

52. Ky.—Holland v. Fayette County, supra.  
50 C.J. p 361 note 48.

53. Kan.—Norton v. Simms, 118 P. 1071, 85 Kan. 822.  
50 C.J. p 361 note 49.

54. Kan.—Norton v. Simms, supra.

55. Iowa.—Miller v. Dickinson County, 26 N.W. 31, 68 Iowa 103.  
50 C.J. p 361 note 51.

56. Mo.—Harkreader v. Vernon County, 116 S.W. 523, 216 Mo. 696.

57. Kan.—Norton v. Simms, 118 P. 1071, 85 Kan. 822.  
50 C.J. p 361 note 53.

58. Kan.—Norton v. Simms, supra.  
50 C.J. p 361 note 54.

59. Tenn.—State v. Trotter, 218 S. W. 230, 142 Tenn. 160.  
50 C.J. p 361 note 55.

60. Iowa.—Miller v. Dickinson County, 26 N.W. 31, 68 Iowa 103.  
50 C.J. p 361 note 56.

61. Ill.—La Salle County v. Milligan, 32 N.E. 196, 143 Ill. 321.

62. Ill.—La Salle County v. Milligan, 34 Ill.App. 346, affirmed 32 N. E. 196, 143 Ill. 321.

63. N.H.—Slotts v. Rockingham County, 53 N.H. 598.

64. Ky.—Talbot v. Caudill, 58 S.W. 2d 385, 248 Ky. 146.

#### Substantial portion

Where a prisoner is kept in jail for any substantial portion of the day, the jailer is entitled to the per diem allowance for a day.—*Corpus Juris* cited in *Smith v. State ex rel. Thomas*, 154 So. 184, 185, 114 Fla. 478.

50 C.J. p 361 note 61.

#### In Tennessee

(1) Under present statute sheriff is entitled to full compensation for fraction of day.—*State ex rel. Biggs v. Barclay*, 216 S.W.2d 711, 188 Tenn. 26.

(2) Under earlier statute, in order to collect for a full day, sheriff had to furnish three full meals.—*State v. Trotter*, 218 S.W. 230, 142 Tenn. 160.

65. Ind.—Martin County v. Pipher, 98 Ind. 124.

*Extra compensation for care of insane prisoner.* A sheriff is entitled to no extra compensation for the care of an insane prisoner,<sup>66</sup> irrespective of any promise by another person to compensate the sheriff.<sup>67</sup>

### (2) Jailer, Turnkey, Guards, and Servants

Ordinarily a sheriff may not recover compensation in addition to his established salary and fees for his services as jailer in maintaining and caring for prisoners, nor may he recover for the services and board of a jailer or turnkey employed by him, but the rule is otherwise under some statutes; in the absence of a statutory provision therefor, an allowance to a sheriff for the expense of a guard usually is not proper.

Ordinarily a sheriff's established salary and fees cover his services as jailer in maintaining and caring for prisoners, and he is not entitled to recover additional compensation therefor,<sup>68</sup> nor may he ordinarily recover for the services and board of a jailer or turnkey employed by him.<sup>69</sup> On the other hand, under some statutes, a sheriff may be entitled to additional compensation for his services as jailer in maintaining and caring for prisoners,<sup>70</sup> as where a sheriff is authorized, when he elects to perform the duties of jailer in person, to retain the fees prescribed therefor in addition to his compensation as sheriff.<sup>71</sup> Moreover, under some statutory provisions, a sheriff is entitled to a specified sum of money per day for attending jail when occupied by a prisoner or prisoners, although he employs deputies as jailers,<sup>72</sup> and, under permissive statutes, a sheriff is entitled to recover the expense of a jailer or turnkey properly employed by him.<sup>73</sup> A sheriff may also be entitled to be reimbursed for the hire of servants in connection with the jail, where in his honest judgment, based on a fair necessity therefor,

he employs such servants.<sup>74</sup>

*Guards.* An allowance to a sheriff for the expense of a guard usually is not proper, in the absence of a statutory provision therefor,<sup>75</sup> although the expense of extra emergency guards necessary to keep a prisoner safely has been held a proper charge against a county.<sup>76</sup> Where the expense of guards is allowed by statute, such an allowance is proper to the extent and within the limitations of the statutory provision;<sup>77</sup> but it has been held that a jailer may not himself be appointed or act as guard and claim compensation therefor.<sup>78</sup> Under some statutory provisions a sheriff is entitled to be reimbursed for the hire of guards in connection with the jail, where in his honest judgment, based on a fair necessity therefor, he employs such guards,<sup>79</sup> and the approval of the county commissioners, or of a judge having jurisdiction in such case, is not a condition precedent thereto.<sup>80</sup>

*Matron.* Where the law allows to the sheriff a fixed salary in full of all services rendered by him or his deputies or assistants, a woman designated to act as matron, as required by statute, is not entitled to be paid out of the county treasury.<sup>81</sup>

### (3) Board of Prisoners

An allowance for compensation for the board of prisoners should be made in accordance with, and subject to, statutory provisions.

Where a statute generally provides for compensation for the board of prisoners, the allowance must be made in accordance with, and subject to, the limitations of the particular statutory provision,<sup>82</sup> whether such compensation is a certain sum per day or week for each prisoner,<sup>83</sup> or whether it is

66. Ind.—Carroll County v. Gresham, 101 Ind. 53.

#### Reason for rule

Since a court has no authority to commit an insane prisoner as such to a jail, the presumption is that he was committed as a prisoner for some offense.—Carroll County v. Gresham, 101 Ind. 53.

67. Ind.—Gehrett v. Ferguson, 149 N.E. 86, 83 Ind.App. 717.  
50 C.J. p 364 note 2.

68. Colo.—Larimer County v. Bransom, 85 P. 750, 4 Colo.App. 274.  
Iowa.—McDonald v. Woodbury County, 48 Iowa 404.  
50 C.J. p 336 note 61.

69. Colo.—Larimer County v. Bransom, 85 P. 750, 4 Colo.App. 274.  
50 C.J. p 362 note 65.

70. Neb.—Afferbach v. York County, 146 N.W. 1050, 96 Neb. 611.  
50 C.J. p 361 note 63.

71. Neb.—Afferbach v. York County, *supra*.  
50 C.J. p 361 note 63 [a].

72. Kan.—Day v. Board of Com'rs of Cowley County, 71 P.2d 871, 146 Kan. 492.

73. Mont.—Lloyd v. Silver Bow County, 39 P. 457, 15 Mont. 433.  
50 C.J. p 362 note 66.

74. Fla.—Brown v. St. Lucie County, 153 So. 906, 114 Fla. 789.

75. Mich.—Peck v. Kent, 11 N.W. 279, 47 Mich. 477.

76. Md.—Baltimore v. Howard County, 61 Md. 326.  
50 C.J. p 362 note 68.

77. Tex.—Cooper v. Johnson County, Civ.App., 212 S.W. 528, error refused.—Ledbetter v. Dallas County, 111 S.W. 192, 51 Tex.Civ.App. 140.  
50 C.J. p 362 note 70.

78. Ky.—Vinsant v. Auditor, 1 Bush 72.  
50 C.J. p 362 note 71.

79. Fla.—Brown v. St. Lucie County, 153 So. 906, 114 Fla. 789.

80. Fla.—Brown v. St. Lucie County, *supra*.

81. Cal.—Santa Barbara County v. Janssens, 169 P. 1025, 177 Cal. 114, L.R.A.1918C 558.  
50 C.J. p 362 note 72.

82. Ark.—Mays v. Phillips County, 274 S.W. 5, 279 S.W. 366, 168 Ark. 829.  
50 C.J. p 362 notes 74, 75.

83. Kan.—Day v. Board of Com'rs of Cowley County, 71 P.2d 871, 146 Kan. 492.  
50 C.J. p 362 note 76.

Although prisoner is not given any diet during his incarceration, jailer is entitled to certain sum per day for feeding and keeping prisoner.—Talbot v. Caudill, 58 S.W.2d 385, 248 Ky. 146.

the actual cost of the board,<sup>84</sup> or an amount to be determined by a board or court.<sup>85</sup> Where the statute makes the county liable for the maintenance of prisoners and requires the sheriff to board them, without fixing compensation, he is entitled to recover the actual cost of boarding them,<sup>86</sup> but not for his personal services or for profits in his favor;<sup>87</sup> and this is true although the statute provides that the allowances shall be within certain limits.<sup>88</sup> If the circumstances are such that a prisoner in the custody of a sheriff cannot be confined in the jail, the county is liable for board and other necessities furnished him elsewhere.<sup>89</sup>

**Municipal prisoners in county jail.** A sheriff has been held entitled to retain amounts paid to him by a municipality for the board of municipal prisoners in the county jail in excess of the amount fixed by the county commissioners for boarding prisoners.<sup>90</sup>

#### (4) Medical Attendance

Under a statute providing for medical attendance to prisoners, and compensation therefor, the general rule is that no allowance may be made except under the circumstances and in the manner provided by statute, although an exception to this rule has been recognized in the case of a physician employed in the case of an emergency; in the absence of a statutory provision for medical attendance it has been held that such attendance is a proper expense of imprisonment.

Under a statute providing for medical attendance to prisoners, and compensation therefor, the general rule is that no allowance may be made except under the circumstances and in the manner provided by

statute;<sup>91</sup> but an exception to this rule has been recognized in the case of a physician employed in the case of an emergency.<sup>92</sup> In the absence of a statutory provision for medical attendance it has been held that such attendance is a proper expense of imprisonment.<sup>93</sup> However, it has also been held that the employment of a physician by a sheriff<sup>94</sup> or by jail inspectors<sup>95</sup> does not impose liability on the county for services rendered by the physician, and that no payment may be made out of the county fund for nursing a prisoner confined in a jail on a criminal charge.<sup>96</sup>

#### (5) Persons Confined under Civil Process

Whether a jailer may recover for the board or support of prisoners confined on civil process depends on statutory provisions.

A statute providing that the county commissioners shall allow a jailer reasonable compensation for the support of prisoners confined on criminal process does not entitle the jailer to recover from the county for the board of prisoners confined on civil process;<sup>97</sup> and a jailer is not bound to receive a poor prisoner in a civil action and incur expenses of his support without some indemnity therefor.<sup>98</sup> Where a tax collector commits a delinquent taxpayer to the county jail, the jailer may not recover for his support while in jail from the town whose selectmen issued the tax warrant, in the absence of an agreement to pay for such support and in the absence of statutory provision imposing such lia-

84. Wis.—Deissner v. Waukesha County, 70 N.W. 668, 95 Wis. 588. 50 C.J. p 363 note 77.

85. Ga.—Lumpkin County v. Davis, 195 S.E. 169, 185 Ga. 393. 50 C.J. p 363 note 78.

#### County commissioners

(1) County commissioners should allow sheriff, as ex officio jailer, sufficient amount for diet of prisoners, that their strength and health should not suffer from insufficiency of food.—Lumpkin County v. Davis, 195 S.E. 169, 185 Ga. 393—Jasper County v. Persons, 116 S.E. 538, 155 Ga. 277.

(2) If amount allowed by county commissioners to sheriff for dieting of prisoners is not reasonably sufficient, sheriff is entitled to recover amount over and above amount allowed by commissioners as would fairly and reasonably compensate him for dieting the prisoners confined in jail.—Lumpkin County v. Davis, supra.

86. Wis.—Bell v. Fond du Lac County, 10 N.W. 523, 53 Wis. 433. 50 C.J. p 363 note 79.

87. Wis.—Doty v. Sauk County, 67 S.W. 10, 93 Wis. 102—Bell v. Fond du Lac County, 10 N.W. 522, 53 Wis. 433.

88. Ohio.—Kohler v. Powell, 154 N.E. 340, 115 Ohio St. 418. 50 C.J. p 363 note 81.

89. Iowa.—Miller v. Dickinson County, 26 N.W. 31, 68 Iowa 102. 50 C.J. p 363 note 84.

90. S.D.—Scovel v. Pennington County, 282 N.W. 524, 66 S.D. 311.

#### Reason for rule

The legislature having made no provision for municipality's payment to county of any part of expense incurred in maintaining jail for use of municipal prisoners, it remains for county commissioners to say whether their consent to use of jail by municipality shall be conditioned on payment to county, so that latter may not recover amounts paid by municipality to sheriff for municipal prisoners' board in excess of rate fixed by county commissioners, especially as statutes provide for payment of county expense by other

counties, states and United States.—Scovel v. Pennington County, supra.

91. Ill.—La Salle County v. Milligan, 32 N.E. 196, 143 Ill. 321. 50 C.J. p 363 note 86.

92. Ind.—Lamar v. Pike County, 30 N.E. 912, 4 Ind.App. 191. N.C.—Spicer v. Williamson, 132 S.E. 291, 191 N.C. 487, 44 A.L.R. 1280.

93. Ky.—Corpus Juris cited in Department of Welfare v. Brock, 206 S.W.2d 915, 917, 306 Ky. 243. 50 C.J. p 363 note 88.

94. Ala.—Mitchell v. Tallapoosa County, 30 Ala. 130. 50 C.J. p 363 note 89.

95. Tenn.—Connell v. Davidson County, 2 Head 188. 50 C.J. p 363 note 90.

96. Va.—State v. Ohio County, 92 S.E. 751, 80 W.Va. 503.

97. N.H.—Spinney v. Seabrook, 104 A. 248, 79 N.H. 34.

98. N.H.—Spinney v. Seabrook, supra. 50 C.J. p 364 note 94.

bility;<sup>99</sup> nor may he recover therefor from the tax collector personally.<sup>1</sup>

### (6) Residence of Jailer

While a jailer may be entitled to recover the expense of maintaining the rooms occupied by him, where he occupies such rooms in pursuance of a statute, and such rooms constitute a part of the jail for the maintenance of which the county is liable, under some statutes a jailer may not be entitled to recover for the maintenance of, and supplies for, his residence.

While a jailer may be entitled to recover the expense of maintaining the rooms occupied by him, where he occupies such rooms in pursuance of a statute, and such rooms constitute a part of the jail, for the maintenance of which the county is liable,<sup>2</sup> under some statutes a jailer may not be entitled to recover for the maintenance of, and supplies for, his residence,<sup>3</sup> so that, where the residence occupied by a jailer during his term of office is not owned by the county, he may not recover from the county for the rent, heat, light, and water for his residence, in the absence of an express contract therefor.<sup>4</sup>

### (7) Federal Prisoners

The compensation for the support of federal prisoners in state or county prisons may include not only the expense of feeding the prisoners, but it may also include a just charge for all other supplies and services incident to maintaining and guarding them; whether a sheriff is entitled to all the money received for the support of federal prisoners, or to any part of such money, depends on statutory provisions.

The compensation for the support of federal prisoners in state or county prisons, being, as discussed supra § 3, a matter of contract, may include not only the expense of feeding the prisoners,<sup>5</sup> but also a just charge for all other supplies and services incident to maintaining and guarding them.<sup>6</sup> Under some statutory provisions a sheriff is entitled to all of the money received for the support of federal prisoners,<sup>7</sup> and the county has been held to have no interest in money in the hands of the sheriff representing profits derived from feeding federal prisoners, where, under the statute, the sheriff acts as jailer for the United States in keeping and caring for such prisoners.<sup>8</sup> Also, under some statutory provisions, the county is not entitled to the amount paid to the sheriff for keeping federal prisoners, in excess of the rate fixed by the county commissioners, inasmuch as the excess amount belongs to the sheriff;<sup>9</sup> and the county has been held not to be entitled to any compensation for the use of the jail.<sup>10</sup>

On the other hand, the fees received by a jailer, under some statutes, for keeping federal prisoners belong to the county and not to the jailer who is on a salary basis.<sup>11</sup> So, under a statute providing that a sheriff shall receive a specified salary as full compensation for the services required of him by law, or by virtue of his office, he is not entitled to retain any part of the amount paid him by the federal government for the support of federal prisoners.<sup>12</sup>

99. N.H.—Spinney v. Seabrook, supra.

50 C.J. p 364 note 95.

1. N.H.—Spinney v. Seabrook, supra.

2. Kan.—Norton v. Simms, 118 P. 1071, 85 Kan. 822.

Liability of jailer for rent see supra § 12.

#### Authority to equip residence

County was required to furnish heat, light, and water for jail building, including portion occupied by jailer, deputy, or sheriff in charge of prisoners, where county had obtained grant of authority from state legislature "to erect sheriff's residence and county jail combined in one building and equip residence, and where sheriffs of county and their families had occupied county jail as living quarters for number of years.—Day v. Board of Com'rs of Cowley County, 71 P.2d 871, 146 Kan. 492.

3. Ky.—Holland v. Fayette County, 41 S.W.2d 651, 240 Ky. 37.

#### Beds

County was not responsible for beds in jailer's residence.—Holland v. Fayette County, supra.

4. Ky.—Laurel County Fiscal Court v. Steele, 148 S.W.2d 283, 285 Ky. 407.

5. Cal.—Los Angeles County v. Cline, 197 P. 87, 185 Cal. 299.

6. Cal.—Los Angeles County v. Cline, supra.

50 C.J. p 364 note 8.

#### Statute construed

Statute requiring board of county commissioners to fix sum to compensate county for money expended for fuel, light, and other expenses in keeping state prisoners and United States prisoners in county jail, and sheriff to collect such sum from federal and state governments, was intended to make the United States share in operating expense of jail, and words "fuel, light, and other expenses" were intended to exclude charges for depreciation and obsolescence, and committed determination of proper allocation of actual out of pocket expense as between state and federal prisoners on a per prisoner basis to board of commissioners.—Adamson v. Minnehaha County, 293 N.W. 542, 67 S.D. 423.

7. Mont.—Majors v. Lewis, etc., County, 201 P. 268, 60 Mont. 608. 50 C.J. p 364 note 11.

8. Okl.—Board of Com'rs of Tulsa County v. Mars, 117 P.2d 129, 189 Okl. 339.

#### Reason for rule

Since statehood the sheriffs of the various counties of the state have retained funds derived as profits from feeding prisoners with the acquiescence and consent of officials charged with administration of fiscal affairs of the counties and state, and the right of sheriffs to such funds has not been heretofore questioned; acquiescence in the construction of the statute is entitled to great weight, even though not participated in by the judiciary.—Board of Com'rs of Tulsa County v. Mars, supra.

9. S.D.—Scovel v. Pennington County, 282 N.W. 524, 66 S.D. 311.

10. Mont.—Majors v. Lewis, etc., County, 201 P. 268, 60 Mont. 608.

11. Ky.—Holland v. Fayette County, 41 S.W.2d 651, 240 Ky. 37.

12. Ariz.—Adams v. Maricopa County, 145 P. 884, 16 Ariz. 418. 50 C.J. p 364 note 14.

Also, a statute, allowing a salary to the sheriff in full compensation for all his services and requiring him to pay over to the county all fees and charges received by him, applies to all moneys coming into the hands of the sheriff for the support of federal prisoners;<sup>13</sup> and a sum paid in addition to the amount allowed for the care of the prisoners, to cover the individual liability of the sheriff for damages for keeping the prisoners in custody, belongs to the county and not to the sheriff,<sup>14</sup> and the sheriff is not entitled to compensation even for extra services rendered such prisoners.<sup>15</sup> Under statutes of the nature just referred to, and other provisions requiring an allowance to the sheriff of his necessary expenses in boarding prisoners, the expenses incurred for the feeding of federal prisoners are to be allowed in the same manner and at the same rates as those for prisoners committed by the state.<sup>16</sup>

### c. Change of Compensation

Where it is the official duty of an officer to board the prisoners in jail, the compensation allowed him therefor has been held to be an emolument within the meaning of a constitutional provision prohibiting any change thereof during an officer's term of office; but it has also been held that fees paid to a jailer for feeding prisoners are not within such a constitutional inhibition, where the jailer has no inherent duty to feed prisoners in jail.

Where it is the official duty of an officer to board the prisoners in the jail, the compensation allowed him therefor has been held to be an emolument within the meaning of a constitutional provision prohibiting any change thereof during an officer's term of office;<sup>17</sup> but it has also been held that fees paid to a jailer for feeding prisoners are not within such a constitutional inhibition, where the jailer has no inherent duty to feed prisoners in jail.<sup>18</sup> Moreover, a constitutional provision of this nature is a limitation on the power of the legislature alone, and does not prevent the court from making changes in the emoluments of a sheriff as authorized by the statute in force at the time of his election.<sup>19</sup>

A constitutional provision against changing an officer's salary does not prevent the legislature from

changing the method of punishing criminals, although it indirectly affects the jailer's fees.<sup>20</sup> Also, where an officer, required to furnish the food of prisoners, may be reimbursed only for the actual cost thereof, the fluctuating cost from time to time has been held not within a prohibition against the change of the salary of an officer during his term of office.<sup>21</sup> Furthermore, under a constitution so providing, the inhibition against increasing or decreasing compensation of public officers during their term of office does not prevent the legislature from increasing or diminishing the allowance to sheriffs or other officers for feeding, transferring, or guarding prisoners.<sup>22</sup>

Inasmuch as an allowance for board should be made in conformity with statute, as discussed supra subdivision b (3) of this section, where a statute fixes the amount to be allowed for boarding prisoners it may not be changed, or the sheriff deprived thereof, by the county commissioners.<sup>23</sup> Under a statute reducing the compensation of sheriffs for boarding prisoners in jail, but declaring that it shall not apply to any sheriff in office at the time of the adoption of the constitution then in force, but shall be in operation after the expiration of the terms of such sheriffs, a sheriff who has been appointed since the passage of the act, to fill the unexpired term of one who was in office at the time of its passage, may not claim the benefit of the proviso.<sup>24</sup> An act increasing the fees of county officers a certain per cent has been held not to increase the compensation allowed the sheriff for boarding prisoners.<sup>25</sup> A statute changing the basis of the compensation of a sheriff in certain respects has been held not to destroy the right of the sheriff to receive and retain amounts paid to him as board for prisoners under an earlier statute.<sup>26</sup>

### d. Persons Entitled

Ordinarily the sheriff, and not his deputy or jailer, is entitled to receive and collect the fees and other compensation for services as jailer, and for boarding and guarding prisoners in jail, although under some statutes the sheriff is not so entitled where the duties of jailer are performed by someone other than himself.

13. Cal.—Los Angeles County v. Cline, 197 P. 67, 185 Cal. 299.

14. Wash.—King County v. Stringer, 227 P. 17, 130 Wash. 287.

15. N.Y.—Franklin County v. Henry, 148 N.Y.S. 627.

16. Cal.—Los Angeles County v. Cline, 197 P. 67, 185 Cal. 299.

17. Ohio.—Griffith v. Newark, 8 Ohio R. & C.P. 326, 6 Ohio N.P. 521. 50 C.J. p 364 note 23.

18. Ky.—Howell v. City of Ashland, 39 S.W.2d 468, 239 Ky. 349.

19. Pa.—McCormick v. Fayette County, 24 A. 667, 150 Pa. 190. 50 C.J. p 364 note 24.

20. Ky.—Duff v. Mosley, 183 S.W. 231, 169 Ky. 61. 50 C.J. p 365 note 25.

21. Ill.—Shirk v. Massac County, 216 Ill.App. 554.

22. Ala.—Stone v. State, 72 So. 536, 197 Ala. 293.

50 C.J. p 365 note 29.

23. Wyo.—Albany County v. Boswell, 1 Wyo. 292.

24. Ala.—Ex parte Mason, 55 Ala. 262.

50 C.J. p 365 note 28.

25. Ala.—Feagin v. Comptroller, 42 Ala. 516.

Pa.—Godshalk v. Northampton County, 71 Pa. 324.

26. S.D.—Scovel v. Pennington County, 282 N.W. 524, 66 S.D. 311.

Ordinarily the sheriff, and not his deputy or jailer, is entitled to receive and collect the fees and other compensation for services as jailer, and for boarding and guarding prisoners in the jail,<sup>27</sup> although under some statutes the sheriff is not so entitled where the duties of jailer are performed by someone other than himself.<sup>28</sup> Where, by law, an allowance is made to a sheriff for the maintenance and care of prisoners, an individual who furnishes such care and maintenance must look to the sheriff for his pay, and not to the county.<sup>29</sup> A statute relating to the fees of a county jailer has been held not to apply to a chief of police who performs the duties of city jailer.<sup>30</sup>

*De facto jailer.* It has been held that one who acts as jailer under color of title is entitled to the amount allowed him by the court for boarding prisoners,<sup>31</sup> although he might not be entitled to fees for committing and releasing prisoners.<sup>32</sup>

## § 26. — Who Liable

- a. In general
- b. Liability of county
- c. Liability of city, town, or other municipality
- d. Liability as between counties and as between towns
- e. Liability of prisoner

### a. In General

The United States is liable for the maintenance of persons committed for contempt under its laws; a state

is liable for jail fees or other prison expenses when, and only when, such liability is imposed by statute.

Since the United States, by force of statute, is liable for the expense of confining persons arrested or committed under its laws, it is liable for the maintenance of persons committed for contempt under its laws;<sup>33</sup> and, hence, the United States,<sup>34</sup> and not the creditors,<sup>35</sup> is liable for the maintenance of a bankrupt committed for contempt.

*Liability of state.* A state is liable for jail fees or other prison expenses when, and only when, such liability is imposed by statute,<sup>36</sup> and in no case may the state be made liable for expenses connected with jails merely by implication.<sup>37</sup>

### b. Liability of County

Under statutes imposing on counties liability for the care of prisoners, the liability of a county is controlled by, and is subject to, the restrictions of the particular statute.

Under statutes imposing on counties liability for the care of prisoners, the liability of a county is controlled by, and is subject to, the restrictions of the particular statute.<sup>38</sup> While, under some statutory provisions, the liability of a county extends only to the maintenance of a jail building and its equipment,<sup>39</sup> a county is generally liable for the care and maintenance of its own prisons and of prisoners confined therein for offenses committed within the county.<sup>40</sup> In some jurisdictions, a county is also liable to the sheriff for the board of prisoners committed under authority of a statute, in pursuance

27. Ill.—Union County v. Patton, 63 Ill. 458.

50 C.J. p 365 note 30.

28. Mo.—Moutier v. Stumpe, 39 Mo. App. 161.

50 C.J. p 365 note 31.

29. Idaho.—Mombert v. Bannock County, 75 P. 239, 9 Idaho 470.

Kan.—Hendricks v. Chautauqua County, 11 P. 450, 35 Kan. 483.

30. Ky.—Corbin v. Davis, 236 S.W. 564, 193 Ky. 391.

50 C.J. p 365 note 33.

31. Ky.—Atchison v. Lucas, 83 Ky. 451.

32. Ky.—Atchison v. Lucas, supra.

33. U.S.—In re Lenka, D.C.N.Y., 295 F. 570.

34. U.S.—In re Centrone Coal Co., D.C.N.Y., 6 F.Supp. 628—In re Lenka, D.C.N.Y., 295 F. 570.

35. U.S.—In re Centrone Coal Co., D.C.N.Y., 6 F.Supp. 628.

50 C.J. p 365 note 42.

36. Tenn.—State v. Shropshire, 4 Yerg. 52.

50 C.J. p 365 note 43.

37. Vt.—Orleans County v. State Auditor, 27 A. 197, 65 Vt. 492.

50 C.J. p 365 note 49.

38. Md.—State, for Use of Board of Welfare v. Board of Com'rs for Anne Arundel County, 170 A. 749, 166 Md. 223.

Okl.—Protest of Kansas City Southern Ry. Co., 11 P.2d 500, 157 Okl. 246.

Pa.—Commonwealth v. Curren, 2 Chest.Co. 393, 9 Phila. 623.

50 C.J. p 366 note 51.

39. Ala.—Holcombe v. Mobile County, 155 So. 640, 229 Ala. 77.

Cost of fuel for cooking

Statutory provision that state shall pay stipulated amount for preparing and serving food of prisoners in county jail includes preparation for its service and hence fuel for cooking it and excludes idea of payment therefor by county; and the term "maintenance" in statute requiring payment of expense of maintenance of county jail by county does not include such expense.—Holcombe v. Mobile County, supra.

40. Tex.—Galveston County v. Du-

cie, 45 S.W. 798, 91 Tex. 665.

50 C.J. p 366 note 52.

### Who is county prisoner

Person charged with crime and in custody of sheriff awaiting trial is county prisoner for whose maintenance county is liable, notwithstanding person had been removed to penitentiary by order of district judge for safekeeping.—State v. Board of Com'rs of San Juan County, 46 P.2d 669, 39 N.M. 310.

### Where sentence commuted

Where one sentenced to death was kept for county at state penitentiary until commutation of sentence, county was liable for day and night guard at statutory rates; the fact that sentence was commuted did not prevent state from recovering for such expenses, under statutes providing for payment of certain sum after execution.—State, for Use of Board of Welfare, v. Board of Com'rs for Anne Arundel County, 170 A. 749, 166 Md. 223.

of a city, village, or town ordinance,<sup>41</sup> and, by virtue of statute, a county may be required to feed and provide suitable and efficient guards for convicts sentenced to the county chain gang by municipalities.<sup>42</sup> Where a county prisoner suffering from contagious disease has been removed to a pesthouse or other place, rent of such place has been held a proper charge against the county.<sup>43</sup>

### c. Liability of City, Town, or Other Municipality

In the absence of a statute providing otherwise, a town or city is not liable for the support of its prisoners in the county jail, but, by virtue of statute, cities or towns may be liable for the care and support of prisoners confined in the county jail for a violation of their ordinances.

In the absence of a statute providing otherwise, a town or city is not liable for the support of its prisoners in the county jail,<sup>44</sup> but, by virtue of statute, cities or towns may be liable for the care and support of prisoners confined in the county jail for a violation of their ordinances,<sup>45</sup> either directly to the sheriff or jailer,<sup>46</sup> or by way of reimbursement or compensation to the county.<sup>47</sup> Under some statutory provisions, the board of county commissioners may determine whether their consent to the use of a county jail by a municipality shall be conditioned on any payment by the municipality to the county.<sup>48</sup>

Under permissive statute, the municipal council may obligate the municipality by contract with the county commissioners to pay a sum not exceeding a certain amount per day per prisoner for the care and maintenance of prisoners in quarters leased from the commissioners,<sup>49</sup> but, under such a statute, the total cost for housing and maintaining a prisoner, including guarding the prisoner, should not exceed a designated amount.<sup>50</sup> In the absence

of a statute, charter provision, or ordinance, a municipal corporation is not liable to the keeper of its jail for the support of prisoners charged with violations of its ordinances.<sup>51</sup> Under some statutory provisions, where municipal authorities establish a municipal chain gang, they are required to pay all the expenses of dieting, guarding, etc., of the convicts sentenced by such authorities to such chain gangs.<sup>52</sup>

### d. Liability as between Counties and as between Towns

Where a prisoner from one county is confined in the jail of another county, the former county ordinarily is either directly liable to the sheriff or jailer or other person entitled thereto for the maintenance and guarding of prisoners, or it must reimburse the latter county for its payment for such expenses; liability as between towns depends on statute.

Where by reason of a change of venue, or because of the want of a jail or its insufficiency, a prisoner from one county is confined in the jail of another county, the former county ordinarily is either directly liable to the sheriff or jailer or other person entitled thereto for the maintenance and guarding of prisoners,<sup>53</sup> or it must reimburse the latter county for its payment for such expenses.<sup>54</sup> The cost of special guards for prisoners coming from different counties for safekeeping should be shared by the several counties.<sup>55</sup>

*Liability as between towns* depends on the statute,<sup>56</sup> and the town in which the jail is located is ordinarily liable to the keeper with the right to recover from the town from which the prisoner was sent or in which he had his settlement or domicile.<sup>57</sup>

### e. Liability of Prisoner

In the absence of statute to the contrary, an action cannot be maintained against a prisoner or his estate,

41. Neb.—*Douglas County v. Co-burn*, 51 N.W. 965, 34 Neb. 351. 50 C.J. p 366 note 53.

42. S.C.—*City of Greenville v. Pridmore*, 160 S.E. 144, 162 S.C. 52.

43. N.Y.—*Matter of Boyce*, 88 N.Y. S. 841, 43 Misc. 297.

44. Conn.—*Norwich v. Hyde*, 7 Conn. 529.

Mass.—*Adams v. Wiscasset*, 5 Mass. 328.

45. Ky.—*Mack v. City of Mayfield*, 39 S.W.2d 679, 239 Ky. 420.

S.C.—*City of Greenville v. Pridmore*, 160 S.E. 144, 162 S.C. 52. 50 C.J. p 366 note 56.

46. Ky.—*Mack v. City of Mayfield*, 39 S.W.2d 679, 239 Ky. 420. 50 C.J. p 366 note 57.

**Keep for overtime**

The fact that jailer detained city

prisoners to work out fine at a certain sum per day, as commanded by police court, instead of at a sum fixed by charter and amendments thereto, did not absolve city from liability to jailer for keep for overtime, where police court had jurisdiction of offense and person in each case.—*Mack v. City of Mayfield*, supra.

47. Cal.—*Sonoma County v. Santa Rosa*, 36 P. 810, 102 Cal. 426. 50 C.J. p 367 note 58.

48. S.D.—*Scovel v. Pennington County*, 282 N.W. 524, 66 S.D. 311.

49. Ohio.—*Board of Com'rs of Hamilton County v. City of Norwood*, 8 Ohio Supp. 111.

50. Ohio.—*Board of Com'rs of Hamilton County v. City of Norwood*, supra.

51. Va.—*Richmond v. Epps*, 35 S.E. 723, 98 Va. 233. 50 C.J. p 367 note 59.

52. S.C.—*City of Greenville v. Pridmore*, 160 S.E. 144, 162 S.C. 52.

53. Minn.—*Daniels v. Polk County*, 134 N.W. 290, 117 Minn. 1. 50 C.J. p 367 note 63.

54. Ga.—*Talbot County v. Mansfield*, 42 S.E. 72, 115 Ga. 766. 50 C.J. p 367 note 64.

55. Neb.—*James v. Lincoln County*, 5 Neb. 38.

56. Mass.—*Sayward v. Alfred*, 5 Mass. 244. 50 C.J. p 367 note 67.

57. Mass.—*Sayward v. Alfred*, supra. 50 C.J. p 367 note 67.



after his death, to recover the price of his board or compensation for his care; and, ordinarily, the expenses of a guard must also be paid by the proper authorities, and not by the prisoners who were guarded.

In the absence of a statute to the contrary, an action cannot be maintained against a prisoner to recover the price of his board,<sup>58</sup> although the prisoner requested it to be furnished,<sup>59</sup> since it is the duty of the prison authorities to furnish such food. Moreover, a sheriff is not entitled to recover compensation for the care of an inmate from his estate after his death,<sup>60</sup> irrespective of anything said by his children or guardian.<sup>61</sup> Ordinarily, the expenses of a guard must also be paid by the proper public authorities,<sup>62</sup> and not by the prisoners who were guarded.<sup>63</sup> On the other hand, where a prisoner, who has been removed to a hospital, has paid the expense for medical service, he is not entitled to have it deducted from the amount of the fine imposed on him on the ground of his ignorance of the liability of the county.<sup>64</sup> Under some statutes, a town which has paid the board of one confined in a jail of another town, because of an offense committed in the former, may bring an action to recover such expense from such person, irrespective of his ability to defray the expense of his support.<sup>65</sup>

## § 27. — Allowance and Payment

### a. In general

### b. Conclusiveness and effect of allowance or report

### a. In General

Claims for allowances for the care and maintenance of prisoners should be presented in the form and manner and within the time prescribed by law; statutory provisions usually control as to what amounts and items should be paid or allowed to a jailer or sheriff for the care and maintenance of prisoners.

Claims for allowances for the care and maintenance of prisoners should be presented in the form and manner<sup>66</sup> and within the time<sup>67</sup> prescribed by law. Also, the duty of fixing the fees of a sheriff for boarding prisoners should be performed at the time designated,<sup>68</sup> and an appeal from an order fixing an allowance should be taken within the statutory time.<sup>69</sup>

Under some statutes, a sheriff may petition the court to fix a per diem allowance to be paid him in addition to other compensation for the custody, care, and maintenance of prisoners.<sup>70</sup> Where the statute so provides, a jailer's fees for county prisoners should be referred monthly to the judge or chairman of the county court for inspection, who should audit it and cause the clerk to issue a warrant for the amount allowed,<sup>71</sup> and, under such statute, the sheriff need not present records showing the admission and discharge of prisoners by dates and time of day.<sup>72</sup> A sheriff may be directed to present an account to the commissioners' court for the expense incurred in the safekeeping and maintenance of prisoners.<sup>73</sup>

58. Conn.—*Washburn v. Belknap*, 3 Conn. 502.

Ky.—*Corpus Juris* cited in *Department of Welfare v. Brock*, 206 S. W.2d 915, 917, 306 Ky. 243.

Pa.—*Commonwealth v. Curren*, 2 Chest.Co. 393, 9 Phila. 623.

Wis.—*Corpus Juris* cited in *In re Gardner*, 264 N.W. 647, 648, 220 Wis. 490—*Corpus Juris* cited in *In re Sprain's Estate*, 263 N.W. 648, 649, 219 Wis. 591.

59. Conn.—*Washburn v. Belknap*, 3 Conn. 502.

Ky.—*Corpus Juris* cited in *Department of Welfare v. Brock*, 206 S. W.2d 915, 917, 306 Ky. 243.

60. Ind.—*Gehrett v. Ferguson*, 149 N.E. 86, 83 Ind.App. 717.

Wis.—*Corpus Juris* cited in *In re Gardner*, 264 N.W. 647, 648, 220 Wis. 490—*Corpus Juris* cited in *In re Sprain's Estate*, 263 N.W. 648, 649, 219 Wis. 591.

61. Ind.—*Gehrett v. Ferguson*, 149 N.E. 86, 83 Ind.App. 717.

62. Ga.—*Peters v. State*, 9 Ga. 109.

63. Ga.—*Peters v. State*, *supra*.

64. Pa.—*Commonwealth v. Morse*, 9 Pa.Dist. & Co. 41.

65. Vt.—*Town of Randolph v. Lyon*, 175 A. 1, 106 Vt. 495.

66. Pa.—*Commonwealth ex rel. Prison Inspectors of Northampton County v. Kichline*, Com.Pl., 29 North.Co. 89.

Tenn.—*State ex rel. Biggs v. Barclay*, 216 S.W.2d 711, 188 Tenn. 26.

Tex.—*Brewster County v. Taylor*, Civ.App., 122 S.W.2d 1097—*Nolan County v. Yarbrough*, Civ.App., 34 S.W.2d 302.

50 C.J. p 368 note 77.

Periodical report of fees received or due for services rendered by a jailer in his official capacity, as required by statute, must include statutory allowances for attendance at court and for furnishing fuel, light, and water to the court, and on receipt of such statement auditor should draw warrant on treasurer for amount not exceeding certain percentage of fees and compensation due to or paid to jailer for services rendered the preceding month.—*Stone v. Pfanz*, 36 S.W. 1128, 99 Ky. 647, 18 Ky.L. 489.

67. Tex.—*Nolan County v. Yarbrough*, Civ.App., 34 S.W.2d 302.

68. Mo.—*Mead v. Jasper County*, 18 S.W.2d 464, 322 Mo. 1191.

50 C.J. p 368 note 88.

69. Ky.—*Leslie County v. Hensley*, 125 S.W.2d 255, 276 Ky. 679.

70. Pa.—*In re Petition of Pritchard*, 30 Pa. Dist. & Co., 367, 85 Pittsb. Leg.J. 676.

71. Tenn.—*State ex rel. Biggs v. Barclay*, 216 S.W.2d 711, 188 Tenn. 26—*Stovall v. Perry*, 185 S.W. 708, 134 Tenn. 707.

### Entry in contradictory language

Although the language was contradictory, where county judge inspected or examined certified account of sheriff for board and keep of county prisoners and turnkey fees and placed thereon the entry "Approved: not audited", there was sufficient compliance with statute, and it was deemed that the county judge made an examination of the face of the accounts before approving them.—*State ex rel. Biggs v. Barclay*, 216 S.W.2d 711, 188 Tenn. 26.

72. Tenn.—*State ex rel. Biggs v. Barclay*, *supra*.

73. Tex.—*Brewster County v. Taylor*, Civ.App., 122 S.W.2d 1097.

Although the keeping of an account and its presentation as required by statute may not be a condition precedent to the allowance of a claim,<sup>74</sup> if sustained by satisfactory evidence,<sup>75</sup> yet, on a failure to do so, the sheriff may be entitled to recover from the county only such expenses as he is able to show by clear and satisfactory evidence that he actually incurred, and only such as are reasonable.<sup>76</sup> Where the sheriff has furnished the itemized statement required by statute for feeding prisoners, the state auditor may not refuse to issue a warrant to cover the bill because the sheriff failed to furnish the state prison inspector a daily ration sheet required by a rule of the inspector,<sup>77</sup> although the inspector is authorized to supervise the feeding of prisoners and to make lawful rules and regulations relating thereto.<sup>78</sup>

Where there is no statute on the subject, reasonable charges may be allowed if it has been an established custom,<sup>79</sup> and such charges may continue to be allowed until the sheriff has notice.<sup>80</sup> However, statutory provisions usually control as to what amounts and items should be paid or allowed to a jailer or sheriff for the care and maintenance of prisoners,<sup>81</sup> and, under some statutory provisions, an allowance may be made retroactive.<sup>82</sup> A board, by its acts, may ratify the doings of a sheriff in good faith and become bound to pay therefor,<sup>83</sup> as where the board for a time pays for the guard of prisoners.<sup>84</sup>

**Preference.** Ordinarily, a sheriff has no preference over other creditors of the county in the payment of claims for boarding prisoners and transporting them to the penitentiary.<sup>85</sup>

**Certiorari to order making allowance.** The return

of a board of supervisors to a writ of certiorari to review its decision reducing the sheriff's charges for board in his account against the county must be taken as true.<sup>86</sup>

**Estoppel of claimant.** Where a sheriff presents bills for boarding prisoners and they are allowed at the precise sum at which he renders them, and are paid, he is estopped to make any other claim,<sup>87</sup> unless he acted under duress;<sup>88</sup> and the fact that he fixed the amount under protest, and accepted the allowances because he was in need of money, does not amount to duress.<sup>89</sup>

#### b. Conclusiveness and Effect of Allowance or Report

Where the allowance to a jailer for maintenance and care of prisoners is in the discretion of a board or court, its determination in some jurisdictions is regarded as conclusive, but in other jurisdictions such a determination is regarded merely as the exercise of a sound legal discretion which is conclusive only in the absence of a showing that the discretion has been abused.

Where the allowance to a jailer for the maintenance and care of prisoners is in the discretion of a board or court, its determination in some jurisdictions is regarded as conclusive,<sup>90</sup> but in other jurisdictions such a determination is regarded merely as the exercise of a sound legal discretion<sup>91</sup> which is conclusive only in the absence of a showing that the discretion has been abused.<sup>92</sup> The determination of such a board is not conclusive where it is subject to review by appeal<sup>93</sup> or otherwise.<sup>94</sup> A presumption of regularity has been held to attach to a resolution of a board empowered to determine the amount to be collected by a sheriff to compensate the county for the expense incurred in keeping federal prisoners and prisoners of other counties

#### Who is prisoner

A person may be a prisoner without statute notwithstanding no complaint has been lodged against him before his incarceration.—*Brewster County v. Taylor*, *supra*.

74. Mass.—*Adams v. Hampden County*, 13 Gray 439.

Wis.—*Deissner v. Waukesha County*, 70 N.W. 668, 95 Wis. 588.

75. Mass.—*Adams v. Hampden County*, 13 Gray 439.

76. Wis.—*Deissner v. Waukesha County*, 70 N.W. 668, 95 Wis. 588.

77. Ala.—*State v. Lee*, 98 So. 337, 18 Ala.App. 264, certiorari denied 90 So. 925, 206 Ala. 699.

78. Ala.—*State v. Lee*, *supra*.

79. Del.—*State v. Ogle*, 7 Del. 503.

80. Del.—*State v. Ogle*, *supra*.

81. Ky.—*Breathitt County v. Cockrell*, 63 S.W.2d 920, 250 Ky. 743, 92 A.L.R. 626—*Holland v. Fayette*

County, 41 S.W.2d 651, 240 Ky. 37.

Pa.—*Petition of Pritchard*, 30 Pa. Dist. & Co., 367, 85 Pittsb.Leg.J. 676.

#### Purpose of allowance

A county jailer's monthly allowance is not intended as compensation for jailer's services, but only to enable jailer to meet necessary expenses, other than caring for and dieting prisoners.—*Leslie County v. Hensley*, 125 S.W.2d 255, 276 Ky. 679.

82. Pa.—*Petition of Pritchard*, 30 Pa. Dist. & Co., 367, 85 Pittsb.Leg.J. 676.

83. Ill.—*La Salle County v. Milligan*, 32 N.E. 196, 143 Ill. 321. 50 C.J. p 368 note 85.

84. Ill.—*La Salle County v. Milligan*, *supra*.

85. S.C.—*Hunter v. Mobley*, 1 S.E. 670, 26 S.C. 192.

86. N.Y.—*People v. Clinton County*, 19 N.Y.S. 642, 64 Hun 636. 50 C.J. p 368 note 94.

87. Mich.—*Cicotte v. Wayne County*, 26 N.W. 686, 59 Mich. 509.

88. Mich.—*Cicotte v. Wayne County*, *supra*.

89. Mich.—*Cicotte v. Wayne County*, *supra*.

90. Kan.—*Hendricks v. Chautauqua County*, 11 P. 450, 35 Kan. 483. 50 C.J. p 368 note 89.

91. Ark.—*Jefferson County v. Hudson*, 22 Ark. 595.

92. Tex.—*Fayette County v. Faires*, 44 Tex. 514.

93. Neb.—*Dakota County v. Borowsky*, 93 N.W. 686, 67 Neb. 317.

94. Cal.—*Fulkerth v. Stanislaus County*, 7 P. 754, 67 Cal. 334. 50 C.J. p 368 note 93.

and states in the county jail,<sup>95</sup> inasmuch as the power of the board in this respect is quasi-judicial.<sup>96</sup> Where the report of an auditor shows a certain sum due and unpaid on a sheriff's account and the report is not excepted to by the county, it has been held binding on the county.<sup>97</sup>

## § 28. — Accounting for Fees and Emoluments

Statutory provisions control with respect to an accounting by a sheriff or jailer for fees and emoluments received by him.

Statutory provisions control with respect to an accounting by a sheriff or jailer for fees and emoluments received by him.<sup>98</sup> Where a statute so provides, fees received by a sheriff as keeper of the jail must be accounted for by him,<sup>99</sup> and he must also account for any surplus, remaining in his hands, of moneys paid to him from the county treasury for the victualing of prisoners,<sup>1</sup> as well as for any surplus of moneys furnished for the policing

of the jail, after paying the salaries of the deputy keepers;<sup>2</sup> and, in order properly to perform this duty, it is the duty of the officer to keep an accurate account of such fees and emoluments.<sup>3</sup> Under some statutes, moneys received by a sheriff for the board of prisoners do not constitute fees for which he must account.<sup>4</sup>

By force of some constitutional and statutory provisions, a jailer may be required to report to the fiscal court all moneys received by him,<sup>5</sup> from all sources,<sup>6</sup> by virtue of his office, including receipts from the federal government for keeping federal prisoners,<sup>7</sup> and he may include in his report all allowable expenditures.<sup>8</sup> Although, under such provisions, a year, and not the sheriff's term of office, is the unit for accounting,<sup>9</sup> a failure to make an annual report and accounting does not preclude the jailer from making his accounting with the court for his entire term of office.<sup>10</sup>

Where a statute, making provision for the settle-

95. S.D.—*Adamson v. Minnehaha County*, 293 N.W. 542, 67 S.D. 423.

### Presumption not overcome

Fact that county was put to almost no extra expense in keeping federal prisoners in county jail was insufficient to overcome presumption of regularity attending resolution of board of county commissioners fixing expense of county for fuel and light in connection with keeping of federal prisoners at certain sum per day, and hence sheriff was not entitled to recover from county such sum collected from federal government for federal prisoners and paid by sheriff to county.—*Adamson v. Minnehaha County*, *supra*.

96. S.D.—*Adamson v. Minnehaha County*, *supra*.

97. Tex.—*McKinney v. Collingsworth County*, Civ.App., 159 S.W. 2d 234.

98. Ky.—*Bell Fiscal Court v. Helton*, 79 S.W.2d 683, 258 Ky. 219.

### In Texas

(1) Under statute now in force allowances to sheriff for safekeeping prisoners are not fees of office for which he is accountable.—*McKinney v. Collingsworth County*, Civ.App., 159 S.W.2d 234—*Nolan County v. Yarbrough*, Civ.App., 34 S.W.2d 302—*Binford v. Harris County*, Civ.App., 261 S.W. 535.

(2) Such allowances are considered mere perquisites of the office.—*McKinney v. Collingsworth County*, Civ.App., 159 S.W.2d 234.

(3) However, under statute relative to an allowance for support and maintenance of prisoners, net profits

made by sheriff should be reported as fees of office.—*McKinney v. Collingsworth County*, Civ.App., 159 S.W.2d 234—*Cook v. Nacogdoches County*, Civ.App., 147 S.W.2d 943, error dismissed, judgment correct—*Binford v. Harris County*, Civ.App., 261 S.W. 535.

(4) Under earlier statute, no one of charges allowed sheriff for safekeeping, support, and maintenance of prisoners was a fee of office subject to being accounted for, but each was merely a perquisite or incidental benefit that sheriff was expected to keep for his own.—*Harris County v. Hammond*, Civ.App., 203 S.W. 451, error refused—*Harris County v. Hammond*, Civ.App., 203 S.W. 445, error refused.

99. N.J.—*Hudson County v. Kaiser*, 69 A. 25, 75 N.J.Law 9, affirmed 71 A. 1133, 76 N.J.Law 829.

1. N.J.—*Hudson County v. Kaiser*, *supra*.

2. N.J.—*Hudson County v. Kaiser*, *supra*.

3. Cal.—*Los Angeles County v. Cline*, 197 P. 67, 185 Cal. 299. 50 C.J. p. 369 note 3.

4. Mo.—*State ex rel Saline County v. Price*, 246 S.W. 572, 296 Mo. 121.

5. Ky.—*Bell Fiscal Court v. Helton*, 79 S.W.2d 683, 258 Ky. 219—*Taylor, for Use and Benefit of Laurel County v. Broughton*, 71 S.W.2d 635, 254 Ky. 265, followed in *Taylor, for Use and Benefit of Laurel County v. Gaines*, 72 S.W.2d 16, 254 Ky. 602—*Breathitt County v. Cockrell*, 63 S.W.2d 920, 250 Ky. 743, 92 A.L.R. 626—*Holland v.*

*Fayette County*, 41 S.W.2d 651, 240 Ky. 37.

6. Ky.—*Breathitt County v. Cockrell*, 63 S.W.2d 920, 250 Ky. 743, 92 A.L.R. 626.

Whatever money comes to county jailer, as jailer, from any source, he receives for state, but, where there is no statutory provision to the contrary, the county, which is only an arm of the state government, is entitled to excess of jailer's fees over salary and expenditures.—*Holland v. Fayette County*, 41 S.W.2d 651, 240 Ky. 37.

7. Ky.—*Taylor v. Todd*, 44 S.W. 2d 606, 241 Ky. 605—*Holland v. Fayette County*, 41 S.W.2d 651, 240 Ky. 37.

8. Ky.—*Bell Fiscal Court v. Helton*, 79 S.W.2d 683, 258 Ky. 219—*Taylor, for Use and Benefit of Laurel County v. Broughton*, 71 S.W.2d 635, 254 Ky. 265, followed in *Taylor, for Use and Benefit of Laurel County v. Gaines*, 72 S.W.2d 16, 254 Ky. 602—*Holland v. Fayette County*, 41 S.W.2d 651, 240 Ky. 37.

9. Ky.—*Taylor, for Use and Benefit of Laurel County v. Broughton*, 71 S.W.2d 635, 254 Ky. 265, followed in *Taylor, for Use and Benefit of Laurel County v. Gaines*, 72 S.W.2d 16, 254 Ky. 602—*Holland v. Fayette County*, 41 S.W.2d 651, 240 Ky. 37.

10. Ky.—*Taylor, for Use and Benefit of Laurel County, v. Broughton*, 71 S.W.2d 635, 254 Ky. 265, followed in *Taylor, for Use and Benefit of Laurel County v. Gaines*, 72 S.W.2d 16, 254 Ky. 602.

ment with the keeper of a penitentiary at the expiration of his term, provides for the valuation of the raw materials, stock, and manufactured articles on hand, by appraisers to be appointed by commissioners of the sinking fund, the acquiescence by the board in the report and valuation of the appraisers is binding on the state,<sup>11</sup> in the absence of fraud<sup>12</sup> or a departure from the authority conferred by statute.<sup>13</sup> Under some statutory provisions, where a city jailer receives and keeps county, state and United States prisoners, the city may not compel him to account to it for the fees received for such services,<sup>14</sup> except to the extent that the salary paid by the city to the jailer exceeds the minimum salary which under the law it is obliged to pay.<sup>15</sup>

## § 29. — Actions

The general rules governing civil actions ordinarily apply to an action for the recovery or the enforcement of payment of the salary, fees, or other emoluments of a sheriff or other prison officer; but where the statute gives a jailer a special action for his fees, it must be strictly pursued.

The general rules governing civil actions ordinarily apply to an action for the recovery or the enforcement of payment of the salary, fees, or other emoluments of a sheriff or other prison of-

ficer.<sup>16</sup> However, where the statute gives a jailer a special action for his fees, it must be strictly pursued.<sup>17</sup> Under some statutory provisions, a sheriff may not sue the county for the amount due him for the safekeeping of prisoners until after his claim has been presented to the commissioners' court and refused.<sup>18</sup> It has been held that if a county refuses to pay for the necessary guarding of prisoners, the sheriff may pay therefor and recover as for money paid for the benefit of the county.<sup>19</sup>

**Pleading.** In a suit to recover for the safekeeping or maintenance of prisoners, plaintiff should allege sufficient facts to constitute a cause of action,<sup>20</sup> and a complaint which fails to set out the actual expenses incurred by plaintiff may be dismissed.<sup>21</sup>

**Evidence.** General rules apply as to the burden of proof,<sup>22</sup> and as to the admissibility and competency of evidence,<sup>23</sup> as well as to the sufficiency of the evidence,<sup>24</sup> in a suit to recover for the maintenance or safekeeping of prisoners. Where defendant files a crossaction to recover back sums alleged to have been illegally paid to plaintiff for feeding prisoners, defendant has the burden of proving that the amounts sued for were illegally paid.<sup>25</sup>

**PRIUS VITIIS LABORAVIMUS, NUNC LEGIBUS.** See 50 C.J. p 369 note 1.

**PRIVACION.** In Spanish law, the penalty for separation from office on account of crime.<sup>1</sup>

**PRIVACY.** The state of being in retirement from

the company or observation of others; secrecy.<sup>2</sup>

The right of privacy is discussed generally in the C.J.S. title Right of Privacy § 1 et seq, also 54 C. J. p 816 note 1 et seq. The right to privacy from overlooking windows is treated in Adjoining Landowners § 49.

11. Ky.—Commonwealth v. Theobald, 11 B.Mon. 223.

**Appraisers' appointment held valid**  
Ky.—Commonwealth v. Theobald, supra.

50 C.J. p 369 note 6 [a].

12. Ky.—Commonwealth v. Theobald, supra.

13. Ky.—Commonwealth v. Theobald, supra.

14. Ky.—Newport v. Ebert, 111 S. W. 330, 33 Ky.L. 820.

15. Ky.—Newport v. Ebert, supra.

16. Tex.—Brewster County v. Taylor, Civ.App., 122 S.W.2d 1097.

17. S.C.—Love v. Lowry, 12 S.C.L. 181.

18. Tex.—Nolan County v. Yarbrough, Civ.App., 34 S.W.2d 302.

19. Mont.—Lloyd v. Silver Bow County, 39 P. 457, 15 Mont. 433.

20. Tex.—Nolan County v. Yarbrough, Civ.App., 34 S.W.2d 302.

Wis.—Doty v. Sauk County, 67 N.W. 10, 93 Wis. 102.

**Allegation held unnecessary**

Tex.—Nolan County v. Yarbrough, Civ.App., 34 S.W.2d 302.

**Petition held sufficient as against general demurrer.**

Tex.—Nolan County v. Yarbrough, Civ.App., 34 S.W.2d 302.

Vt.—Town of Randolph v. Lyon, 175 A. 1, 106 Vt. 495.

21. Wis.—Doty v. Sauk County, 67 N.W. 10, 93 Wis. 102.

22. Tex.—Nolan County v. Yarbrough, Civ.App., 34 S.W.2d 302.

23. S.C.—Walker v. McMahan, 6 S. C.L. 129.

50 C.J. p 369 note 20.

**Evidence held inadmissible**

S.C.—Walker v. McMahan, 6 S.C.L. 129.

Tex.—Nolan County v. Yarbrough, Civ.App., 34 S.W.2d 302.

24. Tex.—Brewster County v. Taylor, Civ.App., 122 S.W.2d 1097.

25. Tex.—Cook v. Nacogdoches County, Civ.App., 147 S.W.2d 943, error dismissed, judgment correct.

**In absence of showing profit by plaintiff, and number of prisoners fed by him, amount collected by plaintiff for feeding prisoners could not be regarded as illegally paid to him by the commissioners' court.**  
Cook v. Nacogdoches County, Tex. Civ.App., 147 S.W.2d 943, error dismissed, judgment correct.

1. Eschriche Diccionario:

2. Mont.—State v. Powell County Third Jud. Dist. Ct., 278 P. 122, 125, 85 Mont. 215.

**PRIVATE.** Belonging to or concerning, an individual person, company, or interest;<sup>3</sup> personal;<sup>4</sup> peculiar to oneself; unconnected with others;<sup>5</sup> one's own;<sup>6</sup> separate.<sup>7</sup>

"Private" is also defined as meaning concealed;<sup>8</sup> secret;<sup>9</sup> confidential;<sup>10</sup> lonely; solitary; secluded; sequestered from company or observation.<sup>11</sup>

Stated negatively, the term is defined as meaning not general;<sup>12</sup> not open;<sup>13</sup> not public;<sup>14</sup> not publicly known;<sup>15</sup> and, in somewhat different senses, not public in character or nature, as a private citizen;<sup>16</sup> not invested with, or engaged in, public office or employment.<sup>17</sup>

"Private" has been held to be synonymous with "local" see 54 C.J.S. p 660 note 55, and "particular" see 67 C.J.S. p 881 note 5.

It has been contrasted with or distinguished from "governmental" see 38 C.J.S. p 969 note 79, and "public."<sup>18</sup>

**Private parts.** A term not always given a strict technical meaning, but which includes the organs of reproduction and their immediate vicinity.<sup>19</sup> Apart from technical distinctions, it sufficiently de-

scribes the female organ of genitiation and its immediate vicinity, not only for that particular portion anatomically known as the womb, but for the vagina, the urethra, and lips of the womb.<sup>20</sup>

**Private right.** A term which cannot be defined further than to say that it includes all those duties due from one person to another for the breach of which the law gives an action.<sup>21</sup> The terms "private right" and "public right" are distinguishable,<sup>22</sup> and it has been said that the test as to whether a matter is a public right or a private right appears to be whether the right is such as to affect the public generally or merely to affect a class of individuals within the political subdivision.<sup>23</sup> The term "private right" is treated in Property § 6.

**Private way.** The word "private," as applied to a way, connotes privately owned as differentiated from publicly owned, or dedicated to public use voluntarily or by eminent domain.<sup>24</sup> It likewise implies a way of convenience for those engaged in common or related activities in a given area.<sup>25</sup>

A "private way" is the right of going over another man's ground.<sup>26</sup> It is an incorporeal heredita-

3. Ga.—*Mitchell v. Green*, 39 S.E.2d 696, 698, 201 Ga. 256.

Mich.—*People v. Powell*, 274 N.W. 372, 373, 280 Mich. 699, 111 A.L.R. 721.

N.C.—*Borders v. Cline*, 193 S.E. 826, 828, 212 N.C. 472.

**Similarly expressed**

"Private" means affecting or belonging to individuals.—*People v. Powell*, 274 N.W. 372, 373, 280 Mich. 699, 111 A.L.R. 721.

4. N.C.—*Borders v. Cline*, 193 S.E. 826, 828, 212 N.C. 472.

50 C.J. p 369 note 9.

5. N.C.—*Borders v. Cline*, supra.

6. Ga.—*Mitchell v. Green*, 39 S.E. 2d 696, 698, 201 Ga. 256.

N.C.—*Borders v. Cline*, 193 S.E. 826, 828, 212 N.C. 472.

7. N.C.—*Borders v. Cline*, 193 S.E. 826, 828, 212 N.C. 472.

S.D.—*Timber v. Desparois*, 101 N.W. 879, 881, 18 S.D. 587.

8. Wis.—*Spain v. Howe*, 25 Wis. 625, 630.

9. S.D.—*Timber v. Desparois*, 101 N.W. 879, 881, 18 S.D. 587.

Va.—*Thomas v. First Nat. Bank*, 186 S.E. 77, 83, 166 Va. 497.

10. Va.—*Thomas v. First Nat. Bank*, supra.

11. S.D.—*Timber v. Desparois*, 101 N.W. 879, 881, 18 S.D. 587.

12. Ga.—*Mitchell v. Green*, 39 S.E. 2d 696, 698, 201 Ga. 256.

N.C.—*Borders v. Cline*, 193 S.E. 826, 828, 212 N.C. 472.

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N.C.—*Borders v. Cline*, 193 S.E. 826, 828, 212 N.C. 472.

15. Va.—*Thomas v. First Nat. Bank*, 186 S.E. 77, 83, 166 Va. 497.

16. N.C.—*Borders v. Cline*, 193 S.E. 826, 828, 212 N.C. 472.

17. N.C.—*Borders v. Cline*, supra.

18. Ill.—*Waken & McLaughlin, Inc. v. Royal Indemnity Co.*, 241 Ill. App. 427, 430.

Mich.—*People v. Powell*, 274 N.W. 372, 373, 280 Mich. 699, 111 A.L.R. 721.

N.Y.—*Farrell v. New York Evening Post*, 3 N.Y.S.2d 1018, 1021, 167 Misc. 412.

50 C.J. p 369 note 8 [a], p 846 note 12.

**"Public" antonym**

Ill.—*People v. Carman*, 52 N.E.2d 197, 199, 385 Ill. 23.

**Opposed to "public"**

N.C.—*Borders v. Cline*, 193 S.E. 826, 828, 212 N.C. 472.

50 C.J. p 846 note 12.

19. N.H.—*State v. Nash*, 145 A. 262, 83 N.H. 536.

20. Ill.—*Clark v. People*, 79 N.E. 941, 943, 224 Ill. 554.

21. N.H.—*Rhobidas v. Concord*, 47

A. 82, 87, 70 N.H. 90, 85 Am.S.R. 604, 51 L.R.A. 381.

22. Ill.—*Village of Hartford v. First Nat. Bank of Wood River*, 30 N.E.2d 524, 527, 307 Ill.App. 447.

50 C.J. p 361 note 3 [a].

**Distinction stated**

If the rights involved are such as are limited to a particular locality they are deemed to be private, while if they are such as belong to all of the people of the state, or in which all of the people of the state are interested, such rights are deemed to be public.—*Village of Hartford v. First Nat. Bank of Wood River*, supra.

23. Okl.—*Board of Com'rs of Oklahoma County v. Good Tp.*, Harper County, 107 P.2d 805, 806, 188 Okl. 151.—*Herndon v. Board of Com'rs in and for Pontotoc County*, 11 P. 2d 939, 941, 158 Okl. 14.

24. Okl.—*Cox v. Oklahoma Tax Commission*, 168 P.2d 634, 636, 197 Okl. 12.

25. Okl.—*Cox v. Oklahoma Tax Commission*, supra.

26. Pa.—*Kister v. Reeser*, 98 Pa. 1, 5, 42 Am.R. 608.

**Private right of way**

That private right which one man has of going over another's land.—*Tomlinson v. Trenton*, etc., St. R. Co., 15 Pa.Dist. 480, 484, 31 Pa.Co. 81—50 C.J. p 372 note 5. As an easement see Easements § 3 a.

ment of a real nature,<sup>27</sup> and, as such, the subject of private property.<sup>28</sup> It is a property right of which the owner cannot be deprived regardless of whether or not he would be injured by the taking,<sup>29</sup> and it may be acquired by grant, reservation, or under a statute authorizing its establishment.<sup>30</sup> Private ways are either appendant or in gross.<sup>31</sup> Statutory private ways are ways laid out under public authority which are private only in name, but are in all other respects public;<sup>32</sup> ways laid out by the

public authorities for the accommodation of individuals and at their expense.<sup>33</sup>

"Private way" has been distinguished from "cartway" see 13 C.J.S. p 1767 note 3, "highway" see Highways § 1 b, and "private road" see Private Roads § 1.

Other phrases employing the word "private" are set out in the note,<sup>34</sup> and for additional phrases as

27. N.J.—Allen v. Stevens, 29 N.J. Law 509, 510.

Pa.—Kister v. Reeser, 98 Pa. 1, 5, 42 Am.R. 608.

Incorporeal hereditaments generally see Property § 7.

"To every private way there are two essential requisites, first, the terminus a quo, or the point or place from which the grantee is to set out in order to use the way, and the terminus ad quem, the place where the way is to end; and second, that the grantor has the right, not the mere revocable permission, of setting out from the terminus a quo, and proceeding to and entering the terminus ad quem. It is one of the most important of incorporeal hereditaments, in which one man has an interest and a right, though another man is the owner of the soil over which it is claimed. It is simply an easement or a privilege, conferring no interest in the land."—Garrison v. Rudd, 19 Ill. 558, 563.

28. N.J.—Allen v. Stevens, 29 N.J. Law 509, 510.

29. Mo.—Sarcosie v. Wild, 64 Mo. App. 403, 407.

30. Ariz.—Territory v. Richardson, 76 P. 456, 457, 8 Ariz. 336.

31. Ind.—Lucas v. Rhodes, 94 N.E. 314, 917, 48 Ind.App. 211.

#### Classes or divisions

"The common-law writers divided private ways into several classes, according to the purpose or purposes for which the right of way could be used. Thus Lord Coke, adopting the civil law, divided them into three kinds; a footway, called iter; a footway and horseway, called actus; and a cartway, which embraced the other two, called via. To which was added a driftway, a road over which cattle could be driven. . . . Woolrych, in his work on the subject, also makes these four classes of ways: footways; footways and horseways; foot, horse, and carriage ways; and driftways. . . . But these old classifications of private ways are not exhaustive of the subject; for as a private way for any particular purpose could always be created by a grant, and, in theory, always rested upon a grant, actual or implied, it is evident that when one person

granted to another a right of way extending from the land of the grantee over the land of the grantor, for the private use of the grantee, in any manner and for any particular purpose, a private way was created."—Jones v. Venable, 47 S.E. 549, 550, 130 Ga. 1, 1 Ann.Cas. 185.

32. Mass.—Munroe v. Worthington Pump, etc., Corp., 139 N.E. 828, 830, 245 Mass. 474—Denham v. Bristol County Comrs., 108 Mass. 202, 208.

33. N.H.—Clark v. Boston, etc., R. Co., 24 N.H. 114, 118.

#### 34. Phrases construed

(1) "Private prosecutor;" one who files the complaint; the one who instigates the prosecution.—Corpus Juris cited in Warren v. State, 94 S.W.2d 430, 432, 130 Tex.Cr. 448—50 C.J. p 371 notes 93, 94. See Indictments and Informations § 19, and the index to Criminal Law.

(2) "Private sewer" has been defined as one built with or without permits, and paid for by the parties, persons, associations, or corporations constructing it.—Prior v. Buehler, etc., Constr. Co., 71 S.W. 205, 206, 170 Mo. 439.

(3) "Private sports;" sports which are engaged in for the entertainment and pleasure of those who participate.—Cheeves v. State, 114 P. 1125, 1126, 5 Okl.Cr. 361.

(4) "Things private;" in the classification of the Spanish civil law, those which belong in particular to every individual, and of which he may acquire or lose dominion.—Sullivan v. Richardson, 14 So. 692, 708, 33 Fla. 1.

#### Phrases elsewhere discussed

(1) "Private action;" see Actions § 1 a (21).

(2) "Private attorney" used in contradistinction to "public attorney" see District and Prosecuting Attorneys § 27.

(3) "Private boarding house" as not within purview of civil rights statutes see Civil Rights § 7.

(4) "Private bridge" see Bridges § 5.

(5) "Private burial place" see 12 C.J.S. p 753 note 14.

(6) "Private business" see 12 C.J. S. p 780 note 95.

(7) "Private canal" see Canals §§ 1, 2.

(8) "Private capacity" distinguished from "public capacity" see 12 C.J.S. p 1118 note 73.

(9) "Private car" in railroad terminology is a car having other than railroad ownership as stated in the C.J.S. title Railroads § 1, also 50 C.J. p 371 note 66; and as exempt from demurrage see Carriers § 343.

(10) "Private carrier" defined generally see Carriers §§ 4, 531; distinguished from "common carrier" see Carriers § 3 b (1); with respect to motor vehicles see Motor Vehicles § 47.

(11) "Private cartway" see 13 C. J.S. p 1767 note 98.

(12) "Private cemetery" see Cemeteries § 1.

(13) "Private charities" distinguished from "public charities" see Charities § 1 f.

(14) "Private charters" see 14 C. J.S. p 561 note 28.

(15) "Private claim" see 14 C.J.S. p 1186 notes 6, 7.

(16) "Private concern" see 15 C.J. S. p 799 note 18.

(17) "Private confession" see the C.J.S. title Religious Societies § 32, also 50 C.J. p 371 note 70.

(18) "Private contract" see Contracts § 10.

(19) "Private crossing" see Railroads § 1, also 50 C.J. p 371 note 76.

(20) "Private document" generally see 27 C.J.S. p 1312 note 15, and in the law of evidence see Evidence § 623.

(21) "Private domain" see 27 C.J. S. p 1318 note 31.

(22) "Private dwelling" see 28 C. J.S. p 605 note 31.

(23) "Private dwelling house" distinguished from "apartment house" see 3 C.J.S. p 1423 note 90.

(24) "Private easement" see Easements § 3 e.

(25) "Private enterprises" see 30 C.J.S. p 261 note 89.

(26) "Private exhibition" distin-

to which more recent adjudications have not been found see 50 C.J. p 369 note 16—p 370 note 58.

**PRIVATEER; PRIVATEERING.** See the C.J.S. title War § 24, also 50 C.J. p 374 note 41, and 67 C.J. p 385 notes 2-6.

**PRIVATELY.** In a private, secret, or unofficial way.<sup>35</sup>

"Privately" or "privately made" has been held to be synonymous with "confidential" see 15 C.J.S. p 821 note 59.

guished from "public exhibition" see 35 C.J.S. p 197 note 54.

(27) "Private expenses" see 35 C.J.S. p 210 note 41.

(28) "Private ferries" distinguished from "public ferries" see Ferries § 2.

(29) "Private garage" see Motor Vehicles § 715.

(30) "Private hack stand" see 39 C.J.S. p 759 note 86.

(31) "Private hall" see 39 C.J.S. p 766 note 84.

(32) "Private hospitals" see Hospitals §§ 1, 3, 5, 8 c.

(33) "Private house" see 41 C.J.S. p 365 notes 74-77.

(34) "Private indebtedness" see 42 C.J.S. p 558 note 58.

(35) "Private injuries" see 43 C.J.S. p 1121 notes 92, 93.

(36) "Private institution" see 44 C.J.S. p 415 note 55—p 416 note 56.

(37) "Private instructions" see 44 C.J.S. p 417 note 79.

(38) "Private international law" see Conflict of Laws § 1.

(39) "Private invitation dance" see 25 C.J.S. p 998 note 44.

(40) "Private land grant" see 38 C.J.S. p 1068 note 36.

(41) "Private laws" see the C.J.S. title Statutes § 169, also 59 C.J. p 738 notes 61-64, and 36 C.J. notes 56, 57.

(42) "Private leak" in navigation see 52 C.J.S. p 1034 note 91.

(43) "Private notes" see Bills and Notes § 7 a (1).

(44) "Private nuisance" see Nuisances § 2.

(45) "Private obligation" within the statutory definition of "tort" see the C.J.S. title Torts § 1.

(46) "Private or proprietary function" distinguished from "governmental function" see 37 C.J.S. p 1399 note 61.

(47) "Private passway" see Easements § 3 a.

(48) "Private policeman" see Municipal Corporations § 568.

(49) "Private pond" see Fish § 1.

(50) "Private preserve" see Fish § 1.

(51) "Private property" see Property § 6.

(52) "Private railroad" distinguished from "cartway" see 13 C.J.S. p 1767 note 2.

(53) "Private residence or dwelling" see 28 C.J.S. p 605 notes 32-34.

(54) "Private river" see Navigable Waters § 1.

(55) "Private road" see Private Roads § 1 et seq. within the meaning of regulations requiring an operator of a vehicle entering a highway to yield the right of way see Motor Vehicles § 347 b.

(56) "Private sale" see the C.J.S. title Sales § 1, also 50 C.J. p 372 notes 9, 10.

(57) "Private school" distinguished from "public school" see the C.J.S. title Schools and School Districts § 1, also 56 C.J. p 169 note 35.

(58) "Private seal" see the C.J.S. title Seals § 1, also 50 C.J. p 373 note 12.

(59) "Private switch" see Railroads § 1, also 50 C.J. p 372 note 17.

(60) "Private track" see Railroads § 1, also 50 C.J. p 372 note 19.

(61) "Private war" see the C.J.S. title War § 1, also 50 C.J. p 373 note 21.

(62) "Private wharf" see the C.J.S. title Wharves § 1, also 68 C.J. p 203 notes 17, 18.

(63) "Private wrong" see the C.J.S. title Torts § 1, also 50 C.J. p 374 notes 34-37. As synonymous with "civil injury" see 14 C.J.S. p 1155 note 77; distinguished from "private injuries" see 43 C.J. p 1121 note 93.

35. Va.—Thomas v. First Nat. Bank, 186 S.E. 77, 83, 166 Va. 497. Privately stealing without knowledge of person from whom thing is taken as constituting larceny from the person see Larceny § 8.

Phrases as to which more recent adjudications have not been found see 50 C.J. p 1374 notes 51, 52.

## PRIVATE ROADS

This Title includes roads established by public authority for accommodation of private persons, but open for free passage to the public; nature and scope of power to establish and maintain such roads in general; constitutional and statutory provisions relating thereto; establishment of such roads, construction, repair, and improvement thereof, and alteration, vacation, and abandonment thereof; local assessments therefor; title to and rights in the land occupied, and removal of and liabilities for obstructions, encroachments, etc.; and use of such roads, and liabilities for injuries from defects, obstructions, etc., therein.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

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### § 1. Definition, Nature, and Distinctions

A "private road" has been defined as a road established by public authority chiefly for the accommodation of an individual or individuals, and at his or their instance and expense.

A "private road" has been defined as a road established by public authority chiefly for the accommodation of an individual or individuals, and at his or their instance and expense.<sup>1</sup> In accurate legal

contemplation, the term involves a contradiction.<sup>2</sup> It is unknown to the common law, having its origin in American legislation, and cannot be regarded as having been employed as a substitute for the word "way" at common law.<sup>3</sup> As to the real nature of a private road, some early decisions hold that the term "private road," as used in the statutes, is in reality what its name implies, a way for the exclusive use by travel by the particular person or per-

1. N.H.—*Clark v. Boston, etc., R. Co.*, 24 N.H. 114.  
N.C.—*Cook v. Vickers*, 53 S.E. 740, 141 N.C. 101.  
"Cartways" defined see 13 C.J.S. p 1767 notes 97-4.  
"Pent Roads" defined see Pent Roads § 1.

2. Cal.—*Sherman v. Buick*, 32 Cal. 241, 252, 91 Am.D. 577.

3. Cal.—*Sherman v. Buick*, *supra*.



sons for whom it is laid out, and not for public use in any sense.<sup>4</sup> However, as a general rule, especially in later decisions, the courts have construed the term "private road," as used in the statutes, as meaning a public road in the sense that it is open to all who see fit to use it, although the principal benefit inures to the individual or individuals at whose request it was laid out.<sup>5</sup> The term "private road," it has been said, is used merely for the purpose of classification,<sup>6</sup> and to distinguish a class of public roads benefiting private individuals who, instead of the public at large, should bear the expense of their establishment and maintenance.<sup>7</sup> The fact that a road is designated as private<sup>8</sup> or that a private individual pays for the right of way<sup>9</sup> does not change its character, provided it is in fact a public road.

The diversity of views as to the nature of private roads may be ascribed to some extent, but not altogether, to a difference in the wording of the statutes. Accordingly, as discussed in Eminent Domain § 34, where the construction prevails that a "private road" is a public road in the sense that it is open to all who see fit to use it, the validity of the statutes which authorize the taking of land for such a purpose has been uniformly upheld as a legitimate exercise of the power of eminent domain. On the other hand, as similarly discussed in Eminent Domain § 34, where the statutes are construed as creating a road which the public has no right to use, such statutes have been held invalid, ex-

cept where, as is the case in many states, as discussed in Easements §§ 18, 29, 35, the condemnation of private property for a private road or way of necessity over the lands of another, differing from private ways acquired by prescription or grant only in the method of acquisition, is expressly authorized by the organic law of the state.<sup>10</sup> Where the right to such way is conferred by statute enacted under constitutional authority, it is not a personal right, but pertains to the land to which it becomes appurtenant.<sup>11</sup>

"Right of way" over another's land has been defined as the forced expropriation of a participation therein.<sup>12</sup>

**Private path.** A "private path" has been defined as a neighborhood road<sup>13</sup> running from one public road to another from a public place to another public place.<sup>14</sup>

**Distinctions.** A private way is an incorporeal hereditament which may be created or extinguished by the acts of the owners of the servient and dominant tenements as private individuals,<sup>15</sup> while private roads do not become attached to the land of the party at whose instance they are laid out, but are established for the use of the public as well as the party asking for the road and may be discontinued or changed when the public interests require it;<sup>16</sup> and the public authorities alone have the power to create or extinguish such road.<sup>17</sup>

4. Ala.—Sadler v. Langham, 34 Ala. 311.

50 C.J. p 377 note 4.

5. Ark.—Parrott v. Fullerton, 193 S. W.2d 654, 209 Ark. 1018.

Me.—Browne v. Connor, 21 A.2d 709, 138 Me. 63.

Or.—Barkley v. Gibbs, 178 P.2d 918, 180 Or. 336.

50 C.J. p 377 note 5.

Right and mode of use of highways generally see Highways § 233.

#### Public road

After a private road is established, it is for private and public use, and thus is a public road. Nowhere do we find any holding to the effect that such a road is established exclusively for the individual for whose accommodation it was laid out.—State v. Van Patton, 94 S.W.2d 1119, 230 Mo.App. 1199.

6. Ill.—Road Dist. No. 4 v. Frailey, 145 N.E. 195, 313 Ill. 568.

7. Cal.—Sherman v. Buick, 32 Cal. 241, 91 Am.D. 577.

Me.—Browne v. Connor, 21 A.2d 709, 138 Me. 63.

N.J.—Allen v. Stevens, 29 N.J.Law 509.

#### Cartway

The text rule has been applied to the term "cartway."—Parsons v. Wright, 27 S.E.2d 534, 223 N.C. 520.

8. Ill.—Road Dist. No. 4 v. Frailey, 145 N.E. 195, 313 Ill. 568.

9. Ill.—Road Dist. No. 4 v. Frailey, supra.

10. Ala.—Steele v. Madison County, 3 So. 761, 83 Ala. 304.

50 C.J. p 378 note 15.

11. Mo.—Wiese v. Thien, 214 S.W. 853, 279 Mo. 524, 5 A.L.R. 1552.

50 C.J. p 378 note 16.

12. La.—Estopinal v. Storck's Estate, App., 44 So.2d 704.

Right of way by prescription see Easements § 18.

13. S.C.—Earle v. Poat, 41 S.E. 525, 63 S.C. 439—State v. Floyd, 17 S.

E. 505, 39 S.C. 23.

Neighborhood road generally see Highways § 1.

14. S.C.—Kirby v. Southern R. Co., 41 S.E. 765, 63 S.C. 494, 502.

48 C.J. p 419 note 12 [a].

#### Distinguished from "private way"

S.C.—Earle v. Poat, 41 S.E. 525, 63

S.C. 439, 453—State v. Floyd, 17 S. E. 505, 39 S.C. 23, 25.

15. N.J.—Allen v. Stevens, 29 N.J. Law 509.

50 C.J. p 378 note 17.

"Private way" defined generally see Easements § 3 a.

The words "private ways," as they appear in various statutes, are susceptible of different meanings and include ways of a special type laid out by public authority for public use which are private in name only, ways opened and dedicated to public use which have not become public ways, and defined ways for travel, not laid out by public authority or dedicated to public use, wholly subject of private ownership.—Opinion of the Justices, 47 N.E.2d 260, 313 Mass. 779.

16. Ark.—Pippin v. May, 93 S.W. 64, 78 Ark. 18.

17. N.J.—Allen v. Stevens, 29 N.J. Law 509.

Jurisdiction and power to establish see infra § 4.

Extinguishment generally see infra § 19.

The distinction between a private road and a public road or highway is considered in Highways § 1.

## § 2. Location and Termini

Although statutory provisions must be observed, the authorities vested with power to lay out a road may exercise a reasonable discretion in varying the route proposed as the public interest may require, provided the route adheres to the termini and the general course stated in the petition.

Although statutory provisions as to the location of a private road must be observed,<sup>18</sup> the authorities vested with the power to lay out a road should determine the propriety of its location and are not obliged to lay it out on the route selected by applicant.<sup>19</sup> They may exercise a reasonable discretion in varying the route proposed as the public interest may require,<sup>20</sup> provided it adheres to the termini and the general course stated in the peti-

tion.<sup>21</sup> In determining the location of the road, the authorities must consider the distance,<sup>22</sup> the most practical way,<sup>23</sup> and the least injury to the person over whose land passage is granted,<sup>24</sup> and, at the same time, proper regard should be had to the interests of the person claiming the right of way.<sup>25</sup> Accordingly, applicant for a private road is not entitled to select his own route where the owner of the land over which the route is asked tenders one which is reasonably convenient and practical,<sup>26</sup> and, conversely, the owner cannot exact that an extremely circuitous, impracticable, and expensive route should be taken by applicant, because it may happen to be less burdensome to the former.<sup>27</sup>

A road cannot be laid out except between the termini prescribed by the statute which authorizes the laying out of the the road.<sup>28</sup> Generally the terminus a quo, as fixed by the statute, is an in-

18. Or.—Fanning v. Gilliland, 61 P. 636, 62 P. 209, 37 Or. 369, 82 Am. S.R. 758.

50 C.J. p 379 note 25.

Description in petition for establishment see *infra* § 7.

Fixing location and termini:

As essential of report of viewers, commissioners, or jurors see *infra* § 8.

In judgment, order or decree laying out or opening see *infra* § 9.

Use of public road

The laying out of a road partly on a public road is illegal because it interferes with the public road.—In re Neeld's Road, 1 Pa. 353—50 C.J. p 379 note 26.

19. Minn.—Trout Brook Realty Co. v. Featherstone, 217 N.W. 499, 173 Minn. 448—Johnson v. Chisago Lake, 141 N.W. 1115, 122 Minn. 134.

20. Minn.—State ex rel. Rose v. Town of Greenwood, 20 N.W.2d 345, 220 Minn. 508.

Laying out or opening road see *infra* § 10.

21. Minn.—State ex rel. Rose v. Town of Greenwood, *supra*.

22. La.—Mercer v. Daws, App., 186 So. 877.

Shortest distance

(1) In general.—Wells v. Anglade, La.App., 23 So.2d 469, rehearing refused 23 So.2d 741.

(2) Passageway taken by the owner of an inclosed estate shall generally be taken on the side where the distance is the shortest from the inclosed estate to the public road.—Estopinal v. Storck's Estate, La.App., 44 So.2d 704.

(3) Rule that right of way of inclosed estate must generally be taken on side nearest road should only be departed from for weighty con-

siderations but most direct course may be deviated from with a view to rendering servitude less onerous to land over which road is to be laid out.—Estopinal v. Storck's Estate, *supra*—50 C.J. p 379 note 25 [a] (1), (2).

(4) Crooked or zigzag route was not "direct" line, within statute, prior to amendment, relating to neighborhood roads.—Wood v. Bird, Tex. Civ.App., 32 S.W.2d 271.

23. La.—Mercer v. Daws, App., 186 So. 877.

Evidence held sufficient

(1) In proceeding to establish roadway over another's land from dwelling house to public highway, evidence supported finding that road proposed by petitioner and laid out by viewers appointed by the county court was the most direct and also the least expensive in construction and maintenance.—Parrott v. Fullerton, 193 S.W.2d 654, 209 Ark. 1018.

(2) In suit to compel conveyance to plaintiff of right of way from his land over defendant's adjoining land to public road, evidence showed that route requested in petition was most practicable and shortest possible and that it was not route most injurious to defendant as depriving him of proper headlands for use in cultivating his adjoining lots, in view of court's reduction of width of way demanded by plaintiff so as to allow additional space for headlands on either side of way.—Wells v. Anglade, La.App., 23 So.2d 469, rehearing refused 23 So.2d 741.

24. Ala.—Harvey v. Warren, 102 So. 899, 212 Ala. 415.

La.—Littlejohn v. Cox, 15 La. Ann. 67—Estopinal v. Storck's Estate, App., 44 So.2d 704—Wells v. Anglade, App., 23 So.2d 469, rehearing refused 23 So.2d 741—Martini

v. Cowart, App., 23 So.2d 655—Mercer v. Daws, App., 186 So. 877.

Mo.—State ex rel. Palmer v. Elliff, 58 S.W.2d 283, 332 Mo. 229.

50 C.J. p 379 note 25.

25. Ala.—Harvey v. Warren, 102 So. 899, 212 Ala. 415.

La.—Littlejohn v. Cox, 15 La. Ann. 67—Estopinal v. Storck's Estate, App., 44 So.2d 704—Martini v.

Cowart, App., 23 So.2d 655—Wells v. Anglade, App., 23 So.2d 469, rehearing refused 23 So.2d 741.

Mo.—State ex rel. Palmer v. Elliff, 58 S.W.2d 283, 332 Mo. 229.

50 C.J. p 379 note 25.

26. Ga.—Wyatt v. Hendrix, 90 S.E. 957, 146 Ga. 143.

La.—Mercer v. Daws, App., 186 So. 877.

Mo.—Welch v. Shipman, 210 S.W.2d 1008, 357 Mo. 338.

Only issue in case

In action by owners of inclosed estate to establish passageway over defendants' land to public road, where defendant without qualification tendered to plaintiffs a right of passage over a route other than the one sought by plaintiffs, the only issue in the case was which of the two routes should be adopted for plaintiffs' use.—Martini v. Cowart, La.App., 23 So.2d 655.

27. La.—Littlejohn v. Cox, 15 La. Ann. 67—Martini v. Cowart, App., 23 So.2d 655—Wells v. Anglade, App., 23 So.2d 469, rehearing refused 23 So.2d 741.

28. Pa.—In re Sandy Lick Creek Road, 51 Pa. 94.

50 C.J. p 379 note 27.

Terminus held not within statute

In action by landowner for cartway across adjoining land based on claim that landowner had no means of egress to private roads, where

closure,<sup>29</sup> a dwelling,<sup>30</sup> a point near a dwelling,<sup>31</sup> a farm or plantation,<sup>32</sup> although separated from the owner's dwelling,<sup>33</sup> cultivated or improved land,<sup>34</sup> or a lot of land;<sup>35</sup> and the other terminus is a highway,<sup>36</sup> a town,<sup>37</sup> a place of necessary public resort,<sup>38</sup> a church,<sup>39</sup> a mill,<sup>40</sup> timber or water,<sup>41</sup> "the nearest point practical on a public road,"<sup>42</sup> or some private way leading to a highway,<sup>43</sup> according as the local statute may provide.

*Between two tracts owned by the same person.*

A road cannot be laid out so as to permit a person to pass over the land of another merely for the purpose of passing from one tract to another tract owned by him, under a statute empowering the highway surveyor to lay out a road from one's land to a mill, market, public landing, or other public road.<sup>44</sup> Likewise, such a road may not be laid out under a statute assuming to authorize it because it would be the taking of private property for a private purpose, in violation of organic law.<sup>45</sup> However, it has been held that a landowner is entitled to a private road over intervening land although after leaving the private road, he must cross other lands of his own to reach a public road.<sup>46</sup>

*Highway beyond boundary of county.* Where a road granted terminates short of a public highway for want of jurisdiction in the commissioners to grant the right, as where the highway is beyond the

boundary of their county,<sup>47</sup> it cannot be sustained by individual grants of a way from that point to the highway.<sup>48</sup>

### § 3. Establishment

Particular matters with respect to the establishment of a private road are discussed in detail in the sections immediately following.

Examine Pocket Parts for later cases.

### § 4. — Jurisdiction and Power to Establish

The power to authorize the laying out of a private road exists only where it has been clearly conferred by legislative enactment, conforming to the limitations imposed by the constitution on the lawmaking power, and then only under the circumstances and conditions prescribed by the enactment.

The power to grant a private road is an exercise of the right of eminent domain.<sup>49</sup> Accordingly, as the power to exercise the right of eminent domain is in the legislature as representing the sovereignty of the state,<sup>50</sup> it necessarily follows that the power to authorize the laying out of a road exists only where it has clearly been conferred by legislative enactment,<sup>51</sup> conforming to the limitations imposed by the constitution on the lawmaking power,<sup>52</sup> and then only under the circumstances and conditions prescribed by the enactment.<sup>53</sup> In other words, the

landowner's evidence showed only plans to build a home on eleven and one half acres without any showing of plans to cultivate land, landowner was not entitled to cartway.—*Brown v. Glass*, 50 S.E.2d 918, 229 N.C. 657.

29. Tex.—*Wood v. Bird*, Civ.App., 32 S.W.2d 271.

30. Or.—*Lesley v. Klamath County*, 75 P. 709, 44 Or. 491.

50 C.J. p 379 note 28.

31. N.H.—*Proctor v. Andover*, 42 N.H. 348.

32. Ga.—*Bibb County v. Harris*, 71 Ga. 250.

50 C.J. p 379 note 30.

33. Pa.—*In re Stewart's Private Road*, 38 Pa.Super. 339.

34. *Mill site*  
A mill site on which a mill was erected was cultivated and improved land.—*Lyon v. Hamor*, 73 Me. 56.

35. Ill.—*Highway Comrs. v. Malory*, 21 Ill.App. 184.

36. Pa.—*In re Sandy Lick Creek Road*, 51 Pa. 94.

50 C.J. p 380 note 34.

37. Me.—*Lyon v. Hamor*, 73 Me. 56.  
*County seat*  
Tex.—*Wood v. Bird*, Civ.App., 32 S.W.2d 271.

38. Pa.—*In re Sandy Lick Creek Road*, 51 Pa. 94.

39. Tex.—*Wood v. Bird*, Civ.App., 32 S.W.2d 271.

40. Tex.—*Wood v. Bird*, supra.

41. Tex.—*Wood v. Bird*, supra.

42. Or.—*Application of Barton*, 225 P. 322, 111 Or. 111.

50 C.J. p 380 note 37.

43. Pa.—*In re Keeling's Road*, 59 Pa. 358.

50 C.J. p 380 note 38.

44. Mo.—*Corpus Juris* quoted in *Seitz Packing & Manufacturing Co. v. Quaker Oats Co.*, 124 S.W.2d 1177, 1179, 343 Mo. 1059.

N.J.—*State v. Guilbaud*, 47 N.J.Law 277.

45. Mo.—*Corpus Juris* quoted in *Seitz Packing & Manufacturing Co. v. Quaker Oats Co.*, 124 S.W.2d 1177, 1179, 343 Mo. 1059.

50 C.J. p 380 note 40.

46. Tenn.—*Brady v. Correll*, 97 S.W.2d 448, 20 Tenn.App. 224.

47. Md.—*Owings v. Worthington*, 10 Gill & J. 283.

50 C.J. p 380 note 41.

48. Md.—*Owings v. Worthington*, supra.

49. N.C.—*Corpus Juris*, cited in

*Parsons v. Wright*, 27 S.E.2d 534, 537, 223 N.C. 520.

Tex.—*Wood v. Bird*, Civ.App., 32 S.W.2d 271.

50 C.J. p 380 note 43.

Power of eminent domain as to private roads or ways generally see *Eminent Domain* § 34.

50. Ga.—*Bibb County v. Harris*, 71 Ga. 250.

51. Mo.—*State v. Van Patton*, 94 S.W.2d 1119, 230 Mo.App. 1199.

50 C.J. p 380 note 45.

*Constitution is self executing*, as far as it pertains to the grant of the right to take private property for the uses therein enumerated. The legislature has provided the procedure and the courts may determine what constitutes a private way of necessity in any particular case, unless restricted by the legislature.—*Crystal Park Co. v. Morton*, 146 P. 566, 27 Colo.App. 74.

52. Ga.—*Bibb County v. Harris*, 71 Ga. 250.

53. Ga.—*Porter v. Foster*, 90 S.E. 967, 146 Ga. 154.

La.—*Mercer v. Daws*, App., 186 So. 877.

Mo.—*Seitz Packing & Manufacturing Co. v. Quaker Oats Co.*, 124 S.W.2d 1177, 343 Mo. 1059—*State v.*

establishment of such a road can be sustained only on a strict compliance with the provisions of the statutes on which the power to establish it is founded,<sup>54</sup> and such compliance must appear on the face of the record itself.<sup>55</sup>

*Authority vested with power.* The power to lay

out private roads must be exercised by the authority to whom it has been delegated by statute.<sup>56</sup> Accordingly, jurisdiction to lay out private roads has been conferred by different statutes on the courts,<sup>57</sup> the ordinary,<sup>58</sup> the town board,<sup>59</sup> or the board of county commissioners or supervisors.<sup>60</sup>

Van Patton, 94 S.W.2d 1119, 230 Mo.App. 1199.  
N.Y.—Matter of Bell, 228 N.Y.S. 649, 131 Misc. 734.  
N.C.—Brown v. Glass, 50 S.E.2d 912, 229 N.C. 657—Rogers v. Davis, 192 S.E. 872, 212 N.C. 35.  
Pa.—Commonwealth v. Kennedy, 16 Pa. Dist. & Co. 564, 35 Dauph. Co. 242, 46 York Leg. Rec. 26.  
Tex.—Wood v. Bird, Civ. App., 32 S.W.2d 271.  
Wash.—Leinweber v. Gallagher, 38 P.2d 311, 2 Wash.2d 388.  
Wis.—State v. Zubke, 227 N.W. 947, 200 Wis. 227.  
50 C.J. p 380, note 47, p 381 notes 54, 64.

#### Damages

Owner of land without access to highway may not claim right of way over adjoining land without offering to pay for damages occasioned.—Ezer-nack v. Ezer-nack, 137 So. 626, 18 La. App. 56.

Damages in condemnation proceedings:

Actions to recover damages see Eminent Domain § 399.

Assessment of compensation generally see Eminent Domain §§ 276-305.

Measure and elements of damages generally see Eminent Domain §§ 136-185.

Nature and necessity of making compensation generally see Eminent Domain §§ 96-103.

Prepayment and security for payment see Eminent Domain § 186.

#### Establishment of cartway

The right to establishment of a cartway is governed by statutory provisions relating to cartways, but proceedings to establish cartway should be had, except as therein provided, under general town road law.—State ex rel. Rose v. Town of Greenwood, 20 N.W.2d 345, 220 Minn. 508.

#### Property subject to jurisdiction

Since the landed estates of non-residents are subject to the police power of the state both for favorable and unfavorable action, such property is subject to the jurisdiction of the state courts relative to the establishment of a road of public easement for the benefit thereof.—Holland-Washington Mortgage Co. v. County Court of Hood River County, 188 P. 199, 95 Or. 668.

54. Mo.—State v. Van Patton, 94 S.W.2d 1119, 230 Mo.App. 1199—Al-

len v. Welch, 102 S.W. 665, 125 Mo. App. 278.

N.C.—Brown v. Glass, 50 S.E.2d 912, 229 N.C. 657—White v. Coghill, 160 S.E. 472, 201 N.C. 421.

#### Statute held not applicable

Statute providing for the removal of obstructions placed by an owner in a private way over his lands used by others, contemplates merely the removal of the obstructions, and does not refer to the condemnation of a way.—Porter v. Foster, 90 S.E. 967, 146 Ga. 154.

55. Mo.—Allen v. Welch, 102 S.W. 665, 125 Mo.App. 278.

Ohio.—Ferris v. Bramble, 5 Ohio St. 109.

56. N.C.—Rogers v. Davis, 192 S.E. 872, 212 N.C. 35.

50 C.J. p 380 note 48.

57. Tenn.—Brady v. Correll, 97 S.W.2d 448, 20 Tenn.App. 224.

#### Commissioners' courts

Ala.—Coffee County Comrs. Ct. v. Ballard, 64 So. 311, 185 Ala. 501. 50 C.J. p 380 note 48 [a].

#### Court of quarter sessions

Pa.—In re Huntingdon Borough Road, 11 Pa.Co. 119. 50 C.J. p 380 note 48 [h].

#### In Missouri

(1) The authority to establish a private road as a way of necessity comprehends judicial, not ministerial action by a county court.—Rippeto v. Thompson, 216 S.W.2d 505, 358 Mo. 721.

(2) Where county court previously had power under statute to establish a private road of necessity but new constitution did not vest judicial power in county court, county court thereafter did not have jurisdiction in such proceedings.—Rippeto v. Thompson, supra.

(3) Circuit court does not have common-law jurisdiction to establish a private way of necessity, and statute giving circuit court jurisdiction to establish private roads of necessity had no retroactive effect.—Rippeto v. Thompson, supra.

(4) Where landowner instituted proceeding in county court for private way of necessity, after new constitution divesting county court of judicial power had become effective, and proceeding was appealed to circuit court prior to enactment of statute giving circuit courts jurisdiction to establish private roads in place of county court, neither court

had jurisdiction over proceeding and judgment establishing private road was invalid.—Rippeto v. Thompson, supra.

#### 58. In Georgia

(1) Private ways may be established by the law by the ordinary on application.—Porter v. Foster, 90 S.E. 967, 146 Ga. 154—Atlantic Coast Line Ry. Co. v. Sweatman, 58 S.E.2d 553, 81 Ga.App. 269.

(2) The county judge of Richmond County, under the act of 1871, creating county courts in several counties, including Richmond, and declaring that the judges thereof shall discharge the duties formerly devolving on the justices of the inferior courts as to county business, has jurisdiction to grant private roads.—Summerville Macadamized, etc., Road Co. v. Deutscher Schuetzen Club, 62 Ga. 318.

(3) The question for the determination of the county judge is whether or not a necessity for the private road exists, and the questions as to the persons who will be entitled to use the road when it is granted and as to the compensation to be paid therefor are not for the county judge to determine.—Summerville Macadamized, etc., Road Co. v. Deutscher Schuetzen Club, supra.

59. Me.—Connor v. Inhabitants of Southport, 12 A.2d 414, 136 Me. 447.

Minn.—Watson v. Board of Sup'rs of Town of South Side, 239 N.W. 913, 185 Minn. 111.

Wis.—State v. Zubke, 227 N.W. 947, 200 Wis. 227.

50 C.J. p 380 note 48 [e].

#### Mandatory duty

Under cartway statute, town board has mandatory duty of establishing a cartway on petition of a landowner where statutory conditions exist and route named in conditions is a proper one.—State ex rel. Rose v. Town of Greenwood, 20 N.W.2d 345, 220 Minn. 508.

60. Idaho.—Latah County v. Haskins, 88 P. 433, 12 Idaho 797. 50 C.J. p 380 note 48 [c].

#### In North Carolina

(1) The board of supervisors has jurisdiction to lay out private roads.—State v. Hardy, 74 S.E. 111, 158 N.C. 652—Warlick v. Lowman, 9 S.E. 453, 103 N.C. 122.

(2) Where statute provided that proceedings to establish cartways over land of others in Haywood

*Construction and operation of statutes.* Since statutes which authorize the laying out of private roads involving the appropriation of private property against the will of the owner are in derogation of the common law and common right,<sup>61</sup> they are not favored statutes,<sup>62</sup> and must be strictly construed,<sup>63</sup> especially where the proposed road is solely for the benefit of the person asking that it be laid out.<sup>64</sup> However, such statutes are not to be so strictly construed as not to allow any deviation from the literal words thereof under any condition,<sup>65</sup> but they should be construed with sufficient liberality to effect their "beneficent purpose."<sup>66</sup>

### § 5. — Convenience or Necessity

As a general rule land can be taken for private roads only in cases of necessity.

County should be commenced before the board of county commissioners, and general statutes subsequently enacted but without repealing clause provided that proceedings to establish cartways over lands of others should be commenced before the clerk, public local law remained in full force and must be treated as an exception to the public law.—*Rogers v. Davis*, 192 S.E. 872, 212 N.C. 35.

(3) Where proceeding was instituted under general law to establish cartway over land of others before clerk, instead of being instituted in accordance with the public local law which provided that such proceedings in Haywood county should be commenced before the board of county commissioners, clerk was without jurisdiction to act on the petition.—*Rogers v. Davis*, supra.

61. N.C.—*Brown v. Glass*, 50 S.E.2d 912, 229 N.C. 657.

Wash.—*State v. Superior Court for Kitsap County*, 181 P. 689, 107 Wash. 228.

Construction of statutes in derogation of the common law or common right generally see the C.J.S. title Statutes § 393, also 59 C.J. p 1124 note 5-p 1128 note 62.

62. Wash.—*State v. Superior Court for Kitsap County*, supra.

63. Mo.—*Rippeto v. Thompson*, 216 S.W.2d 506, 358 Mo. 721.—*Welch v. Shipman*, 210 S.W.2d 1008, 357 Mo. 838.—*State v. Van Patton*, 94 S.W.2d 1119, 230 Mo.App. 1199.

N.C.—*Brown v. Glass*, 50 S.E.2d 912, 229 N.C. 657.

Tex.—*Wood v. Bird*, Civ.App., 32 S.W.2d 271.

50 C.J. p 381 note 51.

Constitutionality see *Eminent Domain* § 34.

64. Conn.—*Perkins v. Colebrook*, 35 A. 772, 68 Conn. 113.

50 C.J. p 381 note 52.

65. La.—*Mercer v. Daws*, App., 186 So. 877.

66. N.C.—*Gorham v. Southern R. Co.*, 74 S.E. 607, 158 N.C. 504.—*Ford v. Manning*, 67 S.E. 325, 152 N.C. 151.

#### Fair and reasonable construction

"While on the one hand we recognize the importance of the rule that proceedings in invitum, to divest an owner of his property, ought to be carefully watched, so that no injustice be done, on the other hand, we cannot fail to recognize the importance of public policy, sanctioned by constitutional provision, which requires that facilities be furnished for private ways, so that property of citizens may be made accessible. This policy will be best promoted by a fair and reasonable, instead of a strained, construction of the statute authorizing the laying out of private roads."—*Satterly v. Winne*, 4 N.E. 185, 188, 101 N.Y. 218.

67. Mo.—*Welch v. Shipman*, 210 S.W.2d 1008, 357 Mo. 838.—*Corpus Juris* cited in *Seitz Packing & Manufacturing Co. v. Quaker Oats Co.*, 124 S.W.2d 1177, 1179, 343 Mo. 1059.—*Richter v. Rodgers*, 37 S.W.2d 523, 327 Mo. 543.

Tenn.—*Towater v. Darby*, 15 Tenn. App. 53.

Tex.—*Wood v. Bird*, Civ.App., 32 S.W.2d 271.

50 C.J. p 381 notes 58, 59, 61.

Allegation as to necessity see *infra* § 7.

Necessity of road generally see *Highways* § 26.

#### Statute construed

Or.—*Barkley v. Gibbs*, 178 P.2d 918, 180 Or. 647.

50 C.J. p 381 note 58 [a].

#### Necessity essential

If the legislature intended to authorize the taking of property of one citizen for the use of private persons, even as a road, where no rea-

sonable necessity exists therefor, such law would be in violation of the constitution and could not stand.—*Leathers v. Craig*, Tex.Civ.App., 228 S.W. 995.

68. Mo.—*Wiese v. Thien*, 214 S.W. 853, 279 Mo. 524, 5 A.L.R. 1552.

N.C.—*Mayo v. Thigpen*, 11 S.E. 1052, 107 N.C. 63.

69. Mo.—*Welch v. Shipman*, 210 S.W.2d 1008, 357 Mo. 838.—*Corpus Juris* cited in *Seitz Packing & Manufacturing Co. v. Quaker Oats Co.*, 124 S.W.2d 1177, 1179, 343 Mo. 1059.—*Hartley v. Brazeal*, App., 224 S.W.2d 550.

50 C.J. p 381 note 64.

70. Ky.—*Mitchell v. Skidmore*, 181 S.W.2d 257, 297 Ky. 756.—*Peery v. Hill*, 120 S.W.2d 762, 275 Ky. 105.

Pa.—*In re Private Road in Juniata Tp.*, 61 Pa.Dist. & Co. 418.

50 C.J. p 382 note 67.

sonable necessity exists therefor, such law would be in violation of the constitution and could not stand.—*Leathers v. Craig*, Tex.Civ.App., 228 S.W. 995.

68. Mo.—*Wiese v. Thien*, 214 S.W. 853, 279 Mo. 524, 5 A.L.R. 1552.

N.C.—*Mayo v. Thigpen*, 11 S.E. 1052, 107 N.C. 63.

69. Mo.—*Welch v. Shipman*, 210 S.W.2d 1008, 357 Mo. 838.—*Corpus Juris* cited in *Seitz Packing & Manufacturing Co. v. Quaker Oats Co.*, 124 S.W.2d 1177, 1179, 343 Mo. 1059.—*Hartley v. Brazeal*, App., 224 S.W.2d 550.

50 C.J. p 381 note 64.

70. Ky.—*Mitchell v. Skidmore*, 181 S.W.2d 257, 297 Ky. 756.—*Peery v. Hill*, 120 S.W.2d 762, 275 Ky. 105.

Pa.—*In re Private Road in Juniata Tp.*, 61 Pa.Dist. & Co. 418.

50 C.J. p 382 note 67.

71. Ark.—*St. Louis-San Francisco Ry. Co. v. Logue*, 224 S.W.2d 42, 216 Ark. 64.

Ky.—*Mitchell v. Skidmore*, 181 S.W.2d 257, 297 Ky. 756.—*Goose Creek Lumber Co. v. White*, 294 S.W. 494, 219 Ky. 739.

Minn.—*Watson v. Board of Sup'rs of Town of South Side*, 239 N.W. 918, 185 Minn. 111.

Pa.—*In re Private Road in Juniata Tp.*, 61 Pa.Dist. & Co. 418.

Wash.—*State v. Gilliam*, 300 P. 173, 163 Wash. 111.—*State v. Superior Court of Okanogan County*, 205 P. 1046, 119 Wash. 372.

50 C.J. p 382 note 68.

The word "necessary" is not to be read as though meaning absolutely necessary, but contemplates practical necessity, and, if applicant's outlet to highway or his own ground or the way he now has does not afford him practical access to the highway, and cannot be made to do so at a reasonable expense, then he is entitled to the establishment of the

the statutes authorizes the opening of roads merely because they will be convenient<sup>72</sup> or save expense.<sup>73</sup>

Where there is in existence a practicable way to and from the land,<sup>74</sup> whether public<sup>75</sup> or private,<sup>76</sup> a case of necessity does not arise, even though such way may be less convenient<sup>77</sup> or practicable<sup>78</sup> than the one proposed. However, this rule necessarily implies that applicant's existing way must be one which is reasonably practicable and sufficient for that purpose.<sup>79</sup> Thus, unless a person has a way either public or private which is unobstructed and

unquestioned, he may institute proceedings under the statutes<sup>80</sup> which, it has been said, do not contemplate that the owner who claims to have no way to his land should be compelled to institute suits to determine whether he has such a way before inviting the aid of the statutes.<sup>81</sup> Accordingly, although there is authority to the contrary,<sup>82</sup> it has been held that the mere premissive use of a private way over the lands of others does not affect applicant's right to a private road,<sup>83</sup> unless he has acquired a legal and enforceable easement.<sup>84</sup> So, also, it has been

way as a necessity.—Peery v. Hill, 120 S.W.2d 762, 275 Ky. 105—Vice v. Eden, 68 S.W. 125, 113 Ky. 255.

#### Rule applied to public service corporations

The rule requiring necessity for the condemnation of a way of necessity over adjoining owner's land should be more strict between private owners who are strangers in title than between public service corporations who are in law representing a necessity common to the whole public.—State v. Superior Court for Kitsap County, 181 P. 689, 107 Wash. 228.

72. Ark.—St. Louis-San Francisco Ry. Co. v. Logue, 224 S.W.2d 42, 216 Ark. 64—Mohr v. Mayberry, 90 S.W.2d 963, 192 Ark. 324.

Mo.—Welch v. Shipman, 210 S.W.2d 1008, 357 Mo. 838.

N.C.—Warlick v. Lowman, 9 S.E. 458, 103 N.C. 122.

Tex.—Leathers v. Craig, Civ.App., 228 S.W. 995.

Wash.—State v. Gilliam, 300 P. 173, 163 Wash. 111.  
50 C.J. p 382 note 72.

#### Inconvenience and hardship

The fact that without the road applicant will be subjected to great inconvenience and hardship furnishes no ground for granting it.—Martin v. Patin, 16 La. 55.

73. Ky.—Coyle v. Elliott, 225 S.W. 489, 189 Ky. 569.  
50 C.J. p 382 note 73.

#### Cost prohibitive

(1) A proposed private road was properly established on ground of necessity over defendant's land, notwithstanding petitioner would have ingress and egress if a road were established on his land, where a road thus located would cross a slough and require a bridge, and cost of required drainage and filling would be prohibitive.—Roth v. Dale, 177 S.W. 2d 179, 206 Ark. 735.

(2) The taking will not be tolerated unless the necessity is paramount in the sense that there is no other way out or that the cost is prohibitive.—State v. Superior Court for Kitsap County, 181 P. 689, 107 Wash. 228.

74. Ark.—Mohr v. Mayberry, 90 S.W.2d 963, 192 Ark. 324.

N.C.—Garris v. Byrd, 49 S.E.2d 625, 229 N.C. 343.  
50 C.J. p 382 note 74.

75. Mo.—Cox v. Tipton, 18 Mo.App. 450.

50 C.J. p 382 note 75.

76. Ga.—Chattanooga, etc., R. Co. v. Philpot, 37 S.E. 181, 112 Ga. 153.  
50 C.J. p 382 note 76.

77. Ark.—St. Louis-San Francisco Ry. Co. v. Logue, 224 S.W.2d 42, 216 Ark. 64—Mohr v. Mayberry, 90 S.W.2d 963, 192 Ark. 324.

La.—Martin v. Patin, 16 La. 55.  
N.C.—Warlick v. Lowman, 9 S.E. 458, 103 N.C. 122.  
50 C.J. p 382 note 77.

78. Ark.—St. Louis-San Francisco Ry. Co. v. Logue, 224 S.W.2d 42, 216 Ark. 64.

Wash.—State v. Kitsap County Superior Ct., 181 P. 689, 107 Wash. 228.

79. Minn.—State ex rel. Rose v. Town of Greenwood, 20 N.W.2d 345, 220 Minn. 508.  
50 C.J. p 382 note 79.

#### No adequate or convenient outlet

(1) Landowner, in order to condemn right of way across intervening land to public road, need not show that he has no outlet, but only that he has no adequate and convenient one.—Brady v. Correll, 97 S.W. 2d 448, 20 Tenn.App. 224.

(2) Existence of private right of way by grant will not prevent the owner of such way from obtaining a way by condemnation if the private way is not an adequate and convenient outlet to a public road.—Debusk v. Riley, 289 S.W. 493, 154 Tenn. 381.

(3) Landowner was not precluded from condemning right of way across intervening land to public road because he could reach his land by crossing river by boat or ferry, since crossing by boat or ferry with machinery and products of land would not be adequate and convenient.—Brady v. Correll, supra.

80. Ark.—Parrott v. Fullerton, 193 S.W.2d 654, 209 Ark. 1018.

La.—Estopinal v. Storck's Estate, App., 44 So.2d 704.

Minn.—State ex rel. Rose v. Town of Greenwood, 20 N.W.2d 345, 220 Minn. 508—Kroyer v. Board of Supervisors of Spring Lake, 277 N.W. 234, 202 Minn. 41.

Pa.—In re Private Road in Juniata Tp., 61 Pa. Dist. & Co. 418.  
50 C.J. p 382 note 80.

81. Iowa.—Carter v. Barkley, 115 N.W. 21, 137 Iowa 510.

82. Ga.—Chattanooga, etc., R. Co. v. Philpot, 37 S.E. 181, 112 Ga. 153.

"Until the way is actually abolished, so that the same cannot be used, and the applicant is thus left without a means of access to his farm or place of residence, there is no such necessity as would authorize the public authorities to appropriate the private property of another to his use."—Chattanooga, etc., R. Co. v. Philpot, supra.

#### Permissive way reasonable and adequate

If available permissive way is reasonable and adequate as a proper means of access, petition for a cartway over adjoining private lands should be denied.—Garris v. Byrd, 49 S.E.2d 625, 229 N.C. 343—Warlick v. Lowman, 9 S.E. 458, 103 N.C. 122.

83. Ky.—Black Mountain Corporation v. Appleman, 38 S.W.2d 327, 236 Ky. 510.

Minn.—State ex rel. Rose v. Town of Greenwood, 20 N.W.2d 345, 220 Minn. 508—Kroyer v. Board of Supervisors of Spring Lake, 277 N.W. 234, 202 Minn. 41.

Pa.—In re Private Road in Juniata Tp., 61 Pa. Dist. & Co. 418.

Tex.—Wood v. Bird, Civ.App., 32 S.W.2d 271.

50 C.J. p 382 note 68 [a] (2).

#### Permissive way insufficient

Where the permissive nature of the way renders it insufficient to meet the requirement of other adequate means of transportation, within the meaning of the statute, the relief should be granted.—Garris v. Byrd, 49 S.E.2d 625, 229 N.C. 343.

84. Ark.—St. Louis-San Francisco

held that the right to institute proceedings is not affected by the fact that applicant for the road might have purchased another way giving him access to the highway over the lands of some third person,<sup>85</sup> or by the fact that a deed to property grants a right of way to continue until the grantee shall procure a private or public road direct to the land granted from his own premises,<sup>86</sup> or by the fact that applicant already has a lease for the right of way sought to be condemned.<sup>87</sup>

**Determination of necessity.** In determining whether there is a necessity for a private road, it is necessary to take into consideration the entire situation.<sup>88</sup> It has been stated that it is impossible to fix the dividing line between necessity and inconvenience,<sup>89</sup> and that every case must, to a large extent, depend on its own facts.<sup>90</sup> It has also been held that, in determining whether a road is necessary, the court must take into consideration not only the convenience and benefit it will be to the limited number of people it serves,<sup>91</sup> but also the injury and inconvenience which it will occasion to

the owner of the land over which the proposed road is to be laid out.<sup>92</sup>

## § 6. — Proceedings in General

- a. Nature
- b. Right to institute

### a. Nature

The statutory proceeding for the establishment of a private road is one having for its object the taking of the property of one person for the private use of another, and is, therefore, in invitum in derogation of the common law and of common right.

The statutory proceeding for the establishment of a private road is one having for its object the taking of the property of one person for the private use of another, and is, therefore, in invitum in derogation of the common law and of common right.<sup>93</sup> It is in the nature of a civil action strictly between petitioner and the owner or owners through whose land the road is to pass, the public at large having no interest therein.<sup>94</sup>

Ry. Co. v. Logue, 224 S.W.2d 42, 216 Ark. 64.

Mo.—Richter v. Rodgers, 37 S.W.2d 523, 327 Mo. 543—Hartley v. Brazeal, App., 224 S.W.2d 550.

Pa.—In re Private Road in Juniata Tp., 61 Pa. Dist. & Co. 418.

85. Iowa.—Anderson v. Lee, 182 N. W. 380, 191 Iowa 248.

86. Pa.—In re Stewart's Private Rd., 38 Pa. Super. 339.

50 C.J. p 383 note 83.

87. Wash.—State v. King County Super. Ct., 157 P. 689, 91 Wash. 249.

50 C.J. p 383 note 84.

88. Wash.—State v. Gilliam, 300 P. 173, 163 Wash. 111.

Determination of necessity of road generally see Highways § 27.

89. Wash.—State v. Gilliam, 300 P. 173, 163 Wash. 111.

90. Wash.—State v. Gilliam, supra.

### Burden of proof

One seeking to establish a private way over lands of another must prove that it is a way of necessity.—Welch v. Shipman, 210 S.W.2d 1008, 357 Mo. 838.

### Necessity held shown

(1) In general.

Ark.—Parrott v. Fullerton, 193 S.W. 2d 654, 209 Ark. 1018—Roth v. Dale, 177 S.W.2d 179, 206 Ark. 735.

Mich.—Leighton v. Elysium Hunting & Fishing Club, 27 N.W.2d 676, 318 Mich. 146.

(2) In proceeding to condemn a passway over five-foot strip of land lying between highway and appli-

cant's residence, where it was possible at great expense and at some hazard to user to construct a passway a fifth of a mile long whereby applicant might reach public highway over his own property, and where it appeared that the taking of the property would do no appreciable damage to the landowner, practical necessity of passway sought to be condemned was established, and warranted taking of the land.—Peery v. Hill, 120 S.W.2d 762, 275 Ky. 105.

**Sufficient reason held not shown for setting aside jury's verdict as to necessity**

Mich.—Leighton v. Elysium Hunting & Fishing Club, 27 N.W.2d 676, 318 Mich. 146.

### Hazardous grade crossing

(1) Where the necessity exists, the fact that the private road will cross the main railroad track and two industrial tracks and that cars while standing on the industrial tracks may tend to some extent to obscure the view of travelers on the road, will not make the crossing so dangerous as to authorize a court to hold that the road should not be established.—Black Mountain Corporation v. Appleman, 33 S.W.2d 327, 236 Ky. 510.

(2) Where a landowner had an implied right to pass over lands of others to public roads, and these passways were not attended with any inconvenience except that they approached the rear of his residence, it was held that there was no practical necessity for opening the pro-

posed passway across a railroad right of way, although the distance of travel saved by the new road would be about four hundred feet.—Louisville, etc., R. Co. v. Geoghagan, 261 S.W. 1104, 203 Ky. 198.

(3) Where lot separated from highway by railroad right of way was only one hundred seventy yards from a public crossing and easement over adjoining land to crossing could be made serviceable the year around at less expense than construction of private road and crossing to provide direct access to highway, reasonable necessity for establishment of private road and crossing was not shown, in view of increased hazard to railroad and public which an additional crossing would entail.—St. Louis-San Francisco Ry. Co. v. Logue, 224 S.W.2d 42, 216 Ark. 64.

91. Ark.—Mohr v. Mayberry, 90 S. W.2d 963, 192 Ark. 324.

Mo.—Welch v. Shipman, 210 S.W.2d 1008, 357 Mo. 838.

50 C.J. p 383 note 86.

92. Ark.—Mohr v. Mayberry, 90 S. W.2d 963, 192 Ark. 324.

Mo.—Welch v. Shipman, 210 S.W.2d 1008, 357 Mo. 838.

Wash.—State v. Gilliam, 300 P. 173, 163 Wash. 111.

50 C.J. p 383 note 86.

93. Mo.—Welch v. Shipman, 210 S. W.2d 1008, 357 Mo. 838—Allen v. Welch, 102 S.W. 665, 125 Mo. App. 278.

94. Mo.—State ex rel. Palmer v. Elliot, 58 S.W.2d 283, 332 Mo. 229 —Allen v. Welch, 102 S.W. 665, 125 Mo. App. 278.

### b. Right to Institute

The statute authorizing the establishment of a private road determines who may institute proceedings therefor.

The statute authorizing the establishment of a private road determines who may institute proceedings therefor,<sup>95</sup> as where it provides that petitioner must live<sup>96</sup> or be settled<sup>97</sup> on the land over which the private road is desired, or where it provides that petitioner must be either a resident who occupies or a nonresident who owns cultivated land which such road will connect with the public highway.<sup>98</sup> It is not absolutely necessary, in order to have the right to petition, that petitioner be the actual owner of the premises,<sup>99</sup> but it is sufficient that he is in possession of the land as owner<sup>1</sup> or that he has either control or an interest in it.<sup>2</sup>

**Several owners.** Under a statute providing for the laying out of roads for private and public use from a lot of land to a public road, several owners of one lot are entitled to petition for the laying out of a road from such lot to a public road.<sup>3</sup> However, such statute includes merely the laying out of the road on the petition of the owner or owners of one lot, and does not authorize the laying out of a road from a public road to one lot of land and from thence to other lots, on a petition joined in by their owners.<sup>4</sup> On the other hand, under other statutes, it has been held that several owners of separate tracts of land may petition for a private road.<sup>5</sup>

**A corporation** may condemn land for a private way of necessity where, under like conditions, natural persons may do so.<sup>6</sup>

**Abandonment of prior proceeding.** The fact that a landowner has already instituted, but abandoned, a proceeding for a road which would have given him the desired access to a parcel of land does not

estop him to institute a proceeding for a different road to such parcel, if, on the first application, no road was actually established.<sup>7</sup>

**Transferee of part of land after trial in county court.** Since in a proceeding to establish a private road, rights of a third person to whom part of the land is transferred after trial of the case in the county court, are not adjudicated, as discussed infra § 13, such person may institute proceedings to establish a private road, if he does not have access to buildings located on the property transferred to him.<sup>8</sup>

**Estoppel.** Where one opens a road over his own land to a highway and afterward by deeds, without reservation of the road, conveys the lots nearest the highway to others who close the road, he is not estopped to institute a statutory proceeding to lay out such road as a private road.<sup>9</sup>

**Time for instituting.** A person who desires to lay out a private road to his lands, and who has already a right of way to them, is not bound to wait until his right of way expires before he brings a proceeding to lay out a private way,<sup>10</sup> but he may move a reasonable time in advance of the expiration of the existing easement, and need not wait until he has no way at all.<sup>11</sup>

## § 7. — Parties, Petition, and Bond

- a. Parties
- b. Petition
- c. Bond

### a. Parties

- (1) Plaintiffs
- (2) Defendants

#### (1) Plaintiffs

The owner of the land for whose benefit a private road is requested and all persons having an interest in

95. Tex.—Wood v. Bird, Civ.App., 32 S.W.2d 271.

96. Me.—Pettengill v. Kennebec County, 21 Me. 377.

97. N.C.—Cozard v. Kanawha Hardwood Co., 51 S.E. 932, 139 N.C. 283, 111 Am.S.R. 779, 1 L.R.A., N.S., 969.

50 C.J. p 383 note 31.

98. Me.—Hall v. Lincoln County, 62 Me. 325—Orrington v. Penobscot County, 51 Me. 570.

99. Pa.—In re Jackson Tp. Road, 42 Pa.Co. 348.

1. La.—Martini v. Cowart, App., 23 So.2d 655.

#### Proof of ownership

In action by owners of inclosed estate to establish passageway over

defendants' land to public road, introduction in evidence of the deed whereby plaintiffs acquired title to their land and a showing that they were in possession thereof as owners were sufficient for plaintiff to maintain the action, and it was not necessary to prove title as against the world.—Martini v. Cowart, supra.

2. Pa.—In re Jackson Tp. Road, 42 Pa.Co. 348.

3. Ill.—Blair v. Faderer, 109 N.E. 1020, 269 Ill. 371.  
50 C.J. p 383 note 96.

4. Ill.—Blair v. Faderer, supra.  
50 C.J. p 383 note 97.

5. Minn.—Watson v. Board of Sup'rs of Town of South Side, 239 N.W. 913, 185 Minn. 111.

6. Colo.—Crystal Park Co. v. Morton, 146 P. 566, 27 Colo.App. 74.

Ky.—Kirk-Christy Co. v. American Assoc., Inc., 108 S.W. 232, 128 Ky. 668, 32 Ky.L. 1177.

7. Conn.—Reynolds v. Reynolds, 15 Conn. 83.

N.C.—Gorham v. Southern R. Co., 74 S.E. 607, 158 N.C. 504.

8. Mo.—Seitz Packing & Manufacturing Co. v. Quaker Oats Co., 124 S.W.2d 1177, 343 Mo. 1059.

9. S.C.—State v. Stackhouse, 14 S. C. 417.

10. Mich.—Palmer v. Clement, 12 N.W. 903, 49 Mich. 45.

11. Mich.—Palmer v. Clement, supra.



the land are proper parties plaintiff in an action to establish the road.

Although the owner of the land for whose benefit a private road is requested is a proper party plaintiff in an action to establish the road,<sup>12</sup> it has been held that all persons having an interest in the land may join in the action as parties plaintiff.<sup>13</sup> Accordingly, where remaindermen are in possession of land and the life tenant is not, the life tenant and remainderman may properly join as parties plaintiff in a proceeding to condemn a passway over lands of others to a public road.<sup>14</sup>

## (2) Defendants

While the owners of the lands over which a private road is asked are necessary parties defendant to the proceeding, it is not requisite that the owner of inclosed land join as defendants all owners of land which incloses his.

While the owners of the lands over which a private road is asked are necessary parties defendant to the proceeding,<sup>15</sup> it is not requisite that the owner of inclosed land join as defendants all owners of land which incloses his.<sup>16</sup> Where it is sought to establish the road across the land of a decedent, the heirs or devisees should be made parties defendant.<sup>17</sup> Where a road is sought to be established over lands parallel to a division fence, which becomes the boundary of the road on one side, the adjoining owner is not a necessary party to the proceedings<sup>18</sup> and cannot be heard to object where no part of his land or interest in the division fence is taken or damaged.<sup>19</sup>

## b. Petition

### (1) In general

### (2) Requisites

### (1) In General

The proceedings are generally required by statute to be commenced by petition. Notice of an intended petition may be required.

The proceedings are generally required by statute to be commenced by petition.<sup>20</sup>

In the absence of any statutory requirement to that effect, it has been held that no notice of an intended petition for the laying out of a road need be given to the person over whose land the road is sought to be laid out,<sup>21</sup> but it will be sufficient if he has subsequent notice and is afforded an opportunity at some stage of the proceedings to be heard on the question of compensation for his land sought to be appropriated.<sup>22</sup> On the other hand, if the statute requires such notice, the giving thereof is jurisdictional,<sup>23</sup> and the notice is analogous to a summons in an ordinary civil action.<sup>24</sup>

If the statute providing for notice does not prescribe the method of service, personal service is indispensable,<sup>25</sup> and service made in any other manner will not constitute legal service,<sup>26</sup> even though it in fact accomplishes the purpose of notifying the landowner.<sup>27</sup> Where the statute provides for service on the owner, unless he resides out of the county, in which case notice shall be given by publication, service on the agent of a foreign railroad corporation in charge of its depot and place of business in the county is sufficient.<sup>28</sup>

The giving of the notice is not an act relating to the subject matter of the proceeding,<sup>29</sup> and the landowner by a general appearance subjects himself to the jurisdiction of the tribunal to which the petition is presented.<sup>30</sup>

## (2) Requisites

The petition must contain a statement of all the facts which, by statute, are made necessary to entitle the petitioner to the relief prayed.

The petition must contain a statement of all the facts which, by the statute, are made necessary to entitle petitioner to the relief prayed,<sup>31</sup> but a petition which satisfies this requirement will be suffi-

12. Ky.—Hughes v. Shehan, 234 S. W. 285, 192 Ky. 619.

13. Ky.—Hughes v. Shehan, supra.

14. Ky.—Hughes v. Shehan, supra.

15. N.C.—Burden v. Harman, 54 N. C. 354.

Land held in trust by United States for Indians

Secretary of interior was not a necessary party to proceeding to establish cartway over land held in trust by the United States for Indians.—State v. Adams, 195 S.E. 822, 213 N.C. 243.

16. La.—Martini v. Cowart, App., 23 So.2d 655.

17. Tex.—Dwyer v. Olivari, 16 S.W. 800, 50 C.J. p 384 note 5.

18. Mo.—Wells v. Harris, 38 S.W. 1101, 187 Mo. 512.

19. Mo.—Wells v. Harris, supra.

20. Cal.—Geary v. San Diego County, 40 P. 800, 107 Cal. 530. N.C.—Warlick v. Lowman, 9 S.E. 458, 103 N.C. 122, 50 C.J. p 384 note 8.

21. Or.—Townes v. Klamath County, 53 P. 604, 33 Or. 225, 233.

22. Or.—Townes v. Klamath County, supra, 50 C.J. p 384 note 10.

23. Mo.—Allen v. Welch, 102 S.W. 665, 125 Mo.App. 278, 50 C.J. p 384 note 12.

24. Mo.—Allen v. Welch, supra.

25. Mo.—Allen v. Welch, supra.

26. Mo.—Allen v. Welch, supra, 50 C.J. p 384 note 15.

27. Mo.—Allen v. Welch, supra.

28. Mo.—Fitzmaurice v. Turney, 114 S.W. 504, 214 Mo. 610.

29. Mo.—Allen v. Welch, 102 S.W. 665, 125 Mo.App. 278, 50 C.J. p 384 note 18.

30. Mo.—Allen v. Welch, supra, 50 C.J. p 384 note 19.

31. Ga.—Porter v. Foster, 90 S.E. 967, 146 Ga. 154.

cient.<sup>32</sup> The petition is not required to be so formal and precise as ordinary pleadings,<sup>33</sup> and will be upheld if it contains enough to show with reasonable certainty the jurisdictional facts.<sup>34</sup> Likewise, where the statute expressly designates what facts shall be set forth, it is not essential to set out any other facts than those so designated.<sup>35</sup>

No other or greater number of signatures to the petition than prescribed by statute is necessary.<sup>36</sup>

**Necessity.** Where the right to a private road is limited by constitution and statute to cases of necessity, as discussed supra § 5, it is indispensable that a petition should allege the necessity for the road.<sup>37</sup> Where the petition fails to show this fact, it is demurrable,<sup>38</sup> and the court acquires no jurisdiction to proceed.<sup>39</sup> With respect to the sufficiency of the allegation of necessity, the petition may either follow the language of the statute or constitution, as the case may be,<sup>40</sup> or allege facts which show the necessity of the proposed road with reasonable certainty.<sup>41</sup>

**Person to be benefited.** The petition should state, in terms and truly, the person for whose benefit the projected road is to be,<sup>42</sup> and show that petitioner is one of the class of persons for whom the road may be laid out.<sup>43</sup>

**Statutory authorization and designation of route.** The petition must show that the road is one which

the statute authorizes.<sup>44</sup> It must describe with reasonable certainty the route desired,<sup>45</sup> although it has been held that it need not set out the points of beginning and termination and the courses and distances with the exactness necessary in a petition for a public road.<sup>46</sup> The termini must be described with reasonable certainty;<sup>47</sup> otherwise the petition will be insufficient to give jurisdiction,<sup>48</sup> and an order for the opening of the road on such petition cannot be sustained.<sup>49</sup> Where, however, the termini of the road are described with reasonable certainty, this will be sufficient.<sup>50</sup>

**Waiver of objections.** Defects in the petition consisting merely of informalities of statement must be deemed waived, when raised for the first time after the jury have been impaneled.<sup>51</sup> If it can be considered a valid objection to the petition that it was not sworn to, proceeding to trial without raising the objection constitutes a waiver thereof.<sup>52</sup>

### c. Bond

Where a statute so requires, a bond must be filed with the petition in order to invest the tribunal with jurisdiction to act on the petition.

Some statutes require that a bond be filed with the petition in order to invest the tribunal with jurisdiction to act on the petition.<sup>53</sup> If the bond does not substantially comply with such statutes, no jurisdiction of the proceedings is acquired,<sup>54</sup> and a defect in the bond cannot, at a late stage in the

La.—Wells v. Anglade, App., 23 So. 2d 469, rehearing refused 23 So.2d 741.

50 C.J. p 384 note 20.

#### Petitions held sufficient

La.—Estopinal v. Storck's Estate, App., 44 So.2d 704—Wells v. Anglade, App., 23 So.2d 469, rehearing refused 23 So.2d 741.

N.C.—Pearce v. Privette, 196 S.E. 843, 213 N.C. 501.

32. Mo.—Wiese v. Thien, 214 S.W. 853, 279 Mo. 524, 5 A.L.R. 1552.

50 C.J. p 384 note 21.

#### Substantial compliance

The petition must be in substantial compliance with the requirements of the statute.—Geary v. San Diego County, 40 P. 800, 107 Cal. 530.

33. N.C.—Warlick v. Lowman, 9 S. E. 458, 103 N.C. 122.

50 C.J. p 384 note 22.

34. N.C.—Warlick v. Lowman, supra.

35. Mo.—State v. McElhinney, 151 S.W. 457, 246 Mo. 44.

50 C.J. p 384 note 24.

36. Tex.—Galveston, etc., R. Co. v.

Baudat, 45 S.W. 939, 18 Tex.Civ. App. 595.

50 C.J. p 384 note 25.

37. Mo.—Welch v. Shipman, 210 S.

W.2d 1008, 357 Mo. 838.

50 C.J. p 384 note 27.

38. Ga.—Neal v. Neal, 50 S.E. 929, 122 Ga. 804.

39. Mo.—Colville v. Judy, 73 Mo. 651.

40. Mo.—Barr v. Flynn, 20 Mo.App. 383.

50 C.J. p 385 note 30.

41. N.C.—Barber v. Griffin, 74 S.E.

110, 158 N.C. 348.

50 C.J. p 385 note 31.

#### Allegations held sufficient

Mo.—Richter v. Rodgers, 37 S.W.2d 523, 327 Mo. 543.

50 C.J. p 385 note 31 [a].

42. Me.—Fernald v. Palmer, 22 A. 467, 83 Me. 244.

43. N.C.—Ford v. Manning, 67 S.E. 325, 152 N.C. 151.

50 C.J. p 385 note 33.

44. Ill.—Randolph v. Aetna High-

way Comrs., 8 Ill.App. 128.

50 C.J. p 385 note 34.

45. Conn.—Perkins v. Colebrook, 35 A. 772, 68 Conn. 113.

50 C.J. p 385 note 35.

Location and termini generally see supra § 2.

#### Description held sufficient

Mo.—State ex rel. Palmer v. Elliff, 58 S.W.2d 283, 332 Mo. 229.

46. Mo.—State ex rel. Palmer v. Elliff, supra.

47. Ill.—Highway Comrs. v. Mal-

lory, 21 Ill.App. 184.

50 C.J. p 385 note 36.

48. Ill.—Highway Comrs. v. Mal-

lory, supra.

49. Pa.—In re Keeling's Road, 59 Pa. 358.

50. Or.—Towns v. Klamath County, 53 P. 604, 33 Or. 225.

50 C.J. p 385 note 39.

51. N.C.—Warlick v. Lowman, 9 S. E. 458, 103 N.C. 122.

52. Mich.—Palmer v. Clement, 12 N.W. 908, 49 Mich. 45.

53. Cal.—Geary v. San Diego Coun-

ty, 40 P. 800, 107 Cal. 530.

54. Cal.—Geary v. San Diego Coun-

ty, supra.

proceeding, be cured by filing an amended bond.<sup>55</sup> However, the validity of the bond is not affected by inaccurate recitals as to the petition, if the petition is sufficiently identified;<sup>56</sup> nor can the validity of the bond be attacked collaterally.<sup>57</sup>

## § 8. — Commissioners, Viewers, Jurors, Surveyors, and Like Officers

- a. In general
- b. Appointment, qualification, and eligibility
- c. Acts and proceedings
- d. Report
- e. Return of report and proceedings thereon

### a. In General

On the filing of a petition for the establishment of a private road, the statutes generally provide for the appointment of commissioners, viewers, a jury, or the like to view the proposed road and determine matters relating to its establishment.

While under most statutes when a petition is presented to the court or tribunal for the establishment of a private road, provision is made for the appointment of commissioners, viewers, or the like to view the proposed road and determine matters relating to its establishment,<sup>58</sup> under some statutes these matters are for a jury.<sup>59</sup> Under a statute providing that one of the viewers appointed shall be a surveyor, it is not necessary that the court should appoint a county surveyor.<sup>60</sup>

### b. Appointment, Qualification, and Eligibility

- (1) In general
- (2) Notice of application for appointment
- (3) Answer
- (4) Order of appointment

### (1) In General

It is not necessary or proper that the court should find the proposed road a necessity as a preliminary for appointing commissioners. The commissioners must take the oath prescribed by statute and must be disinterested.

It is not essential that the court should find the proposed road a necessity as a preliminary for appointing commissioners.<sup>61</sup> On the contrary, the only questions for determination are whether the petition shows facts which under the statute entitle applicant to have commissioners appointed,<sup>62</sup> and who shall be appointed commissioners.<sup>63</sup> Accordingly, where a prima facie showing of necessity is made by applicant who seeks to establish a private road, the court has no right to proceed to try that issue,<sup>64</sup> but should appoint commissioners,<sup>65</sup> who, after going on and investigating the premises, make their recommendations in the form of a report to be disposed of thereafter on exceptions filed by the litigant who is dissatisfied with it.<sup>66</sup> It is no objection to the appointment of a committee that a committee has been previously appointed on the same petition, and has made a report which had been set aside,<sup>67</sup> and statutes making it necessary to pay compensation to the owner of the land over which the road is to be laid out before it is opened do not make such payment a prerequisite to the appointment of commissioners to lay out the road.<sup>68</sup>

**Qualification.** After appointment by the court, the commissioners are sworn to discharge their duties faithfully and impartially.<sup>69</sup> Accordingly, if a county surveyor is appointed, it is as essential for him to take the oath as it is for the others,<sup>70</sup> and his failure to do so nullifies the entire proceedings.<sup>71</sup> In some jurisdictions the oaths of jurors need not be reduced to writing<sup>72</sup> or shown by the record.<sup>73</sup>

55. Cal.—Geary v. San Diego County, *supra*.  
50 C.J. p 385 note 44.

56. Cal.—Mariposa County v. Knowles, 79 P. 525, 146 Cal. 1.

57. Cal.—Madera County v. Raymond Granite Co., 72 P. 915, 139 Cal. 128.

58. Ga.—Porter v. Foster, 90 S.E. 967, 146 Ga. 154.

Ky.—Mitchell v. Skidmore, 181 S.W. 2d 257, 297 Ky. 756.

Pa.—In re Private Road in Juniata Tp., 61 Pa. Dist. & Co. 418.

59. N.C.—Garris v. Byrd, 49 S.E.2d 625, 229 N.C. 343.  
50 C.J. p 386 note 48.

Means of enforcement of order of clerk

Where order of clerk fixes right of petitioner to a way of ingress to,

and egress from, petitioner's land over defendant's land to state highway, appointment of jury of view to locate, lay out, and mark the bounds of the easement thus established is the mechanics, in the nature of an execution, provided for the enforcement of the order.—Triplett v. Lall, 41 S.E.2d 755, 227 N.C. 274.

60. Idaho.—Latah County v. Has-further, 88 P. 433, 12 Idaho 797.

61. Mo.—Richter v. Rodgers, 37 S.W.2d 523, 327 Mo. 543.

50 C.J. p 386 note 58.

62. Ky.—Exall v. Holland, 179 S.W. 241, 186 Ky. 315.

63. Ky.—Exall v. Holland, *supra*.

64. Ky.—Mitchell v. Skidmore, 181 S.W.2d 257, 297 Ky. 756.

65. Ky.—Mitchell v. Skidmore, *supra*.

66. Ky.—Mitchell v. Skidmore, *supra*.

67. Conn.—Reynolds v. Reynolds, 15 Conn. 83.  
50 C.J. p 386 note 60.

68. Ga.—Green v. Reeves, 6 S.E. 865, 80 Ga. 805.

69. Idaho.—Latah County v. Has-further, 88 P. 433, 12 Idaho 798.  
Ky.—Skidmore v. Mitchell, 181 S.W. 2d 257, 297 Ky. 756.

70. Idaho.—Latah County v. Has-further, 88 P. 433, 12 Idaho 798.

71. Idaho.—Latah County v. Has-further, *supra*.

72. Tex.—Galveston, etc., R. Co. v. Baudat, 45 S.W. 939, 18 Tex. Civ. App. 595.

73. Tex.—Galveston, etc., R. Co. v. Baudat, *supra*.

**Eligibility.** The statutes generally provide that a member of a tribunal laying out a road shall be disinterested.<sup>74</sup> Accordingly sons or nephews of petitioner are disqualified to act.<sup>75</sup> However, a person is not disqualified to act by having served in previous ineffectual proceedings taken by the same person to obtain another right of way to the same land.<sup>76</sup>

Objections to the commissioners on the ground of disqualification may be waived,<sup>77</sup> as where there is a failure to make timely objection.<sup>78</sup>

## (2) Notice of Application for Appointment

In the absence of a waiver, there must be a compliance with statutory requirements that notice be given to the owners of the land, over which the proposed road is to be laid out, of the time when and place where the application for the appointment of viewers will be made.

There must be a compliance with statutory requirements that notice be given to the owners of the land, over which the proposed road is to be laid out, of the time when and place where the application for appointment of viewers will be made,<sup>79</sup> unless the requirement is waived.<sup>80</sup> Accordingly, one who participated in the selection of viewers or commissioners,<sup>81</sup> or was present at the hearing before the ordinary and made no objection to the appointment,<sup>82</sup> or failed to raise the issue of want of notice by an exception to the report,<sup>83</sup> or delayed in making the objection until the report was filed,<sup>84</sup> waives any want of notice of the intended application.

## (3) Answer

In jurisdictions where no hearing is had before the commissioners, an answer to the application for the appointment of commissioners is not necessary or proper and does not make an issue.

In jurisdictions where no hearing is had before the commissioners, as discussed *infra* subdivision

c (2) of this section, an answer to the application for the appointment of commissioners is not necessary,<sup>85</sup> is not proper,<sup>86</sup> does not make an issue,<sup>87</sup> and may be rejected,<sup>88</sup> or, if filed, it may be disregarded,<sup>89</sup> since the only issues are those presented by the commissioner's report and exceptions there-to.<sup>90</sup>

## (4) Order of Appointment

The order appointing viewers must recite the jurisdictional facts and should specify the character of notice to be given.

The order appointing viewers must recite the jurisdictional facts,<sup>91</sup> and whenever it fails so to do the proceeding should be dismissed without prejudice.<sup>92</sup> Where petitioner does not apply for a particular route, the commissioners should be directed to report the one they consider most practical and convenient,<sup>93</sup> and the order should specify the character of notice to be given.<sup>94</sup> However, notice of the order making the appointment is waived by appearing in court and contesting on the merits a proceeding to locate the road<sup>95</sup> or by failing to raise the issue of want of notice by an exception to the report.<sup>96</sup>

**Seal.** When so provided by statute, the order must be under the seal of the court,<sup>97</sup> and its omission is a defect and not a mere informality;<sup>98</sup> and the order is void when the seal is not attached until after the report of the viewers is filed.<sup>99</sup> The court has no power to supply the omission of the seal on the return of the order and report.<sup>1</sup> Where, however, an order to view on a petition to lay out a private road is correctly captioned as being in the court of quarter sessions, and is signed by the clerk thereof, who is also the clerk of the orphans' court, but the seal of the orphans' court is erroneously affixed to the order in lieu of the seal of the court of quarter sessions, the record may be amended by substituting the correct seal.<sup>2</sup>

74. Idaho.—Latah County v. Has-further, 88 P. 433, 12 Idaho 797.

75. Me.—Lyon v. Hamor, 78 Me. 56.

76. Mich.—Palmer v. Clement, 12 N. W. 903, 49 Mich. 45.

77. Ala.—Long v. Butler County Comrs. Ct., 18 Ala. 482.  
50 C.J. p 386 note 57.

78. N.Y.—People v. Taylor, 34 Barb. 481.

50 C.J. p 386 note 57.

79. Ky.—Martin v. Morgan, 221 S. W. 523, 188 Ky. 122.

50 C.J. p 386 notes 63, 64.

80. Ky.—Martin v. Morgan, *supra*.

81. Ga.—Green v. Reeves, 6 S.E. 865, 80 Ga. 305.

82. Ga.—Green v. Reeves, *supra*.

83. Ky.—Martin v. Morgan, 221 S. W. 523, 188 Ky. 122.

84. Pa.—Matter of Dennison Tp. Private Road, 13 Pa.Super. 227.

85. Ky.—Martin v. Morgan, 221 S. W. 523, 188 Ky. 122.

86. Ky.—Martin v. Morgan, *supra*.

87. Ky.—Martin v. Morgan, *supra*.

88. Ky.—Martin v. Morgan, *supra*.

89. Ky.—Martin v. Morgan, *supra*.

90. Ky.—Martin v. Morgan, *supra*.

91. Ky.—Abney v. Barnett, 1 Bibb 557.

50 C.J. p 387 note 77.

92. Ky.—Karnes v. Drake, 44 S.W. 444, 103 Ky. 134, 19 Ky.L. 1794.

93. Ky.—Hughes v. Shehan, 234 S. W. 285, 192 Ky. 619.

94. Pa.—In re Union Tp. Private Road, 14 Pa.Co. 436.

95. Or.—Towns v. Klamath County, 53 P. 604, 33 Or. 225.

96. Ky.—Martin v. Morgan, 221 S. W. 523, 188 Ky. 122.

97. Pa.—In re Bryson's Road, 2 Penr. & W. 207—In re Lower Towamensing Tp. Private Road, 25 Pa. Co. 305.

98. Pa.—In re Bryson's Road, 2 Penr. & W. 207.

99. Pa.—In re Lower Towamensing Tp. Private Road, 25 Pa.Co. 305.

1. Pa.—In re Bryson's Road, 2 Penr. & W. 207.

2. Pa.—Petition of Knox, 46 Pa. Dist. & Co. 408, 1 Lawrence L.J. 249.

## c. Acts and Proceedings

- (1) In general
- (2) Hearing

## (1) In General

Statutes providing for the appointment of commissioners and viewers create a special tribunal to determine the necessity and location of a proposed private road and also the amount of damages to be paid to the landowner over whose land the road is to pass.

A statute providing for the appointment of viewers on a petition for a private road has been held to create a tribunal for a special purpose,<sup>3</sup> and to endow it with an authority that no court has the right to destroy.<sup>4</sup> Under such statute, the necessity for the road,<sup>5</sup> its location,<sup>6</sup> and the amount of damages<sup>7</sup> are exclusively within the jurisdiction of the viewers whose decision on such matters is not subject to review by the trial court,<sup>8</sup> although their actions are subject to review by the trial court, in the same manner as the actions of the trial court are subject to review by appellate courts.<sup>9</sup> Accordingly, although the trial court must accept the determination of the viewers as to the question of necessity,<sup>10</sup> inquiry into the regularity of road proceedings is not precluded,<sup>11</sup> and, if the viewers acted dishonestly or corruptly, their conduct may be inquired into and their action set aside.<sup>12</sup>

If the viewers agree that there is a necessity for a road, they should proceed to lay out the proposed road<sup>13</sup> in such a manner as will do the least injury to private property,<sup>14</sup> and, also, as far as practicable, as will be agreeable to the desire of petitioner.<sup>15</sup> In determining the route to be followed by a

private road, the viewers should naturally consult petitioner,<sup>16</sup> and their adoption of the route proposed by him is no possible indication of partiality or bias on their part.<sup>17</sup>

On the other hand, in some jurisdictions, although the laying off of the private road,<sup>18</sup> and the question of damages,<sup>19</sup> are for the jury of view, their findings are subject to review by the trial court.<sup>20</sup>

## (2) Hearing

Although under some statutes no hearing is afforded to the parties except by way of exceptions to the report of the commissioners, under other statutes a hearing may be had before the commissioners or viewers on the issue of the necessity of the proposed road.

Although under some statutes no hearing is afforded to the parties<sup>21</sup> except by way of exceptions to the report of the commissioners, as discussed infra subdivision e (3) of this section, other statutes provide for a hearing before the commissioners or viewers,<sup>22</sup> on the issue of the necessity of the proposed road.<sup>23</sup>

**Notice.** Personal notice must be given to the owner or owners of the land, over which the proposed road is to pass, of the time and place of the meeting of the viewers, in order to determine the question as to the necessity of such road.<sup>24</sup> However, the objection of want of sufficient notice is waived where the owner has appeared at the hearing and contested on the merits,<sup>25</sup> or has appeared and put in his claim for damages and has had as full opportunity to be heard as though a valid notice had been given.<sup>26</sup>

3. Pa.—In re Private Road in Juniata Tp., 61 Pa. Dist. & Co. 418.

4. Pa.—In re Private Road in Juniata Tp., supra.

5. Pa.—In re Private Road in Juniata Tp., supra.  
Necessity generally see supra § 5.  
**Finding held justified**

A board of viewers is entirely justified in finding that a right of way is necessary to land completely surrounded by lands of others, where the only suggested alternative routes are one which is frequently under water and would require bridging a stream and another which is devious and hilly, has not been used for many years, and would be very expensive to improve.—In re Private Road in Juniata Tp., supra.

6. Pa.—In re Private Road in Juniata Tp., supra.

7. Pa.—In re Private Road in Juniata Tp., supra.

8. Pa.—In re Private Road in Juniata Tp., supra.

9. Pa.—In re Private Road in Juniata Tp., supra.

Review by appellate courts see infra § 11.

10. Pa.—In re Private Road in Juniata Tp., supra.

11. Pa.—In re Private Road in Juniata Tp., supra.

12. Pa.—In re Private Road in Juniata Tp., supra.

13. Pa.—In re Private Road in Juniata Tp., supra.

14. Pa.—In re Private Road in Juniata Tp., supra.

15. Pa.—In re Private Road in Juniata Tp., supra.

16. Pa.—In re Private Road in Juniata Tp., supra.

17. Pa.—In re Private Road in Juniata Tp., supra.

18. N.C.—Garris v. Byrd, 49 S.E.2d 625, 229 N.C. 343.

19. N.C.—Garris v. Byrd, supra.

20. Conn.—Reynolds v. Reynolds, 15 Conn. 83.

N.C.—Garris v. Byrd, 49 S.E.2d 625, 229 N.C. 343.

21. Ky.—Kirk-Christy Co. v. American Assoc., Inc., 108 S.W. 232, 128 Ky. 668, 32 Ky.L. 1177.

No issues should be heard in the case until the report of the commissioners comes in and it is definitely settled where the road will be located.—Kirk-Christy Co. v. American Assoc., Inc., supra.

22. Pa.—In re Road in Plum Creek Tp., 1 A. 431, 110 Pa. 544.

23. Conn.—Reynolds v. Reynolds, 15 Conn. 83.

24. Pa.—In re Road in Conemaugh Tp., 20 Pa. Dist. & Co. 428.  
50 C.J. p 387 note 86.

25. N.Y.—Mohawk, etc., R. Co. v. Artcher, 6 Paige 83.

26. Tex.—Galveston, etc., R. Co. v. Baudat, 45 S.W. 939, 18 Tex. Civ. App. 595.

### d. Report

A report of the viewers of their proceedings is necessary to the proper establishment of a private road. It should substantially conform to the petition and order of appointment and contain a statement of all the facts necessary to entitle the applicant to the road.

A report of the viewers of their proceedings is necessary to the proper establishment of a private road.<sup>27</sup> The report should substantially conform to the petition and order of appointment,<sup>28</sup> and contain a statement of all the facts necessary to entitle applicant to the road.<sup>29</sup>

It is not necessary for the committee to direct in its report the particular kind of fences which petitioners shall build in the places designated for that purpose, where the law furnishes a sufficient guide on the subject.<sup>30</sup>

A declaration in the report, in direct contravention of the statute, that the road shall remain such as long as the petitioner shall keep it in repair, and no longer, invalidates the whole proceeding;<sup>31</sup> and the fact that the selectmen did not intend to annex such a condition, having taken the clause containing it from a book of forms, does not justify the court in permitting them to amend their report by striking out the clause so as to validate their proceedings.<sup>32</sup>

**Description.** The report must describe the road by metes and bounds, courses and distances,<sup>33</sup> and fix the width of the road as a basis for the computation of damages,<sup>34</sup> unless the statute under which the proceeding was instituted itself provides that the road shall be of a given width, and does not expressly require it to be specified in the report.<sup>35</sup> Likewise, the report must fix and designate the termini of the private road with the precision re-

quired by the statute.<sup>36</sup> Thus the terminal points of the road as contained in the report of viewers must correspond with those stated in the petition and order;<sup>37</sup> but it is sufficient if there is substantial conformity in this particular.<sup>38</sup> The report will be sustained against the objection that it fails to fix the termini of the road, if the report<sup>39</sup> or a draft which by the statute is made an essential part of the report,<sup>40</sup> locates the termini with reasonable certainty, since mathematical precision is not required.

**Necessity of road.** The report of the commissioners must contain a statement as to the necessity of the proposed road;<sup>41</sup> otherwise the report will be fatally defective.<sup>42</sup> It has been held, however, that it will be sufficient to state generally that there is "occasion for the road,"<sup>43</sup> or to make a report that the road is for private use.<sup>44</sup>

**Notice of view to landowner.** A report of viewers must show personal notice to the owner of the land, over which it is proposed to lay out a road, of the time and place of view.<sup>45</sup>

**Certifying regard had to public convenience.** Where a private road laid out under the statute is not a road strictly for private use, but is open to the use of the public, a failure to certify that in the laying out of the road regard was had to the public convenience is fatal to the validity of the report.<sup>46</sup>

**Damages.** The commissioners must find and report the damages to which the owner of the property over which the road is to be laid is entitled.<sup>47</sup>

**Waiver of defects.** A petitioner cannot object to the report of the committee appointed to hear the application on the ground that such report contains irrelevant findings of fact, if he made no ob-

27. Ga.—Porter v. Foster, 90 S.E. 967, 146 Ga. 154.

Ky.—Skidmore v. Mitchell, 181 S.W. 2d 257, 297 Ky. 756.

Pa.—In re Private Road in Juniata Tp., 61 Pa.Dist. & Co. 418.

28. Pa.—In re Lower Merion Road, 58 Pa. 66.  
50 C.J. p 387 note 1.

29. Ky.—Martin v. Morgan, 221 S.W. 523, 188 Ky. 122.

30. Conn.—Reynolds v. Reynolds, 15 Conn. 83.

31. N.H.—In re Brown, 51 N.H. 367.

32. N.H.—In re Brown, supra.

33. Ky.—Martin v. Morgan, 221 S.W. 523, 188 Ky. 122.

Mo.—State ex rel. Palmer v. Elliff, 58 S.W.2d 283, 332 Mo. 229.

Pa.—In re Road in Conemaugh Tp., 26 Pa.Dist. & Co. 428.

Location and termini generally see supra § 2.

34. Pa.—In re Plum Creek Tp. Road, 1 A. 431, 110 Pa. 544.

35. Del.—In re Rickards, 58 A. 945, 21 Del. 17.

36. Pa.—In re Road in Conemaugh Tp., 20 Pa.Dist. & Co. 428.

37. Pa.—In re Seiple's Private Road, 8 Pa.Dist. & Co. 303.  
50 C.J. p 388 note 13.

38. Pa.—In re Springfield Road, 73 Pa. 127.  
50 C.J. p 388 note 14.

39. Pa.—In re Springfield Road, 73 Pa. 127.  
50 C.J. p 388 note 15.

40. Pa.—In re South Abington Tp. Road, 109 Pa. 118.  
50 C.J. p 388 note 16.

41. Ky.—Skidmore v. Mitchell, 181

S.W.2d 257, 297 Ky. 756—Vice v. Eden, 68 S.W. 125, 113 Ky. 255, 24 Ky.L. 132.

Pa.—In re Road in Conemaugh Tp., 20 Pa.Dist. & Co. 428.  
50 C.J. p 387 note 5.

42. Pa.—In re Road in Conemaugh Tp., supra.

43. Pa.—In re Pocopson Road, 16 Pa. 15, 17.  
50 C.J. p 387 note 7.

44. Pa.—In re Reserve Tp., 2 Grant 204.

45. Pa.—In re Plumcreek Tp. Road, 1 A. 431, 110 Pa. 544.  
50 C.J. p 388 note 21.

46. N.J.—Parmley v. White, 35 N.J.Law 203.

47. Ky.—Martin v. Morgan, 221 S.W. 523, 188 Ky. 122.

jection at the hearing to the admission of the evidence on which such findings are based.<sup>48</sup>

### a. Return of Report and Proceedings Thereon

- (1) In general
- (2) Amendments
- (3) Objections and exceptions
- (4) Confirmation

#### (1) In General

The report of proceedings to establish a private road must be made and filed within the time provided by statute, the usual requirement being that the report shall be made to the next term of court after the appointment of the viewers.

The report of proceedings to establish a private road must be made and filed within the time provided by statute,<sup>49</sup> and the usual requirement is that the report shall be made to the next term of court after the appointment of the viewers,<sup>50</sup> in order to allow time for filing exceptions to the report, if necessary.<sup>51</sup> Accordingly, it has been held that it is not proper for viewers to assemble on the ground, assess the damages, and make their report to the court on the day on which they were appointed,<sup>52</sup> and for the court on the next day to confirm the report absolutely.<sup>53</sup>

*Subsequent views.* Some statutes make provision for a petition for a review.<sup>54</sup> Where a petition for a review is filed to the report of viewers appointed by the court to lay out a private road, petitioner is estopped, by his act in requesting the review, to question the regularity of the original petition and the report thereon.<sup>55</sup> If the original petition and report of viewers are irregular in any way, the landowner's remedy is by proceedings to set them aside, rather than to file exceptions which do not cover any of the necessary facts which will justify

the court in dismissing the petition or setting aside the report.<sup>56</sup>

#### (2) Amendments

Although the court may have no power to alter the report, a mere clerical error in the report is amendable.

Although, the court may have no power to alter the report, where its power is limited to a rejection or confirmation of the report,<sup>57</sup> a mere clerical error in the report is amendable.<sup>58</sup> If an amendment is desired, the proper remedy is an application for the recommitment of the report to the viewers for correction,<sup>59</sup> although it has been held that the action of the court in accepting an amended report may be regarded as an equivalent of its having been recommitted to the viewers for correction.<sup>60</sup>

#### (3) Objections and Exceptions

Under some statutes, if the owner of the land over which the road is proposed to be laid out desires to resist the application, he may do so by filing exceptions to the commissioners' report.

Under some statutes, if the owner of the land over which the road is proposed to be laid out desires to resist the application, he may do so by filing exceptions to the commissioners' report.<sup>61</sup> The purpose of the exceptions to the commissioners' report is to challenge the finding,<sup>62</sup> and to obtain a review as by an appeal.<sup>63</sup> Accordingly, if an issue is made on a particular item, or for a particular cause, by exceptions, the effect is to vacate the commissioners' award.<sup>64</sup>

An owner's motion to dismiss proceedings for a road over his land on the ground that he had not been served with notice, made only two days after the report was filed, is prematurely made, where it does not appear that it was not the intention of the parties to give the notice.<sup>65</sup>

48. Conn.—Perkins v. Colebrook, 35 A. 772, 68 Conn. 113.

49. Pa.—In re Road in Conemaugh Tp., 20 Pa.Dist. & Co. 428.

50. Pa.—In re Boyer's Road, 37 Pa. 257—In re Road in Conemaugh Tp., 20 Pa.Dist. & Co. 428.

51. Pa.—In re Boyer's Road, 37 Pa. 257.

52. Pa.—In re Boyer's Road, supra.

53. Pa.—In re Boyer's Road, supra.

54. Pa.—In re Private Road in West Providence Tp. over Lands of Smith, 101 Pa.Super. 9.

55. Pa.—In re Private Road in West Providence Tp. over Lands of Smith, supra.

56. Pa.—In re Private Road in West Providence Tp. over Lands of Smith, supra.

57. Pa.—In re Beigh's Road, 23 Pa. 302.

58. Pa.—In re Thompson's Private Road, 25 A. 414, 154 Pa. 541. 50 C.J. p 388 note 24.

59. Pa.—In re Boyer's Road, 37 Pa. 257—In re Beigh's Road, 23 Pa. 302.

60. Pa.—Appeal of Elliott, 25 A. 814, 154 Pa. 541.

61. Ky.—Mitchell v. Skidmore, 181 S.W.2d 257, 297 Ky. 756—Kirk-Christy Co. v. American Assoc., Inc., 108 S.W. 232, 128 Ky. 668, 32 Ky.L. 1177.

50 C.J. p 388 note 34.

Acts and proceedings of commissioners and viewers generally see supra subdivision c of this section.

**Effect on parties not filing exceptions**

A report of commissioners as to value of land taken for road and damages for taking thereof is not binding on litigant filing no exceptions thereto, where one of parties excepts to confirmation of report and assigns grounds for exception, thereby raising an issue.—Skidmore v. Mitchell, 188 S.W.2d 434, 300 Ky. 255.

62. Ky.—Skidmore v. Mitchell, supra.

63. Ky.—Skidmore v. Mitchell, supra.

Review on appeal see infra § 11.

64. Ky.—Skidmore v. Mitchell, supra.

65. Ky.—Martin v. Morgan, 221 S.W. 523, 188 Ky. 122.

*Defenses.* The owners of the land over which the proposed road is to be laid out may, by exception to the report, present any defenses which they may have,<sup>66</sup> and such defenses as they do not embody in the exceptions to the report are conclusively deemed to be waived.<sup>67</sup> So, also, objections which should have been raised at an earlier stage of the proceedings are not available by way of exceptions to the report.<sup>68</sup> It is sufficient ground to sustain exceptions to the report that the road is located across a railroad at grade and that the use of it would imperil life, limb, and property.<sup>69</sup>

*Pleadings.* The report, it has been said, serves much the same purpose as a petition in an ordinary equitable action.<sup>70</sup> The pleadings are deemed sufficient if they are of such a character as clearly to show the questions arising and give both parties an opportunity to defend their rights.<sup>71</sup> The allegations made in the exceptions need not be traversed as in case of a pleading.<sup>72</sup>

*Evidence.* The burden of proof is on the exceptor to sustain the exceptions to the commissioners' report.<sup>73</sup> On proper exceptions to the commissioner's report, the owner of the land may show that the proposed road is not the most practical and convenient way over the land and, by such showing, defeat the establishment of the particular route proposed.<sup>74</sup> Evidence that there had been travel over the route of the proposed road until a well defined road was worn is competent as reflecting the conditions of the land as to its value.<sup>75</sup> The fact that petitioner has secured another way for his own use is relevant on the question of the necessity of a proposed private road;<sup>76</sup> and, like other facts, may be estab-

lished by testimony as to what applicant himself has said on the subject.<sup>77</sup>

Expert testimony has been held admissible on the question of the necessity of a road.<sup>78</sup>

*Trial.* Under some statutes on exceptions to the report of the commissioners, the proceedings are tried de novo,<sup>79</sup> and are conducted in general conformity with the proceedings in ordinary nisi prius trials.<sup>80</sup> The trial de novo opens up the whole case for trial on its merits, or at least with respect to the issue made.<sup>81</sup> Unless the parties agree that the court may try the case, the court must cause a jury to be impaneled to try the issues made by the exceptions.<sup>82</sup> The verdict of the jury, however, is not conclusive on the court,<sup>83</sup> but is only advisory,<sup>84</sup> and, on the report of the commissioners, the verdict, and other evidence, the court must determine whether the private road shall be established.<sup>85</sup> Accordingly, if sufficient grounds are not shown for setting aside the verdict of the jury, the court will render judgment in conformity therewith.<sup>86</sup>

#### (4) Confirmation

When the report of the commissioners is returned to the court, it must proceed to establish the road or refuse it, and, if the court finds that the report is in conformity with law, it will confirm the report. Where a statute so requires, notice of the report must be given.

When the report of the commissioners is returned to the court, it must proceed to establish the road or refuse it.<sup>87</sup> In the absence of objections or exceptions, the report of the commissioners is binding on the court,<sup>88</sup> and, if the court finds that the report is in conformity with law, it will confirm it.<sup>89</sup> Ac-

66. Ky.—Martin v. Morgan, *supra*.

67. Ky.—Martin v. Morgan, *supra*. 50 C.J. p 388 note 35.

68. Pa.—Petition of Knox, 46 Pa. Dist. & Co. 408, 1 Lawrence L.J. 249.

50 C.J. p 389 note 36.

69. Pa.—In re Harbaugh's Road, 8 Pa.Co. 671.

70. Ky.—Martin v. Morgan, 221 S. W. 523, 188 Ky. 122.

71. Ky.—Skidmore v. Mitchell, 188 S.W.2d 434, 300 Ky. 255.

72. Ky.—Skidmore v. Mitchell, *supra*.

73. Ky.—Skidmore v. Mitchell, *supra*—Black Mountain Corporation v. Appleman, 33 S.W.2d 327, 236 Ky. 510.

74. Ky.—Moore v. Bentley, 248 S. W. 890, 198 Ky. 346—Hughes v. Shehan, 234 S.W. 285, 192 Ky. 619.

75. Ky.—Martin v. Morgan, 221 S. W. 523, 188 Ky. 122.

76. Ky.—McCauley v. Dunlap, 4 B. Mon. 57.

77. Ky.—McCauley v. Dunlap, *supra*.

78. Ky.—Vice v. Eden, 68 S.W. 125, 113 Ky. 255, 24 Ky.L. 132. 50 C.J. p 387 note 95.

79. Ky.—Skidmore v. Mitchell, 188 S.W.2d 434, 300 Ky. 255.

80. Ky.—Skidmore v. Mitchell, *supra*.

81. Ky.—Skidmore v. Mitchell, *supra*.

82. Ky.—Exall v. Holland, 179 S.W. 241, 166 Ky. 315—McCauley v. Dunlap, 4 B.Mon. 57.

#### View of land

Whether or not the passway is necessary is a question to be determined from the circumstances, and the jury may be sent by the court to view the land.—Vice v. Eden, 68 S. W. 125, 113 Ky. 255, 24 Ky.L. 132.

83. Ky.—Vice v. Eden, *supra*—McCauley v. Dunlap, 4 B.Mon. 57.

Same weight as verdict of jury Ky.—Exall v. Holland, 179 S.W. 241, 166 Ky. 315.

84. Ky.—Vice v. Eden, 68 S.W. 125, 113 Ky. 255, 24 Ky.L. 132.

85. Ky.—Vice v. Eden, *supra*. Ky.—McCauley v. Dunlap, 4 B.Mon. 57.

86. Ky.—Exall v. Holland, 179 S.W. 241, 166 Ky. 315.

87. Ky.—Vice v. Eden, 68 S.W. 125, 113 Ky. 255, 24 Ky.L. 132.

88. Ky.—Skidmore v. Mitchell, 188 S.W.2d 434, 300 Ky. 255.

#### Confirmation unnecessary

The decision of the jury becomes effective without confirmation by the court if neither party makes a timely application to the court.—Matter of Bell, 228 N.Y.S. 649, 131 Misc. 734.

89. Ky.—Black Mountain Corpora-



cordingly, if the report is favorable to the proposed road, it may be established and recorded.<sup>90</sup>

*No confirmation nisi* of a report is necessary where at the term to which the report is made a review was awarded, the effect of which was to suspend any judgment on the report.<sup>91</sup>

*Notice of report.* There must be a compliance with statutory provisions as to notice of the report of the commissioners.<sup>92</sup> Under some statutes, on the filing of the commissioners' report, the clerk of court must issue process against the owners of the land to show cause why the report should not be confirmed,<sup>93</sup> and a judgment establishing the road is a nullity if there is not a compliance with the statutory requirement,<sup>94</sup> unless the owner renders such notice unnecessary by entry and appearance at the proceedings.<sup>95</sup>

*Order of confirmation.* A confirmation of a report is in effect an order that the road be opened;<sup>96</sup> but confirmation of a report nunc pro tunc followed by a simultaneous final confirmation and issue of the order to open the road does not cure previous informal and unauthorized proceedings.<sup>97</sup> Under some statutes the decree of confirmation is final,<sup>98</sup> subject to review in the proper manner,<sup>99</sup> and the road opened thereunder can be abolished only in the manner prescribed by statute.<sup>1</sup>

Where the width of a road is fixed during the same term at which the decree of confirmation nisi of a report of viewers laying out a private road is made, it is sufficient, although omitted in the decree itself,<sup>2</sup> and where, if more than one term passes before final confirmation, and another term thereafter elapses before any exceptions are filed, the road is duly granted, it is error to vacate the decree of confirmation and set aside the proceedings.<sup>3</sup>

Waiver of defects in the order of confirmation, as far as the landowner is concerned, results from his proceeding by petition to recover the damages assessed in the proceeding.<sup>4</sup>

## § 9. — Order, Judgment, or Decree

- a. In general
- b. Conditions precedent

### a. In General

The judgment establishing a private road must recite all the facts made essential by statute to the establishment of such a road.

The judgment establishing a private road must recite all the facts made essential by statute to the establishment of such a road.<sup>5</sup> Accordingly, the judgment, order, or decree should describe the location of the road granted;<sup>6</sup> but its failure to do so will not invalidate it where it referred to the description in the petition and report of the commissioners, both of which were part of the record.<sup>7</sup> The fact that the description of the location of the road contained in the order laying out the road does not follow the language of the application is not fatal to the proceeding, provided the description in the application is incorporated in the order by reference and the two descriptions are not irreconcilably repugnant.<sup>8</sup>

*Termini.* In ordering the laying out of a road it is the duty of the court, in its judgment, to fix both termini of such way.<sup>9</sup>

*Width.* Where the statute requires that the order of the court establishing the road shall define and specify its width, an omission so to do is fatal to the proceeding.<sup>10</sup> However, the court may, at a subsequent term, correct a mere mistake in fixing the

tion v. Appleman, 33 S.W.2d 327, 236 Ky. 510—Exall v. Holland, 179 S.W. 241, 166 Ky. 315—McCauley v. Dunlap, 4 B.Mon. 57.

Pa.—In re Miller's Case, 9 Serg. & R. 35.

90. Pa.—In re Miller's Case, supra.

91. Pa.—In re Beigh's Road, 23 Pa. 302.

50 C.J. p 388 note 30.

92. Ky.—Martin v. Morgan, 221 S. W. 523, 188 Ky. 122.

93. Ky.—Skidmore v. Mitchell, 181 S.W.2d 257, 297 Ky. 756—Martin v. Morgan, 221 S.W. 523, 188 Ky. 122—Kirk-Christy Co. v. American Assoc., Inc., 108 S.W. 232, 128 Ky. 668, 32 Ky.L. 1177.

94. Ky.—Martin v. Morgan, 221 S. W. 523, 188 Ky. 122, 50 C.J. p 388 note 32.

95. Ky.—Martin v. Morgan, supra. 50 C.J. p 388 note 33.

96. Pa.—In re Beigh's Road, 23 Pa. 302.

97. Pa.—In re Reserve Tp. Road, 2 Grant 204.

98. Pa.—In re Hunter's Private Road, 46 Pa. 250.

99. Pa.—In re Hunter's Private Road, supra.

Review generally see infra § 11.

1. Pa.—In re Hunter's Private Road, supra.

2. Pa.—In re Hunter's Private Road, supra—In re Road in Conemaugh Tp., 20 Pa.Dist. & Co. 428.

3. Pa.—In re Hunter's Private Road, 46 Pa. 250.

4. Order not fixing width

Pa.—In re Weaver's Road, 45 Pa. 405.

5. Mo.—Richter v. Rodgers, 37 S. W.2d 523, 327 Mo. 543.

Operation and effect of judgment see infra § 13.

6. La.—Wemple v. Eastham, 90 So. 637, 150 La. 247. 50 C.J. p 389 note 60.

Description held sufficient

Ark.—Roth v. Dale, 177 S.W.2d 179 206 Ark. 735.

7. Mo.—Fitzmaurice v. Turney, 114 S.W. 504, 214 Mo. 610.

8. N.Y.—Satterly v. Winne, 4 N.E. 185, 101 N.Y. 218.

9. N.C.—Burden v. Harman, 52 N. C. 354.

10. Ind.—Barnhard v. Haworth, 9 Ind. 103.

width,<sup>11</sup> allowing another term to pass before confirming the report absolutely.<sup>12</sup> It is error to fix the width of the road in excess of that prescribed by statute.<sup>13</sup> Likewise, when the report estimates the damages for a road of a designated width, it is error to order the opening of a road of a greater width.<sup>14</sup> On the other hand, when the statute prescribes the width of the private road, there is no necessity, nor is there power, in the court to prescribe the width.<sup>15</sup>

**Opening of road.** If the statute provides that the court shall direct when the roads shall be laid out and when the damages shall be paid, the court must so direct in the decree establishing the road.<sup>16</sup> The order of confirmation need not specify how the road shall be opened, if the law authorizing the proceedings specifies the manner of opening the road in plain and direct terms.<sup>17</sup>

**Manner of keeping in repair.** It is not necessary for the court, in the order of confirmation, to specify how the road shall be kept in repair when the statute authorizing the proceeding provides that it shall be kept in repair by the persons applying for and using it.<sup>18</sup>

**Limiting duration.** Unless the statute expressly so provides, a tribunal establishing a road has no authority to limit in its decree the time for the use of the road to a given period of the year,<sup>19</sup> or to limit its duration to the necessity which required it.<sup>20</sup>

**Negating existence of facts showing lack of jurisdiction.** The order or decree of a court establishing a private road need not negative the existence of every fact which would show that the court could not properly exercise its power in the given case.<sup>21</sup>

**Temporary judgment.** Under some statutes the relief granted to the proprietor of an inclosed estate

must be of a permanent nature,<sup>22</sup> and a temporary judgment awarding a temporary private road is improper.<sup>23</sup>

**Damages.** The compensation to be paid must be fixed by a judicial decree.<sup>24</sup>

**Entry.** A mere verbal order for the opening of a road is ineffectual until entered of record.<sup>25</sup>

**Nunc pro tunc entry** may be resorted to to correct the judgment, order, or decree,<sup>26</sup> but, where no private road has been decreed, although the viewers so recommended, the court is without authority, on petition of the parties in interest, to enter a decree nunc pro tunc creating a private road in conformity with the viewers' recommendations.<sup>27</sup>

#### b. Conditions Precedent

Where a statute requires payment of damages for land taken for the opening of a private road before the opening thereof, it is error to issue an order for the opening of a road before the damages are paid or tendered and brought into court.

Where a statute requires payment of damages for land taken for the opening of a private road before the opening thereof, it is error to issue an order for the opening of a road before the damages are paid<sup>28</sup> or tendered and brought into court.<sup>29</sup> However, under a statute providing that, where no objections are taken to the commissioner's report, the court shall order the road established and enter judgment for the owners for the damages assessed, which the petitioner shall pay to the county treasurer, the court need not wait until the damages assessed have been actually paid by the petitioner to the county treasurer before rendering judgment establishing the way,<sup>30</sup> but may properly enter judgment awarding the damages assessed and adjudging the road established before such payment, although the part of the judgment establishing the road could not be enforced until the damages were in fact paid.<sup>31</sup> Likewise, in the absence of ex-

11. Pa.—In re Weaver's Road, 45 Pa. 405.

12. Pa.—In re Union Tp. Private Road, 7 Kulp 245—In re Kingston Tp. Private Road, 5 Kulp 235.

13. Pa.—In re Killbuck Private Road, 77 Pa. 39.

14. Pa.—In re Clowes' Road, 31 Pa. 12.

15. Pa.—In re Road in Smithfield Tp., 29 Pa. Dist. & Co. 208.

16. Conn.—Reynolds v. Reynolds, 15 Conn. 83.  
50 C.J. p 390 note 71.

17. Pa.—In re Kyle's Road, 4 Yeates 514.

18. Pa.—In re Kyle's Road, supra.  
50 C.J. p 390 note 73.

19. Mass.—Holcomb v. Moore, 4 Allen 529.

20. Conn.—Reynolds v. Reynolds, 15 Conn. 83.  
50 C.J. p 390 note 76.

21. Ala.—Long v. Butler County Comrs.' Ct., 18 Ala. 482.  
50 C.J. p 389 note 59.

22. La.—Estopinal v. Storck's Estate, App., 44 So.2d 704.

23. La.—Estopinal v. Storck's Estate, supra.

24. La.—Wemple v. Eastham, 90 So. 637, 150 La. 247—Ezernack v.

Ezernack, 137 So. 626, 18 La. App. 56.

25. Mo.—Crews v. Lombard, 216 S. W. 512.

Necessity for entry of judgment generally see Judgments § 107.

26. Mo.—Fitzmaurice v. Turney, 114 S.W. 504, 214 Mo. 610.

27. Pa.—In re Road in Smithfield Tp., 29 Pa. Dist. & Co. 208.

28. Pa.—In re Clowes' Road, 31 Pa. 12.

29. Pa.—In re Clowes' Road, supra.

30. Mo.—Fitzmaurice v. Turney, 114 S.W. 504, 214 Mo. 610.

31. Mo.—Fitzmaurice v. Turney, supra.

press statute so providing, payment of costs of an appeal from the assessment of damages is not a condition precedent to the jurisdiction of the court to establish and direct the opening of a road.<sup>32</sup>

## § 10. — Laying Out or Opening Road

A road does not become a legal private road until the public functionaries whose ministerial duty it is so to do have actually laid it out.

A road does not become a legal private road until the public functionaries whose ministerial duty it is so to do have actually laid it out,<sup>33</sup> and the statutes contemplate the location of a permanent way and not the mere adoption of an existing temporary way.<sup>34</sup> The public functionaries whose ministerial duty it becomes to lay out a road have no discretion to change its location,<sup>35</sup> but must lay it out so as to cover ground substantially the same as that described in the application<sup>36</sup> and the order of the court.<sup>37</sup> Likewise, petitioner must construct the road in accordance with the description in the order of the court,<sup>38</sup> and the fact that parties and the viewers were mistaken in assuming that the proposed road ran through the landowner's property gives petitioner no right to construct the road at another location on the landowner's property arbitrarily selected by him.<sup>39</sup>

*Injunction to restrain laying out of road.* Where there is no other adequate remedy, injunction will lie to restrain the laying out of a road in accordance with an order made without any jurisdiction to make it.<sup>40</sup> So, also, injunction will lie to restrain petitioner from locating a road at a place not specified in the order of the court.<sup>41</sup>

## § 11. — Review

- a. Certiorari
- b. Appeal or error

### a. Certiorari

- (1) In general
- (2) Proceedings for writ

- (3) Review and scope thereof
- (4) Determination and disposition

### (1) In General

Certiorari will not lie to review proceedings to establish a private road where an adequate remedy by appeal exists.

In accordance with the general rule discussed in Certiorari § 39, certiorari will not lie to review proceedings to establish a private road where an adequate remedy by appeal or writ of error exists;<sup>42</sup> and, if a writ is improperly issued in such case, it should be dismissed.<sup>43</sup> Likewise certiorari will not lie to review a determination adverse to the establishment of the road, made by a tribunal in the exercise of its discretionary powers.<sup>44</sup> It may be discretionary with the court, to which application is made, to refuse the writ, where no transcript of the record is presented therewith, so as to enable the court to judge of the propriety of issuing the writ.<sup>45</sup>

### (2) Proceedings for Writ

A writ of certiorari may be issued only to one who is a party to the proceedings to establish a private road, and only proper parties should be joined as defendants.

A writ of certiorari may be issued only to one who is a party to the proceedings to establish a private road.<sup>46</sup> One who becomes the owner of the land subsequent to the time of the view, but before issue of the final order, and presents a sufficient objection to the establishment of the road, is entitled, on a showing that he has lost his right of appeal, without fault or negligence on his part, to a writ of certiorari to review the proceedings.<sup>47</sup> After a road has been laid out and opened and the party through whose land it runs has proceeded by petition to recover damages therefor, he cannot, after an adverse award of viewers, sue out a certiorari to reverse the order of confirmation for any defect therein.<sup>48</sup> On a petition for certiorari to be directed to the county court relative to the establishment of a road, neither the county court

32. Ala.—Coffee County Comrs.' Ct., 64 So. 311, 185 Ala. 501.

33. N.Y.—Satterly v. Winne, 4 N.E. 185, 101 N.Y. 218.  
50 C.J. p 390 note 78.

34. Ga.—Porter v. Foster, 90 S.E. 967, 146 Ga. 154.

35. N.Y.—Satterly v. Winne, 4 N.E. 185, 101 N.Y. 218.

Location and termini generally see supra § 2.

36. N.J.—Powell v. Hitchner, 32 N. J.Law 211.

N.Y.—Satterly v. Winne, 4 N.E. 185, 101 N.Y. 218.

37. N.J.—Powell v. Hitchner, 32 N. J.Law 211.

38. Or.—Hanns v. Friedly, 184 P. 2d 855, 181 Or. 631.

39. Or.—Hanns v. Friedly, supra.

40. Tex.—Leathers v. Craig, Civ. App., 228 S.W. 995.  
50 C.J. p 390 note 84.

41. Or.—Hanns v. Friedly, 184 P.2d 855, 181 Or. 631.

42. Mo.—State ex rel. Palmer v. Elliff, 58 S.W.2d 283, 332 Mo. 229.  
50 C.J. p 391 note 95.

43. Mo.—State ex rel. Palmer v. Elliff, 58 S.W.2d 283, 332 Mo. 229.  
50 C.J. p 391 note 96.

44. Ala.—Brooks v. Kirby, 19 Ala. 72.

Certiorari as to matters of discretion generally see Certiorari § 30.

45. Ark.—Roberts v. Williams, 13 Ark. 355.

46. Ark.—Roberts v. Williams, 15 Ark. 43.

47. Ark.—Roberts v. Williams, supra.

48. Pa.—In re Weaver's Road, 45 Pa. 405.

as a judicial tribunal<sup>49</sup> nor the individuals composing it<sup>50</sup> are proper parties. Likewise, it is not necessary expressly to make the county a party where, by statute, it is made a defendant by operation of law.<sup>51</sup>

*Application.* In order to obtain certiorari, the party aggrieved by the establishment of a private road should present an application,<sup>52</sup> together with a duly certified transcript of the record sought to be reviewed.<sup>53</sup> A writ of certiorari should be entitled as between applicant therefor, as plaintiff in certiorari, and applicant for the road, as defendant.<sup>54</sup>

### (3) Review and Scope Thereof

Certiorari in proceedings to establish a private road brings up only the record proper, and nothing is reviewable except the regularity of the proceedings.

In accordance with general rules discussed in Certiorari § 157, certiorari in proceedings to establish a private road brings up only the record proper,<sup>55</sup> and nothing is reviewable except the regularity of the proceedings.<sup>56</sup> The court will not hear evidence<sup>57</sup> or review questions of fact,<sup>58</sup> even though facts may be set forth in the opinion filed by the court below.<sup>59</sup> On questions of fact it must be presumed that the court below arrived at a correct conclusion.<sup>60</sup> Likewise, it will be taken for granted that every objection made to the report and overruled by the court below, which is in its nature capable of being proved, is untrue in point of fact unless the contrary appears from the record.<sup>61</sup>

*On appeal from certiorari proceeding.* Where an appeal may be and has been taken from the proceedings had on certiorari, in accordance with the general rules questions not raised in the court below will not be considered on an appeal taken to review the proceedings had on certiorari.<sup>62</sup>

### (4) Determination and Disposition

Where the record shows that the court had jurisdiction, and that the proceedings were regular on their face, and there is no allegation or proof of abuse of discretion, the order of the lower court will be affirmed; otherwise the proceedings will be quashed, reversed, or remitted.

Where the record shows that the court had jurisdiction, and that the proceedings were regular on their face, and there is no allegation or proof of abuse of discretion, the order of the lower court will be affirmed.<sup>63</sup>

*Quashing proceedings.* The entire proceeding will be quashed where the petition failed to allege that petitioner had no access to his land other than by the proposed road,<sup>64</sup> or where it appears that there was no service of notice, as required by statute, on the owner<sup>65</sup> or occupant<sup>66</sup> of the land, or where applicant for the road paid the surveyors more than their legal fees.<sup>67</sup>

*Reversal.* The proceedings will be reversed where the petition or report of the viewers fails to state, with reasonable certainty, the termini of the road;<sup>68</sup> where the owner over whose land the proposed road is to pass was not given personal notice of the time and place of the meeting of the viewers appointed to lay out the road, and also of the time and place when and where the damages are to be assessed;<sup>69</sup> where the lower tribunal, on confirming the report of the viewers, fails to observe the statutory requirement to fix the width of the road;<sup>70</sup> or where the record shows that the order for the opening of the road was issued before payment or tender into court of the damages assessed,<sup>71</sup> or that the road was laid out on the bridge of another, without making a special order relative to the maintenance and repair of the bridge.<sup>72</sup>

*Remitting proceedings.* In at least one jurisdic-

49. Or.—Holland-Washington Mortg. Co. v. Hood River County Ct., 188 P. 199, 95 Or. 668.

50. Or.—Holland-Washington Mortg. Co. v. Hood River County Ct., supra.

51. Or.—Holland-Washington Mortg. Co. v. Hood River County Ct., supra.

52. Ark.—Roberts v. Williams, 13 Ark. 355.

53. Ark.—Roberts v. Williams, supra.

54. N.J.—Griscom v. Gilmore, 15 N. J. Law 475.

55. Pa.—In re Keller's Private Road, 25 A. 814, 154 Pa. 547, 50 C.J. p 391 note 9.

56. Pa.—In re Keller's Private Road, supra.

57. Pa.—In re Schuylkill Falls Road, 2 Binn. 250—In re Roche's Private Road, 10 Pa.Super. 87, 44 Wkly.N.C. 166.

58. Pa.—In re Keller's Private Road, 25 A. 814, 154 Pa. 547, 50 C.J. p 391 note 12.

59. Pa.—In re Hamilton Street, 24 A. 122, 148 Pa. 640—In re Roche's Private Road, 10 Pa.Super. 87, 44 Wkly.N.C. 166.

60. Pa.—In re Roche's Private Road, supra.

61. Pa.—In re Roche's Private Road, supra.

62. Ala.—Long v. Butler County Comrs.' Ct., 18 Ala. 482, 50 C.J. p 391 note 19.

63. Mo.—State ex rel. Palmer v. Elliff, 58 S.W.2d 283, 332 Mo. 229. Pa.—In re West Pikeland Tp. Private Road, 38 Pa.Super. 466.

64. Mich.—Hall v. Pettit, 50 N.W. 117, 88 Mich. 158.

65. Mich.—Hall v. Pettit, supra.

66. Mich.—Hall v. Pettit, supra.

67. N.J.—Parmley v. White, 35 N. J. Law 203.

68. Pa.—In re Keeling's Road, 59 Pa. 358.

69. Pa.—In re Shawhan, 7 A. 97, 4 Pa.Cas. 181.

70. Pa.—In re Boyer's Road, 37 Pa. 257.

71. Pa.—In re Clowes' Road, 31 Pa. 12.

72. Pa.—In re Clowes' Road, supra.

tion the court may, where it appears that the return of the surveyors exceeds the width of the road prescribed by statute, order the proceedings to be remitted, unless an amendment thereof is ordered on motion of applicant for the road, as authorized by statute.<sup>73</sup>

### b. Appeal or Error

- (1) To courts of intermediate appellate jurisdiction
- (2) To courts of last resort

#### (1) To Courts of Intermediate Appellate Jurisdiction

- (a) In general
- (b) Persons entitled to appeal; parties
- (c) Decisions reviewable
- (d) Scope and extent of review
- (e) Determination and disposition

#### (a) In General

No appeal lies in proceedings to establish a private road, except where it is authorized by constitutional or statutory provision.

In accordance with general principles no appeal lies in proceedings to establish a private road,<sup>74</sup> except where it is authorized by constitutional or statutory provision.<sup>75</sup> Accordingly, it has been said that the right of appeal will not be denied if by fair and reasonable interpretation of the law it can be allowed, and the courts will give a liberal construc-

tion to the statute in favor of the right.<sup>76</sup>

*Time for taking appeal.* The time for taking an appeal is a matter of statutory regulation, and the appeal must be taken within the time prescribed.<sup>77</sup>

*Effect as supersedeas.* Under some statutes the appeal operates as a supersedeas or stay of proceedings on the judgment of the court below.<sup>78</sup>

*Appeal bond.* Some statutes require appellant to give a proper and sufficient bond, in order to confer jurisdiction on the appellate court.<sup>79</sup> Accordingly, where the filing of a proper bond is jurisdictional, there must be a compliance with the statute,<sup>80</sup> and the failure to file such a bond requires the appellate court to dismiss the proceedings.<sup>81</sup> A bond void for failure to comply with the statutory provisions cannot be amended, changed, or renewed.<sup>82</sup>

#### (b) Persons Entitled to Appeal; Parties

Generally an appeal may be taken by any person who is a party to the proceeding and is affected by the establishment of the private road.

One who does not appear to be affected by the establishment of a private road and is not a party to the proceeding cannot sustain a writ of error.<sup>83</sup> On an appeal by a landowner from a judgment establishing a road over his land, the adversary parties are the petitioners for the road, and not the members of the commissioner's court which rendered the judgment.<sup>84</sup> The fact that some defendants did not appeal from the judgment establishing the road

73. N.J.—Gruner v. Hartman, 48 A. 522, 66 N.J.Law 189.

74. N.Y.—People v. Robinson, 29 Barb. 77, 17 How.Pr. 534.  
50 C.J. p 392 note 33.

75. Ky.—Black Mountain Corporation v. Appleman, 33 S.W.2d 327, 236 Ky. 510.

Mo.—Welch v. Shipman, 210 S.W.2d 1008, 357 Mo. 838—State ex rel. Palmer v. Elliff, 58 S.W.2d 283, 332 Mo. 229—Richter v. Rodgers, 37 S.W.2d 523, 327 Mo. 543.

N.C.—Cook v. Vickers, 57 S.E. 1, 144 N.C. 312—Cook v. Vickers, 53 S.E. 740, 141 N.C. 548.  
50 C.J. p 392 note 35.

#### In Maine

(1) Persons aggrieved by town officers' action in laying out private way over such persons' land should present petition to county commissioners for relief and appeal from such commissioners' decision, instead of appealing directly to superior court from such action, although such appeal is proper procedure to present question of damages.—Connor v. Inhabitants of Southport, 12 A.2d 414, 136 Me. 447.

(2) Whether persons aggrieved by municipal officers' action in laying out private way over such persons' land have remedy under section of revised statutes providing for appeal to superior court depends on the will of the legislature, as expressed in such statute, and original statute may be considered in ascertaining such will, since revision of statutes usually simply iterates previous declaration of legislative will.—Connor v. Inhabitants of Southport, supra.

(3) The section of revised statutes, authorizing persons aggrieved by municipal officers' action in laying out private way to appeal to superior court, affords no remedy to owners of land, over which town officers laid out private way for owners of other land, since incorporation of original section, authorizing such appeals to supreme judicial court, in Revised Statutes directly after other sections of same chapter, with nothing to indicate change of intent, except to substitute superior court for supreme judicial court, did not alter or enlarge original scope and meaning of

section.—Connor v. Inhabitants of Southport, supra.

#### In New York

(1) Appeal to the court from the verdict of the jury is now permitted by statute.—West v. McGurn, 43 Barb. 198.

(2) Formerly the verdict of the jury was final and no appeal could be taken.—People v. Robinson, 29 Barb. 77, 17 How.Pr. 534.

76. N.C.—Cook v. Vickers, 53 S.E. 740, 141 N.C. 101.  
50 C.J. p 392 note 36.

77. Ky.—Combs v. Amburgy, 247 S.W. 726, 197 Ky. 635.

78. Mo.—Fitzmaurice v. Turney, 165 S.W. 307, 256 Mo. 181.

79. Kan.—Appeal of Coyle, 196 P.2d 181, 165 Kan. 445.

80. Kan.—Appeal of Coyle, supra.

81. Kan.—Appeal of Coyle, supra.

82. Kan.—Appeal of Coyle, supra.

83. Ky.—Rout v. Mountjoy, 3 B. Mon. 300.

84. Ala.—Cleckler v. Morrow, 43 So. 784, 150 Ala. 524.

does not prevent the court to which the appeal is taken from acquiring jurisdiction of the appeal.<sup>85</sup>

### (c) Decisions Reviewable

Only final judgments or orders are appealable in proceedings to establish a private road.

In accordance with the general rule only final judgments or orders are appealable in proceedings to establish a private road.<sup>86</sup> An order setting aside a report of viewers appointed to lay out a private road because of information improperly given them is not a final order from which an appeal lies.<sup>87</sup> On the other hand, where the court denies the petition for a road and dismisses the proceedings therefor, its action amounts to a final judgment from which the petitioners may take an appeal.<sup>88</sup>

### (d) Scope and Extent of Review

#### aa. In general

#### bb. Trial de novo

#### aa. In General

The scope and extent of review in a proceeding to establish a private road are governed by statute, and ordinarily an appeal brings up for review only the record of the lower court.

The scope and extent of review in a proceeding

to establish a private road are governed by the statutes.<sup>89</sup> Ordinarily an appeal brings up for review only the record of the lower court,<sup>90</sup> unless there is statutory provision for a trial de novo, as discussed *infra* subdivision (d) bb of this section.

**Writ of error.** Under some statutes there is considerable difference in the procedure to be had in the appellate court on an appeal and that to be had on a writ of error,<sup>91</sup> and the writ of error does not bring up the case from the lower court to the appellate court for trial de novo as does an appeal.<sup>92</sup> It is limited to a review of the record,<sup>93</sup> the correction of errors of law<sup>94</sup> and not of fact,<sup>95</sup> and to errors appearing on the face of the record only.<sup>96</sup>

**Presumptions.** It will be presumed on appeal that the viewers observed the order of the court,<sup>97</sup> performed their duty,<sup>98</sup> and that all things were properly done unless the contrary is shown.<sup>99</sup>

#### bb. Trial De Novo

Under a number of statutes proceedings to establish a private road may be transferred to a court or tribunal having appellate jurisdiction, for a trial de novo.

Under a number of statutes proceedings to establish a private road may be transferred to a court<sup>1</sup>

85. Mo.—Fitzmaurice v. Turney, 114 S.W. 504, 214 Mo. 610.

86. Mo.—Richter v. Rodgers, 37 S.W.2d 523, 327 Mo. 543.  
50 C.J. p 392 note 38.

#### Appeal held not premature

(1) In general.—Cook v. Vickers, 53 S.E. 740, 141 N.C. 101—Warlick v. Lowman, 8 S.E. 120, 101 N.C. 543.

(2) In proceeding to establish cartway or way of necessity from land of petitioners over defendant's land to state highway, appeal to superior court at term, from order of clerk adjudging right of petitioners to have the cartway and appointing jury of view to lay off the cartway, was not premature.—Triplett v. Lall, 41 S.E.2d 755, 237 N.C. 274.

(3) The superior court erred in granting motion by one petitioning for establishment of private cartway to remand cause to clerk for appointment of jury of view to lay off cartway without considering merits of petitioner's appeal from clerk's judgment denying petition, since such judgment is final and determinative of parties' rights until reversed or modified and appeal therefrom is not premature.—Dailey v. Bay, 3 S.E.2d 14, 215 N.C. 652.

(4) When appeal from clerk's judgment, denying petition for establishment of private cartway, was placed on civil issue docket, su-

perior court acquired full jurisdiction thereof and was bound to determine fact issues and law questions involved, since it is only after final adjudication of petitioner's right to cartway that judge in his discretion may remand cause to clerk for procedural action necessary to execute judgment.—Dailey v. Bay, *supra*.

87. Pa.—In re Perry Tp. Road, 36 Pa.Super. 131.

88. Mo.—State v. Wlethaupt, 142 S.W. 323, 238 Mo. 155.  
50 C.J. p 392 note 40.

89. Mo.—Richter v. Rodgers, 37 S.W.2d 523, 327 Mo. 543.

90. Pa.—In re Private Road in West Providence Tp. over Lands of Smith, 101 Pa.Super. 9.

Except for the statutory provision for a trial de novo, an appeal from the lower court to the appellate court would merely bring up the record of the lower court for review, just as a certiorari would do.—Richter v. Rodgers, 37 S.W.2d 523, 327 Mo. 543.

91. Mo.—Richter v. Rodgers, *supra*.

92. Mo.—Richter v. Rodgers, *supra*.

There is no statutory provision for trial de novo in the case of a writ of error, so that as at common law a writ of error issues out of the

superior court and commands the judge of the trial court to send up the record of the case for examination as to error of law.—Richter v. Rodgers, *supra*.

93. Mo.—Richter v. Rodgers, *supra*.  
**Record held not defective**

Landowners not objecting to qualification of commissioners assessing damages for private road and abandoning appeal could not on error claim that record was defective for failing to show that commissioners were disinterested.—Richter v. Rodgers, *supra*.

94. Mo.—Richter v. Rodgers, *supra*.

95. Mo.—Richter v. Rodgers, *supra*.

**Hearing of oral and supplemental evidence held properly refused**  
Mo.—Richter v. Rodgers, *supra*.

96. Mo.—Richter v. Rodgers, *supra*.

97. Pa.—In re Private Road in West Providence Tp. over Lands of Smith, 101 Pa.Super. 9.

98. Pa.—In re Private Road in West Providence Tp. over Lands of Smith, *supra*.

99. Pa.—In re Private Road in West Providence Tp. over Lands of Smith, *supra*.

1. Ky.—Black Mountain Corporation v. Appleman, 33 S.W.2d 327, 236 Ky. 510—Exall v. Holland, 179 S.W. 241, 166 Ky. 315.  
Mo.—State ex rel. Palmer v. Elliff,

or tribunal<sup>3</sup> having appellate jurisdiction, for trial de novo. The statutes giving the right of appeal which vary considerably in their provisions prescribe what questions may be considered.<sup>3</sup> Under some statutes the appellate tribunal has full power to proceed and to take all steps necessary to a final determination of the cause,<sup>4</sup> including the power to appoint commissioners where the petition for the establishment of the road has been dismissed by the lower court,<sup>5</sup> or to appoint new commissioners where the petition for the road has been granted by the lower court.<sup>6</sup> Accordingly, where the unrestricted right of trial de novo is given, it is not essential to the jurisdiction of the appellate court that proof of jurisdictional facts and findings should be shown by the record of the lower court.<sup>7</sup> The case is tried on the facts as they exist at the time of the trial.<sup>8</sup>

**Amendments.** In accordance with the general rule the appellate court cannot permit an amendment of a petition for a road so as to change the petition to one for the laying out of a public road;<sup>9</sup> and, where a further appeal is taken to the court of last resort, the amendment will be stricken and the intermediate appellate court will proceed to act on the case as it was presented before the amendment was allowed.<sup>10</sup> On the other hand, where the commissioners are appointed in the appellate court, permitting them to reassemble and amend their re-

port is not error where the case is continued to allow time to file exceptions to the amended report.<sup>11</sup>

**Evidence.** On a trial de novo it is incumbent on appellant to prove every material fact necessary to entitle him to judgment,<sup>12</sup> and either party is entitled to introduce any competent evidence to establish his position.<sup>13</sup> General principles relating to the weight and sufficiency of evidence apply in proceedings of this kind.<sup>14</sup>

**Questions of law and fact.** Whether or not reason exists for granting the proposed road is a question of fact for the jury<sup>15</sup> or for the court sitting as a jury;<sup>16</sup> and it has been held reversible error for the court to hold as a matter of law that petitioner is not entitled to the road.<sup>17</sup> However, under some statutes, where the question of necessity is submitted to a jury, their verdict is only advisory,<sup>18</sup> and the court must determine from the report, verdict, or other evidence whether the road should be established;<sup>19</sup> but the verdict is to be given much consideration and weight on the question of necessity,<sup>20</sup> especially when it follows the recommendation of the commissioners who view the premises and make the survey of the proposed passway.<sup>21</sup>

**Instructions.** General principles governing instructions apply on a trial de novo in proceedings to lay out private roads.<sup>22</sup>

58 S.W.2d 283, 332 Mo. 229—Richter v. Rodgers, 37 S.W.2d 523, 327 Mo. 543.

N.C.—Triplett v. Lall, 41 S.E.2d 755, 227 N.C. 274—Cook v. Vickers, 57 S.E. 1, 144 N.C. 312—Cook v. Vickers, 53 S.E. 740, 141 N.C. 101. 50 C.J. p 392 note 51.

#### Trial by jury

In proceeding to establish passageway over land of another, constitutional requirement that jury be composed of twelve members and that verdict, including amount of damages assessed, be unanimous, may be waived by either litigant, and waiver results when matter is not presented to trial court or insisted on therein.—Parsley v. Madison, 194 S.W.2d 993, 302 Ky. 467.

#### 2. Appeal to three supervisors of county

Ill.—Wright v. Carrollton Highway Comrs., 36 N.E. 980, 150 Ill. 138.

3. Ala.—Ballard v. Cook, 52 So. 147, 166 Ala. 105. 50 C.J. p 392 note 53.

4. Mo.—Richter v. Rodgers, 37 S.W.2d 523, 327 Mo. 543. 50 C.J. p 392 note 53.

5. Ky.—Black Mountain Corpora-

tion v. Appleman, 33 S.W.2d 327, 236 Ky. 510.

6. Mo.—Richter v. Rodgers, 37 S.W. 523, 327 Mo. 543.

7. Mo.—Richter v. Rodgers, supra—State v. McElhinney, 151 S.W. 457, 246 Mo. 44.

8. Minn.—Johnson v. Chisago Lake, 141 N.W. 1115, 122 Minn. 134. 50 C.J. p 393 note 55.

9. N.C.—Holmes v. Bullock, 100 S.E. 530, 178 N.C. 376.

10. N.C.—Holmes v. Bullock, supra.

11. Ky.—Black Mountain Corporation v. Appleman, 33 S.W.2d 327, 236 Ky. 510.

12. Mo.—State v. McElhinney, 151 S.W. 457, 246 Mo. 4.

13. N.C.—Barber v. Griffin, 74 S.E. 110, 158 N.C. 348. 50 C.J. p 393 note 60.

#### Opinion evidence

(1) Since the matter of necessity of the road does not involve any question of science, peculiar skill, or professional knowledge, it has been held that the opinions of witnesses thereon are inadmissible.—Burwell v. Sneed, 10 S.E. 152, 104 N.C. 118.

(2) On the other hand, it has been

held that witnesses acquainted with the locality may give their opinions as to the necessity of the road.—Vice v. Eden, 68 S.W. 125, 113 Ky. 255, 24 Ky.L. 132—50 C.J. p 393 note 60 [f].

14. Minn.—Trout Brook Realty Co. v. Featherstone, 217 N.W. 499, 173 Minn. 448. 50 C.J. p 393 note 62.

15. N.C.—Brown v. Mobley, 135 S.E. 304, 192 N.C. 470. 50 C.J. p 393 note 63.

16. Mo.—Fitzmaurice v. Turney, 114 S.W. 504, 214 Mo. 610.

17. N.C.—Brown v. Mobley, 135 S.E. 304, 192 N.C. 470.

18. Ky.—Williams v. Render, 255 S.W. 703, 200 Ky. 788—Vice v. Eden, 68 S.W. 125, 113 Ky. 255, 24 Ky.L. 132.

19. Ky.—Vice v. Eden, supra.

20. Ky.—Williams v. Render, 255 S.W. 703, 200 Ky. 788.

21. Ky.—Williams v. Render, supra.

22. N.C.—Barber v. Griffin, 74 S.E. 110, 158 N.C. 348. 50 C.J. p 393 note 71.

## (e) Determination and Disposition

In some jurisdictions, if the proceeding to establish a private road is irregular and voidable, it should be reversed; in others the judgment must fix and determine the rights of all the parties.

In some jurisdictions, if the proceeding to establish a private road is irregular and voidable, it should be reversed;<sup>23</sup> but the appellate court will not reverse the order of the lower tribunal unless there is an irregularity apparent on the record,<sup>24</sup> or the court below exceeded its jurisdiction,<sup>25</sup> or erred in its judgment in point of law.<sup>26</sup> In other jurisdictions the judgment must fix and determine the rights of all the parties.<sup>27</sup> Accordingly it has been held to be essential for the appellate tribunal to provide in its judgment for the establishment of the road,<sup>28</sup> and a judgment merely awarding damages and remanding them to the lower tribunal for further proceedings is insufficient.<sup>29</sup>

*Grant of temporary right of way by lower court.*

Where the owner of an inclosed estate established a necessity for an outlet to the public highway but, due to the pendency of a suit to determine disputed boundaries of surrounding realty, a temporary judgment was granted by the lower court awarding a temporary right of way, it has been held that the matter will be remanded pending ultimate determination of boundary lines<sup>30</sup> and for a determination of the least burdensome right of way<sup>31</sup> and the amount of compensation to be paid to surrounding landowners.<sup>32</sup>

## (2) To Courts of Last Resort

The right to appeal to courts of last resort is governed by statute. Where such an appeal is permitted

under some statutes, the court does not try the case de novo, and the general rules as to determination and disposition of causes on appeal will be applied.

The right to appeal to courts of last resort is governed by statute.<sup>33</sup> By the express provision of some statutes authorizing an appeal to the circuit court from orders granting private roads, no appeal lies from the judgment rendered by that court to the court of last resort.<sup>34</sup> One who does not appear to be affected by the establishment of a private road, and is no party to the proceeding, cannot sustain a writ of error.<sup>35</sup>

Where such an appeal is permitted under some statutes, the appellate court does not try the case de novo.<sup>36</sup> Where the right of appeal exists, in accordance with general principles, the appellate court will indulge all reasonable presumptions in favor of the correctness of an order establishing a road if the court below has acquired jurisdiction of the proceeding.<sup>37</sup> Since the necessity of the road is a question of fact, the appellate court, where there is conflicting evidence, will view the evidence in the light most favorable to the appellee's cause,<sup>38</sup> and will not interfere with a finding as to the necessity by the trial court.<sup>39</sup> However, where a motion for a directed verdict is granted after the jury have returned a verdict of necessity, the appellate court must view the evidence as to the necessity for the road in the light least favorable to movant and most favorable to the adverse party.<sup>40</sup>

*Determination and disposition.* On appeal to a court of last resort the general rules as to the determination and disposition of causes on appeal will be applied.<sup>41</sup> Accordingly, where the lower tri-

23. Idaho.—Latah County v. Has-further, 88 P. 433, 12 Idaho 797. 50 C.J. p 393 note 72.

24. Pa.—In re Private Road in West Providence Tp. over Lands of Smith, 101 Pa.Super. 9.

25. Pa.—In re Private Road in West Providence Tp. over Lands of Smith, supra.

26. Pa.—In re Private Road in West Providence Tp. over Lands of Smith, supra.

27. Mo.—Allen v. Welch, 102 S.W. 665, 125 Mo.App. 278.

28. Mo.—Allen v. Welch, supra.

29. Mo.—Allen v. Welch, supra.

30. La.—Estopinal v. Storck's Estate, App., 44 So.2d 704.

31. La.—Estopinal v. Storck's Estate, supra.

32. La.—Estopinal v. Storck's Estate, supra.

33. Md.—Arnsperger v. Crawford,

61 A. 413, 101 Md. 247, 70 L.R.A. 497.

34. Md.—Arnsperger v. Crawford, supra.

35. Ky.—Rout v. Mountjoy, 3 B. Mon. 300.

36. Mich.—Leighton v. Elysium Hunting & Fishing Club, 27 N.W. 2d 676, 318 Mich. 146.

37. Or.—Hartley v. Sherman County, 250 P. 740, 119 Or. 586—Towns v. Klamath County, 53 P. 604, 33 Or. 225.

*Necessity for road*

The appellate court will not presume that the finding of the lower court as to the necessity for the road was made arbitrarily and without considering the evidence.—Richter v. Rodgers, 37 S.W.2d 523, 327 Mo. 543.

38. Ark.—Parrott v. Fullerton, 193 S.W.2d 654, 209 Ark. 1018.

39. Ark.—Parrott v. Fullerton, supra.

Conn.—Reynolds v. Reynolds, 15 Conn. 83.

Mo.—Fitzmaurice v. Turney, 114 S. W. 504, 214 Mo. 610.

40. Mich.—Leighton v. Elysium Hunting & Fishing Club, 27 N.W. 2d 676, 318 Mich. 146.

41. Ky.—Skidmore v. Mitchell, 188 S.W.2d 434, 300 Ky. 255.

*Determination as to interest of parties*

In proceeding to establish private road from plaintiff's property to public street, question was determined by reviewing court on appeal as interest of parties existed at time of trial in county court.—Seitz Packing & Manufacturing Co. v. Quaker Oats Co., 124 S.W.2d 1177, 343 Mo. 1059.

*Finding of necessity implied*

In action to establish road from plaintiff's mining property over defendants' land, jury's verdict, finding that plaintiff was entitled to buy



bunal is without jurisdiction to receive and act on the petition to establish a private road, its judgment entered thereon, as well as all subsequent actions thereon, is void, and the proceeding should be dismissed.<sup>42</sup>

Where the right of appeal exists, the court will reverse the proceedings where the statute on which they were based is unconstitutional<sup>43</sup> or where the petition on which the proceedings are founded fails to show, either directly or by necessary implication, that the proposed road is a way of necessity.<sup>44</sup>

Where the record contains inconsistent and conflicting findings, the appellate court will vacate the judgment and remand the cause for a rehearing.<sup>45</sup>

Where the lower court granted a private road without requiring payment of damages, the appellate court will vacate the judgment and remand the cause for a rehearing.<sup>46</sup>

Where the verdict of the jury on the question of necessity is supported by the evidence, the judgment of the lower court of no cause of action on defendant's motion for a directed verdict will be set aside,<sup>47</sup> and the case remanded for the entry of judgment on the verdict.<sup>48</sup>

## § 12. — Expenses and Costs

Under statutes so providing, the expenses of opening or constructing private roads must be borne by the

persons who apply for them and who will be specially benefited by them. As a general rule the award of costs in a road proceeding is regulated by statute.

Under statutes so providing, the expenses of opening<sup>49</sup> or constructing<sup>50</sup> private roads must be borne by the persons who apply for them and who will be specially benefited by them. However, it has been held, notwithstanding a statute providing that the expense shall be wholly paid by the persons applying for it, that, if a private road is laid out on a petition for a public road, applicant is not liable for the expense of views.<sup>51</sup>

As a general rule, the award of costs in a proceeding to establish a private road is regulated by statute,<sup>52</sup> and costs will not be awarded in the absence of a statute providing therefor.<sup>53</sup> Under some statutes, it has been held that the landowner should not be required to pay the costs of the original hearing in the lower tribunal,<sup>54</sup> while under other statutes it has been held that, where the landowner fails to tender, before institution of suit, a satisfactory road, he must bear the cost of the suit in the lower tribunal.<sup>55</sup>

*Costs where appeal is taken.* Ordinarily, where an appeal is taken to a court of intermediate appellate jurisdiction or from that court to the court of last resort, the cost of the appeal is to be paid by the unsuccessful party as in other appeals in civil cases.<sup>56</sup> However, where the petition is dismissed in

right of way and fixing damage, implicitly found that road was necessary to enable plaintiff to haul coal mined from his land to market, so as to preclude reversal of judgment thereon on ground that jury ignored instructions to award compensation and damages if jury believed that road was necessary for such purpose.—*Skidmore v. Mitchell*, 188 S. W.2d 434, 300 Ky. 255.

42. N.C.—*Rogers v. Davis*, 192 S.E. 872, 212 N.C. 35.

43. Iowa.—*Bankhead v. Brown*, 25 Iowa 540.

44. Mo.—*Colville v. Judy*, 73 Mo. 651.

45. N.C.—*Garris v. Byrd*, 49 S.E.2d 625, 229 N.C. 343.

46. N.C.—*Garris v. Byrd*, *supra*.

47. Mich.—*Leighton v. Elysium Hunting & Fishing Club*, 27 N.W. 2d 676, 318 Mich. 146.

48. Mich.—*Leighton v. Elysium Hunting & Fishing Club*, *supra*.

49. Ala.—*Cleckler v. Morrow*, 43 So. 784, 150 Ala. 524.

50. Ill.—*Road Dist. No. 4 v. Frailey*, 145 N.E. 195, 313 Ill. 563, 50 C.J. p 390 note 87.

51. Pa.—*Ernst v. Baker*, 1 Browne 326.

52. Ark.—*Parrott v. Fullerton*, 193 S.W.2d 654, 209 Ark. 1018.

La.—*Wells v. Anglade*, App., 23 So. 2d 469, rehearing refused 23 So.2d 741.

### Statute construed

(1) The provisions of a statute that the cost of the whole proceeding shall be paid by applicant refers to the cost of the proceeding in the county court.—*Vice v. Eden*, 68 S.W. 125, 113 Ky. 255, 24 Ky.L. 132.

(2) The provision of the statute requiring petitioner to pay the necessary costs of the proceedings has no application where defendant appears and objects to and contests the proceedings and an appeal is taken to the circuit court from the judgment of the county court. The court will not hold that the law is such as to permit defendant in proceedings to establish a private road to contest the proceedings through the courts at plaintiff's expense, even though the final result is a judgment in favor of plaintiff and against defendant.—*Holmes v. Houlshouser*, Mo.App., 167 S.W.2d 943.

53. N.Y.—*Matter of Bell*, 228 N.Y.S. 649, 181 Misc. 734.

54. Ark.—*Parrott v. Fullerton*, 193 S.W.2d 654, 209 Ark. 1018.

Ky.—*Vice v. Eden*, 68 S.W. 125, 113 Ky. 255, 24 Ky.L. 132.

55. La.—*Wells v. Anglade*, App., 23 So.2d 469, rehearing refused 23 So. 2d 741.

56. Ky.—*Vice v. Eden*, 68 S.W. 125, 113 Ky. 255, 24 Ky.L. 132.  
Mo.—*Holmes v. Houlshouser*, App., 167 S.W.2d 943.

### Increase of damages

(1) In proceeding to establish a road from petitioner's home over land of respondent to public highway, under the statute relating to judgment for costs according to "justice between the parties," respondent was entitled to costs of appeal from order of county court to establish the road to the circuit court, where the damages allowed by the county court were doubled by the circuit court and the appeal was taken in good faith and not arbitrarily or for purposes of delay.—*Parrott v. Fullerton*, 193 S.W.2d 654, 209 Ark. 1018.

(2) An order of circuit court on appeal from order of county court establishing a road from petitioner's home over the land of another to a public highway, that such order over whose land the road was to be laid should pay all costs of the appeal

the lower tribunal and petitioner appeals to an intermediary appellate court where he prevails and damages are first ascertained against the landowner, costs in the intermediary appellate court, it has been held, are properly adjudged against petitioner.<sup>57</sup> On the other hand, it has also been held that, where petition is dismissed in the lower tribunal and, on appeal to the intermediate appellate court, petitioner is successful, the landowner must pay all costs, even though he was first awarded damages for his land in the intermediate appellate court.<sup>58</sup>

### § 13. — Operation and Effect

- a. In general
- b. Collateral attack

#### a. In General

Where the proper tribunal has acted in a proceeding to establish a private road, as to all matters within its jurisdiction, its judgment is final and determinative of the rights of the parties, until reversed or modified.

Where the proper tribunal has acted in a proceeding to establish a private road, as to all matters within its jurisdiction, its judgment is final and determinative of the rights of the parties, until reversed or modified.<sup>59</sup> However, where the tribunal, before which the proceeding to establish a private road is commenced, is without jurisdiction, its judgment, as well as all subsequent actions, is void.<sup>60</sup> In some jurisdictions, the establishment of a passage over the estate of a landowner does not take property from him,<sup>61</sup> or deprive him of the use of the land,<sup>62</sup> but it does guarantee to the estate in whose favor it is granted a right to pass over the land at some point to the public road.<sup>63</sup> Where the order of the court locates the road in part on land not owned by the landowner over

whose property the road is requested, petitioner acquires no right as to that part.<sup>64</sup>

*Estoppel to question validity of proceedings.* If the tribunal had jurisdiction, the one at whose instance and for whose benefit the road was established by it is, by accepting and using the road, estopped from questioning the validity of the proceedings.<sup>65</sup>

#### b. Collateral Attack

Judgments or orders in proceedings to lay out private roads are not subject to collateral attack unless they are absolutely void.

In accordance with general principles, an absolute want of jurisdiction in the court or tribunal laying out a private road will be fatal to the proceedings even when they are collaterally drawn in question.<sup>66</sup> On the other hand, judgments or orders in proceedings to lay out private roads are not subject to collateral attack unless they are absolutely void.<sup>67</sup> If the court has jurisdiction, mere irregularities in the proceedings will not be considered,<sup>68</sup> and the judgment or order must stand until reversed by the proper tribunal.<sup>69</sup> In attacking such proceedings collaterally, the records of the tribunal establishing the road should receive a fair and reasonable interpretation,<sup>70</sup> and it is enough if such record clearly shows the purport of its judicial acts.<sup>71</sup>

### § 14. Pleading and Evidence of Existence

The person relying on the acts of a tribunal in establishing a private road must aver and prove all circumstances necessary to give it jurisdiction.

The person relying on the acts of a tribunal in establishing a private road must aver all circumstances necessary to give it jurisdiction.<sup>72</sup> Accord-

was error, and all costs of the proceedings including costs of appeal to the supreme court were assessed against the petitioner.—Parrott v. Fullerton, *supra*.

57. Ky.—Black Mountain Corporation v. Appleman, 33 S.W.2d 327, 236 Ky. 510.

58. Mo.—Holmes v. Houlshouser, App., 167 S.W.2d 943.

59. N.C.—Dalley v. Bay, 3 S.E.2d 14, 215 N.C. 652.

#### Rights of third persons

(1) In proceeding to establish private road from plaintiff's property to public street, rights of plaintiff could not be strengthened or enlarged by transfer of part of land to third persons after trial of case in county court.—Seitz Packing & Manufacturing Co. v. Quaker Oats Co., 124 S.W.2d 1177, 343 Mo. 1059.

(2) In proceeding to establish private road from plaintiff's property to public street, rights of third person to whom part of land was transferred after trial of case in county court were not adjudicated.—Seitz Packing & Manufacturing Co. v. Quaker Oats Co., *supra*.

60. N.C.—Rogers v. Davis, 192 S.E. 872, 213 N.C. 35.

61. La.—Mercer v. Daws, App., 186 So. 877.

62. La.—Mercer v. Daws, *supra*.

63. La.—Mercer v. Daws, *supra*.

64. Or.—Hanns v. Friedly, 184 P.2d 355, 181 Or. 631.

65. Me.—Fernald v. Palmer, 22 A. 467, 83 Me. 244.

66. N.H.—Proctor v. Andover, 42 N. H. 348.

67. Mo.—Jones v. Smith, App., 186 S.W. 1088.

50 C.J. p 394 note 87.

**Proceedings held not subject to collateral attack**  
N.C.—State v. Adams, 195 S.E. 322, 213 N.C. 243.

68. Mo.—Belk v. Hamilton, 32 S.W. 656, 130 Mo. 292.  
50 C.J. p 394 note 88.

69. N.H.—Brown v. Brown, 50 N.H. 538.

70. Mo.—Belk v. Hamilton, 32 S.W. 656, 130 Mo. 292.

71. Mo.—Belk v. Hamilton, *supra*.  
N.C.—State v. Adams, 195 S.E. 322, 213 N.C. 243.

72. N.J.—Perrine v. Farr, 22 N.J. Law 356.

ingly, the use of a private road is not acquired as a private right and should not be pleaded as a private right of way.<sup>73</sup> It should be pleaded in the same manner in which the right to use a public road is pleaded.<sup>74</sup> An averment of the fact that the locus in quo was part of the private road will be sufficient.<sup>75</sup> Likewise, the person relying on the acts of a tribunal in establishing a private road must prove all the circumstances necessary to give it jurisdiction,<sup>76</sup> and, if the particular mode in which a private road was laid out is pleaded, it must be proved as pleaded.<sup>77</sup>

### § 15. Maintenance and Repair

Under some statutes the duty to maintain and repair a private road rests on the person or persons for whose benefit the road is established, while under other statutes the duty is cast on the public.

Under some statutes the duty to maintain and repair a private road rests on the person or persons for whose benefit the road is established,<sup>78</sup> and not on the public.<sup>79</sup> There must be a compliance with this statutory duty,<sup>80</sup> although it has been held that the person for whose benefit the private road is established is not bound to keep in repair that part of the road which runs through his own land, for the benefit of those who may have acquired a prescriptive right to use it.<sup>81</sup> Sometimes statutes authorizing private roads provide that they shall not become public highways in the sense that they must be kept in repair at the expense of the public;<sup>82</sup> but, even where the statute is silent on the subject, no obligation rests on the public to keep the road in repair.<sup>83</sup> On the other hand, it has been held that, where the statute under which a private road is laid out speaks of it as a public highway, the duty is cast on the public to keep it in a suitable state of repair.<sup>84</sup> A statute providing that a town board "may" expend road and bridge funds in the care and improvement of cartways is not merely permissive, but imposes a duty in that respect to the extent to which the public interest requires.<sup>85</sup>

*Gates.* Statutes authorizing private roads, subject to gates, may impose the duty of the erection and maintenance of such gates on the person at whose instance and for whose benefit the road is established.<sup>86</sup>

*Fences.* Unless the cost of fencing has been assessed as damages, the duty to fence a private road devolves on the person for whose accommodation it was laid out.<sup>87</sup>

### § 16. Obstructions and Encroachments

- a. In general
- b. Actions

#### a. In General

An interference with the reasonably free use of a private road may constitute an obstruction.

An interference with the reasonably free use of a private road may constitute an obstruction.<sup>88</sup> Accordingly an owner of land abutting on a private way has no right to use the half of the way adjacent to his premises for any purpose incompatible with its reasonably free use as a way.<sup>89</sup> He has no right to build sheds on the road<sup>90</sup> or to encumber it with lumber, stone, iron, and other things in great quantities.<sup>91</sup> Likewise, it has been held that the construction of a log slide on the road by the person on whose application it has been laid out is not a proper use of the road.<sup>92</sup> It has also been held that, if a private road of a given width is ordered to be laid out, the building of his fences, by the owner of the land, so as not to leave the road of the specified width in the clear, constitutes an obstruction.<sup>93</sup>

*Right to remove obstruction.* Where a road is laid out as a strictly private road and not for the use of the public, obstructions placed in the road by the owner of the land over which it is laid out

73. N.J.—Perrine v. Farr, *supra*.

74. N.J.—Perrine v. Farr, *supra*.

75. N.J.—Perrine v. Farr, *supra*.

76. N.J.—Perrine v. Farr, *supra*.

77. N.J.—Perrine v. Farr, *supra*.

78. N.J.—Allen v. Stevens, 29 N.J. Law 509.  
50 C.J. p 396 note 49.

79. N.J.—Allen v. Stevens, *supra*.

80. Idaho.—Latah County v. Has-further, 88 P. 433, 12 Idaho 797.  
50 C.J. p 396 note 49.

81. Ga.—Purveyor v. Clements, 53 Ga. 232.

82. Idaho.—Latah County v. Has-further, 88 P. 433, 12 Idaho 797.

83. Mass.—Baker v. Dedham, 16 Gray 393.

84. N.H.—Brown v. Brown, 50 N.H. 538.

50 C.J. p 396 note 54.

85. Minn.—Carlson v. Elmo Tp., 169 N.W. 805, 141 Minn. 240.

86. N.H.—Proctor v. Andover, 42 N.H. 362.

87. Iowa.—Wrede v. Grothe, 166 N.W. 686, 183 Iowa 60.

Pa.—Fleming v. Ramsey, 46 Pa. 252.

88. N.H.—Manchester v. Hodge, 71 A. 864, 75 N.H. 166.

N.Y.—Herrick v. Stover, 5 Wend. 580.  
Obstruction or encroachment of highways generally see Highways §§ 217-231.

89. N.H.—Manchester v. Hodge, 71 A. 864, 75 N.H. 166.

90. N.H.—Manchester v. Hodge, *supra*.

91. N.H.—Manchester v. Hodge, *supra*.

92. Pa.—Proctor v. Campbell, 6 Pa. Co. 531.

93. N.Y.—Herrick v. Stover, 5 Wend. 580.  
50 C.J. p 396 note 60.

cannot lawfully be removed by one having no right to use the road.<sup>94</sup>

*Of inchoate right to road.* Under some statutes, when a road has been used as a private way for one year, the owner of the land through which the road passes,<sup>95</sup> or his tenant,<sup>96</sup> may not close or obstruct it without first giving the users of the way thirty days' notice in writing so that they may take steps to have it made permanent by filing application to the proper county authorities to have the road established as a private way in accordance with other statutes providing that this may be done.<sup>97</sup> If the owner obstructs the way without giving the required notice, he will be required to remove it in proper proceedings therefor, as discussed *infra* subdivision b of this section, and the fact that the private way was opened up by the landowner's predecessor in title under an agreement with the adjoining landowner that, if it ever became a nuisance, it could be closed,<sup>98</sup> or the fact that the private way is being used for immoral purposes,<sup>99</sup> does not give the landowner the right to close the way without giving the common users the statutory notice. Nevertheless, the fact that a private way has been used for as much as one year does not establish a way by prescription;<sup>1</sup> nor does it prevent the owner of land from closing such way,<sup>2</sup> but only requires him to give thirty days' notice in writing to the common users for the purpose mentioned.<sup>3</sup>

## b. Actions

- (1) In general
- (2) Actions for damages
- (3) Injunction and removal proceedings

### (1) In General

A person having a right to the use of a private road has a cause of action against one who obstructs the road or impedes its use.

A person having a right to the use of a private road has a cause of action against one who obstructs the road or impedes its use.<sup>4</sup> Accordingly, a per-

son on whose application a private road was laid out has a cause of action against one who obstructs it.<sup>5</sup> Likewise, an abutter having a right to reasonably convenient points of connection with the road has an actionable right against another abutter who impedes his use of such points.<sup>6</sup>

### (2) Actions for Damages

The person at whose instance and for whose benefit a private road was established may maintain an action at law to recover damages arising from an encroachment of a private road.

The person at whose instance and for whose benefit a private road was established may maintain an action at law to recover damages arising from an encroachment of a private road.<sup>7</sup> It is no defense to an action for a substantial encroachment that plaintiff was not thereby interrupted in the use of the road;<sup>8</sup> but it is a good defense that defendant yielded his assent, expressly or impliedly, to the encroachment.<sup>9</sup>

Under statutory provisions granting an inchoate right to a road, discussed *supra* subdivision a of this section, it has been held that a petition for money damages for alleged tortious past obstructions by defendant of a prescriptive private way over defendant's land is not subject to general demurrer with respect to such claim.<sup>10</sup> It has also been held that, a claim of damages generally in a specified sum states a cause of action for recovery of general damages, nominal damages, and punitive damages, as the evidence may show,<sup>11</sup> and is not subject to dismissal as a claim of no recoverable damages.<sup>12</sup>

### (3) Injunction and Removal Proceedings

Injunction to restrain the obstruction of private roads is a proper remedy where an action at law would not furnish an adequate remedy, or where the obstruction works special and peculiar injury to the party asking for the injunction.

Injunction to restrain the obstruction of private roads is a proper remedy where an action at law

94. N.Y.—Drake v. Rogers, 3 Hill, N.Y., 604.

95. Ga.—Riggs v. Martin, 33 S.E.2d 15, 198 Ga. 824—Hall v. Browning, 24 S.E.2d 392, 195 Ga. 423.

50 C.J. p 396 note 66.  
Obstruction or disturbance of way established by prescription see Easements §§ 96-101.

96. Ga.—Dodson v. Scarborough, 35 S.E. 391, 110 Ga. 4.

97. Ga.—Hall v. Browning, 24 S.E. 2d 392, 195 Ga. 423—Dodson v. Scarborough, 35 S.E. 391, 110 Ga. 4.

98. Ga.—Riggs v. Martin, 33 S.E.2d 15, 198 Ga. 824.

99. Ga.—Riggs v. Martin, *supra*.

1. Ga.—Neal v. Neal, 50 S.E. 929, 122 Ga. 804.

Creation of way by prescription see Easements § 18.

2. Ga.—Neal v. Neal, *supra*.

3. Ga.—Neal v. Neal, *supra*.

4. N.Y.—Herrick v. Stover, 5 Wend. 580.

5. N.Y.—Herrick v. Stover, *supra*.  
Pa.—Proctor v. Campbell, 6 Pa.Co. 531.

6. Mo.—Downing v. Corcoran, 87 S. W. 114, 112 Mo.App. 645.

7. Me.—Browne v. Connor, 21 A.2d 709, 138 Me. 63.  
N.Y.—Herrick v. Stover, 5 Wend. 580.

8. N.Y.—Herrick v. Stover, 5 Wend. 580.

9. N.Y.—Herrick v. Stover, *supra*.

10. Ga.—Hall v. Browning, 24 S.E. 2d 392, 195 Ga. 423.

11. Ga.—Hall v. Browning, *supra*.

12. Ga.—Hall v. Browning, *supra*.

would not furnish an adequate remedy,<sup>13</sup> or where the obstruction works special and peculiar injury to the party asking for the injunction.<sup>14</sup>

Where the statutes provide for an inchoate right to a private way, as discussed supra subdivision a of this section, the statutes may also provide a summary remedy for the removal of obstructions from the private way where the owner of land over which such way passes has failed to give the required notice before creating the obstruction.<sup>15</sup> In such jurisdictions, if the obstruction of a private way has been completed, the statutory remedy before the ordinary will afford to the users of the way an adequate remedy at law by removal of the obstruction,<sup>16</sup> so that a petition for injunction will not lie against the owner of the land through which the way passes,<sup>17</sup> but, if the petition alleges a threatened,<sup>18</sup> or a threatened additional obstruction to a completed obstruction as an imminent situation,<sup>19</sup> the remedy of injunction will lie, since the statutory remedy, available only for removing existing obstructions, would not cover the situation,<sup>20</sup> and since the injunction would not be mandatory in character.<sup>21</sup> Where the owner of the land through which a private way runs closes the road without giving the statutory notice, he is not entitled to an injunction to restrain a common user from removing the impediments from the road.<sup>22</sup> The petition must contain a statement of all the facts necessary to entitle the petitioner to the relief prayed.<sup>23</sup> Accordingly, while the petition may be based on both a claim for a prescriptive way and a claim for a way in use for one year, where the owner of the land through which the way passes has failed to give

the required notice before creating the obstruction,<sup>24</sup> it must not confuse the two claims,<sup>25</sup> and on proper demurrer petitioner may be required to indicate on which claim he relies.<sup>26</sup> The petition need only describe the road with reasonable certainty,<sup>27</sup> and not with the particularity demanded in a proceeding to establish a private road.<sup>28</sup> The burden to show that the notice required by the statute was given is on him whose duty it was to give it.<sup>29</sup> A petitioner for the removal of obstructions on a road used for one year must recover on the case made by him, if at all.<sup>30</sup> Accordingly, where the petition for removal of obstructions is based solely on the ground that petitioner's right has been established by prescription, judgment cannot be rendered requiring obstructions to be removed on the ground that the owner failed to give the statutory notice of intention to close the way.<sup>31</sup> However, while an applicant may base his right to relief on the statute relative to prescriptive ways, and on the statute requiring the landowner to give thirty days' notice before obstructing a way used for one year, the order or judgment should show on which claim applicant relied.<sup>32</sup>

### § 17. Use for Travel

Where a private road is considered a public road in the sense that it is open to all who see fit to use it, the owner of the land through which the road is laid out cannot maintain an action in trespass against any person using it.

Where, as discussed supra § 1, a private road is considered a public road in the sense that it is open to all who see fit to use it, it is immaterial that the road is subject to gates and bars,<sup>33</sup> or that it is

13. Mo.—Downing v. Corcoran, 87 S. W. 114, 112 Mo.App. 645.

50 C.J. p 397 note 83.

14. W.Va.—Bent v. Trimboli, 56 S. E. 881, 61 W.Va. 509.

15. Ga.—Hall v. Browning, 24 S.E. 2d 392, 195 Ga. 423.

50 C.J. p 397 note 85.

16. Ga.—Hall v. Browning, supra.

17. Ga.—Hall v. Browning, supra.

18. Ga.—Hall v. Browning, supra.

19. Ga.—Hall v. Browning, supra.

20. Ga.—Hall v. Browning, supra.

21. Ga.—Hall v. Browning, supra.

22. Ga.—Riggs v. Martin, 33 S.E.2d 15, 198 Ga. 824.

23. Ga.—Seaboard Air Line Ry. Co. v. Brown, 190 S.E. 203, 55 Ga.App. 368.

**Averments held subject to special demurrer**

In suit to enjoin defendant from obstructing a private way over his

land, averments of petition that defendant is a bad drunkard, rides up and down the road, and otherwise does wicked and reckless things and is such a man as needs to be under the ban of the court should be stricken on special demurrer as irrelevant.—Hall v. Browning, 24 S.E. 2d 392, 195 Ga. 423.

**Petition held insufficient**

Where petition seeking condemnation of way of necessity averred existence of private way acquired by prescription, but did not allege that it had been obstructed by defendants, it cannot be sustained as a petition to remove obstructions.—Porter v. Foster, 90 S.E. 967, 146 Ga. 154.

24. Ga.—Hall v. Browning, 24 S.E. 2d 392, 195 Ga. 423.

25. Ga.—Hall v. Browning, supra.

26. Ga.—Hall v. Browning, supra.

27. Ga.—Barnes v. Holcomb, 134 S. E. 628, 35 Ga.App. 713.

28. Ga.—Barnes v. Holcomb, supra, 50 C.J. p 397 note 90.

29. Ga.—Powell v. Amoss, 11 S.E. 598, 85 Ga. 273.

30. Ga.—Nugent v. Watkins, 58 S. E. 888, 129 Ga. 382.

31. Ga.—Seaboard Air Line Ry. Co. v. Brown, 190 S.E. 203, 55 Ga.App. 368.

50 C.J. p 397 note 94.

32. Ga.—Hall v. Browning, 24 S.E.2d 392, 195 Ga. 423.—Ford v. Waters, 107 S.E. 351, 27 Ga.App. 83.

33. N.J.—Van Blarcom v. Frika, 29 N.J.Law 516.

50 C.J. p 398 note 97.

The purpose of the legislature in authorizing the town to determine whether a private way shall be subject to gates and bars is to provide a method by which the owners of the land affected could lessen the hazard of unwarranted or casual intrusion on their property due to its being opened to easy access from the main

merely a *cul de sac*.<sup>34</sup> Being thus considered as a public road, it necessarily follows that the owner of the land through which the road is laid out cannot maintain an action of trespass against any person using it;<sup>35</sup> and the fact that the road was invalid by reason of some defect in the proceedings leading to its laying out does not affect this rule.<sup>36</sup> On the other hand, in those jurisdictions where a private road is for the exclusive use by travel of the particular person or persons for whom it was laid out, such person or persons may maintain an action of trespass on the case against the occupant of the land through which it was laid out,<sup>37</sup> or any other person<sup>38</sup> making use of it.

### § 18. Injuries from Defects or Obstructions

Ordinarily, if the duty is imposed to keep a private road in repair, damages are recoverable for injuries resulting from failure to make suitable repairs.

If the duty is imposed on a town to keep a private road in repair it will be liable for special damages caused by its failure to make suitable repairs.<sup>39</sup> There is no such distinction between private roads with gates or bars, and those without, as to justify a different rule as to the liability for want of repair, where, in both cases, they are termed highways in the statute.<sup>40</sup> The objection that a portion of a road was laid out at a greater width than that prayed for in the petition cannot be urged by the town in a suit for injuries caused by its failure to keep the road in repair.<sup>41</sup> On the other hand, it has been held that a county is not liable for an injury produced by a defect in a private road;<sup>42</sup> nor is it liable for a failure to provide a safe approach from a private road to a public highway of the county, or vice versa.<sup>43</sup> Likewise, it has also been held that a county is not liable for negligence

in maintaining or permitting an unsafe approach from a private road to a public bridge,<sup>44</sup> at least where such approach is neither essential nor necessary to the existence or use of the public bridge.<sup>45</sup>

### § 19. Alteration, Vacation, and Extinguishment

- a. Alteration
- b. Vacation
- c. Extinguishment

#### a. Alteration

Under some statutes, any person or persons interested may petition to alter a private road.

Under some statutes, any person or persons interested may petition to alter a private road.<sup>46</sup> Under such statutes, the owner of the land over which the road passes is clearly entitled to petition for such alteration.<sup>47</sup> If the statute authorizing the proceeding requires petitioner therein to put the new road in as good condition as the old, such provision does not apply where the road, as first located, has never been opened.<sup>48</sup>

#### b. Vacation

The power of the legislature to establish private roads carries with it, as a necessary incident, the power to provide for the vacation of such roads, when they shall become no longer necessary.

The power of the legislature to establish private roads carries with it, as a necessary incident, the power to provide for the vacation of such roads, when they shall become no longer necessary.<sup>49</sup> Accordingly, it has been held that the road laid out by public authority may be discontinued by it without the consent or against the will of the person on whose petition it was originally established.<sup>50</sup>

highway. In spite of the erection of gates and bars the public would still have the right to use the way in the same manner as the persons who are primarily interested in it.—*Browne v. Connor*, 21 A.2d 709, 138 Me. 63.

34. Mass.—*Danforth v. Durell*, 8 Allen 242.

35. N.H.—*Brown v. Brown*, 50 N.H. 533.—*Metcalf v. Bingham*, 3 N.H. 459.

50 C.J. p 397 note 96 [a].

Community road, not public highway, traveled generally by public, may be used without user becoming trespasser until forbidden by property owner.—*Goode v. State*, 131 So. 106, 158 Miss. 616.

36. N.H.—*Brown v. Brown*, 50 N.H. 538.

50 C.J. p 398 note 1.

37. N.Y.—*Lambert v. Hoke*, 14 Johns. 383.

The proper form of action against a person using a private road, by the person at whose application it was laid out, is trespass on the case, and not trespass.—*Lambert v. Hoke*, supra.

38. N.Y.—*Lambert v. Hoke*, supra.

39. N.H.—*Proctor v. Andover*, 42 N.H. 348.

Liability for injuries to invitee caused by obstructions placed in private way see Negligence § 75.

40. N.H.—*Proctor v. Andover*, supra.

41. N.H.—*Proctor v. Andover*, supra.

42. Ga.—*Mitchell County v. Dixon*, 92 S.E. 405, 20 Ga.App. 21.

43. Ga.—*Mitchell County v. Dixon*, supra.

44. Ga.—*Mitchell County v. Dixon*, supra.

45. Ga.—*Mitchell County v. Dixon*, supra.

46. Ark.—*Pippin v. May*, 93 S.W. 64, 78 Ark. 18.

Ind.—*Ryker v. McElroy*, 28 Ind. 179.

N.J.—*State v. Allen*, 11 N.J.Law 103.

#### Cases of necessity

The power to widen an existing right of way is limited to those cases where applicant cannot reach a public highway by going over his own land.—*State v. Zubke*, 227 N.W. 947, 200 Wis. 227.

47. Ind.—*Ryker v. McElroy*, 28 Ind. 179.

48. Ind.—*Ryker v. McElroy*, supra.

49. Pa.—*In re Stuber's Road*, 28 Pa. 199.

50. Mass.—*Flagg v. Flagg*, 16 Gray 175.

50 C.J. p 398 note 11.

**Grounds.** The grounds for, or circumstances under, which a private road may be vacated or discontinued are usually a matter of special statutory regulation.<sup>51</sup> Accordingly, under some statutes a private road may be vacated when it has become useless, inconvenient, and burdensome,<sup>52</sup> as where the landowner for whose benefit the private road was established has another convenient way over the land of a third person<sup>53</sup> or where a public road has been established to which there is convenient or practical access.<sup>54</sup>

**Proceedings.** A private road may not be vacated except on strict compliance with the statute.<sup>55</sup> Accordingly, where advertisement is required by statute, the township in which the road proposed to be vacated lies must be named, so that all concerned may know with certainty the location of the road.<sup>56</sup> The petition must contain a statement of all the facts which, by the statute, are made necessary to entitle petitioner to the relief prayed.<sup>57</sup> Under a statute providing that the petition to vacate a private road must set forth in a clear and distinct manner the situation and circumstances of such road or of the part thereof which applicants may desire to have vacated, a petition for the vacation of the entire road need not specify the portions of the road to be vacated,<sup>58</sup> or the particular reasons why the vacation of such portions is desired.<sup>59</sup>

An omission of the surveyors to state in their return the township in which the road proposed to be vacated lies has been held to be fatal, where the township controls the appointment of the surveyors.<sup>60</sup>

**Review.** In reviewing by appeal proceedings for the vacation of a road only the regularity of the proceedings can be considered;<sup>61</sup> but the proceeding will be vacated if it appears that the requirements of the statute necessary to give jurisdiction have not been strictly followed.<sup>62</sup> Likewise, where

a court rule provides that no viewer shall be entertained by, or at the expense of, any person interested, a proceeding for the vacation will be set aside where the viewer is entertained by a party of record,<sup>63</sup> although his interest in the vacation or continuance of the road is doubtful.<sup>64</sup>

### c. Extinguishment

In some jurisdictions, where the petitioner who has procured a private road to be laid out over the lands of another acquires title to the servient tenement, the right to the road is extinguished not only as to him, but as to all other persons, while, in other jurisdictions, the right to use the road can be extinguished only by the action of the proper public authority.

There is a conflict of authority as to whether unity in title and possession of all the land occupied by a private road, which was laid out by public authority, operate to discontinue it. In some jurisdictions, where petitioner who has procured a private road to be laid out over the lands of another acquires title to the servient tenement, the right to the road is extinguished not only as to him, but as to all other persons,<sup>65</sup> while, in other jurisdictions, the right to use the road can be extinguished only by the action of the proper public authority.<sup>66</sup>

## § 20. Penalties

Penalties for failure to open a private road are discussed *infra* § 21, and for leaving an open gate across the road, *infra* § 22.

Examine Pocket Parts for later cases.

## § 21. — For Failure to Open Road

Under a statute providing therefor, a penalty may be recovered from the owner of the land condemned for his failure to open a private road within the time specified in the judgment which ordered the opening of the road.

Under a statute providing therefor, a penalty may be recovered from the owner of the land con-

51. Minn.—*Carlson v. Elmo Tp.*, 169 N.W. 805, 141 Minn. 240.

50 C.J. p 398 note 12.

52. Pa.—*In re Glenfield Borough Road*, 5 Pa.Super. 222.

53. N.C.—*Plimmons v. Frisby*, 60 N.C. 200.

54. Mo.—*Reading v. Chandler*, 192 S.W. 94, 269 Mo. 589, 595.

50 C.J. p 398 note 12 [b].

55. Mo.—*State v. Van Patton*, 94 S.W.2d 1119, 230 Mo.App. 1199.

N.J.—*State v. Allen*, 11 N.J.Law 103. "Neighborhood road"

Old public road on petitioner's lands, not on map posted under statute and not included in county road system taken over by state highway

commission, and not cartway, church road, or mill road, is "neighborhood road," and question of its discontinuance must be determined by special proceeding instituted before clerk, and the board of county commissioners has no jurisdiction.—*In re Edwards*, 174 S.E. 505, 206 N.C. 549.

56. N.J.—*State v. Allen*, 11 N.J.Law 103.

57. Pa.—*In re Glenfield Borough Road*, 5 Pa.Super. 222.

58. Pa.—*In re Glenfield Borough Road*, *supra*.

59. Pa.—*In re Glenfield Borough Road*, *supra*.

60. N.J.—*State v. Allen*, 11 N.J.Law, 103.

61. Pa.—*In re Glenfield Borough Road*, 5 Pa.Super. 222.

50 C.J. p 398 note 13.

62. N.J.—*State v. Allen*, 11 N.J.Law 103.

50 C.J. p 398 note 19.

63. Pa.—*In re Heidelberg Tp. Road*, 1 Pa.Co. 7.

64. Pa.—*In re Heidelberg Tp. Road*, *supra*.

65. N.C.—*Jacocks v. Newby*, 49 N.C. 266.

50 C.J. p 399 note 22.

66. Mass.—*Flagg v. Flagg*, 16 Gray 115.

50 C.J. p 399 note 23.

demned for his failure to open a private road within the time specified in the judgment which ordered the opening of the road.<sup>67</sup> Failure to open the road within the time fixed by the judgment will not authorize the imposition of a penalty, where defendant was led honestly to believe that he had a longer time than that fixed by the judgment within which to open the road, and neither he nor his attorney knew differently until after the time fixed to open the road had expired.<sup>68</sup>

*Effect of appeal.* In an action to recover the penalty imposed for failure to open a private road, the taking of an appeal and the giving of a supersedeas bond so far prevent the judgment from becoming a final one that no action for a penalty will lie until final judgment has been rendered by the appellate court.<sup>69</sup> Accordingly, after a judgment of the circuit court which ordered the opening has been affirmed by the supreme court and its mandate sent down to the circuit court, the circuit court should fix a time within which the road is to be opened,<sup>70</sup> and, until such time is fixed by an order of court, the successful plaintiff cannot recover from the derelict landowner the prescribed penalty.<sup>71</sup>

## § 22. — Leaving open Gate across Road

Some statutes impose a penalty on any person using a private road for leaving open a swinging gate placed across it by the owner of property through which the road passes.

Some statutes impose a penalty on any person using a private road for leaving open a swinging gate placed across it by the owner of property through which the road passes.<sup>72</sup> In order to maintain an action to recover such a penalty, plaintiff must prove that the way in question is a private road, laid out or made such in the manner prescribed by statute.<sup>73</sup> It is no defense to an action for the statutory penalty that defendant had a private way where the private road in question was laid out.<sup>74</sup>

## § 23. Criminal Offenses

Although there is authority that the obstruction of a private road laid out pursuant to law is a criminal offense, indictable as a public nuisance, there is also authority to the contrary.

In some jurisdictions, the obstruction of a private road laid out pursuant to law is a criminal offense,<sup>75</sup> indictable as a public nuisance.<sup>76</sup> However, in other jurisdictions it has been held that the obstruction of a private road cannot be a public nuisance,<sup>77</sup> and hence is not indictable as such.<sup>78</sup>

An indictment for an offense with respect to private roads should charge all the elements of the offense.<sup>79</sup> Accordingly, under a statute making it a public nuisance to obstruct or encroach on the public highways, private ways, etc., an indictment which charges accused with obstructing a "private highway" charges no offense.<sup>80</sup> Likewise, where the statute makes it a criminal offense maliciously to injure a private road laid out by authority of law, an indictment which fails to allege facts showing that such road was so laid out, and which does not even contain a direct allegation to that effect, is fatally defective.<sup>81</sup> An indictment for breaking down a gate across a private road established according to law is sufficient if it is in the words of the statute.<sup>82</sup>

Since, as discussed supra § 1, a private road is a public road in the sense that it is open to all who see fit to use it, an information charging accused with obstructing a private road established according to law has been held to state an offense under the statutes prohibiting the obstruction of a public road.<sup>83</sup>

*Defenses.* Where the crime charged is the breaking down of a gate across a private road located according to law, it is a matter of defense that the road was not located according to law, and is therefore not a private road in law.<sup>84</sup>

*Evidence.* General rules as to the weight and

67. Mo.—Fitzmaurice v. Turney, 165 S.W. 307, 256 Mo. 181—Sullivan v. Kirkpatrick, 156 S.W. 492, 171 Mo.App. 233.

50 C.J. p 399 note 25.

68. Mo.—Sullivan v. Kirkpatrick, supra.

69. Mo.—Fitzmaurice v. Turney, 165 S.W. 307, 256 Mo. 181.

70. Mo.—Fitzmaurice v. Turney, supra.

71. Mo.—Fitzmaurice v. Turney, supra.

72. N.J.—Allen v. Stevens, 29 N.J. Law 509.

73. N.J.—Allen v. Stevens, supra. Pleading and evidence of existence of private road generally see supra § 14.

74. N.J.—Allen v. Stevens, supra.

75. Pa.—Commonwealth v. Kennedy, 16 Pa.Dist. & Co. 564, 35 Dauph. Co. 242, 46 York Leg.Rec. 26.

76. Pa.—Commonwealth v. Kennedy, supra.

77. S.C.—State v. Randall, 32 S.C. L. 110, 47 Am.D. 548.

78. S.C.—State v. Randall, supra.

79. Ariz.—Territory v. Richardson, 76 P. 456, 8 Ariz. 336.

80. Ill.—Gilbert v. People, 121 Ill. App. 423, 425.

50 C.J. p 399 note 35.

81. Ariz.—Territory v. Richardson, 76 P. 456, 8 Ariz. 336.

82. N.C.—State v. Combs, 27 S.E. 30, 120 N.C. 607.

50 C.J. p 399 note 37.

83. Mo.—State v. Van Patton, App., 180 S.W.2d 231—State v. Van Patton, 94 S.W.2d 1119, 230 Mo.App. 1199.

84. N.C.—State v. Combs, 27 S.E. 30, 120 N.C. 607.



sufficiency of the evidence in criminal cases apply in a prosecution for an offense with respect to private roads.<sup>85</sup>

## § 24. Taxes and Assessments

The commissioners of the roads have been held to have power to compel an individual to work on a private path.

The commissioners of the roads have been held to have power to compel an individual to work on a road, in which there is a right of two or more persons, and which is called a private path, as contradistinguished from a public highway.<sup>86</sup>

Work on roads by taxpayers generally is discussed in Highways §§ 307-309.

**PRIVATIO; PRIVATIS; PRIVATORUM.** As the first words of maxims as to which there have been no recent applications see 50 C.J. p 400 notes 15-17.

**PRIVATUM.** In Latin, private.<sup>1</sup> The word is most frequently employed in the phrase "jus privatum," which is discussed in 50 C.J.S. p 1095 note 96-p 1096 note 4.

As the first word of maxims as to which there have been no recent applications see 50 C.J. p 400 notes 19, 20.

**PRIVELEGIO.** In Spanish law, a favor, concession, or exemption granted to someone.<sup>2</sup>

**PRIVILEGE.** The word "privilege" has a variety of meanings, according to the connection or context in which it is used;<sup>3</sup> but inherent in the term is the idea of something apart and distinct from a

common right which pertains to all citizens or exists in all subjects, and the word connotes some sort of a special grant from the sovereignty, some type of necessary special permission or consent which the sovereign in its discretion might have withheld or failed to provide, such as the right to do business as a corporation or the right to record a mortgage.<sup>4</sup> Standing alone the word "privilege" carries the idea of permission, a permissive use,<sup>5</sup> and, while it is frequently defined in terms of a right or immunity granted, it is often said that a person takes privileges to which he may not be entitled.<sup>6</sup>

The word "privilege," as used in its broad and comprehensive sense, means an advantage;<sup>7</sup> a peculiar advantage;<sup>8</sup> a peculiar benefit, favor, or advantage;<sup>9</sup> a particular and peculiar benefit or advantage<sup>10</sup> enjoyed by a person, company, or class, beyond the common advantage of other citizens;<sup>11</sup> a favor granted;<sup>12</sup> an option.<sup>13</sup> The word "privi-

85. N.C.—State v. Adams, 195 S.E. 822, 213 N.C. 243.

Evidence held sufficient

(1) To take case to jury.—State v. Van Patton, Mo.App., 180 S.W.2d 281.

(2) To show establishment of cartway.—State v. Adams, 195 S.E. 822, 213 N.C. 243.

86. S.C.—Glover v. Simmons, 15 S.C. L. 67.

1. Black L.D.

2. Escriche Diccionario.

3. U.S.—U. S. v. Patrick, C.C.Tenn., 54 F. 338, 348.

4. S.D.—State ex rel. Botkin v. Welsh, 251 N.W. 189, 200, 61 S.D. 593.

5. N.J.—Corpus Juris cited in Mitnick v. Furniture Workers Union Local No. 66, C.I.O., 200 A. 553, 555, 124 N.J.Eq. 147.

50 C.J. p 400 note 32.

Similarly expressed

"In common parlance the word is most frequently used in the sense of permission or license."—Schneider v. Maughan, 227 N.W. 294, 295, 199 Wis. 592.

6. Pa.—Commonwealth v. Miller, 180 A. 144, 146, 118 Pa.Super. 58.

7. Cal.—Corpus Juris quoted in People v. Noland, 189 P.2d 84, 85, 83 Cal.App.2d 819.

50 C.J. p 400 note 25.

Phrases

(1) "Privileged vessels" see index to title Collision.

(2) "Privilege tax" distinguished from other forms of taxes including "excise tax" and "property tax" see Licenses § 3.

(3) "Real privilege;" in English law, a privilege granted to, or concerning, a particular place or locality.—Black L.D.

(4) Other phrases as to which more recent adjudications have not been found see 50 C.J. p 403 notes 82-11.

8. Cal.—Sacramento Orphanage & Children's Home v. Chambers, 144 P. 317, 319, 25 Cal.App. 536.

50 C.J. p 400 note 27.

Similarly expressed

A peculiar benefit or advantage.—Hammond v. Fulton, 115 N.E. 998, 999, 220 N.Y. 337, Ann.Cas.1917C 1137—North River Steam Boat Co. v. Livingston, Hopk., N.Y., pp. 170, 232.

9. Cal.—Corpus Juris quoted in

People v. Noland, 189 P.2d 84, 85, 83 Cal.App.2d 819.

N.Y.—Arbuzese v. Norge Realty Corporation, 271 N.Y.S. 889, 890, 151 Misc. 463.

Utah.—Thomas v. Daughters of Utah Pioneers, 197 P.2d 477, 507.

50 C.J. p 400 note 29.

10. Cal.—Daigh v. Schaffer, 73 P. 2d 927, 930, 23 Cal.App.2d 449.

Tenn.—Lawyers' Tax Cases, 8 Heisk. 565, 649.

11. Cal.—Daigh v. Schaffer, 73 P.2d

927, 930, 23 Cal.App.2d 449.

50 C.J. p 400 note 34.

12. Ind.—State v. Griffin, 79 N.E.2d

537, 543, 226 Ind. 279—Hammer v. State, 89 N.E. 850, 851, 173 Ind. 199, 24 L.R.A.N.S., 795, 140 Am.S. R. 248, 21 Ann.Cas. 1034.

Similarly defined

(1) A personal benefit or favor.—Ex parte Levy, 43 Ark. 42, 54, 51 Am.R. 550.

(2) A private or personal favor enjoyed.—Winnipeg v. Barrett, 5 Cartwr.Cas., Can., 32, 91.

13. Cal.—People v. Noland, 189 P. 2d 84, 85, 83 Cal.App.2d 819.

"Option" defined as meaning "privilege" see 67 C.J.S. p 511 note 30.

lege" has also been construed to mean a franchise;<sup>14</sup> a prerogative;<sup>15</sup> a right, claim, or liberty;<sup>16</sup> authority.<sup>17</sup>

"Privilege" has been defined as meaning a right not enjoyed by all;<sup>18</sup> a right peculiar to an individual or body;<sup>19</sup> a right peculiar to the person or class of persons on whom it is conferred, and not possessed by others;<sup>20</sup> a special right or power conferred or possessed by one or more individuals<sup>21</sup> in derogation of the general right;<sup>22</sup> an immunity<sup>23</sup> granted by authority;<sup>24</sup> a peculiar immunity;<sup>25</sup> an immunity held beyond the course of the law;<sup>26</sup> a right or immunity not enjoyed by others or by all.<sup>27</sup>

The word "privilege" is also defined as meaning a

peculiar exemption;<sup>28</sup> an exemption from some general burden, obligation, or duty;<sup>29</sup> an exceptional or extraordinary exemption;<sup>30</sup> the special enjoyment of a good,<sup>31</sup> or an exemption from some evil or burden.<sup>32</sup> A "privilege" is an exemption from some duty, burden, or attendance<sup>33</sup> with which certain persons are indulged,<sup>34</sup> from a supposition of the law that their public duties or services, or the offices in which they are engaged, are such as require all their time and care, and that, therefore, without this indulgence, those duties could not be performed to that advantage which the public good demands;<sup>35</sup> but when the word "privilege" is used with reference to an official power it imports a discretionary power.<sup>36</sup>

14. N.M.—Territory v. Stokes, 2 N. M. 161, 170.

50 C.J. p 401 note 47.  
See Franchises § 1 et seq.

15. Tenn.—Lawyers' Tax Cases, 8 Heisk. 565, 649.

16. N.M.—Territory v. Stokes, 2 N. M. 161, 170.

17. U.S.—U. S. v. Patrick, C.C.Tenn., 54 F. 338, 348.

50 C.J. p 402 note 58.

18. Cal.—People v. Noland, 189 P. 2d 84, 85, 83 Cal.App.2d 819.

Utah.—Thomas v. Daughters of Utah Pioneers, 197 P.2d 477, 507.  
50 C.J. p 402 note 62.

#### Similarly expressed

(1) The enjoyment of some desirable right.—Winnipeg v. Barrett, 5 Cartwr.Cas., Can., 32, 91.

(2) An investiture with special or peculiar rights.—U. S. v. Patrick, C. C. Tenn., 54 F. 338, 348.

(3) Special rights belonging to the individual or class, and not to the mass.—Lonas v. State, 3 Heisk. Tenn., 287, 306—50 C.J. p 402 note 71.

(4) A right conferred on some persons to acquire on more favorable terms what all other persons might acquire on less favorable terms.—Schmalz v. Wooley, 39 A. 539, 541, 56 N.J.Eq. 649.

(5) A right peculiar to the person on whom conferred, not to be exercised by another or others.—Smith v. Cornell University, 45 N.Y.S. 640, 643, 21 Misc. 220—50 C.J. p 402 note 67.

(6) Some peculiar right or favor granted by law contrary to the general rule.—Ex parte Levy, 43 Ark. 42, 54, 51 Am.R. 550.

19. Cal.—People v. Noland, 189 P. 2d 84, 85, 83 Cal.App.2d 819.  
N.Y.—Smith v. Cornell University, 45 N.Y.S. 640, 643, 21 Misc. 221.  
50 C.J. p 402 note 66.

#### Similarly defined

A right conferred peculiar to some individual or body.—State v. Griffin.

79 N.E.2d 537, 543, 226 Ind. 279—Hammer v. State, 89 N.E. 850, 851, 173 Ind. 199, 24 L.R.A., N.S., 795, 140 Am.S.R. 248, 21 Ann.Cas. 1034.

20. Minn.—Northwestern Trust Co. v. Bradbury, 127 N.W. 386, 388, 112 Minn. 76.

50 C.J. p 402 note 68.

21. Cal.—People v. Noland, 189 P. 2d 84, 85, 83 Cal.App.2d 819—Cope v. Flannery, 284 P. 845, 849, 70 Cal.App. 738.

Utah.—Thomas v. Daughters of Utah Pioneers, 197 P.2d 477, 507.

22. Ark.—Leatherwood v. Hill, 89 P. 521, 523, 10 Ariz. 243.

Utah.—Thomas v. Daughters of Utah Pioneers, 197 P.2d 477, 507.

23. Cal.—Sacramento Orphanage & Children's Home v. Chambers, 144 P. 317, 319, 25 Cal.App. 536.

50 C.J. p 401 note 49.

24. U.S.—U. S. v. Patrick, C.C.Tenn., 54 F. 338, 348.

25. Cal.—Van Valkenburg v. Brown, 43 Cal. 43, 49, 13 Am.R. 136.

Del.—Douglass v. Stevens, 1 Del.Ch. 465, 476.

26. N.C.—State v. Cantwell, 55 S.E. 820, 823, 142 N.C. 604, 8 L.R.A., N.S., 498, 9 Ann.Cas. 141.

Wis.—State v. Grosnickle, 206 N.W. 895, 896, 189 Wis. 17.

27. N.Y.—Arbuzzeze v. Norge Realty Corporation, 271 N.Y.S. 889, 890, 151 Misc. 463.

50 C.J. p 402 note 65.

#### Similarly defined

(1) A right or immunity granted to a person either against or beyond the course of the common or general law.—Dike v. State, 38 N.W. 95, 96, 38 Minn. 366.

(2) A right or immunity by way of exemption from the general law.—Louisville & N. R. Co. v. Gaines, C.C.Tenn., 3 F. 266, 278, 2 Flipp. 621—50 C.J. p 402 note 63.

(3) A right, an immunity, benefit, or advantage enjoyed by a person or body of persons beyond the common

advantages of other individuals.—Winnipeg v. Barrett, 5 Cartwr.Cas., Can., 32, 91.

(4) A right or immunity granted as a peculiar advantage and in derogation of a common right.—Commonwealth v. Miller, 180 A. 144, 146, 118 Pa.Super. 58.

28. Cal.—Sacramento Orphanage & Children's Home v. Chambers, 144 P. 317, 319, 25 Cal.App. 536.

50 C.J. p 401 note 46.

29. Ark.—Ex parte Levy, 43 Ark. 42, 54, 51 Am.R. 550.

50 C.J. p 401 note 38.

30. Wis.—State v. Grosnickle, 206 N.W. 895, 896, 189 Wis. 17.

50 C.J. p 401 note 45.

#### Similarly defined

(1) An exemption from such burdens as others are subjected to.—Schneider v. Maughan, 227 N.W. 294, 295, 199 Wis. 592.

(2) An exemption of a private man or a particular corporation from the rigor of the common law.—Territory v. Stokes, 2 N.M. 161, 169.

(3) An exemption of a person or class of persons from the operation of any law.—Commonwealth v. Henderson, 33 A. 368, 172 Pa. 135—50 C.J. p 401 note 43.

31. N.M.—Territory v. Stokes, 2 N. M. 161, 170.

50 C.J. p 401 note 37.

32. Okl.—Wisener v. Burrell, 118 P. 999, 1001, 28 Okl. 546, 34 L.R.A., N.S., 755, Ann.Cas.1912D 356.

50 C.J. p 401 note 39.

33. N.M.—Territory v. Stokes, 2 N. M. 161, 169.

50 C.J. p 401 note 40.

34. Can.—Winnipeg v. Barrett, 5 Cartwr.Cas., Can., 32, 91.

50 C.J. p 401 note 41.

35. N.C.—State v. Cantwell, 55 S.E. 820, 823, 142 N.C. 604, 614, 8 L.R. A., N.S., 498.

36. Cal.—People v. Noland, 189 P.2d 84, 85, 83 Cal.App.2d 819.

"Privilege" is further defined as meaning legal power;<sup>37</sup> a power granted to an individual or corporation to do something, or enjoy some advantage, which is not of common right;<sup>38</sup> a law made in favor of an individual;<sup>39</sup> an affirmative act of selection of special subjects of favors not enjoyed by citizens in general;<sup>40</sup> a license or permission on specified terms to do that which is in general prohibited;<sup>41</sup> a license to do anything which is prohibited by the general law.<sup>42</sup>

The word "privilege" has the same significance in American jurisprudence that it has in Roman law,<sup>43</sup> but in Roman law "privilege" also means a right of priority of satisfaction out of the proceeds of the thing in a concurrence of creditors;<sup>44</sup> something conferred on an individual by a private law, and hence some peculiar benefit or advantage, some right or immunity, not enjoyed by the world at large.<sup>45</sup> In the civil law the word "privilege" has a very different, and much wider, meaning than it had in the common law,<sup>46</sup> and as used in the civil law is practically equivalent to the term "lien" as stated in Liens § 1 d.

"Privilege" has been held to be equivalent to, or synonymous with, "claim" see 14 C.J.S. p 1185 note 70, and "immunity" see 42 C.J.S. p 397 note 88.

It has been compared with, or distinguished from, "corporate right" see Corporations § 935, "immunity" see 42 C.J.S. p 397 note 89, "occupation" see 67 C.J.S. p 77 note 52, "power" see ante p 398 note 73, and "pursuits."<sup>47</sup>

The terms "privilege" and "right" have been compared and distinguished,<sup>48</sup> and it has been said that

the granting of a privilege may confer a right.<sup>49</sup>

The term "privilege" is treated in various connections throughout this work, and is applied to many activities. Naturalization is a privilege, see Aliens § 122, and the operation of an automobile on the public highway is a privilege, as stated in Motor Vehicles § 10 a. The right to hold public office is a privilege, see Officers § 11, and it is stated in Elections § 2 that voting is sometimes regarded as a privilege. Avoidance of a contract by an infant is a mere personal privilege, as stated in Infants § 75. Other privileges of infancy are treated in Infants §§ 19-30. In many jurisdictions a person takes property by descent as a privilege, see Descent and Distribution § 2. However, ownership of property is not regarded as a privilege, but rather as one of the rights which governments were organized to protect, as stated in Property § 13.

The privilege of a witness, including the privilege against self-incrimination, is treated in the C.J.S. title Witnesses §§ 430-457, also 70 C.J. p 717 note 22-p 759 note 7. The privileges of a judge are discussed in Judges §§ 10, 11. A mere personal privilege as not the subject of a chattel mortgage see Chattel Mortgages § 21.

The right to practice law is a privilege, as stated in Attorney and Client § 4 b, and the right to practice medicine is also frequently regarded as a privilege, as stated in Physicians and Surgeons § 2. An occupation or business which requires a license from some proper authority is commonly denominated a "privilege," see Licenses § 1 b, and particular occupations and businesses which are subject to

37. U.S.—U. S. v. Patrick, C.C.Tenn., 54 F. 338, 348.

38. Tenn.—Harrison v. Willis, 7 Heisk. 35, 44, 19 Am.R. 604.

39. U.S.—Louisville & N. R. Co. v. Gaines, C.C.Tenn., 3 F. 266, 278, 2 Flipp. 621.

#### Similarly expressed

A particular law which grants special prerogatives to some persons, contrary to the common right.—Territory v. Stokes, 2 N.M. 161, 169—50 C.J. p 401 note 56.

40. Ind.—State v. Griffin, 79 N.E.2d 537, 543, 226 Ind. 279—Hammer v. State, 89 N.E. 850, 851, 173 Ind. 199, 24 L.R.A., N.S., 795, 140 Am.S. R. 248, 21 Ann.Cas. 1034.

41. Tenn.—Harrison v. Willis, 7 Heisk. 35, 44, 19 Am.R. 604. 50 C.J. p 401 note 54.

42. Tenn.—Wiltse v. State, 8 Heisk. 544, 547.

43. U.S.—Louisville & N. R. Co. v.

Gaines, C.C.Tenn., 3 F. 266, 278, 2 Flipp. 621.

Pa.—Commonwealth v. Henderson, 33 A. 368, 369, 172 Pa. 135.

44. U.S.—The Nestor, C.C.Me., 18 F. Cas.No.10,126, 1 Sumn. 73.

45. Tenn.—Lawyers' Tax Cases, 8 Heisk. 565, 649.

46. Wis.—Schmelder v. Maughan, 227 N.W. 294, 295, 199 Wis. 592.

47. Ark.—State ex rel. Norwood v. New York Life Ins. Co., 171 S.W. 871, 873, 119 Ark. 314.

#### Terms held synonymous

N.Y.—Smith v. Cornell University, 45 N.Y.S. 640, 643, 21 Misc. 220, 225.

Terms sometimes synonymous as used in statutes see the C.J.S. title Statutes § 338, also 50 C.J. p 402 note 77 [a] (2).

#### Used interchangeably

The word "privilege" is often used interchangeably with the word "right." The ordinary layman would

speak of his right to travel a public way and of a privilege or permission to cross the land of a neighbor.—Schmelder v. Maughan, 227 N.W. 294, 295, 199 Wis. 592.

#### Inaccurate use

"While the term 'privilege' is often used as synonymous with the term 'right,' it is not an accurate use of the term."—State v. Grosnickle, 206 N.W. 895, 896, 189 Wis. 17, 22.

#### "Rights" and "privileges" compared

"It may be conceded that to one accustomed to legal nicety in the choice of words there is a distinct difference in definition between 'privilege' and 'right'; nevertheless, the two words are commonly used interchangeably as synonymous, not only amongst laymen, but by lawyers, and, indeed, not infrequently, it must be admitted, even in judicial opinions."—Tantum v. Keller, 123 A. 299, 300, 95 N.J.Eq. 466.

49. Wis.—Schmelder v. Maughan, 227 N.W. 294, 295, 199 Wis. 592.

licensing tax provisions are enumerated in Licenses § 30.

Excise taxes may be imposed on the privilege of engaging in an occupation or calling, either by the federal government see Internal Revenue § 510, or under the authority of the state government see the C.J.S. title Taxation § 122, also 61 C.J. p 155 note 88, p 242 note 83. The word "privilege" is also treated in Franchises § 1 et seq. For reference to other particular applications and specific uses of the word consult the Descriptive-Word Index.

The plural form, "privileges," is employed in various constitutional provisions. The Constitution of the United States Article IV § 2 provides that "the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States," and the Fourteenth Amendment, § 1, provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Various state constitutions contain provisions which forbid the grant to any citizen or class of citizens of privileges not belonging equally to all citizens. These various constitutional provisions are treated in Constitutional Law §§ 456-501.

*As a verb*, the word "privilege" is defined as meaning to grant some particular right or favor to; to invest with a certain privilege or immunity.<sup>50</sup>

*Privileged communication.* Defined generally see 15 C.J.S. p 639 note 44. The term is employed in the law with two significations. In one sense it signifies oral or printed utterances which are not actionable although defamatory, and in this sense the term is treated in Libel and Slander §§ 87-120. In another sense the term "privileged communication" has reference to communications made during the existence of certain confidential relationships recognized by law and not competent to be produced in court during the trial of a case. The subject is treated in the C.J.S. title Witnesses §§ 252-314, also 70 C.J. p 376 note 39-p 472 note 8.

**PRIVILEGIUM.** In modern civil law, in its general sense, every peculiar right or favor granted by the law, contrary to the common rule.<sup>51</sup>

**PRIVILEGIUM OLERICALE.** The benefit of clergy.<sup>52</sup>

**PRIVILY.** Privately or secretly.<sup>53</sup>

**PRIVITY; PRIVIES; PRIVY.** Although it has been said that there is no definition of the word "privity" which can be applied in all cases,<sup>54</sup> as most generally defined,<sup>55</sup> and in its broadest sense,<sup>56</sup> "privity" is the mutual or successive relationship to the same right of property,<sup>57</sup> or such an identifica-

50. N.Y.—*Arbuzese v. Norge Realty Corporation*, 271 N.Y.S. 889, 890, 151 Misc. 463.

51. Black L.D.

50 C.J. p 403 note 18.

"Privilgium" as a species of lien see Liens § 1 d.

52. Black L.D.

See Criminal Law § 1983 b (3).

53. Tex.—*Coombes v. Thomas*, 57 Tex. 321, 322.

54. Fla.—*Corpus Juris* quoted in *First Nat. Bank v. Southern Lumber & Supply Co.*, 145 So. 594, 596, 106 Fla. 821—*Corpus Juris* quoted in *Tallahassee Variety Works v. Brown*, 144 So. 848, 852, 106 Fla. 599.

Ga.—*Corpus Juris* cited in *Rawson v. Brosnan*, 1 S.E.2d 423, 425, 187 Ga. 624.

S.C.—*First Nat. Bank of Greenville v. U. S. Fidelity & Guaranty Co.*, 35 S.E.2d 47, 57, 58, 207 S.C. 15, 162 A.L.R. 1003.

50 C.J. p 404 note 23.

55. N.M.—*Smith v. Hill Bros.*, 134 P. 243, 246, 17 N.M. 415.

#### Similarly expressed

(1) Definition most generally approved by the courts.—*Smith v. Shields*, 240 N.W. 498, 500, 59 S.D. 447.

(2) Definition most frequently encountered.—*Thompson v. Hudgens*, 159 S.E. 807, 812, 161 S.C. 450.

56. Ga.—*Corpus Juris* cited in *Rawson v. Brosnan*, 1 S.E.2d 423, 425, 187 Ga. 624.

Neb.—*Holsworth v. O'Chander*, 68 N.W. 334, 335, 49 Neb. 42.

Tex.—*Corpus Juris* cited in *Daggett v. Corn*, Civ.App., 54 S.W.2d 1098, 1100.

57. U.S.—*Behrens v. Skelly*, C.A. Pa., 173 F.2d 715, 717—*National Lead Co. v. Nulsen*, C.C.A.Mo., 131 F.2d 51, 56—*Hy-Lo Unit & Metal Products Co. v. Remote Control Mfg. Co.*, C.C.A.Cal., 83 F.2d 345, 349—*B. F. Goodrich Co. v. American Lakes Paper Co.*, D.C.Del., 23 F.Supp. 682, 684.

Ala.—*Interstate Electric Co. v. Fidelity & Deposit Co. of Maryland*, 153 So. 427, 429, 228 Ala. 210—*Roberts v. Bright*, 133 So. 907, 909, 222 Ala. 677.

Cal.—*Zaragosa v. Craven*, 202 P.2d 73, 75, 33 Cal.2d 315—*California State Automobile Ass'n Inter-Insurance Bureau v. Brunella*, 58 P.2d 694, 695, 14 Cal.App.2d 464.

Del.—*Coca-Cola Co. v. Pepsi-Cola Co.*, 172 A. 260, 263, 6 W.W.Harr. 124.

D.C.—*David v. Nemerofsky*, Mun. App., 41 A.2d 838, 840.

Ga.—*Corpus Juris* cited in *Thomas v. Lambert*, 1 S.E.2d 443, 445, 187 Ga. 616—*Corpus Juris* quoted in *Rawson v. Brosnan*, 1 S.E.2d 423, 425, 187 Ga. 624—*Roberts v. Hill*, 58 S.E.2d 465, 467, 81 Ga.App. 185—*Morris v. Georgia Power Co.*, 15 S.E.2d 730, 735, 65 Ga.App. 180—*Roadway Express v. McBroom*, 6 S.E.2d 460, 462, 61 Ga.App. 223—*Blakewood v. Yellow Cab Co.*, 6 S.E.2d 126, 127, 61 Ga.App. 149.

Ill.—*Marshall v. New Amsterdam Casualty Co. of Baltimore*, 48 N.E.2d 804, 806, 318 Ill.App. 636.

Iowa.—*Corpus Juris* cited in *State ex rel. Weede v. Bechtel*, 31 N.W. 2d 853, 866, 239 Iowa 1298—*White v. Peterson*, 269 N.W. 878, 880, 222 Iowa 720—*Hawkeye Life Ins. Co. v. Valley-Des Moines Co.*, 260 N.W. 669, 672, 220 Iowa 556, 105 A.L.R. 1018.

Me.—*Burns v. Baldwin-Doherty Co.*, 170 A. 511, 512, 132 Me. 331.

Mo.—*Dillard v. Owens*, App., 122 S.W.2d 76, 83.

Mont.—*State ex rel. Finley v. District Court of First Judicial Dist. in and for Lewis and Clark County*, 43 P.2d 682, 685, 99 Mont. 200.

Neb.—*Consumers Public Power Dist.*

tion in interest of one person with another as to represent the same legal right.<sup>58</sup>

"Privity" is also defined as meaning a successive relationship to, or ownership of, the same property from a common source;<sup>59</sup> a succession of relationship to the same thing, whether created by deed or by other act, or by operation of law;<sup>60</sup> a succession of relationships by deed or other act or by operation of law;<sup>61</sup> and is further defined as meaning

a derivative kind of interest, founded on, or growing out of, the contract of another.<sup>62</sup>

In the feudal sense, "privity" denotes mutuality, but in our body of the law it has a wider and differing significance because it may not only include mutuality, but it also includes successive relationship to the same right of property.<sup>63</sup>

While privity implies succession,<sup>64</sup> it also im-

v. Eldred, 22 N.W.2d 188, 194, 146 Neb. 926.

N.J.—Hudson Transit Corp. v. Antonucci, 61 A.2d 180, 182, 142 N.J.Eq. 728—Di Bologna v. Earl, 23 A.2d 791, 796, 130 N.J.Eq. 571—Canin v. Kesse, 28 A.2d 68, 70, 20 N.J.Misc. 371—Poulos v. Coast Cities Coaches, 198 A. 372, 374, 16 N.J.Misc. 156.

N.Y.—Hartford Accident & Indemnity Co. v. First Nat. Bank & Trust Co. of Hudson, 9 N.Y.S.2d 590, 593, 256 App.Div. 30—Wolf v. Kenyon, 273 N.Y.S. 170, 242 App.Div. 116—Syczak v. Szczerbaniewicz, 252 N.Y.S. 780, 782, 233 App.Div. 342—In re Baker's Estate, 69 N.Y.S.2d 626, 628, 189 Misc. 159—Lyman v. Billy Rose Exposition Spectacles, 39 N.Y.S.2d 752, 755, 179 Misc. 512—In re Smith's Will, 24 N.Y.S.2d 233, 238, 175 Misc. 545.

N.C.—Leary v. Virginia-Carolina Joint Stock Land Bank, 2 S.E.2d 570, 573, 215 N.C. 501—Rabil v. Farris, 196 S.E. 321, 322, 213 N.C. 414, 116 A.L.R. 1083.

Or.—Lane v. National Ins. Agency, 37 P.2d 365, 367, 148 Or. 589.

S.C.—Corpus Juris quoted in First Nat. Bank of Greenville v. U. S. Fidelity & Guaranty Co., 35 S.E.2d 47, 57, 207 S.C. 15, 162 A.L.R. 1003—Thompson v. Hudgens, 159 S.E. 807, 812, 161 S.C. 450.

S.D.—Corpus Juris cited in Smith v. Shields, 240 N.W. 498, 500, 59 S.D. 447.

Tenn.—Fultz v. Fultz, 175 S.W.2d 315, 316, 180 Tenn. 327.

Tex.—Cain v. Balcom, 109 S.W.2d 1044, 1046, 130 Tex. 497—Corpus Juris cited in Pettus Oil & Refining Co. v. Taber, Civ.App., 153 S.W.2d 700, 705—City of Dallas v. Brown, Civ.App., 150 S.W.2d 129, 131—Ames v. Herrington, Civ. App., 139 S.W.2d 183, 190—Pancake v. Kansas City Life Ins. Co., Civ.App., 134 S.W.2d 776, 778—Townsend v. Townsend, Civ.App., 115 S.W.2d 769, 772—Corpus Juris cited in Daggett v. Corn, Civ.App., 54 S.W.2d 1098, 1100.

Utah.—Tanner v. Bacon, 136 P.2d 957, 960, 103 Utah 494.

Wash.—Watkins v. Silver Logging Co., 116 P.2d 315, 326, 9 Wash.2d 703.

W.Va.—Corpus Juris cited in Cater v. Taylor, 196 S.E. 558, 120 W.Va. 93.

50 C.J. p 404 note 26.

#### Greenleaf's definition

"Mutual succession or relationship to the same rights of property."

U.S.—Stacy v. Thrasher for Use of Sellers, La., 6 How. 44, 59, 12 L. Ed. 337—Alling v. Brevda, D.C.N.Y., 17 F.Supp. 986, 987.

Cal.—Zaragosa v. Craven, App., 191 P.2d 470, 473, 475.

Mich.—Schlickemayer v. City of Highland Park, 235 N.W. 156, 253 Mich. 265.

N.Y.—Hartford Accident & Indemnity Co. v. First Nat. Bank and Trust Co. of Hudson, 9 N.Y.S.2d 590, 593, 256 App.Div. 30.

#### Similarly defined

(1) Mutual or successive relationship to the same right or property.

Cal.—California State Automobile Ass'n Inter-Insurance Bureau v. Brunella, 58 P.2d 694, 695, 14 Cal. App.2d 464.

Fla.—Smith v. Urquhart, 176 So. 787, 789, 129 Fla. 742—Marion Mortg. Co. v. Grennan, 143 So. 761, 764, 106 Fla. 913, 87 A.L.R. 1492—Coral Realty Co. v. Peacock Holding Co., 138 So. 622, 625, 103 Fla. 916.

Okl.—Corpus Juris cited in Wilson-Harris v. Southwest Telephone Co., 141 P.2d 986, 990, 193 Okl. 194, 148 A.L.R. 1337.

Utah.—Glen Allen Mining Co. v. Park Galena Mining Co., 296 P. 231, 233, 77 Utah 362.

(2) The mutual or succeeding relationship to the same right of property.—Strong v. Aetna Casualty & Surety Co., D.C.Tex., 52 F.Supp. 787, 788.

(3) Successive relationship to the same right in the same property.—Hilton v. Hilton, 41 S.E.2d 880, 881, 202 Ga. 53.

(4) "Mutual or successive relationship to the rights of property." U.S.—Bate Refrigerating Co. v. Gillett, C.C.N.J., 30 F. 685, 687.

Nev.—Ahlers v. Thomas, 56 P. 98, 94, 24 Nev. 407, 77 Am.S.R. 820.

(5) "Mutual or successive relationship to the right of property, title, or estate."—Strayer v. Johnson, 1 A. 222, 225, 110 Pa. 21.

(6) Privity denotes a mutual or successive relationship to the same right of property or subject matter, or partakes in an interest in any action or thing.—Duffy v. Blake, 157 P. 480, 482, 91 Wash. 140.

58. Cal.—Zaragosa v. Craven, App., 191 P.2d 470, 475.

#### Similarly expressed

Privity involves a person so identified in interest with another that he represents the same legal right.

Ark.—Missouri Pac. R. Co. v. McGuire, 169 S.W.2d 872, 874, 205 Ark. 658.

Cal.—Zaragosa v. Craven, 202 P.2d 73, 75, 33 Cal.2d 315.

S.C.—First Nat. Bank of Greenville v. U. S. Fidelity & Guaranty Co., 35 S.E.2d 47, 57, 58, 207 S.C. 15, 162 A.L.R. 1003.

59. Okl.—Oklahoma City v. Wainwright, 187 P.2d 226, 230, 199 Okl. 470—Green v. Wahl, 246 P. 419, 422, 117 Okl. 292.

Tex.—Corpus Juris cited in Daggett v. Corn, Civ.App., 54 S.W.2d 1098, 1100.

60. Ind.—Cooper v. Tarpley, 41 N.E.2d 640, 643, 112 Ind.App. 1.

Ky.—Souleyette v. McKee, 178 S.W.2d 833, 834, 296 Ky. 868.

La.—Ford v. Ford, App., 34 So.2d 301, 304.

Pa.—Stark v. Lardin, 1 A.2d 784, 786, 133 Pa.Super. 96.

61. La.—Harang v. Golden Ranch Land & Drainage Co., 79 So. 768, 787, 143 La. 982.

N.C.—Atwell v. Shook, 45 S.E. 777, 779, 133 N.C. 387.

62. U.S.—Hodgson v. Midwest Oil Co., C.C.A.Wyo., 17 F.2d 71, 75. 50 C.J. p 405 note 27.

#### Similarly stated

A derivative interest, founded on, or growing out of, contract, connection, or bond of union between the parties.—Consumers Public Power Dist. v. Eldred, 22 N.W.2d 188, 194, 146 Neb. 926.

63. N.Y.—Corpus Juris cited in Simmons v. Capra, 75 N.Y.S.2d 574, 577, 273 App.Div. 83.

50 C.J. p 404 note 23—p 406 note 52.

64. Miss.—Stone v. Grenada Grocery Co., 178 So. 107, 108, 180 Miss. 566.

N.J.—Di Bologna v. Earl, 23 A.2d

plies a derivation of title,<sup>65</sup> and exists only because of the relationship between the parties or because of the derivative character of their title.<sup>66</sup> Privy exists where successive relationship of, or ownership to, the same right of property from a common source appears,<sup>67</sup> and it exists between two successive holders when the latter takes under the earlier, as by grant,<sup>68</sup> descent, will, or voluntary transfer of possession.<sup>69</sup> Thus, in order to constitute privity between successive occupants of property, all that is necessary is that one receives his possession from the other by some act of such other, or by operation of law.<sup>70</sup>

The ground of privity is property, not personal relation,<sup>71</sup> and it relates to persons in their relation to property, and does not relate to any question,<sup>72</sup> claim or right<sup>73</sup> independent of property. There are various kinds of privity which are discussed in following subdivisions, but, whether the privity be

one of estate, contract, blood, or law, it has no personal basis as a mere matter of sentiment, but rests on some actual mutual or successive relationship to the same right of property.<sup>74</sup>

Absolute<sup>75</sup> identity<sup>76</sup> of interest is essential to privity, and sometimes the word "privity" merely means identity of interest,<sup>77</sup> and is defined as meaning interest<sup>78</sup> or mutuality of interest;<sup>79</sup> and it is said that in legal literature "privity" means partaking of, having a part or interest in or cognizance of any action, matter, or thing.<sup>80</sup>

When the word "privity" is not employed in the technical sense of the common law it implies knowledge and something more; it implies special or particular knowledge showing active consent or concurrence.<sup>81</sup> Thus "privity" is frequently defined as meaning cognizance implying consent or concurrence;<sup>82</sup> joint knowledge with another of a private concern,<sup>83</sup> which is often supposed to imply con-

791, 796, 130 N.J.Eq. 571—**Corpus Juris** cited in *Girard Trust Co. v. McGeorge*, 15 A.2d 206, 212, 128 N.J.Eq. 91.

Tex.—**Corpus Juris** cited in *Daggett v. Corn*, Civ.App., 54 S.W.2d 1098, 1100.

50 C.J. p 405 note 30.

#### In shoes of the owner

"He who is in privity stands in the shoes or sits in the seat of the owner from whom he derives his title, and thus takes it charged with the burden attending it."

Miss.—*Stone v. Grenada Grocery Co.*, 178 So. 107, 108, 180 Miss. 566.

N.J.—*Di Bologna v. Earl*, 23 A.2d 791, 796, 130 N.J.Eq. 571.

N.Y.—*Boughton v. Harder*, 61 N.Y.S. 574, 576, 46 App.Div. 352.

#### Succession of rights

Privy signifies merely succession of rights, that is, the devolution, in whole or in part, of the rights and duties of one person on another, as in the case of the succession of an assignee in bankruptcy to the estate of the bankrupt on the one hand, and to the rights of the creditors on the other, or it signifies the derivation of rights, by one person from and holding in subordination to those of another, as in the case of a tenant.—*Thompson v. Hudgens*, 159 S.E. 807, 812, 161 S.C. 450.

"One in privity stands, in relation to a third party, in the post, stand or place of one to whom he succeeds in title."—*Simmons v. Capra*, 75 N.Y.S.2d 574, 577, 273 App.Div. 83.

65. Idaho.—*Kite v. Eckley*, 282 P. 868, 870, 48 Idaho 454.

66. Colo.—*Hummel v. Central City First Nat. Bank*, 23 P. 72, 76, 2 Colo.App. 571.

N.C.—*Sills v. Ford*, 88 S.E. 636, 639, 171 N.C. 738.

#### Similarly expressed

Except to the extent which one person has succeeded to an estate or interest formerly held by another, there can be no privity between them, no matter what were or are their relations to each other, or to the same piece of property, for kinship, whether by affinity or consanguinity, does not create privity, except when it results in the descent of an estate from one to another.

N.J.—**Corpus Juris** quoted in *Riddle v. Cella*, 15 A.2d 59, 63, 64, 128 N.J.Eq. 4.

N.Y.—*Trolan v. Rogers*, 34 N.Y.S. 836, 838, 88 Hun 422.

67. Ariz.—*Davis v. Kleindienst*, 169 P.2d 78, 83, 64 Ariz. 251.

68. Ariz.—*Davis v. Kleindienst*, 169 P.2d 78, 83, 64 Ariz. 251.

50 C.J. p 405 note 38.

69. Minn.—*Sherin v. Brackett*, 30 N.W. 551, 552, 36 Minn. 152.

50 C.J. p 405 note 38.

70. Ind.—*Cooper v. Tarpley*, 41 N.E.2d 640, 643, 112 Ind.App. 1.

71. Mo.—*McDonald v. F. W. Woolworth Co.*, App., 135 S.W.2d 359, 362—*Dillard v. Owens*, App., 123 S.W.2d 76, 83.

S.C.—*Thompson v. Hudgens*, 159 S.E. 807, 812, 161 S.C. 450.

50 C.J. p 405 note 41.

72. Tex.—*Kirby Lumber Corp. v. Southern Lumber Co.*, Civ.App., 192 S.W.2d 460, 463.

50 C.J. p 405 note 42.

73. Tex.—*Townsend v. Townsend*, Civ.App., 115 S.W.2d 769, 772.

74. Ga.—*Thomas v. Lambert*, 1 S.E.2d 443, 445, 187 Ga. 616.

75. S.C.—*Thompson v. Hudgens*, 159

S.E. 807, 812, 161 S.C. 450—*Logan v. Atlantic & C. Air Line R. Co.*, 64 S.E. 515, 516, 82 S.C. 518.

76. Ark.—*Collum v. Hervey*, 3 S.W.2d 993, 995, 176 Ark. 714.

50 C.J. p 405 note 40.

"Technically speaking, there can be no privity where there is not an identity of interest."—*Interstate Electric Co. v. Fidelity & Deposit Co.*, 153 So. 427, 429, 228 Ala. 210—*Rowe v. Johnson*, 108 So. 604, 606, 214 Ala. 510—*Winston v. Westfeldt*, 22 Ala. 760, 771, 58 Am.D. 278.

77. Mo.—*Bartlett v. Kansas City Public Service Co.*, 160 S.W.2d 740, 745, 349 Mo. 13.

78. U.S.—*Hodgson v. Midwest Oil Co.*, C.C.A.Wyo., 17 F.2d 71, 75.

79. Neb.—*Consumers Public Power Dist. v. Eldred*, 22 N.W.2d 188, 194, 146 Neb. 926.

50 C.J. p 406 note 48.

80. U.S.—*Continental Ins. Co. v. Sabine Towing Co.*, C.C.A.Tex., 117 F.2d 694, 697.

81. Fla.—*Spinney v. Sanford-Orlando Kennel Club, Inc.*, 166 So. 559, 561, 123 Fla. 113—*First Nat. Bank v. Southern Lumber & Supply Co.*, 145 So. 594, 596, 106 Fla. 821—*Taylor v. Ferroman Properties*, 139 So. 149, 150, 103 Fla. 960—*Waring v. Bass*, 80 So. 514, 515, 76 Fla. 583.

82. Fla.—*Taylor v. Ferroman Properties*, 139 So. 149, 150, 103 Fla. 960.

Neb.—*Consumers Public Power Dist. v. Eldred*, 22 N.W.2d 188, 194, 146 Neb. 926.

50 C.J. p 405 note 43.

83. Fla.—*Taylor v. Ferroman Properties*, 139 So. 149, 150, 103 Fla. 960.

sent or concurrence;<sup>84</sup> and in a general, nontechnical sense<sup>85</sup> privity is private knowledge.<sup>86</sup>

"Privity" is sometimes defined as meaning connection;<sup>87</sup> connection or bond of union between parties as to some particular transaction;<sup>88</sup> having any knowledge or connection with something;<sup>89</sup> relation which creates obligation;<sup>90</sup> and it may mean the existence of an obligation from a promisee to a stranger,<sup>91</sup> and it is in this sense that the term is used in expressing the rule that a third person may sue on a contract made for his benefit only when there is privity or some duty or obligation owing by the promisee to the third person, this rule being set out in Contracts § 519 c (2) (g).

While the word "privity" is in some cases defined as meaning a partaker, persons connected together or having a mutual interest in the same action or thing by some relation other than that of actual

contract between them,<sup>92</sup> the terms more frequently employed in expressing this concept is "privity" when referring to one person, and "privies" when denoting several persons.

The word "privies" is defined as meaning those who stand in mutual or successive relationship to the same rights of property;<sup>93</sup> those who have a mutual or successive relationship to the same rights of property<sup>94</sup> or subject matter,<sup>95</sup> such as personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, or judgment creditors, or purchasers from them with notice of the facts.<sup>96</sup> Privies are persons who are parties to, or have an interest in, any action or thing, or any relation to another;<sup>97</sup> those who are partakers of, or have an interest in any action<sup>98</sup> or thing,<sup>99</sup> or any relation to another;<sup>1</sup> persons connected together, or having a mutual interest in the same action or thing, by

Neb.—Consumers Public Power Dist. v. Eldred, 22 N.W.2d 188, 194, 146 Neb. 926.

50 C.J. p 406 note 49.

84. Neb.—Consumers Public Power Dist. v. Eldred, supra.

50 C.J. p 406 note 50.

85. Neb.—Consumers Public Power Dist. v. Eldred, supra.

86. Fla.—Taylor v. Ferroman Properties, 139 So. 149, 150, 103 Fla. 960.

Neb.—Consumers Public Power Dist. v. Eldred, 22 N.W.2d 188, 194, 146 Neb. 926.

50 C.J. p 406 note 51.

87. U.S.—Hodgson v. Midwest Oil Co., C.C.A.Wyo., 17 F.2d 71, 75.

88. U.S.—Hodgson v. Midwest Oil Co., supra.

Tex.—Fidelity Lumber Co. v. Ewing, Civ.App., 201 S.W. 1163, 1173.

89. U.S.—Petition of Canadian Pac. R. Co., D.C.Wash., 278 F. 180, 187.

90. La.—Roussel v. Railways Realty Co., 69 So. 27, 31, 137 La. 616.

N.Y.—Hathaway v. Cincinnati, 62 N.Y. 434, 447.

91. U.S.—Commodity Credit Corporation v. Henwood, C.C.A.Mo., 126 F.2d 145, 147.

92. Fla.—Taylor v. Ferroman Properties, 139 So. 149, 150, 151, 103 Fla. 960—Waring v. Bass, 80 So. 514, 515, 76 Fla. 583.

#### Similarly defined

A partaker; persons having a mutual interest in the same action or thing by some relation other than that of actual contract between them.—Spinney v. Sanford-Orlando Kennel Club, Inc., 166 So. 559, 561, 123 Fla. 113.

93. Ala.—Roberts v. Bright, 133 So. 907, 909, 222 Ala. 677.

Miss.—Stone v. Grenada Grocery Co., 178 So. 107, 108, 180 Miss. 566—Burton v. John Hancock Mut. Life Ins. Co., 157 So. 525, 527, 171 Miss. 596.

N.J.—Di Bologna v. Earl, 23 A.2d 791, 796, 130 N.J.Eq. 571.

94. Mich.—Schlickemayer v. City of Highland Park, 235 N.W. 156, 253 Mich. 265.

S.C.—Thompson v. Hudgens, 159 S.E. 807, 812, 161 S.C. 450—Logan v. Atlantic & C. Air Line R. Co., 64 S. E. 515, 516, 82 S.C. 518.

51 C.J. p 406 note 55.

#### Similarly defined

(1) All who have a mutual or successive relationship to the same rights; privies in law, privies in blood, and privies in estate.—Hayward v. Bath, 38 N.H. 179, 183—Chamberlain v. Carlisle, 26 N.H. 540, 551.

(2) In the strict sense, privies are those persons who have mutual or successive relationship to the same right of property or subject matter as is possessed by the parties to the litigation themselves.—Wors v. Tarlton, 95 S.W.2d 1199, 1207, 234 Mo.App. 1173.

(3) Persons who are represented by the parties and who claim through them, or in privity with them, who have a mutual or successive relationship to the same right or thing.—In re Baker's Estate, 69 N. Y.S.2d 626, 628, 189 Misc. 159.

As applied to the law, "privies" means any of those persons having mutual or successive relationship to the same right of property.—Reina v. Erassarret, 203 P.2d 72, 75, 90 Cal. App.2d 418.

95. Mich.—Schlickemayer v. City

of Highland Park, 235 N.W. 156, 253 Mich. 265.

50 C.J. p 406 note 56.

96. Mich.—Schlickemayer v. City of Highland Park, supra.

50 C.J. p 406 note 56 [a].

97. Cal.—Corpus Juris quoted in Zaragosa v. Craven, App., 191 P.2d 470, 475.

N.Y.—Hamelik v. Sypek, 274 N.Y.S. 875, 878, 152 Misc. 799—Gouraud v. Gouraud, 3 Redf.Surr. 262, 267.

98. Cal.—Corpus Juris quoted in Zaragosa v. Craven, App., 191 P.2d 470, 475.

Ga.—Blakewood v. Yellow Cab Co., 6 S.E.2d 126, 127, 61 Ga.App. 149.

Ill.—Marshall v. New Amsterdam Casualty Co. of Baltimore, 48 N. E.2d 804, 806, 318 Ill.App. 636.

N.J.—Brown v. Fidelity Union Trust Co., 9 A.2d 311, 326, 126 N.J.Eq. 406.

S.C.—Hart v. Bates, 17 S.C. 35, 41.

Tenn.—Barnes v. Tort, 181 S.W.2d 881, 887, 181 Tenn. 522.

99. Cal.—Corpus Juris quoted in Zaragosa v. Craven, App., 191 P.2d 470, 475.

Ga.—Blakewood v. Yellow Cab Co., 6 S.E.2d 126, 127, 61 Ga.App. 149.

Ill.—Marshall v. New Amsterdam Casualty Co. of Baltimore, 48 N. E.2d 804, 806, 318 Ill.App. 636.

N.J.—Brown v. Fidelity Union Trust Co., 9 A.2d 311, 326, 126 N.J.Eq. 406.

Tenn.—Barnes v. Tort, 181 S.W.2d 881, 887, 181 Tenn. 522.

50 C.J. p 406 note 59.

1. Ill.—Marshall v. New Amsterdam Casualty Co. of Baltimore, 48 N.E.2d 804, 806, 318 Ill.App. 636.

N.J.—Brown v. Fidelity Union Trust Co., 9 A.2d 311, 326, 126 N.J.Eq. 406.

50 C.J. p 406 note 60.

some relation other than that of actual contract between them;<sup>2</sup> persons whose interest in an estate is derived from the contract or conveyance of others.<sup>3</sup> Privies are those who are so connected with the parties in estate, or in blood, or in law, as to be identified with them in interest, and consequently to be affected with them by the litigation,<sup>4</sup> and all others not included in these classes are strangers.<sup>5</sup> However, the fact that persons are interested in the same question or in proving the same facts, or that one person is interested in the result of litigation involving the other does not make them privies.<sup>6</sup>

The word "privity" is the root of the common word "privity,"<sup>7</sup> and as a noun is defined as meaning a person who has succeeded to some right or obligation which one of the parties to the act derived through the act or incurred under it;<sup>8</sup> one who is a partaker or has any part or interest in any action, matter, or thing;<sup>9</sup> a person having an interest derived from a contract or conveyance to which he is not himself a party;<sup>10</sup> one who has an interest in an estate created by another;<sup>11</sup> one who derives his

right or his title to property from another;<sup>12</sup> and, more particularly, one who is a partner.<sup>13</sup> To be a privy to another, a man must claim by or under that other, by blood, as heir, by representation, as executor, or by contract, as vendee, assignee, and the like;<sup>14</sup> and a privy must come after him to whom he is privy, and can never precede.<sup>15</sup> Thus the general meaning of privies includes those who claim under or in right of parties,<sup>16</sup> and privies are persons claiming under another;<sup>17</sup> persons claiming under the former parties;<sup>18</sup> and privies occupy that relation to others because of derivative rights of property.<sup>19</sup>

In order to make a man a privy to an action he must have acquired an interest in the subject matter of the action either by inheritance, succession, or purchase from a party subsequently to the action, or he must hold property subordinately.<sup>20</sup>

The question who are privies in a given case is often difficult<sup>21</sup> and requires careful examination into the circumstances of each case as it arises.<sup>22</sup> There are general statements to the effect that execu-

2. Cal.—*Corpus Juris* quoted in *Zaragoza v. Craven*, App., 191 P.2d 470, 475.

N.Y.—*Hamelik v. Sypek*, 274 N.Y.S. 875, 878, 152 Misc. 799.

N.C.—*Dillingham v. Gardner*, 21 S.E. 2d 898, 899, 232 N.C. 79.  
50 C.J. p 406 note 61.

3. U.S.—*Tolliver v. Great Northern R. Co.*, Wash., 187 F. 795, 797, 109 C.C.A. 643.

Iowa.—*Woodward v. Jackson*, 52 N. W. 358, 359, 85 Iowa 432, 436.

#### Similarly expressed

Privies are those who are so connected with the parties in an estate as to be identified with them in interest.—*Pettingill v. Jones*, 8 Puerto Rico Fed. 183, 187.

4. S.C.—*Bailey v. U. S. Fidelity & Guaranty Co.*, 193 S.E. 638, 641, 185 S.C. 169.

Tex.—*Wynn v. Pig Stand Co.*, Civ. App., 16 S.W.2d 961, 964.

5. S.C.—*Bailey v. U. S. Fidelity & Guaranty Co.*, 193 S.E. 638, 641, 185 S.C. 169.

6. Ky.—*Ralph Wolff & Sons v. New Zealand Ins. Co.*, 58 S.W.2d 623, 624, 248 Ky. 304.

7. U.S.—*Quinlan v. Pew*, Mass., 56 F. 111, 117, 5 C.C.A. 438.

8. La.—*Gipson v. Gipson*, 192 So. 355, 356, 357, 193 La. 807—*Commercial Germania Trust & Sav. Bank v. White*, 81 So. 753, 754, 145 La. 54—*Baker v. Baker*, App., 21 So.2d 514, 516.

9. U.S.—*Quinlan v. Pew*, Mass., 56 F. 111, 117, 5 C.C.A. 438.

Cal.—*Zaragoza v. Craven*, App., 191 P.2d 470, 475.

#### Similarly defined

One who has an interest in an action or thing.—*Pickett v. Ford*, 5 Miss. 246, 249.

10. N.Y.—*Coan v. Osgood*, 15 Barb. 583, 588.

50 C.J. p 406 note 67.

11. N.Y.—*Bennett v. Couchman*, 48 Barb. 73, 82.

50 C.J. p 406 note 66.

12. U.S.—*Hall v. Main*, D.C.Ill., 34 F.2d 528, 532.

13. U.S.—*Lord v. Goodall*, etc., SS. Co., C.C.Cal., 15 F.Cas.No.8,506, 4 Sawy. 292.

50 C.J. p 406 note 71.

14. Ala.—*Corpus Juris* cited in *Wilkey v. State ex rel. Smith*, 189 So. 198, 202, 238 Ala. 121—*Rowe v. Johnson*, 108 So. 604, 606, 214 Ala. 510—*Crutchfield v. Hudson*, 23 Ala. 393, 400.

15. Ala.—*Rowe v. Johnson*, 108 So. 604, 606, 214 Ala. 510—*Crutchfield v. Hudson*, 23 Ala. 393, 400.

Fla.—*Coral Realty Co. v. Peacock Holding Co.*, 138 So. 623, 625, 103 Fla. 916.

N.J.—*Corpus Juris* cited in *Girard Trust Co. v. McGeorge*, 15 A.2d 206, 212, 128 N.J.Eq. 91.

16. Ga.—*Commercial Credit Corporation v. Citizens & Southern Nat. Bank*, 23 S.E.2d 198, 200, 68 Ga. App. 393.

Miss.—*Lipscomb v. Postell*, 38 Miss. 476, 490.

#### Similarly expressed

Privies are all persons who are

represented by the parties and claim under them; all who are in privity with the parties.—*Roberts v. Hill*, 58 S.E.2d 465, 467, 81 Ga.App. 185.

17. Miss.—*Stone v. Grenada Grocery Co.*, 178 So. 107, 108, 180 Miss. 566.

N.J.—*Corpus Juris* cited in *Girard Trust Co. v. McGeorge*, 15 A.2d 206, 212, 128 N.J.Eq. 91.

Eng.—*Morgan v. Nicholl*, L.R. 2 C.P. 117, 119.

18. Cal.—*McAlister v. Dungan*, 291 P. 419, 420, 108 Cal.App. 185.

19. Tex.—*Corpus Juris* cited in *Daggett v. Corn*, Civ.App., 54 S.W. 2d 1098, 1100.

50 C.J. p 405 note 32.

20. Mich.—*Seymour v. Wallace*, 80 N.W. 242, 243, 121 Mich. 402.

Mo.—*McDonald v. F. W. Woolworth Co.*, App., 135 S.W.2d 359, 362—*Dillard v. Owens*, App., 122 S.W. 2d 76, 83.

Okl.—*Factor Oil Co. v. Brydia*, 85 P. 2d 311, 313, 184 Okl. 113—*Brown v. March*, 242 P. 155, 157, 111 Okl. 238—*Butler v. Fryer*, 159 P. 367, 368, 58 Okl. 274.

#### Similarly expressed

To make one a privy to an action he must have acquired his interest in the subject matter subsequent to the commencement of the suit.—*National Lead Co. v. Nulsen*, C.C.A.Mo., 131 F.2d 51, 56.

21. N.J.—*Brown v. Fidelity Union Trust Co.*, 9 A.2d 311, 326, 126 N. J.Eq. 406.

22. Cal.—*Zaragoza v. Craven*, 202 P.2d 73, 75, 33 Cal.2d 315.



tors and administrators are in privity of interest with their testator or intestate,<sup>23</sup> and that heir and ancestor, assignor and assignee, donor and donee, grantor and grantee, lessor and lessee, or executor and testator are privies,<sup>24</sup> or are in privity,<sup>25</sup> and such statements are not without authority for support, but, like most generalizations, cannot always be considered a correct statement of the rule.<sup>26</sup> Similarly, there are general statements to the effect that, strictly speaking, the master and the servant are not in privity,<sup>27</sup> that there is no privity between debtor and creditor,<sup>28</sup> or between domiciliary and ancillary representative.<sup>29</sup> There is some question whether any privity exists between a tenant for life and a remainderman. There are statements to the effect that there is privity of estate between them, see *infra* p 960 note 51, and it is said that there is close privity of ownership between them,<sup>30</sup> but in *Estates* § 34 it is stated that there is no privity between a life tenant and a remainderman. The statement is made in *Adverse Possession* § 130 f that it is both maintained and denied that sufficient privity exists between a life tenant and his remainderman to permit a tacking of their possession.

A judgment is conclusive and binding on persons who are in privity with the parties to the action

with respect to the subject matter of the litigation, and this rule is stated in *Judgments* §§ 787-810, and discussed there are the relationships which will or will not constitute privity.

A person standing in privity with the original parties is entitled to secure the reformation of an instrument, and is a proper person against whom reformation may be had, as stated in the C.J.S. title *Reformation of Instruments* §§ 47, 54, also 53 C.J. p 976 note 8, p 980 note 80. The word "privity," as used in the *Limited Liability Act*, 46 U.S.C.A. § 143, dealing with the liability of ship-owners is treated in the C.J.S. title *Shipping* § 244, also 53 C.J. p 652 note 47-p 659 note 55. The term is defined as used in statutes providing for liens for labor and materials in *Mechanics' Liens* § 73 c. For other particular applications and specific uses of the term see the indexes to the titles *Estoppel* and *Landlord and Tenant* and consult the *Descriptive-Word Index*.

Privies are classified according to the manner of relationship,<sup>31</sup> being divided by Lord Coke into three classes; privies in estate, privies in law, and privies in blood,<sup>32</sup> and this classification is generally followed,<sup>33</sup> although sometimes other classes of privies or privity are added or recognized,<sup>34</sup> and

Mass.—Old Dominion Copper Mining & Smelting Co. v. Bigelow, 89 N.E. 193, 217, 203 Mass. 159, 40 L.R.A.N.S., 314.

N.J.—Brown v. Fidelity Union Trust Co., 9 A.2d 311, 326, 126 N.J.Eq. 406.

S.C.—First Nat. Bank of Greenville v. U. S. Fidelity & Guaranty Co., 35 S.E.2d 47, 57, 58, 207 S.C. 15, 162 A.L.R. 1008.

23. S.C.—Thompson v. Hudgens, 159 S.E. 807, 812, 161 S.C. 450.

24. S.C.—Bailey v. U. S. Fidelity & Guaranty Co., 193 S.E. 638, 641, 185 S.C. 169.

Tex.—Wynn v. Pig Stand Co., Civ. App., 16 S.W.2d 961, 964.

25. U.S.—National Lead Co. v. Nulsen, C.C.A.Mo., 131 F.2d 51, 56.

Ala.—Roberts v. Bright, 133 So. 907, 909, 222 Ala. 677.

Ga.—Blakewood v. Yellow Cab Co., 6 S.E.2d 126, 127, 61 Ga.App. 149.

Mo.—Dillard v. Owens, App., 122 S.W.2d 76, 83.

N.J.—Poulos v. Coast Cities Coach-ers, 198 A. 372, 374, 16 N.J.Misc. 156.

Heir is in privity with his ancestor from whom he inherits the land by operation of law.—Skelton v. Tyner, 25 So.2d 160, 161, 247 Ala. 511.

26. S.C.—Thompson v. Hudgens, 159 S.E. 807, 812, 161 S.C. 450.

27. N.J.—Canin v. Kesse, 28 A.2d 68, 70, 20 N.J.Misc. 371.

N.Y.—Wolf v. Kenyon, 273 N.Y.S. 170, 171, 242 App.Div. 116.

N.C.—Leary v. Virginia-Carolina Joint Stock Land Bank, 2 S.E.2d 570, 574, 215 N.C. 501.

28. S.C.—Thompson v. Hudgens, 159 S.E. 807, 812, 161 S.C. 450.

29. Mont.—State ex rel. Finley v. District Court of First Judicial Dist. in and for Lewis and Clark County, 43 P.2d 682, 685, 99 Mont. 200.

30. W.Va.—Callihan v. Russell, 66 S.E. 695, 697, 66 W.Va. 524.

31. N.Y.—O'Donnell v. McIntyre, 23 N.E. 455, 456, 118 N.Y. 156.

32. U.S.—Alling v. Brevda, D.C.N.Y., 17 F.Supp. 986, 987.

Mont.—State ex rel. Finley v. District Court of First Judicial Dist. in and for Lewis and Clark County, 43 P.2d 682, 685, 99 Mont. 200.

N.Y.—Hartford Accident & Indemnity Co. v. First Nat. Bank & Trust Co. of Hudson, 9 N.Y.S.2d 590, 593, 256 App.Div. 30.

50 C.J. p 407 note 76 [b].

33. Ala.—Corpus Juris cited in Skelton v. Tyner, 25 So.2d 160, 161, 247 Ala. 511.

D.C.—David v. Nemerofsky, Mun. App., 41 A.2d 838, 840.

50 C.J. p 407 note 76.

"From an early period privies have been classified as in law, in blood, or in estate."—Ralph Wolff & Sons v. New Zealand Ins. Co., 58 S.W.2d 623, 624, 248 Ky. 304.

To be in privity, a person must be included in the following classes, a privy in blood, or estate, or in law.—Roberts v. Bright, 133 So. 907, 909, 222 Ala. 677.—Rowe v. Johnson, 108 So. 604, 606, 214 Ala. 510.

#### 34. Classes enumerated

(1) "Thus there are privies in estate, as donor and donee, lessor and lessee, and joint tenants; privies in blood, as heir and ancestor, and coparceners; privies in representation, as executors and testator, administrators and intestate; privies in law, where the law, without privity of blood or estate, casts the land upon another, as by escheat. All these are more generally classed into privies in estate, privies in blood, and privies in law.' And in note 1 is given privity in tenure between landlord and tenant; privity in contract alone, or in the relation between lessor and lessee, or heir and tenant in dower, or by the curtesy, by the covenants of the latter, after he has assigned his term

there are privies in representation<sup>35</sup> or in deed.<sup>36</sup> There is also privity of contract which is defined generally in Contracts § 518, and discussed as an element of tort in the C.J.S. title Torts § 9, also 62 C.J. p 1099 notes 83-86. Other classes of privity are privity of person, privity of possession, and privity in tenure, these being discussed in the following subdivisions.

Definitions respecting the different kinds of privity are somewhat difficult to formulate,<sup>37</sup> but it has been said that all privies are, in effect, if not in name, privies in estate.<sup>38</sup>

*Privity in estate* denotes the privity between an assignor and assignee,<sup>39</sup> donor and donee,<sup>40</sup> grantor and grantee,<sup>41</sup> joint tenants,<sup>42</sup> landlord and tenant,<sup>43</sup> lessor and lessee<sup>44</sup> or sublessee,<sup>45</sup> vendor by deed of warranty and a remote vendee or assignee;<sup>46</sup>

also between baron and feme,<sup>47</sup> copartners,<sup>48</sup> the lord by escheat and the terre-tenant,<sup>49</sup> and successors in office.<sup>50</sup>

It has also been said that privity of estate is that which exists between tenant for life and remainderman or reversioner, etc., and their respective assignees,<sup>51</sup> and it is stated supra p 959 note 30 that there is close privity of ownership between the tenant for life and the remainderman, but whether privity does or does not exist between the tenant for life and the remainderman is open to question in view of the statements made in Adverse Possession § 130 f and Estates § 34.

A privity in estate is one who derives his title to the property in question by purchase<sup>52</sup> or who takes by conveyance;<sup>53</sup> a successor to the same estate,

to a stranger; privity in estate alone, between the lessee and the grantee of the reversion; and privity in both estate and contract, as between lessor and lessee.—Ottensoser v. Scott, 37 So. 161, 163, 164, 47 Fla. 276, 110 Am.S.R. 137, 66 L.R.A. 346, 4 Ann.Cas. 1076.

(2) There are three manners of privities: First, privity in case of estate only; second, privity in respect of contract only; third, privity in respect of estate and contract together.—Mygatt v. Coe, 26 N.E. 611, 613, 124 N.Y. 212, 11 L.R.A. 646.

(3) The relationship of privity may be by operation of law, by descent, or by voluntary or involuntary transfer from one person to another.—Moore v. Shook, 114 N.E. 592, 595, 276 Ill. 47—Towle v. Quante, 92 N.E. 967, 969, 246 Ill. 568.

(4) There are five kinds of privies; privies in blood, privies in representation, privies in estate, privies in respect to contracts, and privies on account of estate and contract together.—Tinkham v. Borst, 24 How. Pr. N.Y., 246, 247—Gouraud v. Gouraud, 3 Redf.Surr. N.Y., 262, 267.

35. Ga.—Morris v. Murphey, 22 S. E. 635, 95 Ga. 307, 51 Am.S.R. 81.

36. Miss.—Harrington v. Harrington, 3 Miss. 701, 717.

37. Ga.—Rawson v. Brosnan, 1 S.E. 2d 423, 425, 187 Ga. 624.

38. Ill.—Moore v. Shook, 114 N.E. 592, 595, 276 Ill. 47—Towle v. Quante, 92 N.E. 967, 969, 246 Ill. 568.

39. Cal.—Corpus Juris cited in Ravizza v. Budd & Quinn, App., 111 P.2d 720, 723.

Mo.—Womach v. St. Joseph, 100 S. W. 443, 445, 201 Mo. 467, 10 L.R.A., N.S., 140.

N.J.—Corpus Juris quoted in Di Bo-

logna v. Earl, 23 A.2d 791, 795, 130 N.J.Eq. 571.

40. D.C.—David v. Nemerofsky, Mun.App., 41 A.2d 838, 840.

N.J.—Corpus Juris quoted in Di Bologna v. Earl, 23 A.2d 791, 795, 130 N.J.Eq. 571—Brown v. Fidelity Union Trust Co., 9 A.2d 311, 326, 126 N.J.Eq. 406.

50 C.J. p 407 note 84.

41. N.J.—Corpus Juris quoted in Di Bologna v. Earl, 23 A.2d 791, 795, 130 N.J.Eq. 571.

50 C.J. p 407 note 85.

42. D.C.—David v. Nemerofsky, Mun.App., 41 A.2d 838, 840.

N.J.—Corpus Juris quoted in Di Bologna v. Earl, 23 A.2d 791, 795, 130 N.J.Eq. 571—Brown v. Fidelity Union Trust Co., 9 A.2d 311, 326, 126 N.J.Eq. 406.

50 C.J. p 407 note 86.

43. N.J.—Corpus Juris quoted in Di Bologna v. Earl, 23 A.2d 791, 795, 130 N.J.Eq. 571.

50 C.J. p 407 note 87.

44. D.C.—David v. Nemerofsky, Mun.App., 41 A.2d 838, 840.

N.J.—Corpus Juris quoted in Di Bologna v. Earl, 23 A.2d 791, 795, 130 N.J.Eq. 571—Brown v. Fidelity Union Trust Co., 9 A.2d 311, 326, 126 N.J.Eq. 406.

50 C.J. p 407 note 88.

45. Ky.—Breckenridge v. Ormsby, 1 J.J.Marsh. 236, 250, 19 Am.D. 71.

N.J.—Corpus Juris quoted in Di Bologna v. Earl, 23 A.2d 791, 795, 130 N.J.Eq. 571.

46. Ky.—Breckenridge v. Ormsby, 1 J.J.Marsh. 236, 250, 19 Am.D. 71.

47. N.H.—Educational Soc. of Denomination Called Christians v. Varney, 54 N.H. 376, 378.

48. U.S.—Jenkins v. Atlantic Coast Line R. Co., C.C.S.C., 179 F. 535, 537.

Pa.—Hartley v. Phillips, 47 A. 929, 935, 198 Pa. 9.

49. Ky.—Breckenridge v. Ormsby, 1 J.J.Marsh. 236, 250, 19 Am.D. 71.

50. Ark.—Collum v. Hervey, 3 S.W. 2d 993, 995, 176 Ark. 714.

S.C.—Smith v. Moore, 7 S.C. 209, 215, 24 Am.R. 479.

51. U.S.—Jenkins v. Atlantic Coast Line R. Co., C.C.S.C., 179 F. 535, 537.

Pa.—Hartley v. Phillips, 47 A. 929, 935, 198 Pa. 9.

52. Ark.—Corpus Juris cited in Johnson v. Commonwealth Building & Loan Ass'n, 31 S.W.2d 136, 138, 182 Ark. 226.

N.J.—Corpus Juris quoted in Riddle v. Cella, 15 A.2d 59, 63, 128 N.J. Eq. 4.

50 C.J. p 407 note 99.

"Privity in estate is where one derives his title to property by purchase."—Corpus Juris cited in Thompson v. Wright, 181 S.E. 875, 877, 51 Ga.App. 817.

#### Different original meaning

When it is said that there must be privity of estate between the covenantor and the covenantee, all that is meant is that the covenant must impose such a burden on the land as to be in substance, or carry with it, a grant of an easement or quasi easement, or must be in aid of such a grant, but the expression "privity of estate" in this sense is of modern use, and has been carried over from the cases of warranty, where it was used with a wholly different meaning.—Norcross v. James, 2 N.E. 946, 948, 140 Mass. 188—15 C.J. p 1242 note 63.

53. Ark.—Corpus Juris cited in Johnson v. Commonwealth Building & Loan Ass'n, 31 S.W.2d 136, 138, 182 Ark. 226.

N.J.—Corpus Juris quoted in Riddle

not to a different estate in the same property;<sup>54</sup> and, in order to constitute one person a privy in estate to another, such other must be a predecessor in respect of the property in question, from whom the privy derives his right or title.<sup>55</sup> Thus one who acquires real estate pursuant to a tax sale is not in privity with the former owner<sup>56</sup> for the reason that there is no contractual relationship between them, and the owner does not grant the title, the purchaser being the grantee of the state.<sup>57</sup> Privies in estate strictly mean only those between whom there are certain rights and relations resulting from the estate held, and not from contract between them,<sup>58</sup> and privity in estate arises only between mutual or successive holders of title to the same right or interest in the same property,<sup>59</sup> and it denotes mutual or successive relationship<sup>60</sup> as to rights,<sup>61</sup> mutual or successive relation to the same right of property,<sup>62</sup> identity of title to an estate;<sup>63</sup> and it is not created by the receipt of a part of the product of an estate, for an interest in the estate itself is necessary to create such privity.<sup>64</sup>

The term "privity of estate" in some instances means only privity of possession,<sup>65</sup> and does not mean privity of title.<sup>66</sup>

Privity of estate is treated in Covenants § 58. For other references see the index to the title Landlord and Tenant.

*Privity in both estate and contract* denotes the privity between lessor and lessee.<sup>67</sup> Where both privity of contract and of estate exist, privity of estate may be destroyed, and the privity of contract remain.<sup>68</sup>

*Privity in blood* denotes the privity between heir and ancestor<sup>69</sup> and coparceners.<sup>70</sup> A privy in blood derives his title by descent.<sup>71</sup>

*Privity or privies in law.* Where the law, without privity of blood or estate, casts land upon another;<sup>72</sup> the privity in case of escheats.<sup>73</sup> Privies in law are such as the lord by escheat,<sup>74</sup> a tenant by curtesy<sup>75</sup> or in dower,<sup>76</sup> the incumbent of a benefice,<sup>77</sup> a husband suing or defending in right of

v. Cella, 15 A.2d 59, 63, 128 N.J. Eq. 4.

N.Y.—Douglass v. Howland, 24 Wend. 35, 53.

54. Ga.—*Corpus Juris* quoted in Rawson v. Brosnan, 1 S.E.2d 423, 425, 187 Ga. 624—Commercial Credit Corporation v. Citizens & Southern Nat. Bank, 23 S.E.2d 198, 200, 68 Ga.App. 393.

S.C.—*Corpus Juris* quoted in First Nat. Bank of Greenville v. U. S. Fidelity & Guaranty Co., 35 S.E.2d 47, 60, 207 S.C. 15, 162 A.L.R. 1003. 50 C.J. p 408 note 9.

55. Ala.—Skelton v. Tyner, 25 So. 2d 160, 161, 247 Ala. 511.

Ga.—*Corpus Juris* quoted in Rawson v. Brosnan, 1 S.E.2d 423, 425, 187 Ga. 624.

50 C.J. p 408 note 7.

56. Ga.—*Corpus Juris* quoted in Rawson v. Brosnan, 1 S.E.2d 423, 425, 187 Ga. 624.

N.Y.—O'Donnell v. McIntyre, 23 N. E. 455, 456, 118 N.Y. 156.

57. N.Y.—O'Donnell v. McIntyre, supra.

58. Ky.—Breckenridge v. Ormsby, 1 J.J.Marsh. 236, 250, 19 Am.D. 71. 50 C.J. p 407 note 98.

59. N.J.—Di Bologna v. Earl, 23 A. 2d 791, 796, 130 N.J.Eq. 571.

60. W.Va.—Smith v. White, 60 S.E. 404, 405, 63 W.Va. 472, 14 L.R.A., N.S., 530.

50 C.J. p 407 note 2.

**"Privity" in its relationship to estates**

When the term "privity" is considered with respect to its relationship to estates in realty, it must be

understood that it implies succession, that is, successive ownership or possession of the identical estate in the same property, and one who is in privity with another with respect to an estate stands in exactly the same position with respect thereto as did his predecessor in title; he takes the estate with all the burdens and benefits attending it.—Bailey v. Stedronsky, 13 N.E.2d 588, 591, 57 Ohio App. 265.

61. S.C.—Smith v. Moore, 7 S.C. 209, 215, 24 Am.R. 479.

50 C.J. p 407 note 3.

62. Ga.—*Corpus Juris* quoted in Commercial Credit Corporation v. Citizens & Southern Nat. Bank, 23 S.E.2d 198, 200, 68 Ga.App. 393.

N.Y.—Hartford Accident & Indemnity Co. v. First Nat. Bank & Trust Co. of Hudson, 9 N.Y.S.2d 590, 593, 256 App.Div. 30.

50 C.J. p 408 note 4.

**Similarly expressed**

Privity in estate implies mutuality of, or succession in, interest.—Brown v. March, 242 P. 155, 157, 111 Okl. 288—Butler v. Fryer, 159 P. 367, 368, 59 Okl. 274.

63. Ga.—*Corpus Juris* quoted in Commercial Credit Corporation v. Citizens & Southern Nat. Bank, 23 S.E.2d 198, 200, 68 Ga.App. 393.

50 C.J. p 408 note 5.

64. Pa.—Aiken v. Zahn, 23 Pa.Super. 411, 414.

65. Tex.—Free v. Owen, 113 S.W.2d 1221, 1224, 131 Tex. 281—Cook v. Hutto, Civ.App., 151 S.W.2d 642, 645.

66. Tex.—Cook v. Hutto, supra.

67. Fla.—Ottensoser v. Scott, 37 So. 161, 163, 47 Fla. 276, 110 Am.S.R. 137, 66 L.R.A. 346, 4 Ann.Cas. 1076.

68. Colo.—Bonfils v. McDonald, 270 P. 650, 654, 84 Colo. 325.

69. N.J.—Di Bologna v. Earl, 23 A. 2d 791, 796, 130 N.J.Eq. 571—Brown v. Fidelity Union Trust Co., 9 A.2d 311, 326, 126 N.J.Eq. 406. 50 C.J. p 408 note 25.

70. Miss.—H. Weston Lumber Co. v. Lacey Lumber Co., 85 So. 193, 195, 123 Miss. 208, 10 A.L.R. 436. 50 C.J. p 408 note 26.

71. Ga.—*Corpus Juris* quoted in Thompson v. Wright, 181 S.E. 875, 877, 51 Ga.App. 817.

50 C.J. p 408 note 27.

72. N.J.—Di Bologna v. Earl, 23 A. 2d 791, 796, 130 N.J.Eq. 571—Brown v. Fidelity Union Trust Co., 9 A.2d 311, 326, 126 N.J.Eq. 406.

50 C.J. p 408 note 29.

73. N.J.—Di Bologna v. Earl, 23 A. 2d 791, 796, 130 N.J.Eq. 571—Brown v. Fidelity Union Trust Co., 9 A.2d 311, 326, 126 N.J.Eq. 406.

50 C.J. p 408 note 28.

74. Ga.—Blakewood v. Yellow Cab Co., 6 S.E.2d 126, 127, 61 Ga.App. 149.

75. Ga.—Blakewood v. Yellow Cab Co., supra.

Mo.—Womach v. St. Joseph, 100 S. W. 443, 445, 201 Mo. 467, 10 L.R.A., N.S., 140.

76. Ga.—Blakewood v. Yellow Cab Co., 6 S.E.2d 126, 127, 61 Ga.App. 149.

50 C.J. p 408 note 31.

77. Ga.—Blakewood v. Yellow Cab Co., supra.

his wife,<sup>78</sup> etc. Certain privies in law, as an executor or administrator, are also designated as privies in representation.<sup>79</sup> Privy in law, it has been said, involves the right of representation.<sup>80</sup>

*Privy in deed.* By a privy to a deed is meant a party to the deed or a legal representative of, or successor in title to, a party; the heirs, executors, administrators, or assigns of a party; what the French call the *ayant causes*.<sup>81</sup>

*Privy of possession* denotes merely a succession of relationship to the same thing.<sup>82</sup> The privy required for the tacking of adverse possessions into one continuous possession is privy of possession, and not necessarily privy of title, as stated in *Adverse Possession* § 129 b.

*Privy of person* denotes the privy between trustee and cestui que trust.<sup>83</sup>

*Privy in representation* denotes the privy between executor and testator<sup>84</sup> or between administrator and intestate.<sup>85</sup>

*Privy in tenure* denotes the privy between landlord and tenant.<sup>86</sup>

*As an adjective*, the words "privy" or "privacy"

are defined as meaning admitted to the participation of knowledge with another of a secret transaction;<sup>87</sup> privately knowing;<sup>88</sup> secretly cognizant.<sup>89</sup> To be privy to an act means to be bound by it.<sup>90</sup>

*Phrases* employing the word "privy" are set out in the note.<sup>91</sup>

**PRIVY.** In common use the words "water-closet," "privy," "toilet," and "closet" are employed to express the same meaning.<sup>92</sup>

**PRIZE.** A reward gained by contest or competition; that which is obtained against the competition of others; anything carried off as the result or award of a contest.<sup>93</sup> The word "prize" is also defined or discussed in *Gaming* §§ 1 c (2), 88 b (4), and *Lotteries* § 2 d.

"Prize" is employed in a different sense to denote any goods, the subject of marine capture, and in this sense is treated in the C.J.S. title *War* §§ 27-32, also 50 C.J. p 410 notes 63-67.

*Phrases* employing the word "prize" are set out in the note.<sup>94</sup>

78. Ga.—*Blakewood v. Yellow Cab Co.*, supra.

79. Ga.—*Johnston v. Duncan*, 67 Ga. 61, 70—*Latine v. Clements*, 3 Ga. 426, 430.

80. Iowa.—*McConnell v. Poor*, 84 N.W. 968, 969, 113 Iowa 133, 52 L.R.A. 312.

Kan.—*Park v. Ensign*, 71 P. 230, 231, 66 Kan. 50, 97 Am.S.R. 352.

81. La.—*Farley v. Frost-Johnson Lumber Co.*, 63 So. 122, 124, 133 La. 497, L.R.A.1915A 200, Ann.Cas. 1915C 717.

#### Similarly expressed

A privy to a deed means a party, legal representative of, or successor in title to, a party and one bound by the deed.—*Bailey v. Stedronsky*, 13 N.E.2d 588, 591, 57 Ohio App. 265.

82. Ind.—*Cooper v. Tarpley*, 41 N.E. 2d 640, 643, 112 Ind.App. 1.

83. S.C.—*Thompson v. Hudgens*, 159 S.E. 807, 812, 161 S.C. 450. 50 C.J. p 408 note 33.

84. Mo.—*Corpus Juris* cited in *In re Thomasson's Estate*, 196 S.W.2d 155, 159, 355 Mo. 274.

N.J.—*Di Bologna v. Earl*, 23 A.2d 791, 796, 130 N.J.Eq. 571—*Brown v. Fidelity Union Trust Co.*, 9 A.2d 311, 326, 126 N.J.Eq. 406. 50 C.J. p 409 note 34.

85. Mo.—*Corpus Juris* cited in *In re Thomasson's Estate*, 196 S.W.2d 155, 159, 355 Mo. 274.

N.J.—*Di Bologna v. Earl*, 23 A.2d 791, 796, 130 N.J.Eq. 571—*Brown v. Fidelity Union Trust Co.*, 9 A.2d 311, 326, 126 N.J.Eq. 406. 50 C.J. p 409 note 35.

86. Fla.—*Ottensoser v. Scott*, 37 So. 161, 163, 47 Fla. 276, 110 Am.S.R. 137, 66 L.R.A. 346, 4 Ann.Cas. 1076.

87. Fla.—*Taylor v. Ferroman Properties*, 139 So. 149, 150, 103 Fla. 960. 50 C.J. p 406 note 72.

88. Fla.—*Taylor v. Ferroman Properties*, supra. 50 C.J. p 406 note 73.

89. Fla.—*Taylor v. Ferroman Properties*, supra. 50 C.J. p 406 note 74.

90. La.—*Farley v. Frost-Johnson Lumber Co.*, 63 So. 122, 124, 133 La. 497, L.R.A.1915A 200, Ann.Cas. 1915C 717.

#### 91. Phrases

(1) "Privy council" see 20 C.J.S. p 714 note 67.

(2) "Privy examination" see *Acknowledgments* § 80.

(3) "Privy token;" a term used to denote a false mark or sign, forged object, counterfeited letter, key,

ring, etc., used to deceive persons and thereby fraudulently to get possession of property.—*State v. Renick*, 56 P. 275, 276, 33 Or. 584, 72 Am.S.R. 758, 44 L.R.A. 266.

(4) "Privy verdict" see the C.J.S. title *Trial* § 485, also 50 C.J. p 409 notes 42-51.

92. Conn.—*Louisville & N. R. Co. v. Commonwealth*, 194 S.W. 313, 314, 175 Ky. 282. 50 C.J. p 409 note 38.

93. Miss.—*Sullivan v. State*, 7 So. 275, 276, 67 Miss. 346.

#### 94. Phrases

(1) "Prize court" see *Admiralty* §§ 51-55, and the C.J.S. title *War* § 31, also 67 C.J. p 407 note 9-p 411 note 92.

(2) "Prize goods" see the C.J.S. title *War* § 28, also 50 C.J. p 410 note 68, and 67 C.J. p 400 note 61-p 403 note 13.

(3) "Prize law" see 52 C.J.S. p 1029 note 9.

(4) "Prize logs" see *Logs and Logging* § 1 a.

(5) "Prize money" see the C.J.S. title *War* § 32, also 67 C.J. p 411 note 93-p 412 note 5.

(6) "Prize tickets" see *Lotteries* § 1.

## PRIZE FIGHTING

This Title includes fighting without weapons by agreement, for a prize, reward, stakes, or championship, advising or aiding therein, and sending, publishing, accepting, etc., a challenge so to fight; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such acts as public offenses.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

### Analysis

- § 1. Definitions—p 963
- 2. Nature and elements of offense—p 963
- 3. Persons liable—p 965
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See also descriptive word index in the back of this Volume

### § 1. Definitions

A "prize fight" is a contest in which the contestants fight for a prize, reward, or wager.

The term "prize fight" had no technical meaning at common law.<sup>1</sup> It has been defined as a contest in which the contestants fight for a prize, reward, or wager;<sup>2</sup> a pugilistic encounter for a prize or wager;<sup>3</sup> and, according to some authorities, in public.<sup>4</sup> "Prize fighting" has been defined as the act or the practice of fighting for a prize;<sup>5</sup> fighting, especially boxing, in public for a reward or wager.<sup>6</sup>

A "prize fighter" has been defined as one who fights or boxes publicly for a reward;<sup>7</sup> one who fights publicly for a reward.<sup>8</sup>

"Glove contest" is a mere exhibition of skill in sparring with gloves, calculated not to do great

bodily injury,<sup>9</sup> and indulged in for the purpose of recreation, exercise, and instruction,<sup>10</sup> and not for the purpose of introducing and exhibiting for a prize trained and professional prize fighters;<sup>11</sup> "glove contest" is distinguishable from "prize fight."<sup>12</sup>

### § 2. Nature and Elements of Offense

- a. In general
- b. Particular elements

#### a. In General

The specific offense of prize fighting is unknown to the common law; various statutes have created the offense.

The specific offense of prize fighting is unknown to the common law,<sup>13</sup> although under the circum-

1. Ohio.—Seville v. State, 30 N.E. 621, 49 Ohio St. 117, 131, 15 L.R.A. 516.

2. Kan.—State v. Purtell, 43 P. 782, 783, 56 Kan. 479.  
50 C.J. p 411 note 2.

"Fight" defined generally see 36 C.J. S. p 749.

"Wager" defined generally see Gambling § 1 c (1).

Construction of statutory use of term "prize fight" see 50 C.J. p 411 note 4.

3. Ind.—State v. Patton, 64 N.E. 850, 851, 159 Ind. 248.

"Encounter" defined generally see 30 C.J.S. p 239.

"Prize fight or other fight," as used

in statute, means any pugilistic encounter or boxing match for a stake or reward.—Teeters v. Frost, 292 P. 356, 145 Okl. 273, 71 A.L.R. 179.

"Pugilistic encounter" defined by statute

D.C.—Dane v. U. S., 18 F.2d 811, 812, 57 App.D.C. 161, certiorari denied 48 S.Ct. 35, 275 U.S. 538, 72 L.Ed. 413.

50 C.J. p 412 note 4 [e].

4. Miss.—Sullivan v. State, 7 So. 275, 276, 67 Miss. 346.

Fighting in public as element of offense see infra § 2 b.

5. Miss.—Sullivan v. State, supra.

6. Miss.—Sullivan v. State, supra.

7. Miss.—Sullivan v. State, supra. 50 C.J. p 411 note 2 [c].

8. Miss.—Sullivan v. State, supra.

9. La.—State v. Olympic Club, 15 So. 190, 46 La. Ann. 935, 947, 24 L. R.A. 452.

10. La.—State v. Olympic Club, 17 So. 599, 600, 47 La. Ann. 1095.

11. La.—State v. Olympic Club, supra.

12. La.—State v. Olympic Club, 15 So. 190, 46 La. 935, 24 L.R.A. 452. 28 C.J. p 710 note 52.

13. Miss.—Sullivan v. State, 7 So. 275, 67 Miss. 346. 50 C.J. p 412 note 5.

stances the participants might be punishable for affray, as discussed in Affray § 1 c (2), assault and battery,<sup>14</sup> breach of the peace,<sup>15</sup> or riot.<sup>16</sup> At common law holding or engaging in a boxing or sparring match or contest is not necessarily illegal or an offense,<sup>17</sup> but the surrounding circumstances may be such as to render participants guilty of a breach of the peace.<sup>18</sup>

Various statutes have prohibited and defined as a criminal offense prize fighting and certain related acts,<sup>19</sup> and also engaging in a sparring exhibition within the state, at which an admission fee is charged, and certain related acts,<sup>20</sup> subject to the limitation sometimes imposed or recognized that such a statute does not apply to boxing or sparring exhibitions conducted under the regulation and supervision of the state athletic commission.<sup>21</sup> The view has been taken that such a statute, being in derogation of the common law, must be strictly construed.<sup>22</sup> A provision exempting from the operation of the criminal statute activities in a gymnasium or athletic club under certain circumstances does not apply where the contest is in fact a prize fight.<sup>23</sup>

Regulation of boxing or sparring contests is discussed in the C.J.S. title Theaters and Shows §§ 3, 4, also 50 C.J. p 412 notes 18, 19, 21, 22; 62 C.J. p 846 note 81.

Under a former federal statute, in order to con-

stitute the offense of receiving a film or other pictorial representation of a prize fight from the mails or from a common carrier under certain circumstances, a transportation through the mails, as discussed in Post Office § 64, or by a common carrier was necessary,<sup>24</sup> but under a related provision of such statute a transportation by mail, as discussed in Post Office § 37, or by common carrier was not an essential element of the offense.<sup>25</sup>

### b. Particular Elements

Generally the question as to what are the elements of the offense of prize fighting or of related offenses depends on the terms of the statute creating the offense; usually an intention on the part of the participants to attack one another physically and the expectation on their part of a prize or reward are essential.

It is usually held that one of the elements of a prize fight is an intention on the part of the participants to do physical violence to each other.<sup>26</sup> The mere fact that an injury may result incidentally in a boxing or sparring match does not make it a prize fight.<sup>27</sup> The mere fact, however, that it is a so-called friendly bout and for scientific points does not change the character of a contest which is in other respects a prize fight,<sup>28</sup> as anger or ill will on the part of the contestants is not a necessary element of the offense;<sup>29</sup> nor is it necessary that the contest be fought "to a finish," or, in other words, until one of the contestants be overcome.<sup>30</sup>

*Previous appointment or arrangement.* Where

14. Miss.—Sullivan v. State, supra. 50 C.J. p 412 note 6.

15. N.Y.—Fitzsimmons v. New York State Athletic Commn., 146 N.Y. S. 117, affirmed 147 N.Y.S. 1111, 162 App.Div. 904.

16. Miss.—Sullivan v. State, 7 So. 275, 67 Miss. 346. 50 C.J. p 412 note 8.

17. Mo.—Colliseum Athletic Assoc. v. Dillon, 223 S.W. 955, 204 Mo.App. 504.

N.Y.—Zwirn v. Galento, 43 N.E.2d 474, 288 N.Y. 428.

Vt.—State v. Burnham, 56 Vt. 445, 43 Am.R. 801.

18. Vt.—State v. Burnham, supra.

19. N.Y.—Zwirn v. Galento, 43 N.E.2d 474, 288 N.Y. 428—Baksi v. Wallman, 62 N.Y.S.2d 26, affirmed 63 N.Y.S.2d 215, 270 App.Div. 995, modified on other grounds 65 N.Y. S.2d 894, 271 App.Div. 422, affirmed 74 N.E.2d 172, 297 N.Y. 456.

Okl.—Teeters v. Frost, 292 P. 356, 145 Okl. 273, 21 A.L.R. 179. 50 C.J. p 412 note 10.

20. N.Y.—Zwirn v. Galento, 43 N.E.2d 474, 288 N.Y. 428—Baksi v. Wallman, 62 N.Y.S.2d 26, affirmed 63 N.Y.S.2d 215, 270 App.Div. 995, modified on other grounds 65 N.Y.

S.2d 894, 271 App.Div. 422, affirmed 74 N.E.2d 172, 297 N.Y. 456.

#### Contests between amateurs

(1) Prior to certain amendments of the statute authorizing, under regulation of the state athletic commission, boxing and sparring matches, a contest between amateurs at which an admission fee was charged was not unlawful and did not constitute an offense, even though the license contemplated by such regulatory statute had not been obtained.—McHugh v. Mulrooney, 179 N.E. 753, 258 N.Y. 321, 83 A.L.R. 693—Bridge City Athletic Club v. Salberg, 254 N.Y.S. 777, 234 App.Div. 309.

(2) However, there was some authority to the contrary before the rule was settled.—City Island Athletic Club v. Mulrooney, 253 N.Y.S. 768, 141 Misc. 733.

21. Minn.—Safo v. Lakofsky, 238 N.W. 641, 184 Minn. 336.

N.Y.—Zwirn v. Galento, 43 N.E.2d 474, 288 N.Y. 428—Baksi v. Wallman, 62 N.Y.S.2d 26, affirmed 63 N.Y.S.2d 215, 270 App.Div. 995, modified on other grounds 65 N.Y. S.2d 894, 271 App.Div. 422, affirmed 74 N.E.2d 172, 297 N.Y. 456.

22. N.Y.—Zwirn v. Galento, 43 N.E.2d 474, 288 N.Y. 428.

23. Ohio.—In re Athletic Clubs, 5 Ohio S. & C.P. 696, 7 Ohio N.P. 457. 50 C.J. p 412 note 17 [a].

24. U.S.—Atlanta Enterprises v. Crawford, D.C.Ga., 22 F.2d 834.

25. U.S.—Atlanta Enterprises v. Crawford, supra.

#### Statute as:

Prohibiting importation see Customs Duties § 30 b.  
Regulation of commerce see Commerce § 67.

26. Kan.—State v. Purtell, 43 P. 782, 56 Kan. 479. 50 C.J. p 413 note 30.

27. La.—State v. Olympic Club, 15 So. 190, 46 La. Ann. 935, 24 L.R.A. 452. 50 C.J. p 413 note 31.

28. Pa.—Commonwealth v. Sullivan, 16 Wkly.N.C. 14. 50 C.J. p 413 note 32.

29. Mass.—Commonwealth v. Collberg, 119 Mass. 350, 20 Am.R. 328.

30. Ohio.—State v. Moore, 5 Ohio S. & C.P. 689, 4 Ohio N.P. 81. 50 C.J. p 413 note 34.

the statute makes it unlawful to engage in a fight in accordance with a previous appointment or arrangement, it is not material that the appointment or agreement be made at any particular length of time previous to the contest,<sup>31</sup> or in any particular form of words,<sup>32</sup> or in writing.<sup>33</sup> It is not material whether the agreement was made within the jurisdiction in which the fight was held and the prosecution instituted.<sup>34</sup>

**Prize or reward.** Generally, under statutes prohibiting prize fights, or boxing or sparring matches for a prize or reward, it is held that the contest must have been engaged in with an expectation of a prize or reward either to be won from a contestant or otherwise awarded.<sup>35</sup> It is not essential that the prize or reward be gained by the contestant from the other<sup>36</sup> or be awarded by a third person.<sup>37</sup> It may consist of money paid or contributed by the spectators<sup>38</sup> or of the proceeds of door or gate receipts.<sup>39</sup> It is immaterial that the defeated as well as the successful contestant is rewarded,<sup>40</sup> that the contestants are paid a specified sum,<sup>41</sup> that the reward is divided equally between them,<sup>42</sup> or that it is not in kind as to each contestant,<sup>43</sup> or even that the prize was not actually awarded.<sup>44</sup> It has been held that it is not essential that the prize or reward be won by one of the contestants.<sup>45</sup> Under some statutes prohibiting fighting in accordance with a previous arrangement or appointment, it seems that it is not necessary in order to constitute a violation that a fight should be for a prize or reward.<sup>46</sup>

**Contest in public.** Under some statutes only public contests are prohibited,<sup>47</sup> and a private contest, whether amateur or professional, although for a prize or wager, will not constitute an offense thereunder.<sup>48</sup> In some jurisdictions the statutes are construed to prohibit both public and private contests.<sup>49</sup>

**Manner of conducting contest.** The manner of conducting the contest may be consistent with a lawful or unlawful contest;<sup>50</sup> but, if the contest embraces the essential elements of a prize fight, various surrounding circumstances are not material,<sup>51</sup> as, for example, whether conducted with or without gloves<sup>52</sup> for a limited number of rounds only,<sup>53</sup> in a ring,<sup>54</sup> or before few or many spectators;<sup>55</sup> the clothing worn by the contestants;<sup>56</sup> the rules observed;<sup>57</sup> and precautions taken to safeguard the lives and persons of the contestants.<sup>58</sup> It has been said that boxing without gloves, for a display of skill and pastime, when there is no breach of the peace and no intentional injury to the person, is not embraced within a statute prohibiting prize fighting.<sup>59</sup>

### § 3. Persons Liable

One who has charged an admission to see a pugilistic encounter has been regarded as a principal with respect to the violation of a statute making it unlawful to engage in a pugilistic encounter, to see which an admission fee is charged.

With respect to the violation of a statute making it unlawful to engage in a pugilistic encounter, to see which an admission fee is charged, one who charged a fee for admission to see such an encounter has been regarded as a principal.<sup>60</sup>

31. Ohio.—State v. Moore, *supra*.

32. Ohio.—State v. Moore, *supra*.

33. Ohio.—State v. Moore, *supra*.

34. Mass.—Commonwealth v. Welsh, 7 Gray 324.

35. Mich.—People v. Taylor, 56 N. W. 27, 96 Mich. 576, 21 L.R.A. 287. 50 C.J. p 413 note 35.

36. Kan.—State v. Purtell, 43 P. 782, 56 Kan. 479.

37. Kan.—State v. Purtell, *supra*.

38. N.Y.—People v. Finucan, 80 N. Y.S. 929, 80 App.Div. 407, 17 N.Y. Cr. 254.

39. Ohio.—State v. Moore, 5 Ohio S. & C.P. 689, 4 Ohio N.P. 81.

40. Kan.—State v. Purtell, 43 P. 782, 56 Kan. 479.

41. Del.—State v. Gregory, 143 A. 458, 4 W.W.Harr. 115.

42. Okl.—Teeters v. Frost, 292 P. 356, 145 Okl. 273, 71 A.L.R. 179. 50 C.J. p 413 note 42.

43. Mo.—State v. Business Men's

Athletic Club, 163 S.W. 901, 178 Mo.App. 548.

50 C.J. p 413 note 43.

44. Ohio.—State v. Moore, 5 Ohio S. & C.P. 689, 4 Ohio N.P. 81.

45. Ark.—Magness v. Isgrig, 225 S.W. 332, 145 Ark. 232. 50 C.J. p 413 note 45.

46. Mass.—Commonwealth v. Welsh, 7 Gray 324.

50 C.J. p 413 note 47.

47. Miss.—Sullivan v. State, 7 So. 275, 67 Miss. 346.

50 C.J. p 413 note 48.

48. Miss.—Sullivan v. State, *supra*. 50 C.J. p 414 note 49.

49. Ohio.—Seville v. State, 30 N.E. 621, 49 Ohio St. 117, 15 L.R.A. 516 —State v. Hobart, 11 Ohio S. & C. P. 166, 8 Ohio N.P. 246.

50. Vt.—State v. Burnham, 56 Vt. 445, 48 Am.R. 801.

51. N.Y.—People v. Finucan, 80 N. Y.S. 929, 80 App.Div. 407, 17 N.Y. Cr. 254.

50 C.J. p 414 notes 57-65.

52. Okl.—Teeters v. Frost, 292 P. 356, 145 Okl. 273, 71 A.L.R. 179. 50 C.J. p 414 note 57.

53. Ohio.—State v. Hobart, 11 Ohio S. & C.P. 166, 8 Ohio N.P. 246.

54. N.Y.—People v. Finucan, 80 N. Y.S. 929, 80 App.Div. 407, 17 N.Y. Cr. 254.

50 C.J. p 414 note 65 [a].

55. Ohio.—Seville v. State, 30 N.E. 621, 49 Ohio St. 117, 15 L.R.A. 516.

56. La.—State v. Olympic Club, 15 So. 190, 46 La.Ann. 935, 24 L.R.A. 452.

57. La.—State v. Olympic Club, *supra*. N.Y.—People v. Finucan, 80 N.Y.S. 929, 80 App.Div. 407, 17 N.Y. Cr. 254. 50 C.J. p 414 note 63, 65 [a].

58. Del.—State v. Gregory, 143 A. 458, 4 W.W.Harr. 115.

59. La.—State v. Olympic Club, 17 So. 599, 47 La.Ann. 1095.

60. D.C.—Dane v. U. S., 18 F.2d 811, 57 App.D.C. 161, certiorari de-

## § 4. Indictment or Information

General rules as to the sufficiency of indictments and Informations apply to indictments or informations for prize fighting and related offenses.

In accordance with rules in criminal cases generally, stated in Indictments and Informations §§ 100, 130, 139, the indictment or information must sufficiently inform accused and the court of the offense accused is charged with having committed;<sup>61</sup> and it should set forth with reasonable precision and certainty all the elements necessary to constitute such offense.<sup>62</sup> It has been held or recognized that an indictment or information which charges the offense in the words of the statute is sufficient,<sup>63</sup> at least where the statute sets forth with precision and certainty all the elements necessary to constitute the offense,<sup>64</sup> although it is not necessary to follow the language of the statute if the acts constituting the offense are clearly described in the indictment.<sup>65</sup> The view has been taken, however, that where a statute makes engaging in prize fighting an offense, without further definition, it is essential to go beyond the terms of the statute by making allegations aptly charging the offense.<sup>66</sup> The necessity for an averment that the fight took place in public depends on whether publicity is an essential element of the crime.<sup>67</sup> Where the offense consists of engaging in a prize fight, it has been held that the indictment or information must show that both participants fought;<sup>68</sup> but the view has been taken that is sufficient to allege that accused engaged with another in a fight.<sup>69</sup> It is unnecessary to negative the existence of facts bringing the case within exceptions contained in a proviso in a statutory provision creating a different offense.<sup>70</sup>

## § 5. Evidence

Rules as to the admissibility, weight, and sufficiency of evidence applicable in criminal prosecutions generally

apply in prosecutions for prize fighting and related offenses.

Rules as to the admissibility of evidence applicable in criminal prosecutions generally, stated in Criminal Law §§ 600-899, control as to the admissibility of evidence in prosecutions for prize fighting, or for engaging in unlawful boxing or sparring matches and exhibitions.<sup>71</sup> It has been held that it is not competent to show that contests of the type involved are common and harmless amusements in colleges,<sup>72</sup> and that the opinion of an expert as to whether the contest in question was a glove contest or a prize fight is not admissible.<sup>73</sup> The view has been taken that it is not error to refuse to allow the jury to examine the gloves used, as they furnish no criterion of the character of the contest,<sup>74</sup> or of how it was conducted,<sup>75</sup> although evidence that the contest was had with gloved hands has been held admissible,<sup>76</sup> as has evidence as to the kind, size, weight, and other characteristics of the gloves used.<sup>77</sup>

Rules as to the weight and sufficiency of evidence applicable in criminal prosecutions generally, stated in Criminal Law §§ 900-926, apply.<sup>78</sup> Circumstantial evidence may be sufficient to show a previous appointment or arrangement to hold a prize fight.<sup>79</sup>

## § 6. Trial and Review

In prosecution for prize fighting and related offenses, questions of fact are for the jury. Instructions should present to the jury the correct legal principles applicable and should properly point out the elements of the offense.

While the view has been expressed that what constitutes a prize fight may be a question of law,<sup>80</sup> it has been held or recognized that it is usually proper and necessary for the jury to determine under proper instructions whether a contest was a prize

nied 48 S.Ct. 35, 275 U.S. 538, 72 L.Ed. 418.

Liability of spectators under English statute see 50 C.J. p 414 notes 66-71.

61. Del.—State v. Gregory, 143 A. 458, 4 W.W.Harr. 115. 50 C.J. p 414 note 74.

62. Ind.—State v. Patton, 64 N.E. 850, 159 Ind. 248.

63. Mich.—People v. Taylor, 56 N. W. 27, 96 Mich. 276, 21 L.R.A. 287.

64. Mass.—Commonwealth v. Barrett, 108 Mass. 302—Commonwealth v. Welsh, 7 Gray 324.

65. Ind.—State v. Patton, 64 N.E. 850, 159 Ind. 248.

66. Miss.—Sullivan v. State, 7 So. 275, 67 Miss. 346.

67. Miss.—Sullivan v. State, supra. Ohio.—Seville v. State, 30 N.E. 621, 49 Ohio St. 117, 15 L.R.A. 516.

68. Miss.—Sullivan v. State, 7 So. 275, 67 Miss. 346. 50 C.J. p 415 note 81.

69. Ohio.—Seville v. State, 30 N.E. 621, 49 Ohio St. 117, 15 L.R.A. 516. 50 C.J. p 415 note 82.

70. Ohio.—Seville v. State, supra. 50 C.J. p 415 note 83.

71. Ohio.—Seville v. State, 30 N.E. 621, 49 Ohio St. 117, 15 L.R.A. 516. 50 C.J. p 415 notes 89-94.

72. Vt.—State v. Burnham, 56 Vt. 445, 48 Am.R. 801.

73. Ohio.—Seville v. State, 30 N.E. 621, 49 Ohio St. 117, 15 L.R.A. 516.

Civil action in which criminal statute involved

La.—State v. Olympic Club, 15 So. 190, 46 La.Ann. 935, 24 L.R.A. 452.

74. Vt.—State v. Burnham, 56 Vt. 445, 48 Am.R. 801.

75. Vt.—State v. Burnham, supra.

76. Ohio.—State v. Moore, 5 Ohio S. & C.P. 689, 4 Ohio N.P. 81.

77. Ohio.—State v. Moore, supra.

78. Evidence as to particular matters held sufficient

Okl.—Sampson v. State, 194 P. 279, 18 Okl.Cr. 191.

50 C.J. p 415 note 95 [a].

79. Mass.—Commonwealth v. Welsh, 7 Gray 324.

80. Mich.—People v. Taylor, 56 N. W. 27, 96 Mich. 276, 21 L.R.A. 287.



fight or a lawful glove contest,<sup>81</sup> whether an alleged club was only a sham and pretense,<sup>82</sup> and the sufficiency of the corroboration of an accomplice who testifies on a prosecution for aiding and abetting a prize fight.<sup>83</sup>

Since it is the purpose of instructions to define for the jury, and direct their attention to, the legal principles which apply to, and govern, the facts proved or presumed in the case,<sup>84</sup> an instruction in a prosecution for prize fighting is improper, where it fails to distinguish between a prize fight and a sparring exhibition,<sup>85</sup> or between a prize fight and other physical contests,<sup>86</sup> or where it fails to explain the conditions under which sparring exhibitions are permissible under a statute.<sup>87</sup> It has been held, under a statute making it unlawful to be a party to, or

engage in, a prize fight, that a charge that does not instruct that a reward to be gained by the competition, either to be won from the contestant or otherwise awarded, and that an intention to inflict some degree of bodily harm on the contestant, are necessary elements to a prize fight, is improper.<sup>88</sup> The correctness of an instruction with respect to the public character of an exhibition may depend on the evidence.<sup>89</sup>

## § 7. Sentence and Punishment

Judgment and sentence in criminal cases are discussed in Criminal Law §§ 1556-1606, and punishment of crime in Criminal Law §§ 1974-2007.

Examine Pocket Parts for later cases.

**PRO.** A Latin preposition meaning for; in respect of; on account of; in behalf of.<sup>1</sup> It has been held to be equivalent to, or synonymous with "for" see 36 C.J.S. p 1133 note 68.

This preposition is used as the introductory word of many Latin phrases.<sup>2</sup>

*Pro rata.* A Latin expression meaning, literally, "according to the rate."<sup>3</sup> It is so common in use and so frequently employed in daily intercourse among all classes of men that it may almost be said to have become a part of our vernacular,<sup>4</sup> and it is frequently used in statutes as well as in the opinions of learned judges and by text writers on various titles of the law.<sup>5</sup> While it has been said that the term has a double meaning,<sup>6</sup> it has also been said

to have a clearly defined and well-understood meaning,<sup>7</sup> and that it is well understood by persons of ordinary intelligence to denote a disposition of a fund or sum indicated in proportion to some rate or standard, fixed in the mind of the person speaking or writing, manifested by the words spoken or written, according to which rate or standard the allowance is to be made or calculated.<sup>8</sup> However, it has no meaning unless referable to some rule or standard.<sup>9</sup> It never means, as applied to persons, equality, or an equal division; the term used necessarily implies an unequal division, as between different persons.<sup>10</sup>

The term "pro rata" has been defined as meaning according to a measure which fixes proportions.<sup>11</sup> The term "pro rata" has further been de-

81. Kan.—State v. Purtell, 43 P. 782, 56 Kan. 479.  
50 C.J. p 415 note 99.

82. Mass.—Commonwealth v. Mack, 73 N.E. 534, 187 Mass. 441.

83. N.Y.—People v. Finucan, 80 N.Y.S. 929, 80 App.Div. 407, 17 N.Y. Cr. 254.

84. Okl.—Sampson v. State, 194 P. 279, 18 Okl.Cr. 191.  
50 C.J. p 415 note 4.

85. Colo.—People v. Shirley, 210 P. 327, 72 Colo. 120—People v. Corbett, 209 P. 808, 72 Colo. 117.

86. Kan.—State v. Purtell, 43 P. 782, 56 Kan. 479.

87. Colo.—People v. Corbett, 209 P. 808, 72 Colo. 117.

88. Mich.—People v. Taylor, 56 N.W. 27, 96 Mich. 576, 21 L.R.A. 287.

89. Mass.—Commonwealth v. Mack, 73 N.E. 534, 187 Mass. 441.  
50 C.J. p 416 note 9.

1. Black L.D.

2. Black L.D.

3. N.Y.—Home Ins. Co. v. Continental Ins. Co., 73 N.E. 65, 66, 180 N.Y. 389, 105 Am.S.R. 772.  
50 C.J. p 792 note 88.

4. Cal.—Rosenberg v. Frank, 58 Cal. 387, 405.

5. Cal.—Rosenberg v. Frank, supra.  
50 C.J. p 793 note 85.

6. Cal.—Joy v. Rousseau, 236 P. 972, 975, 72 Cal.App. 179.

7. Cal.—Rosenberg v. Frank, 58 Cal. 387, 405.

8. Pa.—Chaplin v. Griffin, 97 A. 409, 411, 252 Pa. 271, Ann.Cas.1918C 787.

9. Cal.—Rosenberg v. Frank, 58 Cal. 387, 405.

10. U.S.—Hendrie v. Lowmaster, C.C.A.Mich., 152 F.2d 83, 85.  
Colo.—Corpus Juris quoted in Robinson v. Booth-Orchard Grove Ditch Co., 31 P.2d 487, 94 Colo. 515.

Tex.—Chenoweth v. Nordan & Morris, Civ.App., 171 S.W.2d 386, 387.  
50 C.J. p 793 note 97.

10. Colo.—Corpus Juris quoted in Robinson v. Booth-Orchard Grove Ditch Co., 31 P.2d 487, 94 Colo. 515.

Tex.—Chenoweth v. Nordan & Morris, Civ.App., 171 S.W.2d 386, 387.  
50 C.J. p 793 note 98.

11. U.S.—Hendrie v. Lowmaster, C.C.A.Mich., 152 F.2d 83, 85.

Colo.—Corpus Juris quoted in Robinson v. Booth-Orchard Grove Ditch Co., 31 P.2d 487, 94 Colo. 515.

Tex.—Chenoweth v. Nordan & Morris, Civ.App., 171 S.W.2d 386, 387.  
50 C.J. p 793 note 88.

Similarly defined

(1) According to a certain part.—Rosenberg v. Frank, 58 Cal. 387, 405.

(2) According to the rate, proportion, or allowance.—Chaplin v. Griffin, 97 A. 409, 412, 252 Pa. 271, 280, Ann.Cas.1918C 787.

defined as meaning proportionately;<sup>12</sup> according to a certain rate, percentage, or proportion;<sup>13</sup> according to the share, interest, or liability of each;<sup>14</sup> a distribution proportionately.<sup>15</sup>

"Pro rata" may be and has been employed as a compound word and as a verb.<sup>16</sup>

"Pro rata" has been held equivalent to, or synonymous with, "proportion"<sup>17</sup> and "ratably."<sup>18</sup>

*Pro tem* or *Pro tempore*. For the time being;<sup>19</sup> temporarily; provisionally.<sup>20</sup>

*Other phrases* commencing with the Latin preposition "pro" are set out in the note.<sup>21</sup>

*Maxims*. "Pro" as the first word of maxims as to which there have been no recent applications see 50 C.J.S. p 790 note 98, p 825 note 33.

**PROBABILITY**. The word "probability" implies consideration of probative facts,<sup>22</sup> and in ordinary language it also implies doubt.<sup>23</sup>

"Probability" is defined as meaning an element addressing itself to the reason,<sup>24</sup> and frequently invoked in matters of human conduct and experience for determining the existence or nonexistence of a fact;<sup>25</sup> an inference as to the existence or nonexistence of one fact from the existence or nonexistence of some other fact, founded in a previous experience of that connection;<sup>26</sup> having more evidence for than against;<sup>27</sup> and supporting or giving ground for a belief, but not to an absolute demonstration.<sup>28</sup>

It is also defined as meaning the state,<sup>29</sup> char-

12. U.S.—Gray v. Commodity Credit Corp., D.C.Cal., 63 F.Supp. 386, 392. Pa.—Chaplin v. Griffin, 97 A. 409, 412, 252 Pa. 271, Ann.Cas.1918C 787.

#### Similarly defined

(1) In proportion.—Gray v. Commodity Corp., D.C.Cal., 63 F.Supp. 386, 392—50 C.J. p 793 note 92.

(2) In due proportion.—Chaplin v. Griffin, 97 A. 409, 412, 252 Pa. 271, Ann.Cas.1918C 787.

13. Colo.—*Corpus Juris* quoted in Robinson v. Booth-Orchard Grove Ditch Co., 31 P.2d 487, 94 Colo. 515. Tex.—Chenoweth v. Nordan & Morris, Civ.App., 171 S.W.2d 386, 387. 50 C.J. p 793 note 89.

**Phrases** employing the term "pro rata" and as to which more recent adjudications have not been found see 50 C.J. p 793 notes 99-3.

14. U.S.—Gray v. Commodity Credit Corp., D.C.Cal., 63 F.Supp. 386, 392.

Pa.—Chaplin v. Griffin, 97 A. 409, 411, 252 Pa. 271, Ann.Cas.1918C 785.

15. N.Y.—Pratt v. Dwelling House Mut. F. Ins. Co., 40 N.Y.S. 179, 181, 7 App.Div. 544.

16. Mass.—Penniman v. Stanley, 122 Mass. 310, 316. 50 C.J. p 793 note 4 [a].

17. U.S.—Hager v. McDonald, C.C. Mo., 65 F. 200, 202.

18. N.J.—Brombacher v. Berking, 39 A. 134, 135, 56 N.J.Eq. 251.

19. Ky.—*Corpus Juris* quoted in Hargadon v. Silk, 129 S.W.2d 1039, 1043, 279 Ky. 69.

Okl.—Dobbs v. State, 115 P. 370, 372, 5 Okl.Cr. 475.

"Judre pro tempore" see Judges § 2 a (1).

20. Ky.—*Corpus Juris* quoted in Hargadon v. Silk, 129 S.W.2d 1039, 1043, 279 Ky. 69. 50 C.J. p 417 note 17.

#### 21. Pro confesso

As confessed.—Black L.D.

#### Pro hac vice

For this turn; for this one particular occasion.—Black L.D.—50 C.J. p 417 note 10 [a].

#### Pro lesione fidei

For breach of faith.—Black L.D.—50 C.J. p 417 note 12.

#### Pro tanto

For so much; to that extent.—*Corpus Juris* quoted in Dickson v. Joy, 112 P.2d 355, 357, 188 Okl. 597—*Corpus Juris* quoted in Roberts v. Boydston, 97 P.2d 898, 901, 186 Okl. 336—50 C.J. p 417 note 14.

#### Additional phrases

(1) "Pro forma" see 37 C.J.S. p 114 note 58.

(2) "Pro interesse suo" see 46 C.J. S. p 1110 note 86.

(3) For still other phrases commencing with the Latin preposition "pro" see 50 C.J. p 416 note 7.

22. Ala.—Gilmore v. State, 13 So. 536, 538, 99 Ala. 154.

23. Cal.—People v. O'Brien, 62 P. 297, 300, 130 Cal. 1.

Ga.—Johns v. State, 169 S.E. 688, 691, 47 Ga.App. 58.

24. Cal.—Moody v. Peirano, 88 P. 380, 383, 4 Cal.App. 411.

50 C.J. p 418 note 19.

#### Reasonable probability

(1) An equivocal term.—Hallum v. Omro, 99 N.W. 1051, 1053, 122 Wis. 337—Block v. Milwaukee St. R. Co., 61 N.W. 1101, 1104, 89 Wis. 371, 46 Am.S.R. 849, 27 L.R.A. 365.

(2) Reasonable probability is susceptible of being taken as meaning reasonable certainty.—Hallum v. Omro, supra.

25. Cal.—Moody v. Peirano, 88 P. 380, 383, 4 Cal.App. 411.

26. Conn.—Johnson v. Connecticut Co., 83 A. 530, 531, 85 Conn. 438.

#### Similarly expressed

(1) A reasonable ground of presumption.—Coppinger v. Broderick, 295 P. 780, 781, 39 Ariz. 473.

(2) The ground of expectation that is recognized when the greater weight of evidence favors, or is taken to favor, an event or supposition.—In re Salomon's Estate, 287 N.Y.S. 814, 821, 159 Misc. 379.

27. Iowa.—State v. Jones, 20 N.W. 470, 472, 64 Iowa 349.

50 C.J. p 418 note 22.

28. Ala.—Page v. State, 81 So. 848, 849, 17 Ala.App. 70.

#### Similarly expressed

(1) The character of an event as more likely to happen or have happened.—In re Salomon's Estate, 287 N.Y.S. 814, 821, 159 Misc. 379.

(2) The likelihood of a proposition or hypothesis being true, from its conformity to reason or experience or from superior evidence or arguments adduced in its favor.—Smith v. State, 90 So. 883, 884, 128 Miss. 258.

(3) That state of a case or question of fact which results from superior evidence or preponderation of argument on one side, inclining the mind to receive it as the truth, but leaving some room for doubt.

Miss.—Smith v. State, supra.

S.C.—Brown v. Atlanta & Charlotte R. Co., 19 S.C. 39, 59.

(4) "Thus, a probability of the existence of a thing is created when there is more evidence in favor of its existence than against it."—O'Brien v. Industrial Commission, 61 P.2d 418, 419, 90 Utah 266—50 C.J. p 418 note 24 [a].

29. Ariz.—Coppinger v. Broderick, 295 P. 780, 781, 39 Ariz. 473.

N.Y.—In re Salomon's Estate, 287 N.Y.S. 814, 821, 159 Misc. 379.

50 C.J. p 418 note 27.

acter,<sup>30</sup> or quality<sup>31</sup> of being probable; that which is probable;<sup>32</sup> appearance<sup>33</sup> of truth,<sup>34</sup> likelihood;<sup>35</sup> verisimilitude.<sup>36</sup>

"Probability" falls short of moral certainty, but produces what is called opinion.<sup>37</sup>

In the doctrine of chances, probability is the likelihood of the occurrence of an event, or the quotient obtained by dividing the number of favorable chances by the whole number of chances.<sup>38</sup>

In legal writings and opinions "assumption," "inference," "presumption," and "probability" have been said to have substantially the same meanings see Evidence § 115.

"Probability" has been distinguished from "likelihood" see 53 C.J.S. p 885 note 84, and "proof" see Evidence § 4, and from "certainty" in connection with the rule stated in Damages § 31 that there must exist a reasonable certainty that the apprehended future consequences will ensue from the original injury in order for damages to be awarded.

"Probability" is defined in Evidence § 1016; the weight of probabilities in civil actions is discussed in Evidence § 1021 b, and in criminal prosecutions in Criminal Law § 910. In connection with reasonable doubt as to the guilt of accused in criminal prosecutions, instructions as to probability of innocence

are discussed in Criminal Law § 1282. Probabilities supporting an award or finding in compensation proceedings see the C.J.S. title Workmen's Compensation Acts § 547, also 71 C.J. p 1085 notes 32-35.

For references to other particular applications in civil actions consult the index to the title Evidence.

**PROBABLE.** The term "probable" is used to refer to past or future occurrences and to human judgments about those occurrences.<sup>39</sup> It implies more than a mere possibility,<sup>40</sup> and more than mere conjecture.<sup>41</sup> It connotes being so supported by evidence as to incline the mind to belief rather than disbelief, yet leaving room for doubt.<sup>42</sup> When applied to past occurrences it may be said to be used inaccurately because accomplished facts are always certain and never merely probable.<sup>43</sup> In common acceptance, when applied to a condition which may be supposed beforehand, the word implies that we know facts enough about the condition supposed to make us reasonably confident of it, or, at the least, that the evidence preponderates in its favor.<sup>44</sup>

"Probable" is defined as meaning having more evidence for than against;<sup>45</sup> having more evidence than the contrary;<sup>46</sup> supported by evidence which inclines the mind to belief, but leaves some room for

30. Cal.—Brown v. Beck, 220 P. 14, 19, 63 Cal.App. 686.

31. Ariz.—Coppinger v. Broderick, 295 P. 780, 781, 39 Ariz. 473.

32. Okl.—Webb v. State, 200 P. 719, 720, 19 Okl.Cr. 390.

33. Ga.—Johns v. State, 169 S.E. 688, 691, 47 Ga.App. 58. 50 C.J. p 418 note 29.

34. Miss.—Smith v. State, 90 So. 883, 884, 128 Miss. 258.

S.C.—Brown v. Atlanta & Charlotte R. Co., 19 S.C. 39, 59.

**Similarly expressed**

(1) Appearance, that is, resemblance, of truth.—People v. O'Brien, 62 P. 297, 300, 130 Cal. 1.

(2) Appearance of reality or truth.—Coppinger v. Broderick, 295 P. 780, 781, 39 Ariz. 473.

(3) A resemblance of truth founded on reason.—Johns v. State, 169 S.E. 688, 691, 47 Ga.App. 58.

35. Ariz.—Coppinger v. Broderick, 295 P. 780, 781, 39 Ariz. 473.

Ga.—Johns v. State, 169 S.E. 688, 691, 47 Ga. 58.

50 C.J. p 418 note 31.

36. Miss.—Smith v. State, 90 So. 883, 884, 128 Miss. 258.

37. Miss.—Smith v. State, supra.

S.C.—Brown v. Atlanta & Charlotte R. Co., 19 S.C. 39, 59.

"Moral certainty" defined see 14 C. J.S. p 109 note 21—p 110 note 38. "Demonstration" and "probability" in law of evidence see Evidence § 1016, "proof" see Evidence § 4.

"Demonstration produces certain knowledge, proof produces belief, and probability opinion."

Miss.—Smith v. State, 90 So. 883, 884, 128 Miss. 258.

S.C.—Brown v. Atlanta & Charlotte R. Co., 19 S.C. 39, 59.

38. Miss.—Smith v. State, 90 So. 883, 884, 128 Miss. 258.

S.C.—Brown v. Atlanta & Charlotte R. Co., 19 S.C. 39, 59.

39. N.Y.—In re Westberg's Estate, 2 N.Y.S. 483, 488, 165 Misc. 728.

40. Ariz.—Conard v. Dillingham, 206 P. 166, 169, 23 Ariz. 596.

41. Iowa.—Bailey v. Centerville, 78 N.W. 831, 833, 108 Iowa 20.

50 C.J. p 419 note 55.

42. N.Y.—In re Salomon's Estate, 287 N.Y.S. 814, 820, 159 Misc. 379.

43. N.Y.—In re Westberg's Estate, 2 N.Y.S.2d 483, 488, 165 Misc. 728.

Opinions respecting past facts may be probable owing to deficiencies in available evidence, or due to weakness of insight in the person striving to ascertain the past fact.—In re Westberg's Estate, supra.

44. Wash.—Corpus Juris cited in In re Eaton's Estate, 16 P.2d 433, 434, 170 Wash. 280—Gallamore v. Olympia, 75 P. 978, 980, 34 Wash. 379.

A future event at most is probable because no outcome of causal operations wholly or partially derived from men possesses a character of inevitability, and probability attaches thereto when all present factors seem to an experienced mind occupying a position favorable for judging to indicate a particular result.—In re Westberg's Estate, 2 N. Y.S.2d 483, 488, 165 Misc. 728.

45. Ala.—Jefferson Standard Life Ins. Co. v. Wigley, 29 So.2d 218, 224, 248 Ala. 676.

Cal.—People v. Novell, 129 P.2d 453, 454, 54 Cal.App.2d 621—Ex parte Crowley, 124 P.2d 329, 330, 51 Cal. App.2d 234—Ex parte McCarty, 35 P.2d 568, 140 Cal.App. 473.

Kan.—State v. Howland, 110 P.2d 801, 807, 153 Kan. 352.

Utah.—O'Brien v. Industrial Commission, 61 P.2d 418, 419, 90 Utah 266.

50 C.J. p 419 note 53.

46. Ariz.—Conard v. Dillingham, 206 P. 166, 169, 23 Ariz. 596.

50 C.J. p 419 note 54.

doubt;<sup>47</sup> capable of being proved.<sup>48</sup>

It is also defined as meaning likely;<sup>49</sup> appearing to be founded in reason;<sup>50</sup> that which is most consonant with reason;<sup>51</sup> having the appearance of truth,<sup>52</sup> of reality and truth.<sup>53</sup>

"Probable" has been held to be synonymous with "apparent" see 3 C.J.S. p 1427 note 87.1, "liable" see 53 C.J.S. p 22 note 41, "likely" see 53 C.J.S. p 886 note 40, and "reasonable."<sup>54</sup> It has also been held that there is no substantial difference between "probable" and "reasonable,"<sup>55</sup> and that "reasonable," "satisfactory," and "probable" all mean substantially the same.<sup>56</sup>

"Probable" has been compared with, or distinguished from, "evenly balanced" see 31 C.J.S. p 472 note 2, "likely" see 53 C.J.S. p 886 note 2, "natural" see 65 C.J.S. p 40 note 38, and "possible" see ante p 245 note 21.

As used in connection with testimony, "probable" involves the idea of preponderance of evidence see Criminal Law § 900.

*Phrases* employing the word are set out in the note.<sup>57</sup>

**PROBABLY.** Having more evidence for than

against;<sup>58</sup> likely as far as the evidence shows;<sup>59</sup> apparently true, yet possibly false.<sup>60</sup>

The word signifies an opinion on a doubtful question.<sup>61</sup>

**PROBANDI NECESSITAS INCUMBIT ILLI QUI AGIT.** See 50 C.J. p 422 note 8.

**PROBANZA.** In Spanish law, proof.<sup>62</sup>

**PROBATE.** The real meaning of the word "probate" is proof,<sup>63</sup> and originally it meant relating to proof,<sup>64</sup> although somewhat later it came to signify relating to proof of wills,<sup>65</sup> but in American law<sup>66</sup> it is now a general term used to include all matters of which probate courts have jurisdiction.<sup>67</sup>

In common usage, the term "probate" is often applied to any of the incidents of administration of a decedent's estate as stated in Executors and Administrators § 3 f; but in its strict sense, as applied to proof of wills, the term is defined in the C.J.S. title Wills § 307, also 68 C.J. p 873 notes 86-92.

*Phrases* employing the word are set out in the note.<sup>68</sup>

47. Cal.—People v. Novell, 129 P.2d 453, 454, 54 Cal.App.2d 621—Ex parte Crowley, 124 P.2d 329, 330, 51 Cal.App.2d 234—Ex parte McCarty, 35 P.2d 568, 140 Cal.App. 473.

50 C.J. p 419 note 56.

**Similarly expressed**

Supported by evidence strong enough to establish presumption, but not proof, of its truth.—State v. Howland, 110 P.2d 801, 807, 153 Kan. 352.

48. Mont.—State v. Trosper, 109 P. 858, 859, 41 Mont. 442.

49. Wash.—In re Eaton's Estate, 16 P.2d 433, 434, 170 Wash. 280.

50 C.J. p 419 note 57.

**Similarly defined**

Likely to be or become true or real; such as logically or actually may be or may happen; reasonably, but not certainly to be believed or expected.—State v. Howland, 110 P. 2d 801, 807, 153 Kan. 352.

50. Utah.—O'Brien v. Industrial Commission, 61 P.2d 418, 419, 90 Utah 266—Bingham Mines Co. v. Allsop, 203 P. 644, 645, 59 Utah 306.

51. Pa.—Gardner v. Gardner, 35 A. 558, 560, 177 Pa. 218.

52. Utah.—O'Brien v. Industrial Commission, 61 P.2d 418, 419, 90 Utah 266—Bingham Mines Co. v.

Allsop, 203 P. 644, 645, 59 Utah 306.

53. Pa.—Gardner v. Gardner, 35 A. 558, 560, 177 Pa. 218.

54. Cal.—Brown v. Beck, 220 P. 14, 19, 63 Cal.App. 686.

55. Tex.—Rust v. Page, Civ.App., 52 S.W.2d 937, 943.

56. Mont.—State v. Trosper, 109 P. 858, 859, 41 Mont. 442.

**57. Phrases**

(1) "Probable cause" see 14 C.J.S. p 44 notes 45-60. In removal proceedings see Criminal Law § 356 a.

(2) "Probable consequence" see 15 C.J.S. p 983 note 84.

(3) "Probable evidence" see Evidence § 2.

(4) "Probable expectancy" or "probable expectation" as applied to the common-law right to a reasonably free labor market see 35 C.J.S. p 204 note 44.

(5) "Probable value" as a convertible term with "net profits" see 66 C.J.S. p 9 note 61.

58. Ark.—Spadra Creek Coal Co. v. Harger, 197 S.W. 705, 130 Ark. 374.

50 C.J. p 422 note 3.

59. Ark.—Spadra Creek Coal Co. v. Harger, supra.

50 C.J. p 422 note 4.

**Similarly expressed**

"Probably" means in all probability; so far as the evidence shows;

presumably; likely.—In re Salomon's Estate, 287 N.Y.S. 814, 820, 159 Misc. 379.

60. Ark.—Spadra Creek Coal Co. v. Harger, 197 S.W. 705, 130 Ark. 374.

61. Mo.—Hensley v. Kansas City R. Cos., App., 214 S.W. 287, 289.

50 C.J. p 422 note 6.

62. Escriche Diccionario.

63. U.S.—Peterson v. Demmer, D.C. Tex., 34 F.Supp. 697, 700.

64. Neb.—In re Hergenrother's Guardianship, 5 N.W.2d 118, 120, 141 Neb. 858.

50 C.J. p 423 note 11.

65. Neb.—In re Hergenrother's Guardianship, supra.

50 C.J. p 423 note 12.

66. Neb.—In re Hergenrother's Guardianship, supra.

50 C.J. p 423 note 13.

67. U.S.—Peterson v. Demmer, D.C. Tex., 34 F.Supp. 697, 700.

Neb.—In re Hergenrother's Guardianship, 5 N.W.2d 118, 120, 141 Neb. 858.

50 C.J. p 423 note 13.

**68. Phrases**

(1) "Courts of probate jurisdiction" see Courts §§ 298-310.

(2) "Probate bond;" a bond which must, by law, be given to the judge of probate.—Thomas v. White, 12 Mass. 367, 369—50 C.J. p 423 note 20.

**PROBATION.** The word "probation" is defined generally as meaning a proceeding to ascertain the truth, to determine character and qualification.<sup>69</sup>

"Probation" is frequently employed with reference to the suspension of execution of a sentence imposed on the conviction of a crime, and is treated in this connection in Criminal Law § 1618 b (2). The term is also employed to indicate a period during which the competency of an officer or employee may be determined, and it is treated in this sense with reference to municipal policemen in Municipal Corporations § 576 b.

**PROBATIONES; PROBATUS.** As the first words of maxims as to which there have been no recent applications. see 50 C.J. p 424 notes 42, 44.

**PROBATIVE.** Serving for trial or proof; pertaining to probation; proving.<sup>70</sup>

**PROBATOR.** In old English law, strictly, an accomplice in felony who, to save himself, confessed the fact, and charged or accused any other as principal or accessory, against whom he was bound to make good his charge.<sup>71</sup> It also signified an approver, or one who undertakes to prove a crime charged on another.<sup>72</sup>

**PROBATORIO.** In Spanish law, probatory; relating to proof.<sup>73</sup>

**PROBITY.** Tried virtue or integrity; moral and intellectual honesty; rectitude; uprightness.<sup>74</sup>

"Probity" has been held synonymous with "integrity" see 46 C.J.S. p 1101 note 32.

**PROCEDENDO.** The writ of procedendo is a common-law<sup>75</sup> prerogative<sup>76</sup> writ, used by chancery courts to compel inferior tribunals to proceed to judgment and to restore jurisdiction.<sup>77</sup> Procedendo is treated in Appeal and Error § 1958, Certiorari § 141, Criminal Law § 1952 a, and Federal Courts § 301 a (9) (a).

The opposite of a procedendo is a prohibition, as stated in Prohibition § 3.

**PROCEDIMIENTO.** In Spanish law, procedure.<sup>78</sup>

**PROCEDURE.** The word "procedure" is defined generally as meaning a course or mode of action;<sup>79</sup> the act or manner of proceeding or moving forward;<sup>80</sup> the manner of proceeding or acting;<sup>81</sup> progress, process, operation, conduct; a step taken, an act performed, a proceeding.<sup>82</sup>

In law the word "procedure" signifies the means whereby the court reaches out to restore rights and remedy wrongs, and in this sense the term is defined as used in the phrase "practice and procedure" in Practice, ante p 471 note 82—p 473 note 19.

**PROCEED.** The verb "proceed" is used in a sense different from the noun "proceeds."<sup>83</sup> "Proceed" is defined as meaning to act by method;<sup>84</sup> to begin and carry on a series of acts or measures according to certain methods;<sup>85</sup> to transact and design;<sup>86</sup> to

(3) "Probate Code" see 14 C.J.S. p 1306 note 29.

(4) "Probate duty" see the C.J.S. title Taxation § 1111, also 61 C.J. p 1590 note 8.

(5) "Probate fee" see Judges § 38.

(6) "Probate homestead" see Homesteads § 239.

(7) "Probate judge" see Judges § 2 a (1).

(8) "Probate jurisdiction" see Courts §§ 298-304.

(9) "Probate law" see 52 C.J.S. p 1029 note 9.

(10) "Probate office" held to be equivalent to "register of probate's office."—Chamberlain v. Perkins, 51 N.H. 336, 339.

(11) "Probate proceeding" see Courts § 305.

(12) "Probate sale."—Ingraham v. Baum, 206 S.W. 67, 68, 136 Ark. 101. 69. N.Y.—People v. Woods, 153 N.Y.S. 872, 873, 168 App.Div. 3.

70. New Standard D.

**Phrases**

(1) "Probative evidence" see Evidence § 1016.

(2) "Probative force" is a force serving for proof.—Appeal of Sturdevant, 42 A. 70, 73, 71 Conn. 392.

71. Black L.D.

72. Black L.D.

73. Escriche Diccionario.

74. Webster New Int.D.

75. Ill.—McCord v. Briggs & Turivas, 170 N.E. 320, 324, 338 Ill. 158.

76. N.M.—Territory v. Ashenfelter, 12 P. 379, 885, 4 N.M. 85.

77. Ill.—McCord v. Briggs & Turivas, 170 N.E. 320, 324, 338 Ill. 158.

78. Escriche Diccionario.

"Procedimiento ejecutivo"

Administrative, as opposed to judicial, procedure.—Escriche Diccionario.

79. La.—Fegan v. Lykes Bros. S. S. Co., 3 So.2d 632, 635, 198 La. 312.

80. Ill.—First Nat. Bank v. Sanford, 83 Ill.App. 58, 59.

81. La.—Fegan v. Lykes Bros. S. S. Co., 3 So.2d 632, 635, 198 La. 312.

82. Ill.—First Nat. Bank v. Sanford, 83 Ill.App. 58, 59.

83. N.Y.—Dow v. Whetten, 3 Wend. 160, 170.  
50 C.J. p 429 note 30 [b].

84. Mont.—Hodson v. O'Keeffe, 229 P. 722, 724, 71 Mont. 322.  
50 C.J. p 426 note 78.

**Phrases** as to which more recent adjudications have not been found see 50 C.J. p 427 notes 89-96.

85. Mont.—Hodson v. O'Keeffe, 229 P. 722, 724, 71 Mont. 322.

**Similarly defined**

(1) To begin and carry on.—State v. Abele, 162 N.E. 807, 809, 119 Ohio St. 210.

(2) To carry on some series of actions.—Stowell v. Texas Employer's Ins. Assoc., Tex.Civ.App., 259 S.W. 311, 316.

(3) To carry on some series of motions.—Hodson v. O'Keeffe, 229 P. 722, 724, 71 Mont. 322.

(4) To conduct.—State v. Abele, supra.

86. Mont.—Hodson v. O'Keeffe, 229 P. 722, 724, 71 Mont. 322.

set oneself to work and go on in a certain way and for some particular purpose.<sup>87</sup>

Where matters of procedure in courts or actions are involved, to conduct; to begin and carry on an action or proceeding;<sup>88</sup> to begin and carry on a legal action;<sup>89</sup> to commence and carry on a legal process.<sup>90</sup>

"Proceed" has been held synonymous with "accrue" see 1 C.J.S. p 760 note 62.

**PROCEEDING.** The terms "proceeding" and "proceedings" are discussed generally in Actions § 1 h (e), and, with reference to bankruptcy, in Bankruptcy § 1. The terms have been held to be synonymous with "case" see Actions § 1 b (1), and "cause" see Actions § 1 c (1), and also have been held synonymous with, or have been distinguished from, "action," "judgment," "process," "prosecution," and "suit" see Actions § 1 h (1) (b).

**PROCEEDS.** The noun<sup>91</sup> "proceeds" is sometimes

regarded as a mercantile term,<sup>92</sup> and it is not used in the same sense as the verb "proceed" as stated ante p 971 note 83.

The word "proceeds" is without any fixed or definite meaning,<sup>93</sup> although etymologically it means something that comes forth or issues from a source or origin, as, for example, something that arises or accrues from some possession or transaction.<sup>94</sup> It is a word of equivocal import<sup>95</sup> and of great generality,<sup>96</sup> having many meanings and varied usages,<sup>97</sup> and of varying<sup>98</sup> and loose<sup>99</sup> significance.

It is frequently employed with different meanings,<sup>1</sup> and very often is of doubtful meaning,<sup>2</sup> although it has been said that the word has a usual, well-known, and general signification.<sup>3</sup> Its meaning in each case depends on its context,<sup>4</sup> and depends very much on the connection in which it is employed and the subject matter to which it is applied.<sup>5</sup>

87. Mont.—Hodson v. O'Keeffe, supra.  
Tex.—Stowell v. Texas Employer's Ins. Assoc., Civ.App., 259 S.W. 311, 316.

88. N.Y.—People v. McCarthy, 61 N. E. 899, 900, 168 N.Y. 549.  
50 C.J. p 427 note 86.

89. Tex.—Stowell v. Texas Employer's Ins. Assoc., Civ.App., 259 S. W. 311, 316.

90. Ohio.—Hiff v. Weymouth, 40 Ohio St. 101, 103.

91. Minn.—In re Cosgrave's Will, 31 N.W.2d 20, 28, 225 Minn. 443.

92. N.Y.—Dow v. Whetten, 8 Wend. 160, 172.  
50 C.J. p 429 note 30 [b].

93. Ill.—Corpus Juris quoted in Gould v. Lewis, 267 Ill.App. 569, 572.

Minn.—Corpus Juris quoted in State ex rel. Holm v. King, 238 N.W. 334, 335, 184 Minn. 250.  
50 C.J. p 428 note 1.

94. Minn.—In re Cosgrave's Will, 31 N.W.2d 20, 28, 225 Minn. 443.

#### Similarly expressed

Strictly speaking, it implies something that arises or leads out of, or from, another thing.—Fardel v. Satre, 206 N.W. 22, 26, 200 Iowa 1109—50 C.J. p 428 note 11.

95. Idaho.—Furst & Thomas v. Elliott, 56 P.2d 1064, 1069, 56 Idaho 491.

Ill.—Corpus Juris quoted in Gould v. Lewis, 267 Ill.App. 569, 572.

Minn.—Corpus Juris quoted in State ex rel. Holm v. King, 238 N.W. 334, 335, 184 Minn. 250.

N.Y.—In re Baum's Will, 91 N.Y.S. 2d 649, 654.  
50 C.J. p 428 note 5.

96. Idaho.—Furst & Thomas v. Elliott, 56 P.2d 1064, 1069, 56 Idaho 491.

Ill.—Corpus Juris quoted in Gould v. Lewis, 267 Ill.App. 569, 572.

Ind.—Hamilton v. Meiks, App., 198 N.E. 883, 846.

Minn.—In re Cosgrave's Will, 31 N. W.2d 20, 28, 225 Minn. 443—Corpus Juris quoted in State ex rel. Holm v. King, 238 N.W. 334, 335, 184 Minn. 250.

N.Y.—In re Baum's Will, 91 N.Y.S. 2d 649, 654.

50 C.J. p 428 note 6.

97. Ill.—Corpus Juris quoted in Gould v. Lewis, 267 Ill.App. 569, 572.

Tex.—Dallas Opera House Assoc. v. Dallas Enterprises, Civ.App., 288 S.W. 656, 660.

98. Ill.—Corpus Juris quoted in Gould v. Lewis, 267 Ill.App. 569, 572.

Mass.—Shea v. Davis, 38 N.E.2d 561, 310 Mass. 433.

Minn.—Corpus Juris quoted in State ex rel. Holm v. King, 238 N.W. 334, 335, 184 Minn. 250.  
50 C.J. p 428 note 2.

99. Ill.—Corpus Juris quoted in Gould v. Lewis, 267 Ill.App. 569, 572.

Minn.—Corpus Juris quoted in State ex rel. Holm v. King, 238 N.W. 334, 335, 184 Minn. 250.

50 C.J. p 428 note 3.

1. Ill.—Corpus Juris quoted in Gould v. Lewis, 267 Ill.App. 569, 572.

Mass.—Shea v. Davis, 38 N.E.2d 561, 310 Mass. 433—Morrison v. Palmer, 115 N.E. 419, 420, 226 Mass. 383.

Minn.—Corpus Juris quoted in State ex rel. Holm v. King, 238 N.W. 334, 335, 184 Minn. 250.

2. Ill.—Corpus Juris quoted in Gould v. Lewis, 267 Ill.App. 569, 572.

N.Y.—In re Baum's Will, 91 N.Y.S.2d 649, 654.

Tex.—Dallas Opera House Assoc. v. Dallas Enterprises, Civ.App., 288 S.W. 656, 660.

3. Kan.—Merrimack River Sav. Bank v. Curry, 46 P. 204, 205, 4 Kan.App. 125.

4. Ill.—Corpus Juris quoted in Gould v. Lewis, 267 Ill.App. 569, 572.

Tex.—Wisdom v. Wilson, 127 S.W. 1128, 1137, 59 Tex.Civ.App. 593.

5. Idaho.—Furst & Thomas v. Elliott, 56 P.2d 1064, 1069, 56 Idaho 491.

Ill.—Corpus Juris quoted in Gould v. Lewis, 267 Ill.App. 569, 572.

#### Similarly expressed

(1) The subject matter and purpose of a contract must be considered in order to determine the meaning of the word as used by the parties.—Corpus Juris quoted in Gould v. Lewis, 267 Ill.App. 569, 572—50 C. J. p 429 note 37.

(2) The word "proceeds" is of such general signification that resort must usually be had to the context, and to the subject matter to which it relates in order to ascertain its meaning.—Furst & Thomas v. Elliott, 56 P.2d 1064, 1069, 56 Idaho 491.

The word "proceeds" has been variously defined,<sup>6</sup> and as generally defined and understood<sup>7</sup> it means the amount proceeding or accruing from some possession or transaction,<sup>8</sup> and this has been said to be the best definition of the term.<sup>9</sup>

The term is also defined as meaning issue;<sup>10</sup> produce;<sup>11</sup> product;<sup>12</sup> rent;<sup>13</sup> yield.<sup>14</sup> It also means the useful or material results of the action or course;<sup>15</sup> the sum derived from the disposal of goods or work, or from the use of capital.<sup>16</sup>

The term "proceeds" is frequently employed with reference to sales,<sup>17</sup> and in this connection is defined as meaning the amount realized from the sale of property;<sup>18</sup> the amount derived from the sale of

goods;<sup>19</sup> a sum of money derived from the sale of property;<sup>20</sup> the sum, amount, or value of goods sold and converted into money;<sup>21</sup> that which arises from anything sold, bartered, or exchanged, or anything proceeding from, or produced by, another thing.<sup>22</sup>

What has been said to be a legal definition of the word "proceeds"<sup>23</sup> is money or other articles of value obtained from the sale of property.<sup>24</sup>

The word "proceeds" may mean gross proceeds<sup>25</sup> or it may mean net proceeds,<sup>26</sup> but when employed with reference to a sale it usually means the entire proceeds,<sup>27</sup> that is, all that was received from the

(3) "From the . . . authorities the rule deducible as to what definition is to be given the word 'proceeds' is that the intention of the parties governs and is gathered from all of the surrounding facts and circumstances."—Furst & Thomas v. Elliott, *supra*.

6. Ill.—*Corpus Juris* quoted in Gould v. Lewis, 267 Ill.App. 569, 573.

50 C.J. p 429 note 38.

7. N.Y.—Matter of Gates, 64 N.Y.S. 1050, 1051, 51 App.Div. 850, 31 N.Y.Civ.Proc. 88.

8. N.Y.—In re Baum's Will, 91 N.Y.S.2d 649, 654.

Ohio.—Ramisch v. Fulton, 180 N.E. 735, 736, 41 Ohio App. 443.

Tex.—Ladd v. Upham, Civ.App., 58 S.W.2d 1037, 1039.

Utah.—U. S. Smelting, Refining & Min. Co. v. Haynes, 176 P.2d 622, 624, 111 Utah 172.

50 C.J. p 428 note 13.

#### Similarly defined

(1) "That which results, proceeds, or accrues from some possession or transaction."—Federal Trust Co. v. Ost, 183 A. 830, 833, 120 N.J.Eq. 43.

(2) "Something that arises or accrues from some possession or transaction."—In re Cosgrave's Will, 31 N.W.2d 20, 28, 225 Minn. 443.

Phrases as to which more recent adjudications have not been found see 50 C.J. p 430 note 50—p 431 note 57.

9. Utah.—U. S. Smelting, Refining & Min. Co. v. Haynes, 176 P.2d 622, 624, 111 Utah 172.

10. Utah.—U. S. Smelting, Refining & Min. Co. v. Haynes, *supra*.

50 C.J. p 428 note 17.

11. N.Y.—Dow v. Whetten, 8 Wend. 160, 170.

50 C.J. p 428 note 19.

12. Utah.—U. S. Smelting, Refining & Min. Co. v. Haynes, 176 P.2d 622, 624, 111 Utah 172.

50 C.J. p 428 note 20.

13. N.Y.—Dow v. Whetten, 8 Wend. 160, 170.

50 C.J. p 429 note 22.

14. Neb.—State v. Brian, 120 N.W. 916, 917, 84 Neb. 30.

Utah.—U. S. Smelting, Refining & Min. Co. v. Haynes, 176 P.2d 622, 624, 111 Utah 172.

15. N.Y.—In re Baum's Will, 91 N.Y.S.2d 649, 654.

50 C.J. p 428 note 14.

16. N.J.—Federal Trust Co. v. Ost, 183 A. 830, 833, 120 N.J.Eq. 43.

17. Tex.—Wisdom v. Wilson, 127 S.W. 1128, 1137, 59 Tex.Civ.App. 593.

50 C.J. p 429 note 33.

18. Tex.—Ladd v. Upham, Civ.App., 58 S.W.2d 1037, 1039.

19. N.Y.—In re Baum's Will, 91 N.Y.S.2d 649, 654.

20. Tex.—Wisdom v. Wilson, 127 S.W. 1128, 1137, 59 Tex.Civ.App. 593.

50 C.J. p 429 note 33.

21. Ky.—Carpenter v. Dummit, 297 S.W. 695, 700, 221 Ky. 67.

50 C.J. p 429 note 29.

#### Similarly defined

(1) "In a commercial sense it means the sum, amount, or value of goods or things sold and converted into money."—Hunt v. Williams, 28 N.E. 177, 126 Ind. 493.

(2) In commerce it means the same amount or value of goods sold and converted into money; and it also means goods purchased with such money, or exchange for the original goods.—Dow v. Whetten, 8 Wend., N.Y., 160, 161.

(3) "In commercial parlance, the term 'proceeds' means, we believe, the money or fund represented by the property consigned."—Hundley v. Spencer, 1 Rob., La., 209, 211.

(4) "The sum, amount; money arising from the sale; the purchase price; the bid."—Merrimack River Sav. Bank v. Curry, 46 P. 204, 205, 4 Kan.App. 125.

22. N.Y.—Dow v. Whetten, 8 Wend. 160, 172.

50 C.J. p 429 note 30.

23. Iowa.—Fardal v. Satre, 206 N.W. 22, 25, 200 Iowa 1109.

N.Y.—Tradesmen's Nat. Bank v. National Surety Co., 62 N.E. 670, 672, 169 N.Y. 563.

24. N.Y.—Tradesmen's Nat. Bank v. National Surety Co., 62 N.E. 670, 672, 169 N.Y. 563.

50 C.J. p 429 note 27.

"When a sale proper is effected, the money, or the thing received in exchange for the specific article sold, constitutes the proceeds of the sale. Such a use of the term 'proceeds' is appropriate and familiar."—Charleston College v. Willingham, 34 S.C.Eq. 195, 207.

25. Ill.—*Corpus Juris* quoted in Gould v. Lewis, 267 Ill.App. 569, 573.

Minn.—*Corpus Juris* cited in State ex rel. Holm v. King, 238 N.W. 334, 335, 184 Minn. 250.

Wash.—Minder v. Rowley, 211 P.2d 170, 171.

50 C.J. p 430 note 44.

#### May not mean gross proceeds

Mass.—Daly v. Crawford, 181 N.E. 396, 398, 279 Mass. 262.

26. Ill.—*Corpus Juris* quoted in Gould v. Lewis, 267 Ill.App. 569, 573.

Mass.—Daly v. Crawford, 181 N.E. 396, 398, 279 Mass. 262.

Minn.—*Corpus Juris* cited in State ex rel. Holm v. King, 238 N.W. 334, 335, 184 Minn. 250.

Wis.—Wisconsin Department of Taxation v. Miller, 2 N.W.2d 362, 363, 239 Wis. 507.

50 C.J. p 430 notes 45, 46 [b].

#### May not mean net proceeds

Idaho.—Furst & Thomas v. Elliott, 56 P.2d 1064, 1068, 56 Idaho 491.

27. Idaho.—Furst & Thomas v. Elliott, *supra*.

50 C.J. p 429 note 33 [b].

sale.<sup>28</sup> It has been held not to mean invoice.<sup>29</sup>

"Proceeds" may refer either to net receipts or to gross receipts,<sup>30</sup> and is frequently interpreted as denoting income,<sup>31</sup> and in this sense it may mean the net returns after the payment of necessary expenses.<sup>32</sup> It has been held to mean and include money,<sup>33</sup> and money easily comes within the definition of the term.<sup>34</sup> However, the word does not necessarily mean money<sup>35</sup> or cash;<sup>36</sup> and it is not restricted in meaning to money only,<sup>37</sup> or to money actually recovered,<sup>38</sup> but it may include notes<sup>39</sup> and securities.<sup>40</sup>

When lands are the subject matter to which it is to be applied, if the title is disposed of, that which is received, whether money or other lands, is properly called the "proceeds;"<sup>41</sup> if the land is retained, and not disposed of, that which it produces by way of rents or issues constitutes the "proceeds."<sup>42</sup> In its ordinary acceptance,<sup>43</sup> when applied to the income to be derived from real estate, the word embraces the idea of issues, rents and profits, or produce,<sup>44</sup> and has been held to include the increase in value of live stock or produce.<sup>45</sup>

"Proceeds" has been held equivalent to, or synonymous with, "avails" see 7 C.J.S. p 1301 note 77, "harvest" see 39 C.J.S. p 779 note 29, "income" see 42 C.J.S. p 534 note 26, "product,"<sup>46</sup> "receipts," "returns," and "yield."<sup>47</sup>

The word "proceeds" is frequently employed in

testamentary instruments and the various constructions which have been given the term when used in this connection are discussed in the C.J.S. title Wills §§ 770, 779, also 69 C.J. p 386 notes 52-55 and p 396 notes 51-62.

The right to proceeds of insurance generally is discussed in Insurance §§ 1140-1193. See also the index to that title. Insurance proceeds as taxable income by the federal government see Internal Revenue § 114, and as subject to federal and state inheritance, succession, or estate tax see Internal Revenue § 486 and the C.J.S. title Taxation §§ 1118, 1149, 1158, also 61 C.J. p 1609 notes 16, 17, p 1670 note 32-p 1671 note 39, and p 1677 note 77.

Disposition of the proceeds of a state income tax is treated in the C.J.S. title Taxation § 1110, also 61 C.J. p 1589 note 77-p 1590 note 88; disposition of proceeds of sale of land for taxes see the C.J.S. title Taxation §§ 816-818, also 61 C.J. p 1212 note 23-p 1215 note 57.

Application of the proceeds of mortgages and of the proceeds of sale on foreclosure is treated in Mortgages §§ 297, 595-598.

For the application and disposition of the proceeds of sale of other property consult the indexes to the specific titles, particular reference here being made to Admiralty, Assignments for Benefit of Creditors, Bankruptcy, Executions, Exemptions,

22. Idaho.—Furst & Thomas v. Elliott, supra.

29. Ill.—Corpus Juris quoted in Gould v. Lewis, 269 Ill.App. 569, 573.

N.Y.—Tradesmen's Nat. Bank v. National Surety Co., 62 N.E. 670, 672, 169 N.Y. 563.

50 C.J. p 430 note 43.

30. Mass.—Shea v. Davis, 38 N.E.2d 561, 310 Mass. 433.

31. N.J.—Federal Trust Co. v. Ost,

183 A. 830, 833, 120 N.J.Eq. 43.

Pa.—In re Foster's Estate, 187 A. 399, 402, 324 Pa. 39.

50 C.J. p 429 note 25.

#### Outcome

Sask.—Canadian Port Huron Co. v. Fairchild, 3 Sask.L. 228, 14 West. L.R. 525.

32. Mass.—Morrison v. Palmer, 115 N.E. 419, 420, 226 Mass. 383.

33. Ill.—Corpus Juris quoted in Gould v. Lewis, 267 Ill.App. 569, 573.

50 C.J. p 429 note 39.

34. Cal.—Peoples Finance & Thrift Co. of Visalia v. Bowman, 137 P. 2d 729, 731, 58 Cal.App.2d 729.

35. Idaho.—Furst & Thomas v. El-

liott, 56 P.2d 1064, 1069, 56 Idaho 491.

Mo.—Murray & Patterson v. Gordon-Watts Grain Co., 260 S.W. 513, 515, 216 Mo.App. 607.

50 C.J. p 428 note 7.

36. Colo.—Corpus Juris cited in Henry Wilcox & Son v. Riverview Drainage Dist., 25 P.2d 172, 174, 93 Colo. 115.

Mo.—Murray & Patterson v. Gordon-Watts Grain Co., 260 S.W. 513, 515, 216 Mo.App. 607.

37. Ill.—Corpus Juris quoted in Gould v. Lewis, 267 Ill.App. 569, 573.

50 C.J. p 430 note 42.

38. Ill.—Corpus Juris quoted in Gould v. Lewis, 267 Ill.App. 569, 573.

50 C.J. p 430 note 41.

39. S.C.—Mordecai v. Seignious, 30 S.E. 717, 721, 53 S.C. 95.

40. Idaho.—Furst & Thomas v. Elliott, 56 P.2d 1064, 1069, 56 Idaho 491.

Ky.—Carpenter v. Dummit, 297 S.W. 695, 700, 221 Ky. 67.

41. Iowa.—Fardal v. Satre, 206 N. W. 22, 25, 200 Iowa 1109.

50 C.J. p 430 note 46.

42. Ill.—People v. Chicago, 75 N.E. 239, 240, 216 Ill. 537.

43. Ind.—Hunt v. Williams, 26 N.E. 177, 126 Ind. 493, 494.

44. Ind.—Hunt v. Williams, supra. Mo.—Gorin Sav. Bank v. Early, App., 260 S.W. 480, 483.

45. Idaho.—Furst & Thomas v. Elliott, 56 P.2d 1064, 1069, 56 Idaho 491.

Ill.—Corpus Juris quoted in Gould v. Lewis, 267 Ill.App. 569, 573.

50 C.J. p 430 note 40.

46. Idaho.—Furst & Thomas v. Elliott, 56 P.2d 1064, 1068, 56 Idaho 491.

Tex.—Ladd v. Upham, Civ.App., 58 S.W.2d 1037, 1039.

#### "Product" equipollent

N.Y.—Matter of Gates, 64 N.Y.S. 1050, 1051, 51 App.Div. 350, 31 N.Y. Civ.Proc. 88—In re Baum's Will, 91 N.Y.S.2d 649, 654.

47. Idaho.—Furst & Thomas v. Elliott, 56 P.2d 1064, 1068, 56 Idaho 491—Dittmore v. Cable Milling Co., 101 P. 593, 594, 16 Idaho 298, 133 Am.S.R. 98.

Tex.—Gibbs v. Barkley, Com.App., 242 S.W. 462, 465—Ladd v. Upham, Civ.App., 58 S.W.2d 1037, 1039.



Factors, Infants, and Insane Persons. See also the Descriptive-Word Index.

**PROCESO.** In Spanish law, the record or collection of papers in a cause criminal or civil.<sup>48</sup>

**PROCESS.** The word "process" has a great variety of meanings,<sup>49</sup> and denotes a progressive action or series of acts or steps, especially in the regular course of performing, producing, or making something,<sup>50</sup> and in general it may be said that process is an act or series of acts or a mode of acting.<sup>51</sup>

*As a noun*, the word "process" is defined as mean-

ing a method of operation or treatment;<sup>52</sup> a course of procedure;<sup>53</sup> a mode of treatment of certain materials to produce a given result;<sup>54</sup> the act of proceeding or coming forth from a source.<sup>55</sup>

The word "process" is also defined as meaning a series of acts;<sup>56</sup> a series of actions, motions, or occurrences;<sup>57</sup> a series of actions, motions, or operations definitely conducing to an end, whether voluntary or involuntary;<sup>58</sup> an act or series of acts, performed on the subject matter to be transformed and reduced to a different state or thing;<sup>59</sup> progressive act or transaction; continuous operation or treatment;<sup>60</sup> something that occurs in a series of

48. *Escrache Diccionario.*

49. *Mich.—Kalee v. Dewey Products Co.*, 296 N.W. 826, 827, 296 Mich. 540.

50. *R.I.—Ralston Purina Co. v. Zoning Board of Town of Westerly*, 12 A.2d 219, 221, 64 R.I. 197.

S.D.—*Bald Mountain Mining Co. v. Welsh*, 271 N.W. 819, 821, 65 S.D. 117.

51. *Mich.—Kalee v. Dewey Products Co.*, 296 N.W. 826, 827, 296 Mich. 540.

52. *U.S.—McComb v. C. H. Musselman Co.*, D.C.Pa., 74 F.Supp. 185, 187—*Martin v. Minerals Separation North American Corporation*, D.C.Md., 29 F.Supp. 146, 148.

Ala.—*Curry v. Alabama Power Co.*, 8 So.2d 521, 527, 243 Ala. 53.

R.I.—*Ralston Purina Co. v. Zoning Board of Town of Westerly*, 12 A.2d 219, 221, 64 R.I. 197.

S.D.—*Bald Mountain Mining Co. v. Welsh*, 271 N.W. 819, 821, 65 S.D. 117.

#### Similarly defined

A process is a mode, method, or operation, whereby a result or effect is produced.—*Kelley v. Coe*, 99 F.2d 435, 441, 69 App.D.C. 202.

53. *Colo.—Bedford v. Colorado Fuel & Iron Corporation*, 81 P.2d 752, 757, 102 Colo. 538.

R.I.—*Ralston Purina Co. v. Zoning Board of Town of Westerly*, 12 A.2d 219, 221, 64 R.I. 197.

Va.—*Campbell v. Goode*, 2 S.E.2d 456, 457, 172 Va. 463.

#### Similarly defined

Normal or actual course of procedure; regular proceeding.—*Sokol v. Stein Fur Dyeing Co.*, 216 N.Y.S. 167, 169, 216 App.Div. 573.

54. *U.S.—Expanded Metal Co. v. Bradford, Pa.*, 29 S.Ct. 652, 657, 214 U.S. 366, 53 L.Ed. 1034—*Cochrane v. Deener, D.C.*, 94 U.S. 780, 788, 24 L.Ed. 139—*Halliburton Oil Well Cementing Co. v. Walker, C.C.A. Cal.*, 146 F.2d 817, 821—*Emmett v. Metals Processing Corporation, C. C.A.Ariz.*, 118 F.2d 796, 798—*Lakeshire Cheese Co. v. Shefford Cheese*

*Co.*, C.C.A.Wis., 72 F.2d 497, 499—*Waldman v. Swanfeldt, C.C.A.Cal.*, 66 F.2d 294, 295—*Abram v. San Joaquin Cotton Oil Co.*, D.C.Cal., 46 F.Supp. 969, 972—*Melvin v. Thomas Potter, Sons & Co.*, C.C. Pa., 91 F. 151, 152—*Carnegie Steel Co. v. Cambria Iron Co.*, C.C.Pa., 89 F. 721, 754—*American Fibre-Chamois Co. v. Buckskin-Fibre Co.*, Ohio, 72 F. 508, 515—*Appleton Mfg. Co. v. Star Mfg. Co.*, Ill., 60 F. 411, 413, 9 C.C.A. 42.

Colo.—*Bedford v. Colorado Fuel & Iron Corporation*, 81 P.2d 752, 757, 102 Colo. 538.

Ohio.—*Huron Fish Co. v. Glander*, 67 N.E.2d 546, 547, 146 Ohio St. 631—*France Co. v. Evatt*, 55 N.E.2d 652, 653, 143 Ohio St. 455.

R.I.—*Ralston Purina Co. v. Zoning Board of Town of Westerly*, 12 A.2d 219, 221, 64 R.I. 197.

55. *S.D.—Bald Mountain Mining Co. v. Welsh*, 271 N.W. 819, 823, 65 S.D. 117.

56. *U.S.—McComb v. Hunt Foods, C. C.A.Cal.*, 167 F.2d 905, 907.

57. *U.S.—McComb v. C. H. Musselman Co.*, D.C.Pa., 74 F.Supp. 185, 187—*Martin v. Minerals Separation North American Corporation*, D.C. Md., 29 F.Supp. 146, 148.

N.Y.—*Sokol v. Stein Fur Dyeing Co.*, 216 N.Y.S. 167, 169, 216 App.Div. 573.

58. *Ala.—Curry v. Alabama Power Co.*, 8 So.2d 521, 527, 243 Ala. 53.

R.I.—*Ralston Purina Co. v. Zoning Board of Town of Westerly*, 12 A.2d 219, 221, 64 R.I. 197.

S.D.—*Bald Mountain Mining Co. v. Welsh*, 271 N.W. 819, 822, 823, 65 S.D. 117.

59. *U.S.—Expanded Metal Co. v. Bradford, Pa.*, 29 S.Ct. 652, 657, 214 U.S. 366, 53 L.Ed. 1034—*Cochrane v. Deener, D.C.*, 94 U.S. 780, 788, 24 L.Ed. 139—*Halliburton Oil Well Cementing Co. v. Walker, C.C. A.Cal.*, 146 F.2d 817, 821—*Emmett v. Metals Processing Corporation, C.C.A.Ariz.*, 118 F.2d 796, 798—*Lakeshire Cheese Co. v. Shefford Cheese*

*Co.*, C.C.A.Wis., 72 F.2d 497, 499—*Waldman v. Swanfeldt, C.C. A.Cal.*, 66 F.2d 294, 295—*Vegetable Oil Products Co. v. Dorward & Sons Co.*, D.C.Cal., 53 F.Supp. 281, 284—*Abram v. San Joaquin Cotton Oil Co.*, D.C.Cal., 46 F.Supp. 969, 972—*Melvin v. Thomas Potter, Sons & Co.*, C.C.Pa., 91 F. 151, 152—*Carnegie Steel Co. v. Cambria Iron Co.*, C.C.Pa., 89 F. 721, 754—*American Fibre-Chamois Co. v. Buckskin-Fibre Co.*, Ohio, 72 F. 508, 515—*Appleton Mfg. Co. v. Star Mfg. Co.*, Ill., 60 F. 411, 413, 9 C. C.A. 42.

Colo.—*Bedford v. Colorado Fuel & Iron Corporation*, 81 P.2d 752, 757, 102 Colo. 538.

Ohio.—*Huron Fish Co. v. Glander*, 67 N.E.2d 546, 547, 146 Ohio St. 631—*France Co. v. Evatt*, 55 N.E. 2d 652, 653, 143 Ohio St. 455.

R.I.—*Ralston Purina Co. v. Zoning Board of Town of Westerly*, 12 A.2d 219, 221, 64 R.I. 197.

60. *U.S.—McComb v. C. H. Musselman Co.*, D.C.Pa., 74 F.Supp. 185, 187—*Martin v. Minerals Separation North American Corporation*, D.C.Md., 29 F.Supp. 146, 148.

Ala.—*Curry v. Alabama Power Co.*, 8 So.2d 521, 527, 243 Ala. 53.

N.Y.—*Sokol v. Stein Fur Dyeing Co.*, 216 N.Y.S. 167, 169, 216 App.Div. 573.

S.D.—*Bald Mountain Mining Co. v. Welsh*, 271 N.W. 819, 821, 823, 65 S.D. 117.

**Similarly expressed**  
A natural or involuntary operation; a series of changes taking place.—*Bald Mountain Mining Co. v. Welsh, supra.*

**Technically speaking** any change, chemical or otherwise, is a process.—*Kennedy v. State Board of Assessment and Review*, 276 N.W. 205, 208, 224 Iowa 405.

59. *U.S.—Expanded Metal Co. v. Bradford, Pa.*, 29 S.Ct. 652, 657, 214 U.S. 366, 53 L.Ed. 1034—*Cochrane v. Deener, D.C.*, 94 U.S. 780, 788, 24 L.Ed. 139—*Halliburton Oil Well Cementing Co. v. Walker, C.C. A.Cal.*, 146 F.2d 817, 821—*Emmett v. Metals Processing Corporation, C.C.A.Ariz.*, 118 F.2d 796, 798—*Lakeshire Cheese Co. v. Shefford Cheese Co.*, C.C.A.Wis., 72 F.2d 497, 499—*Waldman v. Swanfeldt, C.C. A.Cal.*, 66 F.2d 294, 295—*Vegetable Oil Products Co. v. Dorward & Sons Co.*, D.C.Cal., 53 F.Supp. 281, 284—*Abram v. San Joaquin Cotton Oil Co.*, D.C.Cal., 46 F.Supp. 969, 972—*Melvin v. Thomas Potter, Sons & Co.*, C.C.Pa., 91 F. 151, 152—*Carnegie Steel Co. v. Cambria Iron Co.*, C.C.Pa., 89 F. 721, 754—*American Fibre-Chamois Co. v. Buckskin-Fibre Co.*, Ohio, 72 F. 508, 515—*Appleton Mfg. Co. v. Star Mfg. Co.*, Ill., 60 F. 411, 413, 9 C. C.A. 42.

Colo.—*Bedford v. Colorado Fuel & Iron Corporation*, 81 P.2d 752, 757, 102 Colo. 538.

Ohio.—*Huron Fish Co. v. Glander*, 67 N.E.2d 546, 547, 146 Ohio St. 631—*France Co. v. Evatt*, 55 N.E.2d 652, 653, 143 Ohio St. 455.

R.I.—*Ralston Purina Co. v. Zoning Board of Town of Westerly*, 12 A.2d 219, 221, 64 R.I. 197.

55. *S.D.—Bald Mountain Mining Co. v. Welsh*, 271 N.W. 819, 823, 65 S.D. 117.

56. *U.S.—McComb v. Hunt Foods, C. C.A.Cal.*, 167 F.2d 905, 907.

57. *U.S.—McComb v. C. H. Musselman Co.*, D.C.Pa., 74 F.Supp. 185, 187—*Martin v. Minerals Separation North American Corporation*, D.C. Md., 29 F.Supp. 146, 148.

N.Y.—*Sokol v. Stein Fur Dyeing Co.*, 216 N.Y.S. 167, 169, 216 App.Div. 573.

58. *Ala.—Curry v. Alabama Power Co.*, 8 So.2d 521, 527, 243 Ala. 53.

R.I.—*Ralston Purina Co. v. Zoning Board of Town of Westerly*, 12 A.2d 219, 221, 64 R.I. 197.

S.D.—*Bald Mountain Mining Co. v. Welsh*, 271 N.W. 819, 822, 823, 65 S.D. 117.

59. *U.S.—Expanded Metal Co. v. Bradford, Pa.*, 29 S.Ct. 652, 657, 214 U.S. 366, 53 L.Ed. 1034—*Cochrane v. Deener, D.C.*, 94 U.S. 780, 788, 24 L.Ed. 139—*Halliburton Oil Well Cementing Co. v. Walker, C.C. A.Cal.*, 146 F.2d 817, 821—*Emmett v. Metals Processing Corporation, C.C.A.Ariz.*, 118 F.2d 796, 798—*Lakeshire Cheese Co. v. Shefford Cheese*

*Co.*, C.C.A.Wis., 72 F.2d 497, 499—*Waldman v. Swanfeldt, C.C. A.Cal.*, 66 F.2d 294, 295—*Vegetable Oil Products Co. v. Dorward & Sons Co.*, D.C.Cal., 53 F.Supp. 281, 284—*Abram v. San Joaquin Cotton Oil Co.*, D.C.Cal., 46 F.Supp. 969, 972—*Melvin v. Thomas Potter, Sons & Co.*, C.C.Pa., 91 F. 151, 152—*Carnegie Steel Co. v. Cambria Iron Co.*, C.C.Pa., 89 F. 721, 754—*American Fibre-Chamois Co. v. Buckskin-Fibre Co.*, Ohio, 72 F. 508, 515—*Appleton Mfg. Co. v. Star Mfg. Co.*, Ill., 60 F. 411, 413, 9 C. C.A. 42.

Colo.—*Bedford v. Colorado Fuel & Iron Corporation*, 81 P.2d 752, 757, 102 Colo. 538.

Ohio.—*Huron Fish Co. v. Glander*, 67 N.E.2d 546, 547, 146 Ohio St. 631—*France Co. v. Evatt*, 55 N.E. 2d 652, 653, 143 Ohio St. 455.

R.I.—*Ralston Purina Co. v. Zoning Board of Town of Westerly*, 12 A.2d 219, 221, 64 R.I. 197.

60. *U.S.—McComb v. C. H. Musselman Co.*, D.C.Pa., 74 F.Supp. 185, 187—*Martin v. Minerals Separation North American Corporation*, D.C.Md., 29 F.Supp. 146, 148.

Ala.—*Curry v. Alabama Power Co.*, 8 So.2d 521, 527, 243 Ala. 53.

N.Y.—*Sokol v. Stein Fur Dyeing Co.*, 216 N.Y.S. 167, 169, 216 App.Div. 573.

S.D.—*Bald Mountain Mining Co. v. Welsh*, 271 N.W. 819, 821, 823, 65 S.D. 117.

**Similarly defined**  
A continuous and regular action or succession of actions, taking place or carried on in a definite manner and leading to the accomplishment of some result. A continuous op-

actions or events.<sup>61</sup>

As a legal term, "process" is a generic word<sup>62</sup> of very comprehensive signification<sup>63</sup> and many meanings.<sup>64</sup> In its broadest sense, it embraces all the steps and proceedings in a cause from its commencement to its conclusion,<sup>65</sup> and is defined as meaning the whole course of proceeding.<sup>66</sup> In its narrower sense, it is the means of compelling the defendant to appear in court, and in this sense the term is defined in Process § 1.

"Process" has been held equivalent to, or synonymous with, "art" see 6 C.J.S. p 772 note 13, "manufacture" see Manufactures § 1 a (4), "proceedings" see Actions § 1 h (1) (b), and "procedure" see Process § 1.

It has been compared with, or distinguished from, "product"<sup>67</sup> and "reagent."<sup>68</sup>

As a verb, the word "process" is defined as mean-

ing to subject to or treat by a special process;<sup>69</sup> to prepare by an artificial or special process.<sup>70</sup> It is further defined as meaning to subject, especially raw materials, to a process of manufacture, development, preparation for the market, etc.; to convert into marketable form, as live stock by slaughtering, milk by pasteurizing, fruits and vegetables by sorting and repacking,<sup>71</sup> and the courts have generally accepted this definition.<sup>72</sup>

Phrases employing the word "process" are set out in the note.<sup>73</sup>

Processing is a flexible term and may refer to either chemical or physical changes in the thing acted upon.<sup>74</sup> It is defined as meaning a course or method of operations; a series of actions, motions or occurrences; progressive act or continuous operation or treatment; an action, operation, or method of treatment applying to something; a series of

eration or series of operations.—*Bald Mountain Mining Co. v. Welsh*, supra.

61. Colo.—*Bedford v. Colorado Fuel & Iron Corporation*, 81 P.2d 752, 757, 102 Colo. 538.

R.I.—*Ralston Purina Co. v. Zoning Board of Town of Westerly*, 12 A. 2d 219, 221, 64 R.I. 197.

Va.—*Campbell v. Goode*, 2 S.E.2d 456, 457, 172 Va. 463.

62. N.J.—*McArdle Real Estate Co. v. McGowen*, 163 A. 24, 26, 109 N. J. Law 595.

N.M.—*Corpus Juris* quoted in *State ex rel. Dresden v. District Court of Second Judicial Dist.*, in and for Bernalillo County, 112 P.2d 506, 509, 45 N.M. 119.

50 C.J. p 441 note 3.

63. N.M.—*Corpus Juris* quoted in *State ex rel. Dresden v. District Court of Second Judicial Dist.*, in and for Bernalillo County, 112 P. 2d 506, 509, 45 N.M. 119.

50 C.J. p 441 note 4.

64. Kan.—*McKenna v. Cooper*, 101 P. 662, 663, 79 Kan. 847.

N.M.—*Corpus Juris* quoted in *State ex rel. Dresden v. District Court of Second Judicial Dist.*, in and for Bernalillo County, 112 P.2d 506, 509, 45 N.M. 119.

50 C.J. p 441 note 5.

65. Ga.—*Mobley v. Jackson*, 151 S. E. 522, 524, 525, 40 Ga.App. 761.

N.M.—*Corpus Juris* quoted in *State ex rel. Dresden v. District Court of Second Judicial Dist.* in and for Bernalillo County, 112 P.2d 506, 509, 45 N.M. 119.

50 C.J. p 441 note 8.

#### Similarly expressed

The word "process" used in its broadest sense comprehends all acts of court from beginning of proceeding to its end.—*State ex rel. Walling*

*v. Sullivan*, 13 N.W.2d 550, 555, 245 Wis. 180, 154 A.L.R. 841.

#### Applicable to an appeal

"The term 'process,' in its broad significance, applies to an appeal, for it includes all proceedings from the beginning to the end of a cause."

—*Roddy v. Fitzgerald's Estate*, 35 A. 2d 668, 670, 113 Vt. 472.

66. Va.—*Campbell v. Goode*, 2 S.E. 2d 456, 457, 172 Va. 463.

67. U.S.—*Durand v. Green*, C.C.Pa., 60 F. 392, 396.

68. U.S.—*Martin v. Minerals Separation North American Corporation*, D.C.Md., 29 F.Supp. 146, 148.

69. Ohio.—*Huron Fish Co. v. Glander*, 67 N.E.2d 546, 547, 146 Ohio St. 631.

#### Similarly defined

To subject to some special process or treatment.

Ark.—*Sugar Creek Creamery Co. v. Walker*, 187 S.W.2d 178, 180, 208 Ark. 639.

Okl.—*Colbert Mill & Feed Co. v. Oklahoma Tax Commission*, 109 P.2d 504, 506, 188 Okl. 366.

70. Ohio.—*Huron Fish Co. v. Glander*, 67 N.E.2d 546, 547, 146 Ohio St. 631.

71. U.S.—*U. S. v. Public Service Co. of Colorado*, C.C.A.Colo., 143 F.2d 79, 81.

Ariz.—*Moore v. Farmers Mut. Manufacturing & Ginning Co.*, 77 P.2d 209, 211, 51 Ariz. 378.

Ark.—*Sugar Creek Creamery Co. v. Walker*, 187 S.W.2d 178, 180, 208 Ark. 639.

Okl.—*Colbert Mill & Feed Co. v. Oklahoma Tax Commission*, 109 P.2d 504, 506, 188 Okl. 366.

S.D.—*Bald Mountain Mining Co. v. Welsh*, 271 N.W. 819, 823, 65 S. D. 117.

72. U.S.—*U. S. v. Public Service Co. of Colorado*, C.C.A.Colo., 143 F.2d 79, 81.

#### 73. Phrases

(1) "Contact process" and "contact titration process" see 16 C.J.S. p 1523 in Pocket Parts.

(2) "Criminal process" defined and distinguished from "civil process" see Criminal Law § 1.

(3) "Due process" or "due process of law" see Constitutional Law § 567 et seq.

(4) "Judicial process" see 50 C.J.S. p 572 notes 83-84.

(5) "Process of law" see 52 C.J.S. p 1030 note 12.

(6) "Process patent" defined and distinguished from "product patent" see Patents § 9 b.

(7) Other phrases as to which more recent adjudications have not been found see 50 C.J. p 623 notes 5-7.

74. Pa.—*Gulf Oil Corp. v. City of Philadelphia*, 53 A.2d 250, 255, 357 Pa. 101.

#### Similarly expressed

(1) Processing effectuates a change in form, contour, chemical combination, physical appearance or otherwise by artificial or natural means and, in its more complicated form, involves progressive action in performing, producing or making something.—*Corn Products Refining Co. v. Federal Trade Commission*, C.C.A.7, 144 F.2d 211, 219.

(2) Processing is some change made in the natural product as the curing of meats and canning of vegetables. The growing of the article is not in the common use of the term of processing.—*Zeigler v. People*, 124 P.2d 593, 595, 109 Colo. 252.

operations leading to some result.<sup>75</sup> It is also defined as meaning to subject to some special process or treatment; to subject to a process of manufacture, development or preparation for the market.<sup>76</sup>

As used in sales, use, or privilege tax statutes, "processing" is defined and discussed in Licenses § 31 c (10). The question whether employees engaged in processing agricultural products are ex-

empt from the requirements of the Fair Labor Standards Act §§ 7 (c), 13 (a), 29 U.S.C.A. §§ 207 (c), 213 (a) (10), as to minimum wages and overtime pay is discussed in Master and Servant § 151 (19).

"Processing" has been distinguished from "growing" see 38 C.J.S. p 1124 note 14.

75. Colo.—Bedford v. Colorado Fuel & Iron Corporation, 81 P.2d 752, 756, 102 Colo. 538.

76. Ohio.—France Co. v. Evatt, 55 N.E.2d 652, 653, 143 Ohio St. 455.

#### Similarly defined

"Processing" means to subject to some special process or treatment. To subject, especially raw material, to a process of manufacture, development, preparation for the market, etc.; to convert into marketable

form, as live stock for slaughtering, grain for milling, cotton for spinning, milk by pasteurizing, fruits and vegetables by sorting and repacking.—Kennedy v. State Board of Assessment and Review, 276 N.W. 205, 208, 224 Iowa 405.

## PROCESS

This Title includes writs, mandates, precepts, or notices, issued by a court or judge, clerk, attorney, or other officer, in or incident to proceedings in civil actions in general, and more particularly such instruments by which civil actions are begun, and defendants therein are required to appear and answer or are notified of the bringing of the action; issuance, requisites, and validity of such instruments in general; service thereof, personal or substituted, or by publication, privilege from service, and return; defects in process or return, and objections therefor, and how objections to process or service may be taken; amendment of process or return; quashing or setting aside process or return; and abuse of process in general.

**Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index**

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#### **II. SERVICE OF PROCESS, §§ 25-89**

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## I. NATURE, NECESSITY, ISSUANCE, REQUISITES, VALIDITY, AND CONSTRUCTION

## § 1. Definitions, Nature, and Kinds

- a. Process
- b. Civil process; compulsory process
- c. Legal or lawful process; process of law
- d. Original, mesne, and final process
- e. Defective, void, voidable, or irregular process
- f. Other terms

## a. Process

- (1) In general
- (2) Inclusion or exclusion of particular matters

## (1) In General

The term "process" in its broadest sense is equivalent to "procedure," and, in a narrow sense, it is limited to judicial writs in an action or writs or writings issued from or out of a court under the seal thereof and returnable thereto.

The term "process" is not limited to "summons."<sup>1</sup> In its broadest sense it is equivalent to, or synonymous with, "procedure."<sup>2</sup> Sometimes the term is also broadly defined as the means whereby a court compels a compliance with its demands.<sup>3</sup>

"Process" and "writ" or "writs" are synonymous<sup>4</sup>

1. N.J.—Franklyn v. Taylor Hydraulic Air Compressing Co., 52 A. 714, 68 N.J.Law 113.

Control of process by court see Courts § 88.

"Process" defined generally see the C.J.S. definition Process ante.

"Summons" defined see infra subdivision f (2) of this section.

2. Ga.—Mobley v. Jackson, 151 S.E. 522, 40 Ga.App. 761, reversed on

other grounds 156 S.E. 23, 171 Ga. 434, 71 A.L.R. 1178, conformed to 156 S.E. 125, 42 Ga.App. 328.

50 C.J. p 441 note 7.

3. Ga.—Crown Laundry v. Burch, 53 S.E.2d 116, 205 Ga. 211, followed in Crown Laundry v. Higgins, 53 S.E.2d 118, 205 Ga. 214, and Crown Laundry v. Robertson, 53 S.E.2d 119, 205 Ga. 214.

50 C.J. p 441 note 9.

4. Wis.—State ex rel. Walling v. Sullivan, 13 N.W.2d 550, 245 Wis. 180, 154 A.L.R. 841.

50 C.J. p 441 note 10.

"Writ" defined see the C.J.S. definition Writ, also 71 C.J. p 1625 note 51 et seq.

Words "original writ" include declaration with notice to plead attached or indorsed when used to take the

in the sense that every writ is a process,<sup>5</sup> and in a narrow sense of the term "process" is limited to judicial writs in an action,<sup>6</sup> or at least to writs or writings issued from or out of a court,<sup>7</sup> under the seal thereof<sup>8</sup> and returnable thereto;<sup>9</sup> but it is not always necessary to construe the term so strictly as to limit it to a writ<sup>10</sup> issued by a court in the exercise of its ordinary jurisdiction.<sup>11</sup> The term is sometimes defined as a writ or other formal writing issued by authority of law<sup>12</sup> or by some court, body, or official having authority to issue it;<sup>13</sup> and it is frequently used to designate a means, by writ or otherwise, of acquiring jurisdiction of defendant<sup>14</sup> or his property,<sup>15</sup> or of bringing defendant into,<sup>16</sup> or compelling him to appear in,<sup>17</sup> court to answer.<sup>18</sup>

*Meaning of "process" as employed in statutes.* As employed in statutes the legal meaning of the word "process" varies according to the context, subject matter, and spirit of the statute in which it occurs.<sup>19</sup> In some jurisdictions codes or statutes variously define "process" as signifying or including all writs, warrants, summonses, and orders of courts of justice or judicial officers,<sup>20</sup> or any writ, declaration, summons, order, or subpoena

whereby any action, suit, or proceeding shall be commenced, or which shall be issued in or on any action, suit, or proceeding.<sup>21</sup>

*As employed in this title,* and as sometimes defined, the term designates the writ or other formal writing, issued by authority of law, for the purpose of bringing defendant into a court of law to answer plaintiff's demands in a civil action.<sup>22</sup>

## (2) Inclusion or Exclusion of Particular Matters

- (a) Notice
- (b) Pleadings
- (c) Rule, order, or decree
- (d) Execution
- (e) Other matters

### (a) Notice

A notice may be designated as a process where it is given by authority of law for the purpose of acquiring jurisdiction of the defendant.

Generally speaking, notice may constitute process.<sup>23</sup> Except in some jurisdiction,<sup>24</sup> a notice may properly be designated as a process where it is given by authority of law for the purpose of acquiring jurisdiction of defendant<sup>25</sup> or of bringing

place of an original writ.—*Yeager v. Mellus*, 43 N.W.2d 836, 328 Mich. 243.

5. U.S.—*Phillips v. Hiatt*, D.C.Del., 83 F.Supp. 935—U. S. ex rel. Corsetti v. Commanding Officer of Camp Upton, U. S. Army, D.C.N.Y., 3 F.R.D. 360.

50 C.J. p 441 note 11—71 C.J. p 1626 notes 59, 60.

6. Minn.—*Hanna v. Russell*, 12 Minn. 80.

Okl.—*Stearns v. State*, 100 P. 909, 23 Okl. 462.

7. Ga.—*Gay v. Sylvania Cent. R. Co.*, 53 S.E.2d 713, 79 Ga.App. 362. 50 C.J. p 441 note 13.

8. U.S.—*U. S. v. Murphy*, D.C.Del., 82 F. 893, 899. Necessity of seal see *infra* § 19.

9. Minn.—*Hanna v. Russell*, 12 Minn. 80.

10. Minn.—*Wolf v. McKinley*, 68 N. W. 2, 65 Minn. 156. 50 C.J. p 442 note 16.

11. U.S.—*Missouri v. Spiva*, C.C.Mo., 42 F. 435.

12. Ga.—*Savage v. Oliver*, 36 S.E. 54, 110 Ga. 636. 50 C.J. p 442 note 18.

13. Kan.—*State v. Wagoner*, 256 P. 959, 123 Kan. 586.

14. Ill.—*Alexander Lumber Co. v. Kellerman*, 192 N.E. 913, 358 Ill. 207.

R.I.—*Procaccianti v. Procaccianti*, 69 A.2d 635. 50 C.J. p 442 note 20.

15. U.S.—*U. S. v. Tanner*, Ct.Cl., 13 S.Ct. 436, 147 U.S. 661, 37 L.Ed. 321.

S.C.—*Royal Exch. Assur. v. Bennettsville, etc., R. Co.*, 79 S.E. 104, 95 S.C. 375.

16. Ga.—*Colquitt Nat. Bank v. Potivint*, 83 S.E. 198, 15 Ga.App. 329. 50 C.J. p 442 note 22.

17. Del.—*Webb Packing Co. v. Harmon*, 196 A. 158, 9 W.W.Harr. 22. N.J.—*Stevens v. Associated Mortg. Co. of New Jersey*, 152 A. 461, 107 N.J.Eq. 297, affirmed 158 A. 843, 110 N.J.Eq. 70.

Pa.—*In re Gangloff's Estate*, 42 Pa. Dist. & Co. 666, 8 Sch.Reg. 200—*Snyder v. Temple*, 16 Pa.Dist. & Co. 712.

S.C.—*Anderson v. Anderson*, 18 S.E. 2d 9, 198 S.C. 412.

Wis.—*State ex rel. Walling v. Sullivan*, 13 N.W.2d 550, 245 Wis. 180, 154 A.L.R. 841.

50 C.J. p 442 note 23.

18. Del.—*Webb Packing Co. v. Harmon*, 196 A. 158, 9 W.W.Harr. 22. W.Va.—*Nicholas Land Co. v. Crowden*, 32 S.E.2d 563, 176 W.Va. 216. 50 C.J. p 442 note 24.

19. U.S.—*U. S. v. Kinney*, D.C.Pa., 264 F. 542, error dismissed 41 S.Ct. 64, 254 U.S. 663, 65 L.Ed. 464. 50 C.J. p 442 note 25.

20. Idaho.—*Blumhauer-Frank Drug Co. v. Bransetter*, 43 P. 575, 4 Idaho 557, 95 Am.S.R. 151. 50 C.J. p 442 note 27.

21. U.S.—*Ex parte Schollenberger*, Pa., 96 U.S. 369, 24 L.Ed. 853.

Process against foreign insurance corporations see *Insurance* § 1270 b.

22. Okl.—*Emerson v. Emerson*, 265 P. 1078, 130 Okl. 140.

S.C.—*Royal Exch. Assur. v. Bennettsville, etc., R. Co.*, 79 S.E. 104, 95 S.C. 375.

23. N.Y.—*Corpus Juris* cited in *Federal Motorship Corp. v. Johnson & Higgins*, 77 N.Y.S.2d 52, 57, 192 Misc. 401, affirmed 86 N.Y.S.2d 667, 275 App.Div. 660, motion dismissed 87 N.E.2d 63, 299 N.Y. 673, and appeal dismissed 87 N.E.2d 686, 299 N.Y. 793.

50 C.J. p 443 note 40.

"Notice" defined see *Notice* §§ 1-8. "Notice" and "process" distinguished see *Notice* § 8.

24. Iowa.—*Schroeder v. District Court of Iowa in and for Benton County*, 239 N.W. 806, 213 Iowa 814.

50 C.J. p 442 note 43.

### Original notice

Iowa.—*Schroeder v. District Court of Iowa in and for Benton County*, *supra*.

50 C.J. p 443 note 43.

25. Cal.—*Frey & Horgan Corporation v. Superior Court in and for City and County of San Francisco*, 55 P.2d 203, 5 Cal.2d 401, certiorari denied *Frey & Horgan Corp. v. Superior Court of State of Califor-*



him into court to answer.<sup>26</sup>

On the other hand, "process" has been held not to include certain notices,<sup>27</sup> as, for example, a notice given as a condition precedent to a right of action,<sup>28</sup> a notice to a garnishee,<sup>29</sup> a notice to a warrantor requesting him to defend,<sup>30</sup> notice in condemnation<sup>31</sup> or partition<sup>32</sup> proceedings, or notice of an appeal.<sup>33</sup>

*Notice of sale or application therefor.* In some cases it has been held that the word "process" includes a guardian's notice of application to sell his ward's land;<sup>34</sup> but in other cases it has been asserted that notices in proceedings by executors, administrators, and guardians to sell real estate are not process.<sup>35</sup> Likewise in some jurisdictions notice of a tax sale is deemed to be in the nature of process;<sup>36</sup> but in other jurisdictions notices relating to the sale and conveyance of land for taxes are declared not to be process.<sup>37</sup>

### (b) Pleadings

Process is not part of a plaintiff's pleading; it does not include a petition, complaint, information or indictment.

Process is not part of the pleading of a plaintiff.<sup>38</sup> Various papers have been held not to be embraced within the meaning of the term "proc-

ess,"<sup>39</sup> such as a petition,<sup>40</sup> complaint,<sup>41</sup> information,<sup>42</sup> indictment,<sup>43</sup> and a copy of an indictment.<sup>44</sup>

While a declaration in actions commenced without writ, by filing and service of a declaration, is in the nature of process,<sup>45</sup> it is not process in a strict sense or for all purposes.<sup>46</sup>

### (c) Rule, Order, or Decree

A rule, order, or decree generally is included within the term "process", although certain rules, orders, and decrees have been held not to be included within the term.

It has been stated generally that process embraces a rule,<sup>47</sup> order,<sup>48</sup> or decree,<sup>49</sup> and it has been specifically held that it embraces a rule or order to commit.<sup>50</sup> Process does not, however, necessarily embrace every order, as discussed in Motions and Orders § 2 b, and it has been specifically held that it does not include an order in the federal courts for the appearance of an absent defendant, as considered in Federal Courts § 125 c, an order for the holding of a local option election,<sup>51</sup> or a decree enjoining a nuisance.<sup>52</sup> An order directed to the sheriff and indorsed by plaintiff on an affidavit is not strictly within the definition of the term "process."<sup>53</sup>

*Order or decree of sale.* It has been both af-

nia, 56 S.Ct. 955, 298 U.S. 684, 80 L.Ed. 1404.  
50 C.J. p 443 note 44.

26. Okl.—Emerson v. Emerson, 265 P. 1078, 130 Okl. 140.  
S.C.—Royal Exch. Assur. v. Bennettsville, etc., R. Co., 79 S.E. 104, 95 S.C. 375.

27. Notice to take depositions  
Kan.—Atchison, etc., R. Co. v. Sage, 31 P. 140, 49 Kan. 524.

28. Mass.—Healey v. Geo. F. Blake Mfg. Co., 62 N.E. 270, 180 Mass. 270.

29. U.S.—Wile v. Cohn, C.C.Iowa, 63 F. 759, affirmed 70 F. 138, 17 C.C.A. 25.

30. Okl.—Harmon v. Nofire, 267 P. 650, 131 Okl. 1.

31. Wash.—State v. Chelan County Super. Ct., 253 P. 115, 142 Wash. 270.

32. N.J.—Brown v. Gaskill, 70 A. 665, 74 N.J.Eq. 620.

33. Iowa.—Casey v. Hogue, 214 N. W. 729, 204 Iowa 3.  
50 C.J. p 443 note 52.

34. Ill.—Nichols v. Mitchell, 70 Ill. 258.

35. Kan.—McKenna v. Cooper, 101 P. 662, 79 Kan. 847.

36. Colo.—Schwed v. Hartwitz, 47 P. 295, 23 Colo. 187, 58 Am.S.R. 221.

37. Kan.—McKenna v. Cooper, 101 P. 662, 79 Kan. 847.

38. Ga.—Gay v. Sylvania Cent. R. Co., 53 S.E.2d 713, 79 Ga.App. 362.  
"Pleading" defined see Pleading § 1.

39. Okl.—Emerson v. Emerson, 265 P. 1078, 130 Okl. 140.

40. Okl.—Emerson v. Emerson, supra.  
50 C.J. p 443 note 63.

41. S.C.—Royal Exch. Assur. v. Bennettsville, etc., R. Co., 79 S.E. 104, 95 S.C. 375.

42. S.D.—State v. Carlisle, 139 N.W. 127, 30 S.D. 475, error dismissed 35 S.Ct. 663, 238 U.S. 609, 59 L. Ed. 1487.  
50 C.J. p 443 note 65.

43. Del.—State v. Vandegrift, 132 A. 853, 3 W.W.Harr. 154.

44. La.—Fitzpatrick v. New Orleans, 27 La.Ann. 457.  
Miss.—Ivey v. State, 119 So. 507, 154 Miss. 60.

45. Mich.—Menominee v. Menominee County Cir. Judge, 46 N.W. 23, 81 Mich. 577.  
50 C.J. p 443 note 68.

Declaration filed with notice to plead is in the nature of process to bring defendant into court.—Yeager v. Mellus, 43 N.W.2d 836, 328 Mich. 243.

46. N.Y.—Thayer v. Lewis, 4 Den. 269—Corlies v. Holmes, 20 Wend. 681.  
50 C.J. p 443 note 69.

47. Ga.—Colquitt Nat. Bank v. Politvint, 83 S.E. 198, 15 Ga.App. 329.  
N.J.—National Fire Ins. Co. v. Chambers, 32 A. 663, 53 N.J.Eq. 468.  
Rule or order to show cause see Motions and Orders § 20.

48. N.Y.—Corpus Juris cited in Federal Motorship Corp. v. Johnson & Higgins, 77 N.Y.S.2d 52, 57, 192 Misc. 401, affirmed 86 N.Y.S.2d 667, 275 App.Div. 660, motion dismissed 87 N.E.2d 63, 299 N.Y. 673, and appeal dismissed 87 N.E.2d 686, 299 N.Y. 793.  
50 C.J. p 443 note 72.

49. Ga.—Colquitt Nat. Bank v. Politvint, 83 S.E. 198, 15 Ga.App. 329.  
N.J.—National Fire Ins. Co. v. Chambers, 32 A. 663, 53 N.J.Eq. 468.

50. N.Y.—People v. Nevins, 1 Hill 154.

51. Tex.—Gilbert v. State, 25 S.W. 632, 32 Tex.Cr. 596.

52. Mich.—People v. Yarowsky, 210 N.W. 246, 236 Mich. 169.

53. Mont.—State v. District Ct., 83 P. 641, 33 Mont. 359.

firmed<sup>54</sup> and denied<sup>55</sup> that an order or decree of sale is process.

#### (d) Execution

An execution generally is included in the term "process," although under particular statutes an execution may not be embraced by the term.

"Process" includes an "execution,"<sup>56</sup> at least in a broad sense;<sup>57</sup> but a particular statute may be so worded as clearly to indicate a legislative purpose to draw a distinction between the two words and to use the former in a narrow and restricted sense which does not include the latter.<sup>58</sup>

#### (e) Other Matters

Various matters have been regarded as "process," such as a subpoena or citation, a bond in a criminal case, and the drawing of a grand jury.

Process has been held to include various matters,<sup>59</sup> such as the proceedings in claim and delivery which authorize a sheriff to take property,<sup>60</sup> a subpoena,<sup>61</sup> a tax book authenticated by the seal of the court under which a tax collector is authorized by statute to seize and sell property to enforce a collection of taxes,<sup>62</sup> and a writ or order of attachment.<sup>63</sup> A proceeding for the enforcement of a mechanic's lien is in effect a process.<sup>64</sup>

On the other hand, process has been held not to include various other matters,<sup>65</sup> as, for example, the caption of the docket of a justice of the peace<sup>66</sup>

or the record entries of a case before him,<sup>67</sup> a certificate stating the finding and action of a judicial officer,<sup>68</sup> a commission to examine witnesses,<sup>69</sup> a memorial to a court,<sup>70</sup> a motion by the attorney general,<sup>71</sup> a precept under which a sale of land for nonpayment of taxes is made,<sup>72</sup> a proclamation calling an election,<sup>73</sup> and a writ of inquiry.<sup>74</sup>

*Bond, undertaking, or recognizance.* Process includes a bond or recognizance taken in a criminal case,<sup>75</sup> but not a bond in replevin<sup>76</sup> or an appeal bond, undertaking, or recognizance.<sup>77</sup>

*Drawing and list of jurors.* It has been held that "process" includes the drawing of a grand jury<sup>78</sup> and a list of grand and petit jurors who have been selected,<sup>79</sup> but it has also been held not to include a list of a special venire.<sup>80</sup>

*Record or registry of judgment* has been held to be within a broad sense of the term "process" as used in some statutes.<sup>81</sup>

*Cost or fee bill.* Some courts hold that the term "process" includes a fee bill,<sup>82</sup> but other courts hold that a cost bill cannot be regarded as process.<sup>83</sup>

#### b. Civil Process; Compulsory Process

Civil process is a writ or order in a civil action and includes various writs, such as a writ of garnishment.

54. N.J.—Weinstein v. Herman, 86 A. 974, 81 N.J.Eq. 236.

50 C.J. p 444 note 80.

55. Ala.—Parks v. Bryant, 31 So. 593, 132 Ala. 224.

56. Ariz.—Gila Land, etc., Co. v. Eads, 203 P. 549, 23 Ariz. 282.

50 C.J. p 444 note 85.  
"Execution" defined see Executions § 1.

57. Ga.—Colquitt Nat. Bank v. Poitvint, 83 S.E. 198, 15 Ga.App. 329.

58. Ga.—Colquitt Nat. Bank v. Poitvint, supra.

59. Pa.—Coxe v. Martin, 44 Pa. 322. Rule or order to show cause see Motions and Orders § 20. Summons or citation see infra subdivision f (2) of this section. Warrant see infra subdivision f (3) of this section.

Ad audiendum errores

Fla.—Weiskoph v. Dibble, 18 Fla. 22.

60. Cal.—In re Baker, 162 P. 922, 32 Cal.App. 320.

50 C.J. p 444 note 89.

61. U.S.—In re Simon, C.C.A.N.Y., 297 F. 942.

50 C.J. p 444 note 93.

62. U.S.—Missouri v. Spiva, C.C. Mo., 42 F. 435.

63. W.Va.—Brown v. Beckwith, 51 S.E. 977, 58 W.Va. 140, 112 Am.S.R. 955, 1 L.R.A.N.S., 778.

Wis.—Carey v. German American Ins. Co., 54 N.W. 18, 84 Wis. 80, 36 Am.S.R. 907, 20 L.R.A. 267. Writ of attachment see Attachment §§ 180-200.

64. W.Va.—J. E. Moss Iron Works v. Jackson County Ct., 109 S.E. 343, 89 W.Va. 367, 26 A.L.R. 319.

65. Affidavit

Minn.—Dorman v. Bayley, 10 Minn. 383.

Okl.—Emerson v. Emerson, 265 P. 1078, 130 Okl. 140.

66. Del.—May v. State, 132 A. 861, 3 W.W.Harr. 160.

67. Del.—May v. State, supra.

68. Conn.—Anderson v. Dewey, 110 A. 99, 91 Conn. 510.  
50 C.J. p 444 note 1.

69. N.C.—Duncan v. Hill, 19 N.C. 291.

70. Me.—Ex parte Davis, 41 Me. 38.

71. La.—Fitzpatrick v. New Orleans, 27 La. Ann. 457.

72. Ill.—Scarritt v. Chapman, 11

Ill. 443—Curry v. Hinman, 11 Ill. 420.

73. Okl.—Stearns v. State, 100 P. 909, 23 Okl. 462.

74. N.Y.—Cook v. Tuttle, 2 Wend. 289.

Writ of inquiry see Damages § 171.

75. U.S.—U. S. v. Murphy, D.C.Del., 82 F. 893.  
50 C.J. p 444 note 11.

76. R.I.—Simpson v. Wilcox, 25 A. 391, 18 R.I. 40.

77. Or.—In re Burnt River Water Rights, 241 P. 988, 116 Or. 525.  
50 C.J. p 444 note 13.

78. Tex.—Powell v. State, 269 S.W. 443, 99 Tex.Cr. 276.

79. Ark.—Williams v. Hempstead County, 39 Ark. 176.

80. Miss.—Ivey v. State, 119 So. 507, 154 Miss. 60.

81. Under early statute

Tex.—Clements v. Texas Co., Civ. App., 273 S.W. 993.

82. Ill.—Reddick v. Cloud, 7 Ill. 670.

83. Nev.—Radovich v. Western Union Tel. Co., 135 P. 920, 136 P. 704, 36 Nev. 341.

Civil process is a writ or order issued in a civil action.<sup>84</sup>

The term "civil process," includes various matters,<sup>85</sup> such as a writ of garnishment<sup>86</sup> and a writ of assistance on a fieri facias for costs.<sup>87</sup> As used in some statutes, and at least for the limited purpose of bringing the cause before another court, "process in civil actions" includes an appeal from a probate court.<sup>88</sup>

**Compulsory process.** "Compulsory process" is such coercive means as the courts, by virtue of their inherent powers or sanction of the law, are permitted to employ.<sup>89</sup>

### c. Legal or Lawful Process; Process of Law

Legal process is process fair on its face and in fact valid.

"Legal process" has been variously defined as process fair on its face<sup>90</sup> and in fact valid;<sup>91</sup> a process issued in virtue of, and pursuant to, law;<sup>92</sup> and process which is not defective and has issued in the ordinary course of justice from a court or magistrate having jurisdiction of the subject matter.<sup>93</sup> While the term may mean all the proceedings in an action,<sup>94</sup> it is not always used in this sense, but rather in the sense of a "writ."<sup>95</sup>

The term "legal process" has been held to include various matters<sup>96</sup> as, for example, an order directing a sale of real property<sup>97</sup> and the statutory process of supplemental proceedings.<sup>98</sup> On the other hand, the term has been held not to include other

matters,<sup>99</sup> such as a distress warrant.<sup>1</sup>

**Lawful process.** Lawful process is notice the proper service of which on defendant clothes the court with jurisdiction to hear and determine the cause.<sup>2</sup> The term includes a citation<sup>3</sup> and a subpoena.<sup>4</sup>

"Ordinary process of law," as used in some statutes, does not mean ordinary personal judgment and execution, but rather such process as is adapted to enforce a lien or specific charge on property specially assessed.<sup>5</sup>

"Under process of law" does not describe an entry on mortgaged premises by the mortgagee on voluntary surrender.<sup>6</sup>

### d. Original, Mesne, and Final Process

Process has been divided into, and designated as, "original," "mesne," and "final," although in some jurisdictions process has come to be indicated by only two terms, "mesne" and "final".

In some instances process has been divided into, and designated as, "original," "mesne," and "final."<sup>7</sup> Strictly speaking, "original process" is the process which originates a cause,<sup>8</sup> as distinguished from process which prolongs an action already begun<sup>9</sup> or which is appellate in its nature.<sup>10</sup> "Mesne process" is intervening<sup>11</sup> or intermediate<sup>12</sup> process, and embraces all writs and orders of court necessary for the carrying on of the suit after its institution by original process and up to, but not including, final process.<sup>13</sup> "Final process" comprehends those

84. Standard D.  
11 C.J. p 798 note 4.

85. Writ of scire facias on mortgage  
Pa.—Coxe v. Martin, 44 Pa. 322.

86. Mich.—Webster v. Bennett, 236 N.W. 684, 247 Mich. 616.

87. Pa.—Clark v. Martin, 3 Grant 393.

88. Conn.—Appeal of Campbell, 56 A. 554, 76 Conn. 284.

89. Ky.—Greene v. Ballard, 192 S. W. 841, 174 Ky. 808.

90. Kan.—State v. Wagoner, 256 P. 959, 123 Kan. 586.

Wash.—State v. Knapf, 96 P. 1076, 50 Wash. 229, 21 L.R.A., N.S., 66.  
"Due process of law" defined see Constitutional Law § 567.

91. Kan.—State v. Wagoner, 256 P. 959, 123 Kan. 586.

92. Iowa.—Cooley v. Davis, 34 Iowa 128, 130.

93. Pa.—Commonwealth v. Brower, 7 Pa.Dist. 254, 20 Pa.Co. 405.

94. N.Y.—Perry v. Lorillard Fire Ins. Co., 6 Lans. 201.

95. N.Y.—Perry v. Lorillard Fire Ins. Co., supra.

96. Order appointing receiver  
U.S.—In re Bininger, C.C.N.Y., 3 F. Cas.No.1,420, 7 Blatchf. 262.

97. Wis.—Sauer v. Steinbauer, 14 Wis. 70.

98. Minn.—Wolf v. McKinley, 68 N. W. 2, 65 Minn. 156.

99. Foreclosure by advertisement  
Minn.—Loy v. Home Ins. Co., 24 Minn. 315, 31 Am.R. 346.

1. U.S.—U. S. v. Meyers, D.C.Md., 27 F.Cas.No.15,847.  
50 C.J. p 445 note 42.

2. N.J.—Gondas v. Gondas, 134 A. 615, 99 N.J.Eq. 473.

"Lawful process in any action or proceeding" manifestly refers to process emanating from a court, or by the authority of a court, and cannot be understood to refer to such acts or notices in pais between private parties as derive no authority from a court, but simply serve to create a right of action.—Healey v. Geo. F. Blake Mfg. Co., 62 N.E. 270, 180 Mass. 270.

3. N.J.—Gondas v. Gondas, 134 A. 615, 99 N.J.Eq. 473.

4. N.J.—Gondas v. Gondas, supra.

5. Mo.—Neenan v. Smith, 50 Mo. 525, overruling St. Louis v. Clemens, 36 Mo. 467.

6. N.H.—Riddle v. George, 58 N.H. 25.

7. Pa.—White v. Guthrie, 2 Pa.Co. 7.

8. U.S.—Oglesby v. Attrill, C.C.La., 12 F. 227.

50 C.J. p 445 note 51.

9. U.S.—Oglesby v. Attrill, supra.

10. U.S.—Holmes v. Jennison, Vt., 14 Pet. 540, 10 L.Ed. 579.

11. U.S.—Pennington v. Lowenstein, D.C.Miss., 12 F.Cas.No. 10,938.

50 C.J. p 445 note 54.

12. R.I.—Arnold v. Chapman, 13 R. I. 586.

50 C.J. p 445 note 55.

13. Ala.—Birmingham Dry-Goods Co. v. Bledsoe, 21 So. 403, 113 Ala. 418.

50 C.J. p 445 note 56.

writs which are necessary to secure to the successful party the benefit of the suit.<sup>14</sup>

In a number of jurisdictions process has come to be indicated by only two terms, "mesne" and "final,"<sup>15</sup> and "mesne process" is employed as embracing all writs preceding execution or final process,<sup>16</sup> including the process by which a suit is commenced,<sup>17</sup> defendant is brought into court,<sup>18</sup> or property is seized in admiralty proceedings in rem.<sup>19</sup>

### e. Defective, Void, Voidable, or Irregular Process

"Void process," as distinguished from "voidable" or "irregular" process, is such as the court has no power to award, or has not acquired jurisdiction to issue in a particular case, or which fails to comply with legal requisites, or which loses its vitality in consequence of noncompliance with a condition subsequent.

"Defective process" is of two classes, namely, void and voidable.<sup>20</sup> "Void process" is such as the court has no power to award,<sup>21</sup> or has not acquired jurisdiction to issue in the particular case,<sup>22</sup> or which fails in some material respect to comply in form with the legal requisites of process,<sup>23</sup> or which loses its validity in consequence of noncompliance with a condition subsequent, obedience to which is rendered essential;<sup>24</sup> and it is an absolute nullity from the beginning.<sup>25</sup>

"Voidable process" includes all defective process where the defect is of such nature that it is capable of being amended.<sup>26</sup>

"Irregular process" is such as a court has general jurisdiction to issue, but which is unauthorized in the particular case by reason of the existence or nonexistence of some fact or circumstance rendering it improper in such a case.<sup>27</sup> While "irregular process" has been defined as meaning process which is absolutely null and void,<sup>28</sup> it is said that usually the term has been applied to all processes not issued in strict conformity with the law,<sup>29</sup> whether the defects appear on the face of the process or by reference to extrinsic facts,<sup>30</sup> and whether such defects render the process absolutely void or only voidable.<sup>31</sup>

### f. Other Terms

- (1) In general
- (2) Summons; citation
- (3) Warrant

#### (1) In General

In connection with process, various terms have been defined, such as "judicial process," "returnable process," and "summary process".

In connection with process various terms have been defined,<sup>32</sup> according to the judicial author-

14. Ala.—Birmingham Dry-Goods Co. v. Bledsoe, *supra*.  
50 C.J. p 445 note 57.

15. N.Y.—Utica City Bank v. Buel, 9 Abb.Pr. 385, 17 How.Pr. 498.  
50 C.J. p 445 note 58.

16. Ala.—Birmingham Dry-Goods Co. v. Bledsoe, 21 So. 403, 113 Ala. 418.  
50 C.J. p 446 note 59.

17. R.I.—Arnold v. Chapman, 13 R. I. 586.

18. Mo.—Hirshiser v. Tinsley, 9 Mo. App. 339.  
50 C.J. p 446 note 61.

19. U.S.—The City of Philadelphia, D.C.Pa., 263 F. 234.

20. Vt.—Howe v. Lisbon Sav. Bank & Trust Co., 14 A.2d 3, 111 Vt. 201.

21. N.Y.—Hyman v. Ross, 84 N.Y.S. 2d 102, affirmed 87 N.Y.S.2d 422, 275 App.Div. 666.

Ohio.—Brinkman v. Drolesbaugh, 119 N.E. 451, 454, 97 Ohio St. 171, L.R. A.1918F 1132.  
50 C.J. p 446 note 66.

Validity of process see *infra* §§ 10-20.

Process prohibited by law is void.—Enosburg Grain Co. v. Wilder, 20 A.2d 473, 112 Vt. 11.

Process which issues in violation of statute prohibiting it is void

process.—Howe v. Lisbon Sav. Bank & Trust Co., 14 A.2d 3, 111 Vt. 201.

22. N.Y.—Hyman v. Ross, 84 N.Y.S. 2d 102, affirmed 87 N.Y.S.2d 422, 275 App.Div. 666.  
50 C.J. p 446 note 67.

23. N.Y.—Hyman v. Ross, *supra*.  
50 C.J. p 446 note 68.  
Requisites of process see *infra* §§ 10-20.

Process not complying with statutes Process which is not in substantial compliance with statutory requirements is void process, although not prohibited by law.—Howe v. Lisbon Sav. Bank & Trust Co., 14 A.2d 3, 111 Vt. 201.

24. N.Y.—Hyman v. Ross, 84 N.Y.S. 2d 102, affirmed 87 N.Y.S.2d 422, 275 App.Div. 666.  
50 C.J. p 446 note 69.

25. Vt.—Hayden v. Caledonia Nat. Bank, 20 A.2d 675, 112 Vt. 30.  
50 C.J. p 446 note 70.  
Void process as amendable see *infra* § 114.

Process is overthrown and annulled, and proceeding is at an end.—Webb Packing Co. v. Harmon, 196 A. 158, 9 W.W.Harr., Del., 22.

Void process is no process Ga.—W. T. Rawleigh Co. v. Watts, 24 S.E.2d 213, 68 Ga.App. 786.

26. Vt.—Russell v. Lund, 39 A.2d

337, 114 Vt. 16—Howe v. Lisbon Sav. Bank & Trust Co., 14 A.2d 3, 111 Vt. 201.

Voidable process as amendable see *infra* §§ 114, 115.

27. U.S.—Bryan v. Congdon, Kan., 86 F. 221, 29 C.C.A. 670.  
50 C.J. p 446 note 71.

28. Ark.—Dixon v. Watkins, 9 Ark. 139.  
N.Y.—Woodcock v. Bennet, 1 Cow. 711, 13 Am.D. 568.  
50 C.J. p 446 note 72.

"Erroneous process" distinguished Vt.—Paine v. Ely, N.Chip. 14.  
21 C.J. p 822 note 88 [a].

29. Ind.—Doe v. Harter, 2 Ind. 252.

30. Ind.—Doe v. Harter, *supra*.

31. Ind.—Doe v. Harter, *supra*.

32. Va.—Baldwin v. Norton Hotel, 175 S.E. 751, 163 Va. 76.  
Abuse of process see *infra* § 119.  
Criminal process see Criminal Law § 1.

Malicious use of process see *infra* § 119.  
Return and proof of service see *infra* § 90.

Trustee process see Garnishment § 1 a.

#### Monition

(1) A monition is a summons or citation.—Wharton L. Lex.

ities on the question, such as "color of process,"<sup>33</sup> "judicial process,"<sup>34</sup> "process of court,"<sup>35</sup> "returnable process,"<sup>36</sup> and "summary process."<sup>37</sup>

## (2) Summons; Citation

A summons is a means whereby the defendant is notified to appear at the proper time and place to answer the complaint against him and in some jurisdictions is regarded as process.

The word "summons" in connection with process has been variously defined,<sup>38</sup> as, for example, the first process in the institution of an action whereby defendant is notified to appear at the proper time and place to answer the complaint against him;<sup>39</sup> the process whereby parties de-

fendant are brought into court so as to give the court jurisdiction of their person;<sup>40</sup> the process by which defendant is summoned to court;<sup>41</sup> a means supplied by the law to the assertion of jurisdiction;<sup>42</sup> a notice to bring a party into court;<sup>43</sup> a notice required to be given to defendant by plaintiff so that defendant may know where to meet plaintiff in order to present and protect himself against the claim;<sup>44</sup> and a means of notifying defendant of the suit and ordering him to appear in court.<sup>45</sup> It has also been described as the instrument running in the name of the state, issuing out of the court having jurisdiction of the action, directed to a ministerial officer, commanding him

(2) Monition is a process in the nature of summons.—*St. Louis v. Richeson*, 76 Mo. 470, 484.

"Notice of motion," is substitute for writ and declaration in common-law actions, and notifies defendant when and where he is to appear and sets forth cause of complaint.—*Baldwin v. Norton Hotel*, 175 S.E. 751, 163 Va. 78.

"Process issued on any final judgment" does not include an order of commitment, issued by an examining magistrate, to hold a prisoner for trial.—*Ex parte Crowell*, 264 P. 642, 39 Okl.Cr. 201—50 C.J. p 446 note 77.

"Process requiring the arrest of any person" is process that commands restraint of the person.—*Webster v. Bennett*, 226 N.W. 684, 247 Mich. 616—50 C.J. p 446 note 78.

33. "Color of process" is a process sufficient in form and apparently valid.—*Barfield v. Turner*, 8 S.E. 115, 101 N.C. 357—11 C.J. p 1227 note 39.

34. "Judicial process"

In its narrower sense, the means of compelling defendant to appear in court for suing out the original writ in civil and, after indictment, criminal cases.—*State v. Guilbert*, 47 N.E. 651, 56 Ohio St. 575, 60 Am. S.R. 756, 38 L.R.A. 519—34 C.J. p 1185 note 65.

35. "Process of court" clearly includes a proceeding to set off one judgment against another.—*Atkinson v. Pittman*, 2 S.W. 114, 47 Ark. 464.

36. "Returnable process"

A term used to designate process on which the officer receiving it is bound to certify his doings.—*Utica City Bank v. Buell*, 9 Abb.Pr., N.Y., 385, 17 How.Pr. 498.

37. "Summary process"

(1) Process is summary when it is immediate or instantaneous and emanates and takes effect without intermediate applications or delays.—*Gaines v. Travis*, D.C.N.Y., 9 F. Cas.No.5,180, Abb.Adm. 422.

(2) Summary process cannot be extended beyond cases expressly authorized by law.—*Adams v. Ross Amusement Co.*, 161 So. 601, 182 La. 252—*Foret v. Stark*, La.App., 16 So. 2d 79.

(3) An action for restitution of property by summary process does not lie.—*Foret v. Stark*, supra.

(4) A litigant cannot, by coupling a summary action with an ordinary action, deprive defendant of his right to have the ordinary action instituted legally through service of the petition and citation and not by rule or summary process.—*In re A. A. Auto Wrecking Co.*, 200 So. 16, 196 La. 722—*Dunlap v. Ramsey & Dunlap*, 184 So. 710, 191 La. 158.

(5) Right to summary process implies pendency of suit between parties and is confined to incidental matters arising during the contestation, except where summary proceeding is expressly allowed by law.—*Foret v. Stark*, supra.

38. S.C.—*Lybrand v. State Co.*, 184 S.E. 580, 179 S.C. 208, 104 A.L.R. 1118.

"Summons" defined generally see the C.J.S. definition Summons, also 60 C.J. p 1020 note 13 et seq.

Not a pleading

N.D.—*Al G. Barnes Amusement Co. v. District Court in and for Ramsey County*, Second District, 268 N.W. 897, 66 N.D. 727.

Writ as summons

U. S.—*Wilson v. Winchester & P. R. Co.*, C.C.W.Va., 82 F. 16, 17, affirmed 99 F. 642, 41 C.C.A. 215. 71 C.J. p 1627 note 83.

39. N.Y.—*Ackerman v. Berriman*, 114 N.Y.S. 937, 61 Misc. 165.

40. Mo.—*State ex rel. Minihan v. Aronson*, 165 S.W.2d 404, 350 Mo. 309—*St. Ferdinand Sewer Dist. of St. Louis County v. Turner*, Mo. App., 208 S.W.2d 85.

Utah—*Swetnam v. Dalby*, 79 P.2d 20, 95 Utah 74.

60 C.J. p 1020 note 17.

41. N.M.—*Bourgeois v. Santa Fe Trail Stages*, 95 P.2d 204, 43 N.M. 453.

42. S.C.—*Lybrand v. State Co.*, 184 S.E. 580, 179 S.C. 208, 104 A.L.R. 1118—*Southern Cotton Oil Co. v. Hewlett*, 93 S.E. 195, 107 S.C. 533 —*Wren v. Johnson*, 40 S.E. 937, 62 S.C. 545.

43. Mo.—*Riesterer v. Horton Land, etc., Co.*, 61 S.W. 238, 160 Mo. 141. 60 C.J. p 1020 note 18.

Similar definitions

(1) Summons is a notice to defendant that proceedings have been instituted and that judgment therein will be taken against him if he fails to answer.

Cal.—*Pinon v. Pollard*, 158 P.2d 254, 69 Cal.App.2d 129.

Minn.—*Tharp v. Tharp*, 36 N.W.2d 1, 228 Minn. 23—*Griffin v. Faribault Fair & Agricultural Ass'n*, 280 N. W. 7, 203 Minn. 97—*Schultz v. Oldenburg*, 277 N.W. 918, 202 Minn. 237—*Flanary v. Kusha*, 173 N.W. 652, 143 Minn. 308.

Wash.—*Roth v. Nash*, 144 P.2d 271, 19 Wash.2d 731.

60 C.J. p 1020 note 22 [d] (1).

(2) Summons is mere notice informing defendant of action and need to answer complaint within specified time.—*Mutzig v. Hope*, 158 P.2d 110, 176 Or. 368—*Whitney v. Blackburn*, 21 P. 874, 17 Or. 564, 11 Am.S.R. 857.

44. N.D.—*James River Nat. Bank v. Haas*, 15 N.W.2d 442, 73 N.D. 374, 154 A.L.R. 1005.

A summons ad respondendum is the process issuing in a civil case at law notifying defendant therein named that he must appear on day designated and thereupon make answer to plaintiff's statement of his cause of action.—*Walker Fertilizer Co. v. Race*, 166 So. 283, 123 Fla. 84, 105 A.L.R. 341.

45. Ky.—*Louisville & N. R. Co. v. Little*, 95 S.W.2d 253, 264 Ky. 579. Mo.—*State ex rel. Minihan v. Aronson*, 165 S.W.2d 404, 350 Mo. 309.

to execute it, and certify to the court how he executes it.<sup>46</sup>

A summons is to be distinguished from other proceedings or remedies.<sup>47</sup> In some jurisdictions a summons is not process,<sup>48</sup> at least where the summons is issued or signed merely by plaintiff or his attorney.<sup>49</sup> In other jurisdictions a summons has been regarded as process,<sup>50</sup> including a summons from a justice's court<sup>51</sup> and a summons in garnishment.<sup>52</sup>

*Short summons* is a process authorized in some of the states, to be issued against an absconding, fraudulent, or nonresident debtor, which is returnable in a less number of days than the ordinary writ.<sup>53</sup>

*Citation.* A citation is usually the original process in any proceeding where used, and is in that respect analogous to the writ of *capias* or summons at law, and the subpoena in chancery.<sup>54</sup> A citation

has been held to be process,<sup>55</sup> but there is also authority to the contrary.<sup>56</sup>

### (3) Warrant

A warrant, such as a warrant for arrest or a search warrant, is process.

A warrant is the process by which a party is brought into court.<sup>57</sup> The term may be applied to processes in civil, as well as criminal, proceedings.<sup>58</sup> A warrant,<sup>59</sup> such as a warrant for arrest<sup>60</sup> or a search warrant,<sup>61</sup> constitutes process. On the other hand, certain warrants have been held not to constitute process,<sup>62</sup> such as a warrant of commitment by which criminals are transported from the court to the place of commitment.<sup>63</sup>

## § 2. Necessity and Use in Judicial Proceedings

In the absence of a valid waiver, process is necessary in judicial proceedings.

46. Mo.—Horton v. Kansas City, etc., R. Co., 26 Mo.App. 349. 60 C.J. p 1020 note 19.

**Summons is command of sovereign** by whose authority tribunal issuing it was established that officer or person to whom summons is directed execute it, or do acts therein specified.—Prewitt v. Caudill, 68 S.W.2d 954, 250 Ky. 698.

47. Mo.—State ex rel. Gardner v. Hall, 221 S.W. 708, 282 Mo. 425. 60 C.J. p 1020 note 22 [1].

48. Or.—Mutzig v. Hope, 158 P.2d 110, 176 Or. 368.  
Wash.—Roth v. Nash, 144 P.2d 271, 19 Wash.2d 731.  
Wis.—State ex rel. Walling v. Sullivan, 13 N.W.2d 550, 245 Wis. 180, 154 A.L.R. 841.  
50 C.J. p 442 note 33.

#### Not judicial process

Cal.—Harrington v. Superior Court in and for Placer County, 228 P. 15, 194 Cal. 185.  
60 C.J. p 1020 note 22.

In old sense of being a writ issued by the court it is not process. "We termed it process or in the nature of process."—James River Nat. Bank v. Haas, 15 N.W.2d 442, 445, 73 N.D. 374, 154 A.L.R. 1005—Al G. Barnes Amusement Co. v. District Court in and for Ramsey County, Second District, 268 N.W. 897, 899, 66 N.D. 727, 731.

#### In Minnesota

(1) A summons is not process, at least within Const. art 6, § 14 providing that all process shall run in the name of the state.—Tharp v. Tharp, 36 N.W.2d 1, 228 Minn. 23—Griffin v. Faribault Fair & Agricul-

tural Ass'n, 280 N.W. 7, 203 Minn. 97—Schultz v. Oldenburg, 277 N.W. 918, 202 Minn. 237—Flanery v. Kucha, 173 N.W. 652, 143 Minn. 308, 6 A.L.R. 838—Piano Mfg. Co. v. Kaufert, 89 N.W. 1124, 86 Minn. 13—Whitewater First Nat. Bank v. Estenson, 70 N.W. 775, 68 Minn. 28—Hanna v. Russell, 12 Minn. 80.

(2) However, it has also been held, at least for certain purposes, that a summons is process.—Schilling v. Odlebak, 224 N.W. 694, 177 Minn. 90—Sherman v. Gundlach, 33 N.W. 549, 27 Minn. 118—Hinkley v. St. Anthony Falls Water Power Co., 9 Minn. 55.

49. Wis.—Hammond - Chandler Lumber Co. v. Wisconsin Industrial Commn., 158 N.W. 292, 163 Wis. 596.  
50 C.J. p 442 note 34.

50. Mo.—State ex rel. Minihan v. Aronson, 165 S.W.2d 404, 350 Mo. 309.

N.Y.—Corpus Juris cited in Federal Motorship Corp. v. Johnson & Higgins, 77 N.Y.S.2d 52, 57, 192 Misc. 401, affirmed 86 N.Y.S.2d 667, 275 App.Div. 660, motion dismissed 87 N.E.2d 63, 299 N.Y. 673, and appeal dismissed 87 N.E.2d 686, 299 N.Y. 793.

Pa.—Snyder v. Temple, 16 Pa.Dist. & Co. 712.  
50 C.J. p 442 note 36.

#### Form of process

Mo.—State ex rel. Gardner v. Hall, 221 S.W. 708, 282 Mo. 425.

51. Cal.—Nellis v. Justices' Ct., 129 P. 472, 20 Cal.App. 394.  
Ga.—Hyfield v. Sims, 16 S.E. 990, 90 Ga. 808.

52. Okl.—Emerson v. Emerson, 265 P. 1078, 130 Okl. 140.

50 C.J. p 443 note 38.

53. Black L.D.

58 C.J. p 699 note 85.

54. N.J.—Gondas v. Gondas, 134 A. 615, 618, 99 N.J.Eq. 473.

"Citation" defined generally see 14 C.J.S. p 1125 notes 26-29.

55. N.J.—Sheldon v. Sheldon, 134 A. 904, 100 N.J.Eq. 24—Gondas v. Gondas, 134 A. 615, 99 N.J.Eq. 473.

56. La.—Herndon v. Wakefield-Moore Realty Co., 79 So. 318, 143 La. 724.

57. N.D.—Duffy v. Averitt, 27 N.C. 455.

"Warrant" defined generally see the C.J.S. definition Warrant, also 67 C.J. p 603 note 20 et seq.

58. Tex.—A. H. Belo & Co. v. Smith, 42 S.W. 850, 91 Tex. 221.

67 C.J. p 604 note 37.

59. Miss.—Cooper v. State, 10 So.2d 764, 193 Miss. 672.

50 C.J. p 443 note 58.

60. Miss.—Corpus Juris cited in Cooper v. State, 10 So.2d 764, 193 Miss. 672.

50 C.J. p 443 note 59.

61. Okl.—Dunn v. State, 267 P. 279, 40 Okl. Cr. 76.

50 C.J. p 443 note 60.

Search warrant generally see the C. J.S. title Searches and Seizures §§ 63-84, also 56 C.J. p 1184 note 22 et seq.

#### 62. Warrant to collect taxes

Colo.—Haley v. Elliott, 26 P. 559, 16 Colo. 159.

50 C.J. p 443 note 61.

63. U.S.—U. S. Tanner, Ct.Cl., 13 S.Ct. 436, 147 U.S. 661, 37 L.Ed. 321.

Courts cannot function without the use of process.<sup>64</sup> In the absence of a valid waiver, process is necessary<sup>65</sup> in order to acquire jurisdiction, as discussed in Courts § 83 b, to proceed against a person named as a party defendant,<sup>66</sup> to call on defendant to answer,<sup>67</sup> to warrant an adjudication by the court of the property rights of persons interested in the subject matter of the controversy,<sup>68</sup> and to authorize an order in summary proceedings in personam against a third person not a party to the suit.<sup>69</sup> In some jurisdictions the issuance of process is necessary in order to commence an action.<sup>70</sup> The foregoing rules are applicable even though defendant has knowledge of the suit.<sup>71</sup> In

an in rem proceeding, the rights of the parties interested in the res are affected and they are entitled to notice, although it is only constructive, regardless of whether property is seized in the proceeding or is already under the control of the court.<sup>72</sup>

*Purpose of process.* The objects to be accomplished by process are several.<sup>73</sup> The object, purpose, or office of a summons or other process is to give the court jurisdiction of the person of defendant;<sup>74</sup> to bring him into court to answer the complaint or petition;<sup>75</sup> to afford him an opportunity to be heard on the claim made against him;<sup>76</sup> and

64. U.S.—In re Gannon, D.C.Pa., 27 F.2d 362.

N.Y.—In re Galvin's Estate, 274 N.Y.S. 846, 153 Misc. 1.

Vt.—Ford v. Smead, 194 A. 369, 109 Vt. 129.

65. U.S.—Foster-Milburn Co. v. Knight, C.A.N.Y., 181 F.2d 949—Thompson v. Gallien, C.C.A.Pa., 127 F.2d 664, certiorari denied 63 S.Ct. 64, 317 U.S. 662, 87 L.Ed. 532—Creasy v. U. S., D.C.Va., 20 F.Supp. 280—Adair v. Employers' Reinsurance Corporation, D.C.Tex., 10 F.Supp. 725.

Ariz.—Hewins v. Weller, 36 P.2d 799, 44 Ariz. 309.

Ark.—Goodyear Tire & Rubber Co. v. Meyer, 191 S.W.2d 826, 209 Ark. 383.

Cal.—Goland v. Peter Nolan & Co., 60 P.2d 183, 15 Cal.App.2d 696.

Ga.—Jackson v. Jackson, 35 S.E.2d 258, 199 Ga. 716—Kimsey v. Hall, 23 S.E.2d 196, 68 Ga.App. 409.

Miss.—Corpus Juris cited in Townsend v. Beavers, 188 So. 1, 3, 185 Miss. 312, suggestion of error overruled 189 So. 90, 185 Miss. 312.

Mo.—Corpus Juris quoted in State ex rel. Ferrocarriles Nacionales De Mexico v. Rutledge, 56 S.W.2d 28, 37, 331 Mo. 1015, 85 A.L.R. 1375, certiorari denied Ferrocarriles Nacionales De Mexico v. Rutledge, 53 S.Ct. 689, 289 U.S. 746, 77 L.Ed. 1492.

N.J.—Williams v. Board of Education of Trenton, 12 A.2d 127, 124 N.J.Law 380.

N.Y.—Kissam v. Ferguson, 11 N.Y.S.2d 34.

Tex.—Gilbert v. Lobley, Civ.App., 214 S.W.2d 646—Burrage v. Hunt, Civ.App., 147 S.W.2d 532, error dismissed, judgment correct.

W.Va.—Evans v. Hale, 50 S.E.2d 682, 131 W.Va. 808.

50 C.J. p 446 note 84.

Summary proceedings see the C.J.S. title Summary Proceedings § 1 et seq. also 60 C.J. p 1013 note 1 et seq.

#### Failure to comply with statute as to assumed name

Failure of defendants to comply with statute respecting certificate to be filed by person transacting business under assumed name did not relieve plaintiffs from the necessity, in order to bring defendant into case, to have legal process duly served on defendant according to express requirements, of statute.—Leverson v. Unwin, 49 A.2d 472, 72 R.I. 204.

*Duty rests on plaintiff to give notice by service of a valid summons.*—Williams v. Cooper, 24 S.E.2d 484, 222 N.C. 589.

66. U.S.—Creasy v. U. S., D.C.Va., 20 F.Supp. 280.

Md.—Harvey v. Slacum, 29 A.2d 276, 181 Md. 206.

Tex.—Gilbert v. Lobley, Civ.App., 214 S.W.2d 646.

50 C.J. p 446 note 86.

67. Ga.—Brown v. Tomberlin, 73 S.E. 947, 137 Ga. 596.

Minn.—Murtha v. Olson, 21 N.W.2d 607, 221 Minn. 240.

68. Mich.—Straus v. Central Detroit Realty Co., 12 N.W.2d 402, 307 Mich. 669.

50 C.J. p 446 note 88.

69. U.S.—Howden v. Standard Shipbuilding Corp., C.C.A.N.Y., 17 F.2d 530.

Necessity of notice or summons in summary proceedings generally see Summary Proceedings § 4, also 60 C.J. p 1015 note 23 et seq.

70. Pa.—Jones v. Aaronson, 97 Pa. Super. 129.

50 C.J. p 446 note 92.

71. Alaska.—U. S. v. Hoxie, 8 Alaska 201.

Cal.—Waller v. Weston, 57 P. 892, 125 Cal. 201.

50 C.J. p 447 note 94.

Knowledge of action as sufficient to confer jurisdiction on court see Courts § 83 b (1).

72. N.H.—Hollis v. Tilton, 5 A.2d 29, 90 N.H. 119, reheard 6 A.2d 753, 90 N.H. 119.

#### Seizure and sale of realty

Service of notice on debtor is essential to validity of any seizure and sale of real estate to enforce payment of debt.—La Plac Realty v. Vaughan, 24 So.2d 870, 209 La. 481.

73. Fla.—Arcadia Citrus Growers Ass'n v. Hollingsworth, 185 So. 431, 135 Fla. 322.

74. D.C.—Craig v. Heil, Mun.App., 47 A.2d 871.

Fla.—State ex rel. Merritt v. Hefferman, 195 So. 145, 142 Fla. 496, 127 A.L.R. 1263.

Iowa.—In re Duro's Estate, 18 N.W.2d 199, 236 Iowa 165.

Mo.—Coerver v. Crescent Lead & Zinc Corporation, 286 S.W. 3, 315 Mo. 276.

Pa.—Corpus Juris cited in Null v. Staiger, 4 A.2d 883, 885, 333 Pa. 370.

S.C.—Raines v. Poston, 38 S.E.2d 145, 208 S.C. 349—Beard-Laney, Inc. v. Darby, 38 S.E.2d 1, 208 S.C. 313—Jenkins v. Penn Bridge Co., 53 S.E. 991, 73 S.C. 526.

Tex.—Wagner v. Urban, Civ.App., 170 S.W.2d 270—Kost Furniture Co. v. Los Angeles Period Furniture Co., Civ.App., 147 S.W.2d 862—Bozeman v. Arlington Heights Sanitarium, Civ.App., 134 S.W.2d 350, error refused.

50 C.J. p 447 note 2.

"Process is employed only to obtain jurisdiction over the person of the defendant."—Haggerty v. Sherburne Mercantile Co., 186 P.2d 884, 890, 120 Mont. 386.

75. Ala.—Corpus Juris cited in Oden v. McCraney, 179 So. 191, 193, 235 Ala. 363.

Mich.—Westgate v. Dunn, 289 N.W. 161, 291 Mich. 286.

50 C.J. p 447 note 3.

76. Ark.—Southern Kansas Stage Lines Co. v. Holt, 90 S.W.2d 473, 192 Ark. 165.

Idaho.—Corpus Juris cited in Matrice, v. Babcock, 20 P.2d 207, 208, 52 Idaho 653.

Ky.—Rosenberg v. Bricken, 194 S.W.2d 60, 302 Ky. 124, 164 A.L.R. 525.

to notify him that he is sued,<sup>77</sup> that plaintiff claims to have a cause of action,<sup>78</sup> and seeks a judgment,<sup>79</sup> against him, and that he is required to appear and answer<sup>80</sup> at a certain time and place.<sup>81</sup> In some jurisdictions one of the objects of process is to inform defendant of the nature of the action.<sup>82</sup> Process is for the sole benefit of defendant;<sup>83</sup> it is not required for the protection of plaintiff.<sup>84</sup>

**Waiver.** If expressly required by statute as commencement of a suit, the issuance of process can-

not be waived,<sup>85</sup> but otherwise, and sometimes as a result of express statutory authorization, a defendant who is sui juris may waive issuance of process.<sup>86</sup> The issuance of process is to be waived in such manner as the statute may direct.<sup>87</sup> The waiver or acknowledgment must refer to some particular action intended to be instituted in some particular court.<sup>88</sup> A waiver may be executed before the commencement of the action<sup>89</sup> unless such a waiver is prohibited by statute.<sup>90</sup> Where de-

Mont.—Haggerty v. Sherburne Mercantile Co., 186 P.2d 884, 120 Mont. 386.

N.J.—Kurilla v. Roth, 38 A.2d 862, 132 N.J.Law 213.

N.Y.—In re Renard's Estate, 39 N.Y.S.2d 968, 179 Misc. 885—Codling v. Codling, 83 N.Y.S.2d 86.

S.C.—Beard-Laney, Inc. v. Darby, 38 S.E.2d 1, 208 S.C. 313.

Va.—Hiatt v. Tompkins, 10 S.E.2d 489, 176 Va. 82.

50 C.J. p 447 note 4.

77. U.S.—Murphy v. Campbell Soup Co., D.C.Mass., 44 F.2d 214—Creasy v. U. S., D.C.Va., 20 F.Supp. 280.

D.C.—Craig v. Heil, Mun.App., 47 A.2d 871.

Fla.—Gribbel v. Henderson, 10 So.2d 734, 151 Fla. 712, reheard 14 So.2d 809, 153 Fla. 397—State ex rel. Merritt v. Heffernan, 195 So. 145, 142 Fla. 496, 127 A.L.R. 1263—Arcadia Citrus Growers Ass'n v. Hollingsworth, 185 So. 431, 135 Fla. 322.

Ky.—Taylor v. Howard, 208 S.W.2d 73, 306 Ky. 407—Rosenberg v. Bricken, 194 S.W.2d 60, 302 Ky. 124, 164 A.L.R. 525.

Minn.—Peterson v. W. Davis & Sons, 11 N.W.2d 800, 216 Minn. 60.

Mo.—State ex rel. Mills Automatic Merchandising Corporation v. Hogan, 103 S.W.2d 495, 232 Mo.App. 291.

Mont.—Haggerty v. Sherburne Mercantile Co., 186 P.2d 884, 120 Mont. 386.

N.J.—Kurilla v. Roth, 38 A.2d 862, 132 N.J.Law 213.

N.M.—Bourgeois v. Santa Fe Trail Stages, 95 P.2d 204, 43 N.M. 453.

N.Y.—Prosperity Co. v. American Laundry Machinery Co., 67 N.Y.S.2d 669, 271 App.Div. 622, affirmed 74 N.E.2d 188, 297 N.Y. 486.

N.C.—Moseley v. Deans, 24 S.E.2d 630, 222 N.C. 731.

N.D.—Al G. Barnes Amusement Co. v. District Court in and for Ramsey County, Second District, 268 N.W. 897, 166 N.D. 727.

Ohio.—Maloney v. Callahan, 188 N.E. 656, 127 Ohio St. 387—Abraham v. Akron Sausage Co., 155 N.E. 254, 255, 23 Ohio App. 224—Inman v. Radjevick, 2 Ohio Supp. 179.

S.C.—Raines v. Poston, 38 S.E.2d 145,

208 S.C. 349—Beard-Laney, Inc. v. Darby, 38 S.E.2d 1, 208 S.C. 313.

Tex.—Wagner v. Urban, Civ.App., 170 S.W.2d 270—Kost Furniture Co. v. Los Angeles Period Furniture Co., Civ.App., 147 S.W.2d 862—Bozeman v. Arlington Heights Sanitarium, Civ.App., 134 S.W.2d 350, error refused.

Va.—Light v. City of Danville, 190 S.E. 276, 168 Va. 181.

Wis.—Westport Tp. v. City of Madison, 19 N.W.2d 309, 247 Wis. 326.

50 C.J. p 447 note 5.

78. La.—Brannin v. Clements, App., 142 So. 621.

S.D.—Bradey v. Mueller, 118 N.W. 1035, 22 S.D. 534.

79. N.Y.—Stuyvesant v. Weil, 60 N.E. 738, 167 N.Y. 421, 53 L.R.A. 562—Barth v. Owens, 35 N.Y.S.2d 632, 178 Misc. 628.

80. Fla.—Arcadia Citrus Growers Ass'n v. Hollingsworth, 185 So. 431, 135 Fla. 322.

Minn.—Peterson v. W. Davis & Sons, 11 N.W.2d 800, 216 Minn. 60.

N.D.—Al G. Barnes Amusement Co. v. District Court in and for Ramsey County, Second District, 268 N.W. 897, 166 N.D. 727.

S.D.—Bradey v. Mueller, 118 N.W. 1035, 22 S.D. 534.

81. D.C.—Craig v. Heil, Mun.App., 47 A.2d 871.

Fla.—Gribbel v. Henderson, 10 So.2d 734, 151 Fla. 712, reheard 14 So.2d 809, 153 Fla. 397—Arcadia Citrus Growers Ass'n v. Hollingsworth, 185 So. 431, 135 Fla. 322.

N.D.—Al G. Barnes Amusement Co. v. District Court in and for Ramsey County, Second District, 268 N.W. 897, 166 N.D. 727.

Va.—Hiatt v. Tompkins, 10 S.E.2d 489, 176 Va. 82.

50 C.J. p 447 note 9.

82. La.—Weldon v. Gandy, App., 195 So. 655.

Or.—Smith v. Ellendale Mill Co., 4 Or. 70.

83. Tex.—Mosaic Templars of America v. Gaines, Civ.App., 265 S.W. 721.

84. Tex.—Mosaic Templars of America v. Gaines, supra.

85. S.D.—Ramsdell v. Duxberry, 85 N.W. 221, 14 S.D. 222.

Waiver of:

Defects in process see *infra* § 113.

Service of process see *infra* § 25.

86. Ala.—Oden v. McCraney, 179 So. 191, 235 Ala. 363.

Ga.—Henry & Co. v. Johnson, 173 S.E. 659, 178 Ga. 541—Penn Tobacco Co. v. Lemon, 34 S.E. 679, 109 Ga. 428—Jones v. Bland, 27 S.E.2d 102, 69 Ga.App. 883.

Mont.—Haggerty v. Sherburne Mercantile Co., 186 P.2d 884, 120 Mont. 386.

N.J.—Williams v. Board of Education of Trenton, 12 A.2d 127, 124 N.J.Law 380—Chambers v. Boldt, 8 A.2d 73, 123 N.J.Law 111—Gotham Credit Corporation v. Powell, 38 A.2d 700, 22 N.J.Misc. 301.

N.C.—Spence v. Granger, 175 S.E. 824, 207 N.C. 19.

S.C.—Beard-Laney, Inc. v. Darby, 38 S.E.2d 1, 208 S.C. 313.

Tex.—Battle v. Eddy, 31 Tex. 368.

50 C.J. p 447 note 97.

Capacity of infant to waive process see *Infants* § 110 b.

**Codefendant, residing in different county,** may waive issuance of second original and process.—James v. Edward Thompson Co., 87 S.E. 842, 17 Ga.App. 578.

87. Ga.—Jackson v. Jackson, 35 S.E.2d 258, 199 Ga. 716.

Warrant or power of attorney as waiver of process see *Judgments* § 154 a.

88. Ga.—Henry & Co. v. Johnson, 173 S.E. 659, 178 Ga. 541.

**Otherwise it is void for uncertainty,** if not against public policy as tending to use the court as a means of oppression and denying to defendant any fair opportunity to be heard.—Henry & Co. v. Johnson, *supra*.

**Waiver held insufficient**

Ga.—Henry & Co. v. Johnson, *supra*.

89. Ga.—Henry & Co. v. Johnson, *supra*.

**90. In Texas**

(1) Under express provisions of Rev.St. 1925 art 2224, and prior statutes, waiver of process may not be executed prior to filing of suit.—Bragdon v. Wright, Tex.Civ.App., 142 S.W.2d 703, error dismissed—O'Neal



defendant waives process, the necessity of process is dispensed with<sup>91</sup> and the case stands in court as though process had issued.<sup>92</sup> Defendant's right to defend is not impaired by such a waiver.<sup>93</sup>

**Effect of process.** Where defendant has been duly brought into court by summons or other process, he is, in legal contemplation, in court until the action is disposed of<sup>94</sup> or he is otherwise discharged according to law;<sup>95</sup> and, generally speaking, he is in court for all purposes connected with the action<sup>96</sup> and is required to take notice of all subsequent steps and proceedings.<sup>97</sup> However, defendant is not bound to keep watch for new causes of action to which he was not summoned to answer.<sup>98</sup>

### § 3. — To Make, Substitute, or Strike Party

In the absence of a voluntary appearance, a person named in the record as a party is not in fact a party

to the action, unless he has been duly brought in by legal process.

A person named in the record as a party is not in fact a party to the action, unless he has been duly brought in by legal process<sup>99</sup> or has voluntarily appeared and submitted himself to the jurisdiction of the court.<sup>1</sup> However, personal service of process is not necessary to make one a party defendant, even though personal service of process or a voluntary appearance is a prerequisite to a personal judgment.<sup>2</sup>

**Substitution of party.** New or additional process may not be necessary on the substitution of a party plaintiff,<sup>3</sup> unless an entirely different plaintiff is substituted.<sup>4</sup> In the absence of a voluntary appearance, process ordinarily must issue and be served on the party substituted where a party defendant is substituted.<sup>5</sup> In some instances, however, there may be a substitution of a party as defendant without service of process,<sup>6</sup> as, for exam-

v. Clymer, 52 S.W. 619, 21 Tex.Civ. App. 386.

(2) However, it has been held that waiver may be dated before filing of petition.—*Battle v. Eddy*, 31 Tex. 368.

91. *Mont.—Haggerty v. Sherburne Mercantile Co.*, 186 P.2d 884, 120 Mont. 386.

50 C.J. p 447 note 98.

92. *Ala.—Tuskaloosa Wharf Co. v. Tuskaloosa*, 38 Ala. 514.

93. *Fla.—Ochus v. Sheldon*, 12 Fla. 138.

94. *Ky.—Mussman v. Pepples*, 49 S. W.2d 592, 243 Ky. 674.

50 C.J. p 447 note 18.

Jurisdiction of court as continuing without further notice see Courts § 88.

95. *Mo.—In re City of St. Joseph*, 263 S.W. 97, error dismissed *Corby's Estate v. City of St. Joseph*, 45 S.Ct. 351, 267 U.S. 578, 69 L.Ed. 797.

96. *Ky.—Mussman v. Pepples*, 49 S. W.2d 592, 243 Ky. 674.

50 C.J. p 447 note 20.

97. *Ill.—Shippert v. Shippert*, 20 N. E.2d 597, 371 Ill. 267.

*Ky.—Mussman v. Pepples*, 49 S.W. 2d 592, 243 Ky. 674.

50 C.J. p 447 note 21.

Necessity of process on filing amended or cross pleading see *infra* § 4. Notice of intervening petition see Parties § 67 d.

98. *Ohio.—Geese v. Murphy*, 3 Ohio Supp. 52.

99. *U.S.—Corpus Juris quoted in Tex-O-Kan Flour Mills v. United States*, D.C.Tex., 49 F.Supp. 516, 523.

*Ga.—Corpus Juris quoted in Webb*

& *Martin v. Anderson-McGriff Hardware Co.*, 3 S.E.2d 882, 884, 188 Ga. 291.

*Ky.—Corpus Juris cited in McComas v. Hull*, 118 S.W.2d 540, 541, 274 Ky. 192—*De Wolf v. Mallett's Heirs*, 33 Ky. 214, 3 Dana 214.

*La.—Buckner v. Watt*, 19 La. 211.

*Tex.—Corpus Juris cited in National Surety Co. v. United Brick & Tile Co.*, Civ.App., 71 S.W.2d 937, 939, error dismissed.

47 C.J. p 15 note 30—50 C.J. p 447 note 24.

Notice and process on intervention see Parties § 67 d.

Process where new party is added see Parties § 80 g.

**Merely naming of person in title of action does not make him a party to the action.**—*Bennett v. Bird*, 261 N.Y.S. 540, 237 App.Div. 542, reargument denied 262 N.Y.S. 907, 238 App. Div. 786.

1. *U.S.—Corpus Juris quoted in Tex-O-Kan Flour Mills v. United States*, D.C.Tex., 49 F.Supp. 516, 523.

*Ga.—Corpus Juris quoted in Webb & Martin v. Anderson-McGriff Hardware Co.*, 3 S.E.2d 882, 884, 188 Ga. 291.

*Ky.—Corpus Juris cited in McComas v. Hull*, 118 S.W.2d 540, 541, 274 Ky. 192—*De Wolf v. Mallett's Heirs*, 33 Ky. 214, 3 Dana 214.

*La.—Buckner v. Watt*, 19 La. 211.

*N.Y.—Bennett v. Bird*, 261 N.Y.S. 540, 237 App.Div. 542, reargument denied 262 N.Y.S. 907, 238 App.Div. 786.

*Tex.—National Surety Co. v. United Brick & Tile Co.*, Civ.App., 71 S.W. 2d 937.

*Wash.—Junkin v. Anderson*, 120 P.2d 548, 554, 12 Wash.2d 58, opinion

supplemented 123 P.2d 759, 12 Wash.2d 58.

47 C.J. p 15 note 31.

Appearance generally see Appearances § 1 et seq.

2. *Va.—Norman v. Baldwin*, 148 S. E. 831, 152 Va. 800.

Substituted service of process and service by publication see *infra* §§ 43-72.

3. *Mo.—Meservey v. Pratt-Thompson Constr. Co.*, App., 291 S.W. 174.

50 C.J. p 448 note 27.

#### Amendment to pleadings

Service of summons is not indispensable to make a person a party defendant, but amendment to the pleadings may be an appropriate method to accomplish such result in a proper case.—*Simon v. City and County of San Francisco*, 180 P.2d 393, 79 Cal.App.2d 590.

4. *Tex.—Armstrong v. Bean*, 59 Tex. 492.

50 C.J. p 448 note 28.

5. *Ill.—Heinz v. Radio Keith Orpheum Western Vaudeville Exchange*, 70 N.E.2d 216, 329 Ill.App. 648.

*N.J.—Gibson Refrigerator Co. v. Brody*, 146 A. 872, 7 N.J.Misc. 647.

*Pa.—Helfstein v. Milikovsky*, 39 Pa. Dist. & Co. 258.

50 C.J. p 448 note 29.

6. **Change of defendant's name from that of corporation to that of individual doing business in corporate name, to correspond with facts, did not require service of new summons where individual had already been served.**—*Maloney v. Callahan*, 188 N.E. 656, 127 Ohio St. 387.

ple, where the party substituted has misled plaintiff,<sup>7</sup> or where the substitution is that of a county for a county board of commissioners,<sup>8</sup> or of one agent or representative of the United States for another agent or representative,<sup>9</sup> or of infant heirs for a deceased defendant, and they are served with the order making them parties.<sup>10</sup> Process need not be served on a party substituted as defendant or respondent where the statute permitting substitution directs that such notice shall be served on the party substituted as the court shall seem just and reasonable.<sup>11</sup>

*Striking party.* New or additional process is not necessary on the striking of a party.<sup>12</sup>

#### § 4. — After Filing of Amended, Supplemental, or Cross Pleading

- a. Amended and supplemental pleading
- b. Cross pleading

##### a. Amended and Supplemental Pleading

The issuance and service of further or new process

##### 7. Misleading plaintiff as to identity, etc.

A driver of automobile may be substituted as party defendant without service of process or a voluntary appearance where, after accident, such driver had given her sister's name to the driver of the other automobile and where such driver assisted in the preparation of the case for trial, was present at the trial, testified as a witness, and did not claim surprise or ask for a continuance.—*Sidis v. Rosaia*, 17 P.2d 37, 170 Wash. 587.

8. N.C.—*Fountain v. Pitt County*, 87 S.E. 990, 171 N.C. 113.

9. Ark.—*Missouri Pac. R. Co. v. Johnson*, 239 S.W. 738, 153 Ark. 146—*Payne v. Stockton*, 229 S.W. 44, 147 Ark. 598.

10. Cal.—*Emeric v. Alvarado*, 2 P. 418, 64 Cal. 529.

11. Pa.—*Commonwealth v. Haney*, 41 Pa. Dist. & Co. 298.

12. Ky.—*Three Forks City Co. v. Commonwealth*, 45 S.W. 353, 20 Ky.L. 149.

Tex.—*Pecos, etc., R. Co. v. Porter*, Civ.App., 156 S.W. 267.

Notice on striking party see Parties § 92 a.

13. Ark.—*Smith v. Smith*, 79 S.W. 2d 365, 190 Ark. 418.

Ky.—*City of Madisonville v. Nisbit*, 39 S.W.2d 690, 239 Ky. 366.

N.C.—*Bumgarner v. Bumgarner*, 58 S.E.2d 360, 231 N.C. 600.

Ohio.—*Maloney v. Callahan*, 188 N. E. 656, 127 Ohio St. 387—*Harding v. Talbott*, 22 N.E.2d 221, 60 Ohio App. 523.

Tex.—*American Indemnity Co. v. Hidalgo County*, Civ.App., 146 S.W.2d 1076, error refused.

W.Va.—*State v. A. R. Kelly & Co.*, 33 S.E.2d 230, 127 W.Va. 418. 50 C.J. p 448 note 35.

##### Amendments not requiring new process

(1) Change in relief sought or in amount of damages ascertainable after institution of action.—*Johnston v. Federal Land Bank of Omaha*, 284 N.W. 393, 226 Iowa 496.

(2) Changing capacity in which plaintiff sues.

Ga.—*Bolton v. White*, 158 S.E. 436, 43 Ga.App. 13.

N.Y.—*Johnson v. Phoenix Bridge Co.*, 121 N.Y.S. 699.

(3) Changing name of plaintiff.—*Sun Ins. Office v. Budreck*, Ind.App., 91 N.E.2d 364.

(4) Other amendments.—*City of Madisonville v. Nisbit*, 39 S.W.2d 690, 239 Ky. 366—50 C.J. p 448 note 35 [a].

##### Amendment not subjecting additional property to suit

Under some statutes, it is expressly provided that whenever a petition thereon has been duly served by publication, plaintiff may, at any time prior to entering the decree, by leave of court file amended and supplemental pleadings which do not subject additional property to said suit without the necessity of reciting defendant.—*Broughton v. Humble Oil & Refining Co.*, Tex.Civ.App., 105 S.W.2d 480, error refused.

*Severance of tort and equity action*  
Where pursuant to statute a tort

is not necessary on the filing of an amendment which does not set up a new cause of action.

An amended statement of the same cause of action does not necessitate the issuance and service of further or new process;<sup>13</sup> but if a new cause of action is set up by amendment new process must issue,<sup>14</sup> at least where defendant has not answered the original pleading or otherwise appeared in the action.<sup>15</sup> New process is not essential where defendant has answered the amended<sup>16</sup> petition or where he has waived issuance of process on the amended pleading;<sup>17</sup> and it has been held that where defendant has pleaded to the action, or otherwise entered an appearance therein, he is charged with notice of all amendments thereafter filed, including amendments which set up a new cause of action, and new process is not necessary.<sup>18</sup>

*Amendment as to maturity of note.* Where the original petition alleges the existence and non-maturity of a note and an amendment alleging the maturity and nonpayment of the note is authorized

and equity action were severed by orders on motions to dismiss and strike cause of action, it was unnecessary to serve a second summons or amended complaints.—*Rosen v. Goldstein*, 254 N.Y.S. 71, 234 App.Div. 872.

14. Ky.—*Madisonville v. Nisbit*, 39 S.W.2d 690, 239 Ky. 366.

Mass.—*New England Oil Refining Co. v. Canada Mexico Oil Co.*, 174 N.E. 330, 274 Mass. 191.

Tex.—*Simmons v. Brannum*, Civ. App., 182 S.W.2d 1020—*Foster v. National Bondholders Corporation*, Civ.App., 123 S.W.2d 506, error dismissed—*Tubbs v. First Nat. Bank*, Civ.App., 48 S.W.2d 309.

W.Va.—*Staton v. Virginian Ry. Co.*, 195 S.E. 601, 119 W.Va. 658. 50 C.J. p 448 note 36.

15. Tex.—*Phillips v. The Macca-bees*, Civ.App., 50 S.W.2d 478.

16. Ky.—*Fearon Lumber, etc., Co. v. Lawson*, 178 S.W. 1121, 166 Ky. 123.

50 C.J. p 448 note 38.

17. Okl.—*Jones v. Nelson*, 10 P.2d 408, 156 Okl. 236.

18. Tex.—*Slattery v. Uvalde Rock Asphalt Co.*, Civ.App., 140 S.W.2d 987, error refused—*Phillips v. The Macca-bees*, Civ.App., 50 S.W.2d 478.

Where defendant has answered original petition, new process on an amendment setting up a new cause of action is not necessary.—*Farrell v. Gilbert*, Tex.Civ.App., 245 S.W. 775—*Puntney v. Moseley*, Tex.Civ. App., 237 S.W. 1116.

by a code provision, a summons on the amended petition is not necessary.<sup>19</sup>

**Amendment after sustaining demurrer.** On allowing an amendment after sustaining a demurrer to a petition, the court may order defendant to answer without further process.<sup>20</sup>

**Lack of appearance or personal service.** If any of defendants have not appeared, and the complaint is amended, it is necessary in a few jurisdictions that a summons be issued on the amended complaint and be served on such defendants.<sup>21</sup> In other jurisdictions, however, it has been held that, where defendant has been served only by publication and has not appeared, further and proper notice or process is necessary after a material amendment of plaintiff's pleading,<sup>22</sup> but not after a mere formal amendment.<sup>23</sup>

**Amendment to answer.** No process is necessary on filing an amendment to an answer which contains only defensive matter,<sup>24</sup> but new process is necessary where, after the entry of an order for judgment, defendant seeks to set up a wholly independent action as an amendment to the answer.<sup>25</sup>

**Supplemental pleading.** While no new summons or similar process ordinarily is needed for a supplemental petition,<sup>26</sup> where a pleading which plaintiff calls a supplemental complaint is in effect the institution of a new action, the issuance and service of summons are necessary.<sup>27</sup>

### b. Cross Pleading

Unless required by statute, additional process on the plaintiff or a codefendant is not necessary where the defendant files a cross pleading against either of them.

Where defendant files a cross pleading, no additional process is necessary as to the original plaintiff, and statutes sometimes expressly so provide,<sup>28</sup> although in some jurisdictions original process must be served on plaintiff,<sup>29</sup> unless he waives process or enters an appearance as to the cross action.<sup>30</sup> A person impleaded by a garnishee for the sole purpose of having him assert his claim to a fund is not required to take notice of a cross action for damages by plaintiff against him.<sup>31</sup> Under some statutes, where defendants assert a counterclaim and pray affirmative relief,

19. Ky.—Rittenhouse v. Swango, 128 S.W. 299.

#### Note given in satisfaction of judgment

Actual service of process, on a second amended petition, at a later term of court, to enforce a second note executed in satisfaction of a consent judgment was not necessary, where on the first petition service was had, and the defendant entered an appearance.—McKinney v. Wheeler, 3 Ky.Opin. 208.

20. U.S.—Keary v. Mutual Reserve Fund Life Assoc., C.C.Mo., 30 F. 359, error dismissed 10 S.Ct. 1071, 136 U.S. 644, 34 L.Ed. 555.

21. Cal.—W. H. Marston Co. v. Kochritz, 251 P. 959, 80 Cal.App. 352.

22. Kan.—Wood v. Nicolson, 23 P. 587, 43 Kan. 461.  
50 C.J. p 448 note 43.

23. Wyo.—White v. Hinton, 30 P. 953, 3 Wyo. 753, 17 L.R.A. 66.

24. Ky.—Strader v. Miller, 33 S.W. 2d 668, 236 Ky. 637.

25. N.H.—Bernardi Greater Shows v. Boston & Maine R. R., 14 A.2d 1, 91 N.H. 105.

26. Ky.—Moshell v. Reed, 97 S.W. 372, 30 Ky.L. 10—Woolfork v. Caloway, 9 Ky.Op. 161.

Where substituted plaintiffs filed supplemental petition after case had been remanded, additional citation and service on defendant were unnecessary, since such plaintiffs merely took up case where their

predecessors left it.—Citizens Bank & Trust Co. v. Jones, La.App., 167 So. 511.

27. Ark.—Arbaugh v. West, 192 S.W. 171, 127 Ark. 98.

28. Cal.—Fox Woodsum Lumber Co. v. James, 173 P.2d 854, 76 Cal.App. 2d 748.

Ky.—Wagner v. Swoope, 54 S.W.2d 395, 246 Ky. 19.

Mo.—Crawford v. Amusement Syndicate Co., 37 S.W.2d 581.

50 C.J. p 448 note 48.

#### Disregard of corporate fiction

Where a corporation is organized and used by a person as a subterfuge, in an action by the corporation to which a counterclaim is filed against such person, no new process is needed to bring such person into court.—Clermont-Minnesota Country Club v. Coupland, 143 So. 133, 106 Fla. 111, 84 A.L.R. 1354.

Where tenants in common sued cotenants for accounting for rents and profits, cotenants' cross action for partition of common property by sale is germane to original suit, and hence service need not be made on plaintiffs as prerequisite to jurisdiction.—Lankford v. Millhollin, 28 S.E. 2d 752, 197 Ga. 227.

#### Reconventional demand against intervenor

Nonresidents who intervened in attachment suit and ruled attaching creditor into court to determine question of ownership of property were not required to be cited to give court jurisdiction of attaching cred-

itor's demand in reconvention, and order dismissing intervenors, as far as it related to reconventional demand, was erroneous.—Adams v. Ross Amusement Co., App., 158 So. 38, affirmed 161 So. 601, 182 La. 252.

29. Tex.—Early v. Cornelius, 39 S.W.2d 6, 120 Tex. 835—Lindsey v. Ferguson, Civ.App., 80 S.W.2d 407, 50 C.J. p 449 note 49.

#### Prior to, or after, nonsuit

(1) It has been held that where defendant files a pleading asking for affirmative relief after plaintiff has taken a nonsuit, a citation is necessary, but a citation is not necessary when defendant's claim for affirmative relief has been filed prior to the taking of a nonsuit by plaintiff.—Thompson v. Gaither, Tex.Civ.App., 45 S.W.2d 1106, error refused.—Davis v. Wichita State Bank & Trust Co., Tex.Civ.App., 286 S.W. 584.

30. Tex.—Waco Hilton Hotel Co. v. Waco Development Co., Civ.App., 75 S.W.2d 968, error dismissed.

#### Acts constituting waiver

Plaintiff did not waive issuance and service of citation on cross action by entering into stipulation respecting introduction of evidence, where stipulation was executed before plaintiff took nonsuit; signing of stipulation invoked no ruling of court, and it was not filed by plaintiff's attorney.—Lindsey v. Ferguson, Tex.Civ.App., 80 S.W.2d 407.

31. Tex.—City Nat. Bank v. Lummus Cotton Gin Sales Co., Civ.

process is needed to bring in persons who are not parties.<sup>32</sup>

**Codefendants.** Where defendant files a cross pleading, generally speaking, new or additional process is not necessary as to a codefendant who has been properly served or has entered a general appearance in the original action.<sup>33</sup> However, such process is necessary when expressly required by statute<sup>34</sup> and, according to some authorities additional process on a codefendant is necessary,<sup>35</sup> at least where the cross complaint raises new questions against codefendant,<sup>36</sup> unless the codefendant has appeared<sup>37</sup> or answered<sup>38</sup> in the main or original suit.

In some jurisdictions, the issuance and service of additional process after the filing of a cross complaint are not necessary to confer jurisdiction to determine the relations of codefendants incidental to the subject matter of plaintiff's complaint;<sup>39</sup> but, in other jurisdictions, a call in warranty must be served on a codefendant.<sup>40</sup>

**Service of cross pleading** is, in some jurisdictions, necessary and sufficient as to persons who have been made parties to, and served with process

in, the original suit;<sup>41</sup> but a defendant who has not appeared and has not been served with process cannot be compelled to litigate a question with a codefendant by the mere service on him of an answer setting up a cross demand.<sup>42</sup>

**Effect of lack of process.** It is not improper to proceed with the trial without the appearance or presence of a person against whom and plaintiff a cross complaint has been filed where no order making such person a party to the action has been sought, or no summons has issued on the cross complaint or has been served on such person, and his presence is not necessary to a full determination of the controversy.<sup>43</sup>

## § 5. Issuance

Process is to be issued in such manner as the statute directs and it is usually deemed to be issued when it is prepared and placed in the hands of a person authorized to serve it with the intention of having it served.

All the essential requisites of the statute must be substantially complied with in issuing process under statutory authority.<sup>44</sup> Mere preparation of the process by the clerk is not an issuance of it.<sup>45</sup>

App., 297 S.W. 563, affirmed, Com. App., 6 S.W.2d 728.

Interpleader of claimants in garnishment see Garnishment § 278 et seq.

32. Fla.—Lorenz v. Lorenz, 26 So.2d 54, 157 Fla. 402.

33. Ohio.—Geese v. Murphy, 3 Ohio Supp. 52.  
50 C.J. p 449 note 50.

**Duty of codefendant to take notice**  
(1) Codefendant is bound to take notice of the filing of a cross petition by a defendant, where he has been served with the original summons or other process, at least up to the time within which the codefendant is required to plead.

Okl.—Blakeney v. Ashford, 81 P.2d 309, 183 Okl. 213—Turner v. Dexter, 44 P.2d 984, 172 Okl. 252—Central Nat. Bank of Okmulgee v. Sharp, 34 P.2d 241, 168 Okl. 516—Glenn v. Prentice, 12 P.2d 170, 158 Okl. 73—O'Reilly v. Schuermeyer, 9 P.2d 923, 156 Okl. 167—Wood v. Speakman, 5 P.2d 121, 153 Okl. 180.  
Tex.—Farmers' Nat. Bank v. Dublin Nat. Bank, Civ.App., 55 S.W.2d 567, reversed on other grounds Oats v. Dublin Nat. Bank, 90 S.W.2d 824, 127 Tex. 2.  
50 C.J. p 449 note 50 [a].

(2) Necessity of serving notice of cross complaint on codefendant see Pleading § 172.

34. Iowa.—Thode v. Spofford, 17 N.W. 561, 21 N.W. 647, 65 Iowa 294.  
50 C.J. p 449 note 51.

35. Ky.—Ohio Oil Co. v. West, 145 S.W.2d 1035, 284 Ky. 796—Huff v. Black, 82 S.W.2d 473, 259 Ky. 550—Carter v. Capshaw, 60 S.W.2d 959, 249 Ky. 483—Taylor v. Combs, 23 S.W.2d 545, 232 Ky. 333.

**Appointment of attorney for non-resident defendants** under original petition and issuance of summons on original petition did not dispense with similar procedure under cross petition against same nonresident defendants.—Carter v. Capshaw, 60 S.W.2d 959, 249 Ky. 483.

36. Ohio.—Geese v. Murphy, 3 Ohio Supp. 52.  
50 C.J. p 449 note 52.

**Cross action by sureties against principal**

In action on note, defendant sureties waived right to judgment over against principal by failing to have process issued and served on principal on sureties' cross action for such relief.—First Nat. Bank of Fort Worth v. Brown, Tex.Civ.App., 172 S.W.2d 151, error refused.

37. Tex.—Empire Gas & Fuel Co. v. Noble, Com.App., 36 S.W.2d 451—Short v. Stephens, Civ.App., 44 S.W.2d 466.  
50 C.J. p 449 note 53.

38. Tex.—Minus v. Doyle, 170 S.W.2d 220, 141 Tex. 67.  
50 C.J. p 449 note 54.

39. Ind.—Hedges v. Mehrling, 115 N.E. 433, 65 Ind.App. 536.  
50 C.J. p 449 note 56.

40. La.—Jung v. Rhodes, App., 123 So. 183—Gaiennie Co., Ltd. v. Weir, 10 La.App., Orleans, 108, reversed on other grounds 62 So. 219, 133 La. 22.

50 C.J. p 449 note 57.  
Bringing in new parties by calling in warranty see Parties § 84.

41. S.D.—Wright v. McKenzie, 226 N.W. 270, 55 S.D. 300.  
50 C.J. p 449 note 58.

Service of cross complaint generally see Pleading § 411.

42. N.Y.—Joy v. White, 6 N.Y.S. 571—Parker v. Commercial Tel. Co., 3 N.Y.St. 174.

43. Cal.—Johnson v. Risdon, 265 P. 505, 89 Cal.App. 768.

44. W.Va.—State ex rel. Staley v. Hereford, 45 S.E.2d 738, 131 W.Va. 84.

50 C.J. p 449 note 61.  
Issuance of alias or pluries writ see infra § 21.

Issuance of process in equity see Equity § 173.

45. Nev.—Woodstock v. Whitaker, 146 P.2d 779, 62 Nev. 224.

Ohio.—Pilgrim Distributing Corp. v. Galsworthy, Inc., 74 N.E.2d 579, 79 Ohio App. 529, affirmed 76 N.E. 2d 382, 148 Ohio St. 567.

Tex.—Hufstetler v. Harral, Civ. App., 54 S.W.2d 353.

**Mere clerical preparation, dating, and attestation** do not constitute issuance.—Snell v. Knowles, Tex.Civ. App., 87 S.W.2d 871, error dismissed.

Process is generally deemed issued when it is prepared and placed in the hands of a person authorized to serve it with the intention of having it served,<sup>46</sup> or at least when it is given to an officer, or to some one else to be given to the officer, for the purpose of being served.<sup>47</sup> Process is not irregular if delivered by the clerk, signed and sealed in blank, to plaintiff's attorney.<sup>48</sup>

**Issuance by plaintiff or attorney.** Where a summons or other process may be issued by plaintiff or his attorney, it may be considered issued when it has been duly drawn and signed, with intent to deliver it to the process server, although it may

not have been actually delivered.<sup>49</sup>

## § 6. — Authority and Duty to Issue Generally

The issuance of process is a ministerial act and process is to be issued by such person or officer as may be designated by statute.

The issuance of a summons or other process is not a judicial act,<sup>50</sup> but is rather a ministerial act or duty.<sup>51</sup> Process is to be issued by such person or officer as may be designated by statute<sup>52</sup> and process issued by a person or officer without authority is void.<sup>53</sup> There can be no legal service

B. U.S.—*Baker v. Sisk*, D.C.Okl., 1 F.R.D. 232.

Feb.—*McIntosh v. Standard Oil Co.*, 236 N.W. 152, 121 Neb. 92.

Ev.—*Woodstock v. Whitaker*, 146 P.2d 779, 62 Nev. 224.

Ohio.—*Pilgrim Distributing Corp. v. Galsworthy, Inc.*, 74 N.E.2d 579, 79 Ohio App. 529, affirmed 76 N.E.2d 382, 148 Ohio St. 567.

7.Va.—*Nicholas Land Co. v. Crowder*, 32 S.E.2d 563, 127 W.Va. 216. 0 C.J. p 449 note 62.

When process issued for commencement of action:

Generally see Actions § 129 b (1). For limitation purposes see Limitations of Actions § 265 a.

**Process must be either served or delivered to proper officer for service to constitute an issuance.**—*Borden v. Corty*, 232 N.W. 512, 181 Minn. 349.

**Statute as declaratory of common law**

Statute requiring that summons be placed in hands of sheriff or some other person authorized to serve it or service was merely declaratory of common law, making delivery of summons to sheriff necessary for its issuance, so that later statute eliminating such requirement did not repeal common-law rule, but left it more clearly in force.—*Woodstock v. Whitaker*, 146 P.2d 779, 62 Nev. 24.

### Issue defined

(1) The word "issue" in relation to process has acquired a definite meaning.—*McIntosh v. Standard Oil Co.*, 236 N.W. 152, 121 Neb. 92.

(2) It means going out of the hands of the clerk, expressed or implied, to be delivered to the sheriff or service.

Feb.—*McIntosh v. Standard Oil Co.*, supra.

1.C.—*Webster v. Sharpe*, 21 S.E. 912, 116 N.C. 471.

ex.—*Corpus Juris* cited in *Snell v. Knowles*, Civ.App., 87 S.W.2d 871, 877.

(3) A writ or notice is issued when it is put in proper form and

placed in an officer's hands for service; at the time it becomes a perfected process.

Neb.—*McIntosh v. Standard Oil Co.*, supra.

Tenn.—*Corpus Juris* quoted in *Hoover Lines v. Whitaker*, 120 S.W.2d 983, 987, 22 Tenn.App. 223.

Vt.—*Blain v. Blain*, 45 Vt. 538.

33 C.J. p 828 note 15.

(4) In relation to process, the word "issued" often may impart the idea of delivery, but its context should always be considered in determining its meaning in a given case.

Mo.—*Heman v. Larkin*, App., 70 S.W. 907.

Neb.—*McIntosh v. Standard Oil Co.*, supra.

Tenn.—*Corpus Juris* quoted in *Hoover Lines v. Whitaker*, 120 S.W.2d 983, 987, 22 Tenn.App. 223.

33 C.J. p 829 note 18.

47. Tex.—*Snell v. Knowles*, Civ. App., 87 S.W.2d 871, error dismissed.—*Hufstader v. Harral*, Civ. App., 54 S.W.2d 353.

### Delivery to plaintiff or attorney

(1) Delivery of process by clerk to plaintiff, or his attorney, followed by its delivery, within the required time, to an officer for service, is in fact a delivery by the clerk to the officer.

Pa.—*Vaselenak v. Moxham Nat. Bank*, 28 Pa.Dist. & Co. 253, 85 Pittsb.Leg.J. 691.

Tex.—*Medlin v. Seideman*, 88 S.W. 250, 39 Tex.Civ.App. 553.

(2) Summons issued by clerk and delivered to plaintiff or his attorney is not deemed to have been issued in good faith until given to sheriff or other proper officer to be served.—*Blue Grass Mining Co. v. North*, 96 S.W.2d 757, 265 Ky. 250.

48. R.I.—*Burger v. Brindle*, 10 A.2d 353, 64 R.I. 86.

50 C.J. p 449 note 65.

### Use in particular case

Delivery of blank summons or other process need not be for use in any particular suit, but may be for use in any suit that the attorney

may thereafter have occasion to bring.

Mich.—*Sweet v. Newaygo County Cir. Ct.*, 54 N.W. 951, 95 Mich. 449.

R.I.—*Burger v. Brindle*, 10 A.2d 353, 64 R.I. 86.

49. N.Y.—*Mills v. Corbett*, 8 How. Pr. 500.

N.D.—*Smith v. Nicholson*, 67 N.W. 296, 5 N.D. 426.

Authority of plaintiff or attorney to issue process see *infra* § 6.

50. Mo.—*Corpus Juris* cited in *Spitcaufsky v. Hatten*, 182 S.W.2d 86, 87, 353 Mo. 94, 160 A.L.R. 990.

Power, authority, or jurisdiction of: Court to issue process to enforce judgment see Courts § 86; Federal Courts § 311.

Justice of peace to issue summons see Justices of the Peace § 68 a.

51. Ind.—*Corpus Juris* cited in *State v. Davis*, 82 N.E.2d 82, 85, 226 Ind. 526.

Mo.—*Spitcaufsky v. Hatten*, 182 S.W.2d 86, 353 Mo. 94, 160 A.L.R. 990.

N.C.—*English v. Brigman*, 35 S.E. 2d 173, 225 N.C. 402.

Wis.—*Weil v. Geier*, 21 N.W. 246, 61 Wis. 414.

50 C.J. p 450 note 68.

Mandamus to compel issuance of process see Mandamus §§ 69, 83.

### Excuses for refusal to issue process

(1) Feelings of judge as to merits of case do not justify refusal to have process issued.—*State ex rel. Hurd v. Davis*, 82 N.E.2d 82, 226 Ind. 526.

(2) The need by the court of additional time to consider a motion to dismiss the action is not a valid excuse for refusal to have process issued where the court has no authority to dismiss an action not yet lawfully commenced by the issuance of process.—*State ex rel. Hurd v. Davis*, supra.

52. W.Va.—*Nicholas Land Co. v. Crowder*, 32 S.E.2d 563, 127 W.Va. 216.

53. La.—*Denham v. Kelly*, App., 142 So. 292.

of process unless the process purporting to show service was issued by proper authority.<sup>54</sup>

Process usually may be, and is, issued by the clerk of court<sup>55</sup> or his deputy,<sup>56</sup> and, except in some jurisdictions,<sup>57</sup> the clerk or other officer authorized to issue process may issue it in a proceeding in his own behalf.<sup>58</sup> Where a court lacks jurisdiction, it cannot issue valid process.<sup>59</sup>

**Necessity of order from court.** In the absence of a statutory requirement, process may be issued by the officer designated by law, such as the clerk of court, without any order from the court or judge.<sup>60</sup>

**Issuance by plaintiff or attorney.** Under some statutes process is issued by plaintiff or his attorney.<sup>61</sup>

**Action brought in wrong district.** Where the court is not absolutely without jurisdiction of an

action brought in the wrong district but may try the action unless defendant exercises his privilege of having it removed to the proper district, the clerk of court is without power to refuse to issue a summons on the ground that the court is without jurisdiction.<sup>62</sup>

## § 7. — Against Whom Process May Issue

A court of one state may not make a citizen and resident of another state amenable to its process unless he is found within the state.

A natural person is not amenable to the process of a particular court unless he is subject to the jurisdiction of that court.<sup>63</sup> A court of one state cannot make a citizen and resident of another state amenable to its process,<sup>64</sup> unless he<sup>65</sup> or his duly authorized agent<sup>66</sup> is found in the state, but where he is served while in the state, the fact that the summons was issued when he was out of the state

W.Va.—Baird-Gatzmer Corp. v. Henry Clay Coal Min. Co., 50 S.E.2d 673, 131 W.Va. 793—Nicholas Land Co. v. Crowder, 32 S.E.2d 563, 127 W.Va. 216.

54. Tex.—Walker v. Koger, Civ. App., 99 S.W.2d 1034, error dismissed.

55. Ga.—Gay v. Sylvania Cent. R. Co., 53 S.E.2d 713, 79 Ga.App. 362. La.—Denham v. Kelly, App., 142 So. 292.

N.C.—English v. Brigman, 35 S.E.2d 173, 225 N.C. 402.

W.Va.—Baird-Gatzmer Corp. v. Henry Clay Coal Min. Co., 50 S.E.2d 673, 131 W.Va. 793—Nicholas Land Co. v. Crowder, 32 S.E.2d 563, 127 W.Va. 216.

50 C.J. p 450 note 69.

Power of county clerk as ex officio clerk of court to issue process see Counties § 133.

56. W.Va.—Baird-Gatzmer Corp. v. Henry Clay Coal Min. Co., 50 S.E.2d 673, 131 W.Va. 793—Nicholas Land Co. v. Crowder, 32 S.E.2d 563, 127 W.Va. 216.

50 C.J. p 450 note 70.

Chief deputy clerk

La.—Denham v. Kelly, App., 142 So. 292.

57. Conn.—Doolittle v. Clark, 47 Conn. 316.

58. N.C.—English v. Brigman, 35 S.E.2d 173, 225 N.C. 402.

50 C.J. p 450 note 73—11 C.J. p 385 note 92.

Disqualification of clerk of court to act generally see Clerks of Courts § 47.

59. N.Y.—Clarke v. Carlisle Foundry Co., 270 N.Y.S. 351, 150 Misc. 710.

Court in which case not pending

Where suit was instituted in the

"Special District Court of Smith County" and on that court's dissolution was transferred to the "7th Judicial District Court of Smith County," citation issued out of a subsequently created "Special District Court of Smith County" was without legal effect.—Thompson v. Pure Oil Co., Tex.Civ.App., 113 S.W.2d 662.

60. Cal.—Harrington v. Placer County Super. Ct., 228 P. 15, 194 Cal. 185.

Va.—Abney v. Ohio Lumber, etc., Co., 32 S.E. 256, 45 W.Va. 446.

Order after lapse of statutory time see infra § 9.

Præcipe or direction by plaintiff see infra § 9.

Chambers summonses were issuable only by the clerks of the circuit court, under the powers reposed in them by R.L.H.1915 § 2320, when ordered by the circuit judge at chambers, pursuant to the powers reposed in him by the provisions of R.L.H.1915 § 2272, and after his determination ex parte on the propriety of granting the process prayed for under the provisions of R.L.H.1915 § 2479.—Robinson v. McWayne, 35 Hawaii 689.

61. Minn.—Francis v. Knerr, 182 N. W. 988, 149 Minn. 122.

50 C.J. p 450 note 74.

Signature of plaintiff or attorney to summons or other process see infra § 19.

62. N.Y.—North America Mercantile Agency Co. v. Kennedy, 109 N. Y.S. 165, 124 App.Div. 657.

63. Iowa.—Jones v. Illinois Cent. R. Co., 175 N.W. 316, 188 Iowa 850.

64. U.S.—Commonwealth of Kentucky, for Use and Benefit of Kern, v. Maryland Casualty Co. of

Baltimore, Md., C.C.A.Ky., 112 F. 2d 352.

Ga.—Carter v. Carter, 41 S.E.2d 532, 201 Ga. 850—McAlbany v. Allen, 23 S.E.2d 676, 195 Ga. 150—Milner v. Gatlin, 76 S.E. 860, 139 Ga. 109.

Mo.—Corpus Juris cited in State v. Aronson, 165 S.W.2d 404, 407.

N.Y.—Rawstorne v. Maguire, 269 N. Y.S. 39, 240 App.Div. 1, affirmed 192 N.E. 294, 265 N.Y. 204.

Pa.—Vaughn v. Love, 188 A. 299, 324 Pa. 276, 107 A.L.R. 1336.

50 C.J. p 450 note 81.

Place to which process may issue see infra § 8.

As long as nonresident defendant remained outside state, court could acquire no jurisdiction over his person by any process it could issue.—Wm. Bondies & Co. v. Bassel-Flewellen, Tex.Civ.App., 28 S.W.2d 1109, error dismissed.

Process is void

N.Y.—Gilbert v. Burnstine, 174 N.E. 706, 255 N.Y. 348, 73 A.L.R. 1453.

Tex.—Wm. Bondies & Co. v. Bassel-Flewellen, Civ.App., 28 S.W.2d 1109, error dismissed.

65. U.S.—Commonwealth of Kentucky, for Use and Benefit of Kern, v. Maryland Casualty Co. of Baltimore, Md., C.C.A.Ky., 112 F.2d 352.

N.J.—Gilson v. Appleby, 78 A. 668, 78 N.J.Eq. 96, affirmed 81 A. 925, 79 N.J.Eq. 590.

Pa.—Vaughn v. Love, 188 A. 299, 324 Pa. 276, 107 A.L.R. 1336.

66. N.J.—Yarborough v. Slockum, 33 A.2d 905, 130 N.J.Law 565.

Foreign corporation doing business in state see Corporations § 1919 et seq.

Service on statutory agent of nonresident motorist see Motor Vehicles § 502.

does not render it abortive.<sup>67</sup> On the other hand, it is declared that a person who, although absent from a state, is a citizen and resident thereof, is amenable to the process of its courts.<sup>68</sup>

**Particular persons.** Process may be issued against various persons.<sup>69</sup> Statutes making corporations amenable to legal process are sometimes construed not to include public corporations.<sup>70</sup>

**Persons named as parties in pleading.** In those states wherein the statutes require a complaint to be filed on which the summons subsequently issues, as discussed *infra* § 9, the summons can be issued only against those persons who are made parties in the pleading.<sup>71</sup>

## § 8. — Place to Which Process May Issue

- a. In general
- b. County

### a. In General

Except to the extent that statutes may constitutionally otherwise provide, the process of a court may not be issued to be executed beyond the limits of the territorial jurisdiction of the court.

57. Kan.—Shaffer v. Harbaugh, 185 P. 1049, 105 Kan. 681.
58. Tex.—Horst v. Lightfoot, 132 S.W. 761, 103 Tex. 643. Jurisdiction of sovereign over citizens outside its territorial limits see International Law § 11.
59. W.Va.—Welch Lumber Co. v. Carter, 88 S.E. 1084, 78 W.Va. 11, 2 A.L.R. 1583. Issuance of process against: Corporations see Corporations §§ 1305, 1921. Infants see Infants § 115. Insane persons see Insane Persons § 147.
60. W.Va.—Welch Lumber Co. v. Carter, 88 S.E. 1084, 78 W.Va. 11, 2 A.L.R. 1583. Process against municipal corporations see Municipal Corporations § 2205. Sovereignties and public corporations as amenable to garnishment process see Garnishment §§ 39-43.
1. Ind.—Nutting v. Losance, 27 Ind. 37.
2. Neb.—Grose v. Bredthauer, 284 N.W. 869, 136 Neb. 43. 0 C.J. p 450 note 90. Issuance of process to another county see *infra* subdivision b of this section.
3. N.Y.—Yancey v. Andrews, 91 N.Y.S.2d 659, 195 Misc. 336. 0 C.J. p 450 note 91. Jurisdiction of person based on service of process outside territorial jurisdiction of court see Courts § 83 b (2).

- Personal service of process outside of jurisdiction see *infra* § 32. Power of federal district court to issue process running beyond limits of district see Federal Courts § 124 b.
74. Mo.—Corpus Juris cited in State v. Aronson, 165 S.W.2d 404, 407. 50 C.J. p 450 note 92.
75. U.S.—In re Ross, D.C.Or., 48 F. Supp. 815. Fla.—Beckwith v. Bailey, 161 So. 576, 119 Fla. 316. Ga.—Carter v. Carter, 41 S.E.2d 532, 201 Ga. 850—McAlbany v. Allen, 23 S.E.2d 676, 195 Ga. 150—Milner v. Gatlin, 76 S.E. 860, 139 Ga. 109. N.Y.—Gilbert v. Burnstine, 174 N.E. 706, 255 N.Y. 348, 73 A.L.R. 1453—China, etc., Bank v. Morse, 61 N.E. 774, 168 N.Y. 458, 85 Am.S.R. 676, 56 L.R.A. 139—Rawstorne v. McGuire, 269 N.Y.S. 39, 240 App.Div. 1, affirmed 192 N.E. 294, 265 N.Y. 204. Ohio.—Smith v. Smith, 50 N.E.2d 889, 72 Ohio App. 203. Extraterritorial rights and jurisdiction of nations see International Law § 9.
76. N.J.—Yarborough v. Siookum, 33 A.2d 905, 130 N.J.Law 565. Tex.—Watts v. City of El Paso, Civ. App., 183 S.W.2d 249, error refused. 50 C.J. p 450 note 94.
77. N.J.—Valentine v. Franklin Surety Co., 168 A. 85, 11 N.J.Misc. 822. 50 C.J. p 450 note 97.

Except in cases which fall within valid statutes providing otherwise,<sup>72</sup> a court or clerk of court has no power to issue process to be executed,<sup>73</sup> and the process of a court does not run<sup>74</sup> beyond the limits of the territorial jurisdiction of the court. No sovereignty can extend the process of its courts beyond its territorial limits;<sup>75</sup> nor can a tribunal established by a state extend its process beyond the territorial limits of the state.<sup>76</sup>

### b. County

- (1) In general
- (2) Joint defendants

#### (1) In General

Unless authorized by constitutional or statutory provisions, process may not issue to a county other than the one in which the action is commenced.

Process may not issue to a county other than the one in which the action is commenced<sup>77</sup> unless such issuance is authorized by constitutional or statutory provisions.<sup>78</sup> Thus, under the statutes in some jurisdictions, process may be issued to,

In action against corporation see Corporations § 1307.

County other than alleged residence of defendant

Issuance of citation to sheriff of another county than one in which petition alleged that defendants resided was unauthorized, and the filing of amended petition, correctly stating county of defendants' residence, imparted no efficacy to citation issued to sheriff of such county. —Walden v. Locke, Tex.Civ.App., 33 S.W.2d 475.

78. Ga.—Georgia Power Co. v. Fincher, 168 S.E. 109, 46 Ga.App. 524.

Ky.—White v. Crouch, 133 S.W.2d 753, 280 Ky. 637.

Neb.—Grose v. Bredthauer, 284 N.W. 869, 136 Neb. 43.

N.C.—Williams v. Cooper, 24 S.E. 2d 484, 222 N.C. 589.

W.Va.—Hall v. Ocean Accident & Guarantee Corporation, 9 S.E.2d 45, 122 W.Va. 188.

50 C.J. p 450 notes 96, 97, p 451 note 2.

Power of legislature to authorize running of process from one county into another see Constitutional Law § 128 g.

#### Presumption

It will be presumed that some one or more of the eventualities mentioned in the statute permitting the issuance of process to another county existed, thereby authorizing the issuance of a writ to the county other than that of the residence of defendants as alleged in the peti-

another county where an action is rightly brought in the court of any county.<sup>79</sup> The statute in force at the time the action is begun governs as to the right to issue process to another county for service.<sup>80</sup>

Issuance of process to another county is permissible only when the conditions required by the statute exist.<sup>81</sup> Process may not issue to another county where the action is not properly or rightly brought in the county from which the process issues.<sup>82</sup>

**Number of defendants.** Where authorized by statute, process may be issued to another county although there is but one defendant to the action.<sup>83</sup> Thus, process may be issued to another county in the case of a single defendant under a statute providing that where an action is rightly brought in any county, a summons shall be issued to any other county against any one or more of defendants, at the plaintiff's request,<sup>84</sup> or where the statute provides that plaintiff or his attorney may issue as many original summonses as either may elect and deliver one of such summonses to the sheriff of each county in which service on any defendant is desired.<sup>85</sup>

Process may be issued to another county or coun-

ties in the case of several defendants where such issuance is authorized by statute.<sup>86</sup>

## (2) Joint Defendants

Under the conditions specified by statute, where two or more persons are joined as defendants, summons or other process may be issued and sent to another county or counties wherein the remaining defendants reside or may be found.

Under the statutes and the construction placed thereon, where two or more persons are properly joined as defendants and at least one of them resides, is served with summons, or voluntarily appears, in the county wherein the suit was brought, summons or other process may be issued and sent to another county or counties wherein the remaining defendants reside or may be found.<sup>87</sup> Such statutes have been held to apply to actions in tort as well as actions on contract.<sup>88</sup> However, process may be issued and sent to another county or counties where the remaining defendants reside or may be found only in those cases wherein the conditions prescribed by the statute exist.<sup>89</sup> Thus, under the express provisions of some statutes, process may be sent to another county only where the action in the county from which process issues is "rightly brought" therein.<sup>90</sup> It is essential that the action

tion, in absence of a showing to the contrary.—*Sandel v. Dailey*, Tex.Civ. App., 141 S.W.2d 467.

### Court in county exercising state-wide jurisdiction

A superior court, although existing in each county under the constitution, is in fact a court of the state as well as of county, and its process extends to all parts of the state.—*Mosher v. Wayland*, 158 P.2d 654, 62 Ariz. 498, certiorari denied 65 S.Ct. 868, 324 U.S. 862, 89 L.Ed. 1419, appeal dismissed 66 S.Ct. 58, 326 U.S. 682, 90 L.Ed. 399.

79. Neb.—*Nebraska Mut. Hail Ins. Co. v. Meyers*, 92 N.W. 572, 66 Neb. 657.

Ohio.—*State ex rel. Hawley v. Industrial Commission*, 28 N.E.2d 654, 64 Ohio App. 271, affirmed 30 N.E.2d 332, 137 Ohio St. 332.—*Gauder v. Canton Provision Co.*, 10 N.E.2d 163, 56 Ohio App. 170.

Okl.—*Harlow Pub. Co. v. Pennel & Harrison*, 65 P.2d 1206, 179 Okl. 360.

Wyo.—*Holly Sugar Corporation v. Fritzler*, 296 P. 206, 42 Wyo. 446. 50 C.J. p 451 note 2.

80. Ill.—*Funk v. Ironmonger*, 76 Ill. 506.

81. Ohio.—*State ex rel. Hawley v. Industrial Commission*, 28 N.E.2d 654, 64 Ohio App. 271, affirmed 30 N.E.2d 332, 137 Ohio St. 332. 50 C.J. p 450 note 97.

82. Ohio.—*State ex rel. Hawley v. Industrial Commission*, supra.—*Gauder v. Canton Provision Co.*, 10 N.E.2d 163, 56 Ohio App. 170. 50 C.J. p 451 note 1.

83. Okl.—*Harlow Pub. Co. v. Pennel & Harrison*, 65 P.2d 1206, 179 Okl. 360.

84. Okl.—*Harlow Pub. Co. v. Pennel & Harrison*, supra.

### Action in county where realty situated

Where a local action is rightly brought in the county where the real property involved is situated, a summons may, under such statute, be issued to another county, even though there is only a single defendant.—*Nebraska Mut. Hail Ins. Co. v. Meyers*, 92 N.W. 572, 66 Neb. 657.

85. Or.—*Mutzig v. Hope*, 158 P.2d 110, 176 Or. 368.

86. Wyo.—*Holly Sugar Corporation v. Fritzler*, 296 P. 206, 42 Wyo. 446.

Joint defendants see *infra* subdivision b (2) of this section.

87. Kan.—*Voelker v. Broadview Hotel Co.*, 81 P.2d 36, 148 Kan. 326. Ky.—*Rose v. Finley's Ex'r*, 63 S.W.2d 948, 250 Ky. 769.—*Thompson v. Ward*, 12 Ky. 156, 2 Litt. 156.

Neb.—*Hoerler v. Frey*, 252 N.W. 327, 125 Neb. 822.—*Brownell v. Adams*, 236 N.W. 750, 121 Neb. 304.

Ohio.—*Uthoff v. Du Brie*, 23 N.E.2d 854, 62 Ohio App. 285.

Tenn.—*Chickasaw Wood Products Co. v. Lane*, 125 S.W.2d 164, 22 Tenn.App. 596.—*Curtis v. Kyte*, 106 S.W.2d 234, 21 Tenn.App. 115. 50 C.J. p 451 note 7.

Jurisdiction of action on joint obligation where one obligor is within territorial jurisdiction see *Courts* § 78.

### Purpose of statute

Purpose of statute is to make it possible for a wronged party in any transitory action to seek his remedy in one action and not be required to pursue it in two or more separate actions in as many other jurisdictions, just because it happens that his wrongdoers reside in different counties of the state.—*Uthoff v. Du Brie*, 23 N.E.2d 854, 62 Ohio App. 285.

**Failure to bring action in place where injury occurred does not impair the validity of the service.**—*Uthoff v. Du Brie*, supra.

88. Kan.—*Voelker v. Broadview Hotel Co.*, 81 P.2d 36, 148 Kan. 326.

89. Okl.—*Krumme v. Walker*, 181 P.2d 835, 199 Okl. 6.

90. Ohio.—*Uthoff v. Du Brie*, 23 N.E.2d 854, 62 Ohio App. 285.

Okl.—*Krumme v. Walker*, 181 P.2d 835, 199 Okl. 6.—*Allen v. Ramsey*, 41 P.2d 658, 170 Okl. 430, 97 A.L.R.



be bona fide against the resident of the county in which it is brought,<sup>91</sup> and all the persons sued must be rightfully joined as defendants;<sup>92</sup> there must be a cause of action<sup>93</sup> and a right to recover judgment<sup>94</sup> against defendant who resides or is served within the county wherein the suit is brought; and he must be a real and substantial, rather than a nominal, defendant.<sup>95</sup> A party against whom the law affords no right of action in the suit is not a real or material defendant.<sup>96</sup> A collusive joinder for the purpose of bringing suit against a nonresident of the county wherein the action is brought does not permit issuance of process to the other county.<sup>97</sup>

Under some statutes, process must be served on defendant in the county where the action is brought before process may issue against codefendants in other counties;<sup>98</sup> and if service of process is not

legally obtainable on one of several defendants in the county where the action is brought, process may not be issued to any other county.<sup>99</sup>

*In suit begun by attachment* of the property of one defendant, a writ of summons may, under the construction placed on the statutes of some states, be issued to another county in which a codefendant resides or has property.<sup>1</sup>

## § 9. — Conditions Precedent to, and Time for, Issuance

Process may not be issued until such conditions precedent as are prescribed by statute or rule of court have been performed.

Such conditions precedent to the issuance of process must be performed as may be fixed by statute or rule of court,<sup>2</sup> and a failure to comply with the conditions prescribed ordinarily invalidates

1259—Grady v. Rice, 224 P. 321, 98 Okl. 166—Haynes v. City Nat. Bank, 121 P. 182, 30 Okl. 614.

Action is "rightly brought" where a petition is filed stating a joint transitory cause of action against resident and nonresident defendants.—Maggi v. Johnson, 194 P.2d 854, 200 Okl. 361.

91. Kan.—Voelker v. Broadview Hotel Co., 81 P.2d 36, 148 Kan. 326—King v. Ingels, 250 P. 306, 121 Kan. 790.

Tenn.—Chickasaw Wood Products Co. v. Lane, 125 S.W.2d 164, 22 Tenn.App. 596.

92. Tenn.—Corpus Juris quoted in Moore v. Gore, 231 S.W.2d 361, 363—Corpus Juris quoted in Chickasaw Wood Products Co. v. Lane, 125 S.W.2d 164, 169, 22 Tenn.App. 596.

50 C.J. p 451 note 8.

Actual joint liability necessary

Neb.—Neece v. Lee, 262 N.W. 1, 129 Neb. 561.

Ohio.—Trotter v. Trotter, 9 N.E.2d 297, 55 Ohio App. 198.

50 C.J. p 451 note 8 [c].

93. Kan.—Voelker v. Broadview Hotel Co., 81 P.2d 36, 148 Kan. 326—Rohr v. Jeffery, 278 P. 725, 123 Kan. 541—King v. Ingels, 250 P. 306, 121 Kan. 790.

Mo.—Mansfield v. Veach, App., 212 S.W.2d 90.

Okl.—Maggi v. Johnson, 194 P.2d 854, 200 Okl. 361.

Tenn.—Moore v. Gore, 231 S.W.2d 361—Chickasaw Wood Products Co. v. Lane, 125 S.W.2d 164, 22 Tenn.App. 596.

Action is not "rightfully brought" within statute allowing issuance of a summons to another county where an action is "rightfully brought" in any county, where petition fails to state cause of action against resi-

dent defendant.—Maggi v. Johnson, 194 P.2d 854, 200 Okl. 361.

Amendment stating cause of action

In action against resident and nonresident defendants, where court failed to acquire jurisdiction of nonresident defendants on summons issued to county of their residence because petition failed to state cause of action against resident defendant, amended petition which stated a joint transitory action against all defendants did not relate back and supply insufficiency of original petition so as to furnish authority for issuance of summonses served on nonresident defendants.—Maggi v. Johnson, supra.

94. Neb.—Hoerler v. Prey, 252 N.W. 327, 125 Neb. 822—Morearty v. Strunk, 226 N.W. 329, 118 Neb. 718. Tenn.—Moore v. Gore, 231 S.W.2d 361—Chickasaw Wood Products Co. v. Lane, 125 S.W.2d 164, 22 Tenn.App. 596.

95. Kan.—King v. Ingels, 250 P. 306, 121 Kan. 790.

Neb.—Wistrom v. Forsling, 14 N.W. 2d 217, 144 Neb. 638—Peters v. Po-thast, 231 N.W. 805, 120 Neb. 208.

Okl.—Krumme v. Walker, 181 P.2d 835, 199 Okl. 6—Allen v. Ramsey, 41 P.2d 658, 170 Okl. 430, 97 A.L.R. 1259—Grady v. Rice, 224 P. 321, 98 Okl. 166—Haynes v. City Nat. Bank, 121 P. 182, 30 Okl. 614.

Tenn.—Moore v. Gore, 231 S.W.2d 361—Taylor v. McCool, 189 S.W.2d 817, 183 Tenn. 1—Chickasaw Wood Products Co. v. Lane, 125 S.W.2d 164, 22 Tenn.App. 596—Corpus Juris cited in Western Automobile Casualty Co. v. Burnell, 71 S.W.2d 474, 477, 17 Tenn.App. 687.

50 C.J. p 451 note 11.

96. Tenn.—Western Automobile Casualty Co. v. Burnell, 71 S.W.2d 474, 17 Tenn.App. 687.

Test is as to right of action, not as to liability of defendant.—Moore v. Gore, Tenn., 231 S.W.2d 361—Chickasaw Wood Products Co. v. Lane, 125 S.W.2d 164, 22 Tenn.App. 596—Western Automobile Casualty Co. v. Burnell, 71 S.W.2d 474, 17 Tenn.App. 687.

97. Neb.—Wistrom v. Forsling, 9 N.W.2d 294, 143 Neb. 294, rehearing denied and modified on other grounds 14 N.W.2d 217, 144 Neb. 638.

Collusion not shown

Tenn.—Chickasaw Wood Products Co. v. Lane, 125 S.W.2d 164, 22 Tenn.App. 596.

98. Tenn.—Western Automobile Casualty Co. v. Burnell, 71 S.W.2d 474, 17 Tenn.App. 687.

99. Okl.—Stumpf v. Pederson, 54 P. 2d 1035, 176 Okl. 136—Bearman v. Hunt, 171 P. 1124, 68 Okl. 96.

1. Mo.—Williams v. Short, 268 S.W. 706, 219 Mo.App. 99.

Process or notice in attachment proceedings see Attachment §§ 482-490.

2. Vt.—Enosburg Grain Co. v. Wilder, 20 A.2d 473, 112 Vt. 11. 50 C.J. p 451 note 14.

Indorsement of appearance day on petition

Plaintiff's indorsement of day for defendants' appearance on amended petition to be adjudged decedent's heir and devisee would have been permissible under statute, but was not requisite to entitle plaintiff to giving of notice by publication to nonresident defendants and issuance of summons for resident defendants under subsequent provision of statute.—State ex rel. Hurd v. Davis, 82 N.E.2d 82, 226 Ind. 526.

Showing that court has jurisdiction of parties by reason of their

the process.<sup>3</sup> However, the rule is otherwise where the statute is for the benefit of the clerk of court,<sup>4</sup> as where it requires the payment of a tax or issuing fee before the issuance of the writ or summons.<sup>5</sup>

**Præcipe or direction by plaintiff.** A præcipe is a written order to the clerk of a court to issue a writ.<sup>6</sup> In the absence of a statutory requirement, a præcipe need not be filed by plaintiff.<sup>7</sup> The mere filing of a petition, without giving any directions to the clerk as to the issuance of process, amounts to an order to the clerk to issue process,<sup>8</sup> and it is the duty of the clerk to issue process immediately;<sup>9</sup> and, under the express provisions of some statutes, when a complaint is filed with the clerk, he must issue process promptly or immediately.<sup>10</sup> In the absence of directions to the clerk to delay the issuance of process, plaintiff will not be deprived of the benefits of filing for any default or neglect of the clerk unless such default or neglect is attributable to plaintiff.<sup>11</sup> Plaintiff may by request, or other facts showing such intention, delay the issuance of process on the filing of the complaint, even though the statute requires the clerk to issue process on the filing of a complaint;<sup>12</sup> and, where express direction not to is-

sue process is given to the clerk, the filing of the petition does not amount to an order to the clerk to issue process in the cause.<sup>13</sup>

Under the statutes in some jurisdictions plaintiff is required to file a præcipe with the clerk before the summons or other process issues.<sup>14</sup> It serves the twofold purpose of marking the time when the action begins, even though the clerk should be dilatory in issuing the summons, and also as a guide to the clerk in preparing the process or summons.<sup>15</sup> Under such statutes the clerk may refuse to issue the summons until plaintiff files a præcipe;<sup>16</sup> but the filing of a præcipe is not jurisdictional,<sup>17</sup> and the clerk may waive it without affecting the validity of the process.<sup>18</sup>

The mere form of a præcipe is not a determining factor in ascertaining its sufficiency, but the paper, whatever its form, must contain a positive order to put the judicial machinery in motion.<sup>19</sup> Inaccuracies in the præcipe do not invalidate the process.<sup>20</sup> Where a præcipe for a summons or other process had no marks of cancellation or withdrawal superimposed on it at the time it was filed, placing them thereon subsequently, no matter by whom, without leave of court is ineffective to change the præcipe as originally filed.<sup>21</sup>

place of residence is not prerequisite to issuance of summons.—*Meehl, for Use of Eagle Indemnity Co., v. Barr Transfer Co.*, 9 N.W.2d 540, 305 Mich. 276.

3. Tenn.—*Minor v. El. I. Du Pont De Nemours & Co.*, 47 S.W.2d 748, 164 Tenn. 226.  
50 C.J. p 451 note 14.

#### Publicity of partnership

Failure by members of a partnership to comply with provisions of chapter of public laws respecting publicity of partnerships prior to issuance of writ in an action by such members makes process void.—*Enosburg Grain Co. v. Wilder*, 20 A.2d 473, 112 Vt. 11.

4. Ark.—*Brown v. Peevey*, 4 Ark. 442.

5. Ark.—*Brown v. Peevey*, *supra*.

6. Black L. Dict.; *Bouvier L.Dict.* 50 C.J. p 452 note 28.

Filing of præcipe as commencement of action:

Generally see Actions § 129 b (7).  
For limitation purposes see Limitations of Actions § 265 a.

Præcipe for execution see Executions § 56 b (2).

#### Other definition

"Præcipe" is a paper addressed to the prothonotary, entitled in the court out of which the writ is to issue, dated the day of its filing and containing with particularity the

names of the parties, showing the form of the action, commanding the issuance of a writ of the kind and in the manner directed, and signed by the attorney or by the party, if he conducts his suit alone.—*Casey v. Southern Corporation*, Del., 29 A.2d 174.

7. Neb.—*McIntosh v. Standard Oil Co.*, 236 N.W. 153, 121 Neb. 92.

8. U.S.—*Schindler v. Wabash R. Co.*, D.C.Mo., 80 F.Supp. 685—*Johnson v. Missouri Pac. Transp. Co.*, D.C.Mo., 25 F.Supp. 692.

Mo.—*State v. Bates*, App., 286 S.W. 420.

9. Mo.—*State v. Bates*, *supra*.

10. Miss.—*Shackelford v. New York Underwriters Ins. Co.*, 198 So. 31, 139 Miss. 396.

Tex.—*Curtis v. Speck*, Civ.App., 130 S.W.2d 348, error refused.

11. Miss.—*Shackelford v. New York Underwriters Ins. Co.*, 198 So. 31, 139 Miss. 396.

12. Tex.—*Curtis v. Speck*, Civ.App., 130 S.W.2d 348, error refused.

13. U.S.—*Schindler v. Wabash R. Co.*, D.C.Mo., 80 F.Supp. 685—*Johnson v. Missouri Pac. Transp. Co.*, D.C.Mo., 25 F.Supp. 692.

Mo.—*Franz v. Radeacker*, App., 264 S.W. 97.

14. Fla.—*McMillon v. Harrison*, 63 So. 427, 66 Fla. 200, 49 L.R.A., N.S., 946.

W.Va.—*Nicholas Land Co. v. Crowder*, 32 S.E.2d 563, 176 W.Va. 216.

#### Summons on cross petition

(1) An unnecessary second summons issued without a præcipe or other authorization by the cross petitioner after the filing of a cross petition is a mere nullity.—*Rice v. Bontjes*, 250 P. 89, 121 Okl. 292.

(2) Process on cross pleading generally see *supra* § 4 b.

15. Fla.—*McMillon v. Harrison*, 63 So. 427, 66 Fla. 200, 49 L.R.A., N.S., 946.

16. Okl.—*State Life Ins. Co. v. Oklahoma City Nat. Bank*, 97 P. 574, 21 Okl. 823.

17. Fla.—*McMillon v. Harrison*, 63 So. 427, 66 Fla. 200, 49 L.R.A., N.S., 946.

18. Ind.—*Johnson v. Murray*, 13 N.E. 273, 112 Ind. 154, 2 Am.S.R. 174.  
50 C.J. p 452 note 32.

19. Del.—*Casey v. Southern Corporation*, 29 A.2d 174.

20. Okl.—*State Life Ins. Co. v. Oklahoma City Nat. Bank*, 97 P. 574, 21 Okl. 823.

50 C.J. p 452 note 33.

21. Ohio.—*Pilgrim Distributing Corp. v. Galsworthy, Inc.*, 74 N.E. 2d 579, 79 Ohio App. 529, affirmed 76 N.E.2d 382, 148 Ohio St. 567.

*Time for issuance.* Process is to be issued at such time as may be directed by statute.<sup>22</sup> A summons which is issued after the return day is a nullity.<sup>23</sup> Under some statutes and the construction placed thereon, process cannot issue before the filing of the petition, declaration, or complaint.<sup>24</sup> It is not required that the complaint shall be filed and the summons issued at the same time;<sup>25</sup> and in a jurisdiction wherein the statutes place no limitation on the time of issuing a summons, it may issue at any time;<sup>26</sup> but in some jurisdictions the codes or statutes provide for the issuance of a summons within a limited period of time after the filing of the complaint,<sup>27</sup> and it must be issued within the time limited,<sup>28</sup> unless the code or statutory provision is directory<sup>29</sup> or an order of court for the issuance of process is procured;<sup>30</sup> and it is within the discretion of the court to allow or refuse the issuance of summons after a long delay<sup>31</sup> or after the expiration of the statutory period.<sup>32</sup>

## § 10. Form, Requisites, Validity, and Construction

- a. In general
- b. Form and contents

### a. In General

The requisites of process are largely statutory. Some courts construe statutes and rules of court regulating process as mandatory, while others regard them as merely directory.

The requisites of process are largely matters of statutory regulation,<sup>33</sup> and a strict,<sup>34</sup> or at least a substantial,<sup>35</sup> compliance therewith is necessary, although a substantial compliance has been held sufficient.<sup>36</sup> Process merely voidable in character is valid until attacked.<sup>37</sup>

*Construction generally.* The want of proper certainty in a citation cannot be supplied by construction<sup>38</sup> or intendment.<sup>39</sup> In some jurisdictions the statutes and rules of court regulating process are held to be mandatory in character<sup>40</sup> and subject to a strict construction;<sup>41</sup> but in other jurisdictions they are regarded as merely direc-

22. Tenn.—Minor v. E. I. Du Pont De Nemours & Co., 47 S.W.2d 748, 164 Tenn. 226.

Delay in issuance of process as ground for dismissal of action see Dismissal and Nonsuit § 62.

23. W.Va.—Hall v. Ocean Accident & Guarantee Corporation, 9 S.E.2d 45, 122 W.Va. 188.

24. Tenn.—Minor v. E. I. Du Pont De Nemours & Co., 47 S.W.2d 748, 164 Tenn. 226.

Tex.—Moorhead v. Transportation Bank of Chicago, Ill., Civ.App., 62 S.W.2d 184.

50 C.J. p 451 note 18.

Process is void if issued before filing of complaint.

Tenn.—Minor v. E. I. Du Pont De Nemours & Co., 47 S.W.2d 748, 164 Tenn. 226.

Tex.—Moorhead v. Transportation Bank of Chicago, Ill., Civ.App., 62 S.W.2d 184.

#### Prayer for process

(1) In some jurisdictions the complaint or petition must contain a prayer for process and, in the absence of a prayer, the clerk has no authority to issue process, and process issued without such prayer is void.—Crown Laundry v. Burch, 53 S.E.2d 116, 205 Ga. 211, followed in Crown Laundry v. Higgins, 53 S.E.2d 118, 205 Ga. 214, and Crown Laundry v. Robertson, 53 S.E.2d 119, 205 Ga. 214.

(2) In other jurisdictions a prayer for process, such as a citation, is not necessary.—Bauduc v. Doming-

on, 8 Mart.N.S., La., 434—Sompey-rac v. Estrada, 8 Mart., La., 722.

25. Cal.—Harrington v. Placer County Super. Ct., 228 P. 15, 194 Cal. 185.

26. N.C.—Dorsey v. Kirkland, 99 S. E. 407, 177 N.C. 520.

27. Puerto Rico.—Chavier v. Giraldez, 15 Puerto Rico 145.

50 C.J. p 452 note 21.

28. U.S.—U. S. v. Schuerman, D.C. Idaho, 218 F. 915.

50 C.J. p 452 note 22.

29. Puerto Rico.—Chavier v. Giraldez, 15 Puerto Rico 145.

30. Colo.—Stevens v. Carson, 40 P. 569, 21 Colo. 280.

31. Ga.—Reese v. Kirby, 68 Ga. 825.

32. Cal.—Baldwin v. Foster, 108 P. 714, 157 Cal. 643.

Colo.—Stevens v. Carson, 40 P. 569, 21 Colo. 280.

33. Okl.—Corpus Juris cited in State v. City of Tulsa, 5 P.2d 744, 746, 153 Okl. 262.

Requisites of summons, although such instrument is not, strictly speaking, to be regarded as a process, are defined by statute.—Schultz v. Oldenburg, 277 N.W. 918, 202 Minn. 237.

34. Tex.—Boydston v. Nugent, Civ. App., 285 S.W. 695—Kimmell v. Edwards, Civ.App., 193 S.W. 363, 194 S.W. 168.

35. Minn.—Tharp v. Tharp, 86 N.W. 2d 1, 228 Minn. 23.

Okl.—Corpus Juris cited in State v.

City of Tulsa, 5 P.2d 744, 746, 153 Okl. 262.

Tex.—Boulevard Undertaking Co. v. Breaker, Civ.App., 42 S.W.2d 451.

50 C.J. p 452 note 44.

36. Idaho.—Mattice v. Babcock, 20 P.2d 207, 52 Idaho 653.

37. Vt.—Russell v. Lund, 39 A.2d 337, 114 Vt. 16—Howe v. Lisbon Sav. Bank & Trust Co., 14 A.2d 3, 111 Vt. 201—Elwell v. Olin, 134 A. 592, 99 Vt. 460.

38. Tex.—Smith v. Buckholts State Bank, Civ.App., 193 S.W. 780.

39. Tex.—Smith v. Buckholts State Bank, supra.

40. Okl.—Corpus Juris cited in State v. City of Tulsa, 5 P.2d 744, 746, 153 Okl. 262.

Tex.—Firman Leather Goods Corp. v. McDonald & Shaw, Civ.App., 217 S.W.2d 137—Johnson v. Cole, Civ. App., 138 S.W.2d 910, error refused.—In re Keen's Estate, Civ.App., 77 S.W.2d 588—Boulevard Undertaking Co. v. Breaker, Civ.App., 42 S.W.2d 451.

50 C.J. p 452 note 42.

41. N.J.—Williams v. Board of Education of Trenton, 12 A.2d 127, 124 N.J.Law 380.

Tex.—Gutierrez v. Cuellar, Civ.App., 236 S.W. 497.

tory<sup>42</sup> and are accorded a liberal construction.<sup>43</sup>

*What law governs.* The sufficiency of a process must be determined by the law in force on the date of its issuance.<sup>44</sup>

*Power of legislature.* Within constitutional limitations, the legislature may change the form and requisites of a summons as it sees fit.<sup>45</sup>

## b. Form and Contents

The form and contents of a process should be such as to afford notice and to effect a substantial compliance with any provisions of statute or court rule prescribing matters of form.

The form of process must be such as to lead to actual notice as far as information and circumstances permit,<sup>46</sup> and, in the absence of a mandatory requirement of positive law prescribing some particular form, a process which affords adequate notice is sufficient.<sup>47</sup> A summons is sufficient to confer jurisdiction where it performs the function of giving notice according to statutory requirements with such particularity and certainty as not to deceive or mislead.<sup>48</sup> Ordinarily mere irregularities

in form will not vitiate a process,<sup>49</sup> as when a required statement is added by way of a memorandum upon the summons instead of inserting it in the body thereof.<sup>50</sup> A failure to state the street number of plaintiff's attorney is held to be a mere irregularity and not jurisdictional,<sup>51</sup> and it has been said that in order to deprive the court of jurisdiction the process must be so defective as to be void.<sup>52</sup> In jurisdictions wherein a statement of the file number of the suit is required, a failure to state such number in the body or on the face of a citation has been held to be fatal<sup>53</sup> even though it is indorsed on the back of the citation.<sup>54</sup> A registered letter does not constitute effective process.<sup>55</sup>

*Statutes and rules of court.* It is necessary that the writ contain whatever a statute or rule of court prescribes,<sup>56</sup> such as a direction to defendant to answer and to serve his answer on plaintiff at a specified place within the state.<sup>57</sup> Where a statute contains an enumeration of all that is required to constitute a legal citation, failure to insert other matters has been held not fatal.<sup>58</sup> Where

42. N.D.—Al G. Barnes Amusement Co. v. District Court in and for Ramsey County, Second District, 268 N.W. 897, 66 N.D. 727.

43. Minn.—Schultz v. Oldenburg, 277 N.W. 918, 202 Minn. 237—Flanery v. Kusha, 173 N.W. 652, 143 Minn. 308, 6 A.L.R. 838.

### Technical defects

Statute requiring summons to be subscribed by plaintiff or his attorney and directed to defendant, and requiring service of answer at specified place within specified number of days after service is to be liberally construed to avoid defeating action because of technical and formal defects which could not reasonably have misled defendant.—Tharp v. Tharp, 36 N.W.2d 1, 228 Minn. 23.

44. Tex.—Watts v. City of El Paso, Civ.App., 183 S.W.2d 249, error refused.

45. N.D.—James River Nat. Bank v. Haas, 15 N.W.2d 442, 73 N.D. 374, 154 A.L.R. 1005.

46. Fla.—State ex rel. Murphy-McDonald Builders' Supply Co. v. Parks, 48 So.2d 347.

N.Y.—In re Morningstar's Will, 257 N.Y.S. 240, 143 Misc. 620.

### In rem proceeding

While manner and form of notice in an in rem proceeding may differ from one in personam, it must be reasonably efficient to lead to actual notice as far as information and circumstances permit.—Hollis v. Tilton, 5 A.2d 29, 90 N.H. 119, reheard 6 A.2d 753, 90 N.H. 119.

47. N.Y.—In re Morningstar's Will, 257 N.Y.S. 240, 143 Misc. 620.

### Notice of hearing

Citation which gives person whose rights are in jeopardy adequate notice of hearing is sufficient.—In re Morningstar's Will, supra.

### Order or notice

Process need not be in the form of a writ or subpoena, but may be an order or notice.

Del.—Webb Packing Co. v. Harmon, 196 A. 158, 9 W.W.Harr. 22.

N.J.—Stevens v. Associated Mortg. Co., 152 A. 461, 107 N.J.Eq. 297, affirmed 158 A. 343, 110 N.J.Eq. 70.

48. Vt.—Cukor v. Cukor, 49 A.2d 206, 114 Vt. 456, 168 A.L.R. 227.

Wash.—Codd v. Westchester Fire Ins. Co., 128 P.2d 968, 14 Wash.2d 600, 151 A.L.R. 316.

49. La.—Bank of Montgomery v. Calhoun, App., 146 So. 51.

### "Cited" instead of "summoned"

Citation held not bad because word "cited" was used instead of "summoned."—Bank of Montgomery v. Calhoun, supra.

Use of Arabic figures in the title and number of the case and the number of the judicial district did not render a citation bad, and the contention that such figures were not in English because of Arabic origin could not be seriously entertained.—Bank of Montgomery v. Calhoun, supra.

50. Dak.—Star v. Mahan, 30 N.W. 169, 4 Dak. 213.

N.Y.—Cook v. Kelsey, 19 N.Y. 412.

51. N.Y.—Sullivan v. Harney, 103 N.Y.S. 177, 53 Misc. 249.

52. Iowa.—Rhodes v. Oxley, 235 N.W. 919, 212 Iowa 1018.

53. Tex.—Gutierrez v. Cuellar, Civ. App., 236 S.W. 497.  
50 C.J. p 453 notes 62, 63.

54. Tex.—Crenshaw v. Hempel, 130 S.W. 731, 60 Tex.Civ.App. 385.  
50 C.J. p 453 note 64.

55. Del.—Chappel v. Standard Scale, etc., Corp., 138 A. 74, 15 Del.Ch. 333.

56. N.Y.—Schwartz v. Shapiro, 91 N.Y.S.2d 771.

Ohio.—Crabbe v. Hertzog, App., 66 N.E.2d 659.

Okl.—Corpus Juris cited in State v. City of Tulsa, 5 P.2d 744, 746, 153 Okl. 262.

Pa.—Commonwealth v. Allegheny County, Com.Pl., 88 Pittsb.Leg.J. 589.

50 C.J. p 452 notes 40, 41.

Common-law writ of process has been abolished by statute under some practice.—Lybrand v. State Co., 184 S.E. 580, 179 S.C. 208, 104 A.L.R. 1118  
—State v. Burns, 93 S.E. 194, 107 S.C. 541.

### Statute inapplicable to initial process

Mo.—State ex rel. Weber v. McLaughlin, App., 157 S.W.2d 800.

57. Minn.—Tharp v. Tharp, 36 N.W. 2d 1, 228 Minn. 23.

58. La.—Hemken v. Farmer, 3 Rob. 155.

tory<sup>42</sup> and are accorded a liberal construction.<sup>43</sup>

*What law governs.* The sufficiency of a process must be determined by the law in force on the date of its issuance.<sup>44</sup>

*Power of legislature.* Within constitutional limitations, the legislature may change the form and requisites of a summons as it sees fit.<sup>45</sup>

### b. Form and Contents

The form and contents of a process should be such as to afford notice and to effect a substantial compliance with any provisions of statute or court rule prescribing matters of form.

The form of process must be such as to lead to actual notice as far as information and circumstances permit,<sup>46</sup> and, in the absence of a mandatory requirement of positive law prescribing some particular form, a process which affords adequate notice is sufficient.<sup>47</sup> A summons is sufficient to confer jurisdiction where it performs the function of giving notice according to statutory requirements with such particularity and certainty as not to deceive or mislead.<sup>48</sup> Ordinarily mere irregularities

in form will not vitiate a process,<sup>49</sup> as when a required statement is added by way of a memorandum upon the summons instead of inserting it in the body thereof.<sup>50</sup> A failure to state the street number of plaintiff's attorney is held to be a mere irregularity and not jurisdictional,<sup>51</sup> and it has been said that in order to deprive the court of jurisdiction the process must be so defective as to be void.<sup>52</sup> In jurisdictions wherein a statement of the file number of the suit is required, a failure to state such number in the body or on the face of a citation has been held to be fatal<sup>53</sup> even though it is indorsed on the back of the citation.<sup>54</sup> A registered letter does not constitute effective process.<sup>55</sup>

*Statutes and rules of court.* It is necessary that the writ contain whatever a statute or rule of court prescribes,<sup>56</sup> such as a direction to defendant to answer and to serve his answer on plaintiff at a specified place within the state.<sup>57</sup> Where a statute contains an enumeration of all that is required to constitute a legal citation, failure to insert other matters has been held not fatal.<sup>58</sup> Where

42. N.D.—Al G. Barnes Amusement Co. v. District Court in and for Ramsey County, Second District, 268 N.W. 897, 66 N.D. 727.

43. Minn.—Schultz v. Oldenburg, 277 N.W. 918, 202 Minn. 237—Flanery v. Kusha, 173 N.W. 652, 143 Minn. 308, 6 A.L.R. 838.

#### Technical defects

Statute requiring summons to be subscribed by plaintiff or his attorney and directed to defendant, and requiring service of answer at specified place within specified number of days after service is to be liberally construed to avoid defeating action because of technical and formal defects which could not reasonably have misled defendant.—Tharp v. Tharp, 36 N.W.2d 1, 228 Minn. 23.

44. Tex.—Watts v. City of El Paso, Civ.App., 183 S.W.2d 249, error refused.

45. N.D.—James River Nat. Bank v. Haas, 15 N.W.2d 442, 73 N.D. 374, 154 A.L.R. 1005.

46. Fla.—State ex rel. Murphy-McDonald Builders' Supply Co. v. Parks, 43 So.2d 347.

N.Y.—In re Morningstar's Will, 257 N.Y.S. 240, 143 Misc. 620.

#### In rem proceeding

While manner and form of notice in an in rem proceeding may differ from one in personam, it must be reasonably efficient to lead to actual notice as far as information and circumstances permit.—Hollis v. Tilton, 5 A.2d 29, 90 N.H. 119, reheard 6 A.2d 753, 90 N.H. 119.

47. N.Y.—In re Morningstar's Will, 257 N.Y.S. 240, 143 Misc. 620.

#### Notice of hearing

Citation which gives person whose rights are in jeopardy adequate notice of hearing is sufficient.—In re Morningstar's Will, supra.

#### Order or notice

Process need not be in the form of a writ or subpoena, but may be an order or notice.

Del.—Webb Packing Co. v. Harmon, 196 A. 158, 9 W.W.Harr. 22.

N.J.—Stevens v. Associated Mortg. Co., 152 A. 461, 107 N.J.Eq. 297, affirmed 158 A. 343, 110 N.J.Eq. 70.

48. Vt.—Cukor v. Cukor, 49 A.2d 206, 114 Vt. 456, 168 A.L.R. 227.

Wash.—Codd v. Westchester Fire Ins. Co., 128 P.2d 968, 14 Wash.2d 600, 151 A.L.R. 316.

49. La.—Bank of Montgomery v. Calhoun, App., 146 So. 51.

#### "Cited" instead of "summoned"

Citation held not bad because word "cited" was used instead of "summoned"—Bank of Montgomery v. Calhoun, supra.

Use of Arabic figures in the title and number of the case and the number of the judicial district did not render a citation bad, and the contention that such figures were not in English because of Arabic origin could not be seriously entertained.—Bank of Montgomery v. Calhoun, supra.

50. Dak.—Star v. Mahan, 30 N.W. 169, 4 Dak. 213.

N.Y.—Cook v. Kelsey, 19 N.Y. 412.

51. N.Y.—Sullivan v. Harney, 103 N.Y.S. 177, 53 Misc. 249.

52. Iowa.—Rhodes v. Oxley, 235 N.W. 919, 212 Iowa 1018.

53. Tex.—Gutierrez v. Cuellar, Civ. App., 236 S.W. 497.  
50 C.J. p 453 notes 62, 63.

54. Tex.—Crenshaw v. Hempel, 130 S.W. 731, 60 Tex.Civ.App. 385.  
50 C.J. p 453 note 64.

55. Del.—Chappel v. Standard Scale, etc., Corp., 138 A. 74, 15 Del.Ch. 333.

56. N.Y.—Schwartz v. Shapiro, 91 N.Y.S.2d 771.

Ohio.—Crabbe v. Hertzog, App., 66 N.E.2d 659.

Okl.—Corpus Juris cited in State v. City of Tulsa, 5 P.2d 744, 746, 153 Okl. 262.

Pa.—Commonwealth v. Allegheny County, Com.Pl., 88 Pittsb.Leg.J. 589.

50 C.J. p 452 notes 40, 41.

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—State v. Burns, 93 S.E. 194, 107 S.C. 541.

#### Statute inapplicable to initial process

Mo.—State ex rel. Weber v. McLaughlin, App., 157 S.W.2d 800.

57. Minn.—Tharp v. Tharp, 36 N.W. 2d 1, 228 Minn. 23.

58. La.—Hemken v. Farmer, 3 Rob. 155.

so provided by statute, plaintiff must proceed by a summons<sup>59</sup> or citation,<sup>60</sup> rather than a notice<sup>61</sup> or an order to show cause,<sup>62</sup> although under some circumstances defendant may be held to have waived the requirement of a summons so as to make an order to show cause effective where it contains every requisite of a summons.<sup>63</sup> Where the code or statutory provisions relating to a summons do not prescribe a form thereof, a process is sufficient if it clearly informs defendant that the instrument is intended for him and requires an answer to the complaint,<sup>64</sup> but where the codes, statutes, or rules of court do prescribe the form of the process its form should be in substantial compliance with such statutory requirements.<sup>65</sup> A court or judge is without power to prescribe a form which is inconsistent with a code or statutory provision;<sup>66</sup> nor, where an existing statute may reasonably be construed to provide for process, should resort be had to a power conferred on a court by code or statute to frame suitable writs in the absence of a statute prescribing a process to be used.<sup>67</sup> A code provision to the effect that writs in the form or effect of the precedents appended to the code section shall be sufficient, by implication means that any further and substantial withdrawal from the requirements of the common law shall be less than sufficient.<sup>68</sup>

*Direction or demand.* In order to constitute process in court procedure it is essential that the

instrument contain a direction or demand to or on the person to whom it is directed that he perform or refrain from performing some act.<sup>69</sup>

*Statement as to filing of complaint.* Under the practice prevailing in some jurisdictions a summons must state that the complaint has been or will be filed in a certain place<sup>70</sup> and within a certain time.<sup>71</sup>

*Writ sent to another county* for service on a co-defendant should be an exact counterpart of the one which is to be executed within the county,<sup>72</sup> except that it should be directed to another sheriff under principles discussed infra § 12, and only the party to be served need be named, as considered infra § 15.

*Conformity to, and aided by, pleading.* When issued on a pleading, process must conform thereto.<sup>73</sup> Sometimes process is held sufficient when read and construed in connection with a complaint or petition to which it refers<sup>74</sup> or which is attached thereto.<sup>75</sup> An order of court and a petition together may properly be regarded as a summons where it is provided by a subsequent order of court that they shall be so regarded and they contain substantially every requisite of a summons prescribed by code provisions.<sup>76</sup>

## § 11. — Style

The "style" of a process is used to designate the name in which it runs.

59. N.J.—Williams v. Board of Education of Trenton, 12 A.2d 127, 124 N.J.Law 380.

Pa.—Commonwealth v. Allegheny County, Com.Pl., 88 Pittsb.Leg.J. 589.

S.C.—Beard-Laney, Inc. v. Darby, 38 S.E.2d 1, 208 S.C. 313—Middleton v. Robinson, 25 S.E.2d 474, 202 S.C. 418.

50 C.J. p 452 note 54.

Process is ordinarily a summons commanding some officer to summon defendant to answer complaint of plaintiff at time and place named in summons.—Baldwin v. Norton Hotel, 175 S.E. 751, 163 Va. 76.

Summons is usual means of acquiring jurisdiction of person of defendant.—Raines v. Poston, 38 S.E. 2d 145, 208 S.C. 349.

### Lis pendens

Filing of a lis pendens by plaintiff did not take place of a summons.—Goodyear Tire & Rubber Co. v. Meyer, 191 S.W.2d 826, 209 Ark. 383.

60. Tex.—Gilbert v. Labley, Civ. App., 214 S.W.2d 646.

61. Ky.—Ashland Second Nat. Bank v. Prichard, 189 S.W. 14, 172 Ky. 190.

Tex.—Gilbert v. Labley, Civ.App., 214 S.W.2d 646.

62. Pa.—Commonwealth v. Allegheny County, Com.Pl., 88 Pittsb.Leg.J. 589.

Wash.—Nevin v. Pacific Coast, etc., Packing Co., 177 P. 739, 105 Wash. 192.

63. S.C.—Beard-Laney, Inc. v. Darby, 38 S.E.2d 1, 208 S.C. 313.

64. Minn.—Flanery v. Kusha, 173 N. W. 652, 143 Minn. 308, 6 A.L.R. 888. 50 C.J. p 452 note 57.

65. Tex.—Christie v. Hudspeth County Conservation and Reclamation Dist. No. 1, Civ.App., 64 S.W. 2d 978.

Utah.—Glasmann v. Second Dist. Court in and for Weber County, 12 P.2d 361, 80 Utah 1. 50 C.J. p 452 note 58.

Each of statutory specifications required of an original notice is of equal rank with the others, and failure to include any one is as fatal as failure to include another.—Farley v. Carter, 269 N.W. 34, 222 Iowa 92.

66. Pa.—Buehler v. Paxson, 38 Pa. Dist. & Co. 583. 50 C.J. p 453 note 59.

67. Cal.—McKendrick v. Western Zinc Min. Co., 130 P. 865, 165 Cal. 24.

68. Miss.—Burns v. Allen, 31 So.2d 125, 202 Miss. 240.

69. N.Y.—In re Smith's Will, 24 N. Y.S.2d 704, 175 Misc. 688.

70. S.C.—Middleton v. Robinson, 25 S.E.2d 474, 202 S.C. 418.

Utah.—Wasatch Livestock Loan Co. v. District Court in and for Uintah County, 46 P.2d 399, 86 Utah 422.

71. Utah.—Wasatch Livestock Loan Co. v. District Court in and for Uintah County, supra.

72. Ala.—Mayo v. Stoneum, 2 Ala. 390.

Ark.—Womsley v. Cummins, 1 Ark. 125.

73. Neb.—Farmers' Banking, etc., Co. v. Mauck, 97 N.W. 835, 70 Neb. 586.

50 C.J. p 453 note 71.

74. Ga.—Lamb v. McElwaney, 85 S.E. 705, 143 Ga. 490.

75. Or.—Joseph First Nat. Bank v. Rusk, 127 P. 780, 129 P. 121, 64 Or. 35, 44 L.R.A., N.S., 138, 145.

76. S.C.—State v. Sanders, 110 S.E. 808, 118 S.C. 498.

The "style" of a writ should not be confused with the "teste" thereof.<sup>77</sup> The term "style" is employed to designate the name in which the writ or process runs, and a writ is properly said to run in the name of the person from whom or the government from which the command on the face of the writ appears to emanate.<sup>78</sup> The purpose of statutory and constitutional provisions prescribing the style of process is to exclude any private person, or any political power other than that designated, from the exercise of the authority to issue process.<sup>79</sup> The use of quotation marks in such a provision favors the idea that the style prescribed must be used verbatim,<sup>80</sup> and, in any event, in order to effect a compliance with such requirements there should be at least a substantial conformity to the style prescribed.<sup>81</sup> In some states such provisions are held to be mandatory,<sup>82</sup> but in others they are held to be merely directory.<sup>83</sup> Also, in some jurisdictions process which is not in the prescribed style is void,<sup>84</sup> but in others it is voidable only.<sup>85</sup>

*Place of statement.* While the place for the style is properly at the head of the writ, it may nevertheless appear elsewhere without rendering

the summons invalid.<sup>86</sup> However, the statement of the state and county in the margin of process, as ordinarily employed to show the venue, is not sufficient to cause the process to be regarded as running in the name of the state.<sup>87</sup>

*What constitutes process within requirements.*

The word "process" is employed in such provisions in a restricted sense,<sup>88</sup> and, as so employed, has reference only to such process as under the common law of England is required to run in the name of the king;<sup>89</sup> the summons or other instrument by which a defendant is put on notice of the charge lodged against him or of the existence of any action which may have been brought against him.<sup>90</sup> The provisions apply only to judicial proceedings<sup>91</sup> or to process emanating from a court;<sup>92</sup> they do not apply to special proceedings,<sup>93</sup> or to proceedings in an executive department of a state,<sup>94</sup> or to a summons or notice given by a party or his attorney under statutory authority;<sup>95</sup> nor do they apply to a citation,<sup>96</sup> although a citation issued by the court has been regarded as a form of process subject to the statutes.<sup>97</sup>

77. Mich.—Johnson v. Provincial Ins. Co., 12 Mich. 216, 86 Am.D. 49.

78. Mich.—Johnson v. Provincial Ins. Co., supra.

Tenn.—Corpus Juris quoted in City of Murfreesboro v. Bowles, 213 S. W.2d 35, 36, 187 Tenn. 134.

79. Okl.—Ex parte Stephenson, Cr., 209 P.2d 515.

80. Mich.—Johnson v. Provincial Ins. Co., 86 N.W. 49, 12 Mich. 216.

81. Mich.—Forbes v. Darling, 54 N. W. 385, 94 Mich. 621.  
50 C.J. p 453 notes 78, 80.

82. Okl.—Ex parte Stephenson, Cr., 209 P.2d 515—Eslick v. State, 105 P.2d 554, 70 Okl.Cr. 196—State v. Bayliff, 60 P.2d 402, 59 Okl.Cr. 381—Sloan v. State, 282 P. 898, 45 Okl.Cr. 228—Bishop v. State, 288 P. 363, 47 Okl.Cr. 249—Murray v. State, 287 P. 781, 47 Okl.Cr. 219.

Pa.—In re Gangloff's Estate, 42 Pa. Dist. & Co. 666, 8 Sch.Reg. 200.  
50 C.J. p 453 note 89.

83. Mo.—Spitcaufsky v. Hatten, 182 S.W.2d 86, 353 Mo. 94, 160 A.L.R. 990.  
50 C.J. p 453 note 90.

84. Pa.—In re Gangloff's Estate, 42 Pa. Dist. & Co. 666, 8 Sch.Reg. 200.  
50 C.J. p 453 note 91.

85. Neb.—Moore v. Fedawa, 14 N. W. 170, 13 Neb. 379.  
50 C.J. p 453 note 92.

86. Pa.—White v. Commonwealth, 6 Binn. 179, 6 Am.D. 443.  
50 C.J. p 454 note 95.

87. Mo.—Little v. Little, 5 Mo. 227, 32 Am.D. 317.

50 C.J. p 454 note 96.

88. Minn.—Hanna v. Russell, 12 Minn. 80.

Okl.—Burns v. Pittsburg Mortg. Inv. Co., 231 P. 887, 105 Okl. 150.

89. Fla.—State ex rel. Murphy-McDonald Builders' Supply Co. v. Parks, 43 So.2d 347.

Utah.—Patterick v. Carbon Water Conservancy Dist., 145 P.2d 503, 106 Utah 55.

50 C.J. p 453 note 82.

**Statutory tribunal**

Under constitution providing that all writs should be in name of the state, statutory notice or summons issued out of small claims division of district court which was not issued in name of the state was held valid, since constitutional requirement included only such processes as at common law were required to be in name of sovereign, and small claims division of district court was statutory tribunal.—Silent Watchman Corporation v. Katz, 180 A. 240, 13 N.J.Misc. 599.

90. Fla.—State ex rel. Murphy-McDonald Builders' Supply Co. v. Parks, 43 So.2d 347.

91. Mo.—Spitcaufsky v. Hatten, 182 S.W.2d 86, 353 Mo. 94, 160 A.L.R. 990.

Wash.—State v. Thurston County Super. Ct., 247 P. 942, 139 Wash. 454.

92. Kan.—McKenna v. Cooper, 101 P. 662, 79 Kan. 847.

50 C.J. p 453 note 84.

93. S.D.—Kundert v. Madison, 162 N.W. 898, 39 S.D. 48.

50 C.J. p 453 note 85.

**Proceeding to establish water district**

Utah.—Patterick v. Carbon Water Conservancy Dist., 145 P.2d 503, 106 Utah 55.

94. Wash.—State v. Thurston County Super. Ct., 247 P. 942, 139 Wash. 454.

95. Colo.—Comet Cons. Min. Co. v. Frost, 25 P. 506, 15 Colo. 310.

50 C.J. p 453 note 88.

**Mere notice**

A summons is not process within meaning of constitutional provision that all process shall run in the name of the state, but is a mere notice given by plaintiff or his attorney to defendant that proceedings have been instituted and judgment will be taken against defendant if he fails to defend.—Griffin v. Faribault Fair & Agricultural Ass'n, 280 N.W. 7, 203 Minn. 97—Schultz v. Oldenburg, 277 N.W. 918, 202 Minn. 237.

96. La.—Herndon v. Wakefield-Moore Realty Co., 79 So. 318, 143 La. 724.

50 C.J. p 453 note 87.

97. Pa.—In re Gangloff's Estate, 42 Pa. Dist. & Co. 666, 8 Sch.Reg. 200

## § 12. — Direction

Ordinarily process should be directed to the officer who is to serve it; where the officer ordinarily serving process is disqualified to act, the process should be directed to some other designated officer.

Process ordinarily should be directed to the officer who is to serve it,<sup>98</sup> such as the sheriff of the county<sup>99</sup> wherein the suit is pending<sup>1</sup> or where defendant resides,<sup>2</sup> and statutes so providing have been held to be mandatory.<sup>3</sup> Where the defendant is alleged to be a resident of another county and the issuance of process to, and service within, such county is authorized by law, process may be directed to the sheriff of such county;<sup>4</sup> but under some statutes or rules of court the summons is to be directed to defendant.<sup>5</sup> A rule providing that every process shall be directed to any sheriff or constable within the state eliminates a former requirement that new process must be issued to every county wherein the person to be served may be found,<sup>6</sup> and issuance of a process directed to the sheriff or any constable of a named county is a sufficient compliance with such rule.<sup>7</sup>

The right of a litigant to select a process server is a substantial one,<sup>8</sup> and in the absence of statutory authority neither the court nor a clerk thereof may interfere with such right, as by diverting to others a process directed to a particular officer.<sup>9</sup> Where local executive officers have failed to act, the governor, as executive head of the state, may set enforcement machinery in motion and thereby determine to whom civil process shall be directed for execution.<sup>10</sup> Statutes authorizing appointment of a special officer to serve process of a certain

court for good cause shown and providing that a judge in vacation may order process to be directed to any proper person, and that if application is made in vacation it shall be in writing and filed with the clerk, require a written application sufficient to acquaint the judge with a basis to determine whether or not to hear evidence thereon.<sup>11</sup> In an urgent case, as where plaintiff is in danger of losing his debt and an officer is not seasonably to be had, direction of the writ to an indifferent person is permissible under some statutes.<sup>12</sup>

*Officer in another state.* Under some statutes, and the construction placed thereon, process to be served in another state may be directed "to any officer authorized by law to serve process" within that state, without naming or designating any particular officer.<sup>13</sup> In the absence of a statute conferring it, a clerk of court in one state is without authority to issue a summons directed to the sheriff of a county in another state.<sup>14</sup>

*Effect of want of proper direction.* Whether the want of a proper direction is a fatal defect in a writ is a question on which there is a difference of judicial opinion; some courts hold that the defect is fatal to the validity of the writ,<sup>15</sup> while others take the view that it is not fatal.<sup>16</sup> The absence of a proper direction is a mere informality in case of a statutory summons which does not issue out of the court,<sup>17</sup> provided the instrument discloses for whom it is intended.<sup>18</sup>

*Disqualification of officer.* Where the sheriff or other officer who ordinarily serves writs is disqualified to serve process in a particular case, the

98. Tex.—*Corpus Juris* quoted in *Green v. White*, Civ.App., 32 S.W. 2d 488, 489.

50 C.J. p 454 note 97.

99. Tex.—*Corpus Juris* quoted in *Green v. White*, Civ.App., 32 S.W. 2d 488, 489.

50 C.J. p 454 note 98.

1. Ga.—*Moss v. Strickland*, 75 S.E. 622, 138 Ga. 539.

Tex.—*Corpus Juris* quoted in *Green v. White*, Civ.App., 32 S.W.2d 488, 489.

2. Tex.—*Boulevard Undertaking Co. v. Breaker*, Civ.App., 42 S.W.2d 451 —*Green v. White*, Civ.App., 32 S.W.2d 488.

**Officer living in county**

Citation must be directed to sheriff of county in which defendant lives, and only officer living therein can serve citation.—*Green v. White*, supra.

3. Tex.—*Boulevard Undertaking Co. v. Breaker*, Civ.App., 42 S.W.2d 451.

4. Ga.—*W. T. Rawleigh Co. v. Greenway*, 26 S.E.2d 458, 69 Ga. App. 590.

Ky.—*Corpus Juris* cited in *Foster v. Hill*, 138 S.W.2d 495, 496, 282 Ky. 327.

50 C.J. p 454 note 3.

5. Minn.—*Plano Mfg. Co. v. Kaufert*, 89 N.W. 1124, 86 Minn. 13.

50 C.J. p 454 note 5.

6. Tex.—*Nass v. Nass*, 228 S.W.2d 130.

7. Tex.—*Nass v. Nass*, 228 S.W.2d 130, overruling *Mitchell v. Rutter*, Civ.App., 221 S.W.2d 979—*King v. King*, Civ.App., 230 S.W.2d 335, error refused.

8. Mich.—*Brand v. Teagan*, 235 N.W. 243, 253 Mich. 530.

9. Mich.—*Brand v. Teagan*, supra.

**Breach of duty**

Clerk of common pleas court refusing to deliver writ to constable named in præcipe breached legal duty to issue process.—*Brand v. Teagan*, supra.

10. Miss.—*State v. McPhail*, 180 So. 387, 182 Miss. 360.

11. Miss.—*Claunch v. State*, 45 So. 2d 581.

12. Conn.—*Augur v. Augur*, 14 Conn. 82.

Vt.—*Culver v. Balch*, 23 Vt. 618.

13. Mo.—*State v. Hartmann*, 19 S.W.2d 637, 323 Mo. 171.

14. U.S.—*Simonson v. Typer*, C.C.A. Wyo., 285 F. 240.

15. Vt.—*Thomas v. Graves*, 98 A. 508, 90 Vt. 312.

50 C.J. p 454 note 19.

16. Ga.—*Gay v. Sylvania Cent. R. Co.*, 53 S.E.2d 713, 79 Ga.App. 362.

50 C.J. p 454 note 20.

Amendment of process see *infra* §§ 114, 115.

17. Minn.—*Plano Mfg. Co. v. Kaufert*, 89 N.W. 1124, 86 Minn. 13.

18. Minn.—*Plano Mfg. Co. v. Kaufert*, supra.



process should not be directed to him;<sup>19</sup> and where it is provided by statute that in such case the process shall be directed to, and served by, some other designated officer, the process should be directed to such officer;<sup>20</sup> but a statutory condition precedent to such direction must have been fulfilled;<sup>21</sup> and under some statutes the facts giving the substitute authority to serve the writ should appear on the face thereof.<sup>22</sup>

**Directions for return.** The naming of an impossible return day in a writ or process is equivalent to naming no day,<sup>23</sup> and may render a summons void.<sup>24</sup> On the other hand, there may be circumstances under which failure to name a return day will not be prejudicial to defendant,<sup>25</sup> and where the law requires the officer to return process a direction to him to do so need not be inserted.<sup>26</sup>

### § 13. — Designation of Court, Judge, and Place

Process should designate with substantial accuracy the court in which the action is instituted and the place of holding court.

The process should designate the court in which the action is brought<sup>27</sup> and in which defendant should appear.<sup>28</sup> It should be made returnable in the county in which the suit or proceeding is instituted;<sup>29</sup> and, if the process requires defendant's appearance before the court, the place of holding the court must be named with reasonable certainty,<sup>30</sup> unless fixed by law.<sup>31</sup> There should be due compliance with statutory provisions requiring the process to state the place of the filing of the petition or complaint and the county in which the process issues,<sup>32</sup> the place where the answer is to be filed<sup>33</sup> or served,<sup>34</sup> or the county in which plaintiff desires the trial.<sup>35</sup> The process is vitiated by an untrue and misleading statement therein as to the court in which the action is pending,<sup>36</sup> the county,<sup>37</sup> or the place where the answer is to be served,<sup>38</sup> or by a statement which is so uncertain as to make it doubtful in which one of two named counties defendant is to appear;<sup>39</sup> and a summons commanding defendant to appear before one court cannot confer jurisdiction over him on another court;<sup>40</sup> but an omission or inaccuracy may be cured by a

19. W.Va.—Hansford v. Tate, 56 S. E. 372, 61 W.Va. 207.

20. N.C.—State v. Baird, 24 S.E. 668, 118 N.C. 854.

50 C.J. p 454 note 14.

21. Iowa.—Chord v. McCoy, Morr. 311.

22. Ark.—McPherson v. State Bank, 4 Ark. 558.

Mass.—Carlisle v. Weston, 21 Pick. 535.

23. Me.—Inhabitants of Dover-Foxcroft v. Inhabitants of Lincoln, 192 A. 700, 135 Me. 184.

24. Me.—Inhabitants of Dover-Foxcroft v. Inhabitants of Lincoln, supra.

#### Past date

A writ naming a past date as return day was void as against motion to dismiss on special appearance.—Inhabitants of Dover-Foxcroft v. Inhabitants of Lincoln, supra.

25. Mich.—Rudell v. Union Guardian Trust Co., 294 N.W. 132, 295 Mich. 157.

#### Defendant sufficiently advised as to time

Where summons was personally served by delivering copy thereof to defendant who was shown original summons bearing seal of trial court, and no claim was made that process was not served within time fixed by court rule for designation of a return day, and copy notified defendant that bill of complaint had been filed against her and that defendant was required to have her appearance filed within specified

number of days after service of summons, failure to designate a return day in summons was not prejudicial to defendant.—Rudell v. Union Guardian Trust Co., supra.

26. Conn.—Smith v. Bradley, 1 Root 148.

27. Ariz.—Mosher v. Wayland, 158 P.2d 654, 62 Ariz. 498, certiorari denied 65 S.Ct. 868, 324 U.S. 862, 89 L.Ed. 1419, appeal dismissed 66 S.Ct. 58, 326 U.S. 682, 90 L.Ed. 399.

Minn.—Brady v. Burch, 241 N.W. 393, 185 Minn. 435.

50 C.J. p 454 note 24.

28. Iowa.—Rhodes v. Oxley, 235 N. W. 919, 212 Iowa 1018.

Me.—Inhabitants of Dover-Foxcroft v. Inhabitants of Lincoln, 192 A. 700, 135 Me. 184.

29. R.I.—Parker v. Kent County Superior Ct., 100 A. 305, 40 R.I. 214.

Tex.—Boydston v. Nugent, Civ.App., 285 S.W. 695.

30. Del.—Venetsianos v. Tamasoff, 197 A. 385, 9 W.W.Harr. 180.

Me.—Inhabitants of Dover-Foxcroft v. Inhabitants of Lincoln, 192 A. 700, 135 Me. 184.

Utah.—Corpus Juris cited in Galsman v. Second Dist. Court in and for Weber County, 12 P.2d 361, 363, 80 Utah 1.

50 C.J. p 455 note 26.

#### Statements held sufficient

(1) Generally.—Tucker v. Real Estate Bank, 4 Ark. 429—50 C.J. p 455 note 26 [a].

(2) Notice to appear at certain term of court convening at court-

house in particular city and county sufficiently complied with statute respecting designation of place where court would convene.—Ransom v. Mellor, 248 N.W. 361, 216 Iowa 197.

31. Ala.—Yonge v. Broxson, 23 Ala. 684.

Pa.—Stout v. Wertsner, 15 Montg.Co. 48.

32. Even though summons is directed to sheriff of another county, the venue of the summons is properly laid in the county in which the action is brought and the summons issues.—Alden Mercantile Co. v. Randall, 169 N.W. 433, 102 Neb. 738.

#### Citation held sufficient

La.—Medley v. Voris, 2 La. Ann. 140.

34. Minn.—Francis v. Knerr, 182 N. W. 988, 149 Minn. 122.

50 C.J. p 455 note 31.

35. Specification of county in caption held sufficient

N.Y.—Ward v. Sands, 10 Abb.N.Cas. 60.

36. Iowa.—Eggleston v. Wattawa, 91 N.W. 1044, 117 Iowa 676.

Tex.—Rutta v. Laffera, 1 Tex.A.Civ. Cas. § 822.

37. Ill.—Gill v. Hoblit, 23 Ill. 473.

S.C.—Cator v. Cockfield, 3 S.C.L. 91.

38. Minn.—Francis v. Knerr, 182 N. W. 988, 149 Minn. 122.

50 C.J. p 455 note 35.

39. Ill.—Orendorff v. Stanberry, 20 Ill. 89.

40. Utah.—Glasman v. Second Dist. Court in and for Weber County, 12 P.2d 361, 80 Utah 1. 50 C.J. p 455 note 37.

complaint attached to,<sup>41</sup> or served at the same time as,<sup>42</sup> the process, and it will be disregarded where it does not mislead or prejudice.<sup>43</sup>

**Judge.** Where required by statute, a process should be issued under the name of the president judge, and is defective where the name given is not that of the incumbent at the time of issuance.<sup>44</sup> Where, under a statute in force at the time, a summons is to be made returnable before the clerk of court, it is irregular to make it returnable to the judge.<sup>45</sup>

## § 14. — Statement of Time or Date

- a. Of filing of complaint
- b. Of process
- c. For appearance, answer, and return

### a. Of Filing of Complaint

Statutory provisions requiring a summons or citation to state the date of the filing of the complaint have been held to be mandatory.

A code or statutory provision that the summons

or citation shall state the date of the filing of the petition or complaint has been held mandatory<sup>46</sup> and requires a statement of the true date of the filing of the pleading.<sup>47</sup> The requirement is not satisfied by a statement of the date of filing of a copy of the complaint.<sup>48</sup>

### b. Of Process

While a writ or process should be dated, ordinarily it is held that an error or omission in respect of the date will not invalidate the instrument.

While a process should be dated,<sup>49</sup> the date of the writ is not a material part of it,<sup>50</sup> and an error therein,<sup>51</sup> or the entire omission thereof,<sup>52</sup> does not invalidate the writ. A statutory requirement as to the date of process is directory merely.<sup>53</sup> The writ is presumed to have been issued on the day of its date,<sup>54</sup> or the day on which it was tested,<sup>55</sup> and according to some authority such presumption is conclusive,<sup>56</sup> although other authorities hold that the presumption is not a conclusive one.<sup>57</sup> A further reference in the writ to the year of the inde-

41. Idaho.—*Corpus Juris* cited in *Mattice v. Babcock*, 20 P.2d 207, 210, 52 Idaho 653.

N.Y.—*Yates v. Blodgett*, 8 How.Pr. 278.

42. N.Y.—*Yates v. Blodgett*, supra. Or.—*Joseph First Nat. Bank v. Rusk*, 127 P. 780, 129 P. 121, 64 Or. 35, 44 L.R.A., N.S., 145.

Where the summons and complaint are served together and the county and court in which suit is brought, the term of court or the time within which defendants are to appear and answer, and other matters are correctly stated in the copy of the pleadings served, the notice is sufficient, although these facts are not stated in the summons as required by statute.—*W. T. Rawleigh Co. v. Watts*, 24 S.E.2d 213, 68 Ga.App. 786.

43. Ariz.—*Mosher v. Wayland*, 158 P.2d 654, 62 Ariz. 498, certiorari denied 65 S.Ct. 868, 324 U.S. 862, 89 L.Ed. 1914, appeal dismissed 66 S.Ct. 53, 326 U.S. 682, 90 L.Ed. 399. Ga.—*W. T. Rawleigh Co. v. Watts*, 24 S.E.2d 213, 68 Ga.App. 786. 50 C.J. p 455 note 40.

### Substantial compliance with statute

A summons issued out of Mayes County district court, misnaming as Tulsa the county seat of county in which action was filed, but correct in all other respects, substantially complied with statute.—*Tyler Boat Works v. Schreiner*, 153 P.2d 1004, 194 Okl. 601.

44. Pa.—*Buehler v. Paxson*, 33 Pa. Dist. & Co. 583.

45. N.C.—*Piercy v. Watson*, 24 S.E. 659, 118 N.C. 976. 50 C.J. p 455 notes 44, 45.

46. Tex.—*Ross v. Sechrist*, Civ. App., 275 S.W. 287. 50 C.J. p 455 notes 46, 47.

### Mere inference

Where a process failed to state that a petition "is" or "will be" filed, except by inference, it was fatally defective under a statute requiring the notice or process to inform defendant that a petition was or would be filed on or before a date named therein.—*Rhodes v. Oxley*, 235 N.W. 919, 212 Iowa 1018.

### Omission of year

Citation reciting that petition was filed on "the 19 day of October, 194—," was fatally defective and would not support a judgment by default in favor of plaintiff.—*Garza v. Garza*, Tex.Civ.App., 223 S.W.2d 964.

47. Tex.—*Sypert v. Rogers Lumber Co.*, Civ.App., 201 S.W. 1102. 50 C.J. p 455 note 48.

48. N.Y.—*Merrill v. George*, 23 How.Pr. 331.

49. N.J.—*Porter v. Building Associates*, 169 A. 515, 12 N.J.Misc. 42.

50. Okl.—*Corpus Juris* cited in *Stephens v. Ellison*, 63 P.2d 80, 81, 178 Okl. 390. 50 C.J. p 455 note 51.

51. N.J.—*Hirsch v. De Puy*, 166 A. 720, 11 N.J.Misc. 500. 50 C.J. p 455 note 52.

### Obvious clerical error

Original writ of summons and attachment in established form and common use issued out of clerk's

office in name of commonwealth under seal of court, and which conformed to constitutional requirements did not lose its character as a process of the court by reason of an obvious clerical mistake in its date by which it appeared that writ was actually entered four days before its date.—*Moriarty v. King*, 57 N.E.2d 633, 317 Mass. 210.

52. N.D.—*Al G. Barnes Amusement Co. v. District Court in and for Ramsey County*, Second District, 268 N.W. 897, 66 N.D. 727.

Okl.—*Corpus Juris* cited in *Stephens v. Ellison*, 63 P.2d 80, 81, 178 Okl. 390.

50 C.J. p 455 note 53.

### Omission of day of month

Summons, regular except that date was given as "this — day of September, 1934," was held not void, and judgment based on such summons was not void on face of record.—*Stephens v. Ellison*, 63 P.2d 80, 178 Okl. 390.

53. Okl.—*Corpus Juris* cited in *Stephens v. Ellison*, 63 P.2d 80, 81, 178 Okl. 390.

50 C.J. p 456 note 54.

54. U.S.—*Baker v. Sisk*, D.C.Okl., 1 F.R.D. 232.

Mass.—*Smith v. Greeley*, 196 N.E. 903, 291 Mass. 271.

N.J.—*Miller v. Motor Club Ins. Co.*, 189 A. 636, 117 N.J.Law 480. 50 C.J. p 456 note 55.

55. N.J.—*Grainger v. Farrell*, 166 A. 292, 110 N.J.Law 585.

56. Vt.—*Glass v. Starr*, 32 A.2d 123, 113 Vt. 243.

57. Cal.—*Hibernia Sav., etc., Soc. v.*

pendence of the United States may be considered in establishing the true date,<sup>58</sup> or a like reference to the existence of the state may be so considered.<sup>59</sup> In determining the correct date of the process, the date affixed thereto by the clerk, rather than that affixed by plaintiff's attorney, controls.<sup>60</sup>

### c. For Appearance, Answer, and Return

- (1) In general
- (2) Requisites and sufficiency
- (3) Construction

#### (1) In General

A process should specify the time at which the defendant is to appear or answer where so provided by statute or rule of court. The return day of a writ may be regarded as that on which the defendant is ordered to appear.

Sometimes the "return day" of a writ is considered not only as the day on which the sheriff or other officer is to bring in the writ and report or certify what he has done pursuant to the command thereof, as discussed *infra* § 93, but also as the day on which defendant is ordered to appear in court;<sup>61</sup> and some statutes expressly provide that the writ or summons shall command defendant to appear, or appear and answer, on the return day of the process.<sup>62</sup>

*Necessity of specifying date.* A process should specify the time when defendant is to appear<sup>63</sup> or answer,<sup>64</sup> or both,<sup>65</sup> as provided by the statutes or rules of court of the particular jurisdiction. However, there is some authority for the proposition

that, where the law fixes the time within which defendant must appear, the failure of a summons to fix the time for appearance and answer as provided in a code or statutory form is not fatal,<sup>66</sup> as well as for the proposition that, if the return day of the process is fixed by statute, it need not be designated in the process.<sup>67</sup> Some statutes, together with accompanying rules and forms, have eliminated return days from writs of summons.<sup>68</sup>

- (2) Requisites and Sufficiency
  - (a) Appearance or answer
  - (b) Return

#### (a) Appearance or Answer

Process should comply substantially with statutory provisions requiring it to state the time for appearance or answer.

A statement in the process of the time for appearance or answer must, in order to be sufficient, comply substantially with a statute requiring the process to state such time,<sup>69</sup> as well as a statute prescribing the time.<sup>70</sup> The process or summons may not validly shorten the time for appearance or answer from that prescribed by statute.<sup>71</sup> The process is void where it commands or requires the appearance of defendant at an impossible date,<sup>72</sup> such as prior to the date of service.<sup>73</sup>

On the other hand, certain errors, omissions, or irregularities may not be fatal,<sup>74</sup> such as an obvious clerical error,<sup>75</sup> or where the process or summons affords defendant a longer time to appear or answer than provided by statute.<sup>76</sup> Omission of the

Churchill, 61 P. 278, 128 Cal. 633, 79 Am.S.R. 73.

50 C.J. p 456 note 56.

58. U.S.—Gilbert v. South Carolina Interstate, etc., Exposition Co., C. C.S.C., 113 F. 523.

59. Ky.—Bridges v. Ridgley, 2 Litt. 395.

60. N.J.—Cornelia V. V. Booraem's Estate v. Lubow, 1 A.2d 35, 120 N. J.Law 575.

61. Pa.—Lilkins v. Conn, 35 Pa.Co. 551.

62. Mo.—State v. Bates, App., 286 S.W. 420.

Or.—Hunsaker v. Coffin, 2 Or. 107.

63. Del.—Venetsianos v. Tamasoff, 197 A. 385, 9 W.W.Harr. 180. 50 C.J. p 456 note 66.

64. Okl.—State v. Parks, 126 P. 242, 24 Okl. 335.

65. Utah—Winters v. Hughes, 24 P. 759, 3 Utah 443.

66. Ala.—Atlantic Coast Line R. Co. v. Carroll, 94 So. 320, 208 Ala. 361.

67. Ala.—Davis v. McCary, 13 So. 665, 100 Ala. 545.

50 C.J. p 456 note 78.

68. N.J.—Hellemann v. Clowney, 103 A. 687, 90 N.J.Law 87.

69. Tex.—Ross v. Sechrist, Civ. App., 275 S.W. 287.

70. La.—Kendall v. Brotherhood of Railroad Trainmen, App., 140 So. 809.

50 C.J. p 456 note 76.

#### Sufficient compliance shown

U.S.—O'Neill v. Lang Transp. Corporation, D.C.Nev., 19 F.Supp. 477.

La.—Bacas v. Laswell, App., 22 So.2d 591.

Wash.—Codd v. Westchester Fire Ins. Co., 128 P.2d 968, 14 Wash.2d 600, 151 A.L.R. 316.

71. N.Y.—Barth v. Owens, 35 N.Y. S.2d 632, 178 Misc. 628.

72. N.J.—Hamlin v. Coppel, 155 A. 676, 9 N.J.Misc. 651.

Tex.—Roy Campbell & Co. v. Roots, Civ.App., 60 S.W.2d 896, error dismissed.

50 C.J. p 456 note 77.

#### Correction of printed form by typing

Citation issued Febr. 13, 1920, was not void as indicating impossible date in that it required defendant to appear in March, 1912, where numerals 191— were printed on printed form and the numeral 1 following 19 was stricken through with diagonal line made by typewriter and then followed figure 2 followed by an indistinct 0 made by typewriter, since it was clear that it was returnable in March, 1920, not in 1912.—Johnson v. Cole, Tex.Civ.App., 138 S.W.2d 910, error refused.

73. Iowa.—Cummings v. Landes, 117 N.W. 22, 140 Iowa 80.

Miss.—Turner v. Williams, 139 So. 606, 162 Miss. 258.

74. Ill.—Bogden v. Lasswell, 73 N. E.2d 441, 331 Ill.App. 395.

N.Y.—Barth v. Owens, 35 N.Y.S.2d 632, 178 Misc. 628.

75. Miss.—Kelly v. Harrison, 12 So. 261, 69 Miss. 856.

76. N.Y.—Barth v. Owens, 35 N.Y.S. 2d 632, 178 Misc. 628.

word "days"<sup>77</sup> or the words "exclusive of the day of service,"<sup>78</sup> the use of the word "before" instead of "at,"<sup>79</sup> a nonprejudicial attempt to abridge the time for answering by requiring defendant to answer during the forenoon of the last day,<sup>80</sup> a failure to follow the statutory language where such failure does not deceive or mislead defendant,<sup>81</sup> or surplusage concerning the time for appearance will not affect the writ.<sup>82</sup>

*With respect to term.* Under some statutes, and the construction accorded thereto, the process ordinarily should specify, with reasonable certainty, the term,<sup>83</sup> and the day of the term,<sup>84</sup> at which appearance is required; but it has been held sufficient to specify the term merely, where the law determines the day of the term on which appearance must be made.<sup>85</sup> Where a notice undertakes to specify the date on which the term begins, and designates an erroneous date, such erroneous designation is misleading and fatal to the validity of the notice.<sup>86</sup> A summons requiring the appearance of defendant on the first day of the next term of court, and not otherwise specifying the time, may be upheld where the time of holding such term is prescribed by law;<sup>87</sup> but where it is provided that the day shall be plainly expressed, a faulty reference to the day is not aided by the fact that defendant is also required to appear at the "term next to be holden," the date of which is fixed by general law.<sup>88</sup>

### (b) Return

Process must be made returnable to a day which is

a legal return day, and is void where made returnable on an impossible date or at the wrong term or in vacation.

Process is void where it is made returnable to a day which is not a legal return day,<sup>89</sup> or on an impossible date,<sup>90</sup> such as a day past,<sup>91</sup> and where the law fixes a definite date on which a process is returnable it cannot be made returnable on a different date.<sup>92</sup> Generally speaking, if the statute provides that a certain number of days must intervene between the return day and the date of issuance of the writ, the specification of fewer days makes the summons void;<sup>93</sup> and similarly, if the statute requires the return within a specified time, the specification of a longer time may invalidate the summons.<sup>94</sup> However, an error in stating the time at which process is returnable is not fatal where defendant is not deceived or misled to his detriment or prejudice.<sup>95</sup> The omission of the word "next" after the month designated is immaterial,<sup>96</sup> and there is some authority for the proposition that if the return day of the process is fixed by law an erroneous designation does not invalidate it.<sup>97</sup> A provision in process as to the time for the return thereof will be upheld where the time stated is proper under a code or statutory provision which is applicable to the facts.<sup>98</sup> The return day may be expressed in figures.<sup>99</sup>

A summons made returnable "instanter" is void.<sup>1</sup> Likewise, ordinarily it is improper to make a sum-

Okl.—Armstrong v. May, 155 P. 238, 55 Okl. 539.

77. Minn.—Flanery v. Kusha, 173 N. W. 652, 143 Minn. 308, 6 A.L.R. 838.

78. Wash.—Spokane Merchants' Assoc. v. Acord, 170 P. 329, 99 Wash. 674, 6 A.L.R. 835.

79. Mo.—Wilson v. Wilson, 164 S. W. 561, 255 Mo. 528.

80. Neb.—Armstrong v. Middlestadt, 36 N.W. 151, 22 Neb. 711.

81. Okl.—Jones v. Standard Lumber Co., 249 P. 343, 121 Okl. 186. 50 C.J. p 456 note 85.

82. Wash.—Lawyer Land Co. v. Steel, 83 P. 896, 41 Wash. 411.

83. Iowa.—Rhodes v. Oxley, 235 N. W. 919, 212 Iowa 1018.

Me.—Inhabitants of Dover-Foxcroft v. Inhabitants of Lincoln, 192 A. 700, 135 Me. 184. 50 C.J. p 457 note 88.

84. Ill.—Rattan v. Stone, 4 Ill. 540. 50 C.J. p 457 note 89.

85. N.C.—Merrill v. Barnard, 61 N. C. 569.

86. Iowa.—Union Sav. Bank & Trust Co. of Davenport v. Carter, 243 N.W. 523, 214 Iowa 1131—Pendy v. Cole, 233 N.W. 47, 211 Iowa 199.

87. Ark.—Phillips v. Lemoyne, 4 Ark. 144.

Ill.—Rogers v. Miller, 5 Ill. 333.

88. Mass.—Bell v. Austin, 13 Pick. 90.

89. W.Va.—Lebow v. Macomber, etc., Rope Co., 93 S.E. 939, 81 W. Va. 21. 50 C.J. p 457 note 94.

#### Rules day

Where publication process was made returnable neither to a rules day nor to the first day of a regular term, as required by the code, the court did not obtain jurisdiction of nonresident defendant.—Khoury v. Saik, 33 So.2d 616, 203 Miss. 155.

Common-law rule required fifteen days between the teste and the return of the original writ.—Logan v. Lawshe, 41 A. 751, 62 N.J.Law 567.

90. Tex.—McNeil v. Ballinger, 1 Tex.A.Civ.Cas. § 841.

91. Tex.—Spence v. Morris, Civ. App., 28 S.W. 405. 50 C.J. p 457 note 96.

92. Mo.—State v. Blair, 151 S.W. 148, 245 Mo. 680.

93. Pa.—Nicodemus v. Farley, 16 Pa. Dist. & Co. 547—Weinhardt v. Dunlap, Com.Pl., 34 Del.Co. 112. 50 C.J. p 457 note 97.

94. Ill.—Culver v. Phelps, 22 N.E. 809, 130 Ill. 217.

N.Y.—Newcombe v. Cohn, 67 N.Y.S. 930, 33 Misc. 602.

95. Kan.—Alford v. Hoag, 54 P. 1105, 8 Kan.App. 141. 50 C.J. p 457 note 99.

96. Va.—Arminius Chemical Co. v. White, 71 S.E. 637, 112 Va. 250.

97. N.C.—Merrill v. Barnard, 61 N. C. 569. 50 C.J. p 457 note 3.

98. W.Va.—State v. Heatherly, 123 S.E. 795, 96 W.Va. 685. 50 C.J. p 457 note 4.

99. N.J.—Maires v. Smith, 16 N.J. Law 360.

1. Miss.—Joiner v. Delta Bank, 14 So. 464, 71 Miss. 382.

mons returnable on the date of its issuance;<sup>2</sup> but under the construction accorded some code provisions the rule is otherwise.<sup>3</sup>

A code provision that a summons shall be returnable on the second Monday after its date, but that when issued to another county it may be made returnable, at the option of the party having it issued, on the third or fourth Monday after its date, is for the benefit of plaintiff, and does not prevent him from selecting the earlier and usual date for the return of a summons issued to another county.<sup>4</sup>

*Term or vacation.* Process is bad where it is made returnable at a wrong term,<sup>5</sup> a wrong day of a term,<sup>6</sup> a time when no term is to be held,<sup>7</sup> or a day out of term.<sup>8</sup> Under some statutes a writ is properly made returnable to the next succeeding term, although less than the statutory period for notice has intervened between the issuance of the summons and the first day of the term,<sup>9</sup> and although a continuance may be made necessary for lack of proper service;<sup>10</sup> but under other statutes, when the necessary period does not intervene, the summons should be made returnable to the term following the next succeeding term<sup>11</sup> or to the next rule day in vacation.<sup>12</sup>

*Criminal term.* In some states an original summons made returnable at a criminal term is in accordance with the statutes.<sup>13</sup>

*Effect of amount claimed.* In an action instituted in a court which possesses the jurisdiction of a justice of the peace and also additional jurisdiction, the process is, under the statutes and the construction placed thereon, to be made returnable on the first day of the next or succeeding term where the

amount claimed exceeds a specified amount,<sup>14</sup> but if the sum claimed is less than that amount the process is to be made returnable in the same manner as though issued by a justice of the peace.<sup>15</sup>

### (3) Construction

Ordinarily, where there is an ambiguous or indefinite designation of the time for answer or return, a writ will be so construed as to validate it.

Ordinarily, where there is an indefinite or ambiguous designation of the time for answer or return, the language of the writ will be construed so as to support it and render it operative if such construction is reasonable,<sup>16</sup> and insensible words used in connection with the designation of the return day will be rejected as surplusage;<sup>17</sup> but some courts take the view that a want of proper certainty in point of time cannot be supplied by construction or intendment.<sup>18</sup>

*"Next."* Where the writ is made returnable on a certain day of a certain month "next," and the same month has already been expressed in stating the date of the writ, it is construed in some jurisdictions to be returnable in the ensuing year,<sup>19</sup> rendering the writ invalid if the statute requires it to be returnable at an earlier time,<sup>20</sup> but in other jurisdictions it is construed to be returnable in the current year.<sup>21</sup> At any rate, such a provision for return cannot be construed as referring to another day of the month.<sup>22</sup>

## § 15. — Designation of Parties and Title of Cause

Ordinarily process should duly designate the title of the action and the parties.

2. Pa.—Dyott v. Pennock, 2 Miles 313.

3. W.Va.—Spragins v. West Virginia Cent., etc. R. Co., 13 S.E. 45, 35 W.Va. 139, followed in Venable v. Gulf Taxi Line, 141 S.E. 622, 105 W.Va. 156.

4. Ohio.—State v. Hocking Valley R. Co., 18 Ohio Cir.Ct., N.S., 546. 50 C.J. p 457 note 10.

5. Me.—Blake v. Wing, 77 Me. 170. 50 C.J. p 457 note 13.

6. Pa.—Nawocki v. Skaziak, 88 Pa. Super. 100—Ingrava v. Suman, 77 Pa. Super. 344.

7. Ala.—Brown v. Simpson, 3 Stew. 331.

8. Me.—Kehall v. Tarbox, 92 A. 182, 112 Me. 327. 50 C.J. p 458 note 16.

9. Ill.—Mechanics' Sav. Inst. v. Givens, 82 Ill. 157.

Passing case to following term

Making citation returnable to first day of next term of court, although full service of ten days' notice could not be had in time for trial at that term, was not error, and case was properly passed to following regular term when defendants were compelled to plead at risk of default judgment.—Armstrong v. Vaught, Tex.Civ.App., 74 S.W.2d 459.

10. Ill.—Mechanics' Sav. Inst. v. Givens, 82 Ill. 157.

11. Pa.—Gottshall v. Short Line, Inc., of Pennsylvania, 40 Pa. Dist. & Co. 284. 50 C.J. p 458 note 19.

12. Miss.—Walker v. Joyner, 52 Miss. 789.

13. N.C.—Hatch v. Alamance R. Co., 112 S.E. 529, 183 N.C. 617.

14. Neb.—Brauer v. Luntzer, 11 N. W. 730, 12 Neb. 473.

15. Neb.—Brauer v. Luntzer, supra.

16. Mich.—Nash v. Mallory, 17 Mich. 232. 50 C.J. p 458 note 25.

17. Ala.—Lore v. McRae, 12 Ala. 444.

18. Tex.—Taylor v. Taylor, Civ. App., 157 S.W. 1184. 50 C.J. p 458 note 27.

19. Ill.—Hochlander v. Hochlander, 73 Ill. 618.

50 C.J. p 458 note 30.

20. Ill.—Hochlander v. Hochlander, supra.

21. Ga.—McNatt v. Citizens', etc., Bank, 93 S.E. 271, 20 Ga.App. 755. 50 C.J. p 458 note 31.

22. W.Va.—Venable v. Gulf Taxi Line, 141 S.E. 622, 105 W.Va. 156.

When so provided by code or statute, a summons or other process should state the title of the cause.<sup>23</sup> The process not only may,<sup>24</sup> and ordinarily should,<sup>25</sup> state the names of the parties, but it should also state such names fully and correctly,<sup>26</sup> and not name a defendant other than, and different from, the one named in the petition.<sup>27</sup> The naming of defendants in the alternative is fatal.<sup>28</sup> Where the person intended to be sued is named as defendant, service on a different person not acting for the intended defendant confers no jurisdiction over either the person named in the process or the person actually served;<sup>29</sup> and, when a defendant is described and served with process in terms identifying one person or corporation, the proceeding will not bind a different person or entity not served.<sup>30</sup> Where a summons is addressed to a named defendant and by substituted service is left with a third

person at the place of abode common to both the named defendant and his brother, it cannot be considered as service on the brother.<sup>31</sup> A summons failing to name a person on its face and notify him to appear is no summons as far as the unnamed person is concerned,<sup>32</sup> and unless a notice is directed to defendant it is not sufficient.<sup>33</sup> Where the person named in a writ as defendant is dead, the writ is a nullity<sup>34</sup> and service on the decedent's representative confers no jurisdiction over the representative.<sup>35</sup>

On the other hand, the fact that the designation of a party is omitted, inaccurate, or incomplete may not be fatal under the circumstances,<sup>36</sup> as where the omission is supplied or the inaccuracy is cured in another part of the writ<sup>37</sup> or by the complaint, petition, or statement of claim, or copy thereof, which accompanies or is served with the process,<sup>38</sup> or

23. La.—*Louisiana Bank v. Elam*, 10 Rob. 26—*Caldwell v. Glenn*, 6 Rob. 9.

24. S.D.—*Bunker v. Taylor*, 83 N. W. 555, 13 S.D. 433.  
50 C.J. p 458 note 36.

25. Okl.—*Corpus Juris* cited in *State v. City of Tulsa*, 5 P.2d 744, 746, 153 Okl. 262.  
50 C.J. p 458 note 37.

**Ascertainment of parties from writ**  
Mass.—*Bateman v. Wood*, 9 N.E.2d 375, 297 Mass. 483—*Tyler v. Boot and Shoe Workers' Union*, 188 N. E. 509, 285 Mass. 54—*Eaton v. Walker*, 138 N.E. 798, 244 Mass. 23.

**Designation of parties held sufficient**  
(1) Generally.

N.Y.—*Wittenberg v. Banca Commerciale Italiana*, 78 N.Y.S.2d 593, 273 App.Div. 888.

Okl.—*Thomas v. Tucker*, 36 P.2d 1011, 184 Okl. 304.

R.I.—*Procaccianti v. Procaccianti*, 69 A.2d 636.

Tenn.—*Whitson v. Tennessee Cent. Ry. Co.*, 40 S.W.2d 396, 163 Tenn. 35.

(2) Defendant, sued and cited to appear individually and described as doing business as named firm.—U. S. ex rel. *First Nat. Bank v. Robinson*, D.C.La., 7 F.Supp. 853.

(3) Stating name of plaintiff without designating whether it is corporation or partnership.—*Exchange Nat. Bank of Tulsa v. Lyons*, 87 P.2d 123, 184 Okl. 328.

(4) Summons not stating therein names of beneficiaries in administrator's action.—*Walkup v. Covington*, 73 S.W.2d 718, 18 Tenn.App. 117.

#### Notation on back

Notation of a name similar to defendant's on back of summons, which was probably placed there by a clerk or by process server, was not

a part of the process and did not satisfy requirement that defendant's name appear in the summons.—*Rockefeller v. Hein*, 28 N.Y.S.2d 266, 176 Misc. 659.

#### "Et al"

Use of the words "et al" when there is more than one defendant is an insufficient designation.—*Lyman v. Milton*, 44 Cal. 630.

#### In Texas

(1) The statute has been held mandatory.—*Temple Lumber Co. v. McDaniel*, Civ.App., 24 S.W.2d 518.

(2) However, citation stating that nature of plaintiff's demand was fully shown by accompanying copy of petition with specified file number, filed on stated date, was held sufficient as fully complying with civil procedure rule, although it did not state names of all parties to suit.—*Sgitcovich v. Oldfield*, Civ.App., 220 S.W.2d 724, error refused.

26. Okl.—*Corpus Juris* cited in *State v. City of Tulsa*, 5 P.2d 744, 746, 153 Okl. 262.  
50 C.J. p 458 note 38.

#### Omission of "Inc."

Citation held valid, although omitting "Inc." from corporate plaintiff's name, there being a sufficient compliance with statutory requirements that a citation mention the "title of the cause" where the main part of plaintiff's name was set forth.—*Southern Hide Co. v. Best*, 141 So. 449, 174 La. 748.

#### "Et ux;" "et uxor"

A citation to the effect that a named person "et ux" or "et uxor" are the plaintiffs in an action is insufficient for failure properly to designate the wife, since the citation fails to state who the wife is.—*Higgins v. Shepard*, 107 S.W. 79, 48 Tex.Civ.App. 365.

Wis.—*Baker v. Tormey*, 245 N.W. 652, 209 Wis. 627.

27. Okl.—*Corpus Juris* cited in *Allen v. Clover Valley Lumber Co.*, 42 P.2d 850, 852, 171 Okl. 238.  
50 C.J. p 459 note 39.

28. Idaho.—*Alexander v. Leland*, 1 Idaho 425.

29. Mass.—*Bateman v. Wood*, 9 N. E.2d 375, 297 Mass. 483.

30. Kan.—*Franklin v. Jennings*, 264 P. 1041, 125 Kan. 553.

31. Wis.—*Baker v. Tormey*, 245 N. W. 652, 209 Wis. 627.

32. Ill.—*Ohio Millers Mut. Ins. Co. v. Inter-Insurance Exchange of Illinois Automobile Club*, 10 N.E. 2d 393, 367 Ill. 44.

33. Iowa.—*Columbian Hog & Cattle Powder Co. v. Studer*, 8 N.W.2d 592—*Barton v. City of Waterloo*, 255 N.W. 700, 218 Iowa 495.

34. Mass.—*Chandler v. Dunlop*, 39 N.E.2d 969, 311 Mass. 1—*Bateman v. Wood*, 9 N.E.2d 375, 297 Mass. 483.

35. Mass.—*Bateman v. Wood*, supra.

If administratrix was not person intended to be sued, service on her would not have given the court jurisdiction over her.—*Chandler v. Dunlop*, 39 N.E.2d 969, 311 Mass. 1.

36. Fla.—*Walker Fertilizer Co. v. Race*, 166 So. 283, 123 Fla. 84, 105 A.L.R. 341.

Okl.—*City of Sand Springs v. Gray*, 77 P.2d 56, 182 Okl. 248.

37. Tex.—*Bass v. Brown*, Civ.App., 262 S.W. 894.  
50 C.J. p 459 note 41.

38. Ark.—*Clabourne v. Smith Rice Mill Co.*, 25 S.W.2d 1050, 181 Ark. 279.

where the real party intended is before the court by consent or actual personal service.<sup>39</sup> An error in the name of a codefendant offers no ground of objection to a defendant rightly named and served.<sup>40</sup> A summons to answer plaintiff "or his attorney" has been held sufficient<sup>41</sup> on the ground that the last mentioned words might be rejected as surplusage.<sup>42</sup>

Because of the names being idem sonans, the variance between the name stated and the real name may not be material,<sup>43</sup> but the application of the doctrine of idem sonans is more strict with respect to constructive service than where service is personal,<sup>44</sup> and, under the doctrine that statutory methods of giving notice to a defendant other than by personal service are to be strictly followed, it has been held that the rule of idem sonans will not be applied to give a court jurisdiction where service was by publication and defendant's name was erroneously given, even though under other circumstances such name might be sufficient within the rule.<sup>45</sup>

While an inaccuracy in spelling that does not actually mislead has been held not fatal,<sup>46</sup> an error in spelling so great as in effect to name an entirely different person has been held to invalidate the writ.<sup>47</sup>

*Process issued to another county*, against a non-resident defendant, need not,<sup>48</sup> and must not,<sup>49</sup> name the other defendants.

*Full names, initials, or abbreviations.* Although

not essential under some practice,<sup>50</sup> it has been held under other practice that the full Christian name and surname of each party required to be named should be given,<sup>51</sup> and that the use of an initial to designate the Christian name is insufficient;<sup>52</sup> but sometimes the use of an abbreviation is considered not fatal.<sup>53</sup> While the insertion of a wrong initial letter between the Christian and surnames of a party may not be absolutely fatal,<sup>54</sup> a mistake in the middle initial may be material where the Christian name is designated only by an initial.<sup>55</sup>

*Name unknown.* Under some code or statutory provisions, and the construction placed thereon, if the name of a defendant is unknown a fictitious name may be given in the process, adding a statement that it is fictitious.<sup>56</sup>

*Residence or address* of parties must be shown by the process where required by statute,<sup>57</sup> but failure to indorse plaintiff's address on a summons has been held a mere irregularity not affecting the jurisdiction of the court,<sup>58</sup> and in the absence of statutory requirement the summons or other process need not state the residence of the parties.<sup>59</sup>

## § 16. — Statement of Nature of Action

Where required by statute, it is necessary for a process or summons to state the nature of the action directly or by reference to the pleadings.

In the absence of a requirement, a summons need not state the nature of the cause of action or the

N.Y.—Gerdes v. Reynolds, 28 N.Y. S.2d 622.

50 C.J. p 459 note 42.

39. Ill.—Alexander v. State Savings Bank & Trust Co., 281 Ill.App. 88. Mo.—Giddens v. Bankers' Guaranty Life Co., 37 S.W.2d 658, 225 Mo. App. 742.

N.Y.—Roth v. Light, 135 N.Y.S. 601. Okl.—Corpus Juris cited in Allen v. Clover Valley Lumber Co., 42 P.2d 850, 852, 171 Okl. 238.

50 C.J. p 459 note 43.

*Serving right party by wrong name*  
Service of process on right party by wrong name is good service.—Giddens v. Bankers' Guaranty Life Co., 37 S.W.2d 658, 225 Mo.App. 742.—Marsala v. Gentry, Mo.App., 232 S.W. 1046.

40. Tex.—Gunter v. McEntire, Civ. App., 24 S.W. 590.

41. Mass.—Brewer v. Sibley, 13 Metc. 175.

42. Mass.—Brewer v. Sibley, supra.

43. N.H.—Tibbets v. Kiah, 2 N.H. 557.

50 C.J. p 459 note 45.

44. Iowa.—Webb v. Ferkins, 290 N.W. 112, 227 Iowa 1157, followed in 290 N.W. 116, 227 Iowa 1164.

45. Mich.—Schoenfeld v. Bourne, 123 N.W. 537, 159 Mich. 139, 30 L.R.A., N.S., 122.

45 C.J. p 390 note 39.

46. U.S.—Gulf, etc., R. Co. v. James, Ind.T., 48 F. 148, 1 C.C.A. 53.

Ind.—Morgan v. Woods, 33 Ind. 23.

47. N.Y.—McGill v. Weil, 10 N.Y.S. 246, 19 N.Y.Civ.Proc. 43.

50 C.J. p 458 note 38 [cl].

48. Neb.—McCormick Harvesting Mach. Co. v. Cummins, 80 N.W. 1049, 59 Neb. 330.—Hobson v. Cummins, 78 N.W. 295, 57 Neb. 611.

49. Ark.—Hartley v. Tunstall, 3 Ark. 119.

50. La.—Lallande v. Terrill, 12 La. 7.

51. Neb.—Enewold v. Olsen, 57 N.W. 765, 39 Neb. 59, 42 Am.S.R. 557, 22 L.R.A. 573.

50 C.J. p 459 note 53.

52. Ohio.—Herf v. Shulze, 10 Ohio 263.

53. Colo.—Rich v. Collins, 56 P. 207, 12 Colo.App. 511.

50 C.J. p 459 note 55.

54. Ind.—Morgan v. Woods, 33 Ind. 23.

*Summons held sufficient to confer jurisdiction*

N.C.—Lee v. Hoff, 19 S.E.2d 858, 221 N.C. 233.

55. Cal.—Langley v. Zurich General Accident, etc., Ins. Co., Ltd., 275 P. 963, 97 Cal.App. 434.

56. N.Y.—Snyder v. Parezo, 135 N.Y.S. 960, 151 App.Div. 110.

50 C.J. p 459 note 59.

57. La.—Bacas v. Laswell, App., 22 So.2d 591.

50 C.J. p 459 note 60.

*Compliance held shown*

La.—Bacas v. Laswell, supra.

58. N.Y.—Hoher v. Reikert, 162 N.Y.S. 328, 97 Misc. 637.

59. Mich.—Meehl, for Use of Eagle Indemnity Co., v. Barr Transfer Co., 9 N.W.2d 540, 305 Mich. 276. Pa.—Wiest v. Heffernan, 17 Pa.Dist. & Co. 212.

nature and purpose of the suit,<sup>60</sup> and the fact that it undertakes to do so but states only part, and not the whole, of the object and purpose of the suit does not render it void.<sup>61</sup> On the other hand, a statement in the process of the nature of plaintiff's demand, or of the cause and general nature of the action, is necessary when required by statute,<sup>62</sup> since such a statute is mandatory;<sup>63</sup> but the statute is sufficiently complied with by a brief and general characterization, without a statement of details.<sup>64</sup>

While it has been held sufficient to attach to the process a copy of the petition or complaint,<sup>65</sup> or to copy in the process almost literally the allegations of the petition,<sup>66</sup> and the process may be aided by a reference therein to the petition or complaint,<sup>67</sup> nevertheless it is not necessary for the process to contain every allegation made in the petition<sup>68</sup> or to state the cause of action with the same particularity as in the petition,<sup>69</sup> nor is it necessary to attach or annex plaintiff's pleading, or a copy thereof, to the process<sup>70</sup> unless it is so required by statute, in which case a mere folding inside of the writ is not

sufficient.<sup>71</sup>

*Effect of statement.* The fact that a summons is entitled as a specific kind of action does not in itself determine the nature of the action.<sup>72</sup>

### § 17. — Notice of Sum or Relief Demanded or Result of Default

Process should comply with provisions of law requiring it to state the sum of money or other relief demanded and the consequences of default.

Process should comply with code or statutory provisions requiring it to state the sum of money or other relief demanded<sup>73</sup> or to apprise defendant of the result consequent on his default,<sup>74</sup> as in actions for the recovery of money only, that if defendant fail to appear, judgment will be taken against him for a specified sum,<sup>75</sup> or, in other actions, that in such case plaintiff will apply to the court for the relief demanded in the complaint,<sup>76</sup> or that in such case default will be entered against him.<sup>77</sup> A total failure to comply with such a requirement may be fatal;<sup>78</sup> but it is sometimes held not to be so,<sup>79</sup> as where the process refers to the complaint.<sup>80</sup> Either a strict<sup>81</sup> or a substantial<sup>82</sup> compliance with the stat-

60. Fla.—Benedict v. W. T. Hadlow Co., 42 So. 239, 52 Fla. 188.  
50 C.J. p 459 note 62, p 460 note 63.

61. Miss.—Guess v. Smith, 56 So. 166, 100 Miss. 457, Ann.Cas.1914A 300.

62. Del.—Corpus Juris cited in Howell v. Eastburn, 2 A.2d 899, 900, 9 W.W.Harr. 588.

Iowa.—Farley v. Carter, 269 N.W. 34, 222 Iowa 92.

Tenn.—Sanders v. Tomlin, 198 S.W. 2d 817, 29 Tenn.App. 574.

50 C.J. p 460 note 65.

*Mere statement of amount of claim, without stating its nature or showing whether it arose from contract or tort and a reference to petition for further particulars, is insufficient to comply with a statute requiring an original notice to state "in general terms the cause of action" sued on.—Farley v. Carter, 269 N.W. 34, 222 Iowa 92.*

63. Del.—Corpus Juris cited in Howell v. Eastburn, 2 A.2d 899, 900, 9 W.W.Harr. 588.

50 C.J. p 460 note 66.

64. Tenn.—Sanders v. Tomlin, 198 S.W.2d 817, 29 Tenn.App. 574.

Tex.—Watters v. Lanning, Civ.App., 99 S.W.2d 639, error dismissed—Fowler v. Roden, Civ.App., 76 S.W.2d 858, affirmed 105 S.W.2d 187, 129 Tex. 599—Boothe v. American State Bank of Amarillo, Civ.App., 57 S.W.2d 250.

50 C.J. p 460 notes 67, 68.

65. Tex.—Armstrong v. Vaught, Civ.App., 74 S.W.2d 459.  
50 C.J. p 460 note 69.

*Object of law requiring copy of cause of action to be attached to summons being to inform defendant of nature of plaintiff's demand, whether statement of such cause is contained in body of, or actually attached to, summons is immaterial.—Southern Railway v. Collins, 45 S.E. 306, 118 Ga. 411—Callier v. Trussell, 38 S.E.2d 860, 74 Ga.App. 143.*

#### Unsigned petition

*Clerk's certification of petition, attached to citation, as true and correct copy of original petition held sufficient verity, although petition was not signed.—Ablowich v. Jefferson Standard Life Ins. Co., Tex.Civ.App., 85 S.W.2d 259, error dismissed—Cowsar v. Rhodes, Tex.Civ.App., 41 S.W.2d 115.*

66. Tex.—Warne v. Guaranty State Bank, Civ.App., 239 S.W. 277.

67. Tex.—National Equitable Soc. v. Tennison, Civ.App., 174 S.W. 978.

50 C.J. p 460 note 71.

68. Tex.—Patton v. Crisp, Civ.App., 11 S.W.2d 826.

69. Tex.—Hinzle v. Kempner, 18 S.W. 659, 82 Tex. 617—Farmers' State Bank v. Briggs, Civ.App., 228 S.W. 267.

70. Tex.—St. Paul Fire & Marine Ins. Co. v. Earnest, Civ.App., 293 S.W. 677, affirmed 296 S.W. 1088, 116 Tex. 565.

50 C.J. p 460 note 74.

71. Ga.—Ballard v. Bancroft, 31 Ga. 503.

Me.—Saco v. Hopkinton, 29 Me. 268.

72. Cal.—Martin v. Pacific South-west Royalties, 106 P.2d 443, 41 Cal.App.2d 161.

73. Colo.—Farris v. Walter, 31 P. 231, 2 Colo.App. 450.

Ind.—Freeman v. Paul, 5 N.E. 754, 105 Ind. 451.

Ohio.—Renz v. Schmid, 16 Ohio N. P.N.S., 223.

74. Puerto Rico.—Lopez v. Melendez, 22 Puerto Rico 145.

75. Ohio.—Crabbe v. Hertzog, App., 66 N.E.2d 659.

50 C.J. p 460 note 79.

76. Colo.—Atchison, etc., R. Co. v. Nicholls, 6 P. 512, 8 Colo. 188.

50 C.J. p 460 note 80.

77. Iowa.—McKee v. Harris, 1 Iowa 364.

78. Colo.—Farris v. Walter, 31 P. 231, 2 Colo.App. 450.

50 C.J. p 460 note 82.

79. U.S.—Ammons v. Brunswick-Balke-Collender Co., Ind.T., 141 F. 570, 72 C.C.A. 614.

Puerto Rico.—Fuentes v. Maldonado, 7 Puerto Rico Fed. 77.

80. Colo.—Griffing v. Smith, 142 P. 202, 26 Colo.App. 220.

50 C.J. p 460 note 84.

81. Or.—Okanogan State Bank v. Thompson, 211 P. 933, 106 Or. 447.

50 C.J. p 460 note 85.

82. Puerto Rico.—Lopez v. Melendez, 22 Puerto Rico 145.

50 C.J. p 460 note 86.



utory requirement is sufficient. In the absence of statutory requirement, the amount demanded need not be stated.<sup>83</sup>

## § 18. — Teste

The teste of process is the concluding clause, and under statutory or constitutional provisions ordinarily it is proper practice to have a process tested-by either the judge or clerk of court.

The teste of process is the concluding clause commencing: "Witness the Honorable A. B., judge of said Circuit Court, etc.," or as the case may be.<sup>84</sup> Although it is provided for in some state constitutions, the teste of process is generally considered a mere matter of form,<sup>85</sup> its only purpose being to give character and dignity to the process.<sup>86</sup> The use of the precise word "tested" is not necessary to render an attestation of process sufficient.<sup>87</sup>

**Name.** The teste should be in the name of the proper officer,<sup>88</sup> such as the judge<sup>89</sup> or clerk,<sup>90</sup> as the case may be, under the constitutional or statutory provision of the particular jurisdiction; but, where the name of the proper officer is stated, the omission of his official title does not render the process void.<sup>91</sup> A summons which, under the statutes of the particular jurisdiction, is lawfully issued need not be tested in the name of the presid-

ing judge.<sup>92</sup>

**Time.** The writ must be tested in term time,<sup>93</sup> and where it is sued out in vacation it must be tested as of the previous term;<sup>94</sup> it cannot bear teste of a term after it issues,<sup>95</sup> even though it is returnable at a subsequent term.<sup>96</sup> The teste of a writ is not conclusive as to the time of its issuance.<sup>97</sup>

## § 19. — Signature, Seal, and Stamp

- a. Signature
- b. Seal

### a. Signature

Process should be signed by the authority designated by statute, which ordinarily is the clerk of court or, in some cases, the plaintiff or his attorney.

Process should be signed by the authority designated by statute,<sup>98</sup> as by the proper officer,<sup>99</sup> usually the clerk of the court,<sup>1</sup> this being required for purposes of authentication.<sup>2</sup> A signature in which an initial is used for the Christian name of the clerk is sufficient.<sup>3</sup> It has been both affirmed<sup>4</sup> and denied<sup>5</sup> that a writ is sufficiently signed where the signature of the clerk appears in the teste. Generally speaking, the clerk may authorize his signature to be made by another,<sup>6</sup> or he may adopt a

83. Pa.—Marsteller v. Marsteller, 93 Pa. 350.

84. Bouvier L.D.

85. Ga.—Jordan v. Porterfield, 19 Ga. 139, 63 Am.D. 301.  
50 C.J. p 461 note 91.

86. N.H.—Reynolds v. Damrell, 19 N.H. 394.

87. Tex.—St. Louis, etc., R. Co. v. Hamilton, Civ.App., 163 S.W. 666.

88. Tex.—Wimbish v. Wofford, 33 Tex. 109.

89. N.H.—Parsons v. Swett, 32 N.H. 87, 64 Am.D. 352.  
50 C.J. p 461 note 95.

90. Mo.—Spitcaufsky v. Hatten, 182 S.W.2d 86, 353 Mo. 94, 160 A.L.R. 990.

50 C.J. p 461 note 96.

### Requirement merely directory

Constitutional provision requiring that all writs shall be attested by clerk of court from which they shall be issued is more directory than mandatory in nature.—Spitcaufsky v. Hatten, supra.

91. Ga.—Sapp v. Parrish, 59 S.E. 821, 3 Ga.App. 234.

92. Wis.—Johnson v. Hamburger, 13 Wis. 175—Porter v. Vandercook, 11 Wis. 70.

93. Del.—Potter v. White, 3 Del. 329.

94. Del.—Potter v. White, supra.

95. Miss.—Hurst v. Strong, 2 Miss. 123.

96. Miss.—Hurst v. Strong, supra.

97. N.J.—Allen v. Smith, 12 N.J. Law 159.

98. Vt.—State v. Frotten, 46 A.2d 921, 114 Vt. 410.

### Signing copy as insufficient

It is essential to the validity of a suit that there be a signed original process which is served on defendant only by leaving with him a copy thereof, and failure to sign the original process is not cured by the service of a signed copy of the process on defendant, since the signed copy is not a copy of the unsigned original.—Kimsey v. Hall, 23 S.E.2d 196, 68 Ga.App. 409.

99. Vt.—Anderson v. Souliere, 151 A. 509, 103 Vt. 10.  
50 C.J. p 461 note 11.

1. Ga.—Kimsey v. Hall, 23 S.E.2d 196, 68 Ga.App. 409.

N.H.—Smith v. Tallman, 175 A. 857, 87 N.H. 176.

W.Va.—Nicholas Land Co. v. Crowder, 32 S.E.2d 563, 127 W.Va. 216.  
50 C.J. p 461 note 12.

### Different county

Under statutes relating to issuance by clerk of courts of writs com-

mencing civil actions, a writ must show on its face either that it was issued by the clerk of courts for the county where it is entered or that it was issued by the clerk of courts for another county and made returnable where entered, and a clerk may not sign writs which purportedly issue from a county other than his own.—City of Belfast v. City of Bath, 15 A.2d 249, 137 Me. 91.

2. N.H.—Smith v. Tallman, 175 A. 857, 87 N.H. 176.

3. Ill.—Bishop Hill Colony v. Edgerton, 26 Ill. 54.

4. Ind.—Wibright v. Wise, 4 Blackf. 137.

Ky.—Botts v. Williams, 5 J.J.Marsh. 62.

5. Mo.—Smith v. Hackley, 44 Mo. App. 614.

6. Okl.—Harden v. Kifer, 111 P.2d 490, 188 Okl. 538.  
50 C.J. p 461 note 16.

### Use of rubber stamp

Statutory requirement that summons shall be signed by clerk is met if clerk's name appears thereon whether by true signature or rubber stamp, and is duly attested to by a legally appointed, qualified, and acting deputy court clerk.—Allen v. Clover Valley Lumber Co., 42 P.2d 850, 171 Okl. 238.

printed signature;<sup>7</sup> but general authority given by the clerk to an attorney to sign writs is ineffective.<sup>8</sup> In order to be technically correct,<sup>9</sup> signature by a deputy should be in the name of the clerk,<sup>10</sup> but it is not indispensable that it be so,<sup>11</sup> and in certain contingencies provided for by some statutes a deputy may sign as such.<sup>12</sup>

*By plaintiff or attorney.* Under some statutes, and the construction placed thereon, a summons or original notice may<sup>13</sup> and should<sup>14</sup> be signed by plaintiff or his attorney, and it need not be signed by the clerk of court.<sup>15</sup> A typed signature of the attorney has been held sufficient.<sup>16</sup> Under statutes and rules of court requiring that a summons be signed by plaintiff's attorney and subscribed with such attorney's name, it has nevertheless been held that plaintiff's own name is sufficient for a valid summons,<sup>17</sup> the basis of such rule resting on other provisions authorizing a party to a civil action to prosecute or defend in person, and making every provision applicable to attorneys also applicable to parties.<sup>18</sup>

*Effect of lack of proper signature.* There is a difference of opinion among courts as to the effect

of a want of proper signature,<sup>19</sup> some holding that it renders the process void<sup>20</sup> and insufficient to confer jurisdiction,<sup>21</sup> and others holding that it is a nonjurisdictional defect or irregularity<sup>22</sup> which renders the process voidable only.<sup>23</sup>

*Stamp.* Where process is required to be stamped, it has been held that the stamp is but a mere voucher, evidence of an extrinsic fact, namely, the payment of a tax or duty, and hence is no part of the writ.<sup>24</sup>

### b. Seal

Process issuing out of a court should be under its seal, but no seal is required where the process issues from a party or his attorney.

Not only at common law, but also under statutes, and sometimes under rules of court, process which issues out of a court is required to be under the seal of that court,<sup>25</sup> unless the case falls within a statute dispensing with the necessity of a seal in certain cases,<sup>26</sup> or unless there is no official seal,<sup>27</sup> in which case the process should state that fact,<sup>28</sup> or, under some statutes, the clerk may and should affix his private seal.<sup>29</sup> The writ should bear the seal of

7. Cal.—*Ligare v. California Southern R. Co.*, 18 P. 777, 76 Cal. 610.  
Ohio.—*Littleton v. Marshall*, 8 Ohio Dec. 672, 6 Ohio N.P. 509.

8. N.C.—*Gardner v. Lane*, 14 N.C. 53.

9. Ohio.—*Walke v. Circleville Bank*, 15 Ohio 288.

10. Miss.—*Felder v. Meredith*, 1 Miss. 447.

50 C.J. p 461 note 21.

11. Ohio.—*Walke v. Circleville Bank*, 15 Ohio 288.

12. Mich.—*Calender v. Olcott*, 1 Mich. 344.

50 C.J. p 461 note 23.

13. Colo.—*Rand v. Pantagraph Stationery Co.*, 28 P. 661, 1 Colo.App. 270.

50 C.J. p 461 note 25.

*Printed subscription sufficient*

Wash.—*Warner v. Miner*, 82 P. 1033, 41 Wash. 98.

50 C.J. p 461 note 25 [d].

14. Iowa.—*Hoitt v. Skinner*, 68 N.W. 788, 99 Iowa 360.

50 C.J. p 462 note 26.

15. S.C.—*Southern Cotton Oil Co. v. Hewlett*, 93 S.E. 195, 107 S.C. 532.

50 C.J. p 461 note 10.

16. Mich.—*Rood v. McDonald*, 7 N.W.2d 95, 303 Mich. 634.

50 C.J. p 461 note 25 [e].

17. N.Y.—*A. Victor & Co. v. Sleinger*, 9 N.Y.S.2d 323, 255 App.Div. 673, reargument denied 11 N.Y.S.2d 548, 256 App.Div. 1046.

18. N.Y.—*Horter v. De Mesa*, 188 N.Y.S. 20, 196 App.Div. 462.

50 C.J. p 462 note 26 [d].

19. U.S.—*Corpus Juris* cited in National Labor Relations Board v. Suburban Lumber Co., C.C.A., 121 F.2d 829, 834, certiorari denied Suburban Lumber Co. v. National Labor Relations Board, 62 S.Ct. 364, 314 U.S. 693, 86 L.Ed. 554.

20. Colo.—*Reuss v. W. T. Rawleigh Co.*, 73 P.2d 987, 101 Colo. 356.

Ill.—*Ohio Millers Mut. Ins. Co. v. Inter-Insurance Exchange of Illinois Automobile Club*, 10 N.E.2d 393, 367 Ill. 44.

Vt.—*State v. Frotten*, 46 A.2d 921, 114 Vt. 410.—*State v. Elks Club of Montpelier*, 8 A.2d 678, 110 Vt. 397.

50 C.J. p 462 note 27.

21. Colo.—*Reuss v. W. T. Rawleigh Co.*, 73 P.2d 987, 101 Colo. 356.

Me.—*Pinkham v. Jennings*, 122 A. 873, 123 Me. 343.

Vt.—*State v. Frotten*, 46 A.2d 921, 114 Vt. 410.

22. U.S.—National Labor Relations Board v. Suburban Lumber Co., C.C.A., 121 F.2d 829, certiorari denied Suburban Lumber Co. v. National Labor Relations Board, 62 S.Ct. 364, 314 U.S. 693, 86 L.Ed. 554.

N.J.—*Hirsch v. De Puy*, 166 A. 720, 11 N.J.Misc. 500.

50 C.J. p 462 note 29.

23. W.Va.—*Baird-Gatzmer Corp. v. Henry Clay Coal Min. Co.*, 50 S.E.2d 673, 131 W.Va. 793.—*Nicholas Land Co. v. Crowder*, 32 S.E.2d 563, 127 W.Va. 216.

50 C.J. p 462 note 30.

24. Conn.—*Tucker v. Potter*, 35 Conn. 43.

50 C.J. p 463 note 44.

25. Pa.—*Buehler v. Paxson*, 33 Pa. Dist. & Co. 583.

50 C.J. p 462 note 32.

Object of the statute requiring seal of clerk of court to be on all process, with respect to requirement of a seal, is to advise the party on whom the writ is to be served that its authenticity is genuine.—*Mullins v. Lyle*, 183 So. 696, 183 Miss. 297.

*Statute inapplicable*

The statute requiring the seal of clerk of court to be on all process refers to process addressed to individuals, and not publication of a general notice by a county board of supervisors to the public or part thereof not specifically named.—*Mullins v. Lyle*, supra.

26. N.C.—*Shackelford v. McRae*, 10 N.C. 226.

27. Kan.—*Goff v. Russell*, 3 Kan. 212.

28. Miss.—*McAllum v. Spinks*, 91 So. 694, 129 Miss. 237.—*Burton v. Cramer*, 86 So. 578, 123 Miss. 848.

29. Ill.—*Beaubien v. Sabine*, 3 Ill. 457.

the court authorized to issue it,<sup>30</sup> and a writ bearing an improper seal is regarded as though it bore no seal.<sup>31</sup> Some courts hold that an omission of the seal renders the writ void<sup>32</sup> and ineffective to confer jurisdiction;<sup>33</sup> but other courts hold that the omission renders the writ merely voidable<sup>34</sup> and in no way affects the jurisdiction of the court,<sup>35</sup> and that the seal is not requisite to the validity of the process,<sup>36</sup> or that an objection on this ground is without substance where defendant has been actually and fully informed of the nature and purpose of the action and the time when, and place where, he is required to appear.<sup>37</sup>

*Where process issues from party or his attorney, it need not be under the seal of the court.*<sup>38</sup>

## § 20. — Indorsements

An indorsement is an entry made on the back of a writ or process. Lack of due indorsement may invalidate the writ in some jurisdictions.

An indorsement of a writ is an entry made on the back thereof<sup>39</sup> and is sometimes called "backing;"<sup>40</sup> but a statement on the face, and at the foot or bottom, of a writ is held not to be such a failure to comply with a statute or rule of court requiring indorsement of the statement on the writ as to be fatal.<sup>41</sup> Particular matters which should be indorsed on the process, when so provided by statute or rule of court in the particular jurisdiction, include the cause of action,<sup>42</sup> the name of plaintiff's

attorney,<sup>43</sup> the time when the writ was signed,<sup>44</sup> and the name of the officer who serves the writ.<sup>45</sup> Where a statute requiring an indorsement is of limited application, a compliance therewith is necessary in, and only in, cases within its terms.<sup>46</sup> An indorsement need not be signed by the clerk<sup>47</sup> or attested with the seal of the court.<sup>48</sup>

Some courts hold that a statute requiring indorsement of process is mandatory<sup>49</sup> and that a failure to comply therewith is a fatal defect<sup>50</sup> which renders the process void.<sup>51</sup> Other courts, however, hold that such a statute is directory<sup>52</sup> and that a failure to comply therewith is not fatal,<sup>53</sup> but is rather a mere irregularity<sup>54</sup> which does not render the process void.<sup>55</sup> It has also been held that the indorsement on the back of a citation is not deemed an essential part of the proceedings,<sup>56</sup> that a mandatory requirement of statute that a citation state the names of all parties does not apply to an indorsement on the back of the instrument,<sup>57</sup> and that the indorsement of the return day on the back of the writ is merely for the convenience of the serving officer and is no part of its command.<sup>58</sup>

*Effect of unnecessary indorsement.* The making of an unnecessary indorsement on process is not fatal where it does not tend to mislead,<sup>59</sup> as where the facts stated therein are true;<sup>60</sup> but where an unnecessary indorsement names a return day different from the one named in the body of the writ

Mo.—Swink v. Thompson, 31 Mo. 336.

30. Me.—Hamilton v. George, 152 A. 631, 129 Me. 474.

31. Me.—Hamilton v. George, supra.

32. Pa.—Buehler v. Paxson, 33 Pa. Dist. & Co. 583.

50 C.J. p 462 note 37.

33. Me.—Pinkham v. Jennings, 122 A. 873, 123 Me. 343.

34. N.J.—Hirsch v. De Puy, 166 A. 720, 11 N.J.Misc. 500.

50 C.J. p 462 note 39.

35. Fla.—Benedict v. W. T. Hadlow Co., 42 So. 239, 52 Fla. 138.

36. Vt.—State v. Frotten, 46 A.2d 921, 114 Vt. 410.

37. N.C.—Vick v. Flournoy, 60 S.E. 978, 147 N.C. 209.

38. S.C.—Southern Cotton Oil Co. v. Hewlett, 93 S.E. 195, 107 S.C. 532. 50 C.J. p 463 note 41.

39. N.J.—Gondas v. Gondas, 134 A. 615, 99 N.J.Eq. 473.

40. N.J.—Gondas v. Gondas, supra.

41. Kan.—Thompson v. Pfeiffer, 56 P. 763, 60 Kan. 409.

42. Ala.—Howell v. Hallett, Minor p. 102.

43. Cal.—Shinn v. Cummins, 3 P. 133, 65 Cal. 97.

Mont.—Holt v. Sather, 264 P. 108, 81 Mont. 442.

### Typed indorsement

Where name of firm appearing as attorneys for plaintiff was typewritten beneath underwriting on summons on which return of service was made, there was sufficient compliance with statutory requirement that process be subscribed or indorsed in name of plaintiff's attorneys.—Rudell v. Union Guardian Trust Co., 294 N.W. 132, 295 Mich. 157.

44. Vt.—Pollard v. Wilder, 17 Vt. 48.

45. N.H.—Stone v. Sprague, 24 N.H. 309.

50 C.J. p 463 note 57.

46. Kan.—Dusenberry v. Bennett, 53 P. 82, 7 Kan.App. 123.

50 C.J. p 463 note 58.

47. Kan.—Abbey v. W. B. Grimes Dry Goods Co., 24 P. 426, 44 Kan. 415.

48. Kan.—Abbey v. W. B. Grimes Dry Goods Co., supra.

49. Me.—Liberty v. Haines, 64 A. 665, 101 Me. 402.

50 C.J. p 463 note 65.

50. Conn.—Eno v. Frisbie, 5 Day 122.

51. R.I.—Hopkinton Prob. Ct. v. Lamphear, 14 R.I. 291.

50 C.J. p 464 note 67.

52. Idaho.—Foore v. Simon Piano Co., 108 P. 1038, 18 Idaho 167.

53. Idaho.—Foore v. Simon Piano Co., supra.

54. Kan.—Gigoux v. Griffith, 199 P. 103, 109 Kan. 275.

50 C.J. p 464 note 70.

55. Kan.—Gigoux v. Griffith, supra.

56. Tex.—Whisenant v. Thompson, Bros. Hardware Co., Civ.App., 120 S.W.2d 316.

57. Tex.—Whisenant v. Thompson, Bros. Hardware Co., supra.

58. N.J.—Gondas v. Gondas, 134 A. 615, 99 N.J.Eq. 473—Hamlin v. Coppel, 155 A. 676, 9 N.J.Misc. 651.

59. Neb.—Krotter v. Norton, 120 N.W. 928, 84 Neb. 137.

60. Neb.—Boulware v. Otoe County, 19 N.W. 454, 16 Neb. 26.

50 C.J. p 464 note 72.

the latter controls.<sup>61</sup> Indorsement by the sheriff of the day of receipt is not necessary,<sup>62</sup> but, if made, it is conclusive until impeached or set aside.<sup>63</sup>

**Time of indorsement.** An indorsement on a writ must be made at, or within, the time specified by statute or rule of court.<sup>64</sup>

## § 21. Alias, Pluries, Successive, and Renewed Writs

- a. In general
- b. Issuance
- c. Form and contents

### a. In General

An alias writ used to commence an action is a second writ issued after the first has failed to effect its purpose, and a pluries writ is a subsequent writ issued under like circumstances.

An alias writ used to commence an action is a second writ of the same kind issued when the first has failed of its purpose,<sup>65</sup> or, in other words, a writ issued where one of the same kind has already been issued in the same cause, but has lost its force without having been effective;<sup>66</sup> and a pluries writ is a third or subsequent writ issued after preceding writs have proved ineffectual.<sup>67</sup> A summons should be classified according to its substance rather than the name given it,<sup>68</sup> and the mere indorsement of the word "alias" or "pluries" on a process or summons will not make it such if the instrument is in fact merely an ordinary summons;<sup>69</sup> but the

character of process purporting to be original may be changed by a memorandum or order thereon specifying the date of the original writ.<sup>70</sup> A particular summons may be an "alias summons"<sup>71</sup> even though it is entitled "amended summons,"<sup>72</sup> but in jurisdictions wherein a summons is issued and subscribed by plaintiff or his attorney, rather than by the clerk of court, a second or subsequent summons is not an alias or pluries writ.<sup>73</sup> Process issued after a discontinuance cannot be regarded as alias process.<sup>74</sup> When it is desired that the action shall date from the date of the original summons, or when it is necessary for it to do so in order to toll the statute of limitations, the successive writs must show their relation to the original process,<sup>75</sup> and where they do so the subsequent writ may be effective as of the date of the original.<sup>76</sup> Defects in an original but unexecuted summons are not available against an alias,<sup>77</sup> and invalidity of the first process does not affect the validity of a second one.<sup>78</sup> However, service of the alias cannot relate back to the time of the issuance of the original, so as to validate any proceedings had meantime, where the regularity of such proceedings depended on defendant's being before the court.<sup>79</sup> Where the summons first issued is not properly indorsed, and another summons properly indorsed is subsequently issued, the latter summons may be regarded as the original,<sup>80</sup> and not as an alias,<sup>81</sup> summons. Also the fact that a party has secured the issuance of an alias writ, which is irregular and void, does not

61. Miss.—T. A. Howard Lumber Co. v. Hopson, 101 So. 363, 136 Miss. 237.

N.J.—Gondas v. Gondas, 134 A. 615, 99 N.J.Eq. 473.

62. Miss.—Nance v. Webb, 42 Miss. 268.

50 C.J. p 464 note 75.

63. Or.—White v. Johnson, 40 P. 511, 27 Or. 282, 50 Am.S.R. 726.

64. Vt.—Wheelock v. Sears, 19 Vt. 559.

50 C.J. p 463 note 64.

65. Mont.—Schmidt v. Schmidt, 89 P.2d 1020, 108 Mont. 246.

"Alias writ" defined generally see 3 C.J.S. p 514 notes 93-99.

#### Continuance of original process

An alias summons is a continuance of the original process and may issue to add new parties to the record, to continue the action where service on defendant has not been obtained, where those named in the original writ cannot be served before the return date, or where service or return of a previous writ has been set aside without vacation or abatement of the writ itself.—Martz v. Gingell, 37 Pa.Dist. & Co. 429.

66. Mont.—Schmidt v. Schmidt, 89 P.2d 1020, 108 Mont. 246.

Pa.—Simko v. Kunkle, 36 Pa.Dist. & Co. 229, 22 West.Co.L.J. 149.

67. Black L.D.

68. Mont.—Schmidt v. Schmidt, 89 P.2d 1020, 108 Mont. 246.

#### Summons for publication

Summons for publication is required by law to contain additional matter not included in the form of the original summons and is not an alias summons.—Schmidt v. Schmidt, supra.

69. N.C.—McIntyre v. Austin, 59 S. E.2d 586, 232 N.C. 186—Perkins v. Perkins, 59 S.E.2d 356, 232 N.C. 91—Ryan v. Batdorf, 34 S.E.2d 81, 225 N.C. 228.

#### Lack of reference to original

Where summons issued after invalid service of original summons was indorsed with the word "alias," but contained no reference in the body to the original summons, summons was ineffective as "alias summons."—Mintz v. Frink, 6 S.E.2d 804, 217 N.C. 101.

70. N.C.—Ryan v. Batdorf, 34 S.E. 2d 81, 225 N.C. 228.

71. Cal.—W. H. Marston Co. v. Kochritz, 251 P. 959, 80 Cal.App. 352.

50 C.J. p 464 note 80.

72. Cal.—W. H. Marston Co. v. Kochritz, supra.

73. Or.—Lane v. Ball, 160 P. 144, 163 P. 975, 83 Or. 404.

74. W.Va.—Dunaway v. Lord, 173 S. E. 568, 114 W.Va. 671.

75. N.C.—Ryan v. Batdorf, 34 S.E. 2d 81, 225 N.C. 228.

76. N.C.—McIntyre v. Austin, 59 S. E.2d 586, 232 N.C. 186.

77. U.S.—Scull v. Kuykendall, Ark., 21 F.Cas.No.12,570b, Hempst. p. 9. Ala.—Goodlett v. Hansell, 56 Ala. 346.

Mo.—Pacific Mut. Life Ins. Co. of California v. Mansur, 118 S.W. 1193, 136 Mo.App. 726.

78. W.Va.—Hall v. Ocean Accident & Guarantee Corporation, 9 S.E.2d 45, 122 W.Va. 188.

79. Pa.—Tyrone First Nat. Bank v. Cooke, 3 Pa.Super. 278.

80. Ohio.—Renz v. Schmid, 16 Ohio N.P., N.S., 223.

81. Ohio.—Renz v. Schmid, supra.

prevent him from availing himself of any remedy which he might have had if the writ had not been issued;<sup>82</sup> and, where the statute of limitations has not run,<sup>83</sup> a writ which is improper as an alias writ may be good as an original summons<sup>84</sup> or may be treated as a new writ for a new suit.<sup>85</sup> The fact that an alias writ is returned "not found" as to a defendant who was served on the original will not have the effect of vitiating such service.<sup>86</sup>

**Renewal and reissue.** A court with jurisdiction of the subject matter of a suit should issue its process repeatedly and in various forms, if necessary to compel anyone within its jurisdiction to submit thereto.<sup>87</sup> Where a defendant has not been found and served within the original return periods, the court on a showing of due diligence may renew its process so as to make it returnable at a later period.<sup>88</sup> The courts have, however, disapproved the practice of reissuing a returned writ with imprint of a renewal stamp instead of issuing an entirely new instrument.<sup>89</sup>

## b. Issuance

- (1) In general
- (2) Time of issuance

### (1) In General

Issuance of an alias, pluries, successive, or renewed writ may and should be made only in compliance with conditions of statutes or rules of court, and ordinarily it is prerequisite to issuance of such a writ that there first be issued an original writ, and that the latter be returned unexecuted or otherwise be shown to have been ineffective.

In order that another, or alias, summons may be issued under statutory authority it must be shown that the conditions imposed by statute exist.<sup>90</sup> Ordinarily prior issuance of an original writ is prerequisite to issuance of an alias writ or summons,<sup>91</sup> and, where the original process is fatally defective in form, ordinarily it is improper to issue an alias process.<sup>92</sup> Generally an alias or pluries writ may be issued when, and only when, the preceding writ or writs have been returned not executed,<sup>93</sup> the service has been irregular or de-

82. Ind.—Grover v. Sims, 5 Blackf. 498.

83. Mich.—Frantz v. Detroit United R. Co., 110 N.W. 531, 147 Mich. 199.

50 C.J. p 464 note 96.

84. Mich.—Burroughs v. Teitelbaum, 15 N.W.2d 151, 309 Mich. 251.—Westlawn Cemetery Assoc. v. Wayne Cir. Judge, 213 N.W. 143, 238 Mich. 119.

Neb.—Corpus Juris cited in Clark v. Village of Hemingford, 26 N.W.2d 15, 19, 147 Neb. 1044.

N.C.—Ryan v. Batdorf, 34 S.E.2d 81, 225 N.C. 228.

85. Mich.—Gunn v. Gunn, 171 N.W. 371, 205 Mich. 198.

50 C.J. p 464 note 98.

86. Ala.—McBeath v. Spann, 7 Ala. 201.

87. U.S.—Thompson v. Gallien, C.C. A.La., 127 F.2d 664, certiorari denied 63 S.Ct. 64, 317 U.S. 662, 87 L.Ed. 532.

#### Discretion of judge

Whether further process shall issue after return of service has been held insufficient is within discretion of judge.—Luce v. Columbia River Packers' Ass'n, 190 N.E. 539, 286 Mass. 343.

88. Ga.—Murphy v. Ferguson-McElhaney Motor Co., 151 S.E. 653, 40 Ga.App. 847.

89. Md.—North v. Town Real Estate Corp., 60 A.2d 665.

There is less likelihood of error if the clerk issues an entirely new instrument, even though this may involve more trouble for such/ offi-

cial.—North v. Town Real Estate Corp., supra.

90. Mont.—Haggerty v. Sherburne Mercantile Co., 186 P.2d 384, 120 Mont. 386.

Pa.—Stewart v. American Stores, Com.Pl., 1 Fay.L.J. 87.

Tex.—Walker v. Koger, Civ.App., 99 S.W.2d 1034, error dismissed. 50 C.J. p 464 note 6.

#### Request

Where a writ of summons has been returned unexecuted, another writ will not issue without a request therefor.—Mayne v. Jacob Michel Real Estate Co., 180 S.W.2d 809, 237 Mo.App. 952.

#### Number of defendants

(1) Statutory authority to issue a second original process has been held to be limited to cases where there are two or more defendants joined in the same action, and one or more resides in the county where suit is brought and one or more in a different county.—Scott v. Scott, 15 S.E.2d 416, 192 Ga. 370.

(2) On the other hand, it has been held that statute authorizing plaintiff to issue as many original summonses as he may elect and deliver one of them to sheriff of each county in which service on any defendant is desired permits issuance of more than one original summons for single defendant, sued in county of his residence, if plaintiff is uncertain as to whether defendant is to be found in such county or another county, and delivery of such summonses to sheriffs of different counties, so that defendant may be served where found, even though not

found in county wherein suit was filed.—Mutzig v. Hope, 158 P.2d 110, 176 Or. 368.

91. Cal.—Brock v. Fouchy, 172 P.2d 945, 76 Cal.App.2d 363.

#### Jurisdictional defect

Where no summons issued from circuit court wherein detainee action purportedly originated, corporation court to which case was removed could not issue valid alias summons, and did not acquire jurisdiction by issuance of purported alias summons.—Preston v. Legard, 168 S.E. 445, 160 Va. 364.

#### Special appearance not a waiver

Where no summons issued from circuit court wherein detainee action purportedly originated, defendant specially appearing to contest jurisdiction of corporation court to which case was removed would not have waived summons by excepting to sufficiency of seizure bond.—Preston v. Legard, supra.

92. Pa.—Martz v. Gingell, 37 Pa. Dist. & Co. 429.

93. Mich.—Rood v. McDonald, 7 N.W.2d 95, 303 Mich. 634.

Mont.—State ex rel. Montgomery Ward & Co. v. District Court of First Judicial Dist. in and for Lewis and Clark County, 146 P.2d 1012, 115 Mont. 521.

Pa.—Molleson v. Molleson, Com.Pl., 6 Sch.Reg. 111.

50 C.J. p 464 note 7.

#### Technical meaning of "return"

This was true because purpose of statute relating to issuance of alias summons on return of original summons without service, etc., was to permit issuance of alias summons

fective,<sup>94</sup> or the original writ has been lost or destroyed, as discussed *infra* § 23.

The court has inherent power to award such further process;<sup>95</sup> but, unless conferred on him by statute,<sup>96</sup> the clerk has no authority to issue it without an order from the court.<sup>97</sup> While, in case the original summons is a nullity, another summons may be issued by the clerk,<sup>98</sup> without a return of the void summons or an order of court,<sup>99</sup> and even while a motion to quash the first summons is pending,<sup>1</sup> such a summons should not be an alias summons,<sup>2</sup> and where the first process was a nullity the second process should be treated as an original.<sup>3</sup>

It has been held not necessary that the issuance of alias process be preceded by an amendment of the petition,<sup>4</sup> the filing of a new petition,<sup>5</sup> or the refile of the original petition.<sup>6</sup> A request or application for the issuance of alias process may be oral<sup>7</sup> or written,<sup>8</sup> and, if it is in writing, it, or a copy thereof, need not be served.<sup>9</sup> A direction to the clerk to issue alias process will be presumed to

have been properly given.<sup>10</sup> Where the statute does not require the clerk to issue an order directing himself to perform the statutory duty of issuing an alias or pluries writ, nevertheless, if he does draw an order or memorandum containing the facts essential to its issuance, this will not invalidate an otherwise valid writ.<sup>11</sup>

*Issuance by plaintiff or attorney.* In a jurisdiction wherein a summons is issued by plaintiff or his attorney, the issuance of one summons does not exhaust the power<sup>12</sup> or prevent the issuance of another summons;<sup>13</sup> but it has been held that, without leave of court, a second summons cannot properly be issued by plaintiff while a motion to quash the first summons is pending.<sup>14</sup> If the first summons is issued and served and then quashed, and plaintiff at such point issues an alias summons, the latter becomes in effect the original in the sense that it is the one on which jurisdiction of the court depends,<sup>15</sup> and by issuance of the alias summons plaintiff waives the right thereafter to complain of the court's ruling in respect of the first summons.<sup>16</sup>

where original summons had lost its force before its function had been fully performed, and legislature did not intend to authorize alias process whenever someone should choose without apparent reason to take original summons back to clerk's office unserved but still servable.

Mich.—Rood v. McDonald, 7 N.W.2d 95, 303 Mich. 634.

Mont.—State ex rel. Montgomery Ward & Co. v. District Court of First Judicial Dist. in and for Lewis and Clark County, 146 P.2d 1012, 115 Mont. 521.

#### Compliance with statute shown

Okl.—Schuman v. Joseph H. Cohen & Sons, 26 P.2d 733, 166 Okl. 159.

94. Mich.—Rood v. McDonald, 7 N.W.2d 95, 303 Mich. 634.

N.C.—Mintz v. Frink, 6 S.E.2d 804, 217 N.C. 101.

Tex.—Walker v. Koger, Civ.App., 99 S.W.2d 1034, error dismissed. 50 C.J. p 465 note 8.

#### Service on Sunday

Where service of original summons on Sunday was invalid and return was stricken, status of the process was the same as though service had not been made and plaintiff then had the right given by statute to sue out an alias summons.—Mintz v. Frink, 6 S.E.2d 804, 217 N.C. 101.

95. Ill.—Umbright v. Czajkowski, 45 N.E.2d 104, 316 Ill.App. 444.

W.Va.—Hall v. Ocean Accident & Guarantee Corporation, 9 S.E.2d 45, 122 W.Va. 188.—U. S. Blowpipe Co. v. Spencer, 33 S.E. 342, 46 W. Va. 590.

96. N.C.—Corpus Juris cited in Mc-

Intyre v. Austin, 59 S.E.2d 586, 588, 232 N.C. 186.

50 C.J. p 465 note 11.

97. Ga.—State Medical College v. Rushing, 52 S.E. 333, 124 Ga. 239.

50 C.J. p 465 note 12.

98. Okl.—Keaton v. Taylor, 245 P.

56, 114 Okl. 167.

50 C.J. p 465 note 13.

99. Neb.—Walker v. Stevens, 72 N.W. 1038, 52 Neb. 653.

Ohio.—Williams v. Welton, 28 Ohio St. 451.

1. Okl.—Keaton v. Taylor, 245 P. 56, 114 Okl. 167.

2. N.C.—Folk v. Howard, 72 N.C. 527.

3. W.Va.—Hall v. Ocean Accident & Guarantee Corporation, 9 S.E.2d 45, 122 W.Va. 188.

4. Tex.—Lauderdale v. R. & T. A. Ennis Stationery Co., 16 S.W. 308, 30 Tex. 496.

50 C.J. p 465 note 13.

#### Residence in another county

(1) Where citations to Atascosa County were returned unserved, clerk could issue other process to other counties on verbal request of plaintiff's attorney, without amended or supplemental petition having been filed by plaintiff showing residence of defendants to be in other counties.—Thompson v. Mayhew Lumber Co., Tex.Civ.App., 103 S.W. 2d 1005.

(2) Where petition alleged that all defendants lived in county and citation was issued to the proper officer in county for all defendants, there being no amended pleadings

filed, clerk of district court was without authority to issue citation to another county on ground no return was made, where record showed return was made but without service, since second citation was issued before first citation came into sheriff's hands, and thus before return could have been made.—Walker v. Koger, Tex.Civ.App., 99 S.W.2d 1034, error dismissed.

5. Neb.—Hanna v. Emerson, 64 N.W. 229, 45 Neb. 708.

6. Neb.—Hanna v. Emerson, *supra*.

7. N.C.—Corpus Juris cited in McIntyre v. Austin, 59 S.E.2d 586, 588, 232 N.C. 186.

Tex.—Buchanan v. Hunter, Civ.App., 13 S.W.2d 451.

8. N.C.—McIntyre v. Austin, 59 S.E.2d 586, 232 N.C. 186.

9. Tex.—Gillmour v. Ford, 19 S.W. 442—Winter v. Davis, Civ.App., 10 S.W.2d 181.

10. Tex.—Lauderdale v. R. & T. A. Ennis Stationery Co., 16 S.W. 308, 30 Tex. 496.

11. N.C.—McIntyre v. Austin, 59 S.E.2d 586, 232 N.C. 186.

12. Wash.—Roznik v. Becker, 122 P. 593, 68 Wash. 63.

13. Wash.—Roznik v. Becker, *supra*. 50 C.J. p 465 note 40.

14. Colo.—Farris v. Walter, 31 P. 231, 2 Colo.App. 450.

15. Okl.—Harder v. Woodside, 165 P.2d 841, 196 Okl. 449.

16. Okl.—Harder v. Woodside, *supra*.

## (2) Time of Issuance

The time of issuance of an alias, pluries, successive, or renewed writ should comply with the rules governing time and place of issuance of process generally.

Under the general rules governing the time for issuance of process, discussed supra § 9, which ordinarily control with respect to the time for issuance of alias, pluries, successive, and renewed writs,<sup>17</sup> issuance of such a writ or summons should be made within the time specified by statute or rule of court.<sup>18</sup> Where a summons is returned "not found" at any time after the lapse of the time in which it may be lawfully served, plaintiff is entitled to an alias summons without waiting until the return day named in the summons;<sup>19</sup> and, where the service of the original summons is not valid, the party seeking service is not required to wait until the first service is quashed before having an alias summons issued.<sup>20</sup> In some jurisdictions an order for alias summons should be applied for at the term to which the original summons was made returnable;<sup>21</sup> but in other jurisdictions the court may, at a subsequent term, grant an order allowing the issuance of new process<sup>22</sup> unless there has been long and unexplained delay.<sup>23</sup> The court may order the issuance of a new summons after the ex-

piration of the statutory period in which the clerk of court may issue an alias summons.<sup>24</sup> An alias summons cannot be issued after the suit has terminated,<sup>25</sup> as by abatement,<sup>26</sup> discontinuance by operation of law,<sup>27</sup> or dismissal,<sup>28</sup> unless the dismissal is unauthorized and is subsequently vacated.<sup>29</sup>

*Issuance after service by publication.* Where plaintiff has, by publication, matured his cause of action and obtained the best service possible under the circumstances, he may, on a subsequent change of circumstances making it possible to obtain better service, have a personal summons issued<sup>30</sup> unless judgment has been rendered and entered.<sup>31</sup>

## c. Form and Contents

An alias, pluries, successive, or renewal writ should comply in form and contents with the provisions of statutes and rules of court, and ordinarily such an instrument should be a substantial duplicate of the original.

Alias, pluries, successive, and renewal writs should comply in form and contents with the requirements of statutes and rules of court,<sup>32</sup> but a slight variance or defect in the instrument does not invalidate it.<sup>33</sup> Alias process should be a substantial duplicate of,<sup>34</sup> and show in its body its

17. Pa.—*Molleson v. Molleson*, Com. Pl., 6 Sch.Reg. 111.

Tex.—*Walker v. Koger*, Civ.App., 99 S.W.2d 1034, error dismissed.

18. Mich.—*Home Sav. Bank v. Young*, 295 N.W. 474, 295 Mich. 725.

N.C.—*Mintz v. Frink*, 6 S.E.2d 804, 217 N.C. 101.

**Issuance held timely**

Ill.—*Umbright v. Czajkowski*, 45 N.E.2d 104, 316 Ill.App. 444.

19. N.Y.—*People v. Leask*, 1 Abb.N. Cas. 299.

20. Ohio.—*Paragon Refining Co. v. Higbee*, 153 N.E. 860, 22 Ohio App. 440.

21. N.C.—*Hatch v. Alamance R. Co.*, 113 S.E. 529, 183 N.C. 617.

22. Ga.—*Russell v. Virginia Life Ins. Co.*, 30 S.E. 689, 34 Ga.App. 640.

**Returnable to subsequent term**

On failure to obtain perfection of service by reason of invalidity of process, court may pass order for issuance of new process returnable to subsequent term where plaintiff was not negligent, but proceeded with due diligence to perfect service under first process.—*Georgia Power Co. v. Ozburn*, 187 S.E. 154, 53 Ga.App. 797.

23. Ill.—*Daly v. Chicago*, 129 N.E. 129, 295 Ill. 276.  
50 C.J. p 465 note 29.

24. Cal.—*Hibernia Sav., etc., Soc. v. Cochran*, 75 P. 315, 141 Cal. 653.

25. Pa.—*Spektor v. Northwestern F. & M. Ins. Co.*, 8 Pa.Dist. & Co. 510.

**Effect of setting aside judgment**

Where plaintiff recovered a default judgment after issuance and return of summons, and defendant, by another action, subsequently obtained a judgment setting aside the default judgment, trial court could thereafter, on plaintiff's request, issue an alias summons in original action, since cause of action remained undisposed of.—*George v. Williams*, 37 N.E.2d 21, 109 Ind.App. 623.

26. Pa.—*Spektor v. Northwestern F. & M. Ins. Co.*, 8 Pa.Dist. & Co. 510.

27. Mo.—*Weaver v. Woodling*, 272 S.W. 373, 220 Mo.App. 970.

28. Va.—*Park Land, etc., Co. v. Lane*, 55 S.E. 690, 106 Va. 304.

29. Pa.—*Everett v. Niagara Ins. Co.*, 21 A. 817, 142 Pa. 322.

30. Kan.—*Corpus Juris* quoted in *Ware v. Ware*, 58 P.2d 49, 50, 144 Kan. 121.

W.Va.—*U. S. Oil, etc., Supply Co. v. Gartlan*, 64 S.E. 933, 65 W.Va. 689.

31. Kan.—*Corpus Juris* quoted in *Ware v. Ware*, 58 P.2d 49, 50, 144 Kan. 121.

Mont.—*State v. Carey*, 238 P. 597, 74 Mont. 39.

32. Mass.—*Moriarty v. King*, 57 N.E.2d 633, 317 Mass. 210.

**Failure to show alias character**

Fact that citations issued to two other counties after citations to a third county were returned unserved did not show that they were alias citations did not invalidate process.—*Thompson v. Mayhew Lumber Co.*, Tex.Civ.App., 103 S.W.2d 1005.

**Date of original writ**

Under court rules a separate summons is itself a process of the court, and is required to state the day, month, and year of the return of the original writ.—*Moriarty v. King*, 57 N.E.2d 633, 317 Mass. 210.

**Rubber stamp**

Stamp used by common pleas court of City of Detroit on summons, authorizing particular person not interested in the cause to serve the writ, is used to designate particular person other than constable to make service, has nothing to do with pluries summons, and hence is not required on all of successive pluries summonses.—*Schram v. Rosenfield*, D.C.Mich., 36 F.Supp. 449.

33. Mich.—*Rood v. McDonald*, 7 N.W.2d 95, 303 Mich. 634.

34. Idaho.—*Hill v. Morgan*, 76 P. 823, 9 Idaho 718.

Va.—*Richmond, etc., R. Co. v. Rudd*, 14 S.E. 361, 88 Va. 648.  
50 C.J. p 466 note 51.

relation to the original process,<sup>35</sup> but it is not required to be more than a substantial duplicate;<sup>36</sup> a change in its form, in order to conform to a new statutory requirement, is proper.<sup>37</sup> Where an alias summons contains the information which was set out in the former summons, the fact that it contains more information does not invalidate it;<sup>38</sup> and the fact that an alias citation does not show the number of citations previously issued does not render it invalid.<sup>39</sup> While it is proper for an alias summons to employ the words "we command you, as we have before commanded you,"<sup>40</sup> nevertheless the omission of such words does not render the process void where it is in substance an alias writ;<sup>41</sup> and in jurisdictions wherein a second or subsequent summons is not an alias or pluries writ it need not contain the clause, "as we have heretofore commanded you," or, "as we have often commanded you."<sup>42</sup> Where plaintiff has discontinued as to a defendant not served, and issues a new summons as against such defendant, the fact that the new summons contains recitals as to the issuance and failure to serve the former process will not render it void.<sup>43</sup>

**Naming parties defendant.** It has been held that an alias writ need not name all the parties defendant;<sup>44</sup> but there is also authority to the contrary.<sup>45</sup> Also it has been both affirmed<sup>46</sup> and denied<sup>47</sup> that an alias writ may name a party defendant who was not named in the original process.

**Date.** Every subsequent process must be dated on the day of the return of the preceding process.<sup>48</sup>

## § 22. Alteration of Process

Under the practice prevailing in some jurisdictions an alteration made in a process after issuance but before service will invalidate it. Alterations after issuance and service may invalidate the writ.

Alteration of a writ after issuance and before service renders it void under the practice prevailing in some jurisdictions,<sup>49</sup> but in other jurisdictions an alteration before service may be regarded as a nonfatal irregularity,<sup>50</sup> although alteration after service may invalidate the process.<sup>51</sup>

## § 23. Supplying Lost Process

In case of the loss or destruction of process a copy thereof may be supplied in place of the original by an order of court.

Where process has been lost or destroyed, a copy thereof may be supplied in lieu of the original,<sup>52</sup> by, and only by, an order of court<sup>53</sup> made after notice has been given<sup>54</sup> and proper and sufficient evidence has been received.<sup>55</sup> An affidavit that the writ was duly served and thereafter lost should not be received in lieu of the process.<sup>56</sup> In some jurisdictions, where a writ or summons has been lost or destroyed, another, or alias, writ or summons may be issued or filed,<sup>57</sup> and it is within the power of the court to order a lost alias summons

35. N.C.—Hatch v. Alamance R. Co., 112 S.E. 529, 183 N.C. 617.  
50 C.J. p 466 note 52.

36. Mo.—Woodward First Nat. Bank v. Proffitt, App., 293 S.W. 524.  
50 C.J. p 466 note 53.

37. Md.—State v. Logan, 33 Md. 1.

38. Mo.—Woodward First Nat. Bank v. Proffitt, App., 293 S.W. 524.

39. Tex.—Buchanan v. Hunter, Civ. App., 13 S.W.2d 451.

40. Colo.—Farris v. Walters, 31 P. 231, 2 Colo.App. 450.  
50 C.J. p 466 note 57.

41. Mo.—Woodward First Nat. Bank v. Proffitt, App., 293 S.W. 524.

42. Or.—Lane v. Ball, 160 P. 144, 163 P. 975, 83 Or. 404.

43. Ala.—Smith v. Blakeney, 8 Port. 128.

44. Ala.—Lewis v. Grace, 44 Ala. 307.

Ill.—Reed v. Boyd, 84 Ill. 66.

45. Ky.—Morgan v. Morgan, 2 Bibb 388.

46. Cal.—Doyle v. Hampton, 116 P. 39, 159 Cal. 729.  
50 C.J. p 466 note 64.

47. N.Y.—Elias v. Hayes, 53 N.Y.S. 858, 24 Misc. 754.  
50 C.J. p 466 note 65.

48. Tenn.—Slatton v. Jonson, 4 Hayw. 197.

49. Conn.—Denison v. Crafts, 49 A. 851, 74 Conn. 38.  
50 C.J. p 466 note 68—5 C.J. p 504 note 15.

50. Neb.—Ramirez v. Chicago, B. & Q. R. Co., 219 N.W. 1, 116 Neb. 740.  
N.J.—Gondas v. Gondas, 134 A. 615, 99 N.J.Eq. 473.

50 C.J. p 466 note 69—5 C.J. p 504 note 15 [a].

### Changing dates

Irregularity by district court clerk in changing dates of unserved summons did not necessarily invalidate subsequent service.—Ramirez v. Chicago, B. & Q. R. Co., 219 N.W. 1, 116 Neb. 740.

51. Me.—Childs v. Ham, 23 Me. 74.

52. Minn.—State v. Le Roy Sargent & Co., 177 N.W. 633, 145 Minn. 448.  
50 C.J. p 466 note 72.

**Objection to further proceedings** in action of assumpsit in municipal court on ground that original writ

and return cannot be found is unavailable, since record of court may be perfected by filing copy of writ and return.—Smith v. Tallman, 175 A. 857, 87 N.H. 176.

53. Ill.—Long v. Sutter, 67 Ill. 185.

54. Ill.—Long v. Sutter, supra.

55. Ill.—Smith v. Trimble, 27 Ill. 152.  
50 C.J. p 466 note 75.

### Insufficient proof

Affidavit for issuance of an alias summons filed more than one year after commencement of action, alleging merely that affiant could not find the original summons paper for the case and not alleging that original summons had been lost, was insufficient and order for issuance of such alias summons was void where record did not set forth that original summons was ever issued.—Brock v. Fouchy, 172 P.2d 945, 76 Cal.App.2d 363.

56. Ky.—Littell v. Cassady, Hard. 227.

57. N.H.—Taylor v. Cobleigh, 16 N. H. 105.  
50 C.J. p 466 note 77.



to be replaced by another on being satisfied of such loss.<sup>58</sup>

## § 24. Warning Order

In some jurisdictions a warning order may be substituted for service by publication. Such an order should be made only on compliance with statutory requirements.

Under the practice prevailing by statute in some jurisdictions so-called "warning orders" have been substituted for service by publication,<sup>59</sup> and such an order is constructive notice of the pendency of the suit,<sup>60</sup> and may be regarded as the beginning of the action.<sup>61</sup> While the statutory provisions are subject to strict construction,<sup>62</sup> substantial compliance therewith is essential and sufficient to confer jurisdiction on the court.<sup>63</sup> While the code or statutory requirements may be sufficiently complied with by a properly verified petition containing the requisite statements,<sup>64</sup> the rule is otherwise as to a petition which is not verified,<sup>65</sup> or as to an affi-

davit which does not contain the requisite statements,<sup>66</sup> such as a statement relative to defendant's nonresidence,<sup>67</sup> his absence from the state,<sup>68</sup> or as to the country wherein he resides.<sup>69</sup>

If the affidavit is made by plaintiff's agent or attorney, there must be a showing as to affiant's connection with plaintiff and the absence of plaintiff from the county.<sup>70</sup> The court's order pursuant to which notice to appear is served on a nonresident is not a "writ" subject to statutory and constitutional requirements of seal and teste,<sup>71</sup> and the warning order is in the nature of a rule rather than a process.<sup>72</sup> Under some practice it has been held that where no personal judgment could have been rendered, and a nonresident defendant was summoned constructively in an action on contract, there was no occasion for a warning order.<sup>73</sup> The making of the affidavit a short time before its filing and the issuance of the order is not fatal.<sup>74</sup>

## II. SERVICE OF PROCESS

### A. IN GENERAL

## § 25. Nature, Necessity, and Modes of Service Generally

Service of process is the giving of such actual or constructive notice of a suit or other legal proceeding to the defendant as makes him a party and compels him to appear or suffer judgment by default; and what service shall be deemed sufficient is, subject to some limita-

tions, to be determined by the legislative power of the sovereignty in which the proceeding is instituted.

Service of process is the giving of such actual or constructive notice of a suit or other legal proceeding to defendant as makes him a party thereto, and compels him to appear or suffer judgment by de-

58. Idaho.—Elliott & Healy v. Wirth, 198 P. 757, 34 Idaho 797.

59. Ky.—Brownfield v. Dyer, 7 Bush 505—Stump v. Beatty, 8 Dana 14.

50 C.J. p 498 note 18 [b].

60. Ky.—Taylor v. Gibbs, 3 B.Mon. 316—Chiles v. Boon, 3 B.Mon. 82.

61. Ky.—Hoffman v. Brungs, 83 Ky. 400—Anderson v. Sutton, 2 Duv. 480.

62. Ky.—Noble v. Noble, 195 S.W. 2d 319, 302 Ky. 679.

63. U.S.—Pen-Ken Gas & Oil Corporation v. Warfield Natural Gas Co., C.C.A.Ky., 137 F.2d 871, certiorari denied 64 S.Ct. 431, 320 U.S. 800, 88 L.Ed. 483, rehearing denied 64 S.Ct. 634, 321 U.S. 803, 88 L.Ed. 1089.

Ky.—Hill v. Hill, 185 S.W.2d 245, 299 Ky. 351—Ohio Oil Co. v. West, 145 S.W.2d 1035, 284 Ky. 796.

50 C.J. p 529 note 59 [a], p 531 note 96 [b].

#### Affidavit for order

Ky.—Jones v. Blankenship, 232 S.W. 2d 1019—Noble v. Noble, 195 S.W. 2d 319, 302 Ky. 679—Miller v. Hill, 168 S.W.2d 769, 293 Ky. 242.

50 C.J. p 467 note 80.

Making of warning order by clerk has been held proper practice.—Anderson v. Sutton, 2 Duv. Ky., 480—50 C.J. p 528 note 35 [b].

64. Ky.—Miller v. Hill, 168 S.W.2d 769, 293 Ky. 242.

50 C.J. p 467 note 81.

#### Affidavit as sufficient proof

Affidavit for warning order, unless controverted by an affidavit of defendant, is sufficient evidence of the facts therein stated.—Railey v. Railey, 69 S.W. 414, 23 Ky.L. 1891.

65. Ky.—Bond v. Wheeler, 247 S.W. 708, 197 Ky. 437.

66. Ky.—Leonard v. Williams, 265 S.W. 618, 205 Ky. 218—Bond v. Wheeler, 247 S.W. 708, 197 Ky. 437.

67. Ky.—Appleton v. Southern Trust Co., 51 S.W.2d 447, 244 Ky. 453.

#### Allegation merely as to absence insufficient

Allegation that defendant is absent from state, without alleging that he is nonresident, would not authorize issuance of warning order.—Appleton v. Southern Trust Co., supra.

68. Ky.—South Kentucky Building & Loan Ass'n v. Robinson, 118 S.W.2d 766, 274 Ky. 425—Bowles v. Bowles, 60 S.W.2d 985, 249 Ky. 428.

69. Ky.—Goodman v. Redford, 70 S.W.2d 10, 253 Ky. 707.

70. Ky.—Moorman v. Taylor, 147 S.W.2d 1021, 285 Ky. 347.

71. Mass.—Taplin v. Atwater, 8 N.E.2d 786, 297 Mass. 302.

72. U.S.—Pen-Ken Gas & Oil Corporation v. Warfield Natural Gas Co., C.C.A.Ky., 137 F.2d 871, certiorari denied 64 S.Ct. 431, 320 U.S. 800, 88 L.Ed. 483, rehearing denied 64 S.Ct. 634, 321 U.S. 803, 88 L.Ed. 1089.

Ky.—Northern Bank v. Hunt, 19 S.W. 3, 93 Ky. 67, 14 Ky.L. 1.

50 C.J. p 496 note 8 [a] (3).

73. Ark.—W. T. Rawleigh Co. v. Disheroon, 134 S.W.2d 4, 199 Ark. 479.

74. Ark.—Cannon v. Lunsford, 115 S.W. 940, 89 Ark. 64.

50 C.J. p 529 note 55 [a], [c].

fault;<sup>75</sup> and "service" in this connection means the execution of process<sup>76</sup> or the particular act of the officer by which the copy of the citation was communicated.<sup>77</sup> Service of process is a matter of adjective law, since it relates to, and deals with, the mechanics of practice and procedure, the legal machinery by which the substantive law is made effective.<sup>78</sup> The service of a summons is ministerial and not judicial in its nature.<sup>79</sup>

There are two general methods of service of process; one is actual, and the other constructive.<sup>80</sup> Actual service is made by reading the original process to defendant, or by delivering to him a copy thereof;<sup>81</sup> and constructive service, which is a substituted service, is made by leaving a copy of the process at defendant's residence when he is

absent, or by posting or publishing notice of the pendency of the suit, and mailing a copy of the notice posted or published to defendant.<sup>82</sup> When not otherwise defined, "service" means personal service.<sup>83</sup>

While it has been said that the common-law rule with respect to service of process, established by centuries of precedent, is binding in the absence of statute,<sup>84</sup> subject to certain limitations, service of process is wholly a statutory matter;<sup>85</sup> and what service shall be deemed sufficient is to be determined by the legislative power of the state or sovereignty in which the proceeding is instituted, subject only to the limitation that the service must be such as may reasonably be expected to give the notice desired,<sup>86</sup> and any statutory service which

75. Mo.—State v. Myers, 104 S.W. 1146, 126 Mo.App. 544.  
50 C.J. p 467 note 88.

Commencement of action by service of process see Actions § 129 b (8).  
Service of process as required:

By due process of law see Constitutional Law § 619 b.  
To confer jurisdiction over defendant see Courts § 83 b.

#### "Defective service" and "defective return" distinguished

A difference exists between "defective service of process" and a "defective return of service", in that the former is a fact while the latter is evidence thereof.—Tioga Coal Corporation v. Silman, 22 S.E.2d 873, 876, 125 W.Va. 58.

The word "served" as used in connection with a citation or process is a technical term and must be taken in its restricted and not its popular sense.—Philadelphia v. Cathcart, 10 Phila., Pa., 103—57 C.J. p 274 notes 15, 17, 18.

#### Purpose of service is:

(1) To apprise defendant of the nature of the demand made against him.

La.—Weldon v. Gandy, App., 195 So. 655.

Pa.—Vaughn v. Love, 188 A. 299, 324 Pa. 276, 107 A.L.R. 1336.  
50 C.J. p 467 note 88 [a].

(2) To insure actual notice.  
Conn.—Clegg v. Bishop, 136 A. 102, 105 Conn. 564.

Wis.—Westport Tp. v. City of Madison, 19 N.W.2d 309, 247 Wis. 326.  
50 C.J. p 467 note 88 [a].

(3) To give court jurisdiction.—State ex rel. Mills Automatic Merchandising Corporation v. Hogan, 103 S.W.2d 495, 232 Mo.App. 291—50 C.J. p 467 note 88 [a] (3).

76. Ala.—Walker v. State, 52 Ala. 192, 193.

Tex.—McGhee v. Maxey, Civ.App., 230 S.W. 735, 736.

77. Tex.—Continental Ins. Co. v. Milliken, 64 Tex. 46, 47.

78. N.Y.—Kuris v. Pepper Poultry Co., 21 N.Y.S.2d 791, 174 Misc. 801.

79. Ariz.—Bryant v. Bryant, 14 P.2d 712, 713, 40 Ariz. 519.

80. Del.—McCoy v. Hickman, 15 A. 2d 427, 1 Terry 587.

N.J.—Corpus Juris cited in Ruhle v. Caffrey, 174 A. 204, 206, 113 N.J. Law 240, reversed on other grounds 180 A. 834, 115 N.J. Law 517.

N.C.—Stevens v. Cecil, 199 S.E. 161, 214 N.C. 217.

50 C.J. p 467 note 87 [a].

81. Del.—McCoy v. Hickman, 15 A. 2d 427, 1 Terry 587.

N.J.—Ruhle v. Caffrey, 174 A. 204, 113 N.J. Law 240, reversed on other grounds 180 A. 834, 115 N.J. Law 517.

#### Personal service:

By delivery of copy see infra § 36.

By reading original process to defendant see infra § 35.

82. Del.—McCoy v. Hickman, 15 A. 2d 427, 1 Terry 587.

N.J.—Ruhle v. Caffrey, 174 A. 204, 113 N.J. Law 240, reversed on other grounds 180 A. 834, 115 N.J. Law 517.

Substituted service generally see infra §§ 43–53.

83. Tex.—Erwin v. Holliday, 112 S.W.2d 177, 131 Tex. 69.

Personal service see infra §§ 26–42.

84. Pa.—Koll v. Pickford, 44 A.2d 276, 353 Pa. 118—Mid-City Bank & Trust Co. v. Myers, 23 A.2d 430, 343 Pa. 465—Giampalo v. Taylor, 6 A.2d 499, 335 Pa. 121—Williams v. Meredith, 192 A. 924, 326 Pa. 570, 115 A.L.R. 890—Heaney v. Borough of Mauch Chunk, 185 A. 732, 322 Pa. 487—Hartman v. Donahue, 16 A.2d 691, 142 Pa. Super. 382—Arcady Farms Milling Co. v. Rose, 63 Pa. Dist. & Co. 555

—Binder v. Epstein, 41 Pa. Dist. & Co. 640.

85. Mo.—State ex rel. Minihan v. Aronson, 165 S.W.2d 404, 350 Mo. 309.

86. U.S.—Madden v. Truckaway Corporation, D.C. Minn., 46 F. Supp. 702.

Ala.—Krasner v. Gurley, 29 So.2d 224, 248 Ala. 686.

Del.—Webb Packing Co. v. Harmon, 196 A. 158, 9 W.W. Harr. 22.

Ky.—Schaaf v. Brown, 200 S.W.2d 909, 304 Ky. 466.

N.J.—Stevens v. Associated Mortg. Co. of New Jersey, 152 A. 461, 107 N.J. Eq. 297, affirmed 158 A. 343, 110 N.J. Eq. 70.

N.Y.—National City Bank of New York v. Desz, 24 N.E.2d 112, 281 N.Y. 430—Maloney v. Ferguson, 50 N.Y.S.2d 937, 182 Misc. 564.

N.C.—Merchants Bank v. Weaver, 197 S.E. 551, 213 N.C. 767.

50 C.J. p 467 note 97.

Enactment of statutes regulating service of process as within authority of legislature generally see Constitutional Law § 128.

#### Constitutional requisites of statute

A state or territorial statute providing for service of process on non-residents must make ample provision for the giving of actual notice to defendants and for furnishing them with ample opportunity to appear in actions brought against them and offer whatever defenses they may have, and such statutes cannot discriminate against non-residents.—Anderson v. Scholes, D.C. Alaska, 83 F. Supp. 681.

#### Particular statutes held not unconstitutional

(1) Statutory provision that non-resident bringing suit in state must answer in action, brought by opposite party serving writ on attorney, as applied to counterclaims arising out of contract sued on by non-resident.—Frank L. Young Co. v. Mc-

reasonably accomplishes that end answers the requirement of justice.<sup>87</sup> Legislative rules as to service of process in derogation of common law must be strictly construed.<sup>88</sup> The proper method of serving process must be adopted in order to render the service effective.<sup>89</sup>

Neal-Edwards Co., Mass., 51 S.Ct. 538, 283 U.S. 398, 75 L.Ed. 1140.

(2) Statute providing that all process issued on institution of suit which may be begun in county where defendant does not reside may be served by the sheriff of county or the constable of the justice district in which the defendant is found.—Crum v. Baily, 184 So. 774, 135 Fla. 192.

(3) Statutes governing service of process by publication.—Ellsworth v. Ellsworth, 71 N.Y.S.2d 522, 189 Misc. 776.

(4) Statutes providing for extra-territorial service of process within the commonwealth.—Winters v. Rimersburg Coal Co., 61 A.2d 837, 360 Pa. 321—Heaney v. Borough of Mauch Chunk, 185 A. 732, 322 Pa. 487—Gossard v. Gossard, 178 A. 837, 319 Pa. 129.

(5) Statutes authorizing service on agent of nonresident doing business in commonwealth and requiring actual written notice to defendant before judgment, and statute requiring registration of fictitious business name as condition to doing business and requiring nonresident fictitious name certificate to state name of local agent.—Stoner v. Higginson, 175 A. 527, 316 Pa. 481.

#### Statutes construed and held to govern

Cal.—Hunstock v. Estate Development Corporation, 138 P.2d 1, 22 Cal.2d 205, 148 A.L.R. 968.  
N.Y.—La Monica v. Krauss, 76 N.Y. S.2d 520, 191 Misc. 589.

#### Purpose and effect generally

(1) The statutes providing manner in which summons shall be served are general in terms and all inclusive in scope and do not indicate an intent to exclude any particular class of cases.—Smith v. Smith, 39 S.E.2d 458, 225 N.C. 544.

(2) The legislature, when it enacted the civil practice act, had in mind the simplifying of service.—Gray v. Kroger Grocery & Baking Co., 13 N.E.2d 672, 294 Ill.App. 151.

(3) Statute relating to the service of process on nonresident defendants did not have effect of domesticating the parties to litigation in which service therein provided for was made on nonresident defendant by nonresident plaintiff.—Vassili's Adm'r v. Scarsella, 166 S.W.2d 64, 292 Ky. 153.

(4) Even though a statute may be a special venue statute creating a new right and a new remedy, if it fails to provide the manner in which process is to be served, the general

service statutes apply.—State ex rel. Minihan v. Aronson, 165 S.W.2d 404, 350 Mo. 809.

87. N.J.—Reichert v. United Brotherhood of Carpenters and Joiners of America, 183 A. 728, 14 N.J. Misc. 106.

N.Y.—Rawstorne v. Maguire, 192 N. E. 294, 265 N.Y. 204—Alvord & Alvord v. Patenotre, 92 N.Y.S.2d 514, 196 Misc. 524.  
50 C.J. p 467 note 98.

88. U.S.—Rigutto v. Italian Terrazzo Mosaic Co., D.C.Pa., 93 F.Supp. 124.

N.Y.—Korn v. Lipman, 94 N.E. 861, 201 N.Y. 404—Lambert v. Lambert, 278 N.Y.S. 580, 244 App.Div. 78, reversed on other grounds 1 N.E. 2d 833, 270 N.Y. 422.

Pa.—McCall v. Gates, 47 A.2d 211, 354 Pa. 158—Null v. Staiger, 4 A. 2d 883, 333 Pa. 370—Williams v. Meredith, 192 A. 924, 326 Pa. 570, 115 A.L.R. 890—Atlantic Seaboard Natural Gas Co. v. Whitten, 173 A. 305, 315 Pa. 529, 93 A.L.R. 615—Binder v. Epstein, 41 Pa.Dist. & Co. 640—McFadden v. McFadden, Com.Pl., 9 Fay.L.J. 133.

R.I.—Home Sav. Bank v. Rolando, 189 A. 27, 57 R.I. 205.

Tenn.—Pinkerton v. Fox, 129 S.W.2d 514, 23 Tenn.App. 159.

#### Proceeding without personal service

(1) Only personal service of process was recognized at common law, and when other service is authorized by statute it is strictissimi juris.—Southern Mills v. Armstrong, 27 S. E.2d 281, 223 N.C. 495, 148 A.L.R. 1248.

(2) Thus, constructive service is in derogation of the common law, and a statute authorizing it is to be strictly construed.

U.S.—Harlan v. Spark, C.C.A.N.M., 125 F.2d 502.

Fla.—McGee v. McGee, 22 So.2d 788, 156 Fla. 346.

Ill.—Conley v. McNamara, 79 N.E. 2d 645, 334 Ill.App. 396.

Nev.—Zeig v. Zeig, 198 P.2d 724, 65 Nev. 464.

Pa.—Commonwealth v. Lutz, Com. Pl., 43 Sch.Leg.Rec. 148, 61 York Leg.Rec. 150.

**Exceptional methods of obtaining jurisdiction over persons not found within the state must be confined to the cases and exercised in the way indicated by statute, which must be strictly construed.**—Potter v. Potter, 2 A.2d 93, 9 W.W.Harr., Del., 487—Webb Packing Co. v. Harmon, 196 A. 158, 9 W.W.Harr., Del., 22.

#### Particular words or phrases construed

Ga.—White v. Glasgow, 19 S.E.2d

305, 193 Ga. 609, followed in 19 S. E.2d 310, 193 Ga. 618.

89. Ala.—St. Mary's Oil Engine Co. v. Jackson Ice & Fuel Co., 138 So. 334, 224 Ala. 152.

Del.—Nye Odorless Incinerator Corporation v. Nye Odorless Crematory Co., 156 A. 176, 18 Del.Ch. 179.

Ill.—Scharlau v. Lombard State Bank, 278 Ill.App. 504.

Mo.—Corpus Juris cited in State ex rel. Minihan v. Aronson, 165 S.W. 2d 404, 407, 350 Mo. 309—State ex rel. Mueller Baking Co. v. Calvird, 92 S.W.2d 184, 338 Mo. 601—Corpus Juris cited in State ex rel. Ferrocarriles Nacionales de Mexico v. Rutledge, 56 S.W.2d 28, 37, 331 Mo. 1015—State ex rel. Federal Reserve Life Ins. Co. of Kansas City, Kan., v. Wright, App., 88 S. W.2d 427.

Okl.—Corpus Juris quoted in Lovins v. State, 293 P. 273, 274, 49 Okl.Cr. 200.

Pa.—Commonwealth v. Lutz, Com. Pl., 43 Sch.Leg.Rec. 148, 61 York Leg.Rec. 150.

W.Va.—Evans v. Hale, 50 S.E.2d 682, 131 W.Va. 808—State ex rel. Staley v. Hereford, 45 S.E.2d 738, 131 W.Va. 84.

50 C.J. p 467 note 99.

**Service of process in ancillary proceedings to bring in new parties is governed by rules obtaining in original suit.**—Schmitt v. Lamb, D.C. Miss., 43 F.2d 770, reversed on other grounds, C.C.A., 48 F.2d 533, affirmed Lamb v. Schmitt, 52 S.Ct. 317, 285 U.S. 222, 76 L.Ed. 720.

#### Seizure of property

(1) In order to give jurisdiction, in absence of personal service on nonresident defendant, property of latter within territorial jurisdiction must be validly seized under court's process.

La.—Nelson v. Coppage, 128 So. 529, 13 La.App. 520.

Ohio.—Francis v. Allen, Com.Pl., 79 N.E.2d 803.

(2) Court was held without jurisdiction, where returns on writ of attachment showed no property of nonresident defendant not personally served, and garnishee's answers to interrogatories disclosed no indebtedness to defendant.—Nelson v. Coppage, supra.

(3) Control and seizure of defendant's property by court as prerequisite to service by publication see infra § 59.

#### Operation of statute

(1) Constructive service statute is intended to cover causes arising or commenced subsequent to effective

and it must be served by a proper officer or person.<sup>90</sup> As a general rule, constructive service is sufficient to give the court jurisdiction in an action in rem,<sup>91</sup> and insufficient where the object of the action is to determine personal rights and obligations of defendant.<sup>92</sup> Although a substantial<sup>93</sup> or reasonable<sup>94</sup> compliance with the directions of some statutes as to service seems to have been deemed sufficient, the general rule is that directions of a statute as to the service of process are

mandatory<sup>95</sup> and must be strictly followed;<sup>96</sup> and it has been held that a stricter observance is required in constructive than in personal service.<sup>97</sup> The validity of the service does not depend on what is done with the summons after the service is made.<sup>98</sup> Where an action is brought against several named defendants, but only one is served, he alone has a status as defendant in the cause.<sup>99</sup> Service of process may be waived.<sup>1</sup>

date of statute, and any cause instituted prior to such effective date must be continued under law which was in force at time cause was instituted.—*Ake v. Chancey*, 13 So.2d 6, 152 Fla. 677.

(2) Complainant who filed a bill for declaratory judgment prior to effective date of constructive service statute could not, after such effective date and seven years after filing of bill, attempt constructive service under the statute.—*Ake v. Chancey*, supra.

90. U.S.—*Petty v. Dock Contractor Co.*, D.C.Pa., 283 F. 338, 341.

Okl.—*Corpus Juris* quoted in *Lovins v. State*, 293 P. 273, 274, 49 Okl. Cr. 200.

Authority or capacity to serve see *infra* §§ 27–30.

91. Neb.—*In re Kierstead's Estate*, 259 N.W. 740, 128 Neb. 654.

N.M.—*State ex rel. Truitt v. District Court of Ninth Judicial Dist.*, Curry County, 96 P.2d 710, 44 N.M. 16, 126 A.L.R. 651.

Pa.—*Commonwealth v. Lutz*, Com. Pl., 43 Sch.Leg.Rec. 148, 61 York Leg.Rec. 150.

Tex.—*Williams v. Knox*, Civ.App., 207 S.W.2d 151, refused no reversible error.

92. Ohio.—*Francis v. Allen*, Com.Pl., 79 N.E.2d 803.

93. Puerto Rico.—*Andino v. Canales*, 26 Puerto Rico 122—*Orcasitas v. Marquez*, 19 Puerto Rico 454.

#### Constructive service

Generally, provisions of constructive service statutes must be substantially complied with.—*State v. City of Sarasota*, 17 So.2d 109, 154 Fla. 250.

94. Mo.—*State v. Sale*, 132 S.W. 1119, 232 Mo. 166.

95. N.Y.—*In re Federman*, 267 N.Y.S. 126, 149 Misc. 4.

Okl.—*Chaney v. Reddin*, 205 P.2d 310, 201 Okl. 264, 8 A.L.R.2d 337—*Corpus Juris* quoted in *Lovins v. State*, 293 P. 273, 274, 49 Okl. Cr. 200.

Tex.—*Mitchell v. Rutter*, Civ.App., 221 S.W.2d 979.

50 C.J. p 468 note 5.

96. N.Y.—*Korn v. Lipman*, 94 N.E. 861, 201 N.Y. 404—*Lambert v. Lambert*, 278 N.Y.S. 580, 244 App. Div. 78, reversed on other grounds 1 N.E.2d 833, 270 N.Y. 422.

Okl.—*Chaney v. Reddin*, 205 P.2d 310, 201 Okl. 264, 8 A.L.R.2d 337—*Corpus Juris* quoted in *Lovins v. State*, 293 P. 273, 274, 49 Okl. Cr. 200.

Pa.—*Kunsman v. Brady*, 20 Pa. Dist. & Co. 533—*McFadden v. McFadden*, Com.Pl., 9 Fay.L.J. 133.

R.I.—*Home Sav. Bank v. Rolando*, 189 A. 27, 57 R.I. 205.  
50 C.J. p 468 note 6.

#### Service other than personal service

(1) A statute permitting service of process other than by personal service must be strictly complied with in order to confer jurisdiction on the court.

U.S.—*Fisher v. Jordan*, C.C.A.Tex., 116 F.2d 183, certiorari denied *Jordan v. Fisher*, 61 S.Ct. 734, 312 U.S. 697, 85 L.Ed. 1132.

N.Y.—*Air Conditioning Training Corp. v. Pirrote*, 60 N.Y.S.2d 85, 270 App.Div. 391.

N.C.—*Southern Mills v. Armstrong*, 27 S.E.2d 231, 223 N.C. 495, 148 A.L.R. 1248.

(2) Thus, a statute authorizing constructive service of process must be exactly or faithfully followed. Fla.—*McGee v. McGee*, 22 So.2d 788, 156 Fla. 346.

Nev.—*Brockbank v. Second Judicial Dist. Court in and for Washoe County*, 201 P.2d 299, 65 Nev. 781.

**Statute in derogation of common law**  
Only rigid and exact compliance with statutory provisions will confer jurisdiction by method differing from that of common law.—*Haake v. Union Bank & Trust Co.*, Mo.App., 54 S.W.2d 459.

97. Mont.—*Holt v. Sather*, 264 P. 108, 81 Mont. 442.

Okl.—*Addington First State Bank v. Latimer*, 149 P. 1099, 48 Okl. 104.  
50 C.J. p 468 note 7.

98. N.Y.—*Baker v. New York Cent. R. Co.*, 16 N.Y.S.2d 78, 258 App.Div. 854—*Beck v. North Packing & Provision Co.*, 144 N.Y.S. 602, 159 App.Div. 418.

99. U.S.—*Phillipbar v. Derby*, D.C.N.Y., 11 F.Supp. 709, affirmed, C.C.A., 85 F.2d 27.

1. Cal.—*Luckey v. Superior Court in and for Los Angeles County*, 287 P. 450, 209 Cal. 860.

Ga.—*Henry & Co. v. Johnson*, 173 S.E. 659, 178 Ga. 541.

Miss.—*Townsend v. Beavers*, 188 So. 1, 185 Miss. 312, suggestion of error overruled 189 So. 90, 185 Miss. 312.

Mont.—*Haggerty v. Sherburne Mercantile Co.*, 186 P.2d 884, 120 Mont. 386.

N.Y.—*Daley v. Dennis*, 242 N.Y.S. 408, 137 Misc. 1.

N.C.—*Moseley v. Deans*, 24 S.E.2d 680, 222 N.C. 731.

General appearance as waiving or dispensing with service of process see *Appearances* § 17 b.

#### Waiver of:

Objections to service see *infra* § 113.

Personal service see *infra* § 26.

"Service of process affects only jurisdiction over the person and may be waived."—*State ex rel. Murphy v. Second Judicial Dist. Court in and for Silver Bow County*, 41 P.2d 1113, 1115, 99 Mont. 209.

#### Must be clearly established

Claimed waiver of service of process must be clearly established and shown on record.—*Ex parte Cullinan*, 139 So. 255, 224 Ala. 263, 81 A.L.R. 160.

#### Service held not waived by:

(1) Interveners' exception of "want of citation" because of illegal service of citation, with supplemental petition, on their attorneys of record, who had filed proceedings claiming interveners' ownership of property attached by plaintiff.—*Adams v. Ross Amusement Co.*, 161 So. 601, 182 La. 252.

(2) Oral agreement out of court by defendant's counsel to a setting of case for trial.—*Templeman v. Hester*, 29 N.E.2d 216, 65 Ohio App. 62.

#### Statute providing for waiver construed

Miss.—*Cullens v. Cullens*, 193 So. 805, 187 Miss. 731.

## B. PERSONAL SERVICE

## § 26. In General

Personal service ordinarily means actual delivery of the process to the defendant in person, and in the absence of a statute authorizing a substitute method, service must be personal.

Personal service ordinarily means actual delivery of the process to defendant in person,<sup>2</sup> and does not include service by leaving a copy at his usual place of abode,<sup>3</sup> or his home,<sup>4</sup> or at his office,<sup>5</sup>

or by delivery to some one else for him,<sup>6</sup> although, as used in some statutes, the term "personally served" has been held to include such service<sup>7</sup> and to be used in contradistinction to service by publication<sup>8</sup> or by mail.<sup>9</sup>

Personal service is the ordinary method of obtaining jurisdiction over the person of defendant,<sup>10</sup> and, in the absence of a statute authorizing a substitute method,<sup>11</sup> service must be personal;<sup>12</sup> but

2. U.S.—*Martin v. Better Taste Popcorn Co.*, D.C.Iowa, 89 F.Supp. 754.

Ala.—*Corpus Juris* cited in *Henry v. Drennen Motor Car Co.*, 180 So. 563, 566, 235 Ala. 559.

Ky.—*Newsome v. Hall*, 161 S.W.2d 629, 290 Ky. 486, 140 A.L.R. 818.

Minn.—*Jaspersen v. Jacobson*, 27 N.W.2d 788, 224 Minn. 76—*Thomas v. Hector Const. Co.*, 12 N.W.2d 769, 216 Minn. 207.

N.J.—*Corpus Juris* cited in *Ruhle v. Caffrey*, 174 A. 204, 206, 113 N.J. Law 240, reversed on other grounds 180 A. 834, 115 N.J. Law 517.

Ohio.—*Sears v. Welmer*, 55 N.E.2d 413, 143 Ohio St. 312.

Okl.—*Corpus Juris* cited in *Colby v. Jacobs*, 64 P.2d 881, 882, 179 Okl. 170.

50 C.J. p 468 note 9.

3. Minn.—*Jaspersen v. Jacobson*, 27 N.W.2d 788, 224 Minn. 76.

Neb.—*Henze v. Mitchell*, 140 N.W. 149, 93 Neb. 278, Ann.Cas.1914C 108.

N.J.—*Corpus Juris* cited in *Ruhle v. Caffrey*, 174 A. 204, 206, 113 N.J. Law 240, reversed on other grounds 180 A. 834, 115 N.J. Law 517.

50 C.J. p 468 note 10.

4. N.J.—*Corpus Juris* cited in *Ruhle v. Caffrey*, 174 A. 204, 206, 113 N.J. Law 240, reversed on other grounds 180 A. 834, 115 N.J. Law 517.

Okl.—*Corpus Juris* cited in *Colby v. Jacobs*, 64 P.2d 881, 882, 179 Okl. 170.

50 C.J. p 468 note 11.

5. Ga.—*Bennett v. Taylor*, 138 S.E. 273, 36 Ga.App. 752.

N.J.—*Corpus Juris* cited in *Ruhle v. Caffrey*, 174 A. 204, 206, 113 N.J. Law 240, reversed on other grounds 180 A. 834, 115 N.J. Law 517.

6. Ky.—*Newsome v. Hall*, 161 S.W. 2d 629, 290 Ky. 486, 140 A.L.R. 818.

N.J.—*Corpus Juris* cited in *Ruhle v. Caffrey*, 174 A. 204, 206, 113 N.J. Law 240, reversed on other

grounds 180 A. 834, 115 N.J. Law 517.

50 C.J. p 468 note 13.

Service on another under promise to deliver

Service on defendant's husband under promise that husband would deliver summons to wife was not in compliance with statute relating to personal service.—*Wiener v. Rav-ekes*, 270 N.Y.S. 536, 241 App.Div. 774.

Delivery of copy to guardian

Attempted service of original summons on incompetent person was defective service within court rule permitting issuance of alias or pluries summons, where return showed service by delivering copy of summons to defendant's guardian.—*State ex rel. Briggs v. Barns*, 164 So. 539, 121 Fla. 857.

Leaving at son's place of business

Service of summons by leaving it at place of business of defendant's son was invalid.—*Seekatz v. Brandenburg*, 300 P. 678, 150 Okl. 53.

7. Ind.—*Dunkle v. Elston*, 71 Ind. 585.

50 C.J. p 468 note 15.

Leaving summons at usual place of residence of defendant constitutes "personal service" within statute. Ind.—*Dunkle v. Elston*, supra.

Kan.—Board of Com'rs of Sedgwick County v. Ellis, 170 P.2d 145, 161 Kan. 631—*Atchison County v. Challiss*, 69 P. 173, 65 Kan. 179.

8. Kan.—*Atchison County v. Challiss*, supra.

50 C.J. p 468 note 16.

Service by publication see infra §§ 54-72.

9. Wis.—*Westfall v. Farwell*, 13 Wis. 504.

Service by mail see infra § 51.

10. Ind.—*Shafe v. Shafe*, 198 N.E. 826, 101 Ind.App. 200.

Iowa.—*Collins v. Powell*, 277 N.W. 477, 224 Iowa 1015.

Mo.—*State ex rel. Minihan v. Aronson*, 165 S.W.2d 404, 350 Mo. 309.

Neb.—*In re Kierstead's Estate*, 259 N.W. 740, 128 Neb. 654.

Ohio.—*Sears v. Welmer*, 10 Ohio Supp. 1, affirmed 55 N.E.2d 413, 143 Ohio St. 312.

Or.—*Mutzig v. Hope*, 158 P.2d 110, 176 Or. 368.

Tenn.—*Western Automobile Casualty Co. v. Burnell*, 71 S.W.2d 474, 17 Tenn.App. 687.

Va.—*Buttery v. Robbins*, 14 S.E.2d 544, 177 Va. 368.

50 C.J. p 468 note 19.

General appearance as waiving or dispensing with service of process see Appearances § 17 b.

Service of process as conferring jurisdiction generally see Courts § 83 b.

11. N.J.—*Ruhle v. Caffrey*, 174 A. 204, 113 N.J. Law 240, reversed on other grounds 180 A. 834, 115 N.J. Law 517.

Pa.—*McCall v. Gates*, 47 A.2d 211, 354 Pa. 158—*Giampalo v. Taylor*, 6 A.2d 499, 335 Pa. 121—*Heaney v. Borough of Mauch Chunk*, 185 A. 732, 322 Pa. 487.

Personal service held not essential under statute

Ga.—*Benton v. Maddox*, 192 S.E. 316, 56 Ga.App. 132.

12. Cal.—*Pierce v. Superior Court in and for Los Angeles County*, 37 P.2d 460, 1 Cal.2d 759, 96 A.L.R. 1020.

Del.—*McCoy v. Hickman*, 15 A.2d 427, 1 Terry 587—*Webb Packing Co. v. Harmon*, 196 A. 158, 9 W.W. Harr. 22.

Ind.—*Shafe v. Shafe*, 198 N.E. 826, 101 Ind.App. 200.

Md.—*Harvey v. Slacum*, 29 A.2d 276, 181 Md. 206.

Mass.—*Gulda v. Second Nat. Bank of Boston*, 80 N.E.2d 12, 323 Mass. 100.

Mo.—*Spitcaufsky v. Hatten*, 182 S.W.2d 86, 353 Mo. 94, 160 A.L.R. 990.

—*Corpus Juris* cited in *State ex rel. Minihan v. Aronson*, 165 S.W. 2d 404, 407, 350 Mo. 309—*Peterson v. Kansas City*, 23 S.W.2d 1045, 324 Mo. 454.

Neb.—*In re Kierstead's Estate*, 259 N.W. 740, 128 Neb. 654.

N.J.—*Kurilla v. Roth*, 38 A.2d 862, 132 N.J. Law 213.

N.M.—*State ex rel. Truitt v. District Court of Ninth Judicial Dist., Curry County*, 96 P.2d 710, 44 N.M. 16, 126 A.L.R. 651—*Rosser v. Rosser*, 78 P.2d 1110, 42 N.M. 360.

personal service is not ordinarily necessary where the proceeding is in rem.<sup>13</sup>

Personal service of process may be waived,<sup>14</sup> but an admission by defendant that he received a copy of process improperly served will not amount to a waiver of proper service.<sup>15</sup>

*Inconsistency with service by other methods.* Circumstances may arise under which it will not be inconsistent where, in the same case, some of the parties obtain service of process on defendant by one method, and others by a different one.<sup>16</sup> So, where plaintiff sues more than one defendant he may obtain service against one by personal service within the state, and against the other by attachment by substituted service.<sup>17</sup>

## § 27. Authority or Capacity to Serve

The legislature may by statute fix the qualifications of the persons serving the summons by which suit is

commenced; the requirements of such statutes must be observed, and service by one who had no authority to make it is a nullity.

It is competent for the legislature by statute to fix the qualifications for persons serving the summons by which suit is commenced;<sup>18</sup> the requirements of such statutes must be observed,<sup>19</sup> although the writ itself is not invalidated by unauthorized service.<sup>20</sup> Where the statute designates the particular officer or person to make the service, no other person can legally do so;<sup>21</sup> and service by one who had no authority to make it is a nullity.<sup>22</sup>

*Presumption of competency.* Ordinarily, one who makes service of a writ will be presumed to be a proper person in the absence of any showing to the contrary.<sup>23</sup>

## § 28. — Officer or Deputy

### a. In general

N.Y.—Equitable Life Assur. Soc. of U. S. v. Ehrlich, 293 N.Y.S. 660, 250 App.Div. 761—Maloney v. Ferguson, 50 N.Y.S.2d 937, 182 Misc. 564—In re Bennett's Estate, 238 N.Y.S. 723, 135 Misc. 486.  
Ohio.—Crandall v. Irwin, 40 N.E.2d 933, 139 Ohio St. 463, 139 A.L.R. 900—Ruckert v. Matil Realty Co., App., 40 N.E.2d 688.  
Pa.—Giampalo v. Taylor, 6 A.2d 499, 335 Pa. 121—Williams v. Meredith, 192 A.2d 924, 326 Pa. 570, 115 A.L.R. 890—Vaughn v. Love, 188 A. 299, 324 Pa. 276, 107 A.L.R. 1336—Heaney v. Borough of Mauch Chunk, 185 A. 732, 322 Pa. 487—Hartman v. Donahue, 16 A.2d 691, 142 Pa.Super. 382—Arcady Farms Milling Co. v. Rose, 63 Pa.Dist. & Co. 555.  
R.I.—Clesas v. Hurley Mach. Co., 157 A. 426, 52 R.I. 69.  
Tenn.—Pinkerton v. Fox, 129 S.W.2d 514, 28 Tenn.App. 159.  
50 C.J. p 468 note 22.

### Cancellation of insurance policy

Insurance policy comes within rule that suits to cancel contractual rights and obligations are personal actions requiring personal service.—Densby v. Acacia Mut. Life Ass'n, 78 F.2d 203, 64 App.D.C. 319, 101 A.L.R. 863.

If action is instituted in county where defendant may be personally served, personal service must be accomplished.—McCall v. Gates, 47 A.2d 211, 354 Pa. 158.

### Appointment of curator ad hoc

Personal action cannot be brought against temporarily absent resident, without personal service, through appointment of curator ad hoc to represent him.—Mitchell v. Ernesto, La.App., 141 So. 818.

13. N.J.—Leek v. Wileand, 71 A.2d

911, 7 N.J.Super. 501—Reichert v. United Brotherhood of Carpenters and Joiners of America, 188 A. 728, 14 N.J.Misc. 106.

N.Y.—In re Security Trust Co. of Rochester, 70 N.Y.S.2d 260, 189 Misc. 748, reversed on other grounds 92 N.Y.S.2d 308, 275 App. Div. 1020, and affirmed 97 N.Y.S. 2d 922, 277 App.Div. 837—In re Bennett's Estate, 238 N.Y.S. 723, 135 Misc. 486.

Ohio.—Crandall v. Irwin, 40 N.E.2d 933, 139 Ohio St. 463, 139 A.L.R. 900.

14. Cal.—Remillard Brick Co. v. Dandini, 117 P.2d 432, 47 Cal.App. 2d 63.

Ga.—Redd v. Stephens, 173 S.E. 178, 48 Ga.App. 515.

Ind.—Shafe v. Shafe, 198 N.E. 826, 101 Ind.App. 200.

N.C.—Stevens v. Cecil, 199 S.E. 161, 214 N.C. 217.

Ohio.—Crandall v. Irwin, 40 N.E.2d 933, 139 Ohio St. 463, 139 A.L.R. 900.

50 C.J. p 467 note 90 [a].

Waiver of:

Objections to service see infra § 113.

Service of process generally see supra § 25.

### Acts constituting waiver

(1) Defendants, authorizing their attorney in writing to appear in action and admit service for them, voluntarily waived compliance with statutory provisions for personal service of summons on each defendant.—Haggerty v. Sherburne Mercantile Co., 186 P.2d 884, 120 Mont. 386.

(2) Where defendants' counsel gave plaintiff's counsel written notice of authority conferred on defendants' counsel by defendants to

appear and admit service for them and further wrote plaintiff's counsel that defendants' counsel would admit service if plaintiff's counsel would send summons and copy of complaint to defendants' counsel, defendants waived statutory manner and form of service of summons.—Haggerty v. Sherburne Mercantile Co., supra.

15. Ga.—Bennett v. Taylor, 138 S. E. 273, 36 Ga.App. 752.

16. Wash.—Pioneer Sand, etc., Co. v. Olsen, 277 P. 695, 152 Wash. 257. 50 C.J. p 469 note 27.

Double service see infra § 41.

17. Mo.—Kinsley Bank of Kinsley, Kan., v. Woods, App., 61 S.W.2d 384.

Substituted service see infra §§ 43-53.

18. Mich.—Windolph v. Joure, 34 N. W.2d 529, 323 Mich. 1.

50 C.J. p 469 note 28.

19. W.Va.—Pettry v. Shinn, 196 S. E. 385, 120 W.Va. 20.

50 C.J. p 469 note 29.

Requirement that statutory mode of service be followed to give courts jurisdiction see Courts § 83 b (1).

20. Ark.—Hughes v. Martin, 1 Ark. 386.

21. Ga.—Falvey v. Jones, 4 S.E. 264, 80 Ga. 130.

W.Va.—Pettry v. Shinn, 196 S.E. 385, 120 W.Va. 20.

Service by party see infra § 30.

22. Tex.—Turner v. Ephraim, Civ. App., 28 S.W.2d 608.

W.Va.—Pettry v. Shinn, 196 S.E. 385, 120 W.Va. 20.

23. Mo.—Miehl v. South Central Securities Co., 53 S.W.2d 1041, 227 Mo.App. 788.

50 C.J. p 470 note 50.

- b. Disqualification of officer or deputy
- c. Inability to act

### a. In General

In order that an officer may make legal service, he must have authority to do so. Where the statute designates a particular officer to make the service, no other officer can legally make it, although service by a de facto officer has been held valid; but, except as otherwise provided by statute, service may be made by an officer's deputy with the same effect as by the officer himself.

In order that an officer may make legal service, he must have authority to do so.<sup>24</sup> This authority in ordinary actions is the process of the court, issued by the clerk, and bearing teste in the name of the judge.<sup>25</sup> Where a statute designates a particular officer to make the service, he may act within the limits of his authority,<sup>26</sup> and no other officer can legally do so;<sup>27</sup> but an officer may make service as an individual under a statute providing for service by one not a party.<sup>28</sup> It was the rule at common law that an officer commencing to execute process should complete it.<sup>29</sup>

Some statutes either expressly or by construction

authorize the service of process by any officer to whom it might have been directed;<sup>30</sup> but it would seem that, where an officer can serve process only under particular circumstances, he has no power to serve process not directed to him.<sup>31</sup> An officer of one county cannot legally serve process directed to an officer of another county,<sup>32</sup> nor can he make service beyond the limits of his own county<sup>33</sup> unless expressly authorized to do so by statute.<sup>34</sup> No officer has authority to serve a void process.<sup>35</sup>

Service by a de facto officer has been held valid,<sup>36</sup> but service by an officer undertaking to extend his jurisdiction and serve process, which under the law he has no power to execute, is void.<sup>37</sup>

An attorney at law, although an officer of the court, is, in the absence of a provision in the statute making him such, not a statutory officer for the service of summons,<sup>38</sup> and stands in no better position in respect of authority to make such service than any other private citizen.<sup>39</sup>

*Deputies.* Except as otherwise provided by statute, service may be made by an officer's deputy

24. Ga.—Hillyer v. Pearson, 45 S.E. 701, 118 Ga. 815—W. T. Rawleigh Co. v. Greenway, 26 S.E.2d 458, 69 Ga.App. 590.

Pa.—Commonwealth ex rel. Manzi v. Manzi, 182 A. 795, 120 Pa.Super. 360.

Utah.—Rich v. Industrial Commission, 15 P.2d 641, 80 Utah 511. 50 C.J. p 472 note 98 [a].

25. Ga.—Hillyer v. Pearson, 45 S.E. 701, 118 Ga. 815—W. T. Rawleigh Co. v. Greenway, 26 S.E.2d 458, 69 Ga.App. 590.

Mont.—Merchants Credit Service v. Chouteau County Bank, 114 P.2d 1074, 112 Mont. 229.

26. Fla.—Fountain v. Fountain, 167 So. 651, 123 Fla. 748.

Service of process as ministerial duty pertaining to office of sheriff see Sheriffs and Constables § 44, also 50 C.J. p 470 notes 51–52.

#### Warden of state prison

Under statute authorizing warden of state prison and his deputy to serve legal process within the precincts of the prison, the precincts embrace not only the prison building, but also the grounds connected therewith.—Hix v. Sumner, 50 Ma. 290.

27. Minn.—Melin v. Aronson, 285 N. W. 830, 205 Minn. 353.

50 C.J. p 469 note 32, p 470 note 54 [a].

Jailer has no authority to serve process.—Gowens v. Alamance County, 3 S.E.2d 339, 216 N.C. 107.

Officers and members of state highway patrol and such other offi-

cers and investigators as the commissioner of public safety shall designate have no authority under statute to serve process.—Winger v. State, Okl.Cr., 201 P.2d 264—Bowdry v. State, 166 P.2d 1018, 82 Okl.Cr. 119.

28. Iowa.—Buckmiller v. Creston, etc., R. Co., 146 N.W. 447, 164 Iowa 502.

29. Cal.—In re Baker, 162 P. 922, 32 Cal.App. 320.

30. N.C.—Lowe v. Harris, 28 S.E. 535, 121 N.C. 287. 50 C.J. p 469 notes 38, 39.

#### Service held irregular but not void

Where summons in foreclosure suit was addressed to sheriff of S. county but praecipe for summons asked that it be directed to sheriff of G. county and defendant was served by sheriff of G. county, and defendant secured from clerk of court copies of petition, and there was long delay in raising question about service, summons was irregular but not void.—Home Owners' Loan Corporation v. Clogston, 118 P.2d 568, 154 Kan. 257.

31. Miss.—Arnold v. Wynn, 26 Miss. 363.

32. Ga.—W. T. Rawleigh Co. v. Greenway, 26 S.E.2d 458, 69 Ga. App. 590.

Kan.—Corpus Juris cited in Home Owners' Loan Corporation v. Clogston, 118 P.2d 568, 570, 154 Kan. 257.

Okl.—Corpus Juris quoted in Lovins v. State, 293 P. 273, 274, 49 Okl.Cr. 200.

Tex.—Hitt v. Bell, Civ.App., 111 S. W.2d 1164.

50 C.J. p 469 note 41, p 470 note 57.

33. Mont.—Merchants Credit Service v. Chouteau County Bank, 114 P.2d 1074, 112 Mont. 229.

Okl.—Corpus Juris quoted in Lovins v. State, 293 P. 273, 274, 49 Okl.Cr. 200.

50 C.J. p 469 note 42, p 470 note 56.

34. Okl.—Corpus Juris quoted in Lovins v. State, 293 P. 273, 274, 49 Okl.Cr. 200.

50 C.J. p 469 notes 42–43.

35. Ga.—W. T. Rawleigh Co. v. Greenway, 26 S.E.2d 458, 69 Ga. App. 590.

Service of void process as void see *infra* § 40.

36. Vt.—Rounds v. McGeown, 3 A. 2d 547, 110 Vt. 185.

50 C.J. p 469 note 35.

37. Ga.—U. S. Motor Co. v. Baughman Auto. Co., 86 S.E. 464, 16 Ga. App. 783—Georgia, etc., R. Co. v. Anderson, 76 S.E. 1056, 12 Ga.App. 117.

50 C.J. p 469 note 36.

38. Minn.—Melin v. Aronson, 285 N. W. 830, 205 Minn. 353.

39. Minn.—Melin v. Aronson, *supra*. Service by:

Attorney for party see *infra* § 30. Party or private person see *infra* § 30.

with the same effect as by the officer himself.<sup>40</sup> A deputy may serve process already in his hands, although his principal has been removed.<sup>41</sup>

*Process from another county.* It has been held that a deputy may not serve process from another county which is addressed to his principal where he has no authority to serve process except such as he may have by virtue of being a deputy.<sup>42</sup>

*Foreign process.* Authority to serve foreign process is derived from the laws of the state issuing the process and not from the laws of the state in which it is served,<sup>43</sup> and, where such authority is given by the foreign law to an officer, it is personal to him and cannot be exercised by his deputy.<sup>44</sup>

### b. Disqualification of Officer or Deputy

An officer who is a party to, or is interested in, the litigation is generally disqualified from serving process therein, and when the officer is disqualified, his deputy is likewise ordinarily disqualified; but an interest which is remote and indirect, or merely nominal or formal, will not disqualify.

At early common law an officer might serve process at the commencement of the action where he was plaintiff,<sup>45</sup> but not where he was defendant;<sup>46</sup> but later it was held that he could not serve the process, even for the commencement of the action.<sup>47</sup> In many jurisdictions statutes, said to be but a legislative recognition of the common-law principle,<sup>48</sup> govern the service of process where the officer is a party to, or is interested in, the litigation.<sup>49</sup> A disqualification of an officer results in a similar disqualification of his deputy according to one view,<sup>50</sup> although where the statute in words

extended only to the officer, a contrary view has been taken.<sup>51</sup>

An interest which is remote and indirect will not disqualify,<sup>52</sup> and, where his interest in the cause is merely nominal or formal and he has no personal interest in its subject matter, it has been held that the officer is not disqualified,<sup>53</sup> nor is his deputy,<sup>54</sup> and service by either on the substantial party defendant, although a codefendant of the officer, is valid;<sup>55</sup> and service on the officer by his deputy in such a case has been held valid,<sup>56</sup> since it is in effect an acknowledgment of service by the officer.<sup>57</sup> Where, however, the statute disqualifies an officer who is a party to the action, it has been held not necessary that he should have a pecuniary interest in the cause, if he is named a party therein; his disqualification exists if he is a party to the proceeding.<sup>58</sup> The granting of a motion to disqualify an officer from serving process because of his interest or prejudice is mandatory where there is a compliance with the statute authorizing such disqualification.<sup>59</sup>

Service by some other officer in cases of disqualification of the officer ordinarily charged with the duty of serving process is usually provided for by statutes whose requirements have been held to be mandatory,<sup>60</sup> and must, at least substantially, be complied with.<sup>61</sup>

Under some statutes, it has been held that an officer is incompetent to serve process in an action against a town of which he is an inhabitant and taxpayer;<sup>62</sup> but statutes expressly empowering the officer and deputy to make service in such cases

40. Pa.—*Aversa v. Aubry*, 154 A.

311, 303 Pa. 139.

50 C.J. p 470 note 60.

41. U.S.—*Stewart v. Hamilton*, C.C. Ind., 23 F.Cas.No.18,429, 4 McLean 534.

42. Kan.—*Branner v. Chapman*, 11 Kan. 118.

43. Kan.—*Kincaid v. Frog*, 31 P. 704, 49 Kan. 766.

50 C.J. p 470 note 63.

44. Kan.—*Kincaid v. Frog*, supra.

50 C.J. p 470 note 63.

45. Me.—*Hix v. Sumner*, 50 Me. 296.

N.Y.—*Holbrook v. Brennan*, 6 Daly 46, 48 How.Pr. 519.

Disqualification of sheriff to act in cause in which interested in general see the O.J.S. title *Sheriffs and Constables* § 41, also 57 C.J. p 778 note 76 et seq.

46. N.Y.—*Holbrook v. Brennan*, supra.

47. Ga.—*Johnson v. Shurley*, 53 Ga. 417.

50 C.J. p 470 note 62.

48. Hawaii.—*Corpus Juris* cited in *Coulter v. Sterling*, 33 Hawaii 621, 625.

50 C.J. p 470 note 69.

49. Hawaii.—*Corpus Juris* cited in *Coulter v. Sterling*, 33 Hawaii 621, 625.

50 C.J. p 470 notes 70, 71.

50. Iowa.—*Minott v. Vineyard*, 11 Iowa 90.

50 C.J. p 470 note 72.

51. R.I.—*Slocomb v. Powers*, 10 R. I. 255.

52. Ga.—*Davis v. Lexington Bank*, 116 S.E. 58, 29 Ga.App. 454.

50 C.J. p 471 note 78.

53. Ga.—*Lightner v. Belk*, 174 S.E. 349, 178 Ga. 766.

50 C.J. p 471 note 79.

54. Tex.—*Mansfield v. Ramsey*, Civ. App., 196 S.W. 330.

55. Ga.—*Lightner v. Belk*, 174 S.E. 349, 178 Ga. 766.

Tex.—*Mansfield v. Ramsey*, Civ.App., 196 S.W. 330.

56. Va.—*Wood v. Kane*, 129 S.E. 327, 143 Va. 281.

57. Va.—*Turnbull v. Thompson*, 27 Gratt. 306, 68 Va. 308.

50 C.J. p 471 note 83.

58. Hawaii.—*Coulter v. Sterling*, 33 Hawaii 621.

59. Colo.—*Montez v. People*, 132 P. 2d 970, 110 Colo. 208.

60. Colo.—*Kellher v. People*, 205 P. 274, 71 Colo. 202.

50 C.J. p 471 notes 75, 77.

Authority of coroner to serve process in case of vacancy of office or disqualification of sheriff see the C.J.S. title *Sheriffs and Constables* § 38, also 57 C.J. p 778 note 64 et seq.

61. Tex.—*Robinson v. Schmidt*, 43 Tex. 13.

50 C.J. p 471 notes 74, 76.

62. Mass.—*Brewer v. New Gloucester*, 14 Mass. 216.

50 C.J. p 471 note 85.



remove the disability which would otherwise attach to them as codefendants.<sup>63</sup>

Where a deputy is a party, service may not be made on him by the officer or by another deputy,<sup>64</sup> although such service made in another official character may be valid,<sup>65</sup> and disqualification of an officer, not arising out of his official position, does not affect the authority of a deputy to make service as an individual.<sup>66</sup>

*Record showing of disqualification* may be necessary under some statutes.<sup>67</sup> Under a statute disqualifying an officer or his deputies when "parties to the writ," it has been held that interest alone will not disqualify<sup>68</sup> even where the officer was the person really interested in the litigation.<sup>69</sup>

### c. Inability to Act

Where an officer is incapable of serving process by reason of sickness, absence, or the like, a deputy may act.

Instances may arise where an officer is incapable of serving process by reason of sickness, absence from the county, or like cause, in which case a deputy may act.<sup>70</sup>

## § 29. — Persons Specially Deputed or Appointed

### a. In general

#### b. By court or clerk

### a. In General

A person not otherwise authorized by statute to do so ordinarily cannot serve process unless he may be, and has been, specially deputed or appointed for that purpose; and where the matter has been the subject of

legislative regulation, the power to appoint or deputize can be exercised only by the officer designated in the statute, and in the cases contemplated by the statute.

A person not otherwise authorized by statute to do so ordinarily cannot serve process unless he may be, and has been, specially deputized or appointed for that purpose;<sup>71</sup> but, where so specially deputized or authorized, one serving process has all the powers which may be exercised by the officer in executing such process,<sup>72</sup> except that he is not required to be recognized and obeyed as a known officer but must show his authority and make known his business<sup>73</sup> if required by the party to be served.<sup>74</sup> The authority to serve an original will not extend to the service of an alias.<sup>75</sup> The authority conferred may be limited in its exercise to a particular locality.<sup>76</sup>

*Who may appoint.* An officer authorized to serve process may appoint a special deputy to execute a particular process,<sup>77</sup> without any express authority derived from statute or otherwise.<sup>78</sup> Where the matter has been the subject of legislative regulation, the power to appoint or deputize can be exercised only by the officer designated in the statute,<sup>79</sup> and in the cases contemplated by the statute.<sup>80</sup>

*Who may be appointed.* While it has been held, under a statute giving the officer power to depute a person to do a particular act, that he could appoint plaintiff's attorney as special deputy to serve process in the cause,<sup>81</sup> the person appointed must possess the statutory qualifications.<sup>82</sup> The authority may be conferred on a minor,<sup>83</sup> although he cannot act as a general deputy.<sup>84</sup>

63. Me.—Bristol v. Marblehead, 1 Me. 82.

64. Mass.—Gage v. Graffam, 11 Mass. 181.

50 C.J. p 470 note 72 [a], p 471 note 88.

65. Mass.—Gage v. Graffam, supra.—Colby v. Dillingham, 7 Mass. 475. 50 C.J. p 472 note 89.

66. S.D.—Axtell v. Rooks, 162 N.W. 751, 39 S.D. 31.

67. Iowa.—Beard v. Smith, 9 Iowa 50. 50 C.J. p 472 note 91.

68. Me.—Walker v. Hill, 21 Me. 481. Mass.—Merchants' Bank v. Cook, 4 Pick. 405.

69. Me.—Walker v. Hill, 21 Me. 481. Mass.—Merchants' Bank v. Cook, 4 Pick. 405. 50 C.J. p 472 note 94.

70. Iowa.—Minott v. Vineyard, 11 Iowa 90. 50 C.J. p 472 note 96.

Inability of sheriff or constable to

act in a particular case see the C.J.S. title Sheriffs and Constables § 41, also 57 C.J. p 779 notes 86-89.

71. Pa.—Krelling v. Treffinger, 14 Pa.Dist. 357.

50 C.J. p 472 note 98.

72. Vt.—Burton v. Wilkinson, 18 Vt. 186, 46 Am.D. 145.

73. Vt.—Burton v. Wilkinson, supra.

74. Vt.—Burton v. Wilkinson, supra.

75. Ky.—Thompson v. Moore, 15 S. W. 6, 358, 91 Ky. 80, 12 Ky.L. 664.

76. Fla.—Guarantee Trust, etc., Co. v. Buddington, 2 So. 885, 23 Fla. 514.

77. Pa.—Aversa v. Aubry, 154 A. 311, 303 Pa. 139.

50 C.J. p 472 note 8.

78. U.S.—Jewett v. Garrett, C.C.N. J., 47 F. 625.

Ill.—Guyman v. Burlingame, 36 Ill. 201.

79. U.S.—Simonson v. Typer, C.C.A. Wyo., 285 F. 240.

80. Pa.—Arcady Farms Milling Co. v. Rose, 63 Pa.Dist. & Co. 555.

Cases arising from contract relating to real estate

An action in assumpsit to recover real estate commissions based on an oral contract is not a case arising from a contract relating to real estate within the meaning of statute authorizing service by deputization in such a case.—Binder v. Epstein, 41 Pa.Dist. & Co. 640.

81. Iowa.—Wilford v. Miller, Morr. 405.

82. Ky.—Lillard v. Brannin, 16 S.W. 349, 91 Ky. 511, 13 Ky.L. 74.

Ohio.—Parkinson v. Crawford, 13 Ohio N.P., N.S., 73. 50 C.J. p 472 note 21.

83. N.H.—Moore v. Graves, 3 N.H. 408. 31 C.J. p 1004 note 6.

84. Ind.—New Albany, etc., R. Co. v. Groomes, 9 Ind. 243.

*Requisites of appointment.* The appointment at common law could be made in writing only,<sup>85</sup> and this would appear to be still the rule in some jurisdictions.<sup>86</sup> Statutes in many jurisdictions now regulate the deputizing of private persons to serve process, and, where so regulated, such appointment must comply with the statutes,<sup>87</sup> which in some jurisdictions are strictly construed.<sup>88</sup> Where a requirement as to dating is held directory and not mandatory, the omission of date will not vitiate the appointment.<sup>89</sup> Where the statute requires, either in direct terms or by the necessary implication of a prescribed form, that the person appointed be named in the writ,<sup>90</sup> a blank authority to a stranger is void.<sup>91</sup> Unless required by the statute, the person so appointed need not be appointed as a general deputy<sup>92</sup> or take the oath of a deputy sheriff.<sup>93</sup>

*Indorsement, certificate, or record of appointment.* The authority of the person specially deputized must be shown.<sup>94</sup> Under some statutes the authority of the person to serve the process must be indorsed on it,<sup>95</sup> and it has been held that the failure of one specially deputized to serve a writ to indorse on the copy served a copy of his authority, as indorsed on the original, vitiates the service;<sup>96</sup> but a requirement that the appointment shall be in writing indorsed on the writ has been held sufficiently complied with where written on a separate piece of paper and attached to the process.<sup>97</sup>

#### b. By Court or Clerk

A court has inherent power to appoint a special officer to execute its process, and such an appointment may be made under constitutional provisions or statutes providing for the appointment by the court or clerk.

A court has inherent power to appoint a special officer to execute its process,<sup>98</sup> and such an appointment may be made under constitutional provisions or statutes providing for the appointment, by the court or clerk, of private persons to make service of process in certain contingencies.<sup>99</sup> Such appointments are judicial acts,<sup>1</sup> and the authority to make them cannot be delegated,<sup>2</sup> nor can they be made in blank.<sup>3</sup> In some jurisdictions, the power to appoint under such a statute is held to be limited to cases actually pending in the court making the appointment.<sup>4</sup> It has been held that a minor may be appointed specially to serve process<sup>5</sup> although he would be ineligible for appointment to the position of the regular officer whose duty is to make such service,<sup>6</sup> but there are cases holding that an infant cannot be authorized to serve a writ by the magistrate signing it.<sup>7</sup> An appointment made without warrant of law is invalid.<sup>8</sup> Where a constitutional or statutory provision authorizes the appointment of a coroner for a special purpose when the office is vacant, a special coroner may be appointed by the clerk to serve process where the sheriff is a party and there is no coroner in the county.<sup>9</sup>

*Indorsement, certificate, or record of appointment.* Where the statute requires that the special authority of the person deputed or appointed shall be indorsed on the process, it should be made to appear that the person appointed is one eligible for the purpose.<sup>10</sup> Where the statute requires the reason for the appointment to be inserted in, or indorsed on, the process, the statement when so inserted is conclusive,<sup>11</sup> but the facts certified must

85. N.J.—Meyer v. Patterson, 28 N. J.Eq. 239.

86. N.J.—Meyer v. Bishop, 27 N.J. Eq. 141, affirmed 28 N.J.Eq. 239. 50 C.J. p 472 note 13.

87. Ky.—Thompson v. Moore, 15 S. W. 6, 358, 91 Ky. 80, 12 Ky.L. 664. 50 C.J. p 472 note 14 [a].

88. Conn.—Kelley v. Kelley, 76 A. 291, 83 Conn. 274. 50 C.J. p 472 note 16.

89. Neb.—Forbes v. Bringe, 49 N.W. 720, 32 Neb. 757.

90. Ill.—Davis v. Hamilton, 53 Ill. App. 94. Vt.—Thomas v. Graves, 98 A. 508, 90 Vt. 312.

91. Pa.—Krelling v. Treffinger, 14 Pa.Dist. 357.

92. Ind.—Hartford Fire Ins. Co. v. Applebaum, 125 N.E. 237, 71 Ind. App. 514.

93. Ind.—Hartford Fire Ins. Co. v. Applebaum, supra.

94. Conn.—Kelley v. Kelley, 76 A. 291, 83 Conn. 274.

95. Ohio.—Simmons v. Simmons, 175 N.E. 749, 38 Ohio App. 391.

96. Conn.—Kelley v. Kelley, 76 A. 291, 83 Conn. 274.

97. Vt.—Cowdery v. Johnson, 15 A. 188, 60 Vt. 595.

98. Cal.—Wilson v. Roach, 4 Cal. 362.

Neb.—Gilbert v. Brown, 2 N.W. 376, 9 Neb. 90.

99. Attorney whose name did not appear in record as attorney for plaintiff was authorized under statute to serve summons in a tort action.—Burton v. Cahill, 34 N.E.2d 127, 310 Ill.App. 393.

#### Statute held mandatory

Statute providing that, on filing of affidavit of prejudice or interest against sheriff, clerk shall direct process to county clerk who shall execute process, was held manda-

tory.—Trobaugh v. State, 233 N.W. 452, 120 Neb. 453.

1. Vt.—Kelly v. Paris, 10 Vt. 261, 33 Am.D. 199.

2. Vt.—Kelly v. Paris, supra. 50 C.J. p 473 note 32.

3. Vt.—Kelly v. Paris, supra. 50 C.J. p 473 note 33.

4. Ky.—Brumleve v. Cronan, 197 S. W. 498, 176 Ky. 818.

5. S.C.—Bell v. Fruit, 29 S.E. 5, 51 S.C. 344.

6. S.C.—Bell v. Fruit, supra.

7. Vt.—Harvey v. Hall, 22 Vt. 211. 31 C.J. p 1004 note 8.

8. Tex.—McClane v. Rogers, 42 Tex. 214. 50 C.J. p 473 note 37.

9. N.C.—Witkousky v. Wasson, 69 N.C. 38.

10. Vt.—Culver v. Balch, 23 Vt. 618. 50 C.J. p 473 note 42.

11. Conn.—Lawrence v. Kingman, Kirby 6.

be such as prescribed by the statute, and, where no such facts are certified, the certificate is wholly deficient and the appointment is of no effect.<sup>12</sup> Where not required by the terms of the statute, it would not seem necessary to insert the reason for the authorization,<sup>13</sup> or that the authorization appear in the record,<sup>14</sup> or that the appointee be sworn,<sup>15</sup> since it will be assumed, where the contrary does not appear, that authority was conferred on the process server.<sup>16</sup> Where an oath is required of the appointee, it is not necessary that the certificate of appointment contain the oath.<sup>17</sup> Unimportant verbal variations from a prescribed form of appointment will not affect the service,<sup>18</sup> but where the statute required indorsement "on the back of" the writ, an authorization written on a separate and distinct piece of paper has been held insufficient.<sup>19</sup>

### § 30. — Party or Private Person Not a Party

Service by a private person, and even by a party or his attorney is valid under some statutes, but generally, in the absence of statute, a person cannot serve process in his own action.

Service by a private person has been held valid under some statutes;<sup>20</sup> and under statutes which provide that process may be served by any person not a party to the action, service may be made by plaintiff's agent<sup>21</sup> or employee,<sup>22</sup> by a stockholder in a plaintiff corporation<sup>23</sup> or an officer or director

thereof,<sup>24</sup> by an inhabitant of a town which is plaintiff,<sup>25</sup> or even by a disqualified officer in his private capacity;<sup>26</sup> but, unless permitted by the provisions of the statute, not by a minor.<sup>27</sup> A statute authorizing service by any person over twenty-one years of age who is competent to be a witness in the action, other than plaintiff, withholds authority to serve the summons only from a person who is plaintiff in the action,<sup>28</sup> and not from other persons who are interested in the outcome of the lawsuit.<sup>29</sup> Where the statute provides for service by the sheriff of the county where defendant may be found or by any other person not a party, service by a person not a party, beyond the limits of the county in which action was brought, would be valid.<sup>30</sup> It has been held that at common law service outside of the state may be made by a private individual.<sup>31</sup>

*Service by party.* It is a general principle of law that a person cannot serve process in his own action;<sup>32</sup> and this has been said to be the rule at common law with respect to service of summons,<sup>33</sup> but personal service of a summons may be made by plaintiff under a statute providing that civil process, except process requiring the arrest of any person or the seizure of property, may be served by any person of suitable age and discretion;<sup>34</sup> and it has also been said that the common-law rules as to the service of writs and other judicial process have no application to the service of

12. Vt.—Washburn v. Hammond, 25 Vt. 648.

50 C.J. p 473 note 45.

13. Vt.—Culver v. Balch, 23 Vt. 618.

14. N.Y.—Mooney v. McQuirk, 64 N.Y.S. 41, 31 Misc. 744.

15. Ill.—Reed v. Moffatt, 62 Ill. 300.

16. N.Y.—Mooney v. McQuirk, 64 N.Y.S. 41, 31 Misc. 744.

50 C.J. p 473 note 50.

17. Iowa.—Minott v. Vineyard, 11 Iowa 90.

50 C.J. p 473 note 51.

18. Vt.—Fullerton v. Briggs, 20 Vt. 542.

19. Ill.—Gordon v. Knapp, 2 Ill. 438.

20. N.Y.—Cohoes Bronze Co. v. Georgia Home Ins. Co., 276 N.Y.S. 619, 243 App.Div. 224.

21. Mo.—Miehl v. South Central Securities Co., 58 S.W.2d 1011, 227 Mo.App. 788.

N.Y.—Outdoor Supply Co. v. Westhome Sec. Corporation, 249 N.Y.S. 571, 140 Misc. 48.

50 C.J. p 474 note 61.

22. N.Y.—Outdoor Supply Co. v. Westhome Sec. Corporation, supra.

23. Mo.—Miehl v. South Central Securities Co., 58 S.W.2d 1011, 227 Mo.App. 788.

50 C.J. p 474 note 62.

Reason for rule

Stockholders in a corporation are not parties to a writ naming the corporation as a party.—Merchants' Bank v. Cook, 4 Pick., Mass., 405.

24. N.Y.—Outdoor Supply Co. v. Westhome Sec. Corporation, 249 N.Y.S. 571, 140 Misc. 48.

25. Conn.—Windham v. Hampton, 1 Root 175.

26. S.D.—Axtell v. Rooks, 162 N.W. 751, 39 S.D. 31.

Mo.—Corpus Juris quoted in Miehl v. South Central Securities Co., 58 S.W.2d 1011, 1013, 227 Mo.App. 788.

50 C.J. p 474 note 59.

27. Vt.—Harvey v. Hall, 22 Vt. 211.

50 C.J. p 474 note 65.

28. Wash.—Roth v. Nash, 144 P.2d 271, 19 Wash.2d 731.

29. Wash.—Roth v. Nash, supra.

30. S.C.—Easterling v. Odom, 82 S.E. 407, 98 S.C. 171.

31. N.H.—Stone v. Anderson, 25 N.H. 221.

32. Ill.—Filkins v. O'Sullivan, 79 Ill. 524.

Mich.—Windolph v. Joure, 34 N.W. 2d 529, 323 Mich. 1.

Mo.—Corpus Juris quoted in Miehl v. South Central Securities Co., 58 S.W.2d 1011, 1013, 227 Mo.App. 788.

N.D.—Corpus Juris quoted in Froling v. Farrar, 44 N.W.2d 763, 766.

Or.—Welch v. Arney, 219 P.2d 1086.

50 C.J. p 473 note 54.

Statutes held not to apply

The statutes providing in substance that notice of a proceeding shall be in writing and that it may be served by any person who would be a competent witness do not apply to the notice or initial process to be given or served on a party to an original or independent proceeding, which notice or initial process brings party into court for the first time and first subjects the person to the jurisdiction of the court for the prosecution of the proceeding.—State ex rel. Weber v. McLaughlin, Mo. App., 157 S.W.2d 800.

33. Mich.—Windolph v. Joure, 34 N.W. 2d 529, 323 Mich. 1.

50 C.J. p 473 note 54.

34. Mich.—Windolph v. Joure, supra.

a summons, which may be served like any other notice by any private person unless prohibited by statute.<sup>35</sup> One who institutes inquisition proceedings against an insane person,<sup>36</sup> or who applies for letters of guardianship of his person,<sup>37</sup> or for the appointment of a guardian of the person and estate of one who is wasting his property<sup>38</sup> is a party to the proceeding and cannot make service. There is authority to the effect that service by plaintiff is a mere irregularity, rendering the service voidable,<sup>39</sup> of which advantage should be taken in the lower court,<sup>40</sup> and which is not voidable after judgment;<sup>41</sup> but a different view prevails in some jurisdictions and such service has been said to be void.<sup>42</sup>

*Service by real party in interest.* The word "party" as used in a statute providing that summons may be served by any person not a party to the action is not used in its technical sense,<sup>43</sup> and under such provision a real party in interest, although strictly not a party to the record, is not competent to serve a summons on defendant.<sup>44</sup> So it has been held that service is at least voidable when made by one who, although not named as a party, was in fact a real party in interest in the suit, and who might properly have been joined as a party plaintiff.<sup>45</sup>

*Service by party's attorney* has been held void in some jurisdictions under the rule that a person cannot serve process in his own action,<sup>46</sup> and such service is insufficient under statutes or rules of civil

practice specifically forbidding service by an attorney for a party to the action;<sup>47</sup> but service may be made by plaintiff's attorney where the statutes provide that process may be served by any person not a party to the action<sup>48</sup> or by any person over a stated age who is competent to be a witness in the action, other than plaintiff.<sup>49</sup> Where, however, the statute provides that the return of process should be to the clerk "or attorney who issued same," it has been held that, in view of the language of the statute, an attorney of record may not serve summons.<sup>50</sup>

### § 31. Persons to Be Served

Generally, all persons interested in the subject matter of the controversy should be served, but under some statutes service on an agent or attorney may be sufficient.

As a general rule, all persons interested in the subject matter of the controversy should be served,<sup>51</sup> but an exception to the rule is that where the parties are numerous and it is impracticable to bring them all before the court, service on some of them to act for the others as well as for themselves may be held a sufficient service on the whole,<sup>52</sup> and this exception is particularly applicable in actions against unincorporated societies, as discussed in Associations § 36 c. Moreover, service on a named defendant may under the circumstances of the case, not be necessary in order to protect plaintiff's rights.<sup>53</sup> Where individuals are

35. Minn.—First Nat. Bank of Whitewater v. Estenson, 70 N.W. 775, 68 Minn. 28.

Wash.—Roth v. Nash, 144 P.2d 271, 19 Wash.2d 731.

36. Mo.—State v. Duncan, 193 S.W. 950, 195 Mo.App. 541.

37. Mont.—State v. Rosebud County Fifteenth Judicial Dist. Ct., 235 P. 751, 73 Mont. 84.

38. R.I.—Baker v. Searle, 2 R.I. 115.

39. Ky.—Lillard v. Lillard, 5 B.Mon. 340.

N.Y.—Hunter v. Lester, 10 Abb.Pr. 260.

50 C.J. p 474 note 72.

40. Ky.—Lillard v. Lillard, 5 B.Mon. 340.

41. N.Y.—Hunter v. Lester, 10 Abb.Pr. 260.

42. Colo.—Toenniges v. Drake, 4 P. 790, 7 Colo. 471.

43. N.D.—Froling v. Farrar, 44 N.W.2d 763.

44. N.D.—Froling v. Farrar, supra.

45. N.D.—Froling v. Farrar, supra.

46. Mo.—Corpus Juris quoted in Miehl v. South Central Securities

Co., 58 S.W.2d 1011, 1013, 227 Mo.App. 788.

50 C.J. p 473 note 55.

Attorney as not statutory officer for service of summons see supra § 28.

Action of attorney in serving process held improper

Va.—Horne v. Osborne, 175 S.E. 893, 163 Va. 235.

47. Iowa.—Gibbons v. Belt, 13 N.W. 2d 374, 239 Iowa 961.

48. Iowa.—Gibbons v. Belt, supra. Mo.—Corpus Juris quoted in Miehl v. South Central Securities Co., 58 S.W.2d 1011, 1013, 227 Mo.App. 788.

Wash.—Corpus Juris cited in Roth v. Nash, 144 P.2d 271, 273, 19 Wash.2d 731.

50 C.J. p 473 note 57.

49. Wash.—Roth v. Nash, 144 P.2d 271, 19 Wash.2d 731.

50. Colo.—Nelson v. Chittenden, 123 P. 656, 53 Colo. 30, Ann.Cas.1914A. 1198—Nelson v. Chittenden, 127 P. 923, 23 Colo.App. 123.

51. Ill.—Bayci v. Rango, 25 N.E.2d 1015, 304 Ill.App. 203.

#### Joint defendants

Plaintiff can proceed against joint defendants only by serving process on all or by proceeding strictly as required by statute.—Alderman v. Puleston, 24 So.2d 527, 156 Fla. 731.

Particular statutes construed to allow plaintiff to proceed against defendants served, provided they were liable severally or in distinction from such as were not served.—Pruyn v. Black, 21 N.Y. 300.

52. Ill.—Bayci v. Rango, 25 N.E.2d 1015, 304 Ill.App. 203.

53. Wash.—Seattle Nat. Co. v. Gilmore, 9 P.2d 95, 167 Wash. 102.

In stockholder's suit to set aside transfer of assets by corporation allegedly converted to use of bank, allegation that such bank had transferred assets to another bank precluded necessity of serving transferring bank with process, although it was named defendant.—Seattle Nat. Co. v. Gilmore, supra.

Statutory action for recovery of land with mesne profits may proceed against defendant in actual possession, who was served, although a

residents of a state, they are at all times subject to service of process.<sup>54</sup>

As considered *supra* § 26, actual delivery of the process to defendant in person ordinarily is necessary in order to constitute personal service.

*Service on an agent or attorney* is not sufficient,<sup>55</sup> except where the statute provides for service on a corporation or individual by actually making service on an officer or agent, such service then being personal service on such corporation or individual,<sup>56</sup> or except where the person to be served expressly authorizes an agent to receive process for him.<sup>57</sup> Under some statutes, which, since they are remedial, should be liberally construed,<sup>58</sup> process served on an attorney or agent of a party is sufficient,<sup>59</sup> as where the statute provides that, if an action is brought by a nonresident, the writ in a cross action brought against him by defendant in the former action may be served on the attorney of record for plaintiff in the original action.<sup>60</sup> In all actions or proceedings where a party has an attorney of record, the service of papers, when re-

quired, must be made on the attorney,<sup>61</sup> and service on him is sufficient,<sup>62</sup> except in a case where the statute expressly provides otherwise;<sup>63</sup> but this rule applies only after defendant has been properly served and brought into court and employed an attorney to represent him,<sup>64</sup> and the fact that the attorney may have represented the party in other matters does not authorize service in a matter in which he does not appear as attorney.<sup>65</sup> Defendant who appears through counsel specially to bond property attached and to remove the cause to the federal court, being before the court for no other purpose, may not thereafter be brought into court through service on his special counsel.<sup>66</sup> Service on an authorized agent imposes on the one served the duty of acquainting his principal with the commencement of the proceeding in order to avoid default, and to enable defendant to prepare his defense;<sup>67</sup> accordingly, service on an adversely interested agent of defendant is not a valid service as to defendant.<sup>68</sup>

An agent's right to represent his principal to the

nonresident defendant was not served.—*Darnell v. Williams*, 156 S. E. 584, 171 Ga. 651.

54. U.S.—*Spielberger v. Little*, D.C. N.Y., 77 F.Supp. 146, reversed on other grounds, C.A., *Spielberger v. Textron, Inc.*, 172 F.2d 85.

55. Tex.—*Sindorf v. Cen-Tex Supply Co.*, Civ.App., 172 S.W.2d 775—*Scarborough v. Bradley*, Civ. App., 256 S.W. 349.

Authority of attorney to accept or acknowledge service see *Attorney and Client* § 83 a.

Substituted service on agent or attorney see *infra* § 50.

*Service on regional director, trial examiner, and attorney for National Labor Relations Board* in their individual and official capacities, and as such board, was not tantamount to service on board.—*Bethlehem Shipbuilding Corporation v. Nylander*, D.C.Cal., 14 F.Supp. 201.

56. Ark.—*Dixie Motor Coach Corporation v. Toler*, 126 S.W.2d 618, 197 Ark. 1097.

Tenn.—*Green v. Snyder*, 84 S.W. 808, 114 Tenn. 100.

Persons on whom service may be made in actions against corporations see *Corporations* §§ 1812-1814.

57. Mo.—*Peterson v. Kansas City*, 23 S.W.2d 1045, 324 Mo. 454.

58. Tenn.—*Smith v. Tennessee Coach Co.*, 194 S.W.2d 867, 183 Tenn. 676.

59. U.S.—*Frank L. Young Co. v. McNeal-Edwards Co.*, Mass., 51 S. Ct. 538, 283 U.S. 398, 75 L.Ed. 1140.

Wis.—*State ex rel. Ledin v. Davison*, 256 N.W. 718, 216 Wis. 216, 96 A.L.R. 589.

Agent of owner of motor vehicle on whom process may be served see *Motor Vehicles* §§ 501-502.

#### Character of agent

Agent on whom service may be made under nonresident service acts need not be described as attorney in fact, special agent, or agent on whom process may be served; nor need his authority be expressed, since it is sufficient if he has name or character of agent, in appropriate territory, of defendants against whom writ has been directed.—*Stoner v. Higginson*, 175 A. 527, 316 Pa. 481.

60. U.S.—*Huntington Mfg. Co. v. Bradford Worsted Spinning Co.*, D.C.Mass., 37 F.2d 730.

#### Intermediate action by nonresident

Plaintiff, discontinuing first action and suing nonresident anew after intermediate action by nonresident, was held within statute.—*Frank L. Young Co. v. McNeal-Edwards Co.*, Mass., 51 S.Ct. 538, 283 U.S. 398, 75 L.Ed. 1140.

#### Service held insufficient

Service of writ on regional attorney and on examiner and on acting regional director for National Labor Relations Board was insufficient service on members of board to give court jurisdiction over board as against contention service was sufficient, in view of action previously commenced by board against plaintiff, who took no active part and entered no appearance therein, which

action had been dismissed by board.—*New England Transp. Co. v. Myers*, D.C.Mass., 15 F.Supp. 807.

61. Cal.—*Spencer v. Barnes*, 43 P. 2d 847, 6 Cal.App.2d 35.

62. Ga.—*Harrison v. Lovett*, 31 S. E.2d 799, 198 Ga. 466.

Idaho.—*Keane v. Allen*, 202 P.2d 411, 69 Idaho 53.

N.M.—*Sunshine Valley Irr. Co. v. Sunshine Valley Conservancy Dist.*, 18 P.2d 251, 37 N.M. 77.

Pa.—*Plank v. Suskiewicz*, 66 Pa.Dist. & Co. 482, 97 Pittsb.Leg.J. 29.

Wash.—*Pike v. Pike*, 167 P.2d 401, 24 Wash.2d 735, 163 A.L.R. 1314.

"Service of process upon an authorized agent or attorney is as valid and binding as statutory service upon the principal himself."—*Union City v. Capitol-Theatre Amusement Co.*, 57 A.2d 226, 228, 26 N.J.Misc. 102.

63. N.D.—*Commercial Credit Co. v. Braseth*, 237 N.W. 699, 61 N.D. 180.

64. Ga.—*Harris v. Harris*, 52 S.E.2d 598, 205 Ga. 105—*Beebe v. Smith*, 46 S.E.2d 212, 76 Ga.App. 391.

Pa.—*Rambo v. Smith*, Com.Pl., 62 Montg.Co. 54.

65. Cal.—*Spencer v. Barnes*, 43 P. 2d 847, 6 Cal.App.2d 35.

66. U.S.—*Sewerage & Water Board of New Orleans v. The Cumulus*, C.A.La., 172 F.2d 102.

67. Iowa.—*In re Duro's Estate*, 18 N.W.2d 199, 236 Iowa 165.

68. Iowa.—*In re Duro's Estate*, *supra*.

extent of receiving service of process depends on the continuance of his employment.<sup>69</sup> A power of attorney which grants to an attorney in fact the power to institute, prosecute, defend, and dispose of actions, suits, or other proceedings, or otherwise to engage in litigation in connection with the premises, does not authorize service on the attorney in fact of process required as the basis of a suit against the grantor of the power.<sup>70</sup> An official who instigates a suit, and whose duty it is to collect the money claimed therein, cannot at the same time be the real plaintiff and defendant's representative, agent, or attorney in fact, on whom process may be served.<sup>71</sup> The designation by statute of a particular officer or officers on whom service of process may be made excludes all others.<sup>72</sup> Under some statutes, where defendant has not sufficient mental capacity to understand the meaning of papers left with him or to take steps to defend or settle the action, plaintiff should apply to the court for an order designating some person

on whom summons shall be served.<sup>73</sup>

## § 32. Place of Service

- a. In general
- b. In another county
- c. On nonresident within jurisdiction
- d. In another state or country

### a. In General

Subject to such exceptions as may have been made by valid statutory provisions, the general rule is that process cannot be lawfully served outside the territorial limits of the jurisdiction of the court from which it issues.

The place where process may be served must be that permitted by the common law except as changed by statute;<sup>74</sup> and subject to such exceptions as may have been made by valid statutory provisions,<sup>75</sup> the general rule is that process cannot be lawfully served outside the territorial limits of the jurisdiction of the court from which it issues,<sup>76</sup> and this is true regardless of the residence

69. N.Y.—W. B. Kellogg & Co. v. Barrett, 240 N.Y.S. 824, 136 Misc. 275.

70. W.Va.—Harloe v. Harloe, 38 S. E.2d 362, 129 W.Va. 1.

71. W.Va.—Baird-Gatzmer Corp. v. Henry Clay Coal Min. Co., 50 S.E. 2d 673, 131 W.Va. 793.

72. Conn.—FitzSimmons v. International Ass'n of Machinists, 7 A.2d 448, 125 Conn. 490.

73. N.Y.—Codling v. Codling, 83 N. Y.S.2d 86.

74. Pa.—Williams v. Meredith, 192 A. 924, 326 Pa. 570, 115 A.L.R. 890.

75. Ill.—Wieboldt Stores v. Sturdy, 51 N.E.2d 268, 384 Ill. 271.  
50 C.J. p 474 note 76.

#### Statute construed

(1) Statute dealing with service on nonresidents covers that class of cases where a suit in equity is instituted, concerning goods, chattels, lands, tenements or hereditaments, or for the perpetuating of testimony concerning any lands, tenements, etc., situate or within the jurisdiction of the court, or concerning any charge, lien, judgment, mortgage or encumbrance thereon, and that class of cases where the court acquired jurisdiction of the subject matter in controversy, by the service of its process on one or more of the principal defendants.—Mid-City Bank & Trust Co. v. Myers, 23 A.2d 420, 343 Pa. 465.

(2) Extraterritorial service of process under the provisions of the statute may properly be made on a mortgagee in a proceeding in equity by the owner of real estate subject to the mortgage, to ascertain the

amount of the lien in order to tender payment thereof and require the lien to be satisfied of record so as to clear the property of encumbrances, since such a suit directly concerns a mortgage on land within the statutory language.—Stumpf v. Cervino, 44 Pa. Dist. & Co. 511.

(3) The statute does not authorize service of bill outside of jurisdiction of court, where all property affected is not within its jurisdiction and personal decree is sought.—Vandersloot v. Pennsylvania Water & Power Co., 102 A. 422, 259 Pa. 99.

(4) Although the phrase "subject matter" is often used as a synonym for the word "property" in in rem actions, it is used in a broader and more general sense in the statute providing that where court has acquired jurisdiction of the subject matter in controversy, by the service of its process on one or more of the principal defendants, it has the power to order that any process be served on any defendants therein, then residing or being out of the jurisdiction of such court, wherever they may be found.—Mid-City Bank & Trust Co. v. Myers, supra.

(5) The statutory provision means that where the court has acquired jurisdiction of the particular controversy by service of its process on a principal defendant, it then has power to serve its process on other defendants who can be found within the state, jurisdiction of the subject matter being determined by the general powers of the court conferred by the sovereign authority. The legislature in enacting the statute had in mind what has been called

"venue jurisdiction" which means the judicial power of the particular court to determine the cause.—Mid-City Bank & Trust Co. v. Myers, supra.

(6) The statute manifests, when construed as a whole, that the legislature intended to provide for extraterritorial service in actions both in personam and in rem, and to make a different provision as to service in actions of a different nature.—Mid-City Bank & Trust Co. v. Myers, supra.

(7) Under the statute, there need not be, in every case, a finding of a joint undertaking in the sense in which that phrase is ordinarily used, but parties against whom plaintiff has an entirely separate cause of action cannot be brought in by extraterritorial service merely because plaintiff deems it more convenient.—Mid-City Bank & Trust Co. v. Myers, supra.

76. Ga.—Carter v. Carter, 41 S.E. 2d 532, 201 Ga. 850—McAlhany v. Allen, 23 S.E.2d 676, 195 Ga. 150—Milner v. Gatlin, 76 S.E. 860, 139 Ga. 109.

N.Y.—Slutzky v. Lehman, 32 N.Y.S. 2d 549.

Pa.—Mid-City Bank & Trust Co. v. Myers, 23 A.2d 420, 343 Pa. 465—Williams v. Meredith, 192 A. 924, 326 Pa. 570, 115 A.L.R. 890—Heaney v. Borough of Mauch Chunk, 185 A. 732, 322 Pa. 487—Hartman v. Donahue, 16 A.2d 691, 42 Pa. Super. 382—Arcady Farms Milling Co. v. Rose, 63 Pa. Dist. & Co. 555—King v. Buchy, Com.Pl., 63 Montg. Co. 5, 60 York Leg. Rec. 160—Felix & Snyder Const. Co. v.

or citizenship of the party thus served,<sup>77</sup> although the rule does not apply where defendant has agreed in advance to accept or does in fact accept some other form of service as sufficient.<sup>78</sup> There must be actual service within the proper territorial limits on defendant or some one authorized to accept service for him.<sup>79</sup> The fact that defendant has had actual notice of the proceedings cannot supply validity to an attempted service under an unconstitutional statute providing for such service.<sup>80</sup> Statutes governing service of process in another district are construed strictly in favor of defendants,<sup>81</sup> and their provisions must be complied with in every essential requirement.<sup>82</sup>

### b. In Another County

At common law or in the absence of statute, service of process cannot be had on a defendant outside the county where it is issued, but in some cases, by virtue of statutory provisions, process may be served in a county within the state other than the one in which the action or proceeding is instituted.

At common law or in the absence of statute, service of process cannot be had on defendant outside the county where it is issued,<sup>83</sup> but in some cases, by virtue of statutory provisions, process may be served in a county, within the state, other than the one in which the action or proceeding is instituted,<sup>84</sup> as where defendant, after action commenced, has removed to another county,<sup>85</sup> or where

Holcombe, Com.Pl., 97 Pittsb.Leg.J. 355—Koll v. Pickford, Com.Pl., 94 Pittsb.Leg.J. 357, affirmed 44 A.2d 276, 353 Pa. 118.

50 C.J. p 474 note 77.

Service of process out of territorial jurisdiction of court from which it issues as nullity see Courts § 83 b (2).

77. Iowa.—Rahr v. Rahr, 129 N.W. 494, 150 Iowa 511, 35 L.R.A., N.S., 292, Ann.Cas.1912D 680.

Pa.—Vaughn v. Love, 188 A. 299, 324 Pa. 276, 107 A.L.R. 1236.

78. N.Y.—Pohlers v. Exeter Mfg. Co., 56 N.E.2d 582, 293 N.Y. 274.

79. Mo.—Corpus Juris cited in State ex rel. Minihan v. Aronson, 165 S.W.2d 404, 407, 350 Mo. 309. N.J.—Ruhle v. Caffrey, 174 A. 204, 113 N.J.Law 240, reversed on other grounds 180 A. 834, 115 N.J.Law 517.

N.Y.—In re Bennett's Estate, 238 N.Y.S. 723, 135 Misc. 486.

N.C.—Coble v. Coble, 47 S.E.2d 798, 229 N.C. 81.

Pa.—Giampalo v. Taylor, 6 A.2d 499, 335 Pa. 121—Vaughn v. Love, 188 A. 299, 324 Pa. 276, 107 A.L.R. 1236.

50 C.J. p 474 note 79.

### Principal establishment or habitual residence

(1) Under provisions of statute one should be cited in parish in which he has his principal establishment or habitual residence, but one having several residences and occupying one about as much as the other and who has made no declaration of domicile, may be cited at either place.—Mosely v. Dabazies, 76 So. 705, 142 La. 256.

(2) The term "principal establishment," as used in the law, means the principal domestic establishment.—Mosely v. Dabazies, *supra*.  
Service held sufficient

(1) One suing for assault and battery had right to cite and serve defendant at his place of business in parish of venue, wherein cause of

action arose, even though petition alleged that defendant resided in another parish.—Bacas v. Laswell, La.App., 22 So.2d 591.

(2) In suit against a public power and irrigation district and certain state executive and administrative officers charged with the administration of the public waters of the state, service of summons on the officers in the counties of their residence was proper.—Loup River Public Power Dist. v. North Loup River Public Power & Irrigation Dist., 5 N.W.2d 240, 142 Neb. 141, followed in Loup River Public Power Dist. v. Middle Loup Public Power & Irrigation Dist., 5 N.W.2d 249, 142 Neb. 156.

(3) Where defendant in trespass to try title was served in county named as that of his residence in supplemental petition filed after citation and before service, but not in county named in original petition, service was held valid, in view of presumption that citation served was issued on application of plaintiff, which application might have been oral or written.—Jones v. Watkins, Tex.Civ.App., 97 S.W.2d 1027, error dismissed.

80. N.Y.—Freedman v. Poirier, 236 N.Y.S. 96, 134 Misc. 253, affirmed 227 N.Y.S. 618, 227 App.Div. 320.

81. Ky.—Caywood v. Williams, 291 S.W. 377, 218 Ky. 282.

82. Philippine.—Manila Suburban R. Co. v. Santiago, 16 Philippine 412.

83. Fla.—Linger v. Balfour, 136 So. 433, 102 Fla. 591.

Mo.—Yates v. Casteel, 49 S.W.2d 68, 329 Mo. 1101.

Pa.—Williams v. Meredith, 192 A. 924, 326 Pa. 570, 115 A.L.R. 890—Arcady Farms Milling Co. v. Rose, 63 Pa.Dist. & Co. 555—Stinson v. Smith, 22 Pa.Dist. & Co. 143—Endicott Johnson Shoe Co. v. Owens, Com.Pl., 48 Lack.Jur. 225. Tenn.—Harris v. Harris, 280 S.W.2d 982.

W.Va.—Jones v. Main Island Creek Coal Co., 99 S.E. 462, 84 W.Va. 245.

### Service not meeting statutory requirements

Where the only service of summons was outside the county, the service was void where it did not meet with statutory requirements.—Sweetnam v. Dalby, 79 P.2d 20, 95 Utah 74.

### Statute held not to confer right in particular case

Pa.—Koll v. Pickford, 44 A.2d 276, 353 Pa. 118—Heaney v. Borough of Mauch Chunk, 185 A. 732, 322 Pa. 487—Plank v. Suskiewicz, 66 Pa. Dist. & Co. 482, 97 Pittsb.Leg.J. 29—McMaster v. Luckenbaugh, Com.Pl., 57 York Leg.Rec. 9.

84. Mo.—Corpus Juris cited in State ex rel. Minihan v. Aronson, 165 S.W.2d 404, 407, 350 Mo. 309.

Or.—Mutzig v. Hope, 158 P.2d 110, 176 Or. 368.

Pa.—Rich v. Meadville Park Theatre Corp., 62 A.2d 1, 360 Pa. 338—Gossard v. Gossard, 178 A. 837, 319 Pa. 129—Endicott Johnson Shoe Co. v. Owens, Com.Pl., 48 Lack.Jur. 225.

W.Va.—Hall v. Ocean Accident & Guarantee Corporation, 9 S.E.2d 45, 122 W.Va. 188.

The reason for statutes and rules allowing extracounty or other extraterritorial service when the action is brought in the jurisdiction where the cause of action arose is that such jurisdiction is the best place for trial, because of the availability of witnesses, presence there of physical facts relevant to the issue, and other matters of similar nature.—Koll v. Pickford, 44 A.2d 276, 353 Pa. 118—Hartman v. Donahue, 16 A.2d 691, 142 Pa.Super. 382.

Statute held only to regulate service of process and not to change jurisdiction of court.—Kaschak v. Greek Catholic Union of U. S. A., 25 A.2d 749, 148 Pa.Super. 394.

85. Ark.—Fidelity Mortg. Co. v. Evans, 270 S.W. 624, 168 Ark. 459.

the process may and does run to another county,<sup>86</sup> or throughout the state.<sup>87</sup>

Under statutes allowing process to be issued to another county where defendant resides or where he has his usual place of abode, the word "reside" has been held to include the place where defendant for the time being might be, whether or not his permanent place of residence;<sup>88</sup> and it has been held that one may have more than one residence in the state and each be "a usual place of abode" for service of process,<sup>89</sup> or he may have a "usual place of abode" outside the state and may have one within the state at the same time and each may be sufficient for service.<sup>90</sup>

Where by statute plaintiff may elect to sue in the county where the cause of action arose or in the county where defendant resides, it has been held that, if plaintiff sues where the cause of action arose, defendant must be served with process in that county.<sup>91</sup>

Under a statute permitting the action to be brought in any county in which defendant or one of several defendants resides or is summoned, service may be made in any county in which defendant is found,<sup>92</sup> but if the action is not brought in the county in which defendant resides, the service must be had in the county in which the action is brought,<sup>93</sup> although if the action is brought in the county of defendant's residence, summons may be served on defendant in another county.<sup>94</sup>

Where venue is fixed by the location of real estate to be affected or where the cause of action arose,

defendant may be summoned and validly served with process in a county other than that of the venue of the action even in the absence of specific statutory authority,<sup>95</sup> and process may be served in any county in the state;<sup>96</sup> it is not essential that process be served on anyone in the county where suit is pending.<sup>97</sup>

A statute, by its terms providing that process may be issued to an adjoining county in a proceeding for foreclosure of a mortgage, will not authorize such issue in a proceeding to foreclose a common-law lien.<sup>98</sup>

*In case of several defendants.* Where a statute provides that an action may be brought in any county where any of the defendants may reside, process can be served on the other defendants in any other county either before or after service on resident defendant.<sup>99</sup> Under a statute authorizing an action to be brought in the county in which defendant or one of several defendants resides or is summoned, service of process on all defendants may be made in counties other than that in which the action is brought if at its commencement any of them resided in the county where the action is brought,<sup>1</sup> but a nonresident defendant can be served in the county of his residence only by making someone a party defendant who is jointly liable and over whom the court issuing the summons has jurisdiction.<sup>2</sup> Statutes which permit service in another county in an action against several defendants jointly liable have been construed to require service on<sup>3</sup> or general appearance of<sup>4</sup> at least one real or material<sup>5</sup> defendant in the county of venue,

Ky.—Dyas v. Lindsey, 5 Bush 506.  
50 C.J. p 474 note 86.

86. Mo.—Yates v. Casteel, 49 S.W.  
2d 68, 329 Mo. 1101.

Neb.—Grosch v. Bredthauer, 284 N.  
W. 869, 136 Neb. 43.

Ohio.—Baumgardner v. State ex rel.  
Fulton, 192 N.E. 349, 48 Ohio App.  
5.

Or.—Mutzig v. Hope, 158 P.2d 110,  
176 Or. 368.

Va.—Federal Land Bank of Balti-  
more v. Birchfield, 3 S.E.2d 405,  
173 Va. 200.

50 C.J. p 475 note 87.

87. Fla.—Linger v. Balfour, 136 So.  
433, 102 Fla. 591.

88. N.Y.—Matter of Gahn, 180 N.Y.  
S. 262, 110 Misc. 96.  
50 C.J. p 475 note 89.

89. Conn.—Clegg v. Bishop, 136 A.  
102, 105 Conn. 564.

90. Conn.—Dorus v. Lyon, 101 A.  
490, 92 Conn. 55.

91. W.Va.—Danser v. Dorr, 78 S.E.  
367, 72 W.Va. 430.

92. Ark.—Chambers v. Gray, 158 S.  
W.2d 926, 203 Ark. 858.

50 C.J. p 475 note 95.

93. Ark.—Chambers v. Gray, *supra*.

94. Ky.—White v. Crouch, 133 S.W.  
2d 753, 280 Ky. 637.

95. Mo.—State ex rel. Minihan v.  
Aronson, 165 S.W.2d 404, 350 Mo.  
309.

96. Neb.—Rakow v. Tate, 140 N.  
W. 162, 93 Neb. 198.

50 C.J. p 475 note 97.

97. Neb.—Rakow v. Tate, *supra*.

98. Ohio.—Blackburn v. People, 27  
O.C.A. 527.

99. Va.—Brame v. Nolan, 124 S.E.  
299, 139 Va. 413.

1. Ark.—Commercial Union Fire  
Ins. Co. v. Hansen, 170 S.W.2d  
1012, 205 Ark. 612.

Insufficient service on codefendant.  
Since service of process on in-  
dividual defendant, not domiciled in  
county in which suit was brought,  
by leaving copy with wife in county

of venue was insufficient, service on  
corporate codefendant in another  
county of its domicile was insuffi-  
cient.—McGill v. Miller, 37 S.W.2d  
689, 183 Ark. 585.

2. Ark.—New York Life Ins. Co. v.  
Cherry, 50 S.W.2d 584, 185 Ark.  
984.

3. Tenn.—Western Automobile Cas-  
ualty Co. v. Burnell, 71 S.W.2d  
474, 17 Tenn.App. 687.  
50 C.J. p 475 note 4.

4. Pa.—Preston v. Lacey, 2 Del.Co.  
463.  
50 C.J. p 475 note 5.

5. Tenn.—Western Automobile Cas-  
ualty Co. v. Burnell, 71 S.W.2d  
474, 17 Tenn.App. 687.

Party against whom law affords  
no right of action in suit is not real  
or material defendant within rule  
requiring service of original pro-  
cess on such defendant before coun-  
terpart may be issued.—Western Au-  
tomobile Casualty Co. v. Burnell, *su-  
pra*.



since it is held that such statutes apply to a non-resident found within the state,<sup>6</sup> and, where service is had on defendant temporarily in the county, will authorize service on his codefendants outside the county.<sup>7</sup> The joint liability should appear on the face of the pleadings.<sup>8</sup> In some jurisdictions, such statutes are construed as requiring proof of service on a defendant in the county of venue to be filed as a condition precedent to valid service in another county on a codefendant,<sup>9</sup> and where so construed it has been held that, where proof of service on a defendant in the county of venue and on a defendant out of the county are filed on the same day, without any showing of which took place first, service on defendant out of the county is unauthorized.<sup>10</sup> A defendant may, under some circumstances, interplead another party and have process issued to and served in the county in which such interpleaded party resides.<sup>11</sup> Service had on defendant in the county of venue must be a sufficient legal service,<sup>12</sup> hence, it has been held that service outside the county of venue is not legal where defendant served therein was exempt from service.<sup>13</sup>

### c. On Nonresident within Jurisdiction

A nonresident found within the territorial jurisdic-

tion of the court may usually be served with the same effect as though he were a resident.

If a nonresident is found within the territorial jurisdiction of the court, personal service may usually be made on him with the same effect as though he were a resident,<sup>14</sup> and the service is not rendered inoperative by the fact that suit was filed and process issued prior to his coming within the jurisdiction.<sup>15</sup> In cases where the statute provides for service on a nonresident by publication alone, however, personal service on him within the state will be without effect.<sup>16</sup> The mere transaction of business in a state by a nonresident natural person does not imply consent to be bound by the process of its courts;<sup>17</sup> and an attempted service on a nonresident through a local agent after the agency is at an end is of no effect.<sup>18</sup>

### d. In Another State or Country

Except as and for the purposes authorized by statute, personal service without a state is ineffectual for any purpose.

Process from a court of one state cannot flow into another state and compel a person who is there domiciled to subject himself to a proceeding to establish his personal liability in the court from which the process issued.<sup>19</sup> Thus, except as and

#### Good faith in joining resident

(1) The ultimate test in determining validity of service of counterpart summons on nonresident defendant is plaintiff's good faith in joining resident defendant who has real and antagonistic interest in subject matter of suit.—Taylor v. McCool, 189 S.W.2d 817, 183 Tenn. 1.

(2) Service of counterpart summons on resident of another county than that in which action was brought after personal service of summons on nonresident of state in county of venue, to which he was induced by plaintiff to come for purpose of accepting service, without being informed that he had real and antagonistic interest in action, as plaintiff or his representative knew, was invalid.—Taylor v. McCool, supra.

6. Neb.—Adair County Bank v. Forey, 105 N.W. 714, 74 Neb. 811.

7. Neb.—State Nat. Bank v. Parsons, 215 N.W. 102, 115 Neb. 770.  
Tex.—Sanders v. City Nat. Bank, 12 S.W. 110.  
50 C.J. p 475 note 7.

8. Ark.—Hoyt v. Ross, 222 S.W. 705, 144 Ark. 473.  
50 C.J. p 475 note 8.

9. Mich.—Engel v. Smith, 166 N.W. 963, 200 Mich. 395.  
50 C.J. p 476 note 9.

10. Mich.—Clark v. Lichtenberg, 33 Mich. 307.

11. Neb.—Farmers', etc., Bank v. Tate, 147 N.W. 213, 96 Neb. 142.  
50 C.J. p 476 note 11.

12. Okl.—Stumpf v. Pederson, 54 P. 2d 1035, 176 Okl. 136—Bearman v. Hunt, 171 P. 1124, 68 Okl. 96.

13. Okl.—Stumpf v. Pederson, 54 P. 2d 1035, 176 Okl. 136—Bearman v. Hunt, 171 P. 1124, 68 Okl. 96.

14. Ga.—Minsk v. Cook, 173 S.E. 446, 48 Ga.App. 567.

Ill.—Rembke v. Bieser, 6 N.E.2d 900, 289 Ill.App. 136.

N.J.—James H. Rhodes & Co. v. Chaunovsky, 60 A.2d 623, 137 N.J.Law 459—Elgart v. Mintz, 200 A. 488, 124 N.J.Eq. 136.  
50 C.J. p 476 note 14.

Exemptions from service see infra §§ 80–89.

Service procured by fraud or pretense of settlement see infra § 39.

15. Kan.—Shaffer v. Harbaugh, 185 P. 1049, 105 Kan. 681.

Mo.—State Bank v. Tucker, 180 S.W. 457, 192 Mo.App. 139.

16. Ohio.—Ruthrauff v. Ruthrauff, 15 Ohio App. 214.

17. U.S.—Flexner v. Farson, Ill., 39 S.Ct. 97, 248 U.S. 289, 63 L.Ed. 250.

N.Y.—Skandinaviska Granit Artiebolaget v. Weiss, 234 N.Y.S. 202, 226 App.Div. 56.  
50 C.J. p 476 note 20.

Agent of owner of motor vehicle on whom process may be served see Motor Vehicles §§ 501–502.

18. U.S.—Flexner v. Farson, Ill., 39 S.Ct. 97, 248 U.S. 289, 63 L.Ed. 250.

19. U.S.—Pennoyer v. Neff, Or., 95 U.S. 714, 24 L.Ed. 565.

Ariz.—Blair v. Blair, 62 P.2d 1321, 48 Ariz. 501.

Cal.—Frey & Horgan Corporation v. Superior Court in and for City and County of San Francisco, 55 P.2d 203, 5 Cal.2d 401, certiorari denied Frey & Horgan Corp. v. Superior Court of State of California, 56 S.Ct. 955, 298 U.S. 684, 80 L.Ed. 1404.

Ga.—Fain v. Nix, 7 S.E.2d 733, 189 Ga. 772.

Iowa.—Allen v. Allen, 298 N.W. 869, 230 Iowa 504, 136 A.L.R. 617.

La.—Spearman v. Stover, App., 170 So. 259.

Mich.—Stewart v. Eaton, 283 N.W. 651, 287 Mich. 466, 120 A.L.R. 1354.

Mo.—Fisk v. Wellsville Fire Brick Co., App., 145 S.W.2d 451, transferred, see 152 S.W.2d 113, 348 Mo. 73.

N.J.—Newark International Baseball Club v. Theatrical Managers, Agents and Treasurers Union, 7 A.2d 170, 125 N.J.Eq. 575.

N.M.—Rosser v. Rosser, 78 P.2d 1110, 42 N.M. 360.

N.Y.—Karpf v. Karpf, 23 N.Y.S.2d 745, 260 App.Div. 701—Robinson v.

for the purposes authorized by statute,<sup>20</sup> personal service outside a state is ineffectual for any purpose.<sup>21</sup> There can be no revival of a transitory action in personam by service of process outside of the state on the representative or successor in interest of a deceased defendant.<sup>22</sup> A court of the United States will not order service on an American resident of summons from a court of a foreign country in compliance with a letter rogatory requesting such service, where under the laws of such country defendant might be subjected to a personal judgment on his default.<sup>23</sup>

### § 33. Time of Service

- a. In general
- b. Extension of time

#### a. In General

Officers assuming to execute process must execute it

promptly, the essential time element in the service being that the defendant be informed in advance of the hearing the length of time prescribed by law. Statutes or rules of practice regulating the time when process may be served with respect to the day of its issuance and return are held to be mandatory in some jurisdictions and directory in others.

Ministerial officers assuming to execute judicial process on the person or property of a citizen must execute it promptly and precisely.<sup>24</sup> The essential time element in the service of process is that defendant be informed in advance of the hearing the length of time prescribed by law to enable him to defend against it.<sup>25</sup> In some jurisdictions the provisions of statutes or rules of practice regulating the time when process may be served with respect to the day of its issuance and return have been held to be mandatory<sup>26</sup> but in others have been held to be directory.<sup>27</sup> Where process is served within the time limited by stat-

Robinson, 3 N.Y.S.2d 882, 254 App. Div. 696, affirmed 17 N.E.2d 448, 379 N.Y. 582—Caldwell v. Caldwell, 70 N.Y.S.2d 601, 189 Misc. 845—Fromm v. Glueck, 293 N.Y.S. 530, 161 Misc. 502—Smith v. Smith, 29 N.Y.S.2d 469, affirmed 35 N.Y.S.2d 725, 264 App. Div. 769.

Pa.—Atlantic Seaboard Natural Gas Co. v. Whitten, 173 A. 305, 315 Pa. 529, 93 A.L.R. 615—Commonwealth ex rel. Manzi v. Manzi, 182 A. 795, 120 Pa. Super. 360.

20. Pa.—Giampalo v. Taylor, 6 A.2d 499, 335 Pa. 121—Atlantic Seaboard Natural Gas Co. v. Whitten, 173 A. 305, 315 Pa. 529, 93 A.L.R. 615.

Personal service out of jurisdiction in aid of or in lieu of publication see *infra* §§ 73-74.

Service on resident in action for recovery of money

(1) Personal service of process outside the state without an order can be made where defendant is a resident of the state and the complaint demands judgment of a sum of money only, as well as in cases specified in statutes dealing with orders for service of summons by publication and with personal service out of the state without order.—Sperry v. Fliegers, 86 N.Y.S.2d 830, 194 Misc. 438.

(2) Service of summons on resident in Paris, France, without an order, where action was for recovery of money only, was proper under such statute.—Sperry v. Fliegers, *supra*.

21. Ala.—St. Mary's Oil Engine Co. v. Jackson Ice & Fuel Co., 138 So. 834, 224 Ala. 152.

Mich.—Stewart v. Eaton, 283 N.W. 651, 287 Mich. 466, 120 A.L.R. 1354.

Minn.—Garber v. Bancamerica-Blair

Corporation, 285 N.W. 723, 205 Minn. 275.

Mo.—Corpus Juris cited in State ex rel. Minihan v. Aronson, 165 S.W. 2d 404, 407, 350 Mo. 309.

N.J.—Newark International Baseball Club v. Theatrical Managers, Agents and Treasurers Union, 7 A.2d 170, 125 N.J.Eq. 575.

N.Y.—Maloney v. Ferguson, 50 N.Y.S.2d 937, 182 Misc. 564—Saltzman v. Indemnity Ins. Co. of North America, 274 N.Y.S. 806.

Pa.—Giampalo v. Taylor, 6 A.2d 499, 335 Pa. 121—Vaughn v. Love, 188 A. 299, 324 Pa. 276, 107 A.L.R. 1336—Atlantic Seaboard Natural Gas Co. v. Whitten, 173 A. 305, 315 Pa. 529, 93 A.L.R. 615.

50 C.J. p 476 note 24.

Insufficient to begin action

Writ of summons not served within state is insufficient to begin action against nonresidents.—Home Sav. Bank v. Rolando, 189 A. 27, 57 R.I. 205.

22. Minn.—National Council K. L. S. v. Scheiber, 163 N.W. 781, 137 Minn. 423.

23. U.S.—In re Letters Rogatory out of First Civil Court of City of Mexico, D.C.N.Y., 261 F. 652.

24. Ill.—People v. Wiedeman, 154 N.E. 432, 324 Ill. 66. Delay in service of process as ground for dismissal see Dismissal and Nonsuit § 62.

"When the plaintiff confers on the court jurisdiction of the subject matter of a suit, it can only be on condition that he proceed with due diligence to give notice to the defendant."—Yeager v. Mellus, 43 N.W.2d 836, 838, 328 Mich. 243.

25. Tex.—Gunter's Unknown Heirs

and Legal Representatives v. Lagow, Civ.App., 191 S.W.2d 111, error refused.

26. U.S.—U. S. v. De Rasimo, D.C.N.Y., 46 F.2d 362.

Ark.—J. H. Hamlen & Son v. Allen, 57 S.W.2d 1046, 186 Ark. 1104.

Conn.—Daley v. Board of Police Com'rs of East Hartford, 54 A.2d 501, 133 Conn. 716.

Fla.—Smetal Corporation v. West Lake Inv. Co., 172 So. 58, 126 Fla. 595.

Mich.—Home Sav. Bank v. Young, 295 N.W. 474, 295 Mich. 725.

N.C.—Green v. Chrismon, 28 S.E.2d 215, 223 N.C. 724.

50 C.J. p 480 note 26. Time limit, fixed by court for service of citation on interveners after maintaining their exception of want of legal citation, was held unauthorized and without effect.—Adams v. Ross Amusement Co., 161 So. 601, 182 La. 252.

Service of summons has been held void for failure to give proper length of notice.—Jones v. Fite, 14 Pa. Dist. & Co. 362, 26 Luz. Leg. Reg. 46—50 C.J. p 480 note 26 [a].

27. Okl.—Hendron v. Sarkey, 65 P. 2d 519, 179 Okl. 316.

50 C.J. p 480 note 27.

Alias

Fact that alias summons was not issued within specified number of days after issuance of a first summons as required by statute in order to constitute commencement of a suit was held not to render service of process invalid, where service was made before limitations had run against cause of action, although after termination of the specified period.—Hubbard v. George F. Alger Co., 1 N.E.2d 325, 51 Ohio App. 405.

ute it is sufficient,<sup>28</sup> although not served immediately at or near the time of commencement of the action.<sup>29</sup> A provision requiring issuance of summons within a year from the time of filing of the complaint does not require service within a year.<sup>30</sup> Plaintiff's lack of diligence in serving the summons is not excused by the pendency of other proceedings.<sup>31</sup> In statutory proceedings where notice is not required by the statute, but must be given on general principles before the rights of a party can be taken away, the time when the notice should be given is immaterial, as long as the opposite party has it before the court acts.<sup>32</sup>

**Before action begun.** Service before the suit is legally commenced is a nullity.<sup>33</sup> Where the statute expressly provides that a suit shall be commenced by filing a petition in the clerk's office and causing a summons to be issued thereon, issuance and service of summons before the filing of a petition are invalid and of no effect,<sup>34</sup> and where not required, if the complaint when filed, after the service, states facts sufficient, the court has jurisdiction of both the person and of the subject

matter.<sup>35</sup>

**On day of issuance.** Process returnable within a given number of days from its date may be served on the day of its issuance.<sup>36</sup>

**On return day.** Generally, the last day on which process may be executed is the return day thereof;<sup>37</sup> and service is in time if made any time on that day;<sup>38</sup> but, where the statute provides for service "any time before the return day," a service made on that day is void in some jurisdictions<sup>39</sup> and voidable in others.<sup>40</sup>

**After day or term to which returnable.** After the return day, the writ being functus officio,<sup>41</sup> service of it is ineffective according to some decisions,<sup>42</sup> although the view has been taken that a service of summons on the day after it should have been returned does not render the service void, but only voidable.<sup>43</sup> So, where service is returnable to a term of court, its service after the appearance term, without an order extending it, has been held to be a nullity,<sup>44</sup> as has been service not made within an extension of time ordered by the court.<sup>45</sup>

28. Cal.—Atkinson v. Adkins, 268 P. 461, 92 Cal.App. 424.

**Who may or must serve**

Statute providing that action shall be considered as begun when summons is served on defendant or delivered to proper officer for such service, but that such delivery shall be ineffectual as against defendant not served within limitation period, unless summons be actually served on him within specified number of days thereafter, does not require such officer to serve summons within specified number of days after delivery thereof to him, but service by another officer within the statutory time is sufficient.—Berghuis v. Korthuis, 37 N.W.2d 809, 228 Minn. 534.

29. Cal.—Atkinson v. Adkins, 268 P. 461, 92 Cal.App. 424.

30. Utah.—Culmer v. Caine, 61 P. 1008, 22 Utah 216.

31. Cal.—Kreiss v. Hotaling, 33 P. 1125, 99 Cal. 383—Thompson v. Lester, 67 P.2d 1093, 20 Cal.App.2d 745—Watterson v. Hillside Water Co., 183 P. 592, 42 Cal.App. 364.

32. Ill.—Commissioners of B. M. Lewis Union Drainage Dist. No. 1 v. Melville, 58 N.E.2d 580, 388 Ill. 526.

33. Tex.—Texas State Fair, etc. v. Lyon, 24 S.W. 323, 5 Tex.Civ.App. 382.

50 C.J. p 480 note 31.

34. Kan.—Commercial Nat. Bank v. Tucker, 254 P. 1034, 123 Kan. 214.

35. Wash.—Martin v. Ewing, 159 P. 755, 92 Wash. 525.  
50 C.J. p 481 note 34.

36. W.Va.—Spragins v. West Virginia Cent., etc., R. Co., 13 S.E. 45, 35 W.Va. 139.  
50 C.J. p 481 note 35.

37. Ga.—Peck v. La Roche, 12 S.E. 638, 36 Ga. 314.  
50 C.J. p 481 note 36.

38. Neb.—Aumock v. Jamison, 1 Neb. 432.  
50 C.J. p 481 note 37.

**Duty to serve**

Under a statute providing that if it shall not be in the power of the officer to serve a summons a stated time before the return day thereof he may execute it at any time before or on the return day, but if not served the statutory time before the return day defendant shall be entitled to a continuance, it is the officer's duty, when he receives the summons, to serve it, irrespective of whether or not the statutory time would intervene thereafter between the date of service and the first day of the return to which it was returnable.—Taylor v. Southern Ry. Co., D.C.Ill., 6 F.Supp. 259.

39. Tex.—Leach v. City of Orange, Civ.App., 46 S.W.2d 1047.  
50 C.J. p 481 note 38.

40. Okl.—Braden v. Williams, 222 P. 943, 101 Okl. 11.  
50 C.J. p 481 note 39.

41. Ala.—Murphree v. International Shoe Co., 20 So.2d 782, 246 Ala. 384.

Mo.—Corpus Juris cited in Henneke v. Strack, App., 101 S.W.2d 743, 746.

N.C.—Corpus Juris quoted in Green v. Chrismon, 28 S.E.2d 215, 217, 223 N.C. 724—Hatch v. Alamance R. Co., 112 S.E. 529, 183 N.C. 617.

42. Ala.—Murphree v. International Shoe Co., 20 So.2d 783, 246 Ala. 384.  
Ark.—J. H. Hamlen & Son v. Allen, 57 S.W.2d 1046, 186 Ark. 1104.

Mo.—Corpus Juris cited in Henneke v. Strack, App., 101 S.W.2d 743, 746.

N.C.—Corpus Juris quoted in Green v. Chrismon, 28 S.E.2d 215, 217, 223 N.C. 724.

Tex.—Leach v. City of Orange, Civ. App., 46 S.W.2d 1047.

W.Va.—Hall v. Ocean Accident & Guarantee Corporation, 9 S.E.2d 45, 122 W.Va. 188—Dunaway v. Lord, 173 S.E. 568, 114 W.Va. 671.  
50 C.J. p 481 note 41.

43. Ohio.—Kunzelmann v. Duval, 22 N.E.2d 632, 61 Ohio App. 360.

44. Ga.—Thurman v. Roberts, 36 S.E.2d 51, 200 Ga. 43.

N.C.—Corpus Juris quoted in Green v. Chrismon, 28 S.E.2d 215, 217, 223 N.C. 724.

50 C.J. p 481 note 42.

45. Ga.—Warren Brick Co. v. Lagarde Lime, etc., Co., 76 S.E. 761, 12 Ga.App. 58.

N.C.—Corpus Juris quoted in Green v. Chrismon, 28 S.E.2d 215, 217, 223 N.C. 724.

50 C.J. p 481 note 43.

*At or on prohibited times or days.* Service should not be made on a day expressly prohibited by statute.<sup>46</sup>

### b. Extension of Time

Unless prohibited by statute, the courts have discretionary power on good cause to extend the time for making personal service of process, but the application should show a reasonable effort to make service.

Unless prohibited by statute, the courts have discretionary power on good cause to extend the time for making personal service of process.<sup>47</sup> The application for extension should show a reasonable effort to make service.<sup>48</sup> The request for extension must be unconditional<sup>49</sup> and cannot be made to depend on the ruling of the court on objections to the original service.<sup>50</sup> Where a statute provides time for service at a certain distance, and additional time for every additional fifty miles, but there is not an additional fifty miles but a lesser additional distance, a part of a day cannot be added to the time, and the original time must suffice.<sup>51</sup>

*Ex parte order for extension* of time may be set aside where made without a showing of due diligence in effort to make service.<sup>52</sup>

*By attorney or sheriff.* In accordance with the

practice in some jurisdictions, the return day of the writ may be reasonably extended by alteration by the attorney or sheriff<sup>53</sup> even after the original day has passed.<sup>54</sup>

## § 34. Manner of Service

- a. In general
- b. In case of several defendants
- c. Where service refused
- d. Use of force

### a. In General

In order to constitute a good personal service, the defendant must, in some substantial form, be apprised of the fact that service is intended to be made; and, where service of process is regulated by statutes or court rules, the specified method is exclusive and must be followed.

In order to constitute a good personal service, defendant must, in some substantial form, be apprised of the fact that service is intended to be made,<sup>55</sup> which, depending on the statute, rule of court, or practice controlling the matter in the particular jurisdiction, may be done by reading the process to him,<sup>56</sup> explaining its nature,<sup>57</sup> or delivering to him a copy of the process;<sup>58</sup> but the act of effecting service on a defendant must be per-

46. N.Y.—*Martin v. Goldstein*, 46 N. Y.S. 961, 20 App.Div. 208.

50 C.J. p 481 note 45.

Validity of service of process on:

Holiday see Holidays § 5 b.

Sunday see the C.J.S. title Sunday § 42, also 60 C.J. p 1138 note 46 -p 1139 note 58.

47. Ga.—*Allen v. Mutual Loan, etc., Co.*, 12 S.E. 265, 86 Ga. 74. 50 C.J. p 481 note 50.

Perfection of service after term

(1) Where there is neither service nor entry nor waiver of service at appearance term, plaintiff must then and there move for order to perfect service, or he will be chargeable with laches.—*Nail v. Popwell*, 122 S.E. 632, 32 Ga.App. 20.

(2) Where defendant is temporarily absent from jurisdiction, rendering service impossible, failure to move for order to perfect service is not laches.—*Nail v. Popwell*, supra.

(3) If there is no service of the petition and process, and plaintiff is guilty of laches, the writ becomes abortive, and the court loses jurisdiction to amend process and to have service perfected.—*Nail v. Popwell*, supra.—*McClendon v. Ward-Truitt Co.*, 91 S.E. 1000, 19 Ga.App. 495.

(4) Where plaintiff actively endeavors to remedy nonservice of petition and process, and to have service made on first opportunity after his exercise of due diligence discov-

ers that service was not perfected, court's jurisdiction continues to have service perfected after first term.—*McClendon v. Ward-Truitt Co.*, supra.—*Beach Lumber Co. v. Baxley Banking Co.*, 68 S.E. 946, 8 Ga.App. 251.

(5) So, where petition was filed and process regularly issued and annexed thereto, on discovery that defendant had not been served, judge properly ordered that next term be made return, term and defendant be served with copy of petition, and service on defendant of copy of petition and new process attached thereto was sufficient.—*Duren v. Pollock*, 169 S.E. 44, 46 Ga.App. 706.

(6) Where plaintiff, after affidavit of illegality had been sustained, petitioned for an order to perfect service, alleging the exercise of all diligence in having the service perfected, an order to amend process and perfect service was properly allowed.—*McClendon v. Ward-Truitt Co.*, supra.

48. Ga.—*Pape v. Richardson*, 141 S. E. 506, 37 Ga.App. 692.

49. Ga.—*Caine v. Armenia Lodge No. 1930 G. U. O. O. F.*, 77 S.E. 184, 12 Ga.App. 251.

50. Ga.—*Caine v. Armenia Lodge No. 1930 G. U. O. O. F.*, supra.

51. N.Y.—*Hovey v. McCrea*, 4 How. Pr. 31.

52. Ga.—*Pape v. Richardson*, 141 S. E. 506, 37 Ga.App. 692.

53. N.J.—*Kloeping v. Stellmacher*, 36 N.J.Law 176.

50 C.J. p 482 note 62.

54. N.J.—*Kloeping v. Stellmacher*, supra.

55. Mo.—*Corpus Juris cited in Kaimann v. Kaimann Bros., App.*, 175 S.W.2d 66, 70, opinion quashed on other grounds 181 S.W.2d 524, 352 Mo. 1187, conformed to, App., 182 S.W.2d 458.

N.Y.—*Hiller v. Burlington, etc., R. Co.*, 70 N.Y. 223—*Anderson v. Abeel*, 89 N.Y.S. 254, 96 App.Div. 370.

Service on corporations see Corporations §§ 1305-1322.

"For service of process to be valid in an action in personam the service must have been by a method reasonably calculated to give the person or entity knowledge of the attempted exercise of jurisdiction, and an opportunity to be heard."—*Operative Plasterers' and Cement Finishers' International Ass'n of U. S. and Canada v. Case*, 93 F.2d 56, 65, 68 App. D.C. 43.

56. Md.—*North v. Town Real Estate Corp.*, 60 A.2d 665.

Service by reading see infra § 35.

57. Md.—*North v. Town Real Estate Corp.*, 60 A.2d 665.

58. Md.—*North v. Town Real Estate Corp.*, supra.

formed both knowingly and intentionally.<sup>59</sup> Under some statutes the original writ need not be produced and shown to defendant at the time of service.<sup>60</sup> It has been said, as discussed supra § 25, that the common-law rule with respect to service of process is binding in the absence of statute; and it has also been said that in the absence of legislative provision the mode of effecting service rests with the court.<sup>61</sup> Where, as is practically the case in all jurisdictions now, however, service of process is regulated by statute or court rules, the specified method is exclusive<sup>62</sup> and must be followed,<sup>63</sup> and such service must appear of record.<sup>64</sup> If the statutes permit one of two or more methods, the method adopted must be followed strictly.<sup>65</sup> Any attempted service which fails to be effective as service on the party who is sought to be bound is defective service whether it be so fatally defective as to be void, or only so defective as to be voidable.<sup>66</sup> Where what the law requires is done, the doing of additional superfluous acts will not vitiate the service.<sup>67</sup> The fact that defendant was ill when served does not invalidate the service.<sup>68</sup> In

order to serve a fictitious defendant it is not indispensable for the process server to tell the person served he is being served as a fictitious defendant where he knows, or, as a reasonable man, should know, that he is being so served.<sup>69</sup> The party at whose instance a writ has issued, or his attorney, has the right to give the officer directions as to how it shall be executed, which directions, when not in conflict with the law, the officer is bound to follow.<sup>70</sup>

*What law governs.* The method of serving process is governed by the law of the forum,<sup>71</sup> and the law in force at the time of service, and not that in force at the time of issuance, controls.<sup>72</sup>

*Statutory requisites may be waived by defendant.*<sup>73</sup>

#### b. In Case of Several Defendants

Where there are several defendants, the service must be complete and entire as to each; but defective service as to one defendant cannot be availed of by his co-defendant.

Where there are several defendants, the service,

#### Service:

By delivery of copy of process see infra § 36.

Of pleading with process see infra § 37.

59. Minn.—Lee v. Skrukud, 42 N. W.2d 544.

60. Alaska.—Johnson v. Demmert Packing Co., 8 Alaska 452.  
50 C.J. p 482 note 68.

61. U.S.—In re Greyling Realty Corporation, C.C.A.N.Y., 74 F.2d 734, certiorari denied Troutman v. Compton, 55 S.Ct. 639, 294 U.S. 725, 79 L.Ed. 1256.

62. U.S.—Nickerson v. Warren City Tank & Boiler Co., D.C.Pa., 223 F. 843.

Ark.—Howell v. McMillan, 230 S.W. 2d 654.

D.C.—Craig v. Hell, Mun.App., 47 A. 2d 871.

Mich.—Defoe v. Webster, 233 N.W. 335, 252 Mich. 337.

Mo.—State ex rel. Mueller Baking Co. v. Calvird, 92 S.W.2d 184, 338 Mo. 601.

Nev.—Zeig v. Zeig, 198 P.2d 724, 65 Nev. 464.

Okl.—Corpus Juris cited in Chaney v. Reddin, 205 P.2d 310, 313, 201 Okl. 264, 8 A.L.R. 337—Corpus Juris quoted in Lovins v. State, 293 P. 273, 274, 49 Okl.Cr. 200.

Pa.—Kunsman v. Brady, 20 Pa.Dist. & Co. 533.

50 C.J. p 482 note 71 [a].

63. Conn.—FitzSimmons v. International Ass'n of Machinists, 7 A.2d 448, 125 Conn. 490.

D.C.—Doherty v. Kalbach, 87 F.2d 539, 66 App.D.C. 322.

Ga.—Scott v. Scott, 15 S.E.2d 416, 192 Ga. 370.

Ill.—Scharlau v. Lombard State Bank, 278 Ill.App. 504.

Iowa.—Collins v. Powell, 277 N.W. 477, 224 Iowa 1015.

Kan.—Vergo v. City of Mulberry, 207 P.2d 370, 167 Kan. 561.

La.—Adams v. Citizens' Bank, 136 So. 197, 17 La.App. 422.

Mich.—In re Wilkie's Estate, 22 N. W.2d 265, 314 Mich. 186.

Mo.—State ex rel. Madden v. Padberg, 191 S.W.2d 1093, 340 Mo. 667.

N.D.—Corpus Juris cited in Darling & Co. v. Burchard, 284 N.W. 856, 862, 69 N.D. 212.

Ohio.—Sears v. Weimer, 55 N.E.2d 413, 143 Ohio St. 312—Freytag v. Freytag, 13 Ohio Supp. 145.

Okl.—Corpus Juris cited in Chaney v. Reddin, 205 P.2d 310, 313, 201 Okl. 264, 8 A.L.R. 337—Corpus Juris quoted in Lovins v. State, 293 P. 273, 274, 49 Okl.Cr. 200.

Pa.—Kunsman v. Brady, 20 Pa.Dist. & Co. 533—Popky v. Z. M. C. Sales Corporation, Com.Pl., 31 Luz.Leg. Reg. 460.

R.I.—Home Sav. Bank v. Rolando, 189 A. 27, 57 R.I. 205.

Tenn.—O. H. May Co. v. Gutman's Inc., 2 Tenn.App. 43.

Tex.—City of Corpus Christi v. Scruggs, Civ.App., 89 S.W.2d 458.

W.Va.—Evans v. Hale, 50 S.E.2d 682, 131 W.Va. 808.

50 C.J. p 482 note 73.

#### Service as notice is served

The statutory provision that sum-

mons against any person may be served as notice is served under statute relates to personal service.—Taylor v. Taylor, 36 S.E.2d 601, 128 W.Va. 198.

64. Okl.—Corpus Juris quoted in Lovins v. State, 293 P. 273, 274, 49 Okl.Cr. 200.  
50 C.J. p 482 note 74.

65. Md.—North v. Town Real Estate Corp., 60 A.2d 665.  
50 C.J. p 482 note 76.

66. Fla.—State ex rel. Briggs v. Barns, 164 So. 539, 121 Fla. 357.

67. Ill.—Bozarth v. Largent, 21 N.E. 218, 128 Ill. 95.

68. Tex.—Page v. Thomas, Civ. App., 47 S.W.2d 894, reversed on other grounds 71 S.W.2d 234, 123 Tex. 368.

69. Cal.—Petersen v. Vane, 184 P. 2d 6, 57 Cal.App.2d 58.

70. Vt.—Gross v. Gates, 194 A. 465, 109 Vt. 156.

Duty of sheriff to follow directions as to mode of service see the C. J.S. title Sheriffs and Constables § 44, also 57 C.J. p 783 notes 71–78.

71. Minn.—Bloom v. American Exp. Co., 23 N.W.2d 570, 222 Minn. 249.

72. Ark.—Rose v. Ford, 2 Ark. 26.  
50 C.J. p 482 note 78.

73. Ind.—Casteel v. Hiday, 13 Ind. 536.

50 C.J. p 482 notes 79–81.

General appearance as waiver of defects in process or service see Appearances § 17 c.

in order to operate as personal service on all of them, must be complete and entire as to each;<sup>74</sup> and each defendant should be served in the manner prescribed.<sup>75</sup> Where service is defective as to one defendant, it is a matter personal to him and cannot be availed of by his codefendant;<sup>76</sup> nor does it affect the validity of the service on his codefendant.<sup>77</sup>

### c. Where Service Refused

Where facts occur which would convince a reasonable man that personal service of process is being attempted, service cannot be avoided by denying service and moving away without consenting to take the document in hand; and service may be effected by depositing the paper in some appropriate place in his presence where it will be most likely to come into his possession.

When men are within easy speaking distance of each other and facts occur which would convince a reasonable man that personal service of process is being attempted, service cannot be avoided by denying service and moving away without consenting to take the document in hand.<sup>78</sup> The general rule is that, where a defendant on whom service of process by copy is sought to be made refuses to receive the copy offered, the person or officer making the service should inform him of the nature of the paper and of his purpose to make service thereof, and deposit it in some appropriate place in

his presence or where it will be most likely to come into his possession.<sup>79</sup> Every case, however, must depend in a great measure on its own circumstances.<sup>80</sup>

### d. Use of Force

An officer has no right to use force in serving civil process, and has no authority to make a forcible entry into a dwelling house for the purpose, but may enter through an open door or window; and, having lawfully entered upon premises, may use such force as is necessary to overcome resistance he may meet with in the service.

While an officer has no right to use force in serving civil process,<sup>81</sup> and has no authority to make a forcible entry into a dwelling house for the purpose of serving process,<sup>82</sup> even after request for, and refusal of, admittance,<sup>83</sup> he may enter for that purpose through an open door<sup>84</sup> or window;<sup>85</sup> and, where he has entered peaceably upon premises and is lawfully there, he may use such force as is necessary to overcome any resistance he may meet with in the service of the process.<sup>86</sup> Forcing defendant to enter the state for the purpose of serving process on him renders service under such circumstances void.<sup>87</sup>

### § 35. — Reading

Where a different method is not required by statute, service should be made by reading the original process

74. Ga.—*Ambrose v. Barber*, 79 S.E. 1135, 13 Ga.App. 788.

50 C.J. p 485 note 53.  
Delivery of copy of pleading in case of several defendants see *infra* § 37 a.

75. Ga.—*Ambrose v. Barber*, *supra*.  
Tex.—*Covington v. Burleson*, 28 Tex. 368.

76. Vt.—*Muzroll v. Hetu*, 72 A. 323, 82 Vt. 139.

77. Vt.—*Muzroll v. Hetu*, *supra*.

78. Cal.—*Ex parte Ball*, 38 P.2d 411, 2 Cal.App.2d 578.

Refusal to hear process read see *infra* § 35.

"Parties may not refuse service of processes of any court, and the efforts of these parties to escape service of process by refusing to accept and read the same did not destroy the effectiveness of the service thereof."—*State v. Robertson*, 22 S.E.2d 287, 290, 124 W.Va. 648.

79. N.Y.—*Heller v. Levinson*, 152 N.Y.S. 35, 166 App.Div. 673.  
50 C.J. p 486 note 63.

#### 80. Service held sufficient

(1) Where process server, who had previously served petitioner, approached petitioner with process in hand similar to that previously served, and stated while twelve feet away that he had another one of

"those things" for petitioner, and threw process at petitioner when petitioner began to walk away, and stated that petitioner was served.—*Ex parte Ball*, 38 P.2d 411, 2 Cal.App.2d 578.

(2) Where bellboy knew that defendant was in his hotel rooms when he took deputy sheriff to the door thereof, defendant refused to open the door, whereupon deputy sheriff stated that he was from the sheriff's office and had summonses for them, that, if defendant would not open the door, deputy sheriff would place summonses under the door, and that he did so, and defendant picked up the summonses, read them, and understood their nature.—*Hatmaker v. Hatmaker*, 85 N.E.2d 345, 337 Ill. App. 175.

#### Service held insufficient

(1) Where, in order to evade service of summons, defendant disappeared into his house and refused to come out or admit constable, and constable threw summons into the house, statutory requirement as to service by showing original writ to defendant, and delivering to him a copy thereof, was not complied with.—*Mitchell v. Hines*, 9 N.W.2d 547, 305 Mich. 296.

(2) Other acts held insufficient to

constitute service see 50 C.J. p 486 note 65 [a].

81. Mo.—*Corpus Juris* cited in *State v. Buck*, 85 S.W.2d 1026, 1032, 337 Mo. 839.

50 C.J. p 486 note 67.

82. Wash.—*State v. Pope*, 103 P.2d 1089, 4 Wash.2d 394, 129 A.L.R. 240.

50 C.J. p 486 note 68.

83. Wash.—*State v. Pope*, *supra*.

84. D.C.—*Palmer v. King*, 41 App. D.C. 419, L.R.A.1916D 278, Ann. Cas.1915C 1139.

Mo.—*Corpus Juris* cited in *State v. Buck*, 85 S.W.2d 1026, 1032, 337 Mo. 839.

85. D.C.—*Palmer v. King*, 41 App. D.C. 419, L.R.A.1916D 278, Ann. Cas.1915C 1139.

86. Del.—*Prettyman v. Dean*, 2 Del. 494.

N.Y.—*Hager v. Danforth*, 20 Barb. 16.

50 C.J. p 486 note 71.

87. Cal.—*Corpus Juris* quoted in *Bowes v. Superior Court of Alameda County*, App., 124 P.2d 667, 668.

N.Y.—*Ziporkes v. Chmelniker*, 15 N. Y.St. 215.

Procuring service by fraud or pretense of settlement see *infra* § 32.

to the defendant, and, where the statute requires reading, the writ must actually be read to the defendant personally.

Where a different method is not required by statute, service should be made by reading the original process to defendant,<sup>88</sup> and, where the statute requires reading, the writ must actually be read to defendant personally,<sup>89</sup> and a copy need not be left with him<sup>90</sup> unless, as discussed *infra* § 36, the statute requires it in addition to the reading. If, however, defendant refuses to hear it read, the offer to read it is sufficient to constitute a good service.<sup>91</sup> Even though the officer is not expressly required by the statute to read the writ to defendant, it is proper for him to read it or explain its nature.<sup>92</sup>

Reading over a telephone is not a reading personally so as to constitute valid service within the purview of the statute,<sup>93</sup> even though the officer recognizes defendant's voice.<sup>94</sup>

## § 36. — Delivery of Copy of Process

- a. In general
- b. Requisites of copy

### a. In General

Where a statute or rule of court provides for service by delivery of a copy of the process, the copy should be delivered to, and left with, the defendant personally by one authorized to serve it.

Where the statute or court rules provide for service by delivery of a copy of the process, the copy should, except as otherwise provided by statute, be delivered to, and left with defendant personally,<sup>95</sup> by hand,<sup>96</sup> and according to some authority this is customary even though the statute law does not prescribe exactly the manner in which the writ should be served.<sup>97</sup> Under such statutes or rules it is not necessary to read the process to defendant<sup>98</sup> or to explain it to him;<sup>99</sup> and it is not sufficient merely to read it to him<sup>1</sup> or to offer to deliver it.<sup>2</sup> Mere casual delivery of the process to defendant by a person without authority is not sufficient.<sup>3</sup> Under a statute providing merely that a writ of summons shall be issued for defendant, it is not necessary to leave a copy of the writ with him.<sup>4</sup>

*By mail.* Personal service cannot be made by mail.<sup>5</sup>

### b. Requisites of Copy

The copy delivered should conform to the original and must contain the vital things of which the defendant is to be given notice; but service is not void because of a variance between the original writ and the copy served if the defendant is not misled thereby.

The copy delivered should, as a matter of course, conform exactly to the original,<sup>6</sup> and must contain the vital things of which defendant is to be given notice;<sup>7</sup> but a copy is not an original,<sup>8</sup> and defend-

88. Ill.—Law v. Grommes, 41 N.E. 1080, 158 Ill. 492—Ball v. Shattuck, 16 Ill. 299.  
50 C.J. p 482 note 83.  
Delivery see *infra* § 36.

89. N.J.—Steedle v. Woolston, 95 A. 737, 88 N.J.Law 91.  
50 C.J. p 482 notes 85, 86.

90. N.C.—Virginia Carolina Chemical Co. v. Turner, 130 S.E. 154, 190 N.C. 471.

Pa.—Kleckner v. Lehigh County, 6 Whart. 86.

91. Miss.—Story v. Ware, 35 Miss. 299, 72 Am.D. 125.  
N.J.—Slaght v. Robbins, 13 N.J.Law 340.  
Refusal of service generally see *supra* § 34 c.

92. Md.—North v. Town Real Estate Corp., 60 A.2d 665—Harvey v. Slacum, 29 A.2d 276, 181 Md. 296.

93. Md.—Sharpless Separator Co. v. Brillhart, 98 A. 484, 129 Md. 82.  
N.C.—Lowman v. Ballard, 84 S.E. 21, 168 N.C. 16, L.R.A.1915D 427, Ann. Cas.1917B 399.  
50 C.J. p 483 note 89.

94. N.C.—Lowman v. Ballard, *supra*.

95. Ala.—Corpus Juris cited in

Henry v. Drennen Motor Car Co., 180 So. 563, 566, 235 Ala. 559.

Cal.—Hunstock v. Estate Development Corporation, 138 P.2d 1, 22 Cal.2d 205, 148 A.L.R. 968.

Iowa.—Snyder v. Abel, 17 N.W.2d 401, 235 Iowa 724.

Md.—North v. Town Real Estate Corp., 60 A.2d 665.

50 C.J. p 483 note 94.  
Refusal of service see *supra* § 34 c.  
Substituted service see *infra* § 48 et seq.

#### Statutory language construed

Under statute providing that citation shall be served by officer delivering to each defendant in person true copy of citation "unless it otherwise directs," exception means same as though it had said "unless the law otherwise directs."—Texas Pipe Line Co. v. Miller, Tex.Civ.App., 71 S.W.2d 348.

96. Cal.—Hunstock v. Estate Development Co., 138 P.2d 1, 22 Cal. 2d 205, 148 A.L.R. 968.

97. Md.—Harvey v. Slacum, 29 A.2d 276, 181 Md. 206.

98. Md.—North v. Town Real Estate Corp., 60 A.2d 665.

99. Md.—North v. Town Real Estate Corp., *supra*.

1. Ill.—Scott v. Simmons, 260 Ill. App. 274.

Iowa.—Snyder v. Abel, 17 N.W.2d 401, 235 Iowa 724.

50 C.J. p 482 note 86 [c], p 483 note 95.  
Reading when sufficient see *supra* § 35.

2. Iowa.—Snyder v. Abel, 17 N.W. 2d 401, 235 Iowa 724.

3. N.Y.—Mecca v. Young, 233 N.Y. S. 169, 133 Misc. 540.

4. Md.—O'Neill & Co. v. Schulze, 7 A.2d 263, 177 Md. 64.

5. Ala.—Corpus Juris cited in Henry v. Drennen Motor Car Co., 180 So. 563, 566, 235 Ala. 559.

Cal.—Hunstock v. Estate Development Co., 138 P.2d 1, 22 Cal.2d 205, 148 A.L.R. 968.

50 C.J. p 483 note 98.  
Mail in aid of publication see *infra* § 78.

Substituted service by mail see *infra* § 51.

6. N.C.—Washington County v. Blount, 31 S.E.2d 374, 234 N.C. 438.

7. Kan.—Jones v. Marshall, 43 P. 840-841, 3 Kan.App. 529.  
50 C.J. p 483 note 99.

8. Colo.—Hocks v. Farmers Union Co-op. Gas & Oil Co., 180 P.2d 860, 116 Colo. 282.

ant is not entitled to a duplicate original,<sup>9</sup> although if by mistake the original instead of a copy be delivered to, or left for, defendant this will not affect the service.<sup>10</sup> Service is not void because of a variance between the original writ and the copy served if defendant is not misled thereby,<sup>11</sup> but is voidable only.<sup>12</sup> If a single defendant is sued in more than one capacity, he need not be served with more than one copy of the writ.<sup>13</sup>

*Clerical errors in the copy* delivered will not affect the validity of the service where defendant has not been misled.<sup>14</sup> Thus, the following have been held, at most, mere irregularities: Designating the wrong month for the term when the mistake is an obvious one;<sup>15</sup> giving a wrong day of the month as the return day, when the return day is fixed by law;<sup>16</sup> the omission of words of surplusage;<sup>17</sup> giving the wrong year when the date given is obviously an impossible one;<sup>18</sup> the lack of the file number of the case;<sup>19</sup> the want of the signature of the officer who issued it;<sup>20</sup> the omission of the date of the summons;<sup>21</sup> the failure to indorse thereon the date and place of service;<sup>22</sup> and error in stating defendant's initials.<sup>23</sup>

*Omission of plaintiff's name.* Where the copy of the summons does not sufficiently advise defendant of the name of the person or persons by whom he has been sued, the service is fatally defective,<sup>24</sup>

but there is authority for the proposition that the copy will be sufficient if the name is indorsed upon the back thereof.<sup>25</sup>

*Seal* need not be copied on the copy of the process served.<sup>26</sup>

*Copy of stamp.* Although the original summons or process may be required by statute to be stamped, it is not necessary that the copy served indicate that the original bears a stamp.<sup>27</sup>

*Authentication.* The copy need not be certified where not required,<sup>28</sup> but where the statute requires that the copy not only be true, but be attested or certified, a service otherwise sufficient is defective where the copy served is not attested<sup>29</sup> or certified<sup>30</sup> as required.

## § 37. — Delivery of Copy of Pleading

- a. In general
- b. Requisites of copy

### a. In General

The requirement of a statute or rule of court that a copy of the declaration or complaint shall be served with the summons is mandatory, and service of one without the other is not sufficient.

Although a copy of the complaint need not be served with the summons in the absence of a statute or rule so requiring,<sup>31</sup> the requirement of a

9. Colo.—Hocks v. Farmers Union Co-op. Gas & Oil Co., *supra*.

#### Typewritten signature

The statute providing that a summons shall be served by delivering a copy thereof was complied with by delivery of a transcript of the original with names of clerk and counsel in typewriting, but without the actual signature of clerk or counsel. Colo.—Hocks v. Farmers Union Co-op. Gas & Oil Co., *supra*.

Wash.—McElroy v. Andrews, 33 P.2d 379, 178 Wash. 1.

10. N.H.—Adams v. Adams, 9 A. 100, 64 N.H. 224.

Ohio.—Gould v. Rose, 17 Ohio Cir. Ct. 181, 9 Ohio Cir.Dec. 619.

11. N.C.—Washington County v. Blount, 31 S.E.2d 374, 224 N.C. 438. 50 C.J. p 483 note 1.

12. N.Y.—Sivaslian v. Akulian, 166 N.Y.S. 535.

13. Puerto Rico.—Vias v. Perez, 17 Puerto Rico 894.

Tex.—Owsley v. Paris Exch. Bank, 1 Tex.Unrep.Cas. 93.

14. N.C.—Washington County v. Blount, 31 S.E.2d 374, 224 N.C. 438. Vt.—Cukor v. Cukor, 49 A.2d 206, 114 Vt. 466, 168 A.L.R. 227. 50 C.J. p 484 notes 8-15.

15. Ga.—Williams v. Buchanan, 75 Ga. 789.

Tex.—Ketchum v. Bourland, Civ. App., 145 S.W. 276. 50 C.J. p 484 note 8.

16. Iowa.—Irions v. Keystone Mfg. Co., 16 N.W. 349, 61 Iowa 406.

17. La.—Herman v. Sprigg, 3 Mart., N.S., 190.

18. N.Y.—Union Furnace Co. v. Shepherd, 2 Hill 413.

N.D.—Whitmore v. Behm, 133 N.W. 300, 22 N.D. 280.

19. Tex.—Peters v. Crittenden, 8 Tex. 131.

20. Ga.—Corpus Juris cited in Gilbert v. F. M. Brotherton, Inc., 172 S.E. 800, 48 Ga.App. 368.

N.C.—Corpus Juris quoted in Washington County v. Blount, 31 S.E. 2d 374, 376, 224 N.C. 438. 50 C.J. p 484 note 13.

21. N.Y.—Mayerson v. Cohen, 108 N.Y.S. 59, 123 App.Div. 646.

N.C.—Corpus Juris quoted in Washington County v. Blount, 31 S.E.2d 374, 376, 224 N.C. 438. 50 C.J. p 484 note 14.

22. N.C.—Corpus Juris quoted in Washington County v. Blount, 31 S.E.2d 374, 376, 224 N.C. 438.

Puerto Rico.—Ortiz v. Coamo Municipal Judge, 26 Puerto Rico 267.

23. S.C.—Lee v. Störfer, 156 S.E. 177, 159 S.C. 70.

24. Kan.—Jones v. Marshall, 43 P. 840, 3 Kan.App. 529.

Okl.—Hines v. Bacon, 207 P. 93, 86 Okl. 165.

25. Ill.—Williams v. Connors, 149 Ill.App. 29.

26. Me.—Corpus Juris cited in Beaupre v. Schlosberg, 163 A. 653, 654, 131 Me. 407.

50 C.J. p 484 note 18.

Necessity of seal on original see *supra* § 19.

27. Conn.—Tucker v. Potter, 25 Conn. 43.

N.Y.—Watson v. Morton, 18 Abb.Pr. 138.

Necessity of stamp on original see *supra* § 19.

28. Ga.—Corpus Juris cited in York v. Edwards, 133 S.E. 339, 341, 52 Ga.App. 388.

Kan.—Dresser v. Wood, 15 Kan. 344.

29. Pa.—Sechrist v. York R. Co., 26 Pa.Dist. 658.

50 C.J. p 484 note 23.

30. Me.—Matthews v. Blossom, 15 Me. 400.

Pa.—Boyle v. Lansford School Dist., 7 Pa.Dist. 709, 7 Del.Co. 314.

50 C.J. p 484 notes 22, 24.

31. Utah.—First Sav. Bank of Og-



statute or rule of court that a copy of the declaration or complaint shall be served with the summons is usually considered as mandatory.<sup>32</sup> Both must be delivered in order to constitute valid service,<sup>33</sup> and it is not sufficient to serve the copy of the pleading without the writ<sup>34</sup> or the writ without the copy of the pleading.<sup>35</sup>

*In case of several defendants.* Where a statute requires service of summons on several defendants by delivering to the one first served a copy of the petition and writ, and to those subsequently served a copy of the writ, those subsequently served need not be served with a copy of the petition;<sup>36</sup> nor, where there are defendants in more than one county, does such a statute require a copy of the petition to be delivered to the first defendant served in each county.<sup>37</sup> Such a requirement is personal to the defendant first served,<sup>38</sup> and does not require service of copy on any of the subsequent defendants, where the defendant first served appears;<sup>39</sup> and, accordingly, one attacking the validity of a service on the ground that he was not served with a copy of the petition must show that he was the defendant first served.<sup>40</sup>

*Time of service.* Under a statute permitting the filing of a complaint after service of summons, a copy of the pleading need not be served contemporaneously with the summons,<sup>41</sup> but if served therewith will not render the service bad,<sup>42</sup> even though the copy attached is wanting in requisite jurisdictional allegations.<sup>43</sup>

#### b. Requisites of Copy

The service is not rendered fatally defective because

den v. Brown, 54 P.2d 237, 88 Utah 294.

32. Or.—Lane v. Ball, 160 P. 144, 163 P. 975, 83 Or. 404.  
50 C.J. p 484 notes 26, 28.  
Service of pleadings generally see Pleading §§ 407-417.

33. Wash.—McHugh v. Conner, 122 P. 1018, 68 Wash. 229.  
50 C.J. p 484 note 29.

#### Valid service held made

(1) Where process, consisting of summons and complaint, is personally handed to, and left with, a defendant, valid service has been made.—Sorrrell v. Superior Court in and for Los Angeles County, 166 P. 2d 80, 73 Cal.App.2d 194.

(2) Where a copy of a complaint was served on the agent of a railroad company, together with notice of hearing, even though neither the notice nor the complaint were addressed to receivers of the railroad by name, such service was sufficient notice to them to give the commis-

sion jurisdiction to require construction of a depot.—Lusk v. State, 150 P. 151, 47 Okl. 648.

34. Wash.—McHugh v. Conner, 122 P. 1018, 68 Wash. 229.

35. N.Y.—Leighty v. Tichenor, 159 N.Y.S. 457, 173 App.Div. 228.  
50 C.J. p 485 note 31.

36. Mo.—McPherrin v. Lumbermen's Supply Co., 242 S.W. 136, 211 Mo. App. 385.

37. Mo.—Collier v. Catherine Lead Co., 106 S.W. 971, 208 Mo. 246.

38. Mo.—McPherrin v. Lumbermen's Supply Co., 242 S.W. 136, 211 Mo. App. 385.

39. Mo.—McPherrin v. Lumbermen's Supply Co., supra.

40. Mo.—Collier v. Catherine Lead Co., 106 S.W. 971, 208 Mo. 246.

41. Iowa.—Ringstad v. Hanson, 130 N.W. 145, 150 Iowa 324.  
50 C.J. p 485 note 49.

42. U.S.—Goodman v. Ft. Collins, Colo., 164 F. 970, 91 C.C.A. 98.

of differences between the original pleading and the copy served unless the defendant's substantial rights are affected.

It has been held that service will not be set aside because of differences between the original pleading and the copy served unless the substantial rights of defendant are affected.<sup>44</sup> While the statute may not require the petition or the process to be in more than one language, a valid service may require delivery by the sheriff of a copy of the papers in two languages.<sup>45</sup>

*Certification.* Unless required by the statute, the copy of the pleading need not be certified;<sup>46</sup> but, where required, service of an uncertified copy<sup>47</sup> or of a copy merely certified to state the nature of the demand<sup>48</sup> will be insufficient. Where the statute requires a certified copy of the petition to be delivered with process served outside the county where the suit is pending, it is unnecessary to serve such a copy on a defendant who is a resident of the county in which the suit is brought;<sup>49</sup> hence a certified copy of the petition need not accompany a citation when the petition alleges that defendant is to be found in the county where the suit is brought and he is found there.<sup>50</sup>

*After amendment* of the original pleading, service of a copy of it is not sufficient.<sup>51</sup>

### § 38. Acceptance or Acknowledgment of Service

- a. In general
- b. By agent or attorney in fact
- c. Form and requisites

Pa.—Curry v. Phoenixville, etc., R. Co., 26 Pa.Dist. 802.

43. U.S.—Goodman v. Ft. Collins, Colo., 164 F. 970, 91 C.C.A. 98.

44. Cal.—McGinn v. Rees, 165 P. 52, 33 Cal.App. 291.

45. La.—Fleming v. Conrad, 11 Mart. 301.  
50 C.J. p 485 note 37.

46. Wash.—Rauch v. Zander, 245 P. 17, 138 Wash. 610.

47. Tex.—Leard v. Z. D. & J. W. Agnew, Civ.App., 146 S.W. 682.

48. Tex.—Kimmell v. Edwards, Civ. App., 193 S.W. 363, rehearing denied 194 S.W. 168.

49. Tex.—Cauble v. Key, Civ.App., 256 S.W. 654—Brummer v. Moran, 102 S.W. 474, 46 Tex.Civ.App. 410.

50. Tex.—Cauble v. Key, Civ.App., 256 S.W. 654.

51. Tex.—Baker v. Hahn, Civ.App., 161 S.W. 443.  
50 C.J. p 485 note 46.

- d. Time
- e. Proof

### a. In General

An acknowledgment or acceptance of service within the jurisdiction is the full equivalent of actual personal service, and renders such service unnecessary, but it does not constitute an appearance or waive any right of defense, nor does it waive the issuance of process or the right to object that it was not timely served. The authorities are not in accord as to the effect of the mere acceptance of a writ beyond the jurisdiction of the court.

An acknowledgment or acceptance of service within the jurisdiction is the full equivalent of actual personal service,<sup>52</sup> especially where such acceptance of service is fortified by actual participation in the suit to its conclusion,<sup>53</sup> and renders such service unnecessary,<sup>54</sup> and statutes providing for acknowledgment of service are declaratory of the common law.<sup>55</sup> An acknowledgment of "due service" includes an acknowledgment both of a proper manner and a proper time of service.<sup>56</sup> An acknowledgment of service does not constitute an appearance<sup>57</sup> or waive any right of defense,<sup>58</sup> nor does it waive the issuance of process<sup>59</sup> or the right to object that it was not served the requisite time before the appearance term;<sup>60</sup> the fair meaning of an acceptance of service minuted upon the citation is that the signers thereof admit the service with the same effect it would have if made on each of them by an officer, and nothing more.<sup>61</sup> It serves the same purpose as the return made on a summons served by the sheriff in supplying proof

of service.<sup>62</sup>

*Outside jurisdiction of court.* The authorities are not in accord as to the effect of mere acceptance of service of a writ beyond the jurisdiction of the court,<sup>63</sup> but the weight of authority appears to support the view that such acceptance is not equivalent to an appearance<sup>64</sup> and has no effect other than that of personal service outside the jurisdiction,<sup>65</sup> although it has been held, in some cases, equivalent to personal service within the state.<sup>66</sup> An acknowledgment of such service may be so worded, however, as to constitute a waiver and be legally sufficient to confer jurisdiction,<sup>67</sup> and it has been held that an acceptance of service out of the state which includes an extension of time to answer the complaint will give personal jurisdiction.<sup>68</sup>

### b. By Agent or Attorney in Fact

An acknowledgment of service of process by an agent expressly authorized to make such acknowledgment is sufficient, but the authority of an agent to make the acknowledgment must be specially conferred and must be shown; and acceptance by one acting without authority is insufficient, although an unauthorized acceptance may be ratified.

An acknowledgment of service of process by an agent expressly authorized to make such acknowledgment is sufficient;<sup>69</sup> but the authority of an agent or attorney in fact to make such an acknowledgment must be specially conferred and must be shown,<sup>70</sup> and such authority cannot be

52. U.S.—*Corpus Juris* quoted in *Zurich General Accident & Life Ins. Co. v. Taylor*, D.C.W.Va., 38 F.Supp. 159, 163.

Fla.—*McCord v. Smith*, 43 So.2d 704.  
Ga.—*Rembert v. Ellis*, 25 S.E.2d 681, 195 Ga. 807—*Redd v. Stephens*, 173 S.E. 178, 48 Ga.App. 515.

Mont.—*Haggerty v. Sherburne Mercantile Co.*, 186 P.2d 884, 120 Mont. 386.

N.C.—*Stevens v. Cecil*, 199 S.E. 161, 214 N.C. 217.

50 C.J. p 486 note 74.  
Acknowledgment of service in:  
Action against corporation see  
Corporations § 1317.

Divorce proceedings see Divorce § 98.

53. Fla.—*McCord v. Smith*, 43 So.2d 704.

54. U.S.—*Corpus Juris* quoted in *Zurich General Accident & Life Ins. Co. v. Taylor*, D.C.W.Va., 38 F.Supp. 159, 163.

N.C.—*Moseley v. Deans*, 24 S.E.2d 630, 222 N.C. 731—*Stevens v. Cecil*, 199 S.E. 161, 214 N.C. 217.

50 C.J. p 486 note 74.

55. Ala.—*Kent v. Kent*, 139 So. 240, 224 Ala. 183.

56. Wash.—*McClellan v. Gaston*, 51 P. 1062, 18 Wash. 472.

50 C.J. p 487 note 77.

57. S.C.—*Donlevy v. Cooper*, 11 S. C.L. 548.

58. Fla.—*Ochus v. Sheldon*, 12 Fla. 138.

59. Ga.—*Seisel v. Wells*, 25 S.E. 266, 99 Ga. 159.

60. Ga.—*Bell v. Verdel*, 79 S.E. 849, 140 Ga. 768.

50 C.J. p 487 note 81.

61. Vt.—*Town of Brighton v. Town of Charleston*, 44 A.2d 628, 114 Vt. 316.

62. Mont.—*Haggerty v. Sherburne Mercantile Co.*, 186 P.2d 884, 120 Mont. 386.

63. Ky.—*Corpus Juris* cited in *Herr v. Humphrey*, 126 S.W.2d 809, 810, 277 Ky. 421.

Mich.—*Allured v. Voller*, 65 N.W. 285, 107 Mich. 476.

Acknowledgment or acceptance of personal service of process out of jurisdiction in lieu of publication see *infra* § 73.

64. Conn.—*Harris v. Weed*, 93 A. 232, 89 Conn. 214.

65. Ky.—*Corpus Juris* cited in *Herr v. Humphrey*, 126 S.W.2d 809, 810, 277 Ky. 421.

50 C.J. p 487 note 84.

66. Iowa.—*Johnson v. Monell*, 18 Iowa 300.

Neb.—*Cheney v. Harding*, 31 N.W. 255, 21 Neb. 65.

67. Cal.—*Smith v. Moore Mill, etc., Co.*, 281 P. 1049, 101 Cal.App. 492. 50 C.J. p 487 note 86.

68. Utah.—*Myers v. Myers*, 218 P. 123, 62 Utah 90, 30 A.L.R. 74. 50 C.J. p 487 note 88.

69. Mo.—*Peterson v. Kansas City*, 23 S.W.2d 1045, 324 Mo. 454.

70. Cal.—*Corpus Juris* cited in *Hunstock v. Estate Development Corporation*, 138 P.2d 1, 5, 22 Cal. 2d 205.

Mich.—*Najdowski v. Ransford*, 227 N.W. 769, 248 Mich. 465.

50 C.J. p 487 note 90.

Power of attorney held not to confer authority to accept service or receive citation

La.—*Bolton v. Rouss*, 80 So. 226, 144 La. 134, followed in 80 So. 227, 144 La. 138.

predicated on acts or declarations of the agent.<sup>71</sup> There is no presumption that a person who is not an attorney at law has authority to acknowledge service of process on another person;<sup>72</sup> and an agent has no implied authority to accept such service.<sup>73</sup> Acceptance by one acting without authority in that respect is insufficient;<sup>74</sup> but an unauthorized acceptance of service may be ratified by a defendant in whose behalf it is made.<sup>75</sup>

### c. Form and Requisites

The acknowledgment should be in writing and signed, and may be upon a separate piece of paper, but need not necessarily show the time or place of service.

The acknowledgment should be in writing and signed,<sup>76</sup> and may be made upon a separate piece of paper,<sup>77</sup> but not necessarily on the day on which service is acknowledged.<sup>78</sup>

*Statement of time and place.* It has been held unnecessary, where not required by statute, for the acknowledgment to show the time<sup>79</sup> or place<sup>80</sup> of service, and in any event such failure to do so will not be fatal on collateral attack;<sup>81</sup> and, although required by code, such omissions in an acknowledgment of service have been held to be mere irregularities<sup>82</sup> which may be supplied<sup>83</sup> or waived by appearance.<sup>84</sup>

### d. Time

Unless otherwise provided by statute, acknowledg-

ment or acceptance of service may be made before the filing of the declaration, complaint, or petition, but an acknowledgment made after the appearance term or judgment is a nullity.

Unless otherwise provided by statute, the effect of which may be to nullify an acknowledgment previously made,<sup>85</sup> acknowledgment or acceptance of service may be made before the filing of the declaration, complaint, or petition.<sup>86</sup> An acknowledgment made after the appearance term is a nullity,<sup>87</sup> as is an acknowledgment after judgment.<sup>88</sup>

### e. Proof

An acknowledgment of service indorsed on the writ and subscribed by the defendant, supported by proof of the genuineness of the defendant's signature, is sufficient to show service.

An acknowledgment of service indorsed on the writ and subscribed by defendant is usually held to show service,<sup>89</sup> but it must usually be supported by proof of the genuineness of the signature of defendant.<sup>90</sup> Such proof, in some jurisdictions, may be made by the officer who makes service so stating in his return.<sup>91</sup> Where not required by the statute to be proved, in at least one jurisdiction the signature will be presumed genuine in the absence of proof to the contrary.<sup>92</sup> Proof of the fact of acceptance of service made to the court is as satisfactory as a return by the sheriff of the fact on the writ,<sup>93</sup> and the finding of the

N.J.—Cleveland v. Cleveland, 151 A. 85, 106 N.J.Law 562.

#### Power not mere act of administration

Under statute requiring an agent's authority to be express and special, in anything not a mere act of administration a power not a mere act of administration, and for which an agent must have express and special authority, is the power to receive citation in a lawsuit.—Bolton v. Rouss, 80 So. 226, 144 La. 134, followed in 80 So. 227, 144 La. 138.

71. Mich.—Najdowski v. Ransford, 227 N.W. 769, 248 Mich. 465.

72. Tex.—Fowler v. Morrill, 8 Tex. 153.

73. W.Va.—First Nat. Bank v. McGraw, 101 S.E. 474, 85 W.Va. 298.

74. Mass.—Rosenblum v. Ginis, 9 N.E.2d 525, 297 Mass. 493.

75. Ga.—Rogers v. Bowen, 19 Ga. 596.

50 C.J. p 487 note 91.

76. W.Va.—Nicolas Land Co. v. Crowder, 32 S.E.2d 563, 127 W.Va. 216.

50 C.J. p 487 note 92.

77. Ga.—James v. Edward Thompson Co., 87 S.E. 842, 17 Ga.App. 578.

*Defendants' written admission in their attorney's letter to plaintiff's attorney that defendants' attorney received copies of complaint and summons, sent to him as directed by defendants, evidenced plaintiff's full compliance with directions by causing delivery of such copies to agent appointed and empowered by defendants to appear and admit service for them, so as to require them to answer complaint within time specified in summons after service thereof under penalty of having default judgment taken against them.*—Haggerty v. Sherburne Mercantile Co., 186 P.2d 884, 120 Mont. 386.

78. R.I.—Hawkins v. Boyden, 55 A. 324, 25 R.I. 181.

79. N.Y.—White v. Bogart, 73 N.Y. 256.

N.C.—Nicholson v. Cox, 83 N.C. 44, 35 Am.R. 556.

80. S.C.—Corpus Juris cited in Abraham v. New York Underwriters Ins. Co., 196 S.E. 531, 534, 187 S.C. 70.

50 C.J. p 487 note 97.

81. Cal.—Alderson v. Bell, 9 Cal. 315.

S.D.—Stoddard Mfg. Co. v. Mattice, 72 N.W. 891, 10 S.D. 263.

82. N.Y.—White v. Bogart, 73 N.Y. 256—Maples v. Mackey, 15 Hun 533.

83. N.Y.—White v. Bogart, 73 N.Y. 256.

84. N.Y.—White v. Bogart, supra.

85. Tex.—McAnelly v. Ward, 12 S.W. 206, 72 Tex. 342.

50 C.J. p 487 note 4.

86. Ga.—James v. Edward Thompson Co., 87 S.E. 842, 17 Ga.App. 578.

87. Ga.—Bell v. Verdel, 79 S.E. 849, 140 Ga. 768—Bolton v. Keys, 144 S.E. 406, 38 Ga.App. 573.

88. S.C.—State v. Cohen, 13 S.C. 198.

89. Utah.—Culmer v. Caine, 61 P. 1008, 22 Utah 216.

50 C.J. p 488 note 8.

90. Cal.—Alderson v. Bell, 9 Cal. 315.

50 C.J. p 488 note 9.

91. Ala.—Norwood v. Riddle, 9 Port. 425—Rowan v. Wallace, 7 Port. 171.

92. Iowa.—Black v. Chase, 122 N.W. 916, 145 Iowa 715.

93. Mont.—Haggerty v. Sherburne.

court ordinarily is conclusive,<sup>94</sup> although, on a motion to set aside a default, defendant has been permitted to show that the court unadvisedly "found the fact."<sup>95</sup>

### § 39. Service Procured by Fraud or Pretense of Settlement

Personal service is void if obtained by inveigling or enticing the person to be served into the territorial jurisdiction of the court by means of fraud and deceit, or by trick or device; but service will not be held invalid where defendant comes voluntarily into the jurisdiction, even though he is induced by misinformation to permit the process server to obtain an opportunity to serve which he would not otherwise have given him.

Personal service is void if obtained by inveigling or enticing the person to be served into the territorial jurisdiction of the court by means of fraud and deceit,<sup>96</sup> actual or legal,<sup>97</sup> or by trick or device,<sup>98</sup> and in such case defendant is not required to appear or defend.<sup>99</sup> So service is void if obtained by securing defendant's presence within the jurisdiction by means of criminal process,<sup>1</sup> or by pretense of settlement,<sup>2</sup> whether the matter of a settlement was first broached by plaintiff or defendant;<sup>3</sup> but it has been held that the rule is otherwise if there is a bona fide purpose to discuss the matters in controversy in an attempt to

Mercantile Co., 186 P.2d 884, 120 Mont. 386.

50 C.J. p 488 note 13.

94. Ill.—Banks v. Banks, 31 Ill. 162.

95. Ill.—Banks v. Banks, supra.

96. Ala.—Corpus Juris cited in Ex parte Sellers, 33 So.2d 349, 350, 260 Ala. 87.

Cal.—Corpus Juris quoted in Bowes v. Superior Court of Alameda County, App., 124 P.2d 667.

D.C.—Guardian Management Corp. v. Huffman, Mun.App., 61 A.2d 472.

Ill.—Empire Mfg. Co. v. Ginsburg, 253 Ill.App. 242.

Iowa.—Miller v. Acme Feed, 293 N.W. 637, 228 Iowa 861.

Ky.—Corpus Juris cited in Sutton v. Tuggle, 84 S.W.2d 1017, 1018, 260 Ky. 351.

La.—Fidelity & Deposit Co. of Md. v. Bussa, 22 So.2d 562, 207 La. 1042.

Miss.—Nicholson v. Gulf, Mobile & Northern R. Co., 172 So. 306, 177 Miss. 844.

Mo.—Mertens v. McMahon, 66 S.W.2d 127, 334 Mo. 175, 93 A.L.R. 1285.

N.Y.—Neotex Mfg. Co. v. Eidingier, 294 N.Y.S. 767, 250 App.Div. 504.

Okl.—Corpus Juris cited in Oklahoma Industrial Finance Corporation v. Wallace, 69 P.2d 362, 363, 180 Okl. 363—Corpus Juris quoted in Kelly v. Citizens Farmers Nat. Bank of Chickasha, 50 P.2d 734, 737, 174 Okl. 380.

Pa.—Lloyd v. Thomas, 60 Pa.Dist. & Co. 516, 58 Dauph.Co. 264.

Tenn.—Taylor v. McCool, 189 S.W.2d 817, 183 Tenn. 1.

50 C.J. p 488 note 22.

Service procured by fraud as:

Ground for setting aside see infra § 108.

Preventing court from taking jurisdiction see Courts § 83 b (1).

#### Fraud or duress

Courts will not tolerate an abuse of process by which a party is brought within jurisdiction of court through fraud or duress to obtain service or confer jurisdiction in a particular county.—In re Cash, 50 N.E.2d 487, 383 Ill. 409, appeal denied Cash v. Metropolitan Trust Co.,

64 S.Ct. 613, 321 U.S. 747, 88 L.Ed. 1050, rehearing denied 64 S.Ct. 780, 321 U.S. 804, 88 L.Ed. 1090.

97. Cal.—Corpus Juris quoted in Bowes v. Superior Court of Alameda County, App., 124 P.2d 667, 668.

Mo.—Groce v. Skelton, 230 S.W. 329, 206 Mo.App. 471.

Okl.—Corpus Juris cited in Oklahoma Industrial Finance Corporation v. Wallace, 69 P.2d 362, 363, 180 Okl. 363—Corpus Juris quoted in Kelly v. Citizens Farmers Nat. Bank of Chickasha, 50 P.2d 734, 737, 174 Okl. 380.

98. Cal.—Corpus Juris quoted in Bowes v. Superior Court of Alameda County, App., 124 P.2d 667, 668.

La.—Fidelity & Deposit Co. of Md. v. Bussa, 22 So.2d 562, 207 La. 1042.

Md.—Margos v. Moroudas, 40 A.2d 816, 184 Md. 362.

N.Y.—Gumperz v. Hofmann, 283 N.Y.S. 823, 265 App.Div. 622, affirmed 2 N.E.2d 687, 271 N.Y. 544.

Okl.—Corpus Juris cited in Oklahoma Industrial Finance Corporation v. Wallace, 69 P.2d 362, 363, 180 Okl. 363—Corpus Juris quoted in Kelly v. Citizens Farmers Nat. Bank of Chickasha, 50 P.2d 734, 737, 174 Okl. 380.

Pa.—Lloyd v. Thomas, 60 Pa.Dist. & Co. 516, 58 Dauph.Co. 264.

50 C.J. p 488 note 24.

Forcing defendant to enter state for purpose of serving process on him as rendering service void see supra § 34 d.

99. Iowa.—Miller v. Acme Feed, 293 N.W. 637, 228 Iowa 861.

1. Ill.—McNab v. Bennett, 66 Ill. 157.

Ky.—Sutton v. Tuggle, 84 S.W.2d 1017, 260 Ky. 351.

Mo.—Byler v. Jones, 79 Mo. 261—Bowman v. Neblett, App., 24 S.W.2d 697.

N.Y.—Williams v. Becker, 10 Wend. 636.

Okl.—Berryhill v. Stufflebean, 55 P.2d 469, 176 Okl. 476—Thomas v.

Blackwell, 46 P.2d 509, 172 Okl. 487.

Pa.—Crusco v. Strunk Steel Co., 74 A.2d 142, 365 Pa. 326—Loughner v. Hershey, 21 Pa.Dist. 971, 39 Pa. Co. 414—Addicks v. Bush, 1 Phila. 19.

Va.—Wheeler v. Flintoff, 159 S.E. 112, 156 Va. 923.

Validity dependent on fraud or bad faith

(1) Validity of service of process on resident of another jurisdiction obtained while he was in jurisdiction in which served solely for purpose of appearing in court to answer criminal charge depends on whether defendant's presence in jurisdiction was procured by fraud and misrepresentation.

Mo.—Pfeiffer v. Schee, App., 107 S.W.2d 170.

N.D.—Ex parte Hendersen, 145 N.W. 574, 27 N.D. 155.

(2) So it has been held that the service is valid unless the prosecution is instituted in bad faith for the bare purpose of bringing the non-resident into the jurisdiction to be served with civil process.—Broadus v. Patrick, 149 S.W.2d 71, 177 Tenn. 335—Anderson v. Atkins, 29 S.W.2d 248, 161 Tenn. 137—Curtis v. Kyté, 106 S.W.2d 234, 21 Tenn.App. 115.

2. Ill.—Empire Mfg. Co. v. Ginsburg, 253 Ill.App. 242.

Mont.—Corpus Juris cited in State ex rel. Eilan v. District Court of Eighth Judicial Dist. in and for Cascade County, 33 P.2d 526, 530, 97 Mont. 160, 93 A.L.R. 865.

Okl.—Corpus Juris quoted in Kelly v. Citizens Farmers Nat. Bank of Chickasha, 50 P.2d 734, 737, 174 Okl. 380.

Pa.—Lloyd v. Thomas, 60 Pa.Dist. & Co. 516, 58 Dauph.Co. 264.

50 C.J. p 488 note 26.

3. N.J.—Ultcht v. Ultcht, 126 A. 440, 96 N.J.Eq. 583, 585.

Okl.—Corpus Juris quoted in Kelly v. Citizens Farmers Nat. Bank of Chickasha, 50 P.2d 734, 737, 174 Okl. 380.

50 C.J. p 488 note 27.

reach a settlement.<sup>4</sup> The rule applies where the parties reside in separate counties in the same state and venue rests on such residence, as well as where the parties reside in separate states.<sup>5</sup> Action of a plaintiff in creating a debt due from defendant's resident agent to defendant, who is a nonresident, for the purpose of attaching it, is not a fraudulent scheme or device for obtaining jurisdiction over defendant.<sup>6</sup>

The fact that defendant is constantly passing back and forth into the jurisdiction will not excuse service at a time when his presence there was induced by fraud,<sup>7</sup> although effectual service might have been made during any other visit;<sup>8</sup> nor will the fact that service by publication will place defendant in the same position validate a service obtained by fraud.<sup>9</sup>

The rule applies where the fraud is that of plaintiff's agent<sup>10</sup> or attorney,<sup>11</sup> and although plaintiff had no actual knowledge of the fraud practiced on defendant;<sup>12</sup> but where defendant is induced to come into the jurisdiction by a third person not in privity with, or acting in behalf of, plaintiff, service is not invalid.<sup>13</sup>

Service will not be held invalid where defendant

voluntarily comes into the jurisdiction,<sup>14</sup> as to attend to a business in which he and plaintiff are interested and out of which the cause of action arises,<sup>15</sup> or to attend to his own private affairs<sup>16</sup> or business matters,<sup>17</sup> or where he comes at the request of his own attorneys to attempt to effect a settlement of another action,<sup>18</sup> even though it may be inconvenient for him to make his defense in such jurisdiction<sup>19</sup> and even though plaintiff anticipated his coming and intended to obtain service on him.<sup>20</sup> Where one is within the potential reach of service of process he has no grievance if he is induced by misinformation to permit the process server to obtain an opportunity to serve which he would not otherwise have given him.<sup>21</sup> Where, however, a defendant comes within the jurisdiction voluntarily under an agreement providing for a specific course of procedure, and submits himself to service, if plaintiff afterward disregards the agreement the service will be held void.<sup>22</sup>

*Questions of fact; proof.* Abuse of process can be shown only by testimony as to the facts.<sup>23</sup> Whether there was fraud or deceit is a question of fact<sup>24</sup> and may be inferred from facts and circumstances.<sup>25</sup> Courts do not look with favor on any form of trickery or chicanery, and any conduct

4. U.S.—Commercial Mut. Accident Co. v. Davis, Mo., 29 S.Ct. 445, 213 U.S. 245, 53 L.Ed. 782.

5. Cal.—Bowes v. Superior Court of Alameda County, App., 124 P.2d 667.

6. Conn.—Siro v. American Express Co., 121 A. 280, 99 Conn. 95, 37 A.L.R. 1350.  
50 C.J. p 489 note 46.

7. N.J.—Ultcht v. Ultcht, 126 A. 440, 96 N.J.Eq. 583.

8. N.J.—Ultcht v. Ultcht, supra.

9. N.J.—Ultcht v. Ultcht, supra.

10. Ill.—Empire Mfg. Co. v. Ginsburg, 253 Ill.App. 242.

Ky.—Corpus Juris cited in Sutton v. Tuggle, 84 S.W.2d 1017, 1018, 260 Ky. 351.  
50 C.J. p 489 note 32.

11. Iowa.—Crandall v. Trowbridge, 150 N.W. 669, 170 Iowa 155, Ann. Cas.1916C 608.

12. Ky.—Corpus Juris cited in Sutton v. Tuggle, 84 S.W.2d 1017, 1018, 260 Ky. 351.  
50 C.J. p 489 notes 32, 33.

13. U.S.—Union Sugar Refinery v. Mathieson, C.C.Mass., 24 F.Cas.No. 14,397, 2 Cliff. 304.

R.I.—Ex parte Taylor, 69 A. 553, 29 R.I. 129.  
50 C.J. p 489 note 35.

14. Iowa.—Lingo v. Reichenbach

Land Co., 279 N.W. 121, 225 Iowa 112.

50 C.J. p 489 notes 37-41.

Service on nonresident:

Found within jurisdiction generally see supra § 32 c.

Suitor or witness attending court see infra § 80.

15. Kan.—Iams v. Tedlock, 204 P. 537, 110 Kan. 510.

50 C.J. p 489 note 37.

16. U.S.—Fitzhugh v. Reid, D.C. Ark., 252 F. 234.

17. U.S.—Case v. Smith, C.C.N.Y., 152 F. 730.

18. Iowa.—Lingo v. Reichenbach Land Co., 279 N.W. 121, 225 Iowa 112.

19. U.S.—Fitzhugh v. Reid, D.C. Ark., 252 F. 234.

20. U.S.—Case v. Smith, C.C.N.Y., 152 F. 730.

Pa.—National Paper Corp. v. Scheck, Com.Pl., 47 Lack.Jur. 189.  
50 C.J. p 489 note 41.

21. U.S.—Schwarz v. Artcraft Silk Hosiery Mills, C.C.A.N.Y., 110 F. 2d 465.

*Reason for rule*

Persons within jurisdiction have unenforceable duty to submit to service.—Gumperz v. Hofmann, 288 N.Y.S. 823, 245 App.Div. 622, affirmed 3 N.E.2d 687, 271 N.Y. 544.

*Misrepresentation of server's identity and purpose*

Service of summons was held not invalid because procured through meeting arranged with defendant by misrepresentation of process server's identity and purpose where defendant was already within the jurisdiction.—Gumperz v. Hofmann, supra.

22. N.Y.—Graves v. Graham, 44 N.Y.S. 415, 19 Misc. 618.

50 C.J. p 489 note 42.

23. Ark.—Robinson v. Means, 95 S.W.2d 98, 192 Ark. 816.

N.Y.—Allen v. Betterly, 16 N.Y.S.2d 318, 258 App.Div. 907.

24. N.Y.—Allen v. Betterly, supra.  
50 C.J. p 489 note 43.

25. Iowa.—Crandall v. Trowbridge, 150 N.W. 669, 170 Iowa 155, Ann. Cas.1916C 608.

50 C.J. p 489 note 44.

*Coincidence of parties and subject matter in criminal and civil actions*

Fact that there was coincidence of parties and subject matter in both criminal and civil actions, and that a period of only twelve days elapsed from filing of the civil suit and arrest of defendant under criminal warrant raised presumption that plaintiff fraudulently pursued criminal remedy primarily to enable courts to obtain jurisdiction over defendant in civil suit.—Crusco v.

smacking of such improprieties will properly be scrutinized with jealous caution in order to prevent successful perpetration;<sup>26</sup> but honesty of intent on the part of plaintiff will be presumed in the absence of facts and circumstances justifying an inference to the contrary.<sup>27</sup>

#### § 40. Operation and Effect in General

Where a defendant has properly been served with process it becomes his duty to determine whether his right is to be invaded by the litigation, and if so, to appear and plead; and, as between defendants, one properly served is in for every purpose connected with the action; but where an officer serves a void process, the service is void.

Since, as stated in Courts § 83 b (1), where a defendant has properly been served with process, the court has jurisdiction of his person, and since, as shown in Actions § 129, the action is commenced, it then becomes defendant's duty to determine from the record in the cause whether his right is to be invaded by the litigation, and, if so, to appear in the action and plead therein.<sup>28</sup> As between defendants, a defendant properly served is in for every purpose connected with the action, and this applies to all matters brought in question by the petition;<sup>29</sup> and where summonses are issued against all joint obligors of a written guaranty and service is made on all but two, one of whom is deceased and the other whose whereabouts are unascertainable, plaintiff may proceed against defendants served.<sup>30</sup> Where an officer serves a void process the defect cannot be regarded as a mere irregularity, and the service is void.<sup>31</sup> Process for the seizure of property operates when and where it is executed.<sup>32</sup>

#### § 41. Double Service

A second service of process does not waive the first

service, and a valid and complete first service is not affected by a second service except in so far as the first service may entitle the plaintiff only to a judgment in rem and the second service may entitle him to a personal judgment.

A second service of process does not waive the first service,<sup>33</sup> and where the first one is valid, and accomplishes all the purposes for which it issued, it is not affected by a second service,<sup>34</sup> which may be disregarded in the absence of any showing that defendant was misled thereby.<sup>35</sup> A second service will not effect a shortening of time allowed a defendant to do an act under the law applying to the first service.<sup>36</sup> The rule that a valid first service is unaffected by a second one is not applicable, however, where the effect of the first service was to entitle plaintiff only to a judgment in rem;<sup>37</sup> and in such case plaintiff may thereafter make personal service on defendant so as to obtain a personal judgment against him.<sup>38</sup>

#### § 42. Amended and Alias Process

After service of process, a formal amendment does not require service of the amended process, but the amended process must be served where the original is defective and has been set aside or adjudged invalid, or when new parties are added to the writ. The original summons need not be served with an alias.

After service of process, a formal amendment does not require service of the amended process,<sup>39</sup> and it has been held that, after a general appearance by a defendant, the court may allow the writ to be amended by increasing the ad damnum without further service of process;<sup>40</sup> but the amended process must be served where the original process is defective, and has been set aside or adjudged invalid,<sup>41</sup> and the court may properly so order.<sup>42</sup> An amendment of the writ by adding new parties

Strunk Steel Co., 74 A.2d 142, 365 Pa. 326.

26. Ark.—Robinson v. Means, 95 S. W.2d 98, 192 Ark. 816.

27. Iowa.—Crandall v. Trowbridge, 150 N.W. 669, 170 Iowa 155, Ann. Cas.1916C 608.

28. Nev.—Young Inv. Co. v. Reno Club, 208 P.2d 297.

29. Ohio.—Geese v. Murphy, 3 Ohio Supp. 52.

Defendant held served as individual, not corporation

Ga.—American Fidelity & Casualty Co. v. Farmer, 48 S.E.2d 122, 77 Ga.App. 166.

30. Ohio.—Stiving v. Anderson, 195 N.E. 876, 49 Ohio App. 177.

31. Ga.—W. T. Rawleigh Co. v. Greenway, 26 S.E.2d 458, 69 Ga. App. 590.

No authority to serve void process see supra § 28 a.

32. Cal.—Cecil v. Superior Court in and for Los Angeles County, 140 P.2d 125, 59 Cal.App.2d 843.

33. Wash.—Russell v. Millett, 55 P. 44, 20 Wash. 212.  
50 C.J. p 488 note 16.

34. Cal.—Andrews v. Jacoby, 178 P. 969, 39 Cal.App. 382.

Mich.—Rarden v. R. D. Baker Co., 271 N.W. 712, 279 Mich. 145, certiorari denied R. D. Baker Co. v. Rarden, 58 S.Ct. 15, 302 U.S. 697, 82 L.Ed. 538.

35. Mich.—Rarden v. R. D. Baker Co., 271 N.W. 712, 279 Mich. 145, certiorari denied R. D. Baker Co. v. Rarden, 58 S.Ct. 15, 302 U.S. 697, 82 L.Ed. 538.

36. Cal.—Townsend v. Parker, 131 P. 766, 21 Cal.App. 317.

Nev.—Mayenbaum v. Murphy, 5 Nev. 383.

50 C.J. p 488 note 18.

37. Cal.—Andrews v. Jacoby, 178 P. 969, 39 Cal.App. 382.

38. Cal.—Andrews v. Jacoby, supra.

39. Ohio.—State ex rel. Heck v. Sucher, 65 N.E.2d 268, 77 Ohio App. 257.

50 C.J. p 489 note 50.

Amended process generally see infra §§ 114-115.

40. Mass.—Lambert v. Aronson, 133 N.E. 564, 248 Mass. 138, 22 A.L.R. 1291.

41. Ga.—Turpin v. Taylor, 84 S.E. 547, 143 Ga. 224.

Wis.—Prentice v. Stefan, 39 N.W. 364, 72 Wis. 151.

42. Ga.—Lassiter v. Carroll, 13 S.E. 825, 87 Ga. 731.

50 C.J. p 489 note 54.

requires service on them.<sup>43</sup> Where the original process has been returned and filed, the court, in the exercise of its inherent power over its own process, and as the justice and exigencies of the case may demand, may, on amending, order it withdrawn from the files and served<sup>44</sup> or may order an entirely new summons issued and served.<sup>45</sup> In those jurisdictions where the summons is not a writ of court but is issued by plaintiff or his attorney, it would seem that service of an amended summons on defendant would be proper, although he was not served with the one first issued.<sup>46</sup>

Where an original summons becomes functus officio because of failure to serve within the time after its issuance prescribed by statute, if plaintiff desires the action continued he must cause alias summons to be issued and served;<sup>47</sup> but it has been held under some statutes that the issuance of an alias summons does not extend the time within which service of summons must be had after commencement of the action.<sup>48</sup> The original summons need not be served with an alias,<sup>49</sup> since the alias is a writ complete in itself.<sup>50</sup>

## C. SUBSTITUTED SERVICE

### § 43. In General

In its technical sense, "substituted service" is service by leaving a copy of the process at the residence or abode or place of business of the defendant. This method of service is purely statutory, and the provisions of the statute must be observed in order to make the service effective.

Since "substituted service" by its very designation indicates a form of service which may be used as a substitute for personal service, it is obviously, in some respects at least, different and distinct from the latter.<sup>51</sup> Nevertheless, for some purposes sub-

stituted service is deemed equivalent to personal service<sup>52</sup> as distinguished, for example, from service by publication,<sup>53</sup> which is discussed infra §§ 54-72. "Substituted service" as used in its narrow technical sense is distinguishable from "constructive service,"<sup>54</sup> which is a broader term sometimes used to designate service by publication;<sup>55</sup> but "substituted service" itself is frequently used in a broad sense as the equivalent of "constructive service,"<sup>56</sup> and has even been said to be equivalent to "service by publication"<sup>57</sup> or has been used as in-

43. N.Y.—Concrete Pub. Co. v. Reed, 126 N.Y.S. 653, 70 Misc. 22.

44. Idaho.—Empire Mill Co. v. Shoshone County First Judicial Dist. Ct., 149 P. 505, 27 Idaho 400—Ridenbaugh v. Sandlin, 94 P. 827, 14 Idaho 472, 125 Am.S.R. 175.

45. Idaho.—Ridenbaugh v. Sandlin, supra.

46. Wash.—Roznik v. Becker, 122 P. 593, 68 Wash. 63. Authority and duty to issue generally see supra § 6.

47. N.C.—Green v. Chrismon, 28 S. E.2d 215, 223 N.C. 724. Alias process generally see supra § 21.

Time of service of process generally see supra § 33.

48. Cal.—Kelly v. Ferbrache, 6 P.2d 987, 119 Cal.App. 529.

49. N.Y.—Godfrey v. Errett, 120 N. Y.S. 57, 65 Misc. 522—Lawrence v. Bernstein, 92 N.Y.S. 817, 46 Misc. 608.

50. N.Y.—Godfrey v. Errett, 120 N. Y.S. 57, 65 Misc. 522.

51. Minn.—Thomas v. Hector Const. Co., 12 N.W.2d 769, 216 Minn. 207. N.J.—Leek v. Wileand, 71 A.2d 911, 7 N.J.Super. 501.

**Distinction stated**  
"Personal service" ordinarily means actual delivery of the process to defendant in person, while "substituted service" implies a substitute for service on defendant, and, al-

though as good as personal service, it is nevertheless a substitute. —Thomas v. Hector Const. Co., 12 N.W.2d 769, 216 Minn. 207.

52. Kan.—Board of Com'rs of Labette County v. Abbey, 100 P.2d 720, 151 Kan. 710—Royse v. Grage, 42 P.2d 942, 141 Kan. 702. 50 C.J. p 490 note 67.

53. Mo.—Mattocks v. Van Asmus, 168 S.W. 233, 180 Mo.App. 404.

54. Ala.—Campbell v. State, 5 So. 2d 466, 242 Ala. 215.

**Distinction stated**  
There is a distinction between "substituted service" and "constructive service," and the former includes the act of leaving the process at the residence or place of business of the party, or of leaving it with his agent or attorney, or by mailing it to the party, and service by publication alone is said more accurately to be constructive service.—Campbell v. State, supra.

55. U.S.—Harlan v. Sparks, C.C.A. N.M., 125 F.2d 502.

Ala.—Campbell v. State, 5 So.2d 466, 242 Ala. 215.

Fla.—McGee v. McGee, 22 So.2d 788, 156 Fla. 346—Ake v. Chancey, 13 So.2d 6, 152 Fla. 677.

Kan.—Connell v. Kanwa, 170 P.2d 681, 161 Kan. 649.

N.M.—State ex rel. Truitt v. District Court of Ninth Judicial Dist., Cur-

ry County, 96 P.2d 710, 44 N.M. 16, 126 A.L.R. 651.

56. U.S.—Zuckerman v. McCulley, D.C.Mo., 7 F.R.D. 739, appeal dismissed, C.C.A., 170 F.2d 1015.

Ala.—Corpus Juris cited in Campbell v. State, 5 So.2d 466, 471, 242 Ala. 215.

Ill.—Nelson v. Chicago, etc., R. Co., 80 N.E. 109, 225 Ill. 197, 116 Am. S.R. 183, 8 L.R.A.N.S., 1186.

Ky.—Moorman v. Taylor, 147 S.W.2d 1021, 285 Ky. 347.

Nev.—Zeig v. Zeig, 198 P.2d 724, 65 Nev. 464.

50 C.J. p 490 note 69.

Nature and modes of service generally see supra § 25.

#### In suit against nonresident

Where trial court has jurisdiction over justiciable subject matter which is under control of defendant nonresidents and statutes authorize substituted or constructive service of process in suit, which process as issued and served affords due process of law to the defendants, the court may proceed in the cause and the property duly involved and, within jurisdiction of the court is subject to appropriate decrees in the cause pending final adjudication.—Gribbel v. Henderson, 10 So.2d 784, 151 Fla. 712, reheard 14 So.2d 809, 153 Fla. 397.

57. N.Y.—Bentz v. Crotona Park Realty Co., 142 N.Y.S. 193, 81 Misc. 364.

clusive of service by publication<sup>58</sup> or personal service outside the jurisdiction,<sup>59</sup> discussed *infra* § 73. In its narrow technical sense substituted service is service by leaving a copy of the process at the residence or abode or place of business of defendant;<sup>60</sup> and it is in this sense that the term is used in the ensuing discussion.

It is within the power of the legislature to provide for substituted service in cases of necessity

or if personal service is for any reason impracticable.<sup>61</sup> This method of service is purely statutory<sup>62</sup> and in derogation of the common law;<sup>63</sup> it is a method extraordinary in character,<sup>64</sup> and hence may be used only as prescribed and in the circumstances authorized by statute.<sup>65</sup> In order for such service to be effective plaintiff must bring himself and his cause of action clearly within provisions authorizing it;<sup>66</sup> and the statutory requirements must be followed<sup>67</sup> and, under the controlling

58. U.S.—Propper v. Clark, N.Y., 69 S.Ct. 1333, 337 U.S. 472, 93 L. Ed. 1480, rehearing denied 70 S. Ct. 33, 338 U.S. 841, 94 L.Ed. — Thompson v. Terminal Shares, C.C.A.Mo., 89 F.2d 652.

Del.—Potter v. Potter, 2 A.2d 93, 9 W.W.Harr. 487.

Iowa.—Allen v. Allen, 298 N.W. 869, 230 Iowa 504, 136 A.L.R. 617.

Minn.—State v. Northwestern Nat. Bank of Minneapolis, 18 N.W.2d 569, 219 Minn. 471.

N.J.—Hartman v. Gindorff's Heirs, 5 A.2d 686, 125 N.J.Eq. 325, reversed on other grounds Hartman v. Collum, 11 A.2d 67, 126 N.J.Eq. 629.

N.Y.—Korn v. Lipman, 94 N.E. 861, 201 N.Y. 404—Lambert v. Lambert, 278 N.Y.S. 580, 244 App.Div. 78, reversed on other grounds 1 N.E. 2d 833, 270 N.Y. 422—In re Security Trust Co. of Rochester, 70 N.Y. S.2d 260, 189 Misc. 748, reversed 92 N.Y.S.2d 308, 275 App.Div. 1020, and affirmed 97 N.Y.S.2d 922, 277 App.Div. 837.

N.C.—Southern Mills v. Armstrong, 27 S.E.2d 281, 228 N.C. 495, 148 A.L.R. 1248.

59. Mo.—Thompson v. Terminal Shares, C.C.A.Mo., 89 F.2d 652.

Iowa.—Allen v. Allen, 298 N.W. 869, 230 Iowa 504, 136 A.L.R. 617.

Mass.—Gulda v. Second Nat. Bank of Boston, 80 N.E.2d 12, 323 Mass. 100.

Minn.—State v. Northwestern Nat. Bank of Minneapolis, 18 N.W.2d 569, 219 Minn. 471.

60. Ala.—Corpus Juris cited in Krasner v. Gurley, 29 So.2d 224, 227, 248 Ala. 686—Corpus Juris cited in Campbell v. State, 5 So.2d 466, 471, 242 Ala. 215.

Del.—McCoy v. Hickman, 15 A.2d 427, 1 Terry 587.

Ill.—Nelson v. Chicago, etc., R. Co., 80 N.E. 109, 225 Ill. 197, 116 Am. S.R. 183, 8 L.R.A.N.S., 1186. 50 C.J. p 490 note 64.

61. Del.—Potter v. Potter, 2 A.2d 93, 9 W.W.Harr. 487.

Mass.—Duffee v. Duffee, 200 N.E. 395, 299 Mass. 472.

N.J.—Wilentz v. Edwards, 33 A.2d 297, 138 N.J.Eq. 488, affirmed 36 A. 2d 423, 134 N.J.Eq. 522.

#### Purpose of provisions

(1) The purpose of the provisions for substituted service is to give the courts jurisdiction of the person of a defendant on whom personal service within the state cannot be effected.—Rawstorne v. Maguire, 192 N.E. 294, 265 N.Y. 204.

(2) The purpose of the statute requiring that nonresident defendants be actually notified of the action was to prevent judgments being rendered against nonresidents without their being actually apprised of the action and given reasonable opportunity to defend such actions.—Eastman v. Benton, 167 So. 169, 184 La. 620.

(3) The purpose of substituted service of process is to bring knowledge of pending litigation to defendant in order that he may appear and guard his interest. Fla.—Clark v. Clark, 30 So.2d 170, 158 Fla. 731.

Pa.—Robinson v. Robinson, 67 A.2d 273, 362 Pa. 554.

#### Sufficiency of notice afforded

The sufficiency of a statutory substitute for personal service depends on whether it is reasonably calculated to provide defendant with notice of the action, and an opportunity to be heard.—Kurilla v. Roth, 38 A.2d 862, 132 N.J.Law 213.

62. Iowa.—Jermaine v. Graf, 283 N.W. 428, 225 Iowa 1063—Thompson v. Butler, 243 N.W. 164, 214 Iowa 1123.

Ky.—Odley v. Wilson, 213 S.W.2d 17, 309 Ky. 507.

N.Y.—Mechanics' Nat. Bank of Trenton v. Newman, 244 N.Y.S. 529, 137 Misc. 587, reversed on other grounds 244 N.Y.S. 901, 230 App.Div. 833.

N.C.—Hodges v. Home Ins. Co. of N. Y., 61 S.E.2d 372, 232 N.C. 475. 50 C.J. p 490 note 77.

63. Colo.—Carlson v. District Court of City and County of Denver, 180 P.2d 525, 116 Colo. 330.

Ill.—Conley v. McNamara, 79 N.E. 2d 645, 334 Ill.App. 396.

Iowa.—Jermaine v. Graf, 283 N.W. 428, 225 Iowa 1063.

Nev.—Zeig v. Zeig, 193 P.2d 724, 65 Nev. 464.

N.J.—Kurilla v. Roth, 38 A.2d 862,

132 N.J.Law 213—Ruhle v. Caffrey, 174 A. 204, 113 N.J.Law 240, reversed on other grounds 180 A. 834, 115 N.J.Law 517—Eckman v. Gear, 187 A. 556, 14 N.J.Misc. 807.

Ohio.—Ruckert v. Matil Realty Co., App., 40 N.E.2d 688.

Or.—Mutzig v. Hope, 158 P.2d 110, 176 Or. 363.

Pa.—Robinson v. Robinson, 67 A.2d 273, 362 Pa. 554—Corpus Juris cited in Williams v. Meredith, 192 A. 924, 925, 326 Pa. 570.

Tenn.—Corpus Juris cited in Pinkerton v. Fox, 129 S.W.2d 514, 518, 23 Tenn.App. 159.

50 C.J. p 490 note 78.

64. Iowa.—Jermaine v. Graf, 283 N.W. 428, 225 Iowa 1063.

65. Iowa.—Jermaine v. Graf, supra. N.Y.—Mechanics' Nat. Bank of Trenton v. Newman, 244 N.Y.S. 529, 137 Misc. 587, reversed on other grounds 244 N.Y.S. 901, 230 App. Div. 833.

Or.—Mutzig v. Hope, 158 P.2d 110, 176 Or. 363.

Pa.—Holley v. Gramatan Nat. Bank and Trust Co., Com.Pl., 31 North. Co. 364.

66. Fla.—State v. Gray, 111 So. 242, 92 Fla. 1123.

Mo.—State ex rel. Utilities Power & Light Corporation v. Ryan, 88 S.W.2d 157, 337 Mo. 1180.

67. U.S.—Harris v. Hardeman, Miss., 14 How. 334, 14 L.Ed. 444. Fla.—Napoleon B. Broward Drainage Dist. v. Certain Lands Upon Which Taxes Were Due, 33 So.2d 716, 160 Fla. 120.

Pa.—Hertz v. Record Publishing Co., Com.Pl., 31 Erie Co. 204—Zemaitis v. Slocum, Com.Pl., 36 Luz.Leg. Reg. 191—Felix & Snyder Const. Co. v. Holcombe, Com.Pl., 97 Pittsb.Leg.J. 355.

Wash.—Dolan v. Baldrige, 4 P.2d 871, 165 Wash. 69.

#### True copy

In action to try title to office of superior court clerk, service by leaving copy of summons at defendant's last residence is fatally defective, where copy does not purport to be signed by clerk or where copy is not essentially a true copy.—McLeod v. Pearson, 181 S.E. 753, 208 N.C. 539.



decisions, must be followed strictly,<sup>68</sup> faithfully,<sup>69</sup> fully,<sup>70</sup> literally,<sup>71</sup> or at least substantially.<sup>72</sup> Any substitute service other than that authorized by the statute is ineffective.<sup>73</sup>

Service is complete when all the required acts are done.<sup>74</sup> So, if all that the statute requires is done, it is immaterial that defendant in fact receives no actual notice thereof;<sup>75</sup> and the fact that he does not thereafter personally receive the papers which were so served<sup>76</sup> or that he receives them at a late date<sup>77</sup> ordinarily does not affect the validity of the service. Conversely, if the statute is not complied with it is of no avail that defendant does in fact receive actual notice of the action<sup>78</sup> unless the statute provides that such actual notice renders the service sufficient.<sup>79</sup> Nevertheless, it has been said that service under such a statute should be of such a character as to make it reasonably probable that defendant will receive actual notice;<sup>80</sup> and, where the circumstances are such that it is apparent that defendant cannot be notified of the service by the

person with whom the process is left, the service is insufficient.<sup>81</sup>

Where alternative methods are provided for, plaintiff may not arbitrarily select any one of the alternatives regardless of the facts or regardless of his knowledge that the selected method will prove ineffectual to give defendant notice whereas one of the other permitted alternatives would give notice.<sup>82</sup> Where a general statute governing process in a particular court provides for service either personally or by leaving it at defendant's residence, a statute governing process in a particular form of action in such court and providing merely for service on defendant will not be construed as excluding residential service.<sup>83</sup> A statute providing for two days' notice before appearance in cases of personal service has been held to apply to substituted service.<sup>84</sup> When a particular mode of procedure is provided in cases where a defendant is absent from the jurisdiction at the time of commencing the action, leaving a copy of the process

#### Service held invalid

Where service of summons in civil action was attempted pursuant to statute providing that a copy thereof may be left at house of defendant's usual abode with a person of suitable age and discretion then residing therein, but defendant's seventeen-year old daughter refused to open door and plaintiff gained admission thereto by summoning and accompanying two police officers who had been asked to investigate a complaint of alleged juvenile delinquency by such daughter, and police officer without intending to serve summons or knowing the nature of the paper, handed it to daughter, attempted service was invalid, since service of process must be made knowingly and intentionally.—*Lee v. Skrukud*, Minn., 42 N.W.2d 544.

62. Fla.—*Ogden v. Ogden*, 33 So.2d 870, 159 Fla. 604.

Ky.—*Odley v. Wilson*, 218 S.W.2d 17, 309 Ky. 507—*Mann v. Humphrey's Adm'x*, 79 S.W.2d 17, 257 Ky. 647, 96 A.L.R. 584.

La.—*Weldon v. Gandy*, App., 195 So. 655.

Minn.—*MacLean v. Lasley*, 232 N.W. 632, 181 Minn. 379.

Mo.—*State ex rel. Utilities Power & Light Corporation v. Ryan*, 88 S.W.2d 157, 337 Mo. 1180.

N.Y.—*Air Conditioning Training Corp. v. Pirrote*, 60 N.Y.S.2d 35, 270 App.Div. 391.

N.C.—*Hodges v. Home Ins. Co. of N. Y.*, 61 S.E.2d 372, 232 N.C. 475.

Wis.—*Caskey v. Peterson*, 263 N.W. 653, 226 Wis. 690.

69. Nev.—*Brockbank v. Second Judicial Dist. Court in and for Was-*

hoe County, Nev., 201 P.2d 299, 65 Nev. 781.

70. Ill.—*Werner v. W. H. Shons Co.*, 173 N.E. 486, 341 Ill. 478.

N.J.—*Kurilla v. Roth*, 38 A.2d 862, 132 N.J.Law 213—*Ruhle v. Caffrey*, 174 A. 204, 113 N.J.Law 240, reversed on other grounds 180 A. 834, 115 N.J.Law 517—*Eckman v. Grear*, 187 A. 556, 14 N.J.Misc. 807.

71. U.S.—*Pen-Ken Gas & Oil Corporation v. Warfield Natural Gas Co.*, C.C.A.Ky., 137 F.2d 871, certiorari denied 64 S.Ct. 431, 320 U.S. 800, 88 L.Ed. 483, rehearing denied 64 S.Ct. 634, 321 U.S. 803, 88 L.Ed. 1089.

Ky.—*Moorman v. Taylor*, 147 S.W. 2d 1021, 285 Ky. 347.

72. U.S.—*Pen-Ken Gas & Oil Corporation v. Warfield Natural Gas Co.*, C.C.A.Ky., 137 F.2d 871, certiorari denied 64 S.Ct. 431, 320 U.S. 800, 88 L.Ed. 483, rehearing denied 64 S.Ct. 634, 321 U.S. 803, 88 L.Ed. 1089—*Zuckerman v. McCulley*, D.C.Mo., 7 F.R.D. 739, appeal dismissed C.C.A., 170 F.2d 1015.

Iowa.—*Coster v. Jensen*, 257 N.W. 303, 218 Iowa 1215.

Ky.—*Moorman v. Taylor*, 147 S.W. 2d 1021, 285 Ky. 347.

50 C.J. p 491 note 79.

73. N.Y.—*Robinson v. Five One Five Associates Corporation*, 45 N.Y.S.2d 20, 180 Misc. 906.

74. N.Y.—*Dealer's Lumber Corp. v. Stauffer*, 218 N.Y.S. 464, 128 Misc. 358.

#### Period of grace

The ten-day period following proof of substituted service required by statute before service is deemed

complete is simply a matter of grace to allow actual notice to be brought to defendant before the beginning of twenty-day period allowed defendant to answer.—*Colonial Discount Co. v. Martel*, 73 N.Y.S.2d 8.

75. Ind.—*Ettinger v. Robbins*, 59 N.E.2d 118, 223 Ind. 168.

Minn.—*Peterson v. W. Davis & Sons*, 11 N.W.2d 800, 216 Minn. 60—*MacLean v. Lasley*, 232 N.W. 632, 181 Minn. 379.

Wash.—*Larson v. Zabroski*, 152 P. 2d 154, 21 Wash.2d 572, opinion adhered to 155 P.2d 284, 21 Wash. 2d 572.

50 C.J. p 491 note 80.

76. Ga.—*Betton v. Avery*, 183 S.E. 901, 183 Ga. 559.

77. Ga.—*Bowden v. Davison-Paxon Co.*, 31 S.E.2d 83, 71 Ga.App. 379.

78. Iowa.—*Coster v. Jensen*, 257 N.W. 303, 218 Iowa 1215.

Utah.—*Booth v. Crockett*, 173 P.2d 647, 110 Utah 366.

50 C.J. p 491 note 81.

79. Hawaii.—*Richardson v. Pali*, 34 Hawaii 328.

80. Ky.—*Schaaf v. Brown*, 200 S.W. 2d 909, 304 Ky. 466.

81. Fla.—*Clark v. Clark*, 3 So.2d 170, 158 Fla. 731.

With whom copy should be left see infra § 48.

82. Cal.—*People v. One 1941 Chrysler 6 Tour Sedan*, 183 P.2d 368, 81 Cal.App.2d 18.

83. Ohio.—*Freytag v. Freytag*, 13 Ohio Supp. 145.

84. Mich.—*Zimmerman v. May*, 175 N.W. 137, 208 Mich. 55.

at his residence is not good personal service.<sup>85</sup> If, under statutory authority, a private person undertakes to serve the process he is, like the sheriff, agent for plaintiff for that purpose only.<sup>86</sup>

**Rules of statutory construction.** As a general rule statutes or court rules authorizing substituted service must be strictly construed,<sup>87</sup> although it has been said that a statute providing for such service should be liberally construed.<sup>88</sup> The construction and application of the statutes or court rules must comport with the fundamentals of due process,<sup>89</sup> and they should be construed sensibly and applied only in a reasonable way<sup>90</sup> and in a manner consistent with their purpose.<sup>91</sup> Provisions should not be read into such statutes which are not expressly stated therein or necessarily implied.<sup>92</sup> Under the rule that a statute will be construed to uphold its validity wherever possible, discussed in Constitutional Law § 98, a statute providing for service on an agent of a nonresident will be construed to mean a nonresident of the county but a resident of the state, where to construe it to mean a nonresident of the state would render it unconstitutional.<sup>93</sup>

## § 44. When Authorized

Substituted service is effective only if the statutory requirements as to inability to find or serve the defendant personally are met.

Depending on the terms of the statute, it has been held that substituted service is to be used only when defendant cannot be found personally,<sup>94</sup> where defendant seeks to evade personal service,<sup>95</sup> or where defendant cannot be served personally although he is not guilty of self-concealment.<sup>96</sup>

**Knowledge of, or effort to ascertain, defendant's location.** Under some statutes, in order to justify such service, all efforts to locate defendant must have been made,<sup>97</sup> and the service is invalid if his location could in fact have been readily discovered.<sup>98</sup> Under other statutes, however, knowledge of defendant's whereabouts does not prevent substituted service where defendant cannot with the exercise of due diligence be served within the state.<sup>99</sup> Clearly, where it appears that plaintiff has made diligent efforts to serve defendant, and cannot learn of his whereabouts, the order for substituted service is proper.<sup>1</sup>

85. N.H.—Currier v. Gilman, 55 N. H. 364.

86. Wash.—Washington Mill Co. v. Marks, 67 P. 565, 27 Wash. 170.

87. Colo.—Carlson v. District Court of City and County of Denver, 180 P.2d 525, 116 Colo. 330.

Ill.—Conley v. McNamara, 79 N.E.2d 645, 334 Ill.App. 396.

Iowa.—Thompson v. Butler, 243 N. W. 164, 214 Iowa 1123.

Ky.—Haire v. Chilson, 200 S.W.2d 107, 304 Ky. 119—Greene v. Commonwealth, by Marshall, 122 S.W. 2d 523, 275 Ky. 637.

Nev.—Zeig v. Zeig, 198 P.2d 724, 65 Nev. 464.

N.J.—Kurilla v. Roth, 38 A.2d 862, 132 N.J.Law 213—Ruhle v. Caffrey, 174 A. 204, 113 N.J.Law 240, reversed on other grounds 180 A. 834, 115 N.J.Law 517—Eckman v. Grear, 187 A. 556, 14 N.J.Misc. 807.

N.M.—Murray Hotel Co. v. Golding, 216 P.2d 364, 54 N.M. 149.

N.Y.—Robinson v. Five One Five Associates Corporation, 45 N.Y.S.2d 20, 180 Misc. 906—In re Bloss' Will, 226 N.Y.S. 441, 180 Misc. 786.

Ohio.—Ruckert v. Matll Realty Co., App., 40 N.E.2d 688.

Pa.—Corpus Juris cited in Williams v. Meredith, 192 A. 924, 925, 326 Pa. 570—Corpus Juris cited in Hughes v. Hughes, 158 A. 874, 875, 306 Pa. 75.

Tenn.—Corpus Juris cited in Pinkerton v. Fox, 129 S.W.2d 514, 518, 23 Tenn.App. 159.

Vt.—Brammall v. LaRose, 165 A.

916, 105 Vt. 345, followed in 165 A. 918, 105 Vt. 352.

50 C.J. p 491 note 84.

**Construction with reference to other statutes**

Reenactment of provision of civil practice act relating to manner of making substituted service was not necessarily reaffirmation of all of provisions of statute authorizing substituted service.—Midvale Paper Board Co. v. Cup Craft Paper Corporation, 19 N.Y.S.2d 135, 173 Misc. 786.

88. U.S.—Zuckerman v. McCulley, D.C.Mo., 7 F.R.D. 739, appeal dismissed C.C.A., 170 F.2d 1015.

89. N.J.—Kurilla v. Roth, 38 A.2d 862, 132 N.J.Law 213.

90. N.Y.—Robinson v. Five One Five Associates Corporation, 45 N. Y.S.2d 20, 180 Misc. 906.

91. Pa.—Robinson v. Robinson, 67 A.2d 273, 362 Pa. 554.

92. Ky.—Mann v. Humphrey's Adm'r, 79 S.W.2d 17, 257 Ky. 647, 96 A.L.R. 584.

93. Ill.—Joel v. Bennett, 115 N.E. 5, 276 Ill. 537.

50 C.J. p 491 note 86.

94. U.S.—Spielberger v. Little, D.C. N.Y., 77 F.Supp. 146, reversed on other grounds C.C.A., Spielberger v. Textron Inc., 172 F.2d 85, 50 C.J. p 491 note 89.

95. N.Y.—In re Bloss' Will, 226 N. Y.S. 441, 180 Misc. 786.

50 C.J. p 491 note 91.

96. N.Y.—Le Roy v. Squires, 50 N. Y.S.2d 576.

97. Hawaii.—Robinson v. McWayne, 35 Hawaii 689.

Iowa.—Corpus Juris cited in Coster v. Jensen, 257 N.W. 303, 304, 218 Iowa 1215.

98. Iowa.—Coster v. Jensen, 257 N. W. 303, 218 Iowa 1215.

99. N.Y.—Nesi v. Heimann, 33 N.Y. S.2d 559, 178 Misc. 195.

**Under former statute providing for substituted service only in case the place of defendant's sojourn could not be ascertained, the service was invalid if his location could in fact have been readily ascertained.**—Nesi v. Heimann, supra—McElfatrick v. Sire, 120 N.Y.S. 64—50 C.J. p 491 notes 93, 94.

1. N.Y.—Bartley v. Gordon, 12 N.Y. S.2d 347, 257 App.Div. 895—Bishop v. Hughes, 102 N.Y.S. 595, 117 App.Div. 425.

**Defendant in armed forces**

Where a defendant's present location was unknown because he was somewhere with armed forces, the alleged fact that plaintiff's proposed cause of action against defendant was for personal injuries, and that defendant was insured against liability so that action would probably be defended by an insurer, would not authorize substituted service of summons.—Robinson v. Five One Five Associates Corporation, 45 N.Y. S.2d 20, 180 Misc. 906.

**Existence of cause of action.** Under some statutes substituted service may not be made on a non-resident defendant unless a cause of action appears to exist against him.<sup>2</sup>

**On one personally before court.** Under a statute to such effect, when a party is personally before the court either because he instituted the proceeding or because he had personal service of the original process of the forum, all action taken thereafter in that proceeding or supplementary thereto may be begun by substituted service.<sup>3</sup>

## § 45. Against Whom Available

Substituted service cannot be employed against a nonresident except to the extent that a resident agent of a nonresident may be made subject to such service.

2. U.S.—*Frawley v. Chakos*, D.C. Wis., 36 F.2d 373.

3. Ala.—*Campbell v. State*, 5 So.2d 466, 242 Ala. 215.

### Action to obtain new trial

In action against foreign corporation to obtain a new trial of action in which corporation at a previous term of court had obtained a judgment against plaintiff, summons issued and executed pursuant to statute providing for service of summons on a nonresident was not subject to motion to quash on ground that plaintiff sought to obtain a judgment in personam against nonresident corporation.—*South v. Williamson Dealers Corp.*, 183 S.W.2d 634, 298 Ky. 557.

4. Me.—*Abbott v. Abbott*, 64 A. 815, 101 Me. 343.

### Personal representative

Process may be executed on personal representative by substituted service.—*Haller v. Digman*, 167 S.E. 593, 113 W.Va. 240.

5. U.S.—*Hensley v. Green*, D.C.S.C., 36 F.Supp. 671.

N.Y.—*Rawstorne v. Maguire*, 269 N.Y.S. 39, 240 App.Div. 1, affirmed 192 N.E. 294, 265 N.Y. 204.—*Thompson v. Mundheim*, 43 N.Y.S. 2d 632, 180 Misc. 1002, affirmed 45 N.Y.S.2d 412, 266 App.Div. 1001. 50 C.J. p. 492 note 98.

**Where transaction of business in state by nonresident natural persons does not imply consent to be bound by process of its courts.**—*Hensley v. Green*, D.C.S.C., 36 F.Supp. 671.

### Place of residence or domicile

The place of residence, not domicile, controls as to right to make substituted service under statute.—*Hetson v. Sommers*, 44 N.Y.S.2d 31, affirmed 48 N.Y.S.2d 35.

### Persons held resident

(1) Evidence that resident, having departed from this country for purpose of establishing his domicile in Switzerland, stopped en route in

France, at which time substituted service was obtained on him in New York under statute, was insufficient to show effective change of domicile, which requires intent to change accompanied by an actual going to and abiding in new place, and the service was valid.—*Alvord & Alvord v. Pate-notre*, 92 N.Y.S.2d 514, 196 Misc. 524.

(2) Substituted service was not rendered invalid because plaintiff knew that defendant was in Trinidad engaged in constructing United States naval base, where defendant's absence was only temporary and he returned to his residence in New York at completion of his work, since he was still a resident of New York; and the fact that defendant received mail addressed to him at Trinidad did not change the rule.—*Hetson v. Sommers*, 44 N.Y.S.2d 31, affirmed 48 N.Y.S.2d 35.

### Persons held nonresident

(1) Defendant, who lived in another state, was not a resident of the state of the forum so as to be subject to substituted service of process, notwithstanding he made frequent visits to the state of the forum under arrangement with hotel whereby he kept same room for baggage but was charged only for time actually in hotel, and notwithstanding he left permanently for purpose of evading process.—*Rawstorne v. Maguire*, 192 N.E. 294, 265 N.Y. 204.

(2) Defendant who had maintained home within the state was not resident of the state so as to be subject to substituted service of process where there was no bodily presence in the state at time order for substituted service was made, there was no permanent place of abode and no domicile within the state, and defendant and her husband and children maintained home in another state.—*McCandless v. Reuter*, 288 N.Y.S. 952, 248 App.Div. 93.

(3) Under statute providing for

substituted service against a resident defendant is proper.<sup>4</sup> Such service, in its technical sense, as distinguished from service by publication, cannot be employed against nonresidents<sup>5</sup> or outside the territorial limits of the state,<sup>6</sup> at least in actions based on ordinary money demands<sup>7</sup> or to determine purely personal rights and obligations,<sup>8</sup> except where and to the extent that a resident agent of a nonresident may by statute be subject to such service under the rules discussed *infra* § 50. Substituted service is not available against one who is at the time immune from any civil process.<sup>9</sup>

## § 46. Service on Several Defendants

Where several defendants are to be served by sub-

stituted service of summons on a "person residing within the state" on whom plaintiff is unable to make personal service of summons within the state, quoted phrase includes bodily presence in the state; hence substituted service on a member of the armed forces who, while retaining his domicile in the state, has his actual residence changed to place where he is stationed, is not proper since he would not be a "person residing within the state" within meaning of the statute.—*Lerman v. Copperman*, 52 N.Y.S.2d 50, 183 Misc. 352.

6. N.Y.—*Mishkin v. Mishkin*, 47 N.Y.S.2d 514.

7. La.—*Nelson v. Coppage*, 128 So. 529, 13 La.App. 520.

8. U.S.—*Commonwealth of Kentucky, for Use and Benefit of Kern, v. Maryland Casualty Co. of Baltimore, Md.*, C.C.A.Ky., 112 F.2d 352.

Pa.—*Vaughn v. Love*, 188 A. 299, 324 Pa. 276, 107 A.L.R. 1336.

Wis.—*State ex rel. Ledin v. Davison*, 256 N.W. 718, 216 Wis. 216, 96 A.L.R. 589.

9. Pa.—*Fister v. Bollinger*, 51 Pa. Dist. & Co. 621, 37 Berks.Co. 7, 58 York Leg.Rec. 125.

### Soldier in actual service

(1) Under a statute providing that no civil process shall issue or be enforced against any person in actual service of the armed forces of the United States, service of process may not be made on such a soldier by serving an adult member of his family at his dwelling.—*Fister v. Bollinger*, *supra*.

(2) Even apart from such statute, but on grounds of public policy, a person in actual military service overseas is not subject to process served by handing a copy thereof to an adult member of defendant's family at his residence, and the court has power to quash service so made.—*Fister v. Bollinger*, *supra*.

stituted service, a copy must be left for each at the place designated by statute.

Substituted service, in order to be complete as to each one of several defendants, must be had by leaving a copy for each at the place designated by the statute.<sup>10</sup>

## § 47. Place Where Copy Left

Under statutes providing for substituted service, a

copy of the process is generally required to be left at the defendant's domicile, residence, or place of abode, as these terms are construed by the courts.

The statutes generally require that the copy shall be left at defendant's domicile, residence, or place of abode;<sup>11</sup> and the courts have given a great deal of consideration to determining the sense in which such statutes employ the terms "residence,"<sup>12</sup> "dwelling house,"<sup>13</sup> "place of abode,"<sup>14</sup> "usual place of abode,"<sup>15</sup> and the sense in which such statutes

10. Okl.—*Corpus Juris* quoted in *Chaney v. Reddin*, 205 P.2d 310, 312, 201 Okl. 264, 8 A.L.R.2d 337.

Pa.—*Mamlin v. Tener*, 23 A.2d 90, 146 Pa.Super. 593.  
50 C.J. p 492 note 2.

### Defendants in same family

(1) Where two defendants were members of the same family, service of one copy of summons on third member of family for both defendants did not comply with statute, and such service was insufficient to confer jurisdiction on court out of which summons issued; and a default judgment rendered on such service against one of the defendants was void on the face of the record.—*Chaney v. Reddin*, 205 P.2d 310, 201 Okl. 264, 8 A.L.R.2d 337.

(2) Service of execution on mother without leaving copy for daughter living with mother and employed during day was not service on daughter.—*Barnes v. Freed*, 173 N.E. 795, 342 Ill. 73.

11. U.S.—*Doherty v. Cremering*, C. C.A.Ohio, 83 F.2d 388.

Ala.—*Campbell v. State*, 5 So.2d 466, 242 Ala. 215.

D.C.—*Corpus Juris* cited in *Halpern v. Gunn*, Mun.App., 66 A.2d 207.

Iowa.—*Ruth & Clark v. Emery*, 11 N.W.2d 397, 233 Iowa 1234.

Kan.—*Board of Com'rs of Labette County v. Abbey*, 100 P.2d 720, 151 Kan. 710—*Royse v. Grage*, 42 P.2d 942, 141 Kan. 702.

La.—*Hornung v. Mills*, App., 7 So. 2d 665.

Wash.—*John Hancock Mut. Life Ins. Co. v. Gooley*, 83 P.2d 221, 196 Wash. 357, 118 A.L.R. 1484.

50 C.J. p 492 note 3.

### "County of residence"

Under statute providing that, if defendant is not found within the county of his residence, an original notice shall be served by leaving a copy thereof at his usual place of residence, etc., the term "county of his residence" means the county of defendant's legal residence or domicile; the statute contemplates a county from which defendant may be physically absent.—*Ruth & Clark v. Emery*, 11 N.W.2d 397, 233 Iowa 1234.

12. Pa.—*Robinson v. Robinson*, 67 A.2d 273, 275, 362 Pa. 554—*Pruden-*

*dential Ins. Co. v. Himelfarb*, Com. Pl., 35 Del.Co. 371.  
50 C.J. p 492 note 4.

### Actual rather than constructive residence

Word "residence" within statute permitting writ of summons, or complaint, if action is commenced by complaint, to be served on individual defendant by handing a copy at residence of defendant to an adult member of family with which he resides, means actual residence and does not mean constructive residence or domicile.—*Robinson v. Robinson*, 67 A.2d 273, 362 Pa. 554.

13. Or.—*McFarlane v. Cornelius*, 73 P. 325, 43 Or. 513.

14. Ill.—*Conley v. McNamara*, 79 N.E.2d 645, 334 Ill.App. 396.  
50 C.J. p 492 note 5.

### "Abode"

(1) One's fixed place of residence for the time being when service is made.

Fla.—*State ex rel. Merritt v. Hefferman*, 195 So. 145, 147, 142 Fla. 496, 127 A.L.R. 1263.

Minn.—*Berryhill v. Sepp*, 119 N.W. 404, 106 Minn. 458, 21 L.R.A., N.S., 344.

N.J.—*Kurilla v. Roth*, 38 A.2d 862, 864, 132 N.J.Law 213—*Feder v. Bodner*, 28 A.2d 539, 540, 129 N.J. Law 173—*Leidy v. Edwards*, 46 A.2d 723, 724, 24 N.J.Misc. 116—*Augustus Co., for Use of Bourgeois v. Manzella*, 17 A.2d 68, 70, 19 N.J.Misc. 29—*Eckman v. Grear*, 187 A. 556, 558, 14 N.J.Misc. 807.

(2) The place where a person dwells.

Mo.—*L. J. Mueller Furnace Co. v. Dreibelbis*, 229 S.W. 240, 241.

N.J.—*Kurilla v. Roth*, supra—*Feder v. Bodner*, supra—*Leidy v. Edwards*, supra—*Augustus Co., for Use of Bourgeois v. Manzella*, supra.

(3) A person's domicile.—*L. J. Mueller Furnace Co. v. Dreibelbis*, supra.

(4) Where defendant is actually living when the service is made.—*Berryhill v. Sepp*, 119 N.W. 404, 106 Minn. 458, 21 L.R.A., N.S., 344—50 C.J. p 492 note 5 [a] (1).

(5) It may include a place in which defendant is not actually liv-

ing at the time.—*Leidy v. Edwards*, supra.

15. Utah.—*Booth v. Crockett*, 173 P. 2d 647, 649, 110 Utah 366.

50 C.J. p 492 note 6.

### Compared with "residence"

(1) "Usual place of abode" is synonymous with "residence."—*Husband v. Crockett*, 115 S.W.2d 882, 885, 195 Ark. 1031.

(2) "Usual place of abode" is a much more restricted term than "residence."

N.J.—*Augustus Co., for Use of Bourgeois v. Manzella*, 17 A.2d 68, 70, 19 N.J.Misc. 29—*Eckman v. Grear*, 187 A. 556, 558, 14 N.J.Misc. 807.

Utah.—*Booth v. Crockett*, 173 P.2d 647, 649, 110 Utah 366—*Grant v. Lawrence*, 108 P. 931, 933, 37 Utah 450, Ann.Cas.1912C 280.

### Compared with "domicile"

(1) "Usual place of abode" has been held distinguishable from "domicile."

N.J.—*Eckman v. Grear*, 187 A. 556, 558, 14 N.J.Misc. 807.

Utah.—*Booth v. Crockett*, 173 P.2d 647, 648, 110 Utah 366—*Grant v. Lawrence*, 108 P. 931, 933, 37 Utah 450, Ann.Cas.1912C 280.

(2) It has also, however, been held synonymous with it.—*McFarlane v. Cornelius*, 73 P. 325, 328, 43 Or. 513.

Synonymous with "dwelling house"—*Or.—McFarlane v. Cornelius*, supra.

### "Usual place of abode"

(1) The place where a person has his fixed permanent home; the place to which he intends to return.—*McGill v. Miller*, 37 S.W.2d 689, 690, 183 Ark. 585.

(2) The house in which one's wife and children are living, although he may be absent at time of service of process and such absence may have continued over considerable period of time.—*Husband v. Crockett*, 115 S.W.2d 882, 885, 195 Ark. 1031—*Shepard v. Hopson*, 86 S.W.2d 30, 32, 191 Ark. 284.

(3) The customary or settled place of residence; a regular, fixed, and permanent residence as distinguished from a temporary stopping or abiding place.—*Caskey v. Peterson*, 263 N.W. 658, 660, 220 Wis. 690.

(4) The place where defendant is

employ the term "domicile,"<sup>16</sup> and like terms.<sup>17</sup>

If defendant has not changed his domicile or residence he may be served there, even though he himself is and has been absent.<sup>18</sup>

It is insufficient, however, under such a statute, to leave the copy at defendant's place of business<sup>19</sup> unless, where the statute so provides, defendant's residence cannot be found and the court orders service at defendant's place of business;<sup>20</sup> nor is it sufficient to leave the copy at the dwelling

house of another person,<sup>21</sup> or at a house or hotel where he is temporarily stopping<sup>22</sup> unless defendant's place of abode is there,<sup>23</sup> or in defendant's berth in a steamer on which he has taken passage,<sup>24</sup> or in a part of the house which he does not inhabit or frequent<sup>25</sup> or which he occupies only as a business office,<sup>26</sup> or a part in which defendant has no interest other than the privilege of occasional use,<sup>27</sup> or at any other place not constituting defendant's residence or domicile or abode within the meaning of the statute.<sup>28</sup>

actually living at the time of service.

Fla.—State ex rel. Merritt v. Heffernan, 195 So. 145, 147, 42 Fla. 496, 127 A.L.R. 1263.

N.J.—Kurilla v. Roth, 38 A.2d 862, 864, 132 N.J.Law 213—Feder v. Bodner, 28 A.2d 539, 540, 129 N.J.Law 173—Doughnut Corporation of America v. Tsakirides, 1 A.2d 467, 468, 121 N.J.Law 136—Sweeney v. Miner, 95 A. 1014, 1015, 88 N.J.Law 361—Leidy v. Edwards, 46 A.2d 723, 724, 24 N.J.Misc. 116—Augustus Co., for Use of Bourgeois, v. Manzella, 17 A.2d 68, 70, 19 N.J.Misc. 29—Eckman v. Grear, 187 A. 556, 558, 14 N.J.Misc. 807.

Utah.—Booth v. Crockett, 173 P.2d 647, 649, 110 Utah 366—Grant v. Lawrence, 108 P. 931, 933, 37 Utah 450, Ann.Cas.1912C 236.

Wash.—Dolan v. Baldrige, 4 P.2d 871, 873, 165 Wash. 69.

Wis.—Caskey v. Peterson, 263 N.W. 658, 660, 220 Wis. 690.

#### Test

Fact that many personal possessions of defendant remained at parents' home in which defendant had lived prior to departure for naval service, that ties of blood and affection continued, and that defendant frequently corresponded with persons at the home, were to be considered in determining where defendant's usual place of abode was within meaning of statute.—Booth v. Crockett, 173 P.2d 647, 110 Utah 366.

#### Temporary absence or break in continuity

Fact that a person departs from his usual place of abode temporarily does not necessarily show that he has ceased living at usual place of abode within meaning of statute providing for substituted service of summons; but, if the break in the continuity of his activities which constitute living at what was his home is so marked, such as an indefinite tenure of military or any duty away from that home, the place where he lived would be not his present usual place of abode but a former place of abode.—Booth v. Crockett, supra.

"Last home" is not synonymous

with "usual place of abode."—Washburn v. Angle Hardware Co., 132 S. E. 310, 144 Va. 508.

#### Several residences

Under the construction of the phrase "usual place of abode" as meaning the place where defendant is actually living at time of service, where persons have several residences which they permanently maintain, occupying one at one period of year and another at another period, a summons must be served at the dwelling house in which defendant is living at time when service is made.

Fla.—State ex rel. Merritt v. Heffernan, 195 So. 145, 142 Fla. 496, 127 A.L.R. 1263.

N.J.—Camden Safe Deposit, etc., Co. v. Barbour, 48 A. 1008, 66 N.J.Law 103.

16. La.—Rousseau v. Gavarre, 24 La. Ann. 355.

50 C.J. p 492 note 7.

17. Ga.—Water Lot Co. v. Brunswick Bank, 30 Ga. 685.

50 C.J. p 492 note 8.

#### "Usual place of residence"

The term "usual place of residence" is limited to the county of defendant's legal place of residence or domicile.—Ruth & Clark v. Emery, 11 N.W.2d 397, 233 Iowa 1234.

18. Ga.—Venable v. Long Realty Co., 169 S.E. 322, 46 Ga.App. 803.

Ill.—Glineberg v. Evans, 93 N.E.2d 520, 341 Ill.App. 332.

Iowa.—Moughan v. Moughan, 254 N.W. 828, 218 Iowa 1162.

La.—Hornung v. Mills, App., 7 So.2d 665.

50 C.J. p 492 note 9.

#### Defendant in armed forces

Iowa.—Ruth & Clark v. Emery, 11 N.W.2d 397, 233 Iowa 1234.

Ohio.—Commercial Motor Freight Lines Co. v. Monson, 17 Ohio Supp. 99.

#### Domicile held not abandoned

La.—Hornung v. Mills, App., 7 So.2d 665.

#### Temporary absences

The house where a resident of the state habitually spends three days of the week, except when away on trips and vacations, is his usual

place of abode for the purpose of serving process on him.—Dorus v. Lyon, 101 A. 490, 92 Conn. 55.

19. U.S.—Doherty v. Cremering, C. C.A. Ohio, 83 F.2d 388.

Ala.—Corpus Juris cited in Hudson v. Birmingham Water Works Co., 189 So. 72, 73, 238 Ala. 38.

La.—Item Co. v. St. Tammany Hotel, App., 175 So. 421.

N.Y.—Mazer v. Gerstinblith, 11 N.Y. S.2d 392, 256 App.Div. 671.

Pa.—Corn, to Use of, v. Brigham, 58 Pa. Dist. & Co. 271.

50 C.J. p 492 note 10.

20. N.Y.—Mazer v. Gerstinblith, 11 N.Y.S.2d 392, 256 App.Div. 671.

21. Minn.—Berryhill v. Sepp, 119 N.W. 404, 106 Minn. 458, 21 L.R.A., N.S., 344.

50 C.J. p 493 note 11.

22. Wash.—John Hancock Mut. Life Ins. Co. v. Gooley, 83 P.2d 221, 196 Wash. 357, 118 A.L.R. 1484.

50 C.J. p 493 note 12.

23. Ga.—McLeay v. Davison-Paxon-Stokes Co., 88 S.E. 992, 18 Ga.App. 134.

La.—McFaddin v. Garrett, 22 So. 358, 49 La. Ann. 1319.

24. Mass.—Craig v. Gisborne, 13 Gray 270.

25. N.J.—Heilemann v. Clowney, 103 A. 687, 90 N.J.Law 87.

50 C.J. p 493 note 16.

26. U.S.—U. S. v. N. Tully Semel, Inc., D.C.Conn., 88 F.Supp. 732.

#### Extent of separation

Where return of service on summons showed service by leaving at usual place of abode as authorized by statute, but testimony showed that copy of summons was left in business office of person served opening off the opposite side of the common hallway from door of apartment used by him as living quarters, service did not satisfy requirement of statute.—U. S. v. N. Tully Semel, Inc., supra.

27. Conn.—Clover v. Urban, 142 A. 389, 108 Conn. 13.

28. Ill.—Hiram Walker Distributing Co. v. Giaccone, 89 N.E.2d 748, 339 Ill.App. 279—Albers v. Bramberg, 32 N.E.2d 362, 308 Ill.App. 463.

The terms "usual place of abode" and "usual place of residence" are generally held to refer to the time of service;<sup>29</sup> hence it is not sufficient under such a statute to leave the copy at defendant's former dwelling house, residence, or place of abode, as the case may be, after his removal therefrom,<sup>30</sup> or to leave it at defendant's last address in the state before leaving for another state.<sup>31</sup> It has been held that one may have two or more usual places of abode for the purpose of serving process.<sup>32</sup>

Generally speaking, unless the case comes within a statute providing therefor, leaving a copy at the home of defendant is not good service.<sup>33</sup> Some statutes provide for the leaving of the writ at some public place at defendant's dwelling or at some obvious part of the house;<sup>34</sup> but, where the statute requires the process to be left with particular persons, merely leaving it at, or affixing it to, some part of the premises of defendant's resi-

dence, without delivering it to such a person, is insufficient.<sup>35</sup> It has been held that leaving a copy with a proper person in a yard, path, or other part of the premises near the house or residence is sufficient;<sup>36</sup> but it has also been held necessary to leave it with such person at some part of the house.<sup>37</sup> Leaving it with a servant on the piazza of the house has been held to be sufficient.<sup>38</sup>

A statute allowing service by leaving a copy at the place of business when residence cannot be ascertained does not apply to allow service in this manner on a nonresident<sup>39</sup> or on one not having a proprietary interest in the business.<sup>40</sup>

**Concurrent requirement.** Where the statute requires other notice in addition to leaving at last and usual place, failure to give such notice renders the process invalid.<sup>41</sup>

**Time for serving.** When the statute provides that process may be left at defendant's residence

Ind.—Papuschak v. Burich, 185 N.E. 376, 97 Ind.App. 100.

N.Y.—Joyce v. Bauman, 165 A. 425, 11 N.J.Misc. 237.

Ohio.—Ruckert v. Matil Realty Co., App., 40 N.E.2d 689.

50 C.J. p 493 note 18.

#### Service held insufficient

(1) Usual place of abode of defendant who was inducted into navy was not at grandmother's home at which defendant had lived for six months before entering military service and with whom defendant had infrequently communicated after induction, within meaning of statute providing for substituted service of summons by leaving copy of summons at usual place of abode.—Gounis v. Crockett, 173 P.2d 650, 110 Utah 372.

(2) Attempted substituted service made on father of emancipated minor who at time was working on farm away from his father's home was ineffectual to confer jurisdiction of person of minor, since not made at minor's usual place of abode, which was farm home at which he was working.—Caskey v. Peterson, 263 N.W. 658, 220 Wis. 690.

29. U.S.—Earle v. McVeigh, Va., 91 U.S. 503, 23 L.Ed. 398.

Mo.—Madison County Bank v. Summan's Adm'r, 79 Mo. 527.

Neb.—Minnesota Thresher Mfg. Co. v. L'Heureux, 118 N.W. 565, 82 Neb. 692—Ruby v. Pierce, 104 N.W. 1142, 74 Neb. 754—Seymour v. Street, 5 Neb. 85—Blodgett v. Utley, 4 Neb. 25.

W.Va.—Williamson v. Taylor, 122 S.E. 530, 96 W.Va. 246.

30. Ark.—McGill v. Miller, 37 S.W. 2d 639, 183 Ark. 585.

Ill.—Scobbie v. Burch, 86 N.E.2d 160, 337 Ill.App. 656.

La.—Williams & Miller v. Jones, App., 180 So. 140.

Miss.—Hendricks v. Kelloggs, 76 So. 746, 116 Miss. 22.

Mo.—Madison County Bank v. Summan's Adm'r, 79 Mo. 527.

Neb.—Minnesota Thresher Mfg. Co. v. L'Heureux, 118 N.W. 565, 82 Neb. 692—Ruby v. Pierce, 104 N.W. 1142, 74 Neb. 754.

Pa.—Prudential Ins. Co. v. Himelfarb, Com.Pl., 35 Del.Co. 371.

Utah.—Booth v. Crockett, 173 P.2d 647, 110 Utah 366.

Wash.—Dolan v. Baldrige, 4 P.2d 871, 165 Wash. 69.

W.Va.—Crouch v. Crouch, 20 S.E.2d 169, 124 W.Va. 331—Williamson v. Taylor, 122 S.E. 530, 96 W.Va. 246.

50 C.J. p 493 note 14.

31. Pa.—Robinson v. Robinson, 67 A.2d 273, 362 Pa. 554.

32. S.C.—American Agr. Chemical Co. v. Smith, 175 S.E. 275, 173 S.C. 158.

50 C.J. p 493 note 19.

33. Hawaii.—Richardson v. Pali, 34 Hawaii 328.

Ohio.—Crane Co. v. Koper Heating Co., 5 N.E.2d 338, 53 Ohio App. 403.

50 C.J. p 493 note 20.

Effect of actual notice to defendant

While in a proper case substituted service is sufficient if defendant acquires actual notice in due time, where it affirmatively appears that, unknown to defendant and during his temporary absence therefrom, a copy of the summons was left by the serving officer at defendant's home

and neither the summons nor such copy came to his knowledge prior to judgment defendant has not had the notice which the law requires.—Richardson v. Pali, 34 Hawaii 328.

34. Conn.—Clover v. Urban, 142 A. 389, 108 Conn. 13.

50 C.J. p 493 note 21.

35. Ohio.—Ruckert v. Matil Realty Co., App., 40 N.E.2d 688.

36. Ark.—Shephard v. Hopson, 86 S.W.2d 30, 191 Ark. 284.

S.D.—Alberts v. Brubaker, 81 N.W. 2d 769, 72 S.D. 220.

Wash.—Lino v. Hole, 291 P. 1079, 159 Wash. 16.

50 C.J. p 493 note 23.

Degree of proximity

Delivery of summons to thirty-five year old wife of defendant while she was on premises within two hundred feet of house which was defendant's usual place of abode was sufficient compliance with requirement of statute that delivery of summons should be "at" usual place of abode of defendant.—Shephard v. Hopson, 86 S.W.2d 30, 191 Ark. 284.

37. U.S.—Kibbe v. Benson, Ill., 17 Wall. 624, 21 L.Ed. 741.

38. S.C.—Bowers v. Alston, 10 S.C. L. 458.

39. Pa.—West Pennsylvania Fuel Co. v. Rogers, 14 Pa.Dist. 310.

40. Pa.—Kinpacher, etc., Silk Dyeing Co. v. Cole, 16 Pa.Dist. 1015—Kinney v. Stoer, 14 Pa.Dist. 131.

50 C.J. p 493 note 29.

41. Mass.—Porter v. Prince, 74 N.E. 256, 188 Mass. 80.

50 C.J. p 493 note 30.

during certain hours, service at some other hour is bad.<sup>42</sup>

# § 48. With Whom Copy Left

Under the statutes regulating substituted service, a copy of the process must generally be left with some designated person, such as a member of defendant's family or a person living at the house, and meeting certain requirements as to age, discretion, etc.

Under most statutes providing for substituted service, the copy of the process may be left only with certain designated persons, as a member of defendant's family, or a person over a certain age living at the house, or a person of suitable age and discretion, resident therein, etc.,<sup>43</sup> and attempted substitute service which does not meet the requirements of such statutes is invalid.<sup>44</sup> Such statutes presuppose that such a relation of confidence exists between the person with whom the copy is left and defendant that notice will reach de-

fendant;<sup>45</sup> they assume that such person will deliver the process or copy to defendant<sup>46</sup> or in some way give him notice thereof.<sup>47</sup> Nevertheless, it has been held that substituted service is not defective because the person with whom the process is left does not understand the significance of the papers and is not advised to deliver them to defendant.<sup>48</sup>

Under particular statutes it has been held proper to leave the copy with defendant's wife<sup>49</sup> or one representing herself to be his wife,<sup>50</sup> with his sister,<sup>51</sup> his daughter,<sup>52</sup> or daughter-in-law,<sup>53</sup> with his business partner who lives with him,<sup>54</sup> or a person left in charge of defendant's residence,<sup>55</sup> or, where the statute merely requires that the copy be left with a person of suitable age and discretion, with the superintendent of the apartment house in which defendant lives.<sup>56</sup> Where the statute requires service on a member of defendant's family or on a

42. Colo.—Ernst v. Colburn, 268 P. 576, 84 Colo. 170.

43. La.—Brannin v. Clements, App., 142 So. 621.

50 C.J. p 493 note 34.

## "Family"

(1) The term "family" as used in a statute authorizing service of process on some person of the family should be broadly construed.

N.J.—Sullivan v. Walburn, 154 A. 617, 9 N.J.Misc. 280.

Okl.—Moore v. Kasishke, 117 P.2d 113, 189 Okl. 336, 136 A.L.R. 1502.

(2) Broadly speaking, it means a collective body of persons who live in one house under one head or manager, including parents, children, and servants, and, in some instances, lodgers and boarders.—Sullivan v. Walburn, 154 A. 617, 9 N.J.Misc. 280—50 C.J. p 493 note 34 [a] (1).

(3) The word is not confined to blood relatives of defendant residing at his home.

N.J.—Sullivan v. Walburn, supra.

Okl.—Moore v. Kasishke, supra.

(4) Nor is it confined to persons under defendant's control or in his employ; thus a widowed mother, who resides with her son, is a member of his family, within the meaning of the statute.—Ellington v. Moore, 17 Mo. 424.

(5) Other decisions construing the word "family" see 50 C.J. p 493 note 34 [a].

## Servants

(1) Domestic servants living in the establishment are generally regarded as included in the term "family."

Ill.—Lewis v. West Side Trust & Savings Bank, 2 N.E.2d 976, 286 Ill.App. 130.

N.J.—Sullivan v. Walburn, 154 A. 617, 9 N.J.Misc. 280.

Pa.—Waber v. Schaffhauser, 34 Pa. Dist. & Co. 348.

50 C.J. p 493 note 34 [a] (1).

(2) However, servants who render only occasional services and do not live in the house cannot be regarded as members of the family.—Waber v. Schaffhauser, supra.

(3) So it has been held that a maid with no definite contract of employment was not a member of the family on whom substituted service could be made.—Thompson v. Butler, 243 N.W. 164, 214 Iowa 1123.

(4) So too, a nursemaid employed regularly about twice a week, but who did not reside with defendant, was not a person of the family.—Sullivan v. Walburn, supra.

(5) Defendant's negro servant who with his wife resided in a separate house on defendant's premises was not a member of his family.—Moore v. Kasishke, 117 P.2d 113, 189 Okl. 336, 136 A.L.R. 1502.

(6) An elderly negro who was janitor at defendant's rooming house but maintained separate residence was not a person of the family.—Zuckerman v. McCulley, D.C.Mo., 7 F.R.D. 739, appeal dismissed, C.C.A., 170 F.2d 1015.

44. Ohio.—Ruckert v. Matil Realty Co., App., 40 N.E.2d 688.

Pa.—Sasso's, Inc. v. Prohansky, Com. Pl., 38 Luz.Leg.Reg. 323.

50 C.J. p 494 note 35.

## Service held invalid

Service of process in two actions by tacking summons to door in presence of witness who came with constable for purpose of later becoming a statutory witness, and by serving

another summons on person whom defendant did not know, was invalid, notwithstanding defendants apparently were evading service.—Detroit Trust Co. v. Doe (Aguzzino), 267 N.W. 649, 276 Mich. 507.

45. Iowa.—Thompson v. Butler, 243 N.W. 164, 214 Iowa 1123.

"The relationship between the person receiving a copy of the summons and the person upon whom service is thereby attempted must be more confidential and intimate than is the case in most employer-employee or master and servant relationships in order that the receipt of such notice by the former may be deemed to be valid notice to the latter."—Moore v. Kasishke, 117 P.2d 113, 115, 189 Okl. 336, 136 A.L.R. 1502.

46. La.—Brannin v. Clements, App., 142 So. 621.

47. Fla.—Clark v. Clark, 30 So.2d 170, 158 Fla. 731.

48. Minn.—Peterson v. W. Davis & Sons, 11 N.W.2d 800, 216 Minn. 60.

49. La.—Vinson v. Picolo, App., 15 So.2d 778.

50 C.J. p 494 note 36.

50. Ga.—Barton v. J. R. Watkins, 120 S.E. 643, 31 Ga.App. 301.

51. Pa.—Collinge v. McLenegan, 19 Pa.Dist. 1033.

52. Iowa.—Moughan v. Moughan, 254 N.W. 828, 218 Iowa 1162.

53. Okl.—Jackson v. Smith, 200 P. 542, 83 Okl. 64.

54. Pa.—Bujac v. Morgan, 3 Yeates 258.

55. La.—Sharp v. McBride, 63 So. 892, 134 La. 249.

56. N.Y.—Spear v. De Luque, 194 N.Y.S. 433, 118 Misc. 747, affirmed 197 N.Y.S. 950, 204 App.Div. 876.

person living at defendant's usual place of abode, delivery to one who does not reside with defendant is bad.<sup>57</sup> If the statute requires the writ to be left with a member of defendant's family, it is sufficient to leave it with a member of the family in which he resides, where he has no family of his own;<sup>58</sup> but in the absence of such a requirement anyone living with defendant is a suitable person.<sup>59</sup> If the member of the family is also plaintiff, service by leaving the copy with plaintiff is bad.<sup>60</sup> Where the statute merely requires the presence of some person, it need not be left with an occupant of defendant's abode.<sup>61</sup>

While it is not essential that the person with whom the copy is left be an adult,<sup>62</sup> yet, even though the statute is silent as to the age of the person with whom the copy shall be left, it must be construed to mean a person of such age as would understand what was intended to be done with the summons.<sup>63</sup>

*Person in charge of business.* Where, by statute, the copy may be left at defendant's place of business with a person in charge thereof, "person in charge" is held to mean one who may be presumed to have been vested with some authority and to owe a corresponding duty to defendant.<sup>64</sup>

## § 49. — Informing Recipient as to Contents

There must be a compliance with a statute requiring that the person with whom the process is left be informed of its contents; otherwise the service is ineffective.

Where the statute requires that the person with whom process is left be informed of its contents, such a provision is mandatory,<sup>65</sup> and mere delivery without such informing is insufficient.<sup>66</sup> Where the process is duly left with a proper person at defendant's home, enclosed in an envelope addressed to defendant, the fact that such envelope is sealed does not render the service invalid, where the papers reach defendant and he is not prejudiced.<sup>67</sup>

## § 50. Service on Agent or Attorney

Under permissive statute, substituted service may in a proper case be effected by service of a copy on an agent of a nonresident or, under some circumstances, of a resident, or on the defendant's attorney.

While such methods of service are invalid without statutory authority,<sup>68</sup> some statutes, which have been upheld as constitutional,<sup>69</sup> provide for service on a nonresident defendant or on a resident defend-

57. La.—Richardson v. Trustees' Loan & Guaranty Co., 32 So. 387, 15 La.App. 645.

Pa.—Prudential Ins. Co. v. Himelfarb, Com.Pl., 85 Del.Co. 371. 50 C.J. p 494 note 43.

### Relative living separately

(1) Defendant's mother, who maintained permanent home, but who usually visited in defendant's home during winter months, was not a member of defendant's family so as to authorize service on defendant by delivering copy of summons to mother at defendant's residence.—Cleaves v. Funk, C.C.A.Okl., 76 F.2d 328.

(2) Where, at time of service of process, defendant's usual place of abode was on first floor of building and defendant's stepdaughter lived in an apartment on second floor and maintained separate living quarters, stepdaughter was not some person of family within statute providing for substitute or constructive service and attempted service by leaving a copy of process with stepdaughter was a nullity.—Conley v. McNamara, 79 N.E.2d 345, 334 Ill. App. 396.

### Servant

Service of citation on servant not living at defendant's domicile was invalid.—Richardson v. Trustees' Loan & Guaranty Co., 132 So. 387, 15 La.App. 645.

58. Fla.—Pyles v. Beall, 20 So. 778, 37 Fla. 557.

50 C.J. p 494 note 44.

59. Minn.—Brigham v. Connecticut Mut. Life Ins. Co., 82 N.W. 668, 79 Minn. 350.

60. Pa.—Rowan v. Ryan, 5 Lack. Leg.N. 321.

61. Del.—Bernhard v. Ennis, 140 A. 151, 3 W.W.Harr. 525.

62. Ind.—Conrad v. Johnson, 25 Ind. 487.

Pa.—Biles v. Basler, 24 Pa.Co. 3.

50 C.J. p 494 note 47.

63. Pa.—Kimbrel v. Villella, 20 Pa. Co. 18.—Regan v. Timony, 7 Pa.Co. 65.

64. Pa.—Kinpacher, etc., Silk Dyeing Co. v. Cole, 16 Pa.Dist. 1015. 50 C.J. p 494 note 52.

65. Fla.—Barwick v. Rouse, 43 So. 753, 53 Fla. 643.

66. Fla.—Barwick v. Rouse, supra.

50 C.J. p 494 note 55.

67. Minn.—MacLean v. Lasley, 232 N.W. 632, 181 Minn. 379.

68. U.S.—Hensley v. Green, D.C.S. C., 36 F.Supp. 671.

Mo.—State ex rel. Mueller Baking Co. v. Calvird, 92 S.W.2d 184, 338 Mo. 601.

50 C.J. p 494 note 56.

69. Cal.—Reynolds v. Reynolds, 134 P.2d 251, 21 Cal.2d 580.

50 C.J. p 494 note 57.

### Reasonableness of exercise of police power

(1) State's power to confer jurisdiction on courts over persons of individual nonresidents by substituted service depends on whether such statute is reasonable exercise of police power, so that if regulation is for protection of health, safety, and welfare of those within its borders, rather than mere attempt to extend jurisdiction of its courts over citizens beyond its borders, state may legislate to that end.—Sugg v. Hendrix, C.C.A.Miss., 142 F.2d 740.

(2) The statute authorizing service on nonresident by delivery of process to secretary of state, which takes due precaution to insure defendant of receipt of notice and a reasonable opportunity to appear and defend, is for protection of citizens within confines of the state and is a reasonable regulation of the police power of the state.—Davis v. Nugent, D.C.Miss., 90 F.Supp. 522.

### Particular statutes held valid

(1) Statute authorizing service on agent employed in agency through which business involved was transacted.—Davidson v. Henry L. Doherty & Co., 241 N.W. 700, 214 Iowa 739, 91 A.L.R. 1308.

(2) Statute permitting substituted service on agent of nonresident individual on a cause of action arising out of local business.



ant under certain circumstances by service on defendant's agent,<sup>70</sup> or on the resident agents of certain classes of principals,<sup>71</sup> or on a state officer, such as the secretary of state, deemed by reason of express statutory provision to be defendant's agent to receive process,<sup>72</sup> or on an agent appointed to receive process<sup>73</sup> under a provision requiring such appointment where defendant is doing business in the state and the business is of a dangerous nature and subject to the police power of the state.<sup>74</sup>

Statutes also sometimes permit individuals to designate persons on whom service of process may be made in their behalf during their absence from the state,<sup>75</sup> and the provisions of the statute allowing such designation must be observed.<sup>76</sup> While it has been held that such a statute should be liberally construed in order to accomplish the purpose for which it was enacted,<sup>77</sup> it has also been held that such a statute is in derogation of the common law, and for that reason should be strictly construed.<sup>78</sup> The circumstances of the case must fall within the terms of the statute.<sup>79</sup> Service

N.Y.—Interchemical Corp. v. Mirabelli, 54 N.Y.S.2d 522, 269 App. Div. 224.

Utah.—Wein v. Crockett, 195 P.2d 222.

(3) Statute authorizing service on nonresident by delivery of process to secretary of state, which takes due precaution to insure defendant of receipt of notice and a reasonable opportunity to appear in defense.

U.S.—Davis v. Nugent, D.C. Miss., 90 F.Supp. 522.

Miss.—Condon v. Snipes, 38 So.2d 752, 205 Miss. 306.

**Service under unconstitutional statute**

In action against nonresident trustee, service of alias summons on resident agent under unconstitutional statute was void.—Anderson's Adm'r v. Delapp, 190 S.W.2d 471, 300 Ky. 785.

70. Ala.—Corpus Juris cited in Campbell v. State, 5 So.2d 466, 471, 242 Ala. 215.

Iowa.—Davidson v. Henry L. Doherty & Co., 241 N.W. 700, 214 Iowa 739, 91 A.L.R. 1308.

N.Y.—Interchemical Corp. v. Mirabelli, 54 N.Y.S.2d 522, 269 App. Div. 224.

Pa.—Dean v. Frank Martz Coach Co., Com.Pl., 46 Lack.Jur. 42.

Utah.—Wein v. Crockett, 195 P.2d 222.

50 C.J. p 494 note 53.

**Purpose of statute**

The statute relating to service of summons on a nonresident doing business within the state was enacted in order to confer on the courts of the state personal jurisdiction over a nonresident engaged in business in the state in any cause of action growing out of the business, by substituted service on the person in charge of the local business of the nonresident.—Miller v. Swann, 28 N.Y.S.2d 247, 176 Misc. 607.

**Statute applicable to nonresident as well as resident**

(1) Statute authorizing service on agent employed in agency through which business involved was trans-

acted applies to nonresident individuals as well as to individuals who are residents of state but not of county in which agency is situated.—Goodman v. Henry L. Doherty & Co., 255 N.W. 667, 218 Iowa 529, affirmed Henry L. Doherty & Co. v. Goodman, 55 S.Ct. 553, 294 U.S. 623, 79 L.Ed. 1097.—Davidson v. Henry L. Doherty & Co., 241 N.W. 700, 214 Iowa 739, 91 A.L.R. 1308.

(2) However, a federal court has held that the statute, while applicable to nonresident corporations or partnerships, cannot be constitutionally applied to a nonresident individual who is a citizen of the United States.—Western Mut. Fire Ins. Co. v. Lamson Bros. & Co., D.C.Iowa, 42 F.Supp. 1007.

**Partnership**

As used in statute providing that when corporation, company, or individual has an office or agent in any county other than that in which principal resides, service may be had on agent or clerk employed in such office or agency, in actions growing out of or in connection with business thereof, the word "company" includes a "partnership."—Western Mut. Fire Ins. Co. v. Lamson Bros. & Co., supra.

**Noncompliance with statute requiring designation of agent**

Nonresident could not defeat resident's right to claim benefit of statute providing that, when a nonresident conducts a business within the state by an agent, he may be sued on any action arising out of conduct of such business and summons may be served on an agent, by failing to designate an agent in accordance with statute.—Wein v. Crockett, Utah, 195 P.2d 222.

71. Okl.—Johnson v. Martin, 58 P.2d 847, 177 Okl. 281.

50 C.J. p 495 note 53.

72. Ark.—Gillioz v. Kincannon, 214 S.W.2d 212, 213 Ark. 1010.

Miss.—Condon v. Snipes, 38 So.2d 752, 205 Miss. 306.

Pa.—Vaughn v. Love, 188 A. 299, 324 Pa. 276, 107 A.L.R. 1336.

In actions involving motor vehicles see Motor Vehicles § 502.

73. U.S.—Thomes v. Atkins, D.C. Minn., 52 F.Supp. 405.

Colo.—Carlson v. District Court of City & County of Denver, 180 P.2d 525, 116 Colo. 330.

Minn.—Kaiser v. Butchart, 265 N.W. 826, 197 Minn. 28.

74. U.S.—Davis v. Nugent, D.C. Miss., 90 F.Supp. 522.

75. N.Y.—Rosenthal v. United Transp. Co., 188 N.Y.S. 154, 196 App.Div. 540.

50 C.J. p 495 note 69.

76. N.Y.—Lyster v. Pearson, 27 N.Y.S. 399, 7 Misc. 98.

77. U.S.—Thomes v. Atkins, D.C. Minn., 52 F.Supp. 405.

N.Y.—Miller v. Swann, 28 N.Y.S.2d 247, 176 Misc. 607.

78. Colo.—Carlson v. District Court of City and County of Denver, 180 P.2d 525, 116 Colo. 330.

Ky.—Haire v. Chilson, 200 S.W.2d 107, 304 Ky. 119.

79. Ky.—Greene v. Commonwealth, by Marshall, 122 S.W.2d 523, 275 Ky. 637.—Viall v. Walker, 58 S.W.2d 415, 248 Ky. 197.

N.Y.—Interchemical Corp. v. Mirabelli, 54 N.Y.S.2d 522, 269 App. Div. 224.

Pa.—Smith v. Cook, 43 Pa. Dist. & Co. 608.

50 C.J. p 495 note 62.

**Action growing out of automobile accident**

(1) Statute permitting service of summons on nonresidents by making service on the secretary of state applies only in action growing out of accident while operating motor vehicle and does not apply to action on contract.—Ask Mr. Foster Travel Service v. Tauck Tours, 43 N.Y.S.2d 524.

(2) Service of summons, in action against nonresident defendant for abuse of process, by service on commissioner of revenue as agent under statute authorizing such service in action against nonresident motorist, was improper, entitling defendant to dismissal of cause of action, since such action could not have arisen out of automobile accident.—Lindsay v. Short, 186 S.E. 239, 210 N.C. 287.

made in conformity with the statute is good,<sup>80</sup> but service is not good where the person served is not an agent within the meaning of the statute,<sup>81</sup> or where the cause of action is not connected with

#### Doing or engaging in business

(1) One of the conditions which must exist to justify substituted service on a local agent of a nonresident individual is that such nonresident shall have engaged in business in the state.—*Interchemical Corp. v. Mirabelli*, 54 N.Y.S.2d 522, 269 App. Div. 224.

(2) The phrase "engage in business" as used in the statute is equivalent to the phrase "doing business" used in the statute relating to foreign corporations.—*Debre v. Hanna*, 45 N.Y.S.2d 551, 182 Misc. 824.

(3) The statutory requirement for doing business in the state is not satisfied unless a substantial part of defendant's business is conducted within the state.—*Melvin Pine & Co. v. McConnell*, 76 N.Y.S.2d 279, 273 App. Div. 218, 10 A.L.R.2d 194, affirmed 80 N.E.2d 137, 298 N.Y. 27.

(4) Nonresidents, who owned numerous buildings in the state which were managed for the nonresidents by real estate agents, were engaged in business within the state, within statute relating to service of summons on nonresidents who engage in business within the state.—*Miller v. Swann*, 28 N.Y.S.2d 247, 176 Misc. 607.

(5) On the other hand, where defendant, a Spanish wine and liquor dealer, did not have an office, bank account, telephone or directory listing, employees, or merchandise or samples of its products in New York, and was represented in United States by a sales representative, who also represented a number of other concerns and maintained his own office at his own expense, and transactions arranged by such representative were not binding until approved by defendant in Spain, service of process on defendant by serving sales representative was ineffective.—*O'Hagan v. Caballero*, 52 N.Y.S.2d 863, affirmed 59 N.Y.S.2d 300, 269 App. Div. 981.

#### Having "office or agency" in county

(1) As used in the statute providing for substituted service on a corporation, business trust, or any person having "an office or agency" in any county other than that in which the chief officer or principal resides by serving an agent or clerk, the words "agency" and "office" designate a place at which business of the company or individual is transacted by an agent.—*Johnson Freight Lines v. Davis*, 93 S.W.2d 637, 170 Tenn. 177.

(2) Accordingly, a nonresident individual engaged in transportation of freight by truck, who had no office in the county beyond renting

platform space at truck terminal, and wherein such nonresident maintained a part-time solicitor of freight for a week and a half, did not have an office or agency within county so as to authorize service of process on such solicitor.—*Johnson Freight Lines v. Davis*, supra.

#### Termination of "doing business"

Where rooming house had been sold and nonresident former owner had ceased doing business in state several months before action was commenced against her for injuries sustained by tenant before cessation of doing business, service on one who had formerly passed on to defendant rents collected by another was ineffective to acquire jurisdiction over person of defendant.—*Haire v. Chilson*, 200 S.W.2d 107, 304 Ky. 119.

#### Blue-Sky transactions

(1) Where licensed brokers allegedly accepted securities from investment manager and credited manager's account with proceeds of securities which manager had secured from customers pursuant to contracts which constituted unregistered securities and where brokers allegedly had knowledge of fact, action based on theory that brokers had converted securities related to "transaction covered" by the Blue-Sky Law within provision authorizing service on nonresident broker by service on commissioner of securities.—*Thomas v. Atkins*, D.C. Minn., 52 F.Supp. 405.

(2) Securities act, requiring nonresident corporation to appoint attorney on whom process may be served, is not intended to confer jurisdiction only on commissioner of securities in proceedings generally known as typical Blue-Sky suits.—*Vogel v. Chase Securities Corporation*, D.C. Minn., 19 F.Supp. 564.

(3) However, the appointment of commissioner of securities as agent for service of process under statute by nonresident issuer of securities, who was not engaged in selling such securities within state and who had no office, agent, or employee therein, did not constitute commissioner the issuer's agent for service of process in action to recover for issuer's alleged subsequent conversion of securities issued by it and purchased by a resident of state from a dealer therein who was neither agent, employee, nor representative of issuer.—*Boyum v. Massachusetts Investors Trust*, 10 N.W.2d 379, 215 Minn. 485.

80. U.S.—*Davis v. Nugent*, D.C. Miss., 90 F.Supp. 522—*Vogel v. Chase Securities Corporation*, D.C. Minn., 19 F.Supp. 564.

Minn.—*Kaiser v. Butchart*, 265 N.W. 826, 197 Minn. 28.

50 C.J. p 495 note 63.

81. U.S.—*Norwalk v. Air-Way Electric Appliance Corporation*, D.C.N.Y., 14 F.Supp. 129, reversed on other grounds, C.C.A., 87 F.2d 317, 110 A.L.R. 183.

50 C.J. p 495 note 64.

#### Person in charge

(1) Under the statute providing that a nonresident defendant doing business in the state may be served by leaving a copy of the process with a person in charge of such business, the person in charge must be one who is vested with general powers of judgment and discretion.—*Melvin Pine & Co. v. McConnell*, 76 N.Y.S.2d 279, 273 App. Div. 218, 10 A.L.R.2d 194, affirmed 80 N.E.2d 137, 298 N.Y. 27.

(2) A real estate corporation, which managed nonresident owners' building where alleged accident giving rise to plaintiff's cause of action occurred, and various other buildings owned by the owners, was in charge of the owners' business within the state, within statute relating to service of summons on nonresidents doing business within the state, so that service of summons, complaint, and notice on vice president of the corporation was sufficient service on the owners.—*Miller v. Swann*, 28 N.Y.S.2d 247, 176 Misc. 607.

#### Truck driver

In suit for damages resulting from drinking part of bottle of beverage containing spider, service obtained by serving summons in county in which defendant company had no place of business on truck driver, who was delivering company's products to persons engaged in business in such county, was defective, since statute regarding service of summons on truck drivers has application only to action for damages to persons or property occasioned by negligent operation of truck.—*Coca-Cola Bottling Co. of Southwest, Ark., v. Bacon*, 97 S.W.2d 74, 193 Ark. 6.

#### Agent for limited purpose

An agent for the leasing of one piece of real estate and the collection of rents therefrom is not an agent for the service of process within the meaning of the statute.—*Naughton v. McNamara*, 45 Pa. Dist. & Co. 135, 44 Lack. Jur. 51, 57 York Leg. Rec. 4.

#### Termination of agency after transaction involved

Service of process on an agent in charge of an agency out of which the transaction in question arose is sufficient to confer jurisdiction as to

the business of the agency or does not arise out of the business engaged in by defendant in the state,<sup>82</sup> or where the process is served on an agent otherwise competent, but whose relations to plaintiff or to the claim are such as to make it to his interest to suppress the fact of service.<sup>83</sup>

Under statutes of the character under discussion it has been held proper to serve a broker for the sale of defendant's land,<sup>84</sup> an agent for the collection of rents,<sup>85</sup> or a pilot or master of a boat.<sup>86</sup> A statute providing for service on an agent of a nonresident partnership does not permit such service on the agent of a partnership any member of which is a resident.<sup>87</sup> Where the statutes provide for service at defendant's place of business by leaving a copy with one in charge, where

defendant's residence cannot be found, or is outside the jurisdiction, inquiry must be made at the place of business as to residence in the county before process can be left with such person.<sup>88</sup> A statute providing for service on the agent of a nonresident doing business in the state applies with equal force to a nonresident sued on a contract entered into at a time when he was a resident of the state.<sup>89</sup>

**Attorneys.** Under a statute to such effect, service of process may be made on the attorney of defendant,<sup>90</sup> provided defendant has already appeared in the action or has otherwise come personally within the jurisdiction of the court,<sup>91</sup> but an attorney who does not represent defendant cannot be so served;<sup>92</sup> and it has been held that or-

the principal, regardless of whether the agency at time of the service of process has or has not been terminated.—*Hartsock v. Commodity Credit Corp.*, D.C.Iowa, 10 F.R.D. 181.

82. U.S.—*Norwalk v. Air-Way Electric Appliance Corporation*, D.C.N.Y., 14 F.Supp. 129, reversed on other grounds, C.C.A., 87 F.2d 317, 110 A.L.R. 183.

N.Y.—*Interchemical Corp. v. Mirabelli*, 54 N.Y.S.2d 522, 269 App.Div. 224.

50 C.J. p 495 note 65.

#### Test

Statute relating to service of summons on nonresidents doing business within the state was not intended to apply only in favor of such persons as are in a contractual relationship to, or in privity with, a nonresident, and sole test of applicability of statute is whether cause of action, whether based on tort or contract, arises out of the conduct of the business of the nonresident.—*Miller v. Swann*, 28 N.Y.S.2d 247, 176 Misc. 607.

#### Cause of action held to arise out of business

Cause of action in favor of lodger in house leased by nonresident owners to a tenant, for injuries sustained as a result of fire allegedly caused by owners' negligence, was one arising out of business of the owners, within statute relating to service of summons on nonresidents doing business in the state in any action arising out of such business, since it was an incident of ownership, operation, and management of owners' realty that lodger was injured.—*Miller v. Swann*, supra.

#### Cause of action held not to arise out of business

Substituted service of process purportedly effected on nonresident individual defendants by leaving a copy of summons and complaint with a person in charge of defendants'

factory in the state was invalid, where action was for goods sold and delivered to defendants in another state, and the action did not arise out of business in which defendants were engaging in the state.—*Interchemical Corp. v. Mirabelli*, 54 N.Y.S.2d 522, 269 App.Div. 224.

83. Mich.—*John W. Masury & Son v. Lowther*, 300 N.W. 866, 299 Mich. 516.

#### Antagonistic interest of representative

Where one occupies a fiduciary or representative relation to a person or subject matter to be affected by proceeding in which such person has a personal interest antagonistic to interest of others represented by him, service of process on representative confers no jurisdiction, even though statute expressly provides for such service.—*John W. Masury & Son v. Lowther*, supra.

#### Plaintiff as defendant's agent

An official, instigating suit to recover money which it is his duty to collect, cannot be real plaintiff and defendant's representative, agent, or attorney in fact, on whom process may be served, at same time.—*Baird-Gatzmer Corp. v. Henry Clay Coal Min. Co.*, 50 S.E.2d 673, 131 W. Va. 793.

84. Iowa.—*Murphy v. Albany Pecan Dev. Co.*, 151 N.W. 500, 169 Iowa 542.

50 C.J. p 495 note 66.

85. Ky.—*Andonique v. Carmen*, 151 S.W. 921, 151 Ky. 249.

86. Ky.—*Johnson v. Westerfield*, 135 S.W. 425, 143 Ky. 10.

87. Ill.—*Hitchens v. Bennett*, 171 N.E. 562, 339 Ill. 366.

88. Pa.—*Fisher v. Goodman*, 26 Pa. Dist. 584.

50 C.J. p 495 note 73.

89. Miss.—*Condon v. Snipes*, 38 So. 2d 752, 205 Miss. 306.

90. Me.—*Nelson v. Omaley*, 6 Me. 218.

50 C.J. p 495 note 60.

#### Attorney's clerk

Under a statute providing for service of notice and other papers on a clerk, in the absence of the attorney for a litigant, it may be presumed that a stenographer, who was in charge of an attorney's office, was the clerk of the attorney.—*Peter v. Kalez*, 83 P. 526, 11 Idaho 553.

91. Cal.—*Reynolds v. Reynolds*, 134 P.2d 251, 21 Cal.2d 530.

#### Attorney of record; change of attorney

An attorney of record on whom service of papers may be made for a nonresident party is the person the client has named as his agent on whom service of papers may be made; and, in determining whether service of papers on a party's attorney of record to a proceeding binds the party, trial court is concerned, not with whether the party is represented by attorney but whether he has an attorney of record, whether change in attorneys has been made, and whether notice thereof has been given.—*Reynolds v. Reynolds*, supra.

#### Interveners

Interveners cannot be served with citation through their attorney of record under statute providing that after suit is brought and defendant appears through counsel, service of other process, including supplemental petitions, may be made on attorney of record.—*Adams v. Ross Amusement Co.*, 161 So. 601, 182 La. 252.

92. Mass.—*Kimball v. Sweet*, 51 N. E. 116, 170 Mass. 538.

50 C.J. p 495 note 61.

#### "Disabled" attorney

Attorneys discharged by plaintiff were "disabled" within statute staying further proceedings after attor-

dinarily where an attorney represents a client as to a particular matter service on the attorney in unrelated proceedings will not constitute service on the client.<sup>93</sup> It has been held that such a statute, being in derogation of the usual methods of service, should be limited to cases coming clearly within it.<sup>94</sup> Where it is provided by statute that, in case of a cross bill, process and copies shall be issued and served on all material cross defendants named therein, it has been held that substituted service on complainant's attorney in defendant's cross action is permissible only because of necessity when complainant cannot be reached.<sup>95</sup>

**Partnership as agent.** Where the agent is a partnership, service on one of the partners is sufficient.<sup>96</sup>

**Service on assistant of agent,** where assistant is in actual control, has been held to be good.<sup>97</sup>

**Retroactive operation.** A statute providing that certain nonresidents who do business or perform work in the state shall be deemed to have appointed the secretary of state as agent to receive process in any action arising out of such doing of business or performance of work is unconstitutional if, or to the extent that, it is made retroactive.<sup>98</sup>

ney had become disabled, until giving of certain notice, and attorneys could not thereafter appear for or represent plaintiff, and no papers or process could be served on them, but papers in the action could be personally served on litigants.—*Thomas v. Thomas*, 84 N.Y.S.2d 320, 178 Misc. 349.

#### Informal withdrawal

Where conditional sellers obtained judgment for balance due on contract and execution was stayed in consideration of further payments, sellers were not entitled to serve buyers' counsel of record and obtain default judgment for failure to comply with the stay order, notwithstanding he had not formally withdrawn as counsel of record, where he had informed the sellers' attorney before service that he no longer represented the buyers and sellers' attorney represented that service would be had otherwise.—*Chamberlain v. Bruce Furniture Co.*, La.App., 35 So.2d 267.

93. Wash.—*State v. Superior Court of Skagit County*, 292 P. 1011, 159 Wash. 277.

94. La.—*Chamberlain v. Bruce Furniture Co.*, 35 So.2d 267.

#### Service outside state

The statute providing for service on an attorney, during absence of attorney from his office, to be made by

leaving notice with clerk in office, refers only to service within the territorial jurisdiction of the court in which litigation is pending, and it does not permit service on an attorney outside the state of a notice required in litigation pending in such state.—*Zeig v. Zeig*, 198 P.2d 724, 65 Nev. 464.

95. Tenn.—*Keicher v. Mysinger*, 198 S.W.2d 330, 184 Tenn. 226.

96. Ga.—*Render v. Hartford Fire Ins. Co.*, 127 S.E. 902, 33 Ga.App. 716.

50 C.J. p 495 note 74.

97. Ky.—*Crane v. Hall*, 178 S.W. 1096, 165 Ky. 827.

98. Ark.—*Gillioz v. Kincannon*, 214 S.W.2d 212, 213 Ark. 1010.

#### Accrual date of cause governs

Statute providing that, when a nonresident conducts a business within the state by an agent, nonresident may be sued on any action arising out of conduct of such business, and summons may be served on nonresident or on agent, was not unconstitutional as to particular nonresident who entered into a contract with a resident prior to effective date of statute, where nonresident continued to transact business within the state after the act took effect and alleged breach of contract, on which nonresident was sued, took

## § 51. Posting and Mailing

Under some statutes substituted service may in a proper case be effected by posting a copy of the process at some prominent place about the defendant's residence, or by such posting together with mailing, or by mailing without posting.

Under some statutes substituted service may in a proper case be effected by posting a copy of the process at some prominent place about the residence when it is impossible to leave it with a proper person,<sup>99</sup> and in order to confer jurisdiction there must be strict compliance with such statute.<sup>1</sup> Where the statute so requires, the copy must be posted at defendant's usual place of abode;<sup>2</sup> and the requirement is not satisfied by leaving the copy at a former place of abode from which defendant has in good faith removed.<sup>3</sup> Some statutes providing for the posting of process further require that a copy be mailed to defendant, and such requirement must be observed.<sup>4</sup> Mailing without having posted is likewise invalid service.<sup>5</sup>

**Mailing apart from provisions as to posting and mailing.** Statutory provisions for service by mail of notices, pleading, or other papers have been held inapplicable to the service of original process.<sup>6</sup> However, under a statute providing therefor, substituted service may be made by mailing,<sup>7</sup> some-

place after act went into effect.—*Wein v. Crockett*, Utah, 195 P.2d 222.

99. Miss.—*Sellers v. Powell*, 152 So. 492, 168 Miss. 682.

#### Sufficiency of affixing

Binding summons and order with rubber band and twisting band around doorknob amounted to "affixing" thereof to door so as to constitute substituted service.—*Mechanics' Nat. Bank of Trenton v. Newman*, 244 N.Y.S. 529, 137 Misc. 587, reversed by memorandum decision 244 N.Y.S. 901, 230 App.Div. 833.

1. Miss.—*Sellers v. Powell*, 152 So. 492, 168 Miss. 682.

2. N.Y.—*Johnson v. Diamond*, 203 N.Y.S. 895, 208 App.Div. 639, 50 C.J. p 495 note 78.

3. W.Va.—*Williamson v. Taylor*, 122 S.E. 530, 96 W.Va. 246.

4. N.Y.—*Fromer v. Langer*, 201 N.Y.S. 308, 131 Misc. 550, 50 C.J. p 495 note 88.

5. N.Y.—*Leavitt v. Matzkin*, 114 N.Y.S. 687.

6. Minn.—*St. Paul Sav. Bank v. Orthier*, 53 N.W. 812, 52 Minn. 98, 18 Am.S.R. 498.

7. Ala.—*Campbell v. State*, 5 So.2d 466, 242 Ala. 215—*Ex parte Luther*, 168 So. 596, 232 Ala. 518.  
N.Y.—*In re Saffold*, 220 N.Y.S. 200, 128 Misc. 422.

times in conjunction with other forms of substituted service,<sup>8</sup> but service by mailing is proper only in cases in which such service is specifically authorized<sup>9</sup> and the statute is strictly complied with,<sup>10</sup> and provided under the circumstances it is reasonably calculated to give defendant notice of the pending action and an opportunity to be heard.<sup>11</sup> Under rules or provisions to such effect, service by mailing is complete three days after the mailing unless the process is received sooner.<sup>12</sup> A statute authorizing substituted service by registered mail does not authorize such service by mail on a resident of the state outside the state.<sup>13</sup> It has been held that where a paper, directed by a court which already has jurisdiction of the action and the parties to be served by mail, actually comes into the hands of the person to be served within the time required for personal service the place of mailing is immaterial.<sup>14</sup> In the absence of statutory authority, mailing of a copy of the summons and complaint to defendant's attorneys is ineffective as service.<sup>15</sup>

## § 52. Order for Substitution Service

In some jurisdictions substituted service is effective only when made pursuant to court order; such order should direct that service be made in the manner provided by statute.

In some jurisdictions substituted service can be made only when authorized by the court;<sup>16</sup> and the court's order may be made without notice.<sup>17</sup> Such an order is not an order granting a provisional remedy.<sup>18</sup> The order must direct that service be made in the manner provided by the statute.<sup>19</sup> Where the statute provides for filing the order for substituted service within a certain time prior to the return day of the summons, the court obtains no jurisdiction where the order is not so filed,<sup>20</sup> and, where the statute so requires, the order must be served with the process.<sup>21</sup>

## § 53. — Application or Affidavit for Order

Under statutes to such effect, a court order directing substituted service must be predicated on an affidavit setting forth the facts necessary to warrant such service.

Ohio.—*Struble v. Meredith*, 200 N.E. 194, 51 Ohio App. 201.

Pa.—*Burd v. Bennett Transp. Co.*, Com.Pl., 20 Erie Co. 172, 52 York Leg.Rec. 87.—*Leibensperger v. Leibensperger*, Com.Pl., 20 Lehl.L. J. 102.

### Venue not affected

The statute authorizing judges of the court of common pleas to provide by rule for service of writs or process by mail, registered or otherwise, relates only to the method of service and not to the venue of an action and provides merely another method of service.—*Compton v. Compton*, 23 N.E.2d 987, 62 Ohio App. 368.

### Correctness of address

Attempted service by registered mail was ineffective where papers were refused, apparently in good faith, because addressed to "Frederick E. G.," when defendant's correct name was "Frank E. G."—*New York Pattern Co. v. Galton*, 275 N.Y.S. 178, 153 Misc. 424.

### Place of deposit

Deposit in post office box is not equivalent to deposit in "post office" for purposes of substituted service by mail.—*Schulte Real Estate Co. v. Pirkig*, 78 N.Y.S.2d 815, 191 Misc. 926.

8. Pa.—*Wiest v. Heffernan*, 17 Pa. Dist. & Co. 212.

9. D.C.—*Craig v. Hell*, Mun.App., 47 A.2d 871.

### Parties residing "in different places"

Statute providing for service of papers in action by mail, where person making service and person

served reside in different places between which there is mail communication, does not require that their places of residence be in different municipal subdivisions.—*In re Callahan's Estate*, 29 N.W.2d 352, 251 Wis. 247.

### On nonresidents

Under statute providing that process in actions against nonresidents may be served in any county where they may be found, a defendant, who has always been a nonresident, must be found and served in person, as he can have no last or usual place of residence where he may be served by mailing.—*Donnelley v. Thorne*, 51 N.E.2d 873, 114 Ind.App. 468.

10. N.Y.—*In re Saffold*, 220 N.Y.S. 200, 128 Misc. 422.

11. D.C.—*Ellerbe v. Goldberg*, Mun. App., 60 A.2d 232.

### Service held invalid

Notice by registered mail delivered to wife of defendant, who was then serving in United States Army in time of war and who had been out of country for four months prior thereto, was not calculated to give reasonable notice or any notice to defendant, and attempted service was invalid and should have been quashed.—*Ellerbe v. Goldberg*, supra.

12. N.Y.—*Coman v. Coman*, 91 N.Y.S.2d 601, 196 Misc. 138.

13. N.Y.—*Doctor's Hospital v. Kahal*, 277 N.Y.S. 736, 155 Misc. 126, affirmed 277 N.Y.S. 738, 155 Misc. 137.

14. Minn.—*Daw v. Daw*, 4 N.W.2d 313, 212 Minn. 507.

15. N.Y.—*Everett v. Everett*, 269 N.Y.S. 833, 150 Misc. 609.

16. N.Y.—*Matter of McDonald*, 233 N.Y.S. 368, 225 App.Div. 403. 50 C.J. p. 496 note 88.

### On complainant's attorney in defendant's cross action

A court order, allowing substituted service of process on complainant's attorney in defendant's cross action, must be made as preliminary to such a service, and such order or copy thereof must be served with process and copy of cross-bill.—*Keicher v. Mysinger*, 198 S.W.2d 330, 184 Tenn. 226.

### Time of obtaining order

Fact that an order for substituted service was not obtained within the specified number of days after filing his pendens, as expressly required by statute, did not vitiate the service or affect the court's jurisdiction, whatever effect such delay might have on the lis pendens.—*Hess v. Felt*, 112 N.Y.S. 470, 60 Misc. 541.

17. N.Y.—*Globe Indemnity Co. v. MacDougal*, 281 N.Y.S. 643, 133 Misc. 263.

18. N.Y.—*McCarthy v. McCarthy*, 13 Hun 579.

19. N.Y.—*Haight v. Gates*, 34 N.Y.S.2d 306, 263 App.Div. 1060.—*Mazer v. Gerstblith*, 11 N.Y.S.2d 392, 256 App.Div. 671.—*Schulte Real Estate Co. v. Pirkig*, 78 N.Y.S.2d 815, 191 Misc. 926.

20. N.Y.—*Lella v. Holman*, 3 N.Y.S.2d 352, 166 Misc. 796.—*Thompson v. Rawlston*, 117 N.Y.S. 904.

21. Tenn.—*Keicher v. Mysinger*, 198 S.W.2d 330, 184 Tenn. 226.

Some statutes require that an order for substituted service be obtained from the court, on showing by affidavit that personal service cannot be made.<sup>22</sup> Depending on the particular statute, the affidavit should show that plaintiff has been or will be unable with due diligence to serve defendant personally,<sup>23</sup> that every means of effecting per-

sonal service has been exhausted,<sup>24</sup> or that defendant resided in or had his place of business in the state.<sup>25</sup> An order based on an affidavit which does not fully comply with the statute is bad.<sup>26</sup> A mere irregularity in the affidavit is not sufficient to render the process invalid.<sup>27</sup>

## D. SERVICE BY PUBLICATION

### § 54. In General

Service of process by publication is a method provided by statute for giving constructive notice to defendant of the pendency of the suit against him. It is limited to cases where personal service may not reasonably and practicably be had, and is not permissible unless authorized by statute.

Service of process by publication is a method provided by statute for bringing in parties, where

personal service cannot be had after the exercise of due diligence.<sup>28</sup> It is intended as a substitute for personal service,<sup>29</sup> and, although it is a recognized method of giving notice of a judicial proceeding,<sup>30</sup> and its purpose is to bring home, if possible, to the knowledge of defendant the pendency of the suit against him, and of the order to appear therein by a given date,<sup>31</sup> it gives constructive notice only.<sup>32</sup>

22. N.Y.—Haight v. Gates, 34 N.Y.S.2d 306, 263 App.Div. 1060.

23. N.Y.—Haight v. Gates, supra—Le Roy v. Squires, 50 N.Y.S.2d 576.

#### Inability to serve unverified complaint

An order, authorizing substituted service of summons on a resident defendant, which was entered on satisfactory showing of inability to serve defendant personally, was not rendered invalid by the fact that verification to the complaint was dated after the time of attempted personal service of summons and complaint as alleged in affidavit on which order was based, since the right to such order depends on inability to serve defendant personally, and civil practice act authorizes service of summons alone by substituted service, making service of the complaint superfluous as far as valid service and jurisdiction are concerned.—Nesi v. Heimann, 33 N.Y.S.2d 559, 178 Misc. 195.

#### Inability to find residence

Where substituted service of summons was made at defendant's place of business and not at his residence, and it did not appear in the affidavit that defendant's residence could not be found, service was void.—Weinstein v. Potashnikoff, 25 N.Y.S.2d 314.

#### Ignorance of defendant's place of sojourn

The requirement that plaintiff should show by his affidavit that defendant was a natural person and that the place of his sojourn could not be ascertained has been eliminated from the statute, and plaintiff's knowledge of defendant's whereabouts outside the state does not make the substituted service defective.—Nesi v. Heimann, 33 N.Y.S.2d 559, 178 Misc. 195.

#### Inability to find defendant

Under a former New York statute it was necessary, in order to warrant substituted service on a resident, to show that defendant could not be found within the state.—Nichols v. Emmett, 107 N.Y.S. 663, 56 Misc. 321—50 C.J. p 496 note 96.

#### Defendant's evasion of service

(1) Under an earlier New York statute it was essential, in order to justify substituted service on a resident, to show that defendant was evading personal service.—Nesi v. Heimann, 33 N.Y.S.2d 559, 178 Misc. 195—50 C.J. p 496 note 97.

(2) Statutory changes, however, have eliminated this requirement, and substituted service is not defective merely because plaintiff knew where defendant was outside the state and that he was not outside the state for the purpose of evading service.—Nesi v. Heimann, supra.

24. N.Y.—Wolter v. Liebmann, 102 N.Y.S. 487, 52 Misc. 517. 50 C.J. p 496 note 94.

25. N.Y.—Reiter v. Irving, 217 N.Y.S. 186, 128 Misc. 13—Duryee v. Hunt, 107 N.Y.S. 734, 56 Misc. 684.

26. Mont.—Rothrock v. Bauman, 236 P. 1077, 73 Mont. 401. N.Y.—Weinstein v. Potashnikoff, 25 N.Y.S.2d 314.

#### Affidavit on printed form

Where affidavit of process server was incorporated in printed form except necessary insertions, such as names and dates, and related to conversations with alleged housekeeper of defendant, order for substituted service based thereon and default judgment would be set aside where defendant promptly applied for relief.—Katz v. Silverberg, 50 N.Y.S.2d 83, 183 Misc. 492.

27. N.Y.—Lawrence v. Bernstein, 32 N.Y.S. 817, 46 Misc. 608.

28. U.S.—Bronson v. Keokuk, C.C. Iowa, 4 F.Cas.No.1,928, 2 Dill. 498.

29. Ala.—Corpus Juris quoted in Campbell v. State, 5 So.2d 466, 471, 242 Ala. 215.

50 C.J. p 496 note 3.

Substituted service by leaving copy of process at residence or place of business distinguished see supra § 43.

Service of process by publication is harsh and technical substitute for personal service.—Quattrochi v. Quattrochi, Mo.App., 179 S.W.2d 757—50 C.J. p 498 note 18 [a].

#### Miserable substitute

Notice by publication is, at best, but a miserable substitute for personal service.—Edrington v. Allsbroughs, 21 Tex. 189—Parker v. Scobee, Tex.Civ.App., 36 S.W.2d 303.

#### Purposes for which substitution intended

Notice given to absent defendant, on whom no personal service has been made, pursuant to statute authorizing court, on plaintiff's suggestion, to continue action until notice is given as ordered by court, is intended as substitute for service of original writ for all purposes where it can have that effect consistently with federal Constitution, controlling principles of international comity, and other statutes.—Taplin v. Atwater, 8 N.E.2d 786, 297 Mass. 302.

30. Mass.—Young v. Tudor, 83 N.E.2d 1, 323 Mass. 508.

31. Fla.—Seiton v. Miami Roofing & Sheet Metal, 10 So.2d 428, 151 Fla. 631—Ortell v. Ortell, 107 So. 442, 91 Fla. 50.

Purpose of authorizing statutes see infra § 55.

32. Ala.—Corpus Juris quoted in

It was unknown at common law,<sup>33</sup> is of comparatively recent<sup>34</sup> and strictly statutory<sup>35</sup> origin, and is not permissible unless authorized by statute.<sup>36</sup> However, as judicially noted, statutes exist in practically all jurisdictions which authorize service of process by publication in designated cases where personal service cannot be had,<sup>37</sup> and, when all the statutory requirements have been complied with, service by publication must be deemed a complete and sufficient service of process,<sup>38</sup> and in cases falling within the purview of the statute service by

publication has been said to be as effective as personal service.<sup>39</sup>

**Necessity.** Service of process by publication is limited strictly to cases of necessity<sup>40</sup> and is never permissible where personal service is practicable,<sup>41</sup> even though personal service is difficult to obtain.<sup>42</sup>

## § 55. Statutes Authorizing Service

Statutes authorizing service of process by publication are to be strictly construed; and a strict compliance

Campbell v. State, 5 So.2d 466, 471, 242 Ala. 215.

Iowa.—Curtis v. Hoyt, 186 N.W. 460, 192 Iowa 1334.

Va.—Peatross v. Gray, 27 S.E.2d 203, 181 Va. 847.

33. Ind.—Corpus Juris cited in Shafe v. Shafe, 198 N.E. 826, 828, 101 Ind.App. 200.

Mont.—Corpus Juris cited in State ex rel. Fisher v. District Court of First Judicial District in and for Lewis and Clark County, 99 P.2d 211, 212, 110 Mont. 61.

Ohio.—Johnson v. Johnson, 16 Ohio Supp. 81.

Tex.—Parker v. Scobee, Civ.App., 36 S.W.2d 303.

50 C.J. p 496 note 5.

34. Mont.—Corpus Juris cited in State ex rel. Fisher v. District Court of First Judicial District in and for Lewis and Clark County, 99 P.2d 211, 212, 110 Mont. 61.

N.D.—Hartzell v. Vigen, 69 N.W. 203, 6 N.D. 117, 66 Am.S.R. 589, 35 L.R.A. 451.

35. Ind.—Shafe v. Shafe, 198 N.E. 826, 101 Ind.App. 200.

Mont.—State ex rel. Fisher v. First Judicial District in and for Lewis and Clark County, 99 P.2d 211, 110 Mont. 61.

N.Y.—Issala v. Russo-Asiatic Bank, 280 N.Y.S. 735, 155 Misc. 495.

36. D.C.—Cooper v. Burton, 127 F. 2d 741, 75 U.S.App.D.C. 298.

Mich.—Union Guardian Trust Co. v. Grevin, 246 N.W. 143, 261 Mich. 344.

Nev.—Zeig v. Zeig, 198 P.2d 724, 65 Nev. 464.

N.Y.—Issala v. Russo-Asiatic Bank, 280 N.Y.S. 735, 155 Misc. 495.

Ohio.—Johnson v. Johnson, 16 Ohio Supp. 81.

50 C.J. p 496 note 7.

Actions or proceedings in which service authorized see *infra* § 57. Persons on whom service may be made see *infra* § 56.

37. Ga.—Williams v. Batten, 119 S. E. 769, 156 Ga. 620.

50 C.J. p 496 note 8.

38. Mo.—Quattrochi v. Quattrochi, App., 179 S.W.2d 757.

N.Y.—Urquhart v. Urquhart, 57 N.

Y.S.2d 734, 185 Misc. 915, affirmed - 59 N.Y.S.2d 921, 270 App.Div. 759. 50 C.J. p 497 note 14.

39. U.S.—Spielberger v. Little, D.C. N.Y., 77 F.Supp. 146, reversed on other grounds, C.C.A., Spielberger v. Textron, Inc., 172 F.2d 85.

Mo.—Williams v. Luecke, App., 152 S.W.2d 991.

### Jurisdiction

(1) In cases falling within the purview of the statute, and where it is strictly complied with, a court of general jurisdiction in the classes of cases mentioned in the statute obtains as much jurisdiction over the persons of nonresidents on a publication regularly made as if they were personally served with process.—Shemwell v. Betts, 174 S. W. 390, 264 Mo. 268—50 C.J. p 497 note 15.

(2) Acquisition of jurisdiction of defendants for partition purposes see Partition § 83 a.

### Basis of subsequent proceedings

(1) Where trial court has jurisdiction over justiciable subject matter which is under control of defendant nonresidents and statutes authorize constructive service of process in suit, which process as issued and served affords due process of law to defendants, the court may proceed in the cause and the property duly involved and within jurisdiction of the court is subject to appropriate decrees in the cause pending final adjudication.—Gribbel v. Henderson, 10 So.2d 734, 151 Fla. 712, affirmed 14 So.2d 809, 153 Fla. 397.

(2) Constructive service as supporting judgment in personam see Judgments § 24, and judgment in rem see Judgments § 908 b.

(3) Judgment rendered on constructive service complying with statute as not subject to collateral impeachment see Judgments § 422 c.

(4) Recognition in another state of judgment based on constructive service see Judgments § 893 e (3).

40. Colo.—Corpus Juris cited in Bray v. Germain Inv. Co., 98 P.2d 993, 995, 105 Colo. 403.

Fla.—McDaniel v. McElvay, 108 So. 820, 91 Fla. 770.

Or.—Corpus Juris cited in Dixie Meadows Independence Mines Co. v. Kight, 45 P.2d 909, 912, 150 Or. 395.

Wyo.—Corpus Juris quoted in In re Bergman's Survivorship, 151 P.2d 360, 365, 60 Wyo. 355.

50 C.J. p 496 note 11.

### Last resort

Publication is a notoriously inefficient method, and in general the policy of the law requires that it be relied on only as a last resort.—Young v. Tudor, 83 N.E.2d 1, 323 Mass. 508.

41. Hawaii.—Robinson v. McWayne, 35 Hawaii 689.

Ill.—Anderson v. Anderson, 11 N.E. 2d 216, 292 Ill.App. 421.

Or.—Corpus Juris cited in Dixie Meadows Independence Mines Co. v. Kight, 45 P.2d 909, 912, 150 Or. 395.

Wyo.—Corpus Juris quoted in In re Bergman's Survivorship, 151 P.2d 360, 365, 60 Wyo. 355.

50 C.J. p 496 note 12.

Diligent effort to find defendant within state:

In general see *infra* § 58.

Statement in affidavit as to see *infra* § 64.

### Personal notice reasonably practical

Generally, constructive notice, as by publication, is insufficient if personal notice in some form is reasonably practical.—Hollis v. Tilton, 5 A.2d 29, 90 N.H. 119, affirmed 6 A.2d 753, 90 N.H. 119.

### Fraud

Securing of service of process by publication notwithstanding knowledge of adverse party's whereabouts is repugnant to court of equity and of itself gives a taint of suspicion and fraud to the cause of any party who employs it.—Croyle v. Croyle, 40 A.2d 374, 184 Md. 126.

Record held to show impossibility of personal service

Mich.—Straus v. Central Detroit Realty Co., 12 N.W.2d 402, 307 Mich. 669.

42. Tex.—Gordon v. Reeder, Civ. App., 202 S.W. 983.

Wyo.—Corpus Juris quoted in In re Bergman's Survivorship, 151 P.2d 360, 365, 60 Wyo. 355.

therewith is necessary in order to render such service valid and effective to confer jurisdiction.

The purpose of statutes authorizing service of process by publication is to give defendants notice that an action against them is pending and an opportunity to come to court and make their defense.<sup>43</sup> Inasmuch as service of process by publication is in derogation of the common law, the statutes authorizing it are subject to strict construction<sup>44</sup> and

must be strictly,<sup>45</sup> literally,<sup>46</sup> and fully<sup>47</sup> complied with in order to render such service valid<sup>48</sup> and give the court jurisdiction<sup>49</sup> of defendant.<sup>50</sup> Every step required to be taken by the statute is essential to the validity of the service<sup>51</sup> and, if any of the steps necessary to secure it are omitted, the court will not obtain jurisdiction over defendant to render judgment;<sup>52</sup> and this is so, although defendant may have had actual notice.<sup>53</sup> Furthermore, the

43. Fla.—Gribbel v. Henderson, 10 So.2d 734, 151 Fla. 712, reheard 14 So.2d 809, 153 Fla. 397—Balian v. Welkiwa Ranch, 122 So. 559, 97 Fla. 180.

Ky.—Corpus Juris quoted in Booth v. Copley, 140 S.W.2d 662, 665, 283 Ky. 23.

50 C.J. p 497 note 16.

Statutory object is to give actual notice, if possible, of the pendency of the action.—Forbes v. Hyde, 31 Cal. 342.

44. U.S.—Butler v. McKey, C.C.A. Cal., 138 F.2d 373, certiorari denied 64 S.Ct. 636, 321 U.S. 780, 88 L.Ed. 1073—Harlan v. Sparks, C.C.A.N.M., 125 F.2d 502.

Del.—Corpus Juris quoted in Syracuse Trust Co. v. Heller, 165 A. 327, 331, 5 W.W.Harr. 304.

Fla.—United Brotherhood of Carpenters and Joiners of America v. Graves Inv. Co., 15 So.2d 196, 153 Fla. 529.

Ky.—Corpus Juris quoted in Booth v. Copley, 140 S.W.2d 662, 665, 283 Ky. 23.

Mo.—Williams v. Luecke, App., 152 S.W.2d 991—Cates v. Cates, App., 209 S.W. 551.

N.Y.—Korn v. Lipman, 94 N.E. 861, 201 N.Y. 404—Lambert v. Lambert, 278 N.Y.S. 580, 244 App.Div. 78, reversed on other grounds 1 N.E. 2d 833, 270 N.Y. 422—In re Clark's Estate, 259 N.Y.S. 377, 144 Misc. 705.

N.C.—Southern Mills v. Armstrong, 27 S.E.2d 281, 223 N.C. 495, 148 A.L.R. 1248.

Pa.—Hughes v. Hughes, 158 A. 874, 306 Pa. 75.

Tex.—State v. Bagby's Estate, Civ. App., 126 S.W.2d 687—Corpus Juris cited in Parker v. Scobee, Civ. App., 36 S.W.2d 303, 304.

Va.—Peatross v. Gray, 27 S.E.2d 203, 181 Va. 847.

Wash.—Davis v. Woollen, 71 P.2d 172, 191 Wash. 379.

50 C.J. p 497 note 17.

45. U.S.—U. S. v. Sotis, C.C.A.III., 131 F.2d 783.

Fla.—Edmun Realty Corp. v. Weiner, 33 So.2d 867, 160 Fla. 166.

Miss.—Shelby v. White, 131 So. 343, 158 Miss. 880.

Mo.—Delta Realty Co. v. Hunter, 152 S.W.2d 45, 347 Mo. 1108—State ex rel. Utilities Power & Light Cor-

poration v. Ryan, 88 S.W.2d 157, 337 Mo. 1180—Kunzi v. Hickman, 147 S.W. 1002, 243 Mo. 103—Ohlmann v. Clarkson Sawmill Co., 120 S.W. 1155, 222 Mo. 62, 28 L.R.A., N.S., 432, 133 Am.S.R. 506—Orrick v. Orrick, App., 233 S.W.2d 826—Jefferson County Lumber Co. v. Robinson, App., 121 S.W.2d 209—Cox v. Cox, App., 115 S.W.2d 104.

Mont.—State ex rel. Miller v. District Court of Seventh Dist. in and for Richland County, 186 P.2d 506, 120 Mont. 423, 173 A.L.R. 978.

Ohio.—Beachler v. Ford, 60 N.E.2d 330, 77 Ohio App. 41.

50 C.J. p 498 note 18.

In proceeding to enforce lien see Liens § 22 e.

Strict compliance with every essential requirement is necessary.—State v. Bagby's Estate, Tex.Civ. App., 126 S.W.2d 687.

In North Carolina

(1) There is judicial support for the text rule.—S. D. Scott & Co. v. Jones, 52 S.E.2d 219, 230 N.C. 74—Rodriguez v. Rodriguez, 29 S.E.2d 901, 224 N.C. 275.

(2) In an earlier case, however, it was said that substantial compliance with requirements of statute was sufficient.—Denton v. Vassillades, 193 S.E. 737, 212 N.C. 513.

46. U.S.—U. S. v. Sotis, C.C.A.III., 131 F.2d 783—Fisher v. Jordan, D. C.Tex., 32 F.Supp. 608, reversed on other grounds, C.C.A., 116 F.2d 183, certiorari denied Jordan v. Fisher, 61 S.Ct. 734, 312 U.S. 697, 85 L.Ed. 1132.

N.D.—Roberts v. Enderlin Inv. Co., 132 N.W. 145, 21 N.D. 594.

Ohio.—Beachler v. Ford, 60 N.E.2d 330, 77 Ohio App. 41.

50 C.J. p 498 note 18.

47. N.Y.—In re Clark's Estate, 259 N.Y.S. 377, 144 Misc. 705.

48. Del.—Corpus Juris quoted in Syracuse Trust Co. v. Keller, 165 A. 327, 331, 5 W.W.Harr. 304.

Ky.—Odley v. Wilson, 218 S.W.2d 17, 309 Ky. 507—Corpus Juris quoted in Booth v. Copley, 140 S.W.2d 662, 665, 283 Ky. 23.

Mo.—Diekroger v. McCormick, 163 S.W.2d 927, 349 Mo. 1098.

Ohio.—Beachler v. Ford, 60 N.E.2d 330, 77 Ohio App. 41.

50 C.J. p 497 note 17.

Service by publication will be ineffective unless statutory provisions therefor are observed.—Martin v. Martin, 170 S.E. 651, 205 N.C. 157.

49. Del.—Corpus Juris quoted in Syracuse Trust Co. v. Keller, 165 A. 327, 331, 5 W.W.Harr. 304.

Ill.—Anderson v. Anderson, 11 N.E. 2d 216, 292 Ill.App. 421.

Ind.—Grantham Realty Corporation v. Bowers, 22 N.E.2d 832, 215 Ind. 672.

Ky.—Corpus Juris quoted in Booth v. Copley, 140 S.W.2d 662, 665, 283 Ky. 23.

Miss.—Sellers v. Powell, 152 So. 492, 168 Miss. 682.

Mo.—Tooker v. Leake, 48 S.W. 638, 146 Mo. 419.

N.D.—Johnson v. Ranum, 244 N.W. 642, 62 N.D. 607.

Ohio.—Beachler v. Ford, 60 N.E.2d 330, 77 Ohio App. 41.

50 C.J. p 498 note 19, p 512 note 25 [a.] (2).

In partition action see Partition § 83 a.

50. Fla.—United Brotherhood of Carpenters and Joiners of America v. Graves Inv. Co., 15 So.2d 196, 153 Fla. 529—Smetal Corporation v. West Lake Inv. Co., 172 So. 53, 126 Fla. 595.

Judgment based on constructive service not complying strictly with statute:

Collateral impeachment see Judgments § 422 c.

Invalidity see Judgments § 24 h.

51. Del.—Corpus Juris quoted in Syracuse Trust Co. v. Keller, 165 A. 327, 331, 5 W.W.Harr. 304.

Tex.—Corpus Juris quoted in Parker v. Scobee, Civ.App., 36 S.W.2d 303, 304.

50 C.J. p 498 note 20.

52. Del.—Corpus Juris quoted in Syracuse Trust Co. v. Keller, 165 A. 327, 331, 5 W.W.Harr. 304.

Tex.—Corpus Juris quoted in Parker v. Scobee, Civ.App., 36 S.W.2d 303, 304.

50 C.J. p 498 note 21.

All statutory steps must be accurately taken in order to confer on the court jurisdiction over defendant, although the subject matter of the action is within the power of the court.—Davis v. Woollen, 71 P.2d 172, 191 Wash. 379.

53. Del.—Corpus Juris quoted in



method provided by statute for acquiring jurisdiction by constructive service must not only be strictly followed, but must be followed to the exclusion of any other method not also clearly provided.<sup>54</sup>

The rule requiring strict compliance, however, does not forbid interpretation, but is to be applied only after the meaning of the statute has been ascertained by interpretation.<sup>55</sup> Also, the strictness required by the principle of strict construction is reasonable,<sup>56</sup> and not strained or hypercritical<sup>57</sup> strictness; and a statute is not to be so construed as to make compliance therewith impossible.<sup>58</sup> According to some authorities, substantial compliance with the statute is necessary<sup>59</sup> and, in view of the objective of rules of civil procedure, one of such rules relating to citation by publication is not to be given a limited and narrow construction.<sup>60</sup>

**Validity.** Statutes providing for service of process by publication, where personal service cannot be had, and where such parties have property within the borders of the state, have very generally been

sustained when assailed on constitutional grounds.<sup>61</sup> Nevertheless, the states are without power to enact legislation which authorizes a personal judgment against a nonresident defendant on service of process by publication.<sup>62</sup>

**Operation; effect on other statutes.** Statutes relating to service of process by publication will not be given a retrospective operation unless the wording of the statute clearly shows that to be the intention of the legislature.<sup>63</sup> A part of a statute relating to the making of rules is deemed to be permissive and not mandatory and not to require the promulgation of rules as a condition of operation of the statute.<sup>64</sup> A statute may be intended to reenact another law,<sup>65</sup> or to limit the force of pre-existing statutes only to a certain extent.<sup>66</sup>

Such a statute does not create a cause of action or fix venue, and it becomes operative only when suit is properly instituted in the county in which service by publication is sought.<sup>67</sup>

Syracuse Trust Co. v. Keller, 165 A. 327, 331, 5 W.W.Harr. 304.

Fla.—Napoleon B. Broward Drainage Dist. v. Certain Lands Upon Which Taxes Were Due, 33 So.2d 716, 160 Fla. 120.

Ind.—Vizzard v. Taylor, 97 Ind. 90.

Ohio.—Beachler v. Ford, 60 N.E.2d 330, 77 Ohio App. 41.

Tex.—Corpus Juris quoted in Parker v. Scobee, Civ.App., 36 S.W.2d 303, 304.

54. Del.—Corpus Juris quoted in Syracuse Trust Co. v. Keller, 165 A. 327, 331, 5 W.W.Harr. 304.

Tex.—Erwin v. Holliday, 112 S.W.2d 177, 131 Tex. 69—Corpus Juris quoted in Parker v. Scobee, Civ. App., 36 S.W.2d 303, 304.

50 C.J. p 498 note 23.

#### Exclusive procedure

Statutes prescribing procedure for adjudicating interest in property in state, so as to bind nonresident, are exclusive.—American Soda Fountain Co. v. Hairston Drug Co., Tex.Civ. App., 52 S.W.2d 764.

55. Del.—Perrine v. Pennroad Corporation, 168 A. 196, 19 Del.Ch. 368.

56. Fla.—Gribbel v. Henderson, 10 So.2d 734, 151 Fla. 712, reheard 14 So.2d 809, 153 Fla. 397.

#### Disregard of reason

The rule of strict construction, although a valuable one, should not be followed to the extent of forcing the courts to disregard reason and common sense.—State ex rel. Coleman v. Blair, 151 S.W. 148, 245 Mo. 680.

57. Del.—Perrine v. Pennroad Cor-

poration, 168 A. 196, 19 Del.Ch. 368.

58. Mo.—Jefferson County Lumber Co. v. Robinson, App., 121 S.W.2d 209.

59. Ariz.—Evans v. Hallas, 167 P. 2d 94, 64 Ariz. 142.

Substantial compliance with statutory requirements as to contents of:

Notice to be published see infra § 69.

Order for publication see infra § 65 c.

In some cases, a substantial compliance with the essential requirements of the statutes is all that may be necessary to accomplish the purpose of the statutes.—Gribbel v. Henderson, 10 So.2d 734, 151 Fla. 712, reheard 14 So.2d 809, 153 Fla. 397.

60. Tex.—Durst v. Park, Civ.App., 177 S.W.2d 301.

61. Del.—Cantor v. Sachs, 162 A. 73, 18 Del.Ch. 359.

Minn.—State v. Northwestern Nat. Bank of Minneapolis, 18 N.W.2d 569, 219 Minn. 471.

Tex.—Frick-Reid Supply Corporation v. Meers, Civ.App., 52 S.W.2d 115.

50 C.J. p 498 note 26.

Due process of law see Constitutional Law §§ 619, 646 b.

Power of legislature to prescribe constructive service in case of absent defendants see Constitutional Law § 128 g.

Validity of statutes as applied in actions to quiet title see the C.J.S. title Quieting Title § 50, also 51 C.J. p 205 notes 99-2, p 206 notes 10, 11.

Statute providing reasonable method of imparting notice

Ga.—Callaway v. Cox, 40 S.E.2d 578, 74 Ga.App. 555.

Statute making publication as good as other service

Kan.—Federal Savings & Loan Ins. Corporation v. Hatton, 135 P.2d 559, 156 Kan. 673.

62. Ala.—Long v. Clark, 78 So. 832, 201 Ala. 454.

Invalidity of statute see Judgments § 24 e.

63. Ark.—Parsons v. Paine, 26 Ark. 124.

Fla.—Reynolds v. Harrison, 106 So. 909, 90 Fla. 334.

64. Del.—Cantor v. Sachs, 162 A. 73, 18 Del.Ch. 359.

65. Ill.—Fitzgerald, for Use of Foreman-State Nat. Bank v. First Nat. Bank, 272 Ill.App. 570.

66. Statute relating to continuance until notice given

Statute permitting court, on plaintiff's suggestion, to continue action against nonresident defendant, on whom no personal service has been made, until notice is given as ordered by court, was intended to limit force of preexisting statutes relative to notice only as far as might be necessary to make statute law conform to rule that court has no jurisdiction to render binding personal judgment against nonresident served outside of commonwealth or by publication, and statute must be construed to effect that result.—Taplin v. Atwater, 8 N.E.2d 786, 297 Mass. 302.

67. Kan.—Connell v. Kanwa Oil, 170 P.2d 631, 161 Kan. 649.

## § 56. Persons on Whom Service May Be Made

- a. In general
- b. Residents
- c. Nonresidents
- d. Unknown persons

### a. In General

Only those persons who plainly come within the terms of an authorizing statute may be served with process by publication; but service by publication made valid and sufficient as to persons *sui juris* is also valid and sufficient as to persons under legal disability, unless the statute creates an exception in their favor.

Inasmuch as a statute authorizing service of process by publication is in derogation of common law, and is to be strictly construed, as discussed *supra* § 55, only those persons who plainly come within the terms of the statute may be served with process by publication,<sup>68</sup> and they must be either necessary or proper parties;<sup>69</sup> but service by publication made valid and sufficient by statute as to persons *sui juris* is also valid and sufficient as to persons *non compos mentis*, as discussed in *Insane Persons* § 147 b, *infants*, as considered in *Infants* § 115 b (2) (b), and persons under other legal disability,<sup>70</sup> unless the statute creates an exception in their favor.<sup>71</sup>

Service of process, by publication, on domestic corporations is discussed in *Corporations* § 1320, on foreign corporations, in *Corporations* § 1946 c, and on dissolved corporations, in *Corporations* § 1776.

**Beneficiary of trust.** Under a statute providing for service of summons by publication on defendants who claim an interest in the subject of the action, the beneficiary of a trust may be served by publication in an action brought by one of the trustees to have his duties determined;<sup>72</sup> and, under

this statute, one appointed as a succeeding trustee of certain mortgage bonds and the person who has succeeded to the rights in such property after the termination of the trust have an interest in the trust property sufficient to authorize service by publication in a suit to determine the right to possession of the trust property.<sup>73</sup>

**Transient persons.** Under a statute authorizing service by publication on transient persons, it has been held that a woman who lived around over the state with her three or four children was not a "transient person," even though she had no fixed place of residence and could not properly call any of her children's homes her own.<sup>74</sup>

### b. Residents

A resident of the state may be served with process by publication under some statutes and under the circumstances specified thereby, as where he has departed from, or conceals himself within, the state with intent to defraud creditors or to avoid service of process.

Under some statutes, and under some circumstances, process may be served by publication on a resident of the state,<sup>75</sup> as where the residence of defendant, although within the state, cannot be ascertained,<sup>76</sup> or where, after due diligence in searching for him, neither he nor any place of his residence at which service can be made can be found,<sup>77</sup> or where he is absent from the state,<sup>78</sup> or has departed from the state<sup>79</sup> with intent to defraud creditors,<sup>80</sup> or to avoid service of process,<sup>81</sup> or has concealed himself within the state with intent to defraud creditors,<sup>82</sup> or to avoid service of process,<sup>83</sup> or where process directed to the officer of the county in which defendant resides, or is, has been twice delivered to such officer more than ten days before the return day and has been returned without being executed;<sup>84</sup> but these statutes have no application

68. *Tex.—Corpus Juris* cited in *Parker v. Scobee*, Civ.App., 36 S. W.2d 303, 304.

50 C.J. p 499 note 30.

In action for partition see *Partition* § 83 a.

69. *Colo.—Frybarger v. McMillan*, 25 P. 713, 15 *Colo.* 349.

50 C.J. p 499 note 31.

#### Defendants

Service by publication may be had only on defendants.—*Hassett v. Durbin*, 271 N.W. 867, 132 *Neb.* 315.

70. *Fla.—Quigley v. Cremin*, 109 So. 312, modified 118 So. 892, 94 *Fla.* 104.—*McDaniel v. McElvy*, 108 So. 820, 91 *Fla.* 770, 51 A.L.R. 731.

71. *Fla.—Quigley v. Cremin*, 109 So. 312, modified 118 So. 892, 94 *Fla.* 104.

72. *Wis.—Laughlin v. Griswold*, 171 N.W. 755, 169 *Wis.* 50.

73. *Wis.—Laughlin v. Griswold*, *supra*.

74. *Tex.—Gordon v. Reeder*, Civ. App., 202 S.W. 983.

75. *Tex.—Spinnler v. Armstrong*, Civ.App., 63 S.W.2d 1071.

Where statute is in disjunctive, the existence of any one of the alternative situations specified is sufficient.—*Cone Bros. Const. Co. v. Moore*, 193 So. 288, 141 *Fla.* 420.

76. *Tex.—Sharpe v. National Bank of Commerce*, Civ.App., 272 S.W. 321.

50 C.J. p 500 note 57.

77. *Minn.—Wilk v. Russell*, 218 N. W. 110, 173 *Minn.* 580.

50 C.J. p 500 note 58.

78. *Cal.—Bell v. McDermoth*, 246 P. 805, 198 *Cal.* 594.

50 C.J. p 500 note 59.

79. *Cal.—McKendrick v. Western Zinc Min. Co.*, 130 P. 865, 165 *Cal.* 24.

*Mont.—Aronow v. Bishop*, 120 P.2d 423, 112 *Mont.* 611.

80. *Neb.—Skala v. Brockman*, 190 N.W. 860, 109 *Neb.* 259.

50 C.J. p 501 note 61.

81. *Neb.—Skala v. Brockman*, *supra*.

50 C.J. p 501 note 62.

82. *Neb.—Skala v. Brockman*, *supra*.

50 C.J. p 501 note 63.

83. *Minn.—Wilk v. Russell*, 218 N. W. 110, 173 *Minn.* 580.

50 C.J. p 501 note 64.

84. *W.Va.—State v. Young*, 117 S. E. 688, 94 *W.Va.* 7.—*U. S. Oil, etc., Supply Co. v. Gartlan*, 64 S.E. 933, 65 *W.Va.* 689.

and do not authorize service of process by publication, except where the facts enumerated by statute as grounds for service by publication are shown to exist;<sup>85</sup> and it has been held that service by publication in a case wherein rights of persons in property in the state are sought to be excluded is not sufficient as to residents of the state whose whereabouts are known.<sup>86</sup>

### c. Nonresidents

Service of process on a nonresident of the state may, under the statutes, be perfected by publication; but it has been held that the nonresident must have some property within the state and within the jurisdiction of the court.

Service of process on a nonresident of the state may, under the statutes, be perfected by publication<sup>87</sup> in certain classes of cases, as discussed *infra* § 57; but service by publication is ineffective to confer personal jurisdiction over a nonresident.<sup>88</sup> One who is but temporarily absent from the state in the pursuit of his vocation cannot be proceeded against as a nonresident;<sup>89</sup> nor can one be served as a nonresident merely because it cannot be ascertained where his residence is.<sup>90</sup> However, it has been held that one is a nonresident both in law and in fact within the meaning of statutes where he has been absent from the state for over a year and the time of his return to the state, if ever, is rendered uncertain by sickness,<sup>91</sup> and that the same principle applies to a person temporarily residing abroad in an official capacity under the United States government.<sup>92</sup> A person may be a nonresi-

dent, for the purpose of constructive service by publication, where his actual present residence is without the state, although his legal domicile is in the state<sup>93</sup> and although in many cases the residence and domicile of a person on whom constructive service by publication is attempted may be the same.<sup>94</sup>

*Occasional temporary presence* of a nonresident within the state will not defeat the right to serve him by publication.<sup>95</sup>

*Second publication on vacation of default order.* The fact that a default had been entered on a publication of summons against a nonresident defendant does not render nugatory a subsequent publication, the default order having been vacated and new proceedings instituted for service.<sup>96</sup>

*Ownership of property within jurisdiction.* A rule frequently stated, and declared by some statutes, is that the nonresident must have some property within the state<sup>97</sup> and within the jurisdiction of the court<sup>98</sup> in order that service by publication on him may be proper and effective. A defendant, within the rule, does not have property within the state when it is merely brought temporarily into the state.<sup>99</sup>

The question of ownership of property within the state arises, in connection with service by publication, in a divorce action wherein there is an application for alimony, as discussed in Divorce § 247 b, or relief with respect to property is sought as incidental relief, as discussed in Divorce § 78, but it

85. Mont.—Aronow v. Bishop, 120 P.2d 423, 112 Mont. 611.

50 C.J. p 501 note 66.

#### Nature of absence necessary

In order that absence from the state be sufficient ground for publishing summons under a statute authorizing service by publication when defendant has departed from the state, there must be a prolonged or protracted absence, amounting to a departure, as distinguished from a mere temporary absence.—Aronow v. Bishop, *supra*.

86. Wyo.—In re Bergman's Survivorship, 151 P.2d 360, 60 Wyo. 355.

Service by publication as not permissible generally where personal service practicable see *supra* § 54.

87. Ga.—Sweat v. Arline, 197 S.E. 893, 185 Ga. 460.

N.Y.—Clarke v. Carlisle Foundry Co., 270 N.Y.S. 351, 150 Misc. 710. 50 C.J. p 499 note 41 [a]—[e].

#### Person in military service

Service of citation by publication on ground of nonresidence of de-

fendant in military service was sufficient as against contention that he did not lose residence in state because of such service, in absence of evidence conclusively establishing that he was resident of state when he entered service.—Reese v. Bacon, Tex.Civ.App., 176 S.W.2d 971.

88. Mich.—Stewart v. Eaton, 283 N.W. 651, 287 Mich. 466, 120 A.L.R. 1354.

89. Md.—McKim v. Odom, 3 Bland 407.

90. N.Y.—Close v. Van Husen, 6 How.Pr. 157, Code Rep.N.S., 408.

91. N.C.—Brann v. Hanes, 140 S.E. 292, 194 N.C. 571. 50 C.J. p 499 note 44.

92. U.S.—Collinson v. Teal, C.C.Or., 6 F.Cas.No.3,020, 4 Sawy. 241.

93. Fla.—Housey v. Rutter, 166 So. 558, 123 Fla. 156—Minick v. Minick, 149 So. 483, 111 Fla. 469.

N.C.—Brann v. Hanes, 140 S.E. 292, 194 N.C. 571.

94. Fla.—Minick v. Minick, 149 So. 483, 111 Fla. 469.

95. U.S.—Palmer v. McCormick, C.C.Iowa, 30 F. 82.

96. Cal.—Mohn v. Tingley, 217 P. 733, 191 Cal. 470.

97. N.Y.—McNaughton v. Broach, 260 N.Y.S. 100, 236 App.Div. 448—Guffey v. Grand Trunk Ry. Co. of Canada, 122 N.Y.S. 947, 67 Misc. 553.

N.C.—Southern Mills v. Armstrong, 27 S.E.2d 281, 223 N.C. 495, 148 A.L.R. 1248.

S.D.—Minnick v. Lilienquist, 23 N.W. 2d 804, 71 S.D. 276.

Wis.—Riedel v. Preston, 246 N.W. 569, 211 Wis. 149.

50 C.J. p 500 note 48.

#### Nonresident not doing business in state

N.Y.—Rodier v. Fay, 7 N.Y.S.2d 744.

98. N.Y.—Holmes v. Camp, 114 N.E. 841, 219 N.Y. 359.

50 C.J. p 500 note 49.

Control and seizure of defendant's property by court see *infra* § 59.

99. N.Y.—Galusha v. Flour City Nat. Bank, 1 Hun 573, 4 Thomps. & C. 68—Haight v. Husted, 4 Abb. Pr. 348, affirmed 5 Abb.Pr. 1701.

seems not to arise where the only relief sought is dissolution of the marital status, as considered in Divorce § 95, and custody of children, in Divorce § 303 b.

#### d. Unknown Persons

Under an authorizing statute, unknown persons interested in the subject matter of the suit may be served with process by publication; but the persons sought to be so served must be in fact unknown.

Under a statute so providing, unknown heirs or other unknown persons interested in the property within the court's jurisdiction which is the subject matter of the suit may be served with process by publication.<sup>1</sup> However, in order to authorize such service, it must be made to appear that the parties sought to be served are in fact unknown.<sup>2</sup>

### § 57. Actions or Proceedings in Which Service Authorized

- a. In general
- b. Particular actions or proceedings.

#### a. In General

Service by publication may be had, when authorized by statute, in an action in rem, or quasi in rem, which involves a res in the state and within the jurisdiction of the court; but such service is not effective in an action in personam or in any action not within the purview of an authorizing statute.

Since service of process by publication was unknown at common law and is of strictly statutory origin, as discussed supra § 54, it is permissible only in the classes of actions that come within the purview of the statutes.<sup>3</sup> Where a statute, after specifically naming various classes of cases in which service by publication is authorized, uses very broad language to cover other cases, an action, although not within any one of the classes specifically named, may be within the broad language of the statute.<sup>4</sup> Indeed, some comprehensive statutes authorizing service by publication do not impose any limitation as to nature, class, or type of action,<sup>5</sup> and under such statutes service by publication may be had in all cases where the principles of due process do not require actual service within the state.<sup>6</sup>

The fact that the cause of action arose in the state is not alone sufficient to permit service by publication on a nonresident defendant.<sup>7</sup>

*Actions in personam.* Where suit is brought to determine a nonresident defendant's personal rights and obligations, that is, where the suit is purely in personam, service by publication is ineffectual for any purpose.<sup>8</sup> It has been held, however, that, although service by publication in this class of actions is ineffectual for any purpose, it is not objectionable and that an order for such service will

1. Kan.—Federal Savings & Loan Ins. Corporation v. Hatton, 135 P. 2d 559, 156 Kan. 673.

50 C.J. p 501 note 69.

In eminent domain proceeding see Eminent Domain § 245 b.

In action for partition see Partition § 83 a.

In action to quiet title see the C.J.S. title Quieting Title § 50, also 51 C.J. p 205 note 8-p 206 note 15.

Term "unknown heirs," as used in statute, means all who take title to realty by reason of owner's death, including heirs of heirs.—Federal Savings & Loan Ins. Corporation v. Hatton, supra—50 C.J. p 501 note 69 [a].

2. Ill.—Dickey v. Chicago, 38 N.E. 932, 152 Ill. 468.

50 C.J. p 501 note 70.

Showing in affidavit or bill, petition, or complaint see infra § 64.

3. U.S.—Kansas City Southern Ry. Co. v. Chicago Great Western R. Co., D.C.Mo., 58 F.2d 810.

Pa.—Commonwealth v. Lutz, Com. Pl., 61 York Leg.Rec. 150.

50 C.J. p 502 note 76.

4. Mo.—State ex rel. Reid v. Barrett, 118 S.W.2d 33, 234 Mo.App. 684.

5. Ind.—Grantham Realty Corpora-

tion v. Bowers, 22 N.E.2d 832, 215 Ind. 672.

N.J.—Jurewicz v. Locals 1297, 1392, 2343 of United Broth. of Carpenters and Joiners of America, 49 A. 2d 23, 138 N.J.Eq. 493.

6. N.J.—Englander v. Jacoby, 28 A. 2d 292, 132 N.J.Eq. 336.

Character of service required by due process of law see Constitutional Law § 619 b.

7. N.Y.—McNaughton v. Broach, 260 N.Y.S. 100, 236 App.Div. 448.

8. U.S.—National Surety Co. v. Austin Machinery Corporation, C.C.A. Tenn., 35 F.2d 842, certiorari denied 50 S.Ct. 162, 280 U.S. 614, 74 L.Ed. 655.

Fla.—Ake v. Chancey, 13 So.2d 6, 152 Fla. 677.

Ill.—Griffin v. Cook County, 16 N.E. 2d 906, 369 Ill. 380, 118 A.L.R. 1157.

Iowa.—Allen v. Allen, 298 N.W. 869, 230 Iowa 504, 136 A.L.R. 617.

Mont.—State ex rel. Miller v. District Court of Seventh Dist. in and for Richland County, 186 P.2d 506, 120 Mont. 423, 173 A.L.R. 978.

N.J.—Cameron v. Penn Mut. Life Ins. Co., 161 A. 55, 111 N.J.Eq. 24.

N.M.—Sullivan v. Albuquerque Nat. Trust & Sav. Bank of Albuquerque, 188 P.2d 169, 51 N.M. 456.

N.Y.—Gore v. Pennsylvania R. Co., 259 N.Y.S. 410, 144 Misc. 639, affirmed 260 N.Y.S. 941, 236 App.Div. 881—Rodier v. Fay, 7 N.Y.S.2d 744.

N.C.—Southern Mills v. Armstrong, 27 S.E.2d 281, 223 N.C. 495, 148 A.L.R. 1248—Stevens v. Cecil, 199 S.E. 161, 214 N.C. 217.

Ohio.—Francis v. Allen, Com.Pl., 79 N.E.2d 803.

Puerto Rico.—Yrizarry v. Sabater, 1 Puerto Rico Fed. 183.

Wis.—Riedel v. Preston, 246 N.W. 569, 211 Wis. 149.

50 C.J. p 502 note 77.

"Action in personam" defined and distinguished from "action or proceeding in rem" see Actions §§ 1, 52.

Invalidity of personal judgment rendered against person served by publication see Judgments § 24.

Statute authorizing service of process by publication on absent and nonresident defendants is inapplicable to suits in personam.

Ga.—Irons v. American Nat. Bank, 172 S.E. 629, 178 Ga. 160.

Mont.—State ex rel. Miller v. District Court of Seventh Dist. in and for Richland County, 186 P.2d 506, 120 Mont. 423, 173 A.L.R. 978.

not be vacated,<sup>9</sup> since defendant may appear in the action and thus cure all possible defects,<sup>10</sup> and, if he does not, he will sustain no injury because no personal judgment can be rendered against him.<sup>11</sup>

*Actions or proceedings in rem or quasi in rem.* When authorized by statute, service of process by publication may be had in an action or proceeding in rem, or quasi in rem, or in the nature of an action or proceeding in rem,<sup>12</sup> which involves a res in the state<sup>13</sup> and within the jurisdiction of the court.<sup>14</sup> Under the statutes, process may be served by publication where the action involves or affects specific real or personal property in the state and within the jurisdiction of the court,<sup>15</sup> defendant owns such property or has or claims an interest therein,<sup>16</sup> and the object of the suit is to enforce a right in the property<sup>17</sup> or to exclude defendant from any interest therein.<sup>18</sup>

*Personal service required as to part of relief asked.* If claims merely personal in their nature are joined with claims involving real estate, service cannot be had by publication so as to authorize judgment on the personal claims;<sup>19</sup> but the mere fact that a party asks a greater measure of relief

than can be given without personal service does not deprive the court of jurisdiction to grant such relief as is proper under service by publication.<sup>20</sup>

### b. Particular Actions or Proceedings

Service by publication has been considered permissible in various actions, such as an action to enforce a lien, to reform an instrument, or to set aside a conveyance or transfer of property, and not permissible in other actions of a different nature, such as a tort action or a suit for an injunction.

Particular actions or proceedings in which, according to the decisions, service by publication may be made in view of such actions being within statutes authorizing such service and being actions or proceedings in rem or quasi in rem, and not in personam, include: An action against a debtor to subject realty to payment of debts;<sup>21</sup> an action attacking a merger of corporations and involving disposition and restitution of assets;<sup>22</sup> an action by a state to recover money deposited by a prisoner with a sheriff in lieu of bail;<sup>23</sup> an action for an accounting in respect of an estate within the jurisdiction of the court;<sup>24</sup> an action for the recovery of a fund in the possession of a resident party, although claimed by a nonresident assignee;<sup>25</sup> an ac-

9. N.Y.—Clarke v. Boreel, 21 Hun 594.  
50 C.J. p 503 note 78.

10. N.Y.—Clarke v. Boreel, supra.

11. N.Y.—Marrone v. Tesoriere, 156 N.Y.S. 280, 92 Misc. 602.  
50 C.J. p 503 note 81.

12. Iowa.—Allen v. Allen, 298 N.W. 869, 230 Iowa 504, 136 A.L.R. 617.  
N.J.—Cameron v. Penn Mut. Life Ins. Co., 161 A. 55, 111 N.J.Eq. 24.  
—Reichert v. United Brotherhood of Carpenters and Joiners of America, 183 A. 728, 14 N.J.Misc. 106.

N.M.—State ex rel. Truitt v. District Court of Ninth Judicial Dist., Curry County, 96 P.2d 710, 44 N.M. 16, 126 A.L.R. 651.

N.Y.—In re Security Trust Co. of Rochester, 70 N.Y.S.2d 260, 189 Misc. 748, reversed on other grounds 92 N.Y.S.2d 308, 275 App. Div. 1020, and affirmed 97 N.Y.S. 2d 922, 277 App. Div. 837.

N.C.—Southern Mills v. Armstrong, 27 S.E.2d 281, 223 N.C. 495, 148 A. L.R. 1248—Stevens v. Cecil, 199 S. E. 161, 214 N.C. 217—Bernhardt v. Brown, 24 S.E. 527, 118 N.C. 700, 36 L.R.A. 402.

13. Minn.—State v. Northwestern Nat. Bank of Minneapolis, 18 N.W. 3d 569, 219 Minn. 471—First Trust Co. of St. Paul v. Matheson, 246 N.W. 1, 187 Minn. 468, 87 A.L.R. 478.

N.J.—Cameron v. Penn Mut. Life Ins. Co., 161 A. 55, 111 N.J.Eq. 24.  
N.Y.—Urquhart v. Urquhart, 57 N.Y. S.2d 734, 185 Misc. 915, affirmed 59 N.Y.S.2d 921, 270 App. Div. 759.

Where issues affect res or legal status, nonresident defendants may be served by publication.—Ricks v. Wade, 98 P.2d 479, 97 Utah 402.

14. Fla.—Gribbel v. Henderson, 10 So.2d 734, 151 Fla. 712, reheard 14 So.2d 809, 153 Fla. 397.

If court lacks jurisdiction of subject matter of the action, order providing for service by publication is fatally defective.—Urquhart v. Urquhart, 57 N.Y.S.2d 734, 185 Misc. 915, affirmed 59 N.Y.S.2d 921, 270 App. Div. 759.

15. U.S.—Propper v. Clark, N.Y., 69 S.Ct. 1833, 337 U.S. 472, 93 L.Ed. 1480, rehearing denied Propper v. Clark, 70 S.Ct. 33, 338 U.S. 841, 94 L.Ed. —.  
Ga.—Sweat v. Arline, 197 S.E. 893, 186 Ga. 460.

16. Mass.—Gulda v. Second Nat. Bank of Boston, 80 N.E.2d 12, 323 Mass. 106.

Minn.—State v. Northwestern Nat. Bank of Minneapolis, 18 N.W.2d 569, 219 Minn. 471.

N.C.—Cutter v. American Trust Co., 197 S.E. 542, 213 N.C. 686.  
Wyo.—Kumor v. Scottish Union & National Ins. Co., 33 P.2d 916, 47 Wyo. 174.

50 C.J. p 503 note 82 [a].

17. Ill.—Brand v. Brand, 96 N.E. 918, 252 Ill. 134.

Mo.—State ex rel. Reid v. Barrett, 118 S.W.2d 33, 234 Mo.App. 684.

18. Minn.—State v. Northwestern Nat. Bank of Minneapolis, 18 N.W.2d 569, 219 Minn. 471.

N.Y.—Feuchtwanger v. Central Hanover Bank & Trust Co., 43 N.E.2d 434, 288 N.Y. 342.

N.C.—Cutter v. American Trust Co., 197 S.E. 542, 213 N.C. 686.

Wyo.—Kumor v. Scottish Union & National Ins. Co., 33 P.2d 916, 47 Wyo. 174.

19. Kan.—Zimmerman v. Barnes, 48 P. 764, 56 Kan. 419.

20. Ariz.—Hook v. Hoffman, 147 P. 722, 16 Ariz. 540.  
50 C.J. p 505 note 25.

21. Miss.—Zecharie v. Bowers, 11 Miss. 641.  
50 C.J. p 505 note 7.

22. Tenn.—Knapp v. Supreme Com-mandery U. O. G. C., 118 S.W. 390, 121 Tenn. 212.  
50 C.J. p 504 note 6 [a] (1).

23. Ind.—State v. Scanlon, 28 N.E. 426, 2 Ind.App. 320.

24. Fla.—Corpus Juris cited in Gribbel v. Henderson, 10 So.2d 734, 737, 151 Fla. 712, reheard 14 So.2d 809, 153 Fla. 397.

N.Y.—Devlin v. Roussel, 55 N.Y.S. 386, 36 App. Div. 87.

25. N.Y.—Taylor v. Security Mut. Life Ins. Co., 77 N.Y.S. 1012, 38 Misc. 575.

tion to abate a nuisance on land, title to which is vested in a nonresident defendant as an assignee in bankruptcy;<sup>26</sup> an action to collect back taxes;<sup>27</sup> an action to construe a will;<sup>28</sup> an action to enforce the double liability of stockholders;<sup>29</sup> an action to establish the existence and contents of a lost document evidencing the title of one in possession of land;<sup>30</sup> an action to fix a trust in lands;<sup>31</sup> or to trace a trust fund into land and to subject the land to the payment of the trust obligation;<sup>32</sup> an action to impress a bank account with a trust;<sup>33</sup> an action to reform or correct a deed;<sup>34</sup> an action to reform a life insurance policy, in so far as it affects a nonresident beneficiary, where the res, that is, the policy, is in the possession of complainant and within the control of the court;<sup>35</sup> an action to reform notes which a nonresident has sent into the state for collection;<sup>36</sup> a creditors' suit to reach an equitable interest in land of a nonresident debtor;<sup>37</sup> a proceeding by a railroad company for permission to abandon portions of its track, which involves restoration of money received as aid;<sup>38</sup> proceedings for the registration of land;<sup>39</sup> a proceeding relating to the administration of a trust;<sup>40</sup> and trespass to try title.<sup>41</sup>

On the other hand, it has been held that service by publication is not permissible in an action by a stockholder to compel a declaration of dividends;<sup>42</sup> a suit for an injunction;<sup>43</sup> or a tort action.<sup>44</sup>

Service by publication in certain actions or proceedings is discussed in other titles, such as Bas-

tards § 65 a, Divorce § 95, Ejectment § 55, Eminent Domain § 245 b, Interpleader § 25, Partition § 83 a, and the C.J.S. title Quieting Title § 50, also 50 C.J. p 503 notes 83-88; 51 C.J. p 205 note 98-p 206 note 15. Also, service by publication in equitable suits generally is discussed in Equity § 175. b (2), in a suit for annulment of marriage, in Marriage § 55, in an action for separate maintenance, in Husband and Wife § 618, and in an action for specific performance of a contract to sell and convey real estate, in the C.J.S. title Specific Performance § 121, also 58 C.J. p 1144 note 59, p 1145 note 64.

*Action involving corporate stock.* The situs of stock of a domestic corporation ordinarily is considered as being in the state of its incorporation for the purpose of determining the propriety of service by publication in actions involving such stock;<sup>45</sup> and it has been held that such service on nonresident or unknown defendants, as the case may be, is permissible in an action to determine the ownership of stock;<sup>46</sup> an action to set aside an alleged fraudulent transfer of stock;<sup>47</sup> or to compel restitution of stock so transferred;<sup>48</sup> an action to compel a transfer of stock to resident complainants;<sup>49</sup> an action to compel specific performance of a contract relating to it;<sup>50</sup> an action to restrain nonresident owners from voting the stock after having contracted away their right to do so;<sup>51</sup> and an action to terminate a voting trust in the stock.<sup>52</sup>

*Action to establish or enforce lien.* Service of process by publication in actions for the enforce-

26. Iowa.—Radford v. Thornell, 45 N.W. 890, 81 Iowa 709.

27. Mo.—State v. Staley, 76 Mo. 158.

28. Iowa.—Dillavou v. Dillavou, 106 N.W. 949, 130 Iowa 405. 50 C.J. p 505 note 13.

29. U.S.—Irvine v. Elliott, D.C.Del., 203 F. 82. 50 C.J. p 504 note 6 [a] (2).

30. U.S.—Virginia, etc., Coal Co. v. Charles, D.C.Va., 251 F. 83, affirmed 254 F. 379, 165 C.C.A. 599, appeal dismissed 40 S.Ct. 845, 252 U.S. 569, 64 L.Ed. 720.

31. Mo.—State v. Hartmann, 19 S. W.2d 637, 223 Mo. 171. 50 C.J. p 505 note 15.

32. Kan.—Reeves v. Pierce, 67 P. 1108, 64 Kan. 502.

33. N.Y.—Feuchtwanger v. Central Hanover Bank & Trust Co., 43 N. E.2d 434, 288 N.Y. 342.

34. N.J.—Corpus Juris cited in Cameron v. Penn Mut. Life Ins. Co., 161 A. 55, 57, 111 N.J.Eq. 24. 50 C.J. p 505 note 17 [a], [b].

35. N.J.—Cameron v. Penn Mut. Life Ins. Co., 161 A. 55, 111 N.J.

Eq. 24, distinguishing McBride v. Garland, 104 A. 435, 89 N.J.Eq. 314.

36. N.J.—Corpus Juris cited in Cameron v. Penn Mut. Life Ins. Co., 161 A. 55, 57, 111 N.J.Eq. 24. Ohio.—Doepke v. Christy Box Car Loader Co., 14 Ohio N.P., N.S., 523.

37. Colo.—Shuck v. Quackenbush, 227 P. 1041, 75 Colo. 592, 38 A.L.R. 259.

38. Mich.—Williams v. Flint, etc., R. Co., 74 N.W. 641, 116 Mich. 392. 50 C.J. p 504 note 6 [a] (3).

39. Philippine.—Alba v. De la Cruz, 17 Philippine 49.

40. N.C.—Cutter v. American Trust Co., 197 S.E. 542, 213 N.C. 686.

Action for distribution of rental funds under trust agreement U.S.—Blauner v. Hirsch, C.C.A. Ohio, 57 F.2d 114.

41. Tex.—Bassett v. Sherrod, 25 S. W. 312, 13 Tex.Civ.App. 327, appeal dismissed 36 S.W. 400, 90 Tex. 32.

42. N.C.—Southern Mills v. Armstrong, 27 S.E.2d 281, 223 N.C. 495, 148 A.L.R. 1248.

43. Ill.—Harts v. Kimball, 149 Ill. App. 536.

50 C.J. p 502 note 77 [k].

44. Puerto Rico.—Ortiz v. Alcala del Olmo, 2 Puerto Rico Fed. 95, 104.

50 C.J. p 502 note 76 [a].

45. N.Y.—Cohen v. Shaine, 57 N.Y. S.2d 180. 50 C.J. p 504 note 96.

46. Ariz.—Hook v. Hoffman, 147 P. 722, 16 Ariz. 540.

50 C.J. p 504 note 98.

47. N.Y.—Cohen v. Shaine, 57 N.Y. S.2d 180.

48. N.Y.—Holmes v. Camp, 114 N.E. 841, 219 N.Y. 359.

49. N.J.—Sonege v. Singer Mfg. Co., 68 A. 64, 73 N.J.Eq. 567. 50 C.J. p 504 note 1.

50. Cal.—Wait v. Kern River Min., etc., Co., 106 P. 98, 157 Cal. 16.

51. Ohio.—Shinkle v. Dalton Adding Mach. Co., 19 Ohio N.P., N.S., 104.

52. S.D.—Sargent v. McHarg, 174 N.W. 742, 42 S.D. 307.

ment of a lien on real<sup>53</sup> or personal<sup>54</sup> property has very generally been held permissible under pertinent statutes; but a statute allowing service by publication in an action to enforce a lien does not authorize such service in an action to establish a lien.<sup>55</sup>

*Action to set aside conveyance or transfer.* Statutory authorization of service by publication is generally considered to extend to an action to set aside or cancel a conveyance of land,<sup>56</sup> a deed of trust,<sup>57</sup> a transfer of personal property,<sup>58</sup> or a transfer of land and personal property.<sup>59</sup> However, while it has been held that process may be served by publication in an action to cancel or set aside an assignment of a patent,<sup>60</sup> there is also authority to the contrary.<sup>61</sup>

*Ancillary suit or proceeding; proceedings after judgment.* Where a court has acquired jurisdiction over the person of a litigant and thereafter an ancillary suit or proceeding is instituted against him, constructive service of process is sufficient;<sup>62</sup> but a statute allowing service by publication in an action or proceeding for relief after judgment does not relate to the modification of a judgment where the court has continuing jurisdiction of the subject

matter and not of the person.<sup>63</sup> Service by publication has been held permissible in an action to set aside a judgment annulling a marriage on the ground of fraud,<sup>64</sup> and not permissible on a bill for discovery<sup>65</sup> or in a chancery suit for damages as a set-off against a judgment.<sup>66</sup>

## § 58. Prerequisites to Service by Publication

The due diligence which plaintiff must exercise to acquire certain information, specified by statute, before resorting to service by publication is an honest and reasonable effort to acquire such information; and the question of whether it has been exercised is largely a question of fact to be determined on consideration of the facts and circumstances of each case.

It is necessary, under the statutes, that plaintiff, before resorting to service by publication, exercise due diligence, or make due and diligent inquiry, to find defendant in the state, or ascertain his place of residence, or, if it is claimed that defendant is unknown, to ascertain his name and address;<sup>67</sup> and, under this rule, it is incumbent on him to make an honest,<sup>68</sup> conscientious,<sup>69</sup> reasonable,<sup>70</sup> and well directed<sup>71</sup> effort to acquire the information specified in the statute. Diligence, however, is a relative term,<sup>72</sup> and whether due diligence has been used is

53. U.S.—Leigh v. Green, Neb., 24 S.Ct. 390, 193 U.S. 79, 48 L.Ed. 623.

50 C.J. p 504 note 93.

In action or proceeding to:

Enforce mechanic's lien see Mechanics' Liens § 286.

Foreclose mortgage see Mortgages § 633 b (2).

54. U.S.—Thompson v. Terminal Shares, C.C.A.Mo., 89 F.2d 652, certiorari denied Guaranty Trust Co. of New York, 58 S.Ct. 121, 302 U.S. 735, 82 L.Ed. 568.

50 C.J. p 504 note 94.

55. Minn.—Curran v. Nash, 29 N.W.2d 436, 224 Minn. 571, 174 A.L.R. 411.

50 C.J. p 502 note 76 [f].

56. Minn.—Lane v. Innes, 45 N.W.4, 43 Minn. 137.

50 C.J. p 503 note 89.

57. U.S.—Lynch v. Murphy, App.D.C., 16 S.Ct. 523, 161 U.S. 247, 40 L.Ed. 688.

Mo.—State ex rel. Reid v. Barrett, 118 S.W.2d 23, 234 Mo.App. 684.

58. Ind.—Quarl v. Abbett, 1 N.E.476, 102 Ind. 233, 52 Am.R. 662.

50 C.J. p 504 note 90.

Action to have assignment of life insurance policy declared void

N.Y.—Mondin v. Mondin, 80 N.Y.S.2d 176, 274 App.Div. 69.

59. Nev.—Robinson v. Kind, 47 P.1, 977, 23 Nev. 330.

60. N.Y.—Miller v. Jones, 22 N.Y.S.86, 67 Hun 281.

50 C.J. p 504 note 90 [a].

61. D.C.—Backus Portable Steam Heater Co. v. Simonds, 2 App.D.C. 290.

50 C.J. p 502 note 77 [d].

62. N.J.—Englander v. Jacoby, 28 A.2d 292, 132 N.J.Eq. 336.

Service by publication in proceeding to revive judgment see Judgments § 543.

63. Ohio.—Vida v. Vida, 90 N.E.2d 441, 86 Ohio App. 139.

64. N.Y.—Everett v. Everett, 47 N.Y.S. 994, 22 App.Div. 473.

50 C.J. p 505 note 19.

Service by publication generally:

In action, or on motion or statutory petition or complaint, to set aside judgment see Judgments § 294.

In equitable suit to enjoin or set aside judgment see Judgments § 385.

65. D.C.—Plumb v. Bateman, 2 App.D.C. 156.

50 C.J. p 502 note 76 [d].

66. U.S.—National Surety Co. v. Austin Machinery Corporation, C.C.A.Tenn., 35 F.2d 842, certiorari denied 50 S.Ct. 162, 280 U.S. 614, 74 L.Ed. 655.

67. Okl.—Ross v. Thompson, 50 P.2d 385, 174 Okl. 183.

Necessity of "unknown" person being in fact unknown see supra § 56 d.

68. Fla.—Klinger v. Milton Holding Co., 186 So. 526, 136 Fla. 50.

Ill.—Graham v. O'Connor, 182 N.E.764, 350 Ill. 36.

69. Fla.—Klinger v. Milton Holding Co., 186 So. 526, 136 Fla. 50.

Good faith is an underlying element.—Martin v. McCabe, 213 S.W.2d 497, 358 Mo. 118.

Court should satisfy itself of bona fides of plaintiff in attempting to make constructive service under statute.—Minick v. Minick, 149 So. 483, 111 Fla. 469.

70. Fla.—Klinger v. Milton Holding Co., 186 So. 526, 136 Fla. 50.—McDaniel v. McElvy, 108 So. 820, 91 Fla. 770.

Wash.—White v. White, 163 P.2d 137, 24 Wash.2d 52.—Chase v. Carney, 90 P.2d 286, 199 Wash. 99.

50 C.J. p 518 note 7.

Reasonable degree of perseverance is essential.—Narum v. Cheatham, 15 P.2d 1106, 127 Cal.App. 505.

Plaintiff held reasonably diligent Fla.—Housey v. Rutter, 166 So. 558, 123 Fla. 156.

The Corpus Juris text has been cited in connection with the general question of due diligence in the matter of procuring service by publication.—Klinger v. Milton Holding Co., 186 So. 526, 136 Fla. 50.

71. Ill.—Callner v. Greenberg, 33 N.E.2d 437, 376 Ill. 212, 134 A.L.R. 1485.—Graham v. O'Connor, 182 N.E.764, 350 Ill. 36.

72. Cal.—Vorborg v. Vorborg, 117 P.2d 875, 18 Cal.2d 794.—Rue v. Quinn, 66 P. 216, 70 P. 732, 137 Cal. 651.

largely a question of fact<sup>73</sup> to be determined on the facts and circumstances of each case.<sup>74</sup> It is not necessary that extreme diligence<sup>75</sup> or that all possible or conceivable means<sup>76</sup> to ascertain the whereabouts of defendant should be used.

### § 59. — Control and Seizure of Defendant's Property by Court

The seizure or other subjection of some property of defendant to the control of the court, which is deemed essential in order to justify service of process on a nonresident defendant by publication, may, but need not, be by attachment; an injunction or receivership may be sufficient for this purpose.

It has been held or stated generally, without reference to an action, such as one for divorce, involving a personal status or relation, that, in order to justify service of process on a nonresident defendant by publication, not only must such defendant have property within the jurisdiction, as discussed supra § 56 c, but such property must be brought under the control of the court by attachment or other authorized and appropriate act or process,<sup>77</sup> and the judgment rendered is effective, in the absence of an appearance by defendant, only as to property within the court's jurisdiction which has been seized or otherwise brought within the control

of the court.<sup>78</sup>

*Time of acquisition of control.* In some jurisdictions, service by publication prior to the attachment of the property or its seizure in some way is a nullity.<sup>79</sup> In other jurisdictions, jurisdiction is acquired by seizure of the property by attachment or otherwise at any time before rendition of judgment, and publication of process may be ordered before seizure of the property.<sup>80</sup> A statute providing for seizure of property to compel the appearance of a nonresident defendant has been construed to require the seizure to be made a sufficiently long time before appearance day to enable defendant to appear,<sup>81</sup> and has also been construed to make notice by publication mandatory.<sup>82</sup>

*What acts sufficient to give control.* While the general rule in regard to jurisdiction in rem requires the actual seizure and possession of the res by an officer of the court, such jurisdiction may be acquired by acts which are of equivalent import and which stand for and represent the dominion of the court over the thing, and, in effect, subject it to the control of the court.<sup>83</sup> The seizure or control of the property which will justify service by publication may,<sup>84</sup> but need not,<sup>85</sup> be by attachment.

73. Fla.—Klinger v. Milton Holding Co., 186 So. 526, 136 Fla. 50. Showing in affidavit as to diligence see *infra* § 64.

74. Cal.—Vorborg v. Vorborg, 117 P.2d 875, 18 Cal.2d 794. 50 C.J. p 518 note 6.

Inquiry must be as full as circumstances permit

Ill.—Callner v. Greenberg, 33 N.E.2d 437, 376 Ill. 212, 134 A.L.R. 1485. —Graham v. O'Connor, 182 N.E. 764, 350 Ill. 36.

75. U.S.—Jacob v. Roberts, Cal., 32 S.Ct. 303, 223 U.S. 261, 56 L.Ed. 429.

50 C.J. p 518 note 8.

76. S.D.—Cone v. Ballard, 5 N.W.2d 46, 68 S.D. 593, followed in *In re Ballard's Estate*, 5 N.W.2d 48, 68 S.D. 592.

50 C.J. p 518 note 9.

77. Del.—Cantor v. Sachs, 162 A. 73, 18 Del.Ch. 359.

Minn.—Curran v. Nash, 29 N.W.2d 436, 224 Minn. 571, 174 A.L.R. 411.

N.C.—Southern Mills v. Armstrong, 27 S.E.2d 281, 223 N.C. 495, 148 A.L.R. 1248.

Ohio.—Francis v. Allen, Com.Pl., 79 N.E.2d 803.

50 C.J. p 505 note 28.

78. Del.—Cantor v. Sachs, 162 A. 73, 18 Del.Ch. 359.

Ohio.—Francis v. Allen, Com.Pl., 79 N.E.2d 803.

50 C.J. p 500 note 51.

Judgment in rem as operating on,

and enforceable against, property brought within control of court see Judgments § 910.

Satisfaction of judgment out of property subjected to jurisdiction of court see Judgments § 24.

Restriction of subsequent proceedings

"No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court or in any other, nor can it be used as evidence in any other proceeding not affecting the attached property, nor could the costs in that proceeding be collected of defendant out of any other property than that attached in the suit."—Cooper v. Reynolds, Tenn., 10 Wall., U.S., 308, 19 L.Ed. 931.

79. Or.—Willamette Real Estate Co. v. Hendrix, 42 P. 514, 28 Or. 485, 52 Am.S.R. 800.

50 C.J. p 506 note 29.

In action against nonresident to recover money

U.S.—Heydemann v. Westinghouse Electric & Manufacturing Co., D. C.N.Y., 28 F.Supp. 1005.

N.Y.—Goodale v. Central Greyhound Lines, 91 N.Y.S.2d 613, 196 Misc. 71, appeal dismissed 98 N.Y.S.2d 664—Mandi v. Mandi, 61 N.Y.S.2d 364, 187 Misc. 185—Zeide v. Flexser, 25 N.Y.S.2d 610, 175 Misc. 911.

50 C.J. p 506 note 29 [a] (1).

80. Mo.—Tufts v. Volkening, 27 S. W. 522, 122 Mo. 631.

50 C.J. p 506 note 30.

81. Del.—Cantor v. Sachs, 162 A. 73, 18 Del.Ch. 359.

82. Del.—Cantor v. Sachs, *supra*.

83. Mo.—Beyer v. Continental Trust Co., 63 Mo.App. 521.

Ohio.—Corpus Juris cited in Francis v. Allen, Com.Pl., 79 N.E.2d 803, 806.

Necessity and sufficiency of control or seizure in alimony proceeding see Divorce § 247 b.

Court's potential control of property is sufficient.—Cameron v. Penn Mut. Life Ins. Co., 173 A. 344, 116 N.J.Eq. 311.

84. Mo.—Kinsley Bank of Kinsley, Kan., v. Woods, App., 61 S.W.2d 384.

Ohio.—Francis v. Allen, Com.Pl., 79 N.E.2d 803.

85. Ohio.—Corpus Juris cited in Francis v. Allen, Com.Pl., 79 N.E.2d 803, 806.

50 C.J. p 506 note 32.

In divorce action see Divorce § 95.

Action on note

Attachment has been held necessary in action on note, where no personal service was had on defendant maker, residing in a foreign jurisdiction.—Milner v. Outcalt, Wash., 219 P.2d 982.

In New York

(1) A valid levy of a warrant of



Jurisdiction may be acquired by a writ of garnishment on a person holding a fund which is the subject of litigation, although the fund remains in the actual custody of one not an officer of the court.<sup>86</sup> Furthermore, while there is some authority to the contrary,<sup>87</sup> it has been held that an injunction restraining a resident debtor from payment of debts to a nonresident creditor,<sup>88</sup> or restraining a resident holding property for a nonresident from disposing of the property,<sup>89</sup> sufficiently brings the debts or property sought to be subjected to the payment of the debts sued for within the control of the court to authorize service of process by publication; and the same result was held to be reached by the appointment of a receiver to take charge of property specifically described in the complaint.<sup>90</sup> In a suit to enjoin as ultra vires the merger of a domestic and a foreign beneficiary association and to restrain the disposition of the assets of the resident association under such void contract, jurisdiction may be obtained of the nonresident association by publication of process where jurisdiction of the property of the associations has been obtained by impoundment thereof by injunction.<sup>91</sup>

It has been held that the mere joining as a party of a person having possession of a nonresident's property within the state, or holding the title to it in trust for him as a party to the action for the purpose of applying it in payment of the amount sued for, is a sufficient seizure of the property to

authorize constructive service of process by publication;<sup>92</sup> and, where specific property is the subject of the action, it may effectively be brought under the control of the court by being described in a bill of chancery,<sup>93</sup> since the bringing of the suit in which the claim is sought to be enforced is in law equivalent to a seizure and the open and public exercise of dominion over the property for the purposes of the suit,<sup>94</sup> and actual seizure of the res in dispute is unnecessary;<sup>95</sup> but description of property in the complaint is not sufficient where the property so described is not the subject of the action.<sup>96</sup>

### § 60. — Return of "Not Found"

When so provided by statute, but not otherwise, summons must be issued and returned "not found" before resort may be had to service by publication.

While the issue of a summons and its return "not found" is not necessary if not made so by statute,<sup>97</sup> such issuance and return, when required by statute, must be made before resort may be had to service by publication.<sup>98</sup>

Where allegation that defendant is nonresident is made in the petition or affidavit, it is not necessary, under the law of some states, that summons be issued and returned "not found" before resorting to service by publication.<sup>99</sup>

Where there is a return of not found in the county, service by publication may, it seems, be had.<sup>1</sup>

attachment is necessary in order to render proper service by publication in an action against a nonresident to recover a sum of money only.—*Mandl v. Mandl*, 61 N.Y.S.2d 364, 187 Misc. 185.

(2) In other actions, an attachment is not necessary as a basis of service by publication.—*Zeide v. Flexser*, 25 N.Y.S.2d 610, 175 Misc. 911.

(3) No prior levy of attachment is necessary to support order of publication where defendant is resident of state at time.—*Schaefer v. Fisher*, 242 N.Y.S. 308, 137 Misc. 420.

(4) An improper and insufficient attachment levy is ineffective to confer jurisdiction to order service by publication.—*Mackubin v. Gottlieb*, 254 N.Y.S. 83, 234 App.Div. 49.—*Goodale v. Central Greyhound Lines*, 91 N.Y.S.2d 613, 196 Misc. 71, appeal dismissed 98 N.Y.S.2d 664.

86. Mo.—*Beyer v. Continental Trust Co.*, 63 Mo.App. 521.

87. Okl.—*Waldock v. Atkins*, 158 P. 587, 60 Okl. 38.  
50 C.J. p 506 note 34 [a].

88. Ohio.—*Corpus Juris* quoted in

*Francis v. Allen*, Com.Pl., 79 N.E. 2d 803, 807.

50 C.J. p 506 note 35.

89. Ohio.—*Corpus Juris* quoted in *Francis v. Allen*, Com.Pl., 79 N.E. 2d 803, 807.

Wash.—*Kelley v. Bausman*, 168 P. 181, 98 Wash. 686.

90. U.S.—*Propper v. Clark*, N.Y., 69 S.Ct. 1333, 337 U.S. 472, 93 L.Ed. 1480, rehearing denied *Propper v. Clark*, 70 S.Ct. 32, 338 U.S. 841, 94 L.Ed. —.

50 C.J. p 506 note 37.

91. Tenn.—*Knapp v. Supreme Commandery U. O. G. C.*, 118 S.W. 390, 121 Tenn. 212.

92. Minn.—*Thurston v. Thurston*, 59 N.W. 1017, 58 Minn. 279.

93. N.C.—*White v. White*, 103 S.E. 216, 179 N.C. 592.  
50 C.J. p 507 note 40.

94. N.C.—*Bernhardt v. Brown*, 24 S.E. 527, 715, 118 N.C. 700, 36 L.R.A. 402.

95. Del.—*Perrine v. Pennroad Corporation*, 168 A. 196, 19 Del.Ch. 368.

96. Minn.—*Curran v. Nash*, 29 N.W. 2d 436, 224 Minn. 571, 174 A.L.R. 411.

97. Wash.—*Neukirch v. Wong*, 81 P.2d 499, 195 Wash. 451—*Allen v. Peterson*, 80 P. 849, 38 Wash. 599.  
50 C.J. p 507 note 48.

98. Colo.—*Eagle Gold Min. Co. v. Bryarly*, 65 P. 52, 28 Colo. 262.  
N.D.—*Roberts v. Enderlin Investment Co.*, 132 N.W. 145, 21 N.D. 594.  
50 C.J. p 507 note 45.

Order of publication made prior to issuance of summons was void.—*Little v. Currie*, 5 Nev. 90—50 C.J. p 528 note 39.

99. U.S.—*Thomson v. Butler*, C.C.A. Mo., 136 F.2d 644, certiorari denied 64 S.Ct. 69, 320 U.S. 761, 88 L.Ed. 454, rehearing denied 64 S.Ct. 186, 320 U.S. 813, 88 L.Ed. 491.  
N.C.—*Bethell v. Lee*, 158 S.E. 493, 200 N.C. 755.

50 C.J. p 507 notes 43 [c], 45 [c] (1). Showing in affidavit as to return of "not found" see *infra* § 64.

Unauthorized issuance of personal citation does not affect validity of citation by publication.—*Watts v. City of El Paso*, Tex.Civ.App., 183 S.W.2d 249, error refused.

1. Mo.—*Hanna v. Sheetz*, App., 205 S.W.2d 955.

Such a return has been held not insufficient for this purpose;<sup>2</sup> but there is some authority for the view that such a return, where nothing else appears, will not support service by publication.<sup>3</sup>

**Time.** A return of not found in order to form the foundation for publication must not be made until the time has expired within which personal service might be had, and the return of a summons "not found" before the return day is not sufficient to sustain an order for publication;<sup>4</sup> but publication need not take place at once thereafter, and an interim of several months between the return and the publication has been held not to affect the validity of the latter,<sup>5</sup> although an unreasonable and unexplained delay may destroy the right to resort to publication.<sup>6</sup>

### § 61. — Filing Bill, Declaration, Petition, or Complaint

The filing of a bill, petition, declaration, or complaint is or is not a prerequisite to the service of process by publication, or to the making of an order for publication, according as it is or is not made so by statute.

In the absence of any statutory requirement to that effect, the filing of a bill, petition, declaration, or complaint is not a prerequisite to the service of process by publication;<sup>7</sup> but a statutory requirement that such a pleading must be filed before service of process by publication,<sup>8</sup> or before the making of an order for publication,<sup>9</sup> must be complied with.

**Verification.** In some jurisdictions the petition or complaint on which service by publication is ordered must be verified.<sup>10</sup> Where the verification is taken before a commissioner in another state, but is not sufficiently authenticated as required by law, it will not authorize an order of publication;<sup>11</sup> and

a complaint verified before a person purporting to be a commissioner of deeds for the state, but using an insufficient seal, will not authorize an order of publication.<sup>12</sup>

### § 62. Application and Affidavit for Order of Publication

- a. In general
- b. Filing
- c. By whom made
- d. Before whom affidavit taken

#### a. In General

There should be a compliance with a statute or rule of civil procedure requiring an affidavit, stating certain facts, as a prerequisite to service by publication, and the affidavit should be made in good faith within the time prescribed.

A requirement, imposed by statute or rule of civil procedure, that as a prerequisite to service by publication an affidavit shall be made showing the existence of facts made necessary by the statutes or rules of civil procedure to authorize recourse to this method of service, is mandatory and must be complied with;<sup>13</sup> but under some statutes it has been held that the court, on suggestion of the requisite facts, may order service by publication.<sup>14</sup> Where a writ of summons has been returned unexecuted, an order of publication will not issue without request<sup>15</sup> or suggestion.<sup>16</sup>

**Time of making affidavit.** Under a statute requiring the affidavit to be "filed" after the return of the summons by the sheriff, it is not necessary that the affidavit be "made" after the return.<sup>17</sup> Where the affidavit is not made until twenty-one days after the return day of the summons, it has been held that the delay is fatal.<sup>18</sup>

2. Colo.—Gamewell v. Strumpler, 271 P. 180, 84 Colo. 459. 50 C.J. p 507 note 45 [a].

3. N.C.—Bethell v. Lee, 158 S.E. 493, 200 N.C. 755. Basis of order for publication see *infra* § 65 b.

4. Mo.—Himmelberger v. Harrison Co. v. McCabe, 119 S.W. 357, 220 Mo. 154. 50 C.J. p 507 notes 46, 47.

5. Colo.—Eagle Gold Min. Co. v. Bryarly, 65 P. 52, 28 Colo. 262. 50 C.J. p 507 note 48.

6. Ga.—Brunswick Hardware Co. v. Bingham, 35 S.E. 772, 110 Ga. 526. 50 C.J. p 507 note 50.

7. Iowa.—Snell v. Meservy, 59 N.W. 32, 91 Iowa 322. 50 C.J. p 507 note 52.

8. S.D.—Allen v. Richardson, 92 N. W. 1075, 16 S.D. 390. 50 C.J. p 508 note 54, p 528 note 37.

9. N.Y.—Ebsary Gypsum Co. v. Ruby, 176 N.E. 820, 256 N.Y. 406, motion granted 177 N.E. 134, 256 N.Y. 546. 50 C.J. p 508 note 56.

Pleading as substitute for, or in aid of, affidavit: Generally see *infra* § 62. In statement of particular facts see *infra* § 64.

10. N.Y.—Brandow v. Vroman, 50 N.Y.S. 325, 22 Misc. 370, reversed on other grounds 51 N.Y.S. 943, 29 App.Div. 597—McCully v. Heller, 66 How.Pr. 463.

11. N.Y.—Phelps v. Phelps, 6 N.Y. Civ.Proc. 117, affirmed 32 Hun 642 —Williamson v. Williamson, 3 N.

Y.Civ.Proc. 69, 2 McCarty Civ.Proc. 428, 64 How.Pr. 450.

12. Wis.—Oelbermann v. Ide, 68 N. W. 393, 93 Wis. 669, 57 Am.S.R. 947.

13. Ind.—Knue v. Knue, 28 N.E.2d 76, 217 Ind. 319.

Tex.—Durst v. Park, Civ.App., 177 S.W.2d 301.

50 C.J. p 508 note 64.

14. N.H.—Kendrick v. Kimball, 33 N.H. 482.

50 C.J. p 508 note 62.

15. Mo.—Mayne v. Jacob Michel Real Estate Co., 180 S.W.2d 809, 237 Mo.App. 953.

16. Mo.—Pitkin v. Flagg, 97 S.W. 162, 198 Mo. 646.

17. Colo.—Wilson v. Birt, 235 P. 563, 77 Colo. 206.

18. Mich.—Union Guardian Trust

Under some statutes the affidavit must be made at or after the filing of a verified complaint,<sup>19</sup> and an affidavit is invalid as not complying with the statute where it is made a number of days before the institution of the action and the filing of a verified complaint.<sup>20</sup> The fact, however, that the affidavit was made one day before the filing of the petition and affidavit has been held not fatal, since the intervening time was not such as to cast suspicion on the verity of the affidavit or to authorize an inference that the facts stated in the affidavit had ceased to exist at the time of filing.<sup>21</sup>

*Good faith.* One seeking to avail himself of the statutory mode for constructive service must exercise good faith in making his affidavit for publication, and a willfully false affidavit is fraudulent.<sup>22</sup>

*Presumptions on direct attack.* No presumptions can be indulged to sustain the affidavit when directly attacked,<sup>23</sup> as is done in cases of collateral attack when there is sufficient stated to call into exercise the judicial mind.<sup>24</sup>

*Pleading as substitute or aid generally.* It has been held or stated that a verified petition or complaint which states all the facts made necessary by statute as a prerequisite to obtaining an order of service of process by publication is a sufficient substitute for, and dispenses with, the necessity of a separate affidavit showing these facts.<sup>25</sup>

In some jurisdictions it has been held without qualification that the affidavit for publication must contain and state all the statutory requirements, and that reference cannot be made to the complaint on file in the action for the purpose of supplying material facts omitted from the affidavit.<sup>26</sup> Elsewhere, however, it has been held that the affidavit may be aided by plaintiff's pleading where the peti-

tion or complaint is verified<sup>27</sup> and filed simultaneously with the affidavit;<sup>28</sup> and some decisions have held that it is not even necessary that the petition or complaint referred to should be verified.<sup>29</sup> Where the complaint is not referred to, or incorporated in, the affidavit, one view is that it cannot be considered for any purpose,<sup>30</sup> but there is also authority apparently to the contrary.<sup>31</sup>

### b. Filing

An affidavit for service by publication is filed when it is deposited with the proper officer in his office. The filing must take place prior to the publication of process and at such time, in respect of other procedural steps, as is contemplated by the pertinent statute.

Depositing an affidavit for service of process by publication with the proper officer in his office constitutes a filing thereof.<sup>32</sup> Where the order for publication recites the filing of the affidavit, the fact that the date of filing was not indorsed on it at that time is of no consequence.<sup>33</sup> The presumption that an affidavit of nonresidence was never filed, arising from the clerk's failure to make a memorandum of such filing in the appearance docket, and the absence of such affidavit from the other papers in the case, are rebutted by positive testimony that such affidavit was made, that the clerk's office was carelessly conducted, and by a recital in the decree that service had been duly made by publication.<sup>34</sup>

*Time.* Under particular statutes, it has been held that the affidavit must be filed within a reasonable time after the making of the officer's return of "not found",<sup>35</sup> that a filing of the affidavit at or after the filing of a verified complaint is necessary<sup>36</sup> and permissible,<sup>37</sup> and that a filing of the affidavit after the making of an order for publication is not improper, provided the order remains in abeyance until

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| <p>Co. v. Grevnin, 246 N.W. 143, 266 Mich. 344.</p> <p>19. N.D.—Johnson v. Ranum, 244 N.W. 642, 62 N.D. 607.</p> <p>20. N.D.—Johnson v. Ranum, <i>supra</i>.</p> <p>21. Tex.—Durst v. Park, Civ.App., 177 S.W.2d 301.</p> <p>Time of order for publication after making of affidavit see <i>infra</i> § 65 b.</p> <p>22. Utah—Liebhart v. Lawrence, 120 P. 215, 40 Utah 243.</p> <p>50 C.J. p 509 note 66.</p> <p>23. S.D.—Bothell v. Hoellwarth, 74 N.W. 231, 10 S.D. 491.</p> <p>24. S.D.—Bothell v. Hoellwarth, <i>supra</i>.</p> <p>50 C.J. p 509 note 68.</p> <p>25. Ariz.—Evans v. Hallas, 167 P. 2d 94, 64 Ariz. 142—Collins v. Streitz, 54 P.2d 264, 47 Ariz. 146,</p> | <p>appeal dismissed 56 S.Ct. 835, 298 U.S. 640, 80 L.Ed. 1373.</p> <p>N.M.—Singleton v. Sanabrea, 2 P. 2d 119, 35 N.M. 491.</p> <p>50 C.J. p 509 note 70.</p> <p>Pleading as substitute or aid in statement of particular facts see <i>infra</i> § 64.</p> <p>26. Minn.—Gillmore v. Lampman, 90 N.W. 1113, 86 Minn. 493, 91 Am. S.R. 376.</p> <p>50 C.J. p 509 note 71.</p> <p>27. Cal.—Mohn v. Tingley, 217 P. 733, 191 Cal. 470.</p> <p>50 C.J. p 509 note 72.</p> <p>28. N.C.—Martin v. Martin, 170 S.E. 651, 205 N.C. 157.</p> <p>29. Cal.—Ligare v. California Southern R. Co., 18 P. 777, 76 Cal. 610.</p> <p>50 C.J. p 509 note 73.</p> <p>30. Nev.—Victor Mill, etc., Co. v.</p> | <p>Esmeralda County Justice Ct., 1 P. 831, 18 Nev. 21.</p> <p>31. U.S.—Neff v. Pennoyer, C.C.Or., 17 F.Cas.No.10,083, 3 Sawy. 274, affirmed 95 U.S. 714, 24 L.Ed. 565.</p> <p>50 C.J. p 509 note 75.</p> <p>32. Minn.—Bogart v. Kiene, 88 N.W. 748, 85 Minn. 261.</p> <p>33. S.C.—Bush v. Aldrich, 96 S.E. 922, 110 S.C. 491.</p> <p>50 C.J. p 510 note 77.</p> <p>34. Iowa—Simmons v. Simmons, 59 N.W. 272, 91 Iowa 408.</p> <p>35. Minn.—Wiik v. Russell, 218 N.W. 110, 173 Minn. 580.</p> <p>50 C.J. p 510 note 82 [a], [b].</p> <p>36. N.D.—Johnson v. Ranum, 244 N.W. 642, 62 N.D. 607.</p> <p>37. N.D.—Pillsbury v. Streeter, 107 N.W. 40, 15 N.D. 174.</p> <p>50 C.J. p 510 note 81 [a].</p> |
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the affidavit is filed.<sup>38</sup> In a number of jurisdictions, the statutes have been construed as making it an indispensable condition precedent that the affidavit be filed prior to the publication of process, and a noncompliance with this requirement renders the service void;<sup>39</sup> but in a few jurisdictions it has been held that it will be sufficient if the affidavit is filed when the action is called for trial<sup>40</sup> or even at the time of taking judgment.<sup>41</sup>

### c. By Whom Made

It is necessary to comply with a statutory provision stating who shall make an affidavit for service by publication; but in the absence of express provision on the subject, the affidavit may be made by plaintiff, his attorney, or a disinterested stranger familiar with the facts; and where plaintiff is a corporation, the affidavit must of necessity be made by an agent.

Constructive service on a nonresident may be subject in all proceedings to the same rule as to who shall make the requisite affidavit.<sup>42</sup> Where the statute designates the person by whom an affidavit of service of process by publication shall be made, an affidavit made by anyone not so designated is invalid.<sup>43</sup> Where the statute makes no provision with respect to the matter, an affidavit by plaintiff,<sup>44</sup> or his attorney,<sup>45</sup> or by a disinterested stranger familiar with the facts,<sup>46</sup> is sufficient. No special statutory authorization is necessary to render an attorney competent to make the affidavit;<sup>47</sup> and it is held that he may make the affidavit.<sup>48</sup> Where the

affidavit is made by plaintiff's attorney, it need not state that it was made in plaintiff's behalf in the absence of a statute so providing;<sup>49</sup> it must state why the affidavit was not made by plaintiff himself if the statute so requires,<sup>50</sup> but not otherwise.<sup>51</sup> An attorney making the affidavit need not set forth his knowledge, or grounds or means of knowledge,<sup>52</sup> except where this is required by statute.<sup>53</sup> An affidavit in which all the jurisdictional facts are positively stated and sworn to by plaintiff's attorney is not rendered insufficient by a recital that the affidavit was made by plaintiff, since it is manifest that the error is not prejudicial.<sup>54</sup>

*Agent of corporation.* Where a corporation is plaintiff, the affidavit must of necessity be made by an agent,<sup>55</sup> and although a statute requires the affidavit to be made by plaintiff, the agent of a corporation plaintiff may make such affidavit for it.<sup>56</sup> While an affidavit in behalf of a corporation made by one not shown to be its agent is insufficient,<sup>57</sup> a recital of agency in the affidavit is a sufficient showing of authority.<sup>58</sup>

### d. Before Whom Affidavit Taken

The affidavit must be sworn to before an officer qualified to take affidavits.

The affidavit must be sworn to before an officer qualified to take affidavits;<sup>59</sup> otherwise, it gives no authority to the court to grant an order of publication.<sup>60</sup> An affidavit sworn to before plaintiff's

38. N.C.—New Hanover Bank v. Blossom, 92 N.C. 695.

50 C.J. p 510 note 83.

39. Ariz.—Evans v. Hallas, 167 P. 2d 94, 64 Ariz. 142.

Iowa.—Corpus Juris cited in Swift v. Swift, 29 N.W.2d 535, 538, 239 Iowa 62.

50 C.J. p 510 note 84.

40. Cal.—Zumbusch v. Los Angeles County Super. Ct., 130 P. 1070, 21 Cal.App. 76.

41. S.D.—Allen v. Richardson, 92 N. W. 1075, 16 S.D. 390.

50 C.J. p 510 note 86.

42. Ala.—Anthony v. Anthony, 128 So. 440, 221 Ala. 221.

43. Neb.—Moran v. Catlett, 139 N. W. 1041, 93 Neb. 158.

50 C.J. p 510 note 88.

44. N.Y.—Waffle v. Goble, 53 Barb. 517, 35 How.Pr. 356.

45. Wis.—Jenks v. Arms, 151 N.W. 263, 160 Wis. 171.

50 C.J. p 510 note 90.

46. Cal.—Davis-Heller-Pearce Co. v. Ramont, 226 P. 972, 66 Cal.App. 778.

47. Okl.—Tolbert v. State Bank, 121

P. 212, 31 Okl. 403—Spaulding v. Polley, 115 P. 864, 28 Okl. 764.

48. Ala.—Swoope v. Darrow, 188 So. 879, 237 Ala. 692.

Ariz.—Collins v. Streitz, 54 P.2d 264, 47 Ariz. 146, appeal dismissed 58 S.Ct. 835, 298 U.S. 640, 80 L.Ed. 1373.

Mont.—In re Baxter's Estate, 39 P.2d 186, 98 Mont. 291.

49. Wis.—Jenks v. Arms, 151 N.W. 263, 160 Wis. 171.

50. Cal.—Columbia Screw Co. v. Warner Lock Co., 71 P. 498, 138 Cal. 445.

51. Iowa.—Banta v. Wood, 32 Iowa 469.

Okl.—Spaulding v. Polley, 115 P. 864, 28 Okl. 764.

52. Iowa.—Banta v. Wood, 32 Iowa 469.

#### Affidavit as to lack of knowledge

(1) Under a statute so providing, plaintiff's attorney may make an affidavit that defendant's residence is unknown to him.—Frick-Reid Supply Corporation v. Meers, Tex.Civ.App., 52 S.W.2d 115.

(2) It has been said, however, that plaintiff may not avoid the purpose and spirit of the statute by procur-

ing his agent or attorney to make affidavit of such agent's or attorney's want of knowledge of the residence of defendant where such residence is known to plaintiff.—Snell v. Knowles, Tex.Civ.App., 87 S.W.2d 871, error dismissed.

53. Wis.—State v. Gregory, 190 N. W. 913, 179 Wis. 98.

50 C.J. p 511 note 97.

54. Wis.—Jenks v. Arms, 151 N.W. 263, 160 Wis. 171.

55. Colo.—Jotter v. Marvin Inv. Co., 189 P. 22, 67 Colo. 555.

50 C.J. p 511 note 99.

56. Colo.—Jotter v. Marvin Inv. Co., supra.

57. Mo.—Orchard v. Smith, 193 S.W. 574.

58. Ala.—Birmingham Realty Co. v. Barron, 43 So. 346, 150 Ala. 232.

50 C.J. p 511 note 3.

59. Ill.—McDermald v. Russell, 41 Ill. 489.

Tex.—Hardy v. Beaty, 19 S.W. 778, 84 Tex. 562, 31 Am.S.R. 80.

60. Colo.—Frybarger v. McMillen, 25 P. 713, 15 Colo. 349.

Ohio.—Hunt v. Hunt, 14 Ohio N.P. N.S., 521.

attorney is absolutely void, although he is otherwise qualified to take affidavits, where a statute expressly prohibits him from taking an affidavit of a client,<sup>61</sup> and it has been held that this is true irrespective of any statutory prohibition;<sup>62</sup> but there is also authority to the contrary.<sup>63</sup> An affidavit sworn to before an officer in another state is not insufficient merely on that account,<sup>64</sup> but it must be authenticated in accordance with the requirements of the statutes of the state in which the suit is pending.<sup>65</sup>

### § 63. — Form of Affidavit

Whether the affidavit must be entitled depends on whether a suit is pending when the affidavit is made. The want of a venue is not fatal.

If a suit is already pending in court, the affidavit must be entitled in that suit.<sup>66</sup> If no suit is pending at the time the affidavit is made it need not be entitled;<sup>67</sup> but it has been held that an affidavit is not invalidated by reason of the fact that it is entitled in a cause not yet commenced, and the view has been taken that this is at most a mere harmless irregularity.<sup>68</sup>

*Venue.* It is generally considered that the want of a venue is not fatal to the sufficiency of the affidavit;<sup>69</sup> but it has been held that an affidavit is fatally defective where it has no venue<sup>70</sup> and does not otherwise show where it was sworn to or whether the notary public was a resident of, or commissioned for, the county.<sup>71</sup>

*Jurat.* The fact that no jurat is attached thereto will not render the affidavit void, if it is otherwise shown that the oath was actually taken;<sup>72</sup> but an affidavit to which is attached an unsigned and undated jurat is not a sufficient basis for constructive service where no proof is offered that anyone authorized to take affidavits actually took the jurat and affixed his signature or seal.<sup>73</sup> The attaching of a seal is unnecessary where the officer authorized to take the affidavit has no seal of office.<sup>74</sup>

### § 64. — Statement of Facts Essential to Authorize Service by Publication

- a. In general
- b. Particular facts

#### a. In General

The affidavit or sworn statement which is filed to obtain service of process by publication should show every fact which is necessary under the statute to give the right to an order for such service; and it should state probative, rather than ultimate, facts.

The affidavit or sworn statement which is filed to obtain service of process by publication should show every fact which is necessary under the statute to give the right to an order for such service.<sup>75</sup> However, the affidavit or sworn statement need show no facts other than those which are required by the statute<sup>76</sup> and are essential in, and appropriate to, the particular case.<sup>77</sup> Defects in the statement of facts not made necessary by statute

61. Ohio.—Hunt v. Hunt, *supra*.

62. Colo.—Frybarger v. McMillen, 25 P. 713, 15 Colo. 349.

63. N.Y.—De Graff v. De Graff, 128 N.Y.S. 672.

50 C.J. p 511 note 10.

64. Ill.—Johnson v. Gibson, 6 N.E. 205, 116 Ill. 294.

50 C.J. p 511 note 11.

65. N.Y.—Phelps v. Phelps, 6 N.Y. Civ.Proc. 117, affirmed 32 Hun 642.

50 C.J. p 511 note 12.

66. N.Y.—Castle v. Matthews, Lalor p. 438.

67. Neb.—Becker v. Linton, 114 N.W. 928, 80 Neb. 655, 127 Am.S.R. 795.

68. Minn.—Crombie v. Little, 50 N.W. 833, 47 Minn. 581.

Neb.—Becker v. Linton, 114 N.W. 928, 80 Neb. 655, 127 Am.S.R. 795.

69. Colo.—Gibson v. Austin, 128 P. 859, 23 Colo.App. 220.

50 C.J. p 511 note 19.

70. Neb.—Albers v. Kozeluh, 94 N.W. 521, 97 N.W. 646, 68 Neb. 522.

50 C.J. p 511 note 19 [a].

71. Neb.—Northouse v. Torstenson, 19 N.W.2d 34, 146 Neb. 187.

72. Neb.—Bantley v. Finney, 62 N.W. 213, 43 Neb. 793.

50 C.J. p 512 note 22.

73. Fla.—Rumell v. Tampa, 37 So. 563, 48 Fla. 112.

74. Minn.—Crombie v. Little, 50 N.W. 823, 47 Minn. 581.

75. Fla.—Gribbel v. Henderson, 10 So.2d 734, 151 Fla. 712, reheard 14 So.2d 809, 153 Fla. 397—Minick v. Minick, 149 So. 483, 111 Fla. 469.

Wis.—State ex rel. Ralph Lumber Co. v. Kleczka, 290 N.W. 142, 234 Wis. 7.

50 C.J. p 512 note 26.

All facts enumerated conjunctively in statute must be shown in the affidavit.—McGavock v. Pollack, 14 N.W. 659, 13 Neb. 535—50 C.J. p 514 note 49.

#### Time of existence of facts

Affidavit for service of summons by publication must state that the facts required by statute to be stated exist at time of filing of the affidavit.—Johnson v. Ranum, 244 N.W. 642, 62 N.D. 607.

#### Affidavits held sufficient

Fla.—Cone Bros. Const. Co. v. Moore, 193 So. 288, 141 Fla. 420.

Mich.—Union Guardian Trust Co. v. Cherluk, 267 N.W. 569, 275 Mich. 582.

50 C.J. p 512 note 26 [a].

76. Mont.—Hogevoll v. Hogevoll, 162 P.2d 218, 117 Mont. 528.

50 C.J. p 512 note 27.

77. Fla.—Eckersley v. Eckersley, 26 So.2d 811, 157 Fla. 722—Gribbel v. Henderson, 10 So.2d 734, 151 Fla. 712, reheard 14 So.2d 809, 153 Fla. 397—McEwing v. McCulloch, 196 So. 851, 142 Fla. 844.

What are essential matters determinable as question of law

Fla.—Gribbel v. Henderson, 10 So.2d 734, 151 Fla. 712, reheard 14 So.2d 809, 153 Fla. 397.

In case of doubt or where portions of the matters required by statute are not plainly inapplicable or immaterial, it is better and safer practice to include in the sworn statement all of the matters required by statute in the class of cases involved, unless this course will cause repugnancy in material statements; and this is so even though such inclusion may cause some duplications of statements or some apparent but

may be disregarded as surplusage, and will not vitiate an otherwise sufficient affidavit.<sup>78</sup> Also, where two affidavits are filed, a sufficient one by plaintiff and an insufficient one by his attorney, the latter may be disregarded as surplusage.<sup>79</sup> Furthermore, clerical<sup>80</sup> or other<sup>81</sup> errors in stating necessary facts, which are manifestly not prejudicial, will not vitiate the affidavit; and it has been held that, where there is not an entire omission to state some fact made necessary by statute, but it is insufficiently set forth, the proceedings are not void, but merely voidable,<sup>82</sup> and a judgment thereon is not subject to collateral attack, as discussed in Judgments § 422 c.

The sufficiency of the affidavit is to be tested by an examination of the affidavit as a whole.<sup>83</sup>

**Statement of one or more grounds.** Where the grounds for service of process by publication are stated disjunctively in the statute providing for such service, it is necessary<sup>84</sup> and sufficient<sup>85</sup> for the affidavit to state any one of these causes or the affidavit may state two or more of such statutory causes for publication in the disjunctive;<sup>86</sup> and if one ground is sufficiently shown, the insufficient statement of an additional ground will not vitiate the affidavit;<sup>87</sup> but where the facts necessary to be stated for the issuance of an order for publication on two grounds enumerated by statute are inconsistent and contradictory, an affidavit which states facts entitling plaintiff to an order for publication based on both grounds is insufficient, and an order for publication issued thereon is invalid.<sup>88</sup>

**Statement of ultimate or probative facts; following language of statute.** Where all the necessary facts are stated, it is not necessary that the affidavit should follow the language of the statute.<sup>89</sup> Indeed, it is a general rule that a mere allegation of the ultimate facts prescribed by statute as a prerequisite to the allowance of an order for service of process by publication is insufficient, and that the probative facts on which the ultimate facts required by statute depend must be set forth so that the court may judge of the propriety of granting the order.<sup>90</sup> However, under a few statutes, it has been held that it is not necessary that the affidavit should state the probative facts, but it will be sufficient to state the ultimate facts in the language of the statute.<sup>91</sup>

**Definite or inferential statement.** As in the case of an affidavit generally, as discussed in affidavits § 18, one test of the sufficiency of an affidavit for service by publication is whether it is so clear and certain that, if it is false, an indictment for perjury may be sustained.<sup>92</sup> However, while there is some authority to the contrary,<sup>93</sup> it has generally been held that, where an affidavit inferentially states all the material facts required by the statute, it is not void, but at most only voidable.<sup>94</sup>

**Statements on information and belief generally.** It has been held that the affidavit need not rest on personal knowledge of the facts, but may be made on information and belief and need not state the source of affiant's knowledge or information.<sup>95</sup> It has also been held, however, that an affidavit is in-

immaterial conflicts in statements.—Gribbel v. Henderson, *supra*.

78. Mo.—Simms v. Thompson, 236 S.W. 876, 291 Mo. 493. 50 C.J. p 512 note 28.

79. Ariz.—Collins v. Streitz, 54 P. 2d 264, 47 Ariz. 146, appeal dismissed 56 S.Ct. 835, 298 U.S. 640, 80 L.Ed. 1373.

80. Tex.—Pierpont v. Pierpont, 19 Tex. 227.

81. Wis.—Jenks v. Arms, 151 N.W. 263, 160 Wis. 171. 50 C.J. p 512 note 30.

82. Neb.—Fulton v. Levy, 32 N.W. 307, 21 Neb. 478. 50 C.J. p 512 note 31. Judgment as merely voidable see Judgments § 24 h.

**Order for publication is not void.**—Vorborg v. Vorborg, 117 P.2d 875, 18 Cal.2d 794—Rue v. Quinn, 66 P. 216, 70 P. 732, 137 Cal. 651.

83. Mich.—Union Guardian Trust Co. v. Cherluk, 267 N.W. 569, 275 Mich. 582.

84. Ind.—Knue v. Knue, 28 N.E.2d 76, 217 Ind. 319.

85. Cal.—McKendrick v. Western Zinc Min. Co., 130 P. 865, 165 Cal. 24. 50 C.J. p 513 note 46.

86. Ill.—Bickerdike v. Allen, 41 N.E. 740, 157 Ill. 95, 29 L.R.A. 782. Mo.—Jefferson County Lumber Co. v. Robinson, App., 121 S.W.2d 209.

87. Cal.—McKendrick v. Western Zinc Min. Co., 130 P. 865, 165 Cal. 24.

88. Mo.—Frazier v. Radford, 23 S.W.2d 639, 225 Mo.App. 1104. W.Va.—State v. Young, 117 S.E. 688, 94 W.Va. 7.

89. Fla.—Minick v. Minick, 149 So. 483, 111 Fla. 469. 50 C.J. p 513 note 40.

90. Cal.—Ricketson v. Richardson, 26 Cal. 149. 50 C.J. p 513 note 37.

91. Neb.—Jackman v. Miller, 229 N.W. 778, 119 Neb. 463. 50 C.J. p 513 note 38.

#### In Montana

(1) There are decisions, under a certain statute, supporting the text rule.—In re Baxter's Estate, 39 P. 2d 186, 98 Mont. 291—Ervin v. Milne, 43 P. 706, 17 Mont. 494.

(2) Under a differently worded statute, relating to one class of actions, the affidavit must show the evidentiary facts on which the ultimate fact is based.—Aronow v. Anderson, 104 P.2d 2, 110 Mont. 484, distinguishing In re Baxter's Estate, 39 P.2d 186, 98 Mont. 291, and Ervin v. Milne, 43 P. 706, 17 Mont. 494.

92. Cal.—Application of Behymer, 19 P.2d 829, 130 Cal.App. 200.

93. Miss.—Hume v. Inglis, 122 So. 535, 154 Miss. 481—McCray v. McCray, 102 So. 174, 137 Miss. 160.

94. Kan.—Board of Com'rs of Cherokee County v. Smith, 220 P.2d 131, 169 Kan. 623. 50 C.J. p 513 note 43.

95. Mich.—Union Guardian Trust Co. v. Cherluk, 267 N.W. 569, 275 Mich. 582—Kretzschmar v. Rosasco, 229 N.W. 446, 250 Mich. 9.

sufficient where all statements therein relating to diligence are hearsay and based on information obtained from another person.<sup>96</sup>

*Sufficiency to confer jurisdiction.* Where there is a total want of evidence of any fact, the existence of which is by statute made essential to authorize service of process by publication, there is nothing on which the court is authorized to act, and it acquires no jurisdiction to make the order;<sup>97</sup> but in order to authorize an order of publication, it is not essential that the evidence presented by the affidavit should conclusively establish the right to the order.<sup>98</sup> Evidence, even though slight and inconclusive, if sufficient to call for judicial judgment, will be sufficient to confer jurisdiction on the court granting the application.<sup>99</sup> In order to defeat the jurisdiction there must be a total want of evidence on some essential point.<sup>1</sup>

#### b. Particular Facts

- (1) Cause and nature of action
- (2) Status and interest of person as party
- (3) Name and age of defendant or ignorance thereof
- (4) Post-office address or place of residence or ignorance thereof
- (5) Nonresidence
- (6) Departure from state or concealment to avoid service
- (7) Inability to find, or make personal service on, defendant in state
- (8) Property of defendant in state
- (9) Other facts

#### (1) Cause and Nature of Action

##### (a) In general

#### (b) Action in which publication authorized

##### (a) In General

A statute making it a prerequisite to the granting of an order for publication of process that the affidavit or verified complaint show the existence of a cause of action in favor of plaintiff against defendant must be complied with by setting out the facts on which the alleged cause of action is founded.

Statutes which make it an indispensable prerequisite to the granting of an order for publication of process that the affidavit or verified complaint shall show the existence of a cause of action in favor of plaintiff and against defendant are mandatory, and must be complied with;<sup>2</sup> and, in the absence of such a showing, it is immaterial whether or not the subject matter of the suit is properly within the jurisdiction of the court because the existence of that fact alone would not authorize a notice by publication.<sup>3</sup> Under other statutes, the affidavit need not show a cause of action in favor of plaintiff and against defendant, since it is enough if the affidavit contains a statement of the nature of the action sufficient to show that it is one in which the statute authorizes service of process by publication,<sup>4</sup> and to inform defendant as to the nature of the suit against him which he is required to defend.<sup>5</sup> In the absence of statutory requirement, the affidavit need not state whether the action is in rem or in personam or what kind of action it is.<sup>6</sup>

The requirement that a cause of action be stated, for the purpose of obtaining an order for service by publication, is complied with by a verified complaint which states a cause of action<sup>7</sup> or, in some jurisdictions, by an affidavit which refers to and adopts a verified<sup>8</sup> or unverified<sup>9</sup> complaint stating a cause of action; but an affidavit which describes,

96. Cal.—Application of Behymer, 19 P.2d 829, 130 Cal.App. 200.

97. Fla.—Corpus Juris quoted in Gribbel v. Henderson, 10 So.2d 734, 739, 151 Fla. 712, reheard 14 So.2d 809, 153 Fla. 397.  
50 C.J. p 514 note 51.

Determination of truth or falsity of statement of fact see infra § 65.  
Jurisdictional question as dependent on facts shown

The jurisdictional question involved in cases where service of summons by publication is sought always depends on such facts as are shown in compliance with, or as lack of fulfillment of, statutory requirements.—Rodier v. Fay, 7 N.Y.S.2d 744.

98. Fla.—Corpus Juris quoted in Gribbel v. Henderson, 10 So.2d 734,

739, 151 Fla. 712, reheard 14 So.2d 809, 153 Fla. 397.  
50 C.J. p 514 note 52.

99. Fla.—Corpus Juris quoted in Gribbel v. Henderson, 10 So.2d 734, 739, 151 Fla. 712, reheard 14 So.2d 809, 153 Fla. 397.  
50 C.J. p 514 note 53.

1. Fla.—Corpus Juris quoted in Gribbel v. Henderson, 10 So.2d 734, 739, 151 Fla. 712, reheard 14 So.2d 809, 153 Fla. 397.  
N.Y.—Schroeder v. Lear, 17 N.Y. Wkly.Dig. 574.

2. N.C.—Martin v. Martin, 170 S.E. 651, 205 N.C. 157.  
50 C.J. p 524 note 87.

3. D.C.—Lindberg v. Humphreys, 289 F. 901, 53 App.D.C. 243.  
50 C.J. p 524 note 88.

4. Kan.—Gillespie v. Thomas, 23 Kan. 138.  
50 C.J. p 524 note 89.

5. Ind.—Pitts v. Jackson, 35 N.E. 10, 135 Ind. 211.

6. Mont.—Hogevoll v. Hogevoll, 162 P.2d 218, 117 Mont. 528.

7. Wis.—Cummings v. Tabor, 31 N. W. 72, 61 Wis. 185.  
50 C.J. p 509 note 72 [b] (3) (4).

8. Cal.—Woodward v. Brown, 51 P. 2, 119 Cal. 283, 63 Am.S.R. 108, modified on other grounds 51 P. 542, 119 Cal. 283.  
50 C.J. p 509 note 72 [a].

9. Cal.—Davis-Heller-Pearce Co. v. Ramont, 226 P. 972, 66 Cal.App. 778.  
50 C.J. p 509 note 73 [a].

as the basis of the action, a cause of action different from the one alleged in the complaint cannot be made the basis for an order of publication, and in such case the order for publication, and publication of summons under such order, are void, and ineffectual to give an absent defendant constructive notice of the pendency of the action.<sup>10</sup> It is not sufficient to state generally that a cause of action exists in favor of plaintiff and against defendant,<sup>11</sup> but the facts on which the alleged cause of action is founded must be set out<sup>12</sup> so that the court can see and determine that a cause of action exists.<sup>13</sup> Under a statute requiring the order of publication to be founded on a verified complaint showing a sufficient cause of action against the defendant to be served, the complaint must be sufficient to justify the prayer for judgment<sup>14</sup> and show that the cause of action is one of which the court can take cognizance.<sup>15</sup> In a few jurisdictions, it must be shown either that the cause of action arose within the state or that defendant has property therein.<sup>16</sup>

A statement on information and belief that plaintiff has a cause of action against defendant has been held sufficient,<sup>17</sup> but has also been held insufficient.<sup>18</sup>

**Subject of action.** The decisions as to what constitutes "the subject of the action" in statutes which require the affidavit to state that the court has jurisdiction of "the subject of the action" are not harmonious.<sup>19</sup>

### (b) Action in Which Publication Authorized

In order to comply with a requirement that the affidavit show that the action is one of those enumerated by the statute authorizing service of process by publication, it is necessary to state facts showing that the action is one of those enumerated in the statute; and it is neither necessary nor sufficient to state the conclusion of law that the action is within the statute.

Under statutes requiring the affidavit to show that the action is one of those enumerated by the statute authorizing service of process by publication, an affidavit which fails to meet this requirement is fatally defective, and service of process by publication cannot be obtained thereon.<sup>20</sup> It is neither necessary<sup>21</sup> nor sufficient<sup>22</sup> to allege in terms that the action is one of those enumerated in the statute authorizing service of process by publication, since this is a mere conclusion of law, but the affidavit must state facts showing that the action is one in which the statute authorizes service of this kind.<sup>23</sup> It has been held, however, that if there is not an entire omission to state facts showing that the action is one in which constructive service is authorized, but merely an imperfect statement of such facts, the proceedings are voidable and not void.<sup>24</sup>

### (2) Status and Interest of Person as Party

It is necessary to comply with a statute requiring the affidavit or verified complaint to show that the person to be served is a defendant in the suit or is a proper or necessary party thereto, or requiring the petition or

10. Idaho.—Vermont L. & T. Co. v. McGregor, 51 P. 104, 5 Idaho 510.

11. N.C.—Bacon v. Johnson, 14 S.E. 508, 110 N.C. 114.

12. Cal.—People v. Mulcahy, 112 P. 853, 159 Cal. 34.  
50 C.J. p 524 note 94.

13. N.C.—Bacon v. Johnson, 14 S.E. 508, 110 N.C. 114.  
50 C.J. p 525 note 95.

#### Clearness

In order that service by publication may be effective, cause of action must be stated with such clearness as to enable court to determine its sufficiency.—Martin v. Martin, 170 S.E. 661, 205 N.C. 157.

#### Affidavit addressed to clerk of court

Where the affidavit is addressed to and acted on exclusively by the clerk of court, it has been held necessary, in order to comply with the requirement under consideration, that the affidavit state only that plaintiff has a cause of action against defendant so as to inform the clerk of that fact, and the affidavit need not specifically set forth the cause of action.—Calvert v. Calvert, 24 P. 1043, 15 Colo. 390—50 C.J. p 524 note 91 [a].

14. N.Y.—Ebsary Gypsum Co. v.

Ruby, 176 N.E. 820, 256 N.Y. 406, motion granted 177 N.E. 134, 256 N.Y. 546.

**Allegations which, if proved, would entitle plaintiff to judgment in rem** ordinarily are sufficient.—Berson v. Scott, 94 N.Y.S.2d 117.

15. N.Y.—Paget v. Stevens, 38 N.E. 273, 143 N.Y. 172.  
50 C.J. p 525 note 2.

16. N.Y.—Bryan v. University Pub. Co., 19 N.E. 825, 112 N.Y. 382, 2 L.R.A. 638, 16 N.Y.Civ.Proc. 279.

50 C.J. p 525 notes 3, 6 [b].  
Necessity of stating that defendant has property in state generally see infra subdivision b (8) of this section.

17. Mont.—Smith v. Collins, 112 P. 1070, 42 Mont. 350, Ann.Cas.1912A 1153.

50 C.J. p 525 note 97 [b].

18. Cal.—Columbia Screw Co. v. Warner Lock Co., 71 P. 498, 138 Cal. 445.

50 C.J. p 525 note 97 [a].

#### 19. Controversy between parties

The words "subject of the action" have been held to relate to the controversy between the parties, and not property of defendant which has previously been seized on attach-

ment.—Hartzell v. Vigan, 69 N.W. 203, 6 N.D. 117, 66 Am.S.R. 589, 35 L.R.A. 451, applying Minnesota law.

#### Property

It has been held that "subject of the action" is not identical with "cause of action," since the former phrase is held to relate to the property or thing concerning which the proceeding is instituted and carried on, and the changes to be effected by it.—McKinney v. Collins, 88 N.Y. 216.

20. Kan.—Lieberman v. Douglass, 64 P. 590, 62 Kan. 784.

50 C.J. p 526 note 15.

21. Kan.—Harvey v. Harvey, 118 P. 1038, 85 Kan. 689.

50 C.J. p 526 note 16.

22. Kan.—Lieberman v. Douglass, 64 P. 590, 62 Kan. 784.

50 C.J. p 513 note 41, p 526 note 17.

23. Kan.—Harvey v. Harvey, 118 P. 1038, 85 Kan. 689.

50 C.J. p 526 notes 15, 18 [a].

#### Affidavits held sufficient

Ohio.—Francis v. Allen, Com.Pl., 79 N.E.2d 803.

50 C.J. p 526 note 18 [b].

24. Neb.—Fulton v. Levy, 32 N.W. 307, 21 Neb. 478.

50 C.J. p 526 note 19.



complaint, where the name of the person to be served is unknown to plaintiff, to describe his interest in the subject matter of the suit.

Where applicable, a statute imposing an alternative requirement that the affidavit or verified complaint show that the person sought to be served by publication is a necessary or proper party to the action is accorded effect;<sup>25</sup> and under some statutes the probative facts to establish this averment must be stated;<sup>26</sup> but it has been held that, where the statute merely requires that the affidavit should "state" that defendant is a necessary or proper party, a statement of the ultimate fact is sufficient, without setting forth facts which show why and how he is a necessary or proper party,<sup>27</sup> and that, where by statute the affidavit is to be acted on exclusively by the clerk, instead of the court, the affidavit need only allege that defendant is a necessary party to the action.<sup>28</sup> A statement on information and belief that defendant is a necessary party has been held sufficient.<sup>29</sup>

Under a statute which authorizes service of process by publication on "a defendant" under circumstances therein designated, the affidavit, in order to warrant the issuance of an order of publication, must show in some way that the party against whom the order is sought is a defendant to the suit in which the order is to issue.<sup>30</sup>

*Interests of parties.* An affidavit to obtain an order for service by publication on the ground that defendant is a nonresident so that plaintiff is unable to procure personal service need not show the interests of the parties in the absence of any statutory requirement to that effect.<sup>31</sup> Where service by publication on unknown persons who have an interest in the subject matter of the suit is sought, such interest must be described in the petition or com-

plaint where the statute so provides.<sup>32</sup>

### (3) Name and Age of Defendant or Ignorance Thereof

The name of the person to be served must be stated in the affidavit or pleading unless it is unknown, in which case it is necessary to allege that fact and, if so required by statute, that due diligence to ascertain the name has been exercised.

Unless the person against whom service of process by publication is asked is an unknown person interested in the subject matter of the suit, the person against whom such service is asked must be named in the affidavit.<sup>33</sup>

In order to authorize service of process by publication on unknown persons interested in the subject matter of the suit, the proper allegation must be made by affidavit,<sup>34</sup> or by bill, petition, or complaint,<sup>35</sup> or by either bill or affidavit,<sup>36</sup> according as the statute may provide. It must be alleged that the names of such persons are unknown to plaintiff or to affiant,<sup>37</sup> and, if the statute so provides, that due diligence has been exercised to ascertain their names;<sup>38</sup> but, in the absence of statutory requirement, it need not be stated that, on diligent inquiry, the names of the parties could not be ascertained.<sup>39</sup>

Where the affidavit contains a positive and direct statement that the owner of land in suit is unknown; the further statement that affiant believes this to be true does not qualify or detract from the first statement or render the affidavit insufficient;<sup>40</sup> and where an affidavit made by plaintiff's attorney states positively, and not on information and belief, that he knows that the names of the heirs and next of kin of a person named are unknown to plaintiff, it will be presumed that these facts were within the knowledge of affiant.<sup>41</sup> Where the affidavit is more specific in the description of un-

25. Cal.—*People v. Mulcahy*, 112 P. 853, 159 Cal. 34.  
50 C.J. p 527 note 20.

26. Cal.—*People v. Mulcahy*, 112 P. 853, 159 Cal. 34—*Ricketson v. Richardson*, 26 Cal. 149.

27. Minn.—*Crombie v. Little*, 50 N. W. 823, 47 Minn. 581.

28. Colo.—*Calvert v. Calvert*, 24 P. 1043, 15 Colo. 390.

29. Mont.—*Smith v. Collis*, 112 P. 1070, 42 Mont. 350, Ann.Cas.1912A 1158.  
50 C.J. p 527 note 25.

30. W.Va.—*State v. Young*, 117 S.E. 688, 94 W.Va. 7.  
50 C.J. p 527 note 27.

31. Kan.—*Price v. Rucker*, 201 P. 74, 109 Kan. 605.

32. Utah.—*Lawrence v. Murphy*, 147 P. 903, 45 Utah 572.  
50 C.J. p 527 note 31.

33. Kan.—*Rawson v. Sherwood*, 53 P. 69, 59 Kan. 776.

34. Ala.—*Birmingham Realty Co. v. Barron*, 43 So. 346, 150 Ala. 232.  
50 C.J. p 516 note 31.

35. Utah.—*Lawrence v. Murphy*, 147 P. 903, 45 Utah 572.  
50 C.J. p 516 note 32.

36. Tenn.—*Bleidorn v. Pilot Mountain Coal, etc., Co.*, 15 S.W. 737, 89 Tenn. 166, 204.

37. U.S.—*Indiana, etc., Mfg., etc., Co. v. Brinkley*, Ark. 164 F. 963, 91 C.C.A. 91.  
50 C.J. p 516 note 35.

38. S.D.—*Berry v. Howard*, 146 N. W. 537, 33 S.D. 447.  
50 C.J. p 516 note 36.

39. Ill.—*Burgoyne v. Pyle*, 261 Ill. App. 356.

#### Ultimate fact

It has been said that if the affidavit or sworn pleading states that the persons sued as unknown defendants are in fact unknown, it is sufficient, but, where diligence is unnecessarily alleged, it is only necessary to allege ultimate fact of diligence and not particular acts constituting such diligence.—*Campbell v. Doherty*, 206 P.2d 1145, 53 N.M. 280, 9 A.L.R.2d 699.

40. Neb.—*Leigh v. Green*, 90 N.W. 255, 64 Neb. 533, 101 Am.S.R. 592, affirmed 24 S.Ct. 390, 193 U.S. 79, 48 L.Ed. 623.  
50 C.J. p 516 note 30.

41. Ala.—*Birmingham Realty Co. v. Barron*, 43 So. 346, 150 Ala. 232.

known persons than is required by statute, the unnecessary description is surplusage and does not vitiate the affidavit.<sup>42</sup>

Defects in an affidavit become immaterial where there was a stipulation in the suit that it did not appear from the chain of title to the premises involved that there were persons interested in them whose names were unknown.<sup>43</sup>

**Age.** An inferential statement of the age of the person to be served is a substantial compliance with the intent of a statute making a requirement as to statement of age.<sup>44</sup> Where the sworn bill of complaint shows that defendant is, or has been, lawfully married, an allegation of his age is unnecessary and immaterial.<sup>45</sup>

(4) Post-Office Address or Place of Residence or Ignorance Thereof

(a) Place of residence or ignorance thereof

(b) Post-office address or ignorance thereof

(a) Place of Residence or Ignorance Thereof

Under some statutes it is necessary that the affidavit state defendant's residence or that such residence is unknown to affiant. The place of defendant's residence may be stated on information and belief; but where such residence is stated to be unknown to affiant, it is necessary, under some statutes, to state probative facts showing due diligence to ascertain such residence.

It has been held unnecessary to allege where a nonresident defendant resides, in the absence of a statutory requirement to that effect;<sup>46</sup> but it has also been considered that a failure to state where defendant actually resides is an omission of an evidentiary fact necessary to show the ultimate

fact of nonresidence;<sup>47</sup> and, in a number of jurisdictions, the statutes have been construed as requiring the affidavit to state defendant's residence, if known to affiant, or to state that his residence is unknown to affiant if such is the case,<sup>48</sup> or to state that defendant is a resident of another state or country, specifying his place of residence as particularly as may be known to affiant, or stating that it is unknown.<sup>49</sup> An affidavit which fails to comply with these requirements has been held to be fatally defective.<sup>50</sup> The requirements of the statutes are not satisfied by an affidavit stating "that the last post-office address of defendant is unknown,"<sup>51</sup> that the "whereabouts" of defendant are unknown,<sup>52</sup> that the present post-office address of defendant is outside of the state,<sup>53</sup> or that defendant resides in a designated county in another state but that affiant does not know and is unable to ascertain the particular place of residence or post-office address of defendant.<sup>54</sup> Also, an affidavit which, after alleging that the post-office address of defendant is unknown, makes the conflicting statement that affiant has been informed that the post-office address is, or will be, a designated city in another state is insufficient,<sup>55</sup> as is also an affidavit which affirmatively shows that the residence of heirs is in a designated city, and, in place of a statement that the residence is unknown, states that their address is unknown.<sup>56</sup>

On the other hand, it has been held sufficient to state that defendant resides in a designated town or city without stating the street and number,<sup>57</sup> provided such town or city is a small one<sup>58</sup> or it is alleged that the residence is specified as particularly as is known to affiant.<sup>59</sup> Also, an allegation that plaintiff is "unable to find either the residence or post-office addresses of defendants" is equivalent to

42. Ill.—Burgoyne v. Pyle, 261 Ill. App. 356.

43. Ill.—Hopkins v. Patton, 100 N. E. 992, 257 Ill. 346.

44. Fla.—Gribbel v. Henderson, 10 So.2d 734, 151 Fla. 712, reheard 14 So.2d 809, 153 Fla. 397.

45. Fla.—Eckersley v. Eckersley, 26 So.2d 811, 157 Fla. 722.

46. Wash.—DeCorvet v. Dolan, 35 P. 72, 1072, 7 Wash. 365.

47. Mont.—Aronow v. Anderson, 104 P.2d 2, 110 Mont. 484.

48. Nev.—Victor Mill, etc., Co. v. Justice Ct., 1 P. 831, 18 Nev. 21, 50 C.J. p 521 note 47.

49. Fla.—Balian v. Wekiwa Ranch, 122 So. 559, 97 Fla. 180, 50 C.J. p 521 note 48.

50. Nev.—Wildes v. Lou Dillon

Goldfield Min. Co., 170 P. 1046, 41 Nev. 364.

N.D.—Krumenacker v. Andis, 165 N. W. 524, 38 N.D. 500.

51. N.D.—Atwood v. Tucker, 145 N. W. 587, 26 N.D. 622, 51 L.R.A., N. S., 597.

50 C.J. p 521 note 50.

52. N.D.—Jablonski v. Piesik, 153 N.W. 274, 30 N.D. 543.

50 C.J. p 521 note 51.

53. N.D.—Hughes v. Fargo Loan Agency, 178 N.W. 993, 46 N.D. 26, 50 C.J. p 522 note 52.

54. N.D.—Paul v. Green, 191 N.W. 469, 49 N.D. 319.

50 C.J. p 522 note 53.

55. N.D.—Miller v. Benecke, 212 N. W. 925, 55 N.D. 231.

56. Neb.—Moran v. Catlett, 139 N. W. 1041, 93 Neb. 158.

57. Ill.—Burke v. Donovan, 60 Ill. App. 241.

50 C.J. p 522 note 55.

58. Fla.—Minick v. Minick, 149 So. 483, 111 Fla. 469.

59. Fla.—Ortell v. Ortell, 107 So. 442, 91 Fla. 50.

50 C.J. p 522 note 55 [a].

**Substantial compliance with statute; business address as surplusage**

Where bill alleged that defendant lived in Chicago and that no more particular residence was known, there was substantial compliance with statute relating to process and added statement giving defendant's business address as particularly as known to plaintiff was surplusage.—Seiton v. Miami Roofing & Sheet Metal, 10 So.2d 428, 151 Fla. 631.

stating that the place of their residence is unknown and is sufficient;<sup>60</sup> and an affidavit complying literally with the requirements of the statute is sufficient.<sup>61</sup>

*Information and belief.* It has very generally been held that the place of defendant's residence may be stated on information and belief.<sup>62</sup> It has also been held that it is not indispensable to state the source of affiant's information and belief,<sup>63</sup> although the better practice would be to state the source from which the information is derived.<sup>64</sup>

*Diligence to ascertain residence.* Some statutes, in addition to requiring a statement of defendant's residence or an allegation that it is not known to affiant, require, or have been construed to require, that the affidavit shall also show that the residence of defendant could not, on the exercise of due diligence, be ascertained, where it is alleged that defendant's residence is unknown to affiant,<sup>65</sup> and the probative facts which show the exercise of due diligence must be stated, since it is not sufficient merely to follow the language of the statute;<sup>66</sup> but, in some jurisdictions, the affidavit need contain only the language of the statute or its equivalent with respect to diligence;<sup>67</sup> and, where the statute does not mention diligence, it has been held that the affidavit need not show what efforts affiant made to ascertain defendant's residence.<sup>68</sup>

#### (b) Post-Office Address or Ignorance Thereof

The existence or absence of statutory requirement

is determinative of whether or not it is necessary that the affidavit state the defendant's post-office address or that it is unknown to affiant.

In the absence of any statutory requirement to that effect, it has been held that an affidavit for service of process by publication need not state the post-office address of defendant.<sup>69</sup> Some statutes, however, require the affidavit to state defendant's post-office address or that it is unknown to affiant, and a noncompliance with this requirement renders the affidavit fatally defective,<sup>70</sup> and an order of publication based thereon,<sup>71</sup> or a decree based on such order,<sup>72</sup> is void. The statutory requirement is not satisfied by a statement that defendant's place of residence is unknown.<sup>73</sup>

*Information and belief.* An affidavit alleging defendant's nonresidence and stating his post-office address on information and belief has been held sufficient.<sup>74</sup>

#### (5) Nonresidence

If service by publication is sought on the ground that the defendant is a nonresident, an averment of the fact of such nonresidence must be made in the affidavit or, where it is permissible under the statutes to show this fact in the plaintiff's pleading, either in the affidavit or such pleading.

While the contrary has been held,<sup>75</sup> the general rule is that, if service by publication is sought on the ground that defendant is a nonresident, an allegation of the fact of such nonresidence must be made<sup>76</sup> in the affidavit<sup>77</sup> or either in the affidavit or in the bill, declaration, or petition,<sup>78</sup> where it is considered permissible, under the statutes, to show

60. Wash.—Bardon v. Hughes, 88 P. 1040, 45 Wash. 627.

61. Tex.—Frick-Reid Supply Corporation v. Meers, Civ.App., 52 S.W. 2d 115.

62. Cal.—Davis-Heller-Pearce Co. v. Ramont, 226 P. 972, 66 Cal.App. 778.

50 C.J. p 522 note 59.

63. Mich.—Colton v. Rupert, 27 N. W. 520, 60 Mich. 318.

64. Mich.—Colton v. Rupert, supra. 50 C.J. p 522 note 61.

65. Ill.—Correll v. Greider, 92 N.E. 266, 245 Ill. 378, 137 Am.S.R. 327. 50 C.J. p 522 note 64.

66. Ill.—Kircher v. M. Keating, etc., Co., 145 Ill.App. 1. 50 C.J. p 522 note 65.

67. Neb.—Jackman v. Miller, 229 N. W. 778, 119 Neb. 463.

68. N.M.—Singleton v. Sanabrea, 2 P.2d 119, 35 N.M. 491.

69. Or.—Moore Realty Co. v. Carr, 120 P. 742, 61 Or. 34.

70. Colo.—Federal Farm Mortg.

Corporation v. Schmidt, 126 P.2d 1036, 109 Colo. 467.

50 C.J. p 523 note 68.

71. Colo.—Watkins v. Perry, 139 P. 551, 25 Colo.App. 425.

50 C.J. p 523 note 69.

72. Colo.—Federal Farm Mortg. Corporation v. Schmidt, 126 P.2d 1036, 109 Colo. 467.

50 C.J. p 523 note 70.

73. Colo.—Empire Ranch, etc., Co. v. Saul, 127 P. 123, 22 Colo.App. 605.

50 C.J. p 523 note 71.

74. Colo.—Jotter v. Marvin, 189 P. 19, 67 Colo. 548.

50 C.J. p 523 note 73.

75. Iowa.—Taylor v. Ormsby, 23 N. W. 288, 66 Iowa 109.

50 C.J. p 514 note 56 [a].

76. Mo.—Chilton v. Tam, 139 S.W. 126, 235 Mo. 498—Stanton v. Thompson, 136 S.W. 698, 234 Mo. 7.

Mere "non est inventus" return in the absence of such averment of nonresidence is insufficient to sustain an order of publication as it is

no proof of nonresidence.—Stanton v. Thompson, supra.

Statement that defendant is not resident of named county in the state is insufficient.—Collins v. Stretz, 54 P.2d 264, 47 Ariz. 146, appeal dismissed 56 S.Ct. 835, 298 U.S. 640, 80 L.Ed. 1373.

77. Kan.—Carey v. Reeves, 26 P. 951, 46 Kan. 571.

50 C.J. p 514 note 57.

#### Evidentiary facts

Under statute affidavit must show evidentiary facts on which the ultimate fact is asserted that defendant resides out of state and a naked allegation that defendant resides out of state, without a recitation of facts on which the ultimate fact is based, is insufficient.—Aronow v. Anderson, 104 P.2d 2, 110 Mont. 484.

#### Affidavits held sufficient

Okl.—Lester v. Feuquay, 44 P.2d 931, 172 Okl. 288.

50 C.J. p 514 note 57 [a].

78. Mo.—Diekroger v. McCormick, 163 S.W.2d 927, 349 Mo. 1098.

50 C.J. p 515 note 58.

this fact either in plaintiff's pleading or by a separate affidavit.<sup>79</sup> It is not necessary, however, that the language in the statute relating to nonresidence of defendant be used in the affidavit, but it will be sufficient if the statements made substantially show the statutory foundation for service by publication;<sup>80</sup> and it has been held that failure of an affidavit to state the fact of nonresidence directly and positively will not render the affidavit or the service founded thereon void if the nonresidence appears inferentially from the facts stated;<sup>81</sup> but there is also authority to the contrary.<sup>82</sup>

**Relation back.** The allegation of nonresidence need not relate back to the commencement of the action;<sup>83</sup> it is sufficient to allege the nonresidence of the parties at the time of making the affidavit.<sup>84</sup>

**Statements on information and belief.** In some jurisdictions it has been held that a statement that defendant is a nonresident made on information and belief is not sufficient,<sup>85</sup> while in others a directly contrary view has been taken.<sup>86</sup> It has been considered necessary, where the fact of nonresidence is stated on information and belief, to state the source of affiant's information and the ground of his belief.<sup>87</sup> The affidavit may be sufficient where it does not rest solely on information and belief, as where, after stating information and belief, it states nonresidence as a fact.<sup>88</sup>

**Publication sought on ground other than nonresidence.** Under a statute authorizing service of summons by publication if it shall appear by affidavit that defendant could not, after due diligence, be found within the state, it is not necessary to show that defendant was nonresident.<sup>89</sup> Where publication is sought on the ground that the name of de-

fendant is not known to plaintiff, some statutes do not require an allegation that defendant is a nonresident,<sup>90</sup> while others require a statement of plaintiff's belief that defendant's residence is not in the state.<sup>91</sup>

#### (6) Departure from State or Concealment to Avoid Service

Facts necessary to bring the case within the terms of the statute must be stated in the affidavit or other sworn statement where service by publication is sought on the ground that the defendant conceals himself so that process cannot be served on him or has departed from the state either generally or with intent to defraud creditors.

Under a statute, discussed supra § 56 b, authorizing service of process by publication on one who has departed from the state, it has been held that a statement in the affidavit that defendant has departed from the state is one of fact,<sup>92</sup> and is sufficient without giving the evidence on which it is founded;<sup>93</sup> but under a statute authorizing service of process by publication on a defendant who has left the state with intent to defraud creditors it has been held that a mere statement that defendant had left the state with intent to defraud creditors or to avoid the service of summons, in the language of the statute, without a statement of facts tending to prove these grounds, is insufficient, since they are conclusions for the judge to find,<sup>94</sup> and it is necessary that the affidavit state facts showing such intent.<sup>95</sup> An affidavit stating that defendant is absent from the state must state facts from which the conclusion may be reached that there is no intention of immediate return, as well as facts supporting the conclusion that defendant is absent from the state.<sup>96</sup> The affidavit, although slight and not conclusive, if

79. Ariz.—Porter v. Duke, 270 P. 625, 34 Ariz. 217.

50 C.J. p 509 note 70 [a], [b].

**Additional statement that residence unknown**

It is sufficient to state in a verified complaint that defendant is not a resident of the state and that his residence is unknown to plaintiff.—Collins v. Streitz, 54 P.2d 264, 47 Ariz. 146, appeal dismissed 56 S.Ct. 835, 298 U.S. 640, 80 L.Ed. 1373.

80. Kan.—Price v. Rucker, 201 P. 74, 109 Kan. 605.

**Residence in named sister state**

(1) Affidavit for service by publication specifically stating defendant is resident of named sister state need not state defendant is nonresident where the statute requires a statement that defendant is a nonresident only when his residence is unknown.—Kelm v. Lolland, 228 N.W. 420, 59 N.D. 18.

(2) Necessity of stating place of residence or lack of knowledge thereof see subdivision b (4) of this section.

81. Ill.—Allen v. Chicago, 52 N.E. 83, 176 Ill. 113.

Kan.—Ogden v. Walters, 12 Kan. 282.

82. Miss.—Hume v. Inglis, 122 So. 535, 154 Miss. 481.—McCray v. McCray, 102 So. 174, 137 Miss. 160.

83. Kan.—Bogle v. Gordon, 17 P. 857, 39 Kan. 31.

84. Kan.—Bogle v. Gordon, supra.

85. Ark.—Turnage v. Fisk, 22 Ark. 286.

50 C.J. p 515 note 65.

86. N.M.—Bowers v. Brazell, 244 P. 893, 31 N.M. 316.

50 C.J. p 515 note 66.

87. N.Y.—Lyon v. Baxter, 64 How. Pr. 426.

50 C.J. p 515 note 67.

88. Okl.—Lester v. Feuquay, 44 P. 2d 931, 172 Okl. 238.

89. N.Y.—Van Wyck v. Hardy, 4 Abb.Dec. 496, 39 How.Pr. 392.

90. Mo.—Davison v. Arne, 155 S.W. 2d 155, 348 Mo. 790.

91. Ind.—Whitney's Unknown Heirs v. Kimball, 4 Ind. 546, 53 Am.D. 638.

92. Cal.—McKendrick v. Western Zinc Min. Co., 130 P. 865, 165 Cal. 24.

93. Cal.—McKendrick v. Western Zinc Min. Co., supra.

94. N.Y.—Blute v. Fellowes, 128 N.Y.S. 18, 143 App.Div. 825, 2 Civ. Proc.N.S., 209, rehearing denied 129 N.Y.S. 1113, 145 App.Div. 901.

95. N.Y.—Towsley v. McDonald, 32 Barb. 604.

50 C.J. p 515 note 73.

96. Mont.—Aronow v. Bishop, 120 P.2d 423, 112 Mont. 611.

sufficient to call for judicial judgment, is sufficient to confer jurisdiction on the court granting the application.<sup>97</sup> An affidavit stating that up to about the time the action was brought defendant was a resident of the state, that about that time he departed from the state with intent to defraud his creditors or to avoid the service of a summons on him, and that plaintiffs are unable to ascertain either the post-office address or residence of such defendant, sufficiently shows that he was a resident of the state when the affidavit was made.<sup>98</sup>

**Concealment to avoid service.** In order to authorize service of summons by publication on a resident on the ground that he conceals himself so that process cannot be served on him, this fact must be stated by sworn bill or affidavit.<sup>99</sup>

(7) Inability to Find, or Make Personal Service on, Defendant in State

- (a) In general
- (b) Showing diligence

(a) In General

The affidavit or other sworn statement must comply with a statutory requirement that it show that the defendant cannot be found, or be personally served with process, in the state.

A number of statutes providing for service by publication are held to require an affidavit or other sworn statement, filed to obtain an order for such service, to show that personal service on defendant cannot be made within the state,<sup>1</sup> and others are held to require a statement in the affidavit or other sworn statement that defendant cannot be found in the state.<sup>2</sup> Where the statute requires the affidavit to allege that personal service cannot be made on defendant in the state, the requirement is not satisfied by a mere allegation that defendant is a non-

resident of the state.<sup>3</sup> It has also been held that it is insufficient merely to allege that defendant is a nonresident and that plaintiff is unable to make service of summons on defendant;<sup>4</sup> but there is also authority to the contrary.<sup>5</sup>

Alleging on information and belief that defendant cannot be served with process within the state may be sufficient.<sup>6</sup>

In at least one jurisdiction an affidavit for publication against a nonresident individual need not, in addition to stating that he is a nonresident, state that the ordinary process of law cannot be served on him in the state,<sup>7</sup> and a statute requiring the additional statement has been held applicable only where a foreign corporation, and not where an individual, is defendant.<sup>8</sup>

(b) Showing Diligence

- aa. Necessity
- bb. Effect of return "not found"
- cc. Requisites and sufficiency of averments

aa. Necessity

Where required by statute, an allegation that the defendant cannot be found, or be served personally with process, in the state must contain the additional statement that this cannot be done after the exercise of due diligence.

The statutes under consideration are very generally held to require that the affidavit shall show the exercise of due diligence to make personal service of process on defendant within the state and that, in the exercise of such diligence, such personal service could not be made<sup>9</sup> or to impose a like requirement as to stating that defendant cannot, after due diligence, be found in the state.<sup>10</sup> The statutes of some jurisdictions have been construed as having

97. N.Y.—*Stow v. Stacy*, 14 N.Y. Civ.Proc. 45.

98. Wis.—*Frisk v. Reigelman*, 43 N.W. 1117, 44 N.W. 766, 75 Wis. 499, 17 Am.S.R. 198.

99. Fla.—*Balian v. Wekiwa Ranch*, 122 So. 559, 97 Fla. 180.

**Affidavits held sufficient**

Cal.—*Langley v. Zurich General Accident & Liability Ins. Co.*, 25 P. 2d 418, 219 Cal. 101.

Okl.—*Nolan v. Schaetzel*, 292 P. 353, 145 Okl. 231.

1. Colo.—*Sine v. Stout*, 203 P.2d 495, 119 Colo. 254.

Ill.—*Anderson v. Anderson*, 11 N.E. 2d 216, 292 Ill.App. 421.

50 C.J. p 516 note 93.

Service by publication as not per-

missible where personal service practicable see supra § 54.

2. N.C.—*Groce v. Groce*, 199 S.E. 388, 214 N.C. 398.

3. Iowa.—*Carnes v. Mitchell*, 48 N.W. 941, 82 Iowa 601.  
50 C.J. p 517 note 94.

4. Ohio.—*Beachler v. Ford*, 60 N.E. 2d 330, 77 Ohio App. 41.  
50 C.J. p 517 note 95.

5. Kan.—*Elfert v. Elfert*, 294 P. 921, 132 Kan. 218.

N.C.—*Bethell v. Lee*, 158 S.E. 493, 200 N.C. 755.

50 C.J. p 517 note 96.

6. Neb.—*Leigh v. Green*, 86 N.W. 1093, 62 Neb. 344, 89 Am.S.R. 751, affirmed 24 S.Ct. 390, 193 U.S. 79, 48 L.Ed. 623.

50 C.J. p 517 note 98.

7. Mo.—*Hector v. Warren*, 124 S.W. 1119, 225 Mo. 255.  
50 C.J. p 517 note 99.

8. Mo.—*Huiskamp v. Miller*, 119 S.W. 633, 220 Mo. 135—*Keaton v. Jorndt*, 119 S.W. 629, 220 Mo. 117. Service of process on foreign corporation by publication see Corporations § 1946 c.

9. Okl.—*Richardson v. Howard*, 151 P. 887, 51 Okl. 240.  
50 C.J. p 517 note 2.

Necessity of diligence see supra § 58.

10. Cal.—*Narum v. Cheatham*, 15 P.2d 1106, 127 Cal.App. 505.

N.C.—*Rodriguez v. Rodriguez*, 29 S.E.2d 901, 224 N.C. 275—*Groce v. Groce*, 199 S.E. 388, 214 N.C. 398—*Denton v. Vassiliades*, 193 S.E. 737, 212 N.C. 513.

no application to nonresident defendants, and as not requiring an allegation of the exercise of due diligence, where it is alleged that defendant is a non-resident of the state;<sup>11</sup> but in other jurisdictions, where the question has been directly raised, it has been held that an averment that defendant is a non-resident of the state will not dispense with the necessity of showing that he cannot, by the exercise of due diligence, be found or personally served with process within the state.<sup>12</sup>

#### bb. Effect of Return "Not Found"

The requisite diligence may not be shown by an officer's return of "not found" unless the return is incorporated in the affidavit.

Where the statutes require all the facts necessary to confer the right to an order for service of process by publication to be shown by affidavit or other sworn statement, as discussed supra subdivision a of this section, the general rule is that a return of "not found" by an officer cannot be substituted for, and take the place of, an affidavit showing due diligence;<sup>13</sup> and, while there is authority apparently to the contrary,<sup>14</sup> it has also been generally held that the exercise of due diligence cannot be shown partly by affidavit and partly by a return;<sup>15</sup> but it is permissible to incorporate the return in the affidavit for the purpose of showing the exercise of due diligence,<sup>16</sup> and the return may be sufficient for that purpose.<sup>17</sup>

#### cc. Requisites and Sufficiency of Averments

Probative facts showing what diligence has been exercised must be alleged in the affidavit.

According to the weight of authority, it will not be sufficient to allege in general terms the exercise of due diligence; it is necessary to allege the probative facts showing what diligence has been exercised<sup>18</sup> so that the court can judicially determine whether reasonable diligence has been exercised.<sup>19</sup> In a limited number of jurisdictions, however, it is not necessary to allege the probative facts showing what diligence was exercised to obtain personal service.<sup>20</sup>

If the facts stated by the affidavit are not inconsistent with the presence or residence of defendant in the state at the date of the affidavit, it is insufficient.<sup>21</sup>

Stating on information and belief that defendant cannot, after the exercise of due diligence, be found within the state may constitute a sufficient basis for an order of publication;<sup>22</sup> but an affidavit by plaintiff stating no fact known to him, and containing purely hearsay statements, with respect to diligence, has been held insufficient.<sup>23</sup> An additional statement, although a mere expression of belief, has been held not to weaken, or detract from, a positive statement in the affidavit.<sup>24</sup>

*Nonresident defendants.* Affidavits in actions against nonresident defendants which have been held not to allege diligence sufficiently<sup>25</sup> include

11. Wash.—*DeCorvet v. Dolan*, 35 P. 72, 1072, 7 Wash. 365.

50 C.J. p 517 note 3 [a]—[e].

12. N.Y.—*Bixby v. Smith*, 3 Hun 60, 5 Thomps. & C. 279, 49 How. Pr. 50.

50 C.J. p 517 note 4.

13. S.D.—*Grigsby v. Wopschall*, 127 N.W. 605, 25 S.D. 564, 37 L.R.A., N.S., 206.

50 C.J. p 518 note 12.

14. U.S.—*Marx v. Ebner*, Alaska, 21 S.Ct. 376, 180 U.S. 314, 45 L.Ed. 547.

15. S.D.—*Grigsby v. Wopschall*, 127 N.W. 605, 25 S.D. 564, 37 L.R.A., N.S., 206.

50 C.J. p 518 note 14.

16. Cal.—*Seaver v. Fitzgerald*, 23 Cal. 85.

50 C.J. p 518 note 15.

17. Cal.—*Seaver v. Fitzgerald*, supra—*Weiss v. Cain*, 73 P. 980, 7 Cal.Unrep.Cas. 168.

**Return held insufficient**

An affidavit reciting that summons

was returned with indorsement that defendants after due diligence and search could not be found in "county" was insufficient to authorize service by publication because it did not allege that defendants could not, after due diligence, be found in "state."—*Denton v. Vassiliades*, 193 S.E. 737, 212 N.C. 513.

18. U.S.—*Butler v. McKay*, C.C.A. Cal., 138 F.2d 373, certiorari denied 64 S.Ct. 636, 321 U.S. 780, 88 L.Ed. 1073.

50 C.J. p 518 note 18.

What constitutes diligence; nature of effort required see supra § 58.

**Use of all reasonable means to discover the whereabouts of defendant should be shown by the affidavit.**—*Cone v. Ballard*, 5 N.W.2d 46, 68 S.D. 593, followed in *In re Ballard's Estate*, 5 N.W.2d 48, 68 S.D. 592.

**Affidavits held sufficient**

Okl.—*Frost v. Davis*, 79 P.2d 600, 182 Okl. 593.

S.D.—*Cone v. Ballard*, 5 N.W.2d 46, 68 S.D. 593, followed in *In re Ballard's Estate*, 5 N.W.2d 48, 68 S.D. 592.

50 C.J. p 518 note 18 [b].

**Affidavits held insufficient**

Or.—*Laughlin v. Hughes*, 89 P.2d 568, 161 Or. 295.

50 C.J. p 518 note 18 [a].

19. N.Y.—*Rome Trust Co. v. Cummings*, 206 N.Y.S. 728, 123 Misc. 884.

50 C.J. p 519 note 19.

20. Wis.—*Susterlee v. Sir*, 25 Wis. 357.

50 C.J. p 519 note 21.

21. Minn.—*Harrington v. Loomis*, 10 Minn. 366.

W.Va.—*State v. Young*, 117 S.E. 688, 94 W.Va. 7.

22. U.S.—*Butler v. McKay*, C.C.A. Cal., 138 F.2d 373, certiorari denied 64 S.Ct. 636, 321 U.S. 780, 88 L.Ed. 1073.

50 C.J. p 519 note 23.

23. Cal.—*Narum v. Cheatham*, 15 P. 2d 1106, 127 Cal.App. 505.

24. Okl.—*Ritchie v. Keeney*, 73 P. 2d 397, 181 Okl. 207.

**25. Affidavits held insufficient**

N.Y.—*Orr v. Currie*, 35 N.Y.S. 198, 14 Misc. 74, 25 N.Y.Civ.Proc. 16, 2 N.Y. Ann.Cas. 94.

50 C.J. p 520 note 34 [a].

those which allege merely the nonresidence of defendant;<sup>26</sup> that defendant is a nonresident and cannot be found within the state;<sup>27</sup> that defendant is a nonresident, living in an adjoining state, and that plaintiff will be unable, with due diligence, to make personal service on him within the state;<sup>28</sup> that defendants "cannot, after due diligence, be found within the state" and that defendants are not residents of the state;<sup>29</sup> that the officer had returned the summons not served and that due diligence had been used to find defendant;<sup>30</sup> that plaintiff had made every effort to serve process and had been unable to do so because defendant rarely came within the jurisdiction;<sup>31</sup> or that affiant believes "that the defendant is not a resident of the state or cannot be found therein."<sup>32</sup> Affidavits which have been held sufficient in this respect<sup>33</sup> include those which allege that defendants are not residents of the state but reside and, at the time of making the application, are at a designated place in another state.<sup>34</sup>

In some decisions the affidavit has been held sufficient if it presents facts showing clearly and conclusively that defendant is a nonresident living at the time in a distant state or country on the ground that this is sufficient to show that he could not, in the exercise of due diligence, be found or served with process within the state;<sup>35</sup> and a further allegation in the affidavit that defendant cannot with due diligence be served personally within the state will be regarded not solely as a conclusion of law, but as a statement of fact tending to show that due diligence has been used.<sup>36</sup>

*Absent or concealed defendants.* The rule requiring a statement of the probative facts showing what diligence has been used is not satisfied by a general averment that defendant cannot be found

within the state because of his absence therefrom, or concealment within it.<sup>37</sup> The affidavit should state the facts of inquiry and investigation, so that the court can see that the conclusion that the party cannot be found for the reason stated is a reasonable one on such facts;<sup>38</sup> and it has further been held that the proof of defendant's absence and of diligence in seeking to obtain service on him must be based on applicant's own knowledge, and not on information and belief.<sup>39</sup>

#### (8) Property of Defendant in State

A statutory requirement that the affidavit for service of process by publication in an action against a nonresident state that the defendant has property in the state is mandatory and must be complied with by making an allegation which is direct and specifies the property.

In the absence of statutory requirement, an affidavit for service of process by publication in an action against a nonresident need not state that he has property within the state;<sup>40</sup> but a statute imposing such a requirement is mandatory and must be complied with.<sup>41</sup> Where such an allegation is required, it should be direct and specify the property;<sup>42</sup> and it is not sufficient to state the fact on information and belief,<sup>43</sup> or to make the bare assertion that defendant has property in the state,<sup>44</sup> or to refer to the description in the complaint.<sup>45</sup>

#### (9) Other Facts

An affidavit filed for the purpose of obtaining service of process by publication may and must comply with statutory requirements as to stating that the defendant's property in the state has been attached, that no certificate of residence has been filed, that process has been returned unexecuted, that a copy of the summons and complaint has been mailed to the defendant at his place of residence, or that the defendant is a transient person or is out of the state.

26. N.C.—Groe v. Groce, 199 S.E. 388, 214 N.C. 398—Denton v. Vasiliades, 193 S.E. 737, 212 N.C. 513. 50 C.J. p 519 note 25.

27. U.S.—Flint v. Coffin, N.C., 176 F. 872, 100 C.C.A. 342, certiorari denied 30 S.Ct. 693, 217 U.S. 602, 54 L.Ed. 898, 31 S.Ct. 472, 219 U.S. 589, 55 L.Ed. 348. 50 C.J. p 519 note 26.

28. N.Y.—Kennedy v. Lamb, 74 N.E. 834, 183 N.Y. 228, 108 Am.S.R. 800. 50 C.J. p 520 note 27.

29. S.D.—Bothell v. Hoellwarth, 74 N.W. 231, 10 S.D. 491, 493.

30. Nev.—Victor Mill, etc., Co. v. Justice Ct., 1 P. 831, 18 Nev. 21.

31. N.Y.—Rose v. Heller, 179 N.Y.S. 821, 190 App.Div. 519.

32. Minn.—Corson v. Shoemaker, 57 N.W. 134, 55 Minn. 386, overruled

on other grounds Easton v. Childs, 69 N.W. 903, 67 Minn. 242.

33. Affidavits held sufficient N.Y.—Middleton v. Montague, 137 N.Y.S. 520, 152 App.Div. 702. 50 C.J. p 520 note 33 [a].

34. S.D.—Cochrane v. Germain, 87 N.W. 527, 15 S.D. 77. 50 C.J. p 520 note 32.

35. N.Y.—Sinnott v. Ennis, 105 N.Y.S. 218, 120 App.Div. 847. 50 C.J. p 520 note 35.

36. N.Y.—Jerome v. Flagg, 1 N.Y.S. 101, 48 Hun 351.

37. Mich.—Thompson v. Shiawassee County Cir. Judge, 19 N.W. 967, 54 Mich. 236. N.C.—Faulk v. Smith, 84 N.C. 501.

38. Mich.—Thompson v. Shiawassee County Cir. Judge, 19 N.W. 967, 54 Mich. 236. 50 C.J. p 521 note 39.

39. Mich.—Soule v. Hough, 8 N.W. 50, 159, 45 Mich. 418.

40. Cal.—Anderson v. Goff, 13 P. 73, 72 Cal. 65, 1 Am.S.R. 34.

41. N.C.—Martin v. Martin, 170 S.E. 651, 205 N.C. 157. 50 C.J. p 525 note 6. Property, or cause of action arising, in state see supra subdivision b (1) of this section.

42. U.S.—McDonald v. Cooper, C.C. Or., 32 F. 745, 13 Sawy. 86. 50 C.J. p 525 note 8.

43. Minn.—Feikert v. Wilson, 37 N.W. 585, 38 Minn. 341. 50 C.J. p 526 note 11.

44. U.S.—McDonald v. Cooper, C.C., 32 F. 745, 13 Sawy. 86.

45. Minn.—Wiik v. Russell, 218 N.W. 110, 173 Minn. 580.

An averment in an affidavit that the persons to be served reside outside the state is sufficient to assert the statutory ground that defendant is "out of the state."<sup>46</sup>

*Failure to file certificate of residence.* Under a statute providing that, where service by publication is sought on the ground that defendant cannot, after due and diligent search, be found within the state, the affidavit must further state that no certificate of residence has been filed on behalf of defendant, or, if such certificate has been filed, the sheriff could not find him in the place therein designated, the fact that the affidavit alleges that defendant resided out of the state does not obviate the necessity for making this statement.<sup>47</sup> If, however, the affidavit is based on the ground that defendant resided out of the state, the affidavit need not state that no certificate of residence had been filed.<sup>48</sup>

*Levy of attachment.* Where the levy of a warrant of attachment on property of a nonresident defendant within the state is made a condition precedent to the allowance of an order of publication, as discussed supra § 59, the affidavit must show that such warrant has been levied on defendant's property,<sup>49</sup> and it must state pertinent facts as to the manner in which the levy was made so as to prove that a proper levy was made.<sup>50</sup>

*Mailing copy of summons or complaint to defendant's residence.* Under statutes requiring the affidavit for service of process by publication to state that plaintiff has mailed a copy of the summons, or a copy of the summons and complaint, to defendant at his place of residence, or to state that such place of residence is not known, the affidavit need not allege the mailing of a copy of the summons and complaint where it alleges that defendant's place of residence is unknown to affiant.<sup>51</sup> The requirement of the statute is not satisfied by an averment that affiant has mailed a copy of the summons "to the

last known residence address" of defendant.<sup>52</sup>

*Return of process unexecuted.* Under statutes which authorize service of process by publication where process directed to the officer of the county in which defendant resides, or is, has been twice delivered to such officer more than ten days before the return day, and has been returned without being executed, an affidavit which reasonably imports these facts is sufficient;<sup>53</sup> but an affidavit that the persons reside in, or are in, the county, and which omits the words "more than" before "ten days," is insufficient.<sup>54</sup>

*Transient defendants.* In order to authorize a judgment against defendant on constructive service as a transient person, he must be shown to be a transient.<sup>55</sup>

## § 65. Order for Publication

- a. In general
- b. Basis
- c. Form and contents

### a. In General

An order of publication is essential to service of process by publication where it is required by statute.

An order of publication is essential to service of process by publication where it is required by statute,<sup>56</sup> but not otherwise.<sup>57</sup> Under some statutes an order is necessary in some, but not other, cases in which service by publication is had.<sup>58</sup> It has been said that such an order takes the place of process and that its purpose is to bring a party into court, apprise him of the nature of the proceeding against him, and to notify him that his rights will be affected thereby.<sup>59</sup>

*By whom made.* Under some statutes, an order of publication is to be made by the clerk of court,<sup>60</sup> under others it is to be made by the court or

46. Del.—Perrine v. Pennroad Corporation, 168 A. 196, 19 Del.Ch. 368.

47. Cal.—McPhail v. Nunes, 177 P. 193, 38 Cal.App. 557.

48. Cal.—Davis-Heller-Pearce v. Ramont, 226 P. 972, 66 Cal.App. 778.

49. N.Y.—Rome Trust Co. v. Cummings, 206 N.Y.S. 728, 128 Misc. 884.

50 C.J. p 523 note 78.

50. N.Y.—Goodale v. Central Greyhound Lines, 91 N.Y.S.2d 613, 196 Misc. 71.

**Conclusion held insufficient**

N.Y.—Steese v. Steese, 251 N.Y.S. 164, 140 Misc. 611.

51. Wash.—Musselman v. Knottingham, 137 P. 1012, 77 Wash. 435.

52. Minn.—Wiik v. Russell, 218 N. W. 110, 173 Minn. 580.

53. W.Va.—U. S. Oil, etc., Well Supply Co. v. Gartlan, 64 S.E. 933, 65 W.Va. 689.

54. W.Va.—State v. Young, 117 S.E. 688, 94 W.Va. 7.

55. Tex.—Adamson v. Collins, Civ. App., 286 S.W. 598.

56. U.S.—King Tonapah Min., etc., Co. v. Lynch, D.C.Nev., 232 F. 485. 50 C.J. p 527 note 34.

57. Ariz.—Collins v. Streitz, 54 P.2d 264, 47 Ariz. 146, appeal dismissed

56 S.Ct. 835, 298 U.S. 640, 80 L.Ed. 1373.

50 C.J. p 527 note 33.

58. Mich.—Porter v. Chenot, 6 N. W.2d 925, 303 Mich. 651.

Neb.—Schmehl v. Buffalo County, 32 N.W.2d 915, 149 Neb. 897—West Nebraska Land Co. v. Eslick, 169 N.W. 729, 102 Neb. 761.

59. Va.—Peatross v. Gray, 27 S.E.2d 203, 181 Va. 847.

Purpose of statutes authorizing service by publication see supra § 55.

60. Utah.—Cohn v. Lawrence, 120 P. 233, 40 Utah 264.

50 C.J. p 528 note 35 [a], [f] (1).



judge,<sup>61</sup> and under still others it is to be made by the court in some,<sup>62</sup> and by the clerk in other,<sup>63</sup> cases or situations. So too, under some statutes, a clerk of court acts ministerially and not judicially in making or issuing an order of publication;<sup>64</sup> but under other statutes he acts judicially<sup>65</sup> or his duty in granting the order is somewhat of a judicial character.<sup>66</sup>

### b. Basis

An order for publication must be authorized by the facts stated in the required affidavit or other sworn statement; and under some statutes the order may not be made unless the court, judge, or clerk issuing it is satisfied that the conditions for service by publication exist.

The order must be authorized by the facts stated in the required affidavit or other sworn statement;<sup>67</sup> and an order based on a ground other than the one stated in the affidavit or pleading used as a substitute therefor is void.<sup>68</sup>

Where the affidavit or complaint states the facts

made essential by statute as a prerequisite to this mode of service, the right to an order of publication is, by some statutes, made absolute, and it is immaterial whether or not such statements are true.<sup>69</sup> Under other statutes, however, it is the truth, rather than the making, of the affidavit which enables the court to acquire jurisdiction by publication,<sup>70</sup> and an order for service of process by publication may properly be made when, but only when, the court, judge, or clerk, as the case may be, is satisfied that the condition for service by publication exist.<sup>71</sup> Still another view is that, before the statements of fact in the affidavit are challenged in some recognized legal proceeding, it is immaterial whether or not they are true,<sup>72</sup> but that when, at a permissible time, an interested party files an objection impugning the allegations as untrue, it then becomes necessary for the court or judge to set the matter for hearing and determine whether or not the challenged allegations are true.<sup>73</sup> At any rate, if the facts stated in the affidavit are sufficient to

#### 61. In New York

Prior to the amendment of the statute so as to allow the order made by the court or a judge the order was required to be made by a judge.—Crosby v. Thedford, 13 Daly 150, 7 N.Y.Civ.Proc. 245—50 C.J. p 528 note 35 [d].

62. Ind.—Knue v. Knue, 28 N.E.2d 76, 217 Ind. 319.  
50 C.J. p 528 note 35 [c] (5).

63. Mo.—Himmelberger - Harrison Lumber Co. v. Keener, 117 S.W. 42, 217 Mo. 522.  
50 C.J. p 528 note 35 [c] (1)-(3).

64. Fla.—Newport v. Culbreath, 162 So. 340, 120 Fla. 152.  
50 C.J. p 528 note 35 [a].

The Corpus Juris text has been cited in holding that an order of court made by the register is a ministerial and not a judicial act of the register.—Smith v. Smith, 23 So.2d 605, 611, 247 Ala. 213.

65. Utah.—Cohn v. Lawrence, 120 P. 223, 40 Utah 264.  
50 C.J. p 528 note 35 [f] (2).

66. S.C.—Yates v. Gridley, 16 S.C. 496.  
50 C.J. p 528 note 35 [e].

67. Cal.—Narum v. Cheatham, 15 P. 2d 1106, 127 Cal.App. 505.  
Or.—Dixie Meadows Independence Mines Co. v. Kight, 45 P.2d 909, 150 Or. 395.  
50 C.J. p 528 note 40.

#### Presumption of consideration

When order of publication recites reading and filing of affidavit, it must be presumed, in the absence of anything to the contrary, that court read and filed affidavit before

making the order.—Bullard v. Superior Court in and for Los Angeles County, 288 P. 629, 106 Cal.App. 513.

68. N.Y.—Sonnak v. Walker, 180 N.Y.S. 847, 191 App.Div. 156.  
50 C.J. p 528 note 44.

69. Wis.—Gallum v. Well, 92 N.W. 1091, 116 Wis. 236.

#### In Florida

(1) It is the duty of the clerk of court to issue an order of publication when the form of the statute invoking the duty on his part has been duly observed.—Newport v. Culbreath, 162 So. 340, 120 Fla. 152.

(2) While chancellor may, at the time constructive service is made returnable, require proof of good faith, diligence, and the like on part of party resorting to constructive service, such is not essential to valid constructive service as long as allegations follow words of statute.—Cone Bros. Const. Co. v. Moore, 193 So. 288, 141 Fla. 420.

70. Tex.—Kitchen v. Crawford, 13 Tex. 516.

71. Mich.—Kretschmar v. Rosasco, 229 N.W. 446, 250 Mich. 9—Union Guardian Trust Co. v. Cherluk, 267 N.W. 569, 275 Mich. 282.

N.Y.—Carpenter v. Weatherwax, 90 N.Y.S.2d 618, 275 App.Div. 980.  
50 C.J. p 528 note 35 [e], [f] (3).  
Issuance of order as judicial or ministerial act of clerk see supra subdivision a of this section.

#### In Missouri

(1) No judicial investigation or determination is necessary before making an order for publication under Mo.Rev.St. § 891; the order is based not on the ascertainment of

the fact that defendant is nonresident or inaccessible, but on the fact that it is so stated in the petition or in the affidavit.—Cummings v. Brown, 81 S.W. 158, 181 Mo. 711—50 C.J. p 528 note 35 [c] (4).

(2) On the other hand, an order for publication may be made under Mo.Rev.St. § 893, relating to a case where summons has been issued and a return that defendant cannot be found has been made, only when there has been a judicial investigation and the court has become satisfied that process cannot be served.—Williams v. Luecke, App., 152 S.W. 2d 991—50 C.J. p 528 note 35 [c] (6).

(3) Under the latter statute, it is possible for the court to become satisfied, from nothing more than the return, that process cannot be served.—Williams v. Luecke, supra—50 C.J. p 518 note 12 [a].

(4) However, the court is not restricted to return in ascertaining whether defendants can be found within jurisdiction so that another summons can be served on them.—Williams v. Luecke, supra.

(5) A finding by court that defendant cannot be served in county where court is situated is not sufficient to authorize an order of publication based on a non est return.—Diekroger v. McCormick, 163 S.W.2d 927, 349 Mo. 1098.

72. Okl.—Jupe v. Home Owners Loan Corp., 167 P.2d 46, 196 Okl. 588—Lausten v. Union Nat. Bank of Bartlesville, 173 P. 823, 70 Okl. 178.

73. Neb.—Jackman v. Miller, 229 N.W. 778, 119 Neb. 488.

give the court jurisdiction to make the order, it is not subject to collateral attack.<sup>74</sup>

*Facts existing at time order made.* An order for service of process by publication must be based on facts existing at the time it was made;<sup>75</sup> but it is not necessary that the making of the affidavit and the order should follow in instantaneous succession;<sup>76</sup> and it is necessary and sufficient that the order be based on an affidavit made and presented within a reasonable time before the making of the order,<sup>77</sup> that is, within such a time that no presumption can fairly arise that the state of facts presented by the affidavit has changed in the meantime.<sup>78</sup>

Although an affidavit for publication was not filed within a reasonable time before the granting of the order, the order will be upheld where a supplemental affidavit, showing the existence of the jurisdictional facts, was filed one day before the order was granted.<sup>79</sup>

### c. Form and Contents

- (1) In general
- (2) Jurisdictional facts
- (3) Nature, object, and identification of action
- (4) Names and interests of parties
- (5) Day for appearance
- (6) Direction

#### (1) In General

An order for publication must be in writing and comply with statutory requirements as to contents. When otherwise valid, it is not vitiated by surplusage.

The requirements of the statute as to the con-

tents of an order for publication must be complied with and a substantial failure to do so renders the order fatally defective;<sup>80</sup> but a substantial compliance with the requirements of the statute has been held sufficient.<sup>81</sup> The order need not follow the exact language of the statute if the meaning of it is the same,<sup>82</sup> and obviously it is not necessary to comply with a statute which is inapplicable.<sup>83</sup> It has been held that the order must be strictly construed.<sup>84</sup>

The order must be in writing;<sup>85</sup> but, in the absence of a statute requiring it, neither a seal<sup>86</sup> nor a date<sup>87</sup> is essential to the validity of the order. Signature of the clerk of court is not essential in the absence of a statute requiring it;<sup>88</sup> but, when such signature is required by statute, failure of the clerk to sign the order of publication has been held to render the order fatally defective.<sup>89</sup>

It has been held that failure of the judge, to whom the order is tendered for signature, to sign it is fatal;<sup>90</sup> but it has also been held that the judge's signature is not essential to the validity of an order of court which derives its validity from the fact, evidenced by record, that it is made by the court during the transaction of its official business.<sup>91</sup>

*Surplusage.* An otherwise valid order is not vitiated by surplusage.<sup>92</sup>

*Second order.* Where, after obtaining an order for publication, plaintiff, believing the affidavits to be insufficient, procures another order, the validity of the second order is not destroyed by the existence of the first.<sup>93</sup>

74. N.Y.—*Evans v. Weinstein*, 108 N.Y.S. 753, 124 App.Div. 316, affirmed 88 N.E. 1119, 195 N.Y. 549. 50 C.J. p 529 note 48.

75. Mich.—*Union Guardian Trust Co. v. Grevnin*, 246 N.W. 143, 266 Mich. 344. 50 C.J. p 529 note 49.

76. Ark.—*Cannon v. Lunsford*, 115 S.W. 940, 89 Ark. 64. Wis.—*Roosevelt v. Land, etc., Impr. Co.*, 84 N.W. 157, 108 Wis. 653.

77. Utah.—*Atkinson v. Atkinson*, 134 P. 595, 43 Utah 53, 47 L.R.A., N.S., 499. 50 C.J. p 529 notes 52, 54.

**Delay of two days held not unreasonable**  
Mich.—*Adams v. Hosmer*, 56 N.W. 1051, 98 Mich. 51. 50 C.J. p 529 note 55 [b].

**Delay held unreasonable**  
Ill.—*Campbell v. McCahan*, 41 Ill. 45. 50 C.J. p 529 note 56 [a]—[g].

78. Utah.—*Atkinson v. Atkinson*, 134 P. 595, 43 Utah 53, 47 L.R.A., N.S., 499.

50 C.J. p 529 notes 53, 54.

79. Cal.—*Brown v. Sandell*, 249 P. 209, 79 Cal.App. 313.

80. Wis.—*De Fyn v. Power*, 167 N.W. 447, 167 Wis. 342. 50 C.J. p 529 note 59.

81. N.Y.—*Gay v. Ulrichs*, 121 N.Y.S. 726, 136 App.Div. 809. 50 C.J. p 530 note 60.

82. Mont.—*Smith v. Collis*, 112 P. 1070, 42 Mont. 350, Ann.Cas.1912A 1158.

83. U.S.—*Thomson v. Butler*, C.C.A. Mo., 136 F.2d 644, certiorari denied 64 S.Ct. 69, 320 U.S. 761, 88 L.Ed. 454, rehearing denied 64 S.Ct. 156, 320 U.S. 813, 88 L.Ed. 491.

84. Va.—*Peatross v. Gray*, 27 S.E. 2d 203, 181 Va. 847.

85. Iowa.—*Carr v. King*, 169 N.W. 133, 184 Iowa 734.

86. S.C.—*Clemson Agricultural College v. Pickens*, 20 S.E. 401, 42 S.C. 511.

87. S.C.—*Clemson Agricultural College v. Pickens*, supra. 50 C.J. p 530 note 64.

88. Minn.—*Smith v. Valentine*, 19 Minn. 452.

89. S.C.—*Du Bose v. Du Bose*, 72 S.E. 645, 90 S.C. 87. 50 C.J. p 530 note 67.

90. Nev.—*Brockbank v. Second Judicial Dist. Court in and for Washoe County*, 201 P.2d 299, 65 Nev. 781.

91. Mo.—*Williams v. Luecke*, App. 152 S.W.2d 991.

92. Mo.—*Kansas City v. Woerishoeffer*, 155 S.W. 779, 249 Mo. 1. 50 C.J. p 530 note 72.

93. N.Y.—*Littlejohn v. Leffingwell*, 54 N.Y.S. 536, 34 App.Div. 185.

## (2) Jurisdictional Facts

It has been held that an order for publication need not recite a finding of the jurisdictional facts required to appear in the affidavit.

In some jurisdictions it has been held that the order must state the facts showing that publication is authorized,<sup>94</sup> but in other jurisdictions it has been held that the order need not recite a finding of the jurisdictional facts which are required to appear in the affidavit,<sup>95</sup> and if it does so such recital may be treated as surplusage.<sup>96</sup> The order, it has been said, is only the conclusion of the court based on the affidavit and need not contain any recitals of facts whatever.<sup>97</sup> It will be presumed from the fact of making the order that the jurisdictional facts necessary to its making were duly established by the affidavit<sup>98</sup> or by the affidavit and complaint.<sup>99</sup>

## (3) Nature, Object, and Identification of Action

It is necessary to comply with a statutory requirement that the order state briefly and generally the object and nature of the action.

Noncompliance with a statutory requirement that the order of publication state briefly in general terms the object and nature of the action renders the order fatally defective.<sup>1</sup> The words "this cause" appearing in an order are deemed to refer to the cause designated in the caption and to give defendant sufficient notice of the particular suit in which he is to appear.<sup>2</sup>

## (4) Names and Interests of Parties

The names of all defendants, if known, must be correctly stated in the order for publication; and if their names are unknown the order must so state and comply with statutory requirements as to describing the property involved and stating the interest of the defendants therein.

The names both of plaintiffs<sup>3</sup> and of defendants, if known,<sup>4</sup> should be correctly stated in the order.

Publication is ineffective as against one of several defendants not named in the order,<sup>5</sup> even though publication was actually made against all of them;<sup>6</sup> and it has been held that an order is void where it names only the defendant on whom service is made by publication and omits a resident defendant.<sup>7</sup>

If it is sought to serve by publication unknown persons as parties defendant, the order must state the fact that they are unknown<sup>8</sup> and comply with a statutory requirement that it definitely and briefly describe the property involved.<sup>9</sup> An order for publication against unknown defendants which advises defendants of the identical facts as to their interest alleged in the petition is sufficient on collateral attack although it does not do so in the identical words of the petition.<sup>10</sup>

## (5) Day for Appearance

An order of publication is void where, in fixing the date for the defendant's appearance, it does not conform to statutory provisions on the subject.

An order fixing the date of appearance otherwise than in accordance with the statutory provisions on the subject is void;<sup>11</sup> but in the absence of a statutory requirement to that effect it is not necessary that the order should fix a specific day for defendant's appearance.<sup>12</sup>

## (6) Direction

- (a) Of publication
- (b) Of mailing of copies of summons, complaint, and order
- (c) Of alternative method of service

## (a) Of Publication

The order should contain such directions as to publication as are required by statute.

The order should direct publication of summons in accordance with the provisions of the statute au-

94. Nev.—Little v. Currie, 5 Nev. 90.

95. Tenn.—Allen v. Gilliland, 6 Lea 521.

50 C.J. p 531 note 85.

96. Or.—Goodale v. Coffee, 33 P. 990, 24 Or. 346.

97. Or.—Goodale v. Coffee, supra.

98. Cal.—Wilson Co. v. Trainor, 148 P. 954, 27 Cal.App. 43.

N.Y.—Barnard v. Heydrick, 49 Barb. 62, 2 Abb.Pr., N.S., 47, 32 How.Pr. 97.

99. Or.—Knapp v. King, 6 Or. 243.

1. Mo.—Winningham v. Trueblood, 51 S.W. 399, 149 Mo. 572.

50 C.J. p 531 note 92.

2. Fla.—Gantier Properties v. Biscayne Trust Co., 129 So. 848, 100 Fla. 403.

3. Iowa.—Newman v. Bowers, 34 N.W. 212, 72 Iowa 465.

50 C.J. p 530 note 77.

4. Va.—Brown v. Bowden, 159 S.E. 213, 156 Va. 517.

50 C.J. p 530 note 78.

Name by which defendant is known may be used in the order.—Gautier Properties v. Biscayne Trust Co., 129 So. 848, 100 Fla. 403—50 C.J. p 530 note 78 [c].

5. Mo.—Pomeroy v. Betts, 31 Mo. 419.

Va.—Brown v. Bowden, 159 S.E. 213, 156 Va. 517.

6. Mo.—Pomeroy v. Betts, 31 Mo. 419.

7. Mo.—Van Natta v. Harroun Real Estate Co., 120 S.W. 738, 221 Mo. 373.

8. Mo.—State v. Staley, 76 Mo. 158.

9. Fla.—Cone v. Benjamin, 27 So.2d 90, 157 Fla. 800.

Statute applies to personal property as well as real property.—Cone v. Benjamin, supra.

10. Mo.—Hambel v. Lowry, 174 S.W. 405, 264 Mo. 168.

50 C.J. p 530 note 75.

11. Fla.—Laffin v. Gato, 42 So. 387, 52 Fla. 529.

50 C.J. p 531 note 96.

12. Mich.—Lewis v. Weidenfeld, 72 N.W. 604, 114 Mich. 581.

50 C.J. p 531 note 94.

thorizing publication.<sup>13</sup> It should designate the newspaper in which publication is to be made;<sup>14</sup> but a failure to do so has been considered an unsubstantial omission which is not fatal.<sup>15</sup> Although the statutes frequently require in express terms that the order shall direct publication in a paper most likely to give notice to defendant, this fact need not be recited in the order where the statutes do not specifically require such recital.<sup>16</sup>

*Duration of publication.* Statutory requirements as to directions as to the length of time during which publication shall be made must be complied with;<sup>17</sup> but there is authority to the effect that, if publication is made for the proper length of time, it will not be vitiated by the fact that the directions of the order were for publication for a shorter period of time than required by statute.<sup>18</sup>

#### (b) Of Mailing of Copies of Summons, Complaint, and Order

It is necessary that an order of publication comply with a statutory requirement as to directing the mailing of copies of certain papers to the person to be served.

There must be a compliance with a statutory requirement that the order of publication shall direct copies of the summons, or of the complaint and summons, or of the complaint, order, and summons, to be deposited in the post office directed to defendant to be served at his place of residence, if it is known or can be ascertained;<sup>19</sup> but a substantial compliance with such a statute has been held sufficient.<sup>20</sup>

Where defendant's place of residence is given by the affidavit, the order must direct the copies to be sent to the place so designated,<sup>21</sup> and where the order directs the mailing to be made to a place different from that so designated the court acquires no

jurisdiction<sup>22</sup> even though personal service on defendant at the place designated by the affidavit is made under an alternative clause in the order.<sup>23</sup>

*Time of mailing.* There must be a compliance with statutory requirements as to directions contained in the order as to the time of mailing copies or the order will be void.<sup>24</sup> Although the statute provides that the order shall direct that copies shall be mailed "forthwith," it has been held that the omission of the word "forthwith" in the order is at most an irregularity, which does not render the proceedings void on collateral attack, if it appears that, in fact, the copies were mailed within a reasonable time.<sup>25</sup>

*Designating post office.* If the statute provides that the order shall direct the deposit of copies in a designated post office, this requirement must be complied with or the order will be insufficient.<sup>26</sup>

*Where residence is unknown.* If it appears by the affidavit that defendant's residence is unknown and cannot be ascertained, the order need not contain a provision requiring the depositing of a copy of the summons<sup>27</sup> or notice<sup>28</sup> in the post office. Nevertheless, if the order omits such direction, it must appear from the affidavit that after reasonable diligence plaintiff had been unable to ascertain such place of residence.<sup>29</sup>

#### (c) Of Alternative Method of Service

Under a statute providing that the order shall direct service by publication or, at the option of the plaintiff, service of process without the state, the order need not direct both methods of service where the plaintiff elects to have service made in one of the alternative methods.

Under a statute providing that the order shall direct service by publication or, at the option of plaintiff, service of process without the state, the

13. Iowa.—Guise v. Early, 33 N.W. 683, 72 Iowa 283.

50 C.J. p 531 note 97.

14. Iowa.—Guise v. Early, supra.

50 C.J. p 531 note 99.

15. Ala.—Corpus Juris cited in Smith v. Smith, 23 So.2d 605, 611, 247 Ala. 213.

50 C.J. p 531 note 99 [c].

16. N.C.—Smith v. Smith, 39 S.E.2d 391, 226 N.C. 506.

50 C.J. p 532 note 2.

17. Wis.—Roosevelt v. Ulmer, 74 N.W. 124, 98 Wis. 356.

50 C.J. p 532 note 5.

18. Ky.—Blight v. Banks, 6 T.B. Mon. 192, 17 Am.D. 136.

50 C.J. p 532 note 6.

19. Wis.—De Fyn v. Power, 167 N.W. 447, 167 Wis. 342.

50 C.J. p 532 note 9.

Mailing in lieu of aid of publication see infra §§ 77, 78.

**Entire failure to include direction**

An order for publication which entirely omits to include a direction as to mailing copies in accordance with the statutory requirements is fatally defective.—Victor Mill, etc., Co. v. Justice Ct., 1 P. 831, 18 Nev. 21—50 C.J. p 533 note 21.

20. N.Y.—Littlejohn v. Leffingwell, 54 N.Y.S. 536, 34 App.Div. 185.

50 C.J. p 532 note 10.

21. S.D.—Ryan v. Simpson, 132 N.W. 691, 28 S.D. 157.

50 C.J. p 532 note 12.

22. Wis.—Beaupre v. Brigham, 48 N.W. 596, 79 Wis. 436.

50 C.J. p 532 note 13.

23. Wis.—Beaupre v. Brigham, supra.

24. N.Y.—Eleventh Ward Bank v. Powers, 59 N.Y.S. 314, 43 App.Div. 178.

50 C.J. p 532 note 15.

25. Or.—Colfax Bank v. Richardson, 54 P. 359, 34 Or. 518, 75 Am. S.R. 664.

50 C.J. p 532 note 16.

26. N.Y.—Eleventh Ward Bank v. Power, 59 N.Y.S. 314, 43 App.Div. 178.

50 C.J. p 533 note 17.

27. N.Y.—Spaugh v. Schaffner, 2 N.Y.S. 189.

50 C.J. p 533 note 18.

28. Ga.—Watters v. Southern Brighton Mills, 147 S.E. 37, 168 Ga. 15.

29. U.S.—Neff v. Pennoyer, C.C.Or., 17 F.Cas.No.10,083, 3 Sawy. 274, affirmed 95 U.S. 714, 24 L.Ed. 565.

order need not direct both methods of service where plaintiff elects to have service made in one of the alternative methods.<sup>30</sup> An order directing either method alone followed by due service in that manner will be equally good with one which directs both with an option to choose either.<sup>31</sup> It has been held that, if plaintiff makes no election between the two modes of service, and the order is in the alternative, and service is duly made by one of the two methods, defects in the other method attempted to be authorized will not invalidate the order;<sup>32</sup> but there is also authority directly to the contrary.<sup>33</sup> Where the statute provides that, if the post office of defendant is known, the order must direct the mailing of copies to be deposited in a specified post office addressed to defendant at his post-office address, and that if his address cannot be ascertained the order must direct that the deposit may be omitted because defendant's post-office address cannot be ascertained, the order must contain one of two directions, and an order directing deposit of copies to the last known address of defendant, if it can be ascertained, and, if not, the mailing of copies to be omitted, is fatally defective.<sup>34</sup>

## § 66. — Filing and Entry

When required by statute, filing or entry of an order of publication is necessary to confer jurisdiction.

Where a statute requires an order for publication and the papers upon which it is made to be filed with the clerk on or before the day of the first publication, the filing of the order and papers is a condition precedent to the jurisdiction by the court.<sup>35</sup> Nevertheless, where the order and accompanying papers are delivered to the clerk and he retains them in his possession instead of filing them, the failure does not amount to a jurisdictional defect.<sup>36</sup> Where the statute does not prescribe that the order shall be filed at the time the complaint

is filed, failure to file the order until after the filing of the summons and complaint does not invalidate publication of the summons.<sup>37</sup>

**Entry.** In the absence of a statutory requirement to that effect, it has been held that no entry of the order of publication is necessary.<sup>38</sup> Where the statute requires entry of the order, it has been held that the court acquires no jurisdiction, and the proceedings are void, unless the statute is complied with; but in some jurisdictions, where the entry of order is provided for by rule of court,<sup>40</sup> or where a statute was mentioned by the court in passing on the question,<sup>41</sup> it has been held that failure to enter the order is, at most, an irregularity,<sup>42</sup> not available in collateral proceedings.<sup>43</sup>

## § 67. Publication of Notice

Publication of the notice prescribed by statute is essential to service of process by publication.

The publication of the notice prescribed by statute authorizing service of process by publication is indispensable.<sup>44</sup>

## § 68. — Mode of Publication

The mode of publication prescribed by statute must be strictly followed.

The mode of publication prescribed by statute must be strictly followed.<sup>45</sup> If the statutory requirements are followed the publication will be sufficient.<sup>46</sup>

## § 69. — Form and Contents of Notice Published

- a. In general
- b. Nature and object of action or petition
- c. Names of parties

30. N.Y.—*In re Field*, 30 N.E. 48, 131 N.Y. 184.

50 C.J. p 533, note 25.

31. N.Y.—*In re Field*, *supra*.

32. N.Y.—*Sabin v. Kendrick*, 37 N.Y.S. 524, 2 App.Div. 96.

50 C.J. p 533, note 27.

33. Wis.—*Beaupre v. Brigham*, 48 N.W. 596, 79 Wis. 436.

50 C.J. p 533, note 28.

34. Wis.—*De Fyn v. Power*, 167 N.W. 447, 167 Wis. 342.

35. N.Y.—*Wilson v. Banque Francaise du Mexique*, 208 N.Y.S. 213, 124 Misc. 690.

50 C.J. p 533, note 32.

36. N.Y.—*Fink v. Wallach*, 96 N.Y.S. 543, 109 App.Div. 718.

50 C.J. p 533, note 34.

37. N.D.—*Pillsbury v. Streeter*, 107 N.W. 40, 15 N.D. 174.

38. Ala.—*Smith v. Smith*, 23 So.2d 605, 247 Ala. 213.

N.Y.—*Fink v. Wallach*, 96 N.Y.S. 543, 109 App.Div. 718.

39. Ark.—*Gregory v. Bartlett*, 17 S.W. 344, 55 Ark. 30.

40. Minn.—*Smith v. Valentine*, 19 Minn. 452.

41. Ind.—*Horn v. Indianapolis Nat. Bank*, 25 N.E. 558, 125 Ind. 381, 383, 21 Am.S.R. 231, 9 L.R.A. 676.

42. Ind.—*Horn v. Indianapolis Nat. Bank*, *supra*.

Minn.—*Smith v. Valentine*, 19 Minn. 452.

43. Ind.—*Horn v. Indianapolis Nat.*

Bank, 25 N.E. 558, 125 Ind. 381, 2 Am.S.R. 231, 9 L.R.A. 676.

44. Ky.—*Corpus Juris* quoted in *Booth v. Copley*, 140 S.W.2d 661, 665, 283 Ky. 23.

Mich.—*Barnes v. Curry*, 205 N.W. 484, 232 Mich. 532.

50 C.J. p 534, note 45.

45. N.C.—*S. D. Scott & Co. v. Jones*, 52 S.E.2d 219, 230 N.C. 74.

Or.—*Dixie Meadows Independence Mines Co. v. Kight*, 45 P.2d 905, 150 Or. 395.

50 C.J. p 534, note 49.

46. N.Y.—*Mishkind-Feinberg Realty Co. v. Sidorovsky*, 98 N.Y.S. 496, 111 App.Div. 578, affirmed 82 N.E. 448, 189 N.Y. 402.

50 C.J. p 534, note 50.

- d. Description of property
- e. Time for appearance

### a. In General

The published notice must comply with statutory requirements as to form and contents; but substantial compliance therewith is sufficient.

The form of notice for service by publication and what it shall contain rest in legislative discretion, subject to the restriction that the notice shall be of such character that it will have a tendency, in a reasonable degree, to convey information to interested persons that the action affects their rights.<sup>47</sup> Statutes authorizing service of process by publication vary considerably as to the form which the published notice shall take, but the form prescribed should be followed, whether it be a copy of the summons in the action,<sup>48</sup> a copy of the order for publication,<sup>49</sup> a copy of the warning order,<sup>50</sup> or other specified form.<sup>51</sup> A copy of the complaint need not be published where the statute requires publication only of a copy of the summons.<sup>52</sup>

The notice must purport to be an official act;<sup>53</sup> but, where a statute providing for notice prescribes no form, the notice need not bear the style "the state of" or the seal of the court, nor need it be signed by the clerk.<sup>54</sup>

The contents of the notice should fairly communicate to defendant the fact of the commencement of the suit and its general nature, so that he may ascertain whether his interests are affected.<sup>55</sup> There must be a compliance with statutory requirements as to what the notice, or paper published as notice, shall contain in order to give the court jurisdiction.<sup>56</sup> Where the statute prescribes certain things

which the published notice shall contain, they all must be considered essential, and the absence of any of them in the published notice is fatal to the jurisdiction;<sup>57</sup> but the notice need contain nothing which is not required by statute.<sup>58</sup> In determining the sufficiency of the notice published, the substantial, rather than the technical and literal, requirements of the statute are to be observed;<sup>59</sup> hence substantial compliance with the requirements of the statute as to what the notice shall contain will be sufficient,<sup>60</sup> and a notice otherwise sufficient will not be rendered insufficient by informalities in the manner and order of stating the necessary facts,<sup>61</sup> or by formal defects or omissions<sup>62</sup> which are not calculated to mislead,<sup>63</sup> or by surplusage.<sup>64</sup> Nevertheless, the contents of a published notice are measured with greater strictness than where notice is personally served.<sup>65</sup>

*Residence or post-office address of defendant.* The description of defendant's residence by the name of the city and state, without the addition of the street address, may be sufficient;<sup>66</sup> and the misspelling of the post office will not avoid the process if the name as spelled is similar in sound and not misleading.<sup>67</sup>

### b. Nature and Object of Action or Petition

It is necessary to comply with a statutory requirement that the published notice contain a brief or summary statement of the object and nature of the action or petition.

The published notice, in order to be sufficient, must comply with statutory requirements that the notice shall make a brief or summary statement of the object and nature of the action or petition.<sup>68</sup>

47. Neb.—Coffin v. Maitland, 20 N.W.2d 310, 146 Neb. 477.

48. Wis.—Hays v. Lewis, 21 Wis. 663.

50 C.J. p 534 note 52.

49. Mo.—Kelly v. Murdagh, 83 S.W. 437, 184 Mo. 377.

50 C.J. p 535 note 53.

50. Ark.—Beidler v. Beidler, 74 S.W. 13, 71 Ark. 318.

50 C.J. p 535 note 54.  
Warning order see supra § 24.

51. Ohio.—Francis v. Allen, Com. Pl., 79 N.E.2d 803.  
50 C.J. p 535 note 55.

52. Ariz.—Collins v. Streitz, 54 P.2d 264, 47 Ariz. 146, appeal dismissed 56 S.Ct. 835, 298 U.S. 640, 80 L.Ed. 1373.

53. Ind.—Cox v. Matthews, 17 Ind. 367.

54. Kan.—McKenna v. Cooper, 101 P. 662, 79 Kan. 847.

55. Fla.—McDaniel v. McElvy, 108 So. 820, 91 Fla. 770, 51 A.L.R. 731.  
50 C.J. p 535 note 58.

Statutory requirement of brief statement of object and nature of action see infra subdivision b of this section.

56. Fla.—Edmun Realty Corp. v. Weiner, 33 So.2d 867, 160 Fla. 166.  
50 C.J. p 535 note 60.

57. Neb.—Corpus Juris quoted in Coffin v. Maitland, 20 N.W.2d 310, 312, 146 Neb. 477.  
50 C.J. p 535 note 61.

58. Neb.—Corpus Juris quoted in Coffin v. Maitland, 20 N.W.2d 310, 312, 146 Neb. 477.  
50 C.J. p 535 note 62.

59. N.Y.—Cook v. Kelsey, 19 N.Y. 412.

60. Kan.—Elfert v. Elfert, 294 P. 921, 132 Kan. 218.  
50 C.J. p 535 note 64.

61. Mo.—Hambel v. Lowry, 174 S.W. 405, 264 Mo. 168.

62. Kan.—Elfert v. Elfert, 294 P. 921, 132 Kan. 218.

63. Ill.—Clark v. Marfield, 77 Ill. 258.

50 C.J. p 535 note 66.

64. Wash.—Stoll v. Griffith, 82 P. 1025, 41 Wash. 37.  
50 C.J. p 536 note 67.

65. Iowa.—Kriv v. Northwestern Securities Co., 24 N.W.2d 751, 237 Iowa 1189.

66. Ohio.—Waterhouse v. Waterhouse, 8 Ohio S. & C.P. 73, 6 Ohio N.P. 106.

50 C.J. p 538 note 8.

67. Miss.—Copiah Hardware Co. v. Meteor Motor Car Co., 101 So. 375, 136 Miss. 274.

68. Mo.—Bobb v. Woodward, 42 Mo. 482.

50 C.J. p 537 note 96.

or of the object and prayer of the petition,<sup>69</sup> or of the substance of the petition.<sup>70</sup> If more than one object is sought, the notice must contain a statement of all of the objects, otherwise it is fatally defective;<sup>71</sup> and, where the object of the action is different from that stated in the notice, the notice, if not void, is at least irregular and misleading.<sup>72</sup>

The particularity required in a petition or complaint is not necessary in the notice;<sup>73</sup> and although the notice does not state the cause of action as fully as the law requires, it may, nevertheless, be sufficient when collaterally questioned.<sup>74</sup> It has been held that, when not required by statute or rule of court to do so, the published notice need not advise defendant of the nature of the suit or of the character of the relief sought therein.<sup>75</sup>

### c. Names of Parties

The name, if known, of a defendant on whom it is sought to serve process by publication should be correctly stated in the published notice, but it is sufficient to state the name by which the defendant is commonly known; and a slight error in spelling does not render the notice fatally defective where the notice otherwise so describes the defendant that the error is not misleading.

Under some statutes the names of the parties plaintiff should be stated in the notice published.<sup>76</sup> The names of parties defendant on whom service of this character is sought must, if known, be correctly stated in the notice published; if not the notice is void.<sup>77</sup> However, it will be sufficient that the name given in the notice be that by which defendant is commonly known;<sup>78</sup> and where non-resident defendants have left the state many years before commencement of the action, and it could not be discovered by the exercise of due diligence whether they were dead or alive, or their place of residence, it will be sufficient that the published summons designate them by the names by which they were last known when they left the state.<sup>79</sup>

*Estoppel generally.* Parties may be estopped to contend that they were not properly named, as when the grantee in a deed allows his name to be erroneously written therein and the deed so made to be recorded.<sup>80</sup>

*Defendants not sought to be served by publication.* The notice published need not set out the names of any defendants except those summoned by publication.<sup>81</sup>

*Defendants included in class.* There is authority for the view that, in an action in the nature of a proceeding in rem, service by publication of a copy of the summons is sufficient although defendants included in a well-defined class are not named in the summons.<sup>82</sup>

*Married woman.* Designation of a married woman by her maiden name in the notice published usually renders it fatally defective as to her.<sup>83</sup> It is otherwise, however, where she had left the state many years before suit was brought and had not been heard from during that time and where with due diligence it could not be discovered whether she was alive or dead,<sup>84</sup> or where defendant, a nonresident married woman, was last known by the name designated in the notice, and where the instrument through which she claims is of record in that name.<sup>85</sup>

Ordinarily designation of a married woman by the name of her first husband in the notice published renders it fatally defective as to her,<sup>86</sup> especially where the circumstances indicate a purpose to divest her of her interest in the property without compensation on the theory that she had not been heard from for years;<sup>87</sup> but it has been held that designation of a nonresident female defendant who had been a nonresident of the state for many years and had not been heard from during that time, by the only name by which she was known in the state,

69. Ohio.—Francis v. Allen, Com. Pl., 79 N.E.2d 803.

70. Fla.—Edmun Realty Corp. v. Weiner, 33 So.2d 867, 160 Fla. 166.

71. Mo.—Bobb v. Woodward, 42 Mo. 482.

72. Wash.—Hays v. Peavey, 102 P. 889, 54 Wash. 78.  
50 C.J. p 537 note 99.

73. Mo.—Adams v. Cowles, 8 S.W. 711, 95 Mo. 501, 6 Am.S.R. 74.

Wash.—DeCorvet v. Dolan, 35 P. 72, 1072, 7 Wash. 365.

74. Tex.—Hardy v. Beaty, 19 S.W. 778, 84 Tex. 562, 31 Am.S.R. 80.  
50 C.J. p 538 note 1.

75. Del.—Perrine v. Pennroad Corporation, 168 A. 196, 19 Del.Ch. 368.

76. Mich.—Colton v. Rupert, 27 N. W. 520, 60 Mich. 318.  
50 C.J. p 536 note 70.

77. Iowa.—Schaller v. Marker, 114 N.W. 43, 136 Iowa 575.  
50 C.J. p 536 note 71.

78. Mo.—Steinmann v. Strimple, 29 Mo.App. 478.  
50 C.J. p 536 note 72.

79. S.C.—Gladden v. Chapman, 91 S.E. 796, 106 S.C. 486.

80. Minn.—Blinn v. Chessman, 51 N. W. 666, 49 Minn. 140, 32 Am.S.R. 536.

81. Kan.—Head v. Daniels, 15 P. 911, 38 Kan. 1.

N.Y.—Brenen v. North, 39 N.Y.S. 975, 7 App.Div. 79.

82. N.C.—Castevens v. Stanly County, 191 S.E. 739, 211 N.C. 642.

83. Kan.—Morris v. Tracy, 48 P. 571, 58 Kan. 137.  
50 C.J. p 537 note 81.

84. S.C.—Gladden v. Chapman, 91 S.E. 796, 106 S.C. 486.

85. U.S.—Pooler v. Hyne, Ind., 213 F. 154, 129 C.C.A. 506, certiorari denied 35 S.Ct. 603, 238 U.S. 620, 59 L.Ed. 1493.

86. Mo.—Flynn v. Tate, 228 S.W. 1070, 286 Mo. 454.

87. Mo.—Flynn v. Tate, supra.

is sufficient, although her first husband was dead and she had since married again.<sup>88</sup>

**Initials.** It is generally held that it is not sufficient to designate one to whom process or notice is directed by the initials of his given name, where service is by publication and he does not appear,<sup>89</sup> except where an estoppel exists,<sup>90</sup> as where the title to the land in controversy was taken by defendant in the initials of his given name,<sup>91</sup> or the instrument sued on was signed by him by such initials,<sup>92</sup> or where such initials have been commonly used by the individual in the transaction of his business affairs, and he is commonly designated thereby.<sup>93</sup>

**Defendants whose names are unknown.** Where the names of heirs of a deceased person who are necessary parties are unknown, it will generally be sufficient for the published notice to designate them as the heirs of such person.<sup>94</sup> However, a notice addressed generally to the nonresident heirs of a designated person, without naming such as are known, is insufficient;<sup>95</sup> and where the statute requires the notice to describe an unknown party as near as may be by the character in which he is sued, and by reference to his title or interest in the subject matter of litigation, it will not be sufficient to describe defendants as unknown heirs of a designated person, especially where they are not sued as heirs of such persons, but as devisees under his will.<sup>96</sup>

**Immaterial errors.** While the general rule in cases of constructive service of process by publica-

tion tends to strictness even in names,<sup>97</sup> ideal accuracy is not required.<sup>98</sup> A slight error in the spelling of the name of defendant,<sup>99</sup> or the transposition of the initial letters of his name,<sup>1</sup> or the omission of defendant's Christian name<sup>2</sup> does not render the notice fatally defective where defendant is otherwise so described in the notice that the error could mislead nobody. A slight variance in the spelling and pronunciation of the name of defendant in a published summons, caused by the change of a single letter in the Christian name which is not so material as to be misleading, will not be fatal to the jurisdiction of the court;<sup>3</sup> and the same is true of the addition of a single letter in the surname, where the name, as published, appears and sounds similar to the real name.<sup>4</sup>

Although a deceased person is erroneously named as defendant in a notice published in a proceeding in rem or quasi in rem, nevertheless where such person and his unknown heirs are named, the notice will be treated as though the name of the deceased person had been omitted.<sup>5</sup>

#### d. Description of Property

When required by statute, a description of the property involved in the action should be contained in the published notice.

If so required by statute,<sup>6</sup> the notice should contain a description of the property in respect of which the action is brought.<sup>7</sup> The statutory requirement is satisfied if, from the notice published, any person of common understanding would be able

88. Ind.—Jones v. Kohler, 37 N.E. 399, 137 Ind. 528, 45 Am.S.R. 215.

89. Mo.—Stevenson v. Brown, 174 S.W. 414, 264 Mo. 182, 45 C.J. p 374 note 87.

90. Mo.—Brown v. Peak, 177 S.W. 645, 45 C.J. p 374 note 88.

91. Mo.—Ohlmann v. Clarkson Saw Mill Co., 120 S.W. 1155, 222 Mo. 62, 133 Am.S.R. 506, 28 L.R.A., N.S., 432, 45 C.J. p 374 note 89.

92. U.S.—Bigelow v. Chatterton, Minn., 51 F. 614, 2 C.C.A. 402.

93. Ohio.—Daniels v. Taylor, 13 Ohio Cir.Ct., N.S., 116, 31 Ohio Cir. Ct. 611.

94. S.C.—Tygart v. Peeples, 30 S.C. Eq. 46—Cruger v. Daniel, 16 S.C. Eq. 157.

Notice not designating heirs, etc., as "unknown" held sufficient

Okl.—Samuels v. Granite Sav. Bank & Trust Co., 1 P.2d 145, 150 Okl. 174.

95. Miss.—Foley v. McDonald, 46 Miss. 238.

50 C.J. p 537 note 78.

96. Tenn.—Ferriss v. Lewis, 2 Tenn. Ch. 291.

97. U.S.—Grannis v. Ordean, Minn., 34 S.Ct. 779, 234 U.S. 385, 58 L.Ed. 1363.

98. U.S.—Grannis v. Ordean, supra.

99. Ohio.—Buchanan v. Roy, 2 Ohio St. 251.

50 C.J. p 537 note 90.

1. Iowa.—Fanning v. Krapf, 26 N.W. 133, 68 Iowa 244.

50 C.J. p 537 note 91.

2. Mo.—Cruzen v. Stephens, 27 S.W. 557, 123 Mo. 337, 45 Am.S.R. 549, overruled on other grounds Young v. Downey, 51 S.W. 751, 150 Mo. 317 and Winningham v. Trueblood, 51 S.W. 399, 149 Mo. 583.

50 C.J. p 537 note 92.

3. Minn.—Lane v. Innes, 45 N.W. 4, 43 Minn. 137.

50 C.J. p 537 note 93.

4. Okl.—Collingsworth v. Hutchison, 90 P.2d 416, 185 Okl. 101.

5. Mo.—Organ v. Bunnell, 184 S.W. 102.

Mont.—In re Baxter's Estate, 39 P. 2d 186, 98 Mont. 291.

6. Statutes held to require description

Kan.—Caldwell v. Bigger, 90 P. 1095, 76 Kan. 49.

50 C.J. p 538 note 2 [a].

Statutes held not to require description

Wash.—Chase v. Carney, 90 P.2d 286, 199 Wash. 99.

50 C.J. p 538 note 2 [b].

7. Kan.—Caldwell v. Bigger, 90 P. 1095, 76 Kan. 49.

50 C.J. p 538 note 3.

Reference to petition

Where the land is not described in the notice, the notice should at least contain a reference to the petition wherein the land is definitely described.—Francis v. Allen, Ohio Com.Pl., 79 N.E.2d 803.



to locate and identify the property;<sup>8</sup> a description by lot or block number of land is not necessary;<sup>9</sup> and it has been held that, notwithstanding the requirements of the statute, if the notice shows even inferentially or imperfectly that real estate will be affected, it will be upheld as against a collateral attack.<sup>10</sup> Where the notice does not fulfill the statutory requirements, a further publication may be ordered.<sup>11</sup>

#### e. Time for Appearance

There should be a compliance, in the published notice, with a statutory requirement that it state the time fixed by law for defendant's appearance.

There should be a compliance with statutory requirements that the published notice must state the time fixed by law for defendant's appearance,<sup>12</sup> and neither the courts nor the clerks of the courts are vested with any discretion with respect to the date on which defendant shall be notified to make appearance.<sup>13</sup> There is some conflict of authority as to the effect of a notice which fails to give defendant the statutory time for appearance and answer; according to some decisions the court acquires no jurisdiction over defendant by virtue of such notice, and a judgment rendered in the cause is void, rather than merely voidable,<sup>14</sup> but according to other decisions the defect is fatal only on direct, and not on collateral, attack.<sup>15</sup>

A discrepancy between bill and notice as to the time in which complainant asks that defendant may answer the bill is of no importance if the day named for answering in the notice is the proper one.<sup>16</sup>

### § 70. — Time of Publication

A statute designating the period for which publica-

tion shall be made and prescribing how often it shall be made must be strictly observed; but a statutory requirement of publication for a designated number of weeks is satisfied by publication once a week for that number of successive weeks, and it is not necessary that the full number of weeks so designated intervene between the first and last publications.

A statute designating the period for which publication shall be made and prescribing how often it shall be made must be strictly observed;<sup>17</sup> but publication for the number of times, and for the length of time, prescribed by the statute is sufficient.<sup>18</sup> Neither the courts<sup>19</sup> nor the clerks of the courts<sup>20</sup> are vested with any discretion as to the length of time the notice shall be published, where it is prescribed by statute. Failure to publish for the required length of time is not a mere irregularity, but a jurisdictional defect, which renders all subsequent proceedings under such notice void;<sup>21</sup> but, on the other hand, publication for a longer period than that required by the statute<sup>22</sup> or order for publication<sup>23</sup> will not impair the efficacy of the notice, although such publication will not operate to extend the time to answer beyond the period fixed by the statute and order of publication.<sup>24</sup> Failure to complete the service by publication before the return day renders it void;<sup>25</sup> publications after the return day do not serve to give notice.<sup>26</sup>

*Commencement of publication.* When the statute does not prescribe the time for commencing publication, it may be commenced within a reasonable time after a return of the sheriff "not found."<sup>27</sup> If the time within which publication should be commenced is prescribed by statute, the provisions of the statutes are regarded as mandatory, and a valid service by publication cannot be had unless the first

8. Kan.—Caldwell v. Bigger, 90 P. 1095, 76 Kan. 49.

9. Kan.—Caldwell v. Bigger, supra.

10. Kan.—Caldwell v. Bigger, supra.—Garrett v. Struble, 46 P. 943, 57 Kan. 508.

11. Ohio.—Lawler v. Whetts, 1 Handy 39, 12 Ohio Dec., Reprint, 16.

12. Wash.—Dolan v. Jones, 79 P. 640, 87 Wash. 176.  
50 C.J. p 538 note 12.

13. Neb.—Calkins v. Miller, 75 N. W. 1108, 55 Neb. 601.

14. N.Y.—Bell v. Good, 19 N.Y.S. 693, 22 N.Y.Civ.Proc. 356.

15. Neb.—Wilkins v. Wilkins, 41 N. W. 1101, 26 Neb. 235.  
50 C.J. p 538 notes 16, 17.

16. Ala.—McGowan v. Mobile Branch Bank, 7 Ala. 823.

17. Ky.—Corpus Juris quoted in Booth v. Copley, 140 S.W.2d 662, 665, 283 Ky. 23.

N.C.—S. D. Scott & Co. v. Jones, 52 S.E.2d 219, 230 N.C. 74.  
50 C.J. p 539 note 20.

18. Ky.—Corpus Juris quoted in Booth v. Copley, 140 S.W.2d 662, 665, 283 Ky. 23.  
50 C.J. p 539 note 21.

19. Ky.—Corpus Juris quoted in Booth v. Copley, 140 S.W.2d 662, 665, 283 Ky. 23.  
50 C.J. p 539 note 22.

20. Ky.—Corpus Juris quoted in Booth v. Copley, 140 S.W.2d 662, 665, 283 Ky. 23.  
Neb.—Calkins v. Miller, 75 N.W. 1108, 55 Neb. 601.

21. Ky.—Corpus Juris quoted in Booth v. Copley, 140 S.W.2d 662, 665, 283 Ky. 23.

N.C.—Corpus Juris cited in S. D. Scott & Co. v. Jones, 52 S.E.2d 219, 221, 230 N.C. 74.  
50 C.J. p 539 note 24.

22. Ill.—Hernandez v. Drake, 81 Ill. 34.  
50 C.J. p 539 note 25.

23. Cal.—Sacramento Municipal Utility Dist. v. All Parties and Persons, etc., 57 P.2d 506, 6 Cal.2d 197.

24. Cal.—Anderson v. Goff, 13 P. 73, 72 Cal. 65, 1 Am.S.R. 34.

25. Tex.—Mitchell v. Reitz, Civ. App., 269 S.W. 279, appeal dismissed, Com.App., 281 S.W. 1044. Time when service complete see infra § 72.

26. Tex.—Mitchell v. Reitz, supra.  
50 C.J. p 539 note 28.

27. Minn.—Wilk v. Russell, 218 N. W. 110, 173 Minn. 580.  
50 C.J. p 539 note 31.

Six days elapsing between date of making affidavit to obtain service by publication and date of first publication was not an unreasonable length of time.—Ritchie v. Keeney, 73 P.2d 397, 181 Okl. 207.

publication is commenced within the time so prescribed.<sup>28</sup> The first publication is deemed to take place within the prescribed time when the newspaper containing the notice is actually published, that is, actually issued and placed on public sale, within that time, even though the front page of the newspaper states a later date of publication.<sup>29</sup>

*Publication on holiday.* The fact that one of the days on which notice was published was a secular holiday does not affect the validity of the service.<sup>30</sup>

*Number of weeks.* Where publication for a designated number of weeks is required by order of court or statute, service by publication is obviously insufficient if the number of publications made is less than the number of weeks so designated;<sup>31</sup> but, while there is some authority to the contrary,<sup>32</sup> it has generally been held that a statutory requirement that publication be made for a designated number of weeks is satisfied by publication once a week for that number of successive weeks,<sup>33</sup> and that it is not necessary, in order to render the publication sufficient, that the full number of weeks thus designated shall intervene between the first and last publication<sup>34</sup> or that there should be a greater number of publications than the number of weeks during which the statute requires publication to be made.<sup>35</sup> Where the statute requires a designated number of publications to be made in successive weeks, it is not permissible to make two publications in one week and none in another;<sup>36</sup> publication must be made once in each week,<sup>37</sup> but, according to some authorities, it is not necessary that each publication should be made on the same day of the week under a statute of this character<sup>38</sup> or under a statute requiring publication "once a

week" for a stated number of months.<sup>39</sup> It has been held, however, that the publications should be spaced substantially at intervals of seven days.<sup>40</sup>

Where the paper in which publication is made has more than one issue each week, publication in all the regular issues of the paper, whether daily, semi-weekly, or weekly has been held to be necessary to the complete publication of the notice for that particular week.<sup>41</sup> Under an order requiring publication at least twice a week for a period of not less than four weeks, two publications in each such successive seven days commencing on the day of the entry of the order is sufficient although there is but one publication in the last calendar week of the period.<sup>42</sup>

*Number of months.* Where a publication for a certain number of months is required, this must be taken, in the absence of any statutory provision to the contrary, to mean calendar months, and a publication for that number of lunar months is not sufficient.<sup>43</sup> Where the statute requires publication once a week for a designated number of calendar months, it is not necessary that the number of full calendar months shall intervene between the first and the last publication.<sup>44</sup> Under some statutes publication of summons against a defendant residing out of, or absent from, the state ordinarily must be for not less than a prescribed number of months, but an exception exists in the case of certain summary proceedings.<sup>45</sup>

## § 71. — Paper in Which Notice Published

A "newspaper," within the meaning of statutes providing for service by publication, is a publication which appears at daily or weekly intervals and reports news or happenings of local or foreign interest for the infor-

28. Wash.—Deming Inv. Co. v. Ely, 57 P. 353, 21 Wash. 102.  
50 C.J. p 540 note 33.

29. N.Y.—Werblowsky v. Werblowsky, 73 N.Y.S.2d 761, 190 Misc. 988, affirmed 78 N.Y.S.2d 564, 273 App.Div. 944.

30. Minn.—Malmgren v. Phinney, 52 N.W. 131, 50 Minn. 457, 36 Am. S.R. 753.  
50 C.J. p 539 note 29.

Publication on Sunday see the C.J. S. title Sunday § 47, also 50 C.J. p 539 note 30, 60 C.J. p 1142 notes 1-3.

31. Mass.—Ashley v. Brightman, 21 Pick. 285.  
50 C.J. p 540 note 36.

32. D.C.—Morse v. U. S., 29 App.D. C. 433.  
50 C.J. p 540 note 37 [a], [b].

Corpus Juris text has been cited as showing the conflict of opinion.—

Cantrell v. Dyer, 181 P.2d 553, 554, 193 Okl. 660.

33. Miss.—Stevens v. Barbour, 8 So.2d 242, 193 Miss. 109.  
50 C.J. p 540 note 38.

34. Miss.—Stevens v. Barbour, supra.  
N.C.—Corpus Juris cited in S. D. Scott & Co. v. Jones, 52 S.E.2d 219, 222, 230 N.C. 74.  
50 C.J. p 540 note 39.

35. Ind.—Southern Indiana R. Co. v. Indianapolis, etc., R. Co., 81 N. E. 65, 168 Ind. 360, 13 L.R.A., N.S., 197.  
50 C.J. p 540 note 40.

36. N.Y.—Doheny v. Worden, 77 N. Y.S. 959, 75 App.Div. 47.

37. N.Y.—Doheny v. Worden, supra.

38. Minn.—Raunn v. Leach, 54 N. W. 1058, 53 Minn. 84.  
50 C.J. p 540 note 43.

39. Cal.—Foster v. Vehmeyer, 65 P. 974, 133 Cal. 459.  
50 C.J. p 540 note 44.

40. N.C.—S. D. Scott & Co. v. Jones, 52 S.E.2d 219, 230 N.C. 74.

41. Neb.—Davies v. American Inv., etc., Co., 143 N.W. 464, 94 Neb. 427.  
50 C.J. p 540 note 45.

42. U.S.—Leach v. Burr, D.C., 23 S. Ct. 393, 188 U.S. 510, 47 L.Ed. 567.

43. U.S.—Guaranty Trust, etc., Co. v. Green Cove Springs, etc., R. Co., Fla., 11 S.Ct. 512, 139 U.S. 137, 35 L.Ed. 116.  
50 C.J. p 541 note 48.

44. Cal.—Foster v. Vehmeyer, 65 P. 974, 133 Cal. 459—Savings, etc., Soc. v. Thompson, 32 Cal. 347.

45. Cal.—Consolidated Mortg. Co. v. Roberts, 212 P.2d 28, 94 Cal.App.2d 895.

mation of the general reading public. Statutory restrictions, such as a restriction of the newspapers in which publication may be made to those which are printed or published in the county, are accorded effect.

Some statutes empower courts, designated officers,<sup>46</sup> or plaintiff or his attorney<sup>47</sup> to select the paper in which publication is to be made. Where a notice is published in the paper intended by the order it is sufficient, although there has been a slight error in the designation of the paper in the order;<sup>48</sup> and publication in a paper other than the one designated, although irregular,<sup>49</sup> may not, in some circumstances, be wholly ineffective;<sup>50</sup> but, if the statute forbids publication in a designated kind of newspaper, a notice published in such paper is ineffective for any purpose.<sup>51</sup>

Publication in a supplement consisting of an additional sheet or sheets folded in with the newspaper and sent out with it to all subscribers, except that those receiving complimentary copies might not receive the supplement, is a sufficient publication of the notice.<sup>52</sup>

*Length of existence of paper.* A statute requiring state and county printing to be executed within the state, and providing that, when done by a weekly newspaper, it must have been published fifty-two consecutive weeks prior thereto, does not apply to the publication of a summons by order of the court, so as to make it necessary, if published in a weekly newspaper, that the newspaper shall have been theretofore published for fifty-two consecutive weeks.<sup>53</sup>

*Foreign language newspaper.* Under a statute providing that all process "must be in the English language," publication of notice in a newspaper printed entirely in the Italian language is ineffectual, although both parties to the action are Italians;<sup>54</sup> but, where the statute vests the court with discre-

tion to determine in what paper the publication will be most likely to give notice, it has been held that the court may, in its discretion, direct publication in a German, instead of an English, newspaper, as being most likely to give the person intended to be served notice, although defendant is an American, where the notice itself is printed in English as required by the statute.<sup>55</sup>

*Character of matter published.* The word "newspapers," as used in constructive service statutes, has reference to some publication appearing at daily or weekly intervals reporting the news or happenings of local or foreign interest or both, such as social, religious, political, moral, business, professional, editorial, and other kindred information, intended for the general reading public;<sup>56</sup> and, while publications in newspapers meeting these requirements will be sufficient,<sup>57</sup> publication in any newspaper falling short of these requirements is not sufficient.<sup>58</sup> A newspaper designed for the benefit of any one class of the whole population and that class a negligible per cent of the entire public, such as legal and medical journals or literary and scientific publications, does not satisfy the statutory requirement<sup>59</sup> unless in addition thereto it reports daily or weekly the news of a local or foreign interest and in other respects meets the requirement of a newspaper as heretofore defined.<sup>60</sup>

*Place of printing or publication.* If the statute requires the paper to be "published" in the county it is immaterial where it is "printed."<sup>61</sup> If the statute requires the paper to be "printed" in the county, publication of notice in a paper published in the county, but printed elsewhere, is insufficient;<sup>62</sup> but this requirement is satisfied by publication of the notice in that part of the paper printed in the county, although a part of it is printed outside the coun-

46. Tex.—Taliaferro v. Butler, 14 S.W. 191, 77 Tex. 578.

Wis.—Wakeley v. Nicholas, 16 Wis. 588, 592.

50 C.J. p 541 note 53.

47. Formal written statement in record that the newspaper was selected by plaintiff or his attorney is not required.—Hanson v. Hanson, 284 N.W. 141, 226 Iowa 423.

48. Cal.—People v. McFadden, 77 P. 999, 7 Cal.Unrep.Cas. 191.  
50 C.J. p 541 note 54.

49. N.Y.—Valz v. Sheepshead Bay Bungalow Corp., 163 N.E. 124, 249 N.Y. 122, certiorari denied 49 S. Ct. 23, 278 U.S. 647, 73 L.Ed. 560.

50. N.Y.—Valz v. Sheepshead Bay Bungalow Corp., supra.  
50 C.J. p 541 note 62.

51. N.Y.—Alfonso v. Alfonso, 165 N.Y.S. 1037, 99 Misc. 550.

52. Cal.—Corpus Juris cited in Penaat v. Terwilliger, 147 P.2d 552, 554, 23 Cal.2d 865.

Mo.—Heberling v. Moudy, 154 S.W. 65, 247 Mo. 535.

53. Idaho.—Harpold v. Doyle, 102 P. 158, 16 Idaho 671.

54. N.Y.—Alfonso v. Alfonso, 165 N.Y.S. 1037, 99 Misc. 550.

55. Wis.—Wakeley v. Nicholas, 16 Wis. 588.

56. Fla.—Culclasure v. Consolidated Bond, etc., Co., 114 So. 540, 94 Fla. 764—State v. Rose, 114 So. 373, 93 Fla. 1018.

57. Fla.—Culclasure v. Consolidated

Bond, etc., Co., 114 So. 540, 94 Fla. 764.

50 C.J. p 541 note 64.

Publication in daily newspaper of general circulation published in the jurisdiction is sufficient.—Perrine v. Penroad Corporation, 168 A. 196, 19 Del.Ch. 368.

58. Fla.—State v. Rose, 114 So. 373, 93 Fla. 1018.

50 C.J. p 542 notes 65, 66 [a].  
Due process of law see Constitutional Law § 619 c.

59. Fla.—State v. Rose, supra.

60. Fla.—State v. Rose, supra.

61. Ill.—Ricketts v. Hyde Park, 85 Ill. 110—McCormick v. Higgins, 190 Ill.App. 241.

62. Iowa.—Cooke v. Tallman, 46 Iowa 133.

ty.<sup>63</sup> A statute requiring publication to be made in some newspaper "printed" in the county where the petition is filed applies to petitions in error filed in the supreme court.<sup>64</sup> If no newspaper is printed or published in the county, publication may, under some statutes, be made in a newspaper published in an adjoining county.<sup>65</sup> Under a statute requiring publication of notice to be made in a newspaper published in the county, if a county is by statute divided into two judicial districts and the two courts given exclusive jurisdiction of suits arising within their own territory, each court must confine itself to its own territory in making publication of orders, and cannot order publication in a newspaper published in a town lying outside its own territorial limits if there is a newspaper published within such limits.<sup>66</sup>

By express provision of some statutes, in actions involving title to land, notice by publication to unknown heirs must be published in a paper in the county where the land is situated.<sup>67</sup>

## § 72. — Time When Service Is Complete

Statutes expressly providing when service by publication is complete are accorded effect; and, under the construction placed on some statutes not making such express provision, service is not complete until the full

time prescribed for publication, computed from the first publication, has elapsed; but another construction, sometimes adopted, is that service is complete on the date of the last publication.

Completion of publication is essential to acquisition of jurisdiction of defendant by publication of summons.<sup>68</sup> In some jurisdictions it has been held that service is complete on the date of the last publication, although the full number of days necessary to constitute the specified number of weeks or months have not elapsed since the date of the first publication.<sup>69</sup> In other jurisdictions, however, it has been held that, where a notice is required to be published once a week for a certain number of weeks or months, the full number of days necessary to constitute the required number of weeks or months must elapse before the publication can be deemed complete,<sup>70</sup> and when it has elapsed the service is complete.<sup>71</sup> Under the express provisions of some statutes, the service is deemed complete seven days after the last publication,<sup>72</sup> and under other statutes it is complete a specified number of days after the first publication<sup>73</sup> where the requisite number of publications have been made;<sup>74</sup> but a statute prescribing the minimum time to be fixed for appearance does not require notice for such minimum period from and after the date of the last publication.<sup>75</sup>

## E. SERVICE IN AID OR IN LIEU OF PUBLICATION

### § 73. Personal Service Out of Jurisdiction

- a. In general
- b. Requisites

#### a. In General

Under statutes so providing there may be a personal service on a nonresident outside the state as a substi-

tute for, and the equivalent of, constructive service and service by publication; but only jurisdiction in rem is acquired thereby.

Under statutes so providing, generally in connection with provisions for service by publication, there may, under certain conditions, be a personal service on a nonresident defendant beyond the jurisdiction of the state.<sup>76</sup> Under such circumstances, according

- 63. U.S.—Palmer v. McCormick, C.C. Iowa, 30 F. 82.
- 64. Neb.—Flint v. Gurrell, 11 N.W. 431, 12 Neb. 341.
- 65. Iowa—Cooke v. Tallman, 40 Iowa 133.
- 66. Mo.—Jewett v. Boardman, 81 S. W. 186, 188 Okl. 647.
- 67. Tex.—Chapman v. Kellogg, Com. App., 252 S.W. 151.
- 50 C.J. p 542 note 76.
- 68. Or.—Laughlin v. Hughes, 89 P. 2d 568, 161 Or. 295.
- 69. Okl.—Corpus Juris cited in Cantrell v. Dyer, 181 P.2d 553, 554, 198 Okl. 660.
- 50 C.J. p 542 note 77.
- 70. U.S.—Tenney v. American Pipe Mfg. Co., C.C.S.C., 96 F. 919.
- 50 C.J. p 542 note 78.
- 71. Cal.—Sacramento Municipality

- Utility Dist. v. All Parties and Persons, etc., 57 P.2d 506, 6 Cal.2d 197.
- 72. N.C.—S. D. Scott & Co. v. Jones, 52 S.E.2d 219, 230 N.C. 74.
- 73. Ariz.—Collins v. Streitz, 54 P.2d 264, 47 Ariz. 146, appeal dismissed 56 S.Ct. 835, 298 U.S. 640, 80 L.Ed. 1373.
- 74. Miss.—Stevens v. Barbour, 8 So. 2d 242, 193 Miss. 109.
- 75. Mont.—In re Baxter's Estate, 39 P.2d 186, 98 Mont. 291.
- 76. U.S.—Pen-Ken Gas & Oil Corporation v. Warfield Natural Gas Co., C.C.A.Ky., 137 F.2d 871, certiorari denied 64 S.Ct. 431, 320 U.S. 800, 88 L.Ed. 483, rehearing denied 64 S.Ct. 634, 321 U.S. 803, 88 L.Ed. 1089.
- Minn.—State v. Northwestern Nat.

- Bank of Minneapolis, 18 N.W.2d 569, 219 Minn. 471.
- N.Y.—Winter v. Winter, 175 N.E. 533, 256 N.Y. 113.
- Pa.—Alpern v. Coe, Com.Pl., 93 Pittsb.Leg.J. 537, affirmed 42 A. 2d 542, 352 Pa. 208.
- Utah—Ricks v. Wade, 93 P.2d 479, 97 Utah 402.
- 50 C.J. p 542 note 80.
- Constitutionality of statutes providing for service of process outside jurisdiction see Constitutional Law § 619 b.
- Judgment based on service outside jurisdiction see Judgments § 24.
- Service outside jurisdiction in divorce proceedings see Divorce § 95.
- Enforcement of "lawful right"
- Under statute so providing, personal service outside state on nonresident is authorized where suit is

to the decisions, the service is the equivalent of,<sup>77</sup> and incident of,<sup>78</sup> and a substitute for,<sup>79</sup> constructive service, or, it has been held, substituted service,<sup>80</sup> and in lieu of,<sup>81</sup> equivalent to,<sup>82</sup> and effective to the same extent as,<sup>83</sup> service by publication, but only to that extent.<sup>84</sup> It supersedes the necessity both of publication and of mailing;<sup>85</sup> but it is not an abandonment of service by publication and will not invalidate it.<sup>86</sup> Under some statutes, at least under certain conditions, personal service outside the state may be made on a resident.<sup>87</sup>

While personal service on a nonresident outside the state, in aid or in lieu of service by publication, is sometimes denominated "substituted service," it

must, as discussed supra § 43, be distinguished from the substituted service whereby service on a resident is effected by leaving a copy of the process at the residence, abode, or place of business of defendant; and statutes providing for such substituted service have been held not to authorize personal service outside the state.<sup>88</sup>

*Proceedings in rem or in personam.* The statutes providing for personal service of process on a nonresident defendant beyond the jurisdiction of the state refer only to actions in rem and cannot confer jurisdiction to determine rights and obligations which are entirely personal;<sup>89</sup> and it is only in cases coming within the statute that jurisdiction can be acquired.<sup>90</sup> Accordingly, service under these

in rem, provided suit seeks enforcement of "lawful right."—Thompson v. Terminal Shares, C.C.A.Mo., 89 F. 2d 652, certiorari denied Guaranty Trust Co. of New York v. Thompson, 58 S.Ct. 121, 302 U.S. 735, 82 L.Ed. 568.

77. Ala.—Corpus Juris cited in Wells v. Wells, 161 So. 794, 795, 230 Ala. 430.

Mo.—Corpus Juris cited in Oxley v. Oxley, 203 S.W.2d 184, 137, 239 Mo.App. 894.

Tex.—Henderson v. Shell Oil Co., Civ.App., 202 S.W.2d 492, affirmed 208 S.W.2d 863, 146 Tex. 467, certiorari denied 69 S.Ct. 233, 335 U.S. 884, 93 L.Ed. 423.

Wyo.—Corpus Juris quoted in Kimbel v. Osborn, 156 P.2d 279, 282, 61 Wyo. 89, 158 A.L.R. 1079.

50 C.J. p 543 note 81.

78. Cal.—Tucker v. Tucker, 139 P.2d 348, 59 Cal.App.2d 557.

79. U.S.—Thomson v. Butler, C.C.A. Mo., 136 F.2d 644, certiorari denied 64 S.Ct. 69, 320 U.S. 761, 88 L.Ed. 454, rehearing denied 64 S.Ct. 156, 320 U.S. 813, 88 L.Ed. 491.

Wyo.—Corpus Juris quoted in Kimbel v. Osborn, 156 P.2d 279, 282, 61 Wyo. 89, 158 A.L.R. 1079.

50 C.J. p 543 note 82.

80. Tex.—Henderson v. Shell Oil Co., Civ.App., 202 S.W.2d 492, affirmed 208 S.W.2d 863, 146 Tex. 467, certiorari denied 69 S.Ct. 233, 335 U.S. 884, 93 L.Ed. 423.

81. Cal.—Tucker v. Tucker, 139 P.2d 348, 59 Cal.App.2d 557.

82. N.Y.—Winter v. Winter, 175 N. E. 533, 256 N.Y. 113.

83. N.Y.—Winter v. Winter, supra. Wash.—Harder v. McKinney, 60 P.2d 84, 187 Wash. 457.

Wyo.—Corpus Juris quoted in Kimbel v. Osborn, 156 P.2d 279, 282, 61 Wyo. 89, 158 A.L.R. 1079.

50 C.J. p 543 note 83—33 C.J. p 1085 note 20.

84. Wyo.—Corpus Juris quoted in

Kimbel v. Osborn, 156 P.2d 279, 282, 61 Wyo. 89, 158 A.L.R. 1079.

50 C.J. p 543 note 84.

85. U.S.—Brown v. Fletcher, N.Y., 231 F. 92, 145 C.C.A. 280.

50 C.J. p 543 note 85.

Mailing see infra §§ 76-78.

Publication see supra §§ 67-72.

86. D.C.—Thompson v. Thompson, 35 App.D.C. 14, affirmed 33 S.Ct. 129, 226 U.S. 551, 57 L.Ed. 347.

50 C.J. p 543 note 86.

87. N.Y.—Consolidated Razor Blade Co. v. Everest, 74 N.Y.S.2d 195.

88. Nev.—Zeig v. Zeig, 198 P.2d 724, 65 Nev. 464.

89. Pa.—Alpern v. Coe, 42 A.2d 542, 352 Pa. 208, 161 A.L.R. 1046—Goldberg v. Davis Mfg. Co., Com.Pl., 56 Dauph.Co. 358—Hall v. Cohen, Com.Pl., 44 Lack.Jur. 163—Commonwealth v. Lutz, Com.Pl., 43 Sch.L.R. 148, 61 York Leg.Rec. 150.

50 C.J. p 543 note 90.

90. Neb.—Abbott v. Wagner, 188 N. W. 113, 108 Neb. 359.

Property of defendant must be within state

S.D.—Minnick v. Lilenquist, 23 N.W. 2d 804, 71 S.D. 276.

A quasi in rem action under which service of process on a nonresident defendant may be authorized is a proceeding against defendant personally although real object is to deal with particular property, and there must be a res within the state on which the judgment can operate without any personal action required of defendant.

U.S.—B. J. Van Ingen & Co. v. Burlington County Bridge Commission, D.C.N.J., 83 F.Supp. 778.

N.J.—Solomon v. Yudkin-Krell, Inc., 63 A.2d 715, 2 N.J.Super. 315.

Actions held in rem

(1) State court could proceed in rem or quasi in rem against documents, such as bearer bonds, within its territory; hence substituted personal service on nonresidents outside

Beal or personal property involved

(1) Service of summons may be outside state when subject of action is real or personal property, in or on which defendant has or claims a lien or interest, within state, or relief demanded consists wholly or partly in excluding defendant from any such interest or lien.—State v. Northwestern Nat. Bank of Minneapolis, 18 N.W.2d 569, 219 Minn. 471.

(2) Statute permits substituted service by extraterritorial personal service only where plaintiff seeks to enforce legal or equitable lien or claim, or remove cloud on title, to personalty within district.—Kansas City Southern Ry. Co. v. Chicago Great Western R. Co., D.C.Mo., 58 F. 2d 810.

Compelling execution of lease

Suit specifically to enforce nonresident defendant's agreement to execute gas lease involving land within state was held not "suit to quiet title to land" so as to give court jurisdiction based on constructive

service, but in personam, and constructive service of process was not authorized by statute; and court rules referring to remedies on final process to execute decree, and providing that, when any act required to be done is not done, it may be performed by prothonotary in name of delinquent party, were held inapplicable to question whether court acquired jurisdiction over nonresident defendant by constructive service, even though land in litigation was located in state.—Atlantic Seaboard Natural Gas Co. v. Whitten, 173 A. 305, 315 Pa. 529, 93 A.L.R. 615.

Allegations of complaint as controlling

Ordinarily it is enough, as against a motion to set aside personal service outside the state, that there be found in the complaint allegations which, if proved, would entitle plaintiff to a judgment in rem.—Berson v. Scott, 94 N.Y.S.2d 117.

Property of defendant must be within state

S.D.—Minnick v. Lilenquist, 23 N.W. 2d 804, 71 S.D. 276.

A quasi in rem action under which service of process on a nonresident defendant may be authorized is a proceeding against defendant personally although real object is to deal with particular property, and there must be a res within the state on which the judgment can operate without any personal action required of defendant.

U.S.—B. J. Van Ingen & Co. v. Burlington County Bridge Commission, D.C.N.J., 83 F.Supp. 778.

N.J.—Solomon v. Yudkin-Krell, Inc., 63 A.2d 715, 2 N.J.Super. 315.

Actions held in rem

(1) State court could proceed in rem or quasi in rem against documents, such as bearer bonds, within its territory; hence substituted personal service on nonresidents outside

statutes confers jurisdiction in rem;<sup>91</sup> and no jurisdiction over the person of defendant is acquired thereby<sup>92</sup> unless defendant actually enters an appearance.<sup>93</sup> Jurisdiction will not be defeated because a petition unites with a proceeding in rem another separate cause of action in which service would not confer jurisdiction.<sup>94</sup>

**Acknowledgment and acceptance of service.** Under or apart from statutes expressly so providing in some jurisdictions, mere acknowledgment or acceptance of service out of the state, in lieu of service by publication, has the same effect as service by

publication,<sup>95</sup> and is not sufficient to confer jurisdiction of the person.<sup>96</sup> However, an acknowledgment of such service may, by its terms, confer jurisdiction,<sup>97</sup> as where there is coupled with the admission an agreement to enter an appearance<sup>98</sup> or an indorsement waiving the benefit of the statutes with respect to absent defendants;<sup>99</sup> but in some jurisdictions, where the only method provided by statute for service on a nonresident is by order of publication, it has been held that publication cannot be waived by admission of service made out of the state,<sup>1</sup> even though coupled with an agree-

the state was authorized.—*First Trust Co. of St. Paul v. Matheson*, 246 N.W. 1, 187 Minn. 468, 87 A.L.R. 478.

(2) Proceeding to authorize changing, altering and amending of administrative features of life insurance trust agreement wherein court had jurisdiction of trustee, which was the holder of legal title to life policies, was proceeding in rem in which summons could be served by such substituted service.—*Cutter v. American Trust Co.*, 197 S.E. 542, 213 N. C. 686.

(3) Bankruptcy trustee's suit for rescission of allegedly invalid contracts for purchase of stock of domestic corporations and for enforcement of equitable lien on stock to extent of amount paid on purchase price, was in rem or quasi in rem.—*Thompson v. Terminal Shares, C.C.A. Mo.*, 89 F.2d 652, certiorari denied *Guaranty Trust Co. of New York v. Thompson*, 58 S.Ct. 121, 302 U.S. 735, 82 L.Ed. 568.

#### **Actions held not in rem**

Action for unliquidated damages for fraud, misrepresentation, and misappropriation in exchange of realty, and for lien against realty involved, was held not in nature of action in rem sustainable on personal service outside state.—*Kern v. Wilson*, 14 P.2d 1014, 91 Colo. 355.

91. N.Y.—*Engel v. Engel*, Sup., 22 N.Y.S.2d 445.

Pa.—*Atlantic Seaboard Natural Gas Co. v. Whitten*, 173 A. 305, 315 Pa. 529, 93 A.L.R. 615.

#### **Impressing trust on realty**

The rule that no constructive or extraterritorial service of court's process can bring a nonresident within court's jurisdiction, so as to make such person amenable to court's in personam directions or orders, is inapplicable in equity suit to impress constructive trust on realty within court's territorial jurisdiction and require nonresident defendant to execute deed conveying such realty to plaintiff, as real efficient relief sought by plaintiff is in

rem.—*Alpern v. Coe*, 42 A.2d 542, 352 Pa. 208, 161 A.L.R. 1046.

**In action against foreign corporation** commenced by attachment, in city court, where summons and complaint were served within the time and in the manner prescribed by statute on the secretary of state as the designated agent of corporation to receive process on the corporation's behalf, the court was authorized to retain the jurisdiction which it acquired by levy made within the city limits, although the territorial jurisdiction of the court was limited to the city and service of summons and complaint did not confer jurisdiction in personam.—*Swedosh v. Belding Hosiery Mills*, 6 N.Y.S.2d 532, 168 Misc. 673.

#### **Real or personal property or interests therein**

(1) Statutes authorizing courts to proceed in rem or quasi in rem by substituted service of summons, personally outside state, give right to act on or in respect of personal, as well as real property and on or against interests of persons having or claiming such property or some right therein.—*State v. Northwestern Nat. Bank of Minneapolis*, 18 N.W.2d 569, 219 Minn. 471.

(2) Suits which are quasi in rem, such as suits to determine validity of mortgages or other encumbrances on land or to determine ownership of personal property having a situs in the state where suit is brought, involve rights of all persons in so far as they assert any interests in property which is the subject matter of litigation, and substituted service by extraterritorial personal service on nonresident persons is sufficient to enable court having jurisdiction over subject matter to adjudicate controversy.—*Gulda v. Second Nat. Bank of Boston*, 80 N.E.2d 12, 323 Mass. 100.

92. Colo.—*Viles v. Symes*, 65 P.2d 1089, 100 Colo. 50, certiorari denied *Viles v. Johnson*, 61 S.Ct. 30, 311 U.S. 644, 85 L.Ed. 411, motion denied 61 S.Ct. 315, 311 U.S. 728, 85 L.Ed. 474—*People ex rel. Edinburg*

*State Bank & Trust Co. v. District Court of Routt County, Fourteenth Judicial Dist.*, 50 P.2d 789, 97 Colo. 485.

Iowa.—*Allen v. Allen*, 298 N.W. 869, 230 Iowa 504, 136 A.L.R. 617.

Minn.—*State v. Northwestern Nat. Bank of Minneapolis*, 18 N.W.2d 569, 219 Minn. 471.

N.J.—*McClelland v. Colt's Patent Fire Arms Mfg. Co.*, 158 A. 329, 1 N.J.Misc. 156.

N.M.—*Sullivan v. Albuquerque Nat. Trust & Sav. Bank of Albuquerque*, 188 P.2d 169, 51 N.M. 456.

N.Y.—*Swedosh v. Belding Hosiery Mills*, 6 N.Y.S.2d 532, 168 Misc. 67.

—*Engel v. Engel*, 22 N.Y.S.2d 445. Tex.—*Henderson v. Shell Oil Co.* Civ.App., 202 S.W.2d 492, affirmed, 208 S.W.2d 803, 146 Tex. 467, certiorari denied 69 S.Ct. 233, 335 U.S. 884, 93 L.Ed. 423—*Flicks v. Sias* Civ.App., 102 S.W.2d 460, error refused.

50 C.J. p 543 note 87.

93. N.Y.—*Swedosh v. Belding Hosiery Mills*, 6 N.Y.S.2d 532, 168 Misc. 673.

50 C.J. p 543 note 88.

94. N.Y.—*Berson v. Scott*, 94 N.Y.S.2d 117.

Okl.—*Culver v. Diamond*, 167 P. 223, 64 Okl. 271.

#### **Partial relief granted**

N.Y.—*Engel v. Engel*, 22 N.Y.S.2d 445.

95. Va.—*Smith v. Chilton*, 77 Va. 535.

Acceptance or acknowledgment of service generally see *supra* § 38.

96. Ill.—*Chickering v. Failes*, 26 Ill. 507.

50 C.J. p 545 note 41.

97. Iowa.—*Shaw v. National State Bank*, 49 Iowa 179.

Mass.—*Richardson v. Smith*, 11 Allen 134.

98. Iowa.—*Shaw v. National State Bank*, 49 Iowa 179.

99. Mass.—*Richardson v. Smith*, 11 Allen 134.

1. Wis.—*Weatherbee v. Weatherbee*, 20 Wis. 499.

ment to waive all other service.<sup>2</sup>

### b. Requisites

There must be a compliance with statutory provisions authorizing personal service on nonresident defendants beyond the jurisdiction of the state.

The procedure for personal service of process on a nonresident defendant beyond the jurisdiction of the state is wholly statutory<sup>3</sup> and in derogation of the common law,<sup>4</sup> and the statutes must be strictly construed,<sup>5</sup> and strict compliance with the statutory provisions is necessary.<sup>6</sup> The statutes generally require, and it is usually held, that all necessary steps to secure the right to service by publication must be taken, and such service duly ordered, before resort may be had to personal service outside the state;<sup>7</sup> and a statute providing that such service is equivalent to publication has been held to authorize such service only where publication is authorized.<sup>8</sup> However, it has also been held that, while personal service outside the state is equivalent to service by publication, as discussed supra subdivision a of this section, the requirements of service by publication are not applicable to personal service outside the state.<sup>9</sup> Certainly, where the legislature has declared that personal service outside the state is the equivalent of service by publication within the state, additional elements or requirements beyond those necessary for service by publication cannot be imposed by rules of practice.<sup>10</sup>

*Previous attachment of property in the state is not*

necessary to authorize service on a nonresident defendant out of the state<sup>11</sup> unless required by statute.<sup>12</sup> Under a statute so providing, personal service without the state may be made on a resident, in an action for a sum of money only, without the necessity of making an attachment levy on property.<sup>13</sup>

*Affidavit or other showing.* While under some statutes the filing of an affidavit is not necessary as a preliminary to personal service outside the state,<sup>14</sup> under others an affidavit must be filed,<sup>15</sup> and there must be a compliance with requirements respecting the making and filing of a proper affidavit.<sup>16</sup> Where required, the affidavit must show one of the statutory causes for service by publication.<sup>17</sup> Thus it is frequently required that the affidavit<sup>18</sup> or petition<sup>19</sup> must show that defendant is a nonresident; and in a proper case a statement to that effect may be on information and belief,<sup>20</sup> provided the source of affiant's information or knowledge is disclosed.<sup>21</sup> So also, the facts showing due diligence in an attempt to secure service within the jurisdiction must be set forth;<sup>22</sup> and it is not sufficient to allege the use of due diligence in the words of the statute.<sup>23</sup> Under some statutes the existence of a verified complaint on file, stating a cause of action against a defendant, is an essential prerequisite to an order for such service;<sup>24</sup> and under other statutes not requiring an order for such service, and so providing, a verified complaint alleging all necessary jurisdictional facts is essential to a valid service;<sup>25</sup> but it

2. Wis.—*Weatherbee v. Weatherbee*, supra.

3. Iowa.—*Blachly v. Blachly*, 151 N. W. 447, 169 Iowa 489.  
50 C.J. p 543 note 93.

4. N.Y.—*In re Clark's Estate*, 259 N.Y.S. 377, 144 Misc. 705.

Wash.—*Davis v. Woollen*, 71 P.2d 172, 191 Wash. 379.  
50 C.J. p 543 note 94.

5. Mo.—*Kinsley Bank of Kinsley, Kan., v. Woods*, App., 61 S.W.2d 384.

N.Y.—*In re Clark's Estate*, 259 N.Y.S. 377, 144 Misc. 705.

Wash.—*Davis v. Woollen*, 71 P.2d 172, 191 Wash. 379.

6. Ark.—*Swartz v. Drinker*, 90 S.W. 2d 483, 192 Ark. 198.

N.Y.—*In re Clark's Estate*, 259 N.Y.S. 377, 144 Misc. 705.

Wash.—*Davis v. Woollen*, 71 P.2d 172, 191 Wash. 379.  
50 C.J. p 543 note 95.

7. Minn.—*Haney v. Haney*, 203 N. W. 614, 163 Minn. 114.

50 C.J. p 543 note 97.

8. Ind.—*Shafe v. Shafe*, 198 N.E. 826, 101 Ind.App. 200.

9. Wash.—*Harder v. McKinney*, 60 P.2d 84, 187 Wash. 457.

10. N.Y.—*Winter v. Winter*, 175 N. E. 533, 256 N.Y. 113.

11. S.D.—*South Dakota Commercial Assoc. v. Ramsey*, 147 N.W. 75, 34 S.D. 48.

12. N.Y.—*Sauvage v. Sauvage*, 257 N.Y.S. 326, 235 App.Div. 460.  
50 C.J. p 544 note 2.

Control and seizure of defendant's property by court as prerequisite to service by publication see supra § 59.

#### Proof of attachment

In order to sustain service, or order for service outside state, there must be affirmative proof of levy of attachment.—*Steese v. Steese*, 251 N. Y.S. 164, 140 Misc. 611.

13. N.Y.—*Consolidated Razor Blade Co. v. Everest*, 74 N.Y.S.2d 195.

14. Utah.—*Ricks v. Wade*, 93 P.2d 479, 97 Utah 402.

15. Ind.—*Knue v. Knue*, 28 N.E.2d 76, 217 Ind. 319.

16. Ark.—*Swartz v. Drinker*, 90 S. W.2d 483, 192 Ark. 198.

17. Ind.—*Knue v. Knue*, 28 N.E.2d 76, 217 Ind. 319.

18. Okl.—*Addington First State Bank v. Latimer*, 146 P. 1099, 48 Okl. 104.

50 C.J. p 544 note 3.

**Defect in affidavit held not fatal**  
N.C.—*Fidelity & Casualty Co. of New York v. Green*, 157 S.E. 797, 200 N.C. 535.

19. Mo.—*Wright v. Hink*, 91 S.W. 933, 193 Mo. 130.

50 C.J. p 544 note 4.

20. N.Y.—*McQuirk v. Dean*, 206 N. Y.S. 50, 123 Misc. 612.

50 C.J. p 544 note 6.

21. N.Y.—*Roma Trust Co. v. Cummings*, 206 N.Y.S. 728, 123 Misc. 884.

50 C.J. p 544 note 7.

22. N.Y.—*Roma Trust Co. v. Cummings*, supra.

23. N.Y.—*Roma Trust Co. v. Cummings*, supra.

24. Idaho.—*Elliott v. Wirth*, 198 P. 757, 34 Idaho 797.

25. Wis.—*State ex rel. Ralph Lumber Co. v. Kleczka*, 290 N.W. 142, 234 Wis. 7.

has also been held that the filing of a complaint is not a prerequisite to a valid personal service in another state.<sup>26</sup>

**Order for service.** In some jurisdictions the statutes permit service out of the state without the necessity for an order of publication<sup>27</sup> or compliance with the statute in relation thereto.<sup>28</sup> However, under other statutes an order for such service is a prerequisite to personal service outside the jurisdiction;<sup>29</sup> and under such statute personal service without a court order,<sup>30</sup> or based on a void order,<sup>31</sup> is of no legal effect. Nevertheless, even in such jurisdictions, service may be made outside the state without an order of court, under provisions to that effect, in actions affecting title to, or regulating, defining, or limiting an interest in, specific real or personal property within the state;<sup>32</sup> and an action to enforce specific performance of an agreement for the sale of real estate<sup>33</sup> and an action to abate a nuisance<sup>34</sup> have been held to be within the provisions of such a statute; but an intangible right of property, such as an incorporeal interest in patents and in unpatented inventions, has no situs in the state within this provision.<sup>35</sup> An amendment to such statute authorizing personal service outside the state on a resident, under certain conditions, without prior attachment of property, has been held not to limit the provisions permitting service on a nonresident without a court order.<sup>36</sup> If the order provides in the alternative for both publication and personal service outside the state, a defect in the former part of the order will not affect the validity

of service had under the latter part.<sup>37</sup>

**Bond.** Where the statute provides that, when service is had in compliance with its provisions outside the state, it shall be deemed an actual service, it has been held that a bond, required to be filed by a statute providing for service by publication, need not be filed.<sup>38</sup>

**Who may serve.** Where statutes authorizing personal service on nonresident defendants out of the state provide by whom such service may be made, service, in order to be valid, must be made by the person or officer designated.<sup>39</sup> Thus, where the statute authorizes service by a sheriff, constable, or an officer authorized to acknowledge deeds, a service by a deputy United States marshal has been held insufficient;<sup>40</sup> and likewise a service by a deputy United States marshal has been held invalid under a statute providing for service by a United States marshal.<sup>41</sup> Service outside the state by a sheriff of a foreign jurisdiction, without appointment by the sheriff of the county in which the suit was brought, as required by statute, is insufficient.<sup>42</sup> Where the authorization of the statute is generally to any officer authorized to serve process within the jurisdiction where the service is to be made, the process need not be directed to any particular officer,<sup>43</sup> and it is sufficient if the direction is within the terms of the statute;<sup>44</sup> and the service may be made by a deputy sheriff authorized to make service in the foreign jurisdiction.<sup>45</sup>

**Manner of service.** Service must be on defendant

26. Wash.—Harder v. McKinney, 60 P.2d 84, 187 Wash. 457.

27. Utah.—Ricks v. Wade, 93 P.2d 479, 97 Utah 402.

Wis.—State ex rel. Ralph Lumber Co. v. Kleczka, 290 N.W. 142, 234 Wis. 7.

28. S.D.—Newton v. McGee, 140 N.W. 252, 31 S.D. 216.

50 C.J. p 544 note 13.

29. N.Y.—Evans v. Evans, 77 N.Y.S.2d 320, 273 App.Div. 895—Parks v. Welsch, 98 N.Y.S.2d 874, 198 Misc. 469.

30. N.Y.—Evans v. Evans, 77 N.Y.S.2d 320, 273 App.Div. 895—Parks v. Welsch, Sup., 98 N.Y.S.2d 874, 198 Misc. 469.

31. N.Y.—Rome Trust Co. v. Cummings, 206 N.Y.S. 728, 128 Misc. 884.

50 C.J. p 544 note 18.

32. N.Y.—Ebsary Gypsum Co. v. Ruby, 176 N.E. 820, 256 N.Y. 406, motion granted 177 N.E. 134, 256 N.Y. 546.

#### Sufficiency of complaint

In order to bring case within such

provision it is not enough merely to insert in complaint a prayer for judgment in those terms; complaint itself must also set forth a cause of action in favor of plaintiff entitling him to such judgment.—Axelrod v. Barton Securities Co., 96 N.Y.S.2d 363, 276 App.Div. 578.

33. N.Y.—Garfein v. McInnis, 227 N.Y.S. 85, 223 App.Div. 28, affirmed 162 N.E. 73, 248 N.Y. 261.

34. N.Y.—Glass v. Rinse, 190 N.Y.S. 418, 120 Misc. 639.

35. N.Y.—Ebsary Gypsum Co. v. Ruby, 176 N.E. 820, 256 N.Y. 406, motion granted 177 N.E. 134, 256 N.Y. 546.

#### Action for specific performance

Court was held not to acquire jurisdiction by service of process outside state in so far as complaint prayed for specific performance of contract for assignment of interest in letters patent; nor does presence in state of chattels necessary for construction of patented machine give court jurisdiction through service of process outside state, where

only relief sought on contract was specific performance thereof with regard to assignment of interest in patent.—Ebsary Gypsum Co. v. Ruby, supra.

36. N.Y.—Consolidated Razor Blade Co. v. Everest, 74 N.Y.S.2d 195.

37. N.Y.—Sabin v. Kendrick, 87 N.Y.S. 524, 2 App.Div. 96.

38. Ark.—Martin v. Gwynn, 117 S.W. 754, 90 Ark. 44.

39. N.Y.—Gerard Investing Co. v. National Rys. of Mexico, 276 N.Y.S. 1002, 243 App.Div. 294.

40. N.Y.—Cohnfeld v. Bliss, 116 N.E. 1041, 220 N.Y. 681.

41. N.Y.—Sexton v. Bernheimer, 171 N.Y.S. 696, 104 Misc. 1.

42. U.S.—Simonson v. Typer, C.C.A. Wyo., 285 F. 240.

43. Mo.—State v. Hartmann, 19 S.W.2d 637, 323 Mo. 171.

44. Mo.—State v. Hartmann, supra 50 C.J. p 544 note 29.

45. Mo.—Woodward First Nat. Bank v. Proffitt, App., 293 S.W. 524.



in person.<sup>46</sup> Only the summons need be served, where the statute does not also require service of the affidavit, order, or complaint;<sup>47</sup> and the summons served must be the same summons ordered to be published,<sup>48</sup> although a summons containing substantially the same information as the original has been held sufficient.<sup>49</sup> Where the statute requires that the complaint, or other paper, such as a notice of the order for service, be served with the summons, the requirements are jurisdictional and the service is rendered fatally defective by a failure to serve a material exhibit as part of the complaint<sup>50</sup> or to file such paper or notice.<sup>51</sup>

#### § 74. — When Service Complete

The time when personal service outside the state is complete depends on the provisions of the statute authorizing such service.

Where personal service of a nonresident defendant beyond the jurisdiction of the state is resorted to as a substitute for publication, and the statute prescribes the time when such service should be made and when it becomes complete, such provision is controlling;<sup>52</sup> and the time within which defendant must appear does not begin to run until the service is complete under the provisions of the statute;<sup>53</sup> and where service is not made within the time prescribed it is void.<sup>54</sup> The service in some jurisdictions has been held not complete until the expiration of the time provided for publication,<sup>55</sup> although other courts hold that such service is complete as soon as personal service is in fact made.<sup>56</sup> In those cases where, under the statute, such service can be had without an order, the service is deemed com-

plete on actual service of the summons outside the state.<sup>57</sup>

#### § 75. Substituted Service within Jurisdiction

Substituted service within the jurisdiction, if valid against a nonresident, operates only as far as the proceeding is in rem.

Even assuming that substituted service of process within the jurisdiction may be deemed valid against a nonresident, it is only as the equivalent of constructive service by publication and operates only as far as the proceeding is in rem.<sup>58</sup>

#### § 76. Mailing

Mailing of process in lieu of publication is considered infra § 77, and mailing of process in aid of publication infra § 78. Personal service by mail is considered supra § 36, and substituted service by mail supra § 51.

Examine Pocket Parts for later cases.

#### § 77. — In Lieu of Publication

The validity of service of process on nonresidents by mail or registered mail depends on the rules and statutes in the particular jurisdiction.

Statutes which provide that notice of an action may be given by mail or registered mail to nonresidents have been held to provide merely an alternative method to service by publication.<sup>59</sup> Accordingly, under such statutes, where service by publication would be valid service by mailing is similarly valid;<sup>60</sup> and where service by publication would be invalid service by mailing in lieu thereof is likewise invalid.<sup>61</sup> Such notice is insufficient to give

46. U.S.—Adams v. Heckscher, C.C. Mo., 80 F. 742.

47. Mo.—Woodward First Nat. Bank v. Proffitt, App., 293 S.W. 524. 50 C.J. p 544 note 32.

48. Nev.—Coffin v. Bell, 37 P. 240, 22 Nev. 169, 58 Am.S.R. 738.

49. Mo.—Woodward First Nat. Bank v. Proffitt, App., 293 S.W. 524.

50. N.Y.—Fair v. Kenny, 171 N.Y.S. 694, 103 Misc. 412. 50 C.J. p 545 note 36.

51. N.Y.—Conklin v. Federal Trust Co., 163 N.Y.S. 570, 176 App.Div. 572. 50 C.J. p 545 note 37.

52. Ark.—Swartz v. Drinker, 90 S. W.2d 483, 192 Ark. 198.

When an affidavit of service, and the other required papers in the case, are filed service is completed.—Swartz v. Drinker, supra.

53. N.D.—Kaull v. Johnson, 218 N. W. 606, 56 N.D. 563.

54. Mo.—Cates v. Cates, App., 209 S.W. 551.

55. Mont.—Reynolds v. Gladys Belle Oil Co., 243 P. 576, 75 Mont. 382. 50 C.J. p 545 note 48.

56. Nev.—Sherwin v. Sherwin, 122 P. 481, 33 Nev. 321, Ann.Cas.1914A 108. 50 C.J. p 545 note 49.

57. N.Y.—Sheaffer v. Vermont Hygea Ice Co., 195 N.Y.S. 61, 118 Misc. 593.

Necessity of order for service see supra § 73 b.

Rule requiring additional time held invalid

Where the legislature has declared personal service outside the state as equivalent to service by publication and mailing within the state, and has provided that service by publication shall be complete on publication and mailing, the personal service is complete when service is made, and a rule of practice that an addi-

tional lapse of time must occur has been held improper and of no effect.—Winter v. Winter, 175 N.E. 533, 256 N.Y. 113.

58. Mass.—Elliot v. McCormick, 10 N.E. 705, 144 Mass. 10, 12. 50 C.J. p 545 note 56.

Against whom substituted service available see supra § 45.

59. N.C.—Mullen v. Norfolk, etc., Canal Co., 19 S.E. 106, 114 N.C. 8.

60. Pa.—Adam v. Adam, 56 Pa.Dist. & Co. 383, 62 Montg.Co. 64, 60 York Leg.Rec. 89.

Rule prior to such statute  
Pa.—Evans v. Todd, Com.Pl., 35 Luz. Leg.Reg. 102.

Action held to be in rem  
Pa.—Adam v. Adam, 56 Pa.Dist. & Co. 383, 62 Montg.Co. 64, 60 York Leg.Rec. 89.

61. N.C.—Mullen v. Norfolk, etc., Canal Co., 19 S.E. 106, 114 N.C. 8.

jurisdiction to render a personal judgment against a nonresident on whom no personal service has been had.<sup>62</sup> While statutes providing for the service of process on nonresident defendants by registered mail have been held to be valid where reasonable time and opportunity for defense is given,<sup>63</sup> it has also been held that service on a nonresident by mailing to him a copy by registered letter is not valid.<sup>64</sup> In any event, in order to have an effective service by mail there must be strict compliance with the statutory requirements.<sup>65</sup>

### § 78. — In Aid of Publication

There must be a compliance with the requirements of statutes authorizing service by publication as to the mailing of a copy of the notice, summons, or plaintiff's pleading.

Where it is required, under statutes authorizing service of process by publication, that, when the residence of defendant is known, a copy of the notice or of the summons, order of publication, or warning order, published as notice, and sometimes of plaintiff's first pleading, shall be sent to him at such address by mail, noncompliance with this requirement, which is held to be jurisdictional, renders the service void;<sup>66</sup> and if there are two or

more of such defendants a separate notice must be mailed to each defendant sought to be served.<sup>67</sup> However, the statutory requirement as to mailing does not apply where the absent or nonresident defendant's residence is not known<sup>68</sup> and cannot be ascertained by reasonable diligence.<sup>69</sup>

The statute authorizing mailing, in conjunction with publication, has been held to be comprehensive and to extend to all cases where the principles of due process do not require actual service within the state.<sup>70</sup> Such procedure is, however, insufficient to give a court jurisdiction over the person of defendant, even though he may have received the notice.<sup>71</sup>

Since the only effect of mailing the required papers, or of an affidavit of nonmailing to those defendants whose addresses are unknown, is to complete service by publication,<sup>72</sup> on compliance therewith the service is complete,<sup>73</sup> and the jurisdiction of the court obtains without reference to whether the mailing did or did not impart actual notice to the one to whom it was addressed.<sup>74</sup>

*How addressed; where mailed.* The copy to be mailed must be mailed to the correct address, other-

62. Ala.—Long v. Clark, 78 So. 832, 201 Ala. 454.

Conn.—Middlesex Banking Co. v. Realty Inv. Co., 132 A. 390, 104 Conn. 206.

63. N.Y.—Clarke v. Carlisle Foundry Co., 270 N.Y.S. 351, 150 Misc. 710.

64. Ga.—John Hancock Mut. Life Ins. Co. v. Baskin, 175 S.E. 251, 179 Ga. 86.

R.I.—Chew v. Superior Ct., 110 A. 605, 43 R.I. 194.

65. Pa.—Hinkel v. Belting, 69 Pa. Dist. & Co. 129—Evans v. Todd, Com.Pl., 35 Luz. Leg. Reg. 102.

True and attested copy of complaint Pa.—Hinkel v. Belting, 69 Pa. Dist. & Co. 129.

66. Ariz.—Collins v. Streitz, 54 P.2d 264, 47 Ariz. 146, appeal dismissed 56 S.Ct. 835, 298 U.S. 640, 80 L. Ed. 1373.

Wash.—Yarbrough v. Pugh, 114 P. 918, 63 Wash. 140, 33 L.R.A., N.S., 351.

50 C.J. p 545 notes 64, 66.

Direction for mailing in order for publication see supra § 65 c (6) (b).

**Mandatory requirement**

Del.—Cantor v. Sachs, 162 A. 73, 18 Del.Ch. 359.

Only where service is by publication, and not personally, is the requirement of mailing applicable.—

Brown v. Fletcher, N.Y., 231 N. 92, 145 C.C.A. 280.

**Knowledge of defendant's whereabouts**

Under statute providing for compelling appearance of nonresident defendant by seizing his property and giving notice to defendant, court must exact from complainant some showing of where defendant can be found.—Cantor v. Sachs, 162 A. 73, 18 Del.Ch. 359.

**Alias summons**

Where an alias summons issued in a case is a copy of the original summons, the mailing of a copy of the original is a substantial compliance with a statute requiring a copy of the summons to be mailed to defendant.—Harpold v. Doyle, 102 P. 158, 16 Idaho 671.

67. Okl.—Stumpff v. Price, 177 P. 109, 74 Okl. 117.  
50 C.J. p 546 note 67.

**Service held void**

Service of process made by addressing and mailing to two defendants jointly at same address one copy of petition with copy of publication notice attached was void as to both.—Ross v. Thompson, 50 P.2d 385, 174 Okl. 183.

68. Ga.—Tow v. Evans, 20 S.E.2d 922, 194 Ga. 160.

50 C.J. p 547 note 80.

**Affidavits held not to require mailing**  
Allegation in affidavit of nonresi-

dence for service by publication that defendant was believed to reside in another state did not require mailing of copy of summons and complaint to defendant; and statement in attorney's affidavit of service that copy of summons and complaint was mailed to, and refused by, nonresident defendant did not invalidate service by publication where it did not appear whether defendant's residence was learned of after copy of summons and complaint was mailed, or before or after service by publication was completed.—Collins v. Streitz, 54 P.2d 264, 47 Ariz. 146, appeal dismissed 56 S.Ct. 835, 298 U.S. 640, 80 L.Ed. 1373.

**Alternative service by other method**

If defendant's whereabouts are unknown, resort must be made to alternative service by some method other than notice by mail.—Cantor v. Sachs, 162 A. 73, 18 Del.Ch. 359.

69. Or.—Felts v. Boyer, 144 P. 420, 73 Or. 83.

70. N.J.—Englander v. Jacoby, 28 A. 2d 292, 132 N.J.Eq. 336.

71. Ill.—Griffin v. Cook County, 10 N.E.2d 906, 369 Ill. 380, 118 A.L.R. 1157.

72. Okl.—Bradshaw v. Eudaly, 217 P.2d 522.

73. Okl.—Bradshaw v. Eudaly, supra.

74. Okl.—Bradshaw v. Eudaly, supra.

wise the substituted service is void;<sup>75</sup> and it must be mailed at a post office, as designated in the order.<sup>76</sup> While some decisions have held that the deposit of a copy of the summons in a public mail or letter box established by the post office department is a sufficient compliance with a statute requiring mailing in a post office,<sup>77</sup> it has also been held that such mailing is insufficient.<sup>78</sup>

*Time of mailing.* Where by statute the summons and complaint must be mailed to defendant "in pursuance of the order of the court," mailing before the order is made is ineffectual.<sup>79</sup> If required to be deposited in a post office "forthwith," the requirement is satisfied by a deposit within a reasonable time<sup>80</sup> which is to be determined from the facts and circumstances attending the case.<sup>81</sup>

*By whom mailed.* In the absence of some statutory provision to the contrary,<sup>82</sup> anyone competent to make the required proof thereof may deposit the notice in the post office,<sup>83</sup> except probably the party himself.<sup>84</sup>

*Registration of matter mailed.* Where the mailing is made as required by statute, the fact that it was

not registered in compliance with a rule of court is of no consequence.<sup>85</sup>

*Affidavit of mailing.* Where an affidavit showing that a copy of the notice has been mailed to the last known address of defendant is made necessary, this requirement is considered to be jurisdictional, and on noncompliance therewith the court acquires no jurisdiction.<sup>86</sup>

*Necessity of actual receipt.* When service of process is made by mail, the deposit in the post office is the service;<sup>87</sup> and actual receipt of the envelope containing a copy of the summons and complaint is not contemplated by the statute authorizing mailing in aid of publication.<sup>88</sup>

## § 79. Posting in Addition to Publication

Statutory requirements as to posting in addition to publication must be complied with.

The provisions of some statutes that in addition to publication a copy of the notice shall be posted on the courthouse door is a jurisdictional requirement which must be complied with.<sup>89</sup>

## F. PRIVILEGES AND EXEMPTIONS

### § 80. Witnesses and Suitors Generally

- a. Right to immunity in general
- b. As to residence or nonresidence in county
- c. As to county or state other than that in which action pending
- d. Basis, beneficial purpose, and personal nature of exemption
- e. Persons entitled

#### a. Right to Immunity in General

- (1) Witnesses
- (2) Suitors
- (3) Relationship between first and second cases

#### (1) Witnesses

Generally, witnesses in attendance on a court outside the territorial jurisdiction of their residence are

75. S.D.—Ryan v. Simpson, 132 N. W. 691, 28 S.D. 157.  
50 C.J. p 546 note 68.

#### Reference to municipality

Place of residence within statute requiring mailing refers to municipality in which addressee lives or political subdivision where he gets his mail and not to house which he occupies as home.

Minn.—MacLean v. Reynolds, 220 N. W. 435, 175 Minn. 112.  
Okl.—Hecker v. Sadler, 54 P.2d 382, 176 Okl. 34.

76. N.Y.—Smith v. Wells, 69 N.Y. 600.  
50 C.J. p 546 note 69.

77. Okl.—Hecker v. Sadler, 54 P.2d 382, 176 Okl. 34.

78. N.Y.—Gay v. Ulrichs, 121 N.Y. S. 726, 136 App.Div. 809.  
50 C.J. p 546 note 69 [a].

"Post office," "branch post office," "or post office station"

The mere fact that the box where copy of summons was mailed was a mail box authorized or maintained under the provisions of the United States postal laws did not make it a "post office," "branch post office," or "post office station," to authorize mailing of copy of summons there, under statute.—B. Berman, Inc., v. American Fruit Distributing Co. of California, 186 N.Y.S. 376, 114 Misc. 345.

79. Wis.—Rockman v. Ackerman, 85 N.W. 491, 109 Wis. 639.

80. Or.—Colfax Bank v. Richardson, 54 P. 359, 34 Or. 518, 75 Am.S.R. 664.

50 C.J. p 546 note 78.

81. Dak.—Star v. Mahan, 30 N.W. 169, 4 Dak. 213.

N.Y.—Van Wyck v. Hardy, 4 Abb. Dec. 496, 39 How.Pr. 392.

82. Ga.—Williams v. Batten, 119 S. E. 709, 156 Ga. 620.

50 C.J. p 546 note 70.

83. Cal.—Anderson v. Goff, 13 P. 73, 72 Cal. 65, 1 Am.S.R. 84.  
50 C.J. p 546 note 71.

84. Or.—Colfax Bank v. Richardson, 54 P. 359, 34 Or. 518, 75 Am.S.R. 664.

85. Cal.—Hubert v. Hubert, 178 P. 2d 15, 78 Cal.App.2d 498.  
50 C.J. p 546 note 74.

86. D.C.—Thompson v. Tanner, 287 F. 980, 53 App.D.C. 3.  
50 C.J. p 546 note 76.

87. N.Y.—In re Rowley's Will, 186 N.Y.S. 656, 114 Misc. 375.

88. Cal.—Hubert v. Hubert, 178 P. 2d 15, 78 Cal.App.2d 498.

89. Fla.—Laffin v. Gato, 39 So. 59, 50 Fla. 558.  
50 C.J. p 547 note 84.

immune from service of civil process while attending court and for a reasonable time before and after in going to, and returning from, court.

It is almost universally recognized,<sup>90</sup> subject to the exception discussed *infra* subdivision a (3) of this section, that witnesses in attendance on a court outside the territorial jurisdiction of their residence are immune from service of civil process, while attending court, and for a reasonable time before and after, in going to court and returning to their homes;<sup>91</sup> and this immunity is not taken away by a statute prohibiting arrest of persons attending courts as witnesses.<sup>92</sup> The exemption from service of process has been held to preclude attachment of the books, clothing, and other personal effects of a

witness.<sup>93</sup>

The rule applies without regard to the character of the defense which the witness may set up.<sup>94</sup> Moreover, the immunity conferred by it is not affected by the fact that the witnesses have some interest in the action;<sup>95</sup> and this is true even in a jurisdiction where a nonresident plaintiff is held not exempt from service of civil process.<sup>96</sup> Furthermore, the immunity is not limited to witnesses necessarily in attendance,<sup>97</sup> since it is sufficient that they act in good faith in attending on the court for the purpose of giving testimony as required,<sup>98</sup> and they should not be required to determine whether or not their attendance is actually necessary.<sup>99</sup>

90. Va.—Wheeler v. Flintoff, 159 S. E. 112, 156 Va. 923.

91. U.S.—Durst v. Tautges, Wilder & McDonald, C.C.A.Wis., 44 F.2d 507, 71 A.L.R. 1394—Moffett v. Arabian American Oil Co., D.C.N.Y., 8 F.R.D. 566.

Cal.—Murrey v. Murrey, 16 P.2d 741, 218 Cal. 707, 85 A.L.R. 1335, certiorari denied 53 S.Ct. 658, 289 U.S. 740, 77 L.Ed. 1487—Franklin v. Superior Court in and for San Francisco County, App., 220 P.2d 8—**Corpus Juris** cited in Gerard v. Superior Court in and for Los Angeles County, 205 P.2d 109, 111, 91 Cal.App.2d 549—Von Kessler v. Superior Court in and for Los Angeles County, 292 P. 544, 109 Cal. App. 89.

D.C.—**Corpus Juris** quoted in Hollidge v. Crumpler, 72 F.2d 381, 382, 63 App.D.C. 330.

Fla.—State ex rel. Cox v. Adams, 4 So.2d 457, 148 Fla. 426—Rorick v. Chancey, 178 So. 112, 130 Fla. 442, adhered to 195 So. 418, 142 Fla. 290.

Iowa.—**Corpus Juris** cited in Lingo v. Reichenbach Land Co., 279 N. W. 121, 123, 225 Iowa 112—Moseley v. Ricks, 274 N.W. 23, 223 Iowa 1038—Kelly v. Shafer, 239 N.W. 547, 213 Iowa 792—Northwestern Casualty & Surety Co. v. Conaway, 230 N.W. 548, 210 Iowa 126, 68 A.L.R. 1465.

Md.—Margos v. Moroudas, 40 A.2d 816, 184 Md. 362.

Mont.—State ex rel. American Laundry Machinery Co. v. Second Judicial Dist. Court in and for Silver Bow County, 41 P.2d 26, 98 Mont. 278, certiorari denied Second Judicial Court of Montana v. State of Montana, 55 S.Ct. 656, 295 U.S. 744, 79 L.Ed. 1690—State ex rel. Eblan v. District Court of Eighth Judicial Dist. in and for Cascade County, 33 P.2d 526, 97 Mont. 160, 93 A.L.R. 865.

N.J.—Rlewold v. Rlewold, 188 A. 72, 121 N.J.Eq. 134—Brown v. Brown, 165 A. 643, 112 N.J.Eq. 600—Bask-

erville v. Kofsky, 13 A.2d 562, 18 N.J.Misc. 325.

N.Y.—Chase Nat. Bank of City of New York v. Turner, 199 N.E. 636, 269 N.Y. 397, amendment of remittitur denied 3 N.E.2d 459, 271 N.Y. 634—New England Industries v. Margiotti, 60 N.Y.S.2d 430, 270 App.Div. 488, affirmed 70 N.E.2d 540, 296 N.Y. 722—Gillmore v. Gillmore, 58 N.Y.S.2d 556, 185 Misc. 535—Stern v. Worth, 4 N.Y.S.2d 392, 167 Misc. 605—In re Vamvakis, 99 N.Y.S.2d 406—Block v. Block, 91 N.Y.S.2d 577—Cattano v. Holt, 73 N.Y.S.2d 18—Kreiger v. Kreiger, 71 N.Y.S.2d 448, affirmed 72 N.Y.S.2d 403, 272 App.Div. 880, appeal dismissed 75 N.E.2d 629, 297 N.Y. 616, appeal denied 75 N.Y.S.2d 291, 272 App.Div. 1053—Cobb v. Williams, 47 N.Y.S.2d 56, reversed on other grounds 53 N.Y.S.2d 250, 183 Misc. 868.

N.C.—Hare v. Hare, 46 S.E.2d 840, 228 N.C. 740—Hangle v. Webb, 17 S.E.2d 618, 220 N.C. 428.

Ohio.—Roos v. H. W. Roos Co., 28 N.E.2d 1008, 64 Ohio App. 464.

Okl.—Harris Foundation v. District Court of Pottawatomie County, 163 P.2d 976, 196 Okl. 222, 162 A.L.R. 272.

Pa.—Crusco v. Strunk Steel Co., 74 A.2d 142, 365 Pa. 326—Allison v. Allison, 45 Pa.Dist. & Co. 408, 58 Montg.Co. 311—Fugsley v. Strauch, Corn.Pl., 31 Luz.Leg.Reg. 359.

S.C.—Dyar v. Georgia Power Co., 176 S.E. 711, 173 S.C. 527.

Tenn.—Cotton v. Frazier, 95 S.W.2d 45, 170 Tenn. 301—Ballard v. Hutchinson, 87 S.W.2d 1017, 169 Tenn. 370—Anderson v. Atkins, 29 S.W.2d 248, 161 Tenn. 137.

Va.—Wheeler v. Flintoff, 159 S.E. 112, 156 Va. 923.

W.Va.—Fisher v. Bouchelle, 61 S.E. 2d 305.

50 C.J. p 547 note 87.

Against whom process may issue see supra § 7.

Privileges and exemptions with re-

spect to service of civil process where federal courts involved see Federal Courts § 124 f.

Service of process on nonresident within jurisdiction generally see supra § 32 c.

The term "residence" as used in the statement of this rule has been held to mean the same as citizenship or domicile.—Brown v. Brown, 165 A. 643, 112 N.J.Eq. 600—Morgan v. Morgan, 188 A. 258, 15 N.J.Misc. 101, affirmed 192 A. 508, 122 N.J.Eq. 2.

92. N.C.—Cooper v. Wyman, 29 S. E. 947, 122 N.C. 784, 65 Am.S.R. 731.

50 C.J. p 547 note 88.

93. N.C.—Winder v. Penniman, 105 S.E. 884, 181 N.C. 7.

94. D.C.—**Corpus Juris** quoted in Hollidge v. Crumpler, 72 F.2d 381, 382, 63 App.D.C. 330.

50 C.J. p 548 note 91.

95. D.C.—**Corpus Juris** quoted in Hollidge v. Crumpler, 72 F.2d 381, 382, 63 App.D.C. 330.

50 C.J. p 548 note 92.

**Assisting son and testifying**

Nonresident who came into jurisdiction for purpose of assisting his son, also a nonresident, and of testifying, if necessary, on charge of son's reckless driving, was held immune, together with son, from service of process while he and son were in court waiting for case to be called.—Hollidge v. Crumpler, 72 F.2d 381, 63 App.D.C. 330.

96. Conn.—Chittenden v. Carter, 74 A. 884, 82 Conn. 585, 18 Ann.Cas. 125.

97. D.C.—**Corpus Juris** quoted in Hollidge v. Crumpler, 72 F.2d 381, 382, 63 App.D.C. 330.

Wis.—Harvey v. Harvey, 225 N.W. 703, 199 Wis. 212.

98. D.C.—**Corpus Juris** quoted in Hollidge v. Crumpler, 72 F.2d 381, 382, 63 App.D.C. 330.

Wis.—Harvey v. Harvey, 225 N.W. 703, 199 Wis. 212.

99. D.C.—**Corpus Juris** quoted in

*Voluntary or subpoenaed witnesses.* In the absence of express statute controlling the matter,<sup>1</sup> the rule has generally been held to apply with equal force whether the witnesses are voluntary or subpoenaed witnesses;<sup>2</sup> but it has also been held that the rule is limited to persons who enter the state as witnesses voluntarily.<sup>3</sup>

## (2) Suitors

It is the majority rule that suitors in attendance in a court outside the territorial jurisdiction of their residence are immune from service of civil process while attending court and for a reasonable time before and after in going to, and returning from, court.

The courts are not in harmony on the question whether suitors coming within the jurisdiction of the court are immune from service of process.<sup>4</sup> In the majority of jurisdictions, the rule is now es-

tablished that, like witnesses, suitors, in attendance in a court outside the territorial jurisdiction of their residence, are, subject to the exception discussed infra subdivision a (3) of this section, immune from service of civil process, while attending court, and for a reasonable time before and after, in going to court and in returning to their homes.<sup>5</sup> In jurisdictions where the majority rule prevails, although an examination of the decisions shows that the party to whom the exemption was in most cases allowed was defendant, yet where the question has been directly raised it has been almost uniformly held that the exemption extends to plaintiffs as well as defendants;<sup>6</sup> and, accordingly, it has been held that the exemption should apply to one who comes into the state for the purpose of filing an action.<sup>7</sup> On the other hand, in a limited number of jurisdic-

Hollidge v. Crumpler, 72 F.2d 381, 382, 63 App.D.C. 330.

Wis.—Harvey v. Harvey, 225 N.W. 703, 199 Wis. 212.

1. S.D.—Malloy v. Brewer, 64 N.W. 1120, 7 S.D. 587, 58 Am.S.R. 856. 50 C.J. p 547 note 89.

2. D.C.—*Corpus Juris* quoted in Hollidge v. Crumpler, 72 F.2d 381, 382, 63 App.D.C. 330.

Okl.—Harris Foundation v. District Court of Pottawatomie County, 163 P.2d 976, 196 Okl. 222, 162 A.L.R. 272.

Tenn.—Cotton v. Frazier, 95 S.W.2d 45, 170 Tenn. 301. 50 C.J. p 547 note 90.

3. N.Y.—New England Industries v. Margiotti, 60 N.Y.S.2d 53, 185 Misc. 845, affirmed 60 N.Y.S.2d 430, 270 App.Div. 488, affirmed 70 N.E.2d 540, 296 N.Y. 722—Kreiger v. Kreiger, 71 N.Y.S.2d 448, affirmed 72 N.Y.S.2d 403, 272 App.Div. 880, appeal dismissed 75 N.E.2d 629, 297 N.Y. 616, appeal denied 75 N.Y.S.2d 291, 272 App.Div. 1053. 50 C.J. p 547 note 90 [a].

4. Va.—Wheeler v. Flintoff, 159 S.E. 112, 156 Va. 923.

5. U.S.—Durst v. Tautges, Wilder & McDonald, C.C.A.Wis., 44 F.2d 507, 71 A.L.R. 1394—*Corpus Juris* cited in Hardie v. Bryson, D.C.Mo., 44 F. Supp. 67, 70—Moffett v. Arabian American Oil Co., D.C.N.Y., 8 F.R.D. 566.

Ark.—Barnes v. Moore, 229 S.W.2d 492.

Cal.—Murrey v. Murrey, 16 P.2d 741, 216 Cal. 707, 85 A.L.R. 1335, certiorari denied 53 S.Ct. 658, 289 U.S. 740, 77 L.Ed. 1487—Franklin v. Superior Court in and for San Francisco County, App., 220 P.2d 8—Gerard v. Superior Court in and for Los Angeles County, 205 P.2d 109, 91 Cal.App.2d 549.

D.C.—Hollidge v. Crumpler, 72 F.2d 381, 63 App.D.C. 330.

Fla.—*Corpus Juris* cited in State ex rel. Cox v. Adams, 4 So.2d 457, 458, 148 Fla. 426—*Corpus Juris* cited in Rorick v. Chancey, 178 So. 112, 116, 130 Fla. 442, adhered to 195 So. 418, 142 Fla. 290.

Iowa.—Frink v. Clark, 285 N.W. 681, 226 Iowa 1012—*Corpus Juris* cited in Lingo v. Reichenbach Land Co., 279 N.W. 121, 123, 225 Iowa 112—Moseley v. Ricks, 274 N.W. 23, 223 Iowa 1038—Northwestern Casualty & Surety Co. v. Conaway, 230 N.W. 548, 210 Iowa 126, 68 A.L.R. 1465.

Md.—Margos v. Moroudas, 40 A.2d 816, 184 Md. 362.

Mich.—*Corpus Juris* cited in Gist v. Romey, 32 N.W.2d 481, 482, 321 Mich. 357.

Miss.—*Corpus Juris* quoted in Arnett v. Carol C. & Fred R. Smith, Inc., 145 So. 638, 639, 165 Miss. 53.

Mont.—State ex rel. Ellan v. District Court of Eighth Judicial Dist. in and for Cascade County, 33 P.2d 526, 97 Mont. 160, 93 A.L.R. 865.

N.J.—Morgan v. Morgan, 192 A. 508, 122 N.J.Eq. 2—Riewold v. Riewold, 188 A. 72, 121 N.J.Eq. 134—Brown v. Brown, 165 A. 643, 112 N.J.Eq. 600—Kutschinski v. Kutschinski, 164 A. 560, 112 N.J.Eq. 341—Golde v. Golde, 155 A. 677, 108 N.J.Eq. 519—Younger v. Younger, 69 A.2d 219, 5 N.J.Super. 371—Baskerville v. Kofsky, 13 A.2d 562, 18 N.J. Misc. 325.

N.Y.—Chase Nat. Bank of City of New York v. Turner, 199 N.E. 636, 269 N.Y. 397, amendment of remittitur denied 3 N.E.2d 459, 271 N.Y. 634—New England Industries v. Margiotti, 60 N.Y.S.2d 480, 270 App.Div. 488, affirmed 70 N.E.2d 540, 296 N.Y. 722—Gilmore v. Gilmore, 58 N.Y.S.2d 556, 185 Misc. 535—Stern v. Worth, 4 N.Y.S.2d 392, 167 Misc. 605—In re Vamva-

kis, 99 N.Y.S.2d 406—Block v. Block, 91 N.Y.S.2d 577—Cattano v. Holt, 73 N.Y.S.2d 18—Kreiger v. Kreiger, 71 N.Y.S.2d 448, affirmed 72 N.Y.S.2d 403, 272 App.Div. 880, appeal dismissed 75 N.E.2d 629, 297 N.Y. 616, appeal denied 75 N.Y.S.2d 291, 272 App.Div. 1053—Cohen v. Lindstrom, 47 N.Y.S.2d 734, affirmed 50 N.Y.S.2d 167, 268 App.Div. 765.

N.C.—Hare v. Hare, 46 S.E.2d 840, 228 N.C. 740.

Okl.—Harris Foundation v. District Court of Pottawatomie County, 163 P.2d 976, 196 Okl. 222, 162 A.L.R. 272.

Pa.—Crusco v. Strunk Steel Co., 74 A.2d 142, 365 Pa. 326—Luch v. Loughry, 21 Pa. Dist. & Co. 140, 14 Wash.Co. 108—Bowen v. Baker, Com.Pl., 20 Lehigh.L.J. 9.

S.C.—Dyar v. Georgia Power Co., 176 S.E. 711, 173 S.C. 527.

Tenn.—Cotton v. Frazier, 95 S.W.2d 45, 170 Tenn. 301—Ballard v. Hutchinson, 87 S.W.2d 1017, 169 Tenn. 370—Anderson v. Atkins, 29 S.W.2d 248, 161 Tenn. 137.

W.Va.—Fisher v. Bouchelle, 61 S.E. 2d 305.

50 C.J. p 548 notes 98, 99.

6. Cal.—Franklin v. Superior Court in and for San Francisco County, App., 220 P.2d 8.

Md.—Margos v. Moroudas, 40 A.2d 816, 184 Md. 362.

N.Y.—Block v. Block, 91 N.Y.S.2d 577.

Tenn.—Cotton v. Frazier, 95 S.W.2d 45, 170 Tenn. 301—Ballard v. Hutchinson, 87 S.W.2d 1017, 169 Tenn. 370—Anderson v. Atkins, 29 S.W.2d 248, 161 Tenn. 137. 50 C.J. p 549 note 7.

7. Cal.—Franklin v. Superior Court in and for San Francisco County, App., 220 P.2d 8.

N.Y.—In re Vamvakis, 99 N.Y.S.2d 406.

tions the reverse of the majority rule above stated is true, the courts holding without qualification that nonresident suitors are under no circumstances entitled to immunity from service of civil process.<sup>8</sup> Moreover, there is yet a third class of jurisdictions, where neither the majority nor minority rule seems to have been definitely adopted, it being held in these jurisdictions that a plaintiff who is a nonresident of the jurisdiction in which he brings suit is not entitled to immunity from service of civil process;<sup>9</sup> and in some of these jurisdictions the courts seem to intimate that exemption from service of civil process should be denied to all suitors, whether plaintiffs or defendants,<sup>10</sup> while in another jurisdiction expressions are used from which it may be inferred that the court would extend immunity to defendants under some circumstances.<sup>11</sup>

*Attendance voluntarily or by compulsion.* To entitle a suitor to exemption, it is not necessary that a subpoena should have been served on him;<sup>12</sup> and, in fact, it has been held to be essential that he enter the state voluntarily.<sup>13</sup> In determining whether a nonresident has acted or appeared voluntarily or by compulsion in response to a court order, the terms and purpose of the order, and the penalty which may result from failure to comply with it,

must be considered.<sup>14</sup>

### (3) Relationship between First and Second Cases

The immunity of nonresident witnesses and suitors does not generally apply to process issued in the very cause for which they entered the jurisdiction, or in another cause which is in aid of, or incidental to, or connected with, the original suit.

The rule that nonresident witnesses or suitors are exempt from service of process has been held not to apply to process issued in the very cause for which they entered the jurisdiction, or in another cause which is in aid of, or incidental to, or connected with, the original suit, as where it involves the same parties and subject matter,<sup>15</sup> particularly where the objecting party was the plaintiff in the original suit which he entered the jurisdiction to prosecute,<sup>16</sup> since the granting of an exemption in such circumstances would obstruct rather than expedite the administration of justice in the case.<sup>17</sup> However, this exception to the rule is not universally recognized, and in some jurisdictions it is immaterial that the second case involved the same parties and subject matter.<sup>18</sup> In any event there can be no exception to the rule where the two cases are separate and distinct.<sup>19</sup>

8. Ill.—*Cannata v. White Owl Express*, 89 N.E.2d 56, 339 Ill.App. 79—*American Industrial Finance Corporation v. Sholz*, 279 Ill.App. 45.

Mo.—*Mertens v. McMahon*, 66 S.W.2d 127, 354 Mo. 175, 93 A.L.R. 1285.

50 C.J. p 549 note 3.  
Service by inveigling or enticing nonresident into jurisdiction of court see supra § 39.

9. Nev.—*Tiedemann v. Tiedemann*, 129 P. 313, 35 Nev. 259.

50 C.J. p 549 note 10.  
Idaho.—*Gwynn v. McDaniel*, 43 P. 74, 4 Idaho 605, 95 Am.S.R. 158.

50 C.J. p 550 note 11.  
11. Nev.—*Tiedemann v. Tiedemann*, 129 P. 313, 35 Nev. 259.

50 C.J. p 550 note 12.  
12. Okl.—*Harris Foundation v. District Court of Pottawatomie County*, 163 P.2d 976, 196 Okl. 222, 162 A.L.R. 272.

50 C.J. p 549 note 1.  
13. N.Y.—*New England Industries v. Margiotti*, 60 N.Y.S.2d 53, 185 Misc. 845, affirmed 60 N.Y.S.2d 430, 270 App.Div. 488, affirmed 70 N.E. 2d 540, 296 N.Y. 722—*Kreiger v. Kreiger*, 71 N.Y.S.2d 448, affirmed 72 N.Y.S.2d 403, 272 App.Div. 880, appeal dismissed 75 N.E.2d 629, 297 N.Y. 616, appeal denied 75 N.Y.S.2d 291, 272 App.Div. 1058.

14. N.Y.—*New England Industries v. Margiotti*, 60 N.Y.S.2d 53, 185

Misc. 845, affirmed 60 N.Y.S.2d 430, 270 App.Div. 488, affirmed 70 N.E. 2d 540, 296 N.Y. 722.

#### Appearance held voluntary

A nonresident defendant in another action, appearing to be examined before trial pursuant to court order which was not served on defendant, was not subject to punishment for contempt of court or imprisonment or fine for failure to appear, and hence his appearance was voluntary and he was privileged from service of process as a defendant in the instant action, notwithstanding defendant made his appearance in the other action to protect himself against the possible entry of judgment against him.—*New England Industries v. Margiotti*, supra.

15. U.S.—*Lamb v. Schmitt*, Miss., 52 S.Ct. 317, 285 U.S. 222, 76 L.Ed. 720—*Moffett v. Arabian American Oil Co.*, D.C.N.Y., 8 F.R.D. 566.  
N.Y.—*Caldwell v. Caldwell*, 70 N.Y.S. 2d 601, 189 Misc. 845.

#### Dismissal or nonsuit of previous action

(1) Defendants were not immune from service of process while attending trial of previous action, which plaintiff dismissed because of witness' absence.—*Central Farmers' Trust Co. v. Rorick*, C.C.A.Fla., 57 F. 2d 664, certiorari denied *Rorick v. Central Farmers' Trust Co.*, 53 S.Ct. 17, 287 U.S. 616, 77 L.Ed. 535.

(2) A nonresident was not immune from service of process while attending trial of previous action in which plaintiff took a voluntary nonsuit on denial of a motion for continuance, where the second suit was in fact the same action based on the same facts.—*Sanders v. Smith*, 20 So.2d 663, 107 Miss. 304.

16. Cal.—*Horn v. Superior Court in and for Los Angeles County*, 210 P.2d 518, 94 Cal.App.2d 283—*Von Kessler v. Superior Court in and for Los Angeles County*, 292 P. 544, 109 Cal.App. 89.

50 C.J. p 550 note 13.  
17. U.S.—*Lamb v. Schmitt*, Miss., 52 S.Ct. 317, 285 U.S. 222, 76 L.Ed. 720.

"The test is whether the immunity itself, if allowed, would so obstruct judicial administration in the very cause for the protection of which it is invoked as to justify withholding it."—*Lamb v. Schmitt*, supra.

18. Tenn.—*Ballard v. Hutchinson*, 87 S.W.2d 1017, 169 Tenn. 370—*Purnell v. Morton Live Stock Co.*, 1 S.W.2d 1013, 156 Tenn. 383.

19. Mich.—*Grundy v. Refor*, 20 N.W.2d 261, 312 Mich. 428.

#### Cases held separate and distinct

(1) The exception to the rule as to immunity from service of process was held not to apply where the second case, while arising from the

### b. As to Residence or Nonresidence in County

In most jurisdictions the immunity from process of nonresidents applies to witnesses or suitors, who, although residents of the state, are nonresidents of the county in which they are attending court.

The weight of authority is to the effect that the general rule of immunity from civil process for witnesses attending court, stated supra subdivision a (1) of this section, applies with equal force and effect to witnesses resident of the state attending court in a county other than that in which they reside,<sup>20</sup> although in some jurisdictions immunity to such witnesses has either been denied or limited by statute or judicial decision.<sup>21</sup> Generally, the immunity applies even though they are attending voluntarily and not in obedience to a subpoena;<sup>22</sup> but in some jurisdictions the rule is stated to be that a person in a county other than that of his legal residence cannot be legally served with process therein if he is in such county in obedience to legal

process or its equivalent.<sup>23</sup>

**Suitors.** In jurisdictions where the majority rule respecting immunity of suitors in attendance in a court outside the territorial jurisdiction of their residence, discussed supra subdivision a (2) of this section, prevails, it has generally been held that a resident of a state who attends court as a litigant in a county other than that of his residence is privileged from the service of summons in an action brought in that county.<sup>24</sup> However, in some jurisdictions no immunity is granted to a suitor who is a nonresident of the county in which the proceedings are had;<sup>25</sup> and this is true where the question is regarded as essentially one of venue rather than of validity of service,<sup>26</sup> so that the immunity or remedy in the case of such service is merely partial or conditional in that the court may, in its discretion, grant a change of venue<sup>27</sup> if defendant is greatly inconvenienced.<sup>28</sup>

same set of facts, was essentially different in that the prior case was brought in a court of limited jurisdiction for the sum of five hundred dollars while the second case was in a court of general jurisdiction for the sum of five thousand dollars, in that the prior case was for injuries to property only while the second case was for injuries to the person as well, and in that the prior case was against an individual defendant while in the second case his corporate employer was also made defendant.—*Cotton v. Frazier*, 95 S.W.2d 45, 170 Tenn. 301.

(2) An action against a nonresident for services rendered as accountants was not shown to be correlated to action brought in the state by the nonresident against third persons for cancellation of shares of stock to the extent as to justify the service of process on nonresident while in the state conferring with his attorneys in connection with the suit brought by nonresident.—*Grundy v. Refor*, 20 N.W.2d 261, 312 Mich. 428.

20. Mich.—*Meyers v. Barlock*, 275 N.W. 656, 281 Mich. 629.

Okl.—*Stumpf v. Pederson*, 54 P.2d 1035, 176 Okl. 136.

Tenn.—*Cotton v. Frazier*, 95 S.W.2d 45, 170 Tenn. 301.

W.Va.—*Fisher v. Bouchelle*, 61 S.E. 2d 305.

50 C.J. p 550 note 15.

#### In New York

(1) It has not been definitely settled by the court of appeals whether a party or witness attending in a county other than that of his residence is immune from service of civil process.—*Corpus Juris* quoted in *Palazzo v. Conforti*, 50 N.Y.S.2d 706, 707—50 C.J. p 550 note 17 [c].

(2) Some of the lower courts apparently lay down the doctrine without qualification that a witness attending a trial in a county other than that of his residence is not entitled to immunity from service.—*Frisbie v. Young*, 11 Hun 474—*Fletcher v. Franko*, 15 N.Y.S. 674, 21 N.Y.Civ.Proc. 35.

(3) Others hold that a witness who attends a trial or proceeding in a county other than that of his residence is exempt from service of process, by a court of that county.—*Palazzo v. Conforti*, 50 N.Y.S.2d 706—50 C.J. p 550 note 17 [c] (3), (4).

21. Mo.—*Christian v. Williams*, 20 S.W. 96, 111 Mo. 429.  
50 C.J. p 550 note 17.

22. Mich.—*Meyers v. Barlock*, 275 N.W. 656, 281 Mich. 629.  
Tenn.—*Cotton v. Frazier*, 95 S.W.2d 45, 170 Tenn. 301.  
50 C.J. p 550 note 16.

23. W.Va.—*Fisher v. Bouchelle*, 61 S.E.2d 305—*Morris v. Calhoun*, 195 S.E. 341, 119 W.Va. 603.

Sentencing or commitment held not "process"

(1) Neither the sentence for misdemeanor nor the temporary commitment delivered to the jailer along with the prisoner and reciting the date and the length of the sentence and the amount of fine imposed, is "process" within meaning of the immunity rule so that service of process in other litigation on the defendant while in the county jail serving sentence is valid.—*State ex rel. Godby v. Chambers*, 42 S.E.2d 255, 130 W.Va. 115.

(2) Confinement in prison as affecting right to immunity see infra § 82.

24. Mich.—*Meyers v. Barlock*, 275 N.W. 656, 281 Mich. 629.

Miss.—*Corpus Juris* quoted in *Arnett v. Carol C. & Fred R. Smith, Inc.*, 145 So. 638, 640, 165 Miss. 53.

N.Y.—*Singer v. Reising*, 276 N.Y.S. 714, 154 Misc. 239.

Okl.—*State ex rel. Spigner v. Superior Court of Okmulgee County*, 54 P.2d 317, 175 Okl. 632.

Tenn.—*Cotton v. Frazier*, 95 S.W.2d 45, 170 Tenn. 301.

50 C.J. p 551 note 19.

25. Ill.—*Sbertoll v. Clark*, 263 Ill. App. 65—*Lewis v. Schwinn*, 71 Ill. App. 265.

50 C.J. p 551 note 20.  
Service by inveigling or enticing nonresident into jurisdiction of court see supra § 39.

26. N.J.—*Morgan v. Morgan*, 192 A. 508, 122 N.J.Eq. 2—*Brown v. Brown*, 165 A. 643, 112 N.J.Eq. 600—*Kutschinski v. Kutschinski*, 164 A. 560, 112 N.J.Eq. 341—*Allen v. Plowman*, 183 A. 899, 14 N.J.Misc. 251.

27. N.J.—*Brown v. Brown*, 165 A. 643, 112 N.J.Eq. 600.

#### Remedy in particular case

Where by statute a nonresident of a county may be compelled to come into a court of the county by process, it has been held that service on a witness or party residing in another county is not a nullity, but that the court will control the service, and either set it aside or change the venue arising from such service, or otherwise remedy any special disadvantage which such service entails upon the party.—*Massey v. Colville*, 45 N.J.Law 119, 46 Am.R. 754—50 C.J. p 551 note 23.

28. N.J.—*Allen v. Plowman*, 183 A. 899, 14 N.J.Misc. 251.

*In counties in which witnesses or parties reside.* In the absence of statute providing otherwise,<sup>29</sup> witnesses and suitors attending court in counties of their residence are not entitled to immunity from service of civil process.<sup>30</sup>

### c. As to County or State Other than That in Which Action Pending

Authorities differ as to whether nonresident witnesses or suitors are immune from service of process while passing through another jurisdiction in going to, or returning from, court.

According to some decisions nonresidents of the state who come into the state to attend trial of a cause in which they are suitors are protected from service of civil process of a state through which they have to pass in coming from, or returning to, their homes, as well as from the process of the state in which the cause is tried;<sup>31</sup> but there is also authority directly to the contrary of this proposition, the view being taken that witnesses and suitors are not exempt from service of civil process in any jurisdiction other than that in which their attendance as such is required.<sup>32</sup> It has been held that suitors or witnesses going from one county in a

state to another by the most direct route are entitled to claim exemption from service of process while passing through any intermediate county.<sup>33</sup>

### d. Basis, Beneficial Purpose, and Personal Nature of Exemption

The exemption of nonresident witnesses or suitors from service of process rests on grounds of public policy and due administration of justice, and, while personal in its nature, is for the benefit of the court rather than of witnesses and parties.

The privilege of immunity from service of civil process extended to nonresident witnesses and suitors is a very ancient one.<sup>34</sup> Stemming from the common law,<sup>35</sup> it has developed gradually in a natural order to its present force and effect,<sup>36</sup> and is not dependent on statutory law.<sup>37</sup> It is an exception to the general rule that a creditor may subject his debtor to service in whatever jurisdiction he finds him.<sup>38</sup>

The exemption rests on grounds of public policy<sup>39</sup> and the due administration of justice,<sup>40</sup> which require that every reasonable method of ascertaining the whole truth in matters before the court should be open to the court,<sup>41</sup> since the court would be

No great inconvenience shown  
N.J.—Allen v. Plowman, *supra*.

29. Ohio.—Barber v. Knowles, 82 N. E. 1065, 77 Ohio St. 81, 14 L.R.A., N.S., 663, 11 Ann.Cas. 1144.  
50 C.J. p 551 note 24.

30. W.Va.—Corpus Juris quoted in Fisher v. Bouchelle, 61 S.E.2d 305, 308.  
50 C.J. p 551 note 25.

#### Rule limited to nonresidents

The rule of immunity which protects defendants from service of civil process while attending courts as litigant or witness should be applied to those cases where, but for requirement of attendance on court, defendant, a nonresident, would not be required to come into state, or a defendant residing in another county would not be required to come into county where cause of action arose and thereby be able to avoid service of process in county in which cause of action arose.—Fisher v. Bouchelle, W.Va., 61 S.E.2d 305.

31. Tenn.—Sofge v. Lowe, 176 S.W. 106, 181 Tenn. 626, L.R.A.1916A 734.

32. U.S.—Holyoke, etc., Ice Co. v. Ambden, C.C.Mass., 55 F. 593, 21 L.R.A. 391.  
50 C.J. p 551 note 28.

33. Pa.—Tyrone Bank v. Doty, 2 Pa.Dist. 558, 12 Pa.Co. 287.

34. U.S.—Durst v. Tautges, Wilder & McDonald, C.C.A.Wis., 44 F.2d 507, 71 A.L.R. 1394.

Iowa.—Moseley v. Ricks, 274 N.W. 23, 223 Iowa 1038.

N.Y.—Chase Nat. Bank of City of New York v. Turner, 199 N.E. 636, 269 N.Y. 397, amendment of remittitur denied 3 N.E.2d 459, 271 N. Y. 634.  
50 C.J. p 552 note 30.

35. Iowa.—Moseley v. Ricks, 274 N. W. 23, 223 Iowa 1038.  
Miss.—Arnett v. Carol C. & Fred R. Smith, Inc., 145 So. 638, 165 Miss. 53.

N.J.—Baskerville v. Kofsky, 18 A.2d 562, 18 N.J.Misc. 325.

36. U.S.—Hale v. Wharton, C.C.Mo., 73 F. 739.  
50 C.J. p 552 note 31.

37. Iowa.—Moseley v. Ricks, 274 N. W. 23, 223 Iowa 1038.  
50 C.J. p 552 note 29.

38. Pa.—Crusco v. Strunk Steel Co., 74 A.2d 142, 365 Pa. 326.

39. U.S.—Corpus Juris quoted in Hardie v. Bryson, D.C.Mo., 44 F. Supp. 67, 70, 71.

Iowa.—Moseley v. Ricks, 274 N.W. 23, 223 Iowa 1038—Kelly v. Shafer, 239 N.W. 547, 213 Iowa 792.  
Miss.—Arnett v. Carol C. & Fred R. Smith, Inc., 145 So. 638, 165 Miss. 53.

N.J.—Michaelson v. Goldfarb, 110 A. 710, 94 N.J.Law 352—Baskerville v. Kofsky, 18 A.2d 562, 18 N.J. Misc. 325.

N.Y.—Kreiger v. Kreiger, 71 N.Y.S. 2d 448, affirmed 72 N.Y.S.2d 403,

272 App.Div. 880, appeal dismissed 75 N.Y.2d 629, 297 N.Y. 618, appeal denied 75 N.Y.S.2d 291, 272 App. Div. 1053.

Okl.—Thomas v. Blackwell, 46 P.2d 509, 172 Okl. 487.  
50 C.J. p 552 note 33.

40. U.S.—Lamb v. Schmitt, Miss., 52 S.Ct. 317, 285 U.S. 222, 76 L. Ed. 720—Durst v. Tautges, Wilder & McDonald, C.C.A.Wis., 44 F.2d 507, 71 A.L.R. 1394—Corpus Juris quoted in Hardie v. Bryson, D.C. Mo., 44 F.Supp. 67, 70, 71.

Iowa.—Moseley v. Ricks, 274 N.W. 23, 223 Iowa 1038—Kelly v. Shafer, 239 N.W. 547, 213 Iowa 792—Northwestern Casualty & Surety Co. v. Conaway, 230 N.W. 548, 210 Iowa 126, 68 A.L.R. 1465.

Miss.—Arnett v. Carol C. & Fred R. Smith, Inc., 145 So. 638, 165 Miss. 53.

N.J.—Michaelson v. Goldfarb, 110 A. 710, 94 N.J.Law 352—Baskerville v. Kofsky, 18 A.2d 562, 18 N.J.Misc. 325.

N.Y.—Block v. Block, 91 N.Y.S.2d 577.

Okl.—Thomas v. Blackwell, 46 P.2d 509, 172 Okl. 487.

Pa.—Crusco v. Strunk Steel Co., 74 A.2d 142, 365 Pa. 326.

Tenn.—Anderson v. Atkins, 29 S.W. 2d 248, 161 Tenn. 137.

Va.—Wheeler v. Flintoff, 159 S.E. 112, 156 Va. 923.

50 C.J. p 552 note 34.

41. U.S.—Corpus Juris quoted in



often embarrassed and sometimes interrupted if the suitor might be vexed with process while attending on the court for the protection of his rights or the witness attending to testify.<sup>42</sup> It is in the public interest that nonresident suitors and witnesses be encouraged to appear voluntarily,<sup>43</sup> and not deterred from so doing;<sup>44</sup> and unless immunity from service of civil process is given they might be deterred from attending through fear of being subjected to the burden of new litigation,<sup>45</sup> and delays might ensue and injustice be done.<sup>46</sup> Therefore, the courts should protect them against possible litigation by granting immunity from service of civil process and thus removing the liability to such litigation.<sup>47</sup>

It has also been said that the exemption is founded on the principle that, where the law exacts a duty from any person it will protect him in the discharge of it, and that individuals cannot demand the use of public civil process so as to arrest or interfere with others in the performance of public duties or of duties required by public process;<sup>48</sup> and that immunity granted a nonresident witness does not work any injustice to anyone, since, unless he comes within the state, there will be no opportunity to serve any process on him.<sup>49</sup>

*Judicial necessities as determinative.* The rule granting exemption from service of process should not be enlarged beyond the reason on which it is

founded, and should be extended or withheld only as judicial necessities require.<sup>50</sup>

*Comity and reciprocity.* The principle of state comity has been assigned by some courts as a reason for extending to nonresident witnesses and suitors the privilege of immunity from service of civil process.<sup>51</sup> It has been said, however, that the courts of a state should not deny immunity to nonresident witnesses and suitors merely because it is the rule in the courts of the state in which such witnesses and suitors reside to deny immunity from service of civil process to nonresident witnesses and suitors.<sup>52</sup>

*Whether for benefit of witnesses and parties or court.* It has been variously stated that the exemption is not for the benefit of the witnesses and parties, but for the benefit of the court,<sup>53</sup> that the protection of courts of justice is the primary object of the rule and the privilege to the individual incidental,<sup>54</sup> and that the exemption is alike for the benefit of the witnesses and parties and of the court.<sup>55</sup>

*Personal nature of privilege.* The privilege is strictly personal.<sup>56</sup> Hence, where two defendants are sued to enforce a joint liability, and one of them is exempt from service of process in the action, the other cannot oust jurisdiction because of such ex-

Hardie v. Bryson, D.C.Mo., 44 F. Supp. 67, 70, 71.  
50 C.J. p 552 note 35.

42. U.S.—*Corpus Juris* quoted in Hardie v. Bryson, D.C.Mo., 44 F. Supp. 67, 70, 71.  
Iowa.—Northwestern Casualty & Surety Co. v. Conaway, 230 N.W. 543, 210 Iowa 126, 68 A.L.R. 1465.  
50 C.J. p 552 note 36.

43. U.S.—*Corpus Juris* quoted in Hardie v. Bryson, D.C.Mo., 44 F. Supp. 67, 70, 71.  
N.Y.—Block v. Block, 91 N.Y.S.2d 577.  
Va.—Wheeler v. Flintoff, 159 S.E. 112, 156 Va. 923.  
50 C.J. p 552 note 37.

44. U.S.—Lamb v. Schmitt, Miss., 52 S.Ct. 317, 285 U.S. 222, 76 L. Ed. 720—*Corpus Juris* quoted in Hardie v. Bryson, D.C.Mo., 44 F. Supp. 67, 70, 71—Moffett v. Arabian American Oil Co., D.C.N.Y., 8 F.R.D. 566.  
50 C.J. p 552 note 38.

45. U.S.—Lamb v. Schmitt, Miss., 52 S.Ct. 317, 285 U.S. 222, 76 L. Ed. 720—*Corpus Juris* quoted in Hardie v. Bryson, D.C.Mo., 44 F. Supp. 67, 70, 71.  
50 C.J. p 553 note 39.

46. U.S.—*Corpus Juris* quoted in

Hardie v. Bryson, D.C.Mo., 44 F. Supp. 67, 70, 71.  
N.Y.—Person v. Grier, 66 N.Y. 124, 23 Am.R. 35.

47. U.S.—*Corpus Juris* quoted in Hardie v. Bryson, D.C.Mo., 44 F. Supp. 67, 70, 71.  
50 C.J. p 553 note 41.

48. U.S.—*Corpus Juris* quoted in Hardie v. Bryson, D.C.Mo., 44 F. Supp. 67, 70, 71.  
50 C.J. p 553 note 42.

49. U.S.—*Corpus Juris* quoted in Hardie v. Bryson, D.C.Mo., 44 F. Supp. 67, 70, 71.  
50 C.J. p 553 note 43.

50. U.S.—Lamb v. Schmitt, Miss., 52 S.Ct. 317, 285 U.S. 222, 76 L. Ed. 720.  
Pa.—Crusco v. Strunk Steel Co., 74 A.2d 142, 365 Pa. 326.

51. Ind.—Wilson v. Donaldson, 20 N.E. 250, 117 Ind. 356, 10 Am.S.R. 48, 3 L.R.A. 266.  
50 C.J. p 553 note 44.

52. Wyo.—State v. Natrona County Eighth Dist. Ct., 243 P. 123, 34 Wyo. 288.  
50 C.J. p 553 note 45.

53. U.S.—Lamb v. Schmitt, Miss., 52 S.Ct. 317, 285 U.S. 222, 76 L. Ed.

720—*Corpus Juris* quoted in Hardie v. Bryson, D.C.Mo., 44 F. Supp. 67, 70, 71.

Miss.—Arnett v. Carol C. & Fred R. Smith, Inc., 145 So. 638, 165 Miss. 53.  
Pa.—Crusco v. Strunk Steel Co., 74 A.2d 142, 365 Pa. 326.  
50 C.J. p 553 note 46.

54. U.S.—*Corpus Juris* quoted in Hardie v. Bryson, D.C.Mo., 44 F. Supp. 67, 70, 71.  
Iowa.—Moseley v. Ricks, 274 N.W. 23, 223 Iowa 1038.  
Va.—Wheeler v. Flintoff, 159 S.E. 112, 156 Va. 923.  
50 C.J. p 553 note 47.

55. U.S.—Durst v. Tautges, Wilder & McDonald, C.C.A.Wis., 44 F.2d 507, 71 A.L.R. 1394—*Corpus Juris* quoted in Hardie v. Bryson, D.C.Mo., 44 F. Supp. 67, 70, 71.  
N.J.—Morgan v. Morgan, 188 A. 253, 15 N.J.Misc. 101, affirmed 192 A. 508, 122 N.J.Eq. 2.  
Tenn.—Cotton v. Frazier, 95 S.W.2d 45, 170 Tenn. 301—Anderson v. Atkins, 29 S.W.2d 248, 161 Tenn. 137.  
50 C.J. p 553 note 48.

56. Miss.—Arnett v. Carol C. & Fred R. Smith, Inc., 145 So. 638, 165 Miss. 53.  
50 C.J. p 556 note 94.

emption,<sup>57</sup> for the party entitled to the exemption can claim it or not as he sees fit.<sup>58</sup>

### e. Persons Entitled

The immunity of witnesses and suitors to service of process extends only to those whose duty requires their attendance in a judicial proceeding and whose presence is necessary to the court.

The immunity of witnesses and suitors from service of civil process is extended to those persons only whose duty requires their attendance in a judicial proceeding<sup>59</sup> and whose presence is necessary to the court in the performance of its function of administering justice.<sup>60</sup> It is not to be extended so far as to exempt all persons voluntarily coming within the jurisdiction of the court from being served,<sup>61</sup> as where they come in merely to investigate transactions,<sup>62</sup> or otherwise attend to matters which may become the subject of litigation<sup>63</sup> or which may eventually reach a trial.<sup>64</sup> While it has been held that the exemption does not apply to persons who enter the jurisdiction merely to consult with attorneys,<sup>65</sup> other authorities have held that the exemption extends to a nonresident who comes into a jurisdiction at the request of his counsel to confer in connection with a pending case.<sup>66</sup>

**Bad faith.** Since the exemption from service is based on the due administration of justice, as considered supra subdivision d of this section, where justice will not be served, as where the individual seeking the privilege of immunity is not acting in good faith, but collusively, so that injustice will be

achieved, the privilege will not be granted.<sup>67</sup>

**Officers or agents of corporation.** While the contrary doctrine has been asserted,<sup>68</sup> it has been generally held that a nonresident officer or agent of a foreign corporation is exempt from service of process for the commencement of a civil action against the corporation, where he has in good faith come into the state to testify in litigation in which his corporation is engaged<sup>69</sup> or as a witness for the state in a criminal prosecution,<sup>70</sup> or where he is in attendance under subpoena to appear before the grand jury,<sup>71</sup> or for the sole purpose of consulting the attorneys of his corporation with reference to certain rights which it claims to have in property involved in litigation to which the corporation was a party.<sup>72</sup> It has also been held that such officer or agent who has come into the state to testify as a witness in litigation in which the corporation is engaged is exempt from service of process for the commencement of a civil action against himself in his individual capacity;<sup>73</sup> and, similarly, where a nonresident enters the jurisdiction to testify as a witness in a private or some other capacity, he cannot be served with process as director of a foreign corporation.<sup>74</sup>

In jurisdictions where witnesses, residents of the state, attending court in a county other than that in which they reside are exempt from service of civil process, in accordance with the rule discussed supra subdivision b of this section, an officer or agent of a domestic corporation attending as a wit-

57. Neb.—Whitman First State Bank v. Ingram, 186 N.W. 334, 107 Neb. 468.

58. Neb.—Whitman First State Bank v. Ingram, supra. Waiver of privilege by failure to claim it or other acts or omissions see infra § 88.

59. N.Y.—Gilmore v. Gilmore, 58 N.Y.S.2d 556, 185 Misc. 535. 50 C.J. p 553 note 50.

60. Del.—Brooks v. State, 79 A. 790, 26 Del. 1, 51 L.R.A., N.S., 1126, Ann.Cas.1915A 1133. 50 C.J. p 554 note 52.

61. Cal.—Corpus Juris cited in Franklin v. Superior Court in and for San Francisco County, App., 220 P.2d 8, 10.

N.J.—Morgan v. Morgan, 188 A. 258, 15 N.J.Misc. 101, affirmed 192 A. 508, 122 N.J.Eq. 2.

62. Cal.—Franklin v. Superior Court in and for San Francisco County, App., 220 P.2d 8.

Ga.—Vaughn v. Boyd, 82 S.E. 576, 142 Ga. 230, L.R.A.1915A 694.

**Engineer** who was hired by foreign corporation to obtain information

within the state for purpose of testifying as expert witness at on-coming trials was not exempt from service of process, where court for trial of cases for which engineer was gathering information was not in session, and engineer was not in state in capacity of witness, then, to testify.—Dyar v. Georgia Power Co., 176 S.E. 711, 173 S.C. 527.

63. Cal.—Franklin v. Superior Court in and for San Francisco County, App., 220 P.2d 8. Ga.—Vaughn v. Boyd, 82 S.E. 576, 142 Ga. 230, L.R.A.1915A 694.

64. Cal.—Franklin v. Superior Court in and for San Francisco County, App., 220 P.2d 8. 50 C.J. p 554 note 56.

65. Cal.—Franklin v. Superior Court in and for San Francisco County, App., 220 P.2d 8. Ga.—Vaughn v. Boyd, 82 S.E. 576, 142 Ga. 230, L.R.A.1915A 694.

66. Mich.—Grundy v. Redor, 20 N.W.2d 261, 312 Mich. 428.

67. N.J.—Baskerville v. Kofsky, 13 A.2d 562, 18 N.J.Misc. 325.

68. Ky.—Currie Fertilizer Co. v. Krish, 74 S.W. 268, 24 Ky.L. 2471.

69. N.J.—Mulhearn v. Press Pub. Co., 21 A. 186, 53 N.J.Law 158, 11 L.R.A. 101.

50 C.J. p 554 note 58.

70. Ga.—Fidelity, etc., Co. v. Everett, 25 S.E. 734, 97 Ga. 787.

71. Tenn.—Sewanee Coal, etc., Co. v. Williams, 107 S.W. 968, 120 Tenn. 339.

72. Ohio.—Solomon v. Yokum, 10 Ohio N.P., N.S., 271.

73. Pa.—Ferree v. Pierce, 10 Pa. Dist. 746, 25 Pa.Co. 112.

74. S.C.—State v. Broad River Power Co., 167 S.E. 644, 168 S.C. 409.

**President of domestic corporation** Nonresident witness summoned before railroad commission to testify as president of domestic corporation was exempt from service on him as director of foreign corporation, where petition prayed for rule only against domestic corporation and its officers, notwithstanding information sought by rule was within knowledge of foreign corporation.—State v. Broad River Power Co., supra.

ness in a county other than that in which the corporation is domiciled is exempt from service of civil process for commencement of a civil action against the corporation of which he is an officer or agent.<sup>75</sup> However, no such immunity exists where by statute summons could have been served on the corporation in the county of its domicile;<sup>76</sup> and under a statute providing that in an action against a corporation summons shall be served by delivering a copy through the president, it has been held that, if the corporation is a domestic corporation, and its president, who is a nonresident of the state, comes into the state to attend court either as a suitor or witness, he may be served with process in an action against the corporation, since no relief is sought against him in his individual capacity.<sup>77</sup>

### § 81. Proceedings in Which Exemption May Be Claimed

The exemption from service of civil process applies to all proceedings judicial in nature, whether or not they take place in court, including examinations before trial, taking of depositions, and hearings in bankruptcy proceedings.

The right to exemption from service of civil process may be claimed in all proceedings which are in their nature judicial, whether or not they take place in court;<sup>78</sup> but it does not extend to matters which are not judicial suits or proceedings in their nature.<sup>79</sup> Thus the exemption extends to attendance before any subordinate tribunal or officer before whom proceedings necessary in the trial or hearing

of the cause are had,<sup>80</sup> such, for instance, as an arbitrator appointed by rule of court,<sup>81</sup> masters, commissioners, examiners, or referees in chancery,<sup>82</sup> and magistrates.<sup>83</sup> So also it has been held that the privilege extends to witnesses in attendance before a grand jury,<sup>84</sup> to persons attending a statutory proceeding before the attorney general,<sup>85</sup> to parties and witnesses in summary proceedings for dispossession under a landlord and tenant statute,<sup>86</sup> to parties to an interference proceeding in the patent office,<sup>87</sup> and to attendance before a register of wills whose jurisdiction over matters of probate is judicial by a foreign executor on a citation requiring him to file the will of decedent within a designated time.<sup>88</sup> It has also been held to extend to witnesses attending a hearing before a legislative committee<sup>89</sup> or before a commission making authorized official inquiry into affairs relating to matters deeply affecting public interest and having, among other powers, the power to subpoena witnesses.<sup>90</sup> It has even been held that one who attends an appeal in an action in which he is a party is entitled to the exemption.<sup>91</sup> Attendance by a managing officer of a foreign corporation who is in the state to attend a sale of land under a decree of court in which the corporation was a party is not an attendance on a judicial proceeding so as to exempt him from service of summons in an action against the corporation.<sup>92</sup>

The exemption has been held to extend to witnesses attending a hearing before a commissioner

75. Mich.—Flewelling v. Prima Oil Co., 289 N.W. 160, 291 Mich. 281. 50 C.J. p 554 note 64.
76. Ohio.—Syndicate Coal Co. v. Dixon, 157 N.E. 901, 25 Ohio App. 252.
77. S.C.—Breon v. Miller Lumber Co., 65 S.E. 214, 83 S.C. 221, 137 Am.S.R. 803, 24 L.R.A.N.S., 276.
78. U.S.—Durst v. Tautges, Wilder & McDonald, C.C.A.Wis., 44 F.2d 507, 71 A.L.R. 1394.
- Iowa.—Corpus Juris cited in Moseley v. Ricks, 274 N.W. 23, 25, 223 Iowa 1038.
- Mich.—Meyers v. Barlock, 275 N.W. 656, 281 Mich. 629.
- Mont.—Corpus Juris cited in State ex rel. Eilan v. District Court of Eighth Judicial Dist. in and for Cascade County, 33 P.2d 526, 530, 97 Mont. 160, 93 A.L.R. 865.
- N.Y.—Chase Nat. Bank of City of New York v. Turner, 199 N.E. 636, 269 N.Y. 397, amendment of remittitur denied 3 N.E.2d 459, 271 N.Y. 634—People v. Strabo v. Claggett & Co., 246 N.Y.S. 618, 231 App.Div. 866—Stern v. Worth, 4 N.Y.S.2d 392, 167 Misc. 605. 50 C.J. p 554 note 67.

#### Coroner's Inquest

With respect to exemption from process, coroner's inquest is a quasi-judicial proceeding or investigation.—Kelly v. Shafer, 239 N.W. 547, 213 Iowa 792.

79. Mich.—Meyers v. Barlock, 275 N.W. 656, 281 Mich. 629.
80. U.S.—Durst v. Tautges, Wilder & McDonald, C.C.A.Wis., 44 F.2d 507, 71 A.L.R. 1394.
- N.J.—Riewold v. Riewold, 138 A. 72, 121 N.J.Eq. 134.
- N.Y.—People v. Strabo v. Claggett & Co., 246 N.Y.S. 618, 231 App.Div. 866. 50 C.J. p 554 note 68.
81. N.Y.—Parker v. Marco, 32 N.E. 989, 136 N.Y. 535, 32 Am.S.R. 770, 20 L.R.A. 45. 50 C.J. p 555 note 69.
82. Minn.—St. Paul First Nat. Bank v. Ames, 39 N.W. 308, 39 Minn. 179. 50 C.J. p 555 note 70.
83. Pa.—Watsonstown Nat. Bank v. Messenger, 6 Pa.Co. 609, 1 Northumb.Co.Leg.N. 173.
84. Pa.—Melaney v. Atkins, 4 Pa. Dist. 644.

85. N.Y.—People v. Strabo v. Claggett & Co., 246 N.Y.S. 618, 231 App. Div. 866.
86. N.J.—Richardson v. Smith, 65 A. 162, 74 N.J.Law 111.
87. D.C.—Engle v. Manchester, 46 App.D.C. 220.
88. Pa.—Yeakel v. Brands, 9 Pa. Dist. 49.
89. N.Y.—Thorp v. Adams, 11 N.Y.S. 479, 58 Hun 603, 19 N.Y.Civ.Proc. 351.
90. N.Y.—Stern v. Worth, 4 N.Y.S. 2d 392, 167 Misc. 605. 50 C.J. p 555 note 79.
91. N.Y.—Chase Nat. Bank of City of New York v. Turner, 199 N.E. 636, 269 N.Y. 397, amendment of remittitur denied 3 N.E.2d 459, 271 N.Y. 634, criticizing Sampson v. Graves, 203 N.Y.S. 729, 203 App. Div. 522. 50 C.J. p 555 note 80.
92. N.C.—Greenleaf v. People's Bank, 45 S.E. 638, 133 N.C. 292, 98 Am.S.R. 709, 63 L.R.A. 499.

of the department of motor vehicles empowered to determine and hear complaints and enforce his findings by suspending privileges, revoking licenses, and by fine and imprisonment, according to the particular violation;<sup>93</sup> but it has been held not to apply to persons attending an investigation to determine whether a ticket will issue against a person involved in an automobile accident.<sup>94</sup>

*Examination before trial.* A person entering the jurisdiction in order to testify at an examination before trial in connection with an action to which he is a party is entitled to the immunity<sup>95</sup> even though the order to appear for such examination was served on his attorney rather than on him personally.<sup>96</sup>

*Taking of depositions.* Witnesses or parties to whom immunity from service of civil process would be extended while attending court are, according to the weight of authority, entitled to immunity from service of civil process while attending the taking of depositions to be used in the trial of a cause in which they are interested as parties or witnesses,<sup>97</sup> although it has been held in some jurisdictions that a nonresident within the state for the purpose of taking depositions to be used in an action in which he is a party in his own state is not exempt from service of civil process,<sup>98</sup> and that exemption will not be extended to a party acting as his own solicitor to take depositions in pursuance of a notice in a county other than his residence.<sup>99</sup> Under the majority rule stated first above, the fact that a witness is attending without any subpoena having been served will not affect the privilege;<sup>1</sup> and it has also been held that the privilege is not affected by the fact that the depositions were taken by agreement rather than on a notice and by service of a sub-

poena,<sup>2</sup> or by the fact that the depositions were taken before a notary, where by statute a witness may be compelled by process or rule to attend before such officer.<sup>3</sup> It has also been held not to affect the rule that the purpose of having the deposition taken was to make opposing counsel erroneously believe that the deposing witness would not be present at the trial and that there was in fact no intention of using the deposition.<sup>4</sup> The rule has been applied both to parties and witnesses who are nonresidents of the state<sup>5</sup> and to those who, although they are residents of the state, are nonresidents of the county in which the depositions are taken,<sup>6</sup> and to cases where nonresidents of the state attend the taking of depositions within the state to be used in the trial of an action in another state.<sup>7</sup>

*Hearings in bankruptcy proceedings.* Hearings before referees or commissioners in bankruptcy are judicial hearings within the rule exempting witnesses and parties from service of civil process while attending a judicial hearing outside the jurisdiction in which they reside.<sup>8</sup>

*Entry into jurisdiction to effect settlement.* The entry of a person into a state for the purpose of effecting a settlement or compromise of a case to which he is a party is not an entry for a judicial hearing and does not render him immune to service<sup>9</sup> except in so far as such entry may have been the result of his adversary's fraud or deceit, as discussed supra § 39.

## § 82. Persons Charged with Crime or Confined in Prison

Although not universally followed, it is a general rule that a nonresident who enters a jurisdiction to appear,

93. U.S.—Stratton v. Hughes, D.C. N.J., 211 F. 557.

N.Y.—Stern v. Worth, 4 N.Y.S.2d 392, 167 Misc. 605—Palazzo v. Conforti, 50 N.Y.S.2d 700.

Pa.—Scott v. Simmons, 27 Pa. Dist. & Co. 383.

94. Mich.—Meyers v. Barlock, 275 N.W. 656, 281 Mich. 629.

A distinction has been drawn between a hearing to determine whether a ticket should issue and a hearing before a justice of the peace after a ticket has been issued, the exemption applying to the latter, as a judicial hearing, and not to the former.—Meyers v. Barlock, supra.

95. N.Y.—New England Industries v. Margiotti, 60 N.Y.S.2d 430, 270 App. Div. 488, affirmed 70 N.E.2d 540, 296 N.Y. 722.

96. N.Y.—New England Industries v. Margiotti, supra.

72 C.J.S.—71

97. Ga.—Ewing v. Elliott, 181 S.E. 123, 51 Ga. App. 565.

Iowa.—Corpus Juris cited in Moseley v. Ricks, 274 N.W. 23, 25, 223 Iowa 1038.

Mont.—Corpus Juris cited in State ex rel. Eilan v. District Court of Eighth Judicial Dist. in and for Cascade County, 33 P.2d 526, 530, 97 Mont. 160, 93 A.L.R. 865.

50 C.J. p 555 note 82.

98. Ill.—Greer v. Young, 11 N.E. 167, 120 Ill. 184.

50 C.J. p 556 note 90.

99. Ill.—Cassam v. Galvin, 41 N.E. 1087, 158 Ill. 30.

1. N.J.—Miller v. Dungan, 37 N.J. Law 182.

2. U.S.—Roschynialski v. Hale, D. C.Neb., 201 F. 1017.

50 C.J. p 555 note 87.

3. U.S.—Roschynialski v. Hale, supra.

50 C.J. p 556 note 88.

4. Ga.—Ewing v. Elliott, 181 S.E. 123, 51 Ga. App. 565.

5. U.S.—Roschynialski v. Hale, D. C.Neb., 201 F. 1017.  
50 C.J. p 555 note 84.

6. Ark.—Powers v. Arkadelphia Lumber Co., 38 S.W. 842, 61 Ark. 504, 54 Am.S.R. 276.

Pa.—Wetherill v. Seitzinger, 1 Miles 237.

7. N.J.—Riewold v. Riewold, 188 A. 72, 121 N.J.Eq. 134.

50 C.J. p 555 note 86.

8. N.Y.—Powell v. Pangborn, 145 N. Y.S. 1073, 161 App. Div. 453.

Pa.—Bowen v. Baker, Com.Pl., 20 Lehl.J. 9.  
50 C.J. p 556 note 92.

9. Iowa.—Lingo v. Reichenbach Land Co., 279 N.W. 121, 225 Iowa 112.

plead, or be tried in a criminal prosecution against him is exempt from service of civil process.

In a majority of jurisdictions a nonresident of the state who comes into the state for the purpose of appearing, pleading, or being tried in a criminal prosecution against him is exempt from service of civil process while attending court, and for a reasonable time before and after in going to court and returning to his home;<sup>10</sup> and the same exemption has been extended to defendant who resides in a county other than that in which the prosecution is had.<sup>11</sup>

In jurisdictions where the foregoing principles prevail, exemption has been extended both in cases where the attendance is involuntary,<sup>12</sup> and in cases where it is voluntary.<sup>13</sup> Accordingly, exemption has frequently been extended to defendants who were nonresidents of the state or county in which

the criminal prosecution was pending, and who, after waiving extradition and coming voluntarily into the state,<sup>14</sup> or who, after being arrested in a state or county other than that of their residence, gave bond<sup>15</sup> or deposited collateral<sup>16</sup> for their appearance, and whose appearance was in pursuance thereof. It has been held that the rule applies to a proceeding before a justice of the peace, even though no warrant had been issued or indictment returned.<sup>17</sup>

The above rules are not universally accepted, and there are some decisions not in harmony therewith.<sup>18</sup> Thus, in some decisions, it is held that a defendant in a criminal case is not immune from service of civil process.<sup>19</sup> In others, the rule is limited so as to grant immunity to cases where the attendance is voluntary, but not where it is involuntary,<sup>20</sup> unless, as appears supra § 39, the

10. Ark.—Barnes v. Moore, 229 S.W. 2d 492.

Iowa.—Frink v. Clark, 285 N.W. 681, 226 Iowa 1012.

Mich.—Gist v. Romey, 32 N.W.2d 481, 321 Mich. 357.

N.J.—Cook v. Cook, 28 A.2d 178, 132 N.J.Eq. 352—Golde v. Golde, 155 A. 677, 108 N.J.Eq. 519—Younger v. Younger, 69 A.2d 219, 5 N.J.Super. 371.

W.Va.—Fisher v. Bouchelle, 61 S.E. 2d 305—State ex rel. Godby v. Chambers, 42 S.E.2d 255, 130 W. Va. 115—Morris v. Calhoun, 195 S.E. 341, 119 W.Va. 603—**Corpus Juris** cited in Lang v. Shaw, 169 S.E. 444, 446, 113 W.Va. 628. 50 C.J. p 556 note 98.

The term "residence," as used in the statement of this rule, means the same as citizenship or domicile, so that party domiciled in state, who was apprehended in foreign state on indictment found against him in this state, could not claim nonresident's exemption from service of civil process, notwithstanding he had waived extradition and returned to state voluntarily.—Morgan v. Morgan, 188 A. 258, 15 N.J.Misc. 101, affirmed 192 A. 508, 122 N.J.Eq. 2.

11. Fla.—State ex rel. Cox v. Adams, 4 So.2d 457, 148 Fla. 426.

Okl.—Thomas v. Wall, 46 P.2d 516, 172 Okl. 493—**Corpus Juris** cited in Thomas v. Blackwell, 46 P.2d 509, 513, 172 Okl. 487.

W.Va.—Fisher v. Bouchelle, 61 S.E. 2d 305—State ex rel. Godby v. Chambers, 42 S.E.2d 255, 130 W. Va. 115—Morris v. Calhoun, 195 S. E. 341, 119 W.Va. 603—Lang v. Shaw, 169 S.E. 444, 113 W.Va. 628. 50 C.J. p 556 note 99.

12. Ark.—Barnes v. Moore, 229 S.W. 2d 492.

W.Va.—Morris v. Calhoun, 195 S.E. 341, 119 W.Va. 603.

50 C.J. p 557 note 1.

13. Iowa.—Kelly v. Shafer, 239 N. W. 547, 213 Iowa 792.

Mich.—Gist v. Romey, 32 N.W.2d 481, 321 Mich. 357.

N.J.—Cook v. Cook, 28 A.2d 178, 132 N.J.Eq. 352—Younger v. Younger, 69 A.2d 219, 5 N.J.Super. 371.

W.Va.—Morris v. Calhoun, 195 S.E. 341, 119 W.Va. 603.

50 C.J. p 557 note 2.

14. Mich.—Riegler v. Judge Kalamazoo Cir. Ct., 192 N.W. 690, 222 Mich. 421.

Subjection to civil process of persons within jurisdiction by reason of extradition proceedings generally see Extradition §§ 21, 46.

15. U.S.—Adamy v. Parkhurst, C.C. A.Mich., 61 F.2d 517.

Okl.—Thomas v. Blackwell, 46 P.2d 509, 172 Okl. 487.

W.Va.—Lang v. Shaw, 169 S.E. 444, 113 W.Va. 628.

50 C.J. p 557 note 4.

"In constructive custody"

Nonresident who, being voluntarily within state, is arrested and released on bail, is in constructive "custody of court;" hence, may be served with process in civil suit.—Stuart v. Wayne Circuit Judge, 233 N.W. 402, 252 Mich. 522.

16. Md.—Feuster v. Redshaw, 145 A. 560, 157 Md. 302.

17. W.Va.—Morris v. Calhoun, 195 S.E. 341, 119 W.Va. 603.

18. Mo.—Ex parte Noell, 293 S.W. 488, 220 Mo.App. 702.

50 C.J. p 557 note 7.

In North Carolina

Under provisions to that effect, a defendant in a criminal proceeding is not immune to the service of proc-

ess, except where he is brought into the state by or after waiver of extradition proceedings, and even then the exemption is limited to process in civil actions arising out of the same facts as the criminal proceedings on which the extradition proceedings were based; and defendant who is in state as required by a bail bond is not exempt from service of process.—White v. Ordille, 50 S.E.2d 499, 299 N.C. 490—Hare v. Hare, 46 S.E.2d 840, 228 N.C. 740—50 C.J. p 557 note 7 [d].

19. Mo.—Pfeiffer v. Schae, App., 107 S.W.2d 170.

Pa.—Taylor v. Vernon, 25 Pa.Dist. & Co. 550, 25 Del.Co. 146.

50 C.J. p 557 note 7 [c], [e].

20. Colo.—**Corpus Juris** cited in Norquist v. Norquist, 4 P.2d 306, 307, 89 Colo. 486.

N.Y.—Casino Fabrics v. Alpre, 43 N.Y.S.2d 260.

Tenn.—Curtis v. Kyte, 106 S.W.2d 234, 21 Tenn.App. 115.

Wash.—State ex rel. Alexander-Coplin & Co. v. Superior Court for King County, 57 P.2d 1262, 186 Wash. 354.

50 C.J. p 557 note 7 [a].

Reason for rule

Since the obvious reason of the rule is to encourage voluntary attendance on courts and to expedite the administration of justice, that reason fails when a suitor or witness is brought into the jurisdiction of a court while under arrest or other compulsion of law; since such a suitor or witness does nothing to encourage or promote voluntary submission to judicial proceedings.—Broadus v. Partrick, 149 S.W.2d 71, 177 Tenn. 335—Anderson v. Atkins, 29 S.W.2d 248, 161 Tenn. 187—50 C. J. p 557 note 7 [a] (3).

prosecution is instituted in bad faith for the bare purpose of bringing such person into the jurisdiction to be served with civil process; and accordingly, there is no exemption where defendant appears pursuant to bond or recognizance given on his arrest.<sup>21</sup> In some jurisdictions, it has been held that one who is voluntarily in the state to answer a criminal charge is not exempt from service of summons in a civil action,<sup>22</sup> but that the exemption does apply to one who is involuntarily in the state, as where he has been extradited and imprisoned.<sup>23</sup>

**Persons confined in prison.** A person confined in jail on a criminal charge<sup>24</sup> or imprisoned on conviction for such charge<sup>25</sup> is subject to service of civil process, irrespective of the question of residence, at least if he was voluntarily in the jurisdiction at the time of the arrest and confinement.<sup>26</sup> A jail, it has been said, possesses no "privilege of sanctuary."<sup>27</sup>

### § 83. Person Voluntarily Seeking Hearing before Grand Jury

Service of process may be had on an accused person who voluntarily seeks a hearing before a grand jury in a county other than that of his residence.

Service of process may be had on an accused person who voluntarily seeks a hearing before a grand

jury in a county other than that of his residence, since he has no lawful occasion to attend a hearing before the grand jury.<sup>28</sup>

### § 84. Persons Performing Public Duties

One who temporarily enters a jurisdiction other than that of his domicile, solely for the performance of a public duty, may be privileged from service of civil process.

One who temporarily enters a state or district other than that of his domicile, solely for the performance of a duty of a public nature, or to which a public interest attaches, is generally privileged from service of civil process for a reasonable time in going to, returning from, and attending on, the performance of such duty.<sup>29</sup> However, where the majority rule as to the exemption of suitors does not prevail, it has been held that the above exemption does not apply;<sup>30</sup> and a fortiori it will not apply where the person served was not acting in a governmental capacity.<sup>31</sup>

A statute providing that a police officer or patrolman while actually on duty shall not be liable to arrest on civil process or to service of subpoena from civil courts has been held not to render such officer immune from service of a summons and motion papers in a civil action.<sup>32</sup>

#### Federal court process

(1) A summons, as distinguished from a warrant, under federal rule is not compulsory process, and hence a nonresident who entered the state in response to such a summons entered the state voluntarily and was immune from civil process while coming to and going from place of such attendance, and immunity from a civil order of arrest issued in aid of judgment for unpaid arrears of alimony was not lost where, after he had pleaded to indictment, defendant was held by federal court in bail, which he furnished.—*Kreiger v. Kreiger*, 71 N.Y.S.2d 448, affirmed 72 N.Y.S.2d 403, 272 App.Div. 880, appeal dismissed 75 N.E.2d 629, 297 N.Y. 616, appeal denied 75 N.Y.S.2d 291, 272 App.Div. 1053.

(2) Where nonresident did not voluntarily appear in federal court to answer to information against him, but was present under subpoena to attend, he was under "compulsion" of federal process and hence not immune from service of process of state court.—*Casino Fabrics v. Alprent*, 43 N.Y.S.2d 260.

21. Tenn.—*Broadbudd v. Partrick*, 149 S.W.2d 71, 177 Tenn. 335—*Anderson v. Atkins*, 29 S.W.2d 248, 161 Tenn. 137.  
50 C.J. p 557 note 7 [a] (4)–(8).

22. Ga.—*Lomax v. Lomax*, 168 S.E. 883, 176 Ga. 605.

50 C.J. p 557 note 7 [b].

23. Ga.—*Lomax v. Lomax*, supra.

24. Mich.—*Stuart v. Wayne Circuit Judge*, 233 N.W. 402, 252 Mich. 522.  
50 C.J. p 557 note 8.

25. W.Va.—*State ex rel. Godby v. Chambers*, 42 S.E.2d 255, 130 W.Va. 115.

50 C.J. p 557 note 9.

26. Okl.—*Mosier v. Aspinwall*, 1 P. 2d 633, 151 Okl. 97.

27. N.C.—*White v. Underwood*, 34 S. E. 104, 125 N.C. 25, 74 Am.S.R. 630, 46 L.R.A. 706.

28. Ohio.—*Fields v. Ragelmeier*, 7 Ohio N.P.N.S., 585.

29. Cal.—*Corpus Juris* cited in *Murray v. Murray*, 16 P.2d 741, 742, 218 Cal. 707, 85 A.L.R. 1335, certiorari denied 53 S.Ct. 658, 289 U. S. 740, 77 L.Ed. 1487—*Corpus Juris* cited in *Tulley v. Superior Court* in and for Alameda County, 118 P.2d 477, 479, 45 Cal.App.2d 24.  
50 C.J. p 558 note 13.

Immunity from service of civil process of:

Attorneys at law see *Attorney and Client* § 44.

Judges see *Judges* § 11.

Persons engaged in military service and members of state militia

see *Army and Navy* § 19 c and *Militia* § 27 c.

Members of state legislatures see the C.J.S. title *States* § 35, also 59 C.J. p 87 note 54.

United States senators and representatives see the C.J.S. title *United States* § 18, also 65 C.J. p 1265 notes 43, 44.

Privileges and immunities of ambassadors and consuls see *Ambassadors and Consuls* § 12.

#### Sheriff

Fla.—*Harrell v. Black*, 38 So.2d 310.

Officer acting under extradition requisition

Neb.—*Zimmerman v. Buffington*, 238 N.W. 115, 121 Neb. 670.

30. Ill.—*American Industrial Finance Corporation v. Sholz*, 279 Ill. App. 45.

31. Ill.—*American Industrial Finance Corporation v. Sholz*, supra.

32. N.Y.—*Ryan v. Ryan*, 7 N.Y.S.2d 281, 169 Misc. 380.

#### Reason for rule

The statute is founded on the concept that the public interests would sustain a detriment if policemen, while discharging the functions of their office, might be arrested on civil process, or in compliance with a mandate, be compelled to leave their posts of duty to serve as witnesses; but the service of a sum-

## § 85. Electors

Under some statutes the service of civil process on an elector is prohibited during the time appointed for election of state and county officers.

A statute, prohibiting the service of civil process on an elector during the time appointed for election of state and county officers, extends to all writs, whether original or judicial, and to every warrant or summons by which a man is called into court to answer in a civil action as a party.<sup>33</sup> However, the statute is not violated by the filing and service of a declaration which has never been regarded in the law as "civil process."<sup>34</sup>

## § 86. Jurors

Jurors are not ordinarily exempt from service of civil process except in so far as it may interfere with their duties as jurors.

Under a statute providing against the service of any writ or other process on the body of a juror, jurors are not exempt from the service of civil process without arrest during the time they are attending court.<sup>35</sup> Moreover, it has been held that, in the absence of any statute prohibiting the service of civil process on a juror, an order in supplemental proceedings for examination of a judgment debtor may be served on him while a juror in court,<sup>36</sup> but where such proceedings interfere with his duties as a juror, that matter can be presented on a motion for that purpose.<sup>37</sup>

## § 87. Persons Observing Day as Holy Day

Under some statutes, service of process returnable

on a Saturday on a person who keeps Saturday as a holy day is void.

Under a statute making it an offense to serve any civil process returnable on Saturday on any person who keeps Saturday as holy time, process is void where the party has caused it to be returned on Saturday which is observed as holy by the party on whom the process is served.<sup>38</sup> Although the statute does not in express terms forbid the return of legal process on a day regarded as holy by the party on whom it is served, the penalty which it imposes implies a prohibition.<sup>39</sup>

## § 88. Waiver or Loss of Immunity

- a. In general
- b. Attending to other business while in jurisdiction
- c. Unreasonable delay in coming or going

### a. In General

Immunity from service of civil process may be waived or lost by acts or omissions of a person otherwise entitled thereto, as by a failure to claim the privilege or to assert it promptly or in the proper manner.

Since the immunity is personal in its nature, service of civil process on one who is entitled to immunity from such service is not void, but merely voidable;<sup>40</sup> and the immunity may be waived or lost by acts or omissions of a person otherwise entitled thereto.<sup>41</sup>

*Claiming privilege; delay.* The privilege may be waived not only by failure to assert it at all,<sup>42</sup> but also by failure to assert it promptly,<sup>43</sup> or by failure

mons or notice of motion does not entail such consequences.—*Ryan v. Ryan*, *supra*.

33. N.Y.—*Corlies v. Holmes*, 20 Wend. 681.

34. N.Y.—*Corlies v. Holmes*, *supra*.

35. Tenn.—*Grove v. Campbell*, 9 Yerg. 7.

50 C.J. p 558 note 27.

36. N.Y.—*Brown v. Edinger*, 114 N.Y.S. 1116, 61 Misc. 366.

37. N.Y.—*Brown v. Edinger*, *supra*.

38. N.Y.—*Martin v. Goldstein*, 46 N.Y.S. 961, 20 App.Div. 303.

39. N.Y.—*Martin v. Goldstein*, *supra*.

40. Colo.—*Corpus Juris* quoted in *Norquist v. Norquist*, 4 P.2d 306, 307, 89 Colo. 486.

Okl.—*Mosier v. Aspinwall*, 1 P.2d 633, 151 Okl. 97.

W.Va.—*Morris v. Calhoun*, 195 S.E. 341, 119 W.Va. 603.

50 C.J. p 558 note 34

Personal nature of exemption see *supra* § 80 d.

41. Cal.—*Franklin v. Superior Court* in and for San Francisco County, App., 220 P.2d 8.

Colo.—*Corpus Juris* quoted in *Norquist v. Norquist*, 4 P.2d 306, 307, 89 Colo. 486.

Iowa.—*Northwestern Casualty & Surety Co. v. Conaway*, 230 N.W. 548, 210 Iowa 126, 68 A.L.R. 1465.

Kan.—*Corpus Juris* cited in *Phoenix Joint Stock Land Bank v. Eells*, 148 P.2d 732, 733, 158 Kan. 530.

Miss.—*Arnett v. Carol C. & Fred R. Smith, Inc.*, 145 So. 638, 165 Miss. 53.

W.Va.—*Morris v. Calhoun*, 195 S.E. 341, 119 W.Va. 603.  
50 C.J. p 558 note 35.

Facts held not to constitute waiver Where testator sued nonresident outside state for money wrongfully obtained, nonresident contested action, action was dismissed, and nonresident, in a court within the state, contested testator's will cutting off nonresident's rights by offering previous will in which nonresident was

made sole beneficiary, nonresident did not waive rights to immunity from service of process while in the state.—*Moseley v. Ricks*, 274 N.W. 23, 223 Iowa 1033.

42. Iowa.—*Northwestern Casualty & Surety Co. v. Conaway*, 230 N.W. 548, 210 Iowa 126, 68 A.L.R. 1465.  
50 C.J. p 559 note 36.

43. Kan.—*Phoenix Joint Stock Land Bank v. Eells*, 148 P.2d 732, 158 Kan. 530.

Miss.—*Arnett v. Carol C. & Fred R. Smith, Inc.*, 145 So. 638, 165 Miss. 53.

Okl.—*Mosier v. Aspinwall*, 1 P.2d 633, 151 Okl. 97.  
50 C.J. p 559 note 37.

Claim of immunity must be timely made

Okl.—*Thomas v. Wall*, 46 P.2d 516, 172 Okl. 493.—*Thomas v. Blackwell*, 46 P.2d 509, 172 Okl. 487.

Objections held too late

Defendant's objections, in divorce action, to jurisdiction over his person while being held under criminal

to assert it in the proper manner;<sup>44</sup> and in case of failure to assert the privilege promptly, it is immaterial whether or not the delay was an intentional act of bad faith, since its effect would be the same.<sup>45</sup> The privilege must be claimed at as early a stage of the proceedings as possible;<sup>46</sup> and failure to claim the privilege until after it is too late to obtain service of another summons,<sup>47</sup> or until after verdict,<sup>48</sup> or judgment<sup>49</sup> against one otherwise entitled to the privilege, constitutes a waiver thereof; and the privilege is likewise waived where motion to set it aside is not made until two months after the summons of attachment and garnishee processes.<sup>50</sup>

*Commission of act giving cause of action while in attendance.* While it has been held that witnesses and suitors who are nonresidents of the state forfeit their right of exemption by the commission of a wrongful act during the time the exemption is in force, which gives a cause of action against them,<sup>51</sup> and while the same rule has been applied in respect of witnesses and suitors in a cause being heard in a county other than that of their residence,<sup>52</sup> the supreme court of the United States has reached the conclusion to the contrary on the ground that the exemption is for the benefit of the court rather than of the witness and must be upheld with inflexibility for its benefit.<sup>53</sup>

#### b. Attending to Other Business While in Jurisdiction

In determining the effect, on a nonresident's immu-

nity, of his attending to other business while in the jurisdiction, courts are divided between two theories, the "sole purpose doctrine," and the "controlling reason doctrine."

In applying the principle of immunity, and in determining the effect, on a nonresident's immunity, of his attending to other business in the jurisdiction, the courts are divided between two theories, which may be termed the "sole purpose doctrine" and the "controlling reason doctrine."<sup>54</sup>

*"Sole purpose doctrine."* The "sole purpose doctrine" takes the view that to entitle a nonresident witness or suitor to exemption against service of process it is indispensable that he should have come into the state for the sole purpose of appearing as a witness or suitor in the pending litigation;<sup>55</sup> and that, if he is in the state for any other cause besides attendance on the suit, the ground of exemption ceases, and he is subject to service of civil process.<sup>56</sup> Where this view prevails, if a nonresident party and witness comes into the state for the double purpose of attending court and attending to business which has no connection with the trial, the privilege does not attach to him;<sup>57</sup> and a nonresident witness forfeits his exemption from service of process by unnecessarily prolonging his stay and attending to business of a private nature.<sup>58</sup> However, one who enters the jurisdiction for the sole purpose of appearing as a witness is not thereby required to refrain from other activities while visiting the jurisdiction, under penalty of submitting himself to service of process.<sup>59</sup> Accordingly, the exemption is not

process on his extradition from another state, not made until five months after order for body attachment, and after completion of all orders, except order overruling motion to vacate previous orders, were held too late.—*Norquist v. Norquist*, 4 P. 2d 306, 89 Colo. 486.

44. U.S.—*Matthews v. Puffer*, C.C.N. Y., 10 F. 606, 20 Blatchf. 233.

Iowa.—*Northwestern Casualty & Surety Co. v. Conaway*, 230 N.W. 548, 210 Iowa 126, 68 A.L.R. 1465.

45. S.D.—*Austin-Western Road Mach. Co. v. Owen*, 168 N.W. 860, 41 S.D. 110.

46. Kan.—*Eaton v. Eaton*, 248 P. 1040, 120 Kan. 477.

50 C.J. p 559 note 40.

47. N.Y.—*Finucane v. Warner*, 112 N.Y.S. 137, 60 Misc. 336, affirmed 86 N.E. 1118, 194 N.Y. 160.

50 C.J. p 559 note 41.

48. Pa.—*Lauby v. Gould*, 11 Pa.Dist. & Co. 576.

49. Kan.—*Phoenix Joint Stock Land Bank v. Ellis*, 148 P.2d 732, 158 Kan. 530.

50 C.J. p 559 note 43.

50. S.D.—*Austin-Western Road Mach. Co. v. Owen*, 168 N.W. 860, 41 S.D. 110.

51. U.S.—*Iron Dyke Copper Min. Co. v. Iron Dyke R. Co.*, C.C.Or., 132 F. 208.

50 C.J. p 560 notes 64, 65.

52. Kan.—*McAnarney v. Caughe- naur*, 9 P. 476, 34 Kan. 621.

53. U.S.—*Pago Co. v. Macdonald*, Mass., 43 S.Ct. 416, 261 U.S. 446, 67 L.Ed. 737.

50 C.J. p 561 note 67.

54. Cal.—*Gerard v. Superior Court in and for Los Angeles County*, 205 P.2d 109, 91 Cal.App.2d 549.

55. Mont.—*State ex rel. American Laundry Machinery Co. v. Second Judicial Dist. Court in and for Silver Bow County*, 41 P.2d 26, 98 Mont. 278, certiorari denied Second Judicial Court of Montana v. State of Montana, 55 S.Ct. 656, 295 U.S. 744, 79 L.Ed. 1690.

N.Y.—*Chase Nat. Bank of City of New York v. Turner*, 199 N.E. 636, 269 N.Y. 397, amendment of remittitur denied 3 N.E.2d 459, 271 N.Y. 634.

S.C.—*Dyar v. Georgia Power Co.*, 176 S.E. 711, 173 S.C. 527.

50 C.J. p 559 note 45.

56. N.Y.—*Chase Nat. Bank of City of New York v. Turner*, 199 N.E. 636, 269 N.Y. 397, amendment of remittitur denied 3 N.E.2d 459, 271 N.Y. 634.

50 C.J. p 559 note 46.

57. N.Y.—*Finucane v. Warner*, 86 N. E. 1118, 194 N.Y. 160.

58. N.Y.—*Woodruff v. Austin*, 37 N. Y.S. 22, 15 Misc. 450, appeal dismissed 38 N.Y.S. 787, 16 Misc. 543.

*Conference with adversary's attorney*

Nonresident who comes into state to be tried on an indictment is not exempt from service of civil process where, after adjournment of trial, he attends conference at suggestion of court with his wife's solicitor to submit proof of his financial inability to support his wife.—*Morgan v. Morgan*, 183 A. 258, 15 N. J.Misc. 101, affirmed 192 A. 508, 122 N.J.Eq. 2.

59. Mont.—*State ex rel. American Laundry Machinery Co. v. Second*



lost merely because a witness visited friends and participated in normal social activities while in the jurisdiction;<sup>60</sup> and the mere fact that a nonresident witness while attending a trial executed a certificate of copartnership relative to business he was then interested in carrying on will not defeat the exemption;<sup>61</sup> and the fact that a nonresident witness while necessarily detained on the trial incidentally attended a business conference which did not constitute business other than that of attending the trial did not defeat the exemption.<sup>62</sup> Certainly, where a nonresident has entered the jurisdiction to testify as a witness, his immunity is not affected by the fact that he intends subsequently to remain for the purpose of enjoying a vacation.<sup>63</sup>

**"Controlling reason doctrine."** The "controlling reason doctrine" takes the view that a nonresident witness or suitor should be entitled to the exemption if the main and controlling cause or reason for his coming into the state was to attend the trial of a cause as witness or suitor;<sup>64</sup> but that, if the desire to transact other business not connected with the litigation was the controlling motive that brought him within the jurisdiction of the court, he is not entitled to exemption.<sup>65</sup> Where this view prevails, it has been held that,

where the main and controlling cause or reason for a nonresident witness' or suitor's presence in the state is to attend on court business, his immunity is not lost, although, while in attendance on such business, he may transact some other business not connected therewith,<sup>66</sup> provided he does not voluntarily remain in the state after the trial after the reasonable time allowed for departure.<sup>67</sup>

### c. Unreasonable Delay in Coming or Going

The right of a nonresident to assert and claim immunity from civil process while attending court and coming to it and going from it may be forfeited by unreasonable delays in such comings and goings.

While the immunity of nonresident witnesses or suitors or persons charged with crime covers not only the time of actual attendance on the litigation, but also a reasonable time in coming into the jurisdiction, and leaving it and returning to their homes after the purpose of attendance has been fulfilled, it has been held that unreasonable delays in such comings and goings may result in a forfeiture of the right to assert and claim the immunity.<sup>68</sup> It has been said, however, that a reasonable latitude should be allowed,<sup>69</sup> that a person going to, or returning from, court need not take the most direct route,<sup>70</sup> or, in returning, set out for home immediately,<sup>71</sup>

Judicial Dist. Court in and for Silver Bow County, 41 P.2d 26, 98 Mont. 278, certiorari denied Second Judicial Court of Montana v. State of Montana, 55 S.Ct. 656, 295 U.S. 744, 79 L.Ed. 1690.

Ohio.—Roos v. H. W. Roos Co., 28 N.E.2d 1008, 64 Ohio App. 464.

60. Ohio.—Roos v. H. W. Roos Co., supra.

61. Mich.—Connelly v. Judge Wayne Cir. Ct., 198 N.W. 585, 227 Mich. 139.

62. U.S.—Union Water Dev. Co. v. Stevenson, D.C.Cal., 256 F. 981.

63. Mont.—State ex rel. American Laundry Machinery Co. v. Second Judicial Dist. Court in and for Silver Bow County, 41 P.2d 26, 98 Mont. 278, certiorari denied Second Judicial Court of Montana v. State of Montana, 55 S.Ct. 656, 295 U.S. 744, 79 L.Ed. 1690.

64. Cal.—Franklin v. Superior Court in and for San Francisco County, App., 220 P.2d 8—Gerard v. Superior Court in and for Los Angeles County, 205 P.2d 109, 91 Cal. App.2d 549.

Okl.—Harris Foundation v. District Court of Pottawatomie County, 163 P.2d 976, 196 Okl. 222, 162 A.L.R. 272.

50 C.J. p 559 note 47.

65. Cal.—Gerard v. Superior Court in and for Los Angeles County, 205 P.2d 109, 91 Cal.App.2d 549.

Okl.—Burroughs v. Cocke, 156 P. 196, 58 Okl. 627, L.R.A.1916E 1170.

### Controlling purpose held not litigation

Where petitioner came into state and sought custody of his son from maternal grandmother, but spent eight days in state before commencing habeas corpus proceedings to secure custody, reasonable inference was that petitioner's controlling purpose of coming into state was to avoid litigation, and therefore petitioner was not exempt from service of process in another action.—Franklin v. Superior Court in and for San Francisco County, Cal.App., 220 P. 2d 8.

66. Cal.—Franklin v. Superior Court in and for San Francisco County, App., 220 P.2d 8.

50 C.J. p 560 note 55.

### Visiting friends

Okl.—Harris Foundation v. District Court of Pottawatomie County, 163 P.2d 976, 196 Okl. 222, 162 A.L.R. 272.

### Taking lecture course

Cal.—Gerard v. Superior Court in and for Los Angeles County, 205 P. 2d 109, 91 Cal.App.2d 549.

67. Cal.—Hammons v. Los Angeles Super. Ct., 219 P. 1037, 63 Cal.App. 700.

68. Cal.—Franklin v. Superior Court in and for San Francisco County, App., 220 P.2d 8.

Md.—Margos v. Moroudas, 40 A.2d 816, 184 Md. 362.

50 C.J. p 560 note 58.

69. Cal.—Gerard v. Superior Court in and for Los Angeles County, 205 P.2d 109, 91 Cal.App.2d 549.

50 C.J. p 560 note 59.

70. Cal.—Gerard v. Superior Court in and for Los Angeles County, supra.

Ohio.—Barber v. Knowles, 82 N.E. 1065, 77 Ohio St. 81.

71. Cal.—Gerard v. Superior Court in and for Los Angeles County, 205 P.2d 109, 112, 91 Cal.App.2d 549.

"The rule requiring a departure from the state within a reasonable time is not so exacting as to impose upon the party the duty of making hot pursuit of the first train out of the state."

Cal.—Gerard v. Superior Court in and for Los Angeles County, supra.

Minn.—Turner v. Randall, 159 N.W. 958, 134 Minn. 427, 429, L.R.A. 1917B 250.

### Transportation difficulties

Nonresident, who entered state for sole purpose of testifying in action pending against him which was set down for trial for February 1st, was justified in assuming, when he made railroad reservation for return to his home in California, that his presence in New York would be required until

and that reasonable deviations or delays will be allowed,<sup>72</sup> provided they do not arise in carrying out a purpose entirely distinct from the purpose of going to, attending, or returning from, court.<sup>73</sup>

What is reasonable time, it has been said, is a question of fact to be ascertained from the evidence adduced in the circumstances of each particular case.<sup>74</sup>

## § 89. Protection and Enforcement of Privilege

Process issued in violation of the immunity granted to a nonresident while within the state attending trial is illegal; and the immunity may be claimed by a motion to set aside service, a plea to the jurisdiction, or an answer.

Process issued in violation of the immunity granted to a nonresident while within the state attending trial is illegal and the court issuing such process does not acquire jurisdiction thereby,<sup>75</sup> unless there has been a waiver or forfeiture of such privilege, as discussed supra § 88. A claim of immunity or privilege may be asserted by an answer presenting only that question,<sup>76</sup> and perhaps the claim may be asserted by a plea to the jurisdiction.<sup>77</sup> The privilege may not be asserted by a motion to dismiss the action;<sup>78</sup> and such immunity may not be raised by a general appearance but is required to be raised by a special

appearance.<sup>79</sup>

Whether an exemption from the service of process, as a matter of public policy, exists in any given case depends on the particular facts of each case.<sup>80</sup>

*Motion to set aside or quash service.* Motions to set aside or quash the service filed in the court in which the action is pending are very generally recognized as an appropriate method to assert the privilege.<sup>81</sup> A notice of motion to set aside service may be signed by an attorney.<sup>82</sup> The notice need not suggest by what method service may be obtained on the party claiming the privilege.<sup>83</sup> Inasmuch as no issue as to the truth or falsity of the return of the officer serving the process is involved, it is not essential to the jurisdiction of the court to entertain proceeding that the officer be made a party thereto.<sup>84</sup> It is not a ground for demurrer to the motion that issues raised in the motion should be tried by jury.<sup>85</sup> Where a motion to set aside service is overruled, the remedy is to except, answer, and appeal from the final judgment.<sup>86</sup> Where a suitor appears and moves to quash the service of process the court is thereby deprived of jurisdiction to proceed;<sup>87</sup> and this has been held to be true even though there may be a statute to the effect that where a summons or service thereof is quashed on motion of defend-

at least February 7th, and in view of prevalent transportation difficulties he was immune from service of process until departure on February 7th, although plaintiff discontinued pending action on February 2d.—*Cohen v. Lindstrom*, 47 N.Y.S.2d 734, affirmed 50 N.Y.S.2d 167, 266 App. Div. 765.

72. Cal.—*Gerard v. Superior Court in and for Los Angeles County*, 205 P.2d 109, 91 Cal.App.2d 549.

Ohio.—*Barber v. Knowles*, 82 N.E. 1065, 77 Ohio St. 81.

73. Cal.—*Corpus Juris* cited in *Gerard v. Superior Court in and for Los Angeles County*, 205 P.2d 109, 112, 91 Cal.App.2d 549.

Ohio.—*Barber v. Knowles*, 82 N.E. 1065, 77 Ohio St. 81.

### Conferences with counsel

Nonresident parties are entitled to a reasonable amount of time for conferences with their counsel prior to commencement of the trial, during which time they are immune from service of civil process.—*Gerard v. Superior Court in and for Los Angeles County*, 205 P.2d 109, 91 Cal. App.2d 549.

74. Cal.—*Gerard v. Superior Court in and for Los Angeles County*, supra.  
50 C.J. p 560 note 63.

75. Okl.—*Harris Foundation v. District Court of Pottawatomie County*, 163 P.2d 976, 196 Okl. 222, 162 A.L.R. 272.

76. Kan.—*Eaton v. Eaton*, 243 P. 1040, 120 Kan. 477.

77. Ga.—*Thornton v. American Writing Mach. Co.*, 9 S.E. 679, 83 Ga. 288, 20 Am.S.R. 320.

### Question raised by partner

Where service of process on a partner was invalid under the rule that the partner, a nonresident, was immune from service while within the state attending trial, jurisdiction of the partnership was not thereby acquired, and question of jurisdiction could be raised by the other partner not served by a plea to jurisdiction.—*Harris Foundation v. District Court of Pottawatomie County*, 163 P.2d 976, 196 Okl. 222, 162 A.L.R. 272.

78. N.C.—*Cooper v. Wyman*, 29 S. E. 947, 122 N.C. 784, 65 Am.S.R. 731.

79. Fla.—*Harrell v. Black*, 38 So.2d 310.

80. Cal.—*Murray v. Murray*, 16 P.2d 741, 216 Cal. 707, 85 A.L.R. 1335, certiorari denied 53 S.Ct. 658, 289 U.S. 740, 77 L.Ed. 1487.

*Finding of nonresidence held warranted*  
N.J.—*Cook v. Cook*, 28 A.2d 178, 132 N.J.Lq. 352.

81. N.C.—*Dell School v. Peirce*, 79 S.E. 687, 163 N.C. 424.  
50 C.J. p 561 note 74.

### Plea in abatement not required

Sheriff of another state who was served with summons in a common-law action while in the state to perform an official duty could raise question of immunity from service of process by motion to quash with supporting affidavits and was not required to rely on a plea in abatement.—*Harrell v. Black*, Fla., 38 So. 2d 310.

82. S.C.—*Williams v. Hatcher*, 78 S. E. 615, 95 S.C. 49.

83. S.C.—*Williams v. Hatcher*, supra.

84. Ga.—*Watson v. Kvaternik*, 126 E. 552, 33 Ga.App. 415.

85. Ga.—*Watson v. Kvaternik*, supra.

86. N.C.—*Dell School v. Peirce*, 79 S.E. 687, 163 N.C. 424.

87. Miss.—*Arnett v. Carel C. & Fred R. Smith, Inc.*, 145 So. 638, 165 Miss. 53.

ant, defendant shall be deemed to have entered his appearance to the succeeding term of court.<sup>88</sup>

**Presumptions and burden of proof.** Irrespective of the method by which it is sought to assert the privilege, the presumption is that the service is regular,<sup>89</sup> and the burden is on the person claiming the privilege to establish the contrary.<sup>90</sup>

**Affidavits** may be employed to establish facts in proceedings to assert the privilege;<sup>91</sup> and the fact that such affidavits state conclusions and ultimate facts does not render them objectionable.<sup>92</sup> The affidavit of the person asserting the privilege, if not contradicted, either specifically or by proof of conflicting circumstances, is sufficient to establish the claim of privilege.<sup>93</sup>

### III. RETURN AND PROOF OF SERVICE

#### § 90. Definition, Nature, and Necessity of Return

- a. Definition and nature
- b. Necessity

##### a. Definition and Nature

A return of process is a written statement by the officer to whom the process is directed certifying what he has done pursuant to the command of the process or in connection with the service thereof.

A return of process is a statement in writing indorsed thereon or annexed thereto by the officer to whom it is directed, certifying to the court what he has done pursuant to the command of the process or in connection with the service thereof;<sup>94</sup> the officer's answer touching what he is commanded to do by the writ;<sup>95</sup> the bringing of a process into

court with such indorsements as the law requires, whether they are true or false;<sup>96</sup> an official statement by an officer of what he has done in obedience to a command from a superior authority, or why he has done nothing, whichever is required.<sup>97</sup> The purpose of the officer's return is to give evidence of the fact that service has been had in conformity with the command of the process,<sup>98</sup> and to put on the record the statement of a responsible official that notice has been given to defendant of the proceedings against him.<sup>99</sup> The return is an official act,<sup>1</sup> and constitutes the official oath of the officer as to the facts stated in the return.<sup>2</sup> The term also has the more literal meaning of bringing the process back to the court from which it issues or filing it therein.<sup>3</sup>

In determining whether a particular writing or

88. Miss.—Arnett v. Carol C. & Fred R. Smith, Inc., *supra*.

89. N.Y.—Finucane v. Warner, 86 N.E. 1118, 194 N.Y. 160—Sander v. Harris, 14 N.Y.S. 37, 20 N.Y.Civ. Proc. 258.

90. N.J.—Brown v. Brown, 165 A. 643, 112 N.J.Eq. 600.

50 C.J. p 561 note 81.

**Burden of establishing nonresidence** is on the person attacking the validity of the service on the ground of his nonresidence.—Cook v. Cook, 28 A.2d 178, 132 N.J.Eq. 352—Morgan v. Morgan, 192 A. 508, 122 N.J.Eq. 2.

91. Fla.—Harrell v. Black, 38 So.2d 310.

50 C.J. p 561 note 82.

**Grant of motion held proper**

N.C.—Bangle v. Webb, 17 S.E.2d 613, 220 N.C. 423.

**Denial of motion held proper**

Mich.—Dallas v. Garra, 10 N.W.2d 897, 306 Mich. 313.

92. Utah.—Smith v. Iverson, 225 P. 603, 63 Utah 293.

93. N.Y.—Finucane v. Warner, 86 N.E. 1118, 194 N.Y. 160.

94. Mont.—Corpus Juris cited in Haggerty v. Sherburne Mercantile Co., 186 P.2d 884, 893, 120 Mont. 386—Corpus Juris cited in Mont-

gomery Ward & Co. v. District Court, 146 P.2d 1012, 1014, 115 Mont. 521.

50 C.J. p 561 note 87.

**Other definitions**

(1) A recital of action taken by the returning officer.—Cobleigh v. Epping Brick Co., D.C.N.H., 85 F. Supp. 862.

(2) Certificate of officer as to where, when, and how process was executed.—Gunter's Unknown Heirs, and Legal Representatives v. Lagow, Tex.Civ.App., 191 S.W.2d 111, error refused.

(3) Short written statement under official oath, certifying what was done in serving summons.—Haggerty v. Sherburne Mercantile Co., 186 P.2d 884, 120 Mont. 386.

95. N.C.—State v. Moore, 55 S.E.2d 177, 230 N.C. 648.

96. N.C.—State v. Moore, *supra*—Watson v. Mitchell, 12 S.E. 836, 108 N.C. 364.

50 C.J. p 561 note 90 [a].

97. Mich.—Rood v. McDonald, 7 N.W.2d 95, 303 Mich. 634.

**Similar definition**

A return of writ or summons is written statement to court by sheriff or other ministerial officer, under his official oath, of what has been

done touching execution of writ.—Haggerty v. Sherburne Mercantile Co., 186 P.2d 884, 120 Mont. 386—Montgomery Ward & Co. v. District Court, 146 P.2d 1012, 115 Mont. 521—Schmidt v. Schmidt, 89 P.2d 1020, 108 Mont. 246.

98. Mo.—State ex rel. Mills Automatic Merchandising Corporation v. Hogan, 103 S.W.2d 495, 232 Mo. App. 291.

99. U.S.—Murphy v. Campbell Soup Co., D.C.Mass., 44 F.2d 214.

1. Tex.—Missouri State Life Ins. Co. v. Rhyne, Civ.App., 276 S.W. 757, reversed on other grounds, Com.App., 291 S.W. 845.

2. Ark.—Karnes v. Ramey, 287 S.W. 743, 172 Ark. 125.

50 C.J. p 561 note 89.

Necessity of verification see *infra* § 94.

3. Cal.—Frohman v. Bonelli, 204 P. 2d 890, 91 Cal.App.2d 285.

50 C.J. p 561 note 90.

Filing and record of return see *infra* § 105.

**Similar definition**

To make a return of summons is to bring or send it back to a tribunal or office with a certificate of what has been done.—Schmidt v. Schmidt, 89 P.2d 1020, 108 Mont. 246.

part of a writing constitutes the return, the return of the officer is that, and that only, to which he signs his name when he returns the writ.<sup>4</sup>

A return of process, as distinguished from the process itself, is merely the evidence by which the court is informed that defendant has been served or given notice to appear in court.<sup>5</sup> It has been said that the citation is the thing, so to speak, while the return is merely evidence thereof.<sup>6</sup> One may be valid and the other incomplete;<sup>7</sup> and a citation may be fatally defective notwithstanding the return indicates that a legal citation has been had.<sup>8</sup>

### b. Necessity

While the service of process, rather than a return or proof of service, is the jurisdictional requisite, nevertheless a proper return is ordinarily necessary in order that service may be shown to have been duly made.

It is generally considered that the service of process, rather than a return or proof of service,

is the jurisdictional requisite, and that the court acquires jurisdiction, if at all, through proper service, and not through the return thereof.<sup>9</sup> It has been held that in the absence of statutory requirement thereof a return need not be made,<sup>10</sup> and if made in such case has only the force of a private memorandum of the person making it.<sup>11</sup> In order, however, that service may be shown to have been duly made, a proper return is ordinarily necessary,<sup>12</sup> and without it the trial court is not authorized to find that it has jurisdiction;<sup>13</sup> and there is authority to the effect that legal proof of the service of a summons, whether personally or by publication, is a jurisdictional matter.<sup>14</sup>

### § 91. Who May Prove Service by Return

Only a duly authorized officer has power to make proof of service by his certificate or return.

Only such officer as may be thereunto authorized by statute has power to make proof of service by his certificate or return,<sup>15</sup> since it is only an

4. Mo.—State ex rel. Wolf v. Pumphrey, App., 104 S.W.2d 386.

5. Cal.—Frohman v. Bonelli, 204 P. 2d 890, 91 Cal.App.2d 285.

La.—Adler v. Board of Levee Com'rs of Orleans Levee Dist., 123 So. 605, 168 La. 877—Dickey v. Pollock, App., 183 So. 48.

Mont.—Haggerty v. Sherburne Mercantile Co., 186 P.2d 384, 120 Mont. 386.

N.M.—Bourgeois v. Santa Fe Trail Stages, 95 P.2d 204, 43 N.M. 453.

Va.—Buttery v. Robbins, 14 S.E.2d 544, 177 Va. 383.

#### Knowledge of court as to jurisdiction

Official return on writ after service is merely written evidence of time, place, and manner of service so that court to which return is made may judicially be apprised of its jurisdiction or lack of jurisdiction of person served.—Southern Kansas Stage Lines Co. v. Holt, 90 S.W.2d 473, 192 Ark. 165.

6. La.—Weldon v. Gandy, App., 195 So. 655.

7. La.—Weldon v. Gandy, supra.

#### Service not necessarily present

The mere fact that there is a purported citation containing an endorsement of the sheriff's return does not necessarily mean that there must have been service of process.—Weldon v. Gandy, supra.

8. La.—Weldon v. Gandy, supra.

9. Cal.—Vail v. Jones, 287 P. 99, 209 Cal. 251—Daiki Otsuka v. Balangue, 208 P.2d 65, 92 Cal.App.2d 788—North Side Property Owners' Ass'n v. Los Angeles County, 161 P.2d 613, 70 Cal.App.2d 598—In re

Spiers, 89 P.2d 456, 32 Cal.App.2d 124.

Fla.—State ex rel. Briggs v. Barns, 104 So. 539, 121 Fla. 857.

Minn.—Goodman v. Ancient Order of United Workmen, 300 N.W. 624, 211 Minn. 181.

Mont.—State ex rel. Duckworth v. District Court of Seventeenth Judicial Dist., 80 P.2d 367, 107 Mont. 97.

N.M.—Bourgeois v. Santa Fe Trail Stages, 95 P.2d 204, 43 N.M. 453.

N.Y.—Ange v. General Crushed Stone Co., 30 N.Y.S.2d 912, 262 App.Div. 553—Colonial Discount Co. v. Martel, 73 N.Y.S.2d 8.

N.C.—State v. Moore, 55 S.E.2d 177, 230 N.C. 648.

Okl.—Selected Investments Corp. v. Bell, 206 P.2d 989, 201 Okl. 408.

Utah.—Federal Land Bank of Berkeley v. Brinton, 146 P.2d 200, 106 Utah 149.

50 C.J. p 562 notes 92, 93.

Return as condition precedent to:

Jurisdiction specially conferred on court see Courts § 83 b (1).

Service by publication see supra § 60.

Return and proof of service in equity see Equity § 176.

#### Ministerial act

If there had been personal service of process on defendant by sheriff, the making of an entry of service would have been a ministerial act on sheriff's part.—Benton v. Maddox, 16 S.E.2d 141, 65 Ga.App. 540.

10. Wash.—Strandberg v. Stringer, 216 P. 25, 125 Wash. 358.

50 C.J. p 562 note 96.

11. Wash.—Strandberg v. Stringer, supra.

Unauthorized return as evidence see infra § 99.

12. N.C.—State v. Moore, 55 S.E.2d 177, 230 N.C. 648.

Okl.—Atlantic Municipal Corporation v. Wallace, 144 P.2d 975, 193 Okl. 448.

Pa.—Heller v. Receivers of Mechanics Trust Co., Com.Pl., 51 Dauph. Co. 118.

50 C.J. p 562 note 94.

#### Joint defendants

A plaintiff suing joint defendants cannot proceed against defendants served until return of sheriff on summons directed to unserved defendants shows that such defendants were not served because they did not reside in county.—Alderman v. Puleston, 24 So.2d 527, 156 Fla. 731.

#### Knowledge of absence of service or return

(1) Plaintiffs were held chargeable with knowledge of failure of sheriff to make return.—Kruizenga v. Fuller, 299 N.W. 787, 299 Mich. 9.

(2) Litigants are bound to know that on failure of service within specified time, the process server must make and file timely proof of nonservice.—Home Sav. Bank v. Young, 295 N.W. 474, 295 Mich. 725.

13. Nev.—Williamson v. Williamson, 280 P. 651, 52 Nev. 78, rehearing denied 296 P. 1113.

Tex.—Dallas v. Crawford, Civ.App., 222 S.W. 305.

14. Wash.—Case v. City of Bellingham, 197 P.2d 105, 31 Wash.2d 374.

15. Minn.—Leland v. Heiberg, 194 N.W. 93, 156 Minn. 30.

Puerto Rico.—Ocasitas v. Marquez, 19 Puerto Rico 454.

officer who has taken an oath of office and is under bond for the faithful performance of his duty whose certificate of his doings will be evidence of his acts.<sup>16</sup> A party to the action cannot make a return.<sup>17</sup>

## § 92. To Whom Made

A return of process should be made to the court or officer designated by the process.

A return of process should be made to the court or officer designated by the process.<sup>18</sup> A statutory provision designating the officer to whom the return should be made has been held to be merely directory and not to render void process returned to a wrong officer.<sup>19</sup>

## § 93. Time for Making Return

Process should not be returned prematurely or at a time later than that fixed by statute; but by leave of court process may be returned after the lawful return day in a proper case.

At common law process may be returned at the term in which it was issued or at the next term thereafter;<sup>20</sup> and where it is returnable only in

term it cannot validly be returned in vacation.<sup>21</sup> The day on which it is to be returned is, in most jurisdictions, however, dependent on statutory provision,<sup>22</sup> and is called the "return day."<sup>23</sup>

**Prematureness.** Process should not be returned prior to the proper return day unless defendant is sooner found and served;<sup>24</sup> and a return made before the return day, where service has not been had, is premature and invalid,<sup>25</sup> and no subsequent proceeding can be predicated on it.<sup>26</sup> The sheriff is not required to make his return of service before the return day named in the writ.<sup>27</sup>

**Lateness.** By leave of court process may be returned after the lawful return day,<sup>28</sup> unless the term at which it was returnable has closed;<sup>29</sup> and, unless otherwise provided by statute, delay in making a return or proof of service beyond the proper time therefor does not necessarily invalidate the service itself or deprive the court of jurisdiction,<sup>30</sup> even where leave of court has not been obtained.<sup>31</sup> Such proof may be supplied even after judgment.<sup>32</sup>

In a jurisdiction in which an action is deemed to be pending when the writ is issued, whether

In whose name return to be made see *infra* § 94.

### Cases in different courts

Where wife instituted action for injuries in circuit court and husband brought action for loss of services in the common pleas court and service of summons was made in both cases by constable, constable's return of the common pleas summons was by officer's certificate, while his return of the circuit court summons was by affidavit of service as an individual, since the constable is an officer of the common pleas court but not of the circuit court.—*Elliotte v. Lavier*, 300 N.W. 116, 299 Mich. 353.

16. Or.—*Pickard v. Marsh*, 124 P. 268, 62 Or. 192.

Return as constituting official oath of officer see *supra* § 90.

17. Ga.—*Johnson v. Shurley*, 53 Ga. 417.

Mich.—*Windolph v. Joure*, 34 N.W.2d 529, 323 Mich. 1.

18. Ky.—*Wolfe v. Stephens*, 10 Ky. Op. 647.

Designation of court, judge, and place see *supra* § 13.

19. N.Y.—*Ontario Bank v. Garlock*, 1 Wend. 288.

20. N.J.—*Zeek v. Rockaway Rolling Mill*, 74 A. 442, 79 N.J.Law 123—*Bowden v. T. A. Gillespie Co.*, 68 A. 238, 75 N.J.Law 296.

21. Del.—*Johnson v. Wilmington, etc., Electric R. Co.*, 39 A. 777, 17 Del. 87.

22. Pa.—*Sherman v. Rittenhouse*,

16 Pa.Dist. & Co. 305, 29 Sch.Leg. Rec. 122.

Tex.—*Walker v. Koger*, Civ.App., 99 S.W.2d 1034, error dismissed.

50 C.J. p 562 note 8.

Provision in process as to return see *supra* § 14.

### Time of signing held immaterial

Whether deputy making service of summons actually signed return on date service was made or on later date was held immaterial in view of statute authorizing court to amend any process or correct a mistake on the return before or after judgment in furtherance of justice.—*Nickerson v. Nickerson*, 87 N.E.2d 915, 85 Ohio App. 372.

23. Iowa.—*Bankers' Iowa State Bank v. Jordan*, 82 N.W. 779, 111 Iowa 324.

**Plaintiffs were chargeable with knowledge of the return day of the original summons.**—*Kruizenga v. Fuller*, 299 N.W. 787, 299 Mich. 9.

24. Mo.—*Himmelberger - Harrison Lumber Co. v. McCabe*, 119 S.W. 357, 220 Mo. 154.

50 C.J. p 562 note 10.

25. Mo.—*State v. McQuillin*, 165 S.W. 713, 256 Mo. 693—*Himmelberger-Harrison Lumber Co. v. McCabe*, 119 S.W. 357, 220 Mo. 154.

26. Mo.—*Williams v. Sands*, 158 S.W. 47, 251 Mo. 147.

50 C.J. p 562 note 12.

27. Del.—*Webb Packing Co. v. Harmon*, 196 A. 158, 9 W.W.Harr. 22.

28. N.H.—*Langdell v. Eastern*

*Basket & Veneer Co.*, 99 A. 90, 78 N.H. 243—*Chadbourn v. Sumner*, 16 N.H. 129, 41 Am.D. 720.

Pa.—*Corpus Juris* cited in *Riker v. Killinski*, 163 A. 526, 527, 309 Pa. 188.

29. U.S.—*U. S. v. Frederick E. Atteaux Co.*, D.C.Mass., 275 F. 1013. N.J.—*Bowden v. T. A. Gillespie Co.*, 68 A. 238, 75 N.J.Law 296.

30. Neb.—*Pitman v. Heumeler*, 115 N.W. 1083, 81 Neb. 338. 50 C.J. p 562 notes 17, 18.

### Nunc pro tunc entry

Where there has been no return of service but it appears that defendant has in fact been served, the return of service may be made, on motion, by an entry *nunc pro tunc*.—*Elliott v. Porch*, 200 S.E. 190, 59 Ga.App. 181.

31. Neb.—*Graves v. Macfarland*, 79 N.W. 707, 58 Neb. 802. 50 C.J. p 562 note 16.

### Better practice

A return of service made after the return day and after expiration of the term of court will not be stricken as too late, where the return avers personal service on the return day of the writ; while it may be better practice to obtain leave of court to return the writ after term time, such leave would be granted on application.—*Boarman v. Bedway*, 43 Pa.Dist. & Co. 241.

32. U.S.—*Von Arx v. Boone, Alaska*, 193 F. 612, 113 C.C.A. 480.

served or not, if no return of service is made within the time limit fixed by law, the writ is considered to be abandoned; and with its abandonment the action is no longer pending.<sup>33</sup> Under some statutes, if process is not returned within a prescribed period after the date of the commencement of the action, the trial court has no jurisdiction to proceed, unless defendant has appeared;<sup>34</sup> on the day that the prescribed period expires the trial court loses jurisdiction to make any order other than a dismissal of the action.<sup>35</sup>

## § 94. Form, Requisites, and Sufficiency of Return

- a. In general
- b. Service on multiple defendants
- c. By whom and in whose name made

### a. In General

A return of process should show the existence or doing of everything necessary to constitute a good service or execution, although in the absence of statute it need not be in any particular form.

Except where prescribed by statute, the form in which a return of process should be made is left to the officer executing the writ.<sup>36</sup> The return should show on its face the existence or doing of everything necessary to constitute a good service or execution;<sup>37</sup> but it need not be couched in the language of the statute,<sup>38</sup> since any other language which shows compliance with the statute is effectual and sufficient.<sup>39</sup> Where an action is deemed commenced by the delivery of process to an officer for service, the return should also show when the process

was received,<sup>40</sup> but in other cases the time of receipt need not be shown.<sup>41</sup>

It must appear that the process served was that in the particular action or proceeding wherein the return is produced.<sup>42</sup> A sheriff making a return need not name therein the county of which he is sheriff;<sup>43</sup> nor need he designate himself as sheriff, since the court is presumed to know its own officers.<sup>44</sup> In general, the return need show nothing which already appears of record elsewhere;<sup>45</sup> but it must not depend on facts extraneous to the process to which it relates, in order to render it intelligible.<sup>46</sup> Redundancy or surplusage will not vitiate a return.<sup>47</sup>

**Verification.** Unless otherwise provided by law,<sup>48</sup> an officer's return of process need not be verified,<sup>49</sup> except, it would seem, when made by an officer of and in a state other than that in which the action is brought or pending.<sup>50</sup>

**Alterations.** Erasures or interlineations subsequently found in a return of process will not nullify a judgment based on it which recites that the process was served on defendant.<sup>51</sup>

### b. Service on Multiple Defendants

Where there are two or more defendants, a return of process should show on which ones service was made, and the time and manner of service on each.

In the case of two or more defendants a return of process should show clearly on which ones service was made, and when and how it was made on each;<sup>52</sup> and a return showing service on one, but silent as to another, is not sufficient

33. Pa.—Roche v. Scavicchio, 70 Pa. Dist. & Co. 75.

34. Cal.—Chilcote v. Pacific Air Transport, 74 P.2d 300, 24 Cal. App.2d 32.

35. Cal.—Pearson v. Superior Court in and for City and County of San Francisco, 10 P.2d 489, 122 Cal. App. 571.

36. Mass.—Joyce v. Thompson, 119 N.E. 777, 230 Mass. 254. 50 C.J. p 563 note 32.

37. Ill.—Elsue v. Nichols, 81 N.E. 2d 652, 335 Ill.App. 244.

Md.—Murray v. Hurst, 163 A. 183, 163 Md. 481, 85 A.L.R. 442.

Miss.—Demoss v. Brewster, 12 Miss. 661.

Mo.—Ser v. Bobst, 8 Mo. 506—Carter v. Flynn, 112 S.W.2d 364, 232 Mo. App. 771.

Pa.—Andreas v. Paul, 31 Pa. Dist. & Co. 33—Taylor v. Brown, 13 Pa. Co. 655—Boyle v. Whitney, 8 Pa. Co. 501.

50 C.J. p 563 note 33.

38. Mo.—Cain v. Courter, 215 S.W. 17.

39. Mo.—Cain v. Courter, supra.

Returns held sufficient

Ga.—Peel v. Bryson, 72 Ga. 331.

Ill.—Hitchens v. Bennett, 171 N.E. 562, 330 Ill. 366.

Mo.—Kinsley Bank of Kinsley, Kan., v. Woods, App., 61 S.W.2d 384.

Puerto Rico.—Llorens v. Castillo, 22 Puerto Rico 624.

Tex.—Sgticovich v. Oldfield, Civ. App., 220 S.W.2d 724, error refused—Armstrong v. Vaught, Civ.App., 74 S.W.2d 459.

40. Ind.—Marshall v. Matson, 86 N. E. 339, 171 Ind. 238.

Service of process as commencement of action see Actions § 129 b (1).

41. Tex.—Miller v. Davis, Civ.App., 180 S.W. 1140.

42. N.Y.—Litchfield v. Burwell, 5 How.Pr. 341, Code Rep., N.S., 42, 9 N.Y. Leg. Obs. 182.

43. Mich.—Stoll v. Padley, 56 N.W. 1042, 98 Mich. 13.

50 C.J. p 564 note 39.

44. Ill.—Thompson v. Haskell, 21 Ill. 215, 74 Am.D. 98.

45. Tex.—Mills v. Howard, 12 Tex. 9.

46. S.C.—Parker v. Grayson, 10 S. C.L. 171.

50 C.J. p 564 note 42.

47. Ill.—Brignall v. Morkle, 28 N.E. 2d 311, 306 Ill.App. 137.

50 C.J. p 564 note 43.

Redundant or surplus matter disregarded see infra § 97.

48. Pa.—Jansen v. Jansen, 16 Pa. Dist. 418.

49. Okl.—Canard v. Ryan, 45 P.2d 122, 172 Okl. 339.

Pa.—Wolf v. Moyer, 21 Pa.Co. 624.

Affidavit of service see infra § 103.

50. Iowa.—Elvin v. Powell, 162 N. W. 201, 179 Iowa 899.

51. Cal.—Gregory v. Ford, 14 Cal. 138, 73 Am.D. 639.

52. Pa.—Epply v. Rhodes, 12 Pa. Dist. 741.

50 C.J. p 570 note 20.

to show that service was had on such other.<sup>53</sup> Where process runs to more than one county, a general return of execution applies only to such of defendants as reside within the county to which the process issued.<sup>54</sup>

**Delivery of copies.** Where a copy of the process is required by statute to be delivered to each of the defendants, the return must show a delivery to each.<sup>55</sup> In some cases a return reciting service on two or more defendants by delivery of "a" copy has been held to be sufficient to show the delivery of a copy to each of the defendants,<sup>56</sup> but in other cases such a return has been held fatally defective.<sup>57</sup> The fact that an officer whose return recites service on all the defendants charges fees for the service of a number of copies equal to the number of defendants has been held to show that each defendant was served with a copy of the process;<sup>58</sup> but there is also authority to the contrary.<sup>59</sup>

### c. By Whom and In Whose Name Made

A return should be made by the officer who served or attempted to serve it, and, where the process is directed to a particular officer, the return should be made in the name of that officer.

A return of process should be made and signed by the officer who in fact served or attempted to serve it.<sup>60</sup> Moreover, as to writs directed to a particular officer and requiring a return thereon, the return should be made in the name of that officer.<sup>61</sup> However, a return may be made by a deputy under his principal's direction;<sup>62</sup> and the fact that the return is made by a deputy other

than the one who served the process has been held not to render it insufficient where the return is otherwise regular in form and substance and shows proper service on its face.<sup>63</sup> When service has been made by a deputy, the return may be signed by the principal.<sup>64</sup>

A deputy ordinarily should sign a return of process executed by him in the name of his principal by himself as deputy, or should designate the officer for whom he purported to act;<sup>65</sup> and so in some jurisdictions a return by a deputy in his own name is invalid,<sup>66</sup> except where his principal has died,<sup>67</sup> but in others it is held to be sufficient.<sup>68</sup>

### § 95. — Particular Matters to Be Shown

A return of process should show the time, place, and manner of service, the name of the party served, and other particular matters required to make it sufficient.

A return of service of process should show the time of service;<sup>69</sup> but it need be stated or indicated only with reasonable certainty.<sup>70</sup> When a single date appears in the return, without any designation to the contrary, it is ordinarily deemed to refer to the time of service and not to the time of return.<sup>71</sup> The file mark of the clerk, indorsed on the return, showing that it was filed with him at a time when the process was still in force, is sufficient to show that service was made at a proper time.<sup>72</sup>

**Place of service.** In some jurisdictions, a return of service of process must show the place where service was made;<sup>73</sup> but in others such

53. Ala.—Granberry v. Wellborn, 4 Ala. 118.

Ill.—Dickison v. Dickison, 16 N.E. 861, 124 Ill. 483.

54. Miss.—Bozman v. Brower, 7 Miss. 43.

55. Tex.—Schramm v. Gentry, 64 Tex. 143.

50 C.J. p 570 note 94.  
Recital in return as to delivery of copy or other documents generally see *infra* § 95.

56. Ky.—Fleishman v. Goodman, 67 S.W.2d 691, 252 Ky. 535.  
50 C.J. p 570 note 95.

57. N.Y.—In re Snyder, 136 N.Y.S. 670.

50 C.J. p 570 note 96.

58. Ill.—Martin v. Hargardine, 46 Ill. 322.

Ky.—Igo v. Berea Realty & Finance Co., 189 S.W.2d 733, 300 Ky. 526.

59. Tex.—Duke v. Spiller, 111 S.W. 787, 51 Tex.Civ.App. 237.

60. Mo.—Bennett v. Vinyard, 34 Mo. 216.

50 C.J. p 564 note 44.

61. Mo.—Deichmann v. Hogan, App., 26 S.W.2d 874.

62. Idaho.—Boise Valley Tract. Co. v. Boise City, 214 P. 1037, 37 Idaho 20.

63. Tex.—Schneider v. Reidel, Civ. App., 128 S.W.2d 416, error dismissed.

64. Kan.—Goddard v. Harbour, 44 P. 1055, 56 Kan. 744, 54 Am.S.R. 608.

50 C.J. p 564 note 46.

65. Pa.—Stapleton v. Taylor, 13 Pa. Dist. & Co. 650, 44 York Leg.Rec. 139.

50 C.J. p 564 note 49.

66. Pa.—Stapleton v. Taylor, *supra*.

50 C.J. p 564 note 50.

67. Ill.—Timmerman v. Phelps, 27 Ill. 496.

50 C.J. p 564 note 51.

68. Ky.—Bean v. Haffendorfer, 2 S. W. 556, 3 S.W. 138, 84 Ky. 685, 8 Ky.L. 739.

50 C.J. p 564 note 52.

69. Utah.—Thomas v. District Court of Third Judicial Dist. in

and for Salt Lake County, 171 P. 2d 667, 110 Utah 245.

50 C.J. p 564 note 53.

70. Tex.—Mansfield v. Ramsey, Civ. App., 196 S.W. 330.

50 C.J. p 565 note 54.

71. Ill.—Harmon v. Campbell, 30 Ill. 25.

50 C.J. p 565 note 55.

72. Tex.—Stephens v. Austin, Civ. App., 298 S.W. 932.

Filing return see *infra* § 105.

73. U.S.—Granger v. Shouse, D.C. Mo., 10 F.R.D. 439.

Utah.—Thomas v. District Court of Third Judicial Dist. in and for Salt Lake County, 171 P.2d 667, 110 Utah 245.

50 C.J. p 565 note 53.

#### Return held sufficient

Service of summons was not invalidated by reason of erroneous recital in return that service was made at named city in particular county whereas service was actually made in another place in such county, since service in the county is sufficient and recital in return referring

showing is not required.<sup>74</sup> The venue given at the head of the return will be taken as indicative of the place of service when no other place is mentioned in the return.<sup>75</sup>

**Name of party served.** A return of service of process should give the name of the party served or should designate him with such reasonable certainty as to leave no substantial doubt as to his identity,<sup>76</sup> and should show that the service was made on the person to whom the process was directed;<sup>77</sup> but strict accuracy is not required.<sup>78</sup> The full name need not be given, as long as the party served is sufficiently identified;<sup>79</sup> and he need not be designated by name at all if he is described as the party named in the process wherein his name is set forth.<sup>80</sup> However, a return omitting to name or designate the party purported to have been served is insufficient.<sup>81</sup>

**Manner of service.** A return of service of process should show clearly and fully the manner in which service was made, so that it may appear of record whether the statutory requirements as to manner of service have been substantially com-

plied with.<sup>82</sup> However, if the return, taken in its entirety, fairly imports that it was served in the manner required by law, it is sufficient.<sup>83</sup>

**Delivery of copy or other documents.** Where it is required that a copy of the petition or complaint<sup>84</sup> or of the process<sup>85</sup> be delivered to, or left with, defendant, or that other papers or writings be served therewith,<sup>86</sup> the return should show compliance with such requirement.

**Mode authorized only in specified cases.** Where service is permitted to be made on particular persons or in a particular manner only in certain contingencies or at certain places, the existence of such conditions should appear when the return shows service on any such person or in such manner,<sup>87</sup> as where substituted service is authorized only when defendant cannot be found,<sup>88</sup> or where service on a resident agent is permissible when defendant is a nonresident.<sup>89</sup>

**Substituted service.** When a statute provides for substituted service of process by leaving a copy at the residence or place of business of defendant, or other place, or with certain designated persons,

to city was surplusage.—*Alpena Nat. Bank v. Hooy*, 274 N.W. 803, 281 Mich. 307.

74. Ill.—*Gray v. Kroger Grocery & Baking Co.*, 13 N.E.2d 672, 294 Ill. App. 151.

Tex.—*Smith v. Friona State Bank*, Civ.App., 28 S.W.2d 199.  
50 C.J. p 565 note 59.

75. Vt.—*Davis v. Richmond*, 35 Vt. 419.  
50 C.J. p 565 note 60.

76. Ky.—*Corpus Juris* quoted in *James v. Miller*, 113 S.W.2d 473, 475, 272 Ky. 115.  
50 C.J. p 565 note 62.

77. Ky.—*Corpus Juris* quoted in *James v. Miller*, 113 S.W.2d 473, 475, 272 Ky. 115.  
50 C.J. p 566 note 63.

#### Return held insufficient

Statement in sheriff's return that service was made on named individual of a firm which was the named defendant was held not sufficient compliance with statute making return prima facie evidence of agency of person served.—*Cain, Wolcott & Rankin v. Firemen's Fund Ins. Co.*, 141 So. 686, 225 Ala. 44.

78. Ky.—*Corpus Juris* quoted in *James v. Miller*, 113 S.W.2d 473, 475, 272 Ky. 115.  
50 C.J. p 566 note 64.

#### Better practice

While it is the better practice for officers to make their returns with that degree of particularity necessary to show exactly on whom the

process was served, the failure to do so does not invalidate the service.—*State v. Moore*, 55 S.E.2d 177, 230 N. C. 648.

#### Failure to cross "t"

Fact that sheriff in return of service of citation failed to cross "t" in defendant's name was held not to render service defective.—*Boothe v. American State Bank of Amarillo*, Tex.Civ.App., 57 S.W.2d 250.

79. Ky.—*Corpus Juris* quoted in *James v. Miller*, 113 S.W.2d 473, 475, 272 Ky. 115.  
50 C.J. p 566 note 65.

80. Ky.—*Corpus Juris* quoted in *James v. Miller*, 113 S.W.2d 473, 475, 272 Ky. 115.  
50 C.J. p 566 note 66.

81. La.—*St. Louis Jewelry Co. v. Imbragaglio*, 48 So. 1007, 123 La. 389.  
50 C.J. p 566 note 67.

82. Ill.—*Escue v. Nichols*, 81 N.E. 2d 652, 335 Ill.App. 244.

Ky.—*Igo v. Berea Realty & Finance Co.*, 189 S.W.2d 733, 300 Ky. 526.  
50 C.J. p 566 note 69.

83. Ky.—*Igo v. Berea Realty & Finance Co.*, *supra*.

#### Better practice

While it is the better practice for officers to make their returns with that degree of particularity necessary to show exactly in what manner the process was served, failure to do so does not invalidate the service.—*State v. Moore*, 55 S.E.2d 177, 230 N.C. 648.

84. Tex.—*Midwest Piping & Supply Co. v. Page*, Civ.App., 128 S.W.2d 459, error refused.  
50 C.J. p 567 note 71.  
Service of pleading with process see *supra* § 37.

85. N.Y.—*Duval v. Boston, etc., R. Co.*, 111 N.Y.S. 629, 58 Misc. 504.  
50 C.J. p 567 note 72.  
Delivery of copy of process see *supra* § 36.  
Recital in return as to delivery of copies in case of service on multiple defendants see *supra* § 94.

#### Certified copy

Summons would not be quashed or service thereof set aside on ground that copy delivered to defendants was not certified, even if summons must be certified, where return followed exactly wording of statute and meant that both summons and complaint were certified.—*Johnson v. Demmert Packing Co.*, 8 Alaska 452.

86. Iowa.—*Farris v. Powell*, 10 Iowa 553.  
50 C.J. p 568 note 73.

87. Pa.—*Naughton v. McNamara*, 45 Pa.Dist. & Co. 135, 44 Lack.Jur. 51, 57 York Leg.Rec. 4.  
50 C.J. p 568 note 75.

88. W.Va.—*State v. Sears*, 160 S.E. 297, 111 W.Va. 42.  
50 C.J. p 568 note 77.

89. Pa.—*Emery v. Gilkeson*, 42 Pa. Dist. & Co. 357.  
50 C.J. p 568 note 79.



as the case may be, a return of service so made must affirmatively show that everything required by the statute was strictly performed in the manner required by the statute,<sup>90</sup> including the fact that the place at which the copy was left was a place of the character designated by statute,<sup>91</sup> and that the person with whom it was left was one of the class specified therein.<sup>92</sup> In some jurisdictions the name of the person with whom the process was left must be stated in the return,<sup>93</sup> but in others such showing has been held unnecessary.<sup>94</sup>

**Service on agent.** Where service is made on a person as agent of defendant, the return should show that he is such agent,<sup>95</sup> and should show a compliance with the statutes prescribing the requirements for such service.<sup>96</sup>

90. Ill.—Werner v. W. H. Shons Co., 173 N.E. 486, 341 Ill. 478.

Pa.—Noetting v. Wallace, 46 Pa.Dist. & Co. 169, 16 Northumb.L.J. 130 —Federal Discount Co. v. Oldinsky, 20 Pa.Dist. & Co. 683—Kunsmann v. Brady, 20 Pa.Dist. & Co. 533—Stauffer Ins. Agency v. Koenigsburg, 18 Pa.Dist. & Co. 204, 15 Lehigh Co.L.J. 24.

W.Va.—State v. Sears, 160 S.E. 297, 111 W.Va. 42.

50 C.J. p 568 note 82.

**"Leaving" or "posting" copy**

Return stating that summons was executed by "leaving" copy posted at defendant's front door complied with statute authorizing substituted service by "posting" copy of summons at defendant's front door.—Haller v. Digman, 167 S.E. 593, 113 W.Va. 240.

**Notice of nature and pendency of action**

The report of a warning order attorney for absent nonresident defendant should have stated that attorney advised defendant of nature and pendency of action.—Bell v. Bell, 152 S.W.2d 263, 287 Ky. 7.

**Service on secretary of state**

(1) The sheriff's return of service on a nonresident should state that a return receipt was requested on the copies of the complaints sent by registered mail, that the copy mailed to the secretary of the Commonwealth was accompanied by the fee provided by law, and that the copy mailed to defendant contained an endorsement thereon showing that service was made upon the secretary of the Commonwealth.—Hinkel v. Beiting, 69 Pa.Dist. & Co. 129.

(2) Under a statute providing for service of process on the secretary of state in certain cases, and the giving of notice of such service by registered mail, and the filing of defendant's return receipt before the

entry of judgment, plaintiff was held not required to disclose the return receipt card and the copy of the registered letter before the trial of the action.—Eastman v. Benton, 167 So. 169, 184 La. 620.

91. Ill.—Werner v. W. H. Shons Co., 173 N.E. 486, 341 Ill. 478.

50 C.J. p 568 note 83.

**"Residence"**

Where the statutes require substituted service to be made at defendant's dwelling house or place of abode, a return showing that a copy of the summons was left at defendant's "residence" is insufficient, since a residence may be a place where one does not dwell or abide.—F. E. Compton & Co. v. Hulse, 159 A. 806, 10 N.J.Misc. 486—50 C.J. p 568 note 83 [c] (8).

92. Ill.—Werner v. W. H. Shons Co., 173 N.E. 486, 341 Ill. 478.

Pa.—Jones v. Jones, Com.Pl., 44 Lack.Jur. 192—Croushore v. Pennsylvania Water Co., Com.Pl., 86 Pittsb.Leg.J. 37.

50 C.J. p 569 note 84.

**"Person" or "member" of family**

Words "person of the family," as used in statute providing for service of summons, and words "member of the family" as used in return on summons, were held identical in meaning.—Sullivan v. Walburn, 154 A. 617, 9 N.J.Misc. 280—50 C.J. p 569 note 84 [d].

**Service on "maid"**

While a return reciting merely that service had been made on defendant's "maid" at his dwelling house would not be self-supporting, if it also alleges that she was an "adult member of the family," it is sufficient.—Waber v. Schaffhauser, 34 Pa.Dist. & Co. 348.

93. Wis.—Lewis v. Hartel, 24 Wis. 504.

50 C.J. p 569 note 85.

**§ 96. — Process Not Served**

A return of process not served should show the reason for the failure to make service, as that defendant is dead, or could not be found, or is exempt from service, or that the officer was prevented by force of arms from making service.

A return of process not served should show the facts from which the failure to make service resulted, as that defendant is dead,<sup>97</sup> or could not be found in the county,<sup>98</sup> or is exempt from service,<sup>99</sup> or refused to receive a copy of the process when offered,<sup>1</sup> or that the officer was kept off by force of arms.<sup>2</sup>

**Not found.** A return of non est inventus is ordinarily sufficient to show that defendant could not be found within the county of the officer making the return;<sup>3</sup> but a return of not found within

94. Pa.—Sanders v. Eckman, 17 Pa. Dist. & Co. 67, 10 Northumb.Leg. J. 159.

50 C.J. p 569 note 86.

95. N.J.—Corpus Juris cited in Deighan v. Beverage Retailer Weekly & Trade Newspaper Corporation, 16 A.2d 612, 613, 18 N.J. Misc. 705.

50 C.J. p 569 note 88.

**Service on agent:**

As substituted service see supra § 50.

Of corporation see Corporations § 1314.

96. Pa.—Emery v. Gilkeson, 42 Pa. Dist. & Co. 357.

97. Pa.—Burr v. Dougherty, 14 Phila. 6.

98. Okl.—Levy v. Tradesmen's State Bank, 176 P. 512, 71 Okl. 245.

50 C.J. p 570 note 10.

99. Pa.—Hunter v. Weidner, 1 Woodw. 6.

50 C.J. p 570 note 11.

Exemptions from service of process see supra §§ 80-89.

1. Me.—Fuller v. Kenney, 32 Me. 334.

50 C.J. p 570 note 12.

Service refused see supra § 34.

2. N.C.—Crumpler v. Glisson, 4 N. C. 516.

3. Iowa.—Macklot v. Hart, 12 Iowa 428.

46 C.J. p 485 note 7.

"Non est inventus" defined see 66 C.J.S. p 604 note 38 (15).

**Residence unknown**

Return non est inventus showing on its face that residence of defendant was unknown to officer was evidence on which action for breach of contract was properly entered and continued for notice.—Therrien v. Scammon, 176 A. 116, 87 N.H. 214.

the bailiwick of the officer is not sufficient where his bailiwick is or may be smaller than the county.<sup>4</sup> On the other hand, a return that defendant cannot be found within the state is ineffective, since the officer cannot officially know the inhabitants of the state,<sup>5</sup> although such a return may be good as to the territory of which he can take official notice.<sup>6</sup> A return of not found is improper where defendant is a known inhabitant of another county or state.<sup>7</sup> Where it shows that the officer failed to go to the dwelling house of defendant, a return of not found is ordinarily nugatory,<sup>8</sup> but a return that defendant has no last or usual place of abode within the county is sufficient.<sup>9</sup> Where provision is made by statute for substituted service, a return of non est inventus is insufficient without a showing that defendant could not be served within the county.<sup>10</sup> Under statutes authorizing judgment to be taken against less than all of joint defendants only when the other or others are not residents or inhabitants of the county, a return merely that such others were not found is insufficient to sustain such a judgment.<sup>11</sup>

*Nihil habet.* A return of nihil habet may be proper where service cannot be made,<sup>12</sup> although non est inventus is more usual.<sup>13</sup> The former is a fuller answer to the command of the writ than the latter,<sup>14</sup> and so may be sufficient where a return of not found would be sufficient,<sup>15</sup> as where substituted service could be had, although defendant

was not found in person.<sup>16</sup>

*Mortuus est.* When the officer to whom process has been given for service knows that defendant is dead, the proper return is mortuus est,<sup>17</sup> and not nihil habet.<sup>18</sup>

## § 97. — Construction to Determine Sufficiency

A return of process should receive a reasonable construction and, if susceptible of different meanings, should be given that meaning which will most nearly conform to the legal duty of the officer.

A return of process should receive a fair, reasonable, and natural construction;<sup>19</sup> and effect must be given to its plain intent and meaning.<sup>20</sup> In determining whether or not a return of process is sufficient on its face, no nice criticisms will be indulged in respect of the words used, and, if it can be fairly inferred from the language employed that the officer has met the requirements of the law, the return will be deemed sufficient.<sup>21</sup> The return should receive every reasonable intendment,<sup>22</sup> and, if it is susceptible of different meanings, the meaning will be adopted which is most conformable to the legal duty of the officer.<sup>23</sup> Where it is obvious from the words used and the general tenor and context that certain words or their substance have been omitted, such words may be supplied by construction.<sup>24</sup> Redundant or surplus matter will be disregarded.<sup>25</sup>

4. Ky.—Gully v. Sanders, Litt.Sel. Cas. 424.

5. Ky.—Greenup v. Bacon, 1 T.B. Mon. 108.

6. Ky.—Greenup v. Bacon, supra.

7. Ky.—Kibbe v. Deering, 1 Litt. 244.

8. Pa.—Brennen v. Redfern, 11 Pa. Dist. 248.

9. Ind.—Lodge v. State Bank, 6 Blackf. 557.

10. Mass.—Call v. Hagger, 8 Mass. 423.

11. N.J.—Moore v. Miller, 16 N.J. Law 233.

12. Pa.—Brennen v. Redfern, 11 Pa. Dist. 248.

13. Fla.—Doggett v. Jordan, 3 Fla. 215.

14. Ind.—Morris v. Knight, 1 Blackf. 106.

15. Pa.—Sherer v. Easton Bank, 33 Pa. 134—Kinney v. Stoer, 14 Pa. Dist. 181.

46 C.J. p 479 note 33 [a].  
"Nihil habet" defined see 66 C.J.S. p 596 note 41.

13. Pa.—Sherer v. Easton Bank, 33 Pa. 134.

14. Pa.—Sherer v. Easton Bank, supra.

15. Pa.—Sherer v. Easton Bank, supra.

16. Pa.—Sherer v. Easton Bank, supra.

17. Pa.—Burr v. Dougherty, 14 Phila. 6.

18. Pa.—Burr v. Dougherty, supra.

19. Ga.—Burden v. Gates, 3 S.E.2d 679, 188 Ga. 284—Griffin v. Wise, 41 S.E. 1003, 115 Ga. 610—Gibson v. Robinson, 16 S.E. 969, 90 Ga. 756.

20. Mo.—Davis v. Jacksonville Southeastern Line, 28 S.W. 965, 126 Mo. 69—Regent Realty Co. v. Armour Packing Co., 86 S.W. 880, 112 Mo. App. 271.

### Residence and evasion of process

Sheriff's return that after diligent search and inquiry defendant was not to be found in a named county was a representation to the court that defendant was a resident of such county and was evading process.—Willshire v. Frees, 201 S.W.2d 675, 184 Tenn. 523.

20. Mo.—Davis v. Jacksonville Southeastern Line, 28 S.W. 965, 126 Mo. 69—Carter v. Flynn, 112 S.W. 2d 364, 232 Mo.App. 771—Regent Realty Co. v. Armour Packing Co., 86 S.W. 880, 112 Mo.App. 271.

### Absence of service on defendant

Sheriff's return of service "by leaving a copy of the summons at his place of residence" was held to show that there was no service on defendant.—Kent v. Kent, 139 So. 240, 224 Ala. 183.

21. Mo.—Cain v. Courter, 215 S.W. 17.

50 C.J. p 562 note 21.

22. Ga.—Burden v. Gates, 3 S.E.2d 679, 188 Ga. 284—Griffin v. Wise, 41 S.E. 1003, 115 Ga. 610—Gibson v. Robinson, 16 S.E. 969, 90 Ga. 756.

Presumptions in aid of return see infra § 98.

23. Ala.—Farmers' State Bank v. Inman, 92 So. 604, 207 Ala. 284.

24. Ga.—Burden v. Gates, 3 S.E.2d 679, 188 Ga. 284—Griffin v. Wise, 41 S.E. 1003, 115 Ga. 610—Gibson v. Robinson, 16 S.E. 969, 90 Ga. 756.

### "Served"

The indorsement on process as having been "served" implies service as by law required.—State v. Moore, 55 S.E.2d 177, 230 N.C. 648.

24. Mo.—Carter v. Flynn, 112 S.W. 2d 364, 232 Mo.App. 771.

25. Ill.—Brignall v. Merkle, 28 N.E. 2d 311, 306 Ill.App. 137.

The whole of the return must be considered together in determining its effect,<sup>26</sup> and it cannot be separated or divided into parts.<sup>27</sup> Where two returns are indorsed on a process, both will be construed together.<sup>28</sup>

*Service in individual or representative capacity.* A return showing service on a designated person without further description is ordinarily insufficient to show that he was served in a representative capacity.<sup>29</sup> Where one is sued in both his individual and a representative capacity, a return stating merely that personal service was made is equivocal,<sup>30</sup> and is not conclusive that he was served in his individual capacity only and not in his representative capacity.<sup>31</sup>

## § 98. Presumptions

- a. In general
- b. Person served

### a. In General

There is a general presumption in favor of the truth and correctness of a return which is regular on its face; and particular presumptions may also be indulged with respect to the competency of the person making service, due diligence, and the time, place, and manner of service.

In the absence of any showing to the contrary, the truth and correctness of a return of process which is regular on its face are strongly<sup>32</sup> presumed.<sup>33</sup> Where it appears that a copy of the complaint and summons was mailed, and that the complaint was received, it must be presumed, in the absence of evidence to the contrary, that the summons inclosed therewith was also received.<sup>34</sup>

On the other hand, it has been held that no inference or presumption will be indulged to aid an insufficient return of citation or process,<sup>35</sup> and that the fact of service cannot be presumed where it does not appear on the face of a return of process.<sup>36</sup> The presumption of truth and correctness has no application where a mistake in the return is conceded.<sup>37</sup> Moreover, there is some authority to the broad effect that nothing can be presumed in favor of the return or read into it by intendment.<sup>38</sup> No presumption of service has been held to arise from the mere recitation of service in a default judgment.<sup>39</sup> The presumption of a return arising from a judgment is overcome by proof that there actually was no return made.<sup>40</sup> It has been intimated that the presumption in favor of a sheriff's return does not arise where the return is made by a special bailiff.<sup>41</sup>

Mich.—Hennes v. Hebard, 135 N.W. 1073, 169 Mich. 670.

Tex.—Sandel v. Dalley, Civ.App., 141 S.W.2d 467—Whitney v. Nolan County, Civ.App., 53 S.W.2d 98, error dismissed.

Return not vitiated by redundant or surplus matter see supra § 94 a.

26. Ky.—Farmers' Bank v. Riley, 272 S.W. 9, 209 Ky. 54.

Tex.—Missouri, etc., R. Co. v. Ross, 123 S.W. 229, 57 Tex.Civ.App. 349.

27. Ky.—Farmers' Bank v. Riley, 272 S.W. 9, 209 Ky. 54.

28. Ark.—Pillow v. Sentelle, 39 Ark. 61.

50 C.J. p 563 note 27.

29. Mo.—Bostick v. McIntosh, 213 S.W. 456, 278 Mo. 395.

50 C.J. p 563 note 28.

30. Cal.—Morrissey v. Gray, 124 P. 246, 162 Cal. 638.

31. Cal.—Morrissey v. Gray, supra.

32. Iowa.—Swift v. Swift, 29 N.W. 2d 535, 239 Iowa 62—Chader v. Wilkins, 284 N.W. 183, 226 Iowa 417.

50 C.J. p 571 note 35.

33. Cal.—People v. Spiers, 62 P.2d 414, 17 Cal.App.2d 477.

Ill.—Michalowski v. Stefanowski, 58 N.E.2d 264, 324 Ill.App. 363—Nikola v. Campus Towers Apartment Bldg. Corporation, 25 N.E.2d 582, 303 Ill.App. 516.

Iowa.—Ruth & Clark v. Emery, 11

N.W.2d 397, 233 Iowa 1234—Coster v. Jensen, 257 N.W. 303, 218 Iowa 1215—Macklot v. Hart, 12 Iowa 428.

Ky.—Pardue v. Spillman, 202 S.W.2d 414, 304 Ky. 718—Igo v. Berea Realty & Finance Co., 189 S.W.2d 733, 300 Ky. 526.

La.—Logwood v. Logwood, 168 So. 310, 185 La. 1—Smith v. Crescent Chevrolet Co., App., 1 So.2d 421—Wright v. Peters Furniture Co., App., 153 So. 548—Saucier v. McLean, 125 So. 163, 12 La.App. 158.

Md.—Plummer v. Rosenthal, 12 A.2d 530, 173 Md. 149—Weisman v. Davitz, 199 A. 476, 174 Md. 447—Parker v. Berryman, 198 A. 708, 174 Md. 356—Johnson v. Detzel, 179 A. 162, 168 Md. 691.

Ohio.—Nickerson v. Nickerson, 87 N. E.2d 915, 85 Ohio App. 372.

Or.—Peterson v. Hutton, 284 P. 279, 132 Or. 252.

Pa.—Max Meltzer Co. v. Zacks, Com. Pl., 86 Pittsb.Leg.J. 183.

Tex.—McDonald v. Brown, App., 36 S.W.2d 774, error dismissed.

W.Va.—Lanham v. Home Auto Co., 176 S.E. 604, 115 W.Va. 415.

50 C.J. p 571 note 35.

Burden of proof as to contradiction of return see infra § 102.

After judgment, the sheriff's return with respect to service of summons is presumed to be correct, since it is a part of the record on which an adjudication has been

made.—Nikola v. Campus Towers Apartment Bldg. Corporation, 25 N. E.2d 582, 303 Ill.App. 516.

34. Cal.—Palmer v. Lantz, 9 P.2d 821, 215 Cal. 320.

35. Tex.—Scruggs v. Gribble, Civ. App., 41 S.W.2d 643.

**Record showing void service or defective process**

Where remainder of record positively shows void service of process, recital in judgment as to proper service does not give rise, in a collateral proceeding, to a presumption of another service, but it is presumed that service found in record is the same and only service referred to in judgment; and same rule applies to defective process.—Town of Brighton v. Town of Charleston, 44 A.2d 628, 114 Vt. 316.

36. Ill.—Dickison v. Dickison, 16 N.E. 861, 124 Ill. 483.

50 C.J. p 571 note 34.

37. Ark.—Little Rock Chamber of Commerce v. Reliable Furniture Co., 211 S.W. 371, 138 Ark. 403.

38. Mo.—Carter v. Flynn, 112 S.W. 2d 364, 232 Mo.App. 771.

39. Tex.—Peterson & Tvrdik v. Mueller-Huber Grain Co., Civ.App., 58 S.W.2d 890.

40. Ga.—Elliott v. Porch, 200 S.E. 190, 59 Ga.App. 181.

41. Ky.—Gardner v. Lincoln Bank

*Performance of officer's duty.* A general presumption is ordinarily indulged, in aid of an officer's return of process which is regular on its face, that the officer by whom it is made has done his duty in the premises,<sup>42</sup> unless the contrary appears.<sup>43</sup>

*Competency of person making service.* In aid of a return of process, it will ordinarily be presumed that the person by whom service was shown to have been made was competent to make it.<sup>44</sup> Thus, one who makes a return as an officer will be presumed to be duly qualified as such and authorized to serve the process in question,<sup>45</sup> and to be an officer of the proper court<sup>46</sup> and county;<sup>47</sup> one who purports to serve process as a deputy will be presumed to have been duly authorized as such;<sup>48</sup> where the service was made by a coroner, it will be presumed that the conditions existed which made service by him proper;<sup>49</sup> and where a previous grant of authority is necessary in order that one other than an officer may serve process, such grant will be presumed in order to support such service.<sup>50</sup>

*Due diligence.* In the absence of any showing to the contrary, it will be presumed that an officer returning process not served or making a return of substituted service exercised due diligence to execute the process and serve defendant personally.<sup>51</sup>

*Time of service and return.* Where a return of service of process is without date, or the date is imperfectly or uncertainly stated, it will be pre-

sumed that the process was served within the time prescribed by law,<sup>52</sup> and that the return was made at the proper time.<sup>53</sup> Where the officer is in possession of two notices, and his duty is to serve both immediately, there is no presumption or inference as to which was first served;<sup>54</sup> and, where an affidavit for service by publication was filed the same day that the summons and complaint were served, there is no presumption that the summons was served either before or after the filing of the affidavit.<sup>55</sup>

*Place of service.* Where a return of service of process fails to state where the service was made, it will be presumed, in the absence of any showing to the contrary, to have been made within the territorial limits of the officer's authority,<sup>56</sup> except in a suit on a foreign judgment, in which case no such presumption will be indulged as to the service of the process on which the judgment was founded.<sup>57</sup> Similarly, where substituted service is shown, it will be presumed, unless the contrary appears, that the place where a copy of the process is stated to have been left was of the kind designated by the statute providing for such service.<sup>58</sup>

*Manner of service.* While it has been held that no presumptions will supply an omission of a return of service of process to set forth the doing of all acts necessary to constitute a valid service,<sup>59</sup> the more general rule appears to be that, where a return recites execution of the process, it will be presumed that it was executed in the manner provided by law;<sup>60</sup> and where a statute provides what

- & Trust Co., 64 S.W.2d 497, 251 Ky. 109.
42. Tenn.—O. H. May Co. v. Gutman's Inc., 2 Tenn.App. 43. 50 C.J. p 571 note 37.
43. Mo.—Corpus Juris quoted in Delta Realty Co. v. Hunter, 152 S.W.2d 45, 50, 347 Mo. 1108. 50 C.J. p 571 note 38.
44. Nev.—Sherwin v. Sherwin, 111 P. 286, 122 P. 481, 33 Nev. 321, Ann.Cas.1914A 108. 50 C.J. p 571 note 39.
45. Mass.—Brazill v. Green, 137 N. E. 346, 243 Mass. 252. 50 C.J. p 571 note 40.
46. Ga.—Rucker v. Tabor, 54 S.E. 959, 126 Ga. 132.
47. Ga.—Citizens' Bank v. Fort, 83 S.E. 678, 15 Ga.App. 427.
- Okl.—Bollenbach v. Huber, 148 P. 716, 46 Okl. 127.
48. Neb.—Gilbert v. Brown, 2 N.W. 376, 9 Neb. 90.
49. Ky.—Russell v. Durham, 29 S. W. 16, 16 Ky.L. 516.

- Wash.—Rodolph v. Mayer, 1 Wash. T. 133.
50. N.Y.—Hess v. Smith, 37 N.Y.S. 635, 16 Misc. 55.
51. Okl.—Levy v. Tradesmen's State Bank, 176 P. 512, 71 Okl. 245. 50 C.J. p 572 note 48.
- Period of inability to effect service*
- There was no presumption that inability to serve defendants continued for twenty-one days elapsing between return day of summons and affidavit for order of publication.—Union Guardian Trust Co. v. Grevin, 246 N.W. 143, 261 Mich. 344.
52. W.Va.—Stanton-Belmont Co. v. Case, 35 S.E. 851, 47 W.Va. 779. 50 C.J. p 572 note 59.
53. Ky.—Commonwealth v. Schmidt, 176 S.W. 1166, 165 Ky. 351.
54. Iowa.—Boone v. Boone, 141 N. W. 933, 160 Iowa 284.
55. N.D.—Kelm v. Lolland, 228 N. W. 420, 59 N.D. 18.
56. Tex.—Dickinson v. Dickinson, Civ.App., 173 S.W.2d 549.

- W.Va.—Lanham v. Home Auto. Co., 176 S.E. 604, 115 W.Va. 415. 50 C.J. p 572 note 62.
57. Mass.—Rand v. Hanson, 28 N.E. 6, 154 Mass. 87, 26 Am.S.R. 210, 12 L.R.A. 574.
58. Ga.—Jones v. Tarver, 19 Ga. 279.
59. Ark.—Rose v. Ford, 2 Ark. 26.
- Pa.—Philadelphia v. Cathcart, 10 Phila. 103.
- Reading or explanation of process*
- Where writ of summons returnable on the October return day was stamped "renewed to the November return day" but copies were not appropriately changed, court could not assume from return of service, which was made after expiration of October return day, that deputy sheriff either read or explained summons to agent of defendant, with whom he left a copy.—North v. Town Real Estate Corp., Md., 60 A. 2d 665.
60. Ohio.—Nickerson v. Nickerson, 87 N.E.2d 915, 85 Ohio App. 372. 50 C.J. p 572 note 66.

the return shall show, it will be presumed, as to all facts not required to appear therein, that all legal requirements were observed.<sup>61</sup>

*Sufficiency of copy delivered.* Where a return of service of process recites the delivery to the person served of a copy of the process or a pleading, it will be presumed that a true copy was delivered,<sup>62</sup> and that such copy bore the indorsements required by statute;<sup>63</sup> and when a certified copy is stated to have been delivered, the certification will be presumed to have been made by the proper officer.<sup>64</sup>

*Residence of defendant.* Where a return regular on its face recites personal service of process, it will be presumed that defendant was a resident of the county wherein the service is shown to have been made, when such residence is essential to the validity of the service,<sup>65</sup> unless the fact of nonresidence appears;<sup>66</sup> and where the return shows substituted service, under a statute providing for such service on persons who are nonresidents of the county but residents of the state, it will be presumed that defendant was a resident of the state.<sup>67</sup> When process is issued to, and served in, another county there is no presumption that defendant resides in the county in which the action is pending.<sup>68</sup> The presumption that defendant's residence was such as to give the court jurisdiction of his person has no application, where the return does not show the existence of any condition required by statute to authorize service of process in the mode in which it was made.<sup>69</sup>

*Corrections or alterations of return.* In the absence of evidence to the contrary, a correction or alteration of a return will be presumed to have been made before the return left the hands of the officer.<sup>70</sup>

### b. Person Served

Where a return regular on its face recites service of

process on a designated person, a presumption arises that service was made on the person named therein.

Where a return regular on its face recites service of process on a designated person, it will be presumed, until the contrary appears, that service was made on the person named therein,<sup>71</sup> and that such person was the proper person on whom to make the service;<sup>72</sup> and where service on an infant defendant is shown, it will be presumed that he was of such age that service could be made on him personally rather than on his parent or guardian.<sup>73</sup> Where, however, a return of process directed to two or more defendants recites service by delivering a copy to "the within-named defendant," no inference can be indulged as to the identity of the person served.<sup>74</sup>

*Service on agent.* Where a return of substituted service recites that the process was served on an agent of defendant, it will ordinarily be presumed that the person served was defendant's agent;<sup>75</sup> and, although the return omits to set forth the character of the agent, it will be presumed that he was an agent permitted to be served on behalf of his principal by statutes restricting the class or character of agents on whom service may be made.<sup>76</sup>

## § 99. Operation and Effect in General

A proper return of process by an officer authorized to make it is strong or at least prima facie evidence of the facts recited therein, provided the matters set forth constitute an appropriate subject of the return.

A return of process made in due form by an officer authorized to make it, and in a proceeding wherein it is requisite and proper, is strong or at least prima facie evidence of the facts which the officer is authorized and required to show by his return,<sup>77</sup> and is ordinarily the only competent proof

61. Ky.—Webber v. Webber, 1 Metc. 18.

62. Wash.—Rauch v. Zander, 245 P. 17, 138 Wash. 610.

63. Pa.—Commonwealth v. Reo Speed Wagon, 91 Pa.Super. 385.

64. Cal.—Curtis v. Herrick, 14 Cal. 117, 73 Am.D. 632.

65. Cal.—Pellier v. Gillespie, 8 P. 185, 67 Cal. 582.

50 C.J. p 573 note 72.

66. S.D.—Johnson v. Brufiat, 186 N. W. 877, 45 S.D. 200.

67. Ill.—Joel v. Bennett, 115 N.E. 5, 276 Ill. 537.

68. Ky.—Caywood v. Williams, 291 S.W. 377, 218 Ky. 282.

*Residence in either of two counties*  
A presumption is sometimes held

to arise that defendant resided either in the county where the suit was commenced or that in which the process was executed.—Hogan v. Vance, 5 Ky. 34.

69. Ill.—Werner v. W. H. Shons Co., 173 N.E. 486, 341 Ill. 478.

70. Mo.—Cox v. American Ins. Co., 119 S.W. 476, 137 Mo.App. 40. Effect of alterations on validity see supra § 94 a.

71. Tex.—Reed v. McCutcheon, Civ. App., 217 S.W. 174.

72. Va.—Smithson v. Briggs, 33 Gratt. 180, 74 Va. 180. 50 C.J. p 572 note 51.

*Process left with member of family*  
Where means are available for defendant to secure service of copy of summons when left with a member

of the family, court will presume that it was brought to defendant's attention, but not so when it is conclusively shown that it could not have been done.—Clark v. Clark, 30 So.2d 170, 158 Fla. 731.

73. Ky.—Pierce v. Cobb, 2 Ky.Op. 85.

74. Tex.—Texas, etc., R. Co. v. Youngblood, 132 S.W. 898, 62 Tex. Civ.App. 587.

75. Ill.—Sandoval Zink Co. v. Hale, 133 Ill.App. 196.

76. Pa.—Fulton v. Commercial Travelers' Mut. Accident Assoc., 33 A. 324, 172 Pa. 117. 50 C.J. p 572 note 56.

77. U.S.—Cleaves v. Funk, C.C.A. Okl., 76 F.2d 828.

thereof,<sup>78</sup> except in the case of acceptance or acknowledgment of service, as discussed supra § 38, since parol evidence is not receivable to establish the fact.<sup>79</sup> The return, it has been said, imports verity.<sup>80</sup> However, it has also been asserted that where the statute does not make the officer's return conclusive or the only evidence of the manner of executing process, there is no reason why the facts may not be shown by other competent evidence, provided it is not attempted to contradict the return.<sup>81</sup> A return does not lose its force as such evidence by lapse of time,<sup>82</sup> and, therefore, may be used again as evidence of service where a judgment founded on it has been vacated.<sup>83</sup>

The return is not evidence of nonessential matters stated by it,<sup>84</sup> or matters not properly the subject of the return,<sup>85</sup> or matters over which the authority of the officer does not extend.<sup>86</sup> While it is *prima facie* evidence even of matters of which the

officer had no personal knowledge, where they are proper to be stated in the return,<sup>87</sup> statements made without direct knowledge of any kind on the part of the officer have no greater weight than similar statements of other witnesses based on like foundations.<sup>88</sup> The return cannot fix the capacity in which defendant is sued,<sup>89</sup> or give to the place where service was made a character which in fact it does not possess.<sup>90</sup> It has no effect as evidence when it shows that the service was made outside the territorial limits within which the officer has jurisdiction to make service in his official capacity.<sup>91</sup> A return showing defective service does not divest jurisdiction actually acquired by proper service.<sup>92</sup>

*An unauthorized return* is not evidence of the facts stated therein, except as any other private memorandum may be used as evidence.<sup>93</sup>

*Effect on process.* A return of process ordinari-

Ala.—Hood v. Cowdy, 41 So.2d 181, 252 Ala. 471.

Ark.—Hirsch v. Perkins, 200 S.W.2d 796, 211 Ark. 388—Edwards v. Stewart, 165 S.W.2d 265, 204 Ark. 889—Merchants' & Planters' Bank & Trust Co. v. Ussery, 88 S.W.2d 1087, 183 Ark. 838.

Cal.—Roehl v. Texas Co., 291 P. 255, 107 Cal.App. 691.

Ga.—Denham v. Jones, 23 S.E. 78, 96 Ga. 130—Benton v. Maddox, 16 S.E.2d 141, 65 Ga.App. 540.

Ill.—Cannata v. White Owl Express, 89 N.E.2d 56, 339 Ill.App. 79.

Md.—North v. Town Real Estate Corp., 60 A.2d 665—Harvey v. Slacum, 29 A.2d 276, 181 Md. 206.

Minn.—Murtha v. Olson, 21 N.W.2d 607, 221 Minn. 240.

Neb.—Phelps v. Blome, 35 N.W.2d 93, 150 Neb. 547—De Lair v. De Lair, 21 N.W.2d 498, 146 Neb. 771.

N.J.—C. & D. Building Corporation v. Griffiths, 157 A. 137, 109 N.J. Eq. 819.

N.C.—State v. Moore, 55 S.E.2d 177, 230 N.C. 648—Hooker v. Forbes, 162 S.E. 903, 202 N.C. 364—Jordan v. McKenzie, 155 S.E. 868, 199 N.C. 750.

Okl.—Howard v. Stewart, 159 P.2d 537, 195 Okl. 491—A & A Tool & Supply Co. v. Gray, 140 P.2d 926, 192 Okl. 657.

S.C.—Laurens Trust Co. v. Copeland, 151 S.E. 617, 154 S.C. 390.

Tex.—Lafleur v. Switzer, Civ.App., 109 S.W.2d 239.

Wash.—John Hancock Mut. Life Ins. Co. v. Gooley, 83 P.2d 221, 196 Wash. 357, 118 A.L.R. 1484.  
50 C.J. p 573 note 79, p 575 note 8.

#### Great reliance

In order to avoid uncertainty and confusion, great reliance must be placed on returns made by the sworn

officers entrusted with service of process.—Smith v. Crescent Chevrolet Co., La.App., 1 So.2d 421.

#### Date of service

Proof as to date of service of summons has been held unnecessary, since court is charged with knowledge of date of service as shown by return.—Metropolitan Casualty Ins. Co. of New York v. Doles Bros. Co., 20 P.2d 569, 163 Okl. 36.

78. La.—Teal v. Philadelphia, etc., SS. Co., 71 So. 364, 139 La. 194.  
50 C.J. p 573 note 80.  
Lost return see *infra* § 101.

79. Ala.—Morrison v. Covington, 100 So. 124, 211 Ala. 181.

Evidence to aid or explain return see *infra* § 101.

80. Ala.—Krasner v. Gurley, 29 So. 2d 224, 248 Ala. 688—Kent v. Kent, 139 So. 240, 224 Ala. 183.

Ind.—Clark v. Clark, 172 N.E. 124, 202 Ind. 104—Miedreich v. Lauenstein, 86 N.E. 963, 87 N.E. 1029, 172 Ind. 140.

Ky.—Park Hill Realty Co. v. Lykins, 161 S.W.2d 602, 290 Ky. 498.

Mich.—Kretschmar v. Rosasco, 229 N.W. 446, 250 Mich. 9.

Vt.—Bristol v. Noyes, 174 A. 924, 106 Vt. 418.

50 C.J. p 576 note 11.  
Conclusiveness see *infra* § 100.

#### Self-supporting

A return of service on a named person, who has a different surname from the person to be served, but who is described in the return as an adult member of his household, is self-supporting.—Oyer v. Coble, 71 Pa.Dist. & Co. 293.

81. Mont.—Smith v. Hamill, 112 P. 2d 195, 111 Mont. 585.

82. N.Y.—Brien v. Casey, 2 Abb.Pr. 416.

83. N.Y.—Brien v. Casey, *supra*.

84. R.I.—Sheldon v. Comstock, 3 R. I. 84.

85. Ga.—Kinsey v. Macon Lumber Co., 71 S.E. 675, 136 Ga. 369.  
50 C.J. p 573 note 87.

86. La.—Shannon v. Goffe, 15 La. Ann. 86.

50 C.J. p 573 note 88.

87. Cal.—Willson v. Spring Hill Quartz Min. Co., 10 Cal. 445.

50 C.J. p 573 note 89.

88. Minn.—Murtha v. Olson, 21 N.W.2d 607, 221 Minn. 240.

89. Ala.—May v. Clanton, 95 So. 30, 208 Ala. 588.

90. Me.—Camden Auto Co. v. Mansfield, 113 A. 175, 120 Me. 187.

50 C.J. p 574 note 91.

#### Residence or abode

(1) In determining whether a copy of the summons was left at a defendant's usual place of abode, the return of the sheriff on such an issue cannot be accepted as proof of the fact.—Mahler v. Segel, 76 N.E.2d 795, 333 Ill.App. 138.

(2) Statements in return of service that documents were left at defendant's usual place of residence with a member of his family were conclusions of fact and not evidence.—Zazove v. Wilson, 80 N.E.2d 101, 334 Ill.App. 594.

91. N.H.—Northwood v. Barrington, 9 N.H. 369.

N.Y.—Farmers' L. & T. Co. v. Dickson, 9 Abb.Pr. 61, 17 How.Pr. 477.

92. Minn.—Murray v. Murray, 198 N.W. 307, 159 Minn. 111.

Tex.—Corpus Juris cited in Sandel v. Dalley, Civ.App., 141 S.W.2d 467, 468, 469.

93. Wash.—Strandberg v. Stringer, 216 P. 25, 125 Wash. 358.

ly renders it functus officio, and no subsequent service of the same process will be effectual for any purpose.<sup>94</sup> In some jurisdictions, however, the summons is not a writ issuing from a court and the return of the summons to the court does not render it functus officio.<sup>95</sup> When the return relates to less than the whole number of defendants, the court may permit the process to be withdrawn for further service on the others.<sup>96</sup>

### § 100. Conclusiveness

There is a conflict of authority on the question of the conclusiveness of a return of process, some authorities holding that it is conclusive between the parties as to all matters of which the return is evidence, whereas

other authorities hold that it may be rebutted or impeached.

The question of the conclusiveness of a return of process, as to parties to the action and their privies, is one on which there has been said to be an irreconcilable conflict of authority.<sup>97</sup> It is the rule of the English common law<sup>98</sup> and of some American jurisdictions<sup>99</sup> that, as between parties to an action and those in privity with them, a return of process which is regular on its face ordinarily is conclusive as to all matters of which the return is evidence, so that as to such matters it can be controverted only in an action against the officer<sup>1</sup> for a false return,<sup>2</sup> unless the return is con-

94. Mont.—*Corpus Juris* cited in State ex rel. Montgomery Ward & Co. Inc. v. District Court of First Judicial Dist. in and for Lewis and Clark County, 146 P.2d 1012, 1015, 115 Mont. 521.

50 C.J. p 577 note 18.

#### Summons merely left with clerk

Where summons for publication was merely left with the clerk of court without any certificate of what had been done and clerk placed on it his notation of filing, the summons was not "returned" in the sense set forth in the text, so as to make the summons dead.—Schmidt v. Schmidt, 89 P.2d 1020, 108 Mont. 246.

95. Wis.—Westport Tp. v. City of Madison, 19 N.W.2d 809, 247 Wis. 326.

96. Cal.—Hancock v. Preuss, 40 Cal. 572.

97. Mich.—Clabaugh v. Judge Wayne Cir. Ct., 199 N.W. 710, 228 Mich. 207.

50 C.J. p 574 note 94.

98. U.S.—*Corpus Juris* cited in Columbian Nat. Life Ins. Co. of Boston, Mass. v. Robbins, D.C.Pa., 22 F.Supp. 1, 2.

50 C.J. p 574 note 95.

99. Del.—Smulski v. H. Feinberg Furniture Co., 193 A. 585, 8 W.W. Harr. 451.

Mass.—Union Sav. Bank of Boston v. Cameron, 65 N.E.2d 313, 319 Mass. 235.

Mo.—State ex rel. Frazier v. Green, App., 143 S.W.2d 64—Shannon v. Del-Home Light Co., App., 43 S.W.2d 872—White v. Hal-John Realty & Investment Co., 43 S.W.2d 855, 226 Mo.App. 157—Deichmann v. Hogan, App., 26 S.W.2d 874.

N.H.—Goodwin v. Goldberg, 161 A. 375, 85 N.H. 548.

Vt.—Bristol v. Noyes, 174 A. 924, 106 Vt. 418.

50 C.J. p 574 note 96.

Alteration of substantial recitals  
U.S.—Murphy v. Campbell Soup Co., D.C.Mass., 44 F.2d 214.

#### In Pennsylvania

(1) In the absence of fraud, a sheriff's return which is full and complete on its face ordinarily is conclusive and cannot be set aside on extrinsic evidence.—Morris v. Bender, 177 A. 776, 317 Pa. 533—Payne v. East Liberty Spear Co., 200 A. 924, 132 Pa.Super. 278—Seminole Building & Loan Ass'n v. Levit, 163 A. 345, 107 Pa.Super. 252—Rogers v. Metropolitan Life Ins. Co., 99 Pa.Super. 505—Rittenberg v. Stein, 97 Pa.Super. 554—Industrial Acceptance Corporation v. Sickler, 97 Pa.Super. 152—Montgomery Trust Co. v. Pennsylvania R. Co., 25 Pa.Dist. & Co. 203, 51 Mont.Co. 250—Wiest v. Heffernan, 17 Pa.Dist. & Co. 212—Taylor-Davis, Inc. v. Howells, 16 Pa.Dist. & Co. 156—Herr v. Standard Life Ins. Co. of America, 14 Pa.Dist. & Co. 337, 44 York Leg.Rec. 159—Fetrow v. Fetrow, Com.Pl., 59 Dauph.Co. 375—National Paper Corp. v. Scheck, Com.Pl., 47 Lack.Jur. 139—Bandish v. Borough of Pringle, Com.Pl., 37 Luz.Leg.Reg. 389—First Nat. Bank of Freeland v. DePierro, Com.Pl., 36 Luz.Leg.Reg. 318—Vigilante v. Accor, Com.Pl., 55 Mont.Co. 1—Zajac v. Mehalshuck, Com.Pl., 10 Sch.Reg. 1, 57 York Leg.Rec. 187—50 C.J. p 574 note 96 [b] (1).

(2) A constable's return is similarly conclusive.—Polis v. Raphael, 52 A.2d 355, 160 Pa.Super. 544—Ristau, for Use of Ristau, v. Crew Levick Co., 167 A. 800, 109 Pa.Super. 357—Wood v. Industrial Health, Accident & Life Ins. Co., 163 A. 391, 107 Pa.Super. 338—Federal Discount Company v. Oldinsky, 20 Pa.Dist. & Co. 683—Prestandren v. Conaboy, 14 Pa.Dist. & Co. 102—Reading Bone Fertilizer Co. v. Lehman, Com.Pl., 59 Dauph.Co. 192—50 C.J. p 574 note 96 [c].

(3) Return of sheriff on service of summons in suit against fraternal beneficial society brought in county other than that in which society had its principal office was held conclusive that society had no office or place of business in county

in which suit was brought.—Kolesar v. Slovak Evangelical Union, Augsburg Confession of America, 186 A. 302, 122 Pa.Super. 318.

(4) Sheriff's return of service of summons which is defective on its face may be set aside.—Rittenberg v. Stein, 97 Pa.Super. 554—50 C.J. p 574 note 96 [b] (2).

(5) A sheriff's return is not conclusive where a nonresident is involved.—Hagen Corporation v. Empire Sheet and Tin Plate Co., 11 A.2d 144, 337 Pa. 232—Vaughn v. Love, 188 A. 299, 324 Pa. 276, 107 A.L.R. 1336—Hinkel v. Beiting, 69 Pa.Dist. & Co. 129—Snyder v. McCanless, 23 Pa.Dist. & Co. 551—National Paper Corp. v. Scheck, Com.Pl., 47 Lack.Jur. 139—Proctor v. Bourne, Com.Pl., 59 Mont.Co. 245.

(6) Since anyone may serve a statement of claim, the return of service is not conclusive on the parties even if made by the sheriff.—Coleman Dining Car Co. v. Walsh, 48 Pa.Dist. & Co. 283, 44 Lack.Jur. 255, 11 Som.Leg.J. 369, 57 York Leg. Rec. 196.

1. Ky.—Foster v. Hill, 138 S.W.2d 495, 282 Ky. 327—Commonwealth Life Ins. Co. v. Combs, 65 S.W.2d 696, 251 Ky. 540.

Statute applicable only to certificate  
Statute providing that no fact officially stated by an officer regarding a matter about which officer is required by law to make a statement in writing, shall be called in question, except on allegation of fraud in party benefited thereby or mistake by the officer unless in a direct proceeding against officer or his surety, applied only to a certificate actually signed by the officer and not to a forged paper which is a nullity.—Park Hill Realty Co. v. Lykins, 161 S.W.2d 602, 290 Ky. 498.

2. Mo.—State ex rel. Frazier v. Green, App., 143 S.W.2d 64—White v. Hal-John Realty & Investment Co., 43 S.W.2d 855, 226 Mo.App. 157—Deichmann v. Hogan, App., 26 S.W.2d 874.

tradicted by other matters appearing of record in the case,<sup>3</sup> or unless the falsity of the return was the result of fraud or collusion on the part of plaintiff or was known to him,<sup>4</sup> or resulted from the mistake of the officer,<sup>5</sup> except where the return forms the basis for a foreign judgment, in which case it is prima facie evidence only.<sup>6</sup> In a number of jurisdictions the more liberal rule prevails that, while a return of process is strong or at least prima facie evidence of the facts stated therein, as discussed supra § 99, it is not conclusive, even as to parties and their privies, but may be rebutted or impeached,<sup>7</sup> unless, it has been said, the

rights of third persons have intervened.<sup>8</sup>

In the absence of fraud or mistake, the return of an officer may not ordinarily be attacked in a collateral proceeding between parties or privies.<sup>9</sup> On the other hand, in jurisdictions where the strict common-law rule does not prevail, the return is not conclusive on direct attack.<sup>10</sup> Even in jurisdictions where the return is ordinarily conclusive, it is nevertheless not conclusive as to matters which cannot be supposed to have been within the officer's own knowledge,<sup>11</sup> such as defendant's residence or place of abode,<sup>12</sup> or as to collateral matters<sup>13</sup> or

Liability of sheriff or constable for making false return see the C.J.S. title Sheriffs and Constables §§ 114-116, also 57 C.J. p 894 note 42 -p 898 note 14.

3. Va.—Sutherland v. People's Bank, 69 S.E. 341, 111 Va. 515, 522. 50 C.J. p 575 note 99.

4. Ky.—Taylor v. Howard, 208 S.W. 2d 73, 306 Ky. 407—Foster v. Hill, 138 S.W.2d 495, 282 Ky. 327—Commonwealth Life Ins. Co. v. Combs, 65 S.W.2d 696, 251 Ky. 540.

Mo.—White v. Hal-John Realty & Investment Co., 43 S.W.2d 855, 226 Mo.App. 157.

50 C.J. p 575 note 1.

5. Ky.—Taylor v. Howard, 208 S.W. 2d 73, 306 Ky. 407—Foster v. Hill, 138 S.W.2d 495, 282 Ky. 327—Commonwealth Life Ins. Co. v. Combs, 65 S.W.2d 696, 251 Ky. 540—Gardner v. Lincoln Bank & Trust Co., 64 S.W.2d 497, 251 Ky. 109.

50 C.J. p 575 note 2.

6. Va.—Sutherland v. People's Bank, 69 S.E. 341, 111 Va. 515, 522. 50 C.J. p 575 note 3.

7. U.S.—Clevens v. Funk, C.C.A. Okl., 76 F.2d 828—Reel Silk Hosiery Mills v. Philadelphia Knitting Mills Co., C.C.A.Pa., 46 F.2d 25—Berman v. Affiliated Enterprises, D.C.Mo., 17 F.Supp. 305.

Ark.—Hirsch v. Perkins, 200 S.W.2d 796, 211 Ark. 388—Husband v. Crockett, 115 S.W.2d 882, 195 Ark. 1031.

Ill.—Conley v. McNamara, 79 N.E.2d 645, 334 Ill.App. 396—Albers v. Bramberg, 32 N.E.2d 362, 308 Ill. App. 463—Sweet v. Sweet, 277 Ill. App. 545—Wendt v. City of Elgin, 264 Ill.App. 433.

Iowa.—Coster v. Jensen, 257 N.W. 303, 218 Iowa 1215.

Minn.—Holmes v. Conter, 4 N.W.2d 106, 212 Minn. 394.

Neb.—Ehlers v. Grove, 24 N.W.2d 866, 147 Neb. 704—State ex rel. Johnson v. Tautges, Rerat & Welch, 20 N.W.2d 232, 146 Neb. 439.

N.C.—Jordan v. McKenzie, 155 S.E. 868, 199 N.C. 750.

N.D.—Corpus Juris cited in *Baird v. Ellison*, 293 N.W. 794, 800, 70 N. D. 261—*Reinertson v. Rust*, 235 N. W. 346, 60 N.D. 500.

Okl.—Howard v. Stewart, 159 P.2d 527, 195 Okl. 491—A & A Tool & Supply Co. v. Gray, 140 P.2d 926, 192 Okl. 657—Kunsas, Oklahoma & Gulf Ry. Co. v. Horath, 118 P.2d 660, 189 Okl. 555—Seckatz v. Brandenburg, 300 P. 678, 150 Okl. 53.

S.C.—Laurens Trust Co. v. Copeland, 151 S.E. 617, 154 S.C. 390.

Tenn.—O. II. May Co. v. Gutman's Inc., 2 Tenn.App. 43.

Wash.—John Hancock Mut. Life Ins. Co. v. Gooley, 83 P.2d 221, 196 Wash. 357, 118 A.L.R. 1484—Dolan v. Baldrige, 4 P.2d 871, 165 Wash. 69.

50 C.J. p 576 note 9.

#### In Georgia

(1) The return of service of an officer, if properly attacked, is not conclusive as to service.—*Benton v. Maddox*, 16 S.E.2d 141, 65 Ga.App. 540—50 C.J. p 574 note 96 [a] (3).

(2) However, a proper return of service is conclusive in the absence of a legal traverse.—*Crane v. Stratton*, 194 S.E. 182, 185 Ga. 234—*City of Albany v. Parks*, 5 S.E.2d 680, 61 Ga.App. 55—*Benton v. Maddox*, 192 S.E. 316, 56 Ga.App. 132—*Davis v. H. C. Whitmer Co.*, 166 S.E. 425, 46 Ga.App. 15—50 C.J. p 574 note 96 [a] (1).

(3) In trial of claim to real estate against which execution had been levied, testimony of defendant in execution that she did not know that fieri facias had been issued and testimony as to whether she had received copy of suit at her home was held inadmissible to impeach officer's return of service.—*Betton v. Avery*, 188 S.E. 901, 183 Ga. 559.

8. Ill.—Hilt v. Heimberger, 85 N.E. 304, 235 Ill. 235.

9. Ala.—Cain, Wolcott & Rankin v. Firemen's Fund Ins. Co., 141 So. 686, 225 Ala. 44.

Ky.—Thompson v. Board of Drainage Comrs of Muhlenberg County, 70 S.W.2d 381, 258 Ky. 68—Com-

monwealth Life Ins. Co. v. Combs, 65 S.W.2d 696, 251 Ky. 540.

Mich.—Argo Oil Corporation v. R. D. Mitchell, Inc., 257 N.W. 852, 269 Mich. 413.

N.J.—C. & D. Building Corporation v. Griffiths, 157 A. 137, 109 N.J. Eq. 319.

Pa.—Morris v. Bender, 177 A. 776, 317 Pa. 533.

Tex.—Dallas Joint Stock Land Bank of Dallas v. Street, Civ.App., 76 S.W.2d 780, error refused, followed in *Street v. Dallas Joint Stock Land Bank of Dallas*, 84 S. W.2d 1119.

Va.—Buttery v. Robbins, 14 S.E.2d 544, 177 Va. 368.

50 C.J. p 576 note 11.

#### Purchasers in good faith

Where a decree affecting the title to realty has been rendered by a court of equity having jurisdiction, and rights of third persons, as purchasers, have intervened, which rights were obtained in good faith and were based on judgment entered on sheriff's return showing valid service of summons, such return cannot be contradicted in a collateral proceeding.—*Lake v. Tomes*, 90 N.E. 2d 774, 405 Ill. 295—*Espadron v. Davis*, 43 N.E.2d 962, 380 Ill. 199.

10. Mich.—Reves v. Hillmer, 239 N.W. 328, 256 Mich. 239.

Ohio.—Sunday Creek Coal Co. v. West, 192 N.E. 284, 47 Ohio App. 537.

50 C.J. p 576 note 9.

11. Ind.—Papuschak v. Burich, 185 N.E. 876, 97 Ind.App. 100.

Pa.—McCormick v. Perry, 14 Pa. Dist. & Co. 810, 45 York Leg.Rec. 15, 23 Berks.Co. 56.

50 C.J. p 575 note 4.

12. Ind.—Donnelley v. Thorne, 51 N.E.2d 873, 114 Ind.App. 468—*Papuschak v. Burich*, 185 N.E. 876, 97 Ind.App. 100.

Mass.—Bay State Wholesale Drug Co. v. Whitman, 182 N.E. 361, 280 Mass. 188.

50 C.J. p 575 note 4 [a].

13. R.I.—Turks Head Tailoring Co. v. Anthony, 94 A. 857, 38 R.I. 7.



conclusions of fact or law;<sup>14</sup> and it has been held that the rule making the return conclusive becomes applicable only where proper process has issued and been returned to court as the law requires.<sup>15</sup> It has also been held that the return is conclusive only for the purpose of establishing jurisdiction,<sup>16</sup> and is not conclusive of the legality of the officer's action.<sup>17</sup> Furthermore, it may be shown that the person by whom service was made was not the officer he designates himself.<sup>18</sup>

Some authorities, in considering an officer's return, draw a distinction between cases of judgment on no notice, actual, presumptive, or constructive, and cases where there has been actual notice but a technicality is relied on to defeat it, or where defendant appeared and denied service but had opportunity to defend; and they hold that in the former instances the return may be impeached,<sup>19</sup> whereas in the latter instances it may not.<sup>20</sup> As sometimes stated, the verity of a return may be attacked only where the affected party had no notice of the pendency of the suit.<sup>21</sup>

*As to officer making return.* A return of process is conclusive against the officer making it, when

questioned otherwise than in a direct proceeding against him for a false return,<sup>22</sup> at least when the party against whom it is sought to be impeached derives some interest from or under it.<sup>23</sup> It is not conclusive in the officer's favor,<sup>24</sup> although it has been held to be prima facie evidence for him of the fact of service.<sup>25</sup>

*As to strangers to the record.* A return of process does not conclude strangers to the record, but as to them is only prima facie evidence of the facts stated therein, and so may be impeached by extrinsic proof.<sup>26</sup>

## § 101. Aiding or Explaining Return

Extrinsic evidence is admissible to prove material facts concerning the service of process in addition to, and not inconsistent with, those shown by a valid and sufficient return.

Extrinsic evidence is admissible to prove material facts, concerning the execution of process, in addition to, and not inconsistent with, those shown by a valid and sufficient return thereof.<sup>27</sup> Defects or omissions in a return, however, cannot be corrected or supplied by such evidence, according to some authorities,<sup>28</sup> even after the death of the officer

### Official acts required to be set forth

The rule that a party may not aver falsity of return made by proper officer except in a direct proceeding against officer applies only to such facts as officer is required by law to set forth in return, and only when facts stated are official acts done in usual course of proceedings.—U. S. Gypsum Co. v. Moore, 37 N.E.2d 682, 110 Ind.App. 47.

14. U.S.—Cannon v. Time, Inc., C.C.A. Va., 115 F.2d 423.  
50 C.J. p 575 note 6.

*Matters of opinion* cannot be made evidence by stating them in the return.—U. S. Gypsum Co. v. Moore, 37 N.E.2d 682, 110 Ind.App. 47.

15. Mass.—Union Sav. Bank of Boston v. Cameron, 65 N.E.2d 313, 319 Mass. 235.

16. N.J.—C. & D. Building Corporation v. Griffithes, 157 A. 137, 109 N.J.Eq. 319.

17. U.S.—Cobleigh v. Epping Brick Co., D.C.N.H., 85 F.Supp. 862.

18. Vt.—Connecticut Valley Lumber Co. v. Rowell, 77 A. 873, 84 Vt. 24.  
50 C.J. p 575 note 7.

19. W.Va.—Nelson Transfer & Storage Co. v. Jarrett, 157 S.E. 46, 110 W.Va. 97.  
50 C.J. p 576 note 9 [a].

### Ignorance of suit

The return does not preclude a party from showing that he was ignorant that the suit was pending

and so had no opportunity to present his defense in court.—C. & D. Building Corporation v. Griffithes, 157 A. 137, 109 N.J.Eq. 319.

20. W.Va.—Nelson Transfer & Storage Co. v. Jarrett, 157 S.E. 46, 110 W.Va. 97.  
50 C.J. p 576 note 9 [a].

### Availability of defense

As long as the return of a sheriff is permitted to remain unamended, it must be taken as true and is not to be contradicted by the parties, unless it comes within the influence of the rule that a defendant, against whom a judgment has been obtained without service of process or notice, may apply to a proper court for relief, provided he has a defense to the action, which for want of notice he was not permitted to make.—Jaffe v. Leatherman, 146 So. 273, 226 Ala. 182.

21. W.Va.—Anderson v. Anderson, 1 S.E.2d 884, 121 W.Va. 103.

22. Okl.—Federal Tax Co. v. Board of Com'rs of Okmulgee County, 178 P.2d 622, 198 Okl. 390.

Tex.—Fox v. Young, Civ.App., 91 S.W.2d 857.  
50 C.J. p 577 note 13.

Admissibility of officer's testimony to impeach return see infra § 102.

23. N.Y.—Baker v. McDuffie, 23 Wend. 289.

24. Pa.—Federal Discount Company v. Oldinsky, 20 Pa.Dist. & Co. 683.  
50 C.J. p 577 note 15,

25. Ala.—Ingram v. Alabama Power Co., 75 So. 304, 201 Ala. 13.

26. Ill.—Lake v. Tomes, 90 N.E.2d 774, 405 Ill. 295.—Espadron v. Davis, 43 N.E.2d 962, 380 Ill. 199.  
50 C.J. p 577 note 17.

Evidence required to disprove or impeach return see infra § 102.

27. La.—Smith v. Crescent Chevrolet Co., App., 1 So.2d 421.  
N.C.—McIver Park, Inc., v. Brinn, 27 S.E.2d 548, 223 N.C. 502.  
50 C.J. p 577 note 21.

Amendment of return see infra §§ 116, 117.

### Automobile license showing residence

Defendant's affidavit filed with motor vehicle department as basis for issue of automobile owner's license showing his residence to be located at place where service was made was held evidential against him.—Blair v. Vetrano, 172 A. 604, 12 N.J. Misc. 462.

### Knowledge of sale

The fact that defendants knew about sale of realty pursuant to judgment in the action was some indication that defendants might have been summoned.—Taylor v. Howard, 208 S.W.2d 73, 306 Ky. 407.

28. Mass.—Zani v. Phandor Co., 183 N.E. 500, 281 Mass. 139.  
50 C.J. p 577 note 22.

Form and requisites of return see supra §§ 94-97.

Return as only competent evidence of service see supra § 99.

by whom the return was made;<sup>29</sup> but under a more liberal rule it is held that omissions in a return may be supplied or ambiguities explained by parol evidence,<sup>30</sup> as where the return is so indefinite and uncertain as to render its meaning doubtful.<sup>31</sup> Such evidence does not constitute a contradiction of, or attack on, the return,<sup>32</sup> and, accordingly, fraud or mistake in the return need not be shown, even in those jurisdictions in which the strict common-law rule as to the conclusiveness of a return obtains, before such evidence may be admitted.<sup>33</sup>

**Lost return.** Where a return of process has been lost, parol evidence is admissible to show the execution of the process;<sup>34</sup> and in some jurisdictions, under statutes so providing, an entry or notation on the docket of the court is evidence in such case that the process was executed as thereby shown.<sup>35</sup>

## § 102. Impeachment or Contradiction of Return

- a. In general
- b. Evidence required

### a. In General

In so far as a return is not considered conclusive,

extrinsic evidence is admissible to contradict its recitals, the burden of proof being on the one seeking to contradict the return to negative its statements.

As to matters with respect to which a return of process is not conclusive, or in jurisdictions in which it is not regarded as such, extrinsic evidence is admissible to contradict its statements and recitals,<sup>36</sup> subject to the ordinary considerations of relevancy and materiality.<sup>37</sup> Parol evidence is competent for such purpose,<sup>38</sup> and the return may be attacked by the oral testimony of defendant.<sup>39</sup> It has been held that testimony of the officer by whom the return was made<sup>40</sup> or a record kept in his office<sup>41</sup> is not admissible; but it has also been held that, where the testimony of the officer fully corroborates other testimony showing falsity of the return and lack of reasonable diligence to find the proper individual for service of process, all the evidence should be considered.<sup>42</sup> Where other documents accompany the return, it may be contradicted by them.<sup>43</sup>

**Burden of proof.** In general, the burden of proof is on one seeking to contradict a return of service to negative its statements or recitals or show that the process was not served.<sup>44</sup> However, it has been held that the burden of sustaining the

29. Ill.—Wilson v. Greathouse, 2 Ill. 174.

30. N.C.—Lee v. Hoff, 19 S.E.2d 858, 221 N.C. 233.  
50 C.J. p 577 note 24.

31. Okl.—Jackson v. Tenney, 87 P. 867, 17 Okl. 495.  
50 C.J. p 577 note 25.

32. Ky.—Farmers' Bank v. Riley, 372 S.W. 9, 209 Ky. 54.  
50 C.J. p 577 note 26.

Impeachment or contradiction of return see infra § 102.

33. Ky.—Farmers' Bank v. Riley, supra.

Fraud or mistake as essential to right to contradict or impeach return regular on its face see supra § 100.

34. Ind.—Newhouse v. Martin, 68 Ind. 224.

**Testimony as equivalent to return.** Where the original summons and return thereon were lost and defendant denied service, the testimony of one who had seen the summons was to be taken in the absence of any other evidence on the point as equivalent to the production of the original summons with the return thereon.—Homer v. Duncan, 7 Tenn.App. 674.

35. Ky.—Wilson v. Northrup, 13 Ky.Op. 190.  
50 C.J. p 578 note 31.

36. Okl.—Kansas, Oklahoma & Gulf

Rty. Co. v. Horath, 118 P.2d 660, 189 Okl. 555.

Vt.—Bristol v. Noyes, 174 A. 924, 106 Vt. 418.

50 C.J. p 578 note 34.  
Conclusiveness see supra § 100.

37. N.Y.—Mann v. Moryash, 107 N.Y.S. 599.

50 C.J. p 578 note 35.

38. U.S.—Cienavas v. Funk, D.C.Okl., 3 F.Supp. 804.

50 C.J. p 578 note 36.

39. Ga.—Benton v. Maddox, 192 S.E. 316, 56 Ga.App. 132.

50 C.J. p 578 note 37.

Sufficiency of unsupported testimony of defendant see infra subdivision b of this section.

40. La.—Smith v. Crescent Chevrolet Co., App., 1 So.2d 421.

50 C.J. p 578 note 38.

41. Colo.—Pinnacle Gold Min. Co. v. Popst, 131 P. 413, 54 Colo. 451.

42. W.Va.—Tioga Coal Corporation v. Silman, 22 S.E.2d 873, 125 W.Va. 58.

43. Ark.—Good Roads Mach. Co. v. Cox, 212 S.W. 87, 139 Ark. 29.

50 C.J. p 578 note 40.

44. Ala.—Hood v. Cowdy, 41 So.2d 181, 252 Ala. 471.

Cal.—Roehl v. Texas Co., 291 P. 255, 107 Cal.App. 691.

Iowa.—Ruth & Clark v. Emery, 11 N.W.2d 297, 233 Iowa 1234.

Ky.—Taylor v. Howard, 208 S.W.2d 73, 306 Ky. 407.

La.—Logwood v. Logwood, 168 So. 310, 185 La. 1.—Wright v. Peters Furniture Co., App., 153 So. 548.

Md.—Harvey v. Slacum, 29 A.2d 276, 181 Md. 206.—Plummer v. Rosenthal, 12 A.2d 530, 178 Md. 149.—Weisman v. Davitz, 199 A. 476, 174 Md. 447.—Parker v. Berryman, 198 A. 708, 174 Md. 356.

Mich.—Kretschmar v. Rosasco, 229 N.W. 446, 250 Mich. 9.

Minn.—Holmes v. Conter, 4 N.W.2d 106, 212 Minn. 394.

Neb.—De Lair v. De Lair, 21 N.W.2d 498, 146 Neb. 771.

Okl.—Sullivan v. Bryant, 67 P.2d 984, 180 Okl. 89.

Tenn.—Homer v. Duncan, 7 Tenn. App. 674.—O. H. May Co. v. Gutman's Inc., 2 Tenn.App. 43.

50 C.J. p 578 note 41.

### Place of abode

The burden of proof to sustain allegation that defendant had no usual place of abode in county of venue when deputy sheriff posted copy of summons on front door of house wherein defendant formerly lived in such county was on defendant.—Crouch v. Crouch, 20 S.E.2d 169, 124 W.Va. 331.

### Diligence

Person asserting falsity in return of officer making substituted service must show lack of diligence to make

validity of a special statutory process rests on him who asserts it,<sup>45</sup> and that, where substituted service is attacked in limine, the burden is on plaintiff to sustain it.<sup>46</sup>

### b. Evidence Required

Clear, unequivocal, and convincing evidence is re-

quired to negative a return and overcome its recitals, and the unsupported denial of the party alleged to have been served is generally considered insufficient for this purpose.

Clear, unequivocal, and convincing evidence is required to negative a return of process and overcome its statements and recitals;<sup>47</sup> and a mere pre-

personal service.—Kretschmar v. Rosasco, 229 N.W. 446, 250 Mich. 9.

45. U.S.—Covert v. Hastings Mfg. Co., D.C.Neb., 44 F.Supp. 773.

46. Iowa.—Thornburg v. Bennett, 221 N.W. 840, 206 Iowa 1187.

#### Correct residential address

Plaintiff had burden of proving that address to which summons was mailed was correct residential address of defendant, when defendant denied such fact by motion to quash service of summons on him and to vacate money judgment against him.—Porter v. Toops, Ohio App., 62 N.E.2d 769.

47. U.S.—Cleaves v. Funk, C.C.A. Okl., 76 F.2d 828.

Fla.—Golden Gate Development Co. v. Ritchie, 191 So. 202, 140 Fla. 103.

Ga.—Denham v. Jones, 23 S.E. 78, 96 Ga. 130—Benton v. Maddox, 16 S.E.2d 141, 65 Ga.App. 540.

Ill.—Stasel v. American Home Security Corporation, 199 N.E. 798, 362 Ill. 350—Cannata v. White Owl Express, 89 N.E.2d 56, 339 Ill.App. 79—Hatmaker v. Hatmaker, 85 N.E.2d 345, 337 Ill.App. 175—Kulikowski v. North American Mfg. Co., 54 N.E.2d 411, 322 Ill.App. 202.

Iowa.—Chader v. Wilkins, 284 N.W. 183, 226 Iowa 417—Coster v. Jensen, 257 N.W. 303, 218 Iowa 1215.

Ky.—Keehner v. Burchnell, 207 S.W. 2d 30, 306 Ky. 556—Pardue v. Spillman, 202 S.W.2d 414, 304 Ky. 718—Newsome v. Hall, 161 S.W.2d 629, 290 Ky. 486, 140 A.L.R. 818—Park Hill Realty Co. v. Lykins, 161 S.W.2d 602, 290 Ky. 498—Nicholson v. Thomas, 127 S.W.2d 155, 277 Ky. 760—Miller v. National Bank of London, 116 S.W.2d 320, 278 Ky. 243—Halcomb v. Creech, 73 S.W.2d 21, 255 Ky. 262—Billingsly v. Pearcy, 65 S.W.2d 699, 251 Ky. 546—Muscovale v. Horn, 56 S.W.2d 354, 246 Ky. 778.

La.—Logwood v. Logwood, 168 So. 310, 185 La. 1—Sims v. First Nat. Bank, 148 So. 505, 177 La. 386—Smith v. Crescent Chevrolet Co., App. 1 So.2d 421—Wright v. Peters Furniture Co., App., 153 So. 548.

Md.—Harvey v. Slacum, 29 A.2d 276, 181 Md. 206.

Mich.—Alpena Nat. Bank v. Hoey, 274 N.W. 808, 281 Mich. 307.

Minn.—Holmes v. Conter, 4 N.W.2d 106, 212 Minn. 394.

Neb.—Phelps v. Blome, 35 N.W.2d 93, 150 Neb. 547—De Lair v. De Lair, 21 N.W.2d 498, 146 Neb. 771.

N.J.—Seymour v. Nessenbaum, 184 A. 403, 120 N.J.Eq. 24.

N.C.—Hooker v. Forbes, 162 S.E. 903, 202 N.C. 364—Jordan v. McKenzie, 155 S.E. 868, 199 N.C. 750.

Ohio.—Sjogren v. Sjogren, App., 77 N.E.2d 739.

Okl.—Howard v. Stewart, 159 P.2d 527, 195 Okl. 491—A & A Tool & Supply Co. v. Gray, 140 P.2d 926, 192 Okl. 657—Kansas, Oklahoma & Gulf Ry. Co. v. Horath, 118 P.2d 660, 189 Okl. 555—Goldsmith v. Owens, 68 P.2d 849, 180 Okl. 268—Rowe v. Rowe, 52 P.2d 869, 175 Okl. 271.

Or.—Peterson v. Hutton, 284 P. 279, 132 Or. 252.

Tex.—Sanders v. Harder, Civ.App., 223 S.W.2d 61, reversed on other grounds, Sup., 227 S.W.2d 206—McCulloch v. Woodward, Civ.App., 220 S.W.2d 729—Sgitaovich v. Oldfield, Civ.App., 220 S.W.2d 724, error refused—Johnson v. Cole, Civ. App., 138 S.W.2d 910, error refused.

W.Va.—Lanham v. Home Auto Co., 176 S.E. 604, 115 W.Va. 415.

Wis.—Mullins v. La Bahn, 11 N.W.2d 519, 244 Wis. 76.

50 C.J. p 578 note 48.

#### Residence of defendant

The fact that sheriff could not find defendant at place where sheriff left summons did not necessarily show that such place was not actual residence of defendant, particularly where defendant did not deny the truth of the sheriff's return.—Godsoe v. Harder, 187 P.2d 515, 164 Kan. 86.

#### Weight to be given testimony

In suit attacking validity of a default judgment against plaintiff on ground that summons was never served, plaintiff's testimony was of but little weight but testimony of deputy sheriff that summons was executed by deputy's brother by delivering a copy to plaintiff's wife was entitled to considerable weight.—Newsome v. Hall, 161 S.W.2d 629, 290 Ky. 486, 140 A.L.R. 818.

#### Evidence held sufficient

(1) To overcome return.

Ill.—Zazove v. Wilson, 80 N.E.2d 101, 334 Ill.App. 594—Wendt v. City of Elgin, 264 Ill.App. 433.

Ky.—Newsome v. Hall, 161 S.W.2d 629, 290 Ky. 486, 140 A.L.R. 818—

Halcomb v. Creech, 73 S.W.2d 21, 255 Ky. 262.

Md.—Harvey v. Slacum, 29 A.2d 276, 181 Md. 206—Plummer v. Rosenthal, 12 A.2d 530, 178 Md. 149.

Minn.—Murtha v. Olson, 21 N.W.2d 607, 221 Minn. 240.

Miss.—Lampton-Reid Co. v. Allen, 171 So. 780, 177 Miss. 698.

Pa.—Proctor v. Bourne, Com.Pl., 59 Montg.Co. 245.

Tex.—Wright v. Austin, Civ.App., 175 S.W.2d 281, error refused.

50 C.J. p 578 note 48 [b].

(2) To uphold return.

Ill.—Linn v. Laramie State Bank of Chicago, 5 N.E.2d 747, 288 Ill.App. 98—Stasel v. American Home Security Corporation, 279 Ill.App. 172, affirmed 199 N.E. 798, 362 Ill. 350.

Ky.—Hall v. Bradley, 160 S.W.2d 641, 290 Ky. 120.

(3) To establish that defendant acquiesced in manner of service adopted by deputy sheriff.—Hatmaker v. Hatmaker, 85 N.E.2d 345, 337 Ill.App. 175.

(4) To sustain holding that there was no abuse of process in making substituted service.—Kretschmar v. Rosasco, 229 N.W. 446, 250 Mich. 9.

#### Evidence held insufficient

To overcome return.

Ark.—Merchants' & Planters' Bank & Trust Co. v. Ussery, 38 S.W.2d 1087, 183 Ark. 838.

Iowa.—Ruth & Clark v. Emery, 11 N.W.2d 397, 233 Iowa 1234—Chader v. Wilkins, 284 N.W. 183, 226 Iowa 417.

Ky.—Pardue v. Spillman, 202 S.W.2d 414, 304 Ky. 718—Hall v. Bradley, 160 S.W.2d 641, 290 Ky. 120—Ohio Oil Co. v. West, 145 S.W.2d 1035, 284 Ky. 796—Muscovale v. Horn, 56 S.W.2d 354, 246 Ky. 778.

La.—Sims v. First Nat. Bank, 148 So. 505, 177 La. 386.

Mich.—Alpena Nat. Bank v. Hoey, 274 N.W. 808, 281 Mich. 307.

N.J.—Seymour v. Nessenbaum, 184 A. 403, 120 N.J.Eq. 24—Blair v. Vetrano, 172 A. 604, 12 N.J.Misc. 462.

Okl.—Howard v. Stewart, 159 P.2d 527, 195 Okl. 491—Rowe v. Rowe, 52 P.2d 869, 175 Okl. 271.

Tenn.—Johnson v. McKinney, App., 222 S.W.2d 879—O. H. May Co. v. Gutman's Inc., 2 Tenn.App. 43.

Tex.—McCulloch v. Woodward, Civ. App., 220 S.W.2d 729—Sgitaovich

ponderance of the evidence in favor of one contradicting a return is ordinarily insufficient.<sup>48</sup> The return can be set aside only on evidence which is the strongest that the nature of the case will admit.<sup>49</sup> Proof beyond a doubt, however, is not necessary.<sup>50</sup>

While there is some authority to the effect that the testimony of defendant alone may be sufficient to overcome the presumption in favor of the officer's return,<sup>51</sup> generally the rule is laid down that a return of process cannot be impeached by the unsupported testimony of defendant, or the party served, or the party on whom service is stated by the officer to have been made,<sup>52</sup> or of another single witness,<sup>53</sup> even though the officer fails to recall the

service,<sup>54</sup> and that the testimony of other defendants that they were not served is not effective or sufficient.<sup>55</sup> However, a return may be overcome by the testimony of only one witness where his evidence is strongly corroborated.<sup>56</sup> A denial of service by a defendant or witness, in order to overcome the return of process, must be strongly and substantially<sup>57</sup> corroborated.<sup>58</sup> The corroborating evidence need not be direct and may be wholly circumstantial,<sup>59</sup> but it must come from a source other than that of the one witness who is attacking the service.<sup>60</sup> An officer's return of service of process should not be impeached solely by his own testimony.<sup>61</sup>

v. Oldfield, Civ.App., 220 S.W.2d 724, error refused.

W.Va.—Lanham v. Home Auto Co., 176 S.E. 604, 115 W.Va. 415. 50 C.J. p 478 note 48 [c].

48. Tex.—Wedgeworth v. Pope, Civ. App., 12 S.W.2d 1045. 50 C.J. p 579 note 49.

49. Ga.—Denham v. Jones, 23 S.E. 78, 96 Ga. 130—Benton v. Maddox, 16 S.E.2d 141, 65 Ga.App. 540.

50. Tex.—McBride v. Kaulbach, Civ. App., 207 S.W. 576.

51. Miss.—Lampton-Reid Co. v. Allen, 171 So. 780, 177 Miss. 698.

52. Cal.—In re Barker's Guardianship, App., 223 P.2d 64.

III.—Stasel v. American Home Security Corporation, 199 N.E. 798, 362 Ill. 350—Chizewski v. Potter, 89 N.E.2d 749, 339 Ill.App. 79—Cannata v. White Owl Express, 89 N.E.2d 56, 339 Ill.App. 79—Hatzmaker v. Hatmaker, 85 N.E.2d 345, 337 Ill.App. 175—Livestock Mortg. Credit Corp. v. Keller, 83 N.E.2d 356, 336 Ill.App. 282—Michnolowski v. Stefanowski, 58 N.E.2d 264, 324 Ill.App. 363—Kolmar, Inc., v. Moore, 55 N.E.2d 524, 323 Ill.App. 323—Kulikowski v. North American Mfg. Co., 54 N.E.2d 411, 322 Ill.App. 202—Nikola v. Campus Towers Apartment Bldg. Corporation, 25 N.E.2d 582, 303 Ill.App. 516—Corpus Juris quoted in Linn v. Laramie State Bank of Chicago, 5 N.E.2d 747, 748, 288 Ill.App. 98—Sweet v. Sweet, 277 Ill.App. 545. Ky.—Taylor v. Howard, 208 S.W.2d 73, 306 Ky. 407.

La.—Corpus Juris cited in Logwood v. Logwood, 168 So. 310, 312, 185 La. 1—Wright v. Peters Furniture Co., App., 153 So. 548.

Md.—Plummer v. Rosenthal, 12 A.2d 530, 178 Md. 149—Weisman v. Davitz, 199 A. 476, 174 Md. 447—Parker v. Berryman, 198 A. 708, 174 Md. 356.

N.C.—Penley v. Rader, 182 S.E. 387, 208 N.C. 702.

Tenn.—Brake v. Kelly, 226 S.W.2d

1008, 189 Tenn. 612—Homer v. Duncan, 7 Tenn.App. 674.

Tex.—Sanders v. Harder, 227 S.W.2d 206—Boyles v. Cohen, Civ.App., 230 S.W.2d 604, error refused, no reversible error—McCulloch v. Woodward, Civ.App., 220 S.W.2d 729—Sgiteovich v. Oldfield, Civ. App., 220 S.W.2d 724, error refused. 50 C.J. p 579 note 52.

#### Place of service

Uncorroborated testimony of defendant's wife that citation was served on her in store in which she was working was insufficient to overcome presumption of correctness attaching to recital in return that citation was served on her at defendant's domicile.—Smith v. Crescent Chevrolet Co., La.App., 1 So.2d 421.

#### "Sworn return"

Expression "sworn return" as used in rule that uncorroborated parol testimony of judgment debtor is insufficient to overcome officer's sworn return as to personal service means return made by officer who is sworn in accordance with law to perform his duties.—Canard v. Ryan, 45 P.2d 122, 172 Okl. 339.

53. Ill.—Corpus Juris quoted in Linn v. Laramie State Bank of Chicago, 5 N.E.2d 747, 748, 288 Ill. App. 98.

La.—Corpus Juris cited in Logwood v. Logwood, 168 So. 310, 312, 185 La. 1—Smith v. Crescent Chevrolet Co., App., 1 So.2d 421.

Tenn.—O. H. May Co. v. Gutman's Inc., 2 Tenn.App. 43. 50 C.J. p 579 note 53.

54. Ill.—Marnik v. Cusack, 148 N.E. 42, 317 Ill. 862—Livestock Mortg. Credit Corp. v. Keller, 83 N.E.2d 356, 336 Ill.App. 282—Corpus Juris quoted in Linn v. Laramie State Bank of Chicago, 5 N.E.2d 747, 748, 288 Ill.App. 98.

La.—Corpus Juris cited in Logwood v. Logwood, 168 So. 310, 312, 185 La. 1.

55. Ala.—King v. Dent, 93 So. 223, 208 Ala. 78.

56. Tex.—Boyles v. Cohen, Civ.App., 230 S.W.2d 604, error refused no reversible error—San Antonio Paper Co. v. Morgan, Civ.App., 53 S.W.2d 651, error dismissed.

57. Mich.—Alpena Nat. Bank v. Hoey, 274 N.W. 803, 281 Mich. 307. Tex.—McCulloch v. Woodward, Civ. App., 220 S.W.2d 729—Sgiteovich v. Oldfield, Civ.App., 220 S.W.2d 724, error refused—Wright v. Austin, Civ.App., 175 S.W.2d 281, error refused—Johnson v. Cole, Civ.App., 138 S.W.2d 910, error refused. 50 C.J. p 579 note 53 [a].

#### "Strongly corroborated"

Under the rule that the testimony of one witness cannot impeach a return of citation unless "strongly corroborated," the quoted words mean a degree of corroboration amounting to corroboration from independent facts and circumstances which is "clear and satisfactory" to the court and jury, which means independent facts and circumstances which are, in opinion of court and jury, "strong," that is, cogent, powerful, forcible, calculated to make a deep or effectual impression on the mind.—Wright v. Austin, Tex.Civ.App., 175 S.W.2d 281, error refused.

58. Mich.—August v. Collins, 251 N.W. 565, 265 Mich. 389.

#### Disinterested witnesses or corroborating circumstances

Where defendants, whether one or several, deny that they were served with process, and official return and testimony of sheriff are to the contrary, testimony of defendant or defendants should be supported by other disinterested witnesses or corroborating circumstances.—Brake v. Kelly, 226 S.W.2d 1008, 189 Tenn. 612.

59. Tex.—Sanders v. Harder, 227 S.W.2d 206.

60. Tex.—San Antonio Paper Co. v. Morgan, Civ.App., 53 S.W.2d 651, error dismissed.

50 C.J. p 579 note 53 [a] (3).

61. W.Va.—Tioga Coal Corporation

## § 103. Affidavit of Service

- a. In general
- b. Form and requisites
- c. Weight, sufficiency, and conclusiveness

## a. In General

Service of process by one other than an officer authorized to make proof of service by his official return must generally be established by an affidavit or statement under oath of the process server.

A statement of a person by whom process has been served, other than an officer authorized to make proof of service by his official return, as to the fact and manner of service, for the purpose of proving the same, may be made only in the form of an affidavit or under the oath of such person.<sup>62</sup> This rule applies to officers not empowered by statute to make proof of service by their return, such as constables,<sup>63</sup> city marshals,<sup>64</sup> special officers and deputies,<sup>65</sup> and officers of a state other than that in which the action is brought or pending.<sup>66</sup> Furthermore, when any officer makes service as an individual and not in his official capacity, the proof of service must be made by affidavit rather than by return.<sup>67</sup>

*Affidavit of third person.* Service may be proved by the affidavit of a person other than the one who made the service, where his statement is made on personal knowledge and not on hearsay,<sup>68</sup> but one who could not himself legally have served the process cannot be permitted by his affidavit to prove service by another.<sup>69</sup>

## b. Form and Requisites

An affidavit of service should show a compliance with

statutory requisites, as for example, with respect to statements as to the person served and the time and place of service.

An affidavit of service must show a compliance with all the statutory requisites.<sup>70</sup> Under statutes so requiring, the affidavit must state that the person served is, or that affiant knows him to be, the identical person named in the process,<sup>71</sup> and it is not sufficient to show that the person served acknowledged himself to be the person so named;<sup>72</sup> but in the absence of statutory provision therefor such a statement is unnecessary,<sup>73</sup> and a rule of court requiring it has been held invalid as inconsistent with statutes relating to proof of service which are silent as to any such additional statement.<sup>74</sup> It is also sometimes required that the affidavit show the time<sup>75</sup> and place<sup>76</sup> of service, and, even in the absence of statute, it has been held that the place should be shown when service is made outside the state in which the action is brought or pending.<sup>77</sup> In addition, in some jurisdictions, it must appear from the affidavit that the person by whom service was made possessed the qualifications prescribed by statute, as that he was of the proper age,<sup>78</sup> that he is competent to testify as a witness at the trial of the cause,<sup>79</sup> that he is not a party to the action<sup>80</sup> or is not interested in the matter in controversy.<sup>81</sup> It has been held that the affidavit of service need not set forth the date on which the affidavit was made.<sup>82</sup>

A return of service in the ordinary form, not reciting that it is made under oath, but to which a proper jurat has been subjoined, is a sufficient affi-

v. Silman, 22 S.E.2d 873, 125 W. Va. 58.

62. Pa.—Messersmith v. Thomas, Com.Pl., 8 Sch.Reg. 59.

S.D.—Shenandoah Nat. Bank v. Reininger, 237 N.W. 765, 58 S.D. 568. 50 C.J. p 579 note 58.

Who may prove service by return see supra § 91.

63. S.D.—Shenandoah Nat. Bank v. Reininger, supra. 50 C.J. p 579 note 60.

64. Puerto Rico.—Orcasitas v. Marquez, 19 Puerto Rico 454. Wis.—Brauchle v. Nothhelfer, 83 N. W. 563, 107 Wis. 457.

65. Or.—Pickard v. Marsh, 124 P. 268, 269, 62 Or. 192. 50 C.J. p 579 note 62.

66. Mo.—Priest v. Captain, 139 S. W. 204, 236 Mo. 446. 50 C.J. p 580 note 63.

67. Iowa.—Buckmiller v. Creston, etc., R. Co., 146 N.W. 447, 164 Iowa 502.

68. N.Y.—Murphy v. Shea, 37 N.E. 675, 143 N.Y. 78.

69. S.D.—Brettell v. Deffebach, 60 N.W. 167, 6 S.D. 21. 50 C.J. p 580 note 68.

70. N.Y.—Air Conditioning Training Corp. v. Pirrote, 60 N.Y.S.2d 35, 270 App.Div. 391.

Pa.—Messersmith v. Thomas, Com. Pl., 8 Sch.Reg. 59.

S.C.—Matheson v. McCormac, 195 S. E. 122, 186 S.C. 93—Cannon v. Haverty Furniture Co., 183 S.E. 469, 179 S.C. 1.

2 C.J. p 317 note 1 [d]—50 C.J. p 580 note 70.

**Affidavit held insufficient**

S.C.—Matheson v. McCormac, 195 S. E. 122, 186 S.C. 93.

71. Wis.—Schmidt v. Stolarski, 105 N.W. 44, 126 Wis. 55. 50 C.J. p 580 note 72.

72. Ind.—Cole v. Allen, 51 Ind. 122.

73. Minn.—Cunningham v. Water-Power Sandstone Co., 77 N.W. 137,

74 Minn. 282—Young v. Young, 18 Minn. 90.

74. Minn.—Young v. Young, supra. 50 C.J. p 580 note 75.

75. Wis.—Reed v. Catlin, 6 N.W. 326, 49 Wis. 686. 50 C.J. p 580 note 76.

76. W.Va.—Lynch v. West, 60 S.E. 606, 63 W.Va. 571.

50 C.J. p 580 note 77.

77. Mo.—Fisher v. Fredericks, 33 Mo. 612.

78. Utah.—Columbia Trust Co. v. Steiner, 267 P. 788, 71 Utah 498. 50 C.J. p 580 note 80.

79. Cal.—Dimick v. Campbell, 31 Cal. 238—McMillan v. Reynolds, 11 Cal. 372.

80. Puerto Rico.—Serrano v. Berdiel, 22 Puerto Rico 416.

50 C.J. p 580 note 81.

81. Va.—Raub v. Otterbach, 16 S. E. 933, 89 Va. 645.

82. Tex.—Whitney v. Nolan County, Civ.App., 53 S.W.2d 98, error dismissed.

davit of service.<sup>83</sup> While the signature of affiant in the affidavit of service should, according to good form, precede the jurat,<sup>84</sup> the fact that it comes after the jurat has been held not to affect the validity of the affidavit.<sup>85</sup>

**Plural affidavits.** All the requisite facts need not appear in one affidavit, but may be shown by two or more affidavits, considered together.<sup>86</sup>

**Before whom made.** Where a statute provides that an affidavit of service shall be made before a designated officer, an affidavit sworn before any other officer is fatally defective;<sup>87</sup> and, under this rule, affidavits made before a deputy of the officer designated by statute have been held to be insufficient.<sup>88</sup> In the absence of any express provision or restriction, however, the affidavit may be made before any officer authorized to administer oaths.<sup>89</sup>

### c. Weight, Sufficiency, and Conclusiveness

An affidavit of service is ordinarily sufficient proof of service, although it is not conclusive and may be controverted by evidence.

An affidavit of service of process is ordinarily sufficient proof thereof,<sup>90</sup> and will override allegations to the contrary made merely on information and belief.<sup>91</sup> An affidavit of service by a private person is not conclusive,<sup>92</sup> but on direct attack it may be shown to be false<sup>93</sup> and the facts therein stated may be controverted by evidence,<sup>94</sup> even after judgment has been entered.<sup>95</sup> Clear and con-

vincing proof, however, is required to overcome the force of the affidavit.<sup>96</sup>

## § 104. Proof of Publication

- a. In general
- b. Form and requisites of affidavit or certificate
- c. Compliance with concurrent requirements

### a. In General

Service of process by publication is generally proved by an affidavit or certificate of the publisher or other person designated by statute.

Proof of service of process by publication in a newspaper is ordinarily required or permitted by statute to be made by the affidavit or certificate of the publisher of such newspaper or by some other designated person; and the giving of the required affidavit or certificate may be compelled in case of refusal.<sup>97</sup> According to some authorities, the service of process by publication may be proved only by an affidavit or certificate made by the person designated by statute, and no other evidence may be received in substitution therefor.<sup>98</sup> In other jurisdictions, however, such method is not exclusive, and the fact and manner of publication may be shown, or defects or omissions in an affidavit or certificate cured, by any other competent evidence,<sup>99</sup> including, according to the decisions on

83. U.S.—*Mitchell v. National Surety Co.*, D.C.N.M., 206 F. 807.

Va.—*Myers v. Lewis*, 92 S.E. 988, 121 Va. 50.

84. Tex.—*Whitney v. Nolan County*, Civ.App., 53 S.W.2d 98, error dismissed.

85. Tex.—*Whitney v. Nolan County*, supra.

86. Wash.—*State v. Whatcom County Super. Ct.*, 35 P. 256, 42 Wash. 521.

50 C.J. p 580 note 84.

87. U.S.—*Adams v. Heckscher, C.C.* Mo., 80 F. 742.

Mo.—*Givens v. Harlow*, 158 S.W. 355, 251 Mo. 231.

Who may take affidavits generally see Affidavits §§ 10, 11.

88. Mo.—*Givens v. Harlow*, supra—*Priest v. Captain*, 139 S.W. 204, 236 Mo. 446.

89. Iowa.—*Elvin v. Powell*, 162 N. W. 201, 179 Iowa 899.

50 C.J. p 581 note 90.

#### Certificate of authentication

Acknowledgment of affidavit of service in Paris, France, by United States vice-consul under seal of his office was sufficient without a certificate of authentication.—*Sperry v.*

*Fleggers*, 86 N.Y.S.2d 830, 194 Misc. 438.

90. Utah.—*Federal Land Bank of Berkeley v. Brinton*, 146 P.2d 200, 106 Utah 149.

Wash.—*Dubois v. Western States Inv. Corporation*, 39 P.2d 372, 180 Wash. 259.

50 C.J. p 581 note 92.

#### Presumptively correct

Process server's affidavit of return of service is presumptively correct.

—*Dubois v. Western States Inv. Corporation*, supra.

91. N.Y.—*Wessels v. Boettcher*, 86 N.E. 883, 142 N.Y. 212.

92. Ky.—*Corpus Juris* cited in *Gardner v. Lincoln Bank & Trust Co.*, 64 S.W.2d 497, 501, 251 Ky. 109.

Wash.—*Corpus Juris* cited in *Dubois v. Western States Inv. Corporation*, 39 P.2d 372, 374, 180 Wash. 259.

50 C.J. p 581 note 96.

Conclusiveness of officer's return see supra § 100.

93. Wash.—*Corpus Juris* cited in *Dubois v. Western States Inv. Corporation*, 39 P.2d 372, 374, 180 Wash. 259.

W.Va.—*Peck v. Chambers*, 28 S.E. 706, 44 W.Va. 270.

94. W.Va.—*Peck v. Chambers*, supra. 50 C.J. p 581 note 98.

95. N.D.—*Odland v. O'Keeffe Implement Co.*, 229 N.W. 923, 59 N.D. 335.

96. N.D.—*Odland v. O'Keeffe Implement Co.*, supra.

50 C.J. p 581 note 99.

#### Evidence held insufficient

N.D.—*Odland v. O'Keeffe Implement Co.*, supra.

50 C.J. p 581 note 99 [b].

97. N.Y.—*Eberle v. Krebs*, 64 N.Y.S. 246, 50 App.Div. 450.

98. Iowa.—*Manion v. Brady*, 138 N. W. 558, 158 Iowa 306.

50 C.J. p 583 note 42.

99. Mo.—*Murphy v. Butler County*, 180 S.W.2d 732, 352 Mo. 1082.

50 C.J. p 583 note 43.

#### Mailing of petition and notice

Compliance with a statute requiring that, in the case of service by publication, a copy of the petition with a copy of the publication notice should be mailed to defendant may be shown either by the filing of an

the question, parol testimony<sup>1</sup> or the affidavit of some other person who knows the facts,<sup>2</sup> On collateral attack, where it appears either that proof of service by publication was not made or that it cannot be produced, such proof may be supplied by evidence aliunde.<sup>3</sup>

**Time for making.** The time at which an affidavit or certificate of service of process by publication shall be made is prescribed by statute in some jurisdictions; but such a provision has been held to be directory only,<sup>4</sup> and proof of the publication may be supplied even after judgment.<sup>5</sup> An affidavit or certificate of service by publication which is made before the end of the period for which such publication is required to be made is ineffectual.<sup>6</sup>

**By whom made.** An affidavit or certificate of service of process by publication, in order to be valid and sufficient, must be made by the particular person, if any, designated by the statute for such method of proof,<sup>7</sup> such as the publisher of the newspaper in which publication has been made,<sup>8</sup> or the printer or his foreman or principal clerk;<sup>9</sup> and it cannot validly be made for him by proxy.<sup>10</sup>

**Weight and sufficiency.** An affidavit or certificate of service of process by publication, regular on its face, is ordinarily prima facie evidence of the facts therein stated.<sup>11</sup> Its weight may be overcome, however, by positive evidence of its falsity.<sup>12</sup>

#### b. Form and Requisites of Affidavit or Certificate

An affidavit or certificate of service of process by

publication should be made in such form as may be prescribed by statute, and, in general, should show that publication was made at the proper time and in the proper manner.

An affidavit or certificate of service of process by publication should be made in such form as may be prescribed or required by statute.<sup>13</sup> It has been held that jurisdiction of the parties is acquired by proper publication, and not by the proof thereof,<sup>14</sup> and that a judgment will not be set aside merely because the proof is deficient, where it appears that service was in fact properly had;<sup>15</sup> but there is authority for the view that proof of publication is an element of the jurisdiction, and, accordingly, that a want of proof is fatal.<sup>16</sup>

An unsigned certificate ordinarily is ineffectual;<sup>17</sup> and where an affidavit is required, an unsworn certificate is insufficient.<sup>18</sup> However, where a deputy clerk made oath to an affidavit before a competent attesting officer that a copy of the process was mailed to defendant, such affidavit, although unsigned, was held to constitute proof that a copy of the summons was mailed to defendant.<sup>19</sup> Where a printed copy of the process published is required to be returned with the affidavit or certificate, failure to attach such copy renders the proof defective.<sup>20</sup> Misstatements in the affidavit or certificate as to immaterial facts will not render it void;<sup>21</sup> and the omission of an essential or material fact may be supplied by a second affidavit or certificate.<sup>22</sup>

**Competency of affiant or maker.** Inasmuch as an

affidavit or by proof to the trial court.—*Vinson v. Oklahoma City*, 66 P.2d 933, 179 Okl. 590—*Young v. Campbell*, 16 P.2d 65, 160 Okl. 265.

1. Ill.—*Kuzak v. Anderson*, 108 N. E. 662, 267 Ill. 609.  
50 C.J. p 583 note 44.

2. Mich.—*L. Starks Co. v. Eppink*, 151 N.W. 676, 185 Mich. 233.

3. Kan.—*Lipscombe v. Citizens' Bank*, 71 P. 583, 66 Kan. 243—*Robinson v. Hall*, 5 P. 763, 33 Kan. 139.

4. Or.—*McFarlane v. Cornelius*, 73 P. 325, 74 P. 468, 43 Or. 513.

5. U.S.—*Von Arx v. Boone, Alaska*, 193 F. 612, 113 C.C.A. 480.

6. Iowa.—*Manion v. Brady*, 138 N. W. 558, 158 Iowa 306.

Tex.—*Daniel Miller Co. v. Puett*, Civ. App., 252 S.W. 333.

7. Wash.—*Case v. City of Bellingham*, 197 P.2d 105, 31 Wash.2d 374.  
50 C.J. p 581 note 10.

8. Iowa.—*Manion v. Brady*, 138 N. W. 558, 158 Iowa 306.  
50 C.J. p 581 note 11.

9. U.S.—*Pennoyer v. Neff, Or.*, 95 U.S. 714, 24 L.Ed. 565.

50 C.J. p 581 note 12.

10. Ky.—*Nicholas v. Gratz*, 2 J.J. Marsh. 486—*Miller v. Hall*, 3 T.B. Mon. 242.

11. S.D.—*Johnson v. Brufiat*, 186 N. W. 877, 45 S.D. 200.

2 C.J. p 324 note 68 [d].

12. S.D.—*Johnson v. Brufiat*, supra.  
50 C.J. p 583 note 41.

13. Service by publication held perfected

Ga.—*Tow v. Evans*, 20 S.E.2d 922, 194 Ga. 160.

14. Ark.—*Blackwell Oil & Gas Co. v. Maddux*, 27 S.W.2d 514, 181 Ark. 726.

**Order determining whether service by publication has been perfected on nonresident debtor in proceeding which involves his property is not jurisdictional.**—*Tow v. Evans*, 20 S. E.2d 922, 194 Ga. 160.

15. Kan.—*Pierce v. Butters*, 21 Kan. 124.

N.Y.—*Soule v. Chase*, 24 N.Y.Super. 222, 1 Abb.Pr., N.S., 48, reversed on other grounds 39 N.Y. 342.

16. Colo.—*O'Rear v. Lazarus*, 9 P. 621, 8 Colo. 603.

Iowa.—*Curtis v. Hoyt*, 186 N.W. 460, 192 Iowa 1334.

17. Ill.—*Star Brewery v. Otto*, 63 Ill.App. 40.

18. Ind.—*Deputy v. Dollarhide*, 86 N.E. 344, 42 Ind.App. 554.  
50 C.J. p 582 note 16.

19. Mont.—*Smith v. Hamill*, 112 P. 2d 195, 111 Mont. 585.

20. Tex.—*Maury v. Keller*, Civ.App., 53 S.W. 59.

Wash.—*State v. Pierce County Superior Ct.*, 33 P. 827, 6 Wash. 352.

21. Wash.—*Warner v. Miner*, 82 P. 1033, 41 Wash. 98.

**Self-correcting error as to name**

In constructive service on nonresident, recitation in register's certificate of notice that copy was sent to "defendant, Sylvester Napoleon," instead of Susan Napoleon, was held self-correcting.—*Anthony v. Anthony*, 128 So. 440, 221 Ala. 221.

22. Cal.—*Howard v. McChesney*, 37 P. 523, 103 Cal. 536.

affidavit or certificate of service of process by publication may be made only by such person as may be designated by statute, it should affirmatively show that the affiant or maker is the person or one of the class of persons so designated,<sup>23</sup> and a mere description or recital of his character as such has been held insufficient,<sup>24</sup> although there is authority to the contrary.<sup>25</sup> He need not, however, designate himself by the terms or words used in the statute, if he states facts showing that he comes within its purview.<sup>26</sup>

*Time and manner of publication.* Broadly speaking, an affidavit or certificate of service of process by publication should show that such publication as is required by statute has been made in the manner thereby prescribed,<sup>27</sup> and ordinarily no presumption will be indulged in aid of it.<sup>28</sup> It should appear that publication was made in a newspaper,<sup>29</sup> naming it,<sup>30</sup> of the kind specified by the statute,<sup>31</sup> and that it was the same newspaper in which publication was ordered to be made.<sup>32</sup> The affidavit or certificate should also show that publication was made at the proper time, for the requisite number of times, at the proper intervals, and for the required period,<sup>33</sup> and in the proper county and state,<sup>34</sup> as provided by statute or order of court. In some jurisdictions the dates of the issues of the paper in which the notice was published must be shown.<sup>35</sup> Where an affidavit or certificate states that the process was published for a certain length of time or on certain

days, but sets forth dates which show that it was not so published or that publication was made for a different time or on other days, the showing made by the dates will control,<sup>36</sup> unless there is an obvious clerical error in the dates,<sup>37</sup> or unless they are stated merely under a *videlicet*.<sup>38</sup>

### c. Compliance with Concurrent Requirements

Proof of service of process by publication should show a compliance with concurrent requirements, such as posting copies of the process or publication, or mailing copies to the defendant.

Where statutes providing for constructive service of process require other acts to be done in addition to publication in a newspaper, such as posting copies of the process or publication, or mailing copies to defendants served by publication, compliance with such requirements should be shown by affidavit or by the certificate of an authorized officer,<sup>39</sup> and, under some statutes, such affidavit or certificate is jurisdictional;<sup>40</sup> but where it is not, by statute, made exclusive evidence of the doing of the acts required, the fact of compliance may be shown by parol in a proper case.<sup>41</sup>

*By whom made.* An affidavit of compliance with such concurrent requirements should ordinarily be made by the person by whom the acts were done;<sup>42</sup> and, if plaintiff's attorney has performed such acts, he may prove performance by his own affidavit.<sup>43</sup>

23. Wash.—Case v. City of Bellingham, 197 P.2d 105, 31 Wash.2d 374. 50 C.J. p 582 note 24.

24. Cal.—Steinbach v. Leese, 27 Cal. 295.

25. Mich.—Farmers' Nat. Bank v. Fonda, 32 N.W. 664, 65 Mich. 533. 50 C.J. p 582 note 26.

26. Mich.—Pettiford v. Zoellner, 8 N.W. 57, 45 Mich. 358. 50 C.J. p 582 note 27.

27. Ill.—Haywood v. Collins, 60 Ill. 328—Hemingway v. Chicago, 60 Ill. 324.

28. Or.—Dixie Meadows Independent Mines Co. v. Kight, 45 P.2d 909, 150 Or. 395. 50 C.J. p 582 note 29. Presumptions in aid of officer's return see *supra* § 98.

29. Wash.—Warner v. Miner, 82 P. 1033, 41 Wash. 98. 50 C.J. p 582 note 30.

30. Ky.—Hopkins v. Claybrook, 5 J. J. Marsh. 234.

31. Ark.—Gallagher v. Johnson, 44 S.W. 1041, 65 Ark. 90. 50 C.J. p 582 note 32.

32. N.Y.—Waters v. Waters, 27 N. Y.S. 1004, 7 Misc. 519.

Wis.—Frisk v. Reigelman, 43 N.W. 1117, 44 N.W. 766, 75 Wis. 499, 17 Am.S.R. 198.

33. Minn.—Godfrey v. Valentine, 40 N.W. 163, 39 Minn. 336, 12 Am.S.R. 657. 50 C.J. p 582 note 34.

#### Dates of first and last publication

Where affidavit of publisher recited that first publication of summons was on Sept. 18, 1942 and last thereof on Oct. 16, 1942, but at bottom of advertisement as printed and continuously published appeared statement "First Publication: Sept. 18, 1942, Last Publication Oct. 18, 1942" and without the inclusion of dates of publication, notice as published would have been vulnerable to charge of indefiniteness, the statement setting forth the dates of first and last publication constituted an essential part of summons as published.—Netland v. Baughman, 162 P.2d 601, 114 Colo. 148.

34. Tex.—Turner v. McFarland, Civ. App., 233 S.W. 295—Turner v. Maury, Civ.App., 224 S.W. 255.

35. Ark.—Lawrence v. State, 30 Ark. 719.

Tex.—Maury v. Keller, Civ.App., 53 S.W. 59.

36. Idaho.—Harpold v. Doyle, 102 P. 158, 16 Idaho 671. 50 C.J. p 583 note 37.

37. Mo.—Fleming v. Tatum, 135 S.W. 61, 232 Mo. 678. 50 C.J. p 583 note 38.

38. Cal.—Howard v. McChesney, 37 P. 523, 103 Cal. 536.

39. Del.—Corpus Juris quoted in Syracuse Trust Co. v. Keller, 165 A. 327, 331, 5 W.W.Harr. 304.

Pa.—Messersmith v. Thomas, Com. Pl., 8 Sch.Reg. 59. 50 C.J. p 583 note 48.

40. Del.—Corpus Juris quoted in Syracuse Trust Co. v. Keller, 165 A. 327, 331, 5 W.W.Harr. 304. 50 C.J. p 583 note 49.

41. Ohio.—English v. Monypenny, 6 Ohio Cir.Ct. 554, 3 Ohio Cir.Dec. 582.

42. Or.—Colfax Bank v. Richardson, 54 P. 359, 34 Or. 518, 75 Am.S.R. 664. 50 C.J. p 583 note 51.

43. U.S.—Von Arx v. Boone, Alaska, 193 F. 612, 113 C.C.A. 480.



**Requisites and sufficiency.** An affidavit or certificate of mailing a copy should show such facts as to time<sup>44</sup> and place<sup>45</sup> of mailing, and direction or address,<sup>46</sup> as may be necessary under the statute; but receipt of the copy by the person to whom it was mailed need not be shown,<sup>47</sup> since, ordinarily, it is presumed that it was delivered where it is not returned and no notice of nondelivery is given by the postal authorities.<sup>48</sup> Evidence that the copy was not received is no proof, or at most only slight proof, that it was not mailed,<sup>49</sup> and will not prevail over positive evidence of mailing.<sup>50</sup>

## § 105. Filing Return or Proof

In general, there should be compliance with statutes requiring the filing of a return, affidavit, or other proof of execution of process so that the time and manner of service may be shown by the record.

There should be a compliance with statutes requiring that a return, affidavit, or other proof of execution of process be filed in the court wherein the action is brought or pending,<sup>51</sup> in order that the record may disclose the time and manner of service,<sup>52</sup> and it has been held that, where so required, such filing is necessary to constitute the due return of the process,<sup>53</sup> and that without it the court acquires no jurisdiction.<sup>54</sup> According to other au-

thorities, however, it is not essential that the return, affidavit, or proof be filed before default or judgment,<sup>55</sup> or at least a failure to file proof of service within the time prescribed by statute does not in itself deprive the court of jurisdiction,<sup>56</sup> and the court may permit a later filing nunc pro tunc.<sup>57</sup> In determining whether the court should allow a writ to be entered after its return day, each case is to be decided on its merits in the exercise of a sound judicial discretion.<sup>58</sup> Under some statutes, it is only in case of personal service that the summons must be returned with the sheriff's certificate of service or any other person's affidavit of service,<sup>59</sup> and it is not required, in case of publication, that the summons be returned with the affidavits of publication and mailing.<sup>60</sup>

A rule of court providing that process is deemed served when proof of service is filed merely fixes the date from which the time to answer runs,<sup>61</sup> and does not make the filing of proof a part of the service itself.<sup>62</sup>

**Sufficiency of filing.** Unless otherwise provided by statute, a return of process or proof of service thereof is filed when given into the custody of the clerk of the court,<sup>63</sup> and his indorsement thereon of a filing mark is not essential.<sup>64</sup>

Cal.—Anderson v. Goff, 13 P. 73, 72 Cal. 65, 1 Am.S.R. 34.

44. Iowa.—Pinkney v. Pinkney, 4 Greene 324.

45. N.Y.—Schwartz v. Schwartz, 185 N.Y.S. 659, 113 Misc. 444.

50 C.J. p 583 note 54.

46. Iowa.—Foley v. Connelly, 9 Iowa 240.

50 C.J. p 584 note 55.

47. Ill.—Hazard v. Hazard, 205 Ill. App. 562.

48. Ala.—Adams v. Walsh, 75 So. 888, 290 Ala. 140.

50 C.J. p 584 note 58.

49. Ariz.—Crook v. Crook, 170 P. 280, 19 Ariz. 448.

50. Ariz.—Crook v. Crook, supra.

51. N.M.—Bourgeois v. Santa Fe Trail Stages, 95 P.2d 204, 43 N.M. 453.

N.Y.—Diem v. Reisler, 259 N.Y.S. 567, 144 Misc. 886.

N.D.—Shuck v. Shuck, 44 N.W.2d 767.

Okl.—Atlantic Municipal Corporation v. Wallace, 144 P.2d 975, 193 Okl. 448.

Vt.—Glass v. Starr, 32 A.2d 123, 113 Vt. 243.

52. Mont.—Reynolds v. Gladys Belle Oil Co., 243 P. 576, 75 Mont. 332.

"Officer's return is a matter of record."—Brooks v. Clifford, Me., 69 A.2d 825, 826.

### Purpose of statute

The statutory requirement that summons be returned with proofs of service is primarily for the benefit of the court, since its purpose is to apprise the court that due service has been had on the defendant.—Bourgeois v. Santa Fe Trail Stages, 95 P.2d 204, 43 N.M. 453.

53. Neb.—Graves v. Macfarland, 79 N.W. 707, 58 Neb. 802.

50 C.J. p 584 note 63.

### Process deemed returned on filing

A summons will ordinarily be held to be returned on the day the sheriff filed return with the court clerk.—Fitzsimmons v. Rauch, 172 P.2d 633, 197 Okl. 426.

54. Utah.—Reese v. Salt Lake County Dist. Ct., 175 P. 601, 52 Utah 520.

Necessity of return see supra § 90 b.

55. Or.—Cranston v. Stanfield, 261 P. 52, 123 Or. 314.

Tex.—Rhyne v. Missouri State Life Ins. Co., Com.App., 291 S.W. 845.

56. N.M.—Bourgeois v. Santa Fe Trail Stages, 95 P.2d 204, 43 N.M. 453.

N.Y.—Hirschhorn v. C. I. T. Corporation, 253 N.Y.S. 85, 141 Misc. 699.

57. Or.—Cranston v. Stanfield, 261 P. 52, 123 Or. 314.

### Filing by defendant on failure by plaintiff

Where plaintiff's attorney failed to file summons and answer as agreed, court authorized defendant to do so if plaintiff failed to do so within specified number of days after service of order to that effect.—Hirschhorn v. C. I. T. Corporation, 253 N.Y.S. 85, 141 Misc. 699.

58. R.I.—National Casket Co. v. Montgomery, 158 A. 723, 52 R.I. 158.

### Liberal application of statute

R.I.—National Casket Co. v. Montgomery, supra.

59. Mont.—Schmidt v. Schmidt, 89 P.2d 1020, 108 Mont. 246.

60. Mont.—Schmidt v. Schmidt, supra.

61. N.Y.—Dealers' Lumber Corp. v. Stauffer, 218 N.Y.S. 464, 128 Misc. 358.

62. N.Y.—Dealers' Lumber Corp. v. Stauffer, supra.

50 C.J. p 584 note 68.

63. Tex.—Cloyes v. Phillip, Civ. App., 149 S.W. 549.

64. Tex.—Cloyes v. Phillip, supra. Filing mark as indicating time of execution and return see supra § 95.

## IV. DEFECTS, OBJECTIONS, AND AMENDMENTS

## A. DEFECTS AND OBJECTIONS

## § 106. Persons Entitled to Object

As a general rule, the question of defective service may be raised only by the one on whom attempted service was made, and one defendant is not entitled to urge defects in the service on a codefendant.

As a general rule, the question of defective service may be raised only by the one on whom attempted service was made,<sup>65</sup> and one defendant is not entitled to urge defects in the service on his codefendants.<sup>66</sup> A party may be permitted to quash his own writ and thereby work a discontinuance of the action.<sup>67</sup> Service ordinarily will not be set aside on the motion of one not a party to the action.<sup>68</sup> In an action to determine rights in a life insurance policy the beneficiaries are proper and necessary parties, and defendant insurer may, therefore, move to vacate an order for service on them by publication.<sup>69</sup> In a proceeding to determine ownership of a fund, defendant who assigned his interest after service and before special appearance and motion to quash is not in a position to litigate the validity of service.<sup>70</sup>

*Intervening claimants* in proceedings by executory

process to foreclose chattel mortgages cannot urge want of service of legal process on defendant.<sup>71</sup>

*Objections by plaintiff.* In the absence of an apparent material variance between it and the original writ, plaintiff cannot question service of a branch summons on a defendant against whom he had discontinued suit.<sup>72</sup>

## § 107. Grounds for Quashing or Abating Writ

The grounds on which writs may be quashed or abated include most defects and irregularities in the writ or service which are sufficient to invalidate it and are not so trivial that they will be disregarded; but process will not be abated or set aside where it is not irregular or defective, or, if it is, where a party is not prejudiced by the errors or irregularities and it does not violate mandatory provisions of the law.

The grounds on which writs may be quashed or abated are numerous, and include most defects and irregularities in the writ or service which are sufficient to invalidate it under the rules discussed supra § 5 et seq, and are not so trivial that they will be disregarded.<sup>73</sup> Thus it may be ground for abating

65. D.C.—Everett v. Miller, Mun. App., 67 A.2d 399.

**Unknown owners**

Only unknown owners can complain of failure to file proper affidavit to acquire jurisdiction over them.—Burgoyne v. Pyle, 261 Ill. App. 356.

66. D.C.—Corpus Juris cited in Everett v. Miller, Mun.App., 67 A.2d 399, 400.

Ill.—Frank v. La Bounty, 275 Ill. App. 30.

La.—Trew v. Standard Supply & Hardware Co., App., 33 So.2d 426. Mont.—In re Roberts' Estate, 58 P. 2d 495, 102 Mont. 240.

N.Y.—Corpus Juris cited in Kopit v. Zilberszmidt, 35 N.Y.S.2d 558, 561.

50 C.J. p 584 note 72.

**Defendant who interposes an equitable answer** in a law action is in no position to object to failure to serve codefendant.—Cranston v. Ingle, 261 P. 55, 123 Or. 280.

**Presumption**

Where maker of notes secured by mortgage was served without state under statute relating to service on nonresidents, fact that petition failed to allege that maker was nonresident held not fatal to suit as to indorser, since, until contrary was proved, it would be presumed that maker was a nonresident.—Paden v.

American State Bank & Trust Co., Tex.Civ.App., 103 S.W.2d 243, error dismissed.

**Necessity of valid judgment**

In revocatory action by creditors to set aside sale of realty by debtor to purchaser, where purchaser objected to going to trial without all proper parties before the court, and debtor had not been legally served with citation, purchaser could question the service on debtor without filing an exception of nonjoinder of proper parties in limine litis, since a valid judgment against debtor is a prerequisite to right of creditor to revoke sale.—Williams & Miller v. Jones, La.App., 180 So. 140.

67. Ark.—Womsley v. Cummins, 1 Ark. 125.

68. D.C.—Everett v. Miller, Mun. App., 67 A.2d 399. 50 C.J. p 585 note 79.

**Exceptional circumstances**

In beneficiary's action on life policy against an Italian company whose property vested in the alien property custodian, a suggestion of interest by United States on theory that, if beneficiary was allowed to take judgment by default, she might have a stronger claim to share in fund in custodian's hands than she could establish without such a judgment, was a sufficient interest to support motion by United States to

vacate service of summons on state superintendent of insurance and dismiss the action.—Silberfeld v. General Ins. Co., Limited, of Trieste and Venice, 53 N.Y.S.2d 83, 183 Misc. 845.

69. N.Y.—Morgan v. Mutual Ben. Life Ins. Co., 82 N.E. 438, 189 N. Y. 447.

70. N.C.—Fidelity & Casualty Co. of New York v. Green, 157 S.E. 797, 200 N.C. 535.

71. La.—Palmsano v. Louisiana Motors Co., 117 So. 446, 166 La. 416.

72. Ala.—King v. Gibbs, 67 So. 757, 12 Ala.App. 504. 50 C.J. p 585 note 87.

73. N.J.—Hamlin v. Coppel, 155 A. 676, 9 N.J.Misc. 651.

Pa.—McMaster v. Luckenbaugh, Com.Pl., 57 York Leg.Rec. 9.

W.Va.—Hall v. Ocean Accident & Guarantee Corporation, 9 S.E.2d 45, 122 W.Va. 188.

Defects and irregularities as ground for:

Abatement of action see Abatement and Revival § 87.

Dismissing action see Dismissal and Nonsuit § 62.

How objection taken see infra § 110.

Defendant improperly brought into jurisdiction on criminal process

Tenn.—McNabb v. Lynn, 100 S.W.2d 3, 171 Tenn. 8.

or quashing a writ that summons was served under an unconstitutional statute;<sup>74</sup> that it was not served the number of days before the return day required by law;<sup>75</sup> that it issued in the wrong county;<sup>76</sup> that it issued prematurely;<sup>77</sup> that it issued without affidavits required by statute;<sup>78</sup> and that the return day was altered without authority after issuance.<sup>79</sup> It may also constitute ground for quashing or abating the writ or process that service was obtained by fraud;<sup>80</sup> that the writ issued without a proper seal;<sup>81</sup> that it was not, when required, signed by the clerk of the court from which it issued;<sup>82</sup> that it does not show the day, month, and year when it was signed;<sup>83</sup> and that defendant is not designated with sufficient accuracy.<sup>84</sup>

A writ or summons may be quashed or abated on the ground that it contains no return day,<sup>85</sup> or a confusing one;<sup>86</sup> that it commands defendant to appear on an impossible date;<sup>87</sup> that it is returnable on a day or to a court not authorized by law;<sup>88</sup> that it is directed to an officer who is disqualified from serving it;<sup>89</sup> and that it was served by a disqualified or unauthorized person.<sup>90</sup> Other grounds for quashing or abating a writ are that it lacks a suitable indorsement under the require-

ment of a statute;<sup>91</sup> that no authority is indorsed on it for the indifferent person who made service to serve it;<sup>92</sup> that it contains no declaration when such pleading is a necessary part of it;<sup>93</sup> that names are inserted in it which are not authorized by the statute;<sup>94</sup> that it has no teste,<sup>95</sup> or bears teste on Sunday,<sup>96</sup> or bears the teste of an unauthorized person;<sup>97</sup> and that it fails to state the amount of damages demanded.<sup>98</sup>

It may be cause for quashing or vacating a writ or other process that the writ was filled out on a blank previously used and entered in another action,<sup>99</sup> or was altered after having been filled out for use in another action;<sup>1</sup> that it was served on a defendant while privileged from service,<sup>2</sup> although as to this there is authority to the contrary;<sup>3</sup> that it does not have the style required by law;<sup>4</sup> that there is a misnomer of plaintiff<sup>5</sup> and, although there is authority to the contrary,<sup>6</sup> that there is a misnomer of defendant,<sup>7</sup> except where the real names of defendants are not known.<sup>8</sup> It is also ground for setting aside the writ that the process does not sufficiently advise defendant of the names of plaintiffs;<sup>9</sup> that it does not designate with certainty the day on which defendant is commanded

74. Ky.—Anderson's Adm'r v. De-lapp, 190 S.W.2d 471, 300 Ky. 785.

75. N.J.—Paul v. Bird, 25 N.J.Law 559.

50 C.J. p 585 note 90.

76. Me.—Mansur v. Coffin, 54 Me. 314.

50 C.J. p 585 note 91.

77. Okl.—Atchison, etc., R. Co. v. Lambert, 121 P. 654, 31 Okl. 300, Ann.Cas.1913E 329.

50 C.J. p 585 note 92.

78. Mich.—Rice v. Judge Kalama-zoo Cir. Ct., 142 N.W. 336, 176 Mich. 322.

Tenn.—Posey v. McCubbins, 5 Yerg. 235.

79. Conn.—Denison v. Crafts, 49 A. 851, 74 Conn. 38.

80. Kan.—Van Horn v. Great West-ern Mfg. Co., 15 P. 562, 37 Kan. 523.

Okl.—Kelly v. Citizens Farmers Nat. Bank of Chickasha, 50 P.2d 734, 174 Okl. 380.

81. Tex.—Gilliam v. Brock, Civ.App., 1 S.W.2d 1114.

50 C.J. p 585 note 97.

82. Ark.—Powers v. Swigart, 8 Ark. 363.

83. Vt.—Pollard v. Wilder, 17 Vt. 48.

84. Mass.—Zuill v. Bradley, Quin-cy 6.

45 C.J. p 372 note 70 [a] (1).

85. Me.—Pattée v. Lowe, 35 Me. 121.

86. W.Va.—Gorman v. Steed, 1 W. Va. 1.

50 C.J. p 585 note 3.

87. N.J.—Hamlin v. Coppel, 155 A. 676, 9 N.J.Misc. 651.

#### Issuance after return day

A summons which was issued after and served after the return day was a nullity, and, where that fact appeared on the summons itself, motion to quash should have been sustained.—Hall v. Ocean Accident & Guarantee Corporation, 9 S.E.2d 45, 122 W.Va. 188.

88. Pa.—Williamson v. McCormick, 17 A. 591, 126 Pa. 274.

50 C.J. p 585 note 4.

89. W.Va.—Hansford v. Tate, 56 S. E. 372, 61 W.Va. 207.

90. N.Y.—Winterroth v. Umschlag, 74 N.Y.S. 124, 68 App.Div. 324.

50 C.J. p 585 note 6.

91. Ala.—Mayo v. Stoneum, 2 Ala. 390.

N.H.—Haverhill Ins. Co. v. Prescott, 38 N.H. 398.

92. Vt.—Washburn v. Hammond, 25 Vt. 648.

93. Mass.—Rathbone v. Rathbone, 5 Pick. 221—Brigham v. Este, 2 Pick. 420.

94. Ark.—Hartley v. Tunstall, 3 Ark. 119.

95. Mass.—Ripley v. Warren, 2 Pick. 592.

96. N.H.—Parsons v. Swett, 32 N.H. 87, 64 Am.D. 352.

97. Ark.—Haines v. McCormick, 5 Ark. 663.

98. N.H.—Reynolds v. Damrell, 19 N.H. 394.

N.C.—Buchanan v. Kennon, 1 N.C. 530.

99. N.H.—Putney v. Cram, 5 N.H. 174.

99. N.H.—Lyford v. Bryant, 38 N.H. 88.

1. N.H.—Eastman v. Morrison, 46 N.H. 136.

2. U.S.—Dwelle v. Allen, D.C.N.Y., 193 F. 546.

50 C.J. p 586 note 17.

3. Vt.—Wilkins v. Brock, 64 A. 232, 79 Vt. 57—Booraem v. Wheeler, 12 Vt. 311.

4. W.Va.—Gorman v. Steed, 1 W. Va. 1.

50 C.J. p 586 note 19.

5. Ohio.—Herf v. Schulze, 10 Ohio 268.

50 C.J. p 586 note 20.

6. Pa.—Martz v. Gingell, 37 Pa. Dist. & Co. 429.

7. N.Y.—Dole v. Manley, 11 How. Pr. 138.

50 C.J. p 586 note 21.

8. Neb.—Davis v. Jennings, 111 N. W. 128, 78 Neb. 462.

50 C.J. p 586 note 22.

9. Okl.—Hines v. Bacon, 207 P. 93, 86 Okl. 165.

to appear;<sup>10</sup> that the summons was issued upon a petition not verified as required by statute;<sup>11</sup> that the place of holding court is not designated;<sup>12</sup> and that a supplemental summons was served without leave of court.<sup>13</sup> Other matters held to constitute grounds for vacating a writ are that in case of an alias writ there had been a discontinuance prior to its issuance,<sup>14</sup> or that the writ was issued while the original valid summons was still outstanding;<sup>15</sup> that the cause of action is not indorsed on the writ;<sup>16</sup> and that there is a variance between the declaration and the writ;<sup>17</sup> or, in the case of a branch summons, between the original and the branch writs.<sup>18</sup>

**Invulnerable process.** Process will not be abated or set aside where it is not irregular or defective,<sup>19</sup> or, if it is, where a party is not prejudiced by the errors or irregularities<sup>20</sup> and it does not violate mandatory provisions of the law.<sup>21</sup> The courts have shown great liberality in permitting irregularities or defects of form in a summons to be disregarded,<sup>22</sup> and numerous matters have been held not to constitute ground for setting aside the writ under the terms of statutes declaring that all defects and errors in the process or proceedings shall be

disregarded unless they affect the substantial rights of the parties,<sup>23</sup> or providing that no summons or the service thereof shall be set aside where there is sufficient substance about either to inform defendant that there is an action brought against him in court.<sup>24</sup> Under some statutes insufficiency of service of process on a part of defendants is not ground for abatement, but the cause will be continued for proper service.<sup>25</sup>

It is no ground for abatement that there was a mere irregularity in the service respecting a matter not necessary to confer jurisdiction;<sup>26</sup> that there are defects in the return which do not show insufficient service but merely fail to state enough facts to show a good service;<sup>27</sup> that it was not directed to an officer who might have served it, where it was in fact directed to one who could and did;<sup>28</sup> that service was made by a deputized person;<sup>29</sup> or that the blank writ was filled up by an unauthorized person, plaintiff not being at fault.<sup>30</sup> So the process will not be set aside for a mere technical variance between the summons and the pleading,<sup>31</sup> for defects in the declaration,<sup>32</sup> or for an obvious clerical error as to the date of filing the petition.<sup>33</sup>

10. Tex.—Wright v. Wilmot, 22 Tex. 398.

11. Ohio.—Kerns v. Roberts, 2 Ohio Dec., Reprint, 537, 3 West.L.Month. 604.

12. Ala.—Wragg v. Mobile Branch Bank, 8 Port. 195.  
50 C.J. p 586 note 26.

13. N.Y.—Boyle, etc., Co. v. Fox, 76 N.Y.S. 102, 72 App.Div. 617, appeal dismissed 64 N.E. 1118, 172 N.Y. 604.

14. D.C.—Parsons v. Hill, 25 App. D.C. 532.

15. Ill.—First Nat. Bank v. Donnersberger, 283 Ill.App. 517.

16. Ala.—Johnson v. Perry, 4 Stew. & P. 45.  
50 C.J. p 586 note 29.

17. Ky.—Stapp v. Thomason, 2 Litt. 214.  
50 C.J. p 586 note 30.

18. Ala.—Boardman v. Parrish, 56 Ala. 54.

19. Ill.—Bogden v. Lasswell, 73 N. E.2d 441, 331 Ill.App. 395.

Ky.—Logan v. Bradford, 178 S.W.2d 607, 296 Ky. 736.  
N.J.—Ten Eyck v. Mendel, 72 A. 31, 77 N.J.Law 408.

Pa.—Steele v. Sandy Run Miners & Producers, Com.Pl., 38 Luz.Leg. Reg. 296—Miller v. Lehigh Valley R. Co., Com.Pl., 9 Sch.Reg. 4.

20. N.J.—McGarvey v. Atlantic City & S. R. Co., 3 A.2d 385, 123 N.J. Law 281.  
50 C.J. p 586 note 42.

Amount demanded

Refusal to quash summons, stating that action was for amounts found due from defendants, as not stating amount demanded, was held not erroneous, such statement not being manifestly misleading.—Taylor v. Hake, 20 P.2d 546, 92 Colo. 380.

#### Variance as to petition

Motion to quash citation requiring answer to first amended petition, but commanding officer to serve copy of original petition, was held properly denied, copy of first amended original petition accompanying citation.—Cranfill Bros. Oil Co. v. State, Tex. Civ.App., 54 S.W.2d 813, error refused.

21. W.Va.—Koon v. Fairmont Brewing Co., 70 S.E. 1098, 69 W.Va. 94.

22. U.S.—U. S. v. Van Dusen, C.C.A. Minn., 78 F.2d 121.  
Idaho.—Snake River Valley Irr. Dist. v. Stevens, 110 P. 1033, 18 Idaho 541.

**Improper appointment of guardian**  
Plaintiff's disregard of statute in instituting a suit against a minor by naming as a party defendant a guardian appointed on plaintiff's own application does not require the court to strike from the record the summons and statement of claim, where process was in fact served

on the minor, but leave will be granted to defendant to substitute a guardian of his own choosing and to plaintiff to move to amend the names of the parties defendant.—Molaskey v. Crisan, 51 Pa.Dist. & Co. 569.

23. Colo.—Sage Inv. Co. v. Haley, 149 P. 437, 59 Colo. 504.  
50 C.J. p 587 note 56.

24. Ind.—Ross v. Glass, 70 Ind. 391.

25. Ind.—Indiana Nitroglycerin, etc., Co. v. Lippincott Glass Co., 75 N. E. 649, 165 Ind. 361.  
50 C.J. p 587 note 58.

26. Ala.—Jones v. Nelson, 51 Ala. 471.  
50 C.J. p 587 note 44.

27. Ohio.—Paulin v. Sparrow, 110 N.E. 528, 91 Ohio St. 279.

W.Va.—Hopkins v. Baltimore, etc., R. Co., 26 S.E. 187, 42 W.Va. 535.

28. Vt.—Cooper v. Ingalls, 5 Vt. 508.  
50 C.J. p 587 note 46.

29. Vt.—Miller v. Hayes, Brayt. 21.  
50 C.J. p 587 note 47.

30. N.H.—Kinne v. Hinman, 53 N. H. 363.

31. Colo.—Rich v. Collins, 56 P. 207, 12 Colo.App. 511.  
50 C.J. p 587 note 49.

32. Mass.—Bean v. Green, 4 Cush. 279.

33. Tex.—Western Union Tel. Co. v. Johnson, 41 S.W. 367, 16 Tex.Civ. App. 546.

It is no ground for quashing or setting aside the writ that it misdescribed the form of action, where it was correct in all other essential particulars;<sup>34</sup> that no complaint was filed, or copy served, where the summons served contained the complaint;<sup>35</sup> or that there has been a former adjudication of the same cause of action.<sup>36</sup> If the sheriff is not bound to serve a writ for a nonresident plaintiff unless security for costs is indorsed on it, service made without such indorsement is nevertheless good.<sup>37</sup> If the only defect in the writ is that it commands appearance, in a shorter time than is allowed by law, the writ will not be held bad, according to some authorities, but defendant will be granted such an extension of time as he is entitled to;<sup>38</sup> but other cases hold this a proper ground for quashing the writ<sup>39</sup> or setting aside the service, as discussed infra § 108. Although there is authority to the contrary,<sup>40</sup> it has been held that, if a *capias* issues in a case where only a summons is authorized, the writ is not to be dismissed, but defendant is entitled to be discharged from custody without giving bail;<sup>41</sup> and a writ improperly issued as an attachment

against the body of the defendant, but which is not served by attaching his body, is not abatable.<sup>42</sup>

## § 108. Grounds for Quashing or Setting Aside Service or Return

- a. In general
- b. Substituted or constructive service

### a. In General

The grounds for quashing or setting aside the service or return include most defects and irregularities in the writ, service, or return which are sufficient to invalidate it, but service of process should not be set aside lightly.

The grounds for quashing or setting aside the service or return include most defects and irregularities in the writ or service which are sufficient to invalidate it under the rules discussed supra § 5 et seq. and are not so trivial that they will be disregarded.<sup>43</sup> Thus the motion may be made on the ground that service was procured fraudulently<sup>44</sup> or through abuse of the court's process;<sup>45</sup> that the service was irregular;<sup>46</sup> or that defendant was

34. W.Va.—Koen v. Fairmont Brewing Co., 70 S.E. 1098, 69 W.Va. 94.

35. Hawaii.—Peterson v. Lau Tong, 30 Hawaii 191.

36. Pa.—Bruner v. Finley, 60 A. 488, 211 Pa. 74.

S.C.—Ford v. Calhoun, 30 S.E. 830, 53 S.C. 106.

37. Ohio.—Johnson v. Ralph, Tapp. 165.

38. Ind.—Knox v. Golding, 91 N.E. 857, 92 N.E. 886, 46 Ind.App. 634. 50 C.J. p 586 note 35.

39. Okl.—State v. Parks, 126 P. 242, 34 Okl. 335.

40. U.S.—Barnard v. Field, Pa., 1 Dall. 348, 1 L.Ed. 170.

41. Ind.—Rittenour v. McCausland, 5 Blackf. 540.

42. Vt.—Bowman v. Stowell, 21 Vt. 309.

43. Ill.—Empire Mfg. Co. v. Ginsburg, 253 Ill.App. 242.

N.Y.—Seeley v. Waterman S. S. Corp., 83 N.Y.S.2d 502, 274 App. Div. 934—Franklin Fire Ins. Co. of Philadelphia v. Simmons, 39 N.Y.S. 2d 391, 179 Misc. 497.

Pa.—Fister v. Bollinger, 51 Pa.Dist. & Co. 621, 37 Berks Co. 7, 58 York Leg.Rec. 125—Masefield v. Masefield, Com.Pl., 7 Monroe L.R. 83.

44. Ark.—Robinson v. Bossinger, 112 S.W.2d 637, 195 Ark. 445.

Ill.—Empire Mfg. Co. v. Ginsburg, 253 Ill.App. 242.

Md.—Margos v. Moroudas, 40 A.2d 816, 184 Md. 362.

Pa.—Lloyd v. Thomas, 60 Pa.Dist. & Co. 516, 58 Dauph.Co. 264—Na-

tional Paper Corp. v. Scheck, Com. Pl., 47 Lack.Jur. 189.

50 C.J. p 488 notes 22-27, p 489 note 42, p 587 note 60.

#### Enticement

Personal service obtained by inveigling or enticing the person to be served into the territorial jurisdiction of the court, by means of fraud and deceit, actual or legal, or by trick or device, or by the use of force, is void and will be set aside. Cal.—**Corpus Juris** quoted in Bowes v. Superior Court of Alameda County, App., 124 P.2d 667, 668.

Okl.—**Corpus Juris** quoted in Kelly v. Citizens Farmers Nat. Bank of Chickasha, 50 P.2d 734, 737, 174 Okl. 380.

50 C.J. p 488 notes 22-25.

#### Pretense of settlement

Service will be set aside where defendant is induced to come into the jurisdiction by pretense of settlement, and process is served on him, whether the matter of a settlement was first broached by plaintiff or defendant.

Mont.—**Corpus Juris** cited in State v. District Court, 33 P.2d 526, 630, 97 Mont. 160.

Okl.—**Corpus Juris** quoted in Kelly v. Citizens Farmers Nat. Bank of Chickasha, 50 P.2d 734, 737, 174 Okl. 380.

50 C.J. p 488 note 27.

#### Circumstances held not to require setting aside of service

(1) In general.

N.Y.—Gumperz v. Hofmann, 2 N.E. 2d 687, 271 N.Y. 544—National Surety Corporation v. Gutierrez,

51 N.Y.S.2d 349, affirmed 52 N.Y.S. 2d 945, 268 App.Div. 1037, appeal denied 53 N.Y.S.2d 952, 269 App. Div. 664.

Pa.—National Paper Corp. v. Scheck, Com.Pl., 47 Lack.Jur. 189.

50 C.J. p 488 note 28, p 489 notes 36-41.

(2) Misstatements which mislead a defendant and induce him to appear where service may be, and is, made on him, which otherwise would not have been made, afford no ground for vacating the service, provided the trick does not lure the person into the jurisdiction.

U.S.—Schwarz v. Artercraft Silk Hosiery Mills, C.C.A.N.Y., 110 F.2d 465.

N.Y.—Gumperz v. Hofmann, 283 N. Y.S. 823, 245 App.Div. 622, affirmed 2 N.E.2d 687, 271 N.Y. 544.

45. Ark.—Robinson v. Dossinger, 112 S.W.2d 637, 195 Ark. 445.

Okl.—Kelly v. Citizens Farmers Nat. Bank of Chickasha, 50 P.2d 734, 174 Okl. 380.

50 C.J. p 587 note 61.

**Inveigling or enticing person to be served into jurisdiction of court by fraud and deceit, or by trick or device to obtain service of process on him, constitutes abuse of process, and service obtained under such circumstances is ineffective when properly challenged, and will be vacated.**—Kelly v. Citizens Farmers Nat. Bank of Chickasha, supra.

46. Ky.—Smith v. Wells, 112 S.W.2d 49, 271 Ky. 373.

brought into, or kept within, the jurisdiction on criminal process.<sup>47</sup> Likewise, the service or return may be set aside on the ground that service was made on a person privileged from service,<sup>48</sup> or on a nonresident;<sup>49</sup> that both parties are nonresidents, and that the cause of action did not arise within the state;<sup>50</sup> that service was made on the wrong person;<sup>51</sup> that there was a failure to serve a copy of the complaint with the summons;<sup>52</sup> or that the copy of the summons was left at the wrong place.<sup>53</sup>

Other grounds for quashing or setting aside the service or return are that service was made by an unauthorized officer;<sup>54</sup> that service was made in the wrong county;<sup>55</sup> that the writ commands appearance in less time than is allowed by law;<sup>56</sup> that a material part of the process was omitted;<sup>57</sup>

and that the name of plaintiff's attorney was not indorsed on the summons,<sup>58</sup> or on the copy served.<sup>59</sup> The service or return may also be set aside for the reason that the copy served was not a true copy;<sup>60</sup> that a return of "not found" is false;<sup>61</sup> that the summons required defendant to answer a complaint "which has been filed in the office of the clerk," when in fact none was filed;<sup>62</sup> and that the copy served was not attested.<sup>63</sup> It may also constitute good ground for setting aside the service or return that defendant was dead at the time of the alleged service;<sup>64</sup> that the return is ambiguous;<sup>65</sup> that the date and place of service were not indorsed on a copy of the summons as required by statute;<sup>66</sup> that the person on whom service was made was not an agent of defendant;<sup>67</sup> or that the writ was not

#### Conditional designation

Service of supplemental summons and complaint should have been vacated, where service was not had personally on alleged corporate agent, and agreement to designate him for service was conditioned on forbearance of action until final determination of litigation between plaintiff and another.—*Schultze v. Ocean Accident & Guarantee Corporation*, 267 N.Y.S. 284, 239 App.Div. 309.

47. Mo.—*Byler v. Jones*, 70 Mo. 261.  
Okl.—*Berryhill v. Stufflebean*, 55 P. 2d 469, 176 Okl. 476.—*Thomas v. Blackwell*, 46 P.2d 509, 172 Okl. 487.

Pa.—*Crusco v. Strunk Steel Co.*, 74 A.2d 142, 365 Pa. 326.—*Loughner v. Hershey*, 21 Pa.Dist. 971, 39 Pa.Co. 414.—*Addicks v. Bush*, 1 Phila. 19.

48. Iowa.—*Moseley v. Ricks*, 274 N. W. 23, 223 Iowa 1038.

Kan.—*Lyman Flood Prevention Ass'n v. City of Topeka*, 106 P.2d 117, 152 Kan. 484.  
50 C.J. p 587 note 64.

#### Witness

Service of subpoena on one who voluntarily came into state as witness would be set aside, since he was immune from process.—*Morgen Flour Corporation v. Markowitz*, 296 N.Y.S. 64, 251 App.Div. 739.

49. U.S.—*National Typographic Co. v. New York Typographic Co.*, C.C. N.Y., 44 F. 711.

N.Y.—*Crofoot v. Giannini*, 92 N.Y.S. 2d 191, 196 Misc. 213.

Ohio.—*Canton Provision Co. v. Gauder*, 196 N.E. 634, 130 Ohio St. 43.

#### Foreign corporation

Question whether summons was served on officer, agent, or employee of foreign corporation in district, as required by statute, may be raised by motion to quash service of summons.—*Bloedorn v. Washington Times Co.*, 39 F.2d 835, 67 App.D.C. 91.

#### In rem jurisdiction

Where husband was served in separation action with motion papers for temporary alimony and with summons and complaint while claiming to be a resident of another state but wife was a resident of forum entitled to prosecute action, motion to vacate service on ground that court lacked jurisdiction would be denied, since, if husband were not a domiciliary, then service did not confer in personam jurisdiction but did confer in rem jurisdiction.—*Doty v. Doty*, 88 N.Y.S.2d 328, 194 Misc. 907.

#### Reservation of rights

In action for separation defendant's motion to set aside service of summons and complaint on ground of lack of jurisdiction in that defendant was domiciled in another state where process was served personally on him would be denied with leave to defendant to serve an answer reserving his rights by iterating the jurisdictional objection, since the important question of jurisdiction should not be decided on affidavits.—*Zatarga v. Zatarga*, 92 N.Y.S.2d 222, 196 Misc. 448.

50. N.Y.—*Reep v. Butcher*, 27 N. Y.S.2d 330, 176 Misc. 369.

Wis.—*State ex rel. Ralph Lumber Co. v. Kleczka*, 290 N.W. 142, 284 Wis. 7.

51. N.Y.—*Barney v. Northern Pac. R. Co.*, 56 How.Pr. 23.

50 C.J. p 588 note 66.

A person not designated in complaint by either his true name or fictitious name, or as unknown defendant, is not proper party to action, and service of summons on him should be quashed on proper motion.—*Kline v. Beauchamp*, 84 P.2d 194, 29 Cal.App.2d 840.

52. Minn.—*Houlton v. Gallow*, 57 N.W. 141, 55 Minn. 443.

53. Ohio.—*Grady v. Gosline*, 29 N.E. 768, 48 Ohio St. 665.

54. Ky.—*Brumlove v. Cronan*, 197 S.W. 498, 176 Ky. 818.

Tex.—*Olyphant v. Dallas*, 15 Tex. 138, 65 Am.D. 146.

55. Or.—*Hubner v. Hubner*, 136 P. 667, 67 Or. 557.

50 C.J. p 588 note 70.

56. Kan.—*Foster v. Markland*, 14 P. 452, 37 Kan. 32.

57. N.Y.—*Kenngott v. Kenngott*, 190 N.Y.S. 282, 116 Misc. 569.  
50 C.J. p 588 note 72.

58. Ind.—*Hutchens v. Latimer*, 5 Ind. 67.

59. Minn.—*Lee v. Clark*, 55 N.W. 127, 53 Minn. 315.

60. Okl.—*Hines v. Bacon*, 207 P. 93, 86 Okl. 165.

61. Ky.—*Thompson v. Morris*, 2 B. Mon. 35.

50 C.J. p 588 note 78.

62. Minn.—*Millette v. Melmke*, 3 N. W. 700, 26 Minn. 306.

63. Pa.—*Bank v. Perdriau*, Brightly 67.

64. Pa.—*Hunt v. Economical Mut. Ben. Assoc.*, 17 Wkly.N.C. 423.

65. Mo.—*Regent Realty Co. v. Armour Packing Co.*, 86 S.W. 880, 112 Mo.App. 271.

66. Utah.—*Thomas v. District Court of Third Judicial Dist. in and for Salt Lake County*, 171 P.2d 667, 110 Utah 245.

67. D.C.—*National Ass'n of Industrial Ins. Agents v. Committee for Industrial Organization*, D.C., 25 F.Supp. 540.

Ky.—*Dean v. Stillwell*, 145 S.W.2d 830, 284 Ky. 639.

50 C.J. p 588 note 83.

Person not in charge of business  
N.Y.—*Adams v. Davison*, 37 N.Y.S. 2d 741, 265 App.Div. 856.

served in time.<sup>68</sup>

Service of process should not, however, be set aside lightly,<sup>69</sup> and errors, defects, or delays which do not affect the substantial rights of the parties should be disregarded.<sup>70</sup> Accordingly it has been held that it is not ground for quashing service that there was a misjoinder of actions<sup>71</sup> or of parties plaintiff;<sup>72</sup> that defendants were designated by supposed names, their real names being unknown;<sup>73</sup> or that there has been a former adjudication of the same cause of action.<sup>74</sup> After a defective writ has been amended by leave of court, the original service cannot be set aside because the copy served did not conform to the writ as amended.<sup>75</sup> When the entry of a writ is required to be made in the sheriff's book, failure to make it is no ground for setting aside the service, since such entry is merely evidence of the delivery of the process to the sheriff.<sup>76</sup>

The lack of an indorsement of the cause of action on a summons which is required, not by statute, but only by rule of court, is not ground for setting aside the service;<sup>77</sup> and a mere irregularity consisting of the failure of the summons to state the street number of plaintiff's attorney is not ground for setting aside the service.<sup>78</sup> Service will not be set aside because of a mistake in returning the writ to the wrong clerk's office;<sup>79</sup> and, if the return is false, a motion to set aside the service on the ground that the court is without jurisdiction is not the proper remedy.<sup>80</sup> A motion to set aside the service of process is not a proper method of contesting the jurisdiction of the court over the subject

matter of the cause.<sup>81</sup> If the return shows that there was no service whatever on the person authorized to accept service, no application can be given to a statute providing that no summons or service shall be set aside where there is sufficient substance about either to inform the party on whom service is made that there is an action instituted against him, of the name of plaintiff therein, and of the court and time where and when he is to appear.<sup>82</sup>

#### b. Substituted or Constructive Service

It may be ground for quashing or setting aside substituted or constructive service that statutory requirements therefor have not been complied with; but immaterial defects may be such as not to warrant quashing of the constructive service.

It may be ground for quashing or setting aside substituted service that statutory requirements therefor have not been complied with.<sup>83</sup> Where defendant shows that he was not absent from the state, and had not been for some time, when an order for substituted service was made on affidavits, a motion to vacate the order, service, and judgment entered against defendant will be granted.<sup>84</sup> Under a statute providing that substituted service may not be made on a nonresident defendant unless a cause of action appears to exist against him, insufficiency of the complaint is ground for a motion to quash an attempted substituted service.<sup>85</sup>

Service by publication may be set aside on motion where it is insufficient,<sup>86</sup> as where the order of publication does not have the requisites provided for

68. U.S.—U. S. v. De Rasimo, D.C. N.Y., 46 F.2d 362.  
Mich.—Yeager v. Mellus, 43 N.W.2d 836, 328 Mich. 243.  
50 C.J. p 588 note 84.

69. N.C.—Raleigh Banking, etc., Co. v. Nowell, 142 S.E. 584, 195 N.C. 449.  
Evidence necessary to impeach return see supra § 102.

70. Iowa.—Gulberg v. Cooper, 259 N.W. 925, 219 Iowa 858.  
50 C.J. p 588 note 86.

Misnomer of a defendant in a writ is not sufficient ground for striking off the sheriff's return.—Martz v. Gingell, 37 Pa.Dist. & Co. 429.

71. Ky.—Louisville, etc., R. Co. v. Greenbrier Distillery Co., 187 S.W. 296, 170 Ky. 775.

72. Ky.—Louisville, etc., R. Co. v. Greenbrier Distillery Co., supra.

73. Neb.—Davis v. Jennings, 111 N.W. 128, 78 Neb. 462.

74. Pa.—Bruner v. Finley, 60 A. 488, 211 Pa. 74.

S.C.—Ford v. Calhoun, 30 S.E. 830, 53 S.C. 106.

75. U.S.—Chamberlain v. Bittersohn, C.C.S.C., 48 F. 40.

76. S.C.—Miller v. Hall, 28 S.C.L. 1.

77. S.C.—Wilson v. Pyles, 32 S.C.L. 357.

78. N.Y.—Sullivan v. Harney, 103 N.Y.S. 177, 53 Misc. 249.

79. N.Y.—Cutler v. Rathbone, 1 Hill 204.

80. S.C.—George Norris Co. v. S. H. Levine's Sons, 61 S.E. 1103, 81 S. C. 36.

81. N.Y.—Manning v. Canadian Locomotive Co., 105 N.Y.S. 662, 120 App.Div. 735.

82. Ind.—Southern Indiana R. Co. v. Indianapolis, etc., R. Co., 81 N. E. 65, 168 Ind. 360, 13 L.R.A., N.S., 197.

83. D.C.—Wise v. Herzog, 114 F.2d 486, 72 App.D.C. 335.

N.Y.—Evans v. Evans, 77 N.Y.S.2d 320, 273 App.Div. 895.

#### Avoidance of service

Fact that wife and husband allegedly left United States to avoid service of process was held immaterial as respects right of wife who was not resident of state to have vacated order permitting substituted service of process on her.—McCandless v. Reuter, 288 N.Y.S. 952, 248 App.Div. 93.

84. N.Y.—Clarkson v. Butler, 159 N.Y.S. 343, 173 App.Div. 143.

85. U.S.—Frawley v. Chakos, D.C. Wis., 36 F.2d 373.

86. Cal.—Mix v. Yoakum, 31 P.2d 1071, 138 Cal.App. 290.

#### No justiciable matter

Constructive service of process and proceedings to quiet title purporting to be against unknown claimants of unknown claim was properly quashed in that the bill failed to submit for determination a justiciable matter.—Key v. All Persons Claiming Any Estate, etc., Upon Real Property Described in Bill of Complaint in Said Cause, 36 So.2d 366, 160 Fla. 723.

by the statute;<sup>87</sup> where there is no property within the state to give the court jurisdiction;<sup>88</sup> where the publication notice gives less than the statutory time to answer;<sup>89</sup> where publication was in a newspaper not designated in the order;<sup>90</sup> or where the essential facts on which the order is based are erroneously stated.<sup>91</sup>

Service by publication may ordinarily be set aside where the order is based on insufficient affidavits.<sup>92</sup> It has been held, however, that defendant actually receiving a copy of the summons and complaint cannot be heard to complain that the affidavit, on which service by publication was ordered, was defective,<sup>93</sup> and where, notwithstanding the affidavits on which the order is made are defective, it appears that there was another sufficient affidavit used before the judge on procuring the order which had not been filed, a motion to set aside the order, on the ground that it had been allowed on insufficient affidavits, will be denied, since the statutes do not expressly require that the affidavits shall be filed, or provide what shall be done with them.<sup>94</sup> Even though the affidavits on which the order is based are sufficient in form, service may be set aside where it is shown that plaintiff knew that defendant was not a non-resident.<sup>95</sup>

Service will be set aside, according to one view, where claims are improperly united, some being per-

sonal and beyond the jurisdiction of the court;<sup>96</sup> but it has also been held that the fact that plaintiff demands a greater measure of relief than can be given him in an action begun without personal service of summons is not a sufficient ground for setting aside the service,<sup>97</sup> and that, if any of the relief sought was in its nature in rem, a motion to quash on the ground that movant was not personally interested was properly denied.<sup>98</sup> Where an order of publication is void, it and all subsequent proceedings may be set aside on motion,<sup>99</sup> although defendant could have ignored the service.<sup>1</sup>

Immaterial defects may be such as not to warrant quashing of the constructive service.<sup>2</sup> So the mere failure of the clerk to file an order for service by publication will not deprive the court of jurisdiction;<sup>3</sup> nor is the date of the summons so important that service will be set aside because of a variance in this respect between the original and the copy.<sup>4</sup> A motion to quash service by publication should be overruled where plaintiff was entitled to make such service on a ground incidentally stated in the affidavit in terms not sufficiently specific as to facts.<sup>5</sup>

## § 109. Procedure

Alleged defects in process must be raised by objections to the court from which the process issued.

Defendant cannot with impunity ignore an actual

87. N.Y.—Berford v. New York Iron Mine, 2 N.Y.S. 516, 55 N.Y.Super. 516, affirmed 23 N.E. 1148, 119 N.Y. 638.

88. U.S.—Gage v. Riverside Trust Co., C.C.Cal., 186 F. 1002. 50 C.J. p 589 note 3.

### Title to attached goods

Where plaintiff attempted to obtain jurisdiction of defendant by service of process personally without the state after making an alleged levy under a warrant of attachment on goods within the state, whether title to the attached goods was in defendant or a third person could be determined only by proceedings in compliance with statute, not by motion to set aside the service.—David S. Stern Corporation v. Silverman, 13 N.Y.S.2d 355, 257 App. Div. 394.

89. Neb.—Calkins v. Miller, 75 N.W. 1108, 55 Neb. 601.

Okl.—Aggers v. Bridges, 122 P. 170, 31 Okl. 617.

90. N.Y.—Valz v. Sheepshead Bay Bungalow Corp., 163 N.E. 124, 249 N.Y. 122, certiorari denied 49 S. Ct. 82, 278 U.S. 647, 73 L.Ed. 560. 50 C.J. p 589 note 10.

91. N.Y.—Matter of Norwood, 181 N.Y.S. 494, 111 Misc. 580.

92. Tex.—Gilliam v. Brock, Civ. App., 1 S.W.2d 1114. 50 C.J. p 589 note 12.

### Reference to defendant

Service by publication based on an affidavit which contains no reference to a defendant attempted to be served will be set aside on motion subsequently made by him.—Rawson v. Sherwood, 53 P. 69, 59 Kan. 776.

93. Cal.—Langley v. Zurich General Accident & Liability Ins. Co., 25 P.2d 418, 210 Cal. 101.

94. N.Y.—Vernam v. Holbrook, 5 How.Pr. 3.

95. Okl.—Tolbert v. Paden State Bank, 121 P. 212, 30 Okl. 403.

96. Kan.—Zimmerman v. Barnes, 43 P. 764, 56 Kan. 419.

97. N.Y.—Jackson v. Jackson, 49 N.E.2d 988, 290 N.Y. 512, 147 A.L.R. 668—Chesley v. Morton, 41 N.Y.S. 463, 9 App.Div. 461.

98. S.D.—Sargent v. McHarg, 174 N.W. 742, 42 S.D. 307.

### Allegations disregarded

N.Y.—Jackson v. Jackson, 49 N.E.2d 988, 290 N.Y. 512, 147 A.L.R. 668—Paprin v. Bitker, 64 N.Y.S.2d 289.

99. Wis.—Crouch v. Crouch, 30 Wis. 667.

1. N.Y.—Rich v. St. John, 199 N.Y. S. 149, 205 App.Div. 24. 50 C.J. p 589 note 18.

2. N.Y.—Johnson v. Johnson, 67 N.Y.S.2d 886.

### Necessity of notice

In action, wherein plaintiff obtained order of publication of service of summons on defendant outside the state, defendant's motion to vacate service of summons because no notice as required by civil practice rule was annexed to papers served would be denied.—Johnson v. Johnson, supra.

### Foreign judgment

A motion for an order setting aside an order of publication and service of summons on nonresident defendant in a matrimonial action wherein defendant interposed a foreign divorce as a bar to the institution of a matrimonial action would be denied, since the question of recognition of the foreign judgment could best be determined at trial.—Ouvre v. Ouvre, 73 N.Y.S.2d 892.

3. N.Y.—Fink v. Wallach, 96 N.Y. S. 543, 109 App.Div. 718.

4. N.Y.—George v. Fitzpatrick, 41 N.Y.S. 211, 25 N.Y.Civ.Proc. 383.

5. Okl.—Richardson v. Howard, 151 P. 887, 51 Okl. 240.



service of process because of an alleged defect in form therein but must submit objections to the court from which the process issued.<sup>6</sup> If the service of summons is merely defective and as such is subject to attack, it is valid until attacked and confers jurisdiction on the person served.<sup>7</sup>

## § 110. — Mode of Taking Objections

- a. In general
- b. Motions
- c. Plea or answer

### a. In General

Objection to defects and irregularities with respect to process or the service or return should be raised in the proper manner, and ordinarily demurrer is not the proper mode of raising the objection.

Objection to defects and irregularities with respect to process or the service or return should be raised in the proper manner.<sup>8</sup> While it may be proper, in particular circumstances, to raise such objection by motion or answer, as discussed infra subdivisions b and c of this section, or by plea in abatement, as considered in Abatement and Revival §§ 87, 105, or by motion to dismiss, as discussed in Dismissal and Nonsuit § 62, a defendant, who was not served with process and is unwilling to submit

himself to the jurisdiction of the court, may, as an alternative to raising the objection by motion, allow a default judgment to go against him,<sup>9</sup> after which the remedy is not by motion to quash,<sup>10</sup> but by direct attack on the judgment.<sup>11</sup>

**Demurrer.** Defects and irregularities as to process ordinarily cannot be raised by demurrer,<sup>12</sup> whether general<sup>13</sup> or special.<sup>14</sup> Accordingly, a demurrer for want of jurisdiction over the person of defendant will not lie merely for want of a proper service of writ or summons,<sup>15</sup> or because defendant has not been properly brought before the court.<sup>16</sup> It has been held, however, that a special demurrer filed by a defendant made a new party to an action by an amended petition without ever having any summons issued or served on him is properly sustained.<sup>17</sup>

### b. Motions

Defects with respect to process may, in a proper case, be raised by a motion to set aside or quash the writ, service, or return, or, in the case of service by publication, by a motion to vacate the order for publication.

As a general rule, defects with respect to process may, in a proper case, be raised by a motion to set aside or quash the writ,<sup>18</sup> or the service or return;<sup>19</sup>

6. Fla.—Mabson v. Mabson, 140 So. 801, 104 Fla. 462—Walker v. Carver, 112 So. 45, 93 Fla. 337.

7. Ga.—Bell v. Ayers, 60 S.E.2d 523, 82 Ga.App. 32.

8. R.I.—Procaccianti v. Procaccianti, 69 A.2d 635.  
S.C.—Thompson v. Queen City Coach Co., 163 S.E. 693, 169 S.C. 231.

#### Exception

Question of improper citation should have been raised by exception to citation.—Wall v. Graham, 133 So. 511, 16 La.App. 141.

9. N.Y.—McClure Newspaper Syndicate v. Times Printing Co., 149 N.Y.S. 443, 164 App.Div. 108.

10. Neb.—Baldwin v. Burt, 74 N.W. 594, 54 Neb. 287.

Ohio.—Corpus Juris quoted in Hinman v. Executive Committee, 47 N.E.2d 820, 822, 71 Ohio App. 76.

11. Ohio.—Corpus Juris quoted in Hinman v. Executive Committee, 47 N.E.2d 820, 822, 71 Ohio App. 76.

50 C.J. p 590 note 28.

12. Ind.—Reuter v. Milan Water Co., 198 N.E. 442, 209 Ind. 240.  
50 C.J. p 590 note 29.

13. Me.—Marcus v. Rovinsky, 49 A. 420, 95 Me. 106.

Tex.—Kinhead v. Clark, Civ.App., 239 S.W. 717.

14. Ky.—Hughes v. Shehan, 234 S.W. 285, 192 Ky. 619.  
50 C.J. p 590 note 31.

15. Ill.—People v. Mt. Morris, 27 N.E. 757, 137 Ill. 576.  
49 C.J. p 398 note 27.

16. R.I.—Third Nat. Bank v. Angell, 29 A. 500, 18 R.I. 1.  
49 C.J. p 398 note 28.

17. Ky.—Sandford v. Koch, 176 S.W.2d 695, 296 Ky. 329.

18. Md.—Henderson v. Maryland Home Fire Ins. Co., 44 A. 1020, 90 Md. 47.

Mich.—Argo Oil Corporation v. R. D. Mitchell, Inc., 257 N.W. 852, 269 Mich. 418—Croff v. De Vries, 234 N.W. 118, 253 Mich. 180.

Ohio.—Thrasher v. Kelly, 55 N.E.2d 873, 73 Ohio App. 304.  
50 C.J. p 590 note 32.

#### Personal jurisdiction

(1) Where direction of summons and time, place, and manner of service appeared on face of summons and return, sufficiency of service respecting personal jurisdiction was held properly raised by motion to quash.—Yates v. Casteel, 49 S.W.2d 68, 329 Mo. 1101.

(2) A nonresident defendant may raise the question of jurisdiction by a motion to quash the summons, since circuit courts have no jurisdiction over nonresidents.—Patten v. Mokher, 184 So. 29, 134 Fla. 433.

#### Necessity of allowance

Motions to quash writs require an allowance by the court and a rule to show cause.—Petition of Bartol, 67 Pa.Dist. & Co. 180.

19. U.S.—U. S. v. Van Dusen, C.C. A.Minn., 78 F.2d 121.

Ariz.—D. W. Onan & Sons v. Superior Court, Santa Cruz County, 179 P.2d 243, 65 Ariz. 255.

Cal.—Riskin v. Towers, 148 P.2d 611, 24 Cal.2d 274, 153 A.L.R. 442—Kline v. Beauchamp, 84 P.2d 194, 29 Cal.App.2d 340.

N.Y.—Maloney v. Ferguson, 50 N.Y. S.2d 937, 182 Misc. 564.

N.C.—Denton v. Vassiliades, 193 S.E. 737, 212 N.C. 513.

Ohio.—Thrasher v. Kelly, 55 N.E.2d 873, 73 Ohio App. 304.

Pa.—Stokes v. Giarraputo & Son, 42 Pa.Dist. & Co. 597—Tishman Realty & Construction Co. v. Procter, Com.Pl., 57 Montg.Co. 97—Weiss v. Easton Hudson and Essex Co., Com.Pl., 26 North.Co. 263—Miller v. Lehigh Valley R. Co., Com.Pl., 9 Sch.Reg. 4.

Utah.—State Tax Commission v. Larsen, 110 P.2d 553, 100 Utah 103.

Va.—Preston v. Legard, 168 S.E. 445, 160 Va. 364.

50 C.J. p 590 note 32.

#### Jurisdiction over person

A motion to quash service of process in automobile case on secretary of state, on ground that defendant was a resident, was proper method

and acknowledgments of service may also be set aside in proper cases.<sup>20</sup> It has been held that the distinction between motions to quash and to set aside is that a motion to set aside attacks the truth and not the sufficiency of the facts stated,<sup>21</sup> while a motion to quash attacks the sufficiency and not the truth of the facts stated;<sup>22</sup> but it seems that this distinction is not observed.<sup>23</sup> A motion cannot be made in one action to set aside the summons in another.<sup>24</sup>

Although in some jurisdictions a motion to quash supported by affidavits is considered proper practice where the defect is not apparent on the face of the record,<sup>25</sup> a motion to quash is usually available as to patent defects,<sup>26</sup> and only as to such defects;<sup>27</sup> a plea in abatement ordinarily should be used when, and only when, the defect or objection is not apparent on the face of the record, as discussed in Abatement and Revival § 105, and a challenge to a return presenting a question of fact which can be raised and tried only on a plea in abatement should not be made by motion to quash.<sup>28</sup> Where some defects are apparent and others are not, defendant is entitled to elect between a motion to dismiss the writ for the apparent defects, or to plead in abatement for the defects not shown,<sup>29</sup> but he cannot do both.<sup>30</sup> It has been said that courts do not favor motions to quash for jurisdictional defects.<sup>31</sup>

A motion to quash the summons does not go to the merits of the controversy, but its purpose is to show that, although plaintiff may have a just cause of action, defendant has not been properly brought into court so as to require him to answer on the merits.<sup>32</sup> Under some statutes a motion to quash summons confers jurisdiction of the person of the defendant as effectually as though he had been legally served with process,<sup>33</sup> but the motion does not constitute a waiver by defendant of the question of jurisdiction over the subject matter or venue of the action.<sup>34</sup> Trial of the case without a motion to quash the summons having been brought up constitutes an abandonment of the motion.<sup>35</sup>

*Motion to vacate order for publication.* The court has power, on its own motion, to vacate a void order for service of summons by publication previously made in the case.<sup>36</sup> If the order is not void, however, the court can set it aside only on motion made within a reasonable time,<sup>37</sup> or by action where all of the interested parties have an opportunity to be heard.<sup>38</sup>

*Motion to strike affirmative defenses.* The question of the legality and sufficiency of service by publication and mailing of the original process in an alleged judgment of foreclosure should be decided on the trial, and not on a motion to strike affirmative defenses in the answer.<sup>39</sup>

of questioning jurisdiction over defendant's person.—*Carlson v. District Court of City and County of Denver*, 180 P.2d 525, 116 Colo. 330.

#### "Falsity" and "insufficiency"

"Falsity" of a sheriff's return of service is not the same as an "insufficiency" thereof within statute permitting "insufficiency" of service of process to be raised by motion.—*Anthony v. Downs Amusement Co.*, 205 S.W.2d 925, 239 Mo.App. 1136.

#### Objection to substituted service

Where question of jurisdiction over nonresident defendant's person depends solely on whether cause of action is in personam or in rem or quasi in rem, and underlying factual subject matter appears on face of bill, objection to substituted service of process by publication may be made on special appearance by motion to set aside such service.—*Jurewicz v. Locals 1297, 1392, 2343 of United Brotherhood of Carpenters and Joiners of America*, 49 A.2d 23, 138 N.J.Eq. 493.

20. Ala.—*Fall v. Presley*, 50 Ala. 342.

21. Ohio.—*Goodrich v. Hamer*, 9 Ohio Dec. Reprint, 441, 8 Cinc.L. Bul. 11.

22. Ohio.—*Goodrich v. Hamer*, supra.

23. U.S.—*Scott v. Stockholders' Oil Co.*, C.C.Pa., 122 F. 835. 50 C.J. p 590 note 35.

24. N.Y.—*Toma v. Foundation Co.*, 104 N.Y.S. 263, 119 App.Div. 151. 50 C.J. p 591 note 44.

25. Ohio.—*Grady v. Goshline*, 29 N. 10, 768, 48 Ohio St. 665. 50 C.J. p 590 note 38.

26. Ill.—*Craig v. Sullivan Machinery Co.*, 176 N.W. 353, 344 Ill. 334. Mo.—*Mertens v. McMahon*, App., 28 S.W.2d 456, transferred, see 68 S.W.2d 127, 334 Mo. 175, 93 A.L.R. 1285.

Vt.—*Washburn v. Hammond*, 25 Vt. 648. 50 C.J. p 590 note 39.

27. Fla.—*Corpus Juris* cited in *State ex rel. Schenley Distributors, Inc. v. Civil Court of Record of Duval County*, 188 So. 96, 99, 137 Fla. 167.

Ind.—*Donnelley v. Thorne*, 51 N.E. 2d 873, 114 Ind.App. 468.

W.Va.—*Hall v. Ocean Accident & Guarantee Corporation*, 9 S.E.2d 45, 122 W.Va. 188.—*Looney v. West Virginia Hardwood Co.*, 168 S.W. 138, 113 W.Va. 385. 50 C.J. p 590 note 39.

28. W.Va.—*Looney v. West Virginia Hardwood Co.*, supra.

29. Vt.—*Boright v. Williams*, 88 A. 735, 87 Vt. 245.

30. Vt.—*Boright v. Williams*, supra. 50 C.J. p 592 note 68.

31. Utah.—*Clawson v. Boston Acme Mines Dev. Co.*, 269 P. 147, 72 Utah 137, 69 A.L.R. 1318.

32. Md.—*Bricklayers', Masons' & Plasterers' International Union of America v. Seymour Ituff & Sons*, 154 A. 52, 160 Md. 483, 83 A.L.R. 448.

33. Miss.—*Datson & Hatten Lumber Co. v. McDowell*, 131 So. 880, 159 Miss. 322.

34. Miss.—*Datson & Hatten Lumber Co. v. McDowell*, supra.

35. Tenn.—*Department of Highways and Public Works v. Gamble*, 78 S.W.2d 175, 18 Tenn.App. 95.

36. Cal.—*Zumbusch v. Los Angeles County Super. Ct.*, 130 P. 1070, 21 Cal.App. 76.

37. Cal.—*Klokke Inv. Co. v. Los Angeles County Super. Ct.*, 179 P. 728, 39 Cal.App. 717. 50 C.J. p 591 note 49.

38. Cal.—*Zumbusch v. Los Angeles County Super. Ct.*, 130 P. 1070, 21 Cal.App. 76.

39. N.Y.—*Apfelberg v. Lax*, 287 N.Y.S. 33, 227 App.Div. 750.

### c. Plea or Answer

In some jurisdictions, but not in others, the failure to obtain jurisdiction of defendant by proper service of process may be attacked by answer; and under some practice objection to an apparently valid return of service, requiring resort to extrinsic testimony, may be made by a traverse of the officer's return.

Under the practice prevailing in some jurisdictions, the failure to obtain jurisdiction of defendant by proper service of process may be asserted in an answer as a defense;<sup>40</sup> but in other jurisdictions service cannot be attacked in the answer.<sup>41</sup> In any event, after the question of defects in process has been raised and determined on motion to quash, it cannot be raised again by answer;<sup>42</sup> but, where relief was refused in the first instance on the ground that it could not thus be obtained, defendant is not precluded from resorting to the proper procedure.<sup>43</sup> Under some practice, before judgment, a false return regarding service of summons may be taken advantage of by a plea to the jurisdiction of the court over the person of defendant.<sup>44</sup>

As discussed in Abatement and Revival §§ 87, 105, a defect in the writ itself is available by plea in abatement, and the same is true of a defective service; and a plea in abatement should be used when the defect is not apparent on the face of the record.

*Traverse of return.* Under some statutes, when the record shows what purports to be a valid return of service, and it is necessary to resort to extrinsic testimony to show that there has been no service, or an invalid service, the objection can be made by a traverse of the officer's return.<sup>45</sup> Such traverse must be filed at the first term after notice of the return<sup>46</sup> and before pleading to the merits;<sup>47</sup> but it need not be filed before the appearance or return term to which the suit is filed.<sup>48</sup> The traverse is a distinct and independent proceeding from the affidavit of illegality.<sup>49</sup> So an affidavit of illegality will not take the place of a traverse,<sup>50</sup> although the traverse may be included in such an affidavit.<sup>51</sup>

## § 111. — Requisites of Motion, Plea, or Traverse

### a. In general

#### b. Traverse of return

### a. In General

It is usually required that the motion to quash should point out clearly the defect complained of and specify the grounds on which it is based; and all grounds of objection not set up are deemed waived or abandoned.

Although it has been held that a general objection is sufficient,<sup>52</sup> it is usually required that the motion

40. N.J.—Jurewicz v. Locals 1297, 1392, 2343 of United Brotherhood of Carpenters and Joiners of America, 49 A.2d 23, 138 N.J.Eq. 493—McVoy v. Baumann, 117 A. 717, 93 N.J.Eq. 360, affirmed 117 A. 725, 93 N.J.Eq. 638.  
Ohio.—Thrasher v. Kelly, 55 N.E.2d 873, 73 Ohio App. 304.  
50 C.J. p 592 note 58.

#### Special answer

Defendant challenging court's jurisdiction by traversing return of service should proceed by special answer in abatement, not by motion to vacate subpoena.—U. S. v. Doscher, D.C.N.Y., 1 F.Supp. 265.

#### Service in another county

Question of court's jurisdiction over person of defendant served in another county must be raised by answer where petition on its face shows joint liability of defendants, and one is served in county in which action is brought.—Maloney v. Callahan, 188 N.E. 656, 127 Ohio St. 387.—Drea v. Carrington, 32 Ohio St. 595.

41. D.C.—Orinoco Co. v. Orinoco Iron Co., 296 F. 965, 54 App.D.C. 218, appeal dismissed 44 S.Ct. 461, 265 U.S. 598, 68 L.Ed. 1199.

42. U.S.—Foye v. Guardian Printing, etc., Co., C.C.N.Y., 109 F. 368. 50 C.J. p 592 note 55.

43. Pa.—M. Stipp Constr. Co. v.

Sax, etc., Constr. Co., 23 Pa.Dist. 118.

50 C.J. p 592 note 56.

44. Ill.—Nikola v. Campus Towers Apartment Bldg. Corporation, 25 N.E.2d 582, 303 Ill.App. 516.

45. Ga.—Sanford v. Bates, 25 S.E. 35, 99 Ga. 145—City of Albany v. Parks, 5 S.E.2d 680, 61 Ga.App. 55. N.J.—Feder v. Bodner, 28 A.2d 539, 129 N.J.Law 173—Blair v. Vetrano, 172 A. 604, 12 N.J.Misc. 462.  
50 C.J. p 592 note 62.

Conclusiveness of return generally see supra § 100.

Contradicting return by plea in abatement see Abatement and Revival § 87.

#### Who may object

The traverse to the return of a sheriff cannot be made by any one except defendant in the attachment proceedings.—Pace v. Tarver, 92 S. E. 227, 19 Ga.App. 708.

#### Knowledge of defendant

Where return of service was made with defendant's knowledge, defendant was precluded thereby from denying service without traversing return of service and making sheriff a party.—Benton v. Maddox, 192 S.E. 316, 56 Ga.App. 132.

46. Ga.—Crane v. Stratton, 194 S.E. 182, 185 Ga. 234—Backus v. Standridge, 14 S.E.2d 134, 64 Ga.App. 750—City of Albany v. Parks, 5

S.E.2d 680, 61 Ga.App. 55—Spence v. Manufacturers' Finance Acceptance Corporation, 170 S.E. 533, 47 Ga.App. 356—Dugas v. Southern Realty Co., 161 S.E. 653, 44 Ga. App. 355—Mason v. Stevens Warehouse Co., 158 S.E. 631, 43 Ga.App. 375—Cagle v. Baldwin State Bank, 151 S.E. 528, 40 Ga.App. 783.

50 C.J. p 592 note 63—23 C.J. p 549 note 83.

#### Traverse held timely

Ga.—Miller v. Miller, 27 S.E.2d 242, 70 Ga.App. 1.

47. Ga.—Backus v. Standridge, 14 S.E.2d 134, 64 Ga.App. 750—Dugas v. Southern Realty Co., 161 S.E. 653, 44 Ga.App. 355—Cagle v. Baldwin State Bank, 151 S.E. 528, 40 Ga.App. 783.

50 C.J. p 592 note 64.

48. Ga.—Spence v. Manufacturers' Finance Acceptance Corporation, 170 S.E. 533, 47 Ga.App. 356.

49. Ga.—Webb v. Armour Fertilizer Works, 94 S.E. 610, 21 Ga.App. 409.

50. Ga.—Turpie v. Cox, 89 S.E. 492, 18 Ga.App. 424—Rawlings v. Brown, 82 S.E. 803, 15 Ga.App. 162.

51. Ga.—Hamilton v. Chitwood, 140 S.E. 518, 37 Ga.App. 393—Webb v. Armour Fertilizer Works, 94 S.E. 610, 21 Ga.App. 409.

52. Okl.—St. Louis, etc., R. Co. v. Clark, 87 P. 430, 17 Okl. 562.

50 C.J. p 592 note 69.

to quash should point out clearly the defect complained of and specify the grounds on which it is based,<sup>53</sup> and nothing beyond the scope of the motion will be considered.<sup>54</sup> All grounds of objection not set up are deemed waived or abandoned.<sup>55</sup> Where there is an argumentative denial of the return of the officer on a summons only the return of the officer must prevail.<sup>56</sup> The rule that a plea in abatement must give plaintiff a better writ does not apply to a motion presenting a question of privilege.<sup>57</sup> A motion to quash service of summons on the ground that jurisdiction was collusively invoked is subject to the same attack with respect to its sufficiency as if the question were raised by plea.<sup>58</sup>

**Necessity of accompanying affidavits.** It has been held that a motion to quash alleging a fact determinable only by evidence must be supported by affidavits,<sup>59</sup> but, if the illegality of the summons is apparent from the return to the writ, an accompanying affidavit is unnecessary,<sup>60</sup> and in some jurisdictions it is the rule that a motion to set aside a summons for failure of service should be supported by depositions properly taken, rather than by *ex parte* affidavits.<sup>61</sup>

### b. Traverse of Return

The traverse of a return must contain an explicit and unequivocal denial of the specific statements in the return and must also allege that the traverse was made at the proper time. The officer who made the return is a necessary party to a traverse of the return.

Where the traverse of a return is a proper mode of raising an objection to such return, as discussed *supra* § 110 c, it must contain an explicit and unequivocal denial of the truth of the specific statements in the return,<sup>62</sup> and must also allege that the traverse was made at the proper time.<sup>63</sup> A return which shows on its face that the service was void need not be traversed;<sup>64</sup> and, where the case presents no issue as to the truth or falsity of the return, a traverse of the return is not necessary.<sup>65</sup> Accordingly, a timely, proper plea to the jurisdiction of the court does not require the aid of a traverse of the return of service made by the officer.<sup>66</sup>

**Parties.** The officer who made the return is a necessary party to a traverse of the return.<sup>67</sup> If the return was made by a deputy sheriff, both he and the sheriff are necessary parties;<sup>68</sup> and, if either is dead when the traverse is made, his legal representative must be named.<sup>69</sup> Where the traverse is filed at the first term after notice of entry, and before pleading to the merits, the officer whose return is thus attacked may be made a party thereto at a subsequent term,<sup>70</sup> and the traverse may be amended at the subsequent term by making the personal representative of the person, since deceased, who was sheriff at the time of entry of service by the deputy, a party to the proceeding;<sup>71</sup> but it has been held proper to refuse to allow an amendment by which it was attempted to make the sheriff a party,

53. Pa.—Pearsall v. Pazor, 61 Pa. Dist. & Co. 659.

50 C.J. p 592 note 70.

54. Tex.—Mansfield v. Ramsey, Civ. App., 196 S.W. 330.

50 C.J. p 593 note 71.

55. Tex.—Feibleman v. Edmonds, 6 S.W. 417, 69 Tex. 334—Mansfield v. Ramsey, Civ. App., 196 S.W. 330.

56. Ill.—Allegretti v. Stubbett, 126 Ill. App. 171.

57. Md.—Minch, etc., Co. v. Cram, 110 A. 204, 136 Md. 122.

50 C.J. p 593 note 76.

58. U.S.—Benedict v. Seiberling, D. C. Ohio, 17 F.2d 841.

59. Md.—Bricklayers', Masons' & Plasterers' International Union of America v. Seymour Ruff & Sons, 154 A. 52, 160 Md. 483, 83 A.L.R. 448.

50 C.J. p 590 note 38.

60. Md.—Bricklayers', Masons' & Plasterers' International Union of America v. Seymour Ruff & Sons, *supra*.

61. N.J.—Vredenburg v. Weidmann, 183 A. 459, 14 N.J. Misc. 285.

50 C.J. p 590 note 38 [c].

62. Ga.—Webb v. Armour Fertilizer Works, 94 S.E. 610, 21 Ga. App. 409.

63. Ga.—Webb v. Armour Fertilizer Works, *supra*.

50 C.J. p 593 note 80—23 C.J. p 549 note 89.

#### Amendment

Executor's traverse of sheriff's official return included in affidavit of illegality to levy of execution on property of testator, alleging that since last term of court it had come to executor's notice that sheriff made return of service on petition was held amendable at subsequent term of court to show that testator had no notice of return of sheriff before his death within time to have traversed return of officer as required by law.—National Realty Co. v. Lanier, 188 S.E. 279, 54 Ga. App. 466.

64. Ga.—Collins v. Kennedy, 146 S. E. 502, 39 Ga. App. 205.

65. Ga.—Frank Adam Electric Co. v. Witman, 85 S.E. 819, 16 Ga. App. 574.

50 C.J. p 593 note 82.

66. Ga.—O'Kelley v. Dillashaw, 198 S.E. 797, 58 Ga. App. 461.

67. Ga.—Crane v. Stratton, 194 S.E. 182, 185 Ga. 234.

50 C.J. p 593 note 83—23 C.J. p 550 note 1.

68. Ga.—Southern States Phosphate, etc., Co. v. Clark, 101 S.E. 536, 149 Ga. 647, conformed to 102 S.E. 42, 24 Ga. App. 679.

50 C.J. p 593 note 84—23 C.J. p 550 note 2.

69. Ga.—Durden v. Smith Banking Co., 175 S.E. 608, 49 Ga. App. 379—Cochran v. Whitworth, 94 S.E. 609, 21 Ga. App. 406.

70. Ga.—Southern States Phosphate, etc., Co. v. Clark, 101 S.E. 536, 149 Ga. 647, conformed to 102 S.E. 42, 24 Ga. App. 679—Webb v. Armour Fertilizer Works, 94 S.E. 610, 21 Ga. App. 409.

71. Ga.—Eldson v. Citizens Bank & Trust Co., 60 S.E.2d 401, 82 Ga. App. 75.

#### Erroneous refusal of amendment

In proceeding to revive a dormant judgment, error in refusing to permit defendant so to amend traverse rendered further rulings and judgment nugatory.—Eldson v. Citizens Bank & Trust Co., *supra*.

when the amendment was offered after the first term, after notice, and after pleading to the merits.<sup>72</sup>

Failure to make an officer a party renders any proceeding on the traverse void,<sup>73</sup> and the failure to object that both sheriff and deputy were not made parties thereto does not validate the traverse.<sup>74</sup> Where an affidavit of illegality was filed, the mere filing of the traverse to the entry of service by the sheriff, and service of a copy thereof on the sheriff by a private individual, did not make the sheriff a party thereto.<sup>75</sup> Since it is unnecessary to traverse a return which shows on its face that the service was void, in such a case, the officer need not be made a party to an attack on the service;<sup>76</sup> nor is the officer making service a necessary party where there is no issue affecting the return,<sup>77</sup> as where defendant files a plea to the jurisdiction on the ground that defendant was a resident of another county.<sup>78</sup>

## § 112. — Hearing and Determination

- a. In general
- b. Matters considered
- c. Evidence or proof
- d. Judgment or decision
- e. Operation and effect of ruling

### a. In General

The trial court has control over its process in a pending action, and it may hear and determine objections with respect to such process, and, in a proper case, quash or set aside the process or service; but the legality or regularity of process or service can be determined only when properly presented to the court for decision.

The trial court has control over its process in a pending action,<sup>79</sup> and it may hear and determine objections with respect to such process, and, in a proper case, quash or set aside the process or service.<sup>80</sup> However, the legality or regularity of process or service can be determined only when properly presented to the court for decision,<sup>81</sup> and the court cannot, in advance, on motion, give instructions marking out the future procedure in an action.<sup>82</sup> The question as to whether the court has obtained jurisdiction of defendant by service of process is one of fact, to be determined by the court on proof by affidavit or otherwise, and, if nonservice is disputed by plaintiff, he should meet the issue by proof of service.<sup>83</sup>

*Time of hearing.* The issue raised by a motion to set aside service should be determined before requiring defendant to plead to the merits.<sup>84</sup> The trial judge in the exercise of a sound discretion may continue the hearing on a motion to quash service of summons and grant defendant time to take dep-

72. Ga.—Wilkes v. Branch, 90 S.E. 722, 18 Ga.App. 780.

73. Ga.—Georgia R., etc., Co. v. Davis, 82 S.E. 387, 14 Ga.App. 790.

74. Ga.—Producers' Naval Stores Co. v. Brewton, 90 S.E. 735, 19 Ga. App. 19.

75. Ga.—Parker v. Medlock, 45 S.E. 61, 117 Ga. 813.

76. Ga.—Collins v. Kennedy, 146 S. E. 502, 39 Ga.App. 205.

77. Ga.—Watson v. Kvaternik, 126 S.E. 552, 33 Ga.App. 415.  
50 C.J. p 593 note 93.

78. Ga.—O'Kelley v. Dillshaw, 198 S.E. 797, 58 Ga.App. 461.

79. Del.—In re Denning, Super., 61 A.2d 657.

Ill.—Brown v. Nelson, 41 N.E.2d 499, 379 Ill. 371—Jenkins v. Merriweather, 109 Ill. 647.

Pa.—Bandish v. Borough of Pringle, Com.Pl., 37 Luz.Leg.Reg. 389.  
50 C.J. p 593 note 95.

### Jurisdiction

(1) Court has jurisdiction, where validity of summons is challenged, to determine whether summons was of such character as to give defendant the notice required by statute.—James River Nat. Bank v. Haas, 15 N.W.2d 442, 73 N.D. 374, 154 A.L.R. 1005.

(2) State court has jurisdiction to pass on motion to quash summons served on nonresident while within the state for military service.—Northwestern Casualty & Surety Co. v. Conaway, 230 N.W. 548, 210 Iowa 126, 68 A.L.R. 1465.

80. Del.—In re Denning, Super., 61 A.2d 657.

N.Y.—Reep v. Butcher, 27 N.Y.S.2d 330, 176 Misc. 369—Sweeney v. National Assets Corporation, 246 N.Y. S. 315, 139 Misc. 223.

Pa.—Donahoe v. Harrison Brothers Co., 20 Pa.Dist. & Co. 423.

Quashing process of another court see Courts § 496 a.

Every court of record, unless restrained by positive enactment, has the power, on motion, to vacate its process to prevent a perversion thereof or to frustrate oppression.—Litsky v. Fulton Operating Corp., 71 N.Y.S.2d 30, 189 Misc. 397.

81. N.Y.—Milovich v. American Serbian Soc., 115 N.Y.S. 851, 61 Misc. 399.

Mere filing of motion to quash service of summons in foreign state on nonresident was held insufficient to render nonresident immune.—Northwestern Casualty & Surety Co. v. Conaway, 230 N.W. 548, 210 Iowa 126, 68 A.L.R. 1465.

82. N.Y.—Milovich v. American Serbian Soc., 115 N.Y.S. 851, 61 Misc. 399.

83. N.Y.—Otto v. Royal Palm Bar, 86 N.Y.S.2d 307.

### Issue of fact held raised

Plaintiff's answer to petition to strike off the return was held improperly treated as a demurrer and as raising no issue of fact where answer after setting forth sheriff's return asserted that sheriff's return "contains the truth" and return which was made part of answer controverted every essential averment of petition.—Vaughn v. Love, 188 A. 299, 324 Pa. 276, 107 A.L.R. 1336.

84. Mich.—De Velin v. Judge Wayne Cir. Ct., 178 N.W. 87, 211 Mich. 56. S.D.—Halverson v. Sonotone Corp., 19 N.W.2d 14, 70 S.D. 489, 161 A.L.R. 292.

### Prompt determination

Where notice of motion to set aside substituted service of process on nonresident defendant by publication is broad enough to encompass court's debatable jurisdiction to render any effective decree against such defendant, such issue should be promptly determined in summary proceeding.—Jurewicz v. Locals 1297, 1392, 2343 of United Broth. of Carpenters and Joiners of America, 49 A.2d 23, 138 N.J.Eq. 493.

ositions.<sup>85</sup>

**Reference.** Issues of fact may be sent to a referee for determination before passing on a motion to set aside service of summons,<sup>86</sup> but, when the facts are undisputed, the motion should ordinarily be decided by the court, and not sent to a referee.<sup>87</sup>

### b. Matters Considered

On a motion to set aside service of process, the legality and regularity of the service ordinarily are the only points to be considered.

On a motion to set aside service of summons, the legality and regularity of the service are the only points to be considered.<sup>88</sup> Thus questions as to whether the complaint states a cause of action,<sup>89</sup> or whether plaintiff's cause has merit,<sup>90</sup> or whether the cause of action arose in the state in which

it has been brought,<sup>91</sup> will not be considered on such motion; nor may a party to the action, by motion to quash, have determined in advance of trial any issues of fact arising on the pleadings.<sup>92</sup>

Although it has been held that a motion to quash service of process may be made and determined on affidavits alone,<sup>93</sup> it has also been held that the court may look to the pleadings to ascertain the nature of the cause and to evidentiary matters in the record, and to records in interrelated suits.<sup>94</sup> In considering the motion to quash, the court must adhere to the allegations of the petition,<sup>95</sup> and ordinarily it will assume as true facts stated in the complaint;<sup>96</sup> but on a motion to vacate service of summons and complaint, all allegations made by plaintiff on information and belief, not supported by allegations of evidentiary facts and denied by defendant, must be disregarded.<sup>97</sup> In those juris-

85. Ohio.—Sjogren v. Sjogren, App., 77 N.E.2d 739.

#### Discretion held not abused

In suit, wherein defendant moved to quash service of summons on ground that summons was served by deputy sheriff on sister by mistake, trial court did not abuse discretion in refusing to grant wife time to take depositions.—Sjogren v. Sjogren, *supra*.

86. N.Y.—Waterman Corp. v. Johnston, 88 N.Y.S.2d 590, 275 App.Div. 798, appeal denied 90 N.Y.S.2d 688, 275 App.Div. 922.

87. N.Y.—Buchholz v. Florida East Coast R. Co., 69 N.Y.S. 682, 59 App. Div. 566.

88. Alaska.—Graff v. Town of Seward, 9 Alaska 225.  
50 C.J. p 594 note 2.

#### Proper party

On special appearance to quash service of summons, court was limited to a consideration of service made, and could not determine whether defendant making appearance had an interest in the cause or that he was not a proper party defendant.—Graff v. Town of Seward, *supra*.

89. U.S.—Thompson v. Terminal Shares, C.C.A.Mo., 89 F.2d 652, certiorari denied Guaranty Trust Co. of New York v. Thompson, 58 S. Ct. 121, 302 U.S. 735, 82 L.Ed. 568.—Appalachian Electric Power Co. v. Smith, D.C.Va., 4 F.Supp. 3.  
50 C.J. p 594 note 3.

#### Where sufficiency not attacked

On defendant's application to set aside service of summons and complaint on ground that service without the state was unauthorized and ineffectual, complaint would be deemed to state good causes of action for purposes of the application,

where sufficiency of causes of action was not attacked.—Engel v. Engel, 22 N.Y.S.2d 445.

90. La.—Eastman v. Benton, 167 So. 169, 184 La. 620.

Wash.—Embrce v. McLennan, 52 P. 241, 18 Wash. 651.

#### Existence of defense

(1) Whether defendant had a defense to plaintiff's alleged cause of action was irrelevant to consideration of defendant's motion to quash service of alias summons on ground that it had not been served within statutory period of limitation for bringing action or within the sixty days' saving period for issuance of alias summons.—Templeman v. Hester, 29 N.E.2d 216, 65 Ohio App. 62.

(2) Assertion that husband had obtained an absolute divorce from wife prior to institution of her action for alimony without divorce was a matter of defense and was irrelevant on motion to quash service of summons made on the ground that husband, at time of service, was immune from process.—Hare v. Hare, 46 S.E.2d 840, 228 N.C. 740.

#### Estoppel

Contention that plaintiff, in effect, was estopped from prosecuting suit, was held to relate to merits, not determinable on motion to quash service of process.—Appalachian Electric Power Co. v. Smith, D.C.Va., 4 F.Supp. 3.

#### Strength of position

It has been held, however, that motion to vacate service on ground court has not thereby secured jurisdiction of person of defendant company required inquiry whether strength of defendant's position warranted granting of motion if otherwise appropriate.—Goetz v. Interlake S. S. Co., D.C.N.Y., 47 F.2d 753.

91. N.Y.—Mahon v. Ongley Electric Co., 48 N.Y.S. 973, 24 App.Div. 50.

92. Cal.—Jardine v. Superior Court of Los Angeles County, App., 293 P. 117, superseded in part on other grounds Jardine v. Superior Court in and for Los Angeles County, 2 P.2d 756, 213 Cal. 301, 79 A.L.R. 291, appeal dismissed Jardine v. Superior Court of State of California in and for Los Angeles County, 52 S.Ct. 197, 284 U.S. 592, 76 L.Ed. 510.

93. Cal.—Fuller v. Lindenbaum, 84 P.2d 155, 29 Cal.App.2d 227.

94. U.S.—Findlay v. Florida East Coast Ry. Co., D.C.Fla., 3 F.Supp. 393, affirmed, C.C.A., 68 F.2d 540, certiorari denied 54 S.Ct. 629, 292 U.S. 623, 78 L.Ed. 1478.

#### Entries on docket and journal

In passing on a motion to quash an alias summons on jurisdictional grounds, the court has the duty of considering all entries on its docket and journal reflecting the jurisdiction of the court over defendant, including entries involved on the hearing of a motion to quash the first service of summons.—Carr v. Marion Masonic Temple Co., 37 N.E.2d 974, 67 Ohio App. 521.

95. Ohio.—Great Lakes Stages v. Laing, 174 N.E. 784, 38 Ohio App. 34, affirmed 175 N.E. 598, 123 Ohio St. 378.

96. U.S.—Metropolitan Life Ins. Co. v. Skov, D.C.Or., 45 F.Supp. 140.  
N.Y.—Urquhart v. Urquhart, 57 N.Y.S.2d 734, 185 Misc. 915, affirmed 59 N.Y.S.2d 921, 270 App.Div. 759.

97. N.Y.—Ultramar Co. v. Minerals Separation, 212 N.Y.S. 245, 126 Misc. 208, reversed on other grounds 198 N.Y.S. 749, 204 App. Div. 795, reversed on other grounds 142 N.E. 319, 236 N.Y. 647.

dictions where the sheriff's return is conclusive between the parties, the court will look only to the face of the return on a motion to set aside the return or the service,<sup>98</sup> except as to those matters respecting which the return is not conclusive.<sup>99</sup> In other jurisdictions, however, the plea may contradict the sheriff's return.<sup>1</sup>

**Service by publication.** On a motion to vacate an order for publication, in jurisdictions where the disclosure of a cause of action is a prerequisite to service by publication, as discussed supra § 64, the complaint is not to be judged with the same measure of severity which would be applied on a demurrer or motion directly attacking its form or sufficiency;<sup>2</sup> it is sufficient if from all of its allegations there can be gathered those which set forth the substance of a cause of action sufficient to sustain in that respect the order of publication which was made,<sup>3</sup> and every well pleaded allegation of fact therein stands admitted.<sup>4</sup> According to some decisions, however, a motion to quash service of summons by publication is determinable solely on the basis of sufficiency of the affidavit for service by publication, without regard to the sufficiency of the petition to state a cause of action.<sup>5</sup> On such a motion, the court will not pass on the question of defendant's ownership of property on which an attachment was levied as a basis for obtaining jurisdiction of defendant by service of summons by publication, where defendant denied such ownership, but the issue may be raised by answer to be determined at the trial on the merits.<sup>6</sup>

### c. Evidence or Proof

Unless the case is one in which prejudice to defendant is presumed, such prejudice must be shown in order to have service set aside. A return will be set aside only on clear and satisfactory evidence.

On the hearing of objections to defects and irregularities in process, general rules of evidence or proof apply,<sup>7</sup> as with respect to presumptions<sup>8</sup> and burden of proof.<sup>9</sup> On the hearing of the motion to quash, every presumption must be indulged in favor of the order for service of summons by publication.<sup>10</sup> Unless the case is one in which prejudice to defendant is presumed, such prejudice must be shown in order to have service set aside.<sup>11</sup> The showing of the moving party must be such as to negative existence of circumstances which would render the service valid,<sup>12</sup> and it has been held that, in order to avail himself of the technical objection that the summons gave only plaintiff's initials, defendant should make a showing as to plaintiff's true name.<sup>13</sup> Since a motion to quash substituted service of process on the secretary of state challenges the court's jurisdiction, plaintiff has the burden of establishing by competent evidence all facts essential to jurisdiction, including non-residence of defendant.<sup>14</sup>

Parol evidence is admissible to show the receipt of service,<sup>15</sup> or to show that the writ, at the time of service, was void.<sup>16</sup> It is improper, however, to hear evidence on a motion presenting solely a question of law<sup>17</sup> determinable from the facts on record.<sup>18</sup> Where no proof was offered at the

98. Pa.—*Jacobs v. People's Electric, etc., Co.*, 21 Pa.Co. 492.  
50 C.J. p 594 note 9.

99. Pa.—*Fulton v. Commercial Travelers' Mut. Accident Assoc.*, 33 A. 324, 172 Pa. 117.  
50 C.J. p 594 note 10.

1. Ill.—*Albers v. Bramberg*, 32 N.E. 2d 362, 308 Ill.App. 463.  
50 C.J. p 594 note 11.

2. N.Y.—*Holmes v. Camp*, 114 N.E. 841, 219 N.Y. 359.  
50 C.J. p 595 note 32.

Disclosure of cause of action as prerequisite to service by publication see supra § 64.

3. N.Y.—*Holmes v. Camp*, 114 N.E. 841, 219 N.Y. 359.

4. N.Y.—*Grant v. Cobre Grande Copper Co.*, 111 N.Y.S. 386, 126 App.Div. 750, reversed on other grounds 86 N.E. 34, 193 N.Y. 306.

5. Ohio.—*Oldroyd v. Willis*, 194 N.E. 610, 48 Ohio App. 560.

6. N.Y.—*Dalinda v. Abegg*, 29 N.Y. S.2d 5, 177 Misc. 265, affirmed 30 N.Y.S.2d 816, 262 App.Div. 999.

7. S.C.—*St. Clair v. St. Clair*, 178 S.E. 493, 175 S.C. 83.

8. Mo.—*Yates v. Casteel*, 49 S.W.2d 68, 329 Mo. 1101.  
50 C.J. p 594 note 16 [a].

#### Residence

In personal action by summons against single defendant, court, in determining motion to quash summons and return, would presume that defendant was resident of state and county of venue.—*Yates v. Casteel*, supra.

In absence of evidence on motion to quash sheriff's return presumption is that evidence sustained finding agent served was corporation's chief officer within county.—*Kentucky Central Division of Texas-Louisiana Power Co. v. Purvis*, 46 S.W.2d 1065, 242 Ky. 565.

9. Ill.—*Zazove v. Wilson*, 80 N.E.2d 101, 334 Ill.App. 594.

#### Facts denied in affidavit

On defendant's motion to quash service of notice of attorneys' lien and copy of petition, the burden was on plaintiffs to establish facts essen-

tial to a valid service which were denied in affidavit supporting motion to quash.—*Zazove v. Wilson*, supra.

10. N.Y.—*Rich v. St. John*, 199 N.Y. S. 149, 205 App.Div. 24.  
50 C.J. p 591 note 51.

11. S.C.—*Lark v. Chappell*, 12 S.C.L. 566.

12. Mont.—*State ex rel. Gallagher v. District Court of Sixth Judicial Dist. in and for Gallatin County*, 114 P.2d 1047, 112 Mont. 253.

N.Y.—*Matter of Rowley*, 186 N.Y.S. 656, 114 Misc. 375.

13. S.D.—*Newton v. McGee*, 140 N.W. 252, 31 S.D. 216.

14. Colo.—*Carlson v. District Court of City and County of Denver*, 180 P.2d 525, 116 Colo. 330.

15. Cal.—*Langley v. Zurich General Accident & Liability Ins. Co.*, 25 P.2d 418, 219 Cal. 101.

16. Ind.—*Pope v. Anthony*, 5 Blackf. 212.

17. Mo.—*McCafferty v. Clay*, App., 18 S.W.2d 569.

18. Mo.—*McCafferty v. Clay*, supra.  
50 C.J. p 594 note 18.

time the motion was heard, thereafter, on trial of the case on its merits, evidence in support of the motion is inadmissible.<sup>19</sup> Uncontroverted facts recited in the motion to quash will be taken as true.<sup>20</sup> A motion to vacate service, being in the nature of a demurrer, admits the facts alleged in the complaint.<sup>21</sup>

General rules of evidence apply with respect to the weight and sufficiency of evidence as to the validity of service generally,<sup>22</sup> and as to the proof of particular matters arising in a proceeding to quash or set aside process or service.<sup>23</sup> The return will be set aside only on clear and satisfactory evidence,<sup>24</sup> and, where plaintiff's action will be barred by limitation if the service is set aside, the court should be clearly satisfied that the service was insufficient before vacating it,<sup>25</sup> and it should not decide the question solely on affidavits.<sup>26</sup>

*On trial of traverse of return.* On the trial of a traverse to a return of service, the fact that the traverse is filed within the proper time must be

proved.<sup>27</sup> On such trial, the return is to be taken as more than merely prima facie true,<sup>28</sup> and, in order to justify finding against it, the evidence must be the strongest that the nature of the case will permit,<sup>29</sup> and must show that the entry of service is false.<sup>30</sup> When a return of personal service is traversed, proof of service by leaving a copy at defendant's residence will not avail plaintiff.<sup>31</sup>

#### d. Judgment or Decision

Where supported by affidavits, in the absence of answering affidavits, a motion to quash or set aside process or service should be granted, but, when the movant fails to establish his case, the court should refuse to quash. The court may reconsider its ruling, set aside the order, and enter a contrary one at any time before final judgment.

Where supported by affidavits, in the absence of answering affidavits, a motion to quash or set aside process or service should be granted,<sup>32</sup> but, when movant fails to establish his case, the court should refuse to quash.<sup>33</sup> Although a person other than the moving party is named in the summons as

19. Okl.—Sherrill v. Renfrow, 250 P. 515, 120 Okl. 89.

20. Okl.—Wilkinson v. Whitworth, 36 P.2d 932, 169 Okl. 286.

*Affidavits* accompanying motion to quash service, in absence of counter affidavits, are accepted as true.

Iowa.—Burnham Mfg. Co. v. Queen Stove Works of Albert Lea, Minn., 241 N.W. 405, 214 Iowa 112.

Okl.—Kansas, Oklahoma & Gulf Ry. Co. v. Horath, 118 P.2d 660, 189 Okl. 555.

21. U.S.—Knickerbocker Fuel Co. v. Mellon, D.C.N.Y., 18 F.2d 128, affirmed, C.C.A., 22 F.2d 500, certiorari denied 48 S.Ct. 320, 276 U.S. 626, 72 L.Ed. 738.

22. Evidence held sufficient

To show valid service generally.

Cal.—Langley v. Zurich General Accident & Liability Ins. Co., 25 P.2d 418, 219 Cal. 101—Vail v. Jones, 287 P. 99, 209 Cal. 251.

Ga.—Carroll v. Celanese Corp. of America, 54 S.E.2d 221, 205 Ga. 493, certiorari denied 70 S.Ct. 345, 338 U.S. 937, 94 L.Ed. —.

S.C.—McInnis v. Caulk, 180 S.E. 340, 176 S.C. 399—St. Clair v. St. Clair, 178 S.E. 493, 175 S.C. 88.

23. U.S.—Hensley v. Green, D.C.S. C., 36 F.Supp. 671.

N.Y.—Wendel v. Hoffman, 18 N.Y.S. 2d 96, 258 App.Div. 1084, 259 App. Div. 732, appeal dismissed 29 N.E. 2d 664, 284 N.Y. 588, and 37 N.E.2d 59, 286 N.Y. 691.

Utah.—Thomas v. District Court of Third Judicial Dist. in and for Salt Lake County, 171 P.2d 667, 110 Utah 245.

50 C.J. p 594 note 16 [b].

*Defendant's admission* that papers had been served on him, after summons and complaint had been left by sheriff at the home of one of defendant's friends, if such home was not defendant's place of usual abode, was not evidence that defendant received papers in due process.—Murtha v. Olson, 21 N.W.2d 607, 221 Minn. 240.

*Evidence held sufficient*

U.S.—Tope v. Beal, C.C.A.Pa., 98 F. 2d 548.

Cal.—Thorndyke v. Jenkins, 142 P.2d 348, 61 Cal.App.2d 119.

Fla.—Kennedy v. Seville Holding Co., 169 So. 860, 125 Fla. 415.

Minn.—Lee v. Skrukud, 42 N.W.2d 544.

N.J.—Feder v. Bodner, 28 A.2d 539, 129 N.J.Law 173.

N.Y.—Amon v. Moreschi, 78 N.E.2d 716, 286 N.Y. 395.

*Evidence held insufficient*

Ill.—Mahler v. Segel, 76 N.E.2d 795, 333 Ill.App. 138.

Minn.—Murtha v. Olson, 21 N.W.2d 607, 221 Minn. 240.

Mo.—Pfeiffer v. Sches, App., 107 S. W.2d 170.

Mont.—State ex rel. Gallagher v. District Court of Sixth Judicial Dist. in and for Gallatin County, 114 P.2d 1047, 112 Mont. 253.

N.J.—Vredenburg v. Weidmann, 183 A. 459, 14 N.J.Misc. 285.

50 C.J. p 594 note 16 [c].

24. Ill.—Marnik v. Cusack, 148 N.E. 42, 317 Ill. 362.

50 C.J. p 595 note 24.

25. N.Y.—Wolski v. Booth, 157 N.Y. S. 294, 93 Misc. 651.

*Fraudulent agreement*

In action for injuries to one struck by automobile driven by defendant, who defrauded authorities and plaintiff and violated penal provisions of statute by making collusive attempt with passenger in automobile to defeat justice through fraudulent agreement to take care of passenger if he said that he was driver of automobile, with result that action was first brought against passenger and summons was not served on real driver until conclusion of his testimony in such action, which was not tried until statute of limitations had apparently run as against him, motion to set aside such service must be denied.—Baskerville v. Kofsky, 18 A.2d 562, 18 N.J.Misc. 325.

26. N.Y.—Guilford v. Brody, 262 N. Y.S. 722, 237 App.Div. 726.

27. Ga.—Cochran v. Whitworth, 94 S.E. 609, 21 Ga.App. 406.

50 C.J. p 549 note 90.

28. Ga.—Cochran v. Whitworth, supra.

29. Ga.—Cochran v. Whitworth, supra.

30. Ga.—Cochran v. Whitworth, supra.

31. Ga.—Ambrose v. Barber, 79 S.E. 1135, 13 Ga.App. 788.

32. N.Y.—Collins v. Grey, 204 N.Y. S. 210, 123 Misc. 227.

33. Alaska.—Graff v. Town of Seward, 9 Alaska 225.

Fla.—Housey v. Rutter, 166 So. 558, 123 Fla. 156.

Ky.—Kentucky Central Division of Texas-Louisiana Power Co. v. Purvis, 46 S.W.2d 1065, 242 Ky. 565.



defendant, the motion will be denied where plaintiff shows that the moving party was the individual sought to be served.<sup>34</sup> If the motion is not pressed, it will be denied.<sup>35</sup> Permitting an amendment so as to avoid the objection raised is virtually to overrule the motion.<sup>36</sup>

The relief granted in case of defective service should be the setting aside of the service, not the dismissal of the action.<sup>37</sup> The proper form of judgment on quashing the writ and return on motion is simply "writ quashed,"<sup>38</sup> and it has been held that, the return having been quashed for service less than ten days before return day, the case is properly remanded to rules.<sup>39</sup> An adverse ruling by the court on the request of a defendant to enter a special appearance to test the validity of constructive service and its ruling that such service was good is in effect an adjudication of the validity of the service and it does not transfer the service into one personal in character and on which a personal judgment could be entered.<sup>40</sup> Under some rules of court, the trial court's denial of defendant's motion to quash service of summons is without prejudice to his right to appear and plead.<sup>41</sup> In a proper case the court may, at plaintiff's expense, compel attendance of the person making the return.<sup>42</sup>

*Rehearing; review.* Since a court order, sus-

taining or overruling a motion to quash the service of summons,<sup>43</sup> or the return on a summons,<sup>44</sup> is interlocutory and not appealable, the court may reconsider its ruling, set aside the order, and enter a contrary one at any time before final judgment. So, where defendant moved to vacate service of summons, but was denied the opportunity of meeting answering affidavits, he may apply for a rehearing.<sup>45</sup> Where a motion to set aside service is sustained, and a motion for rehearing is filed, the court, by continuing hearing of that motion to the next term, may preserve jurisdiction to correct an error in its earlier ruling.<sup>46</sup> Where the question whether defendant had been legally served with process was determined on conflicting evidence on a motion to vacate the service, affidavit of service, and the default entry, the question is not reviewable on a subsequent motion under statute to vacate a default judgment and permit defendant to answer.<sup>47</sup>

*On traverse of return.* Issues of fact raised by a traverse to a return should be disposed of at the trial.<sup>48</sup> Where there is no issue of fact, it is not error to direct a verdict on the traverse of the return of service.<sup>49</sup> So, where an affidavit of illegality to a return of service did not make the officer a party, and the traverse was not filed prior to the illegality proceedings, a verdict was properly directed against the affidavit.<sup>50</sup> The traverse to

Md.—Bricklayers', Masons' & Plasterers' International Union of America v. Seymour Ruff & Sons, 154 A. 52, 160 Md. 483, 83 A.L.R. 448.

N.Y.—Smith v. Fleming, 279 N.Y.S. 515, 244 App.Div. 843—Youngentob v. Luongo, 249 N.Y.S. 415, 139 Misc. 840.

Okl.—Cornelius v. Jackson, 209 P.2d 166, 201 Okl. 667, appeal dismissed 69 S.Ct. 412, 335 U.S. 906, 93 L.Ed. 440.

Pa.—Pearsall v. Pazor, 61 Pa.Dist. & Co. 659—Pavloff v. Clark-Kehoe Chevrolet, Inc., 24 Pa.Dist. & Co. 374, 16 Lehigh Co.L.J. 295—Harr v. Haydock, Com.Pl., 54 Montg.Co. 333.

50 C.J. p 594 note 98.

#### Opportunity to defend

Affidavit for notice by publication to nonresident defendant stating that defendant was nonresident, and that plaintiff could not procure service of summons on such defendant within state by use of due diligence authorized inference that defendant was not within state at time of filing and issuance of notice and justified denial of motion to quash affidavit and service of notice where defendant appeared in response thereto, was afforded opportunity to original-

ly defend action, and did not deny truthfulness of positive and inferential averments of affidavit.—Yount v. Bank of Commerce, 44 P.2d 874, 172 Okl. 65.

34. N.Y.—Lederer Amusement Co. v. Pollard, 75 N.Y.S. 619, 71 App. Div. 35—Sherwood v. Artistic Marble Co., 125 N.Y.S. 566.

35. U.S.—Boss v. Irvine, D.C.Wash., 28 F.Supp. 983.

36. Ill.—Shepard v. Ogden, 3 Ill. 257.

37. N.Y.—Beacon v. Rogers, 29 N.Y.S. 507, 79 Hun 220—Metcalf v. Clark, 41 Barb. 45.

38. Md.—Minch, etc., Co. v. Cram, 110 A. 204, 136 Md. 122.

39. Va.—Norfolk, etc., Co. v. Carter, 22 S.E. 517, 91 Va. 587.

40. Wyo.—Kimbrel v. Osborn, 156 P. 2d 279, 61 Wyo. 89, 158 A.L.R. 1079.

41. Mich.—Reaume & Silloway v. Tetzlaft, 23 N.W.2d 219, 315 Mich. 95.

42. Va.—Alsop Motor Corp. v. Barker, 123 S.E. 350, 138 Va. 598. 50 C.J. p 595 note 29.

43. Ohio.—Carr v. Marlon Masonic Temple Co., 37 N.E.2d 974, 67 Ohio App. 521.

#### Basis

Where motion to quash service of summons was not based on ground that defendant was not amenable to process, but on ground that summons was not served and that it was not properly served, and order sustaining motion did not dismiss petition, the order was not a "final order," but merely an "interlocutory order" which court had jurisdiction to change at any time during pendency of the cause.—Carr v. Marlon Masonic Temple Co., supra.

44. Ky.—Bastian Bros. Co. v. Field, 134 S.W.2d 648, 280 Ky. 727.

45. N.Y.—Girardon v. Angelone, 254 N.Y.S. 657, 234 App.Div. 351, appeal dismissed 182 N.E. 183, 259 N.Y. 565.

46. Kan.—Dye v. Denver, etc., R. Co., 168 P. 1087, 101 Kan. 666.

47. Cal.—Riskin v. Towers, 148 P.2d 611, 24 Cal.2d 274, 153 A.L.R. 442.

48. Ga.—Miller v. Miller, 27 S.E.2d 242, 70 Ga.App. 1. 50 C.J. p 595 note 40.

49. Ga.—Robertson v. Byrne, 93 S.E. 895, 147 Ga. 329.

50. Ga.—Hamilton v. Chitwood, 140 S.E. 518, 37 Ga.App. 393.

the return of service of a petition and process will be overruled where the only discrepancy between the copies served and the original was the omission, from the copy of the petition, of address to the proper court.<sup>51</sup> So the traverse will be stricken where it shows on its face that service was complete except that the copy of the petition served was not apparently signed by counsel for plaintiff.<sup>52</sup>

### e. Operation and Effect of Ruling

An order vacating service of summons and dismissing an action puts an end to the litigation without a judicial investigation of the merits.

An order vacating service of summons and dismissing an action puts an end to litigation without a judicial investigation of the merits;<sup>53</sup> and the effect of granting a motion to quash service is to declare the service void and not to dismiss the complaint.<sup>54</sup> On the writ being quashed, the case stands as if no writ had been issued.<sup>55</sup> Where one of two defendants pleads the general issue, but the other pleads in abatement because of defects in the writ, on sustaining the plea in abatement the suit should be abated as to one and retained as to the other.<sup>56</sup> Under some statutes it is provided that, where an action abates by reason of an insufficient service or return due to the default or neglect of the officer, a new action may be begun at any time within a specified period.<sup>57</sup>

## § 113. Time for Objections, Waiver, and Cure

### a. In general

### b. Waiver

### c. Laches and estoppel

### d. Cure

### a. In General

Objections to defects in process or service may and should be taken within the time, if any, fixed by statute or court rule, or, in the absence of such provision, as early as possible before the taking of steps relating to the merits of the case; but such restrictions as to time for objection do not apply to substantial defects which render the writ or the service void.

Objections to defects in process or service may and should be taken within the time, if any, fixed by statute or court rule,<sup>58</sup> and it is frequently held, often in conformity with a statute or court rule, that objections must be taken not later than the first term on a designated day thereof.<sup>59</sup> A motion to quash a writ for a cause which may be taken advantage of by a plea in abatement must, in general, be made within the time limited for filing a plea in abatement.<sup>60</sup> Independent of any statute, objections to defects in process or service should be made as early as possible or in the first instance,<sup>61</sup> and the failure to interpose a timely objection may preclude the assertion of the defect on the theory of waiver, estoppel, or laches, as discussed *infra* subdivisions b and c of this section. Inasmuch as a general appearance ordinarily waives all defects and irregularities in the process, service, or return, as discussed in *Appearances* § 17, a party who wishes to raise any question as to these matters must do so at a preliminary stage, before taking any steps relating to the merits of the case,<sup>62</sup> although, until a voluntary appearance, defendant may attack the validity of process or service.<sup>63</sup> It has been held, however, that these restrictions as to time for objection do not apply to substantial

51. Ga.—Byrom Nat. Bank v. Byromville, 88 S.E. 922, 145 Ga. 194.

52. Ga.—Brooke v. Lowry Nat. Bank, 81 S.E. 223, 141 Ga. 493.

53. N.Y.—Klepper v. Canadian Pac. Ry. Co., 85 N.Y.S.2d 258, 193 Misc. 808.

54. S.C.—Thompson v. Queen City Coach Co., 168 S.E. 693, 169 S.C. 231.

55. Ark.—Bird v. Mathis, 6 Ark. 379.

50 C.J. p 595 note 46.

56. Miss.—Foster v. Collins, 13 Miss. 259.

57. Mich.—Ricaby v. Gentle, 80 N.W. 1093, 122 Mich. 336.

50 C.J. p 595 note 48.

58. Ill.—Umbright v. Czajkowski, 45 N.E.2d 104, 318 Ill.App. 444.

Pa.—Ensminger v. Jones, Com.Pl., 58 Dauph.Co. 58—Bandish v. Borough of Fringle, Com.Pl., 37 Luz. Leg.Reg. 389.

59. Ga.—Spence v. Manufacturers' Finance Acceptance Corporation, 170 S.E. 533, 47 Ga.App. 356.

50 C.J. p 595 note 50.

60. Me.—Shorey v. Hussey, 32 Me. 579.

50 C.J. p 596 note 58.

61. Ga.—Beall v. Blake, 13 Ga. 217, 58 Am.D. 513—Cherry v. McCutchen, 23 S.E.2d 587, 68 Ga.App. 682.

### Seasonably raised

Matters involving irregularities of process must be seasonably raised.—McClees v. Grand International Brotherhood of Locomotive Engineers, 18 N.E.2d 812, 59 Ohio App. 477.

### On or before return day of writ

An application to set aside service of process may be made on or at any time before the return day of the writ, provided no other step has been taken in the case, and provided the position of the parties has not

changed meanwhile.—Allison v. Allison, 45 Pa.Dist. & Co. 408, 58 Montg. Co. 311.

### Motion held not premature

Motion to quash attempted service of process on nonresident was held not premature, as against contention that nonresident might yet be served.—Ex parte Cullinan, 139 So. 255, 224 Ala. 263, 31 A.L.R. 160.

62. Ga.—Beall v. Blake, 13 Ga. 217, 58 Am.D. 513—Cherry v. McCutchen, 23 S.E.2d 587, 68 Ga.App. 682.

Ky.—Smith v. Wells, 112 S.W.2d 49, 271 Ky. 373.

Mass.—Cohn v. Carlisle, 37 N.E.2d 260, 310 Mass. 126.

N.C.—Town of Asheboro v. Miller, 17 S.E.2d 105, 220 N.C. 298.

W.Va.—Morris v. Calhoun, 195 S.E. 341, 119 W.Va. 603.

50 C.J. p 596 note 57.

63. Mo.—Benz v. Phillips Pipe Line Co., App., 47 S.W.2d 170.

defects which render the writ or the service void,<sup>64</sup> and that, where service of summons is void, the question may be raised by motion to quash at any time, even after entry of appearance in the cause.<sup>65</sup> Any objection to the omission of a prayer for process, and to the failure to attach process, should precede an attack as to service.<sup>66</sup>

**Contradiction of return.** A return of a sheriff on the summons, where the return is in harmony with the findings of the court in its judgment that defendant was duly served, cannot be contradicted after the term of court has ended in which judgment was rendered,<sup>67</sup> unless a false return has been procured by plaintiff's fraud.<sup>68</sup>

### b. Waiver

Generally, defendant may waive certain defects or irregularities in process or service, as by failure to assert the defect or irregularity by a timely and appropriate plea or motion, or by participating in the trial on the merits of the case; but, where the defect in the process or service is so substantial as to render the process or service void, it cannot be cured by waiver, consent, or agreement.

As a general rule, defendant may waive certain defects or irregularities in process or service,<sup>69</sup> and accordingly, where process is not in substantial compliance with statutory requirements, although not prohibited by law, the defect may be waived so as to give the trial court jurisdiction.<sup>70</sup> It has been held, however, that a void process cannot be revived by waiver,<sup>71</sup> that, where compliance with statutory provisions as to process is necessary to confer jurisdiction on the court, such compliance may not ordinarily be waived,<sup>72</sup> and that, where certain process is prohibited by law, the defect in such process cannot be cured by waiver, consent, or agreement.<sup>73</sup> Waiver by one defendant does not operate as a waiver by other defendants;<sup>74</sup> neither does waiver of service of summons in one court constitute waiver of service in another court.<sup>75</sup>

A failure to assert a defect or irregularity by a timely and appropriate plea or motion is usually regarded as a waiver.<sup>76</sup> Defects in process or service may also be waived by defendant's partici-

64. Mo.—Henneke v. Strack, App., 101 S.W.2d 743.

W.Va.—Morris v. Calhoun, 195 S.E. 341, 119 W.Va. 603.  
50 C.J. p 596 note 54.

#### Default judgment

Where judgment was entered by default without valid service of summons on defendant, question of trial court's jurisdiction could be raised at any time, by proper application, unless it had been waived by general appearance.—State Tax Commission v. Larsen, 110 P.2d 553, 100 Utah 103.

#### Extraterritorial service

A defendant should be permitted to appear specially and to move, even after expiration of the time allowed for filing motion to vacate service of summons, to have an extraterritorial service declared a nullity.—Maloney v. Ferguson, 50 N.Y.S.2d 937, 182 Misc. 564.

65. Ohio.—Campbell v. Johnson, 79 N.E.2d 147, 83 Ohio App. 225, followed in Campbell v. Duncan, 81 N.E.2d 238.

66. Ga.—Harrison v. Lovett, 31 S.E. 2d 799, 198 Ga. 466.

67. Del.—Smulski v. H. Feinberg Furniture Co., 193 A. 585, 8 W.W. Harr. 451.

Ill.—Chapman v. North American Ins. Co., 126 N.E. 732, 292 Ill. 147.—Albert Pick Co. v. Valos, 64 N.E. 2d 319, 327 Ill.App. 404.—Adams v. Butman, 264 Ill.App. 378.

68. Ill.—Travelers Ins. Co. v. Wagner, 279 Ill.App. 13.

69. Fla.—Mabson v. Mabson, 140 So. 801, 104 Fla. 462.

Ga.—Fields v. Fields, 47 S.E.2d 640, 203 Ga. 561.

N.J.—Beebe v. George H. Beebe Co., 46 A. 168, 64 N.J.Law 497.—Shepard v. Philadelphia Record Co., 49 A.2d 33, 24 N.J.Misc. 310.

W.Va.—Morris v. Calhoun, 195 S.E. 341, 119 W.Va. 603.—State ex rel. Doddridge County Court v. Doddridge County Bank, 182 S.E. 884, 116 W.Va. 683.

#### Waiver:

Of issuance of process generally see supra § 2.

Of service of process generally see supra § 25.

General appearance as waiver of defects in process or service see Appearances § 17 c.

Waiver of right to urge abatement because of defects in issue or service of process see Abatement and Revival § 193 c (2) (a).

#### Waiver held not shown

U.S.—Mecke v. Valley Town Mineral Co., C.C.N.C., 89 F. 114.

Ga.—W. T. Rawleigh Co. v. Greenway, 26 S.E.2d 458, 69 Ga.App. 590.

70. Vt.—Howe v. Lisbon Sav. Bank & Trust Co., 14 A.2d 3, 111 Vt. 201.

71. Ga.—Mendel v. Mendel, 44 S.E. 2d 257, 202 Ga. 675.—Wallace & Wallis v. Kent, 83 S.E. 1100, 15 Ga.App. 615.

72. Ohio.—O'Dell v. O'Dell, 64 N.E. 2d 126, 78 Ohio App. 60.

Wrong seal on writ was held defect which could not be waived by parties, defect being jurisdictional.—Hamilton v. George, 152 A. 631, 129 Me. 474.

73. Vt.—Enosburg Grain Co. v. Wilder, 20 A.2d 473, 112 Vt. 11.—Howe v. Lisbon Sav. Bank & Trust Co., 14 A.2d 3, 111 Vt. 201.

74. Neb.—Vian v. Hilberg, 196 N.W. 153, 111 Neb. 232.  
50 C.J. p 598 note 90.

75. Ohio.—Rice v. Pike, 160 N.E. 90, 117 Ohio St. 521.  
50 C.J. p 598 note 91.

76. Ill.—Callender v. Gates, 45 Ill. App. 374.

Ky.—Horton v. Horton, 92 S.W.2d 373, 263 Ky. 413.

Ohio.—Inman v. Radjevick, 2 Ohio Supp. 179.

Pa.—Stokes v. Giarraputo & Son, 42 Pa.Dist. & Co. 597.—Knauss v. Latsch, Com.Pl., 32 North.Co. 1.

Tenn.—Hunter v. May, 25 S.W.2d 530, 161 Tenn. 155.

Tex.—Rogers v. Allen, Civ.App., 80 S.W.2d 1085.

50 C.J. p 596 note 59—33 C.J. p 1092 note 71.

#### Joint and several obligation

Where three defendants are named in suit on joint and several obligation at common law, right to object to plaintiff's failure to perfect service on one may be waived by joining issue and by going to trial without objection.—Harrington v. Bowman, 136 So. 229, 102 Fla. 339, reheard 143 So. 651, 106 Fla. 86.

#### Inaccurate appellation

Real party in interest, when duly served with summons under inaccurate appellation, must take timely advantage of error by appropriate plea; otherwise defect is waived and judgment against him is conclu-

pation in the trial on the merits of plaintiff's cause of action,<sup>77</sup> by the filing of an answer,<sup>78</sup> by giving a stipulation to answer judgment,<sup>79</sup> or by an express agreement to consider the service good,<sup>80</sup> an agreement to submit the case to referees,<sup>81</sup> or an agreement as to the time and manner of trial.<sup>82</sup> A party will be regarded as waiving defects in process or service by moving, on other grounds, to vacate judgment,<sup>83</sup> or coupling other objections with an objection to the method of service;<sup>84</sup> by not requesting a ruling on the motion to quash before or at the time of submission of the cause,<sup>85</sup> or by answering to the merits before the court rules on the motion;<sup>86</sup> by permitting the process to be amended without objection;<sup>87</sup> or by confessing judgment.<sup>88</sup>

An individual defendant, by designating an agent or attorney to receive service of process for him, may waive service on himself in person;<sup>89</sup> and parties who have entered into a stipulation waiving trial in one court and submitted issue to another cannot attack jurisdiction for lack of process.<sup>90</sup> A party waives defects in service by applying for, and agreeing to, a continuance,<sup>91</sup> but a mere entry in the record that a cause was "continued by consent of parties," where one of several defendants

had been duly served, does not constitute a waiver of service, and confer jurisdiction as to defendants who were not served.<sup>92</sup>

Waiver ordinarily is not effected, on the other hand, by merely obtaining an extension of time to answer,<sup>93</sup> or paying part of the judgment;<sup>94</sup> nor is waiver shown by demanding and accepting service of a copy of the complaint while reserving all rights,<sup>95</sup> by filing motions for default against plaintiff for failure to plead, for judgment, and for a bond to prosecute,<sup>96</sup> or by giving notice of motion to strike part of the complaint, which motion was subsequently withdrawn.<sup>97</sup> Defendant's right to have defective process quashed is not limited by the fact that he was in the court room and refused to answer in the case.<sup>98</sup> Where judgment has been rendered, although the process or service was fatally defective, the defect is not waived by moving to set aside such judgment<sup>99</sup> or excepting to it and giving notice of appeal.<sup>1</sup> Taking depositions to be used in the cause, while a motion to quash the writ is pending, is not a proceeding touching the merits of the case which will waive the motion.<sup>2</sup>

*Acceptance or acknowledgment of service* precludes the party from taking advantage of any de-

sive.—*Maloney v. Callahan*, 188 N.E. 656, 127 Ohio St. 387.

77. Ill.—*Brignall v. Merkle*, 28 N.E. 2d 311, 306 Ill.App. 137.

78. Ky.—*Horton v. Horton*, 92 S.W. 2d 373, 263 Ky. 413.

N.Y.—*Goodale Real Estate Corporation v. Subridge Holding Corporation*, 248 N.Y.S. 245, 139 Misc. 209.

#### Motion for withdrawal

Defendant's motion for leave to withdraw his answer and appearance on ground that return of service of citation revealed that citation was issued on Sunday was properly overruled, since the filing of answer was a "waiver" of any defect in citation.—*Erbach v. Donald*, Tex.Civ.App. 170 S.W.2d 289, error refused.

79. U.S.—*The Acadia*, D.C.N.Y., 1 F. Cas.No.24, Brown Adm. 73.

#### Agreement to amicable action

Agreement of successors of deceased registered property owner to amicable action on municipal claim was held valid waiver of statutory requirement for service on registered owner.—*Roth v. Freeborn*, 164 A. 601, 309 Pa. 553.

80. N.H.—*Burleigh v. Wong Sung Leon*, 139 A. 184, 83 N.H. 115. 50 C.J. p 597 note 70.

81. Me.—*Hix v. Sumner*, 50 Me. 290.

82. Tex.—*Deutschmann v. Ryan*, Civ.App., 148 S.W. 1140.

83. N.M.—*Miera v. Sammons*, 248 P. 1096, 31 N.M. 599. 50 C.J. p 597 note 74.

84. U.S.—*Lukosewicz v. Philadelphia Coal, etc., Co.*, D.C.N.Y., 232 F. 292.

85. Ark.—*Broken Bow First Nat. Bank v. Horatio Bank*, 255 S.W. 881, 161 Ark. 259.

#### Abandonment of motion

The failure to request ruling on motion to quash service constituted abandonment thereof.—*Buschow Lumber Co. v. Ellis*, 105 S.W.2d 531, 194 Ark. 104.

86. La.—*Winn v. Veal-Winn Co.'s Receiver*, 134 So. 264, 16 La.App. 323.

50 C.J. p 597 note 78.

87. Ga.—*Lamb v. Tucker*, 91 S.E. 66, 146 Ga. 216.

88. Ga.—*Raney v. McRae*, 14 Ga. 589, 60 Am.D. 660. 50 C.J. p 597 note 80.

89. N.Y.—*Wolski v. Booth*, 157 N.Y. S. 294, 93 Misc. 651.

90. S.C.—*Muldrow v. Jeffords*, 142 S.E. 602, 144 S.C. 509. 50 C.J. p 597 note 82.

91. Ark.—*Engleman, Inc. v. Briscoe*, 291 S.W. 795, 172 Ark. 1088. 50 C.J. p 597 note 83.

92. Ark.—*Snow v. Grace*, 25 Ark. 570.

93. N.Y.—*Bell v. Good*, 19 N.Y.S. 693.

#### As incident to special appearance or motion

Where extension of time to answer is merely incidental to, or part of, special appearance or motion attacking complaint or service thereof on jurisdictional grounds, or stay of proceedings is obtained as mere incident to or part of such appearance, no "waiver" of point of improper service of summons results.—*Thompson v. Mundheim*, 48 N.Y.S.2d 632, 180 Misc. 1002, affirmed 45 N.Y. S.2d 412, 266 App.Div. 1001.

94. Pa.—*Musselman v. Reese*, 19 Pa.Dist. 249.

95. S.C.—*Williams v. Hatcher*, 78 S. E. 615, 95 S.C. 49.

96. Conn.—*First Bank of Cordova, Alaska, v. Lucchini*, 155 A. 88, 113 Conn. 770.

97. S.C.—*Williams v. Hatcher*, 78 S. E. 615, 95 S.C. 49.

98. Tex.—*Gilliam v. Brock*, Civ. App., 1 S.W.2d 1114.

99. N.Y.—*Review, etc., Co. v. Gilbreth*, 120 N.Y.S. 100, 65 Misc. 503.

1. Tex.—*Llano Impr. Co. v. Watkins*, 23 S.W. 612, 4 Tex.Civ.App. 428.

2. Me.—*Briggs v. Davis*, 34 Me. 158.

fects or irregularities in the service,<sup>3</sup> but such a waiver cannot bind third parties;<sup>4</sup> nor does it apply to any defects in the summons itself.<sup>5</sup>

**Filing of motion to dismiss.** It has been held that a party waives objection to defects in process or service by moving to dismiss for want of jurisdiction of the subject matter,<sup>6</sup> or by moving to dismiss because plaintiff improperly named a resident of the county as a defendant solely to give jurisdiction to serve movant in such country;<sup>7</sup> but the filing of a motion to dismiss does not constitute a waiver of defendant's objections to service of process, where the motion to dismiss alleged that the court had no jurisdiction and the court at the hearing permitted the substitution of a motion to quash service.<sup>8</sup>

**After objection overruled.** Failure to except to an order overruling an objection to a defective summons, service, or return is a waiver of such objection.<sup>9</sup> There is some conflict in the cases as to the effect of answering to the merits after a preliminary objection to the summons, service, or return has been improperly overruled, some authorities holding that the point is not waived at least if an exception is taken,<sup>10</sup> but others holding that the objection is always waived by so answering,<sup>11</sup> provided the lack of jurisdiction over defendant's

person is not based on facts dehors the record, that is, on matters outside the face of the return.<sup>12</sup>

### c. Laches and Estoppel

Unnecessary or unexcused delay or laches will deprive defendant of the right to urge formal objections to process, service, or return; and defendant, by his conduct, may be estopped to object that due service was not made.

As a general rule, unnecessary or unexcused delay or laches will deprive defendant of the right to urge formal objections to process, service, or return,<sup>13</sup> and, where formally defective process is personally served, or where personal service is improperly made, and defendant makes no appearance and enters no objection to it but lets the cause proceed, he will not be permitted to object at a subsequent term, but will be deemed to have lost his right to attack the defect by his silence.<sup>14</sup> It has been held, however, that a defect which totally invalidates a writ or the service thereof may be taken advantage of at any time regardless of failure to raise objection thereto at the proper time.<sup>15</sup>

**Estoppel.** Defendant may, by his conduct, be estopped to object that due service was not made,<sup>16</sup> as where the sheriff, at defendant's request, serves the writ in a manner not authorized by law.<sup>17</sup> On the other hand, the circumstances may be such as

3. Mont.—Haggerty v. Sherburne Mercantile Co., 186 P.2d 884, 120 Mont. 386.  
50 C.J. p 597 note 66.

#### Notice of authority

Where defendants' counsel gave plaintiff's counsel written notice of authority conferred on defendants' counsel by defendants to appear and admit service for them and further wrote plaintiff's counsel that defendants' counsel would admit service if plaintiff's counsel would send summons and copy of complaint to defendant's counsel, defendant waived statutory manner and form of service of summons and return made thereon.—Haggerty v. Sherburne Mercantile Co., *supra*.

4. Ga.—American Grocery Co. v. Kennedy, 28 S.E. 241, 100 Ga. 462.

5. La.—Sexton v. Brooks, 12 La. 596.  
50 C.J. p 597 note 68.

6. U.S.—Shoemaker v. Merrill Mortuaries, D.C.Mont., 2 F.Supp 672, appeal dismissed, C.C.A., Merrill Mortuaries v. Shoemaker, 71 F.2d 1012.

7. Kan.—Maynard v. Planters' State Bank, 182 P. 542, 105 Kan. 259.

8. U.S.—Berman v. Affiliated Enterprises, D.C.Me., 17 F.Supp. 305.

9. Mo.—Williams v. Browning, 45 Mo. 475.

10. U.S.—Southwell v. Robertson, D.C.Pa., 27 F.Supp. 944.

Ill.—Ruthfield v. Louisville Fuel Co., 38 N.E.2d 832, 312 Ill.App. 415.  
Ky.—Lincoln Nat. Life Ins. Co. v. Means, 95 S.W.2d 264, 264 Ky. 566, certiorari denied 57 S.Ct. 42, 299 U.S. 578, 81 L.Ed. 426.  
50 C.J. p 598 note 96.

11. Cal.—Sears v. Starbird, 20 P. 547, 78 Cal. 225.  
50 C.J. p 587 note 97.

12. Mo.—Mertens v. McMahon, App., 28 S.W.2d 456, transferred, see 66 S.W.2d 127, 334 Mo. 175, 93 A.L.R. 1285.

13. Kan.—Home Owners' Loan Corporation v. Clogston, 118 P.2d 568, 154 Kan. 257.

N.J.—Hirsch v. De Puy, 166 A. 720, 11 N.J.Misc. 500.  
50 C.J. p 598 note 1.

#### After judgment

(1) Objection to process usually is not available after judgment.—Dannenburg v. Powers, 77 P.2d 1142, 182 Okl. 404—50 C.J. p 598 note 1 [a] (3)—33 C.J. p 1092 note 71.

(2) Generally, sheriff's return of summons may not be impeached by oral testimony, after judgment, as to matters recited in return which were clearly within the sheriff's personal knowledge.—Kackley State Bank of

Kackley v. Nichols, 179 P.2d 186, 162 Kan. 648.

#### Reasonable delay

A motion to set aside service of process is not barred by delay for a time no longer than that reasonably necessary to investigate the law and the facts and to prepare supporting affidavits and procure their verification.—Phelps v. Connecticut Co., C.C.N.Y., 188 F. 765.

14. Kan.—Farmers' Co-op. Grain, etc., Assoc. v. Hed, 251 P. 1090, 122 Kan. 435, 436.

50 C.J. p 598 note 98.

15. Pa.—Mamlin v. Tener, 23 A.2d 90, 146 Pa.Super. 593.

16. Ky.—James v. Ashland Finance Co., 30 S.W.2d 897, 235 Ky. 180.  
50 C.J. p 599 notes 2, 3.

#### Opportunity to be heard

Party may not choose time, place, or manner for his defense, or form of notice to be given, and, if he is given reasonable opportunity to appear and has notice thereof, actual or constructive, he must take advantage of it in manner pointed out by law, or be estopped from claiming that he has had no chance to be heard.—Hewins v. Weller, 36 P.2d 799, 44 Ariz. 309.

17. Ga.—Johnson v. Johnson, 52 Ga. 449.

50 C.J. p 599 note 3.

not to estop defendant to deny the legality of citation in the name of another,<sup>18</sup> and, since defendant is not bound to give notice of a defective service of process, his silence does not estop him from objecting to the want of jurisdiction.<sup>19</sup>

#### d. Cure

Certain errors and defects in process may be cured by subsequent proceedings, as by the rendition of verdict and judgment, or by nunc pro tunc order; but a void process is not cured by verdict; nor is the omission of a return of service so cured.

Certain errors and defects in process may be cured by subsequent proceedings, even after judgment.<sup>20</sup> So it has been held, sometimes by virtue of statutory provision, that errors and defects in process, to which timely objection was not raised, are cured by verdict and judgment,<sup>21</sup> at least where the process is merely defective and not void;<sup>22</sup> but a void process is no process and is not cured by verdict;<sup>23</sup> nor is the omission of a return of

service an amendable defect which is cured by verdict.<sup>24</sup> In a proper case, irregularities may be cured by nunc pro tunc order,<sup>25</sup> or by striking out counts in the declaration;<sup>26</sup> and it has been held that a defective statement of the title of a cause in the process is cured by a correct statement thereof in the petition.<sup>27</sup> The question of the validity of service of summons on defendant in a county other than the county of his residence while attending court as a witness has been held not material where defendant was later served with alias summons in that county while on private business.<sup>28</sup> The failure of the clerk to sign the order of publication may, in some circumstances, be considered merely as a curable irregularity,<sup>29</sup> especially on collateral attack.<sup>30</sup>

While certain errors in process may be regarded as harmless, and cured by recitals of the judgment,<sup>31</sup> ordinarily a recital in the judgment that the court has jurisdiction does not cure an error

18. La.—Richardson v. Trustees' Loan & Guaranty Co., 132 So. 387, 15 La.App. 645.

19. N.Y.—Williams v. Van Valkenburg, 16 How.Pr. 144.

20. N.Y.—Valz v. Sheepshead Bay Bungalow Corp., 163 N.E. 124, 249 N.Y. 122—Marks v. Provident Mut. Life Ins. Co. of Philadelphia, 83 N.Y.S.2d 614, 274 App.Div. 368, appeal denied 85 N.Y.S.2d 322, 274 App.Div. 1017, appeal dismissed, 85 N.E.2d 60, 298 N.Y. 917.

50 C.J. p 485 note 30 [a].  
Cure by amendment see *infra* § 114.  
Subsequent order

Where officer made return non est inventus, stating defendant's residence was unknown to officer, and thereafter residence to which defendant had removed was discovered, service in accordance with subsequent order of notice on defendant was authorized.—Therrien v. Scammon, 176 A. 116, 87 N.H. 214.

Omission in order of publication as to process running in the name of the state is cured by the statute of jeofails.—Hansford v. Hansford, 34 Mo.App. 262.

21. Kan.—Board of Com'rs of Mitchell County v. Allen, 137 P.2d 143, 156 Kan. 701.  
50 C.J. p 599 note 6.

#### No motion in arrest

Mere error or defect in process is cured by verdict where no motion in arrest of judgment is made on such account.—Walkup v. Covington, 73 S.W.2d 718, 18 Tenn.App. 117.

22. Ga.—Bettou v. Avery, 178 S.E. 297, 180 Ga. 110—W. T. Rawleigh Co. v. Watts, 24 S.E.2d 213, 68 Ga. App. 786.

23. Ga.—W. T. Rawleigh Co. v. Watts, *supra*.

24. Ga.—Mollett v. Porch, 200 S.E. 190, 59 Ga.App. 181.

25. N.Y.—Gullette v. Parish, 65 N.Y.S.2d 731.  
50 C.J. p 599 note 7.

#### Filing and entry of order of publication

(1) The failure to file order of publication to obtain jurisdiction of nonresident defendant may be corrected nunc pro tunc.—Marks v. Provident Mut. Life Ins. Co. of Philadelphia, 83 N.Y.S.2d 614, 274 App.Div. 368, appeal denied 85 N.Y.S.2d 322, 274 App.Div. 1017, appeal dismissed 85 N.E.2d 60, 298 N.Y. 917—Hehn v. Nassau County, 51 N.Y.S.2d 300, 268 App.Div. 917—50 C.J. p 534 note 35.

(2) It has also been held, however, that the filing of the order for publication is a condition precedent to the jurisdiction of the court, and that, if this requirement is not complied with, the court cannot make an order nunc pro tunc to cure the defect.—Pink v. Wallach, 96 N.Y.S. 543, 109 App.Div. 718—Wilson v. Banque Francaise du Mexique, 208 N.Y.S. 213, 124 Misc. 690.

(3) Order for publication may be entered nunc pro tunc at any time before final judgment.—Horn v. Indianapolis Nat. Bank, 25 N.E. 558, 125 Ind. 381, 21 Am.S.R. 231, 9 L.R.A. 676—50 C.J. p 534 note 44.

#### Defects in affidavit

Defendant's motion to vacate affidavit of service was denied, where defects in affidavit were cured by affidavit which established that service was properly made on defendant and which could be filed nunc pro

tunc.—Gullette v. Parish, 65 N.Y. S.2d 731.

#### Omissions

Where summons was properly issued, under seal, and prosecution bond and verified complaint duly filed, but copies delivered to insurance commissioner for nonresident insurer defendant failed to show name of clerk, seal of court, or name of plaintiff's attorney, nunc pro tunc order supplying such omissions cured defect in service and justified order denying motion to strike out entry of service.—Branch Banking & Trust Co. v. Smith, 187 S.W. 780, 210 N.C. 582.

#### Service on nonresident

Under circumstances, although requisite affidavit was not filed before summons issued for personal service on nonresident outside state, defect could be supplied nunc pro tunc.—Fidelity & Casualty Co. of New York v. Green, 157 S.E. 797, 200 N.C. 535.

26. Vt.—Rowley v. Shepardson, 81 A. 917, 85 Vt. 268.  
50 C.J. p 599 note 8.

27. La.—Mitchell Motor Co. v. Maxcoy, 7 La.App. 247—Sentilles v. Morgan's Louisiana, etc., R., etc., Co., 9 La.App. Orleans, 15.

28. Okl.—Whitney v. Doyle, 159 P. 2d 237, 195 Okl. 501.

29. Mo.—McDermott v. Gray, 95 S. W. 431, 198 Mo. 266.

30. Mo.—McDermott v. Gray, *supra*.  
50 C.J. p 530 note 69.

31. Okl.—Allen v. Clover Valley Lumber Co., 42 P.2d 850, 171 Okl. 238.

lying in the failure of the record to show service of process or notice as required by statute.<sup>32</sup> Accordingly, recitals of proper service in the judgment<sup>33</sup> or in the record containing the return of service<sup>34</sup> will not cure defects in the official return showing improper service; nor is failure to comply with the statutory requirement of an averment of nonresidence of defendants sought to be served by publication cured, as affecting defendant's rights, by a subsequent recital of such nonresidence in an agreed statement of facts.<sup>35</sup>

An insufficiency in an affidavit or order granting leave for service by publication is not cured by personal service of the summons in another jurisdiction.<sup>36</sup> It has also been held that an affidavit required by statute authorizing service of summons by publication, filed after publication and

judgment, does not validate the process,<sup>37</sup> although there is some authority to the contrary.<sup>38</sup> Failure to sign the original process as required by law is not cured by the service of a signed copy of the process on defendant, since the signed copy is not a copy of the unsigned original.<sup>39</sup> Where the order for publication entirely omits to include a direction as to mailing copies of the summons, complaint and order in accordance with the statutory requirements, such defect, it has been held, is not cured by a mailing which satisfies the requirements of the statute,<sup>40</sup> but there is authority to the contrary.<sup>41</sup> A void service of summons under an unconstitutional statute is not validated by a subsequent amendment of the statute eliminating the features of the prior act which rendered it unconstitutional.<sup>42</sup>

## B. AMENDMENT OF DEFECTS

### § 114. Amendment of Process

- a. In general
- b. Process amendable
- c. Procedure
- d. Operation and effect

#### a. In General

A court may, in the furtherance of justice, at any stage of the proceedings, amend its process by correct-

ing mistakes therein, on such terms as it deems just, where such action will not prejudice the rights of the parties or of third persons.

Courts have inherent discretionary power, within certain limitations, to amend their process,<sup>43</sup> and this power is usually declared, defined, and limited by statutes which vary greatly in their terms, but ordinarily repose large discretionary powers in the court.<sup>44</sup> Statutes authorizing the amendment of

#### Amount of recovery

Where, in action for recovery of money only, summons notifies defendant that plaintiff is seeking judgment for such sum, together with interest thereon from July 30, 1930, instead of from July 24, 1930, as recited in prayer of petition and in *præcipe*, error appearing on face of summons was held harmless and cured by recital of judgment in journal entry in conformity with prayer of petition.—*Allen v. Clover Valley Lumber Co.*, *supra*.

32. Ill.—*Sherman & Ellis v. Journal of Commerce and Commercial Bulletin*, 259 Ill.App. 453.

33. Colo.—*Stubbs v. McGillis*, 96 P. 1005, 44 Colo. 138, 18 L.R.A., N.S., 405, 130 Am.St.R. 116.

Ill.—*Werner v. W. H. Shons Co.*, 173 N.E. 486, 341 Ill. 478.

#### Substituted service

Defect in return of substituted service, not alleging statutory requirements, cannot be aided by recitals of valid service in decree.—*Werner v. W. H. Shons Co.*, *supra*.

34. Ill.—*Werner v. W. H. Shons Co.*, *supra*.

#### Findings of court

Jurisdiction of court in action based on substituted service must be

determined on return by sheriff, findings of court inserted in record being immaterial.—*Werner v. W. H. Shons Co.*, *supra*.

35. Mo.—*Stanton v. Thompson*, 136 S.W. 698, 234 Mo. 7.

36. N.Y.—*Goetz v. Solms*, 159 N.Y. S. 552, 173 App.Div. 373—*Peck v. Cook*, 41 Barb. 549.

37. Ariz.—*Evans v. Hallas*, 167 P. 2d 94, 64 Ariz. 142.

38. N.Y.—*Marks v. Provident Mut. Life Ins. Co. of Philadelphia*, 83 N.Y.S.2d 614, 274 App.Div. 368, appeal denied 85 N.Y.S.2d 322, 274 App.Div. 1017, appeal dismissed 85 N.E.2d 60, 298 N.Y. 917.

39. Ga.—*Kimsey v. Hall*, 23 S.E.2d 196, 68 Ga.App. 409.

40. Nev.—*Victor Mill, etc., Co. v. Justice Ct.*, 1 P. 831, 18 Nev. 21.

41. Iowa.—*Lyon v. Comstock*, 9 Iowa 306.

42. Ky.—*Anderson's Adm'r v. Delapp*, 190 S.W.2d 471, 300 Ky. 785.

43. N.Y.—*Corpus Juris* cited in *People v. Logan*, 278 N.Y.S. 746, 751, 154 Misc. 576.

N.C.—*Rushing v. Ashcraft*, 191 S.E. 332, 211 N.C. 627.

50 C.J. p 599 note 13.

#### Ample power

The power of the court to permit amendments of process is ample.—*Meekins v. Coastal Game Preserves*, 192 S.E. 848, 212 N.C. 96.

44. Ill.—*Thomas v. Rossetter*, 91 N.E.2d 155, 339 Ill.App. 647.

Me.—*Collins v. Bugbee & Brown Co.*, 1 A.2d 178, 136 Me. 12.

N.C.—*Clevenger v. Grover*, 193 S.E. 12, 212 N.C. 13, 124 A.L.R. 82.

R.I.—*Friedman v. Arnold*, 57 A.2d 444, 73 R.I. 451.

#### Purpose

Statute authorizing courts to amend any process was enacted for purpose of expediting administration of justice and the prevention of delays in bringing matters to an issue, and authorizes the court to make such amendments as are required for purpose of correcting mistakes so long as the parties are not prejudiced thereby.—*State ex rel. Heck v. Sucher*, 65 N.E.2d 268, 77 Ohio App. 257.

#### Mistake, irregularity, or defect

The statute relating to correction of mistake, irregularity, or defect applies to process as well as to other steps in an action.—*Barth v. Owens*, 35 N.Y.S.2d 632, 178 Misc. 628.

process should be liberally construed,<sup>45</sup> and such a statute, broad in its terms, is to be construed broadly as a remedial statute.<sup>46</sup> A clerk of court has no power to amend on his own motion.<sup>47</sup>

Under a statute giving the court discretionary power to amend, it may, in the furtherance of justice, amend any process by correcting mistakes therein, on such terms as it deems just.<sup>48</sup> Amendments to process are liberally granted where the rights of defendants are not prejudiced,<sup>49</sup> but ordinarily no amendment will be permitted when third persons have acquired rights which would be injuriously affected thereby.<sup>50</sup> In exercising the power to amend process, the court must consider the substantive rights of both parties and it is not authorized to further the interests of one litigant at the expense of the other.<sup>51</sup>

*Time of amendment.* As a general rule, the power to amend process may be exercised at any stage of the proceedings.<sup>52</sup> The amendment may be made nunc pro tunc at a term subsequent to that at which

the order allowing it is made,<sup>53</sup> or even after judgment,<sup>54</sup> but not after the case is out of court.<sup>55</sup> Authority to allow an amendment after an appeal or proceedings in error have been perfected is considered in Appeal and Error § 617.

### b. Process Amendable

In the absence of any statutory restriction denying the court power to allow the particular amendment sought, process that is merely voidable is amendable; but process that is void cannot be amended.

In the absence of any statutory restriction denying the court power to allow the particular amendment sought, process that is merely voidable is amendable.<sup>56</sup> However, inasmuch as there must be something to amend or amend by,<sup>57</sup> it follows that void process which must be considered as no process at all<sup>58</sup> cannot be amended.<sup>59</sup> Where the complaint setting out the cause of action is attached to the summons, there is something to amend by, and the summons is clearly amendable.<sup>60</sup> Original writs are amendable as well as any other process under a statute authorizing the court to amend

45. Ohio.—Wechsler v. Sholander, 14 Ohio Supp. 58.

Okl.—Tyler Boat Works v. Schreiner, 153 P.2d 1004, 194 Okl. 601—Harden v. Kifer, 111 P.2d 490, 188 Okl. 538—Texas Title Guaranty Co. v. Mardis, 98 P.2d 593, 186 Okl. 433.

46. U.S.—Massachusetts Bonding & Insurance Co. v. Concrete Steel Bridge Co., C.C.A.W.Va., 37 F.2d 695.

50 C.J. p 600 note 16.

47. Ga.—Frank Adam Electric Co. v. Witman, 85 S.E. 819, 16 Ga.App. 574.

48. N.C.—Choate Rental Co. v. Justice, 193 S.E. 817, 212 N.C. 523. N.D.—James River Nat. Bank v. Haas, 15 N.W.2d 442, 73 N.D. 374, 154 A.L.R. 1005.

Tex.—Employer's Reinsurance Corporation v. Brock, Civ.App., 74 S.W.2d 435, error dismissed. 50 C.J. p 600 note 23.

#### Technical errors

Statute providing that court may at any stage of any action before or after judgment amend any process enables court to allow amendments as will prevent technical errors from avoiding a just result.—Lofgren v. Preferred Acc. Ins. Co., 41 N.W.2d 599, 256 Wis. 492.

49. Minn.—Tharp v. Tharp, 36 N.W. 2d 1, 228 Minn. 23.

N.C.—Hughes v. Oliver, 47 S.E.2d 6, 288 N.C. 680.

50. N.C.—Rushing v. Ashcraft, 191 S.E. 322, 211 N.C. 627.

50 C.J. p 600 note 17.

51. Wis.—Lofgren v. Preferred Acc. Ins. Co., 41 N.W.2d 599, 256 Wis. 492.

52. N.C.—Choate Rental Co. v. Justice, 193 S.E. 817, 212 N.C. 523. N.D.—James River Nat. Bank v. Haas, 15 N.W.2d 442, 73 N.D. 374, 154 A.L.R. 1005.

Tex.—Employer's Reinsurance Corporation v. Brock, Civ.App., 74 S.W.2d 435, error dismissed.

Wis.—Lofgren v. Preferred Acc. Ins. Co., 41 N.W.2d 599, 256 Wis. 492.

53. Ga.—Myers v. Griner, 48 S.E. 113, 120 Ga. 723. N.Y.—Gribbon v. Freal, 93 N.Y. 93, 65 How.Pr. 273, McCarty Civ.Proc. 482.

54. N.C.—Choate Rental Co. v. Justice, 193 S.E. 817, 212 N.C. 523. Tex.—Employer's Reinsurance Corporation v. Brock, Civ.App., 74 S.W.2d 435, error dismissed. 50 C.J. p 600 note 25.

55. N.J.—Van Ness v. Harrison, 3 N.J.Law 632.

N.Y.—Burk v. Barnard, 4 Johns. 309.

56. Ga.—Betton v. Avery, 178 S.E. 297, 180 Ga. 110—W. T. Rawleigh Co. v. Watts, 24 S.E.2d 213, 68 Ga.App. 786.

Mich.—Miller v. Bradway, 300 N.W. 889, 299 Mich. 574.

Miss.—Corpus Juris cited in Johnson v. State, 31 So.2d 127, 128, 202 Miss. 233.

Okl.—Corpus Juris cited in Texas Title Guaranty Co. v. Mardis, 98 P.2d 593, 594, 186 Okl. 433.

Vt.—Russell v. Lund, 39 A.2d 837, 114 Vt. 16—Corpus Juris cited in

Howe v. Lisbon Sav. Bank & Trust Co., 14 A.2d 3, 6, 111 Vt. 201. 50 C.J. p 600 note 27.

57. Me.—Collins v. Bugbee & Brown Co., 1 A.2d 178, 136 Me. 12. 50 C.J. p 600 note 29.

58. Ga.—W. T. Rawleigh Co. v. Watts, 24 S.E.2d 213, 68 Ga.App. 786.

Okl.—Corpus Juris cited in Texas Title Guaranty Co. v. Mardis, 98 P.2d 593, 594, 186 Okl. 433. 50 C.J. p 600 note 30.

59. Ga.—W. T. Rawleigh Co. v. Watts, 24 S.E.2d 213, 68 Ga.App. 786.

Me.—Israelson v. Gallant, 154 A. 574, 130 Me. 213.

Miss.—Corpus Juris cited in Johnson v. State, 31 So.2d 127, 128, 202 Miss. 233.

Okl.—Corpus Juris cited in Texas Title Guaranty Co. v. Mardis, 98 P.2d 593, 594, 186 Okl. 433.

Vt.—Howe v. Lisbon Sav. Bank & Trust Co., 14 A.2d 3, 111 Vt. 201. 50 C.J. p 601 note 31.

#### Jurisdictional defect

If process served on defendant was jurisdictionally defective, it could not be corrected by the court by amendment even under broad and liberal language of the provision of statute authorizing mistake, omission, irregularity or defect to be corrected or supplied, in discretion of the court.—Rockefeller v. Hein, 28 N.Y.S.2d 268, 176 Misc. 659.

60. N.J.—Kostrob v. Riley, 143 A. 883, 105 N.J.Law 37. 50 C.J. p 601 note 32.



"any process,"<sup>61</sup> or under a statute of jeofails providing that the several courts shall proceed and render judgment according to the right of the case, notwithstanding any defect or want of form in the writ, process, or other pleading.<sup>62</sup> The power of the court to amend extends to affidavits and orders for service of process by publication, as discussed *infra* § 118.

### c. Procedure

Generally, leave of court to amend process must be obtained in the court from which the writ issues, and the motion to amend should be made promptly after discovery of the defect. Notice of an application to amend process should usually be given to the other party.

Except where the statute permits an amendment as of course, leave of court to amend process must be obtained.<sup>63</sup> A leave to amend process may not be implied from a leave to amend a return.<sup>64</sup> In a proper case, the court may order an amendment of the process of its own motion in order to correct its records to conform to the facts.<sup>65</sup> The issue presented on a motion to amend summons on the ground of mistake in inserting the name of the wrong court is a question of fact for the court, and in order to aid in determining the issue the court may have recourse to the complaint.<sup>66</sup>

*Time and place of application.* The motion to amend should be made promptly after discovery of the defect;<sup>67</sup> and the court may refuse to allow an amendment on the ground of delay in moving therefor.<sup>68</sup> Since amendments of process ordinarily are permissible only in the court from which the process issues,<sup>69</sup> the motion should be made in the court from which the writ issues,<sup>70</sup> although the appellate court, after taking jurisdiction of a cause, will sometimes amend the process;<sup>71</sup> but

there is also authority to the effect that a motion to amend cannot be made for the first time on appeal.<sup>72</sup>

*Notice of application.* It is generally held that notice of an application to amend process should be given to the other party,<sup>73</sup> at least in the case of an amendment sought after the term at which the judgment is rendered,<sup>74</sup> although some cases have broadly held that such notice is not necessary.<sup>75</sup> Where notice is required, an order allowing an amendment without notice cannot be confirmed *nunc pro tunc*.<sup>76</sup> Unless a statute or rule of court requires it, no notice is necessary where the rights of the parties and the issues to be tried are not affected,<sup>77</sup> as in the case of an *ex parte* application to correct the name of plaintiff,<sup>78</sup> or where it appears that defendant was in fact apprised thereof,<sup>79</sup> or is in court attacking the sufficiency of the process.<sup>80</sup>

*Necessity of actual amendment.* The amendment need not always be actually made, for, if the defect is amendable, the writ may be deemed amended whenever the objection is taken;<sup>81</sup> and this rule is frequently resorted to on appeal,<sup>82</sup> unless it appears that no notice of motion to amend was given defendant.<sup>83</sup> So, where process is defective with respect to the term at which it is returnable, an order of court making the case returnable to a named subsequent term and requiring an answer at such term is substantially equivalent to an amendment to the process and constitutes sufficient notice to defendant to appear and answer at the term designated in the order, without a formal amendment of process.<sup>84</sup> When a summons is amended by making a new party, the better practice is to insert the amendment in the original summons; but there is a substantial amendment

61. N.Y.—*Bartholemew v. Chautauque County Bank*, 19 Wend. 99.

62. Vt.—*Dean v. Swift*, 11 Vt. 331.

63. Ga.—*Griffier v. Southern R. Co.*, 116 S.E. 655, 30 Ga.App. 20. 50 C.J. p 605 note 39.

64. W.Va.—*White v. Sydenstricker*, 6 W.Va. 46.

65. Mo.—*Henneke v. Strack*, App., 101 S.W.2d 743.

66. N.D.—*James River Nat. Bank v. Haas*, 15 N.W.2d 442, 73 N.D. 374, 154 A.L.R. 1005.

67. Ga.—*Griffier v. Southern R. Co.*, 116 S.E. 655, 30 Ga.App. 20.

68. Ga.—*Griffier v. Southern R. Co.*, *supra*.

69. Ohio.—*First Nat. Bank v. Houghton*, 181 N.E. 109, 41 Ohio App. 305.

70. N.H.—*Dennison v. Willson*, 16 N.H. 496.

50 C.J. p 605 note 44.

71. N.C.—*McLean v. Breece*, 18 S.E. 694, 113 N.C. 390—*Capps v. Capps*, 85 N.C. 408.

72. Puerto Rico.—*Arbona v. Christianson*, 26 Puerto Rico 250.

73. Md.—*North v. Town Real Estate Corp.*, 60 A.2d 665. 50 C.J. p 605 note 51.

74. Ill.—*Thriffs v. Fritz*, 101 Ill. 457.

75. Tenn.—*Cooke v. Neighborhood Grocery*, 122 S.W.2d 438, 173 Tenn. 681—*Fowlkes v. Webber*, 27 Tenn. 530, 8 Humph. 530.

76. N.Y.—*Luckey v. Mockridge*, 98 N.Y.S. 335, 112 App.Div. 199.

77. Ill.—*Sidway v. Marshall*, 83 Ill. 438.

N.Y.—*Stuyvesant v. Weil*, 60 N.E. 738, 167 N.Y. 421, 53 L.R.A. 562.

78. Tenn.—*Cooke v. Neighborhood Grocery*, 122 S.W.2d 438, 173 Tenn. 681.

50 C.J. p 606 note 56.

79. N.Y.—*Stuyvesant v. Weil*, 60 N.E. 738, 167 N.Y. 421, 53 L.R.A. 562, 50 C.J. p 606 note 57.

80. N.Y.—*Inman v. Griswold*, 1 Cow. 199.

81. N.J.—*Denn v. Lecony*, 1 N.J. Law 131.

50 C.J. p 605 note 47.

82. Ind.—*Kaufman v. Sampson*, 9 Ind. 520.

83. Fla.—*Sartain v. Bay County*, 99 So. 558, 87 Fla. 231.

84. Ga.—*Minsk v. Cook*, 173 S.E. 446, 48 Ga.App. 567.

where an additional summons incorporating the amendment is issued.<sup>85</sup>

#### d. Operation and Effect

An amendment of process will ordinarily be deemed to relate back to the time of the commencement of the suit, validating all acts done under the process.

An amendment of process will ordinarily be deemed to relate back to the time of the commencement of the suit,<sup>86</sup> validating all acts done under the process,<sup>87</sup> although, where the amendment changes the cause of action or brings in new parties, it is effective only from the date it was granted.<sup>88</sup> Where the defect is in respect of a matter which, by some statutory or other provision, is made a condition precedent to the maintenance of the suit, the nonobservance is fatal, and the doctrine of relation back does not apply, with respect to the operation of the statute of limitations.<sup>89</sup>

As often as a writ is amended it is open to attack for defects and errors,<sup>90</sup> but not as to prior defects which have been corrected.<sup>91</sup> If defendant has already answered the complaint, a second service after amendment of process is not necessary,<sup>92</sup>

especially where any injustice due to unpreparedness for trial caused by the amendment could be obviated by the allowance of more time to prepare.<sup>93</sup>

### § 115. — Amendable Defects

- a. In general
- b. Contents of writ generally
- c. Designation of court and place of trial
- d. Names and addresses of parties and attorneys
- e. Form or cause of action
- f. Relief and amount of damages
- g. Directions for return or appearance
- h. Style, date, teste, signature, and seal

#### a. In General

Formal defects and clerical errors in process are amendable, but defects of substance are not amendable unless the statute relating to amendment of process authorizes it.

A frequently stated rule is that formal defects<sup>94</sup> and clerical errors<sup>95</sup> in process are amendable, but defects of substance are not amendable,<sup>96</sup> unless the

85. S.C.—Arthur v. Allen, 22 S.C. 432.

86. N.C.—Corpus Juris quoted in Lee v. Hoff, 19 S.E.2d 858, 860, 221 N.C. 233.

Tex.—Nash v. Boyd, Civ.App., 225 S.W.2d 649.

50 C.J. p 606 note 59.

#### Rule of convenience

The rule that an amendment of a writ relates back to date of its issue is only a rule of convenience.—B. M. C. Durfee Trust Co. v. Turner, 12 N.E.2d 847, 299 Mass. 276.

87. N.C.—Corpus Juris quoted in Lee v. Hoff, 19 S.E.2d 858, 860, 221 N.C. 233.—Calmes v. Lambert, 69 S.E. 138, 153 N.C. 248.

#### Existence of real plaintiff

Where writ failed to name any plaintiff, finding that there was a real plaintiff was implied in allowance of amendment inserting name of plaintiff.—Ideal Financing Ass'n v. McPhail, 70 N.E.2d 311, 320 Mass. 521.

88. N.C.—Lee v. Hoff, 19 S.E.2d 858, 221 N.C. 233.

89. Tenn.—Flatley v. Memphis, etc., R. Co., 9 Heisk. 230.  
50 C.J. p 606 note 64.

90. Conn.—Mills v. Bishop, Kirby 4. Tenn.—Nashville, etc., R. Co. v. Wade, 2 Baxt. 444.

91. Tenn.—Nashville, etc., R. Co. v. Wade, supra.

92. Ga.—Jarrett v. City Electric R. Co., 47 S.E. 927, 120 Ga. 472.

93. Ga.—Jarrett v. City Electric R. Co., supra.

94. U.S.—Corpus Juris quoted in Baker v. Sisk, D.C.Okl., 1 F.R.D. 232, 236.

Me.—Collins v. Bugbee & Brown Co., 1 A.2d 178, 136 Me. 12.

Okl.—Harden v. Kifer, 111 P.2d 490, 188 Okl. 538.

50 C.J. p 601 note 38.

#### Substantial compliance

Process which is defective because not in the exact form required by statute, but which is in substantial compliance therewith, is "voidable process" and may be amended.—Howe v. Lisbon Sav. Bank & Trust Co., 14 A.2d 3, 111 Vt. 201.

#### Sufficient notice

Defects in the form of process do not render it void, but only irregular and amendable, where such defective process is sufficient to advise defendant of the nature of the case, the court in which it is filed, and his interest therein.—Texas Title Guaranty Co. v. Mardis, 98 P.2d 593, 186 Okl. 433.

Unimportant and unessential variations from the prescribed form of notice of commencement of action not affecting the substantial rights of defendant are irregularities which may be cured by amendment pursuant to the general authority of the court to amend a process, pleading, or other proceeding in furtherance of justice.—Mishkind-Feinberg Realty Co. v. Sidorsky, 82 N.E. 448, 189

N.Y. 402.—Stewart v. Transcontinental Car Forwarding Co. of Akron, Ohio, 7 N.Y.S.2d 926, 196 Misc. 427.

95. Me.—Collins v. Bugbee & Brown Co., 1 A.2d 178, 136 Me. 12.

Tex.—Allen v. Farm & Home Savings & Loan Ass'n of Missouri, Civ.App., 58 S.W.2d 866, error refused.

96. U.S.—Corpus Juris quoted in Baker v. Sisk, D.C.Okl., 1 F.R.D. 232, 236.

Me.—Inhabitants of Dover-Foxcroft v. Inhabitants of Lincoln, 192 A. 700, 135 Me. 184.

Wis.—Kentzler v. Chicago, etc., R. Co., 3 N.W. 869, 47 Wis. 641.

Process which is not in substantial compliance with statutory requirements is "void process," although not prohibited by law, and such process is not amendable.—Howe v. Lisbon Sav. Bank & Trust Co., 14 A.2d 3, 111 Vt. 201.

#### Acquisition of jurisdiction

Where jurisdiction of a nonresident defendant is acquired by service of summons on secretary of state as its attorney and by mailing of summons alone, failure to mail complaint with summons as required by statute may be treated as an irregularity and may be corrected, but, where jurisdiction of defendant is not thus acquired, court may not correct any defect in proceedings by which it was attempted to obtain jurisdiction.—Stewart v. Transcontinental Car Forwarding Co. of Ak-

statute relating to amendment of process authorizes it.<sup>97</sup>

**Nature of writ.** The writ may be changed from a *capias* to a summons,<sup>98</sup> unless, under the statute, the *capias* in the particular action was void,<sup>99</sup> or from a summons to a writ of attachment,<sup>1</sup> or from an attachment to a summons.<sup>2</sup>

**Variance.** A variance between a summons and declaration or complaint,<sup>3</sup> or between an original summons and a branch summons against a joint defendant residing in another county than that in which suit is instituted,<sup>4</sup> or between an original summons and copy,<sup>5</sup> may be corrected by amendment. A fortiori, if the language of the petition and that of the process are equivocal, and a variance exists or does not, according to the construction given, an amendment will be allowed to remove the equivocal features.<sup>6</sup> If an amendment of the complaint is allowed, process is also amendable to conform thereto.<sup>7</sup>

#### b. Contents of Writ Generally

Process may be amended, with respect to its contents, to add words required by statute which have been omitted, to change the words to conform to statutory requirements, and to strike out surplusage; and, when the writ is not directed to any officer, or to the wrong officer, it may be amended.

With respect to its contents, process may be amended to add words required by statute which

have been omitted,<sup>8</sup> to change the words to conform to statutory requirements,<sup>9</sup> to correct a mistake in the name of the county in which the process was issued,<sup>10</sup> to strike out surplusage,<sup>11</sup> or to substitute a successor in office as indorser on the writ.<sup>12</sup> Process may be amended to correct or supply a date therein or in the indorsement thereon, if omitted or wrongly given,<sup>13</sup> except in jurisdictions where the statute is construed as invalidating process for not complying with its terms in this respect.<sup>14</sup> It also may be amended when it fails to state or to state correctly, when and where the complaint will be filed,<sup>15</sup> or when it fails to show the authority for serving the attorney of the party instead of the party himself.<sup>16</sup>

**Direction to officer.** When the writ is not directed to any officer,<sup>17</sup> or to the wrong officer,<sup>18</sup> it may be amended. If the sheriff cannot serve the writ and for that reason it is directed to another officer, a failure to recite the facts making such direction necessary may be cured by amendment.<sup>19</sup>

#### c. Designation of Court and Place of Trial

Process may be amended to add the name, or to make a correction in the name, of the court in which the action was brought, and to designate the county in which plaintiff desires trial; but a court sitting for a county to which a writ on its face is not returnable is without authority to allow an amendment of the writ making it returnable to it.

Process may be amended to add the name,<sup>20</sup>

ron, Ohio, 7 N.Y.S.2d 926, 169 Misc. 427.

97. U.S.—Baker v. Sisk, D.C.Okl., 1 F.R.D. 232.

Me.—Inhabitants of Dover-Foxcroft v. Inhabitants of Lincoln, 192 A. 700, 135 Me. 184.

98. Del.—Ennis v. Ennis, 5 Del. 390.

Me.—Harvey v. Cutts, 51 Me. 604.

99. Vt.—Roy v. Phelps, 75 A. 13, 83 Vt. 174.

1. Me.—Carter v. Thompson, 15 Me. 464.

2. Me.—Ripley v. Harmony, 88 A. 161, 111 Me. 91.

3. Colo.—Sage Inv. Co. v. Haley, 149 P. 437, 59 Colo. 504.

Pa.—Simko v. Kunkle, 36 Pa. Dist. & Co. 229, 22 West.Co.L.J. 149.

50 C.J. p 605 note 33.

4. Ala.—Boardman v. Parrish, 56 Ala. 54.

5. N.Y.—Sivaslian v. Akulian, 166 N.Y.S. 535.

6. Ga.—Lamb v. McElwaney, 85 S. E. 705, 143 Ga. 490.

7. W.Va.—Shepherd v. Pocahontas Transp. Co., 131 S.E. 548, 100 W. Va. 703—O'Neal v. Pocahontas Transp. Co., 129 S.E. 478, 99 W.Va. 456.

8. Ga.—W. T. Rawleigh Co. v. Watts, 24 S.E.2d 213, 68 Ga.App. 786.

N.Y.—Schack v. Bryan, 193 N.Y.S. 548, 118 Misc. 90.

Tex.—Corpus Juris quoted in Nash v. Boyd, Civ.App., 225 S.W.2d 649, 653.

9. Tex.—Corpus Juris quoted in Nash v. Boyd, Civ.App., 225 S.W.2d 649, 652.

50 C.J. p 601 note 46.

10. Ga.—W. T. Rawleigh Co. v. Watts, 24 S.E.2d 213, 68 Ga.App. 786.

Tex.—Corpus Juris quoted in Nash v. Boyd, Civ.App., 225 S.W.2d 649, 652.

50 C.J. p 601 note 47.

11. Tex.—Corpus Juris quoted in Nash v. Boyd, Civ.App., 225 S.W.2d 649, 652.

50 C.J. p 601 note 48.

12. Mass.—Paine v. Gill, 2 Mass. 136.

Tex.—Corpus Juris quoted in Nash v. Boyd, Civ.App., 225 S.W.2d 649, 652.

13. Tex.—Corpus Juris quoted in Nash v. Boyd, Civ.App., 225 S.W.2d 649, 652.

50 C.J. p 601 note 50.

14. Vt.—Pollard v. Wilder, 17 Vt. 48.

15. Tex.—Corpus Juris quoted in Nash v. Boyd, Civ.App., 225 S.W.2d 649, 653.

50 C.J. p 601 note 52.

16. Mass.—Aldrich v. Blatchford, 56 N.E. 700, 175 Mass. 369.

Tex.—Corpus Juris quoted in Nash v. Boyd, Civ.App., 225 S.W.2d 649, 653.

17. Ga.—Neal-Millard Co. v. Owens, 42 S.E. 266, 115 Ga. 959—Gay v. Sylvania Cent. R. Co., 53 S.E.2d 713, 79 Ga.App. 362.

Tex.—Corpus Juris quoted in Nash v. Boyd, Civ.App., 225 S.W.2d 649, 653.

50 C.J. p 601 note 58.

18. Ga.—Georgia Power Co. v. Ozburn, 187 S.E. 154, 53 Ga.App. 797.

Tex.—Corpus Juris quoted in Nash v. Boyd, Civ.App., 225 S.W.2d 649, 653.

50 C.J. p 601 note 59.

19. Tex.—Corpus Juris quoted in Nash v. Boyd, Civ.App., 225 S.W.2d 649, 653.

50 C.J. p 602 note 60.

20. N.Y.—Walker v. Hubbard, 4 How.Pr. 154.

or to make a correction in the name,<sup>21</sup> of the court in which the action was brought. An amendment may also be made to designate the county in which plaintiff desires trial,<sup>22</sup> and to correct the name of the county seat of the county at which the court sits.<sup>23</sup> However, a court sitting for a county to which a writ of summons on its face is not returnable is without authority to allow an amendment of the writ making the writ returnable to it.<sup>24</sup>

#### d. Names and Addresses of Parties and Attorneys

Generally, an amendment may be allowed to correct the names and addresses of a party plaintiff or defendant or of an attorney, or to add or change matter of description of a party whose name already appears in the writ; but, except under some statutes, an amendment changing or substituting parties and thus materially altering the writ will not ordinarily be permitted.

As a general rule, an amendment may be allowed to correct the name of a party plaintiff or defendant,<sup>25</sup> or to add an indorsement of the name of

the person for whose use the action was brought,<sup>26</sup> or to substitute for the equitable owner's name the name of the legal owner for the use of the equitable owner,<sup>27</sup> unless it involves an adjudication on the rights of a third person not before the court and without its jurisdiction.<sup>28</sup> Matter of description of a party whose name already appears in the writ may be added or changed by amendment.<sup>29</sup> If the mistake is made by the clerk in taking the name from a memorandum or *præcipe* filed with him, the writ may be amended from such memorandum or *præcipe*.<sup>30</sup>

The rule authorizing the correction of error by amendment where the right party is sued in the wrong name does not, however, apply where the right party is not before the court.<sup>31</sup> Further, it is held that an amendment in names of parties which would materially alter the writ will not be allowed, as, for example, to substitute another's name for that of the sole party plaintiff,<sup>32</sup> or sole party de-

21. N.D.—James River Nat. Bank v. Haas, 15 N.W.2d 442, 73 N.D. 374, 154 A.L.R. 1005.  
50 C.J. p 602 note 63.

#### Dismissal barring action

Where summons served on defendant erroneously specified the county court instead of district court as the court in which action was brought, but the complaint served with the summons showed that action was brought in district court and was for an amount beyond jurisdiction of the county court, the action was within the exclusive jurisdiction of the district court, and, where a dismissal would bar action under statute of limitations, district court erred in refusing to permit amendment of summons to show that action was brought in district court.—James River Nat. Bank v. Haas, *supra*.

22. N.Y.—Wallace v. Dimmick, 24 Hun 635, distinguishing Osborn v. McCloskey, 55 How.Pr. 345.

23. Okl.—Tyler Boat Works v. Schreiner, 153 P.2d 1004, 194 Okl. 601.

24. R.I.—Sheldon v. Westcott, 25 A. 2d 219, 67 R.I. 480.

#### Intention held immaterial

In determining whether superior court sitting for a county to which writ of summons on its face was not returnable had jurisdiction to allow an amendment of the writ making it returnable to that county, plaintiff's intention in issuing writ, and whether defendant's counsel must have known of such intention by reason of his correspondence with plaintiff's counsel and receipt of a copy of plaintiff's declaration, were immaterial.—Sheldon v. Westcott, *supra*.

25. Fla.—Walker Fertilizer Co. v.

- Race, 166 So. 283, 123 Fla. 84, 105 A.L.R. 341.

- Mass.—Jay State Wholesale Drug Co. v. Whitman, 182 N.M. 361, 280 Mass. 188.

- Mo.—Giddens v. Bankers' Guaranty Life Co., 37 S.W.2d 658, 225 Mo. App. 742.

- N.J.—Patrick v. Brago, 66 A.2d 749, 4 N.J.Super. 226.

- N.Y.—City of Long Beach v. Madden, 65 N.Y.S.2d 176, 271 App.Div. 793, appeal denied 68 N.Y.S.2d 434, 271 App.Div. 931, appeal dismissed 74 N.E.2d 553, 297 N.Y. 578—Rockefeller v. Hein, 28 N.Y.S.2d 266, 176 Misc. 659—Gordes v. Reynolds, 28 N.Y.S.2d 622.

- N.C.—Clevenger v. Grover, 193 S.E. 12, 212 N.C. 13, 124 A.J.R. 82.

- Okl.—Exchange Nat. Bank of Tulsa v. Lyons, 87 P.2d 123, 184 Okl. 328—Chaney v. National Bank of Commerce of Tulsa, 66 P.2d 917, 179 Okl. 469.

- W.Va.—Hayhurst v. J. Kenny Transfer Co., 158 S.E. 506, 110 W.Va. 395.

- 50 C.J. p 602 note 65.

#### Facts in particular case

The amendment of process by substituting a new defendant in place of the one named on theory that the proper defendant was intended to be sued but was sued by the wrong name is permitted according to the facts in the particular case.—Grewenig v. American Baking Co., 13 N.E. 2d 183, 298 Ill.App. 604.

#### Individuals composing partnership

In action on note by "Miller Bailey & Company," amendments of *præcipe* and summons, so as to show names of individuals composing partnership conducted under name of "Miller Bailey & Company," were

- permissible.—Miller v. Bradway, 300 N.W. 889, 299 Mich. 574.

26. N.J.—Paterson Tp. v. Munn, 18 N.J.Law 440.

27. Miss.—Brandt Mercantile Co. v. Lang, 56 So. 447, 100 Miss. 328.

28. U.S.—Frank v. Union Cent. Life Ins. Co., C.C.Tenn., 130 F. 224.  
50 C.J. p 602 note 70.

29. N.J.—Lord's Cut Flower Co. v. Curcio, 35 A.2d 471, 22 N.J.Misc. 42.

- 50 C.J. p 602 note 71.

#### Defect in designation

The court may permit an amendment to the summons in case of some defect in the designation of the defendant.—Rockefeller v. Hein, 28 N.Y.S.2d 266, 176 Misc. 659.

#### "Interlocutory matter"

Where a summons was against an individual, trading as a named company, "a New Jersey corporation," amendment thereof by striking out the quoted words in order to conform to the complaint and properly to describe defendant already in court was an "interlocutory matter" within the court rule conferring authority on a circuit court judge sitting as a supreme court commissioner.—Lord's Cut Flower Co. v. Curcio, 35 A.2d 471, 22 N.J.Misc. 42.

30. U.S.—Furniss v. Ellis, C.C.Va., 9 F.Cas.No.5,162, 2 Brock. 14.  
50 C.J. p 602 note 72.

31. N.J.—Patrick v. Brago, 66 A.2d 749, 4 N.J.Super. 226.

- W.Va.—Hayhurst v. J. Kenny Transfer Co., 158 S.E. 506, 110 W.Va. 395.

32. Me.—Clark v. Anderson, 68 A. 633, 103 Me. 134.

defendant,<sup>33</sup> or to add a party plaintiff's<sup>34</sup> or defendant's<sup>35</sup> name to a writ which had none, or to add the name of a defendant to the names already there.<sup>36</sup>

It has been broadly stated, however, that the court may, in the furtherance of justice, amend any process by adding or striking out the name of any party,<sup>37</sup> and, under some statutes, the name of a party entirely omitted from the summons may be supplied,<sup>38</sup> as under a provision authorizing the court by amendment to correct a mistake in the name of a party, "or a mistake in any other respect."<sup>39</sup> It has also been held that, where no one is harmed thereby, the heirs of a deceased party defendant may be added by amendment,<sup>40</sup> or a father's name as defendant substituted for that of

the son.<sup>41</sup> If a defendant accepts service on a summons in blank, the blank may be filled in later by amendment.<sup>42</sup> Also a writ may be amendable by striking out the name of a joint party.<sup>43</sup>

**Capacity of party.** An amendment specifying or altering the capacity in which plaintiff sues,<sup>44</sup> or the capacity in which defendant is sued,<sup>45</sup> may be allowed, but not when the new description would change a civil action into a criminal prosecution.<sup>46</sup>

**Addresses of parties.** Ordinarily an amendment may be allowed to correct an error in plaintiff's address,<sup>47</sup> or to state the residence of defendant.<sup>48</sup>

**Names and addresses of attorneys.** A summons may be amended when it fails to give the address of plaintiff's attorney,<sup>49</sup> or by substituting the in-

33. N.C.—Hogsed v. Pearlman, 195 S.E. 789, 213 N.C. 240. 50 C.J. p 602 note 75.

**Corporation for company**

(1) Where summons was directed to company which had long since ceased to exist, and service was on an employee of a different corporation which did not operate the property of the company named in the summons, at least openly, until nearly two years after the injury to plaintiff, plaintiff was not entitled to have the process amended by substituting the name of such corporation in lieu of the company.—State ex rel. General Mills v. Waltner, 156 S.W.2d 664, 348 Mo. 852.

(2) In action for injuries sustained in operation of truck owned by corporation plaintiff's motion to amend summons and complaint by striking out words "H. Pearlman, trading as Pearlman's Railroad Salvage Company," and substituting the words "Pearlman's Railroad Salvage Company, Inc." was properly denied, since plaintiff sought to add by substitution as a party defendant the corporation which had never been served with summons.—Hogsed v. Pearlman, 195 S.E. 789, 213 N.C. 240.

**Corporation for individual**

Where action was brought against individual, allowance of amendment of summons by substituting name of corporation of which individual defendant was president and rendering judgment against corporation without service of process on it was held unauthorized.—Derek v. Elder, 249 N.W. 724, 68 N.D. 635.

34. Me.—Jones v. Sutherland, 73 Me. 157.

35. Ga.—Frank Adams Electric Co. v. Witman, 85 S.E. 819, 16 Ga.App. 574.

**Name filled in on back**

Where there was a complete absence of name of defendant in sum-

mons but some one other than person who prepared summons filled in on back of printed form the name of a party, which, although similar to that of defendant, was not spelled same way and contained no initial, summons was jurisdictionally defective and could not be corrected by amendment, even though there was no doubt that party served was defendant intended and was party appearing specially to vacate summons.—Rockefeller v. Hein, 28 N.Y.S.2d 266, 176 Misc. 659.

36. N.Y.—Holmes v. Daniels, 86 N.Y.S. 19. 50 C.J. p 602 note 79.

37. N.C.—Choate Rental Co. v. Justice, 193 S.E. 817, 212 N.C. 523.

**Liberal construction of statute**

The statute providing that the court may, either before or after judgment, in furtherance of justice amend its pleading or process by adding or striking out the name of any party should be liberally construed.—Boykin v. Capehart, 31 S.E.2d 506, 205 S.C. 276.

**Addition of name of plaintiff**

N.C.—Fishell v. Evans, 137 S.E. 865, 193 N.C. 660. 50 C.J. p 602 note 78.

38. Mass.—Ideal Financing Ass'n v. McPhail, 70 N.E.2d 311, 320 Mass. 521.

**Addition of plaintiff**

Where action on an existing cause of action had been seasonably commenced against defendant, who was served with process, but writ failed to name any plaintiff, following the allowance of amendment by inserting name of plaintiff, after proper notice to defendant, plaintiff must be taken to be the one by whom as plaintiff the action was intended to be brought.—Ideal Financing Ass'n v. McPhail, supra.

**Defendant named in complaint**

Where the name of one defendant

was inadvertently omitted from the title of the action in the summons, but appeared in the title of the action in the complaint attached to and personally served on that defendant with the summons, and the complaint stated a cause of action against him by name, the court properly amended the summons on plaintiff's motion, so as to conform to the complaint, notwithstanding defendant made a special appearance to vacate the service of summons.—Griffin v. Faribault Fair & Agricultural Ass'n, 280 N.W. 7, 203 Minn. 97.

39. N.Y.—Van Wyck v. Hardy, 4 Abb.Dec. 496, 39 How.Pr. 392.

40. N.Y.—Steinhardt v. Baker, 46 N.Y.S. 707, 20 Misc. 470, affirmed 49 N.Y.S. 357, 25 App.Div. 197, affirmed 57 N.E. 629, 163 N.Y. 410.

41. Minn.—Morrison County Lumber Co. v. Duclos, 154 N.W. 952, 131 Minn. 173.

42. S.C.—Wicker v. Pope, 40 S.C.L. 366.

43. Me.—Doherty v. Bird, 102 A. 229, 116 Me. 416.

44. Mass.—Drew v. Farnsworth, 71 N.E. 783, 186 Mass. 365. 50 C.J. p 603 note 86.

45. N.Y.—Leardon v. Dart, 23 N.Y.S. 2d 542, 175 Misc. 318. 50 C.J. p 603 note 87.

46. N.C.—Walton v. Kirby, 3 N.C. 174. 50 C.J. p 603 note 88.

47. N.Y.—Drake v. Drake, 92 N.Y.S. 2d 106, 196 Misc. 333—Brooklyn Bldg. Material Co. v. De Goods, 206 N.Y.S. 678, 123 Misc. 917.

48. Ga.—White v. Hart, 35 Ga. 269. 50 C.J. p 602 note 67.

49. N.Y.—Wiggins v. Richmond, 58 How.Pr. 376. 50 C.J. p 603 note 89.

dorsement of the name of an attorney of the court for that of one not admitted to practice in the court.<sup>50</sup>

#### e. Form or Cause of Action

A writ may be amended by designating the form of action, or by stating the nature of the cause of action; but a change in the form or cause of action cannot be made where it would prejudice defendant, unless it is done with the consent of the parties.

A writ may be amended by designating the form of action,<sup>51</sup> or by stating the nature of the cause of action.<sup>52</sup> A change in the form or cause of action cannot be made, however, where it would prejudice defendant,<sup>53</sup> unless it is done with the consent of the parties,<sup>54</sup> or after appearance of defendant and without prejudice to his rights.<sup>55</sup> The writ may be amended by changing the indorsement thereon so as to add other counts to the declaration.<sup>56</sup> The alteration of the form of a writ in an effort to make it serve as the commencement of several different causes of action is in effect an attempt to change a substantial provision of the statute governing the issuance of writs and is not a mere irregularity in form which may be remedied by amendment.<sup>57</sup>

#### f. Relief and Amount of Damages

A writ may be amended by stating the nature of the relief demanded, or by stating, or by reducing or increasing, the amount of damages asked for.

A writ may be amended by stating the nature of the relief demanded,<sup>58</sup> or by stating,<sup>59</sup> or by reducing<sup>60</sup> or increasing,<sup>61</sup> the amount of damages asked for. The amount may be increased, even though in the writ's amended form it could not have been served by the officer who served the original writ,<sup>62</sup>

or been made returnable to the court to which the original writ was returnable.<sup>63</sup> It has been held, however, that, in an action where the jurisdiction of the court depended on the amount of damages claimed, the omission from the writ of any amount claimed affected the jurisdiction of the court and precluded it from assuming jurisdiction even for the purpose of amending the writ.<sup>64</sup>

#### g. Directions for Return or Appearance

Writs held void because they violate some mandatory provision of law relating to directions therein as to the return of the process are not amendable, and a writ returnable to a court without jurisdiction of the petition is likewise not amendable; but defects in the directions for return and answering, not affecting the validity of the writ, may be amended in the discretion of the court in the absence of any showing of injustice or prejudice resulting therefrom.

Under the rule that void process is not amendable, as discussed supra § 114 b, writs held void because they violate some mandatory provision of law relating to directions therein as to the return of the process are not amendable.<sup>65</sup> A writ returnable to a court without jurisdiction of the petition is void and not amendable.<sup>66</sup> However, under the rule that formal defects are amendable, where the writ is tested in the name of the judge of the court having jurisdiction,<sup>67</sup> or a copy of the complaint giving the correct information is served with the summons,<sup>68</sup> an error in the description of the court may be amended, where it appears that defendant has not been misled thereby.

Other defects in the directions for return and answering, not affecting the validity of the writ, may be amended in the discretion of the court in the absence of any showing of injustice or prej-

50. U.S.—Jewett v. Garrett, C.C.N. J., 47 F. 625.

Wis.—Hammond-Chandler Lumber Co. v. State Industrial Commn., 158 N.W. 292, 163 Wis. 596.

51. Ill.—Chester, etc., Coal, etc., Co. v. Lickiss, 72 Ill. 521.

Pa.—Smith v. West Maryland R. Co., 35 Pa.Co. 701.

52. Ind.—State v. Hood, 6 Blackf. 260.

50 C.J. p 603 note 92.

53. N.Y.—Lane v. Beam, 19 Barb. 51, 1 Abb.Pr. 65.

50 C.J. p 603 note 93.

#### Effect of allowance

The mere allowance of amendment to writ is conclusive as to the identity of the cause of action.—Ideal Financing Ass'n v. McPhail, 70 N.E. 2d 311, 320 Mass. 521.

54. N.C.—Anonymous, 2 N.C. 401.

55. N.Y.—Cooper v. Kinney, 2 Hill. 12, 6 Abb.Pr. 380.

56. Ala.—Moore v. Smith, 19 Ala. 774.

57. R.I.—Friedman v. Arnold, 57 A. 2d 444, 73 R.I. 451.

58. U.S.—Chamberlain v. Bittersohn, C.C.S.C., 48 F. 42.

59. Conn.—Sanford v. Bacon, 54 A. 204, 75 Conn. 541.

50 C.J. p 603 note 98.

60. Cal.—Brann v. Blum, 72 P. 168, 138 Cal. 644.

Me.—Converse v. Damariscotta

Bank, 15 Me. 431.

61. Mass.—Laxton v. Hay, 98 N.E. 29, 211 Mass. 463, Ann.Cas.1913B 709.

50 C.J. p 603 note 1.

62. Mass.—Neszy v. Beard, 115 N. E. 420, 226 Mass. 332.

R.I.—Quaglieri v. Venditti, 102 A. 177, 40 R.I. 537.

63. Mass.—Neszy v. Beard, 115 N. E. 420, 226 Mass. 332.

64. N.H.—Holt v. Molony, 2 N.H. 322.

50 C.J. p 603 note 4.

65. Me.—Inhabitants of Dover-Foxcroft v. Inhabitants of Lincoln, 192 A. 700, 135 Me. 184.

50 C.J. p 604 note 7.

Writ naming past date as return day  
Me.—Inhabitants of Dover-Foxcroft v. Inhabitants of Lincoln, 192 A. 700, 135 Me. 184.

N.J.—Hamlin v. Coppel, 155 A. 676, 9 N.J.Misc. 651.

66. Neb.—Land v. Christenson, 189 N.W. 838, 109 Neb. 101.

50 C.J. p 604 note 8.

67. Ga.—Kelly v. Fudge, 59 S.E. 19, 2 Ga.App. 759.

50 C.J. p 604 note 10.

68. Ga.—Stansell v. Grant, 48 S.E. 2d 386, 77 Ga.App. 126.

Tex.—Galveston, etc., R. Co. v. Coker, Civ.App., 135 S.W. 179.

udice resulting therefrom.<sup>69</sup> So, where defendant appeared at the legal time of holding the court and at which the process ought to have required him to appear,<sup>70</sup> or if, failing to appear, it is shown that he has received notice by service of the writ,<sup>71</sup> or by the terms of his bond in the case of bail,<sup>72</sup> or if he has filed his answer,<sup>73</sup> there is no prejudice to defendant's right, and the writ is amendable. Where it appears that some of the defendants have appeared and others have not, the directions for return may be amended if reservice on defendants who have not appeared is provided for.<sup>74</sup>

If a writ is made returnable at the wrong place,<sup>75</sup> or if it fails to name the place,<sup>76</sup> it is amendable, when it appears that defendant has not been prejudiced. If, however, defendant has had no notice of the suit and does not appear, the amendment should be refused.<sup>77</sup> If the return day is properly given, an amendment may be allowed changing it to the next term, when the amendment would be in furtherance of justice.<sup>78</sup> Also an indefinite designation of the return day may be made definite by amendment.<sup>79</sup>

*Resultant injustice* in consequence of a refusal to amend constitutes an additional reason for allowing such amendments.<sup>80</sup>

#### h. Style, Date, Teste, Signature, and Seal

Process may be amended when it does not have the style required by law or when there is an omission or defect with respect to the date, teste, signature, or

seal; but, if the omission or defect renders the process void, it is not amendable.

Process may be amended when it does not have the style required by law,<sup>81</sup> as where it omits the name of the state in which the process was issued;<sup>82</sup> and it has been held that an amendment may be allowed to cure a defect arising from the nonobservance of a constitutional direction as well as of a statutory one.<sup>83</sup>

*Date.* Process may be amended when the date of its issuance is omitted or incorrectly stated.<sup>84</sup> There is no error in allowing an amendment as to the date of the writ if such allowance is made to have the record conform to the truth, even though, by reason of such amendment, plaintiff is thereby enabled to show that his action is not barred by limitations;<sup>85</sup> but this rule is subject to the limitation that an amendment which would substitute for the date of the writ a date which would bring the action within the period of limitation may be allowed only for the purpose of making the record conform to the truth and not merely to avoid the running of the statute of limitations.<sup>86</sup>

*Seal.* Process may be amended when the seal of the court is omitted,<sup>87</sup> unless it otherwise appears to be wholly void.<sup>88</sup> In jurisdictions holding that a writ without seal is no writ at all, the seal cannot be added by amendment.<sup>89</sup>

*Signature or teste.* A summons may be amended when there is an omission of, or defect in, the signature or teste,<sup>90</sup> but not in jurisdictions where such

69. U.S.—*Speare v. Stone*, N.H., 193 F. 375, 113 C.C.A. 301—*Stone v. Speare*, C.C.N.H., 175 F. 584. 50 C.J. p 604 note 12.

70. U.S.—*Speare v. Stone*, N.H., 193 F. 375, 113 C.C.A. 301. 50 C.J. p 604 note 13.

71. N.J.—*McEvoy v. Hudson County School Dist. No. 8*, 38 N.J.Eq. 420. 50 C.J. p 604 note 14.

72. N.C.—*Merrill v. Barnard*, 61 N. C. 569.

73. N.C.—*Thomas v. Womack*, 64 N. C. 657.

74. Ga.—*Turpin v. Taylor*, 84 S.E. 547, 143 Ga. 224.

75. Ga.—*Kelly v. Fudge*, 59 S.E. 19, 2 Ga.App. 759. 50 C.J. p 604 note 18.

76. N.Y.—*Gould v. Meyer*, 220 N.Y. S. 812, 129 Misc. 166. 50 C.J. p 604 note 19.

77. R.I.—*Brainard v. Mitchell*, 5 R.I. 111. 50 C.J. p 604 note 20.

78. Ga.—*Lassiter v. Carroll*, 13 S.E. 825, 87 Ga. 731.

79. Me.—*Ames v. Weston*, 16 Me. 266.

80. N.Y.—*Spruhn v. Brown*, 116 N. Y.S. 568, 63 Misc. 46. 50 C.J. p 604 note 23.

81. Tex.—*Corpus Juris* quoted in *Nash v. Boyd*, Civ.App., 225 S.W. 2d 649, 653. 50 C.J. p 601 note 55.

82. Ill.—*Harris v. Jenks*, 3 Ill. 475. Tex.—*Corpus Juris* quoted in *Nash v. Boyd*, Civ.App., 225 S.W.2d 649, 653.

83. Tex.—*Corpus Juris* quoted in *Nash v. Boyd*, Civ.App., 225 S.W.2d 649, 653.

Wis.—*Ilisley v. Harris*, 10 Wis. 95.

84. Ky.—*Terry v. Terry*, 95 S.W.2d 282, 264 Ky. 625. 50 C.J. p 604 note 25.

85. Mass.—*Perry v. Sapeilo*, 8 N.E. 2d 810, 297 Mass. 242.

Evidence held to warrant finding that proposed amendments to writs which would strike out date of writs which was beyond one-year period of limitation applicable and substitute date within such period would make records conform to truth and

enable plaintiffs to sustain their actions for the causes for which they were brought.—*Perry v. Sapeilo*, supra.

86. Mass.—*Perry v. Sapeilo*, supra—*O'Brien v. McManama*, 183 N.E. 176, 281 Mass. 89.

87. Okl.—*Texas Title Guaranty Co. v. Mardis*, 98 P.2d 593, 186 Okl. 433. 50 C.J. p 604 note 26.

88. U.S.—*Dwight v. Merritt*, C.C.N. Y., 4 F. 614, 18 Blatchf. 305. 50 C.J. p 605 note 27.

89. Me.—*Hamilton v. George*, 152 A. 631, 129 Me. 474. 50 C.J. p 605 note 29.

90. N.C.—*Hooker v. Forbes*, 162 S.E. 903, 202 N.C. 364.

Okl.—*Harden v. Kifer*, 111 P.2d 490, 188 Okl. 538—*Texas Title Guaranty Co. v. Mardis*, 98 P.2d 593, 186 Okl. 433. 50 C.J. p 605 note 30.

*Pretrial amendment*  
Where the sheriff served a summons before discovering that the original was not signed by the clerk, to whom he sent it back for signa-

omission renders the process void.<sup>91</sup>

## § 116. Amendment of Return

- a. In general
- b. By whom amendable
- c. Time of making amendment
- d. Jurisdiction to authorize; discretion
- e. Procedure
- f. Operation and effect

### a. In General

A return or affidavit of service of process, or proof of service by publication, may, as a general rule, be amended to remedy defects therein or to make it conform to the truth, and to the statutory requirements, where such exist; but a proposed amendment will not be allowed if it states an untruth or where prejudice

to rights that have accrued meanwhile will result from the amendment.

An officer's return of service of process may, as a general rule, be amended to remedy defects therein or to make it conform to the truth, and to the statutory requirements, where such exist.<sup>92</sup> The right to amend is a common-law right in no way dependent on statute,<sup>93</sup> although frequently expressly declared by statute.<sup>94</sup> Equally amendable are affidavits of service made by private persons,<sup>95</sup> proofs of service by publication,<sup>96</sup> affidavits of service on nonresidents by nonresident officers,<sup>97</sup> and acknowledgments of service.<sup>98</sup>

A proposed amendment will not be allowed if it states an untruth, or is in direct conflict with the facts.<sup>99</sup> Where prejudice to rights that have ac-

ture before completing his return, the superior court had discretion to allow a pretrial amendment by affixing the clerk's signature.—North Carolina Joint Stock Land Bank of Durham v. Aycock, 28 S.E.2d 494, 223 N.C. 837.

#### Termination of office

Where court's seal on a writ was duly authenticated by an authorized clerk at time of its issue to an attorney, fact that at time writ was dated, signing clerk had ceased to hold office did not make the writ void, but constituted a technical misnomer or irregularity, and writ could be in the discretion of the trial court be amended by striking out signature of clerk appearing thereon and writing in place thereof name of clerk's successor in office.—Burger v. Brindie, 10 A.2d 353, 64 R.I. 86.

91. Me.—Israelson v. Gallant, 154 A. 574, 130 Me. 213.  
50 C.J. p 605 note 32.

#### Signature of clerk

Me.—Israelson v. Gallant, supra.  
50 C.J. p 605 note 32 [a].

92. U.S.—Pen-Ken Gas & Oil Corporation v. Warfield Natural Gas Co., C.C.A.Ky., 137 F.2d 871, certiorari denied 64 S.Ct. 431, 320 U.S. 800, 88 L.Ed. 483, rehearing denied 64 S.Ct. 634, 321 U.S. 803, 88 L.Ed. 1089.

Ala.—Jaffe v. Leatherman, 146 So. 273, 226 Ala. 182.

Cal.—North Side Property Owners' Ass'n v. Los Angeles County, 161 P.2d 613, 70 Cal.App.2d 598—Alpha Stores v. You Bet Mining Co., 63 P.2d 1137, 18 Cal.App.2d 249, followed in 63 P.2d 1138, 18 Cal.App. 2d 767.

Ill.—First Nat. Bank v. Paris, 193 N.E. 207, 358 Ill. 378—Cowen v. Harding Hotel Co., 67 N.E.2d 707, 329 Ill.App. 239, appeal dismissed 72 N.E.2d 177, 396 Ill. 470.

Ky.—Miller v. National Bank of London, 116 S.W.2d 320, 278 Ky. 243.

Mass.—Everett v. Merrill, 184 N.E. 371, 282 Mass. 72—Zani v. Phandor Co., 183 N.E. 500, 281 Mass. 139—Modist v. Lynch, 177 N.E. 861, 277 Mass. 135.

Neb.—De Lair v. De Lair, 21 N.W.2d 498, 146 Neb. 771—State Furniture Co. v. Abrams, 19 N.W.2d 627, 146 Neb. 342.

Pa.—Fackenthall v. Wight, 158 A. 580, 104 Pa.Super. 215—Rogers v. Metropolitan Life Ins. Co., 99 Pa. Super. 505—Rittenborg v. Stein, 97 Pa.Super. 554—Herron v. Corbett, 22 Pa.Dist. & Co. 595, 27 Berks Co. 54—Wood v. Kuhn, Com.Pl., 22 Erie Co. 236—Second Nat. Bank of Wilkes-Barre v. Payne, Com.Pl., 35 Luz.Leg.Reg. 60—Weiss v. Easton Hudson & Essex Co., Com.Pl., 26 North.Co. 268.

S.D.—Shenandoah Nat. Bank v. Reininger, 237 N.W. 765, 58 S.D. 568. Tex.—Gunter's Unknown Heirs and Legal Representatives v. Lagow, Civ.App., 191 S.W.2d 111, error refused—Wagner v. Urban, Civ.App., 170 S.W.2d 270—Watson v. Glenn, Civ.App., 82 S.W.2d 704.

Va.—Buttery v. Robbins, 14 S.E.2d 544, 177 Va. 388—International Brotherhood of Boilermakers, Iron Shipbuilders, Welders and Helpers of America v. Wood, 175 S.E. 45, 162 Va. 517.

W.Va.—Tioga Coal Corporation v. Silman, 22 S.E.2d 873, 125 W.Va. 58.

50 C.J. p 606 note 70.

#### Purpose

A return of service of process which fails to show the necessary jurisdictional facts, although such facts exist, may be amended so as to conform to the truth, not for the purpose of validating a void judgment, but to show that a judgment never was void.—State ex rel. Duckworth v. District Court of Seventeenth Judicial Dist., 80 P.2d 367, 107 Mont. 97.

#### Amendment held not effected

Where, after judgment, the clerk changed the record to indicate that summons was returnable to an earlier term than the actual return term, the court, in ordering the records corrected to conform to the true facts, did not amend the sheriff's return, but merely restored a record that had been the subject of spoliation.—Henneke v. Strack, Mo.App., 101 S.W.2d 743.

93. Iowa.—Mintie v. Sylvester, 197 N.W. 305, 197 Iowa 424.  
50 C.J. p 607 note 72.

94. Tex.—Employer's Reinsurance Corporation v. Brock, Civ.App., 74 S.W.2d 435, error dismissed.

The intent of the statute providing that court may allow any process, return, or proof of service to be amended is to authorize the court to "allow" an amendment to a sheriff's return on the motion of the sheriff, or of a party so as to cure an "insufficiency," and thus avoid unnecessary delay.—Anthony v. Downs Amusement Co., 205 S.W.2d 925, 239 Mo.App. 1136.

95. N.Y.—Air Conditioning Training Corp. v. Pirrote, 60 N.Y.S.2d 35, 270 App.Div. 391—Factrow v. Rothbart, 252 N.Y.S. 721, 141 Misc. 470.

S.D.—Halverson v. Sonotone Corp., 27 N.W.2d 596, 71 S.D. 568.

Wash.—John Hancock Mut. Life Ins. Co. v. Gooley, 83 P.2d 221, 196 Wash. 357, 118 A.L.R. 1484.

50 C.J. p 607 note 74.

96. Ark.—Blackwell Oil & Gas Co. v. Maddux, 27 S.W.2d 514, 181 Ark. 726.

50 C.J. p 607 note 75.

97. N.Y.—Kelly v. Schramm, 189 N.Y.S. 629, 197 App.Div. 377.

98. Colo.—Wilson v. Carroll, 250 P. 555, 80 Colo. 234.

50 C.J. p 607 note 77.

99. Mo.—State ex rel. General Mills



crued meanwhile will result from the amendment, it should not be permitted,<sup>1</sup> as where the effect of the amendment, if allowed, would be to avoid a judgment, to render it erroneous, or subject it to reversal,<sup>2</sup> or to nullify an appeal taken from a judgment which is void unless supported by the amended return,<sup>3</sup> or to make a judgment in an earlier suit, in which the return was made, admissible in a later suit against a defendant who was not a party to the earlier suit.<sup>4</sup> Amendments to a return so as to show diligent search for defendant, inability to find him, and return of the writ to the attorney without service will not be allowed merely to avoid the running of the statute of limitations,<sup>5</sup> but there is no error in allowing such amendments to have the record conform to the truth, even though, by reason of such amendments, plaintiff is thereby enabled to show that his action is not barred by limitations.<sup>6</sup>

**Right to compel amendment.** If the return is, on its face, defective, the sheriff may be compelled to correct it;<sup>7</sup> but he cannot be compelled to revise, alter, or contradict a return which is complete in form and conforms to the law, the only remedy in such a case being an action against the officer for a false return.<sup>8</sup>

### b. By Whom Amendable

The return can be amended only by the person actually serving the process, whether an officer or private individual; but, under a statute restricting proof of service to the single method of proof by an officer of

the court, an individual or officer of a court in a foreign state cannot be allowed to amend his return.

The return can be amended only by the person actually serving the process, whether an officer<sup>9</sup> or private individual,<sup>10</sup> or officer acting as an individual when disqualified to act as an officer.<sup>11</sup> However, under a statute restricting proof of service to the single method of proof by an officer of the court, an individual<sup>12</sup> or an officer of a court in a foreign state<sup>13</sup> cannot be allowed to amend his return.

Even where the statute provides for proof of service of process in a foreign state by an officer thereof, an officer of a foreign state cannot amend his return after he has ceased to act as officer.<sup>14</sup> It has been held that an ex-sheriff cannot amend a return of a service made by his deputy during his term of office,<sup>15</sup> unless the deputy joins in, and swears to, the petition to amend;<sup>16</sup> but, if the deputy joins, the amendment may be allowed,<sup>17</sup> and the fact that the order in terms permits the ex-sheriff, rather than the deputy, to amend is immaterial.<sup>18</sup>

### c. Time of Making Amendment

Generally, an amendment may be allowed at any time, and at any stage of the proceedings; and it may be made after the lapse of years, or after the officer who made the return has gone out of office.

As a general rule, an amendment may be allowed at any time, and at any stage of the proceedings.<sup>19</sup> Thus the amendment may be made after discharge of the jury,<sup>20</sup> or even after judgment or decree.<sup>21</sup>

v. Waltner, 156 S.W.2d 664, 348 Mo. 852.

Pa.—Second Nat. Bank of Wilkes-Barre v. Payne, Com.Pl., 35 Luz. Leg.Reg. 60.

Va.—International Brotherhood of Boilermakers, Iron Shipbuilders, Welders and Helpers of America v. Wood, 175 S.E. 45, 162 Va. 517.

W.Va.—Tioga Coal Corporation v. Silman, 22 S.E.2d 873, 125 W.Va. 58.

50 C.J. p 607 note 73.

1. Ala.—Jaffe v. Leatherman, 146 So. 273, 226 Ala. 132.

Me.—City of Old Town v. Robbins, 186 A. 663, 134 Me. 235.

Pa.—Fackenthall v. Wight, 158 A. 580, 104 Pa.Super. 215—Weiss v. Easton Hudson & Essex Co., Com.Pl., 26 North.Co. 263.

50 C.J. p 607 note 80.

2. Mo.—Coerver v. Crescent Lead, etc., Corp., 236 S.W. 3, 315 Mo. 276. 50 C.J. p 607 note 81.

3. Wis.—Rehmstedt v. Bricoe, 13 N.W. 687, 55 Wis. 616—Hall v. Graham, 5 N.W. 943, 49 Wis. 553.

4. Ga.—Hodges v. Stuart Lumber Co., 79 S.E. 462, 140 Ga. 569.

5. Mass.—Perry v. Sapeilo, 8 N.E.2d 810, 297 Mass. 242.

6. Mass.—Perry v. Sapeilo, supra.

7. Pa.—Mentz v. Hamman, 5 Whart. 150, 34 Am.D. 546.

Wash.T.—Washington Mill Co. v. Kinnear, 1 Wash.T. 99.

8. Wash.T.—Washington Mill Co. v. Kinnear, supra.

50 C.J. p 607 note 85.

9. Ill.—Waite v. Green River Special Drain Dist., 80 N.E. 725, 226 Ill. 207.

50 C.J. p 607 note 88.

10. Wis.—Wausau First Nat. Bank v. Kromer, 105 N.W. 823, 126 Wis. 436.

50 C.J. p 607 note 89.

11. S.D.—Artell v. Rooks, 162 N.W. 751, 39 S.D. 31.

12. Mo.—Priest v. Capitain, 139 S. W. 204, 236 Mo. 446.

13. Mo.—Priest v. Capitain, supra.

14. Mo.—Givens v. Harlow, 158 S. W. 355, 251 Mo. 231.

15. Or.—Knapp v. Wallace, 92 P. 1054, 50 Or. 348, 126 Am.S.R. 742.

16. Ala.—Palatine Ins. Co. v. Hill, 121 So. 412, 219 Ala. 123.

17. Ala.—Palatine Ins. Co. v. Hill, supra.

18. Ala.—Palatine Ins. Co. v. Hill, supra.

19. U.S.—Pen-Ken Gas & Oil Corporation v. Warfield Natural Gas Co., C.C.A.Ky., 137 F.2d 871, certiorari denied 64 S.Ct. 431, 320 U.S. 800, 88 L.Ed. 483, rehearing denied 64 S.Ct. 634, 321 U.S. 803, 88 L.Ed. 1089.

Ala.—Jaffe v. Leatherman, 146 So. 273, 226 Ala. 132.

Pa.—Wood v. Kuhn, Com.Pl., 22 Erie Co. 236.

Tex.—Lafleur v. Switzer, Civ.App., 109 S.W.2d 239—Corpus Juris cited in Employer's Reinsurance Corporation v. Brock, Civ.App., 74 S.W. 2d 435, 445, error dismissed.

50 C.J. p 607 note 2.

20. Mass.—Browning-Drake Corporation v. Amertran Sales Co., 175 N.E. 45, 274 Mass. 545.

21. U.S.—Pen-Ken Gas & Oil Corporation v. Warfield Natural Gas Co., C.C.A.Ky., 137 F.2d 871, certiorari denied 64 S.Ct. 431, 320

It may be made after the lapse of years,<sup>22</sup> on testimony showing the propriety of so doing,<sup>23</sup> or after the officer, who made the return, has gone out of office.<sup>24</sup> An amendment to show service on the principal defendant may be made after amendment of the petition substituting the agent as defendant.<sup>25</sup>

*After action for false or insufficient return.* An amendment by the sheriff of his return may be made after action is brought against him for a false or insufficient return, if the officer has in fact performed his duty and the amendment is sought to make his return conform to the fact,<sup>26</sup> although there is some authority to the contrary;<sup>27</sup> but, even where the contrary view is held, a sheriff may amend his return at any time after receiving notice of the motion against him for a false return up to the time when the motion is actually made.<sup>28</sup> Where the making of a false return is itself a violation of the officer's duty for which the officer is liable, an amendment by the sheriff designed to relieve himself of that liability cannot be made after action against him has been commenced,<sup>29</sup> especially where the return as made had been the basis of judicial action in another proceeding at

the instance of the sheriff, himself.<sup>30</sup>

#### d. Jurisdiction to Authorize; Discretion

Only the court to which the return is made has jurisdiction to authorize an amendment of it, and the application is addressed to its discretion.

Only the court to which the return is made has jurisdiction to authorize an amendment of it.<sup>31</sup> The supreme court to which the case has been transferred on appeal,<sup>32</sup> or a federal court to which it has been removed from a state court on petition,<sup>33</sup> cannot authorize the amendment. However, the power to allow amendment of a sheriff's return belongs to a referee to whom the case has been referred.<sup>34</sup>

*Discretion of court.* The application for leave to amend is addressed largely to the discretion of the court,<sup>35</sup> which discretion is liberally exercised when in the furtherance of substantial justice.<sup>36</sup> It is a judicial, not a personal, discretion, and must be exercised in a judicial manner.<sup>37</sup> The court will not grant leave on doubtful and unsatisfactory evidence.<sup>38</sup> The order permitting amendment to be made will not be disturbed on appeal when it

U.S. 800, 88 L.Ed. 483, rehearing denied 64 S.Ct. 634, 321 U.S. 803, 88 L.Ed. 1089.

Ala.—Fowler v. Fowler, 126 So. 634, 220 Ala. 560—Palatine Ins. Co. v. Hill, 121 So. 412, 219 Ala. 123.

Ky.—Miller v. National Bank of London, 116 S.W.2d 320, 273 Ky. 243.

Utah.—Federal Land Bank of Berkeley v. Brinton, 146 P.2d 200, 106 Utah 149.

50 C.J. p 608 note 4.

#### After default judgment

Pa.—Rogers v. Metropolitan Life Ins. Co., 99 Pa.Super. 505.

**Amendment correcting proof of publication of warning order to obtain constructive service of nonresident defendants can be filed after judgment.**—Blackwell Oil & Gas Co. v. Maddux, 27 S.W.2d 514, 181 Ark. 726.

22. U.S.—Pen-Ken Gas & Oil Corporation v. Warfield Natural Gas Co., C.C.A.Ky., 137 F.2d 871, certiorari denied 64 S.Ct. 431, 320 U.S. 800, 88 L.Ed. 483, rehearing denied 64 S.Ct. 634, 321 U.S. 803, 88 L.Ed. 1089.

50 C.J. p 608 note 6.

23. U.S.—Pen-Ken Gas & Oil Corporation v. Warfield Natural Gas Co., supra.

50 C.J. p 608 note 7.

24. U.S.—Pen-Ken Gas & Oil Corporation v. Warfield Natural Gas Co., supra.

Ala.—Fowler v. Fowler, 126 So. 634,

220 Ala. 560—Palatine Ins. Co. v. Hill, 121 So. 412, 219 Ala. 123.

Ky.—Miller v. National Bank of London, 116 S.W.2d 320, 273 Ky. 243.

50 C.J. p 608 note 8.

25. Ga.—Payne v. Lyon, 111 S.E. 231, 28 Ga.App. 246.

26. N.C.—Swain v. Burden, 32 S.E. 819, 124 N.C. 10.

50 C.J. p 608 note 10.

27. Tenn.—Standifer v. May, 42 S.W.2d 343, 163 Tenn. 210.

50 C.J. p 608 note 11.

#### Entry of motion

Sheriff cannot amend false or insufficient return after entry of formal motion for summary judgment against him; the fact that court, on entry of such formal motion, ordered notice to sheriff did not suspend his pendons.—Standifer v. May, supra.

28. Tenn.—Standifer v. May, supra.—Hill v. Hinton, 2 Head 124.

29. Tenn.—Mullins v. Johnson, 3 Humphr. 396.

50 C.J. p 608 note 13.

30. Va.—Carr v. Meade, 77 Va. 142.

31. Colo.—Barndollar v. Patton, 4 Colo. 474.

50 C.J. p 609 note 38.

32. Colo.—Barndollar v. Patton, supra.

Iowa.—Pilkey v. Gleason, 1 Iowa 85. Wis.—Hall v. Graham, 5 N.W. 943, 49 Wis. 553.

50 C.J. p 609 note 39.

Amendment of process by trial court

after perfection of appeal see Appeal and Error § 617.

33. U.S.—Hawkins v. Peirce, C.C. Ind., 79 F. 452.

50 C.J. p 609 note 40.

34. Fla.—Camp v. Ocala First Nat. Bank, 33 So. 241, 44 Fla. 497, 103 Am.S.R. 173.

35. Mass.—Browning-Drake Corporation v. Amertran Sales Co., 175 N.E. 45, 274 Mass. 545.

N.C.—Lee v. Holt, 19 S.E.2d 358, 221 N.C. 233.

Pa.—Second Nat. Bank of Wilkes-Barre v. Payne, Com.Pl., 35 Luz. Leg.Reg. 60.

Tex.—Watson v. Glenn, Civ.App., 82 S.W.2d 704.

50 C.J. p 609 note 42.

36. Va.—Buttery v. Robbins, 14 S.E.2d 544, 177 Va. 368.

W.Va.—McCormack v. Southern Express Co., 93 S.E. 1048, 31 W.Va. 87.

#### Casual and honest mistake

Courts are liberal in permitting officers to amend their returns to conform to actual facts, especially where a casual and an honest mistake has occurred.—Federal Land Bank of Baltimore v. Birchfield, 3 S.E.2d 405, 173 Va. 200.

37. Mo.—Jackson v. Brown, App., 211 S.W. 893.

38. Colo.—Stubbs v. McGillis, 96 P. 1005, 44 Colo. 138, 130 Am.S.R. 116, 18 L.R.A.N.S., 405.

50 C.J. p 610 note 46.

appears that there has been no abuse of discretion.<sup>39</sup>

### e. Procedure

Generally, it is necessary to secure leave from the court to amend the return. The leave to amend, when granted, is not the equivalent of amendment, and the officer must act on the court's order.

While it has been held that a motion to permit an officer to amend and the officer's offer to do so is the equivalent of amendment even though the court did not grant permission,<sup>40</sup> and that the court has the right to accept an amended return of process, even though the court's consent to the amendment was not first secured,<sup>41</sup> the general rule is that leave to amend must first be secured from the court.<sup>42</sup> A defective return cannot be cured by affidavit without leave.<sup>43</sup>

The leave can be had on application of one of the parties,<sup>44</sup> as by motion informally made;<sup>45</sup> but a bill in equity to amend a return of service by publication will not lie during the statutory period allowed for correcting the process at law.<sup>46</sup> The officer who alone can make, or be compelled to make, the amendment has been held to be a necessary party to any proceedings had for the purpose;<sup>47</sup> but it has also been held that, where application to amend the officer's return was made by a party to an action to which the officer was not a party; service of notice of such application on the officer, although proper, was not necessary.<sup>48</sup> On the application or motion, it must be shown by satisfactory evidence that the case is a proper one for

an amendment,<sup>49</sup> and that, as a matter of fact, the service was properly made.<sup>50</sup> Defendant may contest the truth of the facts sought to be so introduced into the return.<sup>51</sup>

*Notice to other party.* Although it has been broadly held that notice to the parties interested, of an application to amend a return, is required,<sup>52</sup> some cases hold that no such notice need be given, in the absence of any showing of injustice,<sup>53</sup> even though application is made after the trial term.<sup>54</sup> In other cases this rule making notice unnecessary is restricted to an application made in the trial term,<sup>55</sup> notice being necessary if the application is made after the term at which the cause is determined.<sup>56</sup> A sheriff's amendment of his return without notice after the case has been submitted to the appellate court,<sup>57</sup> or where the rights of third persons may be adversely affected,<sup>58</sup> is void. It has been said that, while a sheriff may amend without notice as long as the papers are in his possession, it is better practice to give notice after the return is in court.<sup>59</sup> If defendant is already in court, notice is unnecessary.<sup>60</sup>

*Effectuation of amendment.* The leave to amend, when granted, is not the equivalent of amendment; the officer must act on the court's order;<sup>61</sup> but he may do so by filing an affidavit stating the facts of service,<sup>62</sup> or the filing of a stipulation of facts as to service agreed to by the parties may be considered equal to an actual amendment.<sup>63</sup>

39. Neb.—Shufeldt v. Barlass, 51 N. W. 134, 33 Neb. 785.

40. Ky.—Russell v. Durham, 29 S. W. 16, 16 Ky.L. 516.

41. Ariz.—Fay v. Harris, 164 P.2d 860, 64 Ariz. 10.

42. Ky.—Jones v. Fuller, 134 S.W.2d 240, 280 Ky. 671.

N.C.—Lee v. Hoff, 19 S.E.2d 858, 221 N.C. 233.

Pa.—Blystone v. Gillette Co., 32 Erie Co. 145.

50 C.J. p 610 note 50.

43. Or.—Knapp v. Wallace, 92 P. 1054, 50 Or. 348, 126 Am.S.R. 742. 50 C.J. p 610 note 51.

44. Neb.—De Lair v. De Lair, 21 N. W.2d 498, 146 Neb. 771.

45. Ind.—Wilcox v. Moudy, 89 Ind. 232.

46. Okl.—Farmers' State Bank v. Melson, 211 P. 405, 88 Okl. 6.

47. Ala.—Jefferson County Sav. Bank v. McDermott, 10 So. 154, 39 Ala. 79.

48. Neb.—De Lair v. De Lair, 21 N. W.2d 498, 146 Neb. 771.

49. Ky.—Youngstown Bridge Co. v.

White, 49 S.W. 86, 105 Ky. 273, 20 Ky.L. 1175.

Neb.—De Lair v. De Lair, 21 N.W. 2d 498, 146 Neb. 771.

*Evidence held to warrant finding that proposed amendments to sheriff's returns would make records conform to truth and enable plaintiffs to sustain their actions for the causes for which they were brought.*—Perry v. Sapello, 8 N.E.2d 810, 297 Mass. 242.

50. Mo.—Missouri Valley Trust Co. v. St. Joseph, etc., R. Co., 144 S. W. 511, 162 Mo.App. 158.

Va.—Park Land, etc., Co. v. Lane, 55 S.E. 690, 106 Va. 304.

51. Or.—Fisk v. Hunt, 54 P. 660, 83 Or. 424. 50 C.J. p 610 note 63.

52. Neb.—De Lair v. De Lair, 21 N.W.2d 498, 146 Neb. 771.—State Furniture Co. v. Abrams, 19 N.W. 2d 627, 146 Neb. 342.

53. Tex.—Employer's Reinsurance Corporation v. Brock, Civ.App., 74 S.W.2d 435, error dismissed. 50 C.J. p 610 note 64.

54. Mo.—Kahn v. Mercantile Town

Mut. Ins. Co., 128 S.W. 995, 228 Mo. 585, 137 Am.S.R. 665.

50 C.J. p 610 note 65.

55. Ill.—O'Conner v. Wilson, 57 Ill. 226.

50 C.J. p 610 notes 66, 67.

56. Ill.—O'Conner v. Wilson, supra. 50 C.J. p 610 note 67.

57. Mo.—Little Rock Trust Co. v. Southern Missouri, etc., Co., 93 S. W. 944, 195 Mo. 669.

58. Mich.—Haynes v. Knowles, 38 Mich. 407—Montgomery v. Merrill, 36 Mich. 97.

59. Wis.—Wausau First Nat. Bank v. Kromer, 105 N.W. 823, 126 Wis. 436.

60. Mo.—Kahn v. Mercantile Town Mut. Ins. Co., 130 S.W. 492, 150 Mo. App. 393.

61. Ill.—Chicago, etc., R. Co. v. Suta, 123 Ill.App. 125.

Neb.—Wittstruck v. Temple, 78 N.W. 456, 58 Neb. 16.

62. U.S.—Fountain v. Detroit, etc., R. Co., D.C.Ohio, 210 F. 982.

63. Mo.—State v. Trimble, 274 S.W. 712, 309 Mo. 415.

50 C.J. p 610 note 62 [a].

### f. Operation and Effect

An amendment of a return ordinarily relates back to the time of the original return, curing the defects therein; and the amendment, as allowed, is conclusive on collateral attack; but in the same action between the same parties it does not prevent a later inquiry into the validity of the amendment itself, or into the truth of its recitals.

An amendment of a return ordinarily relates back to the time of the original return, curing the defects therein.<sup>64</sup> Also, defects in the amendment may be cured by adequate recitals in the original.<sup>65</sup> It has been held, however, that an order of court authorizing amendment of a return does not relate back to, and sanction, an earlier unauthorized amendment in the absence of an expressed intention that it shall so operate.<sup>66</sup> The amendment, as allowed, is conclusive on collateral attack,<sup>67</sup> but in the same action between the same parties it does not prevent a later inquiry into the validity of the amendment itself,<sup>68</sup> or into the truth of its recitals.<sup>69</sup> It has been held, however, that the court will not inquire into the truth of an amendment made by an officer to his return, in the absence of suspicious circumstances.<sup>70</sup>

An amendment improperly made invalidates a judgment based thereon,<sup>71</sup> but an invalid order of court directing the amendment to be made will not prevent the court from subsequently making a valid order to the same effect.<sup>72</sup> The erroneous disallowance by the court of an amendment renders everything occurring thereafter nugatory.<sup>73</sup> Failure to amend a defective return is ground for dismissal of the action unless further service of the

writ is ordered.<sup>74</sup> However, an action will not be dismissed after allowance of an amendment to show service on a principal as defendant, even though at the time of allowance the agent's name had been substituted as defendant.<sup>75</sup>

### § 117. — Amendable Defects.

Jurisdictional defects in a return cannot be cured by amendment, as where it is sought to add an indorsement on the writ authorizing a previously unauthorized person to serve it; but defects not affecting the jurisdiction may be amended, as by adding further specifications as to the manner of service or acts done in compliance with statute.

Jurisdictional defects in a return cannot be cured by amendment,<sup>76</sup> as where it is sought to add an indorsement on the writ authorizing a previously unauthorized person to serve it,<sup>77</sup> or where service is made by an unauthorized person and an amendment is asked for showing service by such person as deputy sheriff,<sup>78</sup> or where a declaration as substitute for process is served before being filed,<sup>79</sup> or where an affidavit of service by publication fails to state that residence of defendant was not known, as excusing failure to mail copies, and an affidavit affirmatively stating that fact is offered.<sup>80</sup> Also the court will not permit an amendment showing that a particular person was served as defendant even where there is evidence showing that he was actually served, when it also appears that he was not named as a party defendant in the case.<sup>81</sup>

Defects not affecting the jurisdiction may be amended,<sup>82</sup> as for example, by adding further specifications as to the manner of service or acts done

64. Ky.—*Miller v. National Bank of London*, 116 S.W.2d 320, 273 Ky. 243.

N.C.—*Lee v. Hoff*, 19 S.E.2d 858, 221 N.C. 233.

Tex.—*Lafleur v. Switzer*, Civ.App., 109 S.W.2d 239—*Employer's Reinsurance Corporation v. Brock*, Civ. App., 74 S.W.2d 435, error dismissed.

50 C.J. p 610 note 72.

#### Jurisdiction

Fact of service and not return gives jurisdiction, and if fact of service is shown by amendment to return or otherwise court has jurisdiction.—*Coster v. Jensen*, 257 N.W. 303, 218 Iowa 1215.

#### Default judgment

It has been held, however, that an amendment of sheriff's return to conform to facts does not have effect of validating default judgment entered on defective return of service.—*Rogers v. Metropolitan Life Ins. Co.*, 99 Pa.Super. 505. See *Wood v. Kuhn*, Com.Pl., 22 Erie Co. 286.

65. U.S.—*Doherty v. McDowell*, D. C.Me., 270 F. 728.  
50 C.J. p 611 note 73.

66. Ill.—*Goodpaster v. Chicago, etc., R. Co.*, 240 Ill.App. 287.

67. N.D.—*Jongewaard v. Gesquire*, 199 N.W. 585, 51 N.D. 173.

68. Mo.—*Bauch v. Weber Flour Mills Co.*, 238 S.W. 581, 210 Mo. App. 666.

N.D.—*Jongewaard v. Gesquire*, 199 N.W. 585, 51 N.D. 173.

69. Utah.—*Lashbrook v. Copenhagen*, 259 P. 191, 70 Utah 163.

70. Ill.—*World's Columbian Exposition v. Scala*, 55 Ill.App. 207.

71. Ill.—*Green v. McGowan*, 183 Ill. App. 149.

72. Cal.—*Morrissey v. Gray*, 117 P. 438, 442, 160 Cal. 390, 808.

73. Ga.—*McDuffie Oil, etc., Co. v. Iler*, 113 S.E. 52, 28 Ga.App. 734.

74. Me.—*Abbott v. Abbott*, 64 A. 615, 101 Me. 343.

75. Ga.—*Payne v. Lyon*, 111 S.E. 226, 28 Ga.App. 246.

76. Mich.—*Dades v. Central Mut. Auto Ins. Co.*, 248 N.W. 616, 263 Mich. 260—*Hoben v. Citizens' Telephone Co.*, 142 N.W. 1070, 176 Mich. 596.

Pa.—*C. I. T. Corporation v. Sutter Nash Motor Co.*, Com.Pl., 31 Luz. Leg.Reg. 240.

77. Ky.—*Thompson v. Moore*, 15 S. W. 6, 358, 91 Ky. 80, 12 Ky.L. 664.

78. Fla.—*Jenssen v. Walther*, 7 So. 854, 26 Fla. 448.

79. Mich.—*Ellis v. Fletcher*, 40 Mich. 321.

80. Wash.—*Lutkens v. Young*, 115 P. 1038, 63 Wash. 452, 454.

81. Ga.—*Hodges v. Stuart Lumber Co.*, 79 S.E. 462, 140 Ga. 569.  
50 C.J. p 609 note 37.

82. N.C.—*Corpus Juris* quoted in *Lee v. Hoff*, 19 S.E.2d 858, 860, 221 N.C. 233.

Tex.—*Corpus Juris* cited in *Employer's Reinsurance Corporation v.*

in compliance with statute.<sup>83</sup> Accordingly, it may be proper to amend the return by adding or correcting the signature of the officer,<sup>84</sup> or by showing that he served process as a private individual,<sup>85</sup> by alleging that other acts required by the statute were done in making service,<sup>86</sup> by adding specifications of details required by the statute,<sup>87</sup> or by adding further specifications as to the copy or copies delivered.<sup>88</sup> A return may also be amended by including the names of defendants actually served,<sup>89</sup> by stating facts as to the nonresidence of one of defendants,<sup>90</sup> by stating additional facts as to the person with whom,<sup>91</sup> or the place at which,<sup>92</sup> the summons was left or served, or by showing that one of defendants, stated to have been served, was not found.<sup>93</sup>

Other defects in the return may be cured by amendments designating or correcting the date of service,<sup>94</sup> the date of mailing copies where the service is by publication,<sup>95</sup> the date of the receipt of the summons,<sup>96</sup> or the date of the return;<sup>97</sup> and an amendment may show that the deputy who made the service had been duly appointed by the sheriff,<sup>98</sup> or show that affiant who made the service was over eighteen years of age.<sup>99</sup> The erroneous indorsement of the return to the writ on a notice of summons of the jury rather than on the writ itself may be corrected by amendment.<sup>1</sup>

**Correction of defendant's name.** It has been held that it may be proper to amend the return by correcting the name of defendant,<sup>2</sup> but a return showing service on a corporation having a name slight-

Brock, Civ.App., 74 S.W.2d 435, 442, error dismissed.  
50 C.J. p 608 notes 21-23, p 609 notes 24-26.

A clerical mistake in sheriff's return may be corrected by amendment to conform with the facts, if service was actually made in accordance with law.—*Liberal Credit Clothing Co. v. Tropp*, 4 A.2d 565, 135 Pa.Super. 53.

83. N.C.—*State v. Moore*, 55 S.E.2d 177, 230 N.C. 648.

#### Return receipt for registered mail

In action against nonresident, on defendant's motion to vacate sheriff's return on summons because only copy instead of original of defendant's return receipt for registered mailing of copy of process was attached to plaintiff's declaration, plaintiff's motion to amend by filing return receipt and attaching it to declaration in place of copy was granted.—*Quillen v. Hearne*, 181 A. 665, 7 W.W.Harr., Del., 226.

84. Me.—*City of Old Town of Robbins*, 186 A. 663, 134 Me. 285.

N.C.—*State v. Moore*, 55 S.E.2d 177, 230 N.C. 648—*Corpus Juris* quoted in *Lee v. Hoff*, 19 S.E.2d 858, 860, 221 N.C. 233.  
50 C.J. p 608 note 21.

85. N.C.—*Corpus Juris* quoted in *Lee v. Hoff*, 19 S.E.2d 858, 860, 221 N.C. 233.  
50 C.J. p 608 note 22.

86. N.C.—*State v. Moore*, 55 S.E.2d 177, 230 N.C. 648—*Corpus Juris* quoted in *Lee v. Hoff*, 19 S.E.2d 858, 860, 221 N.C. 233.  
50 C.J. p 608 note 23.

87. Wash.—*John Hancock Mut. Life Ins. Co. v. Gooley*, 83 P.2d 221, 196 Wash. 357, 118 A.L.R. 1484.  
50 C.J. p 609 note 33.

88. N.C.—*Corpus Juris* quoted in *Lee v. Hoff*, 19 S.E.2d 858, 860, 221 N.C. 233.

Wash.—*John Hancock Mut. Life Ins. Co. v. Gooley*, 83 P.2d 221, 196 Wash. 357, 118 A.L.R. 1484.  
50 C.J. p 609 note 24.

#### Attestation

Since an officer of the law is presumed to have done his duty, the sheriff will be allowed to amend his return to indicate that a copy of the writ of summons which he left with defendant was "attested", where defendant does not deny that it was attested, and where the sheriff states that because of the lapse of time since the service, he cannot state definitely whether or not it was attested.—*Reihart v. Hess*, 59 Pa.Dist. & Co. 417.

89. N.C.—*State v. Moore*, 55 S.E.2d 177, 230 N.C. 648—*Corpus Juris* quoted in *Lee v. Hoff*, 19 S.E.2d 858, 860, 221 N.C. 233.  
50 C.J. p 609 note 26.

90. Ky.—*Boyce v. Watson*, 3 J.J. Marsh. 498.

91. Cal.—*Alpha Stores v. You Bet Mining Co.*, 63 P.2d 1137, 18 Cal. App.2d 249, followed in 63 P.2d 1138, 18 Cal.App.2d 767.

Mass.—*Browning-Drake Corporation v. Amertran Sales Co.*, 175 N.E. 45, 274 Mass. 545.

Pa.—*Corpus Juris* cited in *Clinger v. Patterson*, 14 A.2d 371, 373, 140 Pa.Super. 443.

Tex.—*Employer's Reinsurance Corporation v. Brock*, Civ.App., 74 S. W.2d 435, error dismissed.  
50 C.J. p 609 note 27.

**Capacity in which person was served**  
N.C.—*State v. Moore*, 55 S.E.2d 177, 230 N.C. 648.

#### Service on agent

Amendment of sheriff's return of service so as to show service on defendant company's agent only after ascertaining that defendant's president was not in county was held proper.—*First Nat. Bank v. Paris*, 193 N.E. 207, 358 Ill. 378.

92. Va.—*Buttery v. Robbins*, 14 S. E.2d 544, 177 Va. 368.

Wash.—*John Hancock Mut. Life Ins. Co. v. Gooley*, 83 P.2d 221, 196 Wash. 357, 118 A.L.R. 1484  
50 C.J. p 609 note 28.

#### Correction of address

Neb.—*State Furniture Co. v. Abrams*, 19 N.W.2d 627, 146 Neb. 342.

#### Place of posting

A return of service of process, stating that notice was executed by posting copy thereof on front door of defendant's "residence," should have been amended, as permitted by statute, to show that posting was at defendant's "usual place of abode."—*Crouch v. Crouch*, 20 S.E.2d 169, 124 W.Va. 331.

93. Ala.—*Watkins v. Gayle*, 4 Ala. 153.

94. Ky.—*Hudson v. Manning*, 63 S. W.2d 943, 250 Ky. 760.

Me.—*City of Old Town v. Robbins*, 186 A. 663, 134 Me. 285.

Mass.—*Everett v. Merrill*, 134 N.E. 371, 282 Mass. 72.  
50 C.J. p 609 note 30.

95. Ariz.—*Crook v. Crook*, 170 P. 280, 19 Ariz. 448.

96. Or.—*White v. Ladd*, 56 P. 515, 34 Or. 422.

97. Ill.—*Schwartz v. Babcock*, 14 N. E.2d 89, 294 Ill.App. 613.

Okl.—*Fitzsimmons v. Rauch*, 172 P. 2d 633, 197 Okl. 426.

98. N.C.—*Manning v. Roanoke, etc., R. Co.*, 28 S.E. 963, 122 N.C. 824.

99. Cal.—*Woodward v. Brown*, 51 P. 2, 542, 119 Cal. 283, 63 Am.S.R. 108.

1. Ala.—*Fowler v. Fowler*, 126 So. 634, 220 Ala. 560.

2. Mass.—*Modist v. Lynch*, 177 N. E. 861, 277 Mass. 135.

N.C.—*Corpus Juris* quoted in *Lee v. Hoff*, 19 S.E.2d 858, 860, 221 N.C. 233.

50 C.J. p 609 note 25.

ly different from defendant has been held not subject to amendment after entry of a default judgment, as involving "matter of form" the defect being a jurisdictional one.<sup>3</sup>

### § 118. Amendment of Affidavits, Orders, Etc., for Publication

Defective affidavits or orders for publication may be amended when the defect is formal merely, and a defective summons, voidable only, may be amended during the course of the publication; but, when an order is based on an insufficient showing made in the complaint or affidavit, a subsequent amendment of such complaint or affidavit cannot give life to the order, since the defect is jurisdictional.

Defective affidavits or orders for publication may be amended when the defect is formal merely,<sup>4</sup> and a defective summons, voidable only, may be amended during the course of the publication.<sup>5</sup> However, when an order is based on an insufficient showing made in the complaint or affidavit, a subsequent amendment of such complaint or affidavit cannot give life to the order, since the defect is jurisdictional.<sup>6</sup> Also a jurisdictional defect in the order cannot be cured by an alleged correction of the defect in the summons.<sup>7</sup> The failure of the affidavit to give the post-office address of a

nonresident defendant is not jurisdictional, and hence amendable, where the statute does not require that the affidavit state it,<sup>8</sup> but the defect is a jurisdictional one not correctable by amendment where the statute does require it.<sup>9</sup>

Where the defect in the affidavit consists in a failure to state jurisdictional facts in express terms, it may still be amended if the jurisdictional facts exist and are stated in the affidavit inferentially;<sup>10</sup> but, where there is a total want of averment in the affidavit of some material fact required by statute, the service is void and the defect cannot be cured by amendment.<sup>11</sup> A variance between the order requiring publication in a paper named, and publication by mistake in another paper meeting the statutory requirements, may be cured by an amendment of the order nunc pro tunc to conform to the publication in fact made.<sup>12</sup> On the other hand, noncompliance of the publication with statutory requirements cannot be cured by recitals in the decree.<sup>13</sup> Personal appearance of defendant estops him from complaining thereafter of an amendment of the affidavit,<sup>14</sup> or of the addition of his name as party defendant after publication had been made.<sup>15</sup>

## V. ABUSE OF PROCESS

### § 119. Definitions and Distinctions

- a. Abuse of process
- b. Malicious use of process

#### a. Abuse of Process

An abuse or malicious abuse of process is its willful or malicious use to obtain a result which the process was not intended by law to effect.

It has been held that an "abuse"<sup>16</sup> or "malicious

3. Mich.—*Dades v. Central Mut. Auto Ins. Co.*, 248 N.W. 616, 263 Mich. 260.

4. Okl.—*Oliver v. Kelly*, 18 P.2d 1064, 162 Okl. 55.  
50 C.J. p 611 note 87.

Amendment of proof of service by publication see *supra* §§ 116, 117.

#### Name of attorney

Permitting filing of affidavit amending original affidavit as basis for service by publication, so as to strike name of attorney before whom affidavit was acknowledged from petition to which it was signed by inadvertence, was held not error.—*Oliver v. Kelly*, *supra*.

#### Typographical error

Where service by publication was made on nonresident giving her correct home address, but by a typographical error newspaper advertisement and certificate of mailing stated defendant's middle initial to be "B" instead of "E," such publication could be declared complete and effectual under statute authorizing court in furtherance of justice to amend any process by correcting

mistake in name of a party or in any other respect.—*Wechsler v. Shelander*, 14 Ohio Supp. 58.

5. N.Y.—*Deimel v. Scheveland*, 9 N.Y.S. 482, 955, 16 Daly 34.  
50 C.J. p 611 note 88.

6. N.Y.—*Foster v. Electric Heat Regulator Co.*, 37 N.Y.S. 1068, 16 Misc. 147.  
50 C.J. p 611 note 89.

7. N.Y.—*Barleycorn v. Woolley*, 179 N.Y.S. 518, 109 Misc. 224.  
50 C.J. p 611 note 90.

8. Or.—*Moore Realty Co. v. Carr*, 120 P. 742, 61 Or. 34.

9. Ky.—*Bond v. Wheeler*, 247 S.W. 708, 197 Ky. 437.

10. Kan.—*Robinson v. Schappert*, 243 P. 290, 120 Kan. 309.  
50 C.J. p 611 note 96.

11. Okl.—*City Nat. Bank v. Sparks*, 151 P. 225, 50 Okl. 648.  
50 C.J. p 611 note 97.

12. N.Y.—*Valz v. Sheepshead Bay Bungalow Corp.*, 228 N.Y.S. 329, 221 App.Div. 280, affirmed 163 N.E. 124, 249 N.Y. 122, certiorari denied

49 S.Ct. 82, 278 U.S. 647, 73 L.Ed. 560.

13. Miss.—*Belt v. Adams*, 86 So. 584, 124 Miss. 194.

14. Iowa.—*McCarty v. Campbell*, 147 N.W. 131, 166 Iowa 129.

15. Mo.—*Childers v. Schantz*, 25 S.W. 209, 120 Mo. 805.

16. U.S.—*George v. Leonard*, D.C. S.C., 71 F.Supp. 662.

Ala.—*Clikos v. Long*, 165 So. 394, 231 Ala. 424.

Mich.—*Corpus Juris* cited in *Buckenhizer v. Times Pub. Co.*, 255 N.W. 213, 267 Mich. 393.

Mo.—*Corpus Juris* cited in *Thompson v. Farmers' Exchange Bank*, 62 S.W.2d 808, 810, 333 Mo. 437.

50 C.J. p 612 note 4.

#### Abuse of process constituting:

Contempt of court see Contempt § 10.

Duress invalidating deed see Deeds § 61 c.

Ground for injunction see Injunctions § 37.

Larceny by taking under process see Larceny § 7.

abuse<sup>17</sup> of process is its willful or malicious use to obtain a result which the process was not intended by law to effect. It is not limited to the issuance of process, but extends to its oppressive use after issuance.<sup>18</sup>

Abuse of process has been distinguished from false imprisonment in False Imprisonment § 3, from malicious prosecution in Malicious Prosecution § 2, and from malicious suing out of an attachment in Attachment § 516.

Liability of clerk for wrongful issuance of process see Clerks of Courts § 49.

#### Similar definitions

(1) Misuse of legal process for an ulterior purpose.

U.S.—George v. Leonard, D.C.S.C., 71 F.Supp. 662.

Conn.—Shaeffer v. O. K. Tool Co., 148 A. 330, 110 Conn. 528.

N.C.—Melton v. Rickman, 36 S.E.2d 276, 225 N.C. 700.

(2) Employment of process for purpose not contemplated by law.—Buckenhizer v. Times Pub. Co., 255 N.W. 213, 267 Mich. 393.

(3) Malicious misuse or misapplication of process to accomplish some purpose not warranted or commanded by writ is malicious perversion of regularly issued process to secure result not lawfully or properly attainable thereunder.

Neb.—Vybiral v. Schildhauer, 265 N.W. 241, 244, 130 Neb. 433.

N.C.—Melton v. Rickman, 36 S.E.2d 276, 225 N.C. 700—Ellis v. Weltons, 29 S.E.2d 884, 224 N.C. 269.

Va.—Mullins v. Sanders, 54 S.E.2d 116, 121, 189 Va. 624—Glidewell v. Murray-Lacy & Co., 98 S.E. 665, 667, 124 Va. 563, 4 A.L.R. 225.

(4) Employment of legal process for some unlawful object, not the purpose which it is intended by law to effect.—Morphy v. Shipley, 41 A.2d 671, 351 Pa. 425.

(5) Employment of process for doing an act clearly outside authority conveyed by express terms of writ.—Shane v. Gulf Refining Co., 178 A. 738, 114 Pa.Super. 87.

17. Ga.—Baldwin v. Davis, 4 S.E.2d 453, 188 Ga. 587—Simpson v. Jones, 186 S.E. 558, 182 Ga. 544—Dunlop Tire & Rubber Corporation v. Downs, 3 S.E.2d 124, 126, 60 Ga.App. 124—Brosnell v. Mason Kominers Tire Co., 193 S.E. 357, 56 Ga.App. 593—Davison-Paxon Co. v. Walker, 165 S.E. 160, 45 Ga. App. 395—Atlanta Finance Co. v. Cain, 157 S.E. 387, 42 Ga.App. 819. 50 C.J. p 612 note 5.

#### Similar definitions

(1) Employment of legal process for some unlawful object, not the purpose which it is intended by the

law to effect; in other words, a perversion of it.

N.C.—Life Ins. Co. of Virginia v. Smathers, 190 S.E. 484, 486, 211 N.C. 373.

Pa.—Fenton Storage Co. v. Feinstein, 195 A. 176, 129 Pa.Super. 125.

(2) Use of lawful process for purpose not justified by law.—Schneider v. Mueller, 39 A.2d 132, 133, 132 N.J. Law 163—McGrath v. Keenan, 46 A.2d 725, 727, 24 N.J.Misc. 121.

18. Mich.—Tsingos v. Michigan Packing Co., 260 N.W. 783, 272 Mich. 7.

19. Ga.—Price v. Fidelity Trust Co., 41 S.E.2d 614, 74 Ga.App. 836.

Me.—Corpus Juris quoted in Sallem v. Glovsky, 172 A. 4, 6, 132 Me. 402.

N.J.—Corpus Juris cited in Ash v. Cohn, 194 A. 174, 176, 119 N.J.Law 54.

50 C.J. p 612 note 15.

"Malicious abuse of legal process is where the plaintiff in a civil proceeding willfully misapplies the process of the court in order to obtain an object which such a process is not intended by law to effect, as contradistinguished from malicious use of process, where the plaintiff in a civil proceeding employs the court's process in order to execute an object which the law intends such a process to subserve, but proceeds maliciously and without probable cause."—Dunlop Tire & Rubber Corporation v. Downs, 3 S.E.2d 124, 126, 60 Ga. App. 124—Braswell v. Mason Kominers Tire Co., 193 S.E. 357, 56 Ga. App. 593—Davison-Paxon Co. v. Walker, 165 S.E. 160, 163, 45 Ga.App. 395—Robinson v. Commercial Credit Co., 139 S.E. 915, 37 Ga.App. 291—Roberts v. Willys-Overland, Inc., 108 S.E. 138, 27 Ga.App. 304—McElreath v. Gross, 98 S.E. 190, 23 Ga.App. 287.

#### Stated otherwise

(1) Generally, "malicious use of legal process" implies ulterior motive in procuring issuance of writ, while "malicious abuse of legal process" involves improper use of writ after its issuance.—Carl v. Hansbury, 21 S.E.2d 802, 67 Ga.App. 830.

(2) "Malicious use of civil proc-

*Malicious use of process.* The fundamental distinction between malicious use and malicious abuse of process is that the first is an employment of process for its ostensible purpose, although without probable cause, whereas the second is employment of process for a purpose not contemplated by law.<sup>19</sup> Another distinction is that, in case of malicious use, it must be shown that the action in which the process was used has terminated favorably to plaintiff in the suit at bar, whereas this is unnecessary in an action for malicious abuse.<sup>20</sup>

ess" has to do with wrongful initiation of such process, while "abuse of civil process" is concerned with perversion of such process after it is issued.—Publix Drug Co. v. Breyer Ice Cream Co., 32 A.2d 413, 347 Pa. 346.

(3) Action for abuse of process lies for improper, unwarranted, and perverted use of process after it has been issued, while action for malicious use of process lies for causing process to issue maliciously and without reasonable or probable cause.—Ash v. Cohn, 194 A. 174, 119 N.J.Law 54.

(4) A party who employs process for some unlawful object, not the purpose for which it is intended, is guilty of "abuse of process," while a party who employs civil or criminal process maliciously, but with no object other than its proper effect and execution, is guilty of "malicious use of process."—Johnson v. Land Title Bank & Trust Co., 198 A. 23, 329 Pa. 241.

An action in trespass for maliciously causing judgments to be entered by confession on judgment notes was for "malicious use of civil process" and not for "abuse of process."—Publix Drug Co. v. Breyer Ice Cream Co., 32 A.2d 413, 347 Pa. 346.

#### Attachment execution

Complaint was for "malicious use of legal process" rather than "malicious abuse of legal process," where process employed was attachment execution to enforce payment of money judgment, since such was the very purpose for which attachment execution was designed.—Fenton Storage Co. v. Feinstein, 195 A. 176, 129 Pa.Super. 125.

#### Foreclosure of bill of sale

Petition complaining of foreclosure of alleged bill of sale was held based on alleged malicious use, not abuse, of legal process.—Wilcoxon v. Equitable Loan Co., 172 S.E. 682, 48 Ga.App. 250.

20. Ga.—Price v. Fidelity Trust Co., 41 S.E.2d 614, 74 Ga.App. 836—Defnall v. Schoen, 35 S.E.2d 564, 73 Ga.App. 25.

Me.—Corpus Juris quoted in Sallem

Although actions for malicious arrest and for malicious abuse of process differ in some particulars,<sup>21</sup> both are protective of an individual's interest in freedom from confinement, whether such confinement is physically of the person or a limitation of one's personal freedom, as in holding a person to bail, and it is immaterial whether the act of defendant directly or indirectly causes the confinement.<sup>22</sup>

*Malicious arrest* has been distinguished from abuse of process on the ground that, in the former action termination of the proceeding in which the arrest was made must be shown, whereas in the latter it is not necessary to show termination of the proceeding in which the process was abused.<sup>23</sup>

### b. Malicious Use of Process

Malicious use of process is the employment of process for its legitimate purpose, but maliciously and without probable cause.

Malicious use of process is the employment of process for its legitimate purpose, but maliciously and without probable cause.<sup>24</sup> The gravamen of the wrong is the malice and want of probable cause.<sup>25</sup> As discussed in Malicious Prosecution § 2, an action for malicious use of process is similar to one for malicious prosecution, but the nature of the wrong is distinct.

## § 120. Elements

### a. In general

v. Glovsky, 172 A. 4, 6, 132 Me. 402.

N.J.—*Corpus Juris* cited in *Ash v. Cohn*, 194 A. 174, 176, 119 N.J. Law 54.

50 C.J. p 613 note 16.

21. N.J.—*McGrath v. Keenan*, 46 A. 2d 725, 24 N.J. Misc. 121.

#### Designation of action immaterial

Action based on allegations that defendant instituted two dispossessory warrant proceedings against plaintiff to dispossess plaintiff from an apartment, and that such proceedings were malicious and without probable cause and terminated in favor of plaintiff as tenant, was one for malicious use of legal process, notwithstanding designation by plaintiff as an action for malicious abuse of process.—*Price v. Fidelity Trust Co.*, 41 S.E.2d 614, 74 Ga. App. 836.

22. N.J.—*McGrath v. Keenan*, 46 A. 2d 725, 24 N.J. Misc. 121.

23. Vt.—*Roberts v. Danforth*, 102 A. 335, 92 Vt. 88.  
50 C.J. p 612 note 13.

Liability for malicious arrest under mesne process in civil actions see Arrest §§ 85, 86.

Termination of proceeding as essential element of malicious prosecution see Malicious Prosecution § 54.

24. Ga.—*Simpson v. Jones*, 186 S.E. 558, 182 Ga. 544—*Beatus v. Darling Stores Corp.*, 33 S.E.2d 37, 72 Ga. App. 84—*Dunlop Tire & Rubber Corporation v. Downs*, 3 S.E.2d 124, 126, 60 Ga. App. 124.  
50 C.J. p 622 note 67.

#### Similar definition

A malicious use of legal process is use of process for purpose for which it is designed, but with malice.—*Fenton Storage Co. v. Weinstein*, 195 A. 176, 129 Pa. Super. 125.

25. Ga.—*Hallman v. Ozburn*, 144 S. E. 344, 38 Ga. App. 514—*Clement v. Orr*, 60 S.E. 1017, 4 Ga. App. 117.

26. Alaska.—*Jansen v. Pollastrine*, 10 Alaska 316.

Ill.—*T. E. Hill Co. v. Contractors' Supply & Equipment Co.*, 94 N.E.

544, 249 Ill. 304, 34 L.R.A.N.S., 456.

27. U.S.—*Italian Star Line v. U. S. Shipping Board Emergency Fleet Corporation*, C.C.A.N.Y., 53 F.2d 359.

"The reason apparently is that the term has been used as a label for a variety of dissimilar situations which have in common only the fact that actionable injury was inflicted in connection with the use of judicial process and under circumstances such that the narrowly circumscribed action of malicious prosecution was inapplicable."—*Italian Star Line v. U. S. Shipping Board Emergency Fleet Corporation*, supra.

28. U.S.—*Italian Star Line v. U. S. Shipping Board Emergency Fleet Corporation*, supra.

Ill.—*Breytspraak v. Gordon*, 77 N.E. 2d 860, 333 Ill. App. 650—*Merriman v. Merriman*, 3 N.E.2d 64, 290 Ill. App. 139—*Copley v. Bybee*, 3 N.E. 2d 55, 290 Ill. App. 117.

Kan.—*Welch v. Shepherd*, 219 P.2d 444, 169 Kan. 363.

b. Abuse of process

c. Malicious use of process

### a. In General

It has been held that at common law, whenever an injury results from the issuance of judicial process in civil actions, the person procuring its issuance incurs no responsibility, provided he acts in honest conviction that the remedy is necessary to the enforcement of a legal right.

It has been held that at common law, whenever an injury results from the issuance of judicial process in civil actions, the person procuring its issuance incurs no responsibility, provided he acts in honest conviction that the remedy is necessary to the enforcement of a legal right.<sup>26</sup> As discussed in Actions § 15 b (4), the costs, expenses, or other damage incident to the prosecution or defense of an action is generally *damnum absque injuria*, for which no remedy exists, unless there are present malice and want of probable cause.

### b. Abuse of Process

(1) In general

(2) Particular elements

#### (1) In General

Briefly stated, the elements of the tort of abuse of process are an ulterior purpose, an act constituting misapplication of the process, and resulting damage.

It has been stated that the elements vital to an action for abuse of process are not clearly defined.<sup>27</sup> Briefly stated, the elements of the tort are a willful intent, or ulterior, or wrongful purpose, and an act constituting misapplication of the process.<sup>28</sup>



In addition, there must be damage to plaintiff from such misapplication of process.<sup>29</sup> A wrongful purpose may be inferred from acts constituting misapplication of the process,<sup>30</sup> but misapplication will not be inferred from a wrongful purpose.<sup>31</sup>

(2) Particular Elements

- (a) Use of process
- (b) Intent
- (c) Validity of process
- (d) Want of probable cause
- (e) Termination of process or proceeding

(a) Use of Process

aa. Necessity

bb. Wrongful use

aa. Necessity

The actual use of a process after its issuance is an essential element of an action for abuse of process.

An action for the abuse of process does not lie for maliciously causing process to issue.<sup>32</sup> Furthermore, there can be no abuse of process without use thereof, and if the process is not used at all no action can lie for its abuse.<sup>33</sup> Abuse of process is not shown by the mere institution of legal<sup>34</sup> or equitable<sup>35</sup> proceedings.

*Interference with person or property.* As a general rule, in order that action for abuse of process may lie, there must have been an unlawful interference with plaintiff's person or property under color of process,<sup>36</sup> but this rule has been held not to apply where the action is based on the unlawful institution and prosecution of a lunacy proceeding.<sup>37</sup>

Me.—*Sallem v. Glovsky*, 172 A. 4, 132 Me. 402—*McIntosh v. Bramson*, 157 A. 234, 130 Me. 420—*Bourisk v. Derry Lumber Co.*, 156 A. 382, 130 Me. 376.

Mass.—*Noyes v. Shanahan*, 91 N.E. 2d 841—*Gabriel v. Borowy*, 85 N.E. 2d 435, 324 Mass. 231.

Neb.—*Martin v. Sanford*, 261 N.W. 136, 129 Neb. 212, 100 A.L.R. 179. N.J.—*Ash v. Cohn*, 194 A. 174, 119 N.J.Law 54.

N.Y.—*Geller v. Davis*, 81 N.Y.S.2d 332.

N.C.—*Melton v. Rickman*, 36 S.E.2d 276, 225 N.C. 700—*Ellis v. Weltons*, 29 S.E.2d 884, 224 N.C. 269—*Manufacturers & Jobbers Finance Corporation v. Lane*, 19 S.E.2d 849, 855, 221 N.C. 189—*Ledford v. Smith*, 193 S.E. 722, 212 N.C. 447—*Klander v. West*, 171 S.E. 732, 205 N.C. 524.

Tenn.—*Priest v. Union Agency*, 125 S.W.2d 142, 174 Tenn. 304. 50 C.J. p 613 note 26.

29. U.S.—*Italian Star Line v. U. S. Shipping Board Emergency Fleet Corporation*, C.C.A.N.Y., 53 F.2d 359.

Ga.—*Andrew v. George Muse Clothing Co.*, 161 S.E. 296, 44 Ga.App. 291.

Mass.—*Schwartz v. Brockton Sav. Bank*, 60 N.E.2d 362, 318 Mass. 66.

**Damage or detriment held lacking**  
U.S.—*Italian Star Line v. U. S. Shipping Board Emergency Fleet Corporation*, C.C.A.N.Y., 53 F.2d 359.

**Damage not caused by abuse of process**

U.S.—*Italian Star Line v. U. S. Shipping Board Emergency Fleet Corporation*, D.C.N.Y., 41 F.2d 382, affirmed, C.C.A., 53 F.2d 359, 80 A.L.R. 576.

30. Me.—*Sallem v. Glovsky*, 172 A. 4, 132 Me. 402—*Bourisk v. Derry*

*Lumber Co.*, 156 A. 382, 130 Me. 376.

N.J.—*Ash v. Cohn*, 194 A. 174, 119 N.J.Law 54.

50 C.J. p 613 note 27.

**Wrongful use of search warrant**

Where person procures issuance of search warrant for search of another's premises for intoxicating liquors for purpose of gaining entry and aiding in execution of attachment for purchase money by searching premises for blankets, inference is authorized that issuance of warrant and its use were a malicious abuse of legal process.—*L. B. Price Mercantile Co. v. Adams*, 194 S.E. 29, 56 Ga.App. 756.

31. Me.—*Sallem v. Glovsky*, 172 A. 4, 132 Me. 402.

50 C.J. p 613 note 28.

32. Ill.—*Merriman v. Merriman*, 8 N.E.2d 64, 290 Ill.App. 139.

N.Y.—*Corpus Juris* cited in *Solomon v. Baar*, 5 N.Y.S.2d 753, 759, 168 Misc. 439, affirmed 7 N.Y.S.2d 1022, 255 App.Div. 849—*Leif v. Jacobs*, 61 N.Y.S.2d 207.

N.C.—*Melton v. Rickman*, 36 S.E.2d 276, 225 N.C. 700—*Ellis v. Weltons*, 29 S.E.2d 884, 224 N.C. 269.

Wash.—*Gilmore v. Thwing*, 9 P.2d 775, 167 Wash. 457.

50 C.J. p 614 note 32.

33. Mass.—*Gabriel v. Borowy*, 85 N.E.2d 435, 324 Mass. 231.

N.Y.—*Miller v. Stern*, 27 N.Y.S.2d 374, 262 App.Div. 5.

50 C.J. p 613 note 29.

Mere attempt to use legal process for an illegal purpose does not suffice to combine with improper motive to constitute a cause of action for malicious abuse of process.—*Beatus v. Darling Stores Corp.*, 33 S.E.2d 37, 72 Ga.App. 84.

**Issuance and service of process**

must be proved.—*Beadle v. Friel*, 133 A. 761, 320 Pa. 560.

34. Ky.—*Rose v. Finley's Ex'r*, 63 S.W.2d 948, 250 Ky. 769.

N.Y.—*Tricomi v. Tricomi*, 81 N.Y.S.2d 750, 192 Misc. 763—*Corpus Juris* cited in *Solomon v. Baar*, 5 N.Y.S.2d 753, 759, 168 Misc. 439, affirmed 7 N.Y.S.2d 1022, 255 App.Div. 849.

Tex.—*Andrews v. Brown*, Civ.App., 283 S.W. 283, affirmed, Com.App., 10 S.W.2d 707.

50 C.J. p 614 note 30.

"The mere institution of a civil action which has occasioned a party trouble, inconvenience, and expense of defending, will not support an action for abuse of process."—*Miller v. Stern*, 27 N.Y.S.2d 374, 375, 262 App.Div. 5.

**Reason for rule**

Public policy requires that parties be permitted to avail themselves of the courts to settle their grievances without unnecessary exposure to suit for damages in the event of an unsuccessful prosecution.—*Miller v. Stern*, supra.

**Trouble and expense of defending himself and paying counsel fees** do not give a party a cause of action for abuse of process.—*Leif v. Jacobs*, 61 N.Y.S.2d 207.

35. N.Y.—*Corpus Juris* cited in *Solomon v. Baar*, 5 N.Y.S.2d 753, 759, 168 Misc. 439, affirmed 7 N.Y.S.2d 1022, 255 App.Div. 849. 50 C.J. p 614 note 31.

36. N.Y.—*In re Reid's Estate*, 236 N.Y.S. 18, 135 Misc. 814—*Leif v. Jacobs*, 61 N.Y.S.2d 207.

Pa.—*Garland v. Wilson*, 137 A. 266, 289 Pa. 272—*Mayer v. Walter*, 64 Pa. 283.

37. Pa.—*Timmey v. Bloom*, 14 Pa. Dist. & Co. 288.

*Criminal proceedings.* It has been both affirmed<sup>38</sup> and denied<sup>39</sup> that the mere institution of criminal proceedings for a wrongful purpose is an abuse of process.

#### bb. Wrongful Use

The unlawful use of process after its issuance is the gist of the wrong of abuse of process.

The gist of the tort or wrong consists in the unlawful use of a lawful process after its issuance.<sup>40</sup> In other words, the bad intent must culminate in an actual abuse of the process<sup>41</sup> by perverting it to a use to obtain a result which the process was not intended by law to effect,<sup>42</sup> as where the process is perverted in the manner of its execu-

38. Ala.—Hotel Supply Co. v. Reid, 80 So. 137, 16 Ala.App. 563.

50 C.J. p 614 note 33.

Abuse of criminal process generally see *infra* § 121.

Use of criminal process for collateral or private purpose as malicious prosecution see *Malicious Prosecution* § 42.

39. Va.—Glidewell v. Murray-Lacy, 98 S.E. 665, 124 Va. 563, 4 A.L.R. 225.

50 C.J. p 614 note 34.

40. U.S.—George v. Leonard, D.C. S.C., 71 F.Supp. 662.

Ala.—Corpus Juris cited in *Chikos v. Long*, 165 So. 394, 396, 231 Ala. 424.

Cal.—Tranchina v. Arcinas, 178 P.2d 65, 78 Cal.App.2d 522.

Ga.—Ellis v. Millen Hotel Co., 14 S.E.2d 565, 192 Ga. 66—Davidson-Paxon Co. v. Walker, 163 S.W. 212, 174 Ga. 532, answers to certified questions conformed to 165 S.E. 160, 45 Ga.App. 395—Carl v. Hansbury, 21 S.E.2d 802, 67 Ga.App. 320—Powell v. E. Tris Napier Co., 178 S.E. 761, 50 Ga.App. 560.

Ill.—Breytspraak v. Gordon, 77 N.E. 2d 860, 333 Ill.App. 650.

Ind.—Brown v. Robertson, App., 92 N.E.2d 856.

Me.—Corpus Juris quoted in *Sallem v. Glovsky*, 172 A. 4, 6, 132 Me. 402.

Mass.—Swartz v. Brockton Sav. Bank, 60 N.E.2d 862, 318 Mass. 66.

N.J.—Schneider v. Mueller, 39 A.2d 132, 132 N.J.Law 163.

N.Y.—Hauser v. Bartow, 7 N.E.2d 268, 273 N.Y. 370—Miller v. Stern, 27 N.Y.S.2d 374, 262 App.Div. 5—Serxner v. Elgart, 94 N.Y.S.2d 731, 196 Misc. 1053—Tricomi v. Tricomi, 81 N.Y.S.2d 750, 192 Misc. 703—Meisels v. J. C. A. Trading Corp., 69 N.Y.S.2d 720, 189 Misc. 46, affirmed 69 N.Y.S.2d 364, 271 App.Div. 1000—Solomon v. Baar, 5 N.Y.S.2d 753, 168 Misc. 439, affirmed 7 N.Y.S.2d 1022, 255 App.Div. 840—Rothbard v. Ringler, 77 N.Y.S.2d 351—Friedman v. Roseth Corp., 74 N.Y.S.2d 733—Rubinstein v. Rubinstein, 35 N.Y.S.2d 926—Hubbard v. Banker, 24 N.Y.S.2d 289, affirmed 23 N.Y.S.2d 198, 260 App. Div. 901.

N.C.—Abernethy v. Morrison, 2 S.E. 2d 369, 215 N.C. 454.

Or.—McInnis v. Atlantic Inv. Corporation, 4 P.2d 314, 137 Or. 648.

Pa.—Publix Drug Co. v. Breyer Ice

Cream Co., 32 A.2d 413, 347 Pa. 346.

Tenn.—Corpus Juris quoted in *Priest v. Union Agency*, 125 S.W.2d 142, 144, 174 Tenn. 304.

Wis.—Docter v. Riedel, 71 N.W. 119, 96 Wis. 158, 37 L.R.A. 580.

50 C.J. p 614 note 36.

"Gist of the action for abuse of process lies in the improper use of process after it is issued. To show that regularly issued process was perverted to accomplishment of an improper purpose is enough."—Hauser v. Bartow, 7 N.E.2d 268, 269, 273 N.Y. 370—Rothbard v. Ringler, 77 N.Y.S.2d 351, 352—Mormon v. Baran, 35 N.Y.S.2d 906, 908—Hubbard v. Banker, 24 N.Y.S.2d 289, affirmed 23 N.Y.S.2d 198, 260 App.Div. 901—50 C.J. p 615 note 37.

Action lies only for improper use of process.

Ill.—Merriman v. Merriman, 8 N.E. 2d 64, 290 Ill.App. 139.

N.Y.—Corpus Juris cited in *Solomon v. Baar*, 5 N.Y.S.2d 753, 759, 169 Misc. 439, affirmed 7 N.Y.S.2d 1022, 255 App.Div. 840—Leif v. Jacobs, 61 N.Y.S.2d 207.

N.C.—Melton v. Rickman, 36 S.E.2d 276, 225 N.C. 700—Ellis v. Weltons, 29 S.E.2d 384, 224 N.C. 269.

50 C.J. p 614 note 32.

The gravamen of the complaint is the use of process for a purpose not justified by law.

U.S.—George v. Leonard, D.C.S.C., 71 F.Supp. 662.

Conn.—Shaffer v. O. K. Tool Co., 148 A. 330, 110 Conn. 528.

#### Exceeding authority

Where defendants exceeded authority of attachment writ which they had obtained, they became trespassers ab initio.—*Sallem v. Glovsky*, 172 A. 4, 132 Me. 402.

#### Use for unfair advantage

There is said to be an abuse of process when an adversary, through the malicious and unfounded use of some regular legal proceeding, obtains some advantage over his opponent.—*Life Ins. Co. of Virginia v. Smathers*, 190 S.E. 484, 211 N.C. 373.

41. Ind.—Brown v. Robertson, App., 92 N.E.2d 856.

Me.—Corpus Juris quoted in *Sallem v. Glovsky*, 172 A. 4, 6, 132 Me. 402.

N.J.—Ash v. Cohn, 194 A. 174, 119 N.J.Law 54.

N.C.—Melton v. Rickman, 36 S.E.2d 276, 225 N.C. 700.

Tenn.—Corpus Juris quoted in *Priest v. Union Agency*, 125 S.W.2d 142, 144, 174 Tenn. 304.

50 C.J. p 615 note 39.

#### Purpose not accomplished

Arrest and incarceration of defendant in bail trover process for purpose of collecting debt by forcing defendant to give up government checks payable to defendant, amounts due on which could not be reached by any process, were held not malicious abuse of process, where it did not appear that defendant actually gave up any of checks.—*Powell v. E. Tris Napier Co.*, 178 S.E. 761, 50 Ga.App. 560.

Fact that accused discharged civil liability to relieve himself of criminal prosecution arising from same transaction did not show abuse of legal process.—*Cole v. Rogers, Inc.*, 167 S.E. 781, 46 Ga.App. 450.

Filing of a certified copy of void judgment in office of clerk of district court, as a lien on realty, is an abuse of process.—*Little v. Sowers*, 204 P.2d 605, 167 Kan. 72.

42. Ga.—Corpus Juris cited in *Ellis v. Millen Hotel Co.*, 14 S.E.2d 565, 567, 192 Ga. 66—*McAfee v. Haverly Loan & Savings Co.*, 179 S.E. 419, 51 Ga.App. 15—*Sherrod v. Haverly Furniture Co.*, 179 S.E. 164, 50 Ga.App. 549.

Kan.—*Ahring v. White*, 131 P.2d 699, 156 Kan. 60.

Me.—Corpus Juris quoted in *Sallem v. Glovsky*, 172 A. 4, 6, 132 Me. 402.

N.J.—Schneider v. Mueller, 39 A.2d 132, 133, 132 N.J.Law 163.

N.Y.—Hauser v. Bartow, 7 N.E.2d 268, 273 N.Y. 370—Serxner v. Elgart, 94 N.Y.S.2d 731, 196 Misc. 1053—Meisels v. J. C. A. Trading Corp., 69 N.Y.S.2d 720, 189 Misc. 46, affirmed 69 N.Y.S.2d 364, 271 App.Div. 1000—Rothbard v. Ringler, 77 N.Y.S.2d 351.

Tenn.—Corpus Juris quoted in *Priest v. Union Agency*, 125 S.W.2d 142, 144, 174 Tenn. 304.

50 C.J. p 615 notes 36, 40.

#### Test

The test as to whether there has been an "abuse of process" is whether the process has been used to accomplish some end which is without the regular purview of the process or which compels the party against whom it is used to do some collateral thing which he could not

tion,<sup>43</sup> or used to accomplish a collateral purpose not contemplated by law,<sup>44</sup> or where a party is fraudulently induced to come within the jurisdiction of the court so as to render him or his property subject to its process;<sup>45</sup> or, in the case of criminal process, where the process is executed in an oppressive and unlawful manner,<sup>46</sup> or where it is used unlawfully to coerce plaintiff,<sup>47</sup> such, for instance, as coercing him to pay a private debt.<sup>48</sup>

However, mere arrest and detention under a lawful warrant, without any act amounting to misuse or oppression, are not an abuse of process.<sup>49</sup>

A legal and legitimate use of process, to effect the result which such process is designed by law to accomplish, is not an abuse thereof.<sup>50</sup> Regular use of process cannot constitute abuse, even though the user was actuated by a wrongful motive,<sup>51</sup> pur-

legally and regularly be compelled to do.

Ill.—Coplea v. Bybee, 3 N.E.2d 55, 290 Ill.App. 117.

Me.—Lambert v. Breton, 144 A. 864, 866, 127 Me. 510.

Minn.—Nelson v. National Casualty Co., 228 N.W. 437, 179 Minn. 53, 67 A.L.R. 509.

N.J.—Ash v. Cohn, 194 A. 174, 119 N.J.Law 54.

N.C.—Manufacturers & Jobbers Finance Corporation v. Lane, 19 S.E. 2d 849, 853, 221 N.C. 189.

#### Acts not constituting perversion of process

Issuance of execution after term at which judgment was entered had elapsed, return thereof nulla bona and subsequent garnishment proceedings were not such a perversion of process as to constitute an abuse of process.—Breytspraak v. Gordon, 77 N.E.2d 860, 333 Ill.App. 650.

43. Ill.—Coplea v. Bybee, 3 N.E.2d 55, 290 Ill.App. 117.

Tenn.—Corpus Juris quoted in Priest v. Union Agency, 125 S.W.2d 142, 144, 174 Tenn. 304.

50 C.J. p 615 note 41.

#### Excessive attachment

(1) Attachment of property of value far in excess of amount fixed in writ constitutes an abuse of process.—Sallem v. Glovsky, 172 A. 4, 132 Me. 402.

(2) Liability for excessive levy in general see Attachment § 513.

#### Unwarranted acts

Attaching officer was held unwarranted in locking up debtor's place of business, assuming control, and excluding debtor.—Bourisk v. Derry Lumber Co., 156 A. 382, 130 Me. 376.

#### Wrongful sale of attached property

Where defendants acting under attachment writ took plaintiffs' store, sale of property in store was unauthorized and improper use of such process.—Sallem v. Glovsky, 172 A. 4, 132 Me. 402.

44. Ga.—Defnall v. Schoen, 35 S.E. 2d 564, 78 Ga.App. 25.

N.Y.—Miller v. Stern, 27 N.Y.S.2d 874, 262 App.Div. 5—Lader v. Benkowitz, 66 N.Y.S.2d 713, 188 Misc. 906—Mormon v. Baran, 35 N.Y.S. 2d 908.

Tenn.—Corpus Juris quoted in Priest v. Union Agency, 125 S.W.2d 142, 144, 174 Tenn. 304.

Wis.—Docter v. Riedel, 71 N.W. 119, 96 Wis. 153, 65 Am.St.R. 40, 37 L.R.A. 580.

50 C.J. p 615 note 42.

"As soon as the actor uses the process of the court, not to effect its proper function, but to accomplish through it some collateral object, he commits this tort."—Hauser v. Bartow, 7 N.E.2d 268, 269, 273 N.Y. 370.

#### Circumvention of law

Cal.—Tranchina v. Areinas, 178 P.2d 65, 78 Cal.App.2d 522.

#### Oppression or annoyance

U.S.—George v. Leonard, D.C.S.C., 71 F.Supp. 662.

45. Ill.—Wanzer v. Bright, 52 Ill. 35.

Tenn.—Corpus Juris quoted in Priest v. Union Agency, 125 S.W.2d 142, 144, 174 Tenn. 304.

46. Tenn.—Corpus Juris quoted in Priest v. Union Agency, 125 S.W.2d 142, 144, 174 Tenn. 304.

Va.—Mullins v. Sanders, 54 S.E.2d 116, 189 Va. 624.

50 C.J. p 615 note 44.

#### Departure from terms of warrant

U.S.—Ingo v. Koch, C.C.A.N.Y., 127 F.2d 667.

Holding accused incommunicado before compliance with warrant requiring accused to be brought before magistrate was held to constitute an abuse of process.—People v. Crabb, 24 N.E.2d 46, 49, 372 Ill. 347.

#### Misuse of custody

Minn.—Hoppe v. Klapperich, 23 N.W. 2d 780, 224 Minn. 224.

47. Mo.—Corpus Juris cited in In re Williams, 128 S.W.2d 1098, 1104, 233 Mo.App. 1174.

Tenn.—Corpus Juris quoted in Priest v. Union Agency, 125 S.W.2d 142, 144, 174 Tenn. 304.

Va.—Mullins v. Sanders, 54 S.E.2d 116, 189 Va. 624.

50 C.J. p 615 note 45.

48. Tenn.—Corpus Juris quoted in Priest v. Union Agency, 125 S.W.2d 142, 144, 174 Tenn. 304.

Va.—Corpus Juris cited in Mullins v. Sanders, 54 S.E.2d 116, 121, 189 Va. 624.

50 C.J. p 615 note 46.

Law does not look with favor on use of criminal courts to collect debts.—Figuccion v. Prudential Ins.

Co. of America, 116 S.W.2d 291, 273 Ky. 287.

49. Ind.—Brown v. Robertson, App., 92 N.E.2d 856.

Mass.—MacLean v. Naumkeag Trust Co., 167 N.E. 748, 268 Mass. 437.

Tenn.—Corpus Juris quoted in Priest v. Union Agency, 125 S.W.2d 142, 144, 174 Tenn. 304.

"The mere fact that the creditor has procured a criminal warrant against the debtor for the ulterior purpose of enforcing the collection of the debt will not of itself support an action for abuse of process, for, in addition to incurring civil liability, the debtor may have violated the criminal law, so as to justify his arrest and prosecution."—Mullins v. Sanders, 54 S.E.2d 116, 122, 189 Va. 624.

50. U.S.—Ira S. Bushey & Sons v. W. E. Hedger Transp. Corp., C.C.A. N.Y., 167 F.2d 9.

Me.—Sidelinker v. York Shore Water Co., 105 A. 122, 117 Me. 528, 2 A. L.R. 327.

N.J.—State of Ohio ex rel. Lien v. Tartalsky, 19 A.2d 625, 129 N.J. Eq. 372.

N.Y.—Geller v. Davis, 81 N.Y.S.2d 832.

N.C.—Manufacturers & Jobbers Finance Corporation v. Lane, 19 S.E. 2d 849, 221 N.C. 189.

Tenn.—Corpus Juris quoted in Priest v. Union Agency, 125 S.W.2d 142, 144, 174 Tenn. 304.

50 C.J. p 615 note 48.

#### Third party order

In action predicated on alleged malicious interference by defendant with plaintiff's bank account by means of a third-party order containing a stay directed against bank, recovery could not be had based on theory that there was an abuse of process, since order was used for purpose for which it was issued.—Polo v. Edelbrau Brewery, 60 N.Y.S. 2d 346, 185 Misc. 775.

51. Ind.—Brown v. Robertson, App., 92 N.E.2d 856.

Me.—Corpus Juris quoted in Sallem v. Glovsky, 172 A. 4, 6, 132 Me. 402.

N.Y.—Hauser v. Bartow, 7 N.E.2d 268, 273 N.Y. 370—Serxner v. Elgart, 94 N.Y.S.2d 731, 196 Misc. 1053—Rothbard v. Ringler, 77 N.Y.S.2d 851.

Tenn.—Corpus Juris quoted in Priest

pose,<sup>52</sup> or intent,<sup>53</sup> or by malice.<sup>54</sup>

In accordance with the foregoing rules it has been held that relief will not be given for a regular use of process to collect a debt,<sup>55</sup> to evict a tenant<sup>56</sup> or to arrest a person under civil<sup>57</sup> or criminal<sup>58</sup> warrant. Abuse of process is not shown by the authorized filing of a lien,<sup>59</sup> or by actual<sup>60</sup> or threatened<sup>61</sup> levy in accordance with regular procedure, or by a receiver's taking possession of property under proper equitable proceedings.<sup>62</sup> However, the bringing and prosecution of supplementary proceedings by a judgment creditor, who knows that the debt has been fully satisfied, for the purpose of compelling the debtor to pay again has been held to constitute an abuse of legal process.<sup>63</sup>

### (b) Intent

The abuse of process, in order to be actionable, must have been willful and for a wrongful purpose. There is said to be a conflict of the authorities on the question of whether malice is an essential element of an action for abuse of process.

In order to be remediable the abuse of process must have been willful<sup>64</sup> and for an unlawful purpose,<sup>65</sup> and, as discussed infra § 123, good faith constitutes a defense.

While the element of malice is inherent in some definitions,<sup>66</sup> and the action is often denominated one for the "malicious abuse of process,"<sup>67</sup> it has been said that the authorities are in conflict as to whether malice is an essential element of abuse of process,<sup>68</sup> some authorities stating broadly that malice is essential,<sup>69</sup> and others denying that mal-

v. Union Agency, 125 S.W.2d 142, 144, 174 Tenn. 304.  
50 C.J. p 615 note 49.

"Improper motive alone is not enough to make the institution of the receivership proceeding an abuse of process."—Italian Star Line v. U. S. Shipping Board Emergency Fleet Corporation, C.C.A.N.Y., 53 F.2d 359, 361.

#### Reason for rule

Legal pursuit of one's rights cannot be deemed illegal or inequitable.—Ash v. Cohn, 194 A. 174, 119 N.J. Law 54.

52. Me.—Corpus Juris quoted in Salim v. Glovsky, 172 A. 4, 6, 132 Me. 402.

N.C.—Carpenter v. Hanes, 83 S.E. 577, 167 N.C. 551.

53. Me.—Corpus Juris quoted in Salim v. Glovsky, 172 A. 4, 6, 132 Me. 402.

Neb.—Martin v. Sanford, 261 N.W. 136, 129 Neb. 212, 100 A.L.R. 179.  
N.Y.—Geller v. Davis, 81 N.Y.S.2d 332.

N.C.—Melton v. Rickman, 36 S.E.2d 276, 225 N.C. 700.

Pa.—Edwards v. Dauphin Deposit Trust Co., Com.Pl., 49 Dauph.Co. 129.

Tenn.—Corpus Juris quoted in Priest v. Union Agency, 125 S.W.2d 142, 144, 174 Tenn. 304.  
50 C.J. p 615 note 51.

54. Ga.—Ehrlich v. Exchange Bank of Savannah, 134 S.E. 809, 35 Ga. App. 790.

Ind.—Brown v. Robertson, App., 92 N.E.2d 856.

N.Y.—Miller v. Stern, 27 N.Y.S.2d 374, 262 App.Div. 5—Serxner v. Elgart, 94 N.Y.S.2d 731, 196 Misc. 1053—Meisels v. J. C. A. Trading Corp., 69 N.Y.S.2d 720, 189 Misc. 46, affirmed 69 N.Y.S.2d 364, 271 App.Div. 1000—Rothbard v. Ringler, 77 N.Y.S.2d 351—Mormon v. Baran, 35 N.Y.S.2d 906.

55. Ga.—Ehrlich v. Exchange Bank of Savannah, 134 S.E. 809, 35 Ga. App. 790.

Tenn.—Priest v. Union Agency, 125 S.W.2d 142, 174 Tenn. 304.  
50 C.J. p 616 note 53.

#### Criminal process

A creditor, merely aiding in prosecution of criminal proceeding against debtor in regular manner by procuring warrant in proper way for debtor's arrest and appearing as witness for prosecution in such proceeding, is not liable for abuse of process, even though prosecution results in payment of debt.—Mullins v. Sanders, 54 S.E.2d 116, 189 Va. 624.

56. Ga.—McKellar v. Moynihan, 111 S.E. 580, 28 Ga.App. 431.  
50 C.J. p 616 note 54.

57. N.Y.—Bianchi v. Leon, 122 N.Y. S. 1004, 138 App.Div. 215.  
50 C.J. p 616 note 55.

58. Minn.—Nelson v. National Casualty Co., 228 N.W. 437, 179 Minn. 53.  
50 C.J. p 616 note 56.

59. N.J.—Carroll Bldg. Corp. v. Louis Greenberg Plumbing Supplies, 214 N.Y.S. 42, 216 App.Div. 268.  
50 C.J. p 616 note 57.

60. Ill.—Dixon v. Smith-Wallace Shoe Co., 119 N.E. 265, 288 Ill. 234.  
50 C.J. p 616 note 58.

61. S.D.—Ingalls v. Christopherson, 114 N.W. 704, 21 S.D. 574.  
50 C.J. p 616 note 59.

62. Pa.—Garland v. Wilson, 137 A. 266, 289 Pa. 272.

63. Mass.—Lorusso v. Bloom, 71 N.E.2d 218, 321 Mass. 9.

64. Ala.—Corpus Juris quoted in Clikos v. Long, 165 So. 394, 398, 231 Ala. 424.

N.C.—Klander v. West, 171 S.E. 782, 205 N.C. 524.  
50 C.J. p 616 note 61.

65. Ala.—Corpus Juris quoted in Clikos v. Long, 165 So. 394, 398, 231 Ala. 424.  
50 C.J. p 616 note 62.

Utterior purpose is an essential element.  
Ala.—Clikos v. Long, 165 So. 394, 231 Ala. 424.

Ga.—Ellis v. Millen Hotel Co., 14 S.E.2d 565, 192 Ga. 66—Carl v. Hansbury, 21 S.E.2d 302, 67 Ga.App. 830—Davison-Faxon Co. v. Walker, 163 S.E. 212, 174 Ga. 532, answers to certified questions conformed to 165 S.E. 160, 45 Ga.App. 395.

Ill.—Breytspraak v. Gordon, 77 N.E. 2d 860, 333 Ill.App. 650—Merriman v. Merriman, 8 N.E.2d 64, 290 Ill. App. 188.

Kan.—Welch v. Shepherd, 219 P.2d 444, 169 Kan. 863.

Me.—Salim v. Glovsky, 172 A. 4, 132 Me. 302—McIntosh v. Bramson, 157 A. 234, 130 Me. 420.

66. Wash.—Rock v. Abraashin, 280 P. 740, 741.  
50 C.J. p 616 note 65.

67. Ala.—Corpus Juris cited in Clikos v. Long, 165 So. 394, 397, 231 Ala. 424.  
50 C.J. p 616 note 66.

68. Ala.—Corpus Juris cited in Clikos v. Long, 165 So. 394, 397, 231 Ala. 424.

Cal.—Corpus Juris cited in Tranchina v. Arcinas, 178 P.2d 65, 63, 78 Cal.App.2d 523.

Ill.—Copley v. Bybee, 8 N.E.2d 55, 290 Ill.App. 117.  
50 C.J. p 616 note 67.

69. Ala.—Clikos v. Long, 165 So. 394, 231 Ala. 424.

Mass.—Shaw v. Fulton, 166 N.E. 26, 266 Mass. 189.

Tex.—Robert & St. John Motor Co. v. Bumpass, Civ.App., 65 S.W.2d 893.

50 C.J. p 617 note 63.

ice must be shown.<sup>70</sup> However, some authorities have held that while malice is never essential in connection with the issuance of the process,<sup>71</sup> it may be essential in connection with the use of the process.<sup>72</sup>

Malice need not be independently proved, but may be legally inferred from a willful perversion of process with a wrongful purpose,<sup>73</sup> although it cannot be inferred from a mere mistake.<sup>74</sup> Where, however, the circumstances afford no inference of malice, it has been held that actual malice must be proved.<sup>75</sup>

### (c) Validity of Process

Validity of the process is no defense to an action for abuse of process.

Since an action for abuse of process presupposes an originally valid and regular process, duly and properly issued,<sup>76</sup> the validity of the process is no defense to an action for its abuse,<sup>77</sup> and plaintiff in the suit for abuse cannot support his case by showing invalidity of the process as a basis for proving abuse thereof.<sup>78</sup>

70. U.S.—George v. Leonard, D.C. S.C., 71 F.Supp. 662.

N.C.—Klander v. West, 171 S.E. 782, 205 N.C. 524.

Pa.—Morphy v. Shipley, 41 A.2d 671, 351 Pa. 425—Edwards v. Dauphin Deposit Trust Co., Com.Pl., 49 Dauph.Co. 129.

50 C.J. p 617 note 69.

"The term malice as used in this connection [with malicious abuse of process] is not to be given its ordinary meaning, but is to be extended so as to include willfulness."—Coplea v. Bybee, 8 N.E.2d 55, 59, 290 Ill.App. 117.

#### Actual malice

In action for abuse of process, actual malice is unimportant if process is willfully used to accomplish purpose intended, since unlawful acts willfully done are to be deemed malicious as to those injured thereby.—Coplea v. Bybee, 8 N.E.2d 55, 290 Ill.App. 117.

71. Va.—Mullins v. Sanders, 54 S.E. 2d 116, 189 Va. 624.

50 C.J. p 617 note 70.

"Malicious prosecution" distinguished see Malicious Prosecution § 2.

72. Va.—Mullins v. Sanders, supra. 50 C.J. p 617 note 71.

73. Ala.—Clikos v. Long, 165 So. 394, 231 Ala. 424.

Cal.—Corpus Juris cited in Tranchina v. Arcinas, 178 P.2d 65, 68, 78 Cal.App.2d 522.

50 C.J. p 617 note 72.

"Abusing the process of the law, to the injury of another, is of it-

self malicious."—Coplea v. Bybee, 8 N.E.2d 55, 60, 290 Ill.App. 117.

Malice is implied from willful abuse of process.—Coplea v. Bybee, 8 N.E.2d 55, 290 Ill.App. 117.

74. Mass.—Shaw v. Fulton, 165 N.E. 26, 266 Mass. 189.

75. Pa.—Humphreys v. Sutcliffe, 43 A. 954, 192 Pa. 336, 73 Am.S.R. 819—McCullough v. Grishobber, 4 Watts & S. 201.

76. Va.—Glidewell v. Murray-Lacy, 98 S.E. 665, 124 Va. 563, 569, 4 A.L.R. 225.

50 C.J. p 617 note 74.

77. Me.—Corpus Juris cited in Sallem v. Glovsky, 172 A. 4, 6, 132 Me. 402.

50 C.J. p 617 note 75.

78. Va.—Glidewell v. Murray-Lacy, 98 S.E. 665, 124 Va. 563, 4 A.L.R. 225.

50 C.J. p 617 note 76.

79. U.S.—George v. Leonard, D.C. S.C., 71 F.Supp. 662.

Ga.—Baldwin v. Davis, 4 S.E.2d 458, 188 Ga. 587—Price v. Fidelity Trust Co., 41 S.E.2d 614, 74 Ga. App. 836.

N.C.—Klander v. West, 171 S.E. 782, 205 N.C. 524.

Pa.—Morphy v. Shipley, 41 A.2d 671, 351 Pa. 425.

50 C.J. p 617 note 77.

Want of probable cause is implied from proof of abuse of process.—Coplea v. Bybee, 8 N.E.2d 55, 290 Ill. App. 117.

80. Pa.—Azar v. Markle, 166 A. 889, 311 Pa. 296.

### (d) Want of Probable Cause

Want of probable cause for instituting the proceedings in which the process was issued is not an essential element of an action for abuse of process.

In order to support an action for abuse of process it is not necessary to show want of probable cause for instituting the proceeding in which the process was issued,<sup>79</sup> or, although there is authority apparently to the contrary,<sup>80</sup> for suing out the process.<sup>81</sup> Some authorities have held that want of probable cause for the acts constituting the abuse of process is essential,<sup>82</sup> while others have indicated that it is not essential<sup>83</sup> because there can be no such thing as probable cause for perversion of process.<sup>84</sup>

### (e) Termination of Process or Proceeding

Termination of the proceedings in which the process was issued is not an essential element of an action for abuse of process.

Plaintiff in an action for abuse of process need not show that the process improperly employed is at an end,<sup>85</sup> or that the proceeding in which it was issued has terminated.<sup>86</sup> It has been held,

Tex.—Robert & St. John Motor Co. v. Bumpass, Civ.App., 65 S.W.2d 399, error dismissed.

81. N.C.—Jackson v. American Tel. & Co., 51 S.E. 1015, 139 N.C. 347, 70 L.R.A. 738.

50 C.J. p 617 note 78.

82. Iowa.—Nix v. Goodhill, 63 N.W. 701, 95 Iowa 282, 58 Am.S.R. 434.

50 C.J. p 618 note 79.

83. Utah.—Kool v. Lee, 134 P. 906, 43 Utah 394.

50 C.J. p 618 note 80.

84. Utah.—Kool v. Lee, supra.

50 C.J. p 618 note 81.

85. N.Y.—Dishaw v. Wadleigh, 44 N.Y.S. 207, 15 App.Div. 205, 4 N.Y. Ann.Cas. 170.

50 C.J. p 618 note 82.

86. U.S.—George v. Leonard, D.C. S.C., 71 F.Supp. 662.

Ga.—Baldwin v. Davis, 4 S.E.2d 458, 188 Ga. 587—Price v. Fidelity Trust Co., 41 S.E.2d 614, 74 Ga. App. 836—Defnall v. Schoen, 35 S.E.2d 564, 73 Ga.App. 2.

Ill.—Coplea v. Bybee, 8 N.E.2d 55, 290 Ill.App. 117.

Mass.—Swartz v. Brockton Sav. Bank, 60 N.E.2d 362, 318 Mass. 66.

N.Y.—Keller v. Butler, 158 N.E. 510, 246 N.Y. 249, 55 A.L.R. 349.

N.C.—Manufacturers & Jobbers Finance Corporation v. Lane, 19 S.E. 2d 849, 221 N.C. 189—Klander v. West, 171 S.E. 782, 205 N.C. 524.

Pa.—Fenton Storage Co. v. Feinstein, 195 A. 176, 129 Pa.Super. 125.

however, that no abuse of process is shown where accused in a criminal prosecution, without coercion, procures by his own initiative and effort a dismissal of the prosecution after a settlement which requires him to pay only what he owes to the complainant.<sup>87</sup>

### c. Malicious Use of Process

Essential elements of an action for malicious use of process are malice, want of probable cause, and termination of the proceedings in which the process was used favorably to plaintiff in the action for malicious use of process.

malice of the proceedings in which the process was used favorably to plaintiff in the action for malicious use of process.

In order to support an action for malicious use of process it must appear that the process complained of was issued and served,<sup>88</sup> that defendant acted maliciously,<sup>89</sup> and without probable cause,<sup>90</sup> and that the proceeding in which the process was used has terminated<sup>91</sup> favorably to plaintiff in the action for malicious use,<sup>92</sup> before he filed his suit

Va.—*Corpus Juris* cited in *Mullins v. Sanders*, 54 S.E.2d 116, 121, 189 Va. 624.

50 C.J. p 618 note 83.

87. Minn.—*Nelson v. National Casualty Co.*, 228 N.W. 487, 179 Minn. 53, 67 A.L.R. 509.

88. Pa.—*Beadle v. Friel*, 183 A. 761, 320 Pa. 560.

89. Ga.—*Georgia Veneer & Package Co. v. Florida Nat. Bank*, 32 S.E.2d 465, 198 Ga. 591—*Defnall v. Schoen*, 35 S.E.2d 564, 73 Ga.App. 25—*Wilcoxon v. Equitable Loan Co.*, 172 S.E. 682, 48 Ga.App. 250.

Ill.—*T. E. Hill Co. v. Contractors' Supply & Equipment Co.*, 94 N.E. 544, 249 Ill. 304, 34 L.R.A.N.S., 456.

Kan.—*Bankers' Inv. Co. v. Butts*, 276 P. 824, 128 Kan. 213—*Dendy v. Russell*, 114 P. 239, 84 Kan. 377.

Mo.—*Bredell v. Kerr*, 147 S.W. 105, 242 Mo. 317.

Pa.—*Morphy v. Shipley*, 41 A.2d 671, 351 Pa. 425—*Publix Drug Co. v. Breyer Ice Cream Co.*, 32 A.2d 413, 347 Pa. 346—*Johnson v. Land Title Bank & Trust Co.*, 198 A. 23, 329 Pa. 241—*Scheide v. Home Credit Co.*, 162 A. 321, 107 Pa. Super. 204.

50 C.J. p 622 note 73.

#### Inference of malice

Malice in such a case need not be express, but may be inferred from a total want of probable cause.—*Johns v. Gibson*, 4 S.E.2d 480, 60 Ga.App. 585.

Allegations in petition for mandamus to obtain access to allegedly public records in clerk's office that clerk had become "arrogant in manner and drunk with power" afforded no basis for charge of improper use of court's processes.—*Hunter v. Beckley Newspapers Corp.*, 40 S.E.2d 332, 129 W.Va. 302.

90. Ga.—*Georgia Veneer & Package Co. v. Florida Nat. Bank*, 32 S.E.2d 465, 198 Ga. 591—*Defnall v. Schoen*, 35 S.E.2d 564, 73 Ga.App. 25—*Underwood Elliott Fisher Co. v. Evans*, 180 S.E. 558, 53 Ga.App. 673—*Wilcoxon v. Equitable Loan Co.*, 172 S.E. 682, 48 Ga.App. 250.

Ill.—*T. E. Hill Co. v. Contractors' Supply & Equipment Co.*, 94 N.E. 544, 249 Ill. 304, 34 L.R.A.N.S., 456.

Pa.—*Morphy v. Shipley*, 41 A.2d 671, 351 Pa. 425—*Publix Drug Co. v. Breyer Ice Cream Co.*, 32 A.2d 413, 347 Pa. 346—*Johnson v. Land Title Bank & Trust Co.*, 198 A. 23, 329 Pa. 241—*Scheide v. Home Credit Co.*, 162 A. 321, 107 Pa. Super. 204.

50 C.J. p 622 note 74.

#### What constitutes

Probable cause, in action for malicious use of process, depends on whether defendant had reasonable ground to believe plaintiff was indebted, as alleged in former action.—*Mumford v. Sears, Roebuck & Co.*, 162 S.E. 661, 44 Ga.App. 52.

#### Effect of probable cause

An action filed with probable cause, no matter with what motive, cannot serve as basis for subsequent suit for malicious use of process.—*Beatus v. Darling Stores Corp.*, 33 S.E.2d 37, 72 Ga.App. 84.

Want of probable cause in suit exists, so as to authorize recovery of damages for malicious use of civil process, where circumstances are such as to satisfy reasonable man that one bringing suit had no ground for proceeding except his desire to injure defendant therein.—*Johns v. Gibson*, 4 S.E.2d 480, 60 Ga.App. 585.

#### Bad faith

Kan.—*Bankers' Inv. Co. v. Butts*, 276 P. 824, 128 Kan. 213.

#### Process obtained at request of plaintiff

An action on the case for raising a writ of habeas corpus to be issued and served on the party therein alleged to be restrained, who that his authority and against his consent, cannot be maintained if it appears that the complaint was made by authority from plaintiff and such request, expressed either directly to defendant or indirectly through some other person.—*Linda v. Hudson*, 1 Cush., Mass., 185.

91. Ga.—*Georgia Veneer & Package Co. v. Florida Nat. Bank*, 32 S.E.2d 465, 198 Ga. 591—*Sparrow v. Weld*, 169 S.E. 487, 177 Ga. 111, conformed to 170 S.E. 1427—*Beatus v. Darling Stores Corp.*, 33 S.E.2d 37, 72 Ga.App. 84—*Johns v. Gibson*, 4 S.E.2d 480, 60 Ga.App. 585—*Randolph v. Mer-*

*chants & Mechanics Banking & Loan Co.*, 199 S.E. 549, 58 Ga.App. 566.

50 C.J. p 622 note 75.

#### Reason for rule

Want of probable cause in the institution of the original action is an element of the offense which cannot be determined until that action is ended.—*Garland v. Wilson*, 137 A. 266, 289 Pa. 272.

#### Pendency of original suit

Suit for malicious use of process in bringing equity suit could not be maintained while suit was pending.—*Garland v. Wilson*, 137 A. 266, 289 Pa. 272.

92. Ga.—*Baldwin v. Davis*, 4 S.E.2d 458, 188 Ga. 587—*Simpson v. Jones*, 180 S.E. 558, 182 Ga. 544—*Sparrow v. Weld*, 169 S.E. 487, 177 Ga. 134, conformed to 170 S.E. 301, 47 Ga.App. 254—*Price v. Fidelity Trust Co.*, 41 S.E.2d 614, 74 Ga.App. 836—*Defnall v. Schoen*, 35 S.E.2d 564, 73 Ga.App. 25—*Johns v. Gibson*, 4 S.E.2d 480, 60 Ga.App. 585—*Randolph v. Merchants & Mechanics Banking & Loan Co.*, 199 S.E. 549, 58 Ga.App. 566—*Sherrod v. Haverty Furniture Co.*, 179 S.E. 164, 50 Ga.App. 549—*Wilcoxon v. Equitable Loan Co.*, 172 S.E. 682, 48 Ga.App. 250—*Coggins v. General Motors Acceptance Corporation*, 170 S.E. 308, 47 Ga.App. 314—*Ehrlich v. Exchange Bank of Savannah*, 184 S.E. 809, 35 Ga.App. 790.

N.J.—*Ash v. Cohn*, 194 A. 174, 119 N.J.Law 54.

Pa.—*Publix Drug Co. v. Breyer Ice Cream Co.*, 32 A.2d 413, 347 Pa. 346—*Beadle v. Friel*, 183 A. 761, 320 Pa. 560—*Kendzierski v. Home Credit Co.*, 162 A. 324, 107 Pa. Super. 213—*Scheide v. Home Credit Co.*, 162 A. 321, 107 Pa. Super. 204.

50 C.J. p 622 note 76.

Nonresidence of plaintiff did not abrogate the rule requiring termination of a suit in favor of defendants before an action for malicious use of civil process can be maintained against the party who brings the alleged wrongful suit.—*Georgia Veneer & Package Co. v. Florida Nat. Bank*, 32 S.E.2d 465, 198 Ga. 591.

for damages.<sup>93</sup> It must further appear that the process maliciously used was valid.<sup>94</sup>

While malice may be inferred from a total want of probable cause,<sup>95</sup> want of probable cause cannot be inferred from the existence of malice.<sup>96</sup>

*Interference with person or property.* It has been held that the prosecution of a civil action maliciously and without probable cause gives rise to a cause of action for malicious use of process only when the person or property of the defendant has been interfered with, as by arrest or attachment<sup>97</sup> or some special damage has been done to him other than such as necessarily results in all like suits.<sup>98</sup> Interference with the person or property has been held unnecessary in the case of the wrongful institution of a lunacy proceeding.<sup>99</sup>

#### Recovery on cross bill

In conditional seller's action of bill trover for automobile, defendant's recovery, on cross bill disaffirming conditional sales contract for automobile, of part of payments made was not termination in favor of defendant which warranted defendant's recovery for malicious use of legal process.—*Coggins v. General Motors Acceptance Corporation*, 170 S.E. 308, 47 Ga.App. 314.

#### Merits of cause

The termination need not be on the merits of the cause.—*Scheide v. Home Credit Co.*, 162 A. 321, 107 Pa. Super. 204.

#### Satisfaction of execution by agreement

Where assignee of note entered judgment thereon and issued execution after note was paid, satisfaction thereof by parties' agreement after maker's petition to open judgment was not final adjudication favorable to maker. Such agreement for satisfaction of the judgment bars the maker's action for malicious use of process.—*Scheide v. Home Credit Co.*, 162 A. 321, 107 Pa. Super. 204.

92. Ga.—*Johnson v. Gordon*, 106 S. E. 615, 26 Ga.App. 526.  
50 C.J. p 622 note 77.

94. Ga.—*Gray v. Joiner*, 55 S.E. 752, 127 Ga. 544.  
50 C.J. p 623 note 78.  
Validity of original proceeding as affecting right to sue for malicious prosecution see *Malicious Prosecution* §§ 6-12.

95. Ga.—*Wilcoxan v. Equitable Loan Co.*, 172 S.E. 682, 48 Ga.App. 250.

96. Ga.—*Wilcoxan v. Equitable Loan Co.*, *supra*.

97. Ga.—*Jacksonville Paper Co. v. Owen*, 17 S.E.2d 76, 193 Ga. 23—

*Price v. Fidelity Trust Co.*, 41 S.E. 2d 614, 616, 74 Ga.App. 836.

Pa.—*Publix Drug Co. v. Breyer Ice Cream Co.*, 32 A.2d 413, 347 Pa. 346.—*Scheide v. Home Credit Co.*, 162 A. 321, 107 Pa. Super. 204.—*Shick v. Norristown-Penn Trust Co.*, Com.Pl., 60 Montg.Co. 217.

98. Ga.—*Jacksonville Paper Co. v. Owen*, 17 S.E.2d 76, 193 Ga. 23.—*Price v. Fidelity Trust Co.*, 41 S.E. 2d 614, 74 Ga.App. 836.

"No damages are recoverable for a malicious use of legal process where defendant's person or property is not seized and he sustains no damage as a result of institution of suit except such as necessarily results in all suits prosecuted to recover in like causes of action."—*Jacksonville Paper Co. v. Owen*, 17 S.E.2d 76, 78, 193 Ga. 23.—*Price v. Fidelity Trust Co.*, 41 S.E.2d 614, 616, 74 Ga.App. 836.—*Swain v. American Surety Co. of New York*, 171 S.E. 217, 47 Ga.App. 501.

*Expenses held not special damages*  
Attorney's fees, expenses of transportation of witnesses to hearing, loss of time in preparation of case, reporter fees, and fees of auditor were not recoverable as special damages.—*Jacksonville Paper Co. v. Owen*, 17 S.E.2d 76, 193 Ga. 23.

99. Pa.—*Timmey v. Bloom*, 14 Pa. Dist. & Co. 288.

1. U.S.—*George v. Leonard*, D.C.S. C., 71 F.Supp. 662.

Cal.—*Tranchina v. Arcinas*, 178 P.2d 65, 78 Cal.App.2d 522.

N.C.—*Ellis v. Wellons*, 29 S.E.2d 884, 224 N.C. 269.

50 C.J. p 612 note 9.

"The abuse may be of civil or criminal process."—*Ellis v. Wellons*, 29 S.E.2d 884, 885, 224 N.C. 269.

Action for abuse of criminal process could be maintained.—*George v. Leonard*, D.C.S.C., 71 F.Supp. 662.

## § 121. Particular Forms of Process Subject to Abuse

In some jurisdictions actions for malicious abuse or malicious use of process may be predicated on process in either a civil or criminal proceeding; in other jurisdictions process in civil proceedings only may be the basis for such actions.

In defining the terms "abuse" or "malicious abuse" of process and in enforcing the remedy therefor, some courts have made no distinction between civil or criminal process; either of such processes constitutes a basis for an action of abuse of process.<sup>1</sup> Others, however, have confined the remedy to an abuse of civil process.<sup>2</sup> Similarly, some authorities use the term "malicious use of process" as referable to either civil or criminal process,<sup>3</sup> while others confine it to use of civil process.<sup>4</sup>

2. Ga.—*Hughes v. Georgia Power Co.*, 15 S.E.2d 466, 469, 65 Ga.App. 163.—*Floyd County Dairies v. Brooks*, 6 S.E.2d 360, 61 Ga.App. 239.  
50 C.J. p 612 note 10.

"There is no cause of action for malicious abuse of criminal process."—*Dugas v. Darden*, 15 S.E.2d 901, 903, 65 Ga.App. 394.

"Malicious abuse of legal process is where a plaintiff in a civil proceeding willfully misapplies the process of a court in order to obtain an object which such a process is not intended by law to effect."—*Baldwin v. Davis*, 4 S.E.2d 458, 462, 188 Ga. 537.—*Simpson v. Jones*, 188 S.E. 558, 182 Ga. 544.—*Price v. Fidelity Trust Co.*, 41 S.E.2d 614, 74 Ga.App. 836.—*Dunlop Tire & Rubber Corporation v. Downs*, 3 S.E.2d 124, 126, 60 Ga.App. 124.—*Braswell v. Mason Kominers Tire Co.*, 193 S.E. 357, 56 Ga.App. 593.—*Davidson-Faxon Co. v. Walker*, 165 S.E. 160, 45 Ga.App. 395.—*Atlanta Finance Co. v. Cain*, 157 S.E. 337, 42 Ga.App. 819.—*Roberts v. Willys-Overland, Inc.*, 108 S.E. 133, 27 Ga.App. 304.—*McElreath v. Gross*, 98 S.E. 190, 23 Ga.App. 287.

3. Pa.—*Mayer v. Walter*, 64 Pa. 283.—*Whelan v. Miller*, 49 Pa. Super. 91.

4. Ga.—*Hughes v. Georgia Power Co.*, 15 S.E.2d 466, 65 Ga.App. 163.—*Floyd County Dairies v. Brooks*, 6 S.E.2d 360, 61 Ga.App. 239.—*Dunlop Tire & Rubber Corporation v. Downs*, 3 S.E.2d 124, 126, 60 Ga. App. 124.

50 C.J. p 622 note 69.

"Malicious use of legal process is where the plaintiff in a civil proceeding employs the court's process in order to execute the object which the law intends for such a process to subserve, but proceeds maliciously and without probable cause."—*Baldwin v. Davis*, 4 S.E.2d 458, 460.

Abuse of process has been predicated on perversion of the process of civil<sup>5</sup> or criminal<sup>6</sup> arrest, dispossessory warrant,<sup>7</sup> search warrant,<sup>8</sup> subpoena,<sup>9</sup> warrant of seizure,<sup>10</sup> or writ of removal.<sup>11</sup> A malicious institution of a proceeding to inquire into the sanity of another may also constitute abuse of process.<sup>12</sup>

Wrongful attachment as a basis for liability is considered in Attachment §§ 503-565, wrongful distress, in Landlord and Tenant § 715, wrongful execution, in Executions §§ 451-458, wrongful garnishment, in Garnishment §§ 310-313, wrongful injunction, in Injunctions §§ 278-316, and wrongful sequestration, in the C.J.S. title Sequestration § 21, also 57 C.J. p 261 note 85-p 270 note 64.

*Writ of capias ad respondendum.* An illegal and

improper use of a writ of capias ad respondendum does not invalidate the writ or the act of the court in issuing it, although plaintiff may be responsible to defendant for the improper use.<sup>13</sup>

## § 122. Persons Liable

As a general rule all persons who knowingly participate in an abuse of process are liable for the damages caused thereby.

As a general rule, all persons who knowingly participate in an abuse of process are liable for damages caused thereby,<sup>14</sup> as, for example, an agent<sup>15</sup> or attorney, as discussed in Attorney and Client § 52 b, the officer executing the process,<sup>16</sup> or a person aiding, advising, or abetting the officer's unlawful acts<sup>17</sup> or subsequently ratifying

188 Ga. 587—Simpson v. Jones, 186 S.E. 558, 182 Ga. 544—Price v. Fidelity Trust Co., 41 S.E.2d 614, 74 Ga. App. 838—Dunlop Tire & Rubber Corporation v. Downs, 3 S.E.2d 124, 126, 60 Ga. App. 124—Wilcoxon v. Equitable Loan Co., 172 S.E. 682, 48 Ga. App. 250—Davison-Paxon Co. v. Walker, 165 S.E. 160, 45 Ga. App. 395—Hallman v. Ozburn, 144 S.E. 344, 38 Ga. App. 514.

Proper and only remedy for the "malicious use" of criminal process, valid on its face and maliciously sued out without probable cause, is an action for malicious arrest or malicious prosecution.—Floyd County Dairies v. Brooks, 6 S.E.2d 360, 61 Ga. App. 239—Grist v. White, 80 S.E. 519, 14 Ga. App. 147.

5. N.J.—Ash v. Cohn, 194 A. 174, 119 N.J. Law 54.  
56 C.J. p 618 note 87.  
Liability on bond or undertaking see Arrest §§ 85-86.

### Commitment for nonpayment of alimony

The obtaining by a wife and her attorneys of an order for commitment of husband to jail for failure to pay alimony arrearage, and withholding execution until the beginning of a holiday week end when courts would be closed and husband would find it impossible to obtain his release, constituted actionable "abuse of process" under guise of compelling payment of accrued alimony. Husband's right of action in such case was not nullified by his obtaining release from prison several hours after the commitment, since the tort occurred when the order of commitment was executed.—Rothbard v. Ringler, 77 N.Y.S.2d 351.

6. U.S.—George v. Leonard, C.A.S. C., 169 F.2d 177.  
N.Y.—Lader v. Benkowitz, 66 N.Y.S. 2d 713, 188 Misc. 906.

### Arrest of fugitive from justice

The willful and malicious arrest of another as a fugitive from justice, where the charge is known to be false, is ground for an action for abuse of process.—Keller v. Butler, 158 N.E. 510, 246 N.Y. 249, 55 A.L.R. 349.

An arrest is not privileged unless made for purpose of bringing person arrested before a court, body, or official, or otherwise securing administration of law.—Hoppe v. Klapperich, 28 N.W.2d 780, 224 Minn. 224, 178 A.L.R. 819.

7. Ga.—Defnall v. Schoen, 35 S.E.2d 564, 73 Ga. App. 25.

8. Ga.—L. B. Price Mercantile Co. v. Adams, 194 S.E. 29, 56 Ga. App. 756—Atlantic Coast Line R. Co. v. Inabinette, 122 S.E. 902, 32 Ga. App. 246.

Wrongful search or seizure see the C.J.S. title Searches and Seizures §§ 99-108, also 56 C.J. p 1254 note 56-p 1260 note 11.

9. N.Y.—Dishaw v. Wadleigh, 44 N.Y.S. 207, 15 App. Div. 205, 4 N.Y. Ann. Cas. 170.

50 C.J. p 618 note 95.

10. N.D.—Blair v. Maxbass Security Bank, 176 N.W. 98, 44 N.D. 12.  
50 C.J. p 618 note 96.

11. Iowa.—Bradshaw v. Frazier, 85 N.W. 752, 113 Iowa 579, 86 Am. S.R. 394, 55 L.R.A. 258.  
50 C.J. p 618 note 97.

12. Pa.—Timmey v. Bloom, 14 Pa. Dist. & Co. 288, 22 Berks Co. 312.

13. Pa.—Powell v. Perkins, 60 A. 781, 211 Pa. 233.

14. U.S.—Ingo v. Koch, C.C.A.N.Y., 127 F.2d 667.

Ill.—Copley v. Bybee, 8 N.E.2d 55, 290 Ill. App. 117.

Me.—Corpus Juris quoted in Sallem v. Glovsky, 172 A. 4, 6, 132 Me. 402.

50 C.J. p 618 note 98.

15. Me.—Lambert v. Breton, 144 A. 864, 127 Me. 510.

Merere presence of salesman of company procuring issuance of sequestration writ would not render him personally liable for officers' unlawful acts in serving writ.—Singer Sewing Mach. Co. v. Mendoza, Tex. Civ. App., 62 S.W.2d 656, modified on other grounds Mendoza v. Singer Sewing Mach. Co., 84 S.W.2d 715, 125 Tex. 639.

16. Ill.—Copley v. Bybee, 8 N.E.2d 55, 290 Ill. App. 117.

Okl.—Corpus Juris cited in Spencer v. Arnold, 4 P.2d 55, 58, 152 Okl. 189.

50 C.J. p 619 note 2.

An officer is not privileged to use his power to arrest a person and keep him in custody to force him to comply with demand not related to accomplishment of purpose for which he is in custody.—Hoppe v. Klapperich, 28 N.W.2d 780, 224 Minn. 224, 178 A.L.R. 819.

17. N.Y.—Treiber v. Mouricourt, 258 N.Y.S. 206, 143 Misc. 741.

Okl.—Corpus Juris cited in Spencer v. Arnold, 4 P.2d 55, 58, 152 Okl. 189.

Tenn.—Long v. Alford, 14 Tenn. App. 1.

50 C.J. p 619 note 3.

### Person directing officer

(1) In action for abuse of legal process, deputy sheriff who served attachment writ was agent of defendants who were personally present and directed his conduct.—Sallem v. Glovsky, 172 A. 4, 132 Me. 402.

(2) Where attaching officer acted under express direction of creditor's attorney, creditor was liable in damages for abuse of process.—Bourisk v. Derry Lumber Co., 156 A. 382, 130 Me. 376.



them.<sup>18</sup> However, a plaintiff who does not direct or participate in abuse of process by the officer, and does not ratify his acts, is not liable;<sup>19</sup> nor is he liable for unauthorized acts of his agent.<sup>20</sup>

*Participation without knowledge* of the wrongful purpose will not render a person liable for abuse of process.<sup>21</sup>

### § 123. Defenses

The absence of an essential element of the tort constitutes a defense to an action for abuse of process or for malicious use of process.

The absence of a necessary element of the tort may be interposed as a defense to the action for abuse of process,<sup>22</sup> as well as to the action of malicious use of process.<sup>23</sup> Thus, good faith has been held a defense to an action for abuse of process.<sup>24</sup> However, advice of counsel has been held not to be a bar to such an action,<sup>25</sup> although it may be shown in mitigation of damages.<sup>26</sup> Probable cause alone, without proof of the absence of malice, is a defense to an action for malicious use of process.<sup>27</sup>

*An estoppel* will prevent plaintiff from recovering for abuse of process.<sup>28</sup>

### § 124. Actions

- a. Right of action
- b. Form of action
- c. When right of action accrues
- d. Pleading
- e. Evidence
- f. Trial
- g. Damages

#### a. Right of Action

A right of action for abuse of process, or for malicious use of process, exists in favor of the injured person.

An abuse of process is a wrong which the courts will not permit,<sup>29</sup> and have power to prevent, as discussed in Courts § 88. The law gives the person aggrieved by the wrongful act a cause of action against the offending person.<sup>30</sup> Such an action is an independent cause of action,<sup>31</sup> as distinguished from an action for malicious prosecution, discussed in Malicious Prosecution § 1 et seq, and from an action for false imprisonment, discussed in False Imprisonment § 1 et seq, and is expressly recognized at common law.<sup>32</sup>

18. Neb.—Gilbert v. Rothe, 184 N. W. 119, 106 Neb. 549.  
50 C.J. p 619 note 4.

19. Ala.—Chikos v. Long, 165 So. 394, 231 Ala. 424.  
Me.—Corpus Juris quoted in Sallem v. Glovsky, 172 A. 4, 6, 132 Me. 402.

Tenn.—Long v. Alford, 14 Tenn. App. 1.  
Vt.—Gross v. Gates, 194 A. 465, 109 Vt. 156.  
50 C.J. p 619 note 5.

Private prosecutor was not liable for abuse of process because of five continuances of criminal prosecution, allegedly procured at instance of private prosecutor and extending over period of many months, where plaintiff had invoked jurisdiction of superior court by appealing from fine and costs imposed by municipal court, since control of appeal, when docketed, passed to solicitor of district and judge presiding over superior court.—Abernethy v. Morrison, 2 S.E.2d 369, 215 N.C. 454.

20. N.C.—Lamm v. Charles Stores Co., 159 S.E. 444, 201 N.C. 134, 77 A.L.R. 923.

21. N.Y.—Foy v. Barry, 84 N.Y.S. 335, 87 App.Div. 291.

#### Officer acting in good faith

In making levy of execution, officer exercises discretion and is not liable for abuse of process for acts performed in good faith, although mistakenly and to prejudice of debtor.

—Chikos v. Long, 165 So. 394, 231 Ala. 424.

22. Ala.—Chikos v. Long, 165 So. 394, 231 Ala. 424.  
Validity of issuance of process not a defense see supra § 120 b (2) (c).

23. Ga.—Callaway v. Janko, 106 S. E. 189, 26 Ga.App. 327.

24. Ala.—Corpus Juris quoted in Chikos v. Long, 165 So. 394, 231 Ala. 424.

Me.—Sallem v. Glovsky, 172 A. 4, 132 Me. 402.  
N.Y.—Solomon v. Baar, 5 N.Y.S.2d 753, 168 Misc. 439, affirmed 7 N. Y.S.2d 1022, 255 App.Div. 849.  
50 C.J. p 616 note 63.

25. Va.—Mullins v. Sanders, 54 S.E. 2d 116, 189 Va. 624.

26. Va.—Mullins v. Sanders, supra.

27. Ga.—Callaway v. Janko, 106 S. E. 189, 26 Ga.App. 327.

28. Pa.—Sacchetti v. Sandt, 24 Pa. Dist. 1090, affirmed 64 Pa.Super. 311.

50 C.J. p 620 note 20.

29. N.C.—Carpenter v. Hanes, 83 S. E. 577, 167 N.C. 551.  
50 C.J. p 619 note 7.

"Power conferred by legal process may not be abused or exercised with unreasonable indignity or oppressive hardship to another."—Ellis v. Welions, 29 S.E.2d 884, 885, 224 N.C. 269.

30. U.S.—George v. Leonard, D.C.S. C., 71 F.Supp. 662.

Cal.—Tranchina v. Arcinas, 178 P.2d 65, 78 Cal.App.2d 522.

Ga.—Defnall v. Schoen, 35 S.E.2d 564, 73 Ga.App. 25.

Mass.—Lorusso v. Bloom, 71 N.E.2d 218, 321 Mass. 9.

Mo.—Thompson v. Farmers' Exchange Bank, 62 S.W.2d 803, 333 Mo. 437.

N.Y.—Rothbard v. Ringler, 77 N.Y. S.2d 351.

N.C.—Melton v. Rickman, 36 S.E.2d 276, 225 N.C. 700.

Tex.—Peerless Oil & Gas Co. v. Teas, Civ.App., 138 S.W.2d 637, affirmed 158 S.W.2d 758, 138 Tex. 301—Robert & St. John Motor Co. v. Bumpass, Civ.App., 65 S.W.2d 399.  
50 C.J. p 619 note 9.

#### At law

Damages for unjustly obtaining judgment against plaintiffs in court of foreign country, if recoverable, are recoverable at law.—Harrison v. Triplex Gold Mines, C.C.A.Mass., 33 F.2d 667.

Officer of corporation could not sue in his own name for abuse of process resulting in damage to the corporation.—Andrew v. George Muse Clothing Co., 161 S.E. 296, 44 Ga.App. 291.

31. U.S.—George v. Leonard, D.C.S. C., 71 F.Supp. 662.

32. U.S.—George v. Leonard, supra. N.J.—Ash v. Cohn, 194 A. 174, 119 N. J.Law 54.

"One who uses legal process to compel a person to do some collateral act not within the scope of the

Malicious use of process gives the injured person a right of action for damages,<sup>33</sup> although it has been said that such actions are not favored by the courts.<sup>34</sup>

### b. Form of Action

Except where the matter has been otherwise regulated by statute, the proper form of action to bring for an abuse of process is ordinarily case or trespass.

Except where the matter has been otherwise regulated by statute, the proper form of action to bring for an abuse of process is ordinarily case<sup>35</sup> or trespass.<sup>36</sup> Case, and not trespass, is the proper remedy for an injury effected by regular process of a court of competent jurisdiction or acts done under color of such authority,<sup>37</sup> although the process may have been fraudulently or maliciously procured,<sup>38</sup> or may be irregular or voidable by reason of facts not appearing on the face of the process or proceeding;<sup>39</sup> but trespass, and not case, is the proper remedy where the process or proceeding is void or irregular on its face,<sup>40</sup> or where it has been annulled or set aside for irregularity,<sup>41</sup> or where process against one person is levied on the goods of another.<sup>42</sup> Where the proceeding subsequently set aside for irregularity was in full force and effect at the time the action for the in-

jury was brought, case and not trespass is the proper remedy;<sup>43</sup> and this is also true where the process was abated for another action pending.<sup>44</sup> The trespass may be waived and an action on the case brought if the issuance of the process was malicious.<sup>45</sup> In particular instances the proper remedy has been held to be case<sup>46</sup> or to be trespass.<sup>47</sup>

### c. When Right of Action Accrues

The cause of action for abuse of process is complete as soon as the acts complained of are committed. The remedy for a malicious use of process, however, is not available until the termination of the original proceedings.

Since it need not be shown that the suit in which the process was abused has terminated, as discussed supra § 120 b (2) (e), the cause of action for an abuse of process is complete as soon as the acts complained of are committed.<sup>48</sup> However, it has been held that where the parties are adversaries in pending and undecided litigation, a termination of such litigation is required before suit for malicious abuse of process may be instituted and tried.<sup>49</sup> It has also been held that before a cause of action in the nature of a counterclaim can accrue for abuse of process, the original action must have terminated or the process must have been wholly annulled.<sup>50</sup>

process or for the purpose of oppression or annoyance is liable in damages in a common law action for abuse of process."—*Melton v. Rickman*, 36 S.E.2d 276, 278, 225 N.C. 700.

33. Ga.—*Baldwin v. Davis*, 4 S.E.2d 458, 188 Ga. 587—*Woodley v. Coker*, 46 S.E. 89, 119 Ga. 226.  
50 C.J. p 623 note 79.

"Improper use or issuance of process is actionable."—*Brookley v. Ives*, 278 N.Y.S. 147, 149, 243 App.Div. 487.

#### In whom right of action lies

(1) Husband's petition for malicious use of process in foreclosing alleged bill of sale showed no right of action in husband, where alleging that property foreclosed belonged to wife.—*Wilcoxon v. Equitable Loan Co.*, 172 S.E. 682, 48 Ga. App. 250.

(2) Allegations of husband's petition for malicious use of process in foreclosing alleged bill of sale signed by both husband and wife, apparently as principals and owners, that husband had been discharged in bankruptcy showed no right of action in husband.—*Wilcoxon v. Equitable Loan Co.*, supra.

34. Ga.—*Hallman v. Ozburn*, 144 S. E. 344, 38 Ga.App. 514.

35. Mich.—*Marlatte v. Weickgenant*, 110 N.W. 1061, 147 Mich. 266.  
50 C.J. p 620 note 11.

36. Pa.—*Timme v. Bloom*, 14 Pa. Dist. & Co. 288.  
50 C.J. p 620 note 12.

37. U.S.—*Smith v. Miles*, Super. Ark., 22 F.Cas.No.13,079a, 1 Compst. 34.  
1 C.J. p 1002 note 2—11 C.J. p 6 note 44.

38. Conn.—*Cannon v. Sipplos*, 39 Conn. 505.  
1 C.J. p 1002 note 3—11 C.J. p 6 note 44.

39. Ark.—*Dixon v. Watkins*, 9 Ark. 139.  
1 C.J. p 1002 note 4.

40. Pa.—*Baird v. Householder*, 32 Pa. 168.  
1 C.J. p 1002 note 5—11 C.J. p 6 note 45.

41. S.C.—*Cooper v. Halbert*, 27 S.C. L. 419.  
1 C.J. p 1002 note 6.

42. Ky.—*Wickliffe v. Sanders*, 6 T. B.Mon. 296.

43. S.C.—*Fripp v. Martin*, 28 S.C.L. 236.

44. Mass.—*Hayden v. Shedd*, 11 Mass. 500.

45. Ky.—*Hays v. Younglove*, 7 B. Mon. 545.  
11 C.J. p 6 note 46.

46. Conn.—*Swift v. Chamberlain*, 3 Conn. 537.  
1 C.J. p 1002 note 8.

47. N.Y.—*Vail v. Lewis*, 4 Johns. 450, 4 Am.D. 300.  
1 C.J. p 1002 note 9.

48. Kan.—*Corpus Juris* cited in *Little v. Sowers*, 204 P.2d 605, 608, 167 Kan. 72.  
50 C.J. p 620 note 15.

#### Departure from terms of warrant

In determining liability for abuse of process, from moment when there was a departure from terms of bench warrant, plaintiff's arrest became unlawful aside from any improper intent or purpose on part of defendants.—*Ingo v. Koch*, C.C.A.N.Y., 127 F.2d 667.

49. N.Y.—*Friedman v. Roseth Corp.*, 74 N.Y.S.2d 733, 190 Misc. 742, modified on other grounds 75 N.Y. S.2d 515, 278 App.Div. 755.

50. U.S.—*Bach v. Quigan*, D.C.N.Y., 5 F.R.D. 34.

Minn.—*Blue Earth Valley Tel. Co. v. Commonwealth Utilities Co.*, 167 N.W. 554, 140 Minn. 198.

#### Reason for rule

The orderly conduct of this litigation requires that plaintiff's action be tried first. If that action fails, a determination can then be sought in an action for abuse of process.—*Friedman v. Roseth Corp.*, 74 N.Y.S. 2d 733, 190 Misc. 742, modified on other grounds 75 N.Y.S.2d 515, 278 App.Div. 755.

The remedy of malicious use of process is not available until after the termination of the original action.<sup>51</sup>

### d. Pleading

In order to be sufficient, the pleadings of plaintiff in an action for abuse of process or for malicious use of process must allege facts disclosing all the essential elements of the cause of action.

In accordance with the general rules of pleading in civil actions, facts disclosing all the essential elements of the cause of action for abuse of process should be sufficiently alleged in plaintiff's declaration, complaint, or petition.<sup>52</sup> Thus, plaintiff

should allege not only an actual use of the process,<sup>53</sup> but its willful use,<sup>54</sup> unlawfully,<sup>55</sup> for a wrongful purpose,<sup>56</sup> and that damage to plaintiff resulted therefrom.<sup>57</sup> Facts, rather than conclusions, must be stated,<sup>58</sup> but an allegation of facts from which a willful abuse<sup>59</sup> and wrongful purpose<sup>60</sup> may reasonably be inferred is sufficient without specific allegation of these elements.

It is not necessary to allege that the process was maliciously sued out,<sup>61</sup> but it may be necessary to allege that the process, after it had been sued out, was maliciously abused.<sup>62</sup>

Plaintiff need not allege a want of probable cause

51. Ga.—Beatus v. Darling Stores Corp., 33 S.E.2d 37, 72 Ga.App. 84. **Suit held prematurely instituted**  
D.C.—Pearson v. O'Connor, D.C., 8 F.R.D. 432.

52. U.S.—Gonsouland v. Rosomano, La., 176 F. 481, 100 C.C.A. 97. 50 C.J. p 620 notes 22-26.

**Demand for damages not properly allowable for abuse of process did not render complaint insufficient, where complaint showed some recoverable damage.**—Bartolotta v. Hecht Co., 67 N.Y.S.2d 803, 189 Misc. 65.

#### Knowledge

In action for abuse of process, complaint was held insufficient to state cause of action against attachment plaintiff for levy on property in excess of amount of debt, in absence of averment that officer knew value of property attached or that attachment plaintiff participated in levy.—Clikos v. Long, 165 So. 394, 231 Ala. 424.

#### Allegations held sufficient

D.C.—Davis v. Boyle Bros., Mun. App., 73 A.2d 517.

Ga.—Defnall v. Schoen, 35 S.E.2d 564, 73 Ga.App. 25—Braswell v. Mason Kominers Tire Co., 193 S.E. 357, 56 Ga.App. 593—City of Columbus v. Webster, 180 S.E. 512, 51 Ga.App. 270.

N.Y.—Bartolotta v. Hecht Co., 67 N.Y.S.2d 803, 189 Misc. 65—Lader v. Benkowitz, 66 N.Y.S.2d 713, 188 Misc. 906.

50 C.J. p 620 note 22 [a].

#### Allegations held insufficient

Conn.—Shaeffer v. O. K. Tool Co., 148 A. 330, 110 Conn. 528.

D.C.—Pearson v. O'Connor, D.C., 8 F.R.D. 432.

Ga.—Simpson v. Jones, 186 S.E. 558, 182 Ga. 544—Brown v. Smith, 165 S.E. 243, 175 Ga. 470—Carl v. Hansbury, 21 S.E.2d 302, 67 Ga.App. 830—Dugas v. Darden, 15 S.E.2d 901, 65 Ga.App. 394—Gaines v. Pirkle, 199 S.E. 317, 58 Ga.App. 546—Sherrrod v. Haverty Furniture Co., 179 S.E. 164, 50 Ga.App. 549

—Cole v. Rogers, Inc., 167 S.E. 781, 46 Ga.App. 450—Schroeder v. Bennett, 159 S.E. 121, 43 Ga.App. 389—Wilk v. Bennett, 154 S.E. 654, 41 Ga.App. 709.

Ill.—Ligittos v. Finerman, 67 N.E.2d 610, 329 Ill.App. 241—Dean v. Kirkland, 23 N.E.2d 180, 301 Ill.App. 495.

Ind.—Brown v. Robertson, App., 92 N.E.2d 856.

Mass.—Gabriel v. Borowy, 85 N.E.2d 435, 324 Mass. 231—Jacobs v. Mann, 15 N.E.2d 482, 300 Mass. 253—Jacoby v. Spector, 198 N.E. 157, 292 Mass. 366.

Mo.—Thompson v. Farmers' Exchange Bank, 62 S.W.2d 803, 333 Mo. 437.

N.Y.—Hauser v. Bartow, 7 N.E.2d 268, 273 N.Y. 370—Miller v. Stern, 27 N.Y.S.2d 374, 262 App.Div. 5—Serxner v. Elgart, 94 N.Y.S.2d 731, 196 Misc. 1053—Geller v. Davis, 81 N.Y.S.2d 332—Rubinstein v. Rubinstein, 35 N.Y.S.2d 926—Mormon v. Baran, 35 N.Y.S.2d 906.

N.C.—Melton v. Rickman, 36 S.E.2d 276, 225 N.C. 700, 162 A.L.R. 793.

Pa.—Shick v. Norristown-Penn Trust Co., Com.Pl., 60 Montg.Co. 217.

50 C.J. p 620 note 22 [b].

**Complaint held good against demurrer**

Minn.—Hoppe v. Klapperich, 28 N.W.2d 780, 224 Minn. 224, 173 A.L.R. 819.

N.C.—Cox v. Jenkins, 194 S.E. 119, 212 N.C. 667.

**Demurrer to counterclaim held properly sustained.**—Cody v. Hovey, 5 S.E.2d 165, 216 N.C. 391.

53. N.Y.—Silverman v. UFA Eastern Div. Distribution, Inc., 236 N.Y.S. 18, 135 Misc. 814.

50 C.J. p 620 note 23.

54. Ga.—Dugas v. Darden, 15 S.E.2d 901, 65 Ga.App. 394—McAfee v. Haverty Loan & Savings Co., 179 S.E. 419, 51 Ga.App. 15.

50 C.J. p 620 note 24.

55. Ga.—Dugas v. Darden, 15 S.E.2d

901, 65 Ga.App. 394—McAfee v. Haverty Loan & Savings Co., 179 S.E. 419, 51 Ga.App. 15—American Wholesale Corporation v. Kahn, 156 S.E. 224, 42 Ga.App. 411—Williams v. Adelman, 153 S.E. 224, 41 Ga.App. 424.

50 C.J. p 620 note 25.

**Complaint is demurrable if it fails to disclose improper use.**—Beatus v. Darling Stores Corp., 33 S.E.2d 37, 72 Ga.App. 84—50 C.J. p 620 note 25 [b].

56. Ga.—Ellis v. Millen Hotel Co., 14 S.E.2d 565, 192 Ga. 66—Carl v. Hansbury, 21 S.E.2d 302, 67 Ga.App. 830—Dugas v. Darden, 15 S.E.2d 901, 65 Ga.App. 394—Dunlop Tire & Rubber Corporation v. Downs, 8 S.E.2d 124, 60 Ga.App. 124—McAfee v. Haverty Loan & Savings Co., 179 S.E. 419, 51 Ga.App. 15.

Ind.—Brown v. Robertson, App., 92 N.E.2d 856.

N.Y.—McClerg v. Vilee, 102 N.Y.S. 45, 116 App.Div. 731—Leif v. Jacobs, 61 N.Y.S.2d 207—Mormon v. Baran, 35 N.Y.S.2d 906—Hubbard v. Banker, 24 N.Y.S.2d 289, affirmed 23 N.Y.S.2d 198, 260 App.Div. 981.

57. Ga.—Andrew v. George Muse Clothing Co., 161 S.E. 296, 44 Ga.App. 391.

58. Ga.—Atlanta Finance Co. v. Cain, 157 S.E. 337, 42 Ga.App. 819.

59. N.Y.—Foy v. Barry, 84 N.Y.S. 335, 87 App.Div. 291, 294.

60. N.Y.—Foy v. Barry, supra. 50 C.J. p 620 note 27.

61. Va.—Gildewell v. Murray-Lacy, 98 S.E. 665, 124 Va. 563, 4 A.L.R. 225.

62. Va.—Gildewell v. Murray-Lacy, supra. 50 C.J. p 620 note 30.

**Use of word "malicious" held unnecessary**

Ala.—Clikos v. Long, 165 So. 394, 231 Ala. 424.

for the issuance of the process,<sup>63</sup> or for the institution of the proceedings in which the process was employed<sup>64</sup> or termination of such proceedings,<sup>65</sup> or termination of the process employed.<sup>66</sup>

The addition to a count in a complaint stating a cause of action for abuse of process, of allegations suitable to another action, will not necessarily make the count bad.<sup>67</sup>

**Malicious use of process.** Plaintiff in an action for malicious use of process should allege facts disclosing the essential elements of the wrong,<sup>68</sup> such as malice,<sup>69</sup> want of probable cause,<sup>70</sup> and a favor-

able termination of the proceedings in which the process was maliciously used.<sup>71</sup> Plaintiff must set forth the facts from which the elements appear, and not merely state conclusions.<sup>72</sup>

### e. Evidence

The general rules of evidence in civil cases apply in an action for abuse of process or for malicious use of process.

The general rules of evidence in civil cases govern as to the admissibility<sup>73</sup> and weight and sufficiency<sup>74</sup> of evidence in actions for abuse of process.

63. Pa.—Fenton Storage Co. v. Feinstein, 195 A. 176, 129 Pa.Super. 125.

50 C.J. p 620 note 31.

64. N.Y.—McMullen v. Michigan Home Furnishing Corp., 230 N.Y.S. 508, 132 Misc. 338, affirmed 232 N.Y.S. 124, 133 Misc. 320.

50 C.J. p 620 note 32.

65. Ga.—Defnall v. Schoen, 35 S.E. 2d 564, 73 Ga.App. 25—Dugas v. Darden, 15 S.E.2d 901, 65 Ga.App. 394.

N.J.—Ash v. Cohn, 194 A. 174, 119 N.J.Law 54.

Va.—Mullins v. Sanders, 54 S.E.2d 116, 189 Va. 624.

50 C.J. p 620 note 33.

66. N.J.—Ash v. Cohn, 194 A. 174, 119 N.J.Law 54.

50 C.J. p 621 note 34.

67. Colo.—Coulter v. Coulter, 214 P. 400, 73 Colo. 144.

50 C.J. p 621 note 36.

68. Ga.—Floyd County Dairies v. Brooks, 6 S.E.2d 360, 61 Ga.App. 239—Johns v. Gibson, 4 S.E.2d 480, 60 Ga.App. 585.

Ill.—Coplea v. Bybee, 8 N.E.2d 55, 290 Ill.App. 117.

50 C.J. p 623 note 81.

**Issue, in suit for malicious use of legal process by institution of bankruptcy proceedings against plaintiff, is whether defendant acted maliciously and without probable cause.**—Odum v. Attaway, 152 S.E. 148, 41 Ga.App. 51.

### Pleadings held sufficient

Ga.—Gaines v. Pirkle, 199 S.E. 317, 58 Ga.App. 546—Underwood Elliott Fisher Co. v. Evans, 186 S.E. 858, 53 Ga.App. 673—Mumford v. Sears, Roebuck & Co., 162 S.E. 661, 44 Ga. App. 623.

### Pleadings held insufficient

Ga.—Walker v. Maxwell, 46 S.E.2d 923, 203 Ga. 393—Sherrod v. Haverty Furniture Co., 179 S.E. 164, 50 Ga.App. 549—Jones v. Elsas, 166 S.E. 444, 46 Ga.App. 34.

N.Y.—Serxner v. Elgart, 94 N.Y.S. 2d 731, 196 Misc. 1053.

Pa.—Shick v. Norristown-Penn

Trust Co., Com.Pl., 60 Montg.Co. 217.

69. Ga.—Dugas v. Darden, 15 S.E.2d 901, 65 Ga.App. 394—Williams v. Adelman, 153 S.E. 224, 41 Ga.App. 424.

Pa.—Morphy v. Shipley, 41 A.2d 671, 351 Pa. 425—Publix Drug Co. v. Breyer Ice Cream Co., 32 A.2d 413, 347 Pa. 346—Scheide v. Home Credit Co., 162 A. 321, 107 Pa.Super. 204.

50 C.J. p 623 note 82.

70. Ga.—Dugas v. Darden, 15 S.E. 2d 901, 65 Ga.App. 394—Williams v. Adelman, 153 S.E. 224, 41 Ga. App. 424.

Ill.—Bojarski v. Ballard, 41 N.E.2d 326, 314 Ill.App. 380.

Pa.—Morphy v. Shipley, 41 A.2d 671, 351 Pa. 425—Publix Drug Co. v. Breyer Ice Cream Co., 32 A.2d 413, 347 Pa. 346—Scheide v. Home Credit Co., 162 A. 321, 107 Pa.Super. 204.

50 C.J. p 623 note 83.

71. Ga.—Sparrow v. Weld, 169 S.E. 437, 177 Ga. 134, conformed to 170 S.E. 301, 47 Ga.App. 254—Defnall v. Schoen, 35 S.E.2d 564, 73 Ga. App. 25—Dugas v. Darden, 15 S.E.2d 901, 65 Ga.App. 394—Sherrod v. Haverty Furniture Co., 179 S.E. 164, 50 Ga.App. 549—Powell v. El Tris Napier Co., 173 S.E. 761, 50 Ga.App. 560.

Ill.—Bojarski v. Ballard, 41 N.E.2d 326, 314 Ill.App. 380.

N.J.—Ash v. Cohn, 194 A. 174, 119 N.J.Law 54.

Pa.—Kendziarski v. Home Credit Co., 162 A. 324, 107 Pa.Super. 213.

50 C.J. p 623 note 84.

### Demurrable defect

A petition in an action for malicious use of process was demurrable where it did not aver that the action on which the process was issued had terminated in favor of defendant therein.—Beatus v. Darling Stores Corp., 33 S.E.2d 37, 72 Ga.App. 84—Dunlop Tire & Rubber Corporation v. Downs, 3 S.E.2d 124, 126, 60 Ga.App. 124—Dyer v. Fromshon, 155 S.E. 380, 42 Ga.App. 174—Davis v. Hall, 93 S.E. 25, 20 Ga.App. 393.

### Allegation of false averment

On petition for malicious use of bail trover process, allegation that defendant made false averment in affidavit for bail trover did not supply element of favorable termination. Such allegation went merely to want of probable cause.—Sherrod v. Haverty Furniture Co., 179 S.E. 164, 50 Ga.App. 549.

72. Ga.—Johns v. Gibson, 4 S.E.2d 480, 60 Ga.App. 585—Corpus Juris quoted in Wilcoxon v. Equitable Loan Co., 172 S.E. 682, 683, 48 Ga. App. 250.

"It is not sufficient for the pleader to merely set forth his conclusions in the language of the statute, but such facts must be averred and shown as will enable the court to say that, upon the proof of such facts, the jury would be authorized to find that the former suit was instituted maliciously and without probable cause, or that from such lack of probable cause they would be authorized to infer malice."—Wilcoxon v. Equitable Loan Co., 172 S.E. 682, 683, 48 Ga.App. 250—Hallman v. Osburn, 144 S.E. 344, 345, 38 Ga.App. 514.

73. Conn.—McGann v. Allen, 134 A. 810, 105 Conn. 177.

50 C.J. p 621 note 38.

### Evidence held admissible

Ala.—Clikos v. Long, 165 So. 394, 231 Ala. 424.

Ga.—L. B. Price Mercantile Co. v. Adams, 194 S.E. 29, 56 Ga.App. 756.

Neb.—Schreiner v. Hutter, 177 N.W. 826, 104 Neb. 539.

Tex.—Peerless Oil & Gas Co. v. Teas, Civ.App., 138 S.W.2d 687, affirmed 158 S.W.2d 758, 138 Tex. 301.

### Loss of time

Testimony as to loss of time in seeking a new place to live before as well as after service of writ of possession obtained by abuse of process was insufficient to require allowance of damages in such respect where there was no segregation of the loss of time after the service of such writ.—Bille v. Manning, 210 P.2d 254, 94 Cal.App.2d 142.

**Malicious use of process.** Plaintiff in an action for the malicious use of process has the burden of proving the essential elements of the tort alleged, such as malice and want of probable cause,<sup>75</sup> and termination of the original proceedings favorably to him.<sup>76</sup> Failure of plaintiff in the original proceedings does not of itself raise a presumption that such suit was instituted maliciously<sup>77</sup> or without probable cause;<sup>78</sup> nor is malice or want of probable cause proved by such termination,<sup>79</sup> although such fact is generally sufficient to indicate where the preponderance of the evidence lies.<sup>80</sup>

The usual rules with respect to sufficiency of

evidence apply in actions for malicious use of process,<sup>81</sup> and proof of malice and want of probable cause may be founded on circumstantial evidence.<sup>82</sup>

#### f. Trial

In an action for abuse of process or for malicious use of process, questions of fact should be submitted to the jury under proper instructions from the court.

In actions for the abuse of process, questions of fact, such as the unlawful use of process,<sup>83</sup> or defendant's liability for such abuse,<sup>84</sup> the amount of damages to be awarded,<sup>85</sup> and, where allowable, whether plaintiff should be awarded exemplary damages,<sup>86</sup> should be submitted to the jury under

#### Sickness

Evidence that tenants became nervous and sick because of wrongful eviction obtained by abuse of process was insufficient to require judgment for such damages where unsupported by medical testimony.—*Bille v. Manning*, supra.

#### Evidence held sufficient

(1) In general.

Cal.—*Peterson v. Wilson*, 199 P.2d 757, 88 Cal.App.2d 617.—*Tranchina v. Arcinas*, 178 P.2d 65, 78 Cal.App.2d 522.

N.C.—*Ellis v. Wellons*, 29 S.E.2d 884, 224 N.C. 269.

50 C.J. p 621 note 40 [a].

(2) To establish abuse of process.

—*Spencer v. Arnold*, 4 P.2d 55, 152 Okl. 189—50 C.J. p 621 note 40 [a] (1).

(3) To show that defendants had actual intent to make improper use of attachment writ.—*Sallem v. Glovsky*, 172 A. 4, 132 Me. 402.

(4) To sustain finding of malice.—*Adelman v. Rosenbaum*, 3 A.2d 15, 133 Pa.Super. 386.

(5) To sustain award of punitive damages.—*Adelman v. Rosenbaum*, supra.

#### Evidence held insufficient

(1) In general.—*Italian Star Line v. U. S. Shipping Board Emergency Fleet Corporation*, D.C.N.Y., 41 F.2d 382, affirmed, C.C.A., 53 F.2d 359, 80 A.L.R. 576—50 C.J. p 621 note 40 [b].

(2) To show abuse of process.

U.S.—*Italian Star Line v. U. S. Shipping Board Emergency Fleet Corporation*, supra.

Neb.—*Vybiral v. Schildhauer*, 265 N. W. 241, 130 Neb. 433.

(3) To show malice.—*Sokolowske v. Wilson*, 235 N.W. 80, 211 Iowa 1112.

(4) To establish liability of private prosecutor for abuse of process.—*Abernethy v. Morrison*, 2 S. E.2d 369, 215 N.C. 454.

(5) To authorize recovery of damages for abuse of process.—*Personal*

*Finance Co. of New York v. Gross*, 9 N.Y.S.2d 801, 170 Misc. 166.

75. Ga.—*Smith v. C. I. T. Corporation*, 26 S.E.2d 146, 69 Ga.App. 516. Pa.—*Morphy v. Shipley*, 41 A.2d 671, 351 Pa. 425.—*Publix Drug Co. v. Breyer Ice Cream Co.*, 32 A.2d 413, 347 Pa. 346.—*Johnson v. Land Title Bank & Trust Co.*, 198 A. 23, 329 Pa. 241.—*Scheide v. Home Credit Co.*, 162 A. 321, 107 Pa.Super. 204.

76. Ga.—*Smith v. C. I. T. Corporation*, 26 S.E.2d 146, 69 Ga.App. 516. Pa.—*Johnson v. Land Title Bank & Trust Co.*, 198 A. 23, 329 Pa. 241.—*Kendzierski v. Home Credit Co.*, 162 A. 324, 107 Pa.Super. 213.

77. Ga.—*Johns v. Gibson*, 4 S.E.2d 480, 60 Ga.App. 585.

50 C.J. p 623 note 86.

78. Ga.—*Johns v. Gibson*, supra.

50 C.J. p 623 note 87.

79. Pa.—*Johnson v. Land Title Bank & Trust Co.*, 198 A. 23, 329 Pa. 241.

#### Reason for rule

It is not the policy of the law to give rise to a cause of action based on malicious use of legal process merely because plaintiff in the litigation complained of lost his case.—*Johns v. Gibson*, 4 S.E.2d 480, 60 Ga. App. 585.—*Hallman v. Ozburn*, 144 S. E. 344, 38 Ga.App. 514.

80. Ga.—*Johns v. Gibson*, 4 S.E.2d 480, 60 Ga.App. 585.—*Hallman v. Ozburn*, 144 S.E. 344, 38 Ga.App. 514.

81. Ga.—*Ehrlich v. Savannah Exch. Bank*, 134 S.E. 809, 35 Ga.App. 790. 50 C.J. p 623 note 89.

82. Pa.—*Johnson v. Land Title Bank & Trust Co.*, 198 A. 23, 329 Pa. 241.

83. Ga.—*L. B. Price Mercantile Co. v. Adams*, 194 S.E. 39, 56 Ga.App. 756.

Minn.—*Hoppe v. Klapperich*, 28 N.W. 2d 780, 224 Minn. 224, 173 A.L.R. 819.

N.C.—*Ledford v. Smith*, 193 S.E. 722, 212 N.C. 447.

Tex.—*Peerless Oil & Gas Co. v. Teas*,

Civ.App., 138 S.W.2d 637, affirmed 158 S.W.2d 758, 138 Tex. 301.

50 C.J. p 621 note 42.

**Evidence held sufficient to take case or issue to jury.**

U.S.—*George v. Leonard*, C.A.S.C., 169 F.2d 177.

N.C.—*Abernethy v. Burns*, 188 S.E. 97, 210 N.C. 636.

50 C.J. p 621 note 40 [a].

**Evidence held insufficient to take case to jury.**—*Martin v. Reidsville Motor Co.*, 161 S.E. 77, 201 N.C. 641.

84. Tex.—*Peerless Oil & Gas Co. v. Teas*, Civ.App., 138 S.W.2d 637, affirmed 158 S.W.2d 758, 138 Tex. 301.

50 C.J. p 621 note 43.

#### Participation of defendants

U.S.—*Ingo v. Koch*, C.C.A.N.Y., 127 F.2d 667.

**Evidence held to present question for jury**

U.S.—*George v. Leonard*, D.C.S.C., 71 F.Supp. 662.

N.C.—*Ellis v. Wellons*, 29 S.E.2d 884, 224 N.C. 269.—*Smith v. Somers*, 195 S.E. 382, 213 N.C. 209.

Va.—*Mullins v. Sanders*, 54 S.E.2d 116, 189 Va. 624.

85. **Question of value of use of car as element of damage for abuse of process was held for jury.**—*Sokolowske v. Wilson*, 235 N.W. 80, 211 Iowa 1112.

#### Causation of damage

Whether damage to automobile was traceable to use of car while in hands of officer, warranting recovery as damage for abuse of process was held for jury.—*Sokolowske v. Wilson*, supra.

86. Tex.—*Peerless Oil & Gas Co. v. Teas*, Civ.App., 138 S.W.2d 637, affirmed 158 S.W.2d 758, 138 Tex. 301.

**Evidence in respect of malice was held insufficient to warrant submitting question of exemplary damages for abuse of process.**—*Sokolowske v. Wilson*, 235 N.W. 80, 211 Iowa 1112.

#### Evidence held sufficient

To warrant submission of question

proper instructions from the court.<sup>87</sup> A dismissal<sup>88</sup> or nonsuit<sup>89</sup> or a direction of verdict for defendant<sup>90</sup> is properly granted where the evidence for plaintiff fails to establish the essential elements of the wrong. Where the court grants a motion to dismiss the complaint for failure to state a cause of action, it will also deny a cross motion by plaintiff for the assessment of damages.<sup>91</sup>

*Malicious use of process.* Where plaintiff, after opportunity for amendment, does not sufficiently plead a cause of action for malicious use of process, his action will be dismissed.<sup>92</sup> In actions for malicious use of process, questions of fact should be submitted to the jury,<sup>93</sup> but where the material facts are not in dispute or where only one reasonable inference can be drawn from the evidence, the court should direct a verdict.<sup>94</sup> The court should fully and correctly instruct the jury as to the law with respect to the issues,<sup>95</sup> and, where the complaint sets out a cause of action for malicious use of process, the court should not submit the case to the jury as one for malicious abuse of process.<sup>96</sup> A nonsuit may also be granted where the evidence as to the essential elements of the tort is insuffi-

cient to warrant its submission to the jury.<sup>97</sup>

#### g. Damages

Compensatory damages are recoverable in an action for abuse of process or for malicious use of process, and exemplary damages are sometimes allowable.

Damages recoverable for abuse of process are compensatory for the natural results of the wrong,<sup>98</sup> and may include recompense for physical<sup>99</sup> or mental<sup>1</sup> injury; expenses;<sup>2</sup> loss of time;<sup>3</sup> and injury to business,<sup>4</sup> property,<sup>5</sup> or financial standing.<sup>6</sup>

Counsel fees incurred as an expense in attempting to protect oneself from an abuse of process may be a proper element of damage;<sup>7</sup> but fees paid counsel to prosecute the action for abuse of process are not recoverable as compensatory damages.<sup>8</sup>

It has been held that, where pleaded without timely objection, plaintiff may recover in abuse of process for elements of damage arising from malicious prosecution<sup>9</sup> or false imprisonment.<sup>10</sup>

Where, under general rules of damages, exemplary damages cannot be awarded in the absence of statutory authorization therefor, as considered

of punitive damages to jury.—*Wheeler v. Miller*, 49 Pa.Super. 91.

87. Instructions held proper  
U.S.—*Ingo v. Koch*, C.C.A.N.Y., 127 F.2d 667.

Ga.—*L. B. Price Mercantile Co. v. Adams*, 194 S.E. 29, 56 Ga.App. 756.  
Pa.—*Adelman v. Rosenbaum*, 3 A.2d 15, 133 Pa.Super. 386.

50 C.J. p 621 note 46 [a].

88. N.Y.—*Ballard v. Schneider*, 293 N.Y.S. 1022, 250 App.Div. 769.

50 C.J. p 621 note 48.

89. Ga.—*Creswell v. Acme Lumber, etc., Co.*, 149 S.E. 296, 40 Ga.App. 268.

50 C.J. p 621 note 49.

90. U.S.—*Mollendorf v. Shepherd*, C. C.A.Idaho, 159 F.2d 704.

91. N.Y.—*Mormon v. Baran*, 35 N. Y.S.2d 906.

92. Ga.—*Hallman v. Ozburn*, 144 S. E. 344, 38 Ga.App. 514.

Ill.—*Bojarski v. Ballard*, 41 N.E.2d 326, 314 Ill.App. 380.

93. Ga.—*Johns v. Gibson*, 4 S.E.2d 480, 60 Ga.App. 585.

94. Ga.—*Watkins v. Price Mercantile Co.*, 164 S.E. 231, 45 Ga.App. 272.

95. Ga.—*Callaway v. Janko*, 106 S.E. 189, 26 Ga.App. 327.

50 C.J. p 623 note 91.

96. Ga.—*Gaines v. Pirkle*, 199 S.E. 317, 58 Ga.App. 546.

97. Ga.—*Smith v. C. I. T. Corporation*, 26 S.E.2d 146, 69 Ga.App. 516.

Pa.—*Johnson v. Land Title Bank & Trust Co.*, 198 A. 23, 329 Pa. 241.

Evidence held insufficient to go to jury

Pa.—*Johnson v. Land Title Bank & Trust Co.*, supra.

98. U.S.—*Ingo v. Koch*, C.C.A.N.Y., 127 F.2d 667.

Me.—*Corpus Juris* quoted in *Sallem v. Glovsky*, 172 A. 4, 8, 132 Me. 402.

N.Y.—*Rothbard v. Ringler*, 77 N.Y. S.2d 351.

50 C.J. p 621 note 51.

#### Actual damages

Ill.—*Coplea v. Bybee*, 8 N.E.2d 55, 290 Ill.App. 117.

Tex.—*Peerless Oil & Gas Co. v. Teas*, Civ.App., 138 S.W.2d 637, affirmed 158 S.W.2d 758, 138 Tex. 301.

Damages awarded held not excessive  
Ga.—*L. B. Price Mercantile Co. v. Adams*, 194 S.E. 29, 56 Ga.App. 756.

99. U.S.—*Ingo v. Koch*, C.C.A.N.Y., 127 F.2d 667.

Conn.—*McGann v. Allen*, 134 A. 810, 105 Conn. 177, 184.

Me.—*Corpus Juris* quoted in *Sallem v. Glovsky*, 172 A. 4, 8, 132 Me. 402.

1. U.S.—*Ingo v. Koch*, C.C.A.N.Y., 127 F.2d 667.

Me.—*Corpus Juris* quoted in *Sallem v. Glovsky*, 172 A. 4, 8, 132 Me. 402.  
50 C.J. p 621 note 53.

Nervousness and upset condition  
Pa.—*Adelman v. Rosenbaum*, 3 A.2d 15, 133 Pa.Super. 386.

2. Me.—*Corpus Juris* quoted in

*Sallem v. Glovsky*, 172 A. 4, 8, 132 Me. 402.

50 C.J. p 621 note 54.

#### Costs not recoverable

In action for malicious abuse of process, the costs expended by the plaintiff in his appeal are not recoverable where the court held that each party shall pay its or his own costs of the appeal.—*Shick v. Norristown-Penn Trust Co.*, Pa.Com.Pl., 60 Montg.Co. 217.

3. Me.—*Corpus Juris* quoted in *Sallem v. Glovsky*, 172 A. 4, 8, 132 Me. 402.

50 C.J. p 621 note 55.

4. Conn.—*McGann v. Allen*, 134 A. 810, 105 Conn. 177.

Me.—*Corpus Juris* quoted in *Sallem v. Glovsky*, 172 A. 4, 8, 132 Me. 402.

5. Me.—*Corpus Juris* quoted in *Sallem v. Glovsky*, 172 A. 4, 8, 132 Me. 402.

50 C.J. p 621 note 57.

6. Me.—*Corpus Juris* quoted in *Sallem v. Glovsky*, 172 A. 4, 8, 132 Me. 402.

50 C.J. p 621 note 58.

7. Pa.—*Barnett v. Reed*, 51 Pa. 190, 88 Am.D. 574.

50 C.J. p 621 note 59.

8. Ga.—*I. C. & J. C. Collier, Inc. v. Buice*, 136 S.E. 287, 36 Ga.App. 198.

9. Colo.—*Coulter v. Coulter*, 214 P. 400, 78 Colo. 144.

10. Colo.—*Coulter v. Coulter*, supra.

in Damages § 117, no such damages can be awarded in an action for abuse of process in the absence of a statute providing therefor.<sup>11</sup> On the other hand, where exemplary damages may be awarded under general rules, such damages may be recovered in an action for abuse of process where actual malice is shown,<sup>12</sup> but no such damages can be recovered in the absence of actual malice.<sup>13</sup> It has also been held, however, that where actual dam-

ages are proved in the action, the jury may also add punitive damages;<sup>14</sup> but the punitive damages awarded must not be wholly disproportionate to the actual damages.<sup>15</sup>

*Malicious use of process.* In jurisdictions where such damages may be awarded, exemplary damages may be recovered in an action for malicious use of process.<sup>16</sup>

**PROCESSION.** As a noun, a group, especially of persons or of vehicles containing persons, moving onward in an orderly, ceremonious, or solemn manner; an orderly file or formation, especially of marchers; a parade.<sup>1</sup>

As a verb, to beat the bounds of a parish, lands, etc.; in some of the North American colonies, and still in the states of North Carolina and Tennessee, to make a procession around a piece of land in order formally to determine its bounds.<sup>2</sup>

**PROCESSIONER.** An officer appointed to procession lands.<sup>3</sup>

"Processioning" is defined as a proceeding to determine boundaries, in use in some of the United States, similar in all respects to the English "perambulation."<sup>4</sup>

The ascertainment and settlement of boundaries by processioners and processioning proceedings generally are discussed in Boundaries §§ 87, 88 c, f, j. The act of processioners in locating the public square and streets of a city as not being binding on

property owners who did not consent thereto is treated in Municipal Corporations § 1663.

**PROCESSOR.** One who or that which processes; specifically, one who is in the business of converting any agricultural commodity into a marketable form.<sup>5</sup> It has been said that a grower is not a processor.<sup>6</sup>

**PROCESSUM CONTINUANDO.** In English practice, a writ for the continuance of process, after the death of the chief justice or other justices in the commission of oyer and terminer.<sup>7</sup>

**PROCESSUS.** As the first word of a maxim as to which there have been no recent applications see 50 C.J. p 624 note 15.

**PROCÈS-VERBAL.** A true relation in writing in due form of law of what has been done and said verbally in the presence of a public officer and what he himself does on the occasion; a species of inquisition of office.<sup>8</sup>

**PROCHEIN.** Next; nearest.<sup>9</sup>

11. Mass.—Malone v. Belcher, 103 N.E. 637, 216 Mass. 209, 49 L.R.A., N.S., 753, Ann.Cas.1915A 830.

12. Ill.—Coplea v. Bybee, 8 N.E.2d 55, 290 Ill.App. 117.

N.Y.—Rothbard v. Ringler, 77 N.Y.S. 2d 351.

Pa.—Adelman v. Rosenbaum, 3 A.2d 15, 133 Pa.Super. 386.  
50 C.J. p 622 note 64.

**Increased damages**  
U.S.—Ingo v. Koch, C.C.A.N.Y., 127 F.2d 667.

**Award held not excessive**  
Pa.—Adelman v. Rosenbaum, 3 A.2d 15, 133 Pa.Super. 386.

13. Iowa.—Sokolowske v. Wilson, 235 N.W. 80, 211 Iowa 1112.  
50 C.J. p 622 note 65.

14. Me.—Saliem v. Glovsky, 172 A. 4, 132 Me. 402—Bourisk v. Derry Lumber Co., 156 A. 382, 130 Me. 376.

**Reason for rule**  
Acts wilfully and designedly

done, which are unlawful, are malicious with respect to those to whom they are injurious.—Saliem v. Glovsky, 172 A. 4, 132 Me. 402—Bourisk v. Derry Lumber Co., 156 A. 382, 130 Me. 376.

**Damages held not excessive**  
Me.—Saliem v. Glovsky, 172 A. 4, 132 Me. 402—Bourisk v. Derry Lumber Co., 156 A. 382, 130 Me. 376.

15. Award held not disproportionate  
Pa.—Adelman v. Rosenbaum, 3 A.2d 15, 133 Pa.Super. 386.

16. Ga.—Crusselle v. Pugh, 71 Ga. 744.

1. Webster New Int.D.  
Use of streets for conducting parades or processions as legitimate subject of municipal regulation see Municipal Corporations § 1769; for particular references to matters concerning licenses in connection with parades or processions consult title index to Licenses, sub verbo Parades or Processions.

2. Black L.D.  
See Beating of the Bounds 10 C.J.S. p 221 note 12.

3. Webster New Int.D.

4. Black L.D.

5. Iowa.—Kennedy v. State Board of Assessment and Review, 276 N. W. 205, 206, 224 Iowa 405.  
"Processor" within Agricultural Adjustment Act, 7 U.S.C.A. § 601 et seq. see Internal Revenue § 538.

6. Iowa.—Kennedy v. State Board of Assessment and Review, 276 N. W. 205, 206, 224 Iowa 405.

7. Black L.D.

8. Tex.—Hall v. Hall, 11 Tex. 526, 539.  
50 C.J. p 624 note 16.

9. Webster New Int.D.

**Phrases**

(1) "Prochein ami" see 3 C.J.S. p 1045 note 8. As employed in connection with persons not of full age see title index to Infants.

**PROCLAIM.** In its usual and ordinary signification, to give wide publicity to; to make known by public announcement; to publish abroad; to promulgate;<sup>10</sup> to disclose;<sup>11</sup> to declare.<sup>12</sup> In a technical sense, to make public announcement by formal proclamation.<sup>13</sup>

"Proclaim" has been held synonymous with "announce" see 3 C.J.S. p 1370 note 68, "promulgate,"<sup>14</sup> and "publish."<sup>15</sup>

**PROCLAMATION.** The lexicographers agree in their definition of the word; and the expounders of the law have used nearly the same language.<sup>16</sup> Where it has not apparently been used otherwise, the word is to be given its usual and ordinary meaning.<sup>17</sup> While publicity is an important ingredient of a proclamation, and it is an essential element of its character that it should be openly and publicly made known,<sup>18</sup> it is sufficient if it has such publicity as accomplishes the end to be attained.<sup>19</sup>

"Proclamation" is defined as meaning the act of proclaiming<sup>20</sup> or publishing;<sup>21</sup> any announcement made in a public manner;<sup>22</sup> a publication;<sup>23</sup> a declaration or notice by public outcry;<sup>24</sup> a formal declaration; an avowal.<sup>25</sup> The word is also used to express the public nomination made of any one to a high office.<sup>26</sup>

In law, "proclamation" is defined as meaning an announcement made by a ministerial officer of a court of something to be done;<sup>27</sup> an official notice

given to the public;<sup>28</sup> an official public notification by some executive authority of the occurrence of an event important to the public, or of command, caution, or warning in relation to a matter impending;<sup>29</sup> a notice publicly given of anything whereof the executive thinks fit to inform and notify the public;<sup>30</sup> a public notice by an official of some order, an intended action, or some state of facts;<sup>31</sup> a public notice in writing given by a state or city official of some act done by the government, or to be done by the people;<sup>32</sup> a publication by authority.<sup>33</sup>

Presidential proclamations are discussed generally in the C.J.S. title United States § 30, also 65 C.J. p 1271 notes 66-73; and a proclamation of the president of the United States reserving public lands from sale is treated in Public Lands § 74. The terms "proclamation" and "proclamations" are treated in various other connections throughout this work, particular reference being made to the indexes to the titles Corporations, Elections, Evidence, and Municipal Corporations.

**PROCLAMATOR.** An officer of the English court of common pleas.<sup>34</sup>

**PRO CONFESSO.** See Pro ante C.J.S. p 968 note 21.

**PROCRASTINATE.** To be dilatory; to waste time when one should act; to delay action through laziness, indifference, or indecision.<sup>35</sup>

(2) "Prochein avoidance" see 7 C. J.S. p 1310 note 29.1.

10. U.S.—Simon v. Moore, D.C.Mo., 261 F. 638, 643.

Cal.—People v. Garcia, 98 P.2d 265, 271, 37 Cal.App.2d Supp. 753.

11. U.S.—Simon v. Moore, D.C.Mo., 261 F. 638, 643.

12. Cal.—People v. Garcia, 98 P.2d 265, 271, 37 Cal.App.2d Supp. 753.

13. U.S.—Simon v. Moore, D.C.Mo., 261 F. 638, 643.

14. Cal.—People v. Garcia, 98 P.2d 265, 271, 37 Cal.App.2d Supp. 753.

15. Cal.—People v. Garcia, supra.

16. U.S.—Lapeyre v. U. S., 17 Wall. 191, 201, 21 L.Ed. 606, 609.

17. Ark.—Dickinson v. Page, 179 S. W. 1004, 1006, 120 Ark. 377.

18. U.S.—Lapeyre v. U. S., 17 Wall. 191, 201, 21 L.Ed. 606, 609.

50 C.J. p 625 notes 51, 52.

19. Ark.—Dickinson v. Page, 179 S. W. 1004, 1007, 120 Ark. 377.

50 C.J. p 625 note 53.

20. Md.—Mackin v. State, 62 Md. 244, 247.

**Similarly defined**

Act of proclamation.—State v.

Hitchcock, 146 S.W. 40, 52, 241 Mo. 433.

21. Ark.—Dickinson v. Page, 179 S. W. 1004, 1006, 120 Ark. 377.

**Similarly expressed**

The act of proclaiming or making publicly known; the act of causing some state matters to be published or made generally known.—Attorney General v. Ryan, 5 Man. 81, 92, 93.

22. Ark.—Dickinson v. Page, 179 S. W. 1004, 1006, 120 Ark. 377.

50 C.J. p 624 note 32.

23. Mo.—State v. Hitchcock, 146 S. W. 40, 52, 241 Mo. 433.

50 C.J. p 624 note 36.

24. Md.—Mackin v. State, 62 Md. 244, 247.

50 C.J. p 624 note 33.

25. Ark.—Dickinson v. Page, 179 S. W. 1004, 1006, 120 Ark. 377.

26. Black L.D.

27. Ark.—Dickinson v. Page, supra. 50 C.J. p 624 note 38.

28. U.S.—Lapeyre v. U. S., 17 Wall. 191, 201, 21 L.Ed. 606, 609.

N.M.—Carter v. Territory, 1 N.M. 317, 336.

**Similarly defined**

(1) Official or general notice.—State v. Hitchcock, 146 S.W. 40, 52, 241 Mo. 433.

(2) An official or general notice given to the public.—Attorney General v. Ryan, 5 Man. 81, 93—50 C.J. p 624 note 41.

29. Ark.—Dickinson v. Page, 179 S. W. 1004, 1006, 120 Ark. 377.

50 C.J. p 624 note 42.

30. N.M.—Carter v. Territory, 1 N. M. 317, 336.

50 C.J. p 624 note 43.

31. Mo.—State v. Hitchcock, 146 S. W. 40, 52, 241 Mo. 433.

50 C.J. p 625 notes 45, 47.

32. Md.—Mackin v. State, 62 Md. 244, 247.

**Similarly stated**

A written or printed document in which are contained state matters, issued by proper authority; a published ordinance.—Attorney General v. Ryan, 5 Man. 81, 92.

33. N.M.—Carter v. Territory, 1 N. M. 317, 336.

50 C.J. p 625 note 44.

34. Black L.D.

35. Webster New Int.D.



"Procrastinating" has been held to be an antonym of "prompt."<sup>36</sup>

**PROCRASTINATION.** A term said to be without foundation in law or equity,<sup>37</sup> and defined as meaning the act or habit of procrastinating; delay; dilatoriness.<sup>38</sup>

**PROCTOR.** One appointed to manage the affairs of another or represent him in judgment.<sup>39</sup>

**PROCURADOR DEL COMUN.** See Public Lands § 292.

**PROCURADOR JUDICIAL.** See Attorney and Client § 16.

**PROCURATION.** Defined see Agency § 27.

**PROCURATOR.** In the civil law, a proctor, that is, a person who acts for another by virtue of a

procuration; in old English law, an agent or attorney, a bailiff or servant, a proxy of a lord in parliament.<sup>40</sup>

**PROCURE.** A comprehensive word<sup>41</sup> of many meanings.<sup>42</sup> It connotes action<sup>43</sup> rather than suggestion,<sup>44</sup> and in the sinister sense in which it is often used refers to the action of one in behalf of another.<sup>45</sup> The term does not necessarily imply the formal consummation of an agreement.<sup>46</sup>

In its broadest sense the word "procure" means to prevail upon, induce, or persuade a person to do something;<sup>47</sup> and it is variously defined as meaning to induce;<sup>48</sup> to induce to do something;<sup>49</sup> to prevail upon;<sup>50</sup> to persuade;<sup>51</sup> to entreat;<sup>52</sup> to solicit;<sup>53</sup> to contrive;<sup>54</sup> to effect;<sup>55</sup> to contrive and effect.<sup>56</sup>

"Procure" is further defined as meaning to cause;<sup>57</sup> and, in addition, is said to mean to cause

36. D.C.—Pearson v. Washingtonian Pub. Co., 98 F.2d 245, 248, 68 App. D.C. 373.

37. Va.—Mullins v. Morgan, 10 S.E. 2d 593, 596, 176 Va. 201, 131 A.L.R. 785.

38. Webster New Int.D.

39. Black L.D.

Admiralty jurisdiction of suit by proctor to recover costs or fees see Admiralty § 36.

"Proctor" defined as an attorney in the admiralty and ecclesiastical courts see Attorney and Client § 3 e.

40. Black L.D.

41. Kan.—State v. Eason, 186 P.2d 269, 274, 163 Kan. 763.

42. Tex.—Kadane v. Clark, Civ.App., 134 S.W.2d 448, 456.

43. N.C.—Marcus v. Bernstein, 23 S. E. 38, 39, 117 N.C. 31.

44. Wyo.—Cone v. Iverson, 35 P. 933, 940, 4 Wyo. 203.

45. N.H.—State v. Desmarais, 123 A. 582, 583, 81 N.H. 199.

46. Cal.—Willson v. Turner Resilient Floors, 201 P.2d 406, 409, 89 Cal.App.2d 589—Chamberlain v. Abeles, 198 P.2d 927, 930, 88 Cal. App.2d 291—Brea v. McGlashan, 39 P.2d 877, 882, 3 Cal.App.2d 454.

47. Cal.—Willson v. Turner Resilient Floors, 201 P.2d 406, 409, 89 Cal.App.2d 589—Chamberlain v. Abeles, 198 P.2d 927, 930, 88 Cal. App.2d 291—Brea v. McGlashan, 39 P.2d 877, 882, 3 Cal.App.2d 454.

48. Cal.—Willson v. Turner Resilient Floors, 201 P.2d 406, 409, 89 Cal.App.2d 589—Chamberlain v. Abeles, 198 P.2d 927, 930, 88 Cal. App.2d 291—Brea v. McGlashan, 39 P.2d 877, 882, 3 Cal.App.2d 454.

Ky.—Corpus Juris cited in Lutes v. Commonwealth, 33 S.W.2d 620, 621, 622, 236 Ky. 549, 74 A.L.R. 304.

Nev.—State v. Watts, 296 P. 26, 53 Nev. 200.

Ohio.—State v. Snell, 5 Ohio Dec. 670, 673, 2 Ohio N.P. 55.

50 C.J. p 627 note 98.

49. Ky.—Corpus Juris cited in Lutes v. Commonwealth, 33 S.W.2d 620, 621, 622, 236 Ky. 549, 74 A.L.R. 304.

50 C.J. p 627 note 99.

50. Nev.—State v. Watts, 296 P. 26, 53 Nev. 200.

Ohio.—State v. Snell, 5 Ohio Dec. 670, 673, 2 Ohio N.P. 55.

51. Nev.—State v. Watts, 296 P. 26, 53 Nev. 200.

Ohio.—State v. Snell, 5 Ohio Dec. 670, 673, 2 Ohio N.P. 55.

52. Tex.—Kadane v. Clark, Civ.App., 134 S.W.2d 448, 456.

53. Ky.—Corpus Juris cited in Lutes v. Commonwealth, 33 S.W.2d 620, 621, 622, 236 Ky. 549, 74 A.L.R. 304.

S.C.—Pinson v. South Atlantic Realty Co., 110 S.E. 392, 118 S.C. 262.

Tex.—Kadane v. Clark, Civ.App., 134 S.W.2d 448, 456.

54. Ky.—Corpus Juris cited in Lutes v. Commonwealth, 33 S.W.2d 620, 621, 622, 236 Ky. 549, 74 A.L.R. 304.

Wash.—State v. Bixby, 177 P.2d 689, 700, 27 Wash.2d 144.

50 C.J. p 627 note 93.

**Similarly defined**

To contrive or devise with care, as an action or proceeding.—U. S. v. Richmond, C.C.A.Pa., 17 F.2d 28, 30.

55. Cal.—Willson v. Turner Resilient Floors, 201 P.2d 406, 409, 89 Cal.App.2d 589—Chamberlain v.

Abeles, 198 P.2d 927, 930, 88 Cal. App.2d 291—Brea v. McGlashan, 39 P.2d 877, 882, 3 Cal.App.2d 454.

Ind.—Shonfeld v. State, 40 N.E.2d 700, 702, 219 Ind. 654.

Kan.—State v. Speer, 285 P. 639, 640, 130 Kan. 226.

Minn.—Erickson v. Husemoller, 253 N.W. 361, 364, 191 Minn. 177.

Wash.—State v. Bixby, 177 P.2d 689, 700, 27 Wash.2d 144.

Wyo.—Cone v. Iverson, 35 P. 933, 940, 4 Wyo. 203.

50 C.J. p 627 note 96.

56. Cal.—Willson v. Turner Resilient Floors, 201 P.2d 406, 409, 89 Cal.App.2d 589—Chamberlain v. Abeles, 198 P.2d 927, 930, 88 Cal. App.2d 291—Brea v. McGlashan, 39 P.2d 877, 882, 3 Cal.App.2d 454.

50 C.J. p 627 note 94.

57. Cal.—Willson v. Turner Resilient Floors, 201 P.2d 406, 409, 89 Cal.App.2d 589—Chamberlain v. Abeles, 198 P.2d 927, 930, 88 Cal. App.2d 291—Brea v. McGlashan, 39 P.2d 877, 882, 3 Cal.App.2d 454.

Ind.—Shonfeld v. State, 40 N.E.2d 700, 702, 219 Ind. 654.

Kan.—State v. Speer, 285 P. 639, 640, 130 Kan. 226.

Ky.—Corpus Juris cited in Lutes v. Commonwealth, 33 S.W.2d 620, 621, 622, 236 Ky. 549, 74 A.L.R. 304.

Minn.—Erickson v. Husemoller, 253 N.W. 361, 364, 191 Minn. 177.

Nev.—State v. Watts, 296 P. 26, 53 Nev. 200.

Ohio.—State v. Snell, 5 Ohio Dec. 670, 673, 2 Ohio N.P. 55.

Tex.—Kadane v. Clark, Civ.App., 134 S.W.2d 448, 456.

Wash.—State v. Bixby, 177 P.2d 689, 700, 27 Wash.2d 144.

Wyo.—Cone v. Iverson, 35 P. 933, 940, 4 Wyo. 203.

50 C.J. p 627 note 91.

a thing to be done;<sup>58</sup> to bring about;<sup>59</sup> to bring about by cares and pains<sup>60</sup> or by contrivance;<sup>61</sup> to endeavor to bring about<sup>62</sup> or cause, mostly something evil, to or for a person.<sup>63</sup>

"Procure" is also defined as meaning to acquire;<sup>64</sup> to acquire for oneself;<sup>65</sup> to acquire or provide for oneself or for another;<sup>66</sup> to obtain;<sup>67</sup> to bring into possession;<sup>68</sup> to get;<sup>69</sup> to secure;<sup>70</sup> to gain.<sup>71</sup>

An additional meaning which is sometimes attributed to the word is to begin proceedings.<sup>72</sup>

Generally, in the criminal law, the word has the popular, which is also the dictionary, meaning, that is, to bring about; effect; cause.<sup>73</sup> The term is defined as used in statutes making it an offense to procure or entice a woman to leave her home to go from one place to another for the purpose of prostitution or for other immoral purposes in Prostitution § 7.

tion § 7.

"Procure" has been held equivalent to, or synonymous with, "abet" see 1 C.J.S. p 307 note 9, "acquire" see 1 C.J.S. p 918 note 14, "aid" see 3 C.J.S. p 503 note 36, "find" see 36 C.J.S. p 766 note 41, "introduce" see 48 C.J.S. p 752 note 24, "make" see 54 C.J.S. p 907 note 88, and "purchase."<sup>74</sup>

It has been compared with, or distinguished from, "approve" see 6 C.J.S. p 129 note 15, "forward" see 37 C.J.S. p 133 note 3, "influence" see 43 C.J.S. p 382 note 38, "produce,"<sup>75</sup> and suffer.<sup>76</sup>

*Procuring.* Bringing into possession; obtaining.<sup>77</sup> It has been said that there is a clear legal distinction between procuring an act to be done and suffering it to be done.<sup>78</sup>

*Procured.* A word of broad meaning, which, when

#### Similarly defined

(1) To cause to happen.—State v. Eason, 186 P.2d 269, 274, 163 Kan. 763.

(2) To cause to accrue or to come into possession of.—U. S. v. Hibernia Bank Bldg., D.C.La., 76 F.Supp. 18, 19.

58. Ill.—People v. Van Bever, 93 N.E. 725, 727, 248 Ill. 136.

Ky.—Corpus Juris cited in Lutes v. Commonwealth, 33 S.W.2d 620, 621, 622, 236 Ky. 549, 74 A.L.R. 304.

59. Kan.—State v. Eason, 186 P.2d 269, 274, 163 Kan. 763—State v. Speer, 285 P. 639, 640, 130 Kan. 226.

Ky.—Corpus Juris cited in Lutes v. Commonwealth, 33 S.W.2d 620, 621, 622, 236 Ky. 549, 74 A.L.R. 304.

Minn.—Erickson v. Husemoller, 253 N.W. 361, 364, 191 Minn. 177.

Ohio.—State v. Snell, 5 Ohio Dec. 670, 673, 2 Ohio N.P. 55.

Tex.—Kadane v. Clark, Civ.App., 134 S.W.2d 448, 456.

Wash.—State v. Bixby, 177 P.2d 689, 700, 27 Wash.2d 144.

Wyo.—Cone v. Iverson, 35 P. 933, 940, 4 Wyo. 203.

50 C.J. p 627 note 89.

60. Cal.—Willson v. Turner Resilient Floors, 201 P.2d 406, 409, 89 Cal.App.2d 589—Chamberlain v. Abeles, 198 P.2d 927, 930, 88 Cal. App.2d 291—Brea v. McGlashan, 39 P.2d 877, 882, 3 Cal.App.2d 454.

50 C.J. p 627 note 90.

61. Ind.—Shonfeld v. State, 40 N.E. 2d 700, 702, 219 Ind. 654.

62. U.S.—U. S. v. Richmond, C.C.A. Pa., 17 F.2d 28, 30.

Ky.—Corpus Juris cited in Lutes v. Commonwealth, 33 S.W.2d 620, 621, 622, 236 Ky. 549, 74 A.L.R. 304.

63. U.S.—U. S. v. Richmond, C.C.A. Pa., 17 F.2d 28, 30.

64. Ky.—Corpus Juris cited in Lutes v. Commonwealth, 33 S.W.2d 620, 621, 236 Ky. 549, 74 A.L.R. 304.

Mich.—People v. Johnson, 244 N.W. 251, 252, 260 Mich. 170.

N.H.—State v. Desmarais, 123 A. 582, 583, 81 N.H. 199.

Tex.—Kadane v. Clark, Civ.App., 134 S.W.2d 448, 456.

65. S.D.—Cunningham v. Royal Neighbors of America, 124 N.W. 434, 435, 24 S.D. 489, 140 Am.S.R. 793.

50 C.J. p 626 note 78.

66. U.S.—U. S. v. Hibernia Bank Bldg., D.C.La., 76 F.Supp. 18, 19.

Miss.—Jenkins v. State, 84 So. 217, 218, 82 Miss. 500.

67. Ill.—People v. Catuara, 193 N.E. 199, 200, 358 Ill. 414.

Ky.—Corpus Juris cited in Lutes v. Commonwealth, 33 S.W.2d 620, 621, 622, 236 Ky. 549, 74 A.L.R. 304.

#### Similarly defined

(1) To obtain for oneself or for another.—State v. Desmarais, 123 A. 582, 583, 81 N.H. 199.

(2) To obtain by any means.—U. S. v. Hibernia Bank Bldg., D.C.La., 76 F.Supp. 18, 19—50 C.J. p 626 note 85.

68. U.S.—U. S. v. Hibernia Bank Bldg., D.C.La., 76 F.Supp. 18, 19.

Ky.—Corpus Juris cited in Lutes v. Commonwealth, 33 S.W.2d 620, 621, 622, 236 Ky. 549, 74 A.L.R. 304.

N.H.—State v. Desmarais, 123 A. 582, 583, 81 N.H. 199.

Tex.—Kadane v. Clark, Civ.App., 134 S.W.2d 448, 456.

69. U.S.—U. S. v. Hibernia Bank Bldg., D.C.La., 76 F.Supp. 18, 19.

Ill.—People v. Catuara, 193 N.E. 199, 200, 358 Ill. 414.

Ky.—Corpus Juris cited in Lutes v.

Commonwealth, 33 S.W.2d 620, 621, 622, 236 Ky. 549, 74 A.L.R. 304.

Mich.—People v. Johnson, 244 N.W. 251, 252, 260 Mich. 170.

Minn.—Erickson v. Husemoller, 253 N.W. 361, 364, 191 Minn. 177.

N.H.—State v. Desmarais, 123 A. 582, 583, 81 N.H. 199.

70. Ky.—Lutes v. Commonwealth, 33 S.W.2d 620, 621, 622, 236 Ky. 549, 74 A.L.R. 304.

71. U.S.—U. S. v. Hibernia Bank Bldg., D.C.La., 76 F.Supp. 18, 19.

Ky.—Corpus Juris cited in Lutes v. Commonwealth, 33 S.W.2d 620, 621, 622, 236 Ky. 549, 74 A.L.R. 304.

72. Ill.—People v. Van Bever, 93 N.E. 725, 727, 248 Ill. 136.

73. Ky.—Corpus Juris cited in Lutes v. Commonwealth, 33 S.W.2d 620, 621, 622, 236 Ky. 549, 74 A.L.R. 304.

50 C.J. p 627 note 5.

74. U.S.—First Nat. Bank v. U. S., Ct.Cl., 38 F.2d 925, 930.

75. Mo.—Kyle v. Kansas City Life Ins. Co., Mo., 201 S.W.2d 912, 913, 356 Mo. 331.

76. U.S.—Campbell v. Traders' Nat. Bank, D.C.Ill., 4 F.Cas.No.2,370, 2 Binn. 423.

60 C.J. p 991 note 5 [c].

77. Iowa.—Mighell v. Dougherty, 53 N.W. 402, 403, 86 Iowa 480, 41 Am. S.R. 511, 17 L.R.A. 755.

"Procuring" defined by application of meanings of "procure"

(1) "One of the definitions of the word 'procuring' is 'to obtain by any means'."—Ronnnow v. City of Las Vegas, 65 P.2d 133, 140, 57 Nev. 332.

(2) "Procuring means to obtain, to secure, and to get."—U. S. v. Oruga, 6 Philippine 351.

78. U.S.—U. S. v. Richmond, C.C.A. Pa., 17 F.2d 28, 30.

standing alone, may not be entirely definite.<sup>79</sup> It is defined as meaning acquired; obtained;<sup>80</sup> and it has been held equivalent to, or synonymous with, "at the instance of" see 7 C.J.S. p 165 note 56, and has been distinguished from "permitted" see 70 C.J.S. p 568 note 79.

*Phrases* employing the word in its various forms are set out in the note.<sup>81</sup>

**PROCUREMENT.** The act of procuring, obtaining, bringing about, or effecting.<sup>82</sup> It denotes direction, influences, personal exertion, interference, or other action, with knowledge or belief that such action would produce certain results, which results are produced.<sup>83</sup> Although procurement may be by coaxing, tempting, luring, and the like, which are the characteristic means of enticement, neither persuasion nor inducing nor enticing attraction need be employed.<sup>84</sup>

**PROCURER.** One who uses means to bring anything about, especially one who does so secretly and corruptly.<sup>85</sup> The term is frequently defined as meaning a panderer; a pimp; that is, one who supplies women to houses of ill fame, and in this sense is treated in Prostitution § 6.

**PRODUCE.** The word "produce" is derived from

"pro" meaning before, and "duco" meaning to lead.<sup>86</sup> It has no definite, exact, and particular meaning,<sup>87</sup> but a variety of meanings dependent on the connection in which it is used,<sup>88</sup> and it may be employed in a larger or more restricted sense,<sup>89</sup> but the scope of the word, as judicially defined, can be narrowed only by some other language, employed to express a different intent.<sup>90</sup>

*As a noun.* The common meaning of the word "produce" is production, or that which is produced; brought forth, or yielded, a product or a yield.<sup>91</sup> Similar definitions indicate that "produce" is something brought forth or yielded, as garden products,<sup>92</sup> and the term specifically means an agricultural product or products.<sup>93</sup> The yield of the garden is produce,<sup>94</sup> and the term has been held to include flowers and plants as well as vegetables,<sup>95</sup> tobacco,<sup>96</sup> cotton,<sup>97</sup> and hay.<sup>98</sup> Meat,<sup>99</sup> cement,<sup>1</sup> and coke<sup>2</sup> are sometimes considered to be produce.

On the other hand, "produce" has been held not to include livestock,<sup>3</sup> wild hay,<sup>4</sup> or an abstract of a land title.<sup>5</sup>

The noun "produce" has been held to be equivalent to "income" see 42 C.J.S. p 534 note 27, and has been compared with "provisions."<sup>6</sup>

*As a verb,* the word "produce" is defined as meaning to bring forth;<sup>7</sup> the word "produce" has also

79. Minn.—Erickson v. Husemoller, 253 N.W. 361, 364, 191 Minn. 177.

80. N.H.—State v. Desmarais, 123 A. 582, 584, 81 N.H. 199.

81. *Phrases*

(1) "Pandering and procuring" see Prostitution §§ 6-8.

(2) "Procuring cause" see the indexes to the titles Brokers and Insurance.

(3) Other phrases as to which more recent adjudications have not been found see 50 C.J. p 628 notes 10-27.

82. Ind.—Willey v. State, 52 Ind. 246, 251.

83. N.Y.—Richardson v. Richardson, 114 N.Y.S. 912, 917.

84. Kan.—State v. Riegan, 235 P. 1050, 1051, 118 Kan. 577.

85. U.S.—U. S. v. Richmond, C.C.A. Pa., 17 F.2d 28, 30.

86. C.J. p 628 note 83.

87. Ala.—Elder v. State, 50 So. 370, 373, 162 Ala. 41.

88. Ala.—Corpus Juris quoted in Bowman v. State Tax Commission, 178 So. 216, 217, 235 Ala. 190.

89. D.C.—District of Columbia v. Oyster, 15 D.C. 285, 286, 54 Am.R. 275.

90. H.—Kimball v. Blanchard, 7 A.2d 394, 396, 90 N.H. 298.

88. Ala.—Corpus Juris quoted in Bowman v. State Tax Commission, 178 So. 216, 217, 235 Ala. 190.

50 C.J. p 628 note 42.

*Several meanings*

Mo.—Kyle v. Kansas City Life Ins. Co., 201 S.W.2d 912, 914, 356 Mo. 331.

89. D.C.—District of Columbia v. Oyster, 15 D.C. 285, 286, 54 Am.R. 275.

N.H.—Kimball v. Blanchard, 7 A.2d 394, 396, 90 N.H. 298.

90. U.S.—Manners v. Morosco, D.C. N.Y., 254 F. 737, 741.

91. Ill.—Youngquist v. City of Chicago, 90 N.E.2d 205, 208, 209, 405 Ill. 21.

92. Ill.—Youngquist v. City of Chicago, supra.

93. N.H.—Kimball v. Blanchard, 7 A.2d 394, 396, 90 N.H. 298.

94. Ill.—Youngquist v. City of Chicago, 90 N.E.2d 205, 208, 209, 405 Ill. 21.

95. Ill.—Youngquist v. City of Chicago, supra.

96. U.S.—Cothran & Connally v. U. S., C.C.A.Va., 283 F. 973, 974.

97. Miss.—State v. Borroum, 23 Miss. 477, 482.

98. Me.—Luques v. Thompson, 26 Me. 514, 517.

99. Mo.—Higbee v. Burgin, 201 S. W. 558, 559, 197 Mo.App. 682.

*Pork*

Ind.—Fitch v. Madison, 24 Ind. 425, 427.

1. N.Y.—Haebler v. New York Produce Exch., 44 N.E. 87, 90, 149 N.Y. 414.

2. Eng.—Böwes v. Ravensworth, 15 C.B. 512, 523, 80 E.C.L. 523, 139 Reprint 523.

3. Ala.—Bowman v. State Tax Commission, 178 So. 216, 217, 235 Ala. 190.

4. Man.—Prince v. Tracey, 13 Dom. L.R. 818, 25 West.L.R. 412.

5. N.Y.—Nasman v. Bank of New York, 49 N.Y.S.2d 181, 184.

Tex.—Duggan Abstract Co. v. Moore, Civ.App., 139 S.W.2d 198, 201.

6. N.J.—Sheer v. Newman, 146 A. 180, 181, 105 N.J.Law 624.

7. Iowa.—Lineberger v. Johnson, 239 N.W. 679, 682, 213 Iowa 800.

Tex.—Corpus Juris quoted in Spiller v. McGehee, Civ.App., 68 S.W.2d 1093, 1095.

Ont.—Ottawa Electric Light Co. v. Ottawa, 12 Ont.L. 290, 299.

been said to mean to bring into being or form;<sup>8</sup> to give being or form to; to manufacture;<sup>9</sup> to make,<sup>10</sup> as, he produces excellent pottery.<sup>11</sup>

"Produce" is also defined as meaning to cause;<sup>12</sup> to cause to be or to happen;<sup>13</sup> to originate;<sup>14</sup> to create;<sup>15</sup> to generate;<sup>16</sup> to bear;<sup>17</sup> to yield; to furnish;<sup>18</sup> to give forth; to supply;<sup>19</sup> to bring forward; to lead forth.<sup>20</sup>

The term has been further defined as meaning to exhibit;<sup>21</sup> to bring to view; to declare;<sup>22</sup> to show; to offer to view or notice;<sup>23</sup> to extend; to lengthen; to prolong; to draw out.<sup>24</sup>

The verb "produce" has been held to be almost synonymous with "manufacture" see *Manufactures* § 1 a (4), and has been compared with, or dis-

tinguished from, "procure" see ante p 1207 note 75, and "surrender."<sup>25</sup>

*Producing.* Bringing about;<sup>26</sup> bringing into existence;<sup>27</sup> giving being or form to; manufacturing; making.<sup>28</sup>

*Produced.* The past participle of "produce."<sup>29</sup> It has been held synonymous with "found" see 36 C.J.S. p 766 note 60, and has been distinguished from "handled" see 39 C.J.S. p 771 in *Pocket Parts*.

Under provisions rendering the Fair Labor Standards Act applicable to employers engaged in the production of goods for commerce, the term "produce" means produced, manufactured, mined, handled, or in any other manner worked on in any state, as discussed in *Master and Servant* § 151 (7).

#### Similarly defined

(1) To bring forth, as young, or as a natural product or growth; to give birth to.—U. S. v. *Montgomery Ward & Co.*, D.C.Ill., 58 F.Supp. 408, 413.

(2) To bring forth, as a natural product or growth.—*Creech v. South Carolina Public Service Authority*, 20 S.E.2d 645, 649, 200 S.C. 127.

(3) To beget.—*Dunbar v. Spratt-Snyder Co.*, 226 N.W. 22, 24, 63 A.L.R. 1016, 208 Iowa 490.

3. *Tex.*—*Corpus Juris* quoted in *Spiller v. McGehee*, Civ.App., 68 S.W.2d 1093, 1095.

Ont.—*Ottawa Electric Light Co. v. Ottawa*, 12 Ont.L. 290, 299.

3. U.S.—U. S. v. *Montgomery Ward & Co.*, D.C.Ill., 58 F.Supp. 408, 413  
—*Armature Exchange v. U. S.*, D.C.Cal., 28 F.Supp. 10, 13.

10. U.S.—U. S. v. *Montgomery Ward & Co.*, D.C.Ill., 58 F.Supp. 408, 413.

*Tex.*—*Corpus Juris* quoted in *Spiller v. McGehee*, Civ.App., 68 S.W.2d 1093, 1095.

50 C.J. p 629 note 70.

#### Similarly defined

(1) Make by working upon raw material, or manufacture.—U. S. v. *Montgomery Ward & Co.*, D.C.Ill., 58 F.Supp. 408, 413.

(2) To make economically valuable, to make or create so as to be available for satisfaction of human wants.—*Ohio Oil Co. v. Wright*, 58 N.E.2d 966, 973, 386 Ill. 206.

11. U.S.—U. S. v. *Montgomery Ward & Co.*, D.C.Ill., 58 F.Supp. 408, 413—*Armature Exchange v. U. S.*, D.C.Cal., 28 F.Supp. 10, 13.

12. U.S.—U. S. v. *Montgomery Ward & Co.*, D.C.Ill., 58 F.Supp. 408, 413.

Mo.—*Kyle v. Kansas City Life Ins. Co.*, 201 S.W.2d 912, 914, 356 Mo. 331.

#### Similarly defined

(1) To be the cause of.—*Elder v. State*, 50 So. 370, 373, 162 Ala. 41.

(2) To cause to accrue.—*King v. Garcia*, Tex.Civ.App., 152 S.W.2d 918, 919.

13. Iowa.—*Dunbar v. Spratt-Snyder Co.*, 226 N.W. 22, 24, 63 A.L.R. 1016, 208 Iowa 490.

*Tex.*—*Corpus Juris* quoted in *Spiller v. McGehee*, Civ.App., 68 S.W.2d 1093, 1095.

#### Similarly expressed

To cause to happen or take place, as an effect or result.—*Strong v. Aetna Casualty & Surety Co.*, Tex. Civ.App., 170 S.W.2d 786, 788—*Travelers Ins. Co. v. Johnson*, Tex.Civ. App., 84 S.W.2d 354, 359.

14. Ark.—*Gay Oil Co. v. State*, 280 S.W. 632, 634, 170 Ark. 587.

Iowa.—*Dunbar v. Spratt-Snyder Co.*, 226 N.W. 22, 24, 63 A.L.R. 1016, 208 Iowa 490.

Mo.—*Kyle v. Kansas City Life Ins. Co.*, 201 S.W.2d 912, 914, 356 Mo. 331.

15. Mo.—*Kyle v. Kansas City Life Ins. Co.*, supra.

16. U.S.—U. S. v. *Montgomery Ward & Co.*, D.C.Ill., 58 F.Supp. 408, 413.

S.C.—*Creech v. South Carolina Public Service Authority*, 20 S.E.2d 645, 649, 200 S.C. 127.  
50 C.J. p 629 note 68.

17. U.S.—U. S. v. *Montgomery Ward & Co.*, D.C.Ill., 58 F.Supp. 408, 413.

18. U.S.—U. S. v. *Montgomery Ward & Co.*, supra.

S.C.—*Creech v. South Carolina Public Service Authority*, 20 S.E.2d 645, 649, 200 S.C. 127.

*Tex.*—*King v. Garcia*, Civ.App., 152 S.W.2d 918, 919.  
50 C.J. p 629 note 76.

19. U.S.—U. S. v. *Montgomery*

*Ward & Co.*, D.C.Ill., 58 F.Supp. 408, 413.

20. Ga.—*Perkins v. Terrell*, 58 S.E. 133, 135, 1 Ga.App. 250.  
50 C.J. p 629 note 64.

#### Similarly defined

(1) To bring about.—*Dunbar v. Spratt-Snyder Co.*, 226 N.W. 22, 24, 208 Iowa 490, 63 A.L.R. 1016.

(2) To bring into existence; give rise to.—U. S. v. *Montgomery Ward & Co.*, D.C.Ill., 58 F.Supp. 408, 413.

21. Ark.—*Gay Oil Co. v. State*, 280 S.W. 632, 634, 170 Ark. 587.  
Ga.—*Perkins v. Terrell*, 58 S.E. 133, 135, 1 Ga.App. 250.  
Mo.—*Kyle v. Kansas City Life Ins. Co.*, 201 S.W.2d 912, 914, 356 Mo. 331.

22. Ark.—*Gay Oil Co. v. State*, 280 S.W. 632, 634, 170 Ark. 587.

23. Ga.—*Perkins v. Terrell*, 58 S.E. 133, 135, 1 Ga.App. 250.  
Mo.—*McCray v. Pfoest*, 94 S.W. 998, 999, 118 Mo.App. 672, 678.

24. Ill.—*Cedar Park Cemetery Ass'n v. Village of Calumet Park*, 75 N.E.2d 874, 880, 398 Ill. 324.

25. Ga.—*Perkins v. Terrell*, 58 S.E. 133, 135, 1 Ga.App. 250.

26. Tex.—*Strong v. Aetna Casualty & Surety Co.*, Civ.App., 170 S.W.2d 786, 788—*Travelers Ins. Co. v. Johnson*, Civ.App., 84 S.W.2d 354, 359.

#### Similarly expressed

Any method of bringing forth to view any matter or thing.—*People v. Ellenbein*, 20 N.Y.S. 364, 365, 65 Hun 434.

27. Tex.—*Johnston v. Cole*, Civ. App., 135 S.W.2d 524, 526.

28. Iowa.—*Mignell v. Dougherty*, 53 N.W. 402, 403, 88 Iowa 480, 41 Am.S.R. 511, 17 L.R.A. 755.

29. Webster New Int.D.

The word "produced" as used in a lease which is to continue as long as oil or gas is "produced" means substantially the same as "produced in paying quantities," see *Mines and Minerals* § 202 c (2) (b) bb.

*Phrases* employing the word in its various forms are set out in the note.<sup>30</sup>

**PRODUCER.** One who produces, brings forth, or generates;<sup>31</sup> anyone who produces, generates, or brings forth an article;<sup>32</sup> one who brings something into existence from its original source or materials.<sup>33</sup> The term is commonly used to denote a person who raises agricultural crops and puts them in a condition for the market.<sup>34</sup>

"Producer" and "manufacturer" have been held identical or synonymous, and the terms have also been distinguished, see *Manufactures* § 1 b (3). "Producer" has been distinguished from "dealer" see 25 C.J.S. p 1043 note 8, and "owner" see *Property* § 13.

**PRODUCT.** Anything produced,<sup>35</sup> whether as the result of generation, growth, labor, or thought,<sup>36</sup> or by the operation of involuntary causes;<sup>37</sup> a thing produced by nature or the natural processes;<sup>38</sup> that which is produced by an action, operation, or work; a production.<sup>39</sup> The term is also defined as meaning that which results from operation of a cause, consequence, or effect;<sup>40</sup> anything obtained as a result; the result obtained by multiplication.<sup>41</sup>

The word imports an article which is made of

something, and which, when made, has characteristics which are apparent to the senses.<sup>42</sup> It has been held to include whisky manufactured from grain by the use of labor,<sup>43</sup> peaches,<sup>44</sup> cotton,<sup>45</sup> electricity,<sup>46</sup> and nails.<sup>47</sup>

On the other hand, the word "product" has been interpreted as not including live stock,<sup>48</sup> parts of slaughtered hogs,<sup>49</sup> or labor.<sup>50</sup>

"Product" has been held synonymous with "commodity" see 15 C.J.S. p 588 note 18.2, "fruit" see 37 C.J.S. p 1389 note 38, and "proceeds" see ante p 974 note 46. It has been distinguished from "process" see ante p 976 note 67.

"Products" means things produced,<sup>51</sup> and the products of a farm are those things raised upon the farm, whether such products be live stock or crops.<sup>52</sup>

Products of exempt property as being exempt from seizure and sale for the payment of debts are discussed generally in *Exemptions* § 62; and with respect to exemption of products of a homestead estate see *Homesteads* § 70 b. Tax exemptions to products of manufacturing companies are treated in the C.J.S. title *Taxation* § 275, also 61 C.J. p 441 note 4—p 443 note 21. The right of the cestui que trust to follow or trace trust property through any change in form or species and to have the trust attached to the products or substitutes, and the right to elect to do so, are discussed in the C.J.S. title *Trusts* §§ 437–439, also 65 C.J. p 968 note 38—p 979 note 25, p 981 notes 36–40. An employee's

### 30. Phrases

(1) "Produce broker" defined see *Brokers* § 1, and other references in the title index.

(2) "Produce business" see 12 C.J. S. p 804 note 59.1.

(3) "Produce dealer" defined generally see 25 C.J.S. p 1044 notes 25–27; and within licensing statutes see *Licenses* § 30 d (3) (a).

(4) "Producing well" see *Mines and Minerals* §§ 150 a, 215.

(5) Other phrases employing the word as to which more recent adjudications have not been found see 50 C.J. p 629 notes 52–57, p 629 note 79—p 630 notes 84, 89–96.

31. U.S.—*Armature Exchange v. U. S.*, D.C.Cal., 28 F.Supp. 10, 13. Cal.—*Boland v. Cecil*, 150 P.2d 819, 822, 65 Cal.App.2d Supp. 832.

32. U.S.—*U. S. v. Elm Spring Farm*, D.C.Mass., 38 F.Supp. 508, 510.

33. Ky.—*Burbank v. Sinclair Prairie Oil Co.*, 202 S.W.2d 420, 423, 304 Ky. 833.

34. U.S.—*Sancho v. Bowie*, C.C.A. Puerto Rico, 93 F.2d 323, 326. 50 C.J. p 631 note 9.

35. Ala.—*Elder v. State*, 50 So. 370, 373, 162 Ala. 41.

36. Philippine.—*Molina v. Rafferty*, 38 Philippine 167, 171.

37. U.S.—*Brown v. Cummins Distilleries Corporation*, D.C.Ky., 53 F.Supp. 659, 664—*Bakelite Corporation v. U. S.*, 16 Ct.Cust.App., 378, 381.

38. Neb.—*State v. Interstate Power Co.*, 226 N.W. 427, 433, 118 Neb. 756.

39. Neb.—*State v. Interstate Power Co.*, supra.

40. Neb.—*State v. Interstate Power Co.*, supra.

41. Ala.—*Elder v. State*, 50 So. 370, 373, 162 Ala. 41.

### "The results"

Neb.—*State v. Interstate Power Co.*, 226 N.W. 427, 433, 118 Neb. 756.

42. Ala.—*Elder v. State*, 50 So. 370, 373, 162 Ala. 41.

50 C.J. p 632 note 19.

43. U.S.—*Brown v. Cummins Distilleries Corporation*, D.C.Ky., 53 F. Supp. 659, 664.

44. Ga.—*Cornell v. State*, 12 S.E.2d 378, 379, 64 Ga.App. 202. 50 C.J. p 632 note 25.

45. Ga.—*Whitaker v. State*, 70 S.E. 990, 991, 9 Ga.App. 213.

46. Neb.—*State v. Interstate Power Co.*, 226 N.W. 427, 433, 118 Neb. 756.

47. N.Y.—*People v. New York Tax Commrs.*, 23 N.Y. 242, 246. 50 C.J. p 632 note 24.

48. Ala.—*Bowman v. State Tax Commission*, 178 So. 216, 217, 235 Ala. 190.

49. Ind.—*Morning Star v. Cunningham*, 11 N.E. 593, 595, 110 Ind. 328. 50 C.J. p 632 note 27.

50. Mo.—*Harelsan v. Tyler*, 219 S. W. 908, 913, 281 Mo. 383. 50 C.J. p 632 note 26.

51. Tex.—*Spiller v. McGehee*, Civ. App., 68 S.W.2d 1093, 1095.

52. Cal.—*People v. Mulholland*, App., 98 P.2d 261, 265.

right to share in the profits or products of a business is discussed in Master and Servant §§ 93-95.

*Phrases* employing the word are set out in the note.<sup>53</sup>

**PRODUCTION.** A term of rather broad and comprehensive meaning<sup>54</sup> which may designate a thing produced as well as the operation of producing.<sup>55</sup> It is defined as meaning the creation of something;<sup>56</sup> the act of producing, or the state of being produced; manufacture;<sup>57</sup> that which is produced or made; product; fruit of labor.<sup>58</sup> It has been said that transportation is a form of production.<sup>59</sup>

In political economy, "production" means the creation of objects which constitute wealth,<sup>60</sup> and in an economic sense production requires planning and control as well as manual labor,<sup>61</sup> and thus includes all activity directed to increasing the number of scarce economic goods, not simply the manual, physical labor involved in changing the form or utility of a tangible article.<sup>62</sup>

"Production" has been distinguished from "distribution" see 27 C.J.S. p 364 note 49.2, and "invention" see 48 C.J.S. p 756 note 5.

Production used in connection with insurance as meaning obtaining business see Insurance § 49. The

production of books, papers, writings, and various other documents and instruments is discussed throughout this work, particular reference being made to the C.J.S. titles Attachment § 136; Bills and Notes § 361; Bonds § 125; Carriers §§ 172 c, 597, 611; Depositions § 62; Discovery § 18; Evidence §§ 753-762; Master and Servant § 151 (31); Searches and Seizures §§ 35-48, also 56 C.J. p 1169 note 79-p 1174 note 65; Sheriffs and Constables § 7, also 57 C.J. p 738 notes 56-58; States § 46, also 59 C.J. p 99 notes 94-97; Wills §§ 306, 311, 447, 448, also 68 C.J. p 872 notes 77-83, p 878 note 60-p 881 note 26, p 1059 note 40-p 1060 note 59; and Witnesses § 448, also 70 C.J. p 743 note 77-p 745 note 96.

For other particular applications and specific uses of the term consult the indexes to the various titles and the Descriptive-Word Index.

*Phrases* employing the word are set out in the note.<sup>63</sup>

**PRODUCTIVE.** Having quality or power of producing; bringing forth or able to bring forth, especially in abundance; generative; creative; fertile.<sup>64</sup>

**PROFANE.** Defined see Profanity § 1.

#### 53. Phrases

(1) "Agricultural product" see 3 C.J.S. p 361 note 74.

(2) "Farm product" see 35 C.J.S. p 750 notes 18-23.

(3) "Product patent" see Patents § 3.

(4) Other phrases as to which more recent adjudications have not been found see 50 C.J. p 632 notes 28-35.

54. U.S.—U. S. v. Montgomery Ward & Co., C.C.A.III., 150 F.2d 369, 376.

55. U.S.—Durand v. Green, C.C.Pa., 60 F. 392, 395.

56. N.J.—Kleckhefer Container Co. v. Unemployment Compensation Commission, 13 A.2d 646, 648, 125 N.J.Law 52.

Wyo.—Atwater v. Gaylord, 184 P.2d 437, 440, 63 Wyo. 492.

#### Similarly defined

Creation.—U. S. v. Montgomery

Ward & Co., D.C.III., 58 F.Supp. 408, 413.

57. U.S.—U. S. v. Montgomery Ward & Co., supra.

#### Similarly defined

The act or process of producing, bringing forth, or exhibiting to view.—U. S. v. Montgomery Ward & Co., supra.

58. Ark.—Dano v. Mississippi, etc., R. Co., 27 Ark. 564, 567.

50 C.J. p 633 note 38.

59. U.S.—U. S. v. Montgomery Ward & Co., C.C.A.III., 150 F.2d 369, 378.

60. Tex.—Cole Petroleum Co. v. U. S. Gas & Oil Co., 41 S.W.2d 414, 416, 121 Tex. 59.

Wyo.—Atwater v. Gaylord, 184 P.2d 437, 440, 63 Wyo. 492.

50 C.J. p 633 note 41.

61. U.S.—Borden Co. v. Borella, N. Y., 65 S.Ct. 1223, 1225, 325 U.S. 679, 89 L.Ed. 1865, 161 A.L.R. 1258.

62. U.S.—Borden Co. v. Borella, supra.

#### 63. Phrases

(1) "Production of goods for commerce" within the Fair Labor Standards Act see the title index to Master and Servant.

(2) "Intellectual productions," common law right of property in, see Copyright and Literary Property § 5, and other references in the title index.

(3) "Production worker" is one who is engaged in the actual making of the article created.—Kleckhefer Container Co. v. Unemployment Compensation Commission, 13 A.2d 646, 648, 125 N.J.Law 52. Distinguished from "handy man" see 39 C.J.S. p 772 note 95.

#### 64. Webster New Int.D.

"Productive society" defined see Industrial Co-Operative Societies § 1.

## PROFANITY

This Title includes cursing and profane language not amounting to a malicious reviling of God or an attack on the Christian religion; nature and elements of offense; nature and extent of criminal responsibility therefor and grounds of defense; and prosecution and punishment of such acts as public offenses.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

### Analysis

- § 1. Definition—p 1212
- 2. Nature and elements of offense—p 1212
- 3. — At common law—p 1212
- 4. — Under statutes—p 1213
- 5. Prosecution—p 1214

See also descriptive word index in the back of this Volume

### § 1. Definition

"Profanity" means words denoting irreverence toward God or holy things.

"Profanity" means words denoting irreverence of God and holy things;<sup>1</sup> words importing an imprecation of divine vengeance,<sup>2</sup> or implying divine condemnation.<sup>3</sup> The term "profane" has been defined as irreverent toward God or holy things;<sup>4</sup> speaking or spoken; acting or acted, in manifest or implied contempt of sacred things.<sup>5</sup>

### § 2. Nature and Elements of Offense

The nature and elements of the offense of profanity at common law are discussed *infra* § 3, and, under statutes, *infra* § 4.

Examine Pocket Parts for later cases.

### § 3. — At Common Law

At common law profane swearing and cursing to an extent which constitutes a common nuisance are a criminal offense.

Profane swearing and cursing, in a loud and boisterous tone of voice, and in the presence and hearing of citizens of the commonwealth in a public place, to such an extent as to be a common nuisance to all citizens being present and hearing such swearing and cursing, is an indictable offense at common law.<sup>6</sup> While generally, it is necessary that the profane words should be repeated in order to constitute a common nuisance,<sup>7</sup> it is not always so;<sup>8</sup> a single utterance, if the words used, or the tone, or the manner, or the circumstances surrounding it, make it a common nuisance, may constitute the common-law offense.<sup>9</sup> In itself, however, independently of the circumstances giving it the char-

1. Fla.—Cason v. Baskin, 20 So.2d 243, 247, 155 Fla. 198.

"Blasphemy" distinguished see Blasphemy § 1 a.

Profanity as element of offense of drunkenness see Drunkards § 14 a (2) (d).

"Curse" or "cursing" compared Fla.—Cason v. Baskin, *supra*.

2. U.S.—Duncan v. U. S., C.C.A.Or., 48 F.2d 128, 133, certiorari denied 51 S.Ct. 656, 283 U.S. 863, 75 L.Ed. 1468.

Ala.—Thompson v. State, 42 So.2d 640, 641, 34 Ala.App. 608.

Fla.—Cason v. Baskin, 20 So.2d 243, 247, 155 Fla. 198, 168 A.L.R. 430.

Tenn.—Gaines v. State, 7 Lea 410, 411, 46 Am.R. 64.

Wyo.—Town of Torrington v. Taylor, 137 P.2d 621, 624, 59 Wyo. 109.

3. U.S.—Duncan v. U. S., C.C.A.Or., 48 F.2d 128, 133, certiorari denied 51 S.Ct. 656, 283 U.S. 863, 75 L.Ed. 1468.

Ala.—Thompson v. State, 42 So.2d 640, 641, 34 Ala.App. 608.

Fla.—Cason v. Baskin, 20 So.2d 243, 247, 155 Fla. 198.

Tenn.—Gaines v. State, 7 Lea 410, 411, 46 Am.R. 64.

Wyo.—Town of Torrington v. Taylor, 137 P.2d 621, 624, 59 Wyo. 109.

4. U.S.—Duncan v. U. S., C.C.A.Or., 48 F.2d 128, 133, certiorari denied 51 S.Ct. 656, 283 U.S. 863, 75 L.Ed. 1468.

Wyo.—Town of Torrington v. Tay-

lor, 137 P.2d 621, 624, 59 Wyo. 109.

5. U.S.—Duncan v. U. S., C.C.A.Or., 48 F.2d 128, 133, certiorari denied 51 S.Ct. 656, 283 U.S. 863, 75 L.Ed. 1468.

Wyo.—Town of Torrington v. Taylor, 137 P.2d 621, 624, 59 Wyo. 109.

6. Pa.—Commonwealth v. Brown, 67 Pa.Dist. & Co. 151.

50 C.J. p 634 note 4.

7. Ala.—Goree v. State, 71 Ala. 7.

50 C.J. p 634 note 8.

8. Tenn.—Young v. State, 10 Lea 165—Gaines v. State, 7 Lea 410, 40 Am.R. 64.

9. Tenn.—Young v. State, 10 Lea 165—Gaines v. State, 7 Lea 410, 40 Am.R. 64.

acter of a common nuisance, a single utterance of a profane word is not indictable at common law.<sup>10</sup> Where the cursing is repeated to such an extent as to become a public nuisance, the common-law offense is complete,<sup>11</sup> even though the cursing is confined to a single occasion,<sup>12</sup> and to a limited period.<sup>13</sup> However, a continued use of profane words, in the absence of any showing that it constituted a common nuisance, is not indictable.<sup>14</sup>

**Publicity.** In order to make profane swearing a nuisance, and an indictable offense at common law, the profanity must be uttered in the hearing of other persons.<sup>15</sup> It is not necessary that the language used should have been heard by a large portion of the people in the community, provided it is heard by some.<sup>16</sup> It is not enough merely that it was done in the public streets;<sup>17</sup> but, if the acts are committed in the presence of other persons, then, as far as the character of the place may be material, such presence will, it is said, make any place for the occasion public.<sup>18</sup>

#### § 4. — Under Statutes

Statutes or municipal ordinances sometimes make punishable profanity, and the like; whether particular matters constitute offenses under such statutes or ordinances depends largely on the terms thereof duly construed.

The offense of profanity, profane cursing, or using profane language has been made punishable by some statutes<sup>19</sup> or municipal ordinances.<sup>20</sup> Statutes or ordinances of this type are strictly construed.<sup>21</sup> The character and elements of the offense is in these cases fixed by the terms of the statute<sup>22</sup> or ordinance.<sup>23</sup> If within the terms of statute or ordinance, it is an offense, even though the facts do not constitute a public nuisance,<sup>24</sup> as, for example, where the profane language is not publicly spoken<sup>25</sup> or repeated.<sup>26</sup> All statutory elements must be shown to exist before accused can be convicted of the offense,<sup>27</sup> as, for example, that the profane words were spoken in the presence of a female,<sup>28</sup> without provocation.<sup>29</sup>

**Words used.** As a general rule words are profane or not, within the meaning of a penal statute or ordinance, according to the sense in which they are used,<sup>30</sup> and it is essential to show such sense by other words coupled therewith in order to establish an offense.<sup>31</sup> Under a statute so defining the offense, the use of God's name in a curse makes the offender amenable to the statute.<sup>32</sup> Except where the statute or ordinance makes it an essential element of the offense, generally, it is not necessary that the name of God should be used to constitute the offense, provided only the words used import

10. Wyo.—Corpus Juris quoted in Town of Torrington v. Taylor, 137 P.2d 621, 625, 59 Wyo. 109. 50 C.J. p 634 note 8.

11. N.C.—State v. Chrisp, 85 N.C. 528, 39 Am.R. 713. 50 C.J. p 635 note 9.

12. N.C.—State v. Chrisp, supra.

13. N.C.—State v. Chrisp, supra. 50 C.J. p 635 note 11.

14. N.C.—State v. Pepper, 68 N.C. 259, 12 Am.R. 637. 50 C.J. p 665 note 12.

15. N.C.—State v. Pepper, supra. 50 C.J. p 635 note 13.

16. Ala.—Goree v. State, 71 Ala. 7. 50 C.J. p 635 note 14.

17. N.C.—State v. Pepper, 68 N.C. 259, 12 Am.R. 637.

Pa.—Commonwealth v. Linn, 27 A. 843, 158 Pa. 22, 22 L.R.A. 353.

18. Tenn.—Young v. State, 10 Lea 165.

19. Ga.—Foster v. State, 25 S.E. 613, 99 Ga. 56.

50 C.J. p 635 notes 19, 21-44.

No statutory penalty

Pa.—Commonwealth v. Brown, 67 Pa.Dist. & Co. 151.

20. Wyo.—Town of Torrington v. Taylor, 137 P.2d 621, 59 Wyo. 109. 50 C.J. p 635 note 20.

21. Wyo.—Town of Torrington v. Taylor, supra.

22. Ga.—Williams v. State, 43 S.E. 436, 117 Ga. 13.

N.C.—State v. Warren, 18 S.E. 498, 113 N.C. 683.

23. Cal.—Ex parte Delaney, 43 Cal. 478.

Power of municipal corporation to: Prohibit profanity see Municipal Corporations § 289.

Regulate public morals generally see Municipal Corporations § 135.

24. N.C.—State v. Warren, 18 S.E. 498, 113 N.C. 683—State v. Cainan, 94 N.C. 880.

25. Ark.—Bodenhamer v. State, 28 S.W. 507, 60 Ark. 10.

26. Cal.—Ex parte Delaney, 43 Cal. 478.

Tenn.—State v. Graham, 3 Sneed 134.

27. Ga.—Hardin v. State, 39 S.E. 879, 114 Ga. 58.

50 C.J. p 635 note 43.

28. Ga.—Parks v. State, 36 S.E. 73, 110 Ga. 760.

50 C.J. p 635 note 43.

29. Ga.—Hardin v. State, 39 S.E. 879, 114 Ga. 58.

50 C.J. p 635 note 44.

30. Ga.—Roberts v. State, 47 S.E. 511, 120 Ga. 177.

Wyo.—Town of Torrington v. Taylor, 137 P.2d 621, 59 Wyo. 109.

Particular language held profane

(1) Reference to individual as "damned."—Duncan v. U. S., C.C.A. Or., 48 F.2d 128, certiorari denied 51 S.Ct. 656, 283 U.S. 863, 75 L.Ed. 1408.

(2) Use of expression "by God" irreverently.—Duncan v. U. S., supra.

(3) Statement of intention to call down the curse of God on a certain individual.—Duncan v. U. S., supra.

(4) Other language.—Orf v. State, 113 So. 202, 147 Miss. 160.

31. Ga.—Roberts v. State, 47 S.E. 511, 120 Ga. 177.

Wyo.—Town of Torrington v. Taylor, 137 P.2d 621, 59 Wyo. 109.

Use of words "Jesus Christ" as an exclamation preceding the question "Can't you read?" did not constitute profane language within municipal ordinance, on the theory that the words did not import an imprecation of divine vengeance and did not imply divine condemnation and that it was not clear that the words were used with irreverence toward God or holy things or in manifest or implied contempt of holy things.—Town of Torrington v. Taylor, supra.

32. Pa.—Commonwealth v. Hardy, 1 Ashm. 410.

50 C.J. p 635 note 25.



an imprecation of divine vengeance or imply divine condemnation,<sup>33</sup> as used with other words or under the circumstances in which they were spoken.<sup>34</sup> If, under the circumstances, the words, when spoken, do not carry this meaning, there is no offense.<sup>35</sup> Under a statute penalizing the use of obscene and vulgar or profane language, under certain circumstances, the words need not be even profane to constitute the offense, if they are vulgar or obscene.<sup>36</sup> Where the offense is statutory and the statute is construed to apply to spoken words only, the delivery of a written communication using the profane language does not constitute the offense.<sup>37</sup>

**Place.** Where the statute, by its terms, makes the prohibition against profanity operative in a particular locality or within defined limits, the profanity, in order to constitute an offense, must be within those limits.<sup>38</sup> The profane swearing must be in a public place, where the statute so defines the offense.<sup>39</sup> Under a statute or ordinance prohibiting the use of profanity in a street or public place, the use of the prohibited words on the veranda of a house close to a public street within hearing of persons passing on the street constitutes the offense.<sup>40</sup> Where the statute or ordinance prohibits the cursing "in any street, house or elsewhere in the city," cursing on private premises is an offense.<sup>41</sup>

## § 5. Prosecution

Prosecutions for certain offenses involving profanity may be by indictment, and summary proceeding will lie in some cases.

The prosecution for some offenses involving pro-

fanity may be by indictment, while a summary proceeding in the case of other such offenses may lie.<sup>42</sup> Where accused has uttered several oaths on the same day, a single summary proceeding before the magistrate may include them all,<sup>43</sup> or he may be prosecuted in a separate proceeding for each curse.<sup>44</sup>

In an information given under oath to a magistrate, it is not necessary to specify the offense or offenses with as much certainty as is necessary in an indictment.<sup>45</sup> The view has been taken that the information is sufficient if it follows the words of the statute.<sup>46</sup> Where a number of profane oaths are charged, the words of each oath need not be set forth;<sup>47</sup> the words of one, and the number of times it was uttered, are sufficient.<sup>48</sup> Where the statute requires that the information set out the nature of the oath, a setting out of the oath in the exact words used is sufficient.<sup>49</sup>

An indictment for the common-law offense involving nuisance must set forth all the facts and circumstances which go to make up the offense;<sup>50</sup> and an omission of an essential allegation will not be aided by proof of the facts omitted.<sup>51</sup> It has been held or recognized that essential averments are the words uttered<sup>52</sup> and an allegation to the common nuisance, or its equivalent, supported by alleged facts showing the profanity to be of that character,<sup>53</sup> as, for example, that the words were uttered in the presence or hearing of others,<sup>54</sup> and that they were so repeated in public as to have become an annoyance and inconvenience to the public.<sup>55</sup> The view has been taken, however, that, even though only a single act of profanity is al-

33. Wyo.—*Corpus Juris* quoted in *Town of Torrington v. Taylor*, 137 P.2d 621, 624, 50 Wyo. 109. 50 C.J. p 635 note 28.

34. Wyo.—*Corpus Juris* quoted in *Town of Torrington v. Taylor*, 137 P.2d 621, 624, 59 Wyo. 109. 50 C.J. p 635 note 28.

35. Wyo.—*Corpus Juris* quoted in *Town of Torrington v. Taylor*, 137 P.2d 621, 624, 59 Wyo. 109. 50 C.J. p 635 note 29.

36. Ga.—*Holcombe v. State*, 62 S.E. 647, 5 Ga.App. 47. 50 C.J. p 635 note 31. Use of obscene or vulgar language as offense see *Obscenity* § 6.

37. Ga.—*Williams v. State*, 43 S.E. 436, 117 Ga. 13.

38. N.C.—*State v. Warren*, 18 S.E. 498, 113 N.C. 683.

39. Miss.—*State v. Shanks*, 40 So. 1005, 88 Miss. 410.

40. Hawaii.—*Republic v. Ben*, 10 Hawaii 278.

41. N.C.—*State v. Cainan*, 94 N.C. 880.

42. Tenn.—*State v. Graham*, 3 Sneed 134. 50 C.J. p 636 note 47. Summary criminal prosecution generally see *Criminal Law* §§ 367-403.

43. N.J.—*Johnson v. Barclay*, 16 N.J.Law 1.

44. Conn.—*Holcomb v. Cornish*, 8 Conn. 375.

45. N.J.—*Johnson v. Barclay*, 16 N.J.Law 1. 50 C.J. p 636 note 70. Complaint in summary prosecution generally see *Criminal Law* §§ 373-377.

46. Ind.—*Taney v. State*, 36 N.E. 295, 9 Ind.App. 46. 50 C.J. p 637 note 71.

47. N.J.—*Johnson v. Barclay*, 16 N.J.Law 1.

48. N.J.—*Johnson v. Barclay*, supra.

49. N.J.—*Johnson v. Barclay*, supra.

50. Pa.—*Commonwealth v. Linn*, 27 A. 843, 158 Pa. 22, 22 L.R.A. 353. 50 C.J. p 636 note 56. Indictment or information for nuisance generally see *Nuisances* §§ 164, 165.

Sufficient statement of offense in indictment or information in criminal prosecution generally see *Indictments and Informations* §§ 90-156.

51. N.C.—*State v. Powell*, 70 N.C. 67—*State v. Jones*, 31 N.C. 38.

52. N.C.—*State v. Barham*, 79 N.C. 646. 50 C.J. p 636 note 58.

53. Pa.—*Commonwealth v. Linn*, 27 A. 843, 158 Pa. 22, 22 L.R.A. 353. 50 C.J. p 636 note 59.

54. Pa.—*Commonwealth v. Linn*, supra. 50 C.J. p 636 note 60.

55. N.C.—*State v. Barham*, 79 N.C. 646. 50 C.J. p 636 note 61.

leged, it is not essential to set forth the particular circumstances which would render a single act a nuisance.<sup>56</sup> An allegation that the words were uttered publicly will not be sufficient,<sup>57</sup> unless the averment goes on to say that the words were uttered in the hearing of others so as to become a nuisance.<sup>58</sup> It is not necessary to set out the whole conversation, only as much of it as clearly describes the language used being necessary.<sup>59</sup>

While an indictment for a statutory offense of profanity has been held sufficient if it follows the words of the statute,<sup>60</sup> it has also been held or recognized that it should set out the words spoken;<sup>61</sup> but a failure to do so may be cured by verdict.<sup>62</sup> Where the statute defines the offense as profanity "in any public place," the indictment must state the particular public place where the profanity occurred.<sup>63</sup> Under an indictment alleging facts which would have constituted the offense at common law, accused cannot be convicted on proof of a state of facts which would merely satisfy the statute, where

the statutory offense omits certain elements of the crime as defined at common law.<sup>64</sup>

Rules as to the weight and sufficiency of evidence in criminal prosecutions generally apply in prosecutions for profanity.<sup>65</sup> Under a statute making the uttering of profane oaths in the presence of a female and without provocation an offense, it is for the jury to determine whether accused knew that he was in the presence of a female,<sup>66</sup> and whether or not there was provocation.<sup>67</sup> The view has been taken that whether a single act of profanity constituted a nuisance is a question of fact for the jury.<sup>68</sup> An instruction in a prosecution for an offense here under consideration should be applicable to the evidence.<sup>69</sup>

*Form of conviction.* In a summary prosecution the precise form of conviction provided in the statute, not mandatory in its terms, need not be followed, provided only jurisdiction and the fact of conviction are shown.<sup>70</sup>

**PROPERT.** A short form of "profert in curia,"<sup>1</sup> or "profert in curiam."<sup>2</sup>

"Profert in curia," sometimes written "profert in curiam," law Latin, meaning he produces in court. In old practice these words were inserted in a declaration, as an allegation that plaintiff was ready to produce, or did actually produce, in court, the deed or other written instrument on which his suit was founded, in order that the court might inspect it and defendant hear it read. The same formula was used when defendant pleaded a written instrument.<sup>3</sup>

Profert of written instruments is treated generally in Pleading §§ 230, 367, 368, 370, and more

specifically in Bills and Notes § 570, and Bonds § 108 a (4). Reference is also made to the indexes to the titles Appeal and Error and Executors and Administrators. For other particular applications and specific uses of the term consult the Descriptive-Word Index.

**PROFESS.** To make open declaration of, to make public declaration or avowal.<sup>4</sup>

*Professed.* Openly declared, avowed, acknowledged or claimed.<sup>5</sup>

*Professedly.* Avowedly.<sup>6</sup>

**PROFESSION.** It has been said that it is difficult, if not impossible, to lay down any strict legal

56. Tenn.—Young v. State, 10 Lea 165.

50 C.J. p 636 note 62.

57. Ala.—Goree v. State, 71 Ala. 7.

N.C.—State v. Jones, 31 N.C. 38.

58. Tenn.—Young v. State, 10 Lea 165.

50 C.J. p 636 note 64.

59. Tenn.—State v. Steele, 3 Heisk. 135.

60. Ark.—Bodenhamer v. State, 28 S.W. 507, 60 Ark. 10.  
50 C.J. p 636 note 50.

61. Miss.—Walton v. State, 8 So. 171, 64 Miss. 207.

62. Vt.—State v. Freeman, 22 A. 621, 63 Vt. 496.

63. Miss.—State v. Shanks, 40 So. 1005, 38 Miss. 410.

64. N.C.—State v. Faulk, 70 S.E. 833, 154 N.C. 638.

65. Evidence insufficient to uphold conviction

Wyo.—Town of Torrington v. Taylor, 137 P.2d 621, 59 Wyo. 109.

66. Ga.—Hays v. State, 74 S.E. 314, 10 Ga.App. 823.

67. Ga.—Ray v. State, 39 S.E. 408, 113 Ga. 1065—Hays v. State, 74 S.E. 314, 10 Ga.App. 823.

68. Tenn.—Young v. State, 10 Lea 165.

69. Ga.—Roberts v. State, 47 S.E. 511, 120 Ga. 177.

70. Pa.—Commonwealth v. Muffley, 12 Pa.Dist. 365.

1. U.S.—Germain v. Willgus, Cal., 67 F. 597, 599, 14 C.C.A. 561.

2. Va.—Bowles v. Elmore, 7 Gratt. 385, 389, 48 Va. 385, 389.

3. Black L.D.

4. Tex.—Wristen v. Wristen, Civ. App., 119 S.W.2d 1104, 1106.

Similarly defined

To make open declaration of, as of one's knowledge, belief, action, etc.; to avow or acknowledge; to confess publicly.—Folse v. Monroe, Tex.Civ.App., 190 S.W.2d 604, 607.

5. Tex.—Wristen v. Wristen, Civ. App., 119 S.W.2d 1104, 1106.

6. Tex.—Folse v. Monroe, Civ.App., 190 S.W.2d 604, 607—Wristen v. Wristen, Civ.App., 119 S.W.2d 1104, 1106.

definition of the word "profession,"<sup>7</sup> and that the term may, perhaps, be best understood by mention of some prominent or characteristic elements, rather than by an attempted complete definition.<sup>8</sup> The word is vague,<sup>9</sup> and neither static nor rigid,<sup>10</sup> and is used in many different senses,<sup>11</sup> and in one sense it means a public declaration respecting something,<sup>12</sup> and in a somewhat different sense it means that of which one professes knowledge.<sup>13</sup> However, the word "profession" is more commonly employed in the sense of vocation, business, calling, or occupation, and it is in this sense that the term is treated in the following paragraphs.

While the word "profession" may be broadly defined as meaning vocation,<sup>14</sup> calling,<sup>15</sup> occupation,<sup>16</sup> or employment,<sup>17</sup> literally, the term is applied to a

calling or vocation requiring special knowledge of a branch of science or learning,<sup>18</sup> and in this somewhat restricted sense the word "profession" means an employment requiring a learned education,<sup>19</sup> as, a profession of arms, the profession of a clergyman, lawyer, or physician, the profession of chemistry or physics.<sup>20</sup>

"Profession" is further defined as meaning the occupation which one professes to be skilled in and to follow;<sup>21</sup> the business which one professes to understand and to follow<sup>22</sup> for subsistence;<sup>23</sup> the occupation, if not mechanical or agricultural, or the like, to which one devotes oneself;<sup>24</sup> any calling or occupation involving special mental and other attainments or special discipline, as editing, acting, engineering, authorship;<sup>25</sup> an occupation

7. Hawaii.—Wright v. Borthwick, 34 Hawaii 245, 253.

N.Y.—Teague v. Graves, 27 N.Y.S.2d 762, 766, 261 App.Div. 652.

50 C.J. p 637 note 14 [a].

Similarly expressed

It is evident that an exactly accurate definition of the word "profession" which will preclude the possibility of any controversy is impossible.—Howarth v. Gilman, 73 A.2d 655, 658, 365 Pa. 50.

8. Tex.—Maryland Casualty Co. v. Crazy Water Co., Civ.App., 160 S.W.2d 102, 104.

9. Eng.—Currie v. Inland Revenue Comrs., 2 K.B. 332, 340.  
50 C.J. p 637 note 13.

10. Hawaii.—Wright v. Borthwick, 34 Hawaii 245, 253.

11. Tex.—Maryland Casualty Co. v. Crazy Water Co., Civ.App., 160 S.W.2d 102, 104.

12. Black L.D.

13. Ga.—Georgia State Board of Examiners in Optometry v. Friedmans' Jewelers, 189 S.E. 238, 241, 183 Ga. 669.

50 C.J. p 637 note 11.

14. Ark.—State ex rel. Attorney General v. Gus Blass Co., 105 S.W.2d 853, 856, 193 Ark. 1159.

Ga.—Georgia State Board of Examiners in Optometry v. Friedmans' Jewelers, 189 S.E. 238, 241, 183 Ga. 669.

Hawaii.—Wright v. Borthwick, 34 Hawaii 245, 248.

Tex.—Maryland Casualty Co. v. Crazy Water Co., Civ.App., 160 S.W.2d 102, 104.

50 C.J. p 640 note 35.

Phrases

(1) "Learned profession" see 52 C.J.S. p 1034 note 3—p 1035 note 7.

(2) "Recognized profession;" one who is engaged in teaching persons to ride horses is not a member of a "recognized profession."—Village of

East Hampton v. Mulford, 65 N.Y.S.2d 455, 456, 188 Misc. 1037.

15. Ga.—Georgia State Board of Examiners in Optometry v. Friedmans' Jewelers, 189 S.E. 238, 241, 183 Ga. 669.

Tex.—Maryland Casualty Co. v. Crazy Water Co., Civ.App., 160 S.W.2d 102, 104.

50 C.J. p 640 note 31½.

One's principal calling

Hawaii.—Wright v. Borthwick, 34 Hawaii 245, 248.

16. La.—State v. Pendleton, 119 So. 73, 74, 9 La.App. 100.

Tex.—Maryland Casualty Co. v. Crazy Water Co., Civ.App., 160 S.W.2d 102, 104.

17. Ga.—Georgia State Board of Examiners in Optometry v. Friedmans' Jewelers, 189 S.E. 238, 241, 183 Ga. 669.

Hawaii.—Wright v. Borthwick, 34 Hawaii 245, 249.

La.—Corpus Juris quoted in State v. Cohn, 165 So. 449, 450, 184 La. 53.

Pa.—Howarth v. Gilman, 73 A.2d 655, 658, 365 Pa. 50.

Tex.—Maryland Casualty Co. v. Crazy Water Co., Civ.App., 160 S.W.2d 102, 104.

50 C.J. p 638 note 16.

Known employment

Tex.—Geise v. Pennsylvania Fire Ins. Co., Civ.App., 107 S.W. 555.  
50 C.J. p 640 note 32.

18. Ga.—Georgia State Board of Examiners in Optometry v. Friedmans' Jewelers, 189 S.E. 238, 241, 183 Ga. 669.

Md.—Dvorine v. Castberg Jewelry Corporation, 185 A. 562, 566, 170 Md. 661.

19. Hawaii.—Wright v. Borthwick, 34 Hawaii 245, 249.

La.—Corpus Juris quoted in State v. Cohn, 165 So. 449, 450, 184 La. 53.

50 C.J. p 638 note 17.

20. Ga.—Georgia State Board of Examiners in Optometry v. Friedmans' Jewelers, 189 S.E. 238, 241, 183 Ga. 669.

Hawaii.—Wright v. Borthwick, 34 Hawaii 245, 249.

50 C.J. p 638 note 17 [a]—[c].

Similarly expressed

An employment requiring a learned education, as those of divinity, law, and physic.

U.S.—U. S. v. Laws, Ohio, 16 S.Ct. 998, 1001, 163 U.S. 258, 41 L.Ed. 151.

Pa.—Howarth v. Gilman, 73 A.2d 655, 658, 365 Pa. 50.

21. U.S.—Ocean Accident & Guarantee Corporation v. Herzberg's, C.C.A.Neb., 100 F.2d 171, 172.

La.—State v. Cohn, 165 So. 449, 450, 184 La. 53.

22. Iowa.—Cummings v. Pennsylvania Fire Ins. Co., 134 N.W. 79, 82, 153 Iowa 579, 37 L.R.A., N.S., 1169, Ann.Cas.1913E 235.

La.—State v. Pendleton, 119 So. 73, 74, 9 La.App. 100.

23. Ga.—Georgia State Board of Examiners in Optometry v. Friedmans' Jewelers, 189 S.E. 238, 241, 183 Ga. 669.

50 C.J. p 639 note 30.

24. U.S.—Viti v. Tutton, C.C.Pa., 14 F. 241, 244.

Ga.—Georgia State Board of Examiners in Optometry v. Friedmans' Jewelers, 189 S.E. 238, 241, 183 Ga. 669.

50 C.J. p 639 note 28.

Similarly defined

The occupation, if not purely commercial, mechanical, agricultural, or the like, to which one devotes oneself.

Hawaii.—Wright v. Borthwick, 34 Hawaii 245, 248.

Pa.—Howarth v. Gilman, 73 A.2d 655, 658, 365 Pa. 50.

25. La.—Corpus Juris quoted in

which properly involves a liberal education or its equivalent and mental, rather than manual, labor, especially one of the three learned professions.<sup>26</sup> Very generally the term is employed as referring to a calling in which one professes to have acquired some special knowledge, used by way either of instructing, guiding, or advising others or of serving them in some art;<sup>27</sup> a vocation in which a professed knowledge of some department of science or learning is used by its practical application to the affairs of others, either in advising, guiding, or teaching them, or in serving their interests or welfare in the practice of an art founded on it.<sup>28</sup> "Profession" is also defined as the method or means pursued by persons of technical or scientific training.<sup>29</sup>

The word "profession" implies professed attainments in special knowledge, as distinguished from mere skill;<sup>30</sup> it connotes something more than mere skill in the performance of a task.<sup>31</sup> A profession involves labor, skill, education, and special knowledge,<sup>32</sup> and implies a vocation requiring higher education and learning;<sup>33</sup> intellectual skill as distinguished from that used in an occupation for the production or sale of commodities;<sup>34</sup> and an application of such education or special knowledge to uses for others, as a vocation, as distinguished from its pursuit for one's own purposes.<sup>35</sup> It also implies a practical dealing with affairs as distinguished from mere study or investigation.<sup>36</sup>

While a profession is not a money getting business and has no element of commercialism in it,<sup>37</sup> it does

State v. Cohn, 165 So. 449, 450, 184 La. 53.  
50 C.J. p 638 note 19.

26. La.—Corpus Juris quoted in State v. Cohn, 165 So. 449, 450, 184 La. 53.  
50 C.J. p 638 note 18.

27. Hawaii.—Wright v. Borthwick, 34 Hawaii 245, 248.

La.—Corpus Juris quoted in State v. Cohn, 165 So. 449, 450, 184 La. 53.

N.Y.—Teague v. Graves, 27 N.Y.S.2d 762, 765, 261 App.Div. 652.

Pa.—Howarth v. Gilman, 73 A.2d 655, 658, 365 Pa. 50.  
50 C.J. p 638 note 15.

28. Hawaii.—Wright v. Borthwick, 34 Hawaii 245, 249, 250.

La.—State v. Cohn, 165 So. 449, 450, 184 La. 53.

N.Y.—Geiffert v. Mealey, 59 N.E.2d 414, 415, 293 N.Y. 583—City of New Rochelle, on Complaint of Dassler, v. Friedman, 78 N.Y.S.2d 681, 684, 190 Misc. 654.

Pa.—Howarth v. Gilman, 73 A.2d 655, 658, 365 Pa. 50.

50 C.J. p 638 note 15 [a] (1).

#### Similarly defined

(1) A vocation in which a professed knowledge of some department of learning or science is used in its application to the affairs of others, or in the practice of an art founded on it.

U.S.—Ocean Accident & Guarantee Corporation v. Herzberg's, C.C.A. Neb., 100 F.2d 171, 173.

La.—State v. Cohn, 165 So. 449, 451, 184 La. 53.

Or.—State ex rel. Sisemore v. Standard Optical Co. of Oregon, 188 P. 2d 309, 311, 312, 182 Or. 452.

(2) A vocation founded on prolonged and specialized intellectual training which enables a particular service to be rendered.—State ex rel. Sisemore v. Standard Optical Co. of Oregon, supra.

29. Va.—Board of Sup'rs of Amherst County v. Boaz, 10 S.E.2d 498, 499, 176 Va. 126.

30. U.S.—Aulen v. Triumph Explosive, D.C.Md., 58 F.Supp. 4, 8.

Hawaii.—Wright v. Borthwick, 34 Hawaii 245, 250.

Iowa.—State v. Winneshiek Co-op. Burial Ass'n, 22 N.W.2d 800, 803, 237 Iowa 556, 165 A.L.R. 1092.

La.—Corpus Juris quoted in State v. Cohn, 165 So. 449, 450, 184 La. 53.

N.Y.—Geiffert v. Mealey, 59 N.E.2d 414, 415, 293 N.Y. 583—Teague v. Graves, 27 N.Y.S.2d 762, 765, 261 App.Div. 652—Dickson v. Mynn, 286 N.Y.S. 225, 230, 246 App.Div. 225—City of New Rochelle, on Complaint of Dassler, v. Friedman, 78 N.Y.S.2d 681, 684, 685, 190 Misc. 654.

Pa.—Howarth v. Gilman, 73 A.2d 655, 658, 365 Pa. 50.

50 C.J. p 638 note 20.

#### Distinguishing mark

The principal difference between the situation in ancient and medieval times was that in the latter the teachers, administrators, lawyers, and physicians had received prolonged formal training and constituted a class apart; and it is this characteristic, the possession of an intellectual technique acquired by special training, which can be applied to some sphere of everyday life, that forms the distinguishing mark of a profession.—State ex rel. Sisemore v. Standard Optical Co. of Oregon, 188 P.2d 309, 312, 182 Or. 452.

31. Pa.—Howarth v. Gilman, 73 A.2d 655, 658, 365 Pa. 50.

32. Tex.—Maryland Casualty Co. v. Crazy Water Co., Civ.App., 160 S.W.2d 102, 104, 105.

33. N.Y.—Teague v. Graves, 27 N.Y.S.2d 762, 766, 767, 261 App.Div. 652.

#### Scientific learning and knowledge

are essential requisites in any occupation which may properly be regarded as a profession.—Teague v. Graves, supra.

34. La.—Corpus Juris quoted in State v. Cohn, 165 So. 449, 450, 184 La. 53.

50 C.J. p 638 note 21.

The labor and skill involved in a profession are predominantly mental or intellectual rather than physical or manual.—Maryland Casualty Co. v. Crazy Water Co., Tex.Civ.App., 160 S.W.2d 102, 105.

35. Hawaii.—Wright v. Borthwick, 34 Hawaii 245, 250.

Iowa.—State v. Winneshiek Co-op. Burial Ass'n, 22 N.W.2d 800, 803, 237 Iowa 556, 165 A.L.R. 1092.

La.—State v. Cohn, 165 So. 449, 451, 184 La. 53.

N.Y.—Geiffert v. Mealey, 59 N.E.2d 414, 415, 293 N.Y. 583—Teague v. Graves, 27 N.Y.S.2d 762, 765, 261 App.Div. 652—City of New Rochelle, on Complaint of Dassler, v. Friedman, 78 N.Y.S.2d 681, 684, 685, 190 Misc. 654.

Pa.—Howarth v. Gilman, 73 A.2d 655, 658, 365 Pa. 50.

Tex.—Maryland Casualty Co. v. Crazy Water Co., Civ.App., 160 S.W.2d 102, 105.

50 C.J. p 638 note 22.

36. Hawaii.—Wright v. Borthwick, 34 Hawaii 245, 250.

Iowa.—State v. Winneshiek Co-op. Burial Ass'n, 22 N.W.2d 800, 803, 237 Iowa 556, 165 A.L.R. 1092.

La.—State v. Cohn, 165 So. 449, 451, 184 La. 53.

N.Y.—Teague v. Graves, 27 N.Y.S.2d 762, 765, 261 App.Div. 652.

Pa.—Howarth v. Gilman, 73 A.2d 655, 658, 365 Pa. 50.

Tex.—Corpus Juris quoted in Maryland Casualty Co. v. Crazy Water Co., Civ.App., 160 S.W.2d 102, 105.

50 C.J. p 638 note 22.

37. Wash.—State ex rel. Stiner v.

involve compensation or profit,<sup>38</sup> and it is of the essence of a profession that the profits should be dependent mainly on the personal qualifications of the person by whom it is carried on.<sup>39</sup> It has been said that, in speaking of a person's profession, that branch of the world's activities wherein he expends his usual everyday efforts to gain a livelihood is referred to.<sup>40</sup>

Originally,<sup>41</sup> and historically,<sup>42</sup> the word "profession" was applied only to law, medicine, and theology or divinity,<sup>43</sup> and these were known as the three "learned professions,"<sup>44</sup> and it has frequently been said that formerly these were specifically known merely as "the professions."<sup>45</sup>

In modern usage, and in a restricted sense,<sup>46</sup> the

word "profession" is still sometimes specifically<sup>47</sup> applied only to the learned professions<sup>48</sup> and to the persons engaged therein.<sup>49</sup> However, the tendency has been to enlarge and extend the scope and meaning of the term,<sup>50</sup> and this has resulted in the word becoming more elastic and its denotation more liberalized,<sup>51</sup> so that it has long ceased to be connected only with, and restricted exclusively to, the so-called learned professions.<sup>52</sup> The word "profession" now has a broader and more comprehensive meaning than formerly was accorded to it,<sup>53</sup> and its signification now extends far beyond the well-known classical professions of earlier days,<sup>54</sup> and as the applications of science and learning are extended to other departments of affairs, other vocations also receive the name.<sup>55</sup>

Yelle, 25 P.2d 91, 94, 95, 174 Wash. 402.

#### Desire to be of service

"True, the professional man seeks to live by what he earns, but his main purpose and desire is to be of service to those who seek his aid and to the community of which he is a necessary part. In some instances, where the recipient is able to respond, seemingly large fees may be paid, but to others unable to pay adequately, or at all, the professional service is usually cheerfully rendered."—*State ex rel. Stiner v. Yelle*, supra.

38. Tex.—Maryland Casualty Co. v. Crazy Water Co., Civ.App., 160 S.W.2d 102, 104, 105.

39. Tex.—Corpus Juris quoted in Maryland Casualty Co. v. Crazy Water Co., Civ.App., 160 S.W.2d 102, 105.  
50 C.J. p 638 note 24.

40. Iowa.—Gardner v. Trustees of Main St. M. E. Church of Ottumwa, 244 N.W. 667, 669.

Minn.—State v. Douglas County Dist. Ct., 164 N.W. 366, 368, 133 Minn. 103.

41. Hawaii.—Wright v. Borthwick, 34 Hawaii 245, 253.

N.Y.—Teague v. Graves, 27 N.Y.S.2d 762, 766, 261 App.Div. 652.

42. Ga.—Georgia State Board of Examiners in Optometry v. Friedmans' Jewelers, 189 S.E. 238, 241, 183 Ga. 669.

Historically and ordinarily, the word "profession" is limited to such vocations as the law, the ministry, medicine, military science, engineering, and the like.—*Dvorine v. Castalberg Jewelry Corporation*, 185 A.562, 566, 170 Md. 661.

43. U.S.—Ocean Accident & Guarantee Corporation v. Herzberg's, C.C.A.Neb., 100 F.2d 171, 173—Aulen v. Triumph Explosive, D.C.Md., 58 F.Supp. 4, 8.

Hawaii.—Wright v. Borthwick, 34 Hawaii 245, 253.

Iowa.—State v. Winneshiek Co-op. Burial Ass'n, 22 N.W.2d 800, 803, 237 Iowa 556, 165 A.L.R. 1092.

La.—State v. Cohn, 165 So. 449, 451, 184 La. 53.

N.Y.—Dickson v. Flynn, 286 N.Y.S. 225, 230, 246 App.Div. 225.

Pa.—Howarth v. Gilman, 73 A.2d 655, 658, 365 Pa. 50.

50 C.J. p 637 note 14 [b].

#### Later addition

"Originally the word 'profession' was limited to the three learned professions, divinity, medicine and the law. To this group that of arms was later added."—*Teague v. Graves*, 27 N.Y.S.2d 762, 766, 261 App.Div. 652.

44. Ga.—Georgia State Board of Examiners in Optometry v. Friedmans' Jewelers, 189 S.E. 238, 241, 183 Ga. 669.

Hawaii.—Wright v. Borthwick, 34 Hawaii 245, 253.

N.Y.—Teague v. Graves, 27 N.Y.S.2d 762, 766, 261 App.Div. 652.

45. U.S.—Ocean Accident & Guarantee Corporation v. Herzberg's, C.C.A.Neb., 100 F.2d 171, 173—Aulen v. Triumph Explosive, D.C.Md., 58 F.Supp. 4, 8.

Hawaii.—Wright v. Borthwick, 34 Hawaii 245, 250.

Iowa.—State v. Winneshiek Co-op. Burial Ass'n, 22 N.W.2d 800, 803, 237 Iowa 556, 165 A.L.R. 1092.

La.—State v. Cohn, 165 So. 449, 451, 184 La. 53.

N.Y.—Teague v. Graves, 27 N.Y.S. 2d 762, 766, 261 App.Div. 652—

Dickson v. Flynn, 286 N.Y.S. 225, 230, 246 App.Div. 225.

Pa.—Howarth v. Gilman, 73 A.2d 655, 658, 365 Pa. 50.

50 C.J. p 637 note 14 [b] (1).

46. Hawaii.—Wright v. Borthwick, 34 Hawaii 245, 248.

50 C.J. p 640 note 36.

47. La.—State v. Cohn, 165 So. 449, 450, 184 La. 53.

48. Hawaii.—Wright v. Borthwick, 34 Hawaii 245, 248.

Ill.—People v. Maggi, 33 N.E.2d 925, 927, 310 Ill.App. 101.

La.—State v. Cohn, 165 So. 449, 450, 184 La. 53.

50 C.J. p 640 note 36.

49. Ill.—People v. Maggi, 33 N.E. 2d 925, 927, 310 Ill.App. 101.

50. Hawaii.—Wright v. Borthwick, 34 Hawaii 245, 248, 249.

51. N.Y.—Teague v. Graves, 27 N.Y. S.2d 762, 766, 261 App.Div. 652.

52. U.S.—Ocean Accident & Guarantee Corporation v. Herzberg's, C.C.A.Neb., 100 F.2d 171, 173.

53. Hawaii.—Wright v. Borthwick, 34 Hawaii 245, 248, 249.

54. N.Y.—Teague v. Graves, 27 N.Y.S.2d 762, 766, 261 App.Div. 652.

55. U.S.—Ocean Accident & Guarantee Corporation v. Herzberg's, C.C.A.Neb., 100 F.2d 171, 173—Aulen v. Triumph Explosive, D.C.Md., 58 F.Supp. 4, 8.

Hawaii.—Wright v. Borthwick, 34 Hawaii 245, 250.

Iowa.—State v. Winneshiek Co-op. Burial Ass'n, 22 N.W.2d 800, 803, 237 Iowa 556, 165 A.L.R. 1092.

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N.Y.—Teague v. Graves, 27 N.Y.S. 2d 762, 766, 261 App.Div. 652—

Dickson v. Flynn, 286 N.Y.S. 225, 230, 246 App.Div. 225.

Pa.—Howarth v. Gilman, 73 A.2d 655, 658, 365 Pa. 50.

50 C.J. p 637 note 14 [b] (1), [c].

#### Applied to other occupations or callings

The term has come to be applied to other occupations or callings, all of which require learned and special preparation in the acquirement of scientific knowledge and skill, necessary to a proper understanding and successful management of such

Attorneys<sup>56</sup> and clergymen<sup>57</sup> are regarded as engaging in professions, as are physicians<sup>58</sup> and persons engaged in related or associated occupations<sup>59</sup> such as dentistry,<sup>60</sup> optometry,<sup>61</sup> and veterinary medicine and surgery.<sup>62</sup> The term "profession" is now generally applicable to accountants,<sup>63</sup> architects,<sup>64</sup> chemists,<sup>65</sup> editors,<sup>66</sup> electricians,<sup>67</sup> engineers,<sup>68</sup> journalists,<sup>69</sup> landscape architects,<sup>70</sup> and pharmacists<sup>71</sup> when engaged in the practice of their

vocations. Certified shorthand reporting,<sup>72</sup> and teaching<sup>73</sup> are regarded as professions. For additional businesses, activities, or occupations which have been held to be professions see 50 C.J. p 638 note 25.

On the other hand, beauty culturists,<sup>74</sup> brokers,<sup>75</sup> insurance agents,<sup>76</sup> undertakers and embalmers,<sup>77</sup> and various others<sup>78</sup> have been held not to be engaged in the practice of a profession. For addi-

occupations.—Wright v. Borthwick, 34 Hawaii 245, 252—50 C.J. p 637 note 14 [c].

56. Ga.—Lanier v. Macon, 59 Ga. 187, 188.

N.Y.—People, on Complaint of Furnice, v. Carlock, 11 N.Y.S.2d 82, 84, 170 Misc. 686.

57. Pa.—Ross v. City of Philadelphia, 25 A.2d 834, 836, 149 Pa. Super. 33.

50 C.J. p 638 note 25 [m].

58. Ga.—Lanier v. Macon, 59 Ga. 187, 188.

59. **Chiropody**  
N.Y.—Geiffert v. Mealey, 59 N.E.2d 414, 415, 293 N.Y. 583.

**Osteopathy**  
N.Y.—Geiffert v. Mealey, supra.

**Physiotherapy**  
N.Y.—Geiffert v. Mealey, supra.

60. Hawaii.—Wright v. Borthwick, 34 Hawaii 245, 247, 254.

**Dental hygiene**  
N.Y.—Geiffert v. Mealey, 59 N.E.2d 414, 415, 293 N.Y. 583.

61. Ark.—State ex rel. Attorney General v. Gus Blass Co., 105 S.W. 2d 853, 856, 193 Ark. 1159.

D.C.—Silver v. Lansburgh & Bro., 111 F.2d 518, 519, 520, 72 App.D.C. 77, 128 A.L.R. 582.

Ga.—Georgia State Board of Examiners in Optometry v. Friedmans' Jewelers, 189 S.E. 238, 241, 183 Ga. 669.

Ill.—Babcock v. Nudelman, 12 N.E. 2d 635, 637, 367 Ill. 626—L. Klein v. Rosen, 64 N.E.2d 225, 232, 327 Ill.App. 375.

Kan.—State ex rel. Beck v. Goldman Jewelry Co., 51 P.2d 995, 1001, 142 Kan. 881, 102 A.L.R. 334.

Mass.—McMurdo v. Getter, 10 N.E. 2d 139, 143, 298 Mass. 363.

N.Y.—Geiffert v. Mealey, 59 N.E.2d 414, 415, 293 N.Y. 583.

Ohio.—State ex rel. Bricker v. Buhl Optical Co., 2 N.E.2d 601, 603, 131 Ohio St. 217—State ex rel. Harris v. Myers, 191 N.E. 99, 100, 128 Ohio St. 266.

Or.—State ex rel. Sisemore v. Standard Optical Co. of Oregon, 188 P. 2d 309, 312, 182 Or. 452.

Wash.—State ex rel. Standard Optical Co. v. Superior Court for Chelan County, 185 P.2d 839, 841, 17 Wash.2d 823.

62. N.Y.—Geiffert v. Mealey, 59 N.E.2d 414, 415, 293 N.Y. 583.

63. Hawaii.—Wright v. Borthwick, 34 Hawaii 245, 247, 254.

N.Y.—Geiffert v. Mealey, 59 N.E.2d 414, 415, 293 N.Y. 583.

64. Hawaii.—Wright v. Borthwick, 34 Hawaii 245, 247, 249, 254.

65. Hawaii.—Wright v. Borthwick, supra.

N.Y.—Teague v. Graves, 27 N.Y.S. 2d 762, 765, 261 App.Div. 652.

50 C.J. p 638 note 25 [b].

66. Hawaii.—Wright v. Borthwick, 34 Hawaii 245, 252, 253.

67. Hawaii.—Wright v. Borthwick, supra.

50 C.J. p 638 note 25 [f].

68. N.Y.—Geiffert v. Mealey, 59 N.E.2d 414, 415, 293 N.Y. 583.

**Specific types of engineers**

(1) Civil engineer.—Wright v. Borthwick, 34 Hawaii 245, 247, 254—50 C.J. p 638 note 25 [g] (1).

(2) Consulting engineer.—Ericson v. Brown, 38 Barb. N.Y., 390, 391.

(3) Industrial designer.—Teague v. Graves, 27 N.Y.S.2d 762, 765, 261 App.Div. 652.

(4) Surveyor.—Wright v. Borthwick, 34 Hawaii 245, 247, 253, 254.

69. Hawaii.—Wright v. Borthwick, supra.

70. N.Y.—Geiffert v. Mealey, 59 N.E.2d 414, 415, 293 N.Y. 583.

71. Fla.—Lee v. Gaddy, 183 So. 4, 6, 133 Fla. 749.

La.—Ballard v. Goldsby, 76 So. 219, 142 La. 15.

N.Y.—Geiffert v. Mealey, 59 N.E.2d 414, 415, 293 N.Y. 583.

Pa.—Appeal of Biser, 176 A. 200, 317 Pa. 190.

72. N.Y.—Geiffert v. Mealey, 59 N.E.2d 414, 415, 293 N.Y. 583.

73. N.Y.—Geiffert v. Mealey, supra.

**Teaching of singing or music**  
N.Y.—People ex rel. Fullam v. Kelly, 175 N.E. 108, 109, 255 N.Y. 396.

74. Ill.—People v. Maggi, 33 N.E. 2d 925, 927, 928, 310 Ill.App. 101.

**Specific types of brokers**

(1) Customhouse broker.—People ex rel. Tower v. State Tax Commission, 26 N.E.2d 955, 957, 282 N.Y. 407—Teague v. Graves, 27 N.Y.S.2d

762, 766, 767, 261 App.Div. 652—People ex rel. Robinson v. Graves, 20 N.Y.S.2d 394, 259 App.Div. 956—People ex rel. Tower v. State Tax Commission, 13 N.Y.S.2d 727, 728, 257 App.Div. 1064.

(2) Insurance broker.—Teague v. Graves, supra—Otis v. Graves, 20 N.Y.S.2d 426, 427, 259 App.Div. 957.

(3) Real estate broker.  
Cal.—Jones v. Robertson, 180 P.2d 929, 931, 79 Cal.App.2d 813.

Ill.—Village of Riverside v. Kuhne, 82 N.E.2d 500, 503, 335 Ill.App. 547.

(4) Textile broker.—Teague v. Graves, supra.

76. N.Y.—Teague v. Graves, supra—Recht v. Graves, 12 N.Y.S.2d 158, 159, 257 App.Div. 889.

Okl.—Oklahoma Tax Commission v. Benham, 179 P.2d 123, 125, 193 Okl. 384.

50 C.J. p 639 note 26 [f].

77. Iowa.—State v. Winneshiek Co-op. Burial Ass'n, 22 N.W.2d 800, 803, 237 Iowa 556, 165 A.L.R. 1092.

N.J.—Babcock v. Laidlaw, 166 A. 632, 633, 113 N.J.Eq. 318.

N.Y.—Teague v. Graves, 27 N.Y.S.2d 762, 766, 767, 261 App.Div. 652—Bond v. Cook, 262 N.Y.S. 199, 203, 237 App.Div. 229.

Ohio.—Busse & Borgmann Co. v. Upchurch, 21 N.E.2d 349, 352, 60 Ohio App. 349.

50 C.J. p 639 note 26 [c], [n].

**78. Held not included**

(1) Firm engaged in developing new textile fabrics and working out technical problems in connection with production thereof.—People ex rel. Seidman v. Graves, 22 N.Y.S.2d 985, 986, 260 App.Div. 398.

(2) Furniture designer and traveling consultant.—Application of DeVries, 44 N.Y.S.2d 535, 536, 266 App.Div. 1030.

(3) Registered interstate commerce commission practitioner.—Pollock v. Mealey, 40 N.Y.S.2d 67, 68, 266 App.Div. 699.

(4) The earnings of a person whose work was confined to executive and clerical aspects of business organization and whose services involved improvement of methods of office management, etc., were not derived from practice of a profession.

tional businesses, activities, or occupations which have been held not to be professions see 50 C.J. p 639 note 26.

"Profession" has been held equivalent to, or synonymous with, "business" see 12 C.J.S. p 773 note 53, "employment" see 30 C.J.S. p 234 note 68, and "occupation" see 67 C.J.S. p 77 note 48.

It has been compared with, or distinguished from, "business" see 12 C.J.S. p 774 note 69, "craft" see 21 C.J.S. p 1035 note 73, "occupation" see 67 C.J.S. p 77 note 53, "professional,"<sup>79</sup> and "trade."<sup>80</sup>

The right to engage in a profession, trade, or business is discussed in Constitutional Law § 224. Exemption from liability to seizure and sale of property owned by persons engaged in a profession see Exemptions § 24 d (7). Imputations tending to injury in business, profession, trade, office, or employment are treated in Libel and Slander §§ 32-52; and for professions subject to license or tax see Licenses § 30 a. "Profession" in ecclesiastical law is defined in Religious Societies § 39. For other particular applications and specific uses of the terms "profession" and "professions" consult the indexes to the various titles and the Descriptive-Word Index.

**PROFESSIONAL.** The word "professional" is used in many different senses,<sup>81</sup> and in one sense is defined as meaning that which pertains to a profession,<sup>82</sup> and in this sense the word implies knowledge of an advanced type in a given field of science or learning, gained by a prolonged course of specialized instruction or study,<sup>83</sup> and can only relate to some of those occupations universally classed as professions, the general duties and character of

which the courts must be expected to understand judicially.<sup>84</sup> It has been said that the term "professional" is broad enough to include hair dressers;<sup>85</sup> but pawnbrokers, chauffeurs, venders of merchandise, and many others similarly engaged are not professionals.<sup>86</sup>

In a slightly different sense the word "professional" denotes one undertaking or engaging for money as a means of subsistence in a particular art,<sup>87</sup> and is defined as meaning engaged in by professionals, as a professional race; engaging in a profession, or, by extension, any calling, as a means of livelihood or for gain, as a professional golf player.<sup>88</sup> In this sense the word "professional" is distinguished from "amateur" see 3 C.J.S. p 1013.

Phrases employing the word are set out in the note.<sup>89</sup>

**PROFESSOR.** See Colleges and Universities § 20. As a nonquota alien within the meaning of the immigration act see Aliens § 89.

**PROFILE.** An outline or contour.<sup>90</sup> Technically speaking, a side or sectional elevation; a drawing showing a vertical section of the ground along a surveyed line or graded work.<sup>91</sup>

The filing or recordation of profiles showing the property to be appropriated as a prerequisite to the institution of condemnation proceedings and the taking of lands is discussed in Eminent Domain § 226; and statutory or charter provisions requiring a railroad company to file a profile of the location of its road in the counties through which it passes are treated in the C.J.S. title Railroads § 63, also 51 C.J. p 495 note 92-p 496 note 22.

—Pennicke v. Mealey, 42 N.Y.S.2d 884, 885, 266 App.Div. 888.

79. U.S.—In re Hair Net Packers, Cust. & Pat.App., 115 F.2d 254, 255.

80. U.S.—Viti v. Tutton, C.C.Pa., 14 F. 241, 244.

81. Tex.—Maryland Casualty Co. v. Crazy Water Co., Civ.App., 160 S.W.2d 102, 104.

82. Tex.—Corpus Juris quoted in Maryland Casualty Co. v. Crazy Water Co., Civ.App., 160 S.W.2d 102, 104.

50 C.J. p 640 note 43.

83. N.Y.—Geiffert v. Mealey, 59 N.E.2d 414, 415, 293 N.Y. 583—People ex rel. Tower v. State Tax Commission, 26 N.E.2d 955, 957, 282 N.Y. 407—People ex rel. Moffett v. Bates, 38 N.Y.S.2d 313, 317, 276 App.Div. 38.

84. N.Y.—O'Reilly v. Erlanger, 95 N.Y.S. 760, 761, 108 App.Div. 318.

85. U.S.—In re Hair Net Packers, Cust. & Pat.App., 115 F.2d 254, 255.

86. Hawaii—Wright v. Borthwick, 34 Hawaii 245, 249.

87. U.S.—U. S. v. Commissioner of Immigration at Port of New York, C.C.A.N.Y., 298 F. 449, 450.

88. U.S.—In re Hair Net Packers, Cust. & Pat.App., 115 F.2d 254, 255.

89. "Professional worker"

(1) A teacher is a professional worker.—In re Estey, D.C.N.Y., 6 F. Supp. 570.

(2) A trained nurse, whether classified as pupil, practical, or registered, is, in the course of her vocational employment, a professional, not a manual or industrial, worker.—Mayor and City Council of Baltimore v. Smith, 177 A. 903, 905, 168 Md. 458.

Other phrases

(1) "Professional employee" as

exempt from minimum wage and overtime pay requirements of Fair Labor Standards Act see Master and Servant § 151(12) a.

(2) "Professional ethics" see 31 C.J.S. p 469 note 55.

(3) "Professional gambler" defined see Gaming §§ 1 e, 109, and other references in the title index.

(4) "Professional man" see 54 C.J.S. p 1113 note 78.

(5) "Professional misconduct" as grounds for suspension or disbarment of attorney see Attorney and Client § 23.

(6) Additional phrases as to which more recent adjudications have not been found see 50 C.J. p 640 note 48-p 641 note 58.

90. U.S.—Taggart v. Great Northern R. Co., D.C.Wash., 208 F. 455, 459.

91. U.S.—Taggart v. Great Northern R. Co., supra.

# WORDS AND PHRASES

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